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Attorneys for Plaintiffs

15
16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 OAKLAND DIVISION

19 JAVANNI MUNGUIA-BROWN, ANGELINA
20 MAGAÑA, NORMA RODRIGUEZ, and DAVID
21 BONFANTI individually and on behalf of others
similarly situated,

22 Plaintiffs,

23 vs.

24 EQUITY RESIDENTIAL, a real estate investment
trust, ERP OPERATING LIMITED
25 PARTNERSHIP, a partnership, EQUITY
RESIDENTIAL MANAGEMENT, L.L.C., EQR-
26 WOODLAND PARK A LIMITED
PARTNERSHIP, and EQR-WOODLAND PARK
27 B LIMITED PARTNERSHIP,

28 Defendants.

Case No.: 4:16-cv-01225-JSW

**SECOND AMENDED COMPLAINT FOR
INJUNCTIVE RELIEF, DECLARATORY
RELIEF, AND DAMAGES; CLASS ACTION
[FED. RULE OF CIV. PROC. 23]**

- (1) **VIOLATION OF CAL. CIV. CODE § 1671;**
- (2) **UNLAWFUL AND UNFAIR BUSINESS PRACTICES (BUS. & PROF. CODE §§ 17200-17208);**
- (3) **REASONABLE ATTORNEYS' FEES AND COSTS**

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1 Javanni Munguia-Brown, Norma Rodriguez, Angelina Magaña, and David Bonfanti
2 (“Plaintiffs”), on behalf of themselves and all others similarly situated (hereinafter “Class Members”),
3 upon information and belief, complain and allege as follows:

4 **I. INTRODUCTION**

5 1. Defendants Equity Residential, ERP Operating Limited Partnership, Equity Residential
6 Management L.L.C., EQR-Woodland Park A Limited Partnership, and EQR-Woodland Park B
7 Limited Partnership (hereinafter collectively referred to as “Defendants”), own, lease, and manage
8 residential properties. In California, Defendants own or manage thousands of individual rental units.
9 Defendants have a uniform late rent fee policy and practice across all of their California residential
10 rental properties. Defendants’ policy and practice is to charge tenants fees of \$50 or 5 percent of their
11 monthly rent for the late payment of rent, even if Defendants receive the rent as little as one day late
12 (past the grace period) and incur no damages (other than, potentially, a few cents of lost interest) as a
13 result. Moreover, Defendants’ policy and practice is to charge tenants late fees of \$50 or 5 percent of
14 their monthly rent if tenants carry any accrued balance of unpaid late fees or other charges past
15 subsequent monthly grace periods, even when the tenants timely pay the monthly rent itself, and
16 regardless of whether the outstanding balance is minimal. The late fee is a liquidated damages penalty,
17 allegedly for the breach of tenants’ rental contracts, and is void under California Civil Code § 1671(d)
18 because it is excessive and bears no relation to any actual damages incurred by Defendants when rent
19 or other fees are paid late (Defendants’ late fee penalties are hereinafter referred to as “Excessive Late
20 Fees.”). Because Defendants’ policy and practice of charging Excessive Late Fees violates Civil Code
21 § 1671(d), it is an unlawful business act or practice which causes Plaintiffs and other tenants financial
22 injury, and is prohibited by California’s Unfair Competition Law, Business and Professions Code
23 § 17200, *et seq.* (hereinafter referred to as the “UCL”). It is also an unfair business act or practice in
24 violation of the UCL. Plaintiffs bring this action to challenge Defendants’ Excessive Late Fee policy
25 and practice on behalf of themselves and all other similarly situated residents of Defendants’
26 residential rental properties in California.

1 2. California law establishes a presumption that “the detriment caused by the breach of an
2 obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with
3 interest thereon.” Cal. Civ. Code § 3302. Defendants’ Excessive Late Fees represent exorbitant
4 interest rates for tenants’ failure to pay the amount of rent or other charges due. Defendants’ late fees
5 exceed any reasonable measure of Defendants’ actual damages sustained as a result of their tenants’
6 late rent payments or late payments of outstanding balance amounts.

7 3. For example, when Defendants charge a \$50 late fee when a tenant has paid a rent of
8 \$1,200 two days late, this amounts to an interest rate of 760 percent per annum. By contrast, a 10
9 percent annual interest rate in this example would dictate a daily late fee of approximately thirty-three
10 cents. Similarly, when Defendants charge a \$50 late fee when a tenant has paid an outstanding balance
11 of \$150 two days late, this amounts to an interest rate of 6083 percent. The unreasonableness of the
12 late fee penalty is further demonstrated by the fact that Defendants charge these fees whether the rent is
13 one day late or two weeks late and whether the outstanding balance is \$150 or \$2,500.

14 4. As another example, under Defendants’ Excessive Late Fee policy and practice, if a
15 tenant has been a few days late in paying rent in full in two different months, and has a \$100 or \$150
16 balance consisting of two late fees, Defendants will charge that tenant a new late fee in every month
17 that follows until the full balance of late fees is paid, even if the tenant is paying the full rent itself on
18 time each month. In other words, when a tenant makes a timely payment of one month’s rent but also
19 has a small outstanding balance consisting of prior late fees or other charges, Defendants will allocate
20 the payment to a portion of the balance that includes the outstanding fees, but will then charge a late
21 fee because the full balance has not been paid off. This policy is set out in Defendants’ standard lease,
22 which defines “rent” to include late fees and any other charges outstanding, and provides that a tenant
23 will be charged a late fee if the full amount of outstanding “rent” is not received each month. This
24 policy and practice results in Defendants charging tenants multiple Excessive Late Fees on minimal
25 balances that do not represent a reasonable measure of Defendants’ actual damages.

26 5. For a sub-class of tenants, Defendant charges Excessive Late Fees for outstanding
27 minimal balances even though the tenants’ leases do not authorize it. Specifically, when Defendants
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1 acquired the buildings in which Plaintiffs Munguia-Brown, Rodriguez, and Magaña reside, Defendants
2 stepped into the shoes of the prior lessor, and did not provide them with a new lease. The prior leases
3 provided for a late fee when rent was overdue, but did not provide for the charging of late fees on top
4 of late fees or other outstanding balances. Nonetheless, Defendants applied their standard policy and
5 charged such tenants late fees of \$50 or five percent of the monthly rent whenever there was an
6 outstanding balance, even if the tenants' monthly rent payment itself was timely. There was no
7 contractual basis for the fees Defendants charged these tenants, and the tenants in this sub-class did not
8 agree in their leases upon an amount of damage that Defendants would sustain by the tenants' carrying
9 outstanding balances. This is a separate and independent reason that late fees on outstanding balances
10 (as opposed to late fees for late payment of a month's rent) must be disgorged and returned to the
11 members of this sub-class, with interest. In the alternative, if a court found that there was some
12 implied contractual basis, the policy still would represent an unlawful liquidated damages penalty
13 under California Civil Code § 1671(d), and an unfair business act or practice, for the same reasons
14 asserted on behalf of the class as a whole.

15 6. Plaintiffs and Class Members currently reside or, during the four years prior to filing
16 this action, have resided in Defendants' rental properties. They have paid Excessive Late Fees to
17 Defendants in accordance with Defendants' unlawful and unfair late fee policy. As a result, Plaintiffs
18 and Class Members have suffered injury in fact.

19 7. Plaintiffs seek to represent themselves and similarly situated persons who have rented a
20 residential unit in California from Defendants and have been assessed a late fee by Defendants at any
21 time from four years prior to the original filing of this action through the date of class certification.
22 Plaintiffs also seek to represent a sub-class of tenants whose pre-EQR leases, which were assumed by
23 Defendants, do not state an agreement for the charging of late fees on late fees or other outstanding
24 balances other than the monthly rent due. Pursuant to California Civil Code § 1671(d) and California
25 Business & Professions Code § 17203, Plaintiffs seek restitution of Excessive Late Fees that
26 Defendants have collected. Plaintiffs also seek a declaratory judgment, pursuant to California Code of
27 Civil Procedure § 1060 and California Business & Professions Code § 17203, that Defendants' late fee
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1 policy and practice is prohibited within the state of California. Plaintiffs also seek injunctive relief
2 enjoining Defendants' ongoing unlawful and unfair business practices, as alleged herein, pursuant to
3 California Business & Professions Code § 17203. Defendants' violations of California Civil Code
4 §1671(d) and Business and Professions Code § 17200, *et seq.*, are continuing.

5 **II. SUBJECT MATTER JURISDICTION AND VENUE**

6 8. Defendants removed this action to this Court on March 11, 2016, under the Class
7 Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d). This Court has jurisdiction under CAFA
8 because there are more than one hundred putative class members, the aggregate claims of the putative
9 class members exceed \$5 million, exclusive of interest and costs, and at least one of the members of
10 the proposed class is a citizen of a different state than one or more Defendants.

11 9. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) because a substantial
12 part of the events or omissions giving rise to the claim occurred in this district. Venue is also proper in
13 this district pursuant to 28 U.S.C. § 1441(a), given that this Court has subject-matter jurisdiction under
14 CAFA. Venue in this district is also proper because each Defendant "resides" in this district under 28
15 U.S.C. § 1391(b)(1) and (c)(2), in that each Defendant is subject to this Court's personal jurisdiction
16 with respect to this civil action, as set forth in the following section.

17 **III. THE PARTIES AND PERSONAL JURISDICTION**

18 10. Defendant EQUITY RESIDENTIAL ("EQR") is a real estate investment trust
19 organized under the laws of the state of Maryland, with its principal executive offices located at Two
20 North Riverside Plaza, Chicago, Illinois. EQR is the sole general partner of Defendant ERP
21 OPERATING LIMITED PARTNERSHIP ("ERP"). EQR controls ERP and the day-to-day
22 management of ERP. Through ERP and ERP's subsidiaries, EQR also owns or controls all of the
23 California properties where class members reside and were charged Excessive Late Fees, including
24 properties in this district. EQR also owns or controls the entities that set the late fee policy in question.
25 Therefore, this Court has personal jurisdiction over EQR in this action.

26 11. Defendant ERP is an Illinois limited partnership that is registered with the California
27 Secretary of State to do business in the state of California. ERP was formed to conduct EQR's

1 residential property business, and holds substantially all of EQR's assets. ERP owns and operates
2 single-purpose limited liability companies that acquire residential rental properties throughout the state
3 of California. Through those limited liability companies, ERP owns or controls (or owned or
4 controlled during the class period) thousands of residential rental units throughout the State of
5 California, including Plaintiffs' and Class Members' residences in this district. Therefore, this Court
6 has personal jurisdiction over ERP in this action.

7 12. Defendant EQUITY RESIDENTIAL MANAGEMENT, L.L.C. ("ERM") is a Delaware
8 entity with its principal place of business in Illinois, and is registered with the State of California to do
9 business in this state. On information and belief, Defendant ERP is the sole and controlling "Member"
10 of ERM, pursuant to ERM's corporate governance documents. ERM conducts the day-to-day
11 management of Defendants' residential properties in California, including in this district. ERM
12 manages Defendants' property in which Plaintiff Bonfanti is a tenant, and, during the class period,
13 managed Defendants' properties where Plaintiffs Munguia-Brown, Magaña, and Rodriguez are tenants
14 (until Defendants sold those properties to new owners in approximately February 2016). On
15 information and belief, ERM implements and enforces Defendants' late fee policy. Therefore, this
16 Court has personal jurisdiction over ERM in this action.

17 13. Defendants EQR-WOODLAND PARK A LIMITED PARTNERSHIP ("Woodland Par-
18 A") and EQR-WOODLAND PARK B LIMITED PARTNERSHIP ("Woodland Park B") are both
19 Delaware entities with their principal places of business in Illinois, and both are registered to do
20 business with the State of California. Upon information and belief, Defendants Woodland Park A and
21 Woodland Park B were formed for the sole purpose of holding title to the properties where Plaintiffs
22 Munguia-Brown, Magaña, and Rodriguez reside, and held such title until Defendants sold the
23 properties in approximately February 2016.

24 14. Plaintiff Javanni Munguia-Brown was a tenant of Defendants' residential property in
25 East Palo Alto, California until approximately February of 2016 when Defendants sold the property.
26 She was subject to Defendants' late fee policy. Defendants have assessed Excessive Late Fees against
27 Ms. Munguia-Brown subject to Defendants' policy.

1 15. Plaintiff Norma Rodriguez was a tenant of Defendants’ residential property in East Palo
2 Alto, California until approximately February of 2016 when Defendants sold the property. Defendants
3 have assessed Excessive Late Fees against Ms. Rodriguez subject to Defendants’ policy.

4 16. Plaintiff Angelina Magaña was a tenant of Defendants’ residential property in East Palo
5 Alto, California until approximately February of 2016 when Defendants sold the property. Defendants
6 have assessed Excessive Late Fees against Ms. Magaña subject to Defendants’ policy.

7 17. Plaintiff David Bonfanti is a current tenant of one of Defendants’ residential properties
8 in Los Angeles, California. He is subject to Defendants’ late fee policy. Defendants have assessed and
9 will likely continue to assess Excessive Late Fees against Mr. Bonfanti subject to Defendants’
10 unlawful late fee policy.

11 **IV. FACTUAL BACKGROUND**

12 18. Defendants own, control, lease, and manage residential properties throughout
13 California, and have done so since at least four years prior to the filing of the original complaint.

14 19. Plaintiff Munguia-Brown was a tenant in an EQR-owned apartment in East Palo Alto
15 from approximately 2011 when Defendants purchased her building until approximately February 2016
16 when Defendants sold her building. When Defendants acquired Ms. Munguia-Brown’s building, they
17 stepped into the shoes of the lessor in her existing lease. The prior lease provided for the charging of a
18 late fee when rent was not paid on time, but did not provide for charging of late fees on late fees or
19 other outstanding balance amounts. The prior owners did not charge late fees on outstanding balances.
20 Consistent with their statewide policy, and consistent with the standard Equity Residential lease
21 (although Ms. Munguia-Brown had never entered into that lease), Defendants charged her a late fee of
22 \$50 per month on multiple occasions if she did not pay her rent and any other outstanding balance
23 within Defendants’ deadline, as well as when she made timely rent payments but had an outstanding
24 balance.

25 20. Plaintiff Norma Rodriguez was a tenant in an EQR-owned apartment in East Palo Alto
26 from approximately 2011 when Defendants purchased her building until approximately February 2016
27 when Defendants sold her building. When Defendants acquired Ms. Rodriguez’s building, they

1 stepped into the shoes of the lessor in her existing lease. The prior lease provided for the charging of a
2 late fee when rent was not paid on time, but did not provide for charging of late fees on late fees or
3 other outstanding balance amounts. The prior owners did not charge late fees on outstanding balances.
4 Consistent with their statewide policy, and consistent with the standard Equity Residential lease
5 (although Ms. Rodriguez had never entered into that lease), Defendants charged her a late fee of \$50
6 per month on multiple occasions if she did not pay her rent and any other outstanding balance within
7 Defendants' deadline, as well as when she made timely rent payments but had an outstanding balance.

8 21. Plaintiff Angelina Magaña was a tenant in an EQR-owned apartment in East Palo Alto
9 from approximately 2011 when Defendants purchased her building until approximately February 2016
10 when Defendants sold her building. The prior lease provided for the charging of a late fee when rent
11 was not paid on time, but did not provide for charging of late fees on late fees or other outstanding
12 balance amounts. The prior owners did not charge late fees on outstanding balances. Consistent with
13 their statewide policy, and consistent with the standard Equity Residential lease (although Ms. Magaña
14 had never entered into that lease), Defendants charged her a late fee of \$50 per month on multiple
15 occasions if she did not pay her rent and any other outstanding balance within Defendants' deadline, as
16 well as when she made timely rent payments but had an outstanding balance.

17 22. Plaintiff David Bonfanti has been, and currently is, a tenant in an EQR-owned
18 apartment in Los Angeles since October 2014. Mr. Bonfanti entered into EQR's standardized lease,
19 which specifies that Defendants will assess a 5% (or minimum of \$50) late fee if his rent payment or
20 any other outstanding fees or other balances are received after Defendants' deadline. Defendants have
21 assessed him a late fee of 5% of his monthly rent on multiple occasions.

22 **A. Imposition of Excessive Late Fees**

23 23. Defendants' policy and practice, throughout California, is to assess residential tenants a
24 fee of five percent of rent or a minimum of \$50 for the late payment of rent regardless of the amount of
25 rent owed or the length of time which elapses from the time rent is due and the time that the tenant
26 pays that rent. A tenant's failure to timely pay rent constitutes "a breach of an obligation to pay money
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1 only” pursuant to Civil Code section 3302, as held by the California Supreme Court in *Knight v.*
2 *Marks*, 183 Cal. 354, 357 (1920) and other published decisions.

3 24. Plaintiff Munguia-Brown’s lease provided her rent was due on the first day of the
4 month, with a grace period of four days. Defendants acknowledge receiving Ms. Munguia-Brown’s
5 full February 2012 rent, including past late fees, on February 9, 2012. Defendants assessed a \$50 late
6 fee against Ms. Munguia-Brown, though she paid her monthly rent only four days past the grace
7 period. This resulted in an interest rate of 324 percent per annum based on the rent of \$1,409.75 being
8 late by four days. Defendants again assessed a \$50 late fee in April 2012 after Ms. Munguia-Brown
9 paid her rent in full on April 13, 2012, eight days late. On April 13, 2012, she paid this \$50 late fee.
10 Defendants charged Ms. Munguia-Brown Excessive Late Fees in other months as well.

11 25. Plaintiff Norma Rodriguez’s lease provided her rent was due on the first day of the
12 month, with a grace period of five days. Defendants acknowledge that they received her full rental
13 payment for August 2012 on August 6, one day after the five-day grace period. On August 7, 2012,
14 after receiving rent a single day past the grace period, Defendants assessed a \$50 “Auto Late Fee”
15 against Ms. Rodriguez. This resulted in an interest rate of 1,824 percent per annum based on the rent
16 of \$1,000.80 being late by one day. This happened again in January 2013 when Defendants assessed a
17 \$50 fee for Ms. Rodriguez’s payment of rent just two days after the grace period.

18 26. Plaintiff Angelina Magaña’s lease provided her rent was due on the first day of the
19 month, with a grace period of five days. Defendants acknowledge receiving Ms. Magaña’s full
20 December 2012 rent on December 8, 2012. Defendants assessed a \$50 late fee against Ms. Magaña,
21 though she paid her monthly rent only three days past the grace period. This resulted in an interest rate
22 of 644 percent per annum based on the rent of \$944.38 being late by three days. Defendants also
23 assessed a \$50 late fee in November 2012 when Ms. Magaña paid her rent five days after the grace
24 period, representing an interest rate of 386 percent per annum on Plaintiff’s then \$944.38 rent.
25 Defendants charged Ms. Magaña Excessive Late Fees in other months as well.

26 27. Plaintiff David Bonfanti’s lease with Defendants provided his rent was due on the first
27 of the month with a grace period of two to four days (depending on the year). Defendants

1 acknowledge receiving Mr. Bonfanti's full January 2016 rent by January 7, 2016 so that Plaintiff
2 Bonfanti carried a zero balance on his account ledger. However, Defendants assessed a \$113.15 late
3 fee against Mr. Bonfanti (5% of his rent) even though he paid his full monthly rent only five days past
4 the grace period. This resulted in an interest rate of 365 percent per annum based on the rent of
5 \$2,263.00 being late by five days. Defendants charged Mr. Bonfanti Excessive Late Fees in other
6 months as well.

7 28. California Civil Code § 1671(d), governing parties to a residential property lease, states
8 that "a provision in a contract liquidating damages for the breach of the contract is void except that the
9 parties to such a contract may agree therein upon an amount which shall be presumed to be the amount
10 of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable
11 or extremely difficult to fix the actual damage." Defendants' collection of a fee of \$50 or 5 percent of
12 rent for delays of as little as one to several days in their receipt of tenants' rent payments far exceeds
13 Defendants' damages caused by the delay. Defendants' actual damages sustained by their late receipt
14 of rent due are neither impracticable nor extremely difficult to fix. As the California Supreme Court
15 has held, "[w]hen a tenant fails to pay rent as provided in the lease, the amount of damage is not
16 extremely difficult to fix, and it certainly is not impracticable to fix the amount of such damage." *Jack*
17 *v. Sinsheimer*, 125 Cal. 563, 566 (1899). The California Supreme Court reiterated this presumption
18 again in *McCarthy v. Tally*, 46 Cal. 2d 577, 583 (1956), where the Court cited other California cases
19 and explained that "[o]rdinarily, provisions for liquidated damages will not lie for failure to pay rent as
20 provided in the lease." More recently, in *Garrett v. Coast & Southern Federal Savings & Loan*
21 *Association*, 9 Cal. 3d 731, 741 n.11 (1973), the California Supreme Court again stated that
22 "[d]amages resulting because of the wrongful withholding of money are fixed by law [in Civil Code
23 § 3302] and other damages . . . such as administrative and accounting costs, would not appear to
24 present extreme difficulty in prospective fixing."

25 29. Defendants' late fee is an arbitrary amount which functions as a penalty. Any marginal
26 interest accumulated or other damages that Defendants sustain due to the delay in rent payments are
27 definite and easily ascertainable, as the California Supreme Court has long held. Moreover, when
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1 Defendants seek to collect late rent payments by filing an unlawful detainer action, they charge
2 attorney's fees and costs of filing the action to those tenants, demonstrating that those costs are not
3 among the damages that result when rent is paid late (even assuming that such costs could lawfully be
4 recouped via late fees).

5 30. On information and belief, Defendants have never made a reasonable endeavor to
6 estimate a fair average compensation for the losses sustained when a tenant pays rent late, as required
7 for a liquidated damages provision under California Civil Code § 1671(d) to be enforceable.

8 **B. Successive Imposition of Excessive Late Fees on Small Balances**

9 31. Defendants impose Excessive Late Fees month after month even when a tenant is
10 carrying a minimal balance. This policy is set forth in Defendants' standard lease, which Plaintiff
11 Bonfanti executed. This policy was also put into practice with Plaintiffs Mungia-Brown, Rodriguez,
12 and Magaña and the sub-class, even though it was not disclosed or agreed to in their leases.

13 32. Defendants record fees as a debt on tenants' rent ledger or account. In addition,
14 Defendants do not notify tenants that they have accrued such debt at the time it is incurred. Upon
15 receiving tenants' subsequent monthly rent payments, Defendants apply that payment to the previously
16 recorded debt, rather than the rent due for the month in which payment is made. Defendants then
17 consider that month's rent as not paid in full and again assess another Excessive Late Fee despite
18 tenants' full and timely monthly rent payment. As a result, Defendants charge a late fee of at least \$50
19 on a balance that may be as small as \$100. As a result, tenants incur repeated Excessive Late Fees.

20 33. On February 28, 2014, Plaintiff Munguia-Brown paid Defendants her complete rental
21 payment for the month of March 2014 plus additional money. On March 7, 2014, Defendants assessed
22 Ms. Munguia-Brown a \$50 "Auto Late Fee" despite her having made a complete and timely rental
23 payment for that month because she had a balance of previously assessed fees and other charges of
24 \$322.02.

25 34. In June 2014, this happened again. Ms. Munguia-Brown paid Defendants her complete
26 rental payment for June on May 30, 2014. On June 7, 2014, Defendants assessed Ms. Munguia-Brown
27 a \$50 "Auto Late Fee" despite her having made a complete and timely rental payment for that month
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1 because she had a balance of previously-assessed late fees and other charges of \$429.04. It was not
2 until around June of 2014 that Defendants informed Ms. Munguia-Brown that she was incurring late
3 fees every month because she was carrying a balance.

4 35. Ms. Munguia-Brown paid hundreds of dollars in late fees over the months of January
5 2012, February 2012, April 2012, and August 2013.

6 36. On July 4, 2012, Plaintiff Norma Rodriguez paid Defendants her complete rent payment
7 for that month. On July 7, 2012, Defendants assessed Ms. Rodriguez a \$50 "Auto Late Fee" despite
8 her having made a complete rental payment for that month during the five day grace period set forth in
9 her lease agreement. Defendants assessed this late fee despite a timely rent payment because
10 Ms. Rodriguez had a balance of \$100 in previously-assessed late fees.

11 37. In September 2012, this happened again. Ms. Rodriguez paid Defendants her complete
12 rental payment for September on September 4, 2012. On September 7, 2012, Defendants assessed
13 Ms. Rodriguez a \$50 "Auto Late Fee" despite her having made a complete and timely rental payment
14 for that month because she had a balance of \$201.10 of previously-assessed late fees. Ms. Rodriguez
15 received a receipt for this rental payment that explicitly stated the payment was "FOR RENT" for the
16 days of "9.1.12 to 9.30.12." Despite issuing her this receipt, Defendants applied her payment to her
17 prior late fees in order to assess a new late fee despite her timely payment. Ms. Rodriguez only
18 received notice that Defendants had assessed these Excessive Late Fees after several late fees had
19 accumulated in mid-September 2012 and the balance exceeded \$200.

20 38. Ms. Rodriguez paid Defendants \$180 of accumulated late fees in October 2012.

21 39. On May 4, 2013, Plaintiff Angelina Magaña paid Defendants her complete rental
22 payment for that month. On May 7, 2013, Defendants assessed Ms. Magaña a \$50 "Auto Late Fee"
23 despite her having made a complete and timely rental payment for that month. Ms. Magaña received
24 no notice that Defendants had assessed this late rent fee. Defendants did not advise Ms. Magaña they
25 were assessing late fees when she was paying her rent on time because she was carrying a balance
26 consisting primarily of late fees from prior months.

1 40. Ms. Magaña paid hundreds of dollars in accumulated late fees in September 2012,
 2 October 2012, November 2012, and August 2013.

3 41. Plaintiff Bonfanti’s standard EQR lease states that late fees and other charges will be
 4 considered rent and that he will be charged a late fee if “rent,” including prior late fees, is not received
 5 when it is due. Thus, if he carries over a late fee of \$113.15 (5 percent of his monthly rent) in the
 6 future, his lease provides that he will incur a subsequent late fee of another \$113.15 even if the next
 7 month’s rent is paid on time.

8 **V. CLASS ACTION ALLEGATIONS**

9 42. This action is maintainable as a class action pursuant to Federal Rule of Civil Procedure
 10 23(a), (b)(2), (b)(3), and (c)(4) for Defendants’ violations of California Civil Code § 1671(d) and
 11 California Business and Professions Code § 17200 *et seq.* Plaintiffs are representative of other tenants
 12 at Defendants’ properties throughout California and are acting on behalf of their interests. The
 13 similarly situated tenants are known to Defendants and are readily identifiable and locatable through
 14 Defendants’ own business records. The Class that Plaintiffs seek to represent is defined as follows:

15 All persons who are or were tenants of Defendants’ properties in the
 16 State of California at any time from four years prior to the date of the
 17 filing of the original complaint through the date of class certification
 who have been or are subject to Defendants’ late fee policy.

18 Throughout the Class Period, Class Members were tenants of Defendants’ properties and all of
 19 them have been subjected to Defendants’ Excessive Late Fee policy. Throughout the Class Period,
 20 Defendants have charged Class Members Excessive Late fees both for being both late in paying rent
 21 and for carrying a minimal balance even when they paid the current rent on time. Defendants’
 22 Excessive Late Fee policy and practice violates California law in that (1) determination of Defendants’
 23 actual damages would not be “impracticable or extremely difficult,” Cal. Civ. Code § 1671(d), and
 24 (2) the amount selected by Defendants in these contracts of adhesion – \$50 or 5% of late rent – does
 25 not represent a reasonable endeavor to estimate fair compensation for the loss sustained when rent is
 26 paid late, or when any outstanding balance, no matter how small, is paid late. As such, Class
 27 Members, and each of them, have been subjected to Defendants’ Excessive Late Fee policy and

1 practice in violation of California Civil Code § 1671(d). Defendants' Excessive Late Fee policy and
2 practice is therefore an unlawful business act or practice, as well as an unfair business practice
3 pursuant to California Business and Professions Code § 17200, *et seq.* Additionally, the practice of
4 charging late fees on top of an accumulated balance of late fees is sometimes referred to as
5 "pyramiding" and federal law prohibits banks from engaging in the same unfair scheme. *See* 12 C.F.R.
6 § 227.15(a); 12 C.F.R. § 226.36(c)(ii). If this practice is unlawful in the banking arena, it is at
7 minimum unfair in the context of this case. Defendants' fees have very little relation to their costs that
8 can lawfully be attributed to late rent or minimal balances and thus result in unethical and
9 unscrupulous profits for Defendants that are oppressive and financially harm tenants.

10 Plaintiffs Munguia-Brown, Rodriguez, and Magaña also seek to represent a sub-class defined
11 as follows:

12 All persons who are or were tenants of Defendants' properties in the
13 State of California at any time from four years prior to the date of filing
14 of the original complaint through the date of class certification whose
15 tenancy with Defendants was governed by a predecessor lease assumed
16 by Defendants that did not include a provision for the charging of late
17 fees on outstanding balances other than late rent itself.

18 43. Members of the sub-class are known to Defendants and are readily identifiable and
19 locatable through Defendants' own business records, including leases and rent ledgers displaying late
20 fees charged.

21 44. Upon information and belief, when Defendants acquire a property, they do not require
22 all existing tenants to sign EQR's standardized lease, but step into the shoes of the prior lessor. The
23 Named Plaintiffs representing the proposed sub-class signed, for example, the "California Apartment
24 Association Approved Form" lease, which does not include a provision for the charging of late fees on
25 late fees or other outstanding balance amounts.

26 45. The members of the sub-class were charged by Defendants, and paid to Defendants, late
27 fees that were not provided for under the terms of their agreement, consisting of late fees charged on
28 outstanding balances other than the present month's rent due, as alleged above. Such fees represent
liquidated damages for the breach of lease contracts to which tenants did not agree, and are therefore

1 void under Civil Code § 1671(d). Defendants' policy and practice of charging such fees is an unlawful
2 and unfair business act or practice in violation of California Business and Professions Code § 17200, *et*
3 *seq.* All such fees that Defendants collected must be disgorged from Defendants and returned to the
4 members of the sub-class.

5 **A. Numerosity of Class**

6 46. The members of the class, as well as the sub-class, as defined above are so numerous
7 that joinder of all Class Members is impracticable. Although the precise number of such tenants is
8 unknown, Plaintiffs believe that thousands of tenants who rent or have rented Defendants' properties
9 and have been assessed late fees by Defendants would fall within the putative Class, and that
10 significantly more than 40 class members would fall within the sub-class. The exact numbers are
11 easily ascertainable from Defendants' own business records, which are presently within Defendants'
12 control.

13 **B. Existence and Predominance of Common Questions of Fact and Law**

14 47. There are questions of law and fact common to the class that predominate over any
15 questions affecting only individual members of the class including, without limitation, whether, as
16 alleged herein, Defendants have:

- 17 a. Included late fees in their lease agreements that equate to unlawful liquidated
18 damages;
- 19 b. Charged such late fees, as liquidated damages, when determining the actual
20 amount of damages is neither impracticable nor extremely difficult;
- 21 c. Selected a late fee amount without conducting the required reasonable endeavor
22 to estimate whether it would represent fair compensation for the loss sustained;
- 23 d. Charged late fees that do not represent a fair compensation for the loss
24 sustained;
- 25 e. Engaged in unlawful business practices that violate California Civil Code
26 § 1671; and
- 27
- 28

1 f. Engaged in unfair business practices by charging tenants excessive late fees both
2 on late rent and on minimal balances.

3 48. There are questions of law and fact common to the sub-class that predominate over any
4 questions affecting only individual members of the sub-class including, without limitation, whether, as
5 alleged herein, Defendants' policy of charging late fees on outstanding balances other than the current
6 monthly rental payment due, despite the fact that the leases of sub-class members did not authorize
7 such charges, violated section 1671(d) and/or was an unlawful or unfair business practice; and whether
8 such payments should be disgorged from Defendants and returned to the sub-class members, with
9 interest.

10 **C. Typicality**

11 49. The claims of the named Plaintiffs are typical of the claims of the class they seek to
12 represent. Plaintiffs and Class Members are or were tenants of Defendants' owned, leased, or managed
13 properties. Plaintiffs and Class Members have the same rights to not be subjected to Excessive Late
14 Fees under California Civil Code § 1671. Plaintiffs and all Class Members were subjected to the same
15 violations of their rights under California Law by Defendants and have suffered damages, including
16 Excessive Late Fees, resulting from Defendants' wrongful conduct.

17 50. Named Plaintiffs Munguia-Brown, Rodriguez, and Magaña are typical of the members
18 of the sub-class, in that Defendants stepped into the shoes of their prior lessor, and charged them fees
19 on fees and other outstanding balances in accordance with Defendant's uniform policy, despite the fact
20 that these Plaintiffs' leases did not authorize such charges.

21 51. In addition, Plaintiff Bonfanti and Class Members who are current tenants of
22 Defendants in California are entitled to equitable relief, as permitted by law, because Defendants'
23 actions and violations of state statutes have harmed Class Members, will continue to harm Class
24 Members, and constitute unlawful and unfair business practices, especially when compared to those of
25 competitors that comply with California law.

1 **D. Adequacy of Representation**

2 52. Class Representative Plaintiffs will fairly and adequately represent and protect the
3 interests of the Class Members and members of the sub-class. Plaintiffs' interests are not in conflict
4 with those of the Class Members or members of the sub-class. Plaintiffs' counsel are competent and
5 experienced in litigating large class actions and other complex litigation matters, including housing-
6 related matters like this case.

7 **E. Superiority of Class Action**

8 53. A class action is superior to other available means for the fair and efficient adjudication
9 of this controversy. Each Class Member is entitled to recovery as each has been subjected to or
10 damaged by Defendants' illegal and unfair policy and/or practice of charging liquidated damages that
11 equate to Excessive Late Fees; charging Excessive Late Fees as liquidated damages when determining
12 the actual amount of damages is neither impracticable nor extremely difficult; selecting a Late Fee
13 amount without conducting the required reasonable endeavor to estimate whether it would represent
14 fair compensation for the loss sustained; engaging in business practices that were and are unlawful as
15 they violate California Civil Code § 1671; and engaging in business practices that were and are unfair
16 by charging tenants Excessive Late Fees for late rent and unpaid balances.

17 54. The damages suffered by individual Class Members are small compared to the expense
18 and burden of individual prosecution of this litigation. Individual plaintiffs may lack the financial
19 resources to vigorously prosecute a lawsuit against Defendants to recover such small amounts of
20 damages.

21 55. In addition, class litigation is superior because it will obviate the need for unduly
22 duplicative litigation that might result in inconsistent judgments about the legality of Defendants'
23 Excessive Late Fee policy and practice.

24 **FIRST CAUSE OF ACTION**
25 **UNLAWFUL LIQUIDATED DAMAGES**
26 **(California Civil Code § 1671)**

27 56. Plaintiffs hereby incorporate Paragraphs 1 through 55 above as though fully set forth
28 herein.

1 57. During the Class Period, Defendants rented real property to Plaintiffs and Class
2 Members for use as dwellings by Plaintiffs, Class Members, or those dependent upon Plaintiffs or
3 Class Members for support, pursuant to California Civil Code § 1671(c)(2).

4 58. California Civil Code § 1671(d) provides that “a provision in a contract liquidating
5 damages for the breach of the contract is void except that the parties to such a contract may agree
6 therein upon an amount which shall be presumed to be the amount of damage sustained by a breach
7 thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the
8 actual damage.”

9 59. During the Class Period, on information and belief, any actual damages Defendants
10 sustained as a result of Plaintiffs’ and Class Members’ late payment of rent or other outstanding
11 balance amounts are neither impracticable nor extremely difficult to fix. Neither is Defendants’ late
12 rent fee the result of a reasonable effort to estimate fair compensation for Defendants’ actual damages
13 sustained due to their late receipt of rent or other outstanding balance amounts from Plaintiffs or Class
14 Members.

15 60. The lease agreements of the proposed sub-class contain no provision about Defendants’
16 policy or practice of charging late fees on outstanding balances. Accordingly, members of the sub-
17 class have not agreed upon an amount of damage that would be sustained by a tenant’s failure to timely
18 pay a late fee, as required by Civil Code § 1671(d).

19 61. Defendants’ Excessive Late Fees are accordingly unlawful pursuant to California Civil
20 Code § 1671(d). Plaintiffs and Class Members are entitled to restitution of all fees Defendants have
21 collected from tenants for the late payment of rent or other outstanding balances, as well as interest and
22 other relief as specifically prayed for herein.

23 **SECOND CAUSE OF ACTION**
24 **VIOLATION OF CALIFORNIA UNFAIR COMPETITION LAW**
 (Cal. Bus. & Prof. Code § 17200, *et seq.*)

25 62. Plaintiffs hereby incorporate Paragraphs 1 through 61 above as though fully set forth
26 herein.

1 63. California Business and Professions Code § 17200, *et seq.*, prohibits businesses from
2 engaging in unlawful, unfair, or fraudulent business acts or practices. Defendants’ policy and practice
3 of imposing and collecting Excessive Late Fees from Plaintiffs and Class Members as alleged in the
4 First Cause of Action above constitute unlawful acts and practices prohibited by California Civil Code
5 § 1671 and, as such, are also prohibited by the UCL (Cal. Bus. & Prof. Code §§ 17200-17208).

6 64. Defendants’ Excessive Late Fee policy and practice is also unfair as Defendants impose
7 Excessive Late Fees on tenants even when tenants are only slightly late in paying rent and/or when
8 tenants pay their current monthly rent on time but carry a minimal balance consisting of late fees or
9 other charges, resulting in effective annual interest rates that are unfairly high. Defendants’ fees have
10 very little relation to their costs that can lawfully be attributed to late rent or minimal balances and thus
11 result in unethical and unscrupulous profits for Defendants that are oppressive and financially harm
12 tenants.

13 65. The practice of charging late fees on outstanding late fees and other balance amounts
14 other than the monthly rent itself is an also an unfair business practices, analogous to unlawful
15 “pyramiding” by banks.

16 66. Defendants’ practice of charging members of the sub-class late fees for late payment of
17 charges other than monthly rent, such as late fees on outstanding late fees, is not authorized by the
18 leases of the sub-class members, and is therefore an unfair business practice.

19 67. Plaintiffs and Class Members have suffered injury in fact and lost money or property
20 pursuant to California Business and Professions Code § 17204 as a result of Defendants’ unlawful
21 and/or unfair business acts or practices.

22 68. As a result of these unlawful business acts and practices, Defendants have reaped unfair
23 benefits and illegal profits, at the expense of Plaintiffs and all similarly-situated tenants and former
24 tenants of Defendants. Plaintiffs and Class Members are therefore entitled to an order of restitution
25 requiring Defendants to restore to Plaintiffs and Class Members the money which Defendants have
26 acquired by means of their unlawful and unfair business acts and practices, including excessive late
27

1 fees, with accrued interest. All such remedies are cumulative of relief available under other laws,
2 pursuant to California Business and Professions Code § 17205.

3 **VI. PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiffs, on behalf of themselves and all Class Members, seek the following
5 relief against Defendants and each of them as follows:

6 69. That the Court determine that this action may be maintained as a class action under
7 Federal Rule of Civil Procedure 23, and define the Class and sub-class as requested herein;

8 70. That the Court find and declare that Defendants' late fees and policy and practice of
9 assessing such late fees against Plaintiffs and Class Members are unlawful pursuant to California Civil
10 Code § 1671(d);

11 71. That the Court find and declare that Defendants' late fees and policy and practice of
12 assessing such late fees against Plaintiffs and Class Members are unlawful and unfair under the UCL,
13 Business and Professions Code § 17200, *et seq.*;

14 72. That the Court find and declare that Defendants' late fees and policy and practice of
15 assessing such late fees for outstanding charges other than rent against Plaintiffs and members of the
16 sub-class are unfair under the UCL, Business and Professions Code § 17200, *et seq.*;

17 73. That Plaintiffs and the class be awarded restitution of all Excessive Late Fees collected
18 by Defendants, and interest thereon, pursuant to Code of Civil Procedure § 1060, Business and
19 Professions Code § 17200, *et seq.*, and Civil Code § 3827;

20 74. That the Court award any and all appropriate injunctive and declaratory relief to prevent
21 further repetition of the alleged unlawful and unfair business acts and practices;

22 75. That Plaintiffs and the Class be awarded reasonable attorneys' fees and costs, pursuant
23 to California Code of Civil Procedure § 1021.5, the terms of the lease agreements between Class
24 Members and Defendants, and any other applicable law; and,

25 76. That the Court award such other and further relief as this Court may deem appropriate.
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27
28

1 Dated: February 8, 2017

Respectfully submitted,

2 GOLDSTEIN, BORGEN, DARDARIAN & HO

3
4 /s/ Megan E. Ryan

5 Megan E. Ryan

6 Attorneys for Plaintiffs

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