

Nos. A14-0027 and A14-0123

State of Minnesota
In Court of Appeals

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APPELLATE COURTS
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Jeff Persigehl, et al.,
Appellants/ Cross-Respondents,
vs.

Ridgebrook Investments Limited Partnership, et al.,
Respondents/ Cross-Appellants.

**APPELLANTS/CROSS-RESPONDENTS'
RESPONSE AND REPLY BRIEF**

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STATEMENT OF LEGAL ISSUES

There are three issues being appealed in this case. Issue I is set forth in Plaintiffs' principal brief at page 1, incorporated here by reference. Plaintiffs do not agree with Defendants' phrasing of Issue I, because Defendants' phrasing of the question improperly implies that Minn. Stat. § 504B.215 ("Section 215") does not contemplate regulation of the types of fees at issue in this case. Additionally, Carr v. Schlink, No. UD 1980601900 (Henn. Co. 1999), App. 459, is the most apposite authority, and the quotation Defendants include from Larson v. Wasemiller, 738 N.W.2d 300, 304 (Minn. 2007), is improperly truncated, as discussed at greater length below.

Issue II is set forth in Plaintiffs' principal brief at pages 1-2, incorporated here by reference. As discussed herein, the importance of Issue II to this litigation only arises if this Court declines to reverse the district court's decision on Issue I.

Issue III is set forth in Plaintiffs' principal brief at pages 2-3, incorporated here by reference. Plaintiffs do not agree with Defendants' phrasing of Issue III, because Defendants' phrasing ignores both the fact that AUM was not a party to the Plaintiffs' leases, and that the unjust enrichment claim was pled in the alternative to the statutory claim. The most apposite authority on this issue is Kevin Breyer Concrete, Inc. v. Beutel, Nos. A09-1547, A09-1727, 2010 WL 2732384 (Minn. App. April 13, 2010).

STATEMENT OF THE CASE

Plaintiffs here incorporate by reference Plaintiffs' Statement of the Case from their principal brief. (Plfs.' Br. at pp. 3-6.) Plaintiffs disagree with Defendants' Statement of Facts insofar as it focuses on the terms of Plaintiffs' leases because this case is about violation of Minn. Stat. § 504B.215, the requirements of which cannot be waived by

contract. See Minn. Stat. § 504B.215, subd. 2. By imposing a bright-line rule against charging tenants separately from rent and creating a single exception to that rule to allow only charging tenants for the actual amount of the utility bill, the statute prohibits the fees Defendants are imposing here. This forms the basis for Plaintiffs’ statutory claim under Minn. Stat. § 504B.215.¹

STATEMENT OF FACTS

Plaintiffs incorporate by reference Plaintiffs’ Statement of Facts from their principal brief and here state their disagreement with Defendants’ Statement to the extent it focuses on Plaintiffs’ leases, which, for the reasons discussed above, are irrelevant. The facts driving the resolution of Issue I – which advances Plaintiffs’ primary theory of liability and, indeed, is the threshold question that can and should moot Issue II and inform Issue III – are: Plaintiffs resided in single meter buildings owned and/or managed by Defendants; Defendants billed tenants for the utilities in those buildings, specifically, water and sewer; and, Defendants added a number of fees to those bills which Plaintiffs contend are flatly illegal under Section 215. (See Plfs.’ Br. at pp. 6-9.)

ARGUMENT

I. INTRODUCTION.

Defendants’ practice of charging tenants fees in connection with their utility bills (“add-on fees”) is illegal.

First, Minn. Stat. § 504B.215 (“Section 215” or “the Statute”) requires landlords to pay tenants’ utility bills in single meter buildings. Section 215 provides a single

¹ Additionally, in the event that Section 215 is found not to apply to Defendant AUM, the same facts support Plaintiffs’ unjust enrichment claim.

exception to this requirement, allowing landlords to equitably apportion utility charges that accumulate on a shared meter and to separately bill tenants for those charges. Section 215's general requirement that landlords pay for utilities, combined with a single exception (equitable apportionment) to that general rule, renders landlords' imposition of add-on fees illegal.

Second, in the event that this Court finds that Section 215 does not ban the add-on fees outright, then, like the district court below, the Court must find that the add-on utility fees are subject to the statute's requirement that the overall method of apportioning utility charges be equitable. There is nothing equitable about tacking on add-on fees to tenants' apportioned bills, particularly in light of the size of the add-on fees and the fact that Plaintiffs have alleged the add-on fees bear no relation to any actual costs Defendants face above the actual utility charges from the utility company. These add-on fees are simply exorbitant fees designed to increase Defendants' profits. In light of the overall context in which the fees are imposed, they are inequitable.

Third, in the event Section 215 were found not to apply to Defendant AUM because AUM is not a landlord, Plaintiffs would lack a remedy against AUM at law because AUM is also not a party to Plaintiffs' leases. In light of this possibility, Plaintiffs pled a claim for unjust enrichment against AUM in the alternative. Given that AUM is not a party to a contract with Plaintiffs, and that AUM has not admitted it is Plaintiffs' landlord, Plaintiffs are permitted to plead an equitable claim against AUM as an alternative to their statutory claim.

Therefore, this Court should overrule the district court's opinion as to Issues I and III and affirm the district court's opinion as to Issue II.

II. THE DISTRICT COURT ERRED IN HOLDING THAT SECTION 215 DOES NOT BAR ADD-ON FEES OUTRIGHT.

As the only court to examine this statute prior to this case unambiguously concluded, Section 215 is a “remedial statute intended to protect tenants.”² Carr v. Schlink, No. UD 1980601900 (Henn. Co. 1999), App. 459. Section 215 protects tenants from price-gouging in a marketplace in which landlords and tenants do not have equal bargaining power, a phenomenon which this Court has previously acknowledged. See Love v. Amsler, 441 N.W.2d 555, 559 (Minn. Ct. App. 1989) (noting the “lack of affordable residential housing and the inequality of the bargaining power between residential landlords and tenants, particularly low and moderate income tenants.”). As a remedial statute, Section 215 should be interpreted broadly, and exceptions should be construed narrowly. Current Tech. Concepts, Inc. v. Irie Enterprises, Inc., 530 N.W.2d 539, 544 (Minn. 1995). Under any interpretation, however, Section 215 unambiguously bans the add-on fees at issue in this case.

A. Add-On Fees are Barred under the Plain Language of Section 215.

Defendants’ analysis of the plain language of Section 215 begins and ends with a single point: the statute does not include the word “fees” and, thus, it could not possibly bar them. (Defs.’ Br. at 13-14.) This argument is flawed and should be rejected.

First, Defendants’ interpretation does not even attempt to respond to Plaintiffs’

² Defendants seem to dispute that Section 215’s purpose is tenant protection, by arguing that it is instead designed to “ensure that rental housing is not rendered uninhabitable.” (Defs.’ Br. at 15, n. 6.) This alleged purpose is consistent with, indeed is part-and-parcel of, tenant protection. Moreover, in addition to habitability, Section 215 was also intended to ensure affordability. See Carr, App. 459 (Section 215 designed to protect tenants from “vicissitudes of unknown and unanticipated utility costs”).

arguments regarding the meaning of the terms in Section 215. Section 215 states, in relevant part:

[T]he landlord of a single-metered residential building shall be the bill payer responsible, and shall be the customer of record contracting with the utility for utility services.... This subdivision does not prohibit a landlord from apportioning utility service payments among residential units and either including utility costs in a unit's rent or billing for utility charges separate from rent.... A landlord of a single-metered residential building who bills for utility charges separate from rent.... must predetermine and put in writing for all leases an equitable method of apportionment and the frequency of billing by the landlord....”

Minn. Stat. § 504B.215, subd. 2 and 2a. As Plaintiffs made clear in their opening brief, to “apportion” means to divide, and the only sum that Section 215 contemplates dividing among tenants is the actual bill given to landlords from utility companies. (See Plfs.’ Br. at 11-12.) In fact, Defendants actually concur with this analysis. (See Defs.’ Br. at 16 (as to apportioning the utility bill itself).) Defendants, however, fail to meaningfully respond to Plaintiffs’ next point: if what Section 215 authorizes is the *division* of the utility bill, it must bar Defendants’ conduct, which entails not only the division of the bill, but also the addition of fees to that bill. Put simply, division and addition are distinct concepts, and a statute which authorizes only one certainly bars the other. To hold otherwise would be to allow landlords to overwhelm the limitation imposed by the legislature, which required apportionment of fees (division) by allowing post-apportionment inflation of fees (addition), which is precisely what Plaintiffs allege Defendants have done.

Second, Defendants fail to analyze or explain the implications of their own interpretation – implications which support Plaintiffs’ position that Section 215 bars add-on fees. The parties agree that Section 215 requires that, if the utility bill is to be divided among the tenants, the division must be done in a fair and equitable manner. Why

require that level of care, and subject landlords to legal scrutiny with regard to the precise method used for the apportionment, if landlords are allowed to impose huge and arbitrary fees in addition to the divided bill? Under Defendants' interpretation of the statute, tenants would have legal recourse if the utility bill was divided in such a way that one tenant was arbitrarily charged 5% more than another (for example, all tenants in odd numbered units paying 5% more), but no recourse whatsoever if a landlord began charging all tenants a monthly "administrative fee" equal to 100% of the cost of the utilities themselves.³ Interpreting Section 215 to avoid such a gaping and obvious loophole is simply interpreting a statute to avoid absurd results, which is standard practice for this Court. See In re Kleven, 736 N.W.2d 707, 709 (Minn. Ct. App. 2007) ("When reviewing a statute, this court assumes that the legislature does not intend absurd or unreasonable results.").

³ Defendants may respond that the terms of the lease would prevent such abuse. Ironically, Defendants' form documents belie this assertion. The utility addendum, which was signed by Plaintiffs and which Defendants contend authorizes the fees at issue, speaks only in general terms, and, for most of the fees at issue, does not specify any precise amount. (See Defs.' Br. at 7.) For example, the addendum states that residents "may be charged a new account activation fee" and will be charged "a monthly invoice administration fee" which "may be adjusted from time to time." (App. at 25.) The addendum, however, does not specify the amount of either fee. (Id.) Further, the addendum contains illusory limitations, stating circularly that the late fee will be \$8.00, "or such other fee as may be stated on the utility bill." (Id. at 26.) The "convenience" fee for paying with a credit card is not disclosed at all. Thus, tenants are left with leases whose monetary terms are subject to change at Defendants' whim and without notice. Under vague contract provisions such as these, there is no contractual protection from the hypothetical administration fee above. And, indeed, it is not merely a hypothetical. (See e.g., App. at 33 (Plaintiff Bodley's April 2013 utility bill, including \$11.66 in total utility charges and \$12.35 in total fees).) Such vague terms are a result of the inequality of bargaining power between landlords and tenants, which this Court has previously noted. See Love, 441 N.W.2d at 559. It is in this context that a tenant protection statute such as Section 215 must be interpreted.

Third, Defendants' interpretation is inconsistent with other provisions in Section 215. As Plaintiffs' opening brief noted, Section 215 requires that tenants be given the opportunity to inspect the utility's bill to the landlord, to ensure the allocation is fair. (Plfs.' Br. at 12 (citing Minn. Stat. § 504B.215, subd. 2a(3)).) Under Defendants' interpretation, in which fees of any amount can be added to tenants' bills after the allocation process, the right to inspect the utility bill becomes meaningless because the actual amount tenants will be charged by the landlord bears only a passing relationship to the bills from the utility, in that it is comprised of both the apportioned utility bill *plus* add-on fees in whatever amount Defendants choose. (See Plfs.' Br. at 12, 22.) Because "[e]very law shall be construed, if possible, to give effect to all its provisions," an interpretation which would render these statutory procedures meaningless should be rejected. Minn. Stat. § 645.16. (See also Defs.' Br. at 16, citing Washek v. New Dimensions Home Health, 828 N.W.2d 732, 737 n.2 (Minn. 2013) ("We must interpret a statute as a whole to harmonize all its parts").)

Fourth, Defendants' frequently-repeated arguments regarding "supply[ing] the omissions of the legislature" are flawed. (See Defs.' Br. at 1, 10-11, 13-14.) As an initial matter, Defendants quote only the second clause of this sentence, omitting the first. The full sentence is as follows:

When a question of statutory construction involves a failure of expression rather than an ambiguity of expression, courts are not free to substitute amendment for construction and thereby supply the omissions of the legislature.

Larson v. Wasemiller, 738 N.W.2d 300, 304 n. 1 (Minn. 2007) quoting Genin v.1996

Mercury Marquis, 622 N.W.2d 114, 117 (Minn. 2001) (internal quotations omitted).⁴

The full quotation is illuminating. Rather than the blanket prohibition on judicial gap-filling, which Defendants imply Plaintiffs are urging here, the Minnesota Supreme Court lays out specific instances when gap filling is appropriate and when it is not. In this case, there is no need for gap filling, because the legislature’s silence with respect to fees is not what the Supreme Court would term an “ambiguity of expression.” Rather, it is an unambiguous purposeful omission which must be given full effect by the Court.

On this point, Rohmiller v. Hart, 811 N.W.2d 585, 590 (Minn. 2012), a case relied upon by Defendants, is instructive. In that case, an aunt sought visitation with her niece. Interpreting the statute governing visitation rights, the Minnesota Supreme Court noted that certain relatives were given the right to petition for visitation, but aunts were not among them. Id. at 589. The Court read the legislature’s silence on this subject as a prohibition, holding that “[i]f the legislature wanted to include aunts as a class of individuals who could petition for visitation, it could have. We cannot supply that which the legislature purposely omits or inadvertently overlooks.” Id. at 591. In other words, the legislative “failure of expression,” requires that courts not read allowances into the statute beyond those expressly codified. Plaintiffs’ interpretation is consistent with well-established canons of statutory interpretation:

The doctrine of *expressio unius est exclusio alterius* [which] means that the expression of one thing is the exclusion of another. *Expressio unius* generally reflects an inference that any omissions in

⁴ See Defs.’ Br. at 1, 10-11, 13. The prefatory clause is present in both Larson and Genin, which Larson is quoting. In addition, the full sentence is also quoted in Rohmiller v. Hart, 811 N.W.2d 585, 590 (Minn. 2012), upon which Defendants also rely.

a statute are intentional.

State v. Caldwell, 803 N.W.2d 373, 383 (Minn. 2011) (internal citations omitted).⁵

Similarly, in this case, the legislature provided that landlords can charge tenants directly for the utility bill and apportion that bill. If the legislature wanted to include an authorization to impose additional fees, it could have. But it did not. This Court should not authorize what the legislature has explicitly not authorized.⁶ In the alternative, if this Court finds that the legislature's silence on fees was an "ambiguity of expression," then this Court is free to resolve the ambiguity. Rohmiller, 811 N.W.2d at 590. Because of the legislative history discussed below, as well as Section 215's tenant protection purpose, the Court should resolve any ambiguity in Plaintiffs' favor.

Finally, Plaintiffs' interpretation is not new, or novel. Here, Plaintiffs propound nothing different than Minnesota's Office of the Attorney General did in the Northtown Village case, where it asserted that "[w]hile Minn. Stat. § 504b.215, subd 2a, authorizes the allocation of utility charges, it does not authorize the imposition of additional charges

⁵ Defendants imply that by not explicitly invoking the exact phrase "*expressio unius*" in their opening brief, Plaintiffs have somehow conceded the doctrine's inapplicability. (Defs.' Br. at 13 n. 4.) This is incorrect. Plaintiffs' opening brief clearly invokes this canon of statutory construction by arguing that, given the statutory language, the "only sum that a landlord is allowed to apportion" is the utility bill received from the utility itself, and that the addition of other amounts to tenants' bills is barred by Section 215. (See Plfs.' Br. at 12.)

⁶ Additionally, like the other cases cited by Defendants on the issue of statutory interpretation, Karl v. Uptown Drink, LLC, 835 N.W.2d 14 (Minn. 2013), is inapposite. In that case, the statute at issue prohibited wage deductions. The defendants incorrectly argued that plaintiffs could not state a claim without showing a deduction and also that the deduction caused wages to fall below the minimum wage. In short, the defendants in Karl sought to add a statutory requirement whole cloth, a situation that is not analogous to this case, wherein Section 215 plainly states a prohibition and explicitly lists the single exception thereto.

or fees.” (App. 41.) While Defendants are correct that Northtown Village settled, and therefore no binding precedent comes from that case, the opinion of the top government official with a statutory duty to enforce consumer protection statutes should be persuasive. See Minn. Stat. § 8.32. (See also Defs.’ Br. at 22.) The Attorney General’s common sense interpretation of Section 215 is consistent with Plaintiffs’ here and should be adopted.⁷

B. The Legislative History of Section 215 Supports Plaintiffs’ Interpretation.

Defendants correctly note that all parties and the district court all agree that Section 215 is unambiguous. (Defs.’ Br. at 19, n.7.) However, if this Court concludes that Section 215 is, in fact, ambiguous, this Court must also conclude that the legislative history supports Plaintiffs’ interpretation of Section 215.

As explained at length in Plaintiffs’ opening brief, the statute as initially enacted in 1995 established a bright-line rule that barred landlords from passing utility costs on to

⁷ Defendants urge this Court to ignore the Office of Attorney General’s explicit statement (“[w]hile Minn. Stat. § 504b.215, subd 2a, authorizes the allocation of utility charges, it does not authorize the imposition of additional charges or fees”) and instead read meaning into the Office’s subsequent litigation history, which does not include similar suits. (See Defs.’ Br. at 22.) However, public agencies with finite resources are constantly forced to make difficult and/or political decisions regarding enforcement priorities. The idea that a purported lack of enforcement should be interpreted by the Court as the equivalent of change to explicitly stated policy is outlandish, and would impose an ongoing duty on law enforcement to enforce all of its interpretations of all the laws, at all times, or to run the risk of being viewed as essentially having waived the right to so enforce those laws in the future. This proposed interpretive view has no support in precedent, or logic. Defendants also cite State v. Loge, 608 N.W.2d 152 (Minn. 2000) for the proposition that the Attorney General’s position is “wholly irrelevant,” but this is far off point. (See Defs.’ Br. at 22, n.9.) Loge does stand for the proposition that formal Attorney General opinions are due “careful consideration,” 608 N.W.2d at 157 n. 5, but it is silent on the impact of Attorney General statements outside of the formal opinion process. Loge most empathically does not stand for the proposition that the Attorney General’s actions in Northtown are “irrelevant.”

their tenants through separate billing. (See Plfs.’ Br. at 11 (citing Minn. Stat. § 504B.215, subd. 2 (“[T]he landlord of a single-metered residential building shall be the bill payer responsible, and shall be the customer of record contracting with the utility for utility services.”)).)

Indeed, the unambiguous statement of the chief sponsor of Section 215’s predecessor statute makes clear that landlords would bear utility costs in single-meter buildings, and that the only way in which they would be reimbursed for those costs would be by raising rents a corresponding amount:

[w]hat’s going to happen right now is we’re going to have that landlord put the bill into his or her own name and then if the landlord knows that over the past year that meter has generated \$2,000 in usage and they’ve got four tenants, that means that the rent has got to go up by \$500.00 a year in order for me to get my \$2,000 back, because now it’s going got be in my name. That’s how it’s going to work out.

Carr, App. 470 (quoting transcript of 1995 legislative debate).⁸

Further, the only court to interpret this provision held that this provision unambiguously bars landlords from passing utility costs on to their tenants. (Carr, App. 459.) Consistent with the version of Section 215 existing at the time – which, like the current version, stated that “the landlord of a single-metered residential building shall be the bill payer responsible, and shall be the customer of record contracting with the utility for utility services” – the district court in Carr held that landlords who billed tenants their

⁸ Defendants contrast the requirement that apportionment be expressly authorized with the fact increased rent has always been viewed as an acceptable way for landlords to recoup their utility expenses. (Defs.’ Br. at 20.) However, as noted by the quote above, increased rent is not a separate assessment against a tenant, or even a contemporaneous occurrence. It merely means that landlords are authorized to consider their utility expenses when setting the rent for a new lease term, the same way they contemplate their maintenance expenses, profit margins and other business considerations. (See App. 471.)

apportioned shared of the utility bill were in violation of the statute. (Id.)

After that decision, in statements on the House floor, the chief sponsor of the 1995 bill made clear that apportionment of utility bills had not been contemplated by the original statute, but that he would support an amendment to the bill which would make apportionment legal:

The [1995] bill was meant to address the situation where there are multiple tenants on a single meter, and I thought well, either the landlord can put the meter into his own name with the utility company and be the customer of record and then pass the costs on in the rent, or the other choice would be for the landlord to go to a single meter system and put new meters into that apartment building so that each tenant would have a meter of their own. I didn't envision the third scenario [apportionment], and the third scenario is what Representative Lindner wants to get okayed into law right now, and I'm okay [with that change].

(App. 289.) Although he was speaking in support of a bill which would overrule the *specific* holding of Carr (that apportionment of utility bills was not permitted), in a larger sense, the Representative was endorsing the larger statutory framework Carr propounded: the Statute is a tenant protection statute, which bars all charges not specifically authorized. This is why, in order for the practice of billing tenants for apportioned utility bills to become legal, the legislature had to enact a bill explicitly making it legal. They did so in 1999. (See Plfs.' Br. at 18.) Notably, that is the only additional billing practice the 1999 amendment made legal – it did not legalize the imposition of add-on fees beyond the utility bill.

Nor did the legislature legalize the add-on fees in 2005. In fact, in 2005, the legislature explicitly rejected an attempt at the legalization of such fees. Defendants quote the failed 2005 amendment's sponsor, Representative DeLaForest, as stating that there was "no regulation" of fees in the statute as written at the time, but his statement

was not nearly that unequivocal. (Defs.’ Br. at 23, citing App. at 301.) Representative DeLaForest in fact stated that the fees charged by landlords were in a legal “gray area,” which his amendment would legalize. (App. at 300.) Moreover, Representative DeLaForest appears to have been the only person in the committee room that day who found the legality of fees to be ambiguous. Prior to the hearing, the non-partisan House Research Department had released a report stating that the proposed bill would “allow landlords...to charge tenants a utility billing service fee.” (App. at 295.) With the possible exception of Representative DeLaForest, it was likely commonly understood – and indeed certainly understood by the non-partisan Research Department – that Section 215 did not allow add-on fees. The lack of authority to impose fees is made all the more clear by the fact that the landlords’ lobbying group supported the 2005 bill to legalize fees and the fact that the tenant advocates opposed the bill. (See App. 300-306.)⁹

Despite the foregoing, Defendants misleadingly downplay the meaning of the failed 2005 amendment to this case. Defendants’ narrative of the failed 2005 amendment is as follows: add-on fees were legal prior to 2005, and an amendment was proposed that would cap those fees. This amendment was supported by landlords, and opposed by tenant advocates, and ultimately defeated, leaving fees entirely unregulated. This interpretation is absurd on its face; as a general rule, industry representatives do not

⁹ Defendants imply that Plaintiffs may have selectively transcribed the committee hearing. (Defs.’ Br. at 23 n.10.) This is false. Plaintiffs transcribed the entirety of the portion of the hearing about the proposed amendments to Section 215, and the transcript is an “excerpt” only in that it does not include the discussion of other, unrelated, bills which were discussed in the same committee meeting. Additionally, the audio recording of the hearing is a public record, and if Defendants suspect Plaintiffs’ transcription is incomplete, they have had months to consult the recording and submit any omissions to the Court, but have not done so.

support legislation which caps their (previously uncapped) prices. Moreover, Defendants' view of the 2005 amendment is simply not supported by the historical facts present in the transcript of the hearing itself and the House Research Department's Report, both of which show that the add-on fees at issue have always been illegal and that legislation was necessary to make them legal. (App. at 295, 298.) That legislation never came to be.

Defendants cite Star Tribune v. Univ. of Minn. Bd. of Regents, 683 N.W.2d 274 (Minn. 2004) for the proposition that legislative intent should not be read from failure to act, but the persuasive value of the 2005 hearing goes beyond that. (Defs.' Br. at 22-23.) The hearing demonstrates that after Section 215 was amended to allow apportionment in 1999, the consensus understanding was that add-on fees were barred. This was not only the understanding of the tenant advocates who testified, and the Attorney General in Northtown, but it was also the reason the 2005 bill was introduced in the first place. (See App. at 295.) And because the 2005 bill failed, fees must still be barred. Defendants argue that this Court should not "impose ...legislation that the legislature itself declined to pursue[.]" (Defs.' Br. at 23, citing In re Welfare of M.L.M., 813 N.W.2d 26 (Minn. 2012).) Plaintiffs wholeheartedly agree. The 2005 bill would have "allow[ed] landlords...to charge tenants a utility billing service fee"; however, that bill was never made into law. (See App. at 295.) This Court should not unilaterally adopt a provision the legislature declined to enact.

Section 215 has always barred and continues to bar add-on fees outright. For this reason, the Court must reverse the district court's opinion on Issue I.

III. THE DISTRICT COURT CORRECTLY HELD THAT, IF ADD-ON FEES ARE ALLOWED, THEY MUST BE EQUITABLE UNDER SECTION 215.

To be clear, this Court should reverse on Issue I and hold that add-on fees are barred under Section 215. However, to the extent the Court is inclined to follow the district court's incorrect conclusion that Section 215 does not bar fees outright, then, at minimum, this Court must affirm the district court's ruling as to Issue II. That is, to the extent this Court finds that add-on fees are allowed by Section 215 (which they are not), and to the extent this Court bases its decision on the logic employed by the district court, namely that add on fees are part of the "utility charges" allowed by Section 215 (which they are not), then this Court must determine whether Plaintiffs have stated a claim that appropriately challenges whether those add-on fees violate Section 215's requirement as to an "equitable method of apportionment."

For the reasons stated above, Plaintiffs contend that the concept of "apportionment" cannot apply to add-on fees, but, in the event the Court disagrees, then, at a minimum, the Court must still analyze those fees through the lens of equity.

The parties' disagreement on this point hinges on the language of Section 215, subd. 2a., which provides that a landlord "must predetermine and put in writing for all leases an equitable method of apportionment and the frequency of billing by the landlord...." Defendants insist that this language requires only that the apportionment of the utility bill itself must be equitable, but that add-on fees can go unregulated and can legally be imposed in excessive and unfair amounts. Defendants are wrong.

Notably, Plaintiffs' position regarding the meaning of the "equitable method of apportionment" language of Section 215 is consistent no matter which theory of liability

is adopted. The language applies to all utility-related amounts charged to tenants. If add-on fees are illegal, as Plaintiffs' primary theory of liability under Section 215 urges (see supra § II), then the equitable method of apportionment requirement must only – and can only – apply to the utility bill itself, as Defendants urge. (See Defs.' Br. at 14-15.) If, however, add-on fees can lawfully be imposed, those fees must also be equitably apportioned, as discussed below, because the imposition of those fees then becomes part and parcel of the "method" of apportionment chosen by the landlord.

To explain, the statutory phrase at issue under Plaintiffs' alternative theory of liability is "equitable *method* of apportionment." Minn. Stat. § 504B.215, subd. 2a (emphasis added). Ironically, Defendants argue that it is important to evaluate that phrase as a whole, while focusing on only the words "equitable" and "apportionment," and ignoring the word "method." (See Defs.' Br. at 16, citing Washek 828 N.W.2d at 737 n.2.) However, a court evaluating whether a landlord is complying with the statute should consider not only whether the landlord properly divided the utility bill amongst the tenants, but whether the entirety of the *method* the landlord used to do so was in other ways unfair or inequitable – for example, by imposing fees greater than the amount of the utility bill itself. Simply put, imposing add-on fees is part and parcel of the "method" of apportioning utility bills, and Defendants should not be able to escape judicial review because they list those fees on a separate line of the bill they send tenants.

Further, adopting Defendants' view that any equitable requirement applies only to the utility bill itself would render the law meaningless. Defendants' interpretation of Section 215 would do nothing to prevent the scenario discussed above, in which tenants would have legal recourse if the utility bill was divided in such a way that one tenant paid

5% more than another, but no recourse whatsoever if a landlord began charging an additional “administrative fee” equal to 100% of the cost of the utilities. (See supra at 6.) Section 215 should not interpreted to allow this absurd result, nor should an interpretation which is so obviously contrary to Section 215’s purpose of tenant protection be adopted by this Court.

What is more, Defendants’ interpretation is removed from reality. Plaintiff Bodley’s April 2013 bill provides a poignant example of the inequity on this point. (See App. at 33.) Under “Current Charges,” the following is listed:

Sewer	\$7.18
Water	\$4.48
AUM Admin Charge	\$4.35
Late Payment Charge	\$8.00
Total Current Charges	\$24.01

(Id.) In total, over 50% of the amount charged to Plaintiff Bodley consisted of various fees and charges unrelated to the amount charged by the utility company itself. (Id.) Plaintiffs contend that any method which literally doubles the amount charged by the utility simply cannot be an “equitable method of apportionment.” Yet, under Defendants’ interpretation, Section 215 regulates on the first two items listed above, but has no application whatsoever to the next two items, which make up over 50% of that month’s bill. Of course, Plaintiffs do not have the luxury of picking and choosing which portions of the bill they wish to pay; they must pay the whole bill for their use of the utilities in a given month. Defendants assert that the lease addendum – the contract – controls and demonstrates tenants’ agreement to pay the add-on fees, and that this agreement somehow renders the fees equitable. (See Defs.’ Br. at 18, citing Federal Distillers, Inc. v. State, 229 N.W.2d 144, 157 (Minn. 1975) and Babich v. Oja, 258 Minn. 287,294, 104

N.W.2d 19, 24 (Minn. 1960).) However, Section 215 makes clear that it cannot be waived by contract. Minn. Stat. § 504B.215, subd. 2 (“This subdivision may not be waived by contract or otherwise....”). Thus, given the plain language of Section 215 – including the need to focus on the entire method of apportionment – and consistent with Section 215’s intent to protect tenants and to regulate utility billing, the language must be interpreted to apply to the entirety of the bills Defendants sent their tenants and not just the portion from the utility itself. Moreover, tenants’ purported agreement to pay the fees is, and must be, irrelevant to the question of whether the fees are equitably apportioned. Id.

Finally, Defendants assert that any judicial review of their method of apportionment under Plaintiffs’ interpretation of the Section 215 would be standardless, (Defs.’ Br. at 14), but Defendants fail to acknowledge that this is equally true under their interpretation of Section 215. Defendants acknowledge that Section 215 governs the method of dividing utility companies’ bills, (*id.*), and presumably they would also acknowledge that such division is subject to judicial review. However, Section 215 does not provide an explicit standard by which a court can judge the fairness of this division either. The relevant question for purposes of interpreting the statute is not whether a given interpretation will require the court to determine what it means for fees to be equitable, it is rather which fees will be subject to this analysis. For purposes of evaluating the sufficiency of Plaintiffs’ allegations of inequity, Plaintiffs have adequately pled that the fees were unfair, by demonstrating both that they are disproportionate to the underlying utility bills from the utility, and also by alleging that they bear no relation to the landlords’ associated costs.

For all of these reasons, this Court must affirm the district court's ruling on Issue

IV. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIM FOR UNJUST ENRICHMENT AGAINST DEFENDANT AUM.

Defendants argue that that Plaintiffs have failed to state a cause of action for unjust enrichment because Plaintiffs have not alleged illegality. For the reasons stated above and in Plaintiffs' opening brief, incorporated here by reference, this argument fails. In addition, Defendants' arguments regarding the existence of an alternative remedy fail because Defendants have not established that Plaintiffs have an adequate remedy against AUM at law or under contract.

A. The Lease and Utility Addendum In No Way Precludes an Unjust Enrichment Claim Against AUM.

Despite conceding that AUM is not a party to either of the Plaintiffs' leases or utility addenda,¹⁰ Defendants persist in arguing that those contractual documents bar Plaintiffs' unjust enrichment claim against AUM. This argument is both factually and legally flawed.

Defendants are factually incorrect when they state that, even if AUM is not a party to the contracts (and it is indisputably not), "the contractual documents identify AUM as the Utility Billing Company who acts on the landlord's behalf in collecting the fees agreed to in the Leases and Addenda." (Defs.' Br. at 26.) This is untrue. The Lease and Addenda do not once mention AUM, and Defendants tacitly acknowledge as much when they state that "the Addenda to the Leases specify that the fees are collected by a utility billing provider, identified *on the bill* as being AUM." (*Id.* (emphasis added).) What

¹⁰ "Plaintiffs allege that AUM is not a **party** to the Leases and Addenda. But that fact is immaterial..." (Defs.' Br. at 26, emphasis in original.)

Defendants do not mention, however, is that the bills, which are *the only documents* that identify AUM as the utility billing provider, are not provided to tenants until long after the Lease and Addenda have been signed.¹¹

Defendants are similarly incorrect on the law. To begin, Defendants characterize Kevin Breyer Concrete, Inc. v. Beutel, Nos. A09-1547, A09-1727, 2010 WL 2732384 (Minn. App. April 13, 2010), as addressing “whether an oral contract between the defendant’s wife and a third-party should be applied to the husband,” but that is just one of several issues that case addressed.^{12,13} (Defs.’ Br. at 27.) In fact, after determining the initial issue regarding the existence of the contracts, this Court went on to hold that the contracts in that case did not bar equitable relief against the respondent because the respondent “was not a party to the contracts that allegedly bar equitable relief,” and, because he was not a party, respondent was “not in a position to invoke the rule that [the

¹¹ The documents Defendants themselves cite make this point well. Defendants cite to Plaintiff Persigehl’s utility addendum as supplying the contractual language at issue. (Defs.’ Br. 26, citing App. at 24.) The addendum is dated July 25, 2012. (App. at 24.) Defendants then cite one of Persigehl’s utility bills as a “contractual document” which identifies AUM. (Defs.’ Br. at 26, citing App. at 55.) This bill, however, is dated October, 8, 2012, over three months after the contract was signed. (App. at 55.)

¹² Indeed, the decision in Breyer Concrete is broken up into three sections, divided by roman numerals. Defendants confine their discussion to Section I of the opinion, despite the fact that, in their opening brief, Plaintiffs quoted from Section II, which is the relevant section here, as it addresses whether the contract precludes equitable relief.

¹³ Defendants also criticize Breyer Concrete as unpublished. (Defs.’ Br. at 27 n.12.) However, because the opinion is directly on point, it has strong persuasive value. See Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co., 625 N.W.2d 178, 184 (Minn. Ct. App. 2001). In addition, Breyer Concrete cites a number of reported cases which support its holding. Breyer Concrete at *4 (citing Schimmelpfennig v. Gaedke, 27 N.W.2d 416, 420-21 (Minn. 1947); Leasepartners Corp. v. Robert L. Brooks Trust, 942 P.2d 182, 187 (Nev. 1997); TCF Banking & Sav., F.A. v. Loft Homes, Inc., 439 N.W.2d 735, 740 (Minn. App. 1989)).

contract] bars equitable relief against him.” Breyer Concrete, at *4. This holding is directly on point: AUM is not a party to the contract in this case and, therefore, cannot invoke the rule that the contract bars equitable relief against it.

Breyer Concrete goes on to explicitly distinguish Southtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc., 493 N.W.2d 137 (Minn. App. 1992), the case upon which Defendants almost exclusively rely. As this Court stated in Breyer Concrete, “[Appellant] argues that *Southtown* stands for the proposition that the availability of an adequate legal remedy prevents [respondent] from recovering equitable relief from *any* source. But *Southtown* does not state such a broad rule.” Breyer Concrete at 4 (emphasis in original). Defendants’ interpretation of Southtown was explicitly rejected by this Court in Breyer Concrete, and it should be so rejected again.¹⁴

Further support of Plaintiffs’ position comes from the TCF Banking & Savings, F.A. v. Loft Homes, Inc., 439 N.W.2d 735 (Minn. App. 1989), which was also discussed in Plaintiffs’ opening brief. Defendants argue that TCF Banking, “by its own terms, relates to the narrow situation of a mortgagee rescinding a sale,” but the case itself contains no language whatsoever limiting its holding to those specific facts. (Defs.’ Br.

¹⁴ Other cases relied upon by Defendants are similarly inapposite. The cases cited by Defendants for the proposition that unjust enrichment does not apply when there is a contract at issue almost exclusively address the distinguishable situation when the parties to the suit are also the parties to the contract. (See Defs.’ Br. at 25, citing U.S. Fire Ins. Co. v. Minn. Zoological Bd., 307 N.W.2d 490, (Minn. 1981) (suit between contractual parties); Cady v. Bush, 166 N.W.2d 358 (Minn. 1969) (same); Breza v. Thaldorf, 149 N.W.2d 276 (Minn. 1967) (same; not addressing unjust enrichment at all, but rather *quantum meruit*.) In Caldas v. Affordable Granite & Stone, Inc., 820 N.W.2d 826 (Minn. 2012), a case also cited by Defendants, the plaintiff was not a party to the contract at issue, but was attempting to enforce a contract as a third party beneficiary. This case is plainly distinguishable because (1) AUM is not a party to the utility addendum, and (2) Plaintiffs in this case are seeking to enforce statutory, not contractual, rights.

at 27.) In fact, this Court in TCF Banking considered the general proposition that “equitable relief should be denied when...there is an adequate legal remedy” and found that it did not apply when the remedy at law was not against the party from whom the equitable relief is sought. TCF Banking, 439 N.W.2d at 740 (“to bar equitable relief[,] the available remedy at law must be against the party from whom equitable relief is sought.... As such, the general rule prohibiting equitable relief where an adequate remedy at law is available is not applicable in this case.”). The same reasoning should be applied in this case given that Plaintiffs’ unjust enrichment claim against Defendant AUM is an alternative to be pursued in the event Section 215 is found not to apply to Defendant AUM.¹⁵

B. Section 215 Does Not Preclude The Unjust Enrichment Claim Against AUM.

Plaintiffs allege that Defendant AUM is a “landlord” as that term is defined under the Statute, and therefore assert a statutory cause of action against it. (App. at 11.) In the alternative, however, Plaintiffs allege that, if AUM is found not to be a landlord, it should be found liable for a claim of unjust enrichment for collecting unlawful fees. (App. at 16.) In their brief, Defendants seemingly endorse the idea that AUM is a landlord – or, at

¹⁵ Defendants’ attempt to distinguish Morris v. Wells Fargo Bank, N.A., No. 2:11CV474, 2012 WL 3929805 (W.D. Pa. Sept. 7, 2012) also fails. In that case, the court disallowed a homeowner’s unjust enrichment claim against a bank, because the mortgage governed the relationship between the parties, but allowed an unjust enrichment count against an insurance company (which was not a party to the mortgage) for the same conduct. Id. at *10. If Defendants’ view that the mere existence of a contract that governs the general topic precludes unjust enrichment against parties and non-parties alike was correct, the claim against the insurance company would have failed. It did not because, as should be found here, the unjust enrichment claim against a non-party to the contract was unaffected by the contract’s existence.

least, an agent of a landlord – and is, therefore, subject to Section 215. Defendants argue this bars recovery under an unjust enrichment theory. (Defs.’ Br. at 29.) Plaintiffs welcome Defendants’ concession, and agree that, if it is established that AUM is in fact a landlord, Section 215 will control, and the unjust enrichment claim will become superfluous. However, this case is on appeal from a motion to dismiss and has not progressed beyond the pleadings stage. Defendants have not filed an Answer, and they have not made the concession that AUM is a landlord or agent of the same under Section 215 in any formal pleading or stipulation. With this uncertainty in mind, Plaintiffs are entitled, at this phase of the proceedings, to plead their unjust enrichment count in the alternative. See Minnesota Rule of Civil Procedure 8.01.

For all of these reasons, the district court erred in dismissing Plaintiffs’ unjust enrichment claim.

CONCLUSION

This is a case where the statute at issue – Section 215 – explicitly states a rule and provides the single exception thereto. Defendants acted outside the confines of the rule and its sole exception and, accordingly, violated Section 215. For this reason, the Court must reverse the district court’s opinion as to Issue I, find that Section 215 bars the fees at issue outright, and find that Plaintiffs sufficiently stated a claim for relief under Section 215. However, if the Court upholds the district court on Issue I, then the Court must, at a minimum, affirm the district court’s ruling on Issue II and find that any fees imposed must be consistent with Section 215’s equitable requirements. Finally this Court should overrule the district court’s opinion as to Issue III because Plaintiffs are allowed to plead in the alternative and have properly done so with respect to their unjust enrichment claim

against AUM, who is not a party to a contract with Plaintiffs, and who has not admitted it is subject to liability as a landlord under Section 215.

Based on the foregoing, Plaintiffs respectfully request that the Court reverse the district court's opinion on Issues I and III and affirm the district court's opinion as to Issue II.

Date: May 22, 2014

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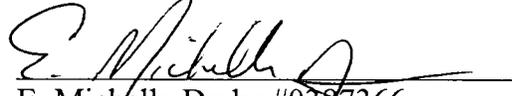
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CERTIFICATE OF COMPLAINT

The undersigned hereby certifies that in accordance with Minn. R. Civ. App. P. 131.01, Subd. 5(d)(7)(C)(i), Appellants/Cross-Respondents' Response and Reply Brief was prepared in 13-point font, and according to Microsoft Word 2010's word count feature contains 7,584 words, including headings, footnotes, and quotations.

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Affidavit

Stephen M. West, being first duly sworn, states that he is an employee of Bachman Legal Printing, located at 733 Marquette Avenue, Suite 109, Minneapolis, MN 55402. That on **May 22, 2014**, he prepared the **Appellants/Cross-Respondents' Response and Reply Brief**, case numbers **A14-0027 and A14-0123**, and served 2 copies of same upon the following attorney(s) or responsible person(s) by **Personal Hand-delivery, via courier**.

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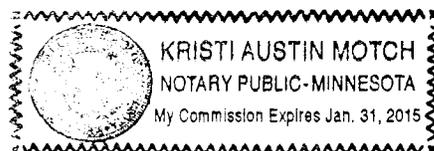
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