STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

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

Plaintiffs,

vs.

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

Defendants.

Court File No. 27-CV-22-10389

ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION FOR SUMMARY JUDGMENT

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

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

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

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

IT IS HEREBY ORDERED:

1. Defendants Motion for Summary Judgment is **DENIED** as to Counts I, II, III, V, VI, VII, VIII, IX, and X.

2. Defendants Motion for Summary Judgment is **GRANTED** as to Count IV against Plaintiffs Shamika and Jerome Gregory.

3. Plaintiffs' Rule 56.04 requests are **DENIED**.

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

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

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

BY THE COURT:

Dated: October 3, 2023

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Christian Sande
Judge of District Court

MEMORANDUM

I. Background

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

On June 6, 2023, Defendants filed a Notice of Motion and Motion for Partial Summary Judgment on Plaintiffs' claims. On June 16, 2023, Defendants filed a brief in support of their summary judgment motion and supporting papers. On June 30, 2023, Plaintiffs filed an opposition memorandum and supporting papers. On July 7, 2023, Defendants filed a reply brief. The Court heard oral argument on July 14, 2023, and took this matter under advisement.

II. Legal Standard

The court shall grant summary judgment if the moving party is able to demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01. The movant bears the burden of proof, and all evidence is viewed in the light most favorable to the nonmoving party. *Fenrich v. The Blake School*, 920 N.W.2d 195, 201 (Minn. 2018) (citing *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 661 (Minn. 2015)). The court should not grant summary judgment where reasonable persons may come to different conclusions based on the evidence presented. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). A party moving for summary judgment must support the assertion

by citing materials in the record, showing that the materials cited do not establish the presence of a genuine issue for trial, or that the adverse party cannot produce admissible evidence to support the facts. Minn. R. Civ. P. 56.03(a). "Mere speculation, without some concrete evidence, is not enough to avoid summary judgment." *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993). The evidence presented "must have some foundation other than mere conjecture." *Id.*

A genuine issue of material fact "must be established by substantial evidence." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997) (citing *Murphy v. Country House, Inc.*, 307 Minn. 344, 351, 240 N.W.2d 507, 512 (Minn. 1976)). "Although evidence is reviewed in the light most favorable to appellant, he still must produce specific facts to create a factual issue for trial." *Dixon v. Depositors Ins. Co.*, 619 N.W.2d 752, 756 (Minn. Ct. App. 2000) (citing *Paulos v. Johnson*, 597 N.W.2d 316, 318 (Minn. Ct. App. 1999)). A party asserting that there is no genuine issue of material fact may support this assertion by citing to materials in the record, showing that the materials cited do not establish the absence or presence of a genuine issue for trial, or showing that an adverse party cannot produce admissible evidence to support the fact. Minn. R. Civ. P. 56.03(a). The nonmoving party must present specific facts to show that there is a genuine issue for trial. Minn. R. Civ. P. 56.05.

No genuine issue of material fact exists "when the evidence presented by the nonmoving party merely creates a metaphysical doubt as to a factual issue and is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *DLH,* 566 N.W.2d at 71. On a motion for summary judgment, it is inappropriate for the district court to make assessments of witness credibility or to weigh conflicting evidence to settle disputed fact issues. *See Fairview Hosp. & Health Care Serv. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995); *Powell v. Anderson*, 660 N.W.2d 107, 122 (Minn. 2003); *Smith v. Woodwind Homes, Inc.*, 605 N.W.2d 418, 423 (Minn. Ct. App. 2000). Where the parties do not

dispute facts, but rather dispute the application of law to those facts, summary judgment is appropriate. *Fire & Cas Ins. Co. of Connecticut v. Illinois Farmers Ins. Co.*, 352 N.W.2d 798, 799 (Minn. Ct. App. 1984).

The weight to be given to an expert's opinion is properly resolved by the factfinder, not on summary judgment. *See Shymanski v. Nash*, 251 N.W.2d 854, 857 (Minn. 1977) (stating that the weight and credibility of expert testimony is generally for the jury); *In re Estate of Torgersen*, 711 N.W.2d 545, 554 (Minn. Ct. App. 2006) ("Credibility determinations . . . especially when experts are involved, are within the discretion of the factfinder."); *See also Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. Ct. App. 2004) (stating that determination of witness credibility is exclusively for factfinder).

III. Analysis

Defendants seek summary judgment on all Counts with respect to Plaintiffs Shamika Gregory and Jerome Gregory (the Gregorys), and on Counts I, II, III, VI, VII, VIII, IX, and X with respect to Plaintiff Sewall.[1] The Court will address each count separately below.

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

Defendants argue that summary judgment is appropriate because the Lease and Right-To-Purchase (RTP) Agreements are the product of careful disclosure and communication with residents, and none of the terms of the Lease or RTP Agreements misstate or violate Minnesota law. Plaintiffs

[1] Defendants concede that a fact dispute exists as to the return of Plaintiff Sewall's security deposit and late fees that were assessed to him during the last weeks of his tenancy, and the parties dispute whether Plaintiff Sewall left the Minnetonka Home without reporting any major damage and mold, requiring Defendants to make major, costly repairs, for which it withheld Plaintiff Sewall's security deposit. Accordingly, those claims (Counts IV and V with respect to Plaintiff Sewall only) and Defendants' counterclaim are not the subject of this motion, and the Court will not address Counts IV and V specifically as to Plaintiff Sewall.

argue that summary judgment is inappropriate because the record demonstrates that Plaintiffs meet the Minnesota Supreme Court's standard for viable claims under Minnesota's consumer protection statutes, and the type of conduct at issue in this matter is exactly the type of conduct that Minnesota's consumer protection statutes were designed to prohibit.

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

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

Minn. Stat. § 8.31, subd. 3(a).

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

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

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

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

deceitful conduct in connection with the sale of merchandise." *Id.* "[D]eceptive practice refers to conduct that tends to deceive or mislead a person." *Id.* at 695 (internal quotations omitted). "[V]iolations of statutes that do not themselves create private causes of action may be the subject of a Consumer Fraud Act claim." *Thompson v. St. Anthony Leased Hous. Assocs. II, LP*, 979 N.W.2d 1, 7 (Minn. 2022) (citing *Graphic Commc'ns*, 850 N.W.2d at 693-94) (tenant not precluded from asserting claim that landlord's rent charges violated CFA where underlying statute governing rent restrictions did not create separate cause of action). "The Prevention of Consumer Fraud Act…applies to deceptive landlord practices in leased housing." *Love v. Amsler*, 441 N.W.2d 555, 556 (Minn. Ct. App. 1989).

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

in the private attorney general statute." *Engstrom v. Whitebirch, Inc.*, 931 N.W.2d 786, 791 (Minn. 2019) (internal quotations omitted) (Plaintiff alleging that Defendant's Consumer Fraud Act violations caused Plaintiff pecuniary loss therefore alleged an injury sufficient to plead cause of action under private attorney general statute).

"[C]ircumstantial evidence is sufficient to establish a causal nexus." *Minnesota Sch. of Bus.*, 935 N.W.2d at 134 (citing *Grp. Health Plan*, 621 N.W.2d at 14). Once more, the Minnesota Supreme Court noted in *Minnesota Sch. Of Bus.* that "an element of individual reliance is embedded in the causal nexus requirement because a fraudulent or misleading statement cannot by its nature cause harm unless the statement had some impact on inducing the individual plaintiff's actions." *Id.* (citing *Grp. Health Plan*, 621 N.W.2d at 14) (internal quotations omitted). Likewise, the Court recognized that "where a defendant's misrepresentations were directed at and affected a broad group of consumers, proof of direct individual reliance is not required to establish a causal nexus between MCFA violations and the harm suffered by consumers." *Id.* (citing *Grp. Health Plan*, 621 N.W.2d at 14-15). The Court also noted that "a showing that some legal nexus exists between the injury and the defendants' wrongful conduct is a more relaxed requirement than the strict showing of direct causation . . . required at common law." *Id.* at 135 (citing *Grp. Health Plan*, 621 N.W.2d at 14) (internal quotation omitted).

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

coverage every month to cover the maintenance of and physical damage to Defendants' rental homes."[2]

1. Monthly rental rates

Plaintiff Sewall's lease states:

> The amount of Rent was negotiated with the express understanding that Tenant will be responsible for the maintenance needs of the Premises as provided in this Lease and in the absence of Tenant's agreement to maintain the Premises at its cost in accordance with the terms of this Lease. Landlord would have charged a higher rent amount.[3]

The Gregorys' lease similarly provides:

> The amount of Rent was agreed upon based on the express understanding that Tenant will be responsible for the maintenance needs of the Premises as provided in this Lease and in the absence of Tenant's agreement to maintain the Premises at its cost in accordance with the terms of this Lease. Landlord would have charged a higher rent amount.[4]

Plaintiffs' signed Repair, Maintenance, & Improvement Addendum also provides:

> Tenant has agreed to accept possession of the Premises in its current AS-IS, WHERE-IS, WITH ALL FAULTS condition and, except as expressly set forth in the Agreements or as provided by Applicable Laws, landlord has no obligation to repair, improve, alter or remodel the Premises. The Rent and Purchase Price amounts were negotiated with the express understanding that Tenant will be responsible for repair and maintenance needs of the Premises, as specified in the Lease and RTP Agreement. In the absence of Tenant's agreement to maintain the Premises, Landlord would have charged a higher Rent and Purchase Price amount.[5]

Plaintiffs present evidence of deposition testimony from Defendants' corporate representatives, Pathlight employees, and Plaintiffs themselves, to establish genuine issues of material fact regarding

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

[3] Ex. 4 to Decl. of Anne T. Regan ("Regan Decl.") in Supp. of Pls.' Mot. for Class Cert. and for Appt. of Class Reps. and Class Counsel at DEFS_00005608, ¶ 15 (May 12, 2023).

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

[5] Ex. 4 to Regan Decl. at DEFS_00005630, ¶ 1 (May 12, 2023); Ex. 5 to Regan Decl. at DEFS_00002834, ¶ 1 (May 12, 2023).

Plaintiffs' ability to negotiate their lease terms, including their monthly rental rates. Given the weight of this conflicting evidence, a reasonable jury may differ in concluding that Defendants deceived or misled Plaintiffs into believing they cannot negotiate their lease terms, despite the fact that Defendants' lease provisions reflect otherwise.

2. Repair responsibility

Plaintiffs' lease states: "Tenant's shall, at Tenant's expense, maintain the Premises (including all appliances, systems, and fixtures located thereon . . .) . . . and keep same in a clean, safe, and health condition and in good working order."[6] Plaintiffs' lease also states that they shall be responsible for payment of:

> (a) all repairs, maintenance or replacement required to the Premises, including the walls, windows, storms doors/windows and screens, ceilings, paint, plastering, plumbing work, pipes, and fixtures belonging to the Premises, whenever damage or injury to the same shall have resulted from misuse, waste or neglect by the Tenant or any Occupant and (b) any and all repairs, maintenance or replacement required to the Premises that shall be necessary to restore the Premises to the same condition as when Tenant took possession of the Premises (including any work performed by Landlord thereafter…), normal wear and tear excepted[.][7]

The record contains sufficient evidence demonstrating fact issues related to whether Defendants deceived and misled Plaintiffs, through their form lease and marketing practices, into believing that Plaintiffs must make all repairs to the rental homes. For example, Plaintiff Sewall testified that he did not anticipate that he "was going to be responsible for the landlord issues that cropped up…and other issues."[8] When signing the lease, Plaintiff Sewall testified that he "perused it and signed it, because . . . I assumed they were going to be a normal landlord[,]"[9] meaning that

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

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

[8] Ex. 1 to Decl. of Anne T. Regan ("Regan Decl.") at 39:6-12 (July 7, 2023).

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

Defendants were going to "provide . . . a clean, safe house, and [were] going to be interested and involved in maintaining that house."[10] When asked if there was anything in the lease that caused confusion in any way, Plaintiff Shamika Gregory testified "[r]esident responsibility."[11] Plaintiff Shamika Gregory also testified that after reviewing the lease for two days prior to signing, she understood her obligations under the lease as it relates to maintenance for the property as "[l]ight bulb fixtures. Minimal, you know, blinds. Things that aren't damaging the structure of the home."[12] Likewise, when asked whether she understood that she was taking on affirmative responsibilities for maintenance and repair for the home when she signed the lease, Plaintiff Shamika Gregory responded "[n]o."[13] As such, a reasonable jury may differ in concluding that Defendants induced Plaintiffs into their respective leases while also illegally and deceptively deferring necessary maintenance and repair costs and obligations to Plaintiffs through unlawful lease provisions.

3. *Insurance*

"The 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." *Melrose Gates, LLC v. Chor Moua*, 875 N.W.2d 814, 825 (Minn. 2016) (internal quotations omitted) (parties' lease supports conclusion that parties reasonably expected that Tenants would be responsible for damage caused by them to the leased premises, but not for damage they negligently cause to other property of Landlord).

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

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

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

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

Plaintiffs' lease requires that tenants "maintain . . . renter's insurance . . . 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 . . . ."[14] Plaintiff Sewall's lease also purports to limit liability on part of the landlord:

> Landlord is not an insurer and does not maintain insurance to cover the personal property. possessions or personal injury of Tenant or any Occupant. Unless required by Applicable Laws, Landlord shall not be liable for any destruction, damage, loss of personal property, possessions or personal injury to Tenant or any Occupant, (including as may be occasioned by fire, smoke, rain, flood, leaking plumbing, gas or water pipes, water, snow, hail, ice, lightning, wind, explosions, earthquake, interruption of utilities, theft, hurricane) or for any damage arising from acts or neglect of Landlord or anyone claiming through Landlord, all of which are expressly waived by Tenant.
>
> Tenant agrees that all damage to personal property and possessions and any personal injury of Tenant and any Occupant in the Premises shall be at Tenant's sole risk (or the risk of the parties owning same).[15]

The Gregorys' lease reflects similar language:

> Landlord is not an insurer and does not maintain insurance to cover the personal property, possessions or personal injury of Tenant or any Occupant. Except to the extent required by Applicable Laws, Landlord shall not be liable for any destruction, damage, loss of personal property, possessions or personal injury to Tenant or any Occupant (including as may be occasioned by fire, smoke, mold, rain, flood, leaking plumbing, gas or water pipes, water, snow, hail, ice, lightning, wind, explosions, earthquake, interruption of utilities, theft, hurricane or other causes) or for any damage arising from acts or neglect of Landlord or anyone claiming through Landlord, all of which are expressly waived by Tenant, to the maximum extent waivable under Applicable Law.
>
> Tenant agrees that all damage to personal property and possessions and any personal injury of Tenant and any Occupant in the Premises shall be at the risk of the owner of such personal property.[16]

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[14] Ex. 4 to Regan Decl. at DEFS_00005606, ¶ 11 (May 12, 2023); Ex. 5 to Regan Decl. at DEFS_00002810, ¶ 12 (May 12, 2023).

[15] Ex. 4 to Regan Decl. at DEFS_00005606, ¶ 11 (May 12, 2023).

[16] Ex. 5 to Regan Decl. at DEFS_00002810, ¶ 12 (May 12, 2023).

In this case, the record conflicts as to whether Defendants have already charged Plaintiffs for Defendants' underlying costs to insure physical damage through the base rental rates, despite advertising the Resident Liability Program as an option for satisfying Defendants' liability coverage requirement.[17] Plaintiffs present additional evidence creating genuine issues of material fact as to whether Defendants profit directly from their captive insurance policy (despite not disclosing this arrangement to tenants) in order to support their position that these 'liability waiver' premiums paid to Defendants are pooled together to pay for damages caused by other tenants, not necessarily by the tenants subject to the lease. The Minnesota Supreme Court took up a similar issue in *Melrose Gates*, which dealt with a residential apartment unit lease:

> [P]aragraph 25 absolves Landlord of liability for damage done to Tenants, their guests, or their property that was not caused by Landlord, and recommends that Tenants obtain Renter's insurance to protect against injuries or property damage. The court of appeals interpreted these provisions as reflect[ing] an intention that each party be responsible for damage caused by their actions . . . We do not completely agree. To be sure, the statement that Landlord is not responsible for damages it did not cause does support that interpretation, if only slightly. But the 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. In short, paragraph 25 neither strongly supports nor undermines any particular interpretation. Thus, the parties' lease, when taken as a whole, supports the conclusion that the parties reasonably expected that Tenants would be responsible for damage caused by them to the leased premises—that is, to the Apartment—but not for damage they negligently cause to other property of Landlord.

Melrose Gates, 875 N.W.2d at 825 (internal quotations omitted) (citing *Melrose Gates, LLC v. Moua*, No. A14-1131, 2015 WL 1608845 (Minn. Ct. App. Apr. 13, 2015)). The Minnesota Supreme Court expressly recognized that "[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

[17] Ex. 16 to Decl. of Anne T. Regan ("Regan Decl.") (July 7, 2023).

their property, cannot be understood as a recommendation for Tenants to obtain insurance to cover damage to Landlord's property." *Id.* (internal quotations omitted). Given this, a reasonable jury may differ in concluding that Defendants' lease provisions regarding insurance deceived and misled Plaintiffs into believing they must pay for renters' insurance, or use Defendants' hand-picked liability coverage every month to cover the maintenance of and physical damage to Defendants' rental homes.

4. *Injury*

Plaintiffs submit an affidavit from their expert, Dr. Robert Kneuper, who opines that Plaintiffs have been injured by Defendants' alleged Consumer Fraud Act violations through overpayments of rent and other charged fees.

On a motion for summary judgment, it is inappropriate for the district court to make assessments of witness credibility or to weigh conflicting evidence in order to settle disputed fact issues on summary judgment. *See Shymanski v. Nash*, 251 N.W.2d 854, 857 (Minn. 1977) (stating that the weight and credibility of expert testimony is generally for the jury); *In re Estate of Torgersen*, 711 N.W.2d 545, 554 (Minn. Ct. App. 2006) ("Credibility determinations . . . especially when experts are involved, are within the discretion of the factfinder."); *See also Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. Ct. App. 2004) (stating that determination of witness credibility is exclusively for factfinder). Moreover, the evidence conflicts with respect to the amounts that Defendants would have actually charged Plaintiffs if additional maintenance services were included in the lease. Accordingly, the Court shall deny Defendants' Motion as to Count I.

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

For the same reasons that Defendants argue Plaintiffs' Consumer Fraud Act claim fails, Defendants argue there is no evidence to support Plaintiffs' Deceptive Trade Practices Act claim. Defendants also argue that Plaintiffs' Deceptive Trade Practices Act claim fails because Plaintiffs are

not at risk for future harm. Plaintiffs argue that there is sufficient evidence to support their Deceptive Trade Practices Act claim, and Defendants' illegal practices continue to harm Plaintiffs.

> Minnesota Statute Section 325D.44 outlines the definition of a deceptive trade practice:
>
> **Acts constituting.** A person engages in a deceptive trade practice when, in the court of business, vocation, or occupation, the person:
>
> (2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
>
> * * *
>
> (5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;
>
> * * *
>
> (7) represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
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> * * *
>
> (13) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

Minn. Stat. § 325D.44, subd. 1(1), (2) and (13). Section 235D.45 of the Deceptive Trade Practices Act provides the following relief:

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

Minn. Stat. § 325D.45, subd. 1-3. "Minnesota's consumer-protection statutes are commonly read together so as to prohibit the use of deceptive and unlawful trade practices." *Liabo v. Wayzata*

Nissan, LLC, 707 N.W.2d 715, 724 (Minn. Ct. App. 2006). "Consumer-protection statutes are remedial in nature and are liberally construed in favor of protecting consumers." *Id.* (citing *State by Humphrey v. Alpine Air Prods., Inc.,* 490 N.W.2d 888, 892 (Minn.App.1992), *aff'd,* 500 N.W.2d 788 (Minn.1993); *see also Wiegand v. Walser Auto. Groups, Inc.,* 683 N.W.2d 807, 812 (Minn.2004) (discussing policy and purpose underlying the MCFA); *State by Humphrey v. Phillip Morris, Inc.,* 551 N.W.2d 490, 496 (Minn.1996) (stating that the Deceptive Trade Practices Act is broadly construed to enhance consumer protection)).

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

The Court has already determined that several fact issues exist with respect to Plaintiffs' consumer-protection claims. *Liabo*, 707 N.W.2d at 724 ("Minnesota's consumer-protection statutes are commonly read together so as to prohibit the use of deceptive and unlawful trade practices"). The Court must also determine whether a fact dispute exists as to Plaintiffs' risk of future harm. Plaintiffs present sufficient evidence demonstrating that the Gregorys are still subject to the lease (*i.e.*, the essence of this suit), and Defendants do not refute the fact that the Gregorys' lease has not been modified. While Defendants argue that Plaintiff Sewall cannot prove future harm because he has purchased another home, Defendants concede that a fact dispute exists regarding issues stemming from Plaintiff Sewall's former lease. As such, the Court cannot

conclude that no genuine issues of material fact exist as to Plaintiffs' risk of future harm. Accordingly, the Court shall deny Defendants' Motion as to Count II.

C. Count III (Breach of Covenants of Landlord, Minn. Stat. § 504B.161)

Defendants argue that there is no evidence to support Plaintiffs' claim for breach of the covenant of habitability because the terms of the lease do not violate Minn. Stat. § 504B.161, and Plaintiffs have no evidence that Defendants shifted any burden of repair or maintenance to them in violation of Minn. Stat. § 504B.161. Plaintiffs assert that Defendants' leases violate multiple provisions of the Landlord Tenant Act.

Minnesota Statute Section 504B.161 provides:

> **Requirements.** (a) In every lease or license of residential premises, the landlord or licensor covenants:
>
> (1) that the premises and all common areas are fit for the use intended by the parties;
>
> (2) to keep the premises in reasonable repair during the term of the lease or license, except when the disrepair has been caused by the willful, malicious, or irresponsible conduct of the tenant or licensee or a person under the direction or control of the tenant or licensee;
>
> * * *
>
> (4) to maintain the premises in compliance with the applicable health and safety laws of the state, and of the local units of government where the premises are located during the term of the lease or license, except when violation of the health and safety laws has been caused by the willful, malicious, or irresponsible conduct of the tenant or licensee or a person under the direction or control of the tenant or licensee.
>
> (b) The parties to a lease or license of residential premises may not waive or modify the covenants imposed by this section.

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

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

Id. at § 504B.161, subd. 2. "Minn. Stat. § 504B.161, subd. 1(a), establishes several covenants, known as the covenants of habitability, which are implied in every residential lease." *Wise v. Stonebridge Communities, LLC*, 927 N.W.2d 772, 775–76 (Minn. Ct. App. 2019) (citing *Fritz v. Warthen*, 298 Minn. 54, 213 N.W.2d 339, 340-41 (Minn. 1973)). "Parties to a lease may not waive the covenants and they are to be liberally construed." *Id.* at 776 (citing *Rush v. Westwood Vill. P'ship*, 887 N.W.2d 701, 706 (Minn. App. 2016). "The supreme court has determined that the legislature clearly intended for the covenants of habitability to guarantee adequate and tenantable housing." *Id.* (citing *Fritz*, 213 N.W.2d at 342) (internal quotations omitted). "The protections in section 504B.161 were devised to assure adequate and tenantable housing within the state." *Rush v. Westwood Vill. P'ship*, 887 N.W.2d 701, 709 (Minn. Ct. App. 2016) (citing *Meyer v. Parkin,* 350 N.W.2d 435, 438 (Minn. Ct. App. 1984)) (internal quotations omitted). "However, the landlord's covenants to keep leased premises in reasonable repair and fit for intended use do not impose strict liability upon a landlord or expand the landlord's liability beyond that previously articulated in caselaw." *Id.* (citing *Meyer,* 350 N.W.2d at 438). "Minn. Stat. § 504B.161, subd. 1(a)(1), does not impose liability where the landlord cures or attempts to cure a defect within a reasonable time using an effective method of repair, even when the tenant prefers a different repair method or is inconvenienced by the chosen method." *Id.*

Plaintiff Sewall's lease contains the following terms related to the move-in conditions of the premises:

> Tenant acknowledges that any damage to the Premises beyond normal wear and tear which is not so noted on the Condition Form returned by Tenant will be presumed to have been caused by Tenant; therefore, it is important to note any such damage and to timely return the Condition Form. Except for the covenants of landlord expressly contained in this Lease, and the other written documents among the parties pertaining to the Premises, and as otherwise specified by Applicable Laws, (a) Tenant hereby represents, warrants and acknowledges that it is leasing the Premises in its AS-IS, WHERE-IS. WITH ALL FAULTS condition as of the date of this Lease and 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.[18]

The Gregorys' lease contains similar language:

> Tenant acknowledges that any damage to the Premises beyond normal wear and tear which is not so noted on the Condition Form returned by Tenant will be presumed to have been caused by Tenant; therefore, it is important to note any such damage and to timely return the Condition Form. Except for the covenants of landlord expressly contained in this Lease or other documents executed by Landlord, or as otherwise specified by Applicable Laws, (a) Tenant hereby represents, warrants and acknowledges that it is leasing the Premises in its AS-IS, WHERE-IS. WITH ALL FAULTS condition as of the Effective Date of and specifically and expressly without any warranties, representations or guarantees, either express or implied, as to its condition, fitness for any particular purpose, merchantability, or any other warranty of any kind, nature, or type whatsoever from or on behalf of Landlord, and (b) except as may be required by Applicable Laws, Landlord has no obligation to perform any work, supply any materials, incur any expense or make any alterations or improvements to any portion of the Premises.[19]

Although Minn. Stat. § 504B.161, subd. 2 allows a landlord and tenant to split specific repair obligations so long as the agreement is reduced to conspicuous writing and supported by adequate consideration, the statute also prohibits landlords from waiving or modifying the covenants set forth by the statute, including the covenant to keep the premises in reasonable repair. The lease language clearly states that Plaintiffs lease the premises from Defendants without any warranties, representations, or guarantees as to its habitability. As such, a reasonable jury may differ in determining that the lease impermissibly shifts the burden of repair to Plaintiffs.

Likewise, while Defendants argue that Plaintiffs' cannot prevail because the Landlord Tenant Act does not recognize a claim for a violation of Minn. Stat. § 504B.161, subd. 1, Defendants

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

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

misconstrue Plaintiffs' Landlord Tenant claim. Plaintiffs do not simply allege that the repair and maintenance agreements do not meet the necessary requirements under Minn. Stat. § 504B.161, subd. 1, for which no cause of action exists. Rather, Plaintiffs specifically claim that Defendants violated Minn. Stat. § 504B.161, subd. 2 through their burden-shifting provisions that waive or modify the covenants as prescribed by law. As such, Plaintiffs' Landlord Tenant Act claims are valid.

Defendants also purport that "[t]he relevant question for this motion is whether Defendants maintained the homes in reasonable repair and fit for the intended use of the parties."[20] This inquiry necessarily requires a factual determination, upon which reasonable persons may come to different conclusions based on the evidence presented by both parties. The evidence also shows issues of fact as to whether Defendants cured, or attempted to cure, the defects complained of by Plaintiffs so as to absolve Defendants of liability. *Rush*, 887 N.W.2d at 709. Accordingly, the Court shall deny Defendants' Motion as to Count III.

D. Count IV (Interest on and Return of Security Deposits, Minn. Stat. § 504B.178)

Defendants argue that the Gregorys do not have claim with respect to their security deposit as a matter of law. Plaintiffs argue that it is entirely conceivable that the Gregorys will have a claim during the pendency of this action given (a) Defendants' alleged failure to comply with the Landlord Tenant Act in other respects, and (b) the evidence of Defendants' illegal charging for ordinary wear and tear damage or for damage they have caused. Because the Gregorys are current tenants of the Brooklyn Center home, Plaintiffs concede that the Gregorys do not currently have standing to bring a claim. Accordingly, the Court shall grant Defendants' Motion as to Count IV.

[20] Defs.' Reply to Their Mot. for Partial Summ. J. of Pls.' Claims at 5 (July 7, 2023).

E. Count V (Late Fees, Minn. Stat. § 504B.177)

Defendants argue that the lease, on its face, does not violate Minnesota law. Defendants argue that the record is devoid of any evidence that Defendants charged the Gregorys any late fee in violation of Minnesota Stat. § 504B.177. Plaintiffs argue that neither the language of the leases, nor Defendants' accounting system, complies with Minnesota law.

Minn. Stat. § 504B.177 provides:

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

Minn. Stat. § 504B.177(a).

The Gregorys' lease provides:

> 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.[21]

Here, genuine issues of material fact exists as to whether Defendants wrongly charged the Gregorys excess late fees. For example, Plaintiff Shamika Gregory testified that she was wrongly charged "like 700 and something dollars in late fees" despite being told by a Pathlight representative that she was not responsible for the late fees incurred when a third-party agency pays for a tenant's

[21] Ex. 5 to Regan Decl. at DEFS_00002807, ¶ 4 (May 12, 2023) (emphasis in original).

rent.[22] Plaintiffs also rely on support from the Office of Attorney General, which notes "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."[23] Although Defendants assert that the October 2022 late fee totaling $19.15 was assessed in relation to the Gregorys' outstanding October balance (totaling $252.49) and resulted in a late fee equal to less than eight percent in compliance with Minn. Stat. § 504B.177(a), Plaintiffs rely on conflicting evidence to show that the Gregorys were charged the October 2022 late fee based on the cumulative balance amount, which included base rent, non-base rent HVAC filter fee, liability coverage, "no show" and late fees from September 2022.

Plaintiffs also assert that the lease language facially violates Minnesota law because Defendants could assess a late fee of $100, even if the outstanding amount were $80. While Defendants assert that there is no evidence to establish that Defendants charged $100 in lieu of an eight percent late fee, the language of the lease states that "all sums received by Landlord from Tenant shall be applied to the oldest outstanding monetary obligation owed by Tenant to Landlord…"[24] This language can theoretically allow Defendants to charge duplicative late fees by assessing outstanding balances that already include late fees, in addition to non-base rent items. And while the parties dispute the ability of the lease's savings clause to insulate Defendants from liability, Defendants do not cite to any Minnesota caselaw that would allow these savings clauses to automatically override any illegal provisions contained within the lease. Accordingly, the Court shall deny Defendants' Motion as to Count V.

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

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

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

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

Defendants argue that Count VI fails because the lease terms upon which Plaintiffs complain of are legal as written, and since there is no evidence that the lease terms were enforced illegally with respect to the Plaintiffs, there is also no evidence that Defendants 'unjustifiably hindered' Plaintiffs' performance of the lease. Plaintiffs assert that the record contains ample evidence showing that Defendants have breached the implied covenant of good faith and fair dealing.

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

The record conflicts as to whether the lease terms are legal as written, and whether the lease terms were illegally enforced with respect to Plaintiffs. Moreover, genuine issues of material fact exists as to whether Defendants' leases, policies, and practices have unjustifiably hindered Plaintiffs' abilities to fulfill their obligations under the leases. Accordingly, the Court shall deny Defendants' Motion as to Count VI.

G. Count VII (Rescission)

Defendants argue that Count VII fails as a matter of law because none of the lease terms are illegal, misleading, or deceptive, and Plaintiff Sewall cannot recover under his claim of rescission because he no longer had a contract with Defendants when he filed this suit. Plaintiffs assert that Count VII is meritorious because Plaintiffs have presented ample evidence showing Defendants' leases are misleading and deceptive, and therefore rescindable.

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

"A contract is voidable if a party's assent is induced by either a fraudulent or a material misrepresentation by the other party, and is an assertion on which the recipient is justified in relying." *Carpenter v. Vreeman*, 409 N.W.2d 258, 260–61 (Minn. Ct. App. 1987) (citing Restatement of

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

Plaintiff's rescission claim is predicated on their claim that Defendants' leases are illegal, unenforceable, deceptive, and misleading. The Court has already concluded that genuine issues of material fact exist with respect to these issues. Defendants also assert that Plaintiff Sewall cannot

recover under this claim because he no longer had a contract with Defendants when he filed this suit. However, Defendants concede that a fact dispute exists as to the return of Plaintiff Sewall's security deposit and late fees, which were assessed to him during the last weeks of his tenancy, and the parties dispute whether Plaintiff Sewall left the Minnetonka Home without reporting any major damage and mold, requiring Defendants to make major, costly repairs, for which it withheld Plaintiff Sewall's security deposit. Defendants continue to pursue Plaintiff Sewall for a 'Remediation and Buildback' charge arising from his previous lease, and Plaintiff Sewall seeks to cancel this charge and recover his security deposit under the terms of his previous lease. As such, the Court cannot conclude that Plaintiff Sewall cannot seek recovery when an active dispute exists on this issue. The Court shall deny Defendants' Motion as to Count VII.

H. Count VIII (Unjust Enrichment)

Defendants argue the record is devoid of evidence showing that Plaintiffs having paid rent unjustly enriched Defendants, or that Defendants were unjustly enriched by Plaintiffs having paid for costs of maintenance. Plaintiffs assert that the evidence establishes that the governing leases are illegal, unenforceable, and void due to Defendants' unfair, fraudulent, or misleading conduct.

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

"An unjust enrichment claim may be founded upon failure of consideration, fraud, or mistake, or situations where it would be morally wrong for one party to enrich himself at the expense of another." *Midwest Sports Mktg*, 552 N.W.2d at 268 (citing *Holman,* 457 N.W.2d at 745) (internal quotations omitted).

Although Defendants rely on language from their form lease stating that Defendants charged Plaintiffs less rent than it otherwise would because of the split of maintenance activities, the Court has already determined that a fact dispute exists as to whether Defendants knowingly shifted maintenance and repair costs and charged other fees illegally under the terms of the lease, and whether Plaintiffs overpaid for rent and other fees as a result of the terms of the lease. Given this, the Court shall deny Defendants' motion as to Count VIII.

I. Count IX (Declaratory Relief) and Count X (Injunctive Relief)

Defendants assert that Plaintiffs are not entitled to declaratory relief because the lease is legal and Defendants have not engaged in the fraud that Plaintiffs allege. Plaintiffs assert that the record is replete with 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 Prevention of Consumer Fraud Act and the Minnesota Uniform Deceptive Trade Practices Act. Plaintiffs also assert that these harms are continuing, and will continue, absent an injunction from this Court.

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. "[A] declaratory judgment action must present an actual, justiciable controversy." *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337 (Minn. 2011). "A justiciable controversy exists if the claim (1) involves definite and concrete assertions of right that emanate from a legal

source, (2) involves a genuine conflict in tangible interests between parties with adverse interests, and (3) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion." *Id.* at 336-7 (citing *Onvoy, Inc. v. ALLETE, Inc.,* 736 N.W.2d 611, 617–18 (Minn. 2007)) (internal quotations omitted). "[E]quitable relief cannot be granted where the rights of the parties are governed by a valid contract." *U. S. Fire Ins. Co. v. Minnesota State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981) (citing *Cady v. Bush*, 283 Minn. 105, 166 N.W.2d 358 (Minn. 1969)).

Plaintiffs present sufficient evidence establishing (a) an actual controversy between the parties regarding Defendants' form leases and practices in violation of Stat. § 504B.161, the Minnesota Prevention of Consumer Fraud Act, and the Minnesota Uniform Deceptive Trade Practices Act, and (b) ongoing harm to Plaintiffs as a result of Defendants' practices. Defendants reiterate the principle set forth in *U.S. Fire Ins. Co.* that "equitable relief cannot be granted where the rights of the parties are governed by a valid contract." *Id.* (citing *Cady*, 283 Minn. at 105, 166 N.W.2d at 358). Plaintiffs, however, present sufficient evidence which calls into question the legality and enforceability of Defendants' lease. Accordingly, the Court shall deny Defendants' Motion as to Counts IX and X.

J. Rule 56.04(b)

Plaintiffs argue that the Court should exclude Christopher Scallon's testimony under Minn. R. Civ. P. 56.04(c) because Defendants submitted the Declaration of Christopher Scallon without disclosing Scallon as a witness until June 14, 2023 (the day fact discovery closed), and Defendants were thus provided ample opportunity to identify their own witnesses and documents and failed to do so. Alternatively, to the extent the Court is inclined to consider any of Scallon's testimony, Plaintiffs argue that they should be provided the opportunity to take his deposition. Defendants argue that Plaintiff's Rule 56.04 arguments are not compelling because (1) Scallon was disclosed on April 28,

2023 during the deposition of Scallon's supervisor, and before the close of discovery by Defendants, and (2) Plaintiffs' counsel had the opportunity to (and did) question Slankard and other Defendants' witnesses about the 'applications team' as described in Scallon's declaration, and (3) Plaintiffs knew about Scallon and could have chosen to depose him before the close of discovery.

Minn. R. Civ. P. 56.04 provides "[i]f a nonmovant shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . allow time to obtain affidavits or to take discovery; or issue any other appropriate order." Minn. R. Civ. P. 56.04(b)-(c). Although Discovery closed on June 14, 2023, Plaintiffs were made aware of Scallon on April 28, 2023:

> Q. Who were your direct reports?
>
> A. My direct reports have changed over 2023. Currently my direct reports are *Christopher Scallon*, Nicholas Sohl, Harrison Nichols, Nicole Cooper, Robert Lindemann, and Gyna McElwee.
>
> * * *
>
> Q. And is the applications team a team that you supervise?
>
> A. The applications team reports up to Chris Scallon who reports up to me. They are a part of the acquisitions team.[25]

Plaintiffs did not depose Scallon, nor have Plaintiffs brought a motion to compel with respect to this issue. Plaintiffs likewise concede that Scallon was technically disclosed by Defendants prior to the close of discovery. The Court finds that such circumstances do not warrant re-opening discovery. Accordingly, the Court shall deny Plaintiffs' Rule 56.04 requests.

CS

[25] Ex. 7 to Decl. of Carolyn A. Gunkel ("Gunkel Decl.") at 44:25-45:4, 52:11-15 (July 7, 2023) (emphasis added).