DISTRICT COURT, ADAMS COUNTY, COLORADO Adams County Justice Center 1100 Judicial Center Drive Brighton, Colorado 80601 (303) 659-1161	DATE FILED February 2, 2024 4:23 PM CASE NUMBER: 2021CV30718
Plaintiff(s): **Alexander Koch** v. Defendant(s): **Griffis Group of Companies, LLC d/b/a Griffis Residential**	↑ COURT USE ONLY ↑
	Case Number: 2021CV30718 Division: C

Order Re: Plaintiff Alexander Koch's Motion For Class Certification

This matter comes before the Court concerning Plaintiff Alexander Koch's Motion for Class Certification (hereinafter "Motion"). The Court has reviewed the Motion, Defendant's Response, and Plaintiff's Reply. The Court has also reviewed the relevant case law and statutes. The Court, being fully informed in the premises, hereby rules as follows:

Introduction and Procedural History

Defendant Griffis is a large operator of residential communities across various properties, managing thirteen communities and 3,100 units in Colorado as landlord. Prospective tenants must sign a Rental Lease Agreement before beginning their lease period. The Rental Lease Agreement ("Lease") includes attached addenda, which may include charges for additional services or resident options such as animal fees, as well as cleaning charges and parking and access addendums. The Lease further assesses several other mandatory fees in the form of Late

Fees, Notice Posting Fees, Credit Card Surcharge Fees, and Valet Trash Fees (together the "Challenged Fees"). It is these Challenged Fees that lie at the heart of the present dispute.

The Lease requires that tenants pay rent on or before the first day of each month. Should a tenant fail to remit payment on or before the third day of the month in which rent is due, the tenant must pay a Late Fee. The Late Fee consists of an initial charge of $50.00 plus $10.00 commencing on the fifth day of the month for each day it is unpaid thereafter. If Defendant serves a defaulting resident with any notice connected with default of rent obligations, then the resident must pay a Notice Service Fee of $35.00.

Plaintiff's Lease additionally includes a Utility Billing Addendum, providing in part that Plaintiff must pay a fee for trash collection services based on a monthly flat rate not to exceed $50.00 per month. The Valet Trash Addendum, another document accompanying Plaintiff's Lease, obligated Plaintiff to a $30.00 trash collection fee per month. Valet trash collection services involve Defendant collecting a tenant's full trash bag from a container placed outside of the unit.

Finally, Plaintiff's Lease required payment of rent through Defendant's website in accordance with Defendant's policies. Defendant's policies permit rent payment through ACH, credit or debit card, and through e-Money Order. However, a resident may only make any payments in response to an eviction or notice for rent via an electronic order and is not permitted to make such payment through Defendant's website. A resident who renders a rent payment by credit card is assessed certain surcharge fees for processing by a third-party vendor who administers the payment through its payment portal. While Defendant provides prospective residents with a "Welcome Home Letter" before residents execute the Lease that details various move-in costs, the Challenged Charges are not presented.

During the timeframe relevant to this litigation, Plaintiff was a tenant of Defendant. Plaintiff signed a lease agreement containing all of the above fees. In 2018, Plaintiff attempted to remit an ACH payment for rent. The payment was unsuccessful due to Plaintiff's insufficiency of funds, leading Defendant to suspend Plaintiff's ability to pay through ACH. Plaintiff subsequently completed payment by credit card, incurring a Credit Card Surcharge Fee.

On June 22, 2021, Plaintiff filed the initial Complaint. In its Order of February 10, 2022, the Court dismissed a number of Plaintiff's claims. Plaintiff filed the Amended Class Action Complaint on April 27, 2022 ("Amended Complaint"). The Amended Complaint alleges three

claims for relief – the first seeks declaratory and injunctive relief individually and on behalf of the Class that the Challenged Fees under the Lease constitute unenforceable penalties under Colorado law or, in the alternative, violate the implied covenant of good faith and fair dealing and are unconscionable; the second pursuant to a claim for breach of contract for the Lease's charging of unlawful liquidated damages and imposition of unconscionable terms; and the third pursuant to a non-declarative claim for breach of the implied covenant of good faith and fair dealing.

The Plaintiff brings the Amended Complaint pursuant to C.R.C.P. 23 on behalf of himself and a Class of fellow tenants defined as all persons in the State of Colorado who (1) from the date three years prior to the filing of the Complaint through the date notice is sent to the Class; (2) leased a residence from Defendant using Defendant's Form Lease; (3) who Defendant caused to be charged any of the Challenged Fees. Plaintiff alleges that class certification is proper because Defendant included the Challenged Fees as part of its standardized Lease agreement entered by each of its over three thousand tenants across Colorado.

The Plaintiff filed the present Motion seeking class certification. Defendant contests the Motion.

Standard of Review

Pursuant to C.R.C.P. 23, "One or more members of a class may sue or be sued as representative partes on behalf of all." C.R.C.P. 23(a). Rule 23 permits class action certification upon a finding that (1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. C.R.C.P. 23(a). These represent Colorado's class action prerequisites of numerosity, commonality, typicality, and adequacy of representation. *Jackson v. Unocal Corp.*, 262 P.3d 874, 880 (Colo. 2011). If C.R.C.P. 23(a)'s conditions are met, a class action may only be maintained if:

> (1) The prosecution of separate action by or against individual members of the class would create a risk of:
>
> > (A) Inconsistent or varying adjudications with respect to the individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

C.R.C.P. 23(b).

Due to the fact-driven nature of class certification, the Court must "rigorously analyze the evidence and determine to its satisfaction that each CRCP 23 requirement is met." *Jackson*, 262 P.3d at 874. Class certification's nature as a case-management mechanism affords trial courts "a great deal of discretion in determining whether to certify a class action." *Id.* (citing *Friends of Chamber Music*, 696 P.2d 309, 316-17 (Colo. 1985)). Accordingly, a court's decision to certify a class will not be reversed absent an abuse of discretion. *Jackson*, 262 P.3d at 880; *Friends*, 696 P.2d at 317.

Ultimately, "whether a case should be certified is a fact-driven, pragmatic inquiry guided by the objective of judicial efficiency and the need to provide a forum for the vindication of dispersed losses." *Jackson*, 262 P.3d at 877 (citing *Medina v. Conseco Annuity Assur. Co.*, 121 P.3d 345, 348 (Colo. App. 2005)). The Court's rigorous analysis of the evidence is to be liberally construed in light of Colorado's policy of favoring the maintenance of class actions. *Id.*; *Farmers Ins. Exch. V. Benzing*, 206 P.3d 812, 817-18 (Colo. 2009). As such, "trial courts generally should accept the plaintiff's allegations in support of certification." *Id.* at 818. Disputes regarding the C.R.C.P. 23 requirements may require the Court to look beyond the pleadings and conduct "some inquiry into the plaintiff's theory of the case." *Id.* at 820; *Jackson*, 262 P.3d at 881; *LaBerenz v. Am. Family Mut. Ins. Co.*, 181 P.3d 328, 334 (Colo. App. 2007).

A court must "make findings regarding the factual predicates of each class certification requirement." *Jackson*, 262 P.3d at 881. The class action advocate bears the burden of demonstrating that each C.R.C.P. 23 requirement is met. *Jackson* 262 P.3d at 818.

Certification Under C.R.C.P. 23(a)

The Court "must rigorously analyze the evidence and make a finding that '[t]he class is so numerous that joinder of all members is impracticable.' C.R.C.P. 23(a)(1). Similarly, a trial court must rigorously analyze the evidence and make findings that each of the remaining C.R.C.P. 23 requirements is satisfied." *Id.* As a threshold matter, the Court may deem persuasive federal authority concerning the requirements for class certification. "Because C.R.C.P. 23 is almost identical to Fed.R.Civ.P. 23, [the court] may look to case law regarding the federal rule for guidance in interpretating the state rule. *LaBerenz v. American Family Mut. Ins. Co*., 181 P.3d 328, 333 (Colo.App.2007)." *Patterson v. BP American Production Co*., 240 P.3d 456, 463 (Colo. App. 2010). However, "to the extent recent federal circuit court decisions are based on a policy of limiting class actions . . . they are not persuasive." *Jackson*, 262 P.3d at 884.

Numerosity

A party seeking class certification establishes numerosity through a satisfactory showing that the Class is sufficiently large to render joinder impracticable. *Id.* The Class need not attain a level of ascertainability such that every potential member be identified at the commencement of the action. *Id.* at 462; *LaBerenz*, 181 P.3d at 334. Plaintiff bears the burden by description of the Class that is sufficiently precise to allow the Court to determine whether it encompasses a particular individual. *Id.* It is inappropriate at the class certification stage to deny certification on the ground that the Class definition is so broad as to include individuals who cannot sustain the burden of proving claims pursued by the class as a whole. *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 384 (D. Colo. 1993). "The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *LaBerenz*, 181 P.3d at 334.

The Court finds that the proposed Class is adequately numerous. Plaintiff seeks class certification for a group of individuals consisting of every tenant of Defendant's who leased a unit subject to the standardized Lease provisions who was charged the Challenged Fees within a three-year period. This includes upwards of 1800 units across six properties who are subject to the Valet Trash Addendum on a standard basis. **Ex. 1, 70:1-18.** Plaintiff's Lease represents Defendant's standard Colorado Lease utilized by Defendant, with variations depending on certain options. **Ex. 1, 41:13-19; 64:4-65:2.** Paragraphs 1-33 of the Lease are standardized among all Colorado tenants, as well as the Utility Billing Addendum. **Ex. 1, 66:18-22; 68:21-25.** Paragraphs 1-33 include the Challenged Fees.

The class is readily ascertainable on the basis of the Lease being a largely standardized agreement across all of Defendant's Colorado properties; thus, all members of the Class constitute those tenants who signed the Lease, which may be specifically ascertained by Defendant's business records. Plaintiff places the numbers of tenants who were subject to the Challenged Fees during the relevant period of time at 3,100 individuals. The numerosity requirement "is satisfied where the exact size of the class is unknown but general knowledge and common sense indicate that it is large." *LaBerenz*, 181 P.3d 328, 334-35 (Colo. App. 2007). Here, general knowledge of leasing agreements entered into by a landlord who entertains hundreds of units across various properties indicates that the group of tenants subjected to the admitted standardized Lease is large. In fact, it indicates that the group consists of every tenant who ever signed a Lease with Defendant during the pertinent Class period.

The Court makes a finding here that the Class is both capable of objective ascertainability and is sufficiently numerous. This is clear from Plaintiff's specified period and Defendant's testimony that a standardized lease containing the Challenged Fees was entered into by each Colorado tenant.[1] As a decision on the merits of Plaintiff's claim is not needed to determine whether an individual tenant is a member of the Class, the proposed class action is not unmanageable by definition. *Id.* at 336. Therefore, the Court finds that C.R.C.P. 23(a)'s numerosity requirement is met. Indeed, the parties do not dispute numerosity.

Commonality

The second prerequisite to class certification is that "there must be issues of law or fact common to the class." *LaBerenz*, 262 P.3d at 338 (quoting *Jospeh v. Gen. Motors Corp.*, 109 F.R.D. 635, 639 (D. Colo. 1986)). The Defendant contests an affirmative finding of commonality.

The Defendant argues that Plaintiff's recitation of its purported common questions is not susceptible to common answers based on Class-wide evidence. As framed by the Defendant and reflected in Plaintiff's Amended Complaint, these questions include: (1) whether the Late Fees and Notice Fees meet the three-part liquidated damages test; (2) whether the Surcharge Fees are

[1] The Court recognizes that while each Lease for each tenant across the various communities imposed the Challenged Fees, there is dispute as to whether the amounts charged sufficiently permit certification on other requirements. For the purposes of numerosity, the Court finds the fact that the fact of their presence in a standardized lease permits sufficient objective ascertainability.

unlawful; (3) whether the Valet Trash Fees are unlawful; (4) whether the Valet Trash Fees violate the covenant of good faith and fair dealing; and (5) whether the Valet Trash Fees violate public policy.

In particular, Defendant contends that Plaintiff's claim for violation of good faith and fair dealing requires Plaintiff to prove that Defendant exercised its discretionary authority in a manner that prevented the residents from realizing their reasonable expectations. As argued by Defendant, each tenant's expectations are a function of unique information presented to the tenant on an individualized basis; that is, each Class member's expectations varied based on the sources they reviewed before entering the Lease, as well as their personal discussions with Defendant staff.

The Defendant similarly argues that Plaintiff's unconscionability claim requires a finding that the contract terms at issue defeat the reasonable expectations of the parties. Such a finding, Defendant argues, must consider evidence of assent, unfair surprise, and notice, factors dependent on an examination into each tenant's individualized interactions with Defendant staff. Regarding Plaintiff's unlawful liquidated damages claim, Defendant asserts that evidence related to whether each Class member intended to liquidate damages cannot be proven through Class-wide evidence as each member's intent differs based on their personal experiences.

The Plaintiff disputes that his claims present individualized issues. Plaintiff argues that, beyond hypothetical instances, Defendant has failed to identify any material or personal staff conversations that might contribute to each tenant's expectations. Additionally, Plaintiff argues that the Court need not conduct reviews into individual experiences and conversations because the requisite meeting of the minds is established by the unambiguous Leases, which may not be varied by extrinsic evidence due to singular interpretation and the presence of an integration clause.

Furthermore, Plaintiff contends that individual examinations into each Class member's unique dealings for class actions pursuant to a claim of unconscionability would render certification virtually impossible. Here, Plaintiff contends that each member had identical bargaining power, was subjected to the same terms and policies, and if the Lease is found unconscionable for Mr. Koch, it is found unconscionable for all. Plaintiff argues likewise for his claim concerning the Late Fees and Notice Fees as unlawful penalties: whether the parties

intended to liquidate damages will be based on the nature of the same form contract entered by all of them.

Implied Covenant of Good Faith and Fair Dealing.

The parties each cite to a United States Supreme Court case in support of their competing positions regarding commonality, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). *Wal-Mart* concerned one of the most expansive class actions in judicial history, involving a class of one and half million plaintiffs alleging that Wal-Mart violated Title VII's prohibition against discrimination because of supervisor decisions over pay and promotion. *Id.* at 342. Commonality rested at the heart of the case. *Id.* at 349.

The Supreme Court held that, "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Id.* at 349-350 (internal citations omitted). Although all members need not suffer a violation of the same provision of law, their claims must depend on a common contention where determination of its truth or falsity will resolve an issue central to the validity of each claim in one stroke. *Id.* at 350.

> What matters to class certification . . . is not the raising of common "questions"—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id.

Utilizing these rules of law, the Supreme Court found that the respondents failed to identify a common mode of Wal-Mart's exercising of discretion that pervaded the entire company such that every one of the members would be subjected to it. *Id.* at 356. Notably, the Supreme Court accentuated its reasoning with a rule of law maintained by numerous federal courts in determination of Rule 23(a)'s commonality requirement:

> We quite agree that for purposes of Rule 23(a)(2) even a single common question will do. We consider dissimilarities not in order to determine (as Rule(b)(3) requires) whether common questions *predominate*, but in order to determine (as Rule 23(a)(2) requires) whether there *is* even a single common question. And there is not here. Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.

Id. at 359 (internal citations omitted); *see also*, *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999); *K.L. v. Valdez*, 167 F.R.D. 688, 690 (D.N.M. 1996); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996); *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994).

Taken in conjunction with federal courts holding that "differences in the claims of the class members should not result in a denial of class certification where common questions of law exist," *Joseph v. General Motors Corp.*, 109 F.R.D. 635 (D. Colo. 1986) (quoting *Milonas v. Williams*, 691 F.2d 931, 938 10th Cir. 1982), the Court finds that commonality among Plaintiff's claimed Class will exist if even one common question of law exists.

The Court must now examine whether Defendant's argument that a common question of law cannot exist among the Class because of variable personal expectations amongst potential class memebers. There is no dispute that the standardized provisions of the Lease contained the Late Fees, Notice Fees, payment options resulting in the Surcharge Fee, and a standardized Valet Trash Addendum accompanied by varying amounts charged to separate communities. **Ex. 1, 41:15-19; 52:5-11; 64:1-65:12; 65:22-25; 66:1-70:18.** Defendant refers to the Lease as "the form Lease." **Ex. 1, 72:1-4.** The evidence is therefore clear that every tenant was charged the Challenged Fees during the Class period.[2]

The evidence is further clear that Defendant engages in a general process of discussion with its tenants prior to move-in. Some tenants may ask questions when presented with the Lease. **Ex. 1, 71:5-12.** On a standard basis, Defendant is "constantly communicating" with the tenant through move-in, including communicating the application and approval process and a Welcome Home Letter. **Ex. 1, 72:7-20.** The Welcome Home Letter illustrates what a tenant must know, inclusive of move-in costs, the proration of rents, deposits, and verifying any rented garage. **Ex. 1, 72:21 – 73:13.** Defendant communicates other neighborhood information over the course of a tenancy, such as emergency maintenance and the location of trash dumpsters and other amenities. **Ex. 1, 73:17 – 74:23.** Defendant argues that these communications preclude a finding of commonality as to Plaintiff's claim for violation of good faith and fair dealing.

Every contract in Colorado imposes with it an implied duty of good faith and fair dealing in its performance. *McDonald v. Zions First Nat'l Bank, N.A.*, 348 P.3d 957, 967 (Colo. App. 2015). The good faith performance doctrine serves to effectuate the intentions of the parties or to

[2] At this stage, the Court concerns itself only with whether a common issue exists, not whether the factual differences between any common issue (such as the amount charged) prevent predomination under C.R.C.P. 23(b).

honor their reasonable expectations. *Bayou Land Co. v. Talley*, 924 P.2d 136, 154 (Colo. 1996). However, the Colorado Supreme Court discussed the confines of the doctrine as it relates to fully integrated, unambiguous contracts in *Amoco Oil Co. v. Ervin*, 908 P.2d 493 (Colo. 1995). The *Amoco* Court held:

> The application of the reasonable expectations doctrine often "fails to give effect to some hornbook rules governing the construction of contracts," including "the precept that contracts which are free from ambiguity are to be enforced as written...." *Davis*, 712 P.2d at 990 & n. 7. Nonetheless, adherence to this principle promotes "the central policy underlying contract law, that of construing contracts so as to effectuate the parties' intentions...." *Id*. at 991; *see also State Farm*, 851 P.2d at 166–67; *Simon v. Shelter Gen. Ins. Co.*, 842 P.2d 236, 240 (Colo.1992).

Id. at 498

Accordingly, the covenant of good faith and fair dealing may only be relied upon where one party commands discretionary authority to determine certain terms of a contract, such as quantity, price, or time. *Id.* "The covenant may be relied upon only when the manner of performance under a specific contract term allows for discretion on the part of either party. *See Hubbard Chevrolet Co.*, 873 F.2d at 877. However, it will not contradict terms or conditions for which a party has bargained. *Id.*" *Id.* Merger and integration clauses, standing alone, do not permit a party to breach the implied covenant of good faith and fair dealing regarding contractual issues over which they command discretion. *Id.* For example, in *Amoco*, Amoco Oil retained discretion to modify monthly rental amounts yet attempted to argue that the contract's waiver of covenants thereby waived its obligations of good faith and fair dealing. *Id.* The Court of Appeals, as well as the Colorado Supreme Court, disagreed. *Id.* The Colorado Court of Appeals likewise holds that the doctrine of reasonable expectations applies only in cases of contractual ambiguity and is not purposed toward substituting well-settled principles of contract construction. *See Shean v. Farmers Ins. Exch.*, 934 P.2d 835 (Colo. App. 1996); *Shelter Mut. Ins. Co. v. Breit*, 908 P.2d 1149 (Colo. App. 1995); CJI-Civ 30:16 n. 5, 7. The Court declines to travel against the grain of this authority.

The Court finds that Defendant's argument regarding reasonable expectation is not fatal to commonality under C.R.C.P. 23(a) because the Court finds that the Lease is unambiguous and does not allocate Defendant discretion in setting the Challenged Fees. Whether a contract is ambiguous is a question of law. *Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1314

(Colo. 1984). An ambiguity of language is held to exist where the disputed provision is reasonably susceptible on its face to more than one interpretation. *State Farm Mut. Auto. Inc. Co. v. Stein*, 940 P.2d 384, 387 (Colo. 1997). The Lease provisions assessing the Challenged Fees are not subject to more than one reasonable interpretation. The Lease unambiguously states that the Late Fee will be charged at $50.00 plus $10.00 for each day delinquent after the fourth day of the month. **Ex. 2, ¶ 7.** The Notice Fee is likewise charged unambiguously. **Ex. 2, ¶ 7.** While the Lease does not provide the precise dollar figure, it does not expressly retain Defendant's discretion to set it. Ms. Pichot testified that the Notice Fee is always $35, representing a "kind of standard amount" that Griffis charges. **Ex. 1, 116:1-22.** Defendant ceased charging the $35.00 Notice Fee only per change in Colorado law. **Ex. 1, 116:21-25.** The Valet Trash Fee is unambiguous, as well. The Valet Trash Addendum explicitly states, "The cost for trash is $30.00 per month." **Ex. 2 at 14.** The Utility Billing Addendum states, "Trash Collection service for the Resident's apartment and common areas will be paid by the Resident. Trash collection bills will be based on a monthly flat rate not to exceed $50.00 per month." **Ex. 2 at 13.** The Lease appears to grant Defendant discretion in setting the trash collection bill between $0.00 and $50.00. However, it unambiguously precludes Defendant from setting a maximum amount greater than $50.00.

The Surcharge Fee presents a somewhat unique case. The Lease is clear that payment of rent must be remitted through Defendant's online community website in accordance with Defendant's policies. **Ex. 2, ¶ 6.** Nonetheless, Paragraph 6, titled Payment of Rent, discusses neither Defendant's policies nor the permitted payment methods allowed by the website. In fact, Paragraph 6 allocates discretion to Defendant in its imposition of rent payment method. It provides, "Owner may change Resident's payment methods upon thirty (30) days written notice to resident," and that, "Upon written notice and regardless of Resident's default, Owner may at any time require Resident to pay Owner all sums in certified funds, or in one monthly check or payment rather than in multiple checks or payments." **Ex. 2, ¶ 6.**

The Court therefore finds that because the Challenged Fees are unambiguous and do not vest Defendant with discretion to modify or set the amounts insofar as Defendant's control over the Notice, Late, and Trash Valet Fees, Plaintiff may sufficiently alleged commonality based on common issues raised by the Lease itself, irrespective of any claimed conversations had between

Defendant's staff and any one tenant that may have led to reasonable expectations beyond those reflected in the plain language of the Lease.

Given that class certification must be construed liberally toward certification, the Court concludes that Plaintiff sufficiently meets the requirement commonality. Defendant charges the Challenged Fees at a set amount either for all tenants, in the case of the Late Fee and Notice Fee, or for all tenants in a certain community, in the case of the Trash Valet Fee. For the purposes of commonality pursuant to C.R.C.P. 23(a), the Court finds there exists at least one common issue regarding Plaintiff's claim of violation of good faith and fair dealing. For example, the legal question of whether the Late Fees and Notice Fees are violative of the implied covenant of good faith and fair dealing are capable of classwide resolution for the entire class. Plaintiff's good faith and fair dealing claim surrounding the Trash Valet Fee is also capable of classwide resolution.[3]

The Court's position finds some measure of support in *Gillis v. Respond Power, LLC*, 677 Fed.Appx. 752 (3rd Cir. 2017). The Third Circuit in *Gillis* reversed the district court's denial of class certification on the plaintiffs claims for declaratory judgment and breach of contract by breach of the implied covenant of good faith and fair dealing. *Id.* at 754. The Third Circuit reversed, holding in part that the lower court erroneously "based its denial of class certification on irrelevant evidence of Plaintiffs' individualized understanding of Respond's standard form contract." *Id.* at 753. However, the factual posture prevents this Court from rendering a general holding based on precisely this basis. Notable for this Court is the fact that the district court found the contract at issue to be ambiguous, and thus reasoned that plaintiffs' understanding of the terms, adjudged through extrinsic evidence, was likely shared by all nearly 50,000 alleged members. *Id.* at 755. The Third Circuit held this analysis improper, concluding that extrinsic evidence of one party's undisclosed, subjective understanding about the meaning of ambiguous contract language cannot be used to substantiate a particular interpretation of that language. *Id.* Overall support for this Court's finding lies in *Gilli*'s additional discussion regarding form contracts.

[3] Any concerns regarding the factual differences between the amounts Defendant charged for trash collection services at each of its properties is addressed by the Court's statutory discretion to certify appropriate subclasses. This is further discussed below.

Here, the Lease is unambiguous. However, the Lease is also a standard form. *Gillis* otherwise held that "[i]n the context of standard form contracts . . . extrinsic evidence of individual understandings is especially irrelevant." *Id.* 756. Standard form contracts "should be interpreted uniformly as to all similarly situated signatories whenever it is reasonable to do so, rendering individual, transaction-specific interpretations inapposite. *See Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432, 440–41 (1st Cir. 2013) (lead opinion of equally divided en banc court); Restatement (Second) of Contracts § 211(2) & cmt. e (Am. Law. Inst. 1981)." *Id.* Because form contracts should be interpreted uniformly as to all signatories, federal courts recognize that claims involving the interpretation of standard form contracts "are particularly well-suited for class treatment." *Id. See, e.g., Kolbe*, 738 F.3d at 441 (1st Cir. 2013) (listing federal courts that have "certified classes for contract disputes over form contracts because the form contracts are interpreted uniformly across members of the class, and ... the outcome does not depend on extrinsic evidence that would be different for each putative class member"); *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc*., 601 F.3d 1159, 1171 (11th Cir. 2010) (denying certification due to variation in material terms across plaintiffs' contracts, but noting that "[i]t is the form contract, executed under like conditions by all class members, that best facilitates class treatment").

The Court finds Defendant's legal authority unpersuasive on this issue. The Court is persuaded by the above Colorado and federal appellate and Supreme Court authorities over Defendant's use of *Rappucci v. High Sierra Energy, LP*, a federal trial court case. Plaintiff correctly represents *Rappucci* as involving precontractual statements. *Rappucci*, 2014 WL 5423282 (D. Colo. Oct. 24, 2014) at *2. The trial court also found that the plaintiff had not alleged the existence of a contract. *Id.* Here, it is undisputed that a contract existed with clearly stated terms. *Paquet v. Smith*, 854 F.Supp.2d 1003, is fairly addressed by the Court's above discussion regarding the law surrounding reasonable expectations. The Court in *Bushbeck v. Chicago Title Ins. Co.*, 2011 WL 13100725 (W.D. Wash Aug. 5, 2011), did indeed conclude that the plaintiffs could not establish commonality on their good faith and fair dealing claim. *Id.* at *12. However, the *Bushbeck* Court did so on a finding that the implied-in-fact contract at issue dictated that the Court find a meeting of the minds and mutual intention, which would require individualized proof as to the implied terms between the defendant and each plaintiff. *Id*. Here,

the Lease is a written contract signed by every tenant in the alleged Class that is not susceptible to more than one reasonable meaning.

Colorado caselaw permits the Court to rigorously analyze factual and legal disputes for the purpose of making a C.R.C.P. 23 determination, even where those disputes overlap with the merits of the case. *Jackson*, 262 P.3d at 885. The Court "may analyze the substantive claims and defenses that will be raised to determine whether class certification is appropriate...." *Benzing*, 206 P.3d at 818. "Importantly though, a trial court's class certification decision may not 'prejudge the merits of the case.'" *Jackson*, 262 P.3d at 885 (citing *Benzing*, 206 P.3d at 818). "Accordingly, a trial court may consider factual and legal issues that overlap with the merits only to the extent necessary to satisfy itself that the requirements of C.R.C.P. 23 have been met." *Id.*

Consistent with this authority, the Court determines that there are questions of fact and law common to the class concerning whether the Challenged Fees violate the implied duty of good faith and fair dealing. The Court notes that it does not decide the merits of whether these terms are in fact violative.

Unconscionability

For proper Class certification of Plaintiff's unconscionability claim, the operative inquiry is once more whether Plaintiff's claim is susceptible to common answers by virtue of a common question of law or fact capable of classwide resolution. After review of the evidence and Colorado authority, the Court finds persuasive Plaintiff's argument as to whether his claim of unconscionability, and claims of unconscionability in general, may properly comply with C.R.C.P. 23(a)'s requirement of commonality.

The Defendant correctly recites Colorado unconscionability law. In order to support a finding of unconscionability, "there must be evidence of some overreaching on the part of one of the parties such as that which results from an inequality of bargaining power or under other circumstances in which there is an absence of meaningful choice on the part of one of the parties." *Davis v. M.L.G. Corp.*, 712 P.2d 985, 991 (Colo. 1986) (citing *McMillion v. McMillion*, 522 P.2d 125 (Colo. App. 1974). The Colorado Supreme Court in *Davis* enumerated several factors germane to an unconscionability determination to include: (1) a standardized agreement executed by parties of unequal bargaining strength; (2) lack of opportunity to read or become familiar with the document before signing it; (3) use of fine print in the portion of the contract

containing the provision; (4) absence of evidence that the provision was commercially reasonable or should reasonably have been anticipated; (5) the terms of the contract, including substantive unfairness; (6) the relationship of the parties, including factors of assent, unfair surprise, and notice; and (7) and all the circumstances surrounding the formation of the contract, including its commercial setting, purpose, and effect. *Id.*

The Defendant's argument accepts that these factors cannot be satisfied through classwide evidence. While the Court notes that the unique experiences between two contracting parties may facilitate an analysis of several factors that is individualized, the nature of the Lease as a standardized agreement entered between a multi-community landlord and its tenants presents classwide issues. Plaintiff's Lease is a form document presented to every Colorado tenant, with variation between tenants based on rentable items such as the pet addendum and garage agreements. **Ex. 1, 64:4-65:21.** As testified, Paragraphs 1 through 33, which contain the Late and Notice Fees, in addition to the payment options leading to the Surcharge Fee, are utilized on a standard basis across all of Defendant's Colorado properties. **Ex. 1, 66:10-21.** Defendant precludes its tenants from engaging in any negotiation regarding the standardized terms:

> Q. Does Griffis allow its tenants to negotiate the terms of the form lease agreement?
>
> A. No, we don't negotiate the forms of the lease agreement, but what is very common is what we call reasonable accommodations or modifications. But as far as the terms of the actual lease agreement itself, no, we don't allow them to make modifications, nor o-site teams.

Ex. 1, 76:18-25.

Such reasonable accommodations may constitute physical disability parking space allowances or special service pet permissions. **Ex. 1, 77:1-15.** Ms. Pichot, Griffis' Rule 30(b)(6) designee, testified that other than these types of accommodations, the Lease cannot be modified by tenants. **Ex. 1, 77:16-19.**

The Colorado Court of Appeals has held that the balance of bargaining power tilts against a residential tenant who signs a standardized rental agreement. *Stanley v. Creighton Co.*, 911 P.2d 705, 708 (Colo. App. 1996). The Court acknowledged that the *Stanley* Court did not confront an unconscionability claim. It did, however, conduct a general analysis as to the bargaining power between a tenant and landlord in its discussion regarding an exculpatory clause. *Id.* The Court

founded its holding in part on a finding that "it is undisputed that the clause was part of a standardized rental agreement, signed with no opportunity for negotiation or option for protection against negligence upon payment of an increased rental rate or special fee." *Id.* The *Stanley* Court additionally found *Anderson v. Rosebrook* supportive. *Id. Rosebrook* recognized a disparity of bargaining power in a residential landlord-tenant relationship. 737 P.2d 417, 421 (Colo. 1987). The evidence therefore demonstrates that all tenants had an equal, disparate bargaining power, bargaining power that could not be ameliorated through negotiation.

Moreover, the Court does not find that the discussions and notice alleged by Defendant evidence lack of commonality. Defendant fairly argues that Griffis communicates with each tenant to differing degrees, including conversations about the Lease and any questions they may have. **Ex. 1, 71:5-16.** Ms. Pichot testified that some residents may ask to view the Lease in advance of move-in to ask questions, while some may do so on move-in day. **Id.** Defendant "constantly" communicates with each tenant through move-in, including communication of the application and approval process and the Welcome Home Letter. **Ex. 1, 72:7-20.** However, Defendant does not identify specific conversations had regarding the Challenged Fees, and Ms. Pichot's testimony indicates that the Welcome Home Letter does not discuss the Challenged Fees. **Ex. 1, 73:3-13.** Plaintiff himself does not recall the material he read on Defendant's website, nor recall if he conversed with any staff member prior to applying for the unit. **Ex. D, 16:19-17:21.**

It is not the Court's role upon a motion for certification to prejudge the merits of the case. The Court is solely concerned with whether commons issues exist, not whether the Class will succeed in proving that they merit judgment in its favor. Therefore, the Court limits its finding to a holding that Plaintiff sufficiently demonstrates the tenants were subject to indicia of unconscionability shared among them.

The Plaintiff avers that a contrary holding would contravene established caselaw permitting class action lawsuits on issues of unconscionability shared among a multiplicity of plaintiffs. The heart of Plaintiff's position is that this finding would render class certification virtually impossible for unconscionability claims as a court would be compelled to inquire into each individual's unique dealings in every case. The Court agrees. Plaintiff cites numerous federal cases supporting the position that courts permit class action lawsuits for unconscionability claims. The Court has reviewed the authority and concludes that courts allow

certification for unconscionability claims should the requirements for class certification be met. *See, e.g., Hart v. Louisiana-Pacific Corp.*, 641 Fed.Appx. 222 (4th Cir. 2016) (affirming decertification of an unconscionability claim by affirming, on different grounds, the trial court's grant of summary judgment, not through a holding that such a claim is barred from certification as a matter of law).

The case Defendant urges the Court to consider is factually distinguishable from the case at bar. In *O'Neill v. The Home Depot U.S.A., Inc.*, a purported class of Florida customers who rented tools and equipment brought suit against defendant Home Depot. 243 F.R.D. 469, 471 (S.D. Fla. 2006). As part of the tool rental process, a written contract was executed at the time the customer rented a tool. *Id.* The written contract contained a damage waiver and informed the customer that the damage waiver was optional. *Id.* at 472. O'Neill alleged that the damage waiver excluded from its protection the only liability the renter had under the contract and thus was unconscionable. *Id.* O'Neill admitted that Home Depot presented him with a rental agreement with the damage waiver and that he initialed the section. *Id.* at 474. He further admitted that he failed to read the contract despite his signature and that no one advised him that the damage waiver was either mandatory or optional. *Id.*

The *O'Neill* Court held that commonality and typicality were not met. *Id.* at 478. Relevant to this Court's decision, it found that the waiver's optional nature defeated commonality. *Id.* Here, the terms of the Lease are not optional. They are instead imposed on every tenant with the same force and effect. Any differences in the purported class members' individual experiences with Griffis regarding the terms of the Lease cannot be said to alter the terms of the same.

The Court finds that based on the evidence presented, Plaintiff's claim arises out of the same course of conduct and legal theory as the absent class members. Plaintiff and all proposed members were subjected to the standardized provisions of the Challenged Fees with no opportunity for negotiation. The fact-finder's determination of whether Defendant's Challenged Fees are unconscionable for Plaintiff will determine whether they are unconscionable for all tenants. Should the Court decline to certify the Class, each tenant's suit against Defendant will hinge upon the Lease, its terms, and its non-negotiability.

Unlawful Penalties

Pursuant to Colorado law, a liquidated damages provision is valid if (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 the breach." *Ravenstar, LLC v. One Ski Hill Place, LLC*, 401 P.3d 552, 555 (Colo. 2017) (internal citations omitted). The Court previously found that Plaintiff may defeat Defendant's averment that the Lease contains lawful liquidated damage through refutation of one, two, or all prongs. **Order RE: Motion to Reconsider Order on Defendant Griffis's Motion to Dismiss and Strike Class Allegations at 2.** The Court further found that (1) paragraphs 11 and 15 of the Complaint sufficiently alleged that the Late Fees and Notice Fees not intended to be liquidated damages; and (2) paragraphs 3, 15, 26, and 28 when taken as true demonstrate that the Late Fees and Notice Fees were not reasonable estimates of the presumed damages. **Id. at 3.**

Undoubtedly, class certification does not have the same standard of review as that of a dismissal. Nevertheless, the evidence supports a finding that this claim is susceptible of Class-wide resolution. The Lease imposes the Late Fee and Notice Fee on every tenant throughout all of Defendant's properties, as they are included in the set of standardized Lease paragraphs. **Ex. 1 65:22-66:21.** Defendant contends that evidence related to whether each putative Class member intended to liquidate damages cannot be proven with Class-wide evidence because each member's intent arises from their own experiences. Both parties direct the Court to *Bd. Of Cnty. Com'rs v. City & Cnty. of Denver*, 40 P.3d 25 (Colo. App. 2001).

The Court of Appeals in *Bd. Of Cnty. Com'rs* held, "The terms used by the parties are not conclusive as to whether a contract provision was intended to be a liquidated damages clause. Rather, the determination depends upon the intention of the parties as it appears from the nature of the contract, the situation of the parties, and the attending circumstances." *Id.* at 30. Plaintiff claims that even should the Court adopt Defendant's argument as regards intent, this is one of three possible legal avenues by which to prove that the Challenged Fees are unlawful penalties. The Court tends toward Plaintiff's position. As a matter of law, Plaintiff may establish that a provision in the Lease is an unlawful penalty by proving lack of intent, unreasonableness of damages, or ease of ascertaining the amount of damages that would result from a breach. Even if the Court were to conclude that the situation of the parties and the attendant circumstances

cannot be proven through Class-wide evidence, Class-wide proof can still be utilized to demonstrate that the Notice and Late Fees are unreasonable or not difficult to calculate at time of contracting.

The Court incorporates its prior discussion regarding the standardized Lease. The Court finds that whether the Notice Fee and Late Fee are unlawful penalties is a question capable of Class-wide resolution due to the Fees being within the standardized portion of the Lease imposed on all tenants across all Colorado properties.

Based on the foregoing, C.R.C.P. 23(a)'s requirement of commonality is met.

Typicality

The third prerequisite to class action certification is typicality. A class representative must "demonstrate that there is a nexus between the class representatives' claims or defenses and the common questions of fact or law which unite the class." *Patterson*, 240 P.3d at 462. The positions of the representative and the putative class members need not be identical. *Id.* Typicality may be satisfied "even though varying fact 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." *Id.* "However, if the named plaintiffs have considerations that are unique and which may be dispositive, class certification may be denied." *LaBerenz*, 181 P.3d at 338 (quoting *Ammons v. Am. Family Mut. Ins. Co.*, 897 P.2d 860, 862 (Colo. App. 1995)). A class representative must be a member of the class, possess the same interest, and suffer the same injury as the class members. *Armstrong v. Chicago Park Dist.*, 117 F.R.D. 623, 629 (N.D.Ill. 1987).

The parties' arguments both for and against typicality set forth parallel grounds as their arguments regarding commonality. Unique to Defendant's argument is its assertion that Plaintiff's unique need in requiring a wheelchair accessible unit renders his unconscionability claim atypical of the putative Class members' claim.

Typicality as to Similarly Postured Claims

The Court examines in conjunction all claims under typicality that share factual and evidential similarity to the Court's commonality analysis. The commonality and typicality

requirements of Rule 23(a) overlap: "Both requirements focus on whether a sufficient nexus exists between the legal claims of the named class representative and those of individual class members to warrant class certification." *Prado–Steiman v. Bush*, 221 F.3d 1266, 1278–79 (11th Cir. 2000). Commonality refers to the class characteristics as a whole and typicality concerns the individual characteristics of the class members in relation to the class. *Id.*; *see also Baby Neal v. Casey*, 43 F.3d 48, 56 (3rd Cir. 1994).

Typicality serves to ensure that, prior to class certification, there is "identical unlawful conduct which has been directed at both the class representative and the proposed class members irrespective of some variation in the facts that underlie the individual claims." *Garcia v. Medved Chevrolet, Inc.*, 240 P.3d 371, 377-78 (Colo. App. 2009) (quoting *LaBerenz*, 181 P.3d at 338). The Court has discussed at length the factual evidence in this case showing that the portions of the Lease containing all Challenged Fees but the charged Trash Valet Fee are standard across Defendant's Colorado properties. Additionally, the Court has discussed (1) Plaintiff's good faith and fair dealing claim in relation to the parties' reasonable expectations; (2) whether, per *O'Neill*, the circumstances surrounding Plaintiff's entrance into the Lease speak to the putative members' experience sufficient for certification of Plaintiff's unconscionability claim; and (3) the putative Class's shared considerations relevant to Plaintiff's unlawful liquidated damages claim. The Court's holdings placed the standardized Lease at the core of its analysis. Resolution of Plaintiff's claims necessitates resolution of paragraphs of the Lease also imposed on all other tenants in the Class as individuals.

The Court concludes that Plaintiff requiring a wheelchair accessible unit is a factual difference, not a fatal distinction. Plaintiff testified that he and his roommates settled on a Griffis property after searching for units accessible to a wheelchair. **Ex. D, 14:13-23.** One of Plaintiff's roommates spoke with Griffis staff to confirm the availability of such a unit. **Ex. D, 17:15-25.** Defendant accurately portrays that a claim of unconscionability may be maintained on an absence of meaningful choice. *Davis*, 712 P.2d at 991. However, the *Davis* Court's full holding must be read in the disjunctive:

> In order to support a finding of unconscionability, there must be evidence of some overreaching on the part of one of the parties such as that which results from an inequality of bargaining power ***or*** under other circumstances in which there is an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to that party.

Id. (emphasis added).

The Court previously addressed Colorado law concerning the inequality of bargaining power in tenant-landlord leasehold agreements. All Griffis tenants share this disparity of bargaining power, a factor included in Colorado's unconscionability calculus. *See Davis, supra.*

Accepting Plaintiff's allegations as true in a manner construed toward certification, the terms of the Lease are identical unlawful conduct directed at all of its Colorado-based tenants. Therefore, the Court finds that there exists a nexus between Plaintiff's claims and common questions of fact or law that unite the class. However, the Court finds that typicality is only met for Plaintiff's claims purposed to the Notice Fee, Late Fees, and Valet Trash Fees.[4]

Typicality as to Surcharge Fees

The Defendant's imposition of the Surcharge Fees presents a factually juxtaposed circumstance. Not all individual tenants purported to belong to the Class share Plaintiff's situational circumstances regarding the Surcharge Fees that led to his alleged damages, nor can it be held that Plaintiff's injury in this case is typical of the purported Class.

The form Lease authorizes payment of rent through Defendant's website in accordance with Griffis policy. **Ex. 2, ¶ 6.** Payment of any money in connection with an eviction notice or demand for rent must be via electronic money order. **Ex. 2, ¶ 7**. The standardized provisions of the Lease prohibit any such payment through Defendant's website. **Id.** Consistent with the Court's above findings, Paragraphs 6 and 7 are Lease provisions charged to each tenant on a Class-wide regime. It is rather Plaintiff's unique dispute with the Surcharge Fees that is atypical.

As testified by Ms. Pichot, payment "via the website" constitutes a standard payment transferred by electronic transfer of funds through either ACH or from a checking or savings account. **Ex. 1, 106:15-23.** The Surcharge Fee is a charge associated with making payments by credit card. **Ex. 1, 204:21-24.** Defendant does not determine the Surcharge Fee associated with credit card payments. **Ex. 1, 56:18-57:2.** When questioned, Ms. Pichot answered that she spent minutes preparing for her testimony on the topic of the Surcharge Fee because "that's not something that [Defendant] is in control of or manages." **Ex. 1, 55:13-56:2.** Determination of the Surcharge Fee is delegated to a third party who facilitates the electronic credit card transfer from

[4] The Court addresses the factual distinctions regarding amounts charged for trash collection between Defendant's properties in its discussion on the C.R.C.P. 26(b) factors.

a tenant to Defendant. **Ex. 1, 196:16-23.** Additionally, Defendant does not collect revenue from the Surcharge Fee. **Ex. 1, 204:25-205:6.**

According to Plaintiff's Amended Complaint, Plaintiff was forced to incur the surcharges related to payment by credit card because Defendant disabled his ability to pay via ACH after an ACH payment was returned for insufficient funds in December of 2018. **Amend. Compl. ¶ 42; Ex. H at 3.** After ACH payment was denied, Plaintiff made a series of rent payments using a credit card January through April of 2019. **Ex. H at 3-5.** However, also in April of 2019, Plaintiff began rendering payment by eMoney Order and continued to do until electing to pay once again by credit card in December of 2019. **Ex. H at 4-5, 7-8.** Plaintiff testified that payment by eMoney Order employs a $2 fee and that despite the payment option always existing during his tenancy, Plaintiff chose to render payment by credit card. **Ex. D, 50:2-25.**

An insufficiency of funds compelling tenants to choose payment by credit card is not likely to be factually uniform among all of Defendant's Colorado tenants. Some putative members may choose to pay the Surcharge Fee without similar compulsion or may have the option to pay through ACH yet decline to do so. Plaintiff claims that Defendant's forcing of the fee by virtue of the Lease provisions is violative of the common law rules it pursues, including unconscionability. However, upon rigorous review of the evidence, not all putative members can be said to be forced to incur the Surcharge Fee in a similar manner. Dispositive factual differences may result in atypicality. *LaBerenz*, 181 P.3d at 338. While the choice of how to remit rent payment is within the standardized paragraphs of the Lease, neither the final Surcharge Fee amount nor reference to the Surcharge Fee itself occurs within the Lease. It is not charged by Defendant on a Class-wide basis to every tenant, as every tenant may occupy novel positions with respect to why they chose to render payment via ACH, credit card, or eMoney Order.

The Court finds this to be a potentially dispositive factual distinction. An analysis of unconscionability may consider the absence of meaningful choice together with the presence of unreasonably favorable contract terms to one party. *Davis*, 712 P.2d at 991. It also may consider a standardized agreement entered by two parties of unequal bargaining power. *Id.* The primary thrust of Plaintiff's argument issues from the former. The previously discussed lack of the Surcharge Fee's presence in the standardized portions of the Lease is likely to elevate absence of meaningful choice as a dispositive issue for Plaintiff's unconscionability claim. Likewise, class certification for Plaintiff's breach of good faith and fair dealing claim as applied to the Surcharge

Fee depends on Class-wide evidence that Defendant in its discretion set the Surcharge Fee for every Colorado tenant. The evidence before the Court does not support such a finding.

Unlike the remainder of the Challenged Fees, the Court finds that the Surcharge Fee is not forcibly incurred by all purported Class members on a sufficiently typical basis. The Court noted the novelty of the Surcharge Fees during its discussion of commonality. Because the Court finds that typicality is not met with respect to the Surcharge Fees, it need not discuss in length whether Plaintiff's claims centering the Surcharge Fee also fail C.R.C.P. 23(b)'s predominance requirement.[5]

The Plaintiff's First Claim for Relief, Second Claim for Relief, and Third Claim for Relief meet C.R.C.P. 23(a)'s requirement of typicality for all Challenged Fees except the Surcharge Fee. Any claims regarding the Surcharge Fee are more appropriately brought as claims by individual plaintiffs outside of a class action lawsuit.

Adequacy of Representation

Adequate representation includes an inquiry into both the adequacy of the representative and the adequacy of counsel. *Kuhn v. State Dep't of Revenue of State of Colo.*, 817 P.2d 101, 105-06 (Colo, 1991). In order to adequately represent the class, two requirements must be met: "(1) the class representative must not have interests antagonistic to those of the class, and (2) the attorney representing the class must be qualified, experienced, and generally able to conduct the proposed litigation." *Lopez v. City of Santa Fe*, 206 F.R.D. 285, 289-90 (D.N.M. 2002). Federal courts further hold that inquiry into the knowledge and involvement of the representative is germane to a finding of adequacy. *See Kelley v. Mid-America Racing Stables, Inc.*, 139 F.R.D. 405, 409 (W.D. Okla. 1990) ("Class certification has thus been properly denied when 'the class representatives had so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys.'" (quoting *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987).).

[5] The Court finds in brief that it does under identical reasoning.

It is undisputed that Plaintiff's counsel is adequately qualified as members of a law firm whose primary practice area includes consumer class action lawsuits. Counsel for the Plaintiff's attached Firm Resume clearly demonstrates they are adequate counsel. **See Ex. 9.**

The Court additionally finds that Mr. Koch is an adequate class representative. Mr. Koch does not have interests antagonistic to the class due to the congruency of common interests between himself and all other purported Class members. Defendant argues that Mr. Koch's lack of knowledge of his claims renders him inadequate. Defendant cites Mr. Koch's deposition as support. The Court concurs that Mr. Koch struggled to recall certain facts, such as what he read on Griffis' website, whether he spoke with Griffis staff prior to applying for the unit, how long he waited before signing the Lease, and whether he held any expectations about certain fees before signing. **Ex. D, 16:23-25, 17:9-14, 21:9-11, 23:11-24.**

Nevertheless, the Court finds that this lack of knowledge does not rise to the same level as *Kelley*. The *Kelly* Court deemed the class representatives inadequate on a finding that they demonstrated no personal knowledge of whether the defendants cheated him. *Id.* at 409-10. The *Kelly* Court held that the representatives stated no basis for their involvement in the lawsuit beyond what was communicated to them by counsel. *Id.* at 410. The Court risks belaboring the point that Plaintiff's claims concern the standardized portions of the Lease, and, for purposes of class certification, need not depend on the expectations of the parties. Mr. Koch has knowledge of his entrance into the Lease and his various rent payment methods. **Ex. D, 50:2-25; Ex. 2 to Reply, 46:1-11.** Additionally, he has knowledge of the insufficient transaction and resulting conversation with Griffis, as well as the $50 Late Fee. **Ex. 2 to Reply, 51:1-53:13, 61:6-11, 63:5-6.** Mr. Kock assisted his counsel in providing his answers to Defendant's interrogatories, attended mediation, sat for a deposition, and otherwise has no conflict with the purported Class. **Ex. D, 82:24-83:5; Notice of Completion of ADR.** Throughout his deposition, Mr. Koch showed a willingness to review document evidence to refresh his recollection and prepare for his case.

Evidence of Mr. Koch's lack of knowledge of the matters emphasized by Defendant may travel to the merits of his case, but the Court does not hold that it must find him an inadequate representative as a result. "Where 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." *Sosna v. Iowa*, 419 U.S. 393, 403 (1974).

Based on the foregoing, Plaintiff meets the prerequisite requirements of C.R.C.P. 23(a).

Certification Under C.R.C.P. 23(b)

Provided C.R.C.P. 23(a)'s prerequisites are met, a class action may be certified pursuant to C.R.C.P. 23(b)(1), (b)(2), or (b)(3). In the present Motion, Plaintiff moves for certification of a C.R.C.P. 23(b)(2) or (b)(3) class action.

C.R.C.P. 23(b)(2)

The parties appropriately argue that courts hesitate to certify a class action under both C.R.C.P. 23(b)(2) and (b)(3). As pertinent here, "C.R.C.P. 23(b)(2) certification is appropriate for classes seeking predominantly injunctive or declaratory relief." *Town of Breckenridge v. Egencia, LLC*, 442 P.3d 969, 982 (Colo. App. 2018) (citing *State v. Buckley Powder Co.*, 945 P.2d 841, 845 (Colo. 1997)). However, "certification is not prohibited where damages are sought in addition to injunctive and declaratory relief, so long as the damages are incidental to the other relief sought." *Id.* Accordingly, certification pursuant to C.R.C.P. 23(b)(2) is not appropriate in cases where final relief relates exclusively or predominantly to monetary damages. *Id.*; *see also Goebel v. Colorado Dept. of Institutions*, 764 P.2d 785, 795 (Colo. 1988) ("Generally, courts have determined that 23(b)(2) is applicable where the relief sought is predominately injunctive or declaratory, and does not apply where the primary claim is for damages.").

Here, Plaintiff alleges three claims for relief. The First Claim for Relief seeks declaratory and injunctive relief that the Late Fee and Notice Fee constitute unenforceable penalties under Colorado law, violate good faith and fair dealing, and are unconscionable. Plaintiff's Second and Third Claims for Relief seek money damages on behalf of himself and the purported Class for breach of contract and breach of the implied covenant of good faith. Plaintiff states that Griffis data portrays Defendant's collection of Challenged Fees over the Class period in an amount over $3,000,00.00. **Mot. at 6.** The Court finds that the predominant relief Plaintiff seeks is monetary, based on its seeking of money damages in two of the three causes of action that require

adjudication of the very issues set forth in the First Claim for Relief. Plaintiff likewise admits that certification under 23(b)(3) is most appropriate.

As such, the Court declines to certify the purported Class pursuant to C.R.C.P. 23(b)(2) and restricts its analysis to C.R.C.P. 23(b)(3).

C.R.C.P. 23(b)(3)

C.R.C.P. 23(b)(3) "requires a petitioning party to demonstrate that (1) common questions of law or fact predominate over any questions affecting only individual members and (2) a class action is superior to other available remedies." *Breckenridge*, 442 P.3d at 982. A district court is afforded broad discretion in assessing whether a class action is the superior method to resolve the case when determining C.R.C.P. 23(b)(3) claims. *Buckley*, 945 P.2d at 845. A district court's determination regarding whether C.R.C.P. 26(b)(3)'s requirement are satisfied will be upheld absent an abuse of discretion provided the court "rigorously analyze[d] the evidence presented." *State Farm Mut. Auto. Ins. Co. v. Reyher*, 266 P.3d 383, 387 (Colo. 2011).

Predominance

An affirmative finding that common questions predominance over individual questions "turns on 'whether the proof at trial will be predominantly common to the class or primarily individualized.'" *Hicks v. Colorado Hamburger Company, Inc.*, 527 P.3d 451, 456 (Colo. App. 2022) (quoting *Garcia*, 263 P.3d at 98). The Court must engage in a "fact-driven, pragmatic inquiry guided by the objective of judicial efficiency and the need to provide a forum for the vindication of dispersed losses." *Medina*, 121 P.3d at 348. A plaintiff demonstrates predominance when it "advances a theory by which to prove or disprove an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position." *Benzing*, 206 P.3d at 820. Related to the Court's analysis of commonality, a may consider the parties' substantive claims but must not prejudge the merits of the case or certify only those claims likely to prevail on the merits. *Jackson*, 262 P.3d at 885. Furthermore, the need for individual proof of damages does not preclude a finding of predominance. *Id.* at 889.

Thus, the Court looks to whether Plaintiff has shown evidence that the purported Class "plan[s] to use common evidence . . . without resorting to lengthy individualized examination." *Medina*, 121 P.3d at 348 (quoting *In re Polypropylene Carpet Antitrust Litig.*, 996 F.Supp. 18, 22

(N.D.Ga. 1997)). The common evidence in this case comprises the standardized Lease agreements. Defendant's position on this factor ventures along similar grounds as its arguments above. The Defendant contends that predominance is not met due to the absence of significant common legal or factual questions. Defendant argues such an absence exists because each of Plaintiff's claims require individualized inquiries as to liability; namely, the unique expectations surrounding the Notice Fee and Valet Trash Fee amounts, the individualized nature of any unfair surprise or notice pertaining to Plaintiff's unconscionability claim, and personal queries into whether each tenant intended to liquidate damages.

It is undisputed that the standardized provisions of the Lease contained the Late Fees, Notice Fees, and a standardized Valet Trash Addendum accompanied by varying amounts charged to separate communities. **Ex. 1, 41:15-19; 52:5-11; 64:1-25 – 65:1-2; 65:22-25; 66:1-25 – 70:1-18.** These provisions are included in "the form Lease." **Ex. 1, 72:1-4.** The number of units subjected to some form of Valet Trash Addendum on a standard basis is over 1800 units. **Ex. 1, 70:1-18.** Paragraphs 1-33 of the Lease are standardized between all Colorado tenants. **Ex. 1, 66:18-22; 68:21-25.** The Court once again states the evidence clearly establishes that the Challenged fees, minus the Surcharge Fee, are charged by Defendant to every one of its Colorado tenants. Defendant does not contest this fact. Defendant's argument is the same advanced at the commonality stage above.

For the purposes of this factor, and given the identical nature of Defendant's argument, the Court must engage in some measure of duplicative analysis. As such, the Court incorporates its above discussion regarding (1) whether Plaintiff's good faith and fair dealing claim depends on individualized expectations between parties given a standardized, unambiguous instrument; (2) tenants' unfair notice and surprise; and (3) the parties' intent to liquidate damages as merely one factor that may be refuted for a finding of unlawful penalties. Class-wide proof, Defendant's charging of the standardized Challenged Fees, is common to all members of the purported Class. All tenants entered the standardized Lease and thus had identical legal rights under it. As the Court has discussed, lengthy individualized discussion of factual considerations unique to each tenant is not required on the claims the purported Class seeks.[6] Proof supporting the Class's

[6] See the Court's commonality discussion, *supra*. The Court notes that the legal requirements of commonality and predominance are distinct. However, given the breadth of commonality among Class members, the Court finds the same facts merit a finding of predominance under analogous reasoning.

claims at trial will consist principally of the form Lease, an identical copy of which was signed by every putative Class member.

Every member, however, except the individuals of Defendant's communities who were charged varying amounts for trash collection. Ms. Pichot testified that the Valet Trash Collection Fee varies between properties based on the effort, time, and scope of trash collection services unique to each Griffis property. **Ex. 1, 52:7-15; 69:1-5; 156:3-15.** Plaintiff's Lease provides that the Valet Trash Collection Fee charged for Plaintiff's community was $30.00 per month. **Ex. 2, at 14.** Defendant's Resident Charges/Payments Ledger for Plaintiff depicts a trash collection fee of $42.00 per month from August 2018 to April 2020 and a fee of $30.00 per month from May 2020 through June 2021. **Ex. D at 1, 4, 7, 10, 11.** The evidence thus determines that Mr. Koch was charged two Valet Trash Fees at different times. This has the result of individualizing the amounts charged to two groups of Class members, those charged a $30.00 fee and those charged a $42.00 fee. Thus, the Court cannot find that every Class member was charged the same Valet Trash Fee under a shared contractual term. Defendant avers that this factual distinction prevents Class certification on Plaintiff's claim of unconscionability. Defendant argues that a finding that a $30.00 Valet Trash Fee is unconscionable does not beget a finding that other fees set at other amounts are, as well. The Court agrees. Defendant's cited case is pertinent, where the Eleventh Circuit held that "claims for breach of contract are peculiarly driven by the terms of the parties' agreement, and common questions rarely will predominate if the relevant terms vary in substance among the contracts." *Sacred Heart Health Systems, Inc. v. Humana Military Healthcare Services, Inc.*, 601 F.3d 1159, 1171 (11th Cir. 2010). The Eleventh Circuit additionally concluded that it is instead "the form contract, executed under like conditions by all class members, that best facilitates class treatment." *Id.* Here, the substance of the contracts as it relates to the Valet Trash Fee varies across Griffis properties and is not uniform across the purported Class. Thus, the Lease is not form for the Valet Trash Fee.

Plaintiff invites the Court to carve out a subclass consisting of all tenants charged a $30.00 fee and a $45.00 fee. **Reply at 10 n. 5.** Courts enjoy broad flexibility under Rule 23 in determining how to shape a class action. *Goebel*, 764 P.2d at 794. C.R.C.P. 23 "provides the court with 'ample powers, both in the conduct of the trial and relief granted to treat common things in common and to distinguish the distinguishable.' *Jenkins v. United Gas Corp.*, 400 F.2d 28, 35 (5th Cir.1968)." *Id.* When appropriate, Rule 23 provides that "[a]n action may be brought

or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class . . . .” C.R.C.P. 23(c)(4). A court may utilize its powers under 23(c)(4) to restructure complex cases to meet the requirements of the rule and may do so upon motion or upon its own initiative. *Goebel*, 764 P.2d at 794.

The Court finds that is appropriate based on the facts presented. Through careful delineation of the subclass with respect to Plaintiff’s claim of unconscionability, “the advantages of adjudicating issues that are common to the entire class or subclass on a representative basis may be secured even though other issues in the case may have to be litigated separately be each class member.” *Fogel v. Wolfgang*, 47 F.R.D. 213, 217 (S.D.N.Y. 1969). The Court previously denied Class certification for Plaintiff’s claim concerning the Surcharge Fees under a finding that it meets neither typicality nor predominance. The Court finds that delineation of a subclasse for Plaintiff’s unconscionability claim better achieves Rule 23’s objectives in light of the contractual identicality of all tenants in communities charged $30.00 and $45.00.

Lastly, the Defendant urges the Court to follow an argued routine denial of class certification for good faith and fair dealing and unconscionability claims. The Court finds this authority distinguishable from the present case.

In *Avritt*, the contractual document was ambiguous, thus analyzing contractual duties would likely require extrinsic evidence about the individual intent of each policyholder. *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1031-32 (8th Cir. 2010). Here, the Lease is unambiguous.

The *Neale* Court held the class allegations failed predominance because (1) the plaintiffs failed to demonstrate the existence of a uniform, enforceable contract amongst all class members; (2) any implied obligation to disclose latent defects would directly contradict the general rules that a manufacturer may limit liability through a warrant and an express warranty does not extend to defects that lay dormant during the warranty period; and (3) the plaintiffs did not explain what evidence they would use to prove their potentially varied consumer expectations on a Class-wide basis. *Neale v. Volvo Cars of North America, LLC*, 2021 WL 3013009 (D.N.J. July 15, 2021). Here, there exists a uniform contract among all Class members. Plaintiff’s claims do not rely on an implied obligation to disclose latent defects and instead rest on standardized evidence, the form Lease, imposed on all Class members at once. Defendant also has failed to show that any oral representations about the Challenged Fees were ever made to any tenant.

The Court of *In re ConAgra Foods, Inc.* confronted in its 198-page opinion an unjust enrichment claim under Texas law setting forth the occurrence of unjust enrichment when a defendant wrongfully secures a benefit or passively receives a benefit that would be "unconscionable" for it to retain. *In re ConAgra Foods, Inc.*, 90 F.Supp.3d 919, 1017 (C.D. Cal. 2015). The plaintiffs in *ConAgra* were consumers residing in eleven different states who purchased Wesson Oils from ConAgra and alleged deceptive and misleading marketing. *Id.* at 939. Here, a purported Class argues that the written terms of a standardized tenancy contract entered between Defendant and every member of the Class are unconscionable. This is factually and legally distinguishable from *ConAgra*.

Finally, the leases in *Eastman v. First Data Corp.* included different goods and services, making difficult resolution of the case with Class-wide evidence. 292 F.R.D. 181, 189 (N.D.J. 2013). Moreover, the unconscionability inquiry "require[d] determining the value to each individual merchant – an inquiry which cannot be determined with common evidence." *Id.* Here, there are no competing goods, services, or values.

The Court is persuaded by many courts' general recognition that form contracts are well-suited for class action treatment. *See Maez v. Springs Automotive Group, LLC*, 268 F.R.D. 391 (D. Colo. 2010); *Sacred Heart Health*, 268 F.R.D. 391; *Arenson v. Whitehall Convalescent and Nursing Home, Inc.*, 164 F.R.D. 659 (N.D.Ill. 1996). The pivotal issues at the heart of all Class members' claim are the Challenged Fees assessed by the Lease. This predominates over any potential individual issues in this case.

Superiority

The Court finds that the class action is superior for adjudicating these claims: (1) all of the Leases were consummated in Colorado; (2) the costs associated for pursuing the claims individually are likely to be prohibitive for some class members; (3) the Court declines to force potentially hundreds of different forms of the same litigation for common issues; and (4) the class action would not so unmanageable as to create an unfair or inefficient proceeding. *See Maez*, 268 F.R.D. 391. As previously discussed, individualized issues do not exist such that the Court would be compelled to preside over thousands of miniature trials.

The Court therefore finds that common questions predominate among all of Defendant's Colorado tenants for Plaintiff's claims regarding the Notice Fees and Late Fees. For the Valet Trash Fee, the Court finds that common questions predominate among all of Defendant's Colorado tenants only for those tenants who were charged $30 and $45 both during the Class period and during the same monthly period as Plaintiff.

The Court additionally finds that a class action pursuant to C.R.C.P. 26(b)(3) is the superior method of litigation. Accordingly, Plaintiff's claims not including the Surcharge Fee meet the requirements of C.R.C.P. 26(b)(3).

Conclusion

Based on the foregoing, the Court hereby **GRANTS WITH AMENDMENT** Plaintiff Alexander Koch's Motion for Class Certification and certifies class membership pursuant to C.R.C.P. Rule 23 as follows:

- For the Class claims of Breach of Contract and Breach of Implied Covenant of Good Faith based on Defendant Griffis' charging of the Notice Fee and Late Fee, the Class is defined as:

  > "All persons in the State of Colorado who (1) from the date three years prior to the filing of the Complaint through date notice is sent to the Class; (2) leased a residence from Defendant using Defendant's Form Lease; (3) who Griffis caused to be charged the Notice Fee or the Late Fee."

- For the Class claim of Breach of Contract based on Defendant Griffis' charging of an unconscionable Valet Trash Fee, the Subclass is defined as:

  > "All persons in the State of Colorado who (1) from the date three years prior to the filing of the Complaint through date of notice is sent to the Class; (2) leased a residence from Defendant using Defendant's Form Lease; (3) who Griffis caused to be charged the Trash Valet Fee in an amount of $42.00 from August 2018 to April 2020 and $30.00 from May 2020 through June 2021."

- Certification of any Class claim based on Defendant Griffis's charging of the Surcharge Fee is **DENIED**. An order denying certification has the effect of dismissing the action as to all class members who are not named plaintiffs. *Goldsworthy v. American Family Mut. Ins. Co.*, 209 P.3d 1108, 115 (Colo. 2008). The Court, in analyzing the complaint in the context of a class action, may conclude that only certain aspects of the complaint are amenable to class certification. In the exercise of its discretion, a trial court may choose to separate such claims from the other claims in the action and certify those claims only. *Chisolm v. TranSouth Financial Corp.*, 194 F.R.D. 538, 545 (E. D. Va. 2000).

The Court further orders:

- Pursuant to C.R.C.P. Rule 23(c)(1), the Court clarifies that its Order is conditional and may be altered or amended before the decision on the merits.

- The Parties shall contact the division C clerk at Debra.Reyes@judicial.state.co.us within 14 days of this Order to set the case for a status hearing to address the most appropriate means of noticing potential class members under C.R.C.P. Rule 23(c)(2).

- The deadline imposed under the operative CMO issued on May 30, 2023 requires the filing of a revised proposed joint amended CMO no later than 14 days after the issuance of this Order. That deadline remains.

SO ORDERED February 2, 2024

BY THE COURT:

Sarah E. Stout

District Court Judge