DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202 720-865-8301	
Plaintiffs: BRANDON SMITH, KENDRA RAYLENE KEELY, LYNETTE RHODES, AND SHIVANI MOHAN v. **Defendants:** CARDINAL GROUP MANAGEMENT & ADVISORY, LLC d/b/a CARDINAL GROUP MANAGEMENT; GLENDALE PROPERTIES I, LLC d/b/a MINT URBAN INFINITY; GLENDALE PROPERTIES II, LLC d/b/a MINT URBAN INFINITY.	**▲ COURT USE ONLY ▲**
Attorneys for Defendants Glendale Properties I, LLC and Glendale Properties II, LLC: Mark W. Nelson, #27095 Melissa J. Hessler, #35114 K. Thomas Cantley, #47604 NELSON LAW FIRM, LLC 1740 N. High Street Denver, Colorado 80218 Telephone Number: 303-861-0750 Facsimile Number: 303-861-0751 E-Mail: mark@nelsonlawfirm.net melissa@nelsonlawfirm.net thomas@nelsonlawfirm.net	**Case Number:** 2021CV33357 **Division:** 275

DEFENDANTS GLENDALE PROPERTIES I, LLC AND GLENDALE PROPERTIES II, LLC'S *CORRECTED* RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND REQUEST FOR EVIDENTIARY HEARING

Defendants, Glendale Properties I, LLC d/b/a Mint Urban Infinity and Glendale Properties II, LLC d/b/a Mint Urban Infinity, by and through their counsel, Nelson Law Firm, LLC, hereby submit the following *Corrected* Response to Plaintiffs' Motion for Class Certification and Request for Evidentiary Hearing, as follows:

INTRODUCTION AND BACKGROUND[1]

Mint Urban Infinity ("MUI" or the "Property") is a multifamily apartment complex located at 1225 S. Bellaire Street and 1253 S. Birch Street in Denver. MUI consists of 10 buildings containing 561 units. The buildings were constructed in the late 1960s and range between 4 to 6 stories in height. In property investment terminology, the property is considered a Class C or aged property because it is more than 30 years old and in fair condition. **Exhibit 1 -** *Glendale 1275-1450, AEI Consultants Property Condition Report, Section 2.2.*

Glendale Purchases MUI in 2017 and Hires Cardinal to Manage the Property

Glendale Properties I and II (holding companies for Mapletree Investments – collectively "Glendale") purchased MUI in 2017 and contracted with experienced property management company, Cardinal Group Management ("Cardinal"), to manage the Property. **Exhibit 2 -** *Property Management Agreement.* Cardinal prepared the leases that the residents signed, set all fees within the lease agreements, and Cardinal handled the day-to-day operations and maintenance of the Property. **Exhibit 2 -** *Property Management Agreement;* **Exhibit 3 -** *Garnic Deposition, 95:14-96-24; 100:11-101:18; 102:1-105:22.* Generally, Cardinal reported to Glendale when it needed approval for capital expenditures and repairs to the property that exceeded $20,000. General daily operations and repairs to the property under $20,000 were within the discretion of Cardinal. **Exhibit 2** - *Property Management Agreement;* **Exhibit 3** - *Garnic Deposition, 76:2-77:25.*

COVID Hits and the Property Suffers

In March 2020, the global COVID pandemic hit the Denver metro area and MUI, like many other multifamily housing properties across the country, faced numerous COVD related issues.

[1] Glendale generally refutes Plaintiffs' "Statement of Facts" section of their Corrected Motion for Class Certification.

These issues include, but were not limited to, supply chain issues affecting MUI's ability to get replacement parts for the heating and air conditioning systems, pools, and elevators[2]; staff turnover of leasing and maintenance personnel to care for the Property[3]; strain on the Property caused by residents in a lock down situation who had lost jobs and were actively vandalizing the property and the pools and stealing from other residents[4]; unreliable trash pickup from outside vendors who themselves were facing staffing shortages; resulting pest control issues on the Property caused by failed vendor trash pickup and residents in lockdown conditions[5]; and increased Denver homeless population getting onto properties like MUI and digging through garbage and damaging and stealing property[6].

All the above issues were exacerbated by the perfect storm of large-scale property systems failures at MUI, including simultaneous elevator and boiler system breakdowns.[7]. Further, the City of Denver lacked permitting personnel during COVID to timely inspect and approve the property's pools for opening.[8]

Plaintiff Brandon Smith Attempts to Solicit MUI Residents for a Class Action Lawsuit

Purported "lead plaintiff" Brandon Smith moved into MUI in April 2021. Four months after he moved into MUI he experienced some of the above-referenced COVID-related issues,

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[2] **Exhibit 4** - *Smith Deposition, 59:22-60:24*; **Exhibit 5** - *Hughett Deposition; 163:9-165:20; 174:6-175:18.*

[3] **Exhibit 6** - *Hawthorne Deposition, 119:12-121:9;* **Exhibit 5** - *Hughett Deposition; 155:4-18;* **Exhibit 7** - *Gephardt Deposition, 70:3-15;* **Exhibit 8** - *Keely Deposition, 57:5-16*; **Exhibit 9** - *Rhodes Deposition, 66:3-67:17.*

[4] **Exhibit 7** - *Gephardt Deposition, 146:8-148:7*; **Exhibit 10** - *Mohan Deposition, 26:16-28:14; 34:2-35:18; 37:12-38:4; 58:9-59:3;64:6-65:9;* **Exhibit 8** - *Keely Deposition, 53-55; 57:23-58:14; 66:8-68:18*; **Exhibit 6** - *Hawthorne Deposition, 93:19-95:17; 124:2-13.*

[5] **Exhibit 10** - *Mohan Deposition, 43:10-13*; **Exhibit 4** - *Smith Deposition, 80:1-19.*

[6] **Exhibit 10** - *Mohan Deposition, 43: 14-25; 59:4-60:4.*

[7] **Exhibit 6** - *Hawthorne Deposition, 93:12-95:17.*

[8] **Exhibit 3** - *Garnic Deposition, 120:8-121:18;* **Exhibit 6** - *Hawthorne Deposition, 182:8-23*; **Exhibit 4** - *Smith Deposition; 85:1-12.*

grew restless and, in August 2021, began actively soliciting fellow MUI residents to join a "class action" lawsuit against MUI. **Exhibit 4** - *Smith Deposition, 93:14-94:17; 124:13-129:9.* Mr. Smith approached numerous local law firms to get his case started. **Exhibit 4** - *Smith Deposition, 94:18-23.* Mr. Smith's public relations day job is to set up clients with media contacts. **Exhibit 4** - *Smith Deposition, 10:14-11:17.* Mr. Smith harnessed his job experience with media outlets to contact the local media to complain and encouraged other residents to contact local media and the health department. **Exhibit 10** - *Mohan Deposition, 84:6-85:13.* Mr. Smith shoved flyers under residents' doors, sent out hundreds of spam emails to residents, and organized "community meetings" under the guise that the MUI resident's issues would be addressed. **Exhibit 4** - *Smith Deposition, 93:14-22; 122:1-124:12; 152:22-153:18*; **Exhibit 8** - *Keely Deposition, 69:1-70:16*; **Exhibit 9** - *Rhodes Deposition, 95:14-98:12*; **Exhibit 10** - *Mohan Deposition, 79:2-81:18.* Mr. Smith did not invite Glendale or Cardinal to his community meetings to address any resident complaints because his true purpose was to sign people up for this lawsuit. **Exhibit 4** - *Smith Deposition, 67:5-69:19.* Brandon Smith told any MUI resident he encountered that "if you have anything that would help the lawsuit, please send it to Jason [Legg, counsel for Plaintiffs]". **Exhibit 10** - *Mohan Deposition, 79:2-81:18; 83:23-85:13.*

Despite heroic efforts, Mr. Smith was only able to convince three other former MUI tenants to join this lawsuit. He could not even convince his own roommate to join his lawsuit. **Exhibit 4** - *Smith Deposition; 75:18-76:12.* As discussed below, the claims amongst and between Mr. Smith and the three other Plaintiffs are different, have not been demonstrated to be widespread, and do not support class treatment pursuant to C.R.C.P. 23. No Plaintiff alleges damages more than a thousand dollars, and one Plaintiff testified that she has no damages at all. **Exhibit 10** - *Mohan Deposition, 83:1-8.*

Plaintiffs' Alleged Breach of Warranty of Habitability/Customary Diligence Allegations

Elevators

The complaints the Plaintiffs have about their time at MUI vary – the only consistent complaint among the named Plaintiffs is that the elevators did not always function. Two of the Plaintiffs, Ms. Rhodes and Ms. Keely, testified that they did not regularly use the elevators. **Exhibit 8** - *Keely Deposition, 65:1-24*; **Exhibit 9** - *Rhodes Deposition, 43:2-16.* More important, elevators are not a habitability issue; MUI is not a high-rise property, and the elevators are a convenience amenity. **Exhibit 11** - Murovitz November 21, 2022 Report, p. 8; **Exhibit 12** - *Murovitz Deposition, 220:4-14*; **Exhibit 13** - McPherson November 21, 2022 Report.

Nevertheless, the modernization of the elevators were part of an ongoing large capital expenditure project Defendants were working to address from 2019 to 2021. **Exhibit 3** - *Garnic Deposition, 41:11-43:14.* Glendale was committed to spending no less than $1.5 million to modernize the elevators. **Exhibit 3** - *Garnic Deposition, 169:4-171:19.* As recognized by Cardinal Vice President of Operations, Brian Hawthorne, large capital expenditure projects, like elevators, are not authorized overnight. **Exhibit 6** - *Hawthorne Deposition, 148:4-149:24.*

Air Conditioning

Glendale installed brand new air conditioning units on the property prior to 2020. **Exhibit 3** - *Garnic Deposition, 47:2-15; 161:3-162:16; 196:11-197:15***.** There was no deferred maintenance of this system and its malfunction in the summer of 2021 was not anticipated. Defendants worked diligently to get air conditioning restored but were hampered by COVID-related supply chain and vendor issues. Defendants offered penalty-free lease breaks to residents adversely affected by the lack of air conditioning. **Exhibit 13** - McPherson November 21, 2022 Report; **Exhibit 3** - *Garnic Deposition, 198:15-199:17;* **Exhibit 11** - Murovitz November 21, 2022

Report, pp. 10-13.

Importantly, lack of air conditioning in and of itself is a not a habitability requirement under Colorado law and not all Colorado multifamily properties offer air conditioning. **Exhibit 12** - *Murovitz Deposition, 135:19-137:1*; **Exhibit 11** - Murovitz November 21, 2022 Report, pp. 10-13. In addition, not all Plaintiffs experienced an ongoing lack of air condition during the summer of 2021 (**Exhibit 10** - *Mohan Deposition, 57:1-17*) and, other than the low-cost inconvenience of purchasing fans or portable AC units, Mr. Smith's "jock itch" from sweating and his internet purchases of ketamine to self-dose his alleged anxiety (**Exhibit 4** - *Smith Deposition, 105:9-21; 147:11-149:2*), the Plaintiffs have no damages as a result of the lack of air conditioning.

Pests and "Rodents"

Plaintiffs have provided no evidence of a widespread rodent issue or for that matter ***any*** rodent issue on the Property. It is unclear why this is included in the header in Plaintiffs' Corrected Motion ("Plaintiffs' Corrected Motion") on page 5. MUI, like all responsible multifamily properties, had contracts for ongoing pest control on the Property and the cost of this service was included in the rent and explained in the lease agreement. Unfortunately, bed bugs and roaches are a by-product of multifamily living and ownership dedicated proper funds for treatment and established a monthly service to treat and address tenant concerns. **Exhibit 13** - McPherson Report, p. 4; **Exhibit 11** - Murovitz Report, pp. 14-15.

Trash

As discussed above and in the experts' reports, trash removal on the property was handled by a third-party vendor who, like many businesses during COVID, was struggling with staffing issues. In addition, the Plaintiffs testified that the residents themselves were spreading trash all over the property and homeless people were dumpster diving, which made the manager's ability

to control trash on the property difficult. The trash situation was not a breach of any warranty of habitability, nor did it rise to a breach of customary diligence in property maintenance. **Exhibits 13 and 11** - McPherson and Murovitz Reports.

Security Doors

As discussed above, Cardinal regularly repaired and replaced security doors, but the residents vandalized and literally tore doors off the hinges as soon as they were replaced. **Exhibit 6** - *Hawthorne Deposition, 124:2-13; 135:13-21.*

Exterior/Interior Lighting

This area of "concern" seems to be manufactured by counsel. There is no evidence of any widespread issue with lights being burned out on the property. The only evidence regarding lighting issues are as follows: (1) Plaintiff Shivani Mohan testified that a lightbulb in a stairwell was out and was replaced by management as soon as she reported it. **Exhibit 10** - *Mohan Deposition, 42:7-43*; (2); Plaintiff Kendra Raylene Keely testified that she had some issues with a kitchen light that property management had tried to replace. **Exhibit 8** - *Keely Deposition, 32:14-33:21.*

The Pool

As discussed above, the pool was vandalized by the residents, parts for the pool were delayed due to COVID supply-chain issues and, when the pool could finally open after the COVID quarantine was lifted, the City of Denver was shorthanded when it came to personnel required to inspect the pools and issue permits to open the pools.

Retaining Wall/Asphalt

This is another area of "concern" that seems to be manufactured by counsel. None of the Plaintiffs complained about a crumbling retaining wall on the property nor did they complain about

the condition of the asphalt. These are not warranty of habitability issues and these issues were being addressed by the Defendants as capital expenditure items. **Exhibits 13 and 11** - McPherson and Murovitz Reports.

Move-Out and Administrative Fees

Plaintiffs fail to provide any of evidence that the industry standard Administrative Fees, Pest Control Fees, and Move-Out Fees in the MUI Lease Agreement violate any law. Plaintiffs' own expert, Steven Epcar, does not opine that these fees are illegal. **Exhibit 14** - Steven Epcar Report dated October 7, 2022. Notably missing from Epcar's class damages model is any category of damages for standard lease fees. ***Id***. The alleged "illegal" lease fees are the linchpin of Plaintiffs' commonality and numerosity claims justifying class certification. Lacking support for these claims, Plaintiffs' motion for class certification should be denied.

Glendale Requests an Evidentiary Hearing

Defendant Glendale requests an evidentiary hearing on Plaintiffs' Motion for Class Certification. The determination of an action's class status may require more than a review of the pleadings; its resolution may well demand consideration of the nature of the evidence that will be presented. It is generally a better practice for a trial court to hold an evidentiary hearing on the question of class certification. *Villa Sierra Condo. v. Field Corp*., 787 P.2d 661 (Colo. App. 1990); *Medina v. Conseco Annuity Assurance Co.*, 121 P.3d 345 (Colo. App. 2005).

LEGAL STANDARD FOR CLASS CERTIFICATION

C.R.C.P. 23 provides the procedural standards for filing and maintaining a class action. Rule 23(a) permits a member of a class to sue as a representative party on behalf of all members only if: (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. *Robinson v. Lynmar Racquet Club, Inc.*, 851 P.2d 274, 277 (Colo. App. 1993); *Mountain States Telephone & Telegraph Co. v. District Court*, 778 P.2d 667 (Colo.1989).

The basic purpose of a class action is "to eliminate the need for repetitious filing of many separate lawsuits involving the interests of large numbers of persons and common issues of law or fact by providing a fair and economical method for disposing of a multiplicity of claims in one lawsuit." *Mountain States Tel. & Tel. Co. v. Dist. Court*, 778 P.2d 667, 671 (Colo.1989). A class action is a *procedural* device utilized to efficiently handle a large number of similarly situated claimants. *Jackson v. Unocal Corp.*, 262 P.3d 874, 880 (Colo. 2011) citing *Reyher v. State Farm Mut. Auto. Ins. Co.*, 2012 COA 58, ¶ 41, 280 P.3d 64, 72.

In determining whether an action is appropriate for class certification, a trial court must ascertain whether the claims actually meet the preconditions of C.R.C.P. 23(a): numerosity, commonality, typicality, and adequacy of representation. If these conditions are met, the trial court may then consider, pursuant to C.R.C.P. 23(b)(3), granting certification where it "finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." C.R.C.P. 23(b)(3).

In any application to proceed as a class action, the burden of establishing that an action should proceed as a class action is on the party seeking to utilize the class action. *Medina v. Conseco Annuity Assurance Co.*, 121 P.3d 345 (Colo. App. 2005).

ARGUMENT

I. Plaintiffs' Claims Do Not Qualify for Class Certification.

Plaintiffs' claims fail to meet the preconditions of C.R.C.P. 23(a) as to numerosity, commonality and typicality. While the Court's analysis can end here, any common questions of law or fact common to the purported members of the class pursuant to C.R.C.P. 23(b) do not predominate over the questions affecting individual members, such that a class action would be superior to individualized claims.

A. Plaintiffs fail to adequately define the class.

The definition of the class is an essential prerequisite to maintaining a class action. *Jackson v. Unocal Corp.*, 262 P.3d 874, 887 (Colo. 2011) citing *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 382 (D.Colo.1993) ("To satisfy the requirements of Rule 23(a), plaintiffs must first adequately define each class and then establish that each class is so numerous that joinder of all members is impracticable."); *see also McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 877 (D.S.D.1982) ("Prior to a consideration of the criteria established by Rule 23, the Court must determine whether a class exists, and is capable of legal definition."). Prior to analyzing the C.R.C.P. 23 criteria, a court must determine whether the proposed class definition "specif[ies] a particular group that ***was harmed*** during a particular time frame," and "facilitate[s] a court's ability to ascertain [the class's] membership in some objective manner." *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 477 (S.D.Ohio 2004)(emphasis added); *see also Cook*, 151 F.R.D. at 382 (requiring a proposed class definition that is "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member [of the class]").

Plaintiffs propose the certification of 3 classes ("Proposed Classes"):

(1) All persons in the US who leased a residence at MUI from October 22, 2018 to June 30, 2022.

(2) All persons in the US who leased a residence in Colorado from Cardinal from October 22, 2018 to June 30, 2022 using Cardinal's lease form who Cardinal caused to be charged any Administrative Fee on or after August 2, 2019.

(3) All persons in the US who leased a residence in Colorado from Cardinal from October 22, 2018 to June 30, 2022 using Cardinal's lease form who Cardinal caused to be charged a move-out fee, including those who had any portion of their security deposit withheld in whole or in part to satisfy a move-out fee.

Plaintiffs' Corrected Motion, p. 2.

Proposed Classes 2 and 3 generally apply to co-defendant, Cardinal. The problem with proposed Class 1 – the MUI Class - is that it is not specific to MUI lessors who ***were harmed*** by the alleged property conditions. Plaintiffs purport to include as class members ***any MUI resident*** between 2017 and 2022. This class definition is grossly overbroad, not linked to any liability or damages allegation in the Second Amended Complaint, and therefore untenable. For this reason alone, Plaintiffs' motion for class certification should be denied.

B. C.R.C.P. 23(a) Analysis.

1. Plaintiffs fail to demonstrate numerosity.

A party seeking class certification is required to establish by competent evidence that the class is sufficiently large to render joinder impracticable. *Kniffin v. Colo. W. Dev. Co.*, 622 P.2d 586 (Colo. App. 1980). The actual size of the defined class is significant factor in the determination that the class is sufficiently large to render joinder impracticable and mere speculation as to size is insufficient. *Id*. Here, Plaintiffs have not even bothered to speculate as to class size. Having produced no evidence as to the potential size of the defined class or any other basis to permit a conclusion that joinder is impracticable, the Plaintiffs fail to sustain their burden of proof pursuant to C.R.C.P. 23(a)(1).

In addition, the proposed class is not defined with sufficient precision such that each class member could be identified through the application of objective criteria. Rather, the class is defined as anyone who resided at MUI during a four-year time period, whether they were exposed to or

experienced any of the complained of property conditions and/or sustained damages therefrom. Glendale cannot be held liable to a MUI resident who was not assessed move-out charges. Glendale cannot be held liable to a MUI resident who did not experience issues with elevators and/or air conditioning. Glendale cannot be held liable to a MUI resident not impacted by a pool closure, a retaining wall or parking lot asphalt issue. Glendale cannot be held liable to a resident with no discernable damages from any property condition.

2. Plaintiffs fail to demonstrate commonality/typicality.

The Rule 23(a)(2) requirement for commonality is particularly important in the injunctive/equitable claims context. The test for commonality has become more demanding since the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). The Court in *Wal-Mart* ruled that a trial court may only certify the class once it determines, "after rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 342. The proponent of certification must identify "a common contention of such nature that it is capable of classwide resolution." *Id.* at 350. It is not enough to show a common question or multiple common questions, "even in droves." *Id.* Rather, the plaintiff must show "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* at 389-90.

Here, the issues presented are too individualized for class treatment. The myriad of claims have disparate alleged treatment amongst the few named Plaintiffs and Plaintiffs have failed to prove that common issues exist across a ***nationwide class*** where Defendants - by virtue of ***damages caused*** by elevator issues, air conditioning issues, pool problems, pest problems, outdoor lighting, trash, asphalt, and/or retaining wall maintenance – were the result of the breach the warranty of habitability or any contractual customary diligence requirement at the MUI property in Denver,

Colorado. *See Medina v. Conseco Annuity Assurance Co., 121 P.3d 345* (Colo. App. 2005)(Where plaintiff alleged misconduct by insurer in charging higher premiums than stated in policy, the fact that the insurer used at least seven different types of policies, with varying statements of the amounts and payment schedules for premiums, precluded class certification.).

C. C.R.C.P. 23(b) Analysis.

1. Rule 23(b)(2) certification is not appropriate because Glendale no longer owns MUI.

The purported MUI class seeks injunctive and declaratory relief. However, Defendant Glendale no longer owns the property (**Exhibit 3** - *Garnic Deposition, 32:21-33:23*) so this avenue for relief, at least against Glendale, is not available to Plaintiffs or any class of plaintiffs.

2. Rule 23(b)(3) certification is not appropriate because individual issues predominate over common issues.

Plaintiffs appear to concede that "to the extent the Court adheres to *Goebel* and *Buckley Power Co.*, the focus should be on Rule 23(b)(3)." *Plaintiffs' Corrected Motion, p. 21.* Glendale agrees. To certify a class under C.R.C.P. 23(b)(3), a trial court must find that common questions "predominate over any questions affecting only individual members" and that class resolution is "superior to other available methods for the fair and efficient adjudication of the controversy." *Jackson v. Unocal Corp.*, 262 P.3d 874, 889 (Colo. 2011). This inquiry focuses on "whether the proof at trial will be predominantly common to the class or primarily individualized." *Medina,* 121 P.3d at 348. Often, the issue most relevant is "whether the plaintiff advances a theory by which to prove or disprove 'an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position.'" *Farmers Ins. Exchange v. Benzing*, 206 P.3d 812, 820 (Colo. 2009) (quoting *Lockwood Motors, Inc. v. Gen. Motors Corp.*, 162 F.R.D. 569, 580 (D.Minn.1995)).

In this case, issues concerning individualized experience with property amenities and damages therefrom predominate over issues common to the class, and therefore, the Plaintiffs have failed to demonstrate that proof of the claim elements obviate the need to examine each class member's individual position. As a result of the proposed structure of the MUI class, in order to assess class claims, the Court will need to conduct individual mini-trials to determine: (1) whether a particular resident was exposed to any of the complained-of property conditions; (2) whether the Defendants' breach of warranty of habitability and/or failure of customary diligence caused the particular property condition; and (3) whether the resident suffered any damages as a result of a property condition.

Plaintiffs' assert that class certification is appropriate because "[n]o one else has expressed an interest in filing a separate case – rather, absent class members are watching the instant matter to learn of their rights." *Plaintiffs' Corrected Motion, p. 24.* The evidence demonstrates this statement is not true. Despite Plaintiff Smith's best efforts to solicit potential plaintiffs by spamming MUI residents with flyers and emails, no other residents (including his roommate) appear to be interested in joining this lawsuit. Plaintiffs concede that "[a]bsent certification, there is little incentive to pursue this case." *Plaintiffs' Corrected Motion, p. 24-25.*

II. If Class Certification is Granted it Should be Conditional.

C.R.C.P. 23(c), unlike amended F.R.C.P. 23, still allows class certification to "be conditional." A trial court is not therefore bound by a "definitive" class certification determination, but rather has a duty to monitor, and the flexibility to alter, the class certification decision in light of any new evidence, *see Benzing,* 206 P.3d at 818. If the Court is inclined to grant class certification without conducting an evidentiary hearing to address (1) the lack of a coherent class definition; and (2) a general estimate as to how many class members Plaintiffs

reasonably anticipate, Glendale requests that certification be granted on a conditional basis and reserves the right to challenge the propriety of class certification as the litigation proceeds.

CONCLUSION

Plaintiffs fail to adequately define the proposed class(es) and Plaintiffs' Motion fails to satisfy the requirements of C.R.C.P. 23(a) and 23(b) and should be denied.

Dated this 4th day of January, 2023.

Respectfully submitted,

NELSON LAW FIRM, LLC

/s/ Melissa J. Hessler
Mark W. Nelson, Esq.
Melissa J. Hessler, Esq.
K. Thomas Cantley, Esq.
Attorneys for Defendants Glendale Properties I, LLC & Glendale Properties II, LLC

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2023, a true and correct copy of the foregoing was electronically filed with the Court and served via Colorado E-Filing and addressed to all active counsel of record on Colorado E-Filing System's service list.

/s/ Ivy Sanders
Ivy Sanders