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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street, Denver, CO 80202

PLAINTIFFS: **BRANDON SMITH, KENDRA RAYLENE KEELY, LYNETTE RHODES, AND SHIVANI MOHAN,** on behalf of themselves and all others similarly situated

v.

DEFENDANTS: **CARDINAL GROUP MANAGEMENT & ADVISORY, LLC d/b/a CARDINAL GROUP MANAGEMENT; GLENDALE PROPERTIES I, LLC d/b/a MINT URBAN INFINITY; GLENDALE PROPERTIES II, LLC d/b/a/ MINT URBAN INFINITY**

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Case Number: 21CV33357

Div: 275

Attorneys for Plaintiffs:
Jason Legg (#42946)
Scott Cadiz (#42490)
Cadiz Law, LLC
501 S. Cherry St., Suite 1100
Denver CO 80246
720-330-2800

Steven L. Woodrow (#43140)
WOODROW & PELUSO, LLC
3900 East Mexico, Ave. Suite 300
Denver, CO 80210
Telephone: (720) 213-0675
Facsimile: (303) 927-0809

PLAINTIFFS' CORRECTED MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

This lawsuit challenges Defendants' management and ownership of the Mint Urban Infinity Apartment Complex. Cardinal, the property manager, and Glendale/MapleTree, the

owners, operated a veritable "slum" in Southeast Denver. Elevators and air conditioning failed for weeks and months, doors and hallways were unsafe, the pool and laundry facilities were in disrepair, and the property suffered from repeated infestations. The Court should certify 3 classes:

> **1. The "MUI Class":** (1) All persons in the United States (2) who leased a residence from Defendants at Defendants' Mint Urban Infinity Apartment site (3) from the date three years prior to the filing of the initial Complaint in this case through June 30, 2022.
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> **2. The Cardinal Administrative Fee Class:** (1) All persons in the United States (2) who, from the date three years prior to the filing of the initial Complaint in this case through the date notice is sent to the Class, (3) leased a residence in Colorado from Cardinal, (4) using Cardinal's Form Lease, and (4) who Cardinal caused to be charged any Administrative Fee on or after August 2, 2019.
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> **3. The Cardinal Move-Out Fee Class:** (1) All persons in the United States (2) who, from the date three years prior to the filing of the initial Complaint in this case through the date notice is sent to the Class, (3) leased a residence in Colorado from Cardinal (4) using Cardinal's Form Lease and (5) who Cardinal caused to be charged a Move-Out Fee, including those who had any portion of their security deposit withheld in whole or in part to satisfy the Move-Out Fee.

This case will answer for all MUI Class Members—in a single stroke—whether conditions at the property breached the warranty of habitability, whether the Defendants used "customary diligence" to maintain the property, and whether Cardinal unlawfully collected Administrative Fees, Pest Control Fees, and Move-Out Fees. Additionally, and given that Cardinal charges its Administrative Fees and Move-Out Fees across all of its Colorado properties, the Court should certify an Administrative Fee Class and a Move-Out Fee Class covering all Cardinal tenants in Colorado who were assessed such fees. Separate trials are not needed to determine the rights of such tenants—all were charged the same allegedly unlawful fees under the same lease language. If the Named Plaintiffs show the fees violated Colorado law, all tenants who faced or paid such fees should be able to recover.

Each of the Classes meets the elements of Rule 23, and the Court should grant certification.

II. STATEMENT OF FACTS

The MUI Property put Cardinal in the "poor light of being a 'slum lord'"

That MUI suffered from serious unlivable conditions is hardly debatable. As Plaintiffs' expert, Steven Epcar, a real estate professional with several decades of experience managing residential apartments, puts it: "Defendants' breach of landlord duties to maintain habitability is comprehensive." **Ex. A,** Epcar Report, 5. Brett Hughett, Cardinal's portfolio manager charged with oversight for the complex, described "the property, from an ownership level, [a]s being handled as, you know, sort of a run-to-fail operation." **Ex. B,** Hughett Depo. 212:1-3. The property was so rundown one Cardinal employee remarked that "[t]he way we are currently running the community puts Cardinal in the poor light of being a 'slum lord'…The community really tarnishes our reputation." **Ex. C,** Cardinal_015530-015532.

By 2019[1], the conditions at issue in this lawsuit were known to both Cardinal, the property manager, and MapleTree, the property owner that held title through the Glendale entities[2]. *See* **Ex. A,** Epcar Report 7 ("By the time the Plaintiffs began leasing from Defendants in the Spring of 2021, the property already suffered from a substantial number of significantly delayed capital improvements that had been present since at least the Fall of 2019.") Defendants knew the property needed serious repairs. Indeed, in addition to on-site employees, Cardinal's corporate headquarters

[1] A "Property Condition Assessment Report" dated March 2, 2015, obtained by Mapletree in conjunction with its purchase of MUI, made clear that many aspects of MUI, such as the elevators, were near the end of their "Remaining Useful Life". *See* **Ex. D**, Glendale_1275-1283, 1326.
[2] "MapleTree" is used interchangeably with "Glendale" as the real owner in interest.

is located directly next to MUI such that Cardinal personnel, including senior staff, physically looked down on the property. *Id*., 6; *see also* **Ex. B**, Hughett Depo. 202:21-203:10.

Tenants, including the Named Plaintiffs, reported their experiences with the defective conditions to Cardinal.[3] They were not exaggerating. The property suffered from numerous community-wide issues, several of which threatened the health and safety of the residents:

Elevators. The elevators were routinely cited for code violations, and the staff feared them. *See* **Ex. E**, Cardinal_012833 (Hughett Email, March 31, 2021, "As I have attempted to share throughout my oversight of MUl, its elevators are the greatest source of concern and frustration for residents and Cardinal alike. Frankly, they are dangerous and scary."), 010794, 012153, 042622-042623. Nearly every building was impacted. *See Id*.; *see also* **Ex. D; Ex. F,** Cardinal_015163-015164, 015167, 042646-042673, 042678. MapleTree delayed modernization. *See* **Ex. G**, Cardinal_014361 (Hughett Email July 27, 2021, "[T]hey just need to take greater urgency and treat it as a value-add. They do everything by dipping their little toe in the shallow end, only addressing…7 of 15 elevator mods, etc.")[4]; **Ex. E**, at Cardinal_042622-042623 (Marshden Elevator Email March 24, 2021, "This topic has been addressed over the last 3 years and has been presented to your ownership multiple times. Based on the age of this equipment it is pointless and not economical to modernize them on a piece by piece basis.").

Air Conditioning. The air conditioning repeatedly failed during the Summer months, leading to tenant complaints, citations, and public outcry.[5] *See* **Ex. H**, Cardinal_ 015938-015941;

[3] Unless otherwise stated, the Second Amended Complaint is incorporated herein by reference.
[4] MapleTree's interference regularly "prevented [Cardinal] from managing this property in accordance with customary diligence". *See* **Ex. B**, Hughett Depo. 173:9-19.)
[5] *See* **Ex. B**, Hughett Depo. 161:5-10 ("Q [I]s it a fair characterization that it bothered you, as a property manager with over ten years' experience, that your tenants were sweltering in the heat of

see also **Ex. B**, Hughett Depo. 164:19-165:4; *see also* **Ex. I**, Cardinal_013134, 013141, 081220. Defendants' chronic late payments alienated a prior vendor (with a demonstrable competency starting up the A/C units for the season), delaying the start-up of the chillers for the Summer. *See* **Ex. J**, Cardinal_042731-042732, 200813-200814. Cardinal suggested that MapleTree provide a rental abatement for the A/C failures, but MapleTree refused after asking *Cardinal* what it intended to contribute. *See* **Ex. K,** Cardinal_015288.

Pests and Rodents. MUI was routinely infested with pests. **Ex. A,** Epcar Report, 5 ("Plaintiffs experienced on-going safety and risk exposures due to…infestations of bed bugs, and cockroaches that lacked appropriate vermin response."). **Ex. L**, Cardinal_013083-013084. Defendants were informed in 2017 that they must caulk apartment interiors to prevent infestations. **Ex. M**, Cardinal_025049. Despite this, MUI continued to be cited by DDPHE for caulking failures associated with infestations well into 2021. **Ex. N**, Smith_003378-003387 (DDPHE Violations).[6]

Trash in Common Areas. As of January 9, 2020, "the hallways are full of holes and trash is left everywhere." *See* **Ex. P**, Cardinal_009380. Tenants were required to use a "valet trash service", *see* **Ex. Q**, Form Lease, "Utility and Services Addendum" §1.k, that resulted in excess trash in the hallways. *See* **Ex. R**. Cardinal_054798, 054967.

Security Doors. Security doors were broken for months, such that Cardinal complained internally that "[w]e are having homeless people staying and peeing…a lot more than normal."

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a Colorado summer without air conditioning? A It's certainly not a resident experience we would want at any community we manage.")

[6] MUI was repeatedly cited by the Denver Department of Public Health and the Denver Fire Department. *See* **Ex. O**, Cardinal_200929-200931 (DFD had placed MUI under a "fire watch".)

Ex. S, Cardinal_010703-010704. In October 2019, Cardinal's staff identified a need to fix the doors "in a way so that this doesn't keep happening." *See* **Ex. T**, Cardinal_117627.

Indoor/Exterior Lighting. Hallway lighting was listed as a MUST HAVE agenda item dating back to November of 2019. *See* **Ex. U**, Cardinal_008428.

The Pool. It is undeniable that the pool looked "like a swamp" and was a shade of green. **Ex. B**, Hughett Depo. 212:5-8. Hughett admitted "there might be some shared responsibility" with Cardinal. *Id*., Hughett 212:16-18; *see also* **Ex. V**, Cardinal_012133, 107508.

Retaining Wall and Asphalt. Defendants also delayed making necessary improvements to sidewalks and retaining walls for years, posing safety hazards. *See* **Ex. D** at Glendale_1281, *see also* **Ex. W**, Cardinal_002266-002267. It was not until late-April 2021 that the repair job was awarded after a vendor had dropped out a year earlier.[7]

By July 2021, these issues had come to a head. On July 14, 2021, Hughett wrote to Garnic:

> We are falling further behind at MUI every day and are only able to handle emergent items for the foreseeable future. We anticipate our last remaining Leasing Team Member to be giving Notice today, so although we have identified our ACM replacement, we'll be back to needing to re-hire four of six office positions. With chillers, gas leaks, retaining wall project, asphalt project, disgruntled residents, Notices of Violations/OTCs, HUD Complaint, and the list goes on, iAuditor rebids are pretty far down the list at this time.[8]

Epcar explains that this falls far short of customary diligence:

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[7] This was due to MapleTree's process and late payments. *See* **Ex. X**, Cardinal_011351 (March 20, 2020, Email from Hughett to Garnic, "I just received an update from Denver Concrete…They have found the application process overly cumbersome and not worth their time….")

[8] On July 23, 2021, a Cardinal employee wrote: "Brett, we are in desperate need of some additional maintenance help at MUI. With the ongoing issues with the chillers and multiple leaks/emergencies, we do not have the capacity with the current team to properly handle and address anything in a timely manner. We are drowning, and the residents have been relentless." **Ex. Y**, Cardinal_014297.

> In my 45 years of operating real estate management companies, overseeing third-party real estate firms and providing consulting services to property management firms, I have never seen an email such as the one sent by Mr. Hughett. It desperately and succinctly conveys the dysfunction, lack of control, and hopelessness of the management conditions which exist at MUI.

Ex. A, Epcar Rep., 7.

In sum, MUI suffered from systemic issues effecting the common areas.

In Addition to Failing to Maintain MUI, Cardinal Assessed Administrative Fees and Move-Out Fee that Plaintiffs Claim are Unlawful.

Cardinal also charged, as set forth in its Form Leases[9] Administrative Fees, Pest Control Fees, and Move-Out Fees. Plaintiffs challenge Cardinal's assessment of Administrative fees under Colorado's Rental Application Fairness Act, C.R.S. § 38-12-901 *et seq*., and the Move-Out Fees as unlawful penalties, both of which were uniformly charged to all of Cardinal's Colorado tenants. The MUI Class also challenges the Pest Control Fee, given systemic infestations.

As set forth below, these facts support the certification of at least 3 classes.

III. ARGUMENT

"The basic purpose of a class action is to eliminate the need for repetitious filing of many separate lawsuits involving the interests of large numbers of persons and common issues of law or fact by providing a fair and economical method for disposing of a multiplicity of claims in one lawsuit." *Patterson v. BP Am. Prod. Co.*, 240 P.3d 456, 461 (Colo. App. 2010), *aff'd*, 263 P.3d 103 (Colo. 2011) (quoting *Mountain States Tel. & Tel. Co. v. District Court*, 778 P.2d 667, 671 (Colo.1989)). Rule 23 "should be liberally construed in light of its policy favoring the maintenance

[9] The Form Leases, used at all Cardinal properties, were non-negotiable as to repairs, maintenance, and the Challenged Fees. *Id.*, 72:18-21. *See e.g.* **Ex. B**, Hughett Depo. 72:14-17.

of class actions[, and] trial courts generally should accept the plaintiff's allegations in support of certification." *Jackson v. Unocal Corp.*, 262 P.3d 874, 881 (Colo. 2011).

Here, each class meets the requirements of Rule 23 and should be certified.

A. The Court should first certify a Class of Cardinal Tenants at MUI.

As set forth below, the MUI class meets the requirements of Colorado Rule 23[10].

1. Membership may be determined by wholly objective criteria.

As a preliminary matter, an "ascertainable class definition" is often viewed as an implied prerequisite to certification. *See Edwards v. Zenimax Media Inc.*, No. 12-CV-00411-WYD-KLM, 2012 WL 4378219, at *4 (D. Colo. Sept. 25, 2012). If the court "can ascertain the members of the class by reference to objective criteria, then the class is adequately defined." *Edwards*, 2012 WL 4378219, at *4; *see* 5 James Wm. Moore et al., Moore's Federal Practice, ¶ 23.21[1] (3d ed. 2001) (same.). There is no need to identify every potential member. *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 382 (D.Colo.1993); *see also Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015) (There is no "requirement that plaintiffs prove at the certification stage that there is a 'reliable and administratively feasible' way to identify all who fall within the class definition.").

In this case, each of the 3 requirements for membership in the MUI Class are entirely objective: there is nothing subjective about whether someone lives in the United States or if they leased a residence at MUI during the relevant period. As such, the MUI class is ascertainable.

2. The MUI Class consists of hundreds of Cardinal tenants if not more.

[10]Colorado courts "look to case law interpreting C.R.C.P. 23's federal counterpart, Fed. R. Civ. Proc. 23, for guidance…." *Farmers Ins. Exch. v. Benzing*, 206 P.3d 812, 818 (Colo. 2009) (citing *Goebel v. Colo. Dep't of Insts.*, 764 P.2d 785, 794 n. 12 (Colo.1988)). That said, there are differences. *See Jackson*, 262 P.3d at 884 ("To the extent recent federal circuit court decisions are based on a policy of limiting class actions…they are not persuasive.")

"A party seeking class certification is required to establish by competent evidence that the class is sufficiently large to render joinder impracticable." *Kniffin v. Colo. W. Dev. Co.,* 622 P.2d 586, 592 (Colo.App.1980). "The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *Cook v. Rockwell Int'l Corp., supra,* 151 F.R.D. at 384 (quoting *Gen. Tel. Co. v. Equal Employment Opportunity Comm'n,* 446 U.S. 318, 330, 100 S.Ct. 1698, 1706, 64 L.Ed.2d 319 (1980)); "[N]umerosity…is satisfied where the exact size of the class is unknown but general knowledge and common sense indicate that it is large." *LaBerenz v. Am. Family Mut. Ins. Co.*, 181 P.3d 328, 334-35 (Colo. App. 2007); *see e.g. Neiberger v. Hawkins*, 208 F.R.D. 301, 313 (D. Colo. 2002) (court may use common sense when determining whether joinder is impractical.).[11]

Here, MUI consisted of approximately 561 apartment units, and there was steady turnover. Cardinal Answer to First Amd. Compl., ¶ 1; *see also* **Ex. S**, Cardinal_010703. Further, data produced show that Cardinal charged over $600,000 in the challenged fees to its MUI tenants alone. *See* **Ex. Z**, Glendale MUI Financials. Common sense indicates numerosity is met.

3. The MUI Class Members' share common issues including whether: conditions at MUI breached the warranty of habitability, Defendants acted with customary diligence, and the Challenged Fees were lawful.

Commonality requires only a single common issue. *Colorado Cross-Disability Coal. v. Abercrombie & Fitch Co.*, No. 09-CV-02757-WYD-KMT, 2012 WL 1378531, at *3 (D. Colo. Apr. 20, 2012); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S.Ct. 2541, 2545-46, 180 L.Ed.2d 374 (2011) ("[E]ven a single common question will do."). Factual "differences in the

[11] Some courts presume numerosity at 40 members. *See Stewart v. Abraham,* 275 F.3d 220, 226–227 (3d Cir. 2001); *see also Consol. Rail Corp. v. Hyde Park,* 47 F.3d 473, 483 (2d Cir.1995) (presuming numerosity at forty members).

claims of the class members should not result in a denial of class certification where common questions of law exist." *Joseph v. Gen. Motors Corp*., 109 F.R.D. 635, 640 (D. Colo. 1986) (*quoting Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983)). As set forth below, the instant litigation will answer for every MUI Class member—in a single stroke—whether the property suffered from defects that violated Colorado's warranty of habitability, whether Defendants failed to maintain the property with customary diligence, and whether Defendants unlawfully assessed the Challenged Fees.

a. Common Issue 1: Did the property suffer from conditions that violated Colorado's Warranty of Habitability?

The first common issue asks whether the property violated the warranty of habitability. Every MUI Class Member has an identical legal right to a premises kept in a habitable condition.[12] Colorado's warranty of habitability statute requires that landlords maintain:

> (I) Functioning appliances that conformed to applicable law at the time of installation and that are maintained in good working order;
> (II) Waterproofing and weather protection of roof and exterior walls maintained in good working order, including unbroken windows and doors;
> (III) Plumbing or gas facilities that conformed to applicable law in effect at the time of installation and that are maintained in good working order;
> (IV) Running water and reasonable amounts of hot water at all times furnished to appropriate fixtures and connected to a sewage disposal system approved under applicable law;
> (V) Functioning heating facilities that conformed to applicable law at the time of installation and that are maintained in good working order;
> (VI) Electrical lighting, with wiring and electrical equipment that conformed to applicable law at the time of installation, maintained in good working order;
> (VII) Common areas and areas under the control of the landlord that are kept reasonably clean, sanitary, and free from all accumulations of debris, filth, rubbish, and garbage and that have appropriate extermination in response to the infestation of rodents or vermin;

[12] *See* C.R.S. § 38-12-503(1) ("In every rental agreement, the landlord is deemed to warrant that the residential premises is fit for human habitation.")

> (VIII) Appropriate extermination in response to the infestation of rodents or vermin throughout a residential premises;
> (IX) An adequate number of appropriate exterior receptacles for garbage and rubbish, in good repair;
> (X) Floors, stairways, and railings maintained in good repair;
> (XI) Locks on all exterior doors and locks or security devices on windows designed to be opened that are maintained in good working order; or
> (XII) Compliance with all applicable building, housing, and health codes, the violation of which would constitute a condition that materially interferes with the life, health, or safety of the tenant.

C.R.S. § 38-12-505. Landlords must also ensure that conditions do not otherwise materially interfere with a tenant's life, health, or safety. C.R.S. § 38-12-503(2)(a)(II). Whether the property's common areas systemically suffered from infestations, elevator entrapment risks, fire hazards, security threats, and other conditions that violated the warranty of habitability—and the Defendants' response to those conditions—present common issues for the MUI tenants. *See e.g. Diamond v. New York City Hous. Auth*., 179 A.D.3d 525, 528, 118 N.Y.S.3d 77, 80 (2020) (questions related to "the heating systems that failed served multiple housing units, and proof of NYCHA's efforts to repair each system will be common to numerous class members."); *see also Phillips v. Waukegan Hous. Auth.*, 331 F.R.D. 341, 351 (N.D. Ill. 2019) ("Determining whether the defendants' systemic response to the bedbug infestation was adequate…[presents] [c]ommon questions…."); *Peviani v. Arbors at California Oaks Prop. Owner, LLC*, 62 Cal. App. 5th 874, 891–92, 277 Cal. Rptr. 3d 223, 237 (2021), *reh'g denied* (Apr. 29, 2021), *review denied* (July 14, 2021) ("[T]he condition of the dumpsters and the grounds is not an individualized issue—it is the same for everyone.")

As a hearing on the merits will show for every MUI Class Member, "Defendants' breach of landlord duties to maintain habitability is comprehensive." **Ex. A**, Epcar Report, 5. The property was routinely infested with pests. *Id.*, at 6. There were an inadequate number of exterior dumpsters.

See **Ex. AA**, Smith_003182-003184. The elevators were routinely cited for code violations and the staff feared using them. *See* **Ex. F**. Security doors were broken for months. **Ex. S**.[13] The hallways were filled with garbage. *See* **Ex. AA**, Smith_003182-003184. And during the summer months, A/C outages threatened their health and welfare. This is not a case where an apartment complex featured a unit or two that suffered from certain material defects. Far from it, the problems were pervasive throughout the property, and a single forum is all that's required to determine whether these issues, and the Defendants' attempts to address them, breached the warranty of habitability. Commonality is met because the answer is the same for everyone.

b. Common Issue 2: Did Defendants act with customary diligence?

A second (and related) common issue asks whether MUI was maintained in accordance with "customary diligence." "It is not difficult to find common factual and legal questions within a class of plaintiffs who all signed form contracts containing identical provisions." *Maez v. Springs Auto. Grp., LLC*, 268 F.R.D. 391, 396 (D. Colo. 2010); *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1171 (11th Cir. 2010); 2 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:24 (5th ed. 2012) (stating that claims arising out of "form contracts" are often "particularly appropriate for class action treatment"); *Arenson v. Whitehall Convalescent and Nursing Home, Inc.*, 164 F.R.D. 659, 664 (N.D.Ill. 1996) (same); *see also Seeger v. AFNI, Inc.*, No. 05-cv-0714, 2006 WL 2290763 (E.D. Wis. Aug. 9, 2006) (adhesion contracts well-suited to class certification, even where different versions exist).

[13] Natalie Rosario, an on-site Cardinal employee who dealt with tenants day-to-day, remarked in February 2021, "One thing we should do is remove the word 'Luxury' from any advertisement immediately as we are far from that!" *See* **Ex. AB,** CARDINAL_12814.

Every MUI Class Member had a tenancy at MUI governed by Cardinal's Form Lease. The Form Lease states that Defendants will act with "customary diligence to":

> (1) keep common areas reasonably clean, subject to paragraph 26 (Conditions of the Premises and Alterations);
> (2) Maintain fixtures, furniture, hot water, heating and A/C equipment;
> (3) comply with applicable federal, state, and local laws regarding safety, sanitation, and fair housing; and
> (4) make all reasonable repairs, subject to your obligation to pay for damages for which you are liable.

Ex. Q, Form Lease, § 32.)[14] Defendants here failed to act with customary diligence with respect to the conditions that impacted the entire community. *See* **Ex. B**, Hughett Depo. 161:15-17 ("[N]ot having functioning AC when that's part of the lease agreement is not customary diligence"); 128:13-18 ("Not having any concrete replacement in four to five years" is inconsistent with customary diligence); 130:19-25 - 131:1-5 (funding delays not customary diligence).[15] Mr. Epcar agrees.[16] *See* **Ex. A**, Epcar Report 7 ("In my opinion, Defendants failed to use customary diligence to keep common areas reasonably clean, maintain fixtures, hot water, heating, and A/C equipment, to substantially comply with applicable federal, state, and local laws regarding safety, sanitation and fair housing, and make all reasonable repairs…."). Cardinal was plainly overwhelmed. *See* **Ex. Y**, Cardinal_014297 (July 23, 2021, Email from Cardinal, "We do not have the ability to

[14] The lease also uses customary diligence to describe a tenant's duties. **Ex. Q**, Form Lease, § 26.
[15] One of Cardinal's Rule 30(b)(6) designees, Brian Hawthorne, attempted to walk this back several weeks later during his deposition, but his assertions lack substantiation. *See* **Ex. AD**, Hawthorne Depo. 115:9-117:22.
[16] Defendants' experts insist that customary diligence was used. *See* **Ex. AE**, Defendants' Expert Reports. Relevant to certification, however, is that the eventual answer will be the same with respect to every MUI Class Member. *See Jackson*, 262 P.3d at 886 ("At the class certification stage, however, a trial court need not determine which expert will ultimately prevail for that is simply a merits decision best left for the jury.")

properly handle/address anything in a timely manner"). And evidence suggests that Cardinal marked maintenance requests as having been "complete"—often the same day as the request was submitted—despite the fact they had never been addressed at all. *See* **Ex. AC,** Smith_004379 (Data compilation and summary of Cardinal_015150-015115, a spreadsheet recording tenant maintenance requests and their resolution from January 1, 2021, through October 31, 2021).

Again, critical for now is that the answer will be the same for everyone: Defendants either acted with customary diligence to make repairs to the common areas or they did not. Whether customary diligence was met thus presents another common issue under Rule 23(a)(2).

c. Common Issue 3: Are Defendants jointly liable for failing to manage the property?

A third common question asks whether both Defendants are liable. Under the common law, "an agent who negotiates a contract with a third party can be sued for any breach of the contract unless the agent discloses both the fact that he or she is acting on behalf of a principal *and* the identity of the principal." *Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997, 1001 (Colo. 1998). An "agent is liable on contracts negotiated on behalf of a 'partially disclosed' principal; that is, a principal whose existence—but not identity—is known to the other party." *Id*. 955 P.2d 997, 1002. Whether a principal is partially or completely disclosed is a question of fact. *Id*. at 1002.

The leases list Cardinal as the "Landlord's Authorized Agent" and are between the tenants and the "owner listed above"—listed as "Mint Urban Infinity." (*See* Form Lease § 1.) Mint Urban Infinity is a d/b/a used jointly by two limited liability companies, both of which are merely holding companies for MapleTree. And Cardinal's on-site staff used emails identifying themselves as employees of MUI. Whether this is a partial or complete disclosure is a common question, and a

hearing will resolve whether Cardinal may be liable under agency principles or other theories.[17] That the answer will be the same for every class member satisfies commonality.

d. Common Issue 4: Were Defendants' Administrative Fees, Pest-Control Fees, and Move-Out Fees lawfully assessed?

A third common issue for the MUI Class asks whether Defendants lawfully assessed and collected Administrative Fees, Pest Control Fees, and Move-Out Fees.

Administrative Fees. First, Plaintiffs allege that Cardinal charges "Administrative Fees" in violation of the Colorado Rental Application Fairness Act, C.R.S. § 38-12-901 *et seq*. ("RAFA"). Under RAFA, "[a] landlord shall not charge a prospective tenant a rental application fee unless the landlord uses the entire amount of the fee to cover the landlord's costs in processing the rental application." C.R.S. § 38-12-903. RAFA defines "rental application fee" to mean:

> any sum of money, however denominated, that is charged or accepted by a landlord from a prospective tenant in connection with the prospective tenant's submission of a rental application or any nonrefundable fee that precedes the onset of tenancy. "Rental application fee" does not include a refundable security deposit or any rent that is paid before the onset of tenancy.

Colo. Rev. Stat. Ann. § 38-12-902(5). As a hearing on the merits will show, the Administrative Fees are rental application fees. The Administrative Fees were charged and accepted in connection with the tenant's submission of a rental application. Cardinal's expert, Joel Murovitz, admits that the Administrative Fee "covers the time and resources required to start the tenancy by setting up the new tenant in the property management system… and allows the landlord to take the apartment off the market *during the application process*." **Ex. AE**, Murovitz Rep. ¶ 26(b) (emphasis added).

[17] It should be noted that substantial evidence shows Cardinal independently failed to act with customary diligence through self-dealing, a failure to treat the chillers and maintain the pool, and a refusal to act independently in emergency situations.

Further, the fees were non-refundable, and Cardinal often charged and collected them before the onset of tenancies. *See e.g*. **Ex. B**, Hughett Depo. 62:13-15; *see also* **Ex. AG**, Smith_ 004376-004378 (Cardinal "Welcome Home Letter" noting Administrative Fee was collected on December 23, 2021 when lease commenced December 28, 2021.) Critical for the purposes of Rule 23(a)(2) commonality is that the answer to the question—"were the Administrative Fees 'rental application fees' under RAFA?"—will be the same for everybody: the Administrative Fees were rental application fees, or they were not, for *every* class member. As such, whether the Administrative Fees violated RAFA presents another common issue.

Pest Control Fees. The legality of the Pest Control Fees also presents a common issue for the MUI Class members. Colorado's Warranty of Habitability statute places the onus on the landlords to ensure appropriate "extermination in response to the infestation of rodents or vermin." Colo. Rev. Stat., § 38-12-505(1)(b)(VIII), *see also* Colo. Rev. Stat., §§ 38-12-503(5), 506 (setting forth the single exception for when a landlord may delegate responsibilities under the statute to tenants.) The Form Lease, however, contains a Pest Control Addendum that shifts the burden and cost of pest control onto tenants. **Ex. Q**, Pest Control Addendum, § 6 ("Resident shall practice good housekeeping to prevent pest infestations and to promptly eradicate them."); § 9 ("Owner is not liable to Resident for any damages caused by pests….") Under the "Utility And Services Addendum" each tenant was charged a $2 flat rate per month for Pest Control Services. (Utility and Services Addendum § 1.j.)

Given the persistent infestations and the Defendants' duty to ensure the property is free from infestations, another common question asks whether the $2 monthly charge was reasonable or otherwise void as against public policy. The answer will be the same for every class member.

Move Out Fees. The Move-Out Fees present another common issue. Plaintiffs allege that the Move-Out Fees are either unlawful penalties or lawful liquidated damages, but not both:

> A liquidated damages provision is valid and enforceable if three elements are met: (1) "the parties intended to liquidate damages"; (2) "the amount of liquidated damages, when viewed as of the time the contract was made, was a reasonable estimate of the presumed actual damages that the breach would cause"; and (3) "when viewed again as of the date of the contract, it was difficult to ascertain the amount of actual damages that would result from a breach." *Klinger v. Adams Cty. Sch. Dist. No. 50*, 130 P.3d 1027, 1034 (Colo. 2006) (quoting *Rohauer v. Little*, 736 P.2d 403, 410 (Colo. 1987)). If any one of the elements is not met, the provision is an invalid penalty. *Id.* A penalty differs from a liquidated damages clause because "a penalty is designed to punish for a breach of contract[,] whereas liquidated damages are intended as fair compensation for the breach." 25A C.J.S. Damages § 200 (2016).

Ravenstar, LLC v. One Ski Hill Place, LLC, 2017 CO 83, ¶ 10, 401 P.3d 552, 555.[18] Again, as will be explained on the merits, the Move-Out fees were unlawful penalties. Despite boilerplate lease language, the parties never intended to liquidate damages, the amounts charged for the Move-Out fees were excessive, and predicting the "damages" in case of any early move-out, or in the event a tenant didn't provide 60-days advance notice or non-renewal, were not difficult to estimate.[19] *See e.g. Kirkland v. Allen*, 678 P.2d 568, 571 (Colo. App. 1984) ("[L]andlords cannot demonstrate why any damages resulting from tenant's breach are 'difficult to prove.")

For the purposes of certification—and again central to Rule 23(a)(2)—the critical fact is that the answer will be the same for every MUI Class Member: the Move-Out fees were either

[18] *See also Sun Ridge Inv'rs, Ltd. v. Parker*, 1998 OK 22, ¶ 13, 956 P.2d 876, 878 ("In reviewing the case at bar, we find that the $5.00 per day 'additional rent' sought to be imposed for late-payment or non-payment of rent is a penalty."); *Harbours Condo. Ass'n, Inc. v. Hudson*, 852 N.E.2d 985, 992 (Ind. Ct. App. 2006) (late fees were "an unenforceable penalty, not liquidated damages."); *Arbors Condo. Ass'n v. Abdella*, No. 240796, 2003 WL 22339475, at *4 (Mich. Ct. App. Oct. 14, 2003) (same).

[19] Cardinal was able to access vacancy rates "essentially in real time," **Ex. B**, Hughett Depo. 104:22-25, and it knew its turnover costs, aiming to relet units within 5 days. *Id*., 108:1-8.

unlawful penalties or lawful liquidated damages with respect to all of them. The question of intent is the same for everyone, the amounts were uniformly excessive, and any claimed difficulty in calculating damages did not vary tenant-by-tenant. As such, this litigation will answer for every MUI Class Member whether the Move-Out Fees were unlawful penalties.[20]

In sum, this case will answer for the MUI Class Members whether conditions at MUI violated the warranty of habitability, whether Defendants acted with customary diligence, and whether the Challenged Fees were unlawful. As such, Rule 23(a)(2) is satisfied.

4. The Named Plaintiffs are members of the MUI Class and have claims that are typical of the other MUI Class Members.

The next prong, typicality, requires "a nexus between the class representatives' claims or defenses and the common questions of fact or law which unite the class." *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 385 (D. Colo. 1993); *Devora v. Strodtman*, 2012 COA 87, ¶ 29, 282 P.3d 528, 533 (same) (internal citations omitted). Typicality:

> requires that the class representative claims be typical of the class and that the class claims are encompassed by the named plaintiffs' claims. This requirement is usually met "[w]hen it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented ... irrespective of varying fact patterns which underlie individual claims."

1 H. Newberg, *Newberg on Class Actions* § 3–13, at 3–77 (3d ed.1992); *see also Ammons v. Am. Family Mut. Ins. Co.*, 897 P.2d 860, 863 (Colo. App. 1995); *LaBerenz v. Am. Family Mut. Ins. Co.*, 181 P.3d 328, 338 (Colo. App. 2007). The claims or facts need not be identical. *Patterson*, 240 P.3d at 462 ("[T]he requirement of typicality may be satisfied even though varying fact

[20] To the extent any penalties were deducted from security deposits, such tenants have deposit claims, raising further common issues. *See e.g. Silver v. Rudeen Mgmt. Co., Inc.*, 197 Wash. 2d 535, 544, 484 P.3d 1251, 1255 (2021) (reversing dismissal of security deposit class action).

patterns support the claims or defenses of individual class members, and even though there is disparity in the damages claimed by the class representatives and the putative class members.").

Applied here, each of the Named Plaintiffs is typical of the absent MUI Class members. All the Named Plaintiffs leased units at MUI during the relevant period of time. And if the Named Plaintiffs prevail on their claims for breach of the warranty of habitability, breach of contract, and other theories, then the absent class members will be entitled to relief on those causes of action as well. Conversely, the opposite is also true: if the Named Plaintiffs lose on the merits, so too would the remaining class members. As such, the Court should find typicality is satisfied here.

5. Plaintiffs and their counsel are adequate representatives.

The final requirement of Rule 23(a) is adequacy of representation. "Adequate representation includes inquiry into (1) adequacy of representative and (2) adequacy of counsel." *Kuhn v. State Dep't of Revenue of State of Colo.*, 817 P.2d 101, 105-06 (Colo. 1991) (citing J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 23.07[1] (2d ed. 1991)); *see also Sosna v. Iowa*, 419 U.S. 393, 403, 95 S.Ct. 553, 559, 42 L.Ed.2d 532 (1974) ("[W]here it is unlikely that segments of the class appellant represents would have interests conflicting with those she has sought to advance, and where the interests of that class have been competently urged at each level of the proceeding, we believe that the test of [adequate representation] is met").

The Named Plaintiffs are adequate representatives. Each has been involved in the case by communicating with counsel, answering discovery, and sitting for their depositions. They have kept themselves abreast of the lawsuit and the underlying claims and have no conflicts with absent class members. Proposed Class Counsel, Steven Woodrow of Woodrow & Peluso, LLC and Jason Legg of Cadiz Law, LLC are also adequate. In addition to having no actual conflicts, they have

experience in class actions against Colorado landlords. *See* **Group Ex. AH**, Firm Resumes. They have also researched the claims, expended thousands in costs, and have diligently pursued the lawsuit—all while facing a risk of nonpayment. Class counsel are therefore adequate.

Having met the requirements of Rule 23(a), the analysis shifts to Rule 23(b).

6. The Court should certify the MUI Class under both Rule 23(b)(2) and Rule 23(b)(3).

In addition to the elements of Rule 23(a), Plaintiffs must show that certification is proper under one of the provisions of Rule 23(b). Colorado courts generally avoid certifying classes under *both* Rule 23(b)(2) (injunctive and declaratory relief) and Rule 23(b)(3) (classes seeking damages). Rather, where the primary relief sought is damages, the analysis should be restricted to Rule 23(b)(3). *See e.g. Goebel v. Colorado Dep't of Institutions*, 764 P.2d 785, 795 (Colo. 1988) (citing 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 23.45[1] (1987)); *see also State v. Buckley Powder Co.*, 945 P.2d 841, 845 (Colo. 1997) (C.R.C.P. 23(b)(2) (explaining that Rule 23(b)(2) "certification is not prohibited where damages are sought in addition to the injunctive and declaratory relief if the damages can be characterized as incidental to the other relief requested.") This has to do with the sending of notice, which is not required for Rule 23(b)(2) classes. As set forth below, certification is appropriate here under either Rule 23(b)(2) or Rule 23(b)(3) or both (and notice should be sent in any case).

a. Rule 23(b)(2) certification is available for injunctive and declaratory relief with respect to Defendants' collection efforts.

Though the MUI Class predominantly seeks money damages, they also seek injunctive and declaratory relief that the Court could find appropriate for certification under Rule 23(b)(2), though notice should still be disseminated. Rule 23(b)(2) certification is allowed where "The party

opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." C.R.C.P. 23. That is the case here: Defendants failed to maintain the property's common elements. Declarations that conditions breached the warranty of habitability, that Defendants acted absent customary diligence, and that the Challenged Fees were unlawful, plus an injunction barring the collection of unlawful sums, would benefit every MUI Class Member.

That said, the primary relief remains monetary damages. As such, to the extent the Court adheres to *Goebel* and *Buckley Power Co.,* the focus should be on Rule 23(b)(3).

b. Rule 23(b)(3) certification for damages is appropriate because common issues predominate and a class action is both manageable and superior.

Certification is most appropriate under Rule 23(b)(3). The common questions predominate, and a class would be both manageable and superior.

1) The Common Questions Predominate.

C.R.C.P. 23(b)(3)'s predominance inquiry focuses on "whether the proof at trial will be predominantly common to the class or primarily individualized." *Garcia v. Medved Chevrolet, Inc.,* 263 P.3d 92, 98 (Colo. 2011) (quoting *Medina v. Conseco Annuity Assur. Co.,* 121 P.3d 345, 348 (Colo. App. 2005)). Predominance is found more readily when the focus is on the Defendants' common conduct. *BP Am. Prod. Co. v. Patterson,* 263 P.3d 103, 111 (Colo. 2011) (common issues predominate where "the inquiry necessarily focuses on defendants' conduct, that is, what defendants did rather than what plaintiffs did."). Predominance is a "fact-driven, pragmatic inquiry." *BP Am. Prod. Co.*, 263 P.3d at 109 (quoting *Medina,* 121 P.3d at 348 (Colo. App. 2005)).

Common issues predominate here. Whether the common areas suffered from defects that violated Colorado's Warranty of Habitability statute and breached the Defendants' duties under

the Form Lease predominate over any individualized issues. *See e.g. Peviani*, 62 Cal. App. 5th at 893, 277 Cal. Rptr. 3d at 238 ("The evidence does not demonstrate that there are individualized issues concerning the habitability of the common areas. Instead, it shows that similar questions will arise among each member of the putative class.") The proof at trial will be common to the MUI Class members—the very same emails, purchase orders, invoices, annual budgets, and testimony will be used with respect to everyone to show that the Defendants breached the warranty of habitability or failed to act with customary diligence in making repairs. *See Medina*, 121 P.3d at 348 (citing *In re Polypropylene Carpet Antitrust Litig.*, 996 F.Supp. 18, 22 (N.D.Ga.1997) ("[T]o satisfy the requirements of predominance, the '[p]laintiffs must show they plan to use common evidence...without resorting to lengthy individualized examination'").

Here, with respect to the claims based on the defective conditions, the issues "were community-wide and building-wide problems that are identifiable in Defendants' records, including their emails, as well as from governmental documents, discovery responses, tenant testimony, and the public record." **Ex. A**, Epcar Rep. 9.[21] There are no individualized issues as to the common elements. Similarly, the common issues also predominate related to the Challenged Fees. Put simply, given the uniform contract language and policies, there are no individual defenses related to the Administrative Fees, Pest Control Fees, or Move-Out Fees.

That damages may have to be ascertained on an individual basis does not defeat class certification either. *Menocal v. GEO Grp., Inc.*, 882 F.3d 905, 922–23 (10th Cir.), *cert. denied*, 139 S. Ct. 143, 202 L. Ed. 2d 34 (2018) (quoting *Wallace B. Roderick Revocable Living Tr. v.*

[21] To the extent necessary, the Court can designate building-specific subclasses. *See e.g. Diamond*, 179 A.D.3d at 527, 118 N.Y.S.3d at 80; *Roberts v. Ocean Prime, LLC*, 148 A.D.3d 525, 49 N.Y.S.3d 666 1st Dept. 2017) (court can designate subclasses as needed).

XTO Energy, Inc., 725 F.3d 1213, 1220 (10th Cir. 2013) (citations omitted); 6 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 18:27 (4th ed. 2002) ("A particularly significant aspect of the Rule 23(b)(3) approach is the recognition that individual damages questions do not preclude a Rule 23(b)(3) class action when the issue of liability is common to the class.").[22] Under Colorado law, a constructively evicted tenant is entitled to damages that were the actual, natural, direct and proximate result of the wrongful eviction and conversion of the property. *Clark v. Morris*, 710 P.2d 1130, 1133 (Colo. App. 1985); *Radinsky v. Weaver*, 170 Colo. 169, 460 P.2d 218 (1969). As Mr. Epcar explains:

> For purposes of calculating damages, it is possible to identify each defective condition that is ultimately proven and assign either a dollar value for the monthly abatement that would have been due or percentage of the rent reduction representing the condition's negative impact on the monthly rental amount. A tenant who was exposed to that condition during the months the condition persisted would receive a rental abatement equal to the conditions suffered multiplied by each month the conditions persisted that the tenant resided at the premises.

Ex. A, Epcar Rep. 9-10 (providing damages matrix); *see e.g. Baker v. Equity Residential Mgmt., L.L.C.*, 390 F. Supp. 3d 246, 263 (D. Mass. 2019) ("In any event, a substantial heat or hot water outage should reduce the value of the typical apartment by the same amount.") Epcar further opines that for any months "where the air conditioning, elevators, and at least one other condition were present" in the tenant's building, the rental abatement should be 100%. (Epcar Rep. 10.) Mapletree's expert seemingly agrees. **Ex. AF**, McPherson Depo. 205:24-209:2 (admitting that a two-week air-conditioning outage is an example of when a one-fourth month's rent abatement is

[22] Indeed, predominance "usually involves liability, not damages." *State Farm Mut. Auto. Ins. Co. v. Reyher*, 266 P.3d 383, 387 (Colo. 2011); *Buckley Powder Co.*, 70 P.3d at 554.

appropriate and that the amount of such abatements would vary based on duration of the issue.) Class damages will not be difficult to calculate here. Common issues therefore predominate.

2) A Class Action is Both Manageable and Superior.

Rule 23(b)(3) further requires that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." Matters pertinent to this finding include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and; (D) the difficulties likely to be encountered in the management of class action."

Id. The "class action device is frequently superior where proceeding individually would be difficult for class members with small claims." *Belote v. Rivet Software, Inc.*, No. 12-CV-02792-WYD-MJW, 2013 WL 2317243, at *4 (D. Colo. May 28, 2013) (citing *Seijas v. Republic of Argentina,* 606 F.3d 53, 58 (2d Cir. 2010)). Certification is warranted where "an issue potentially affecting every [class member] [may] be litigated in an economical fashion under Rule 23." *Gen. Tel Co. of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982) (quotation omitted). [23]

A class is superior in this case. No one else has expressed an interest in filing a separate case—rather, absent class members are watching the instant matter to learn of their rights. This is the appropriate forum as well: while government entities inspected and cited the property, Defendants resisted efforts that would have required them to make needed repairs. This Court will not face any similar enforcement issue. Meanwhile, individual cases are not possible. Plaintiffs

[23] It's worth nothing that in New York, for example, it is well settled that expert testimony is not required as both the landlord and tenant are "competent to give their opinion as to the diminution in value occasioned by the breach." *Park W. Mgmt. Corp. v. Mitchell*, 47 N.Y.2d 316, 329–30, 391 N.E.2d 1288 (1979).

may have suffered several thousand dollars in damages, but it is not enough to warrant individual litigation. To date, depositions, experts, and other costs exceed $15,000. Absent certification, there is little incentive to pursue this case.

Nor will certification pose managerial difficulties. The evidence is common, and data may be used to identify MUI Class Members and disseminate the Class Notice (advising class members of the claims in this lawsuit and their right to exclude themselves). Plaintiffs' Counsel or an administrator can field inquiries. As such, a class is manageable as well.

In short, the MUI Class satisfies Rule 23(b)(3), and should be certified.

B. The Court should also certify Classes of all persons who leased a residence from Cardinal Anywhere in Colorado using Cardinal's Form Lease Who Were Charged Administrative Fees or Who Were Charged Move-Out Fees.

The Administrative Fee Class and the Move-Out Fee Class also satisfy each of the requirements of Rule 23(a) and 23(b)(3). Cardinal assessed its Administrative Fees and Move-Out Fees across all of its properties in Colorado using the same Form Lease. If the Proposed Class Representatives demonstrate at trial that Cardinal's Administrative Fee was an Application Fee under C.R.S. § 38-12-902(5) and that Cardinal failed to follow the statute's requirements, then those fees were unlawfully assessed across all of Cardinal's Colorado properties. The same applies to the Move-Out Fees: if the Named Plaintiffs prevail in demonstrating that the Move-Out Fees are unlawful penalties under Colorado law as opposed to lawful liquidated damages, then the fees are penalties no matter which Cardinal-managed property the tenant happened to have lived at. Common evidence will be used to prove the claims, and separate lawsuits are unnecessary (and pose a risk of inconsistent rulings).

For all these reasons, the Court should certify both the Administrative Fee Class and the Move-Out Fee Class in this proceeding.

IV. CONCLUSION

Tenants who lived at MUI have common claims that the property breached the warranty of habitability and that the Defendants failed to act with "customary diligence." These tenants also faced allegedly unlawful Administrative Fees, Pest Control Fees, and Move-Out Fees. Their claims all succeed or fail together, rendering certification appropriate. Further, because Cardinal charged its Administrative Fees and Move-Out Fees across all of its Colorado properties using identical Form Lease language (and the same policies and procedures), the Court should also certify an Administrative Fee Class and a Move-Out Fee Class that cover all Cardinal's Colorado tenants who were assessed such fees. If the Named Plaintiffs demonstrate the fees violated Colorado law, all of Cardinal's tenants who paid such fees should be able to recover. Thus, certification is proper because each of the classes meets the requirements of Rule 23.

WHEREFORE, the Named Plaintiffs respectfully request an Order certifying the Classes, appointing the Named Plaintiffs as Class Representatives, appointing Steven Woodrow and Jason Legg as Class Counsel, Ordering Class Counsel to submit a notice plan, and awarding such additional relief as the Court deems necessary, reasonable, and just.

Dated: December 14, 2022

By:/s/ Steven L. Woodrow

Steven L. Woodrow
swoodrow@woodrowpeluso.com
Woodrow & Peluso, LLC
3900 East Mexico Ave., Suite 300
Denver, Colorado 80210

Jason Legg
CADIZ LAW, LLC

501 S. Cherry St., Ste. 1100
Denver, CO 80246

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2022, a true and correct copy of the foregoing document was electronically filed with the Court via Colorado E-Filing System, and served via Colorado E-Filing, addressed to all active counsel of record on Colorado E-Filing System's service list.

/s/ Jason Legg
Jason Legg
Attorney for Plaintiffs