DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: City and County Building 1437 Bannock Street Denver, CO 80202	DATE FILED: February 22, 2024 10:35 AM CASE NUMBER: 2021CV33357
Plaintiffs: **BRANDON SMITH, KENDRA RAYLENE KEELY, LYNETTE RHODES, and SHIVANI MOHAN** v. Defendants: **CARDINAL GROUP MANAGEMENT & ADVISORY, LLC dba CARDINAL GROUP MANAGEMENT; GLENDALE PROPEERTIES I, LLC dba MINT URBAN INFINITY; GLENDALE PROPERTIES II, LLC dba MINT URBAN INFINITY**	Case Number: **21CV33357** Courtroom: **409**

ORDER RE: PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

This is before the Court on the Plaintiffs' Motion for Class Certification. The Court has considered the motion, the responses filed on behalf of the defendants, the reply, as well as the attachments to the pleadings and the evidence introduced at the hearing on the motion. Upon consideration thereof and being advised, the Court finds and orders as follows.

FACTS

The plaintiffs herein are tenants or former tenants of Mint Urban Infinity (MUI),[1] which is a twelve-building, 561-unit residential apartment complex, located at 1225 South Bellaire Street and 1253 South Birch Street in Denver, Colorado. Defendant Cardinal Group Management is a real estate management, investment, construction and marketing firm. In 2017, MUI contracted with Cardinal to manage the property. Cardinal was accordingly responsible for preparing tenant leases, setting terms, conditions and fees within the lease agreements, and conducting day-to-day operation and maintenance of the property, subject to approval from MUI for major capital expenditures and repairs.

According to the plaintiffs' complaint, as well as the evidence introduced at the hearing on the instant motion, at the times relevant to this action Cardinal employed the use of a standardized lease patterned after a form lease prepared and adopted by the National Apartment Association. The standard lease was required for all tenants at MUI (including the plaintiffs herein), contained terms, conditions and obligations that were substantially the same for all tenants, and was non-negotiable. Among the terms of the lease is an "Administrative Fee" for a set (albeit variable) amount that is payable on the day the lease contract commences. According to the lease, the fee is assessed for the purpose of offsetting "anticipated costs for administering the Lease Contract and associated maintenance requests during the Lease Contract term."

Each MUI lease also contained a provision for "Early Move Out," which provides for a potential fee for reletting and remarketing the unit if the tenant vacates the unit without providing the requisite notice, moves out without paying the requisite rent, or otherwise defaults or is judicially evicted. Alternately, the lease authorizes "liquated damages" in a specified amount if the tenant moves out without paying rent in full or otherwise defaults or is evicted.[2] The lease also assesses a $2.00 per month pest control fee that is assessed to recover the costs of providing pest remediation services. Pursuant to the lease, and among the defined "Responsibilities of the Owner," is the obligation to act "with customary diligence" to keep common areas reasonably clean, maintain fixtures, furniture,

[1] The property is owned by defendants Glendale Properties I and II, which purchased MUI in 2017. At all relevant times Glendale operated the property under the name of MUI.

[2] For example, the lease executed by plaintiff Brandon Smith provides for potential "Liquidated Damages" in the amount of $3,016.00, which represents two months' rent, in lieu of a "Re-Letting Charge."

hot water, heating and air conditioning equipment, comply with applicable laws regarding safety, sanitation and fair housing, and make reasonable repairs.

The MUI property is considered under investment terminology as a Class C or aged property because it was built in the 1970's, is more than 30 years old, and is in fair condition. It is undisputed that, by 2019, there were substantial deferred maintenance issues that were pervasive throughout the property and affected both individual units and common areas. According to the complaint, as substantiated at the evidentiary hearing, the elevators in nearly every building were in need of modernization and/or repair, were subject to breakdowns, and in some instances, were described as "dangerous and scary." Air conditioning systems periodically failed to properly operate during summer months. At other times issues with the boilers resulted in tenants lacking hot water and heating. Although tenants were required by their lease to use a third-party "valet trash service," trash was frequently left to accumulate in hallways and common areas, thereby exposing tenants to foul odors and unsanitary conditions. Additionally, exterior dumpsters were often overflowing and ill-maintained. Despite the assessment of pest control fees, tenants experienced, and complained to management about, infestations of bed bugs, cockroaches and other vermin that went unabated and, in some instances, required tenants to vacate their units. Additionally, tenants complained that locks on external security doors were repeatedly broken or non-functional, leading to instances of vandalism, intrusions by non-tenants, and other untoward behaviors.

The plaintiffs' Second Amended Complaint seeks declaratory and injunctive relief on grounds, *inter alia*, that the administrative and move out fees imposed under the leases constitute unlawful penalties; are violative of various statutory provisions including Colorado's Rental Application Fairness Act and Security Deposit Act; are void and enforceable as against public policy; and are violative of the contractual provisions set forth in the lease. The complaint also seeks monetary damages based on theories of breach of contract and unjust enrichment due to the defendant's alleged breach of the above cited statutory provisions; breach of Colorado's statute governing Warranty of Habitability; and the defendants' alleged breach under the lease to act with customary diligence to remedy and remediate the asserted defective conditions. Additionally, the complaint seeks declaratory relief and monetary damages on grounds that a pest control fee is assessed pursuant to the lease when no such services are, allegedly, provided.

The Second Amended Complaint, as well as the instant motion, seeks certification of the following classes:

> **1. The "MUI Class":** (1) All persons in the United States (2) who leased a residence from Defendants at Defendants' Mint Urban Infinity Apartment site (3) from the date three years prior to the filing of the initial Complaint in this case through June 30, 2022.
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> **2. The Cardinal Administrative Fee Class:** (1) All persons in the United States (2) who, from the date three years prior to the filing of the initial Complaint in this case through the date notice is sent to the Class, (3) leased a residence in Colorado from Cardinal, (4) using Cardinal's Form Lease, and (4) who Cardinal caused to be charged any Administrative Fee on or after August 2, 2019.
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> **3. The Cardinal Move-Out Fee Class:** (1) All persons in the United States (2) who, from the date three years prior to the filing of the initial Complaint in this case through the date notice is sent to the Class, (3) leased a residence in Colorado from Cardinal (4) using Cardinal's Form Lease and (5) 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 the Move-Out Fee.

STANDARD OF REVIEW

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. District Court,* 778 P.2d 667 (Colo. 19890. Such actions are favored, and the supreme court has held that C.R.C.P. 23 should be liberally construed to advance these policies. *See Farmers Ins. Exch v. Benzing,* 206 P.3d 812, 818 (Colo. 2009). The Rule should therefore be liberally construed in light of its policy favoring the maintenance of class actions, and "trial courts generally should accept the plaintiff's allegations in support of certification." *Id,* 206 P.3d at 818.

A plaintiff seeking class certification bears the burden of demonstrating that each of the requirements of C.R.C.P. 23 have been met. *Benzing,* 206 P.3d at 818. C.R.C.P. 23(a) establishes four prerequisites to the maintenance of a

class action: (1) numerosity; i.e. the class is so numerous that joinder of all members is impracticable; (2) commonality; i.e. there are questions of law or fact common to the class; (3) typicality, i.e. the claims or defenses of the class representatives are typical of the claims or defenses of the class; and (4) adequacy; i.e. the class representatives will fairly and adequately protect the interests of the class.

If these prerequisites are satisfied, then the plaintiff must additionally show that the class meets the requirements of one of the subsections of C.R.C.P. 23(b). A class action may be maintained if all the prerequisites of subsection (a) are satisfied and, in addition, the court finds that the questions of law or fact common to the members of the class predominate over 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).[3]

The Rule provides that a trial court's certification order on the maintainability of a class action "may be conditional, and may be altered or amended before the decision on the merits." C.R.C.P. 23(c)(1). The trial court's order "is not final or irrevocable, but rather, it is inherently tentative." *Benzing,* 206 P.3d at 818 (citing *Officers for Justice v. Civil Serv. Comm'n of City & and County of S.F.,* 688 F.2d 615, 633 (9th Cir. 1982)). Thus, once a court certifies a class, it retains a "continuing obligation to review whether proceeding as a class action is appropriate...." *Id.* Additionally, C.R.C.P. 23 allows a court flexibility in shaping a class action, and a court may utilize its powers under C.R.C.P 23(c)(4) on its own initiative to create subclasses, where appropriate. *LaBerenz v. American Family Mutual Insurance Company,* 181 P.3d 328 (Colo. App. 2007*).* Ultimately, the decision of whether to certify a class action lies within the discretion of the trial court and will not be disturbed unless the decision is clearly erroneous and an abuse of discretion. *Id.,* 181 P.3d at 332-33.

ANALYSIS

Rule 23(a)

1. Numerosity

[3] Alternatively, a trial court may certify a C.R.C.P. 23(b)(1) or (b)(2) class action. While the plaintiffs' motion seeks certification under C.R.C.P. 23(b)(1), (2) and (3), it appears from the pleadings, evidence and argument that the primary relief sought is for monetary damages. The plaintiffs' argument in support for class certification likewise primarily focuses on the factors set forth in C.R.C.P. 23(b)(3). Accordingly, the Court restricts its analysis to the factors set forth in subsection (b)(3).

Rule 23(a)(1) requires a class of plaintiffs so numerous that joinder is impractical. Accordingly, a party seeking class certification is required to establish by competent evidence that the class is sufficiently large to render joinder impractical. *LaBerenz,* 181 P.3d at 334. "The actual size of the defined class is a significant factor in such determination, and mere speculation as to size is insufficient." *Kniffin v. Colo. W. Dev. Co,* 622 P.2d 586, 592 (Colo. App. 1980). However, the class does not have to be so ascertainable that every potential member can be identified at the commencement of the action. "The description of the class must be 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.'" *LaBerenz,* 181 P.3d at 334 (quoting *Cook v. Rockwell Int'l Corp,* 151 F.R.D. 378, 382 (D. Colo. 1993)). In determining whether the numerosity requirement is met, a court may consider reasonable inferences that can be drawn from the facts before it, and the requirement is satisfied even where the exact size of the class is unknown but general knowledge and common sense indicate that it is large. *LaBerenz,* 181 P.3d at 334 – 35.

As an initial matter, the Court finds that the description of the classes as proposed by the plaintiff are sufficiently defined and definite such that it is administratively feasible to determine whether a particular individual is a member of the class. Each of the three proposed classes are defined in neutral terms from which membership of the class may be ascertained through objective criteria. Nor are the class definitions premised upon a legal conclusion or an impermissible "fail-safe" classification. Although proof of liability, as asserted in the complaint (e.g. whether the assessed fees constitute impermissible penalties), and the existence of resulting damages will ultimately be subject to determination on a trial on the merits, dispute as to such issues here does not preclude certification on a class-wide basis.

Here, the MUI property consists of over 500 individual units. The complaint asserts, and the evidence in support of the motion confirms, that each MUI tenant[4] was required to execute a lease consistent with Cardinal's form lease

[4] While the Court is satisfied that each of the MUI tenants were subject to substantially similar lease terms and the assessment of the Administrative Fee for the stated purposes as provided in the lease, the Court cannot find with fair assurance that "all persons within the United States" who leased a residence pursuant to Cardinal's form lease that contained some form of Administrative Fee are necessarily similarly situated with the MUI tenants. The Court therefore exercises its discretion to reshape the Administrative Class to include all persons in the United States who leased a residence at **Defendants' Mint Urban Infinity Apartment** during the time period as stated in the plaintiffs' proposed class definition.

which contained substantially similar terms and conditions, including the assessment of an Administrative Fee. The Court can therefore reasonably infer based upon a common sense understanding of how many tenants have occupied the property pursuant to the MUI leases over the applicable time periods that the size of the proposed class is sufficiently large as to render joinder impractical.

Likewise, the complaint asserts and the evidence suggests that the described deficient conditions of the MUI property giving rise the plaintiffs' statutory and contractual claims affected multiple, if not each, of the twelve buildings that comprised the MUI property. The deficiencies as alleged affected not only individual units but common areas throughout the property, and occurred over an extended period of time. The Court therefore infers that the number of MUI tenants affected by such conditions, and who may be entitled to assert claims, is sufficiently large as to render joinder impractical. The Court therefore concludes that the plaintiffs have established the numerosity requirement as to the MUI Class and the Cardinal Administrative Fee Class (as modified per note 4, *supra*).

The Court reaches a different conclusion as to the proposed Cardinal Move Out Fee Class. The fact that each of the MUI leases contained some form of Move Out or Liquidated Damages provision initially suggests that the size of the putative class is large. However, the class is further defined as those tenants who were "charged a Move-Out Fee, including those who had any portion of their security deposit withheld in whole or in part to satisfy the Move-Out Fee." Based upon the evidence submitted, the Court can only speculate as to the number of MUI tenants who meet the proposed criteria. By way of example, the evidence establishes that, while plaintiff Brendon Smith and plaintiff Raylene Keely each were subject to similar lease conditions, Brendon Smith was not actually assessed such a fee while Raylene Keeley was. The question of how many other tenants were actually assessed the move out or liquidated damage fee, and under what circumstances, is only a matter of conjecture.

Accordingly, the Court is unable to find with fair assurance that the number of such individuals is sufficiently large as to make joinder impractical. The Court therefore concludes that the plaintiffs have not established the numerosity requirement as to the Cardinal Move Out Fee Class.

2. Commonality

Rule 23(a)(2) requires the existence of significant common legal or factual issues within the class. The Rule does not require that every issue must be

common to the class. Instead, "it is to be recognized that there may be varying fact situations among individual members of the class and this is all right as long as the claims of the plaintiffs and other class members are based on the same legal or remedial theory." *LaBerenz,* 181 P.3d at 338.

Here, while the defendants' assert that certain of the claims are not applicable to all tenants and that the asserted claims are too individualized to qualify for class certification, defendants do not contest in any meaningful way the existence of common issues of fact and law. Indeed, resolution of claims asserted by the Administrative Fee class necessarily requires a determination of whether the fee, in the manner and for purpose in which it is assessed, runs afoul of applicable statutory provisions, including Colorado's Rental Application Fairness Act. Determination of that singular issue is applicable to each of the class members and is subject to resolution on a class-wide basis.

Additionally, the issue of whether or not the deficiencies in the physical condition of the MUI property rose to the level as to render the common areas of the property dangerous or otherwise unhabitable presents factual issues common to many if not all MUI tenants. Likewise, the defendants' response to tenant complaints and the sufficiency of their actions to address and remediate the conditions raise common factual and legal issues regarding whether they acted with customary diligence as required by their leases and whether the resulting conditions violated statutory mandates, including Colorado's Warranty of Habitability.

Accordingly, the Court concludes that the plaintiffs have established the commonality requirement as to the MUI Class and the Cardinal Administrative Fee Class (as modified).[5]

3. Typicality

Rule 23(a)(3) requires that the claims or defenses asserted by the parties are typical of the claims or defenses of the other class members. The requirement of typicality may be satisfied when it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, regardless of varying fact patterns that underlie the individual claim. *Ammons v. American Family Mutual Insurance,* 897 P.2d 860 (Colo. App.

[5] Based upon the Court's conclusion that the plaintiffs failed to establish the numerosity requirement as to the Cardinal Move Out Class, the Court need not address the commonality requirement as to that class.

1995). However, if the named plaintiff has considerations that are unique and which may be dispositive, class certification may be denied. *Id.,* 897 P.2d at 863.

Here, the claims asserted by the named plaintiffs regarding the illegality of the assessed Administrative Fee are typical, if not identical, to the claim asserted by members of the putative class. The claim that the fee is violative of statutory provisions or otherwise constitutes an improper penalty is based upon the same factual determinations and legal theories, whether asserted by an individual claimant or on behalf of applicable class members.

Similarly, the claim of whether or not there were systemic deficiencies in the physical premises affecting the common areas of the MUI property rendered such areas uninhabitable in violation of statute, and whether the defendants' response to such conditions was contrary to and in breach of their obligations under the leases, as asserted by the named plaintiffs, is applicable to and typical of claims to be asserted by members of the putative class. The fact that individual plaintiffs, whether named or as members of the class, may have experienced some but not all of the conditions, while perhaps raising issues regarding the determination and assessment of damages (if any), does not of itself defeat a finding that the claims, as asserted, meet the typicality requirement.

The Court therefore concludes that the plaintiffs have established the typicality requirement as to the MUI Class and the Cardinal Administrative Fee Class (as modified).[6]

4. <u>Adequacy</u>

Rule 23(a)(4) requires that the representative parties fairly and adequately protects the interests of the class. The Court is initially satisfied that counsel in this action are sufficiently qualified to adequately represent the interests of the class. Moreover, it appears from the pleadings and the testimony elicited at the hearing that each of the named plaintiffs are invested in the litigation, have cooperated with counsel, followed the progress of the litigation, participated in

[6] While the Court need not address the typicality requirement as to the Cardinal Move Out Fee Class (*see* n. 5, *supra*), the Court herein finds that the plaintiffs have not established typicality as to that putative class. The terms of the lease regarding the assessment of either a move out fee or a liquidated damages are predicated upon specific and individualized factual preconditions and legal defenses. Hence a tenant may or may not contest, for example, that requisite notice was provided or that a deficiency of rental payments or other default occurred. The particularized circumstances underlying the assessment of the fee, and whether and to what extent the assessment was justified, raise individualized considerations that preclude a finding that the claims asserted by the named plaintiffs are typical of claims of the unnamed class members.

the discovery process, and in other respects have actively prosecuted this action. Nor does the Court find any disqualifying conflict of interest among the named plaintiffs that would impair their ability to adequately represent the interest of the classes.

Accordingly, the Court concludes that the plaintiffs have established the adequacy requirement as to each of the proposed classes.

Rule 23(b)

1. Predominance

To meet the predominance requirement, class representatives must show that questions of law or fact common to the class predominate over those that affect only individual members. C.R.C.P. 23(b)(3). The focus for the trial court is whether the proof at trial will be predominantly common to the class or primarily individualized. *Patterson v. BP America Production Company,* 240 P.3d 456, 462 (Colo. App. 2010); *Medina v. Conseco Annuity Assurance Co.,* 121 P.3d 345, 348 (Colo. Ap. 2005). The predominance requirement necessitates "a fact-driven, pragmatic inquiry guided by the objective of judicial efficiency and the need to provide a forum for the vindication of dispersed losses." *Id.* Thus, the class representatives must advance "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.'" *Benzing,* 206 (quoting *Lockwood Motors, Inc. v. General Motors Corp.,* 162 F.R.D. 569, 580 (D. Minn. 1995).

The predominance requirement is clearly established as to the Administrative Fees Class (as modified). With respect to the MUI tenants, Cardinal utilized the same or substantially similar lease, each of which included the assessment of the administrative fee. The evidence regarding the factual issues will be essentially the same for all plaintiffs and class members and will necessitate minimal, if any, individualized proof. Moreover, the plaintiffs herein assert theories of liability which, if proven, are applicable to and provide means for relief for all class members. Conversely, should the plaintiffs fail to prevail on their claim, the unified theory for relief is fairly binding on the class members without the necessity of consideration of individualized issues.

The Court recognizes that issues regarding the MUI Class raise more particularized and individualized considerations. As is evident from the complaint and the testimony presented at the hearing on the motion, each of the named plaintiffs experienced some, but not all, of the alleged deficiencies in the physical condition of the MUI property, both in the common areas and in their individual units. To the extent each of the named plaintiffs encountered the same alleged deficiencies, it fairly appears from the evidence that they were affected to varying degrees. However, as the Court perceives the plaintiffs' complaint, the thrust of the plaintiff's statutory and contractual claims stem from alleged community-wide and building-wide issues, and the defendants' systemic and institutional response to such issues. Proof at trial will accordingly be common among the MUI class members; i.e. the same emails, purchase orders, invoices, annual budgets and other documentary evidence will be introduced in order to establish whether the defendants breached a warranty of habitability or their contractual obligations to their tenants by failing to act with customary diligence.

Moreover, the fact that damages may have to be ascertained on an individualized basis does not, of itself, defeat class certification. *See Menocal v. GEO Grp, Inc.,* 882 F.3d 905 (10th Cir. 2018). Of course, should the course of litigation subsequently divulge that the focus of the plaintiffs MUI claims are not as represented, or is modified in a manner that seeks relief based upon individualized circumstances, the Court retains the jurisdiction to modify or decertify the class. But as the claims are presently postured, the Court finds that the proof at trial will be predominantly common to the class such as justify class certification.

The Court therefore concludes that the plaintiffs have established the predominance requirement as to the MUI and Administrative Fee classes (as modified).

2. <u>Superiority</u>

Finally, Rule 23 requires 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). Among the factors to be considered are the interests of the class in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already commence by or against members of the class; the desirability or undesirability of concentrating

the litigation of the claims in the particular forum; and the difficulties likely to be encountered in the management as a class action. C.R.C.P. 23(b)(3)(A) – (D).

Here, the Court recognizes that the named plaintiffs, as well as many of the potential class members, present small or relatively small claims. As such, there is a likelihood that members of the class will be disinclined to incur the time, expense, and resources necessary to prosecute claims or direct the course of litigation in their own right. Nor is the Court advised that current or former MUI tenants (with the exception of the named plaintiffs herein), have asserted or intend to assert claims against the defendants individually in separate actions. As such, a resolution of the issues raised herein on a class-wide basis is a superior means in which address such claims, or potential claims. Moreover, the fact that named plaintiffs assert claims associated with the lease terms (i.e. the administrative fee) in conjunction with their statutory and contractual claims regarding the condition of the MUI property, which is located within the confines of this jurisdiction, weights in favor of concentrating the litigation in the present forum. Finally, given the convergence of issues and the commonality of the plaintiffs and claims raised, the Court discerns no particular difficulties in management of the class action.

CONCLUSION AND ORDERS

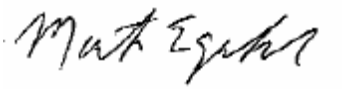
Based on the foregoing, the Plaintiffs motion for class certification of the MUI Class and the Cardinal Administrative Fee Class (as modified), is **granted.** Accordingly, pursuant to C.R.C.P. 23 the Court certifies the following classes:

> **The "MUI Class":** (1) All persons in the United States (2) who leased a residence from Defendants at Defendants' Mint Urban Infinity Apartment site (3) from the date three years prior to the filing of the initial Complaint in this case through June 30, 2022.
>
> **The Cardinal Administrative Fee Class:** (1) All persons in the United States (2) who, from the date three years prior to the filing of the initial Complaint in this case through the date notice is sent to the Class, (3) leased a residence at Defendant's Mint Urban Infinity Apartment site, (4) using Cardinal's Form Lease, and (4) who Cardinal caused to be charged any Administrative Fee on or after August 2, 2019.

The Plaintiffs motion for class certification of the Cardinal Move Out Fee is **denied.**

SO ORDERED this 22nd day of February, 2024.

BY THE COURT:



Martin F. Egelhoff
District Court Judge