UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

| Case No. | CV 12-2449-GW(JCGx) | Date | July 16, 2012 |
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| 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 | |
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| Javier Gonzalez | Mary Rickey | |
| Deputy Clerk | Court Reporter / Recorder | Tape No. |

| Attorneys Present for Plaintiffs: | Attorneys Present for Defendants: |
|---|---|
| Robert D. Newman<br>Nauneet K. Grewal | Jean M. Daly<br>Kyle Kueton |

**PROCEEDINGS:** **PLAINTIFFS' MOTION FOR CLASS CERTIFICATION (filed 06/20/12)**

The Court's Tentative Ruling is circulated and attached hereto. Parties inform the Court that settlement discussions are ongoing. The motion is continued to **October 18, 2012 at 8:30 a.m.** A status report re settlement will be filed by October 11, 2012.

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Initials of Preparer JG

***Galindo, et al. v. Housing Auth. of the City of Los Angeles***, Case No. CV-12-2449
Tentative Ruling on Motion for Class Certification

## I. Background

Plaintiffs Marco A. Galindo and Emma Gullette ("Plaintiffs") reside in public housing owned and operated by the Housing Authority of the City of Los Angeles ("HACLA"), a public housing authority established under the U.S. Housing Act. *See* Complaint ¶¶ 5, 9-11, 26-27. Section 1437a(a)(1) of the Housing Act limits the shelter costs that can be charged to tenants to no more than either 1) 30% of a family's monthly adjusted income, 2) 10% of the family monthly income, or 3) if a family receives payments for welfare assistance in which a part of the payment is specifically designated for the family's housing costs, no more than that designated amount. *See id.* ¶¶ 2, 20. This statutory ceiling on rent includes the cost of utilities. *See id.* ¶ 21. If a public housing authority does not directly provide for utilities such as (according to Plaintiffs) trash, electricity, or sewer service under the tenant's lease, then it must provide a reasonable utility allowance and credit that amount to the tenant's maximum rent contribution. *See id.* ¶ 25.

Plaintiffs also allege that HACLA's lease agreement with every one of its tenants indicates that the housing authority will directly provide for trash/rubbish removal, but in violation of the agreement, HACLA requires tenants to pay the City of Los Angeles for trash removal services out of pocket. *See id.* ¶¶ 3, 24, 32. When the fee for trash removal is combined with what Plaintiffs pay HACLA for rent and other utilities, Plaintiffs' total shelter costs exceed the rent ceiling required by federal law. *See id.* ¶¶ 26-27.

In October 2011, Legal Aid Foundation of Los Angeles notified HACLA that requiring tenants to pay the trash fees to the city was in violation of HACLA's lease agreement and federal law. *See id.* ¶ 33. Two months later, HACLA announced that it would provide a utility allowance for the trash fees, but refused to retroactively credit previous payments made by tenants. *See id.* ¶¶ 34-35.

Plaintiffs sue HACLA and Douglas Guthrie, President and Chief Executive Officer of HACLA for 1) violation of 28 U.S.C § 1983, 2) violation of 42 U.S.C. § 1437a, and 3) breach of contract. *See id.* ¶¶ 12, 45, 49, 54. Plaintiffs seek declaratory and injunctive relief, damages, and

specific performance. *See id.* ¶¶ 46-47, 50-51, 55-56. They also originally sought class certification to represent all persons who have resided in and/or will reside in HACLA-owned public housing and have been or will be required to pay for trash collection fees while living in public housing. *See id.* ¶ 14.

Plaintiffs now move for class certification but, instead of one class, they now (as of their Reply brief) seek certification of two separate classes (in light of an argument Defendants make in their Opposition to this motion). The exact (altered) proposed class definitions are as follows: for the first and second claims for relief, all persons who "1) have resided 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, except for any time period when the residents have chosen or will choose to pay rent pursuant to the flat rate option"; and, for the third claim for relief, all persons who "1) have resided 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." *See* Plaintiffs' Opening Brief (Docket No. 29) at 1:12-14; Plaintiffs' Reply Brief (Docket No. 61) at 3:21-4:10.

**II. Analysis**

A. Procedural Issue

On July 11, 2012, Defendants filed an *ex parte* application asking permission to file a 15-page sur-reply brief because of new evidence and what they perceive as new arguments in Plaintiffs' Reply brief. Even ignoring Plaintiffs' position expressed by way of an opposition to this ex parte application, *see* Docket No. 68, the Court denies that *ex parte* application largely because there are only two pieces of "new" information in the Reply brief that are necessary to the Court's decision: 1) Plaintiffs' offer to alter the class definition as it relates to their first and second claims, in essence creating two classes; and 2) evidence that those who elect a flat rate rent payment amount to only approximately 5% of HACLA's tenants. Plaintiffs' offer to create a separate class for claims one and two definition is not a "new" argument or fact; it is in direct *response* to Defendants' argument regarding the effect of a flat rate choice under the applicable law. The *percentage* of those electing the flat rate is obviously relevant given the (appropriate) decision to create the second class (and the need to demonstrate numerosity under Fed. R. Civ. P. 23(a)(1)) and is evidence that was certainly available to Defendants – it came from the deposition (which Defendants obviously attended) of HACLA's own witness. *See* Ana

Rodriguez Depo. (Docket No. 63-1), at 29:22-24. Plaintiffs have not surprised Defendants with something about which they were theretofore in the dark.[1]

B. Class Certification Standards

The proponent of class treatment bears the burden of demonstrating that class certification is appropriate. *See In re N. Dist. of Cal., Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982). Before certifying a class, the trial court must conduct a "rigorous analysis" to determine whether the party seeking certification has met the prerequisites of Rule 23 of the Federal Rules of Civil Procedure (hereinafter referred to as either "Rule 23" or "Fed. R. Civ. P. 23"). *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996). Rule 23 requires that the party seeking certification satisfy all four requirements of Rule 23(a)[2] and at least one of the subparagraphs of Rule 23(b). *See id.* at 1234. Here, Plaintiffs attempt to satisfy Rule 23(b)(2) and/or 23(b)(3). Rule 23(b)(2) allows for certification where the party (or parties) opposing the class has/have acted or refused to act on grounds that apply generally to the class so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole. *See* Fed. R. Civ. P. 23(b)(2). Rule 23(b)(3) allows for certification where questions of law or fact common to members of the class predominate over questions affecting only individual members and a class action is superior to other available methods for fairly and

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[1] Because of the Court's approach in this regard, it need not resolve any of the evidentiary objections Defendants asserted on July 12, 2012, *see* Docket No. 67, except the last of those objections, which concerns the introduction of further excerpts of the deposition transcript of Ana Rodriguez, HACLA's Rule 30(b)(6) witness. The Court overrules that objection for the reasons addressed above. Defendants have not expressed any way in which they could have been prejudiced by the consideration of evidence germane to an issue that they first raised in their Opposition brief and to which they obviously have had access at all pertinent times. Certainly they have not suggested any way in which they would substantively or meaningfully contradict the 5% figure Rodriguez's testimony supports.

[2] Rule 23(a) requires that the party/parties seeking certification show:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

efficiently adjudicating the controversy. *See* Fed. R. Civ. P. 23(b)(3).[3]

One overarching comment is appropriate before the Court dives in to analysis of each of the applicable Rule 23(a) and 23(b) factors. Much of Defendants' arguments on this motion depends upon the Court adopting Defendants' position(s) on the ultimate merits of this litigation. The Court is of course permitted to consider any material necessary to its determination, though it should not engage in a trial of the merits. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551-52 (2011) (noting that the "rigorous analysis" required at class certification will "[f]requently…entail some overlap with the merits of the plaintiff's underlying claim"); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) ("[I]t is not correct to say a district court *may* consider the merits to the extent that they overlap with class certification issues; rather, a district court *must* consider the merits if they overlap with the Rule 23(a) requirements.") (emphasis added); *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 949 (9th Cir. 2011) (characterizing as "a correct statement of law" the district court's determination that "although it could not 'weigh the evidence or otherwise evaluate the merits of a plaintiff's class claim,' it could 'compar[e] the class claims, the type of evidence necessary to support a class-wide finding on those claims, and the bearing of those considerations on Rule 23 certification'"); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 947 n.15 (9th Cir. 2009) ("The district court may consider the merits of the claims to the extent that it is related to the Rule 23 analysis.") (emphasis added)..

However, with the exception of the "flat rate" issue discussed below and the assertion that none of the putative class members (Plaintiffs included) that Plaintiffs have identified actually paid more than the applicable rent ceiling, Defendants have not explained why any of their merits-based arguments actually overlap with issues pertinent to class certification. Instead, what they effectively seek is a summary judgment-type ruling before much discovery has occurred and without all of the procedural requirements appurtenant to such a motion. *Cf. Ellis*, 657 F.3d at 983 ("[W]e agree that the district court was not required to resolve factual disputes regarding: (1) whether women were in fact discriminated against in relevant managerial positions at Costco, or (2) whether Costco does in fact have a culture of gender stereotyping and

[3] Defendants themselves assert that Plaintiffs need meet only a preponderance of the evidence standard when a court's class certification analysis entails some measure of "factual finding." *See* Defendants' Opposition Brief (Docket No. 54) at 13:15-19 (citing Third Circuit and Fifth Circuit decisions for this proposition). As to any "facts" the Court's analysis herein relies upon, Plaintiffs have met that standard.

paternalism.); *id.* at 983 n. 8 ("Costco seems to equate a 'rigorous analysis' with an in-depth examination of the underlying merits .... This is incorrect. The district court is required to examine the merits of the underlying claim ... only inasmuch as it must determine whether common questions exist; not to determine whether class members could actually prevail on the merits of their claims."). Moreover, there is no reason why that summary judgment-type ruling should not (at the appropriate time) be applicable to *all* (proposed) class members.[4] In other words, the issues Defendants pose are amenable to a common resolution for all (proposed) class members. They do not, in any way, detract from a conclusion that certification is appropriate in this case.

C. Numerosity

Rule 23(a)(1) requires that any certified class "is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The evidence is clear that thousands of people would be class members in this case even excluding any individuals who are *not yet* residents of any HACLA property.[5] That is undeniably sufficient to satisfy any numerosity requirement. *See, e.g., Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042, 1051-52 (9th Cir. 2003) (refusing to invalidate, on numerosity grounds, certifications of classes containing in excess of 60 members and noting that certification of even that small a number would serve "interests of judicial economy").

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[4] This would include, among others, any argument that 1) HACLA is somehow blameless because it was the Los Angeles Department of Water and Power who actually billed and collected payments from HACLA's tenants, 2) trash utility payments are simply excluded from the utility payments covered by the allowance requirements, and 3) direct payment for trash utility expenses does not come within HACLA's contractual obligation to provide for "rubbish removal."

[5] Defendants object on more than one ground to the class definitions including individuals who are not yet residents of any HACLA property. The Court shares Defendants' skepticism concerning how notice would work with respect to individuals who have not resided in a HACLA property yet (or even how those individuals' claim could have even accrued yet). *See also Frank v. United Airlines, Inc.*, 216 F.3d 845, 852 n.6 (9th Cir. 2000) (questioning whether rule that class action judgment is normally binding on "all those who subsequently come into the class" is true when "subsequent" class members complain about having not been adequately represented in that class action); *Hiser v. Franklin*, 94 F.3d 1287, 1292-93 (9th Cir. 1996) (dealing with res judicata ramifications due to inclusion in earlier class action including "future" class members). Nevertheless, Plaintiffs direct the Court to several cases where class definitions have included people who would only in the future suffer harm that was the subject of the action. *See, e.g., Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010) (commenting, in context of ripeness analysis, that "[t]he inclusion of future class members in a class is not itself unusual or objectionable"); *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 779-80 (9th Cir. 1986). That does not necessarily mean that the Court would not consider manageability of a "future member" class (made up of individuals whose claims have not yet accrued and who could not possibly understand that notice is directed to them) problematic. Manageability is a factor affecting Rule 23(b)(3) and will be discussed further below.

In their Opposition to this motion, Defendants argue that those who elect a "flat rate" rent option are not entitled to any of the utility allowance-associated "maximum rent" protections, *i.e.* they are not given any utility allowance. Plaintiffs agree with this statement in their Reply and, as a result, offer to create two classes, one which applies (for the breach of contract claim) to all of those covered by the Complaint's original class definition and one which excludes anyone for any part of time in which they elected the "flat rate" option.

Plaintiffs' proposed creation of two classes is well-taken in light of the "flat rate" issue. Both classes would still plainly satisfy the numerosity requirement. The breach of contract class would still cover all tenants of HACLA's 6,500 residences. The class for the two claims based on federal law would cover all but 5% of that number. Rule 23(a)(1) is obviously satisfied as to both proposed classes.[6]

D. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact [which are] common to the class." This commonality requirement has been permissively construed. *See Ellis*, 657 F.3d at 981; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Although there must be common questions of law or fact, it is not necessary that *all* questions of law or fact be common. *See Hanlon*, 150 F.3d at 1019 ("The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."); *see also Staton v. Boeing Co.*, 327 F.3d 938, 953-57 (9th Cir. 2003). The Ninth Circuit has made clear that Rule 23(a)(2) is more lenient than the related requirement

[6] That being said, the only question the Court would ask Plaintiffs to clarify is why there is a need to include *future* HACLA-property residents in the class definition for the first and second claim considering HACLA's recent decision to include a trash utility allowance in the rent calculation. Another way of asking that question is to inquire as to whether injunctive relief would be part of any remedy awarded to the class on the first and second claims (thereby also implicating whether a Rule 23(b)(2) certification would be appropriate as to those claims), although presumably Plaintiffs would respond that there is nothing (other than Plaintiffs' view of the applicable legal requirements) obligating HACLA to maintain its present policy of allowing a trash utility allowance. In addition, Plaintiffs take the position in their Reply that, whether or not injunctive relief is a useful remedy on the first two claims, they would still pursue *declaratory* relief on those claims so as to settle the issue of the legality of HACLA's practices (though courts often comment that declaratory relief is likewise intended to provide a remedy to resolve *present* or *future* – not *past* – disputes). At the same time, if there is a Rule 23(b)(2) certification in this case, there would seemingly be little reason for any class certified pursuant to that subparagraph to include *past* HACLA tenants (unless the Court could dispose of the incidental damages and due process issues the Supreme Court addressed in *Dukes*) because they presumably would have no standing to obtain injunctive or declaratory relief. *See Ellis*, 657 F.3d at 988. All of these considerations feed into the Court's conclusion, discussed further below, that certification is appropriate under Rule 23(b)(3) and that Rule 23(b)(2) is likely best avoided in the context of this case.

in Rule 23(b)(3) that common questions of fact or law *predominate*.[7] *See Hanlon*, 150 F.3d at 1019. Under that approach, for purposes of Rule 23(a)(2), the common questions need only exist, even if they do not predominate.

However, in *Dukes*, the Supreme Court indicated that in order to satisfy the commonality requirement, the putative class members'

> claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

131 S.Ct. at 2551. It then quoted a commentator for the notion that

> "[w]hat matters to class certification…is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

*Id.* (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 132 (2009)) (italics in *Dukes*; underline added); *see also Ellis*, 657 F.3d at 981. The Supreme Court determined the "central" commonality was lacking in *Dukes*. *See Dukes*, 131 S.Ct. at 2552 ("Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."); *id.* at 2554 ("[D]emonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's.").

Here, the crucial questions will wind up being whether HACLA had any obligation to include a trash disposal-related utility allowance in any of its rent calculations for HACLA-property residents, whether its failure to do so (at least when a resident's rent was otherwise maximized) pushed rents above the statutory maximum, and whether HACLA's failure to pay for trash-related utility expenses breached its requirement to provide for "rubbish removal" in its

[7] This was true at least up until the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011). However, notwithstanding the Supreme Court's protestation to the contrary, *see id.* at 2556-57, it is somewhat difficult to understand *Dukes* as doing something other than melding the commonality requirement with the predominance requirement of Rule 23(b)(3) (the latter of which was not at issue in *Dukes*, which was a Rule 23(b)(2) class). In any event, even if that analysis is accurate, commonality is satisfied here for the reasons discussed above.

leases with tenants. These legal issues are undergirded by common facts – at a minimum, HACLA's failure to provide for a trash utility allowance (until February 2012); the tenants' direct payment for trash utilities; HACLA's formulas for calculating maximum rental amounts; and common lease terms. All of these questions should produce common questions, and each would seemingly resolve issues that are central to the claims in this case. In this respect, this is a quintessential case for commonality, even after *Dukes*. *See, e.g.*, *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) ("We have previously held…that commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.") (citing *LaDuke v. Nelson*, 762 F.2d 1318, 1332 (9th Cir. 1985)).

As noted above, certain of Defendants' commonality arguments – such as that HACLA is not responsible because it is the Los Angeles Department of Water and Power that assessed the charges and collected the payments – raise, in effect, merits issues (and, on first glance, not particularly persuasive ones) that *still* may be resolved *commonly* across the class. In other words, they do not detract from commonality.

Defendants' other commonality argument is founded upon a belief that damages calculations will necessitate individual scrutiny of each tenant's payment and rent situations. First, as discussed further below, individual damages issues alone will not prevent class certification. Second, notwithstanding the fact that multiple factors play into each tenant's rent calculations and that those factors can change each year, Defendants have made no effort to demonstrate what number, if any, of its tenants have their rent set at a level sufficiently below the maximum allowed such that inclusion of a trash utility payment would not take their rental payments (if it should effectively be included therein) above the maximum rate.[8] Without that information, the Court could not conclude that rental calculation issues would necessarily cause this case to fail either Rule 23(a)(2) or the predominance requirement of Rule 23(b)(3).[9]

In connection with this argument, Defendants contend that neither Plaintiffs nor four other putative class members providing declarations in connection with this motion paid more than the applicable rent ceiling. Yet, Plaintiffs have provided evidence (which the Court credits under Defendants' proposed preponderance standard) that – at least prior to February 2012 –

[8] Of course, this issue would only affect the class for the first and second claims for relief.

[9] Even then, Plaintiffs or the Court could probably narrow the class definitions appropriately to allow for certification.

they were charged the full amount of allowable rent, yet had to pay additional charges for trash collection to the city without being given a utility allowance prior to February 2012. If trash should have been included in any utility allowance, this would demonstrate a violation for any HACLA tenant in a similar circumstance. *See, e.g.*, Rodriguez Depo. (Docket No. 30) at 114:16-118:1; Gullette Decl. (Docket No. 36) ¶¶ 6-9; Galindo Decl. (Docket No. 40) ¶¶ 5, 7-8.

Moreover, as Plaintiffs point out, HACLA has already performed a calculation that it feels is appropriate for estimating the amount that would be necessary to compensate for trash utility payments, either in the form of the monthly amount it now includes as such an allowance in connection with rent calculations or in the amount it estimates it would cost the agency annually. To the extent individual plaintiffs would still have to demonstrate they paid over the rent ceiling without such allowance, that is a calculation that would seemingly be relatively easy to make, either by way of one or more mathematical equations or by way of reference of the matter.

Thus, unlike *Dukes*, where the Supreme Court ultimately rejected certification in that case because it was clear that each individual class member's discrimination case would be tied to facts particular to that plaintiff, here there is unquestionably some over-arching action that would potentially demonstrate liability to all members. In sum, here "common answers apt to drive the resolution of the litigation" will exist, whether those answers are resolved in Plaintiffs' favor or Defendants.

Rule 23(a)(2) is satisfied for both proposed classes.

E. Typicality

Rule 23(a)(3) requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class. "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose . . . ." *Id.* (citation and internal quotation marks omitted). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.* (citation and internal quotation marks omitted). Thus, unique defenses may affect typicality. *See Ellis*, 657 F.3d at 984. The representative plaintiffs' claims need not

be identical to those of the class, but rather need only be "reasonably co-extensive with those of absent class members . . . . " *Hanlon*, 150 F.3d at 1020. In practice, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

Here, Plaintiffs, like all of HACLA's tenants (or at least like all of HACLA's tenants who did not pay a "flat rate" rent, insofar as the first and second claims are concerned), have been confronted and had to deal with the common facts addressed in the preceding section. There is nothing to suggest that Plaintiffs are in any way unique in relation to those facts (and the resulting legal issues they raise). The only argument (other than differences in damage calculations, which, again, will not serve to defeat certification of a class) Defendants raise in connection with typicality is their repeated belief that Plaintiffs did not pay more than the rent ceiling (which would only impact the first and second claims). As discussed in the preceding section, the Court rejects that notion for purposes of this motion. However, if Defendants are correct in that regard and they are also correct in their assertion that *no* member of the putative classes paid more than the ceiling, then Plaintiffs unquestionably *are* typical of the proposed class members.

Rule 23(a)(3) is satisfied with respect to both proposed classes.

F. Adequacy

"To determine whether named plaintiffs will adequately represent a class, courts must resolve two questions: '(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Ellis*, 657 F.3d at 985 (quoting *Hanlon*, 150 F.3d at 1020); *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) ("Whether the class representatives satisfy the adequacy requirement depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.") (omitting internal quotation marks) (quoting *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) and *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994)); *Staton*, 327 F.3d at 957. Plaintiffs and their counsel are plainly ready, willing and able to vigorously represent the class. In challenging Plaintiffs' adequacy as class representatives, Defendants only repeat their merits, commonality and typicality arguments,

which, as discussed above, are not persuasive.[10]

Rule 23(a)(4) is satisfied for both proposed classes, meaning that all four subparagraphs of rule 23(a) are fulfilled.

G. Rule 23(b)(2)

As noted above, Plaintiffs need only satisfy one of the Rule 23(b) subparagraphs for the Court to certify their proposed classes. Rule 23(b)(2) permits maintenance of a class action if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001); *see also Ellis*, 657 F.3d at 986 (post-*Dukes* decision reiterating this rule from *Zinser*); *Dukes*, 131 S.Ct. at 2557 ("We now hold that [claims for monetary relief] may not [be certified under Rule 23(b)(2)], at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.").

Plaintiffs freely admit that HACLA is now providing a trash-related utility allowance in connection with rents paid by residents of its properties. In essence, therefore, the need for injunctive or declaratory relief on the first and second claims is at least somewhat lessened. It is true that this does not dispose of the basis for a request for injunctive relief in the form of specific performance (or *vice versa*) in connection with the breach of contract claim because HACLA still would not be making those payments *directly*, as Plaintiffs argue it is obligated to do under the terms of HACLA's tenant lease agreement, but the *need* for such injunctive relief is no longer patently obvious because HACLA tenants are – given the utility allowance – seemingly no longer being *harmed* by HACLA's non-payment. In any event, it is hard to see how injunctive or declaratory relief could be characterized as the "primary" relief sought in this case at this point in time, given HACLA's recent change with respect to the trash utility allowance. At the same time, the Court would reject Defendants' assertion that Rule 23(b)(2) certification is inappropriate here because "each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant[s]." *Dukes*, 131 S.Ct. at 2557. There would be no need for individualized injunctive or declaratory relief here; if any such relief

[10] Defendants concede that at least Plaintiffs' counsel are adequate within the meaning of Rule 23(a)(4). Assuming that class certification is ordered here, there is no reason why Plaintiffs' counsel should not be appointed class counsel pursuant to Fed. R. Civ. P. 23(g).

is afforded, all HACLA tenants would enjoy the benefit of a ruling that HACLA is obligated to provide a trash utility-related rental allowance and/or HACLA is obligated to make trash utility payments directly according to the terms of the standard HACLA-tenant lease agreement.

All that being said, there *will* be classes certified in this case pursuant to Rule 23(b)(3), as discussed below. As such, there either seems to be little reason not to *also* have a Rule 23(b)(2) class with respect to at least the third claim for relief or there is no reason to even engage in the Rule 23(b)(2) analysis because a class will be certified in any event. *Cf. Ellis*, 657 F.3d at 987 ("[I]f the district court certifies a (b)(3) class in place of, or *in addition to* a (b)(2) class, it may determine that the punitive damages claim is more appropriate to a (b)(3) class.") (emphasis added). The Court would be inclined towards the latter view because there appears to be little doubt Plaintiffs could obtain injunctive, declaratory, or any other necessary relief in a Rule 23(b)(3) class action. *See Bauman v. U.S. Dist. Court*, 557 F.2d 650, 659 n.13 (9th Cir. 1977) (referring to case that other court had found "maintainable as a class action under either Rule 23(b)(2) or (b)(3) because both injunctive relief and money damages were sought"); *Lidie v. State of Cal.*, 478 F.2d 552, 555 (9th Cir. 1973) (rejecting Rule 23(b)(3) certification because representatives – who sought injunctive relief – were not typical of the class); *see also Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 647 (8th Cir. 2012) (involving "relatively straightforward declaratory judgment action seeking injunctive relief under Rule 23(b)(3)"); *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 826 (7th Cir. 2011) ("The proper approach in this case would thus have been for the plaintiffs to seek class certification under Rule 23(b)(3)…but to ask for injunctive as well as monetary relief."). Certainly it would appear that the question of "incidental damages" that often comes up in the context of a Rule 23(b)(2) certification analysis is effectively irrelevant here given that certification will occur, at a minimum, pursuant to Rule 23(b)(3) (which plainly allows for damages, incidental or otherwise), giving rise to notice and opt-out rights.[11] The Court would have the parties address these comments before it decides whether Rule 23(b)(2) certification is necessary or appropriate in this case.

H. Rule 23(b)(3)

A class may be certified under Rule 23(b)(3) where questions of law or fact common to members of the class predominate over questions affecting only individual members and a class

[11] Dukes, for instance, involved a certification only under Rule 23(b)(2).

action is superior to other available methods. *See* Fed. R. Civ. P. 23(b)(3). The predominance analysis focuses on "the legal or factual questions that qualify each class member's case as a genuine controversy" and is "much more rigorous" than commonality. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). It does not involve counting the number of common issues, but weighing their significance. *See, e.g., Local Joint Executive Bd. of Culinary/Bar-tender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001) (contrasting the "number and importance" of common issues with the "few" and "relatively easy" individualized issues); *see also Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 593 (9th Cir. 2010), *overruled in other respects by Dukes*, 131 S.Ct. 2541 (noting that Rule 23(b)(3) "requires a district court to formulate 'some predictions as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case"). In addition, the predominance analysis looks, at least in part, to whether there are common issues the adjudication of which "will help achieve judicial economy," further the goal of efficiency and "diminish the need for individual inquiry." *See Vinole*, 571 F.3d at 939, 944 (quoting and citing *Zinser*, 253 F.3d at 1189); *see also In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009) ("A principal purpose behind Rule 23 class actions is to promote 'efficiency and economy of litigation.'") (quoting *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553 (1974)).

The common factual issues noted above in the Court's commonality analysis appear, at least at this stage, to be far and away the most important/significant issues in this case. Resolution of those issues will unquestionably help achieve judicial economy in connection with this dispute. Moreover, as referenced above, individuals' differences in damages alone may not serve to defeat class certification. *See, e.g., Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010). The Court therefore concludes that predominance within the meaning of Rule 23(b)(3) is present here.

As to superiority, the matters that are to be taken into consideration in making all of the necessary findings under Rule 23(b)(3) include the following:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3)(A)-(D). Plaintiffs indicate that they are unaware of any other claims by other putative class members and that it would not be economically feasible or rational for individual tenants to challenge HACLA's practices. Defendants do not challenge either of those assertions. As a result, the considerations reflected by Rule 23(b)(3)(A) and 23(b)(3)(B) would appear to point towards a class action of the type Plaintiffs propose being a superior method of resolution.

Given that this lawsuit involves HACLA and its impact on thousands of area residents, there is no reason to question the desirability of this forum, covering, as it does, the City of Los Angeles. As such, Rule 23(b)(C) also supports a superiority finding.

Finally, Defendants believe that a class action would be unmanageable because it would be difficult to identify who the class members were, because there is a high turnover rate in the HACLA tenant pool and because some tenants do not leave forwarding addresses. As to the first notion (at least insofar as it concerns present and past tenants[12]), if tenants do not already know whether they are or have been charged rent at the maximum allowable rate, it is an issue that is seemingly readily discernible by way of simple calculations. With respect to the latter issue, as Plaintiffs argue in their Reply, class actions *often* proceed without perfect contact information for class members, and direct mail is not the only form of notice permissible under Rule 23. Even assuming this was an issue that was in some measure troubling to the Court, Defendants have not given the Court any indication of what percentage of former tenants *do not* leave a forwarding address.

For all of the above reasons, except with the possible issue of manageability concerns over the inclusion of future tenants in the classes, a Rule 23(b)(3) certification is appropriate for both proposed classes here.

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[12] As referenced *supra*, Footnote 5, the Court would seriously consider whether manageability concerns counsel for a revision in the class definitions so as to exclude future HACLA tenants. However, the inclusion of future tenants does not so much raise manageability challenges in connection with *this* litigation as it does pose potential, foreseeable, down-the-road difficulties should any future tenant seek to institute a similar action or otherwise challenge whether he or she could be bound by any judgment in this case consistent with notions of due process. *See, e.g.*, *Frank*, 216 F.3d at 852 n.6; *Hiser*, 94 F.3d at 1292-93 (dealing with res judicata ramifications due to inclusion in earlier class action including "future" class members)

I. Conclusion

The Court would certify the two classes (though whether it does so on any basis other than Rule 23(b)(3) is unclear, as addressed *supra*) and, as Plaintiffs request, order the parties to meet and confer concerning notice to the class pursuant to Fed. R. Civ. P. 24(c)(2).

J. Defendants' Evidentiary Objections (Docket No. 49)

1. Overrule.
2. Overrule.
3. Overrule.
4. Overrule.
5. Sustain.
6. Overrule.
7. Overrule.
8. Overrule.
9. Overrule.
10. Sustain.
11. Overrule.
12. Overrule.
13. Sustain.
14. Sustain.
15. Sustain.
16. Overrule.
17. Overrule.
18. Overrule.
19. Overrule.
20. Sustain.
21. Sustain.
22. Overrule.
23. Overrule.
24. Sustain.
25. Overrule.
26. Overrule.

27. Sustain.
28. Overrule.
29. Overrule.
30. Sustain.
31. Overrule.
32. Overrule.
33. Overrule.
34. Sustain.
35. Overrule.
36. Sustain.