

1 Jason H. Tarricone (SBN 247506)
 jason@clsepa.org
 2 Margaret McBride (SBN 294066)
 mmcbride@clsepa.org
 3 COMMUNITY LEGAL SERVICES IN EAST PALO ALTO
 1861 Bay Road
 4 East Palo Alto, CA 94303
 Tel: (650) 326-6440
 5 Fax: (866) 688-5204

6 Linda M. Dardarian (SBN 131001)
 ldardarian@gbdhlegal.com
 7 Andrew P. Lee (SBN 245903)
 alee@gbdhlegal.com
 8 Anne P. Bellows (SBN 293722)
 abellows@gbdhlegal.com
 9 Katharine L. Fisher (SBN 305413)
 kfisher@gbdhlegal.com
 10 GOLDSTEIN, BORGES, DARDARIAN & HO
 155 Grand Avenue, Suite 900
 11 Oakland, CA 94612
 Tel: (510) 763-9800
 12 Fax: (510) 835-1417

13 Attorneys for Plaintiffs and the Certified Classes
 14 *(Additional Counsel for Plaintiffs and the Certified
 Classes listed on following page)*

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

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

21 Plaintiffs,
 22 vs.

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

27 Defendants.
 28

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

**THIRD AMENDED COMPLAINT FOR
 INJUNCTIVE RELIEF, DECLARATORY
 RELIEF, AND RESTITUTION; 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

1 Craig Nicholas (SBN 178444)
2 craig@nicholaslaw.org
3 Alex Tomasevic (SBN 245595)
4 alex@nicholaslaw.org
5 NICHOLAS & TOMASEVIC, LLP
6 225 Broadway, 19th Floor
7 San Diego, CA 92101
8 Tel: (619) 325-0492
9 Fax: (619) 325-0496

10 Attorneys for Plaintiffs and the Certified Classes
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Javanni Munguia-Brown, Norma Rodriguez, Angelina Magaña, David Bonfanti, and Shannah
 2 Smith (“Plaintiffs”), on behalf of themselves and all others similarly situated (hereinafter “Class
 3 Members”), 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 (or separate class, but referred to herein as “sub-class”) of tenants,
27 Defendants charge Excessive Late Fees for outstanding minimal balances even though the tenants’
28

1 leases do not authorize it. Specifically, when Defendants acquired the buildings in which Plaintiffs
2 Munguia-Brown, Rodriguez, and Magaña reside, Defendants stepped into the shoes of the prior lessor,
3 and did not provide them with a new lease. The prior leases provided for a late fee when rent was
4 overdue, but did not provide for the charging of late fees on top of late fees or other outstanding
5 balances. Nonetheless, Defendants applied their standard policy and charged such tenants late fees of
6 \$50 whenever there was an outstanding balance, even if the tenants' monthly rent payment itself was
7 timely. There was no contractual basis for the fees Defendants charged these tenants, and the tenants
8 in this sub-class did not agree in their leases upon an amount of damage that Defendants would sustain
9 by the tenants' carrying outstanding balances. This is a separate and independent reason that late fees
10 on outstanding balances (as opposed to late fees for late payment of a month's rent) must be disgorged
11 and returned to the members of this sub-class, with interest. In the alternative, if a court found that
12 there was some implied contractual basis, the policy still would represent an unlawful liquidated
13 damages penalty under California Civil Code § 1671(d), and an unfair business act or practice, for the
14 same reasons 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 of \$50 or 5 percent of
21 their monthly rent by Defendants at any time from four years prior to the original filing of this action
22 through the date seventy-five (75) days before the trial of this action, for recovery of monetary relief
23 pursuant to Federal Rule of Civil Procedure 23(b)(3). They also seek to represent, under Rule 23(b)(2)
24 for purposes of injunctive and declaratory relief, all current and future Equity Residential tenants in
25 California who at any time prior to judgment in this action were charged and/or paid one or more late
26 fee(s) under Equity Residential's standard late fee provision: 5% of the outstanding balance owed
27 (capped at 5% of the total amount of monthly recurring charges) or \$50, whichever is greater.

Plaintiffs also seek to represent a sub-class of tenants whose pre-EQR leases, which were assumed by Defendants, do not state an agreement for Defendants' charging of late fees. Pursuant to California Civil Code § 1671(d) and California Business & Professions Code § 17203, Plaintiffs seek restitution of Excessive Late Fees that Defendants have collected. Plaintiffs also seek a declaratory judgment, pursuant to California Code of Civil Procedure § 1060 and California Business & Professions Code § 17203, that Defendants' late fee policy and practice is prohibited within the state of California. Plaintiffs also seek injunctive relief enjoining Defendants' ongoing unlawful and unfair business practices, as alleged herein, pursuant to California Business & Professions Code § 17203. Defendants' violations of California Civil Code § 1671(d) and Business and Professions Code § 17200, *et seq.*, are continuing.

II. SUBJECT MATTER JURISDICTION AND VENUE

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

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

III. THE PARTIES AND PERSONAL JURISDICTION

10. Defendant EQUITY RESIDENTIAL ("EQR") is a real estate investment trust organized under the laws of the state of Maryland, with its principal executive offices located at Two North Riverside Plaza, Chicago, Illinois. EQR is the sole general partner of Defendant ERP OPERATING LIMITED PARTNERSHIP ("ERP"). EQR controls ERP and the day-to-day

1 management of ERP. Through ERP and ERP's subsidiaries, EQR also owns or controls all of the
2 California properties where class members reside and were charged Excessive Late Fees, including
3 properties in this district. EQR also owns or controls the entities that set the late fee policy in question.
4 Therefore, this Court has personal jurisdiction over EQR in this action.

5 11. Defendant ERP is an Illinois limited partnership that is registered with the California
6 Secretary of State to do business in the state of California. ERP was formed to conduct EQR's
7 residential property business, and holds substantially all of EQR's assets. ERP owns and operates
8 single-purpose limited liability companies that acquire residential rental properties throughout the state
9 of California. Through those limited liability companies, ERP owns or controls (or owned or
10 controlled during the class period) thousands of residential rental units throughout the State of
11 California, including Plaintiffs' and Class Members' residences in this district. Therefore, this Court
12 has personal jurisdiction over ERP in this action.

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

24 13. Defendants EQR-WOODLAND PARK A LIMITED PARTNERSHIP ("Woodland
25 Park-A") and EQR-WOODLAND PARK B LIMITED PARTNERSHIP ("Woodland Park B") are
26 both Delaware entities with their principal places of business in Illinois, and both are registered to do
27 business with the State of California. Upon information and belief, Defendants Woodland Park A and
28

1 Woodland Park B were formed for the sole purpose of holding title to the properties where Plaintiffs
 2 Munguia-Brown, Magaña, and Rodriguez reside, and held such title until Defendants sold the
 3 properties in approximately February 2016.

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

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

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

14 17. Plaintiff David Bonfanti was a tenant of one of Defendants' residential properties in Los
 15 Angeles, California. He was subject to Defendants' late fee policy. Defendants assessed Excessive
 16 Late Fees against Mr. Bonfanti subject to Defendants' unlawful late fee policy.

17 18. Plaintiff Shannah Smith is a current tenant of one of Defendants' residential properties
 18 in Redwood City, California. She is subject to Defendants' late fee policy. Defendants have assessed
 19 and will likely continue to assess Excessive Late Fees against Ms. Smith subject to Defendants'
 20 unlawful late fee policy.

21 **IV. FACTUAL BACKGROUND**

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

24 20. Plaintiff Munguia-Brown was a tenant in an EQR-owned apartment in East Palo Alto,
 25 from approximately 2011 when Defendants purchased her building until approximately February 2016
 26 when Defendants sold her building. When Defendants acquired Ms. Munguia-Brown's building, they
 27 stepped into the shoes of the lessor in her existing lease. The prior lease provided for the charging of a
 28

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

8 21. Plaintiff Norma Rodriguez 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. When Defendants acquired Ms. Rodriguez's building, they
11 stepped into the shoes of the lessor in her existing lease. The prior lease provided for the charging of a
12 late fee when rent was not paid on time, but did not provide for charging of late fees on late fees or
13 other outstanding balance amounts. The prior owners did not charge late fees on outstanding balances.
14 Consistent with their statewide policy, and consistent with the standard Equity Residential lease
15 (although Ms. Rodriguez had never entered into that lease), Defendants charged her a late fee of \$50
16 per month on multiple occasions if she did not pay her rent and any other outstanding balance within
17 Defendants' deadline, as well as when she made timely rent payments but had an outstanding balance.

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

1 23. Plaintiff David Bonfanti was a tenant in an EQR-owned apartment in Los Angeles from
2 approximately October 2014 to July 2017. Mr. Bonfanti entered into EQR's standardized lease for
3 Defendants' California tenants, which specifies that Defendants will assess a 5% (or minimum of \$50)
4 late fee if his rent payment or any other outstanding fees or other balances are received after
5 Defendants' deadline ("Standard Late Fee"). Defendants have assessed him a late fee of 5% of his
6 monthly rent on multiple occasions.

7 24. Plaintiff Shannah Smith has been, and currently is, a tenant in an EQR-owned
8 apartment in Redwood City since approximately 2013, when Defendants purchased the building at
9 which Ms. Smith had been living since December 2004. Ms. Smith entered into EQR's standardized
10 lease for Defendants' California tenants, which specifies that Defendants will assess a 5% (or
11 minimum of \$50) late fee if her rent payment or any other outstanding fees or other balances are
12 received after Defendants' deadline ("Standard Late Fee"). On or about January 8, 2015, Defendants
13 assessed Plaintiff Smith a late fee of 5% of her monthly rent, which she paid, along with her monthly
14 rent payment of \$2,648, on or about January 9, 2015.

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

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

22 26. Plaintiff Munguia-Brown's lease provided her rent was due on the first day of the
23 month, with a grace period of four days. Defendants acknowledge receiving Ms. Munguia-Brown's
24 full February 2012 rent, including past late fees, on February 9, 2012. Defendants assessed a \$50 late
25 fee against Ms. Munguia-Brown, though she paid her monthly rent only four days past the grace
26 period. This resulted in an interest rate of 324 percent per annum based on the rent of \$1,409.75 being
27 late by four days. Defendants again assessed a \$50 late fee in April 2012 after Ms. Munguia-Brown
28

1 paid her rent in full on April 13, 2012, eight days late. On April 13, 2012, she paid this \$50 late fee.
2 Defendants charged Ms. Munguia-Brown Excessive Late Fees in other months as well.

3 27. Plaintiff Norma Rodriguez's lease provided her rent was due on the first day of the
4 month, with a grace period of five days. Defendants acknowledge that they received her full rental
5 payment for August 2012 on August 6, one day after the five-day grace period. On August 7, 2012,
6 after receiving rent a single day past the grace period, Defendants assessed a \$50 "Auto Late Fee"
7 against Ms. Rodriguez. This resulted in an interest rate of 1,824 percent per annum based on the rent
8 of \$1,000.80 being late by one day. This happened again in January 2013 when Defendants assessed a
9 \$50 fee for Ms. Rodriguez's payment of rent just two days after the grace period.

10 28. Plaintiff Angelina Magaña's lease provided her rent was due on the first day of the
11 month, with a grace period of five days. Defendants acknowledge receiving Ms. Magaña's full
12 December 2012 rent on December 8, 2012. Defendants assessed a \$50 late fee against Ms. Magaña,
13 though she paid her monthly rent only three days past the grace period. This resulted in an interest rate
14 of 644 percent per annum based on the rent of \$944.38 being late by three days. Defendants also
15 assessed a \$50 late fee in November 2012 when Ms. Magaña paid her rent five days after the grace
16 period, representing an interest rate of 386 percent per annum on Plaintiff's then \$944.38 rent.
17 Defendants charged Ms. Magaña Excessive Late Fees in other months as well.

18 29. Plaintiff David Bonfanti's lease with Defendants provided his rent was due on the first
19 of the month with a grace period of two to four days (depending on the year). Defendants
20 acknowledge receiving Mr. Bonfanti's full January 2016 rent by January 7, 2016 so that Plaintiff
21 Bonfanti carried a zero balance on his account ledger. However, Defendants assessed a \$113.15 late
22 fee against Mr. Bonfanti (5% of his rent) even though he paid his full monthly rent only five days past
23 the grace period. This resulted in an interest rate of 365 percent per annum based on the rent of
24 \$2,263.00 being late by five days. Defendants charged Mr. Bonfanti Excessive Late Fees in other
25 months as well.

26 30. Plaintiff Shannah Smith's lease with Defendants states that her rent is due on the first of
27 the month with a grace period of four days. In January 2015, Ms. Smith had tendered payment of her
28

1 monthly rent before the end of the grace period, however the rent payment bounced. Defendants
 2 assessed a \$132.40 late fee against Ms. Smith (5% of her rent) for her January 2015 rent even though
 3 she successfully paid her full monthly rent on the fifth day after the grace period. Defendants
 4 acknowledge receiving Ms. Smith's full January 2015 rent, the late fee, and a \$25 Not Sufficient Funds
 5 (NSF) fee only five days past the grace period. The \$132.40 late fee that Defendants assessed against
 6 Ms. Smith (5% of her rent) equates to an interest rate of 365 percent per annum based on the rent of
 7 \$2,648.00 being late by five days.

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

26 32. Defendants' late fee is an arbitrary amount which functions as a penalty. Any marginal
 27 interest accumulated or other damages that Defendants sustain due to the delay in rent payments are
 28

1 definite and easily ascertainable, as the California Supreme Court has long held. Moreover, when
 2 Defendants seek to collect late rent payments by filing an unlawful detainer action, they charge
 3 attorney's fees and costs of filing the action to those tenants, demonstrating that those costs are not
 4 among the damages that result when rent is paid late (even assuming that such costs could lawfully be
 5 recouped via late fees).

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

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

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

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

21 36. On February 28, 2014, Plaintiff Munguia-Brown paid Defendants her complete rental
 22 payment for the month of March 2014 plus additional money. On March 7, 2014, Defendants assessed
 23 Ms. Munguia-Brown a \$50 "Auto Late Fee" despite her having made a complete and timely rental
 24 payment for that month because she had a balance of previously assessed fees and other charges of
 25 \$322.02.

26 37. In June 2014, this happened again. Ms. Munguia-Brown paid Defendants her complete
 27 rental payment for June on May 30, 2014. On June 7, 2014, Defendants assessed Ms. Munguia-Brown
 28

1 a \$50 “Auto Late Fee” despite her having made a complete and timely rental payment for that month
2 because she had a balance of previously-assessed late fees and other charges of \$429.04. It was not
3 until around June of 2014 that Defendants informed Ms. Munguia-Brown that she was incurring late
4 fees every month because she was carrying a balance.

5 38. Ms. Munguia-Brown paid hundreds of dollars in late fees over the months of January
6 2012, February 2012, April 2012, and August 2013.

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

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

21 41. Ms. Rodriguez paid Defendants \$180 of accumulated late fees in October 2012.

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

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

44. Plaintiff Bonfanti's standard EQR lease stated that late fees and other charges would be considered rent and that he would be charged a late fee if "rent," including prior late fees, was not received when it is due. Thus, if he carried over a late fee of \$113.15 (5 percent of his monthly rent) in the future, his lease provided that he would incur a subsequent late fee of another \$113.15 even if the next month's rent was paid on time.

45. Plaintiff Shannah Smith’s standard EQR lease states that late fees and other charges will be considered rent and that she will be charged a late fee if “rent,” including prior late fees, is not received when it is due.

V. CLASS ACTION ALLEGATIONS

46. This action is maintainable as a class action pursuant to Federal Rule of Civil Procedure 23(a), (b)(2), (b)(3), and (c)(4) for Defendants' violations of California Civil Code § 1671(d) and California Business and Professions Code § 17200 *et seq.* Plaintiffs are representative of other tenants at Defendants' properties throughout California and are acting on behalf of their interests. The similarly situated tenants are known to Defendants and are readily identifiable and locatable through Defendants' own business records. Plaintiffs seek to certify three classes.

a. First, Plaintiffs seek to certify a class under Rule 23(b)(2) (for injunctive and declaratory relief) that consists of every tenant of Defendants' California residential properties who have been subject to Defendants' Standard Late Fee provision ("the Standard Late Fee Injunctive Relief Class"), defined as:

All current and future Equity Residential tenants in California who at any time prior to judgment in this action were charged one or more late fee(s) under Equity Residential's standard late fee provision: 5% of the outstanding balance owed (capped at 5% of the total amount of monthly recurring charges) or \$50, whichever is greater.

b. Second, Plaintiffs seek to certify a class for restitution and related monetary relief under Rule 23(b)(3) that consists of every tenant of Defendants' California residential properties

1 who have been subject to Defendants' Standard Late Fee provision ("the Standard Late Fee Monetary
2 Relief Class"), defined as:

3 All Equity Residential tenants in the State of California from September
4 3, 2010 through the date 75-days before the commencement of trial who
5 were charged one or more late fee(s) under Equity Residential's standard
6 late fee provision: 5% of the outstanding balance owed (capped at 5% of
the total amount of monthly recurring charges) or \$50, whichever is
greater.

7 Hereinafter, and unless otherwise specified, members of these two classes will collectively be
8 referred to as the "Standard Late Fee Classes" or "Standard Late Fee Class Members."

9 c. Third, Plaintiffs Munguia-Brown, Rodriguez, and Magaña also seek to represent
10 a sub- or separate Woodland Park Preexisting Lease Class under Rule23(b)(3), for restitution and
11 related monetary relief, defined as:

12 All Equity Residential tenants in the Woodland Park Property from
13 December 1, 2011 until Defendant sold the property in February 2016
14 who were charged one or more late fee(s) of \$50 under Equity
15 Residential's policy of charging a flat \$50 late fee to tenants on pre-
existing non-EQR leases.

16 Hereinafter, and unless otherwise specified, members of the three classes collectively will be
17 referred to as "Class Members" or "members of the proposed Classes."

18 47. Throughout the Class Period, Class Members were tenants of Defendants' properties
19 and all of them have been subjected to Defendants' Excessive Late Fee policy. Throughout the Class
20 Periods, Defendants have charged Class Members Excessive Late fees both for being both late in
21 paying rent and for carrying a minimal balance even when they paid the current rent on time.
22 Defendants' Excessive Late Fee policy and practice violates California law in that (1) determination of
23 Defendants' actual damages would not be "impracticable or extremely difficult," Cal. Civ. Code
24 § 1671(d), and (2) the amount selected by Defendants in these contracts of adhesion – \$50 or 5% of
25 late rent – does not represent a reasonable endeavor to estimate fair compensation for the loss sustained
26 when rent is paid late, or when any outstanding balance, no matter how small, is paid late. As such,
27 Class Members, and each of them, have been subjected to Defendants' Excessive Late Fee policy and
28

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’ late fees have very little relation to their costs
 8 that 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 48. Members of the proposed Classes are known to Defendants and are readily identifiable
 11 and locatable through Defendants’ own business records, including leases and rent ledgers displaying
 12 late fees charged.

13 49. Upon information and belief, when Defendants acquire a property, they do not require
 14 all existing tenants to sign EQR’s standardized lease, but step into the shoes of the prior lessor. The
 15 Named Plaintiffs representing the proposed Woodland Park Preexisting Lease Class signed, for
 16 example, the “California Apartment Association Approved Form” lease, which does not include a
 17 provision for the charging of late fees on late fees or other outstanding balance amounts.

18 50. The members of the Woodland Park Preexisting Lease class were charged by
 19 Defendants, and paid to Defendants, late fees that were not provided for under the terms of their
 20 agreement, consisting of late fees charged on outstanding balances other than the present month’s rent
 21 due, as alleged above. Such fees represent liquidated damages for the breach of lease contracts to
 22 which tenants did not agree, and are therefore void under Civil Code § 1671(d). Defendants’ policy
 23 and practice of charging such fees is an unlawful and unfair business act or practice in violation of
 24 California Business and Professions Code § 17200, *et seq.* All such fees that Defendants collected
 25 must be disgorged from Defendants and returned to the members of the Woodland Park Preexisting
 26 Lease Class.

1 **A. Numerosity of Classes**

2 51. The members of the Standard Late Fee Classes, as well as the Woodland Park
 3 Preexisting Lease Class, as defined above are so numerous that joinder of all Class Members is
 4 impracticable. Although the precise number of such tenants is unknown, Plaintiffs believe that the
 5 Standard Late Fee Classes consist of more than one hundred thousand tenants who rent or have rented
 6 Defendants' California residential properties and have been assessed late fees by Defendants. The
 7 exact numbers are easily ascertainable from Defendants' own business records, which are presently
 8 within Defendants' control. The Woodland Park Preexisting Lease Class is also numerous, consisting
 9 of approximately 1,800 members.

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

11 52. There are questions of law and fact common to each class that predominate over any
 12 questions affecting only individual members of the classes including, without limitation, whether, as
 13 alleged herein, Defendants have:

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

26 53. There are questions of law and fact common to the Woodland Park Preexisting Lease
 27 Class that predominate over any questions affecting only individual members of this class including,
 28

1 without limitation, whether, as alleged herein, Defendants' policy of charging a late fee of \$50 when
2 rent was not timely paid, regardless of the late fee provision contained in the class members' pre-
3 existing leases violated section 1671(d) and/or was an unlawful or unfair business practice; and
4 whether such payments should be disgorged from Defendants and returned to the Woodland Park
5 Preexisting Lease class members, with interest.

6 **C. Typicality**

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

13 55. Named Plaintiffs Bonfanti and Smith are typical of the members of the Standard Late
14 Fee Monetary Relief Class, and Plaintiff Smith is typical of the members of the Standard Late Fee
15 Injunctive Relief Class.

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

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

25 **D. Adequacy of Representation**

26 58. Class Representative Plaintiffs Bonfanti and Smith will fairly and adequately represent
27 and protect the interests of the Standard Late Fee Monetary Relief Class Members, and Class
28

Representative Plaintiff Smith will fairly and adequately represent and protect the interests of the Standard Late Fee Injunctive Relief Class Members. Class Representative Plaintiffs Munguia-Brown, Magana, and Rodriguez will fairly and adequately represent and protect the interests of the Woodland Park Preexisting Lease Class. Plaintiffs' interests are not in conflict with those of the Class Members they seek to represent. Plaintiffs' counsel are competent and experienced in litigating large class actions and other complex litigation matters, including housing-related matters like this case.

E. Injunctive and Declaratory Relief Is Appropriate to the Standard Late Fee Injunctive Relief Class

59. Class certification is appropriate for the Standard Late Fee Injunctive Relief Class pursuant to Federal Rule of Civil Procedure 23(b)(2) because Defendants have acted and/or refused to act on grounds generally applicable to the Class, making appropriate declaratory and injunctive relief with respect to Plaintiffs and the Class as a whole. All Standard Late Fee Class Members have entered into Defendants' Standard Lease that includes Defendants' Standard Late Fee provision, all are subject to Defendants' Standard Late Fee policy, and all have been charged and/or paid or will be charged and/or pay the Standard Late Fee. The Class Members are entitled to injunctive relief to end Defendants' unlawful Standard Late Fee and declaratory relief finding the Standard Late Fee to be unlawful.

F. Superiority of Class Action

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

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

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

FIRST CAUSE OF ACTION
Unlawful Liquidated Damages
(California Civil Code § 1671)

63. Plaintiffs hereby incorporate Paragraphs 1 through 62 above as though fully set forth herein.

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

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

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

67. The lease agreements of the proposed Woodland Park Preexisting Lease Class contain no provision about Defendants' policy or practice of charging late fees on outstanding balances.

Accordingly, members of the Woodland Park Preexisting Lease Class have not agreed upon an amount of damage that would be sustained by a tenant's failure to timely pay a late fee, as required by Civil Code § 1671(d).

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

69. Plaintiff Smith and Standard Late Fee Injunctive Class Members are also entitled to injunctive and declaratory relief as specifically prayed for herein.

SECOND CAUSE OF ACTION

Violation of California Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq.*)

70. Plaintiffs hereby incorporate Paragraphs 1 through 69 above as though fully set forth herein.

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

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

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

74. Defendants' practice of charging members of the Woodland Park Preexisting Lease Class late fees for late payment of charges other than monthly rent, such as late fees on outstanding late fees, is not authorized by the leases of the Woodland Park Preexisting Lease Class members, and is therefore an unfair business practice.

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

76. As a result of these unlawful business acts and practices, Defendants have reaped unfair benefits and illegal profits, at the expense of Plaintiffs and all similarly-situated tenants and former tenants of Defendants. Plaintiffs and Class Members are therefore entitled to an order of restitution requiring Defendants to restore to Plaintiffs and Class Members the money which Defendants have acquired by means of their unlawful and unfair business acts and practices, including Excessive Late Fees, with accrued interest. Plaintiffs and Standard Late Fee Injunctive Class Members are also entitled to injunctive and declaratory relief as specifically prayed for herein. All such remedies are cumulative of relief available under other laws, pursuant to California Business and Professions Code § 17205.

VI. PRAYER FOR RELIEF

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

A. That the Court determine that this action may be maintained as a class action under Federal Rule of Civil Procedure 23, and define the Standard Late Fee Classes and Woodland Park Preexisting Lease Class as requested herein;

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

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

D. That the Court find and declare that Defendants' late fees and policy and practice of assessing such late fees for outstanding charges other than rent against Plaintiffs and members of the Woodland Park Preexisting Lease Class are unfair under the UCL, Business and Professions Code § 17200, *et seq.*;

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

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

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

H. That the Court award such other and further relief as this Court may deem appropriate.

Dated: November 16, 2021

Respectfully submitted,

GOLDSTEIN, BORGEN, DARDARIAN & HO

/s/ Linda M. Dardarian
Linda M. Dardarian

Attorneys for Plaintiffs and the Certified Classes