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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT
Case Type: Other Civil

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

Plaintiffs,

v.

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
Judge Christian Sande

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

In their motion for summary judgment, Defendants reprise the central argument from their unsuccessful motion to dismiss—that their Leases comply with Minnesota law—and make conclusory arguments suggesting no evidence supports any of Plaintiffs' claims. This motion is both futile, given the numerous issues of disputed fact on the issues for which they seek summary judgment, and premature, given the swaths of discovery they still refuse to produce in this case. Defendants wave away the many facially illegal or unenforceable provisions in their Leases by simply relying upon the caveats and catch-all provisions that, according to Defendants, cure any possible misinterpretation. According to Defendants, references to "applicable laws," and "bold print" in some places eliminate any fact issue as to whether the Leases were fraudulent, misleading or unenforceable.

Remarkably, Defendants move for summary judgment on Plaintiffs' claims despite admitting there are credibility issues regarding Plaintiffs' assertion that they were misled by Defendants (*see e.g.*, Def. Br. at 27), and by themselves deciding what the Lease provisions mean. Defendants purport to tell the Court what the "negotiation" provision should mean to the tenant (Def. Br. at 29); how Plaintiffs should interpret the "as-is" provisions (Def. Br. at 26); and that by signing leases with a stated rental rate, Plaintiffs not only agreed that the rental rate provided "adequate consideration" to take on repair and maintenance obligations ranging from preventing and repairing water intrusion to ridding the home of pest infestations, but that rent was also reduced to reflect this alleged agreement. (Def. Br. at 22). Defendants also move for summary judgment on the grounds that Plaintiffs were not economically harmed because Plaintiffs' costs to maintain and repair the property were less than Defendants'.

Contrary to Defendants' assertions, Plaintiffs have put forth evidence that Defendants charged them rental rates that incorporate the expected costs of maintenance and repair and

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insurance, but which are not reduced to reflect Plaintiffs' alleged agreement to maintain and repair the property. Plaintiffs do not have the opportunity to negotiate this rate, much less any Lease term.

[redacted] Plaintiffs have been harmed because they paid rent, fees, and additional costs to maintain and repair Defendants' properties, all while being bound by unenforceable Lease terms.

The Court should deny Defendants' motion for summary judgment.

STATEMENT OF ADDITIONAL DOCUMENTS THAT COMPRISE THE RECORD FOR SUMMARY JUDGMENT

The additional documents comprising the record are listed on and attached to: (1) the May 12, 2023 Declaration of Anne T. Regan and all exhibits attached thereto; (2) the June 30, 2023 Declaration of Anne T. Regan and all exhibits attached thereto; (3) the May 10, 2023 Declaration of Barry Sewall and all exhibits attached thereto; (4) the May 10, 2023 Joint Declaration of Shamika and Jerome Gregory and all exhibits attached thereto; (5) the June 27, 2023 Declaration of Barry Sewall; (6) the June 27, 2023 Joint Declaration of Shamika and Jerome Gregory; (7) the May 12, 2023 Declaration of Professor Akshay Rao, Ph.D.; and (8) the May 12, 2023 Declaration of Robert Kneuper, Ph.D.

RULE 115.03 STATEMENT OF FACTS

Defendants' brief supporting their motion for summary judgment incorporates by reference an entire background fact section of their opposition to Plaintiffs' Motion for Class Certification, which Defendants represent was filed "concurrently." (Def. Br. at 3). This is improper under the General Rules of Practice and makes it impossible for Plaintiffs to know whether Defendants contend the "facts" stated in a section of an entirely different brief are material or undisputed. Minn. R. Gen Prac. 115.03; Minn. R. Civ. P. 56.01. Additionally, Defendants did not file their

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opposition to Plaintiffs' Motion for Class Certification concurrently. Defendants filed their brief in support of their motion for summary judgment on June 16, 2023, and filed their opposition to Plaintiffs' Motion for Class Certification three days later, on June 19, 2023.

Regardless, on the issues for which Defendants seek summary judgment (Def. Br. at 1-3), the facts are squarely disputed.

I. Defendants' Minnesota Operations

Defendants are the second largest owner and investor of single-family residences in Minnesota. (Index #92, Ex. 1). Defendants function as absentee landlords, with no office and very few employees in Minnesota. They operate out of Chicago, Illinois and Plano, Texas, and through a remote call center and centralized web portal. (Index #92, Ex. 2; Ex. 37, 30.02(f) Dep. at 28:16-31:15; Ex. 39, Schenck Dep. at 22:22-25:25, 100:7-16).

Defendants operate two rental programs within Minnesota. The first, called a "lease-to-purchase," "lease purchase," or "right to purchase" program (hereafter referred to as "LTP"), is the means through which Defendants acquire single family homes to rent and later re-sell. (Index #92, Ex. 26; Ex. 40, Slankard Dep. at 23:7-11). In the LTP program, Defendants work through affiliated local real estate agents to reach prospective customers contemplating purchasing a house, but who are not ready to buy. (Index #92, Ex. 37, 30.02(f) Dep. at 132:21 – 136:12). [redacted] (Index #92, Ex. 33). The second program is a non-right-to-purchase (NRTP) one-year rental program, where tenants re-lease one of Defendants' previously acquired properties, after an LTP participant has terminated the lease. (Index #92, Ex. 37, 30.02(f) Dep. at 60:10-19).

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II. Defendants Dictate The Terms of Their Leases And Their Rental Programs.

Defendants use standard form leases and do not negotiate Lease terms with their tenants. (Index #92 Exs. 4, 5; Ex. 37, 30.02(f) Dep. at 248:8-24). In other words, the Leases are form contracts of adhesion. Indeed, Defendants admit to a nationwide "desire for consistency" so Lease terms do not vary from state to state, much less tenant to tenant. (Def. Br. at 11). Notwithstanding their consistent form contracts of adhesion, Defendants suggest that Plaintiffs had the ability to negotiate their lease terms, including the rental rates they were charged. Defendants have no proof for this contention. Defendants' systematic processes and procedures and "desire for consistency," demonstrate no deviation from their formulas was possible.

A. Defendants determine the homes that are "eligible" for purchase and rent.

Through their real estate agents, Plaintiffs chose their homes from the list of homes that Defendants had determined were eligible for purchase and rent. (June 30, 2023 Declaration of Anne T. Regan, Ex. 25, Slankard Dep. at 73:8-25; 84:5-17; Ex. 26, Polanzi Dep. at 91:1-19; 111:23-112:4; Index #92, Exs. 28, 33).[1] [redacted]

[1] Unless otherwise stated, all references to "Ex.__" in this brief refer to exhibits filed concurrently with the June 30, 2023 Declaration of Anne T. Regan.

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[redacted]

B. Defendants unilaterally set rental rates, incorporating expected costs of maintenance, insurance and other overhead into the Base Rental Rate.

Defendants calculate RTP rents "formulaically." (Ex. 5, Defs.' Answers to Interrogatory No. 28). Defendants calculate these rates using software that applies a proprietary algorithm to derive the rental rate and a "rent yield" for a given property—even before Home Partners makes an offer on the house. (Index #92, Ex. 26 at DEFS_00265781; Ex. 40, Slankard Dep. at 74:18-76:15; 84:5-88:15; Ex. 41, Polanzi Dep. at 72:19-74:22). The "RTP rent is calculated off of a target yield and anticipated expenses based on the features of the property." (Ex. 5, Defs.' Answers to Interrogatory No. 28). [redacted]

Plaintiffs did not have the opportunity to negotiate their Lease terms. (Ex. 1, Sewall Dep. at 109:2-8; Ex. 2, S. Gregory Dep. at 51:15-19; Index #95 Ex. 3 at p. 18; Index #98 Ex. 3 at p. 25).

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None of Defendants' witnesses, including their corporate designee, could cite a single instance of a tenant negotiating a term of their lease, including the rental rate. (Index #92, Ex. 37, 30.02(f) Dep. at 248:8-24; Ex. 41, Polanzi Dep. at 93:10-11, 111:10-13). There is no evidence that Defendants adjust or discount the monthly rental rate to compensate tenants for the alleged agreement to maintain and repair. (Index #92 Ex. 37, 30.02(f) Dep. at 248:2-11; Ex. 41, Polanzi. Dep at 89:18-91:14). Further, no record evidence supports the contention that Plaintiffs (or any putative class member) were able to negotiate their rental rate. (Index #92 Ex. 37, 30.02(f) Dep. at 247:20-249:5; Ex. 41, Polanzi Dep. at 93:6-11, 111:4-13; Index #95 ¶ 29, Ex. 3 at p. 18; Index #98 ¶ 13, Ex. 3 at p. 25).

C. Defendants defer necessary maintenance and repair, refuse to repair, and fail to inspect.

Once a tenant selects the home they would like to rent with an option to later purchase, Defendants control all aspects of the prospective purchase, including inspection and the decision whether to make repairs before the purchase. [redacted] Per policy, Defendants do not disclose to tenants the results of any home inspection and exercise their sole discretion whether to make any needed repairs. (Index #92, Exs. 14, 36; Ex. 38, Wood Dep. at 51:13-25).

1. Barry Sewall

Barry Sewall needed to rent a house "in a certain area, [with] proximity to [his] job and elderly parents and disabled brother." He soon learned there were [redacted]

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[redacted]

It is undisputed that Defendants did not provide a copy of this inspection report to Sewall, inform Sewall of any issues with the home that might have caused past damage or would cause damage, or disclose what repairs had been done before he moved into the home. (Ex. 1, Sewall Dep. at 46:23-47:6; 55:11-56:14; Index #95 ¶ 12).

After obtaining the inspection report they concealed from Sewall, [redacted]

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[redacted]

Sewall agreed to rent the home with no knowledge of the issues found in the pre-lease inspection. During his tenancy, Sewall "spent considerable effort on [his] part over five years maintaining the home as best [he] could. Not without difficulties encountered along the way." (Ex. 1, Sewall Dep. at 121:18-21). Sewall made numerous repairs that were never compensated by Defendants, including:

- applying self-leveling caulk to a gap in front of the garage to try to remediate persistent water intrusion (Ex. 1, Sewall Dep. at 61:11-18; Index #95 Ex. 3 at p. 13);

- mopping or squeegee-ing out water intrusion in the garage and utility room (Ex. 1, Sewall Dep. at 27:13-25, 124:5-13; Index #95 at ¶ 56);

- removing an ice dam that caused substantial damage, as Sewall reported to Defendants (Ex. 1, Sewall Dep. at 74:8-75:13; Index #95 at ¶¶ 25-26, Ex. 3 at p. 13-14);

- reporting persistent plumbing problems (Index #95 Exs. 6, 7 and 8) and addressing himself when Defendants' vendors could not (Ex. 1, Sewall Dep. at 27:13-18);

- washing dishes by hand due to a non-functioning dishwasher (Ex. 1, Sewall Dep. at 27:22-25);

- undertaking other "handyman" and other responsibilities like lawn care and snow removal. (Ex. 1, Sewall Dep. at 122:23-123:25; 156:20-25) ("The master shower drain, five years, never fixed. Standing water, draining, the whole mold on it, never fixed. Water on the floor in the equipment room, never fixed. Water on the floor of the garage – tougher issue. Get it. Foundation, roof, whatever is going on – but not even really addressed.")

Sewall informed Defendants on May 31, 2021 of his intent to move out on August 31, 2021. (Index #95 ¶ 27). Despite that notice and Sewall's many attempts to communicate with Defendants before August 2021 regarding the move-out process, he did not receive a response. (Index #95 ¶¶ 28-34). Sewall attempted to contact Defendants by phone several times to determine

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where to leave the keys, whether there would be a move-out inspection and to report issues with the master shower drain and sweating mechanical systems. (Index #95 ¶¶ 31-32, Ex. 18). Over a month after Sewall moved out, he received a security deposit disposition letter assessing $15,000 for "Remediation and Buildback" with no further explanation. (Ex. 7, Sewall Security Deposit Disposition Letter; Ex. 1, Sewall Dep. at 120:11-121:21; Index #95 ¶¶ 35-37).

Defendants eventually claimed the repairs to the home were necessitated by an "unreported roof leak." (Ex. 33). These repairs included roof replacement, carpet replacement, drywall replacement, and other related repairs. (Ex. 32). To date, Defendants have failed to provide *any* evidence of a roof leak. (Ex. 25, Schenck Dep. at 147:1-2 ("Q. Where was the roof leaking? A. I do not recall."); Ex. 28, Sahr Dep. at 55:5-8 ("Q. And so you were just kind of guessing that it was a roof leak? A. Correct, I would have, again, put in a bid to assess the roof and bid for replacement."). Sewall disputes he owes any money for these repairs. (Index #95 ¶¶37-41; Index #69, Pls.' Answer to Counterclaim).

2. Shamika and Jerome Gregory

Like Sewall, the Gregorys submitted a request to rent a home from the few options available to them in Defendants' listed inventory. (Ex. 3, J. Gregory Dep. at 16:20-25, 19:20-24, 20:2-6). Defendants' vendor completed an inspection on June 22, 2021. (Index #92, Ex. 35). [redacted] The Gregorys knew an inspection had been done and inquired about the results, but were not allowed to see the report. (Ex. 2, S. Gregory Dep. at 61:3-62:3).

The Gregorys's Lease had a scheduled move-in on August 26, 2021. (Index #92, Ex. 5 at DEFS_00002798). On August 17, 2021, they learned their move-in would be delayed. (Ex. 34 at

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DEFS_00006192; Index #98 ¶¶ 14-17). Though Defendants did not disclose why, the Gregorys later learned it was because the house had failed the City of Brooklyn Center's inspection and Defendants failed to obtain a rental license. (Ex. 34 at DEFS_00006197; Ex. 2, S. Gregory Dep. at 80:14-19). The house was not up to code and the inspector found multiple issues, none of which were disclosed to the Gregorys while they had no place to live during the delay. (Ex. 34 at DEFS_00006200).

After the Gregorys were finally able to move in, they reported to Defendants that the home was filthy and not "move-in ready" as promised. (Ex. 2, S. Gregory Dep. at 83:2-13). The home was infested with mice, lights were not working, doors and blinds were missing, and the Gregorys found "belongings in the backyard, clothes, miscellaneous items from whomever was working on the house." (Ex. 2, S. Gregory Dep. at 83:2-13; Ex. 35).

The Gregorys have made repeated maintenance requests during their tenancy, the majority related to issues affecting health and safety. The Gregorys went without a working refrigerator for two months, despite repeated requests to Defendants for repair or replacement.

Refrigerator	Not Working, Broken or Damaged	Vendor Paid	Dispatched back to sms	7/22/2022 7:19
Refrigerator	Not Working, Broken or Damaged	Cancelled	Dispatched back to sms	7/29/2022 8:41
Refrigerator	Not Working, Broken or Damaged	Vendor Paid	Dispatched back to sms	9/2/2022 8:44

On July 22, 2022, the Gregorys told Defendants their refrigerator had died. Instead of supplying a new refrigerator, Defendants waited for months until parts for the old unit were available. (Index #98 ¶ 33-34, Ex. 10). The Gregorys and their four children went without a working refrigerator from July 22 until September 23, 2022 (Ex. 8). The Gregorys made repeated

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requests during that time because they had nowhere to keep their food cold. (Index #98, Gregory Decl. ¶ 33-34; Ex. 10).

The City of Brooklyn Center also issued many notices and citations that Defendants failed to address for several months. The City issued seven Rental Correction Notices citing the same repairs between June and November 2022. (Ex. 9). The City's first citation, issued on July 15, 2022, directed Defendants to repair the ceiling where water leaks during rain. (Index #98, Ex. 11). Defendants failed to repair the ceiling and the City issued identical citations on July 29 and September 9. (Index #98, Exs. 12, 13). The City added the refrigerator to its list in the July 29, August 30, September 9, and September 27 notices. (Ex. 9). While Defendants agreed to send vendors to re-secure lights, vents and fans in the ceiling, they continue to fall out because Defendants decided not to pay to fix known structural issues within the home. (Ex. 10; Ex. 3, J. Gregory Dep. at 88:5-12, 92:2-7; Index #92, Ex. 35).

Defendants also failed to timely address the Gregorys' flooring, which was "severely cupping" with exposed nails, causing their toddler to cut her foot. (Index #98, Gregory Decl. ¶ 24, Ex. 7). The Gregorys first reported this in December 2021; Defendants eventually agreed to send a vendor to assess the floor five months later, in May 2022. (Index #98, Gregory Decl. ¶ 25, Ex. 7). Once work finally began, the Gregorys and their four children lived with unsafe subflooring for weeks, which posed safety concerns. (Index #98, Exs. 4, 5, 6, 7). Below are a few photographs:

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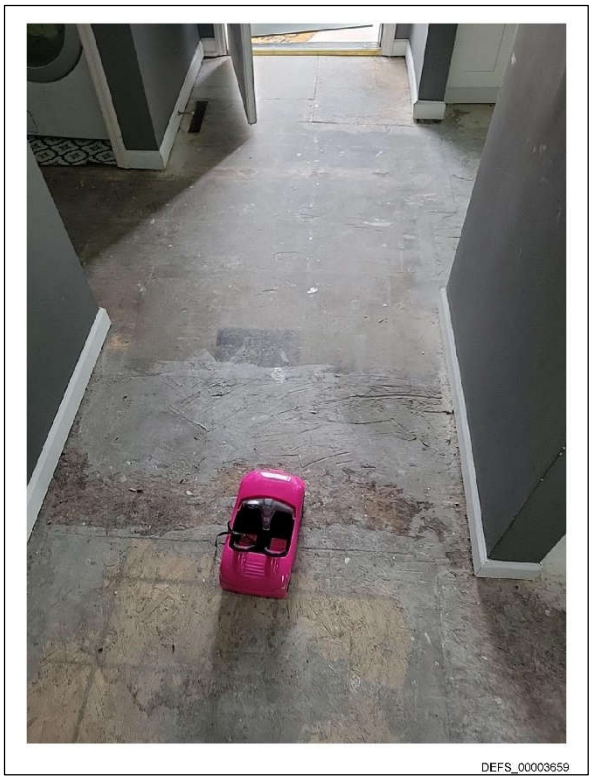

In April 2022, the Gregorys also requested maintenance request for their dryer, which began emitting an odor that smelled like gas. (Index #98, ¶ 38). Defendants sent a vendor, who told the Gregorys the dryer would not be repaired because it did not cause structural damage to the home. (Index #98, ¶ 38). When the odor got worse, the Gregorys submitted maintenance requests on October 14 and November 3, 2022, but both were rejected as "outside our standard scope." (Index #98, ¶ 39). On November 21, 2022, the Gregorys called CenterPoint Energy, who discovered a serious gas leak and a corroded dryer fitting. (Index #98 ¶ 39). The Gregorys and their children had to evacuate their home. (Index #98 ¶ 39). The Gregorys informed Defendants of the gas leak. Over one week later, Defendants closed the work order and did not send a vendor to repair the leak. (Index #98, ¶¶ 38-40, Exs, 15, 16).

Defendants produced to Plaintiffs in this litigation a spreadsheet containing data about repair and maintenance requests submitted to Defendants by Minnesota residents. (Cefalu Decl. ¶

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34). The spreadsheet refers to the Gregorys' requests to address the gas odor near the dryer unit, as "Resident Responsibility".

Washer/Dryer	Not Working, Broken or Damaged	Resolved Without Dispatch	Resident Responsibility	10/14/2022 17:05
Washer/Dryer	Not Working, Broken or Damaged	Resolved Without Dispatch	Resident Responsibility	11/3/2022 20:23
		Resolved Without Dispatch	Resident Responsibility	11/3/2022 20:26
		Resolved Without Dispatch	Resident Responsibility	11/3/2022 20:28
		Resolved Without Dispatch	Resident Responsibility	11/12/2022 20:15
Washer/Dryer	Not Working, Broken or Damaged	Resolved Without Invoice	Dispatched back to sms	11/21/2022 16:40
Washer/Dryer	Not Working, Broken or Damaged	Pending Dispatch		12/5/2022 14:54

In December 2022, the Gregorys received a letter from the City of Brooklyn Center Public Works Department indicating the Gregorys were required to schedule an appointment to replace the water meter to avoid the City shutting off their water service. The Gregorys immediately attempted to schedule an appointment, but were told this was Home Partners' responsibility to address. (Ex. 11). The Gregorys also contacted Defendants and Conservice, Defendants' utilities manager, neither of whom provided a response. (Ex. 11).

Plaintiffs through their counsel sent a letter to Defendants dated January 18, 2023 regarding the water meter. (Ex. 11). Defendants then disputed the Gregorys' version of events, refusing to "concede that [Pathlight] is responsible for—or needs to be involved in—the scheduling of a Brooklyn Center water utility service at the property for which there is no charge." (Ex. 12). In Defendants' letter regarding the water meter, Defendants requested "future communications between the Gregorys and Defendants be directed through counsel." (Ex. 12). Plaintiffs responded with a letter to Defendants' counsel outlining outstanding maintenance and repair items, including

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the mice infestation, lack of gutters, structural issues within the garage, leaking water in the bathroom and loose ceiling fixtures. (Ex. 13).

After Plaintiffs' second letter, Defendants finally created work orders to begin addressing these issues (Ex. 14). Some of the work orders have been resolved; and yet, the Gregorys have continued to report issues. For example, the home did not have gutters until May 2, 2023, causing water runoff and safety issues during the winter. While Defendants finally agreed to install gutters, a vendor brought the materials in March and simply everything in the yard until May. Though the vendor came to complete the work, the gutters were improperly installed, crooked, leaked and flooded into the backyard. The Gregorys reported these defects so that Defendants could exercise any warranty rights it has with the vendor. (Ex. 15; Ex. 36).

III. Defendants Unlawfully Charge Fees For Insurance, Outside Attorney File Review, Outstanding Balances, And Other Overhead Costs.

A. The Liability Waiver program

The Leases require in relevant part that tenants "maintain…renter's insurance[2]…which must include (1) general liability coverage of not less than $300,000…and (2) personal property coverage…Tenant is required to (a) cause Landlord to be named as an 'an additional interested party'…on the general liability portion of the Renter's Insurance policy…" (Index #92 Ex. 5, Gregory Lease ¶ 12).

[2] Renter's insurance is a 'contents' policy which covers tenant's possessions, such as furniture, appliances, personal belongings, and household goods." Aleatra P. Williams, *Insurers' Rights of Subrogation Against Tenants: The Begotten Union Between Equity and Her Beloved,* 55 Drake L. Rev. 541, 571 (2007). "However, renter's insurance does not typically cover the structure of the leased premises." *Id.* at 572. Most renter's insurance policies typically offer a limit of $100,000 in liability coverage. See Insurance Information Institute, *Renters Insurance,* http://www.iii.org/article/renters-insurance.

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Since 2019, Defendants have automatically enrolled tenants in their "Master Resident Liability Waiver" program and require payment of $13 on the first of every month. (Ex. 16; Cockson Decl. Ex. 10). [redacted] Tenants can opt out only by providing proof a policy with "general liability" coverage of $300,000. (Index #92 Ex. 5 at DEFS_00002826). The Gregorys did not have renters' insurance with this coverage limit, so Defendants required them to stay in the Liability Waiver program. (Index #98, Ex. 3 at p. 27). The Gregorys have paid a $13 per month fee every month of their tenancy for Defendants' "liability coverage" requirement. (Cockson Decl. Ex. 10).

The Liability Waiver program provides less coverage than a separately obtained renters' insurance policy would provide. If a tenant remains in the program, it covers only Defendants' property damage, with a limit of up to $100,000. (Index #92 Ex. 5 at DEFS_00002826). Conversely, if tenants procure their own insurance, they are required to carry "general liability" coverage of up to $300,000. *Id.* The Liability Waiver program does not cover liability for bodily injury claims or other personal liability. *Id.* It does not cover the tenant's personal property. *Id.*

Defendants are careful to represent that the Liability Waiver program costs less than the typical renters' insurance to encourage tenants to participate in the program. (Ex. 17) ("Note that using an outside provider may cost $20 a month or more.") They also reiterate this deceptive theme in their brief. (Def. Br. at 14).

[redacted]

[3] [redacted] That is a risk every landlord bears. Nevertheless, both the Leases and the Program impermissibly shift that risk back to tenants.

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[redacted]

B. Defendants Unlawfully Charge Attorneys' Fees For File Review.

[redacted]

Full Paid	10/19/2022	Legal Fees Recovery	Burns & Hansen, P.A. 9/14/22 Invoice #89636	$30.00	$226.64	$30.00	$0.00

[redacted] Defendants claimed this charge was billed to the Gregorys because "during the summer of 2022, the Gregorys fell behind in their rent payments. Defendants, with the assistance of the Burns & Hansen P.A. law firm, began the process for

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eviction…The $30 Legal Fees Recovery charge on October 19, 2022 relates to the closing of the opened eviction matter…" (Ex. 4, Defs.' Suppl. Answer to Interrogatory No. 16). Defendants claimed that the charge was supported by section 4 of the Gregorys' lease, which states that the "[t]enant agrees to pay Landlord's costs and expenses incurred in collecting any such Rent, together with reasonable attorneys' fees to the extent permitted under Applicable Law." *Id.*

C. Defendants Unlawfully Charge Cumulative Late Fees.

The Gregorys have also been charged late fees under section 4 of their Lease, which 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.

(Index #92 Ex. 5 at ¶ 4 (emphasis in original)[4]; Cockson Decl. Ex. 10).

The Gregorys's Ledger shows Defendants' cumulative charging of late fees on all outstanding amounts, including non-base rent. (Cockson Decl. Ex. 10). An example of the cumulative fee charging is summarized in the table below:

[4] Sewall's Lease contains an identical provision. (Index #92, Ex. 4 ¶ 3).

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[redacted]

On September 20, 2022, the Gregorys' "total balance" incorporated past costs for base rent, a late fee, and other fees for September and prior months, due in large part to Defendants' failure to properly credit a $10,800 rent assistance payment Defendants had received on June 28, 2022. (Ex. 18; Cockson Decl. Ex. 10). While the Gregorys had been communicating with Defendants regarding their rental assistance payment since at least May 24, 2022, Defendants still failed to properly credit the amount. (Ex. 18). Even though the Gregorys had fully paid their base rent of $2240.00 as of October 5, 2022, and the amount credited for security deposit interest was sufficient to cover the charges for the (illegal) October 1, 2022 HVAC filter and liability coverage fees, Defendants nevertheless charged a late fee on the cumulative balance (which included base rent, non-base rent HVAC filter fee, liability coverage, "no show" and late fees from September 2022).

D. The HVAC Filter Fee Is Assessed To Ensure Compliance With Health And Safety.

Defendants also charge tenants $15 per month for HVAC filters. (Index #92 Ex. 5 at DEFS_00002839). The HVAC filter replacement fee "ensures the best care for your HVAC system and in turn, the air quality in your home." *Id.* at DEFS_00002840. "There is not an opt-out option for this program, as it is designed to ensure that the air quality in your home is safe, and your system is functioning properly." *Id.* at DEFS_00002841. Despite the fact that they are supposed to receive two filters every other month, the Gregorys have only received two air filters in 2022, and had only received one as of April 19, 2023 (Ex. 2, S. Gregory Dep. at 279:17-282:9).

E. Defendants Unlawfully Charge Utility Pass-Through "Pay-to-Pay" Fees.

The Gregorys have also been assessed a monthly utility billing service fee (UBSF). The Leases are silent on the nature and purpose of this charge. In the lead-up to getting tenants to sign a lease, Defendants represent in the "Anticipated Terms" that:

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> There is also a one-time utility setup fee of $30 and a monthly $9.95 Utility Billing Service Fee ($3.95 in North Carolina) charged to residents to reimburse for utilities and services paid for by Landlord (typically, water and other utilities and services bundled with the water bill) and a monthly $15.00 fee to reimburse for HVAC unit air filters (if applicable to your HVAC unit) that will be sent to your door every 60 days.

(Index #98 Ex. 1, Gregory Anticipated Terms). In other words, Defendants represent that the UBSF is to "reimburse" Defendants for "water and other utilities and services bundled with the water bill." *Id.* That is what Shamika Gregory understood. (Ex. 2, S. Gregory Dep. at 279:17-280:6). She was therefore confused, and displeased, to learn that not only was she to pay considerably more than that for water, sewer, and stormwater recovery, but that she also had to pay an additional fee in order to pay for those services. (Ex. 2, S. Gregory Dep. at 190:2-191:8).

[redacted] This fact is not disclosed in either the Leases or in any "Anticipated Terms" sent to prospective tenants. (Index #92, Exs. 4, 5; Index #98, Ex. 1).

IV. Plaintiffs Testified That Defendants' Leases Are Deceptive And Their Practices Are A "Scam."

Sewall believed he understood the Lease based on the pre-approval notice and renovation checklist he received. (Index #95, Sewall Decl. ¶ 9; Sewall Dep. at 112:11-15). But these documents said very little about what he as a tenant would be obligated to do. "We'll provide you with this, this, and this. The one that says we won't do this and this, but we'll provide you with a safe home, equipment is going to be working, that criteria." (Ex. 1, Sewall Dep. at 167:1-4). To Sewall, these documents meant he was a quality renter who would be renting a quality home. (Ex. 1, Sewall Dep. 166:8-13).

Sewall briefly reviewed the full Lease and Right to Purchase Agreements and signed both on June 28, 2016, believing that the obligations in the Lease would be consistent with those stated

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in the pre-leasing documents. (Ex. 1, Sewall Dep. at 232:11-234:14; Index #92, Ex. 4; Index #95 ¶¶ 9-10, Ex. 3 at p. 19-20). Having learned differently during the course of his tenancy, Sewall formed a different opinion, and testified the Lease was deceptive and misleading, and that Defendants' practices were unfair: "Part of the shift or burden which was, at least, apparent to me from what I was expecting coming into what is actually in the fine print, is a pretty significant shift. And then the whole move to if I'm going to be their tenant, it is going to be taking on that much responsibility from the property manager, Pathlight, then there should be some little compensation on the wrap." (Ex. 1, Sewall Dep. at 232:11-19). "My expectations were based on past experiences, being on both sides of a rental, not necessarily a home rental, and the documents that Pathlight and the real estate agent, you know, initially brought out, without reading the fine details afterwards. But that was where my – my perspective was. And the timing was pretty rapid. There was not two weeks to look at the renter agreement ..." (Ex. 1, Sewall Dep. at 233:20-234:5).

Jerome Gregory also testified he thought the Lease and the LTP program was deceptive. "I just think it is a scam and a whole – the whole lease is just a scam. It is just a way to triple money and get over on people who aren't able to go the other route as far as purchasing a home." (Ex. 3, J. Gregory Dep. 179:2-20). Jerome further explained their delayed move-in was only the beginning: "Then from there, it just started being problems here, problems there, and more work than we even thought. Because it looked like it was just all nice and renovated and everything was up to par, which it wasn't. It was a cover-up." (Ex. 3, J. Gregory Dep. at 32:20-33:1).

Shamika Gregory, asked at deposition if the lease was deceptive, stated "I would have to go through the lease," but was not provided that opportunity. (Ex. 2, S. Gregory Dep. at 178:5).[5]

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When asked to identify what caused her confusion, Shamika testified that Defendants' "resident responsibility" claims were confusing. (Ex. 2, S. Gregory Dep. at 179:20-23). The Gregorys had reported several issues affecting health and safety that were each denied as "resident responsibility," including a shed full of maggots and dead animals and wired enclosures in the backyard. (*Id*. at 93:6-95:20). They also didn't understand why the concerning gas smell near the dryer was denied as "resident responsibility." (*Id*. at 129:7-19; 228:22-229:20).

All Plaintiffs have asserted they would have made different choices if they had known then what they know now. (Index #95 ¶ 60, Ex. 3 at p. 19-20; Index #98 ¶ 48, Ex. 3 at p. 25).

V. Discovery Is Ongoing And Facts Are Unavailable To Plaintiffs.

Defendants have filed their early summary judgment motion with significant discovery, including expert discovery, and document production outstanding. As pertinent to Defendants' motion for summary judgment, the parties have been engaged in ongoing meet and confers related to Defendants' refusal to produce various categories of documents, including but not limited to records, communications and other documents relating to their "Master Resident Liability Program" and the underlying calculations used to determine Plaintiffs' and putative class members' monthly base rent. (June 30 Regan Decl. ¶ 9). [redacted] *See* Minn. Stat. § 65A.44 (for purposes of residential renters' insurance, "insurer" means an insurer licensed to write renters' insurance in this state).

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Defendants have also submitted the Declaration of Christopher Scallon, a Director on the Applications Team for Home Partners. (Scallon Decl. ¶ 1). Defendants did not disclose Scallon as a witness until June 14, 2023, the day fact discovery closed. (Ex. 6). In his declaration, Scallon provides testimony regarding processes and procedures in place at Home Partners since "early 2016." (Scallon Decl. ¶¶ 9-20). But Scallon was not a Director of the Applications Team in 2016. (Ex. 19). During this timeframe he appears to have been engaged in communications work related to marketing the LTP program to real estate agents, which is work unrelated to prospective LTP tenant applications. *Id.* (Ex. 26, Polanzi Dep. at 42:15-23; 67:6-71:1; 99:12-100:22; Ex. 25, Slankard Dep. at 21:6-22:9; 52:1-10, 73:8-19, 86:5-88-1; 90:24-91:2, 107:8-12).

[redacted] (Scallon Decl. ¶ 9). There is no evidence in either Plaintiffs' or Defendants' records that Sewall was provided a sample Lease and Right to Purchase Agreement. (June 30 Regan Decl. ¶ 7; Sewall Decl. ¶ 4). Indeed, the "Home Partners of America Pre-Approval Notice" states that "I *will* receive the sample Lease with Right to Purchase Agreement (*in a separate document* attached to your approval email)…" (Scallon Decl. Ex. 4, at DEFS_00000665) (emphasis added). Defendants have not produced the approval email with a separate document, and Plaintiffs have located no such email in Sewall's records. (June 30 Regan Decl. ¶ 7). Sewall does not recall receiving the sample agreement. (Sewall Decl. ¶ 4).

With respect to the Gregorys, Scallon also asserts that Home Partners sent the Gregorys a sample Lease and Right to Purchase Agreement. (Scallon Decl. ¶ 9 & Ex. 6). Again, Defendants have not produced an approval email with the separately attached document. (June 30 Regan Decl. ¶ 8). The Gregorys also do not recall receiving the document. (Gregory Decl. ¶ 4).

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The Court should exclude Scallon's testimony. Minn. R. Civ. P. 56.04(c). Defendants were provided ample opportunity to identify their own witnesses and documents, yet failed to do so. (June 30 Regan Decl. ¶ 5). Alternatively, to the extent the Court is inclined to consider any of Scallon's testimony because the Court finds it is material to the resolution of an issue in Defendants' motion, Plaintiffs should be provided the opportunity to take his deposition. Minn. R. Civ. P. 56.04(b).

LEGAL STANDARD

Rule 56's test is "demanding." *Peterson v. W. Nat'l Mut. Ins. Co*., 946 N.W.2d 903, 911 (Minn. 2020). At summary judgment, the Court views the evidence in the light most favorable to the nonmoving party and resolves all doubts and factual inferences against the moving party; indeed, it "must ignore all the evidence that points in favor of the moving party and focus solely on the evidence supporting the nonmoving party's position." *Id.* at 911. The sole purpose of summary judgment is to determine whether a genuine issue of fact exists on a claim or defense—it is not to resolve factual issues or make credibility determinations. *Kenneh v. Homeward Bound, Inc*., 944 N.W.2d 222, 228 (Minn. 2020) (citations omitted); Minn. R. Civ. P. 56.01. "When reasonable persons might draw different legal conclusions from the evidence presented, summary judgment must be denied." *Kenneh*, 944 N.W.2d at 228 (citing *Montemayor v. Sebright Prods., Inc*., 898 N.W.2d 623, 628 (Minn. 2017)).

ARGUMENT

Defendants' use of Leases and their property management policies and practices violate the LTA, CFA and DTPA and Minnesota common law. Because Defendants have failed to establish the absence of disputed facts on the issue whether their Leases "waive or modify" the covenants imposed by the Habitability statute, Minn. Stat. § 504B.161, Subd. 1; fail to conspicuously specify the repairs and maintenance that a tenant must take on and provide

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consideration for that agreement, Minn. Stat. § 504B.161, Subd. 2; or charge cumulative late fees, Minn. Stat. § 504B.177, or attorneys fees that are not recoverable, Minn. Stat. § 504B.172, summary judgment should be denied. Defendants have also failed to demonstrate an absence of fact issues on whether Plaintiffs were misled or deceived by the Leases and Defendants' other representations and omissions, and whether they were harmed by paying illegal fees or for repairs and maintenance they were not obligated to pay. The Court should therefore deny their motion for summary judgment on Plaintiffs claims under the CFA and DPTA. And because Defendants have failed to establish the absence of disputed facts for any of the foregoing issues, the Court cannot grant summary judgment on Plaintiffs' common law claims for breach of good faith and fair dealing, rescission, or unjust enrichment, or for equitable and declaratory relief.

I. Defendants' Leases Violate Multiple Provisions Of The Landlord Tenant Act.

A. The Leases explicitly disclaim the warranty of habitability and shift the burden of compliance to tenants.

Subdivision 1 of Minn. Stat. § 504B.161 mandates that:

> (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 conduct of the tenant or licensee or a person under the direction or control of the tenant or licensee;
>
> *** and
>
> (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.

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> (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 (emphasis added). *Love v. Amsler*, 441 N.W.2d 555, 559 (Minn. Ct. App. 1989) ("These [covenants of habitability] may not be waived or modified").

Defendants contend that their Leases do not violate the statute. This is wrong. The Leases state in very plain (but not conspicuous) 8-point font that upon moving into the home:

> 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 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. *Attachment D* to this Lease entitled

(Index #92 Ex. 4, Sewall Lease ¶ 9; Ex. 5, Gregory Lease ¶ 10; *id.* ¶ 40 at DEFS_00002819) ("…there are and shall be no implied warranties of merchantability, suitability, fitness for a particular purpose or of any other kind arising out of this Lease or the Premises, all of which are expressly waived by Tenant…"). The same paragraph explains 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 the Tenant." *Id.* Thus, the disclaimer provides that even latent or undisclosed defects in the property will become the tenant's responsibility.

The disclaimer violates the Habitability statute. Unable to save this Lease language, Defendants next claim that because Plaintiffs agreed to take on repairs, the Lease terms do not otherwise violate the statute. This argument fails as a matter of law.

B. The alleged agreement to maintain and repair is neither specific, conspicuous nor supported by adequate consideration, as required by Minn. Stat. § 504B.161.

Subdivision 2 of the Habitability statute states:

> 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

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> 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.

Minn. Stat. § 504B.161. Defendants have failed to show the Leases meet any of the above conditions. Indeed, one Minnesota court has noted that Defendants' Lease "contains language that purports to make the tenant responsible for most repairs. This type of provision is unenforceable under Minnesota law except in certain circumstances…The presence of this clearly improper language in the lease is troubling to the Court as it may discourage less informed tenants from seeking repairs that are the responsibility of the landlord." (Ex. 20, Order at 4, *Koenig v. HPA Borrower 2017-1 LLC*, No. 82-CV-20-2832 (Tenth D. Ct., July 15, 2021) (emphasis added)).

1. Specified repairs and maintenance

Defendants contend that the "specified repairs and maintenance" that Plaintiffs agreed to take on are listed in the Lease and that they have fairly divided the responsibilities. They have to argue in the negative, however, pointing to specific sentences stating what *Defendants* agreed to perform. (Def. Br. at 22). Everything else falls on Plaintiffs, because Defendants expect them to maintain the home as if it were the tenants' own. (Index #98, Ex. 1, Anticipated Terms). Minnesota law requires more. *Wardin v. Maski*, No. C4-97-2245, 1998 WL 481917, at *3 (Minn. Ct. App. Aug. 18, 1998) (unpublished).

The Leases here first admonish that: "**Tenant shall, at Tenant's expense, maintain the Premises (including all appliances, systems, and fixtures located thereon and serving same but excluding only those items which are required to be maintained by Landlord … and keep the same in clean, safe and healthy condition and in good working order.**" (Index #92 Ex. 4, Sewall Lease ¶ 15; Ex. 5 Gregory Lease ¶ 16).

The Leases' maintenance and repair provision tacks on another list, making tenants responsible for things such as taking "all such actions as are reasonably necessary to *promptly*

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eliminate any dangerous condition on the Premises..."; keeping "the Premises and exteriors in a neat and sanitary condition*, and in compliance with all applicable health and safety regulations, Applicable Laws, and HOA Rules*"; and using "reasonable efforts (including providing appropriate climate control) to maintain the Premises in such a condition as to prevent the accumulation of moisture and the growth of mold or mildew…". (Index #92, Ex. 5, Gregory Lease ¶ 16) (emphasis added).[6]

The Minnesota Court of Appeals long ago held that a provision requiring tenants to "maintain mechanical systems" was not specific. *Wardin,* 1998 WL 481917, at *3. The court affirmed the district court's finding that the tenants "were not responsible for maintaining the heating system and water pipes," and held the provision void and unenforceable. *Id.* This Court should find the Leases here likewise fail for their lack of specificity, and deny summary judgment to Defendants.

2. Adequate consideration

In every lease, Defendants state that the "**amount of rent was negotiated**…" or the "**amount of rent was agreed to with the express understanding that Tenant will be responsible for the maintenance needs of the Premises as provided in this Lease and in the**

[6] Defendants required the Gregorys to sign a "Mold Addendum" to "assume responsibility …to take action reduce or eliminate the occurrence of mold growth in the home. Tenant's failure to take preventative actions may reduce or preclude Landlord's responsibility for water damage or water intrusion…" (Index #92, Ex. 5, Gregory Lease at DEFS_00002837). This Addendum also insulates and releases Defendants from liability for "any and all Claims with respect to the presence and/or existence of molds, mildew, and/or microscopic spores unless caused by the sole gross negligence or willful misconduct on the part of the Landlord." *Id.* at ¶ 7, DEFS_00002837. The onerous exculpatory terms of this Addendum do not comply, at all, with Minn. Stat § 504B.161, subd. 1. *Cf. Angel v. Helena Renaissance 1, L.P.*, 2023 Ark. App. 297, 2023 WL3607184 at *15 (reversing summary judgment in favor of landlord where, even under Arkansas' less tenant protective *caveat lessee* doctrine, exculpatory clause in mold and lease addendum was unenforceable).

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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 amount." (Index #92, Ex. 4 at DEFS_00005608 ¶ 15; Ex. 5 at DEFS_00002811-12 ¶ 16). Despite its falsity, Defendants contend this language meets the "adequate consideration" requirement.

Rather than identify or provide proof of the consideration to Plaintiffs in exchange for the alleged agreement to repair and maintain—either reduced rent or direct payment—Defendants sidestep the issue by claiming that Plaintiffs "agreed" rent was lower than it otherwise would have been, merely because they affixed their signatures on the Leases. (Def. Br. at 22). A reasonable person, having been confronted with so many similar fine print agreements over the course of a lifetime, could reach a different conclusion. *See* Section III, *infra.* Indeed, Barry Sewall testified that "[p]art of the shift or burden which was, at least, apparent to me from what I was expecting coming into what is actually in the fine print, is a pretty significant shift… if I'm going to be their tenant, it is going to be taking on that much responsibility from the property manager, Pathlight, then there should be some little compensation on the wrap." (Ex. 1, Sewall Dep. at 232:11-19).

[redacted] Defendants cannot point to a single document or any testimony identifying the monetary amount they would have charged in *higher* rent to the named plaintiffs, or any class member, absent the tenants' alleged agreement to maintain and repair. (Ex. 23, 30.02(f) Dep. at 248:21-250:2). Indeed, the record evidence points in the opposite direction—tenants like Plaintiffs automatically pay for Defendants' expected costs of maintenance and other overhead through their monthly rental payments. In other words, Defendants' Leases charge all

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expected overhead and operations costs to tenants as part of the monthly base rent, and also require tenants to maintain the home as if they were the owners—solid evidence that Defendants shifted to tenants maintenance and repair costs, including costs that must be solely borne by the landlord.

It is undisputed Plaintiffs did not negotiate their rents, nor had the power to do so. Defendants have not, and cannot, identify what the rental rate would have been but for the alleged agreement to maintain and repair in any expense category, whether it be mowing the lawn or removing standing water from the property. Defendants' motion should be denied.

3. Conspicuous writing

In addition, the Leases' maintenance and repair clause fails to comply with the statute's "conspicuous writing" requirement. The maintenance and repair provision appears in paragraph 15 of Sewall's lease, and paragraph 16 of the Gregorys', and is set forth in 8-point font. It is also six full tightly-spaced paragraphs.

The Minnesota Court of Appeals long ago held that a provision requiring tenants to "maintain mechanical systems" was neither specific nor conspicuous where it "appear[ed] on page three of a six-page form lease" and was "written in the same typeface as the rest of the lease." *Wardin,* 1998 WL 481917 at *3. The court affirmed the district court's conclusion that the tenants "were not responsible for maintaining the heating system and water pipes," and held the provision void and unenforceable. *Id.*[7]

[7] *See also Partin v. NuWave, LLC*, No. 3:21CV713, 2022 WL 1516313, at *4 (E.D. Va. May 13, 2022) (warranty disclaimer for pressure cooker was not conspicuous in a manual even where "several sub-headings on the page are bolded" because "none of the headings indicate to the reader that the information below limits or disclaims a warranty"); *Strubel v. Cap. One Bank (USA), N.A.*, 179 F. Supp. 3d 320, 322–23 (S.D.N.Y. 2016) (describing typographical guidelines used by Consumer Financial Protection Bureau to ensure its model forms are "readable," noting recommendation to use "a readable font style and font size (10-point Arial)" and "sufficient spacing between lines of the text," "[s]tandard spacing between words and characters" and "sufficient white space").

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Likewise, the Iowa Supreme Court held that cost-shifting provisions in a "pre-printed lease contain[ing] seventy tightly-spaced paragraphs featuring many subparts and considerable detail," were void and unenforceable under Iowa's Uniform Residential Landlord and Tenant Law. *DeStefano v. Apts. Downtown, Inc.*, 879 N.W.2d 155, 160, 181-82, 185 (Iowa 2016). The court observed that the lease's "approach to the 'specified repairs' section," which provided a "stock laundry list of specified repairs," could be used to "undermine" the "landlord's obligation to provide a fit and habitable premises." *Id*. at 181-82. "Further, a tenant could be liable for highly expensive repairs that occur at the end of the term of the lease even though the tenant did not cause the uninhabitable condition to arise." *Id.*

In sum, Defendants have failed to meet the demanding burden to show that as a matter of law, their Leases comply with the Habitability statute. For this reason alone, their motion for summary judgment should be denied.

C. Defendants in fact shifted the burden of repair and maintenance, including health and safety repairs, to Plaintiffs.

Defendants claim that notwithstanding their illegal lease provisions, they have complied with the LTA because they have performed requested repairs and maintenance at Plaintiffs' properties, and Plaintiffs have no incurred exorbitant costs. Defendants also suggest that their obligations to repair are limited to those affecting only "health and safety." Def. Br. at 1, 23. The evidence is sharply disputed, and Defendants are wrong that they are only on the hook for "health and safety" repairs. *See* Minn. Stat. § 504B.161(a)(2).

First, with respect to Sewall, Defendants seek more than $15,000 in repayment for repairs they made after Sewall moved out, for alleged damage that Sewall did not cause and actually reported during his tenancy. *See* Section II.C.1. Defendants seek to make Sewall responsible for a "roof leak" under the maintenance and repair provision (Index #68 ¶ 56), despite Lease language

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saying Defendants are responsible for maintaining the roof, and the evidence showing Defendants' failure to repair defects in the roof before Sewall moved in. Sewall disputes he owes any money for these repairs and attests he reported conditions at the home necessitating repair. (Index #95 ¶¶ 37-41; Index #69, Pls.' Answer to Counterclaim). Further, contrary to Defendants' contention, Sewall personally completed maintenance and repairs during his tenancy that were never compensated by Defendants, and paid fees, including the costs to insure.

Second, with respect to the Gregorys, Defendants ignore that the repairs they complain about making were required because (1) the City of Brooklyn Center issued notices of violations, (2) Defendants' own policies and procedures mandated repair, and (3) beginning in February 2023 and at the request of Defendants' counsel, Defendants agreed to take responsibility for the outstanding repair requests. (Ex. 14). Before the parties' counsel interceded, Shamika Gregory estimated she had called Defendants hundreds of times to request repairs or ensure Defendants were handling requested maintenance and repair. (Ex. 2, S. Gregory Dep. at 162:2-14). Defendants continued to refute that they bore responsibility for the requested repairs. (Index #98 Exs. 22, 43 45). Defendants' systematic refusal to meet the basic on-site maintenance and repair responsibilities of a residential landlord or property manager shifted all of these burdens to the Gregorys, in violation of Minnesota statute and common law.

Plaintiffs have in fact overpaid in rent, the damages for which will be determined through expert testimony on a classwide basis. (Kneuper Decl. at p. 4-5, 9-12, 19). In addition, tenants must separately pay out of pocket to insure, maintain, repair, including for non-ordinary wear and tear, and for all utilities and other fees. (Ex. 27, Puri Dep. at 27:11-25, 70:9-15; Ex. 5, Defs.' Answer to Interrogatory No. 28; *see also* Index 94, Larson Decl. ¶ 5 & Ex. 1). And all tenants become the *de facto* property managers, because none of Defendants' employees bother to inspect

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or visit the homes. (Ex. 25, Slankard Dep. at 103:7-13; Ex. 24, Schenck Dep. at 144:2-16). Defendants' motion for summary judgment must be denied.

D. Defendants charge illegal late fees.

Minn. Stat. § 504B.177(a) states in part:

> 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.

In a recent opinion letter, the Office of the Attorney General (OAG) analyzed the statute, including its plain language and legislative history, and opined 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.*" (Index #92, Ex. 23, Minn. Op. Att'y Gen. 430, at p. 4 (June 30, 2021) (emphasis added)). The OAG explained that the "plain and ordinary meaning of the" statute was to "cap the fee at eight percent of the particular rent payment that is overdue on a single date in time, and not on the cumulative total of multiple overdue rent payments." *Id*. at p. 3.

Under the Leases, on the first of every month, both monthly base rent and any unpaid fee (including a late fee or utility, "no-show", HVAC filter, or "liability coverage" fee) are due. (Index #92, Ex. 5, Gregory Lease at Section 2 (definitions of Rent and "Additional Rent") & ¶ 4. The Leases also provide that if base rent is not paid by the fifth of the month, Defendants calculate the initial late fee based on the eight percent of the unpaid monthly base rent, or $100, whichever is higher. (Index #92, Ex. 5, Gregory Lease ¶ 4).

On its face, this Lease language violates Minnesota law. First, Defendants could assess a late fee of $100 even if the outstanding amount were $80. But even if they did not do this, the Leases also state that "*all sums received by Landlord from Tenant shall be applied to the oldest*

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outstanding monetary obligation owed by Tenant to Landlord…" *Id.* ¶ 4 (emphasis added). This language means Defendants first apply tenant payments to the balance from prior months, including on non-base rent items like utility fees that are charged before the base rent is charged. As detailed in the ledger replicated in Section III.C, above, is precisely how Defendants charged the Gregorys duplicate late fees. Defendants assessed late fees on outstanding balances that already included late fees, as well as non-base rent items.

Defendants' Lease impermissibly consolidates all outstanding amounts owed and makes them "rent." While the LTA does not define "rent," rent usually means "a periodic sum paid for the use or occupancy of a property." *Lockett v. Blue Ocean Bristol, LLC*, 132 A.3d 257, 271 (Md. 2016) (citing Merriam-Webster's Collegiate Diction and Black's Law Dictionary). It does not mean fees like the ones Defendants force tenants like the Gregorys to pay here, which are not for the use or occupancy of the property, but for the maintenance and repair of the property. *Id.*

Neither the language of the Leases, nor Defendants' accounting system, complies with Minnesota law. For this reason, Defendants' motion summary judgement on Count V must be denied.

E. Defendants charge illegal attorney fees.

[redacted] Defendants claimed this charge was billed to the Gregorys because they "fell behind" on their rent. (Ex. 4, Defs.' Suppl. Answer to Interrogatory No. 16). Defendants further claimed that the charge was supported by section 4 of the Gregorys' lease, which states that the "[t]enant agrees to pay Landlord's costs and expenses incurred in collecting any such Rent, together with reasonable attorneys' fees to the extent permitted under Applicable Law." *Id.*

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"Applicable Law" does not so permit. Minnesota law allows for landlord recovery of attorneys fees only when it is the prevailing party in "an action." Minn. Stat. § 504B.172. No law allows a landlord to recover fees for exploring the possibility of filing an eviction. While the Gregorys dispute Defendants' assertion that they "fell behind" in their rent—in fact, they proactively sought rent assistance and Defendants failed to timely credit that payment[8]—it is undisputed that Defendants never served, filed or prevailed in an eviction action against the Gregorys. Regan Decl. (Ex. 4, Defs.' Suppl. Answer to Interrogatory No. 16). [redacted] Minnesota law expressly forbids this practice.

II. The Leases' Savings Clauses Do Not Save Defendants.

One throughline of Defendants' motion is that because the Leases contain "dozens of" clauses purportedly assuring compliance with Applicable Laws, these clauses insulate Defendants from liability. In this narrative, Defendants conceded the Leases mispresent Minnesota law.

A contractual savings clause "preemptively resolves conflicts between contract language and applicable law in order to preserve the remaining, non-conflicting contract language." *Kristian v. Comcast Corp.*, 446 F.3d 25, 48 & n.16 (1st Cir. 2006). Fatally for Defendants, where no non-conflicting contract language in the offending provision exists, there is nothing to save. *Id.* ("Savings clause is a bit of a misnomer. The contractual language in conflict with applicable law is not saved. The non-conflicting language is saved…"); *see also Kendall v. Cubesmart L.P.*, No.

[8] The timeline stated in Defendants' interrogatory answer is sharply disputed. The Gregorys in fact sought to apply a public assistance rent payment from Rent Help as early as April 2022. (Ex. 18). Defendants inexplicably rejected that payment multiple times. *See* Cockson Decl. Ex. 10, at DEFS_00281436 (6/28/2022 Reversal of Public Assistance Payment, 7/13/2022 Journal Entry, 8/19/2022 entry).

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15-6098, 2016 WL 1597245, at *7 (D.N.J. Apr. 21, 2016) (stating seller could not avoid liability for invalid terms in a contract "by including general assurances that those terms of the consumer contract would only be exercised in compliance with applicable law.").

Here, Defendants argue that the clauses stating "except as required by Applicable Law" or "subject to Applicable Law" save those Lease provisions that do not comply with Minnesota law. But Defendants fail to identify any language in the Lease provisions at issue that accurately states Minnesota law. Nor can they, because the provisions are in direct conflict with the law. For example, based on the Leases a tenant would have to accept that:

- Defendants could asses them a late fee of $100 if they were overdue in rent by $80 (Index #92 Ex. 5, Gregory Lease ¶ 4 ("Tenant shall pay…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"). *Contra* Minn. Stat. § 504B.177 ("In no case may the late fee exceed eight percent of the overdue rent payment.");

- Defendants are not required to pay for interest on a security deposit (*Id.* ¶ 5 ("Landlord [is]…not…obligated to pay and Tenant is not entitled to interest on the Security Deposit")). *Contra* Minn. Stat. § 504B.178, Subd. 2;

- Tenant was "leasing the Premises in its 'AS-IS, WHERE-IS, WITH ALL FAULTS CONDITION'…and specifically and expressly without any warranties, representations or guarantees, either express or implied, as to its condition, fitness for any particular purposes, merchantability or any other warranty of any kind…" and that "Landlord has no obligation to perform any work, supply any materials, incur any expenses or make any alterations or improvements to any portion of the Premises" (*Id.* ¶ 10). *Contra* Minn. Stat. § 504B.161; or

- Tenant had negotiated or "agreed upon" rental rates, when in fact they did nothing but sign their name. (*Id.* ¶ 16). *Contra* Index #95, Sewall Decl. Ex. 3 at p. 18; Index #98, Gregory Decl. Ex. 3 at p. 25.

These are manifestly false statements of law and fact. *See also* Ex. 20, Koenig Order at 4-5.

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Courts have held so-called "legal fallback" clauses are in and of themselves unenforceable as inherently misleading. The Supreme Judicial Court of Massachusetts, for example, analyzed nearly identical clauses in a landlord's lease and held:

> The defendants contend that this provision is rendered perfectly lawful by the inclusion, in small print, of words to the effect that the implied warranty is disclaimed "except so far as governmental regulation, legislation or judicial enactment otherwise requires." We disagree. … an act or practice is deceptive if it possesses "a tendency to deceive." …§In determining whether an act or practice is deceptive, "regard must be had, not to fine spun distinctions and arguments that may be made in excuse, but to the effect which it might reasonably be expected to have upon the general public." *P. Lorillard Co. v. F.T.C.*, 186 F.2d 52, 58 (4th Cir.1950).
>
> Taken as a whole, paragraph eight clearly tends to deceive tenants with respect to the "landlord's obligation to deliver and maintain the premises in habitable condition." Paragraph eight suggests, as the judge found, that the implied warranty of habitability is "the exception and not the rule, if it exists at all." Indeed, the average tenant, presumably not well acquainted with our decision in *Boston Hous. Auth. v. Hemingway*, *supra*, is likely to interpret the provision as an absolute disclaimer of the implied warranty of habitability. The conjunction of bold face and small print suggests, as the judge recognized, "a clear and calculated effort to further mislead tenants." It suggests to tenants that their signatures on the lease constitute a waiver of their right to habitable housing.

Leardi v. Brown, 474 N.E.2d 1094, 1099–100 (Mass. 1985); *see also* Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Real Estate Market*, 9 Journal of Legal Analysis 1, 30-31 (2017) (noting that "subject to applicable law" or "except as required by applicable law" fine print "may also be an attempt to immunize an otherwise unenforceable or deceptive clause from judicial intervention").[9]

[9] *See Commw. v. Chatham Development Co., Inc.*, 49 731 N.E.2d 89 (Mass. App. Ct. 2000) (illegal fee in residential lease is "deceptive" practice in violation of Massachusetts's consumer protection statutes); *Commw., by Creamer v. Monumental Properties, Inc.*, 329 A.2d 812, 828 (Pa. 1974) (reversing dismissal of consumer protection claim where Commonwealth alleged a lease's "archaic and technical language beyond the easy comprehension of the consumer of average intelligence" and landlord failed to notify tenants of their statutory rights, holding that absence of disclosure of applicable law could be found misleading); *Consumer Fin. Prot. Bureau*

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Defendants don't dispute that on their face the Leases do not comply with Minnesota law. In the absence of any dispute, they strain to argue that Plaintiffs agreed, at deposition, that the Leases say Defendants will comply with "applicable law." (Def. Br. at 29). But in fact, contrary to Defendants' representation to this Court, Plaintiffs had far different responses to this Quizbowl line of questioning. Ex. 1, Sewall Dep. 128:22-131:7 ("***I kind of read it the opposite, but—that it was the tenant responsible for everything, and the landlord is not responsible***"); (Ex. 2, S. Gregory Dep. 148:17-18) ("Q. ***What did you understand [applicable law] to mean? A. I didn't really understand it***.") (emphasis added); *see also Thompson v. St. Anthony Leased Hous. Assocs. II, LP*, 979 N.W.2d 1, 7–8 (Minn. 2022) (holding tenants asserted viable claim for rent exceeding statutory restrictions even though tenants had signed leases stating that any "rent increase will be made in accordance with all applicable state and local laws")).

In sum, because savings clauses operate to save only applicable law, and not conflicting contract provisions, and because the provisions challenged by Plaintiffs are unlawful on their face, Defendants are not entitled to summary judgment.

III. Standard Contracting Principles Do Not Apply To Form Contracts Of Adhesion.

Another throughline of Defendants' motion is that the transactions here were the product of arm's length bargaining and negotiation—and thus even though Plaintiffs could not agree to illegal or unenforceable Lease terms, *see* Minn. Stat. § 504B.161(b), the Leases should be enforced under "applicable law." Def. Br. 22, 30. The Court should ignore this fiction.

Minnesota courts do not blindly apply "freedom of contract" principles where the Legislature has unambiguously stepped in to limit that freedom by enacting remedial statutes. *State*

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v. CashCall, Inc., No. 15-7522, 2016 WL 4820635, at *10 (C.D. Cal. Aug. 31, 2016) (consumer contracts with unenforceable provisions give false "net impression" of enforceability and are "likely to mislead consumers").

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v. Int'l Harvester Co., 63 N.W.2d 547, 551 (Minn. 1954) ("It is well established that freedom of contract is a qualified right and not an absolute right…"); Minn. Stat. § 504B.161, Subd. 4 ("This section shall be liberally construed…). The Leases are textbook contracts of adhesion, offered on a "take it-or-leave-it" basis. (Index #100 at pp. 11-14). Minnesota courts may refuse to enforce in whole or part contracts "drafted unilaterally by a business enterprise and forced upon an unwilling or unknowing public for services that cannot readily be obtained elsewhere." *Schlobohm v. Spa Petite, Inc*., 326 N.W.2d 920, 924 (Minn.1982); *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 896 N.W.2d 115, 130–31 (Minn. Ct. App. 2017), *aff'd*, 913 N.W.2d 687 (Minn. 2018) (noting residential lease is one type of adhesion contract). The hallmarks of an adhesion contract are (1) a great disparity in bargaining power with no opportunity for negotiation, and (2) that the services offered by defendants are a public necessity and cannot be obtained elsewhere. *Id*. at 924–25. "In examining whether the type of service being offered is a public or essential service, the courts consider whether it is the type generally thought suitable for public regulation." *Id.* at 925.

Here, the subject matter of the Leases—housing—is indisputably a subject of public regulation and necessity. *See, e.g.,* Minn. Stat. § 504B.161; *see also Crawford v. Buckner*, 839 S.W.2d 754, 757–58 (Tenn. 1992) ("[A] residential lease concerns a business of a type that is generally thought suitable for public regulation."). Moreover, courts across the country have held that residential leases are contracts of adhesion because they involve "housing, a basic necessity of life," *Chili Venture LLC v. Stahl*, 39 N.Y.S.3d 735, 740 (N.Y. City Ct. 2016), and landlords "have greater bargaining power than tenants." *Taylor v. Leedy & Co*., 412 So. 2d 763, 766 (Ala. 1982) ("Clearly, landlords have greater bargaining power than tenants in residential leases. A tenant must live somewhere. The tenant has no meaningful choices. He can accept this landlord or go to another landlord who charges the same rent and asks the tenant to sign the same standard

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form lease. In other words, the modern standard form lease is in essence an adhesion contract."); *see Love,* 441 N.W.2d at 559 (noting "the inequality of the bargaining power between residential landlords and tenants").

Courts have refused to enforce adhesive terms that have (1) abrogated statutory rights, *Chili Venture,* 39 N.Y.S.3d at 740; (2) insulated a landlord from personal injury and negligence claims, *Ransburg v. Richards*, 770 N.E.2d 393, 400–01 (Ind. Ct. App. 2002), *Crawford v. Buckner*, 839 S.W.2d 754, 757–58 (Tenn. 1992); (3) assessed illegal fees, *Oldendick v. Crocker*, 70 N.E.3d 1033, 1048 (Ohio Ct. App. 2016) (early termination fee was a penalty), *Spring Valley Gardens Assocs. v. Earle*, 447 N.Y.S.2d 629, 631 (N.Y. Sup. Ct. 1982) (late fee was a penalty); or (4) included non-rent charges and fees in "rent," *Lockett,* 132 A.3d at 270 ("It is unlikely that parties to a residential lease actually negotiate the definition of "rent." Residential leases are more likely to be provided on a take-it-or-leave-it basis and, as here, to be provided after the tenant has already agreed to lease the premises and to be signed by the tenant without being read.")

Courts have also rejected landlord arguments that tenants "read and understood" the particular provisions at hand, and therefore are bound by them, due to the lack of "equal bargaining power" and inability to negotiate. *E.g., Oldendick,* 70 N.E.3d at 1048. That real estate agents are involved, or that Defendants suggest in other fine print documents that prospective tenants may want attorneys to review the Leases, does not alchemize the transaction into one involving parties of equal sophistication.[10] So private commercial contract governance principles do not uniformly apply.

[10] The sole function of the "attorney review" clause within the Lease is to limit the Court's ability to construe the contract against Defendants, the drafters. (Index #92 Ex. 5, Gregory Lease ¶ 38). That only becomes necessary if the Court concludes the contract is ambiguous. *Staffing Specifix,* 896 N.W.2d at 130–31. Plaintiffs do not argue the relevant terms of the Leases are

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Defendants misrepresent why they tell prospective tenants to consult with an attorney. The purpose is to "avoid any potential delays or missed cutoff dates"—not to ensure the prospective tenant understands they are about to sign away their rights. (Scallon Decl. Ex. 6, at DEFS_00288893). Moreover, no reasonable person looking *to rent* a home pays an attorney to review a lease. (Sewall Decl. ¶ 6; Gregory Decl. ¶ 6). Not even Defendants' real estate expert opines that this is common in the industry. (Index #155, Declaration of Steven D. Epcar). [redacted]

It does not matter if Plaintiffs affixed their signature to the Leases or read them if the underlying terms of those Leases are illegal, deceptive, unfair, misleading or confusing—which they are. As the supreme court recognized in *Minnesota School of Business*, the consumer fraud statutes were intended to "help protect consumers against the unequal bargaining power present in consumer transactions." *State v. Minnesota Sch. of Bus., Inc.,* 935 N.W.2d 124, 133 (Minn. 2019). That unequal bargaining power is on full display here. Defendants—sophisticated multi-billion dollar corporate investors, property owners and managers—cannot now claim they successfully duped tenants into "agreeing" to terms they could not.

Defendants have not cited a single case to support their claims that Plaintiffs agreed to illegal, deceptive, or unfair lease terms, and therefore should be bound by them. (Def. Br. at 30). For this additional reason, summary judgment must be denied.

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ambiguous. The claim is that their plain language, including the statement they comply with "applicable law," does not comply with the LTA and misrepresents the tenants' rights.

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IV. Defendants' Conduct, Practices And Policies Violate Minnesota Consumer Protection Laws.

Defendants next claim that they are entitled to summary judgment on Plaintiffs' CFA and DTPA claims for essentially the same reasons as above—the Leases and Defendants' policies and practices are not illegal, deceptive or misleading, and Plaintiffs did not pay any out-of-pocket costs for maintenance or repairs they were not other otherwise obligated to pay. These arguments are meritless. The record demonstrates that Plaintiffs easily meet the Minnesota Supreme Court's standard for viable claims under Minnesota's consumer protection statutes. Moreover, the type of conduct at issue here—Defendants' policies and practices designed to induce consumers to enter into a single-family rental home program, culminating in the presentation of non-negotiable form contracts of adhesion containing unenforceable or misleading terms—is exactly the type of conduct that Minnesota's consumer protection statutes were designed to prohibit.

"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). Minnesota's Prevention of Consumer Fraud Act, Minn. Stat. § 325F.69 ("CFA") states, in pertinent part, "[t]he 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." The DTPA in turn provides "[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." Minn. Stat. § 325D.45.

These statutes are designed "to address the unequal bargaining power often present in consumer transactions," *Ly v. Nystrom*, 615 N.W.2d 302, 308 (Minn. 2000), and must be "liberally

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construed." *Meyer v. Dygert,* 156 F. Supp. 2d 1081, 1086 (D. Minn. 2001). Only two elements are necessary to state a claim that the CFA and DTPA have been violated: "[T]he defendant engaged in conduct prohibited by the [CFA and DTPA] and that the plaintiff was damaged thereby." *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 12 (Minn. 2001). Traditional common law fraud allegations, such as reliance and proof of damages, are not necessary. *Id.*; *see also Minnesota Sch. of Bus.,* 935 N.W.2d at 135–36 (reaffirming *Group Health*).

"Violations of other state or federal statutes, even those that do not themselves create a private cause of action, may be the subject of a consumer fraud claim." *Thompson,* 979 N.W.2d at 7. In addition, deceptive contractual provisions may form the basis of a consumer fraud violation. *City of Farmington Hills Emps. Ret. Sys. v. Wells Fargo Bank, N.A.*, 281 F.R.D. 347, 355–56 (D. Minn. 2012) (holding that common questions predominated where contract class members signed contained the same alleged misrepresentation).

A. Defendants' practice of charging illegal rent is actionable under the CFA and DTPA.

Defendants argue that as a matter of law, they are not liable for charging illegal rent because the Leases as written are neither deceptive nor misleading. As demonstrated above, Defendants have failed to comply with the most basic of the LTA's provisions requiring landlords to specifically and conspicuously identify those items of repair and maintenance and provide adequate consideration. Lease provisions imposing duplicative and unlawful fees and reciting that all terms comply with applicable law are false and actionable under the CFA and DTPA, as well as the LTA. *E.g., Thompson,* 979 N.W.2d at 7–8 (holding rent charge could not exceed statutory restrictions and tenants stated a claim under CFA and DTPA).

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B. Defendants illegally and deceptively shifted costs of maintenance and repair and lease administration through additional fees, which are also actionable under the CFA and DTPA.

Defendants argue that their preemptive shifting of various liability, insurance, and other lease administration costs to tenants is legal because these costs are mere "add-on" fees under *Persigehl v. Ridgebrook Investments*, 858 N.W.2d 824, 832 (Minn. Ct. App. 2015). Defendants' reliance on *Persigehl* is misplaced. For each of the fees at issue here—the "legal services recovery," "liability waiver," HVAC filter, or the "pay-to-pay" Conservice utility fee—either the Legislature has spoken and declared the fee illegal, or Defendants have omitted or misrepresented material facts regarding the true nature of these fees, which benefit only Defendants. Accordingly, Defendants are not entitled to summary judgment on Plaintiffs' CFA and DTPA claims.

In *Persigehl*, the court of appeals considered whether a section of the LTA prohibited a landlord from billing tenants for add-on fees in connection with their utility bills. *Persigehl*, 858 N.W.2d at 830-31. The tenants resided in a single-meter, multi-unit residential building. *Id.* Unlike here, their utility billing was governed by statute requiring equitable apportionment of charges to tenants. *Id.* (citing Minn. Stat. § 504B.215, Subd. 2). The court held that because this statute did not explicitly forbid "add-on" fees in charging utility services, the tenants could be required to pay the additional costs associated with those services. But the court also expressly held that "[w]hen a statute is clearly limited to specifically enumerated subjects, we do not extend its application to other subjects by process of construction." *Id.* at 832.

Said differently, *Persigehl* is limited to the "enumerated subjects" of the statute at issue in that case: utility billing within multi-unit residential housing. *Persigehl* did not consider the question of whether pass-through or add-on fees can be the subject of a CFA or DTPA claim, where the nature or purpose of the add-on fees has been misrepresented or is otherwise illegal and therefore, deceptive.

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1. The Legislature has prohibited Defendants' attorney fees shifting provision.

As explained above in Section I.E., Minnesota law allows for landlord recovery of attorneys fees only when it is the prevailing party in "an action." Minn. Stat. § 504B.172. No law allows a landlord to recover fees for exploring the possibility of filing an eviction. Minnesota law expressly forbids this practice. Defendants' motion for summary judgment on Plaintiffs' CFA and DTPA claims should be denied.

2. The Liability Waiver Program is deceptive.

Defendants assert that the Lease provisions requiring tenants to pay for Defendants' Liability Waiver program are permitted under Minnesota law and therefore are not deceptive. (Def. Br. at 28). Defendants cite a total of two inapposite cases. (Def. Br. at 28).

In *RAM Mutual Ins. Co. v. Rohde*, the Minnesota Supreme Court abrogated the former bright-line rule that a landlord's insurer could not subrogate against a tenant because the tenant was a co-insured under the landlord's property-insurance policy. *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 13-14 (Minn. 2012) (overruling *United Fire & Cas. Co. v. Bruggeman*, 505 N.W.2d 87, 89-90 (Minn. Ct. App. 1993)). The court held that whether an equitable subrogation action could be brought by an insurer must be determined under a "case-by-case" analysis. That analysis includes whether "it was reasonably anticipated by the landlord and tenant that the tenant would be liable, in the event of a [tenant-caused property] loss paid by the landlord's insurer, to a subrogation claim by the insurer." *Id.* at 16. Because "subrogation is an equitable remedy" requiring a balancing of the equities, "the court may consider, among other factors, whether the lease is a contract of adhesion, and if the provisions allocating responsibility are found to be unfair, may declare such provisions invalid as being in violation of public policy." *Id.* (cleaned up).

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RAM says nothing about whether a landlord can require a tenant to maintain renters insurance to cover casualty damage allegedly "caused by" the Tenant. In fact, that decision opens the door for the Court to consider whether the Leases are unfair or invalid "as in violation of public policy." *Id.* In connection with the Leases' insurance requirement, the public policy of this State is that landlords are only permitted to pursue claims of property damage against tenants where that damage was the result of "willful and malicious conduct" or "unlawful conduct," not negligence. Minn. Stat. § 504B.165; Minn. Stat. §504B.171.[11] Defendants have attempted to contract around this limitation, but that attempt is impermissible. Minn. Stat. § 504B.165(b) ("Any provision, whether oral or written, of any lease or other agreement, whereby any provision of this section is waived by a tenant, is contrary to public policy and void."). Put differently, Defendants do not have an unfettered right to pursue property damage claims–and therefore cannot require a tenant to insure against property damage claims—unless the tenant intentionally damaged the property. Moreover, the evidence adduced to date is that Defendants *have already charged* Plaintiffs for Defendants' underlying costs to insure physical damage to the properties—through the base rental rates. Section II.A, *supra*; *see Cincinnati Ins. Co. v. DuPlessis*, 848 N.E.2d 220, 222 (Ill. App. Ct. 2006) (holding tenant was coinsured and not liable for fire damage to property where landlord "paid the premiums for the insurance and, presumably, passed along all or part of the cost to the tenant.") The $13 "liability waiver" is therefore a windfall to Defendants.

[11] Defendants will likely argue that the circumstances and standards under which a landlord may pursue a property damages claim against tenants is the same as the standard under which a landlord may defend a Habitability claim in a rent escrow or emergency tenant remedies' action. Under Minn. Stat. § 504B.161, Subd.1, and Minn. Stat. § 415, a landlord has a defense to a tenant remedies action if the violation of the statute is "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." Minn. Stat. § 504B.161, Subd. 1; Minn. Stat. § 504B.385, Subd.1. The statute, however, does not permit the landlord to sue the tenant for damages caused by either negligence or "irresponsible conduct."

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Defendants' citation to *Young v. Landstar Investments* is also nonsensical. In that case, the Wisconsin Court of Appeals determined that a lease requiring a tenant to maintain renters' insurance "*if a dog will be kept on the premises and for all fish aquariums and waterbeds"* did not void the lease. *Young v. Landstar Invs. LLC*, 2016 WI App 16, ¶ 23, 366 Wis. 2d 808, 874 N.W.2d 346. The court determined that the lease neither violated Wisconsin statutes prohibiting landlords from waiving liability for property damage or personal injury, *id.* ¶ 25, nor imposed liability on the tenant for personal injury or casualty damage. *Id*. ¶¶ 25-26.

In addition, the Leases' provisions pertaining to insurance expressly state that the purpose of mandatory renters' insurance is connected with the tenant's agreement to take on the risk of "damage to [tenant] *personal property* and possession and any *personal injury of any Occupant in the Premises*…" (Index #92 Ex. 5, Gregory Lease ¶ 12 (emphasis added)). That is also the purpose of the "Replacement Renters Insurance." *Id.* Accordingly, the Court cannot read this as requiring the tenants to procure insurance to cover any alleged damage to their property. *See Melrose Gates, LLC v. Chor Moua*, 875 N.W.2d 814, 825 (Minn. 2016) ("[T[he recommendation that Tenants obtain renter's insurance 'to protect against injuries or property damage,' in a paragraph dealing with damage to Tenants, *their* guests, and *their* property, cannot be understood as a recommendation for Tenants to obtain insurance to cover damage to *Landlord's* property.")

Finally, even if Defendants were allowed to require a specific type of policy with particular coverage limits (they are not), that does not end the analysis. [redacted]

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[redacted] Defendants cannot point to any record evidence showing they disclose this arrangement to prospective or current tenants.[12]

Defendants' failure to disclose these facts about the "liability waiver" fees are material omissions and actionable under the CFA and DTPA. *Graphic Comms. Local JB Health & Welfare Fund A v. CVS Caremark Corp.,* 850 N.W.2d 682, 695-96 (Minn. 2014); *see, e.g., Coleman v. CubeSmart*, 328 F. Supp. 3d 1349, 1362–63 (S.D. Fla. 2018) (discussing caselaw on deceptive pass-through charges, including cases finding rental storage company's failure to disclose that it "kept as a profit a large part of the premium that it purportedly sent to the insurance company," which could be found deceptive or misleading).

No Minnesota statute requires residential tenants to hold insurance covering damage to the landlord's real property, for any reason. Nor does any statute permit landlords to require such insurance. The evidence here is more than enough to defeat Defendant' motion for summary judgment on Plaintiffs' consumer protection claims.

3. The pay-to-pay Conservice fee and HVAC fees are misleading and deceptive.

Defendants also fail to demonstrate either an entitlement to charge their $9.95 UBSF and HVAC fees, or that the charges are not deceptive. As noted in Section III.E, above, the UBSF is not explained in the Lease. Pre-lease, Defendants misleadingly represent to Plaintiffs that the fee

12 [redacted] *See* Minn. Stat. § 65A.44 (for purposes of residential renters' insurance, "Insurer" means an insurer *licensed to write* insurance and writing residential renter's insurance *in this state*).

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is to "reimburse for utilities and service paid for by Landlord (typically, water and other utilities and services bundled with the water bill)". *Id.*

The HVAC fee is similarly illegal, representing an attempt by Defendants to shift responsibility for "ultimate compliance" with Minn. Stat. § 504B.161 to the tenants, by charging them a fee to ensure that the air quality in their home is safe. Section III.D, *supra*. *State, City of Minneapolis v. Ellis*, 441 N.W.2d 134, 138 (Minn. Ct. App. 1989) (stating "the ultimate responsibility for compliance with subdivision 1 remains with the lessor/licensor. Appellant"s attempt to transfer this ultimate responsibility must fail under the statutory prohibition.")

C. The evidence demonstrates that Defendants defer necessary maintenance and repair.

Defendants also argue that their leasing process is "careful and thorough" and that their homes are of "sufficient quality." Plaintiffs dispute these claims. (Index #100 ¶ 18, 29, 39; Section II.C, *supra*.).

First, contrary to Defendants' arguments, Plaintiffs dispute they received "sample" leases in time for them to consider before they rented. *See* Section V, *supra*. Plaintiffs also dispute Defendants' contention that they (or any putative class member) could walk away from the deal, even after Defendants have purchased a home, "with little consequence." Def. Br. at 25. Other Minnesota consumers have sued for the return of their security deposit after signing the anticipated terms documents and Leases. (Exs. 21, 22). And, in fact, Defendants represent if they "do not receive the full Deposit and the executed Program Documents (defined below) from you prior to the expiration of the 2-business-day Deposit Deadline, Home Partners will terminate the underlying purchase contract and disqualify you from the Lease Purchase Program." (Index #98, Ex. 1, Gregory Anticipated Terms).

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Second, Plaintiffs dispute Defendants' bizarre contentions that (1) Plaintiffs could have performed their own inspections, and that (2) Defendants were prohibited by their own vendor from sharing the results of the inspections Defendants performed. (Def. Br. at 25-26). These contentions negate Defendants' arguments that they are fully transparent with tenants.

Common sense dictates that prospective tenants do not hire home inspectors (for $600-$800 or so) to determine whether the home they are about to rent has any structural or other issues—they rely on landlords to do that. The evidence here proves just that: Plaintiffs relied on Defendants' statements that they perform inspections on the homes and make them ready for occupancy, including for health and safety repairs. (Ex. 3, J. Gregory Dep. at 51:14-52:6 ("You would think that, when you are getting into a program, that they would be responsible for anything that has to do with the structure of your home. […] If my ceiling is caving or discolored or something like that from water damage from the roof, that's deemed as Pathlight's responsibility, not mine. […] If there's a hole in my garage that is showing outside from the inside, that's deemed as Pathlight's responsibility. If they didn't finish sheetrocking and insulating my garage, that's Pathlight's responsibility. If my floor is hollow and coming up and lifting up and everything, that's Pathlight's responsibility."); *see Khoday v. Symantec Corp.,* No. 11-180, 2014 WL 1281600, at *31 (D. Minn. Mar. 13, 2014) ("Digital River has not refuted the common sense inference that its representations may have successfully persuaded class members that download insurance was a required purchase at the point of sale…") (citing *City of Farmington Hills,* 281 F.R.D. at 356 ("Wells Fargo has not, at this point in the litigation, negated the common sense inference in this case that the statement in the [document] may have successfully persuaded the class members of the safety of their investments.")).

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Third, Plaintiffs dispute Defendants' contention that the multiple disclaimers of the warranty of habitability in the Lease are coextensive with their representations about the "make ready" process. (Def. Br. at 26). Notably, the "make ready" process is not even mentioned or defined in the Leases. Plaintiffs do not dispute that Defendants decide what items they will "make ready"—tenants are not even afforded an opportunity to negotiate the "make ready" list. Section II.A, *supra*. The "make ready" process occurs before Plaintiffs move in, at which point Defendants' Leases say that the tenant is taking the property "AS-IS" and without any warranties, express or implied. The only way to interpret that "plain language" is to mean exactly what it says—once tenants move in, they're on their own.

Finally, from this same evidence—the failure to disclose the results of inspections and the disclaimer of habitability—a reasonable fact finder could draw equally plausible inferences favoring Plaintiffs. A reasonable juror could find that Defendants defer maintenance and repair costs–such as with Sewall's roof, or the Gregorys' refrigerator or flooring—to minimize their up-front capital expenditures. Section II.C, *supra*. The same fact finder could also conclude that because Defendants add the "make ready" costs to the "estimated purchase price," Defendants have an additional incentive to keep those pre-lease costs low, in order to make that "estimated purchase price" artificially low, so as to entice LTP program participation. A higher estimated purchase price could dissuade the prospective LTP tenants from deciding to go through with the transaction.

D. Plaintiffs have been injured by Defendants' violations of the consumer protection laws.

Defendants contend that Plaintiffs do not satisfy the Private Attorney General statute's "injured by" requirement, because they have not suffered a monetary loss. The evidence regarding this issue is disputed. *See* Section IV, *supra*. Moreover, Defendants' argument ignores that for

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purposes of the CFA or DTPA, it is not necessary to allege or prove pecuniary loss. "Under Minnesota's Private Attorney Statute [Minn. Stat. § 8.31, subd. 3a]... any person injured by a violation of the laws entrusted to the Minnesota Attorney General to investigate and enforce – including the [CFA and DTPA]—may file a lawsuit and recover damages **as well as costs and fees.**" *In re Levaquin Prod. Liab. Litig*., 752 F. Supp. 2d 1071, 1076 (D. Minn. 2010) (emphasis added); *see also Engstrom v. Whitebirch, Inc.*, 931 N.W.2d 786, 791 (Minn. 2019) (noting allegation of pecuniary loss satisfies the "injury" requirement in the private attorney general statute). Regardless, Plaintiffs have demonstrated, that they overpaid for rent and other illegally charged fees. (Kneuper Decl. at pp. 11, 19). Defendants cannot refute this evidence.

E. Defendants' illegal practices continue to harm Plaintiffs.

Defendants argue that Plaintiffs are not at risk for future harm. Def. Br. 31. The Court rejected this exact argument at the motion to dismiss stage, and the reasons for rejecting that argument still exist. Jan. 23, 2023 Order at 9-10; *Boschee v. Burnet Title Co*., No. CT 03-016986 (Minn. Dist. Ct. Jun. 15, 2004) ("To bar a person … from bringing an action under the DTPA merely because they are now forewarned against such a practice would seem to run counter to the remedial nature of the DTPA. Moreover, the strong possibility exists that [plaintiff] may some time in the future again decide to refinance her home or to purchase a new home."); *see also Blue Cross & Blue Shield of Minnesota v. Wells Fargo Bank, N.A.*, No. CIV. 11-2529, 2012 WL 1343147, at *7 (D. Minn. Apr. 18, 2012) (denying motion to dismiss DTPA claim where plaintiffs had not exited a securities lending program and sought injunction for return for some of those securities as part of their DTPA claim); *see generally Surdyk's Liquor v. MGM Liquor Stores, Inc.*, 83 F. Supp. 2d 1016, 1021 (D. Minn. 2000) (noting that a defendant's failure to "halt or modify its past...practices" does not moot claim for injunctive relief under the Lanham Act).

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The Gregorys are still subject to the Lease and must pay the illegal fees and rent "about which they complain." (Def. Br. 31). Defendants have provided no evidence that they have modified their Leases to comply with Minnesota law or have stopped charging illegal fees and rent. Thus the Gregorys continue to be harmed by Defendants' illegal leasing and property management practices, and their claims for declaratory and injunctive relief are not moot. Sewall's claim for declaratory relief is similarly not moot, because Defendants still seek to hold him to illegal lease terms. (Index #104 at p. 12).

For the same reason it rejected Defendants' motion to dismiss these claims, it should deny Defendants' summary judgment motion.

V. Defendants Are Not Entitled To Summary Judgment On Plaintiffs' Breach Of Good Faith And Fair Dealing Claim.

Defendants are not entitled to summary judgment on Plaintiffs' claim for breach of good faith and fair dealing. Under Minnesota law, every contract includes "an implied covenant of good faith and fair dealing," which prohibits one party from "unjustifiably hinder[ing]" the other's performance under the contract. *In re Hennepin Cnty. 1986 Recycling Bond Litig*., 540 N.W.2d 494, 502 (Minn. 1995); *Semler Const., Inc. v. City of Hanover*, 667 N.W.2d 457, 467 (Minn. Ct. App. 2003) (denying summary judgment on whether city violated duty of good faith and fair dealing). The implied covenant is applicable to the exercise of discretion in contract performance. *White v. Stone Partners, LP v. Piper Jaffray Cos., Inc.*, 978 F. Supp. 878, 881 (D. Minn. 1997) (denying motion to dismiss where plaintiff stated a claim, and noting "honesty in fact" is the standard for breaching the covenant); *see also M.T. v. Kentwood Const. Co.*, 651 A.2d 101, 103 (N.J. Super. Ct. App. Div. 1994) (holding landlord failure to execute documents required by the government to obtain rent subsidy was a breach of the implied covenant).

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In their Leases, Defendants set forth the amount of rent, but do not state how they calculate the amount of rent or the alleged consideration to tenants. Defendants' rent charges are based on their exercise of discretion in interpreting the Leases and other "Applicable Law" and their own business needs. Defendants exercised their discretion in setting the initial monthly base rent to incorporate all expected costs of maintenance and repair, to insure, and to cover other overhead costs. Defendants did not disclose these calculations, and instead required Plaintiffs to "agree" that the rent would have been higher.

Defendants' Leases, policies and practices have further injured Plaintiffs' abilities to fulfill their obligations under the Leases, including by failing to share inspection reports and to apprise Plaintiffs of property conditions, noted at inspection, that may require additional vigilance on the part of the tenant. In addition, the evidence shows Defendants (1) refused or failed to respond to Sewall's requests for a move-out inspection, (2) refused to respond to Sewall's repeat requests that Defendants provide documentation justifying their withholding of his security deposit, (3) failed to credit the Gregorys' rent assistance payment and then charged them late fees because Defendants were going to file an eviction due to their failure to apply the rent assistance payment, (4) claimed that needed health and safety repairs the Gregorys requested (e.g., the dryer gas leak or mice infestation) were their responsibility, and (5) shut down tenants' access to the resident portal,[13] and then charged a late fee for payments not received during the time the portal was inaccessible. *See* Section III.C, *supra*; Index #95 ¶¶ 21-26; Index #98 ¶¶ 22, 25, 28, 38-39.

[13] The September portal shut down occurred in all markets where Defendants operate, not just Minnesota.

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The record contains ample evidence showing Defendants have breached the implied covenant of good faith and fair dealing. Defendants' motion for summary judgment on this claim must be denied.

VI. Plaintiffs' Rescission Claim Is Meritorious.

Plaintiffs' rescission claim is based on Defendants' illegal and unenforceable leases, including Defendants' misrepresentations and omissions. Plaintiffs have presented ample evidence showing Defendants' leases are misleading and deceptive, and therefore rescindable. "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." *Abdallah, Inc. v. Martin*, 65 N.W.2d 641, 644 (Minn. 1954) (citation omitted); *see also Hatch v. Kulick*, 1 N.W.2d 359, 360 (Minn. 1941). A trial court may rescind a contract based on misrepresentation when a party's assent is induced by either a fraudulent or a material misrepresentation by the other party. *Carpenter v. Vreeman*, 409 N.W.2d 258, 260–61 (Minn. Ct. App. 1987).

As at the motion to dismiss stage, the Court noted that Defendants argument rested "on the notion that the lease complies with Minnesota law." Jan. 23 Order, at 16. Plaintiffs have adduced more than enough evidence to demonstrate that relief in the form of rescission should be demanded, *id.*, including but not limited to evidence that they were induced to sign Leases saying they received adequate consideration for their agreement to maintain and repair, or that they must enroll in Defendants' rental insurance, pay illegal late fees, attorneys fees, and other fees. *See* Section III *supra*. In addition, Defendants induce prospective tenants into believing they'll be renting a home of their choosing that was rigorously inspected and repaired, and that Defendants' will properly maintain that home. In reality, Defendants use their form leases to disclaim their statutory duties.

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Defendants are also incorrect in arguing Sewall cannot seek rescission because he is no longer a tenant. Defendants continue to pursue him for a bogus "Remediation and Buildback Charge" (Index #68, Defendants' Answer and Counterclaim). Sewall seeks to cancel the "Remediation and Buildback" charge and recover his security deposit as "that with which he parted by reason of the contract." *Hatch*, 1 N.W.2d at 360 (citations omitted).

Defendants' motion for summary judgment on Plaintiffs' rescission claim must be denied.

VII. Plaintiffs Can Assert An Unjust Enrichment Claim.

Defendants argue they were not unjustly enriched because Plaintiffs paid rent "in homes of their choosing" and knew what that rent would be each month. (Def. Br. at 35). These facts do not support Defendants' motion for summary judgment. "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). "The cause of action for unjust enrichment has been extended to also apply where, as here, the defendants' conduct in retaining the benefit is morally wrong." *Id*.

Here, Defendants induced Plaintiffs to enter into draconian contracts of adhesion that failed to comply with the most basic provisions of the LTA. Plaintiffs continue to pay rent under the illegal Leases, and Defendants continue to shift the costs of maintenance and repair and other lease administration costs by withholding security deposits and charging the "liability waiver," HVAC, Conservice, and other illegal fees. Because the evidence establishes that governing Leases are illegal, unenforceable and void due to Defendants' unfair, fraudulent or misleading conduct and therefore, equitable relief can be granted, the Court should deny Defendants' motion for summary judgment on Plaintiffs' unjust enrichment claim.

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VIII. Plaintiffs Are Entitled To Equitable Relief.

This Court should deny Defendants' motion with regard to Plaintiffs' claims for declaratory judgment (Count VIII) and injunctive relief (Count IX). Defendants argue their leases are legal and they have not engaged in fraud, but again, Defendants are incorrect. Minnesota's Uniform Declaratory Judgments Act grants courts the power "to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Minn. Stat. § 555.01. This type of relief is common in landlord-tenant disputes. *See, e.g.*, *Johanneson's, Inc. v. Anderson*, No. C2-99-451, 1999 WL 619016, at *1 (Minn. Ct. App. Aug. 17, 1999) (landlord was levying an impermissible common area maintenance charge).

Plaintiffs have provided substantial evidence presenting an actual controversy between the parties regarding Defendants' illegal form leases, as well as Defendants' practices, in violation of Minn. Stat. § 504B.161, the Minnesota CFA and the Minnesota DTPA. *See* Sections II – IV, *supra*. As stated in connection with their DTPA claim, Defendants have violated both the Habitability statute and the CFA and DTPA by including unlawful provisions, including the replacement renter's insurance provision, in their leases. The harms that Plaintiffs allege are continuing and will continue absent an injunction from this Court. Defendants' motion must be denied.

IX. The Security Deposit Claim Should Not Be Dismissed.

Finally, while Plaintiffs agree that the Gregorys do not yet have a claim under Minn. Stat. §504B.474, this claim should not be dismissed. Given Defendants' failure to comply with the LTA in other respects, and the evidence of Defendants' illegal charging for ordinary wear and tear damage or for damage they caused, (Index #104 at pp. 4-6, 9). it is entirely conceivable that the Gregorys will have a claim during the pendency of this action.

CONCLUSION

Defendants' motion for summary judgment must be denied.

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Respectfully submitted,

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