STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Barry Sewall, Shamika Gregory, and Jerome Gregory, each individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

Home Partners Holdings LLC, SFR Acquisitions I LLC, and OPVHHJV LLC, d/b/a Pathlight Property Management,

Defendants.

Court File No. 27-CV-22-10389

ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION FOR CLASS CERTIFICATION

The above-entitled matter came duly before the Honorable Christian Sande, Judge of the above-named court, on Friday, July 14, 2023 at the Hennepin County Government Center, Minneapolis, Minnesota.

Anne Regan, Nathan Prosser, Lindsey Larson, Joseph Bourne, and Susan Ellingstad, Attorneys at Law, appeared on behalf of the plaintiffs.

Michael Cockson, Nathan Brennaman, Diego Garcia, and Brian Neighbarger, Attorneys at Law, appeared on behalf of the defendants.

Based upon all the files, records, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Class Certification is **GRANTED** under Rule 23.02(c) as to Counts I (Minn. Stat. § 325F.69), III (Minn. Stat. § 504B.161), V (Minn. Stat. § 504B.177), VI (Covenant of Good Faith and Fair Dealing), VII (Rescission), and VIII (Unjust Enrichment) of the Second Amended Complaint filed on February 2, 2023.

2. Plaintiffs' Motion for Class Certification is **DENIED** under Rule 23.02(c) as to Count II (Minn. Stat. § 325D.44) of the Second Amended Complaint filed on February 2, 2023.

3. Plaintiffs' Motion for Class Certification is **DENIED** under Rule 23.01(d) as to Count IV (Minn. Stat. § 504B.178) of the Second Amended Complaint filed on February 2, 2023.

4. Plaintiffs' Motion for Class Certification is **GRANTED** under Rule 23.02(b) as to Counts II (Minn. Stat. § 325D.44), IX (Declaratory Relief), and X (Injunctive Relief) of the Second Amended Complaint filed on February 2, 2023.

5. Plaintiffs' Motion for Appointment of Class Representatives and Class Counsel is **GRANTED**. Plaintiffs Barry Sewall, Shamika Gregory, and Jerome Gregory are each certified to proceed as class representatives for the above-certified claims.

6. The class definition for the above-certified claims shall be as follows:

   a. Damages Class:

      > All persons within the State of Minnesota who, since March 1, 2016, paid rent or other fees to Defendants pursuant to a lease.

   b. Injunctive Class:

      > All persons within the State of Minnesota who, since March 1, 2016, have entered into a lease with Defendants.

7. Anne Regan, Nathan Prosser, and Lindsay Larson (Hellmuth & Johnson PLLC), Susan Ellingstad, Joseph Bourne, and Sarah Lundberg (Lockridge Grindal Nauen PLLP), and Scott Harris and Michael Dunn (Milberg Coleman Bryson Phillips Grossman PLLC) are appointed as counsel for the plaintiffs' class.

8. The attached Memorandum is incorporated by reference in this Order.

9. All prior and consistent orders shall remain in full force and effect.

10. Service of a copy of this order shall be made upon self-represented parties by first class U.S. mail at their address(es) last known to the Court Administrator, or to attorneys by e-service, which shall be due and proper service for all purposes.

BY THE COURT:

Dated: October 3, 2023

Christian Sande
Judge of District Court

MEMORANDUM

I. Background

This case commenced on July 12, 2022. On July 20, 2022, Defendants Home Partners Holdings LLC, SFR Acquisitions I LLC, and OPVHHJV LLC, d/b/a Pathlight Property Management (Defendants) filed an Amended Notice of Motion and Motion in Support of Partial Motion to Dismiss and supporting papers. The Court held a hearing on the defendants' motion on October 25, 2022. On January 23, 2023, the Court issued an Order Denying Partial Motion to Dismiss. On February 2, 2023, Plaintiffs Barry Sewall, Shamika Gregory, and Jerome Gregory (Plaintiffs) filed a Second Amended Complaint.

On May 15, 2023, Plaintiffs filed a Notice of Motion and Motion for Class Certification and for Appointment of Class Representatives and Class Counsel and supporting papers. On June 19, 2023, Defendants filed an opposition memorandum and supporting papers. On July 7, 2023, Plaintiffs filed a reply brief. The Court heard oral argument on July 14, 2023, and took this matter under advisement.

II. Legal Standard

Minnesota Rule of Civil Procedure 23 provides:

> **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if
>
> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the class;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (d) the representative parties will fairly and adequately protect the interests of the class.

Minn. R. Civ. P. 23.01.

> An action may be maintained if the prerequisites of Rule 23.01 are met, and:
>
> (b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (c) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.

Id. at 23.02(b)-(c).

"Minn. R. Civ. P. 23 is modeled after Fed. R. Civ. P. 23." *Lewy 1990 Tr. ex rel. Lewy v. Inv. Advisors, Inc.*, 650 N.W.2d 445, 452 (Minn. Ct. App. 2002) (*compare* Fed. R. Civ. P. 23 *with* Minn. R. Civ. P. 23). "Because the procedural rules are essentially parallel, federal precedent is instructive in interpreting our rule." *Id.* (citing *Johnson v. Soo Line R.R.,* 463 N.W.2d 894, 899 n.7 (Minn. 1990)). "Under Rule 23(a), a district court may certify a class only if [the court] is satisfied, after a rigorous analysis, that the four threshold requirements are met: numerosity of plaintiffs, commonality of legal or factual questions, typicality of the named plaintiff's claims or defenses, and adequacy of representation by class counsel." *Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 477–78 (8th Cir. 2016) (citing *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 161 (1982); *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 613–15 (1997)) (internal quotations omitted). "Frequently that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (internal quotations omitted). "The Court accepts the substantive allegations in Plaintiffs' complaint as true when determining if the proposed class is acceptable." *Portz v. St. Cloud State Univ.*, 297 F. Supp. 3d 929, 942 (D. Minn. 2018) (citing *Mathers v. Northshore*

Mining Co., 217 F.R.D. 474, 483 (D. Minn. 2003). "In determining the propriety of a class action, the focus is on whether the class satisfies Rule 23 and not whether the proposed action will prevail." *Id.* (citing *Mathers*, 217 F.R.D. at 483).

"Class certification under rule 23 is a two-step process." *Lewy*, 650 N.W.2d at 451. "First, the class must satisfy all four mandatory requirements of rule 23.01: numerosity, commonality, typicality, and adequacy of representation." *Id.* (citing Minn. R. Civ. P. 23.01). "Second, a class must also satisfy the requirements of one of the subdivisions of Rule 23.02." *Id.* at 451-52. (citing Minn. R. Civ. P. 23.02).

"Under rule 23.02(c), a class action may be maintained if two basic conditions are met." *Id.* at 455. "First, common questions must predominate over individual issues, and second, the class action must be superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* (citing Minn. R. Civ. P. 23.02(c)).

"Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Ebert*, 823 F.3d at 480 (citing *Dukes*, 564 U.S. at 359, 131 S. Ct. at 2557). "Rule 23(b)(2) does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.* (citing *Dukes*, 564 U.S. at 359, 131 S. Ct. at 2557) (internal quotations omitted). "Although a Rule 23(b)(2) class need not meet the additional predominance and superiority requirements of Rule 23(b)(3), it is well established that the class claims must be cohesive." *Id.* (citing *Barnes v. Am. Tobacco Co.,* 161 F.3d 127, 143 (3d Cir.1998)). "In fact, cohesiveness is the touchstone of a (b)(2) class, as a (b)(2) class share[s] the most traditional justification[ ] for class treatment, in that the relief sought must perforce affect the *entire class at once.*" *Id.* (citing *Dukes,* 564 U.S. at 361-62, 131 S.Ct. at 2558) (internal quotations omitted) (emphasis in original). "Because a (b)(2) class is mandatory, the rule provides no opportunity for

(b)(2) class members to opt out, and does not oblige the district court to afford them notice of the action, both of which are prescribed for (b)(3) classes." *Id.* (citing *Dukes,* 564 U.S. at 362, 131 S.Ct. at 2558). "For these reasons, the cohesiveness requirement of Rule 23(b)(2) is more stringent than the predominance and superiority requirements for maintaining a class action under Rule 23(b)(3)." *Id.* (citing *Gates v. Rohm and Haas Co.,* 655 F.3d 255, 269 (3d Cir.2011)).

III. Analysis

Plaintiffs seek certification of the following classes: (1) a Damages Class, pursuant to Rule 23.02(c), comprising of "[a]ll persons within the State of Minnesota who, since March 1, 2016, paid rent or other fees to Defendants pursuant to a lease[,]"[1] and (2) an Injunctive Class, pursuant to Rule 23.02(b), comprising of "[a]ll persons within the State of Minnesota who, since March 1, 2016, have or will enter into a lease with Defendants within the State of Minnesota and who pay rent and other fees to Defendants pursuant to a lease."[2] On behalf of the Injunctive Class, Plaintiffs also seek injunctive and declaratory relief requiring that:

> (1) Defendants cease use of leases containing clauses that mislead tenants regarding their rights or obligations under Minnesota law, or which are unenforceable per se; (2) calculate late fees solely in accordance with Minn. Stat. § 504B.177; (3) cease assessing attorneys' fees to tenants, unless Defendants have been found to be the prevailing party in an action against the tenant under Minn. Stat. § 504B.177; (4) cease charging tenants for the $9.95 UBSF; and (5) cease charging tenants for HVAC filters.[3]

Plaintiffs argue that the requirements of Rule 23.01 are met, and the Damages Class meets the requirements of Rule 23.02(c). Defendants argue that (a) Plaintiffs' proposed Damages Class cannot be certified under Rule 23.02(c) because individual issues predominate, (b) a class action

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[1] Memo. of Law in Supp. of Pls.' Mot. for Class Cert. and Appt. of Class Reps. and Class Counsel at 13 (May 15, 2023).

[2] *Id.*

[3] *Id.*

is not a superior method of adjudicating class claims, (c) Plaintiffs' Rule 23.02(b) Injunctive Class fails because it is not cohesive and because Plaintiffs' are really seeking monetary damages, and (d) Plaintiffs' claims are not typical, and they will not adequately represent the class.

A. Numerosity

"Rule 23.01(a) requires that the class be so numerous that joinder of all members is impracticable." *Lewy*, 650 N.W.2d at 452 (citing *Jenson v. Cont'l Fin. Corp.*, 404 F. Supp. 806, 809 (D.Minn.1975) (internal quotations omitted). "Courts have not developed arbitrary or rigid rules to define the required size of a class, and impracticability is a fact-specific determination." *Id.* (citing *Parkhill v. Minn. Mut. Life Ins. Co.*, 188 F.R.D. 332, 337 (D.Minn.1999) (internal quotations omitted). "In determining impracticability, courts generally consider a number of factors, including the size of the putative class, the size of the class member's individual claim, the inconvenience of trying individual suits, and the nature of the action itself." *Id.* (citing *Parkhill*, 188 F.R.D. at 337). "[M]ere speculation as to the size of the class is insufficient to satisfy the numerosity requirement." *Id.* (citing *Irvin E. Schermer Trust v. Sun Equities Corp.,* 116 F.R.D. 332, 336 (D.Minn.1987)). "Generally, a putative class size[ ] of forty will support a finding of numerosity, and much smaller classes have been certified by courts in the Eighth Circuit." *Portz*, 297 F. Supp. 3d at 944 (D. Minn. 2018) (citing *Beaver Cty. Emps.' Ret. Fund v. Tile Shop Holdings, Inc.*, No. 14–786, 2016 WL 4098741, at *12 (D. Minn. July 28, 2016)) (internal quotations omitted). "When the class is very large—numbering in the hundreds—joinder is almost always impracticable, but the difficulty of joining as few as 40 class members may also raise a presumption that joinder is impracticable." *Lewy*, 650 N.W.2d at 452 (citing *Lockwood Motors, Inc. v. Gen. Motors Corp.,* 162 F.R.D. 569, 574 (D.Minn.1995)).

In this case, Plaintiffs present evidence showing that Defendants have entered into at least 1,300 form leases with Minnesota residents over the last eight years. For example, the record reveals

that "for March 1, 2016 to November 7, 2022, there have been 1,306 Minnesota leases with an accompany Right to Purchase Agreement. Of those, 919 are active and the remainder are not active."[4] Defendants also advertise the fact that as of 2022, approximately 2,000 Right to Purchase Agreements have been exercised,[5] and concede that their "portfolio in Minnesota consists of approximately 2,000 unique homes of different sizes, ages, locations, neighborhoods, and purchase prices."[6] Notably, Defendants do not present any argument refuting Plaintiffs' support for a finding of numerosity, and legal precedent has historically recognized a finding of numerosity for putative class sizes of forty or more. *Portz*, 297 F. Supp. 3d at 944 (D. Minn. 2018) (citing *Beaver Cty. Emps.' Ret. Fund v. Tile Shop Holdings, Inc.*, No. 14–786, 2016 WL 4098741, at *12 (D. Minn. July 28, 2016)). Moreover, Plaintiffs point out that Defendants continue to operate in Minnesota – all the while using the same form leases – and Defendants do not rebut this contention. Given the scale of Plaintiffs' proposed classes, the Court finds that the classes are so numerous that joinder of all members is impracticable.

Plaintiffs satisfy the numerosity requirement under Rule 23.01(a).

B. Commonality

Rule 23.01(b) requires that certification be based on questions of law or fact common to the class. *Lewy,* 650 N.W.2d at 453. "The threshold for commonality is not high and requires only that the resolution of the common questions affect all or a substantial number of class members." *Streich v. Am. Fam. Mut. Ins. Co.*, 399 N.W.2d 210, 214 (Minn. Ct. App. 1987) (citing *Jenkins v. Raymark Industries, Inc.,* 782 F.2d 468, 472 (5th Cir.1986)). "For commonality to exist, behavior causing a common effect must be subject to some dispute." *Id.* (citing *In Re Objections & Defenses To Real*

[4] Ex. 3 to Decl. of Anne T. Regan ("Regan Decl.") at 15 (May 12, 2023).

[5] Ex. 28 to Regan Decl. at DEFS_00280724 (May 15, 2023).

[6] Defs.' Opposition to Pls.' Mot. for Class Cert. at 12 (June 19, 2023).

Property Taxes for 1980 Assessment, 335 N.W.2d 717, 719 (Minn. 1983)). The claims "must depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 338.

Plaintiffs intend to rely on common evidence among the proposed class as a means of proving that Defendants mislead tenants regarding their rights and obligations. For example, Plaintiffs rely on evidence showing that all putative class members have (a) leased Defendants' properties using Defendants' form leases, (b) been subject to the same material lease terms, (c) been subject to the same policies and procedures regarding the shifting of repair and maintenance obligations, as well as costs, onto tenants, and (d) used the centralized maintenance and accounting systems. Plaintiffs also turn to the fact that no putative class member was provided an opportunity to negotiate rent or consideration in exchange for their agreement to shift maintenance and repair obligations, nor were they provided a full and fair disclosure of the repair and maintenance obligations under the terms of their leases. Plaintiffs rely on common questions specifically focusing on Defendants' uniform course of conduct, as opposed to the conduct of any individual class members. Such questions include:

- Whether the lease as written is unenforceable under Minnesota law;
- Whether the lease provisions are false, misleading, unfair or deceptive;
- Whether Defendants' pre-lease representations were false, misleading, unfair, or deceptive;
- Whether Defendants failed to comply with Minnesota landlord-tenant laws;
- Whether Defendants illegally charge the UBSF, insurance, late, and attorneys' fees;
- Whether Defendants breached the duty of good faith and fair dealing;
- Whether Plaintiffs and the proposed Damages Class are entitled to compensatory
- damages or equitable monetary remedies, like recission, restitution, or disgorgement; and
- Whether the Injunctive Class is entitled to injunctive or declaratory relief.[7]

[7] Memo. of Law in Supp. of Pls.' Mot. for Class Cert. and Appt. of Class Reps. and Class Counsel at 15 (May 15, 2023).

The crux of Defendants' argument rests on the assertion that common questions do not predominate over individual issues. The Court takes up the issue of predominance separate from that of Rule 23.01(b). *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623–24 (1997) ("Even if Rule 23(a)'s commonality requirement may be satisfied…the predominance criterion is far more demanding"); *See generally* 2 W. Rubenstein, Newberg on Class Actions § 4.51, at 260 (6th ed. 2022) ("The predominance demand is stricter than Rule 23(a)(2)'s commonality requirement").

As to the requirements of Rule 23.01(b), the resolution of common questions presented by Plaintiffs will, at the very least, affect a substantial number of the proposed class members, considering that (a) these class members were all subject to Defendants' form lease, and (b) the focus of this action centers around Defendants' uniform course of conduct towards the proposed class. *See Streich*, 399 N.W.2d at 214 (citing *In Re Objections*, 335 N.W.2d at 719) ("For commonality to exist, behavior causing a common effect must be subject to some dispute").

Plaintiffs satisfy the commonality requirement under Rule 23.01(b).

C. Typicality

Plaintiffs argue that their claims are typical because the claims are based on identical legal theories, turn on the common question of whether the lease terms are enforceable or void, share a common nucleus of operative fact, and seek remedies that apply to the entire class. Defendants argue that Plaintiffs' claims are not typical because the putative class members' claims do not emanate from the same event and are not based on the same legal theory.

"Rule 23.01(c) requires that the claims and defenses of the representative parties must be typical of the claims or defenses of the class." *Lewy*, 650 N.W.2d at 453 (internal quotations omitted). "This requirement functions jointly with the representational-adequacy requirement to insure that the claims of the class members are fully presented and vigorously prosecuted." *Id.* (citing *Sley v. Jamaica*

Water & Utils., Inc., 77 F.R.D. 391, 394 (E.D. Pa.1977)) (internal quotations omitted). "The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *Id.* (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig.,* 148 F.3d 283, 311 (3rd Cir.1998)). "Typicality requires that the representative parties have an interest compatible with that of the class sought to be represented." *Id.* (citing *Ario v. Metro. Airports Comm'n,* 367 N.W.2d 509, 513 (Minn. 1985) (internal quotations omitted). "A potential for rivalry or a conflict that may jeopardize the interests of the class weighs against a finding of typicality." *Id.* (citing *Ario*, 367 N.W.2d at 513). "The typicality requirement is met when the claims of the named plaintiffs arise from the same event or are based on the same legal theory as the claims of the class members." *Id.* (citing *Alpern v. UtiliCorp United, Inc.,* 84 F.3d 1525, 1540 (8th Cir.1996); *Paxton v. Union Nat'l Bank,* 688 F.2d 552, 561–62 (8th Cir.1982); *Lockwood,* 162 F.R.D. at 575). "A strong similarity of legal theories satisfies the typicality requirement even if substantial factual differences exist." *Id.* (citing *Lockwood,* 162 F.R.D. at 575) (internal quotations omitted).

Plaintiffs' Second Amended Complaint contains ten (10) separate claims. The majority of these claims involve the same set of facts and repeatedly require the same determination: whether Defendants' allegedly illegal leases were fraudulent or misleading as to the burden of maintenance and repair, as well as the nature of tenants' obligations. These claims all arise from the same event and invoke the same legal theories as the proposed class, including alleged violations of the Consumer Fraud Act, Deceptive Trade Practices Act, Landlord Tenant Act, and Minnesota common law, due to Defendants' use of their allegedly illegal or misleading form leases. Because the claims of the named Plaintiffs arise from the same event (*i.e.*, Defendants' lease provisions and conduct), and are based on the same legal theory as the proposed class (*i.e.*, violations of the Consumer Fraud Act, Deceptive

Trade Practices Act, portions of the Landlord Tenant Act, and Minnesota common law), the Court finds that the interests of the representative parties are compatible with that of the proposed class. There is also nothing to suggest that a potential for rivalry or conflict exists which may jeopardize the interests of the class.

Plaintiffs also seek remedies that can be calculated and are applicable to the entire class – including compensatory damages, equitable monetary remedies, and injunctive and/or declaratory relief. Plaintiffs employ the methodology of Dr. Robert Kneuper, who surmises:

> In this case, damages to the Class and its Members can be objectively and systematically measured using a straightforward formula based on a "but for" rent which provides economic compensation to Home Partners' tenants for the expected cost of illegal burden-shifting maintenance and repairs. This approach to measuring damages relies on objective, measurable, market-based factors which can be applied to reasonably estimate damages to the Class and individual Class Members in this case. There is substantial data that is readily available with which to measure damages in this case.[8]

Similarly, Plaintiffs seek an award of judgment against Defendants for restitution and disgorgement which can be assessed on a classwide basis from classwide evidence. Plaintiffs' proposed declaratory and injunctive relief also applies to the class as whole, considering Plaintiffs seek entry of a declaratory judgment seeking Defendants' practices as unlawful and an injunction enjoining Defendants and their agents from continuing the practices that Plaintiffs allege are unlawful.

Plaintiffs satisfy the typicality requirement under Rule 23.01(c).

D. Adequacy of Representation

Plaintiffs argue that the proposed class representatives have protected and will continue to protect the class's interests. Defendants argue that the Plaintiffs' interests are not like those of the

[8] Decl. of Robert Kneuper, Ph.D. ("Kneuper Decl.") at 11-19 (May 12, 2023).

class, and Plaintiffs cannot deprive putative class members of their choice in asserting their claims in other established ways by imposing their preferred method on the entire class.

Rule 23.01(d) requires that the representative parties will fairly and adequately protect the interests of the class. *Lewy*, 650 N.W.2d at 454. "Representational adequacy means the representative parties' interests must coincide with the interests of other class members and that the parties and their counsel will competently and vigorously prosecute the lawsuit." *Id.* (citing *Ario,* 367 N.W.2d at 513). The court may use several factors to determine if representation is satisfied, including:

> (1) whether the representatives' interests are sufficiently identical to those of absent class members so that the representatives will vigorously prosecute the suit on their behalf; (2) whether the attorneys are qualified, experienced, and capable of conducting the litigation; and (3) whether the representatives have any interests that conflict with the objective of the class they represent.

Id. (citing *Smith v. B & O R.R.,* 473 F. Supp. 572, 581 (D.Md.1979)). 2021 "General knowledge and participation in discovery are enough to demonstrate representational adequacy." *Id.* at 455 (citing *Schwartz v. Sys. Software Assocs., Inc.,* 138 F.R.D. 105, 107–08 (N.D.Ill.1991); *Harman,* 122 F.R.D. 522, 528–29 (N.D.Ill.1988); *Grossman v. Waste Mgmt., Inc.,* 100 F.R.D. 781, 790 (N.D.Ill.1984)). "Also, it is familiar law that a class representative need not have personal knowledge of the evidence and the law involved in pursuing a litigation." *Id.* (citing *Nathan Gordon Trust v. Northgate Exploration, Ltd.,* 148 F.R.D. 105, 107 (S.D.N.Y.1993)). "It is the lawyer's task to prepare the case both on the facts and the law." *Id.* (citing *Nathan Gordon Trust*, 148 F.R.D. at 107).

As to Count IV (Interest On and Return of Security Deposits, Minn. Stat. § 504B.178) specifically, Plaintiffs assert that "Defendants fail to fully credit security deposit interest in the statutorily-required written statement at the end of tenancy and unreasonably shift wear and tear or

other repairs and maintenance to tenants through security deposit deductions."[9] At the same time, Defendants present evidence showing that (a) Plaintiff Sewall received the full interest on his deposit, and (b) the Gregorys are current tenants. Plaintiffs likewise concede that the Gregorys do not have standing to bring forth this claim (yet encourage the Court to maintain this claim, despite this issue). Given this, the Court finds that Plaintiffs' interests are not representative of the entire class as to Count IV.

As to all other counts, the record demonstrates that the interests of the proposed representatives are sufficiently identical to those of the absent class members. Plaintiffs present common evidence related to the 925 active RTP leases and 726 active NRTP leases (all of which, Defendants acknowledge exist) in pursuit of the same claims as the putative class members. For example, Plaintiffs intend to use common evidence like Defendants' internal policies and procedures that were used to uniformly transfer maintenance and repair expenses to tenants throughout the duration of their leases.

To date, Plaintiffs have actively participated in this case, whether by responding to document requests and interrogatories or sitting for depositions. Plaintiffs have retained Hellmuth & Johnson PLLC, Lockridge Grindal Nauen PLLP, and Milberg LLP to prosecute their claims. Plaintiffs' counsel are competent and qualified attorneys who have experience in handling class actions and have already expended the necessary financial resources to properly represent the putative class. Moreover, there is nothing to demonstrate that any intra-class conflict exists that would interfere with the representatives' ability to vigorously prosecute the suit on behalf of the putative class.

[9] Memo. of Law in Supp. of Pls.' Mot. for Class Cert. and Appt. of Class Reps. and Class Counsel at 19 (May 15, 2023).

The crux of Defendants' argument rests on the proposition that Plaintiffs' interests are not sufficiently identical to those of the class because Plaintiffs are requesting rescission of leases that some class members may not want terminated. As Plaintiffs points out, class members can elect to rescind or ratify their lease agreements if the class prevails on their rescission claim. Furthermore, while Defendants assert that Plaintiffs are inadequate because class members may prefer to proceed with their claims in another way, those potential class members can opt out of participating in the class and pursue their individual damages claims elsewhere.

Plaintiffs satisfy the adequacy requirement under Rule 23.01(d) on all counts other than Count IV. The Court shall deny Plaintiffs' Motion for Class Certification on Count IV.

E. Predominance (Counts I, III, V, VI, VII, and VIII)

Plaintiffs argue that the damages class meets the predominance requirements of Rule 23.02(c) because common questions predominate under all of their claims, and monetary relief can be calculated classwide. Defendants argue that Plaintiffs' proposed damages class cannot be certified under Rule 23.02(c) because individual issues predominate on each of Plaintiffs' claims.

"No bright-line rules determine whether common questions predominate." *Lewy*, 650 N.W.2d at 455 (citing *Lockwood,* 162 F.R.D. at 580). "Instead, a court must consider whether the generalized evidence will prove or disprove an element on a simultaneous, class-wide basis that would not require examining each class member's individual position." *Id. See generally* 2 W. Rubenstein, Newberg on Class Actions § 4:49 at 240 (6th ed. 2022) (predominance "focuses on the extent to which the issues are more common as opposed to individual – the more common the issues are, the more likely it is that the case will be processed efficiently in the aggregate"). "Thus, a class action is appropriate when common questions representing the significant aspect of a case can be resolved in a single action." *Id.* (citing *In re Workers' Comp.,* 130 F.R.D. at 108–09). "The common question need not be dispositive

of the entire action because predominance as used in the rule is not automatically equated with determinative." *Id.* (citing *In re Workers' Comp.,* 130 F.R.D. at 108–09*; see also Lockwood Motors,* 162 F.R.D. at 580) (internal quotations omitted).

"[P]redominance will be found where generalized evidence may prove or disprove elements of a claim." *Id.* (citing *In re Hartford Sales Practices Litig.,* 192 F.R.D. 592, 604 (D.Minn.1999)). "As with the commonality and typicality requirements, the predominance inquiry is directed toward the issue of liability." *Id.* "When determining whether common questions predominate courts focus on the liability issue…and if the liability issue is common to the class, common questions are held to predominate over individual questions." *Id.* at 455-56 (citing *Genden v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 114 F.R.D. 48, 52 (S.D.N.Y.1987) (quoting *Dura-Bilt Corp. v. Chase Manhattan Corp.,* 89 F.R.D. 87, 93 (S.D.N.Y.1981)); *see also Lockwood Motors,* 162 F.R.D. at 580) (internal quotations omitted).

"The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453, 136 S. Ct. 1036, 1045 (2016) (citing *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 623, 117 S.Ct. 2231 (1997)) (internal quotations omitted). "This calls upon courts to give careful scrutiny to the relation between common and individual questions in a case." *Id.* "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Id.* (citing 2 W. Rubenstein, Newberg on Class Actions § 4:50, pp. 196–197 (5th ed. 2012)) (internal quotations omitted); *See generally* 2 W. Rubenstein, Newberg on Class Actions § 4:50 at 258 (6th ed. 2022) ("Common issues will predominate if individual factual determinations can be accomplished using

computer records, clerical assistance, and objective criteria—thus rendering unnecessary an evidentiary hearing on each claim"). "To predominate, common issues must constitute a significant part of the individual cases." *Lewy*, 650 N.W.2d at 456 (citing *Streich,* 399 N.W.2d at 217); *See generally* 2 W. Rubenstein, Newberg on Class Actions § 4:49 at. 241 (6th ed. 2022) ("Predominance therefore asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues").

"When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods*, 577 U.S. at 453–54, 136 S. Ct. at 1045 (citing 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778 at 123–124 (3d ed. 2005)) (internal quotations omitted). "Courts frequently grant class certification despite individual differences in class members' damages." *Tyson Foods*, 577 U.S. at 456-57, 136 S. Ct. at 1045 (citing *White v. NFL,* 822 F. Supp. 1389, 1403–04 (D.Minn.1993); *B & B Inv. Club v. Kleinert's Inc.,* 62 F.R.D. 140, 144 (E.D.Pa.1974); *In re Memorex Sec. Cases,* 61 F.R.D. 88, 103 (N.D.Cal.1973); *Minnesota v. U.S. Steel Corp.,* 44 F.R.D. 559, 567 (D.Minn.1968)). "The fact that the amount of damages may vary, and thus require more or less time to calculate, does not defeat certification." *Tyson Foods*, 577 U.S. at 457, 136 S. Ct. at 1045. *See generally* 2 W. Rubenstein, Newberg on Class Actions § 4:54 at 274-75 (6th ed. 2022) ("the black letter rule is that individual damage calculations generally do not defeat a finding that common issues predominate, and courts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individual damage determinations"). "When common questions of law and fact predominate on the

cause of damages, individual variations on the amount of damages will not preclude class certification." *Tyson Foods*, 577 U.S. at 450, 136 S. Ct. at 1045.

1. Count I (Violation of Minnesota Prevention of Consumer Fraud Act, Minn. Stat. § 325F.69)

Plaintiffs assert that common questions predominate because common evidence shows that Defendants explicitly intend for prospective and current tenants to rely on the statements in their leases, websites, and anticipated terms prior to leasing, in order to determine their rights and obligations under the leases, and these statements are false.

Minnesota Statue Section 8.31 allows private parties to seek redress for violation of certain statutes:

> **Private remedies.** In addition to the remedies otherwise provided by law, any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court. The court may, as appropriate, enter a consent judgment or decree without the finding of illegality. In any action brought by the attorney general pursuant to this section, the court may award any of the remedies allowable under this subdivision.

Minn. Stat. § 8.31, subd. 3(a).

The Minnesota Prevention of Consumer Fraud Act, Minn. Stat. § 325F.69, prohibits the following practices:

> **Fraud, misrepresentation, deceptive practices.** The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoinable as provided in section 325F.70.

Minn. Stat. § 325F.69, subd. 1. "Merchandise" is defined as "any objects, wares, goods, commodities, intangibles, real estate, loans, or services." *Id.* at § 325F.68, subd. 2.

"Minnesota Statutes § 8.31, subdivision 3a, allows private plaintiffs to seek damages if they are injured by violations of the Consumer Fraud Act." *Wiegand v. Walser Auto. Groups, Inc.*, 683 N.W.2d 807, 809 (Minn. 2004) (internal citations omitted). "The conduct proscribed by the CFA is broad." *Graphic Commc'ns Loc. 1B Health & Welfare Fund A v. CVS Caremark Corp.*, 850 N.W.2d 682, 694 (Minn. 2014). "The language of the statute indicates that the target of the CFA is deceitful conduct in connection with the sale of merchandise." *Id.*

"[D]eceptive practice refers to conduct that tends to deceive or mislead a person." *Id.* at 695 (internal quotations omitted). "[V]iolations of statutes that do not themselves create private causes of action may be the subject of a Consumer Fraud Act claim." *Thompson v. St. Anthony Leased Hous. Assocs. II, LP*, 979 N.W.2d 1, 7 (Minn. 2022) (citing *Graphic Commc'ns*, 850 N.W.2d at 693-94) (tenant not precluded from asserting claim that landlord's rent charges violated Consumer Fraud Act where underlying statute governing rent restrictions did not create separate cause of action). "The Prevention of Consumer Fraud Act…applies to deceptive landlord practices in leased housing." *Love v. Amsler*, 441 N.W.2d 555, 556 (Minn. Ct. App. 1989). Courts have also recognized that a Consumer Fraud Act claim requires a party to "plausibly allege that, due either to [Defendants'] affirmative misrepresentations or to [Defendants'] material omissions, the [practice] could deceive a reasonable consumer." *Song v. Champion Petfoods USA, Inc.*, No. 18-CV-3205 (PJS/KMM), 2020 WL 7624861, at *3 (D. Minn. Dec. 22, 2020), aff'd, 27 F.4th 1339 (8th Cir. 2022) (citing *In re 100% Grated Parmesan Cheese Mktg. & Sales Pracs. Litig.*, 275 F. Supp. 3d 910, 920 (N.D. Ill. 2017) (discussing "common requirement" of various consumer-protection statutes, including the Minnesota Unlawful Trade Practices Act, Minnesota Uniform Deceptive Trade Practices Act, Minnesota False Statement in Advertising Act, and Minnesota Prevention of Consumer Fraud Act); *see also In re Gen. Mills Glyphosate Litig.*, No. 16-2869 (MJD/BRT), 2017 WL 2983877, at *5–6 (D. Minn. July 12, 2017)

(applying "reasonable consumer" standard to claims under the Minnesota Unlawful Trade Practices Act, Minnesota Uniform Deceptive Trade Practices Act, and Minnesota Prevention of Consumer Fraud Act) (internal quotations omitted).

To state a claim for damages under Minn. Stat. § 8.31, subd. 3a based on a violation of the Consumer Fraud Act, a plaintiff must show "that the defendant engaged in conduct prohibited by the statutes and that the plaintiff was damaged thereby." *Grp. Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 12 (Minn. 2001). "Allegations that the plaintiff relied on the defendant's conduct are not required to plead a violation." *Id.* "The defendant must intend that its conduct be relied on, but reliance by the victim is not necessary for the violation to occur." *Id.* "Allegations of reliance are therefore not necessary to state a claim under section 8.31, subdivision 3a, for damages resulting from a violation." *Id*. However, "an individual plaintiff must establish a causal nexus between the conduct alleged to violate the [MCFA] and the damages claimed." *State v. Minnesota School of Bus., Inc.*, 935 N.W.2d 124, 134 (Minn. 2019) (citing *Grp. Health Plan*, 621 N.W.2d at 4) (internal quotations omitted). "To recover damages under the Private AG Statute for a violation of the CFA . . . the plaintiff must plead and prove a causal relationship between the alleged injury and the wrongful conduct that violates the statute." *Graphic Commc'ns*, 850 N.W.2d at 693-94 (citing *Grp. Health Plan*, 621 N.W.2d at 13). "[T]he allegation of pecuniary loss satisfies the injury requirement in the private attorney general statute." *Engstrom v. Whitebirch, Inc.*, 931 N.W.2d 786, 791 (Minn. 2019) (internal quotations omitted) (Plaintiff alleging that Defendant's Consumer Fraud Act violations caused Plaintiff pecuniary loss therefore alleged an injury sufficient to plead cause of action under private attorney general statute).

"[C]ircumstantial evidence is sufficient to establish a causal nexus." *Minnesota School of Bus.*, 935 N.W.2d at 134 (citing *Grp. Health Plan*, 621 N.W.2d at 14). The Minnesota Supreme Court

noted that "an element of individual reliance is embedded in the causal nexus requirement because a fraudulent or misleading statement cannot by its nature cause harm unless the statement had some impact on inducing the individual plaintiff's actions." *Id.* (citing *Grp. Health Plan*, 621 N.W.2d at 14) (internal quotations omitted). Likewise, the court recognized that "where a defendant's misrepresentations were directed at and affected a broad group of consumers, proof of direct individual reliance is not required to establish a causal nexus between MCFA violations and the harm suffered by consumers." *Id.* (citing *Grp. Health Plan*, 621 N.W.2d at 14-15). "A showing that some legal nexus exists between the injury and the defendants' wrongful conduct is a more relaxed requirement than the strict showing of direct causation . . . required at common law." *Id.* at 135 (citing *Grp. Health Plan*, 621 N.W.2d at 14) (internal quotation omitted).

Count I of the Complaint alleges that Defendants repeatedly violated Minn. Stat. § 325F.69, subd. 1 through practices such as "Defendants' unlawful lease provisions that deceive and mislead consumers into believing they (a) cannot negotiate their monthly rental rates or cannot negotiate the purchase prices of the home, while forcing them to sign agreements stating they in fact did, (b) must make all repairs to their rental homes, and (c) must pay for renters' insurance or use Defendants' hand-picked liability coverage every month to cover the maintenance of and physical damage to Defendants' rental homes."[10]

Plaintiffs must show that Defendants engaged in conduct prohibited the Consumer Fraud Act, and that Plaintiffs were damaged by Defendants' conduct. *Grp. Health Plan*, 621 N.W.2d at 12 ("to state a claim that any of the substantive statutes has been violated, the plaintiff need only plead that the defendant engaged in conduct prohibited by the statutes and that the plaintiff was damaged

[10] Second Am. Compl. Jury Trial Demanded at 40, ¶ 132 (Feb. 2, 2023) (internal quotations omitted).

thereby"). Plaintiff must also "plead and prove a causal relationship between the alleged injury and the wrongful conduct that violates the statute" in order to recover damages under the private AG statute. *Graphic Commc'ns*, 850 N.W.2d at 69 (citing *Grp. Health Plan*, 621 N.W.2d at 13). Even in cases where a statute does not create a private cause of action, a violation of said statute may still "be the subject of a Consumer Fraud Act claim." *Thompson*, 979 N.W.2d at 7 (citing *Graphic Commc'ns*, 850 N.W.2d at 693-94) (injured party "not barred from bringing a Consumer Fraud Act claim based on the underlying conduct that violated the Pharmacy Practice Act"). Thus, Plaintiffs may bring a Consumer Fraud Act claim for conduct that incidentally violates the Landlord Tenant Act "provided that the plaintiff pleads and proves the required elements of a consumer fraud claim." *Graphic Commc'ns*, 850 N.W.2d at 693.

Plaintiffs rely on shared evidence such as the form lease used uniformly by Defendants, which sets forth the obligations of the tenants and reflects the notion that the "amount of rent was negotiated . . ."[11] or that the "amount of rent was agreed upon . . ."[12] between the tenants and Defendants. Defendants assert that there is nothing false or deceptive about the statements contained in their form lease regarding rent negotiation, notwithstanding the fact that common evidence exists to support Plaintiffs' claim that Defendants unilaterally set rent prices based on their own methodology that incorporates factors such as the seller's asking price and the expected cost/maintenance of the house without taking into account the value of the tenant's agreement to take on the maintenance obligations of the premises.

For example, Emily Cefalu, Senior Director of Operations at Pathlight Property Management and Defendants' 30.02(f) corporate representative, testified that she did not know whether there was

[11] Ex. 4 to Regan Decl. at DEFS_00005608, ¶ 15 (May 12, 2023).

[12] Ex. 5 to Regan Decl. at DEFS_00002812, ¶ 16 (May 12, 2023).

any negotiation of the lease terms in this case,[13] nor could she say for certain whether Home Partners has ever negotiated any of the lease terms that were found in either Plaintiffs' or any lease.[14] Likewise, when asked whether she agreed that Defendants otherwise represent that tenants rent is nonnegotiable, Cefalu testified "yes."[15] Jeff Polanzi also testified that he was not aware whether there is anyone within Home Partners that negotiated rent.[16] Plaintiffs also rely on the expert opinion of Akshay R. Rao, Ph.D., who recognizes:

> [T]he Defendants' form lease includes a phrase indicating that '(**t)he amount of Rent was negotiated with the express understanding that Tenant will be responsible for the maintenance needs of the Premises as provided in this Lease and in the absence of Tenant's agreement to maintain the Premises at its cost in accordance with the terms of this Lease, Landlord would have charged a higher rent amount[]**'…While this statement conflicts with Defendants' actual practices (Polanzi Dep. p. 111) and representations, (https://app.pathlightmgt.com/help/detail/Lease-Information/360043853871/Is-rentnegotiable) ("Pathlight Properties does not negotiate rental rates"), inexpert consumers are unlikely to process the bolded statement in the lease or challenge its accuracy, because of the truth bias.[17]

Professor Rao's expert opinion is "[b]ased on my decades of experience in the field of consumer behavior, an academic discipline that focuses on, among other things, how consumers perceive and process information (i.e., "standing in the shoes of the consumer") and my analysis of peer-reviewed literature."[18] Evidence of Professor Rao's expert opinion supports Plaintiffs' prima facie showing that Defendants intended for prospective and current tenants to rely on the statements

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[13] Ex. 23 to Decl. of Anne T. Regan ("Regan Decl.") in Opp'n. to Defs.' Mot. for Summ. J at 250:3-5 (July 7, 2023).

[14] *Id.* at 250:6-9.

[15] *Id.* at 250:19-22.

[16] Ex. 26 to Regan Decl. at 111:10-13 (July 7, 2023).

[17] Decl. of Professor Akshay R. Rao, Ph.D. ("Rao Decl."), in Supp. of Pls.' Mot. for Class Cert. at 16, ¶ 36 (May 12, 2023) (bold in original).

[18] *Id.* at 5, ¶ 10.

contained within Defendants' leases, web sites, and anticipated terms prior to leasing as a means of determining their rights and obligations under the lease.

Plaintiffs also present shared evidence of Defendants' form lease and marketing materials to support their claim that Defendants uniformly misrepresent tenant's responsibilities. Defendants' form lease states: "Tenant's shall, at Tenant's expense, maintain the Premises (including all appliances, systems, and fixtures located thereon . . .) . . . and keep same in a clean, safe, and healthy condition and in good working order."[19] The form lease also states that tenants shall be responsible for payment of:

> (a) all repairs, maintenance or replacement required to the Premises, including the walls, windows, storms doors/windows and screens, ceilings, paint, plastering, plumbing work, pipes, and fixtures belonging to the Premises, whenever damage or injury to the same shall have resulted from misuse, waste or neglect by the Tenant or any Occupant and (b) any and all repairs, maintenance or replacement required to the Premises that shall be necessary to restore the Premises to the same condition as when Tenant took possession of the Premises (including any work performed by Landlord thereafter…), normal wear and tear excepted[.][20]

Professor Rao provides an explanation as to Defendants' capacity to mislead or confuse tenants as to their responsibilities and obligations under the terms of the form lease based on the reasonable consumer standard:

> While "Resident Responsibilities" are enumerated in brief in the Welcome Guide (DEFS 00004293) document, a more detailed listing of those responsibilities is maintained in Defendants' centralized policies and procedures. (Cefalu Deposition Exhibit 54). It is my understanding that this detailed listing of responsibilities is an internal document, not shared with tenants, that governs Defendants' practices and conduct with regard to all of the tenants comprising the proposed Minnesota class. In this document, several maintenance categories (ranging from HVAC to Pest Control) are enumerated. Under each category, the document specifies Defendants' responsibilities (the first column in every category) and resident responsibilities (in each of the remaining three columns with some qualifiers).

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[19] Ex. 4 to Regan Decl. at DEFS_00005608, ¶ 15 (May 12, 2023); Ex. 5 to Regan Decl. at DEFS_00002812, ¶ 16 (May 12, 2023).

[20] Ex. 4 to Regan Decl. at DEFS_00005608, ¶ 15 (May 12, 2023).

> It appears that based on this document, Defendants in fact have a more detailed list of items that are "Resident Responsibility" than that provided to residents before they sign leases. Defendants appear to omit the true expectations they have for tenants. Here, both hidden information and hidden action combine to favor the party with the informational advantage. That is, defendants have more information than tenants about how repair and maintenance responsibilities are to be apportioned between them and the tenants, prior to the consummation of the transaction, *and* this information is not completely shared between the parties after the consummation of the transaction.
>
> Therefore, I conclude that the form leases and the marketing practices and materials employed by Defendants had the capacity to and likely did mislead or confuse consumers based on the above consumer behavior phenomena, and that Defendants were likely aware of the possibility of consumers being misled or confused. The omissions, misrepresentations, and conflicting information provided by Defendants caused consumers to misunderstand certain non-negotiable terms of the leases, and their legal rights and obligations under the leases.[21]

In rendering his reply opinion, Professor Rao references Plaintiffs' testimony, noting "[t]he selective references to the S. Gregory and Sewall depositions, when read in the context of the entire colloquy, support the contention that they either skimmed the lease documents or attempted to read it carefully, but given their relative lack of expertise, did not comprehend it or question it."[22]

Plaintiffs' testimony reflects a shared confusion and an overall lack of understanding regarding the lease terms. For example, Plaintiff Sewall testified that he did not anticipate that he "was going to be responsible for the landlord issues that cropped up…and other issues."[23] Plaintiff Sewall also testified that one of the complaints he had with Defendants was "repairs, the quality of the repair, or the lack thereof, the attention to the repair requests, referring to the house as-is and they are not responsible for that, the requirement that I be home for either for our eight hours to receive a repair person."[24] When signing the lease, Plaintiff Sewall testified that he "perused it and signed it,

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[21] Rao Decl. at 18-19, ¶¶ 40-42 (May 12, 2023).

[22] Reply Decl. of Professor Akshay R. Rao, Ph.D., in Supp. of Pls.' Mot. for Class Certification ("Rao Decl.") at 3-4, ¶ 4 (July 7, 2023).

[23] Ex. 1 to Regan Decl. at 39:6-12 (July 7, 2023).

[24] *Id.* at 18:24-19:18.

because . . . I assumed they were going to be a normal landlord[,]"[25] meaning that Plaintiff Sewall believed that Defendants were going to "provide . . . a clean, safe house, and [were] going to be interested and involved in maintaining that house."[26] Despite receiving a welcome packet explaining the allocation of responsibilities between Defendant Pathlight and Plaintiff Sewall, Plaintiff Sewall testified that "the ten to twelve examples in that document were fairly straightforward, not detailed, did not cover anything."[27] Moreover, when asked if there was anything in the lease that caused confusion in any way, Plaintiff Shamika Gregory testified "[r]esident responsibility."[28] Plaintiff Shamika Gregory also testified that after reviewing the lease for two days before she signed it, she understood her obligations under the lease as it relates to maintenance for the property as "[l]ight bulb fixtures. Minimal, you know, blinds. Things that aren't damaging the structure of the home."[29] Likewise, when asked whether she understood that she was taking on affirmative responsibilities for maintenance and repair for the home when she signed the lease, Plaintiff Shamika Gregory responded "[n]o."[30]

Plaintiffs also employ Dr. Robert Kneuper. who hypothesizes that "in a 'but for' world in which Home Partners' potential tenants in Minnesota are provided with adequate disclosure of the illegal burden shifting, there would have been a lower demand for renting Home Partners' properties which would likely have forced Home Partners to systematically lower its rent levels in Minnesota."[31]

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[25] *Id.* at 35:7-9.

[26] *Id.* at 35:10-13.

[27] *Id.* at 35:11-20.

[28] Ex. 2 to Regan Decl. at 179:20-23. (July 7, 2023).

[29] *Id.* at 33:18-23.

[30] *Id.* at 45:1-5.

[31] Reply Decl. of Robert Kneuper, Ph.D. ("Kneuper Decl.") at 4, n.3 (July 7, 2023) (internal quotations omitted).

Moreover, when asked about the specific amount that Defendants would have charged if Plaintiff Sewall did not agree to take on maintenance and repair obligations, Cefalu explained:

> I mean, it depends. So when residents ask questions about this, the way we explain it is, for example, if you weren't responsible for landscaping, if we were going to have the lawn mowed every week or every two weeks or every three weeks, that would influence your rent rate. So if we were going to be doing additional maintenance services outside of industry standards, then there'd be an additional cost.[32]

Polanzi testified that he was not aware whether there was "any place where a tenant could find the higher amount of rent that this lease states Home Partners would charge absent the agreement to maintain" or "any place in a Home Partners document, record, e-mail, anything like that" as well as "any conversation that [Polanzi] ever recall[s] having at Home Partners that Home Partners would be charging higher amounts in rent if the tenants weren't agreeing to take on maintenance and repair[.]"[33] With this in mind, Dr. Kneuper presents a damages formula applicable to the entire class that quantifies the injury that Plaintiffs suffered as a result of Defendants' allegedly illegal conduct:

> This lease term recognizes the economic trade-off between rent levels and maintenance/repair burdens. *Notwithstanding Home Partners' awareness that shifting the maintenance needs to the tenant requires compensation*, my understanding from counsel for Plaintiffs is that Home Partners unilaterally sets the rent amount and no negotiation occurs.
>
> * * *
>
> The available data from both Home Partners and other sources can be used to systematically measure damages to the Class and its members based on the legally required consideration that compensates tenants for the expected cost of maintenance and repair expenses shifted to them. Because this compensation takes the form of a lower rent *under a fair and informed negotiation*, whether particular tenants actually incurred more or less maintenance repair expenses compared to other tenants is irrelevant to applying this damages formula. What matters is the expected cost of these repair and maintenance items at the time of the negotiation, which takes the form of a lower 'but for' rent.[34]

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[32] Ex. 23 to Regan Decl. at 249:5-17 (July 7, 2023).

[33] Ex. 26 to Regan Decl. at 112:10-24 (July 7, 2023).

[34] Kneuper Decl. at 11-19 (May 12, 2023) (emphasis added).

While Defendants assert that causation invokes a reliance component that necessitates an individualized inquiry, this argument ignores two important points. First, proof of individual reliance is not required under Minnesota law. *Minn. Sch. of Bus.*, 935 N.W.2d at 135 (citing *Grp. Health Plan*, 621 N.W.2d at 14–15). Second, Plaintiffs present common evidence of Defendants' form leases (which contain materially similar contract terms and misrepresentations) and Defendants' business practices (to which all tenants were subject) as a means of establishing that (a) had Defendants disclosed tenants' rights to negotiate rent and receive consideration for the maintenance obligations set forth by the form leases, Plaintiffs and class members would have negotiated lower rent based on the opinion offered by Professor Rao, and (b) because Plaintiffs would have negotiated lower rent, Plaintiffs were therefore injured by Defendants' alleged conduct in violation of the Consumer Fraud Act, and such injury can be uniformly quantified on a class-wide basis using Dr. Kneuper's damages formula.

Taken altogether, Plaintiffs present sufficient class-wide evidence establishing common issues of law and fact that predominate Plaintiffs' Consumer Fraud Act claim. *Lewy*, 650 N.W.2d at 456 (citing *Streich,* 399 N.W.2d at 217). Plaintiffs satisfy the predominance requirement under Rule 23.02(c) as to Count I.

2. Count II (Violation of Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.44)

Plaintiffs argue that the Deceptive Trade Practices Act claims may be certified under Rule 23.02(c) because Defendants intend for prospective tenants to rely on the statements in their marketing materials and leases to determine their liability for maintenance and repair and other obligations during the lease, and common questions thus predominate regarding whether these misrepresentations have the capacity to deceive tenants regarding their legal rights and obligations after they have entered the leases.

Minnesota Statute Section 325D.44 outlines the definition of a deceptive trade practice:

> **Acts constituting.** A person engages in a deceptive trade practice when, in the court of business, vocation, or occupation, the person:
>
> (2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> * * *
>
> (5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;
>
> * * *
>
> (7) represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
>
> * * *
>
> (13) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

Minn. Stat. § 325D.44, subd. 1(1), (2) and (13).

Section 235D.45 of the Act provides the following relief:

> **Injunctive relief.** A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits, or intent to deceive is not required. Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source.
>
> **Costs and attorney fees.** Costs shall be allowed to the prevailing party unless the court otherwise directs. The court may award attorneys' fees to the prevailing party if (1) the party complaining of a deceptive trade practice has brough an action knowing it to be groundless, or (2) the party charged with a deceptive trade practice has willfully engaged in the trade practice knowing it to be deceptive.
>
> **Remedies cumulative.** The relief provided in this section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state.

Minn. Stat. § 325D.45, subd. 1-3.

"Minnesota's consumer-protection statutes are commonly read together so as to prohibit the use of deceptive and unlawful trade practices." *Liabo v. Wayzata Nissan, LLC*, 707 N.W.2d 715, 724 (Minn. Ct. App. 2006). "Consumer-protection statutes are remedial in nature and are

liberally construed in favor of protecting consumers." *Id.* (citing *State by Humphrey v. Alpine Air Prods., Inc.,* 490 N.W.2d 888, 892 (Minn. Ct. App. 1992), *aff'd,* 500 N.W.2d 788 (Minn.1993); *see also Wiegand v. Walser Auto. Groups, Inc.,* 683 N.W.2d 807, 812 (Minn. 2004) (discussing policy and purpose underlying the Minnesota Consumer Fraud Act); *State by Humphrey v. Phillip Morris, Inc.,* 551 N.W.2d 490, 496 (Minn.1996) (stating that the Deceptive Trade Practice Act is broadly construed to enhance consumer protection)).

"The Uniform Deceptive Trade Practices Act does not permit a private action for damages and a grant of injunctive relief is a condition precedent for an award of attorney fees under the Act." *Dennis Simmons, D.D.S., P.A. v. Mod. Aero, Inc.*, 603 N.W.2d 337 (Minn. Ct. App. 1999). The Court of Appeals in *Dennis Simmons*, *D.D.S., P.A.* expressly affirmed the lower court's decision, which concluded that "the [Deceptive Trade Practices Act] provides only injunctive relief, and because appellant pursued damages, not an injunction, he has not stated a claim for which relief could be granted." *Id*.

Count II of the Complaint alleges:

> Defendants have repeatedly violated Minnesota Statutes section 325D.44, subdivision 1, by engaging in the deceptive and fraudulent conduct described in this Complaint with respect to the rental of residential properties. Those deceptive acts and practices include, but are not limited to: (a) Representing to consumers that they do not negotiate rental rates or purchase prices while requiring consumers to sign leases stating that such amounts have been negotiated; (b) Representing to consumers that they take the property AS IS and must make and pay for maintenance and repairs to Defendants' rental homes, when in reality, the law requires that Defendants, not tenants, keep the homes in reasonable repair and in compliance with applicable health and safety laws; (c) Representing to consumers that they must pay for Renters Insurance every month to cover the maintenance of rental homes when Minnesota law requires that they, not tenants, keep the homes in reasonable repair and in compliance with applicable health and safety laws; and (d) Representing that consumers must pay fees related to lease management and administration, such as a UBSF, legal services

recovery for file review, as well as cumulative late fees, in violation of Minnesota law.[35]

Plaintiffs rely on the evidence used to support their Consumer Fraud Act claim as they do for their Deceptive Trade Practices Act claim. The Deceptive Trade Practice Act permits only injunctive relief. *Dennis Simmons, D.D.S., P.A.*, 603 N.W.2d at 337. As such, Plaintiffs' proposed damages class is not appropriate for certification under Rule 23.02(c) as to Count II.[36]

3. Counts III (Breach of Covenants of Landlord, Minn. Stat. § 504B.161) and V (Late Fees, Minn. Stat. § 504B.177)[37]

Plaintiffs argue that common evidence exists that will assist the Court in determining whether Defendants' illegal lease provisions void the contract as a matter of law or whether they are otherwise unenforceable. Plaintiffs also argue that common evidence exists that will allow the Court to determine whether Defendants' conduct violated the Landlord Tenant Act.

Minnesota Statute Section 504B.161 provides:

> **Requirements.** (a) In every lease or license of residential premises, the landlord or licensor covenants:
>
> (1) that the premises and all common areas are fit for the use intended by the parties;
>
> (2) to keep the premises in reasonable repair during the term of the lease or license, except when the disrepair has been caused by the willful, malicious, or irresponsible

[35] Second Am. Compl. Jury Trial Demanded at 41, ¶ 136 (Feb. 2, 2023) (internal quotations omitted).

[36] Plaintiffs also seek certification of Plaintiffs' Minnesota Uniform Deceptive Trade Practices Act claim under Rule 23.02(b), which the Court will address separately.

[37] In regard to Count IV (Interest On and Return of Security Deposits, Minn. Stat. § 504B.178), Defendants concede that a fact dispute exists as to the return of Plaintiff Sewall's security deposit and late fees that were assessed to him during the last weeks of his tenancy. Defendants present evidence showing that (a) Sewall received the full interest on his deposit, and (b) the Gregorys are current tenants. Given this, the Court finds that Plaintiffs' interests are not representative of the class on Count IV. Seeing as Plaintiffs' Motion for Class Certification fails on Count IV under the adequacy requirement (*see*, *supra*, at 14-15), the Court will not address the issue of predominance as to Count IV.

conduct of the tenant or licensee or a person under the direction or control of the tenant or licensee;

* * *

(4) to maintain the premises in compliance with the applicable health and safety laws of the state, and of the local units of government where the premises are located during the term of the lease or license, except when violation of the health and safety laws has been caused by the willful, malicious, or irresponsible conduct of the tenant or licensee or a person under the direction or control of the tenant or licensee.

(b) The parties to a lease or license of residential premises may not waive or modify the covenants imposed by this section.

Minn. Stat. § 504B.161, subd. 1(a)-(b). Subdivision 2 of Minn. Stat. § 504B.161 expressly states:

Tenant maintenance. The landlord or licensor may agree with the tenant or licensee that the tenant or licensee is to perform specified repairs or maintenance, but only if the agreement is supported by adequate consideration and set forth in a conspicuous writing. No such agreement, however, may waive the provisions of subdivision 1 or relieve the landlord or licensor of the duty to maintain common areas of the premises.

Id. at § 504B.161, subd. 2. Minn. Stat. § 504B.177 pertains to late fees:

(a) A landlord of a residential building may not charge a late fee if the rent is paid after the due date, unless the tenant and landlord have agreed in writing that a late fee may be imposed. The agreement must specify when the late fee will be imposed. In no case may the late fee exceed eight percent of the overdue rent payment. Any late fee charged or collected is not considered to be either interest or liquidated damages. For purposes of this paragraph, the "due date" does not include a date, earlier than the date contained in the written or oral lease by which, if the rent is paid, the tenant earns a discount.

Minn. Stat. § 504B.177(a). Minn. Stat. § 504B.178 governs security deposits:

Interest. Any deposit of money shall not be considered received in a fiduciary capacity within the meaning of section 82.55, subdivision 26, but shall be held by the landlord for the tenant who is party to the agreement and shall bear simple noncompounded interest at the rate of three percent per annum until August 1, 2003, and one percent per annum thereafter, computed from the first day of the next month following the full payment of the deposit to the last day of the month in which the landlord, in good faith, complies with the requirements of subdivision 3 or to the date upon which judgment is entered in any civil action involving the landlord's liability for the deposit, whichever date is earlier. Any interest amount less than $1 shall be excluded from the provisions of this section.

Minn. Stat. § 504B.178, subd. 2.

"Minn. Stat. § 504B.161, subd. 1(a), establishes several covenants, known as the covenants of habitability, which are implied in every residential lease." *Wise v. Stonebridge Communities, LLC*, 927 N.W.2d 772, 775–76 (Minn. Ct. App. 2019) (citing *Fritz v. Warthen*, 298 Minn. 54, 213 N.W.2d 339, 340-41 (Minn. 1973)). "Parties to a lease may not waive the covenants and they are to be liberally construed." *Id.* at 776 (citing *Rush v. Westwood Vill. P'ship*, 887 N.W.2d 701, 706 (Minn. App. 2016). "The supreme court has determined that the legislature clearly intended for the covenants of habitability to guarantee adequate and tenantable housing." *Id.* (citing *Fritz*, 213 N.W.2d at 342) (internal quotations omitted). "The protections in section 504B.161 were devised to assure adequate and tenantable housing within the state." *Rush v. Westwood Vill. P'ship*, 887 N.W.2d 701, 709 (Minn. Ct. App. 2016) (citing *Meyer v. Parkin,* 350 N.W.2d 435, 438 (Minn. Ct. App. 1984)) (internal quotations omitted).

"[T]he landlord's covenants to keep leased premises in reasonable repair and fit for intended use do not impose strict liability upon a landlord or expand the landlord's liability beyond that previously articulated in caselaw." *Id.* (citing *Meyer,* 350 N.W.2d at 438). "Minn. Stat. § 504B.161, subd. 1(a)(1), does not impose liability where the landlord cures or attempts to cure a defect within a reasonable time using an effective method of repair, even when the tenant prefers a different repair method or is inconvenienced by the chosen method." *Id.*

Count III of Plaintiffs' alleges:

> Defendants' conduct, practices, and actions described in this Complaint constitute multiple, separate violations of Minnesota Statutes section 504B.161, subdivision 1(b). Among other things, Defendants' leases, including the burdenshifting repair provisions, constitute violations of subdivision 1(b) because they are attempts to waive and modify the Covenants of Habitability required by subdivision 1(a).[38]

Count V alleges:

[38] *Id.* at 43, ¶ 141.

> Defendants' conduct…constitutes multiple separate violations of Minnesota Statutes § 504B.177, by charging tenants more than eight percent of their alleged overdue rent payments. Each time Defendants imposed a late payment fee in the manner prescribed by the form lease, as described above, Defendants charge substantially more than eight percent as a penalty for late rent payments in violation of Minnesota Statutes section 504B.177. The Minnesota Office of Attorney General (OAG) recently issued an opinion letter stating that '[p]enalizing a late rent payment at the statutory maximum [of eight percent] violates the statute because…imposing the maximum late fee multiple times on the same late payment results in the late fee exceeding the eight percent statutory cap.' OAG June 30, 2021 Opinion Letter.[39]

Count V alleges "Defendants' method of applying late fees to amounts charged as base and additional rent results in cumulative late fees on the same late payment, in violation of Minnesota law."[40]

The Court is specifically tasked at this stage with determining whether the same evidence exists for each proposed class member to establish a prima facie case of liability under the Landlord Tenant Act. *Tyson Foods*, 577 U.S. at 453, 136 S. Ct. at 1045 (citing 2 W. Rubenstein, Newberg on Class Actions § 4:50, pp. 196–197 (5th ed. 2012)). Once more, Plaintiffs present evidence of Defendants form leases, internal business records, uniform policies and procedures, communications with tenants, internal communications, and security deposit deposition letters to establish the existence of predominance regarding Defendants' liability under the Landlord Tenant Act. For example, Plaintiff Sewall's lease provides the following terms related to the move-in conditions of the premises:

> Tenant acknowledges that any damage to the Premises beyond normal wear and tear which is not so noted on the Condition Form returned by Tenant will be presumed to have been caused by Tenant; therefore, it is important to note any such damage and to timely return the Condition Form. Except for the covenants of landlord expressly contained in this Lease, and the other written documents among the parties pertaining to the Premises, and as otherwise specified by Applicable Laws, (a) Tenant hereby represents, warrants and acknowledges that it is leasing the Premises in its AS-IS, WHERE-IS. WITH ALL FAULTS condition as of the date of this Lease and

[39] *Id.* at 44-45, ¶ 148.

[40] *Id.* at 45, ¶ 149.

> specifically and expressly without any warranties, representations or guarantees, either express or implied, as to its condition, fitness for any particular purpose, merchantability, habitability or any other warranty of any kind, nature, or type whatsoever from or on behalf of Landlord, and (b) except as set forth in this Lease, any Addendum attached to this Lease or other written document among the parties pertaining to the Premises and executed on behalf of Landlord, or as otherwise required by Applicable laws, Landlord has no obligation to perform any work, supply any materials, incur any expense or make any alterations or improvements to any portion of the Premises.[41]

The Gregorys' lease contains similar language:

> Tenant acknowledges that any damage to the Premises beyond normal wear and tear which is not so noted on the Condition Form returned by Tenant will be presumed to have been caused by Tenant; therefore, it is important to note any such damage and to timely return the Condition Form. Except for the covenants of landlord expressly contained in this Lease or other documents executed by Landlord, or as otherwise specified by Applicable Laws, (a) Tenant hereby represents, warrants and acknowledges that it is leasing the Premises in its AS-IS, WHERE-IS. WITH ALL FAULTS condition as of the Effective Date of and specifically and expressly without any warranties, representations or guarantees, either express or implied, as to its condition, fitness for any particular purpose, merchantability, or any other warranty of any kind, nature, or type whatsoever from or on behalf of Landlord, and (b) except as may be required by Applicable Laws, Landlord has no obligation to perform any work, supply any materials, incur any expense or make any alterations or improvements to any portion of the Premises.[42]

As to Count III, a close review of this evidence reveals that Defendants' lease derives from a form agreement containing virtually identical provisions amongst all tenants governing issues such as habitability, maintenance/repair obligations and requirements, fee recovery, late fees, and security deposits. These specific provisions, present in leases held by the entire class, that allegedly violate Minn. Stat. § 504B.161, subd. 2, whether by: (1) impermissibly waiving the statutory covenant of habitability, (2) failing to comply with various statutory requirements such ensuring that any agreement to perform specified repairs or maintenance as adequate consideration and conspicuous writing, or ensuring that the property is kept in reasonable repair and in a manner fit for its intended

[41] Ex. 4 to Regan Decl. at DEFS_00005606, ¶ 9 (May 12, 2023).

[42] Ex. 5 to Regan Decl. at DEFS_00002809, ¶ 10 (May 12, 2023).

use, (3) impermissibly recovering attorneys' fees even where Defendants have not been deemed the prevailing party, (4) impermissibly collecting late fees in excess of 8 percent of the amount of base rent owed, and (5) failing to fully credit security deposit interest in the statutorily-required written statement at the end of tenancy and unreasonably shifting ordinary wear and tear or other repairs and maintenance to tenants through security deposit deductions.

Defendants contend that they cannot be held liable unless Plaintiffs show proof that Defendants failed to make necessary repairs. While this is one way upon which a tenant may show a violation of the covenant of habitability, this is not the only way. For example, Minn. Stat. § 504.B.161, subd. 2. expressly prohibits a landlord from waiving the covenants set forth in Minn. Stat. § 504.B.161, subd. 1. As Plaintiffs point out, a breach of the statutory covenant can occur where a landlord has used a lease to 'waive or modify' these covenants. Thus, despite Defendants' argument that Plaintiffs' Landlord Tenant Act claim lacks predominance because there is no uniformity amongst the repair and maintenance experiences of the 3,500 putative class members each residing in unique single-family homes, Plaintiffs' Landlord Tenant Act claim rests upon the existence of Defendants' facially illegal lease provisions, which are shared amongst the entirety of the proposed class and presented as common evidence by Plaintiffs, to show that Defendants' form lease impermissibly waives the covenant of habitability.

As to Count V, the Gregory's lease states:

> If any portion of any required Rent payment is not received by Landlord on or before five (5) days from the date when due including any Returned Payment (each such unpaid amount, an "*Overdue Payment Amount*"), then Tenant shall pay to Landlord, in addition to such Overdue Payment Amount, a "late fee" in the amount of, whichever is highest, (a) One Hundred Dollars ($100.00) or (b) eight percent (8%) of the applicable Overdue Payment Amount (not to exceed the maximum late fee permitted by Applicable Law) (each, a "*Late Payment Fee*"), per month, for each month that any

> portion of such Overdue Payment Amount remains delinquent, to cover administrative expenses for' the late payment.[43]

Plaintiff Sewall's lease states:

> Tenant agrees that if all or any portion of any Rent payment required to be paid by Tenant (including Monthly Base Rent, Pro-Rated Rent, if applicable, or Additional Rent) is not received by Landlord on or before five (5) days from the date when due including any such payment that becomes a Returned Payment (each such unpaid amount, an "*Overdue Payment Amount*"), then Tenant shall pay to Landlord, in addition to such Overdue Payment Amount, a "late fee" in the amount of, whichever is higher, (a) $100.00 or (b) eight percent (8%) of the applicable Overdue Payment Amount (not to exceed the maximum late fee permitted by Applicable law) (each, a "*Late Payment Fee*"), per month, for each month that such Overdue Payment Amount (or portion thereof) remains delinquent, to cover administrative expenses for the late payment.[44]

Plaintiffs assert that Defendants' form lease purports to allow late fees in excess of the eight percent statutory maximum, and Defendants have subsequently enforced such provisions amongst the entire class. In doing so, Plaintiffs present shared evidence of specific provisions related to late fees contained in Defendants' form leases, as well as Defendants' enforcement of these provisions, to support their Landlord Tenant Act claim. For example, the record reveals that the Gregorys have been assessed six separate late fees totaling $287.84. Of the six late fees that the Gregorys have been charged, Defendants assert that none of these late fees exceeded eight percent of the Gregorys' overdue rent. Defendants also contend that the Gregorys' late fees were ultimately waived by Defendants. However, Plaintiff Shamika Gregory testified that she was wrongly charged "like 700 and something dollars in late fees" despite being told by a Pathlight representative that she was not responsible for the late fees incurred when a third-party agency pays for a tenant's rent.[45]

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[43] *Id.* at DEFS_00002807, ¶ 4 (emphasis in original).

[44] Ex. 4 to Regan Decl. at DEFS_00005603, ¶ 5 (May 12, 2023) (emphasis in original).

[45] Ex. 2 to Regan Decl. at 238:16-239:14 (July 7, 2023).

Plaintiffs rely on support from the Office of Attorney General (OAG), which explains that "under Minn. Stat. § 504B.177(a), a landlord may not charge a late fee equal to eight percent of the total unpaid rent when the total includes an overdue rent payment for which a late fee has already been assessed."[46] Although Defendants assert that the October 2022 late fee totaling $19.15 was assessed based on the Gregorys' outstanding October balance (totaling $252.49) and resulted in a late fee equal to less than eight percent in compliance with Minn. Stat. § 504B.177(a), Plaintiffs point out that the Gregorys were charged the October 2022 late fee based on the cumulative balance amount, which included base rent, non-base rent HVAC filter fee, liability coverage, "no show" and late fees from September 2022.

Plaintiffs point out that the lease language violates Minnesota law on its face because Defendants could assess a late fee of $100 even if the outstanding amount were $80. While Defendants assert that there is no evidence showing that Defendants charged $100 in lieu of an eight percent late fee, the language of the Gregorys' lease states that "all sums received by Landlord from Tenant shall be applied to the oldest outstanding monetary obligation owed by Tenant to Landlord . . . ."[47] This language could thereby allow Defendants to charge duplicative late fees assessed on outstanding balances that already include late fees, in addition to non-base rent items. And while the parties dispute the ability of the lease's savings clause to insulate Defendants from liability, Defendants do not cite to any Minnesota caselaw that would allow these savings clauses to automatically override any illegal provisions contained within the lease which would thereby render these provisions valid and enforceable.

[46] Ex. 23 to Regan Decl. at 4 (May 12, 2023).

[47] Ex. 5 to Regan Decl. at DEFS_00002807, ¶ 4 (May 12, 2023).

Defendants assert that the Landlord Tenant Act does not bar Defendants from charging late fees, but the statutory language of Minn Stat. § 504B.178 and the guidance from the Minnesota Attorney General indicate otherwise. As to Defendants' assertion that they have complied with Minn Stat. § 504B.178, Defendants do not present evidence supporting this assertion, and Plaintiffs present evidence that Defendants' form lease is facially noncompliant with the requirements of Minn Stat. § 504B.178 as to late fees. Individual differences, if any, in late fee charges can be determined from Defendants' business records as addressed through a claims process should Plaintiffs prevail in the substance of this matter. Plaintiffs satisfy the predominance requirement under Rule 23.02(c) as to Count III and V.

4. *Count VI (Breach of Good Faith and Fair Dealing)*

Count VI alleges:

> Defendants' actions and uniform course of conduct, including, but not limited to their constructive refusal to make even basic repairs or to unduly delay repairs, and to enforce the "as is" representations in the lease, breach their contractual duty of good faith and fair dealing and unjustifiably hinder Plaintiffs' performance under the contracts.[48]

Count VI also alleges that "Defendants have acted in bad faith by refusing to perform their contractual duties, effectively foisting the burden of maintaining their homes onto their Tenants in order to generate more revenue and cut their own costs."[49] Count VI likewise claims that "Plaintiffs have not impeded Defendants from performing their obligations under their lease agreements in any way"[50] and "Defendants' actions caused Plaintiffs injury and damages, entitling Plaintiffs to the categories of remedies discussed herein."[51]

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[48] Second Am. Compl. Jury Trial Demanded at 45, ¶ 153 (Feb. 2, 2023).

[49] *Id.* at 46, ¶ 154.

[50] *Id.* at 46, ¶ 155.

[51] *Id.* at 46, ¶ 156.

"Under Minnesota law, every contract includes an implied covenant of good faith and fair dealing requiring that one party not unjustifiably hinder the other party's performance of the contract." *In re Hennepin Cnty. 1986 Recycling Bond Litig.*, 540 N.W.2d 494, 502 (Minn. 1995) (citing *Zobel & Dahl Constr. v. Crotty,* 356 N.W.2d 42, 45 (Minn. 1984); *see also Haase v. Stokely–Van Camp, Inc.,* 257 Minn. 7, 13, 99 N.W.2d 898, 902 (Minn. 1959); Restatement (Second) of Contracts § 205 (1981)) (internal quotations omitted). "In Minnesota, the implied covenant of good faith and fair dealing does not extend to actions beyond the scope of the underlying contract." *Id.* at 503. When alleging a claim for a breach of an implied covenant of good faith and fair dealing, a party "need not first establish an express breach of contract claim—indeed, a claim for breach of an implied covenant of good faith and fair dealing implicitly assumes that the parties did not expressly articulate the covenant allegedly breached." *Id.* (citing *Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F. Supp. 1504, 1516 (S.D.N.Y. 1989)). "To establish a violation of this covenant, a party must establish bad faith by demonstrating that the adverse party has an ulterior motive for its refusal to perform a contractual duty." *Minnwest Bank Cent. v. Flagship Properties LLC*, 689 N.W.2d 295, 303 (Minn. Ct. App. 2004) (citing *Sterling Capital Advisors, Inc. v. Herzog,* 575 N.W.2d 121, 125 (Minn. Ct. App. 1998)).

The crux of Defendants' argument rests on the proposition that Plaintiffs' claim fails on the merits because the case Plaintiff relies on, *Thompson v. St. Anthony Leased Hous. Assocs, II, LP*, 979 N.W.2d 1 (2002), does not involve a claim for breach of good faith and fair dealing. The Minnesota Supreme Court noted in *Thompson* that the plaintiff originally "brought [a] putative class action against landlords for…breach of implied covenant of good faith and fair dealing." *Id.*

Plaintiffs present the same shared evidence used to support their Consumer Fraud Act and Landlord Tenant Act claims to demonstrate Defendants' liability on a classwide basis. Defendants

assert that because Plaintiffs' Landlord Tenant Act and Consumer Fraud Act claims turn on individual issues, the same individual issues driving the Consumer Fraud Act and Landlord Tenant Act claims predominate over any common issues related to breach of good faith and fair dealing. However, there are common issues applicable across the entire class regarding Defendants' alleged violation of the implied covenant of good faith and fair dealing. Plaintiffs present sufficient classwide evidence establishing common issues of law and fact that predominate Plaintiffs' breach of good faith and fair dealing claim. *Lewy*, 650 N.W.2d at 456 (citing *Streich,* 399 N.W.2d at 217). Plaintiffs satisfy the predominance requirement under Rule 23.02(c) as to Count VI.

5. Count VII (Rescission)

"Rescission has been defined as the unmaking of a contract." *Abdallah, Inc. v. Martin*, 242 Minn. 416, 420, 65 N.W.2d 641, 644 (1954) (citing *Butler Mfg. Co. v. Elliott & Cox*, 211 Iowa 1068, 233 N.W. 669 (1930); *Kunde v. O'Brian*, 214 Iowa 921, 243 N.W. 594 (1932); *Fuller v. Fried*, 57 N.D. 824, 224 N.W. 668 (1928)). "It has also been stated that to rescind a contract is not merely to terminate it but to abrogate it and undo it from the beginning." *Id.* (citing 1 Black, Rescission and Cancellation § 1 (2nd ed.)). "There are three general methods of effecting a rescission, namely (a) by mutual agreement of the parties; (b) by one of the parties declaring a rescission of the contract without the consent of the other if a legally sufficient ground therefor exists; and (c) by applying to the courts for a decree of rescission." *Id.* (citing 1 Black, Rescission and Cancellation § 1 (2nd ed.)).

"A contract is voidable if a party's assent is induced by either a fraudulent or a material misrepresentation by the other party, and is an assertion on which the recipient is justified in relying." *Carpenter v. Vreeman*, 409 N.W.2d 258, 260–61 (Minn. Ct. App. 1987) (citing Restatement of Contracts (Second) § 164(1) (1981). "A misrepresentation is an assertion that is not in accord with

the facts." *Id.* at 260 (citing *General Electric Credit Corp. v. Wolverine Ins. Co.,* 420 Mich. 176, 186, 362 N.W.2d 595, 600 (1984); *see also* Restatement of Contracts (Second) § 159 (1981)). "A misrepresentation is fraudulent if it is intended to induce a contract and either is known to be false or made without knowledge of whether it is true or false." *Id.* at 261 (citing Restatement of Contracts (Second) § 162(1) (1981)). "A misrepresentation is material if it would be likely to induce a reasonable person to manifest his or her assent or the maker knows that for some special reason it is likely to induce the particular recipient to manifest such assent." *Id.* (citing Restatement of Contracts (Second) § 162(2) (1981); *see also Pasko v. Trela,* 153 Neb. 759, 763, 46 N.W.2d 139, 143 (1951)). "Nonfraudulent misrepresentations must be material to be actionable." *Id.* "There is no legal effect from a misrepresentation, material or fraudulent, unless the recipient assents to the contract in reliance on the misrepresentation." *Id.* (citing Restatement of Contracts (Second) § 164 comment c (1981)). "This is a question of fact that must be determined by the trial court." *Id.* "Where reliance on the misrepresentation is demonstrated, but is not justified, relief may be denied." *Id.* (citing Restatement of Contracts (Second) § 164 comment d (1981); *see also Mims v. Cooper*, 203 Ga. 421, 422, 46 S.E.2d 909, 910–11 (1948)). "Whether appellants were justified in relying on respondent's representations is also a question of fact for the trial court." *Id.* "If the trial court determines there was a fraudulent or material misrepresentation by respondent, upon which appellants justifiably relied, and which induced appellants to assent to the contract, and if respondent fails on his affirmative defense . . . then appellants are entitled to the relief they seek." *Id.*

Count VII alleges that "Plaintiffs and the Proposed Class have incurred out-of-pocket expenses for maintenance costs associated with their leases that should never have been their responsibility to pay as a direct result of the terms of the lease agreement."[52] Count VII also alleges

[52] *Id.* at 47, ¶ 163.

that "[a]s a direct and proximate result of Defendants' conduct, Defendants have received substantial benefits to which they have no entitlement, at Plaintiffs' and the Proposed Class Members' expense, including maintenance costs, rent hikes, insurance premiums and other expenses"[53] and "Plaintiffs and the Proposed Class are entitled to compensation for all of the expenses they were illegally required by Defendants to bear, and that Defendants should have but did not pay."[54]

Plaintiffs concede that their recission claim is premised on the same legal theory and facts as their claims under the Landlord Tenant Act and Consumer Fraud Act, and arises out of the same conduct as their statutory and common law claims. Plaintiffs rely on the same evidence of Defendants' form leases, communications, and business practices that all class members were subject to as a means of establishing a prima facie showing of recission. For example, Professor Rao concludes "the practices employed and materials supplied by Defendants before consumers entered their leases indicate Defendants intended and expected consumers to rely on these materials"[55] and "because of omissions and conflicting information provided by Defendants, these materials caused reasonable consumers to misunderstand or not fully appreciate certain terms of their leases that affected their rights and obligations as tenants."[56] Likewise, Dr. Kneuper's but-for methodology recognizes:

> All of the Class Members experienced a common economic harm under this approach since they were not compensated in the form of lower rents for the illegal repair and maintenance burdens that were shifted to them through Defendants' leases. This impact occurs regardless of their individual repair and maintenance expenses.[57]

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[53] *Id.* at 45, ¶ 164.

[54] *Id.* at 45, ¶ 165.

[55] Rao Decl. at 5, ¶ 10 (May 12, 2023).

[56] *Id.*

[57] Kneuper Decl. at 3 (July 7, 2023).

Dr. Kneuper's formula is "calculated based on a reduction in rent that compensates tenants for the expected costs of repairs that should legally be the responsibility of the Landlord absent specific consideration and compensation for shifting those repairs"[58] and "relies on objective, measurable, market-based factors which can be applied to reasonably estimate damages to the Class and individual Class Members in this case"[59] without deference to individual inquiry, thereby making classwide relief ascertainable.

Defendants argue that recission necessarily entails an individualized inquiry because if the putative class prevails, some residents may prefer to rescind their leases and RTP agreements and vacate their homes, while others may prefer to remain in their homes and receive money damages. This determination is premature, as the Court must first decide whether Defendants are liable under Plaintiffs claim before class members would have the option to rescind or ratify their leases.

Defendants also argue that Plaintiffs' class definition also includes former residents who are no longer active parties to a lease, and those former residents do not have a legally cognizable recission claim under Minnesota law. However, damages and class membership can be deciphered from Defendants' business records. Likewise, the Court may grant certification irrespective of differences in individual damages. *Tyson Foods*, 577 U.S. at 456-57, 136 S. Ct. at 1045 (citing *White*, 822 F. Supp. at 1403–04; *B & B Inv. Club*, 62 F.R.D. at 144; *In re Memorex Sec. Cases,* 61 F.R.D. at 103; *U.S. Steel Corp*, 44 F.R.D. at 567 ("Courts frequently grant class certification despite individual differences in class members' damages").

[58] *Id.*

[59] *Id.*

Plaintiffs present sufficient classwide evidence establishing common issues of law and fact that predominate Plaintiffs' recission claim. *Lewy*, 650 N.W.2d at 456 (citing *Streich,* 399 N.W.2d at 217). Plaintiffs satisfy the predominance requirement under Rule 23.02(c) as to Count VII.

6. Count VIII (Unjust Enrichment)

Count VIII alleges "Plaintiffs and the Proposed Class conferred a benefit on the Defendants by, among other things, paying rent and for the costs of maintenance and other fees that Defendants should have paid."[60] Plaintiffs claim that "Defendants voluntarily accepted and retained through today the benefits conferred by Plaintiffs and the Proposed Classes' payments for rent and the costs of maintenance[,]"[61] "[t]he circumstances are such that it would be inequitable for the Defendants to retain these payments[,]"[62] and "Defendants consciously accepted the benefits that Plaintiffs and the Proposed Class conferred and those benefits were not conferred gratuitously."[63]

"A claim for unjust enrichment arises when a party gains a benefit illegally or unlawfully." *Midwest Sports Mktg., Inc. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 268 (Minn. Ct. App. 1996) (citing *Holman v. CPT Corp.,* 457 N.W.2d 740, 745 (Minn. Ct. App. 1990)). "In order to establish a claim for unjust enrichment, the claimant must show that another party knowingly received something of value to which he was not entitled, and that the circumstances are such that it would be unjust for that person to retain the benefit." *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. Ct. App. 2001) (citing *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.,* 544 N.W.2d 302, 306 (Minn. 1996); *see also, Acton Constr. Co. v. State,* 383 N.W.2d 416, 417 (Minn. Ct. App. 1986)). "An unjust enrichment claim may be founded upon failure of consideration, fraud, or mistake, or

[60] Second Am. Compl. Jury Trial Demanded at 48, ¶ 167 (Feb. 2, 2023).

[61] *Id.* at 48, ¶ 168.

[62] *Id.*

[63] *Id.* at 48, ¶ 169.

situations where it would be morally wrong for one party to enrich himself at the expense of another." *Midwest Sports Mktg*, 552 N.W.2d at 268 (citing *Holman,* 457 N.W.2d at 745) (internal quotations omitted).

Like Plaintiffs' recission claim, Plaintiffs concede that their unjust enrichment claim is premised on the same legal theory and facts as their claims under the Landlord Tenant Act and Consumer Fraud Act, and arises out of the same conduct as their statutory and common law claims. Defendants primary argument rests on the idea that unjust enrichment necessarily entails an individualized inquiry because determining whether any given class member conferred a benefit on Defendants (and the value of said benefit) can only be done on a resident-by-resident basis.

Plaintiffs' legal argument is based on the premise that Defendants were enriched at Plaintiff's expense due to illegal, unfair, and fraudulent conduct from the Defendants' lease terms, communications, and business practices. Plaintiffs rely on the same evidence of Defendants' form leases, communications, and business practices that all class members were subject to as a means of establishing a prima facie showing of unjust enrichment. For example, Professor Rao concludes "the practices employed and materials supplied by Defendants before consumers entered their leases indicates Defendants intended and expected consumers to rely on these materials"[64] and "because of omissions and conflicting information provided by Defendants, these materials caused reasonable consumers to misunderstand or not fully appreciate certain terms of their leases that affected their rights and obligations as tenants."[65] Likewise, Dr. Kneuper's but-for methodology recognizes:

> All of the Class Members experienced a common economic harm under this approach since they were not compensated in the form of lower rents for the illegal repair and

[64] Rao Decl. at 5, ¶ 10 (May 12, 2023).

[65] *Id.*

> maintenance burdens that were shifted to them through Defendants' leases. This impact occurs regardless of their individual repair and maintenance expenses.[66]

Moreover, Dr. Kneuper's formula is "calculated based on a reduction in rent that compensates tenants for the expected costs of repairs that should legally be the responsibility of the Landlord absent specific consideration and compensation for shifting those repairs"[67] and "relies on objective, measurable, market-based factors which can be applied to reasonably estimate damages to the Class and individual Class Members in this case"[68] without deference to individual inquiry, thereby making classwide relief ascertainable.

Plaintiffs present sufficient classwide evidence establishing common issues of law and fact that predominate as to their' unjust enrichment claim. *Lewy*, 650 N.W.2d at 456 (citing *Streich,* 399 N.W.2d at 217). Plaintiffs satisfy the predominance requirement under Rule 23.02(c) as to Count VIII.

F. Superiority – Counts I, III, V, VI, VII, and VIII

Plaintiffs argue that a class action is a superior means to other available methods for the fair and efficient adjudication of this dispute. Defendants argue that a class action is not a superior method of adjudicating class claims.

"Factors to consider in a superiority analysis include manageability, fairness, efficiency, and available alternatives." *Lewy*, 650 N.W.2d at 457 (citing *Streich,* 399 N.W.2d at 218) (internal quotations omitted). "The class action is most often needed in litigation in which individual claims are small." *Id.* (citing *Forcier v. State Farm Mut. Auto. Ins. Co.,* 310 N.W.2d 124, 130 (Minn. 1981)). "When collective adjudication promises substantial efficiency benefits or makes it possible for class

[66] Kneuper Decl. at 3 (July 7, 2023).

[67] *Id.*

[68] *Id.*

members with small claims to bring suit and enforce the substantive law, a class action is superior to other available methods for the fair adjudication of the controversy." *Id.* (citing *Vernon J. Rockler & Co. v. Graphic Enter., Inc.,* 52 F.R.D. 335, 347 (D.Minn.1971)).

There are minimal difficulties regarding management of this action. Courts have generally granted class certification in cases of this size or greater, and any issues related to specifics such as which class members paid which fees will be resolved by Defendants' business records. There is no specific requirement that Plaintiffs submit a trial plan. There is also no indication that another case currently exists seeking the same relief or challenging the same conduct, minimizing any risk of unfairness. Given the size of Plaintiffs' proposed class, class certification will ensure efficiency and reduce the risk of re-litigating the same claims, which would therefore reduce the potential strain on other judicial resources if each claim were to be resolved individually. The scope of litigation in this case is relatively narrow, which helps to ensure that all issues related to liability are decided in one proceeding and promotes judicial efficiency. While Defendants assert that individual members might have a strong interest in controlling the prosecution of their specific claims, Defendants have provided no such evidence as to absent class members, and individual class members can always choose to opt out of the class or file objections. The Court has no evidence that any significant number of class members wish to pursue alternative methods of adjudication.

The Court concludes that Plaintiffs satisfy the superiority requirement under Rule 23.02(c) as to Count I, III, IV, V, VII, and VIII. Accordingly, the Court shall grant Plaintiffs' Motion for Class Certification pursuant to Minn. R. Civ. P. 23.03(c) on Counts I, III, IV, V, VI, VII, and VIII, and shall deny Plaintiffs' Motion for Class Certification pursuant to Minn. R. Civ. P. 23.03(c) as to Count II.

G. Grounds Applicable to the Class – Counts II (Violation of Minnesota Uniform Deceptive Trade Practices Act, Minn. Stat. § 325D.44), IX (Declaratory Relief), and X (Injunctive Relief)

Plaintiffs argue that Defendants have acted on grounds that apply generally to all class members through misleading or unenforceable leases, policies, and procedures. Defendants argue that Plaintiffs' Rule 23.02(b) injunctive relief class fails because it is not cohesive and because Plaintiffs are really seeking money damages.

"Class certification under Rule 23(b)(2) is proper only when the primary relief sought is declaratory or injunctive." *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1035 (8th Cir. 2010) (citing *In re St. Jude Med., Inc.,* 425 F.3d 1116, 1121 (8th Cir.2005)) (district court did not abuse its discretion in denying Rule 23.02(b) certification where, in part, Plaintiffs conceded that case was primarily about money damages, not injunctive relief, and resolution of the plaintiffs' claims would require numerous individual determinations). "Rule 23.02(2) does not apply . . . where the requested relief is money damages, not the declaratory or injunctive relief envisioned by the section." *Streich*, 399 N.W.2d at 216.

"Although Rule 23(b)(2) does not refer to the predominance of common questions, class claims thereunder still must be cohesive." *Avritt*, 615 F.3d at 1035 (citing *In re St. Jude*, 425 F.3d at 1121) (internal quotations omitted). "Indeed, cohesiveness is even more important for a Rule 23(b)(2) class because, unlike Rule 23(b)(3), there is no provision for unnamed class members to opt out of the litigation." *Id.* (citing *In re St. Jude*, 425 F.3d at 1121). "Individuals comprising a Rule 23(b)(2) class are therefore generally bound together through preexisting or continuing legal relationships or by some significant common trait such as race or gender." *Id.* (citing *In re St. Jude*, 425 F.3d at 1122) (internal quotations omitted).

Here, Defendants' form leases are materially similar and applicable to every tenant. These leases contain materially similar or same terms, and the tenants subject to these terms were also subject to Defendants policies and procedures. As such, the class members described by Plaintiffs are "bound together through preexisting or continuing legal relationships" with Defendants. *Id.* (citing *In re St. Jude*, 425 F.3d at 1122) (internal quotations omitted). In opposing cohesiveness, Defendants reframe their predominance argument by contending that the proposed injunctive relief and declaratory judgment class are not cohesive because certain tenants paid certain fees and others did not. Defendants' business records will answer this question, and Defendants' assertion does not negate the fact that the class coheres around the question of Defendants' liability.

Plaintiffs seek declaratory and injunctive relief on Counts II, IX, and X that is both separate and distinct from the monetary relief sought by Plaintiffs. Plaintiffs intend to pursue the following injunctive and declaratory relief requiring that:

> (1) Defendants cease use of leases containing clauses that mislead tenants regarding their rights or obligations under Minnesota law, or which are unenforceable per se; (2) calculate late fees solely in accordance with Minn. Stat. § 504B.177; (3) cease assessing attorneys' fees to tenants, unless Defendants have been found to be the prevailing party in an action against the tenant under Minn. Stat. § 504B.177; (4) cease charging tenants for the $9.95 UBSF; and (5) cease charging tenants for HVAC filters.[69]

Plaintiffs' proposed relief is that envisioned by Rule 23.02(b) – primarily injunctive and declaratory.

The Court concludes that Plaintiffs satisfy the cohesiveness requirement under Rule 23.02(b) as to Count II, IX, and X. Accordingly, the Court shall grant Plaintiffs' Motion for Class Certification pursuant to Minn. R. Civ. P. 23.03(b) on Counts II, IX, and X.

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[69] Memo. of Law in Supp. of Pls.' Mot. for Class Cert. and Appt. of Class Reps. and Class Counsel at 13 (May 15, 2023).