UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-2449-GW(JCGx)	Date	September 23, 2013
Title	*Marco A Galindo, et al., v. Housing Authority of the City of Los Angeles, et al.,*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Kane Tien	Katie Thibodeaux	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Richard Rothchild Navneet Grewal	Jean M. Daly Kyle Kveton

PROCEEDINGS: **PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT [102];**

DEFENDANTS' MOTION TO DECERTIFY CLASS [112]

Court hears oral argument. The Tentative circulated and attached hereto, is adopted as the Court's final ruling. The Court adopted the tentative rulings issued on July 18, 2013 and August 26, 2013 as the final ruling, supplemented by today's tentative ruling.

All pending dates are VACATED. A scheduling conference is set for **January 9, 2014 at 8:30 a.m.** A joint report re proposed dates is due by January 6, 2014.

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Initials of Preparer KTI

Galindo, et al. v. Housing Auth. of the City of Los Angeles, Case No. CV-12-2449-GW
Rulings re Further Consideration of: (1) Defendants' Motion to Decertify Class, and (2) Plaintiff's Motion for Partial Summary Judgment

This is a continuation of hearings held on July 18 and August 26, 2013. *See* Docket Nos. 174, 197. On those days, the Court handed out a "Tentative Ruling" and a "Further Consideration," respectively, in connection with the two above-captioned motions. Those two documents are incorporated herein by reference. Subsequent to the latest hearing, the parties submitted still further briefing. *See* Docket Nos. 198-1, 201. Taking into consideration Docket No. 197, the parties' August 26, 2013 oral argument, and the latest round of supplemental briefing, the Court offers its summary answers to the six questions addressed on August 26.

Question 1: Given the Court's understanding of the phrase "required to pay" in the context of this case, receipt of HEAP or Lifeline payments does not affect ascertainability and will not affect class membership, but will be taken into account at the damages stage, at least on the breach of contract claim. Even those who were never charged and/or who wind up being undamaged monetarily will still be entitled, as class members, to injunctive relief (assuming they are still HACLA tenants).

Question 2: The Court will employ the *McDowell* measure of damages for the two federal claims, but will only allow for recovery under that measure for time periods in which class members actually paid rent.

Questions 3/5. The third class needs to be re-defined/sub-classed and any resulting sub-class will need a proper sub-class representative[1] before the Court addresses any issues relevant to the proposed subclass.[2] In addition, the Court would hold off on

[1] Plaintiff has requested 90 days in which to identify a sub-class representative. Defendants do not appear to object to this request or proposed timeframe.

[2] Defendants assert that any change to the breach of contract class to attempt to account for those residents who materially breached their lease will cause an ascertainability problem. While it is somewhat unclear whether Defendants mean to refer to what remains of the original breach of contract class or the proposed subclass made up of alleged material-breachers, they have not explained in detail why they think this will lead to such a problem. Presumably HACLA has some record of their tenants who were in material breach of their lease over the class period. If not, then the Court would question whether Defendants' original arguments concerning their due process right to assert individualized defenses was anything more than sound and fury, signifying nothing.

addressing Defendants' breach of contract liability as to the remainder of the originally-defined class (*i.e.*, those *not* affected by the re-definition/sub-class creation) until the parties' complete whatever additional notice process is required as a result of the re-definition/sub-classing.

Question 4. Plaintiff has indicated that he has no objection to the Bureau of Sanitation intervening in this action or to those portions of the damages for the breach of contract claim that would cover amounts owed, but unpaid, to the Bureau of Sanitation, actually being awarded to the Bureau of Sanitation (so long as the Bureau of Sanitation credits the accounts of the affected class members and explains how account arrearages are divided between water, electricity and trash services).[3] Whether or not the Bureau of Sanitation will intervene in this action is for it to decide.

Question 6: Class membership is not limited only to the "Resident," but can include any "Household Member" who actually established an account or otherwise contracted to pay for trash services. Obviously, there shall be no double-counting for any particular residence for any particular time period. Within those groundrules and with the limitation proffered by Plaintiff's counsel on the record at the August 26, 2013, hearing,[4] it will be up to the particular Resident or Household Member to demonstrate a basis for his or her recovery of any damages as part of the individualized damages process.

Other issues: The Court confirms that portion of its July 18, 2013 tentative ruling granting Plaintiff partial summary judgment as to Defendants' liability on the first two claims for relief. *See* Docket No. 174, at 7-9. However, until one or more party demonstrates that there is no triable issue with respect to what should have been the amount of the utility allowance over the course of the class period, the Court presumes there will be a trial of at least that issue. The individualized damages stage will have to await the outcome of that proceeding, if there is to be one. Plaintiff's suggestion that the

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[3] Previously, the Court has referred to the Department of Water and Power in this context. Plaintiff informs the Court, however, that the Department of Water and Power is simply a billing agent for the Bureau of Sanitation, and it would be the latter entity that would be entitled to billed, but unpaid, fees.

[4] "What we have proposed and may cut through all of this is that the damages go to the resident who is the person listed on the lease with HACLA for all of these causes of action with the following exception: Where the resident is either dead or incapacitated. And in that situation and in those situations only might someone else be allowed to present a claim." Rough Transcript of 8/26/13 Hearing, at 16:11-17.

parties begin discussing how the individualized damages phase will be conducted, and before whom, is well-taken.

Galindo, et al. v. Housing Auth. of the City of Los Angeles, Case No. CV-12-2449-GW
Further Consideration of: (1) Defendants' Motion to Decertify Class and (2) Plaintiff's Motion for Partial Summary Judgment

On July 18, 2013, the Court heard oral argument on the above-listed motions and then took them under submission. *See* Docket No. 174. On July 22, 2013, the parties submitted a stipulation to the Court listing six questions the parties intended to further brief in light of the July 18, 2013 hearing: 1) "Whether the Home Energy Assistance Program payments affect one's obligation to pay for trash services"; 2) "Whether the *McDowell*[1] measure of damages is appropriate for this litigation"; 3) "Whether or not any tenant's rent obligation (or other breached obligation) is independent of any obligation under the lease for HACLA to provide for trash service"; 4) "Whether any 'damages' (to the extent that the class members are required to, or are liable for, past trash collection fee payments they did not make) should be held in constructive trust for DWP or whichever other payee is appropriate under the circumstances"; 5) "Whether a re-definition of one of the classes at this stage is workable procedurally (including whether re-noticing is necessary) or poses problematic due process-type considerations for any heretofore class members who may now be excluded"; and 6) "Whether anyone other than the 'Resident' listed on the lease has standing to enforce obligations under the lease". Docket No. 175, at 2:10-3:4. In an Order dated July 29, 2013, the Court established the briefing schedule concerning those six questions. *See* Docket No. 176. The briefing is now complete and the Court will address the questions at issue.

1. HEAP Payments

The parties are in agreement that Home Energy Assistance Payments ("HEAP") have, in fact, been applied to some class members' Department of Water and Power ("DWP") payments/invoices,[2] which include (though do not break out as a separate line

[1] *See McDowell v. Philadelphia Housing Auth. (PHA)*, 423 F.3d 233 (3d Cir. 2005).

[2] Without actually addressing the merits of the question – because the Court does not believe the issue is presented for decision and the surrounding facts have not been fully investigated or vetted – it would appear that application of HEAP payments to charges for trash services is not consistent with the intent underlying such funds. *See* 42 U.S.C. §§ 8621 (authorizing grants to states "to assist low-income households...primarily in meeting their immediate home energy needs"); *id.* § 8622(6) (defining "home

item) trash charges. Plaintiff takes the position that the number of class members falling into this category is miniscule, or at least that defendants Housing Authority of the City of Los Angeles ("HACLA") and its President and Chief Executive Officer, Douglas Guthrie (collectively "Defendants") have not evidenced a large number of such class members to this point. The size of the affected group is somewhat irrelevant, however. Those class members plainly should not be allowed to recover damages – at least on the breach of contract claim – for trash charges/payments already covered by some alternative source, such as HEAP (or Lifeline). However, the Court views this as an issue to be dealt with at an individualized damages stage – a stage that the Court feels is not by itself sufficient to indicate that a class action is inappropriate here.

Defendants argue that the HEAP (and Lifeline) issue is a more fundamental problem, one that goes to the basic question of class membership. The classes in this case have been defined for the first and second claims and the third claim, respectively, as follows:

> "all persons who 1) have resided on or since March 21, 2008, and/or will reside in public housing owned by [HACLA], and 2) have been required or will be required to pay for trash collection fees while living in public housing except for any time period when the residents have chosen or will choose to pay rent pursuant to the flat rate option."
>
> and
>
> "all persons who 1) have resided on or since March 21, 2008, and/or will reside in HACLA owned public housing, and 2) have been required or will be required to pay for trash collection fees while living in public housing."

Docket No. 96. Defendants believe that individuals who have had their bills actually paid by someone or something other than their own pocketbook or who were – because of a

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energy" as "a source of heating or cooling in residential dwellings"); *id.* § 8624(b)(1) (requiring a state to certify, in annual application for funds, that funds would be used for various purposes having nothing to do with trash removal and no other purposes). That issue is left for another day and perhaps another case (although it may become necessary to decide, as Plaintiff intimates, if the Court must resolve how HEAP payments were applied to unsegregated electricity/trash accounts for purposes of damages calculations on the third claim for relief). At the same time, Plaintiff is misguided in his demand that Defendants provide some form of written assurance from DWP that it will never seek to assert the class members' liability for the charges satisfied by virtue of the HEAP payments. First, DWP is not a party to this litigation and is not represented by HACLA. Second, that issue is nowhere near ripe at this point in time. If, in fact, DWP does ever seek to recover from class members any such payments because of misdirected HEAP payments, the class members presumably would have a basis either to amend their allegations in this case (if it is still pending at that time) or to institute a new action involving both Defendants and DWP.

DWP mistake or otherwise – never even charged trash collection fees have not been "required to pay" for trash services, meaning that they fall outside of the classes. Yet, that only presents the question of what "required to pay" means. If "required to pay" meant "paid," the class definitions presumably would have used the term "paid."

The Court understood – and understands – that phrase to mean obliged to pay under the parties' relationship, or at least that relationship as it existed prior to February 2012. The parties' practice (as the summary judgment papers and Defendants' current briefing confirms) was that, under the lease arrangement and/or account relationship with DWP, the tenants were "on the hook" for trash payments whether or not those payments were ever made (or by whom/what). *See* Defendants' Statement of Genuine Disputes of Material Facts, Docket No. 158, ¶ 7; Docket No. 194, at 22:25-23:8. If they were "on the hook" for those payments, they were, at least in principle, damaged in some measure by virtue of HACLA's failure to do what federal law and – seemingly – the lease actually required. The Court therefore had an adequate basis to believe both that such individuals would have Article III standing and would fall within one or more of the classes as defined.

In sum, the Court does not believe that HEAP payments (or Lifeline payments) present a problem related to class membership or to ascertainability of the class. Instead, the Court views it as an issue to be dealt with at any individualized damages stage of the case.[3]

2. *McDowell* measure of damages

The parties spend much of their time on this question arguing whether or not

[3] Whether or not Defendants could be said to have waived any setoff-based affirmative defense (assuming that HEAP and/or Lifeline payments would be characterized as such), the Court will not countenance any damages award amounting to a windfall to any class member, at least on the breach of contract claim. As discussed further, *infra*, some measure of windfall-related risk is seemingly built into the United States Housing Act, upon which Plaintiff's two federal claims are based. *See McDowell v. Philadelphia Housing Authority (PHA)*, 423 F.3d 233, 236 (3d Cir. 2005) ("If a tenant's utility bill exceeds the allowance, the tenant must make up the difference; if the allowance exceeds the bill, the difference may be pocketed."). By its very nature, the utility allowance is an estimate, which may be high or may be low as compared to actual payments. That is the low-stakes gamble the statute enacts, and the Court sees little reason to replace that risk with certainty upon a responsible government agency's violation of the statute. Perhaps an argument could be made (though probably not because how bills were actually paid is somewhat beside the point when it comes to the utility allowance's impact on rent-setting) for offsetting *McDowell*-type damages on the federal claims with HEAP or Lifeline payments, but actual *customer-made* payments should not factor in. The Court discusses this issue further *infra* in connection with the second question the parties have briefed.

McDowell is sufficiently similar, factually and procedurally, for the Court to conclude that the measure of damages found appropriate in that case would be appropriate here in connection with Plaintiff's two federal claims. The Court need not rely on *McDowell* to be persuaded that the measure of damages it applied is appropriate. It simply serves as a check on what would seem to be plainly a proper measure given the terms of the statutes and regulations at issue.

Under 42 U.S.C. §§ 1437a(a)(1)(A), 1437a(a)(2)(B)(i)-(ii), and 24 C.F.R. § 960.253(c)(3) – assuming the Court has interpreted those statutory and regulatory provisions correctly – class members were to be given a measure of a utility allowance for trash-related services. They were not. In this Court's view, the natural measure of damages for the consequential violation is the difference between the rent the class members paid[4] and the rent they would have paid had they received a proper utility allowance.

3. The Independence/Dependence of Trash/Rent Obligations

The Court does not believe that it must resolve the question of the dependent/ independent nature of HACLA's trash obligation under the lease *vis a vis* the class members' rent payment obligation. At base, the purpose of this line of inquiry is to determine whether Defendants have some colorable basis for a defense to some portion of the class members – as the classes are currently defined – consisting (presumably) of members of the class for the third claim who HACLA had notified prior to the initiation of this lawsuit that they were in material breach of the lease for non-payment of rent. If a colorable defense exists in that regard, the Court would conclude that either a) the continued certification of the class on the third claim is improper under Fed. R. Civ. P. 23(a)(3)'s typicality requirement, Fed. R. Civ. P. 23(a)(4)'s adequacy requirement, and/or Fed. R. Civ. P. 23(b)(3)'s predominance requirement, or b) depriving Defendants of the

[4] The Court views the sole damage stemming from Defendants' violation of federal law as an over-*payment* in rent. Thus, for any time period during which any class member did not actually pay rent, they would not have been damaged by Defendants' conduct, at least for purposes of the federal claims. In that sense, therefore, it is not so clear that a class-wide damages calculation on the federal claims would be as simple as the number of months a class member was *charged* rent during the class period multiplied by the proper allowance figure. Still, the parties likely could do the necessary calculations given those ground rules to still be able to send out individualized notices reflecting recovery on the federal claims and giving the class members – as Plaintiff proposes in his description of his trial plan – an option between selecting that recovery or attempting to prove up damages under the breach of contract claim.

opportunity to present and resolve that defense or those defenses because of the nature of the class proceeding would raise significant due process concerns. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2561 (2011).

Having considered the parties' competing positions concerning the dependent/ independent nature of their lease-based obligations, the Court believes Defendants do, in fact, have such a colorable defense, whether or not it is one upon which they will prevail in the end. As such, the Court believes that there is a need either for redefinition of the second class in this case or the creation of one or more subclasses, with one or more appropriate subclass representatives. The parties appear to agree that any such alteration of the classes will require some measure of new notice to at least the affected individuals. *See also* Footnote 11, *infra*. Plaintiff, however, believes that such a process should not hold up any ruling on Defendants' liability for the breach of contract claim. Once Plaintiff has resolved the question of whether he will simply seek to redefine the second class or to employ one or more subclasses (with appropriate representatives) the parties and the Court can return to the question of liability under the third claim for relief.

4. Constructive Trust for "Damages" Related to Amounts Owed, But Not Paid

The question here is whether any damages class members might otherwise be awarded for amounts that they owe DWP, but have not paid DWP, should be held in constructive trust for DWP (or should be directed to DWP by way of some other remedial effort or design).[5] Plaintiff has presented persuasive reasons for why a constructive trust, in particular, is not an appropriate remedy, given that DWP is not a party here, the property in question is not even (or at least not yet) in the possession of the class members, the class members have done nothing wrongful or fraudulent to obtain it even if they did currently possess it, and there is no distinction on DWP's bills between electricity payments that are past due (and which would not be included within any damages award) and trash payments that are past due. At the same time, there is no question about the identity of the rightful recipient of such moneys to the extent they are included in any damages award, and an award of damages in part meant to compensate

[5] If the Court adopts the recommended approach to use only the measure of damages used in *McDowell* with respect to Plaintiff's first two claims, the resolution of this particular question would only relate to the breach of contract claim (and those class members who, under Plaintiff's trial plan – or some variation thereof – elect to seek damages for that claim instead of on the first two claims).

for any such unpaid amounts which is awarded free-and-clear of any limitations may be akin to a windfall in that respect.[6] Defendants emphasize that a court's equitable powers are broad (though Plaintiff correctly responds that, at least to the extent damages are involved, this is not an equitable proceeding).

The Court would ask the parties whether some or all (depending on the size of the delinquency) of the damages awarded on the third claim for any class member could be "made payable to" DWP. Alternatively, the Court could investigate with the parties whether it would be feasible and permissible to include in any injunctive relief in this case a provision for HACLA to pay DWP directly for any trash removal-related past due amounts owed during the class period. Failing those options, the Court might inquire as to whether there is any prospect that DWP will attempt to intervene in this litigation. If none of those possibilities cure the reluctance to award damages to class members for amounts they owe DWP, it may be that it is simply up to the DWP to proceed by whichever method it deems appropriate to recover those amounts following the issuance of any breach of contract-based damages awards in this case.

5. Re-Definition of Class/Classes

As discussed above in connection with the third question, the Court believes that, in order to avoid decertification generally, there is a need either for a re-definition of the class for the third claim, or the creation of one or more subclass(es) as to that claim, along with a new notice process directed to the individuals affected. *See also* Footnote 11, *infra.*

6. Resident/Household Member Standing

Defendants assert that only the "Resident" named in the lease has the necessary standing to enforce any trash removal-related obligation (and to collect any damages for violation thereof), whereas Plaintiff believes that any "Household Member" has sufficient third party beneficiary status to do so in addition to any "Resident." "The test for determining whether a contract was made for the benefit of a third person is whether an intent to benefit a third person appears from the terms of the contract." *Spinks v. Equity*

[6] This problem would be avoided if the Court were to conclude that class members on the third claim simply had not suffered any compensable damage merely by being liable for unpaid trash fees. Such individuals presumably would remain class members, however, with no need to further adjust the third class, if only to still obtain injunctive relief.

Residential Briarwood Apartments, 171 Cal.App.4th 1004, 1022 (2009) (omitting internal quotation marks). But "it is not enough that the third party would incidentally have benefited from performance." *Id.* (omitting internal quotation marks). "Although, generally, it is a question of fact whether a third party is an intended beneficiary of a contract, if the issue is presented to the court on the basis of undisputed facts and uncontroverted evidence and only a question of the application of the law to those facts need be answered," it is reviewable by an appellate court *de novo*, as a legal question. *H.N. & Frances C. Berger Found. v. Perez*, 218 Cal.App.4th 37, 43 (2013) (internal quotation marks omitted). Here, the parties direct the Court only to the standard form lease (attached as Exhibit A to the Complaint, hereinafter referred to as "Lease") for resolution of this question.

It may be that Household Members are intended beneficiaries of some aspects of the lease agreement (or for the overall purpose of the lease – occupancy rights,[7] *see* Lease ¶¶ 1.B, 1.D), but Plaintiff arguably has not demonstrated how they are intended beneficiaries for purposes of recovering damages for non-payment of trash removal-related payments (though the answer conceivably might be different when it comes to injunctive relief[8]). Thus, a further question – which the parties do not appear to have directly answered – could be whether a person can be a third-party beneficiary for certain purposes of an agreement, but not others.

It is true that, under the Lease, it is the "Resident" who bears the obligation of arranging with local utility companies for provision of utility services and for directly paying for such services, but only for those utility services "*not* provided by [HACLA]" (including for gas and electrical service when not provided by HACLA). Lease ¶ III.D (emphasis added). It is also the "Resident" who "receive[s] a utility allowance," as

[7] Defendants emphasize the closing language of the Public Housing Rental Agreement Rental Summary, located at pages 22-23 of the Lease, which states that "By signing this Agreement, Household Members do not acquire an interest in the Premises." Whatever the Lease means by an "interest in *the Premises*," it is not at all clear that such language would by any means be dispositive of the question concerning status as intended beneficiary *of the lease*.

[8] This would at least seem to be true where, for instance, HACLA had failed to live up to its obligation – assuming it had one – to directly pay for trash removal and that failure, in and of itself, threatened occupants – including Household Members – with eviction or other loss of occupancy rights running to them as intended third party beneficiaries.

Defendants emphasize in their briefing, but that only comes into play with respect to natural gas or electricity (in the event HACLA provides those utilities). Lease ¶ III.B.

On the other hand, HACLA's obligation to "provide...rubbish removal" runs to the *Residence*, not the Resident, *see* Lease ¶ III.A, and Household Members are undeniably permissible occupants of the Residence. Yet, at least in the latest briefing, Plaintiff does not appear to have relied upon paragraph III.A in its attempt to demonstrate that Household Members can be considered third party beneficiaries of the lease for purposes of bringing the third claim in this action. It is not exactly clear why that provision is not front-and-center in the inquiry.[9]

The parties can address this issue further at oral argument, but given paragraph III.A of the Lease there appears to be no valid reason for limiting the class on the third claim for relief only to any "Resident" named as such in any lease, or at least no reason for necessarily excluding a "Household Member" from such class membership *to the extent* such Household Member was the individual who actually contracted with DWP to pay for trash removal-related services.[10]

7. Conclusion as to the Six Questions

The six questions considered herein and addressed in the parties' briefing have presented a number of moving parts, some of less-than-perfectly-certain applicability. At a minimum, they collectively demonstrate the relative complexity of what appeared, at first glance, to present a fairly straight-forward case for class certification. A district court might very well be within its discretion to conclude that the action is close to, if not already past, the breaking point for continued certification. But Rule 23 is highly

[9] Plaintiff also argues that a Household Member should be allowed to enforce HACLA's lease obligation if the Resident is deceased or incapacitated. To the extent what Plaintiff means by "enforce" is "obtain damages for such a breach," the Court might question why that right would not fall to the hypothetical deceased Resident's estate or to the hypothetical incapacitated Resident's guardian.

[10] In the parties' latest briefing, Defendants also raise the concern that class members seeking to claim damages under the first two claims may not even be entitled to protection of the Brooke Amendment. *See* 8 U.S.C. § 1611(c)(1)(B) (ruling out eligibility of "alien[s] who [are] not...qualified alien[s]" for many Federal public benefits). It is somewhat unclear whether that concern is related to Defendants' emphasis on the "Resident" vs. "Household Member" distinction – the Court might ask Defendants whether it is the case that they have previously (for instance, at the onset of the leasing relationship) vetted any "Resident" for Federal public benefit eligibility but not all "Household Members." If that is the case (and assuming section 1611 is not otherwise shown to be inapplicable in this case), during the claims process the parties may need to advise that any non-"Resident" making a claim must demonstrate their entitlement to Federal public benefits such as those provided by the Brooke Amendment.

discretionary, and this Court does not believe that it *must* reach that conclusion here.

That being said, one of the take-aways from the issues discussed herein is that – as noted above – the class for the third claim for relief needs alteration, either by way of re-definition or the creation of one or more appropriate subclasses.[11] Plaintiff needs to contemplate that conclusion and propose a workable next-step in that regard. The other conclusions to be reached from the instant briefing would appear to include – at least – the following: a) the class-members can include both a person who is a "Resident" under the Lease and a person who is a "Household Member" under the Lease, but of course damages should never be double-counted per Residence[12]; b) the measure of damages employed in *McDowell* will be the measure of damages on Plaintiff's first two claims for relief, except that class members can obtain such damages only for months in which they actually paid rent; c) HEAP and Lifeline payments, at a minimum, will be factored into damages calculations on the breach of contract claim (if Defendants are found liable thereon); and d) the Court will at least remain open to suggestions for how it can best avoid a windfall-type award of damages to class members who have not paid, but who owe, sums of money to DWP for trash removal-related services.

8. Trial Plan

As part of the instant briefing, Plaintiff proposes that, for trial, there be a short trial regarding class-wide damages for the three causes of action or that the Court skip trial on the class-wide damages and proceed directly to individual class member damages. Given the foregoing discussion, it seems the latter is a better suggestion – it may be virtually impossible to reach a class-wide damages figure given the variations in individual circumstances that are sure to come to the fore during individualized damages determinations.

On the other hand, perhaps the one area in which a trial may be necessary would

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[11] The Court might also ask the parties for their views on whether the term "required to pay," as used in *both* class definitions, requires further clarification, or if the mere clarification by the Court as to its understanding of that term resolves any difficulties that might otherwise arise from the imprecision of the term.

[12] If a Household Member cannot show that he or she was "required to pay" by virtue of being the named account holder on a DWP account, that Household Member seemingly could not be a member of the classes. The inclusion of any Household Members in the classes would therefore seem to be contingent on Plaintiff's ability to identify DWP accountholders.

be in determining what the utility allowance would/should have been for the class period. As of February 2012, HACLA began providing a utility allowance in the amount of either $24.33 or $36.32. Plaintiff argues that those figures would or should apply to the entire class period, but Defendants argue that 1) they set those figures at a time when they did not fully understand all the details of DWP trash-related payments[13] and 2) they would have (had) the option of computing the utility allowance using data concerning actual payments. As to the latter point, Plaintiff admits that HACLA could have used actual payments to help arrive at a proper utility allowance figure, but observes that Defendants have cited to no authority suggesting that a different utility allowance figure could be established for each household.[14] The Court would discuss with the parties whether it would be necessary to hold a trial at least as to this issue.

9. Under-Submission Summary Judgment Ruling

Finally, there is no apparent reason why the Court cannot confirm its tentative ruling, issued July 18, 2013, *see* Docket No. 174, at 7-9, as to Defendants' liability on Plaintiff's first two claims for relief.

10. Evidentiary Objections

Plaintiff's Objections (Docket No. 195): A. Sustain, at least pursuant to Rule 26 (at least for purposes of the instant proceedings). B. Sustain, at least pursuant to Rule 26 (at least for purposes of the instant proceedings). C.1. Sustain, at least pursuant to Rule 26 (at least for purposes of the instant proceedings). C.2. Sustain, at least pursuant to Rule 26 (at least for purposes of the instant proceedings). C.3. Sustain. D. Sustain, at least pursuant to Rule 26 (at least for purposes of the instant proceedings).

Defendants' Objections (Docket No. 196): 1. Overrule.

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[13] Defendants assert that they believed every resident was being charged a trash fee, that the trash fee was uniform, and that residents were not receiving discounts or other taxpayer-funded benefits to eliminate or offset the amounts owed.

[14] Unless Defendants can present such authority, the Court would agree with Plaintiff that it appears Defendants are simply attempting a back-door route to avoid the *McDowell* measure of damages by way of an alternative, *post-hoc*, and apparently unjustifiable method of calculating individualized utility allowances.

Galindo, et al. v. Housing Auth. of the City of Los Angeles, Case No. CV-12-2449
Tentative Rulings on: (1) Defendants' Motion to Decertify Class, and (2) Defendants' Motion for Partial Summary Judgment

(Part of this ruling reveals information submitted under seal. See footnote 12, supra. Unless a party objects at the hearing and asks for the removal of said item, the ruling will be made publically available including the aforementioned footnote.)

Motion 1

Defendants Housing Authority of the City of Los Angeles ("HACLA") and its President and Chief Executive Officer, Douglas Guthrie (collectively "Defendants"), move to decertify the classes certified in this action on January 3, 2013. *See* Docket No. 89. The Court largely agrees with the plaintiffs, led by class representative Marco A. Galindo ("Plaintiff"), that the issues Defendants raise primarily[1] involve questions about differences in calculating damages. As the Court noted when certifying the classes in this case, individual damages calculations do not make this suit inappropriate for class treatment. *See, e.g., Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010). The Supreme Court's recent decision in *Comcast Corp. v. Behrend*, __ U.S. __, 133 S.Ct. 1426 (2013), does not change that approach. *See Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513-14 (9th Cir. 2013). As such, this Court generally has no reason to address many of the disputes the parties currently present in the context of this decertification motion.

The parties argue about whether statistical sampling or some form of formulaic approach will be an appropriate method of determining damages assuming liability here. The Court need not reach a final decision on that point in this case at this time (because, again, individualized damages do not preclude class certification),[2] although it is

[1] Defendants' late challenges to Galindo as an inadequate class representative are unpersuasive, whereas their criticisms of other class members who are not class representatives are, essentially, irrelevant. With respect to Galindo, in particular, Defendants argue that he suffered no damages in at least certain instances where any combined utility and trash payments would not have exceeded the allowance he in fact received from HACLA. However, Plaintiff has directed the Court to *McDowell v. Philadelphia Housing Authority (PHA)*, 423 F.3d 233 (3d Cir. 2005), which suggests otherwise. *See id.* at 236 ("If a tenant's utility bill exceeds the allowance, the tenant must make up the difference; if the allowance exceeds the bill, the difference may be pocketed."). Again, he may well differ from many class members in the damages he can recover here, but that difference will not preclude certification or his service as representative plaintiff.

[2] There are several other damages-related issues that should be resolved at some point in time prior to any damages-related proceedings in this case, including (but not necessarily limited to) 1) whether Home

somewhat skeptical about the use of such an approach in this case given that many resident class members will have circumstances deviating from the norm in one fashion or another (application of discounts, non-payment, non-billing, etc.). However, in the end, even if Plaintiff is unable to rely upon some form of sample/formula, he is correct that the Court may resort to appointing a special master (or Magistrate Judge) to undertake damages calculations. *See generally* Fed. R. Civ. P. 53. At this juncture, that result would appear to be the most likely one.[3] Indeed, perhaps recognizing the availability of this avenue, Defendants do not even address the suggestion in their Reply, focusing instead on how inappropriate they believe damages calculations by way of formula would be.

Beyond individualized damages issues, the Court would agree with Defendants that, if the class definitions encompassed people who never actually paid (or were not at least required to pay) for trash removal/disposal, the definitions might be overbroad.[4] The class definitions already deal with this perceived problem, however, because they define the classes to include only people who "have been required or will be required to

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Energy Assistance Program payments affect one's obligation to pay for trash services; and 2) whether, in fact, the *McDowell* measure of damages is appropriate here. *See also* Footnote 7, *infra*. It would seem that these issues are all legal issues which the Court may answer, though, again, there appears to be no reason why it need do so in connection with this decertification motion. They are perhaps better suited to focused, single-issue, motions along the lines of one or more partial summary judgment motions or motions-in-limine.

[3] A special master could be imbued with the authority to apply agreeable formulas for determining damages, if the class members could be appropriately grouped with like-situated class members according to the circumstances affecting their recovery.

[4] The Court might tend to agree with Plaintiff that the indication in *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 594 (9th Cir. 2012), that a class can never be defined/certified if it contains members who have not been harmed is 1) often an effectively unworkable requirement without the benefit of hindsight resulting from continued development of the issues in a case, and 2) cannot be – as a decision issued by a three-judge panel – considered binding to the extent that it conflicts with other Ninth Circuit authority on the topic. *See, e.g., Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements."), *cert. denied*, 132 S.Ct. 1970 (2012). At the same time, as an aspirational goal, it is, at a minimum, a wise target to aim for, and properly emphasizes that a court should be careful in how it defines a class, to avoid the possibility that later revelations that some sizable portion of a class does, in fact, lack Article III standing, should lead to a re-definition of the class. In any event, Plaintiffs argue here that even those who have never paid for trash removal/disposal would have Article III standing to the extent that they are on the hook for such payments. *See* Plaintiff's Opposition Brief (Docket No. 140), at 9:13-10:4 (citing, among other cases, *Bernard v. Walkup*, 272 Cal.App.2d 595, 605 (1969) ("[G]enerally, the measure of damages for breach of contract is that which will compensate the aggrieved party for all the detriment proximately caused thereby....")).

pay for trash collection fees while living in public housing."[5] Docket No. 96 at 3:7-8, 3:12-13.

To (presumably) address that fact, Defendants also argue that the class is not ascertainable. The Court has doubts about that assertion, as it seems that a simple cross-check of bills/invoices against "Residents" and account holders should answer the question of membership in the class(es). *See* Footnote 7, *infra.* While Defendants complain that neither they nor Plaintiff have the necessary records to perform such an analysis, they have not sufficiently explained why they are not able to obtain them from the Department of Water and Power and/or any other third party who would maintain such records. To the extent that no one is able, even then, to answer the question of whether a class member ever actually paid for trash services, this might affect that individual's ability to recover damages,[6] but the Court questions why it should operate to exclude an individual from the class definition where that person might still – assuming they are still HACLA residents – enjoy the benefits of injunctive relief.

At the same time, however, Defendants *have* demonstrated there is reason to believe that the definition of the class for at least the third claim for relief may need adjustment because of the apparent likelihood that, as currently defined, the class contains individuals as to whom Defendants may very well have a valid defense – the class member's own pre-existing breach of the lease excusing any breach (if there was one at all) by HACLA. The Court tends to agree that resolving the breach of contract claim on a class-wide basis while not allowing Defendants to present these defenses on an individual basis would indeed pose due process problems. It may be that the answer of the effect of the tenant breaches can, again, be resolved commonly, but in order to do so the case may require one or more subclasses. Alternatively, the class definition may need refinement to exclude any tenants or former tenants who might otherwise have fit

[5] For the first and second claims, this requirement is qualified so as to exclude "any time period when the residents have chosen or will choose to pay rent pursuant to the flat rate option." Docket No. 96 at 3:8-9.

[6] Plaintiff asserts that even those class members who have never paid for trash services might still recover damages to the extent that they are required to, or liable for, past payments they did not make. *See* Footnote 4, *supra.* Even if the Court takes that approach (on what would appear to be yet another common question, at least if the class or subclass is defined properly), the Court might consider whether any "damages" in that regard should not merely be held in constructive trust for the Department of Water and Power or whichever other payee is appropriate under the circumstances.

therein had they not breached their lease agreement.[7]

Given that notice of this action and the class definition(s) has already been issued, the Court would ask the parties for their view on whether a re-definition of one of the classes at this stage is workable procedurally (including whether re-noticing is necessary) or poses any problematic due process-type considerations for any heretofore class members who may now be excluded.

Motion 2

Plaintiff has filed a motion for partial summary judgment, in which he seeks summary judgment in the classes' favor on the issue of liability for all three claims for relief. While there is no apparent reason not to proceed on the motion insofar as it relates to the first two claims for relief, given the Court's concern (as discussed further above) that there are issues with the continued certification of the class for the third claim for relief, it may not be possible to proceed with a partial summary judgment disposition on that claim at this time. As such, the following analysis only addresses (and the Court's discussion of the factual background only relates to) the first two claims for relief.

A. Summary Judgment Standards

Summary judgment shall be granted when a movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In other words, summary judgment should be entered against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Parth v. Pomona Valley Hosp. Med. Ctr.*, 630 F.3d 794, 798-99 (9th Cir. 2010).

To satisfy his burden at summary judgment, a moving party *with* the ultimate

[7] Here too there is a crucial issue that the parties have addressed briefly, but that could probably benefit from yet another single-issue motion: whether or not any tenant's rent obligation (or other breached obligation) is independent from any obligation under the lease for HACLA to provide for trash services. If, indeed, upon resolution of that/those question(s) the Court determines either that a new subclass needs to be created in connection with the third claim for relief or that the existing class definition needs refinement/ adjustment, it may make sense for the parties to also first brief – or at least more completely and thoroughly brief – the question of whether anyone other than the "Resident" listed on the lease has standing to enforce obligations under the lease. If the ability to enforce the lease is, in fact, limited to the "Resident," the class definition for that third claim may also need to be adjusted to reflect that fact.

burden of persuasion (as Plaintiff is here for purposes of demonstrating Defendants' liability), "to prevail on summary judgment it must show that the evidence is so powerful that no reasonable jury would be free to disbelieve it." *Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) (omitting internal quotation marks); *see also S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (requiring proof "beyond controversy" of every element of claim or defense). If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, "the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment[, but instead] must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial." *T.W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987) (internal citations and quotation marks omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence, and views all evidence and draws all inferences in the light most favorable to the non-moving party. *See T.W. Elec.*, 809 F.2d at 630-31 (citing *Matsushita*); *see also Hrdlicka v. Reniff*, 631 F.3d 1044 (9th Cir. 2011); *Motley v. Parks*, 432 F.3d 1072, 1075 n.1 (9th Cir. 2005) (*en banc*); *Miranda v. City of Cornelius*, 429 F.3d 858, 860 n.1 (9th Cir. 2005).

B. Defendants' Evidentiary Objections (Docket No. 137)

Grewal Decl.

1. Overrule.

Schultzman Decl.

2. Sustain as to paragraphs 5-11, otherwise overrule.
3. Overrule.
4. Overrule.
5. Overrule.
6. Sustain.
7. Sustain.

8. Sustain.

9. Sustain.

10. Sustain.

11. Sustain.

12. Sustain.

Perez Decl.

13. Sustain.

14. Sustain.

C. Plaintiff's Evidentiary Objections (Docket No. 169)[8]

A. Overrule (as to decertification); sustain (as to summary judgment).

B. Overrule.

C. Sustain.

D. Sustain.

E. Sustain.

D. Relevant Factual Background (Drawn From Parties' Separate Statements, see Docket No. 158)[9]

Generally speaking, as between HACLA and the residents of HACLA's public housing, the residents are charged with paying trash collection fees directly to the City Department of Water and Power for services provided by the City Bureau of Sanitation. *See* Defendants' Statement of Genuine Disputes of Material Facts ("DSGD")[10], Docket No. 158, ¶ 7. The majority[11] of HACLA households have been charged $24.33 per

[8] Plaintiff's objections are offered in connection with the both Defendants' decertification motion and Plaintiff's partial summary judgment motion. Where a single ruling is indicated, it applies to both motions.

[9] Plaintiff's paragraph 22 and Defendants' response thereto has been redacted from the public record.

[10] Defendants have divided the DSGD up into two segments. The first simply responds to Plaintiff's Statement of Uncontroverted Facts and Conclusions of Law, and will be numbered accordingly. The second segment consists of Defendants' "Additional Material Facts." Those paragraph numbers, to the extent they are cited herein, will for clarity's sake be preceded by the acronym "AMF." The AMF consist, in part, of facts relevant to *damages* calculations, *see* DSGD AMF ¶¶ 1-3, whereas this partial summary judgment motion is directed at *liability*.

[11] Though Defendants dispute paragraph 8, they have no apparent dispute with Plaintiffs' assertion that "the majority" of HACLA households pay this fee.

month in trash collection fees. *See id.* ¶ 8.

Federal law provides for reimbursement via a utility allowance of payments by public housing residents who are responsible for paying a utility. *See id.* ¶ 10; see also 24 C.F.R. § 960.253(c)(3). A utility allowance designed to cover monthly costs of a reasonable amount of tenant-paid utilities is included in income-based rental calculations (for those who opt for the income-based rent). *See* DSGD ¶¶ 9-10; *see also* 24 C.F.R. § 5.603. The vast majority of HACLA households have their rent calculated at 30% of their adjusted monthly income. *See* DSGD ¶ 9.

Stemming from an October 2011 inquiry with the Department of Housing and Urban Development, HACLA learned that trash fees (at the very least) *could* be[12] included in the utility allowance. *See id.* ¶¶ 14-15, AMF ¶¶ 4-5, 13, 20-21. On December 1, 2011, HACLA issued a public notice indicating that, beginning February 1, 2012, it intended to increase the utility allowance provided to public housing residents by $24.33 to cover the cost of the trash service charge. *See id.* ¶ 17. It has, in fact, done so in the minimum amount of $24.33[13] for all households that choose to pay an income-based rent, instead of a flat rent. *See id.* ¶¶ 20-21. Prior to February 2012, HACLA provided no utility allowance for its public housing residents' payment of trash fees, and HACLA has not reimbursed public housing residents for utility payments they made directly prior to February 1, 2012. *See id.* ¶¶ 10, 18.

E. Analysis

Under 42 U.S.C. § 1437a(a), families paying rent for a dwelling unit assisted under Chapter 8 (titled "Low-Income Housing") of Title 42 may pay no more than "30 per centum of the family's monthly adjusted income," to the extent they have not elected a "flat rent" option. 42 U.S.C. § 1437a(a)(1)(A), (a)(2)(B)(i)-(ii). Meanwhile, 24 C.F.R. § 960.253(c)(3) provides that "[t]he income-based tenant rent must not exceed the total tenant payment...for the family minus any applicable utility allowance for tenant-paid

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[12] The parties have not raised a question about whether this determination is, in some way, due deference in accord with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). **[UNDER SEAL: In a sentence discussing reimbursement of HACLA, HUD later wrote that the February 2012 change in HACLA's utility allowance to include the trash fees was a "change" that "was in accordance with public housing requirements." DSGD ¶ 22.]**

[13] HACLA provided households resident in duplexes and triplexes with an increased amount to reflect their higher fees. *See id.* ¶ 21.

utilities." 24 C.F.R. § 960.253(c)(3); *see also Wright v. City of Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 420 (1987) ("HUD has consistently considered 'rent' to include a reasonable amount for the use of utilities...."); *McDowell v. Philadelphia Housing Auth. (PHA)*, 423 F.3d 233, 236 (3d Cir. 2005); *Dorsey v. Housing Auth. of Baltimore City*, 984 F.2d 622, 624 (4th Cir. 1993) ("The Brooke Amendment requires public housing authorities...to charge tenants no more than 30% of their income for rent, which is to include a reasonable allowance for utilities."); *Clary v. Mabee*, 709 F.2d 1307, 1308 (9th Cir. 1983). "Utility allowance" is defined as "an amount equal to the estimate made or approved by a [public housing authority] or HUD of the monthly cost of a reasonable consumption of such utilities and other services by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment." 24 C.F.R. § 5.603(b); *see also id.* § 5.601(b) ("This subpart states HUD requirements on the following subjects...(b) Determining payments by and utility reimbursements to families assisted in [public housing programs]."); 24 C.F.R. § 965.505(a) (indicating, in regulatory section titled "Standards for allowances for utilities," that "[t]he objective of a public housing authority in designing methods of establishing utility allowances for each dwelling unit category and unit size shall be to approximate a reasonable consumption of utilities by an energy-conservative household of modest circumstances consistent with the requirements of a safe, sanitary, and healthful living environment"). Essentially, the single question bearing upon this motion (at least insofar as the first and second claims for relief are concerned) is whether HACLA's public housing residents' trash payments fit within this definition of "utility allowance," in particular the reference to "a safe, sanitary, and healthful living environment."

On what appears to be an issue of first impression (and one of law[14]), the correct answer appears to be relatively obvious. Consumption of the "utility" of trash collection services plainly falls within "the requirements of a safe, *sanitary*, and *healthful* living environment." 24 C.F.R. § 5.603(b) (emphasis added); *see also Estey v. Comm'r, Me.*

[14] How certain individuals understand either the term "utility" or Defendants' obligations under federal law is essentially irrelevant where the Court is tasked with simply giving meaning to statutory and regulatory provisions.

Dep't of Human Servs., 21 F.3d 1198, 1200 (1st Cir. 1994) ("Tenants in HUD and FmHA housing pay no more than 30% of household income for rent plus an allowance for any utilities not supplied by the landlord. Water, sewerage, trash collection, electricity, cooking fuel, heat, and hot water are utilities for which allowances may be established."); *id.* ("The reimbursement ensures that FmHA and HUD tenants, living in very poor households, will not generally pay more than 30% of household income for energy, water, sewerage, and trash collection costs."). As such, Defendants were required to include it within any "utility allowance," and to the extent they did not set it at a reasonable level (the pre-February 2012 level of $0 is unquestionably unreasonable) and public housing residents' rents rose above the maximum allowable, Defendants violated federal law.[15]

Therefore, with respect to the question of liability on the first and second claims for relief in this case, the Court would grant summary judgment in Plaintiff's favor.

[15] As discussed in connection with the discussion of the decertification motion, the question of damages due to any such failure is for another day.