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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel.
DENIKA TERRY and ROY HUSKEY III,
and each of them for themselves
individually, and for all other persons
similarly situated and on behalf of the
UNITED STATES OF AMERICA,

Plaintiffs/Relators,

v.

WASATCH ADVANTAGE GROUP,
LLC, WASATCH PROPERTY
MANAGEMENT, INC., WASATCH
POOL HOLDINGS, LLC, CHESAPEAKE
COMMONS HOLDINGS, LLC, LOGAN
PARK APARTMENTS, LLC; LOGAN
PARK APARTMENTS, LP,

Defendants.

No. 2:15-cv-00799 KJM DB

ORDER

Plaintiffs are tenants who receive rental assistance through the federally subsidized Housing Choice Voucher Program commonly known as “Section 8.” They claim defendant lessors improperly charged plaintiffs, as well as the putative class members they seek to represent, for washer and dryer rentals, renter’s insurance and covered parking. Plaintiffs argue these services constitute impermissible rent under the Section 8 contracts and regulations, and

1 defendants therefore violated the Section 8 contracts and submitted false claims for
2 reimbursement under the federal program.

3 Plaintiffs now move to amend their complaint and move for class certification on
4 behalf of themselves and other similarly situated tenants at defendants' properties located in
5 California in the past four years. Pls.' Mot. Class Cert. (Mot.), ECF No. 72-1; ECF No. 71
6 (motion to amend); *see, e.g.*, Lavine Decl. Exs. A-J, ECF No. 72-5 (including documents related
7 to tenants at defendants' properties in Fresno, Hanford, Kingsburg, Norco, Rancho Cordova,
8 Sacramento, San Diego and Spring Valley, California). Defendants oppose both motions. Defs.'
9 Opp'n Class Cert. (Opp'n), ECF No. 78; ECF No. 77 (opposition to motion to amend). Plaintiffs
10 have replied. Pls.' Reply Class Cert. (Reply), ECF No. 80; ECF No. 79 (reply to defendant's
11 opposition to motion to amend). For the reasons discussed below, plaintiffs' motion to amend is
12 GRANTED, plaintiffs' class certification motion is GRANTED as to the Rule 23(b)(3) class and
13 plaintiffs' class certification motion is GRANTED CONDITIONALLY as to the Rule 23(b)(2)
14 class, conditioned on plaintiffs substituting a new class representative who has standing to pursue
15 declaratory and injunctive relief.

16 I. BACKGROUND

17 A. Factual Background

18 Because the court grants plaintiffs' motion to amend, the facts below are taken
19 primarily from the plaintiffs' third amended complaint (TAC), ECF No. 71-2. Although
20 defendants are correct as a general matter that "it is the operative pleading that controls the scope
21 of this litigation," Opp'n at 20, courts have considered class definitions differing from those in the
22 operative complaint and relied on amended complaints filed after a motion for class certification
23 was filed. *See, e.g., Stuart v. Radioshack Corp.*, No. C-07-4499 EMC, 2009 WL 281941, at *1-4,
24 6, 13-14, 18 (N.D. Cal. Feb. 5, 2009) (granting leave to amend where plaintiff moved to file new
25 complaint after moving for class certification and defendant "pointed out [plaintiff] was asking
26 for certification of a class different from that alleged in his complaint," then relying on the new
27 complaint when addressing the motion for class certification). Given the similarity between the
28

1 second and third amended complaints, and the absence of any prejudice to defendants if the court
2 relies on the latter, the court does so here in the interests of efficiency and justice.

3 Plaintiffs seek to represent a class of past, present and prospective tenants of
4 residential apartments owned, rented, and managed by defendants. TAC ¶¶ 1-2. Defendants’
5 properties include four apartment communities in the Sacramento area. *Id.* ¶ 3. Plaintiffs Denika
6 Terry and Roy Huskey III lived at two of them. *Id.* ¶¶ 4-5. Defendants rent numerous apartments
7 to tenants who receive rental assistance through the federally subsidized Housing Choice Voucher
8 Program, commonly known as “Section 8.” *Id.* ¶ 6. The Section 8 program provides that
9 participating tenants pay between thirty percent and forty percent of their adjusted monthly
10 income toward rent and utility costs and the federal government and local housing agencies pay
11 the balance of rent directly to the property owner. *Id.* Across defendants’ properties, there are
12 hundreds of Section 8 tenants. *Id.* ¶ 8. Defendants were parties to Housing Assistance Payment
13 Contracts (HAP Contracts) with plaintiffs as part of the Section 8 program. *Id.* ¶ 9. As part of
14 their usual course of business, defendants demanded additional monthly charges from plaintiffs
15 and other Section 8 tenants; the additional charges were treated no differently from rent, and were
16 in excess of the tenants’ portion of the rent due under the HAP Contracts. *Id.* ¶ 10. The
17 additional payment demands included rental charges for washers and dryers, renters’ insurance
18 and covered parking. *Id.*

19 Plaintiffs’ claims rely on defendants’ treating these additional charges no
20 differently than rent. The HAP Contracts, which are agreements between and among the tenant
21 family, the landlord and the local housing authority, establish the initial lease term and the total
22 amount of monthly rent due from the tenant. *Id.* ¶¶ 31-34. The sum of the housing assistance
23 payment by the public housing agency and the tenant’s share of rent under the HAP Contract is
24 known as the contract rent, which is subject to change in limited circumstances and only after
25 notice is given. *Id.* ¶¶ 37-38. The regulations governing rent under a HAP Contract, found at 24
26 C.F.R. § 982.451, provide in pertinent part, “[t]he owner may not demand or accept any rent
27 payment from the tenant in excess of the maximum and must immediately return any excess rent
28 to the tenant.” *Id.* ¶ 39 (citing 24 C.F.R. § 982.451(b)(4)(ii)). Similarly, Part C of the Tenancy

1 Addendum to the standard HAP Contract provides: “The owner may not charge or accept, from
2 the family or from any other source, any payment for rent of the unit in addition to the rent to
3 owner.” *Id.* ¶ 40.

4 Plaintiffs allege defendants repeatedly demanded payment of additional charges,
5 rent payments or “side payments,” all in violation of the HAP Contracts and without authorization
6 of the local housing agency or the U.S. Department of Housing and Urban Development (HUD).
7 *Id.* ¶¶ 50, 96-100, 117-21. As noted, defendants’ demand for “side payments” included payment
8 for washer and dryer rentals, renter’s insurance and covered parking. *Id.* ¶¶ 96, 117. As an
9 example, defendants’ Resident Ledger for the Terry residence for the month of January 2012
10 reflects a monthly charge of \$40 for “Washer/Dryer Rental,” \$17.91 for “Renter’s Insurance” and
11 \$10 for “Covered Parking Charges.” *Id.* Ex. B. Similarly, defendants’ Resident Ledger for the
12 Huskey residence for the month of January 2012 reflects a monthly charge of \$50 for
13 “Washer/Dryer Rental” and \$17.91 for “Renter’s Insurance.” *Id.* Ex F. Plaintiffs periodically
14 entered into several Residential Rental Agreements, each of which included an Additional
15 Services Agreement that addressed these additional charges. *Id.* ¶¶ 55, 64, 88-89, 110-11; *id.*
16 Exs. G, H, I (Terry Agreements); *id.* Exs. J, K (Huskey Agreements). To enforce additional rent
17 payment requirements, defendants threatened Terry and Huskey each with eviction for
18 nonpayment of the “side payments.” TAC ¶¶ 96, 100-01, 117, 121-22. Defendants ultimately
19 filed an eviction action against Terry for not making the unlawfully demanded “side payments.”
20 *Id.* ¶ 102.

21 Based on these allegations, plaintiffs bring four claims against all defendants: (1)
22 violation of the Federal False Claims Act, 31 U.S.C. § 3729(a), for “knowingly present[ing] a
23 false or fraudulent claim for payment or approval” to the United States, *id.* ¶¶ 144-58; (2) Breach
24 of Contract, Cal. Civ. Code §§ 3300 *et seq.*, for breaching the terms of the HAP Contracts that
25 prohibit the charging of additional rent payments, *id.* ¶¶ 159-65; (3) violation of the Consumer
26 Legal Remedies Act, Cal. Civ. Code § 1750, for engaging in deceptive practices in connection
27 with the conduct of a business providing services, *id.* ¶¶ 166-77; and (4) Unfair Business
28 Practices, Cal. Bus. & Prof. Code § 17200 *et seq.*, for engaging in “unfair competition,” including

1 any “unlawful, unfair, or fraudulent business act or practice,” *id.* ¶¶ 178-92. Plaintiffs seek
2 damages and injunctive and other equitable relief. *Id.* ¶ 194.

3 B. Procedural Background

4 Plaintiffs filed their initial complaint on April 14, 2015. ECF No. 1. After the
5 court granted in part and denied in part defendants’ motion to dismiss, the plaintiffs filed a second
6 amended complaint. ECF No. 66.

7 Now plaintiffs have filed a motion to amend the complaint based not on new
8 theories of liability, but on “evidence discovered.” ECF No. 71-1. Defendants oppose this
9 motion, ECF No. 77, and plaintiffs have replied. ECF No. 79.

10 On the same day as their motion to amend, plaintiffs filed a motion to certify two
11 classes. ECF No. 72-1. Defendants oppose this motion, ECF No. 78, and plaintiffs replied. ECF
12 No. 80.

13 Plaintiffs have not expressly requested a hearing on the question of preliminary
14 class certification, which the court has submitted on the papers. Min. Order, ECF No. 81; *see*
15 *also Merrill v. S. Methodist Univ.*, 806 F.2d 600, 608-09 (5th Cir. 1986) (noting district courts
16 ordinarily should hold a hearing on the question of class certification if a plaintiff expressly
17 requests one but observing Federal Rule of Civil Procedure 23 does not require an evidentiary
18 hearing).

19 II. LEGAL STANDARD

20 A. Motion to Amend

21 Contrary to plaintiffs’ assertions, ECF No. 79 at 3, when a party seeks to amend its
22 complaint after a Rule 16 scheduling order has been issued, the party’s ability to amend his
23 complaint is governed by Rule 16(b). *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608
24 (9th Cir. 1992); *see also Johnson v. St. Mary*, No. CIV S-06-0508 WBS EFB PS, 2007 WL
25 1100507, at *1 (E.D. Cal. Apr. 11, 2007), *findings and recommendations adopted*, No. CIV-S-06-
26 0508-WBS EFB PS, 2007 WL 1365400 (E.D. Cal. May 9, 2007) (“[The Eastern District],
27 applying *Johnson v. Mammoth Recreations*], has confirmed that once the district court has filed a
28 pretrial scheduling order pursuant to Federal Rule of Civil Procedure 16, a motion to amend the

1 pleadings is governed first by Rule 16(b), and only secondarily by Rule 15(a)"). Although
2 plaintiffs have asserted the court "issued other, superseding scheduling orders that do not mention
3 a deadline for any complaint amendments," ECF No. 79 at 3, the first amendment to the
4 scheduling order in this case, which modified only three deadlines related to class certification
5 and a status conference, clearly stated, "All other provisions in of the initial scheduling order
6 (ECF No. 39) remain in effect," ECF No. 54. The initial scheduling order states, "No further
7 joinder of parties or amendments to pleadings is permitted without leave of court, good cause
8 having been shown." ECF No. 39 at 2 (citing Fed. R. Civ. P. 16(b) and *Johnson*, 972 F.2d 604).
9 The court therefore analyzes plaintiffs' motion to amend under Rule 16(b), then under Rule 15(a).

10 Under Rule 16(b), a movant must demonstrate "good cause" to justify adding a
11 new defendant. *Mammoth*, 975 F.2d at 608; *St. Mary*, 2007 WL 1100507, at *1 (citing *Jackson v.*
12 *Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D. Cal. 1999); *Roberts v. Beard*, No. 15cv1044-WQH-
13 PCL, 2018 WL 454437, at *4 (S.D. Cal. Jan. 17, 2018). "The 'good cause' standard 'focuses on
14 the diligence of the party seeking amendment.'" *St. Mary*, 2007 WL 1100507, at *1. "Relevant
15 inquiries [into diligence] include: whether the movant was diligent in helping the court to create a
16 workable Rule 16 order; whether matters that were not, and could not have been, foreseeable at
17 the time of the scheduling conference caused the need for amendment; and whether the movant
18 was diligent in seeking amendment once the need to amend became apparent." *Id.*

19 If good cause exists, the party next must satisfy Rule 15(a). *Cf. Johnson*, 975 F.2d
20 at 608 (citing approvingly *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C.1987), for its
21 explication of this order of operations). Federal Rule of Civil Procedure 15(a)(2) states "[t]he
22 court should freely give leave [to amend its pleading] when justice so requires," and the Ninth
23 Circuit has "stressed Rule 15's policy of favoring amendments." *Ascon Props., Inc. v. Mobil Oil*
24 *Co.*, 866 F.2d 1149, 1160 (9th Cir.1989). "In exercising its discretion [to grant or deny leave to
25 amend] 'a court must be guided by the underlying purpose of Rule 15—to facilitate decision on
26 the merits rather than on the pleadings or technicalities.'" *DCD Programs, Ltd. v. Leighton*, 833
27 F.2d 183, 186 (9th Cir.1987) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir.1981)).
28 However, "the liberality in granting leave to amend is subject to several limitations. Leave need

1 not be granted where the amendment of the complaint would cause the opposing party undue
2 prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay.” *Ascon*
3 *Props.*, 866 F.2d at 1160 (internal citations omitted).

4 B. Motion for Class Certification

5 Litigation by a class is “an exception to the usual rule” that only the individual
6 named parties bring and conduct lawsuits. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348
7 (2011) (citation and internal quotation marks omitted). Only when a class action “promot[es]
8 . . . efficiency and economy of litigation” should a motion for certification be granted. *Crown,*
9 *Cork & Seal Co. v. Parker*, 462 U.S. 345, 349 (1983). A court considers whether class litigation
10 promotes “economies of time, effort and expense, and . . . uniformity of decisions as to persons
11 similarly situated, without sacrificing procedural fairness or bringing about other undesirable
12 results.” Fed. R. Civ. P. 23(b)(3) advisory committee’s note to 1966 amendment.

13 To be eligible for certification, the proposed class must be “precise, objective, and
14 presently ascertainable.” *Williams v. Oberon Media, Inc.*, No. 09-8764, 2010 WL 8453723, at *2
15 (C.D. Cal. Apr. 19, 2010); *see also* 7A Charles Alan Wright, et al., *Federal Practice and*
16 *Procedure* § 1760 (3d ed. 2018) (“If the general outlines of the membership of the class are
17 determinable at the outset of the litigation, a class will be deemed to exist.” (footnote with
18 citations omitted)). The proposed class definition need not identify every potential class member
19 from the very start. *See, e.g., Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 645 (4th Cir.
20 1975); *O’Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998). This requirement
21 is a practical one. It is meant to ensure the proposed class definition will allow the court to
22 efficiently and objectively ascertain whether a particular person is a class member, *see In re TFT-*
23 *LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 592 (N.D. Cal. 2010), for example, so that
24 each putative class member can receive notice, *O’Connor*, 184 F.R.D. at 319.

25 Class certification is governed by Federal Rule of Civil Procedure 23. The court
26 must first determine whether to certify a putative class, and if it does, it must then define the class
27 claims and issues and appoint class counsel. Fed. R. Civ. P. 23(c)(1), (g). To be certified, a
28 putative class must meet the threshold requirements of Rule 23(a) and the requirements of one of

1 the subsections of Rule 23(b), which defines three types of classes. *Leyva v. Medline Indus., Inc.*,
2 716 F.3d 510, 512 (9th Cir. 2013). Here, plaintiffs seek certification under Rules 23(b)(2) and
3 23(b)(3). Rule 23(b)(2) requires a showing that “the party opposing the class has acted or refused
4 to act on grounds that apply generally to the class, so that final injunctive relief or corresponding
5 declaratory relief is appropriate respecting the class as a whole.” A Rule 23(b)(2) class can be
6 certified where “a single injunction or declaratory judgment would provide relief to each member
7 of the class.” *Wal-mart*, 564 U.S. at 360. Rule 23(b)(3) provides for certification of a class
8 where common questions of law and fact predominate and a class action is the superior means of
9 litigation.

10 Rule 23(a) imposes four requirements on every class. First, the class must be “so
11 numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Second,
12 questions of law or fact must be common to the class. *Id.* 23(a)(2). Third, the named
13 representatives’ claims or defenses must be typical of those of the class. *Id.* 23(a)(3). And fourth,
14 the representatives must “fairly and adequately protect the interests of the class.” *Id.* 23(a)(4). If
15 the putative class meets these requirements, Rule 23(b)(3) imposes two additional requirements:
16 first, “that the questions of law or fact common to class members predominate over any questions
17 affecting only individual members,” and second, “that a class action is superior to other available
18 methods for fairly and efficiently adjudicating the controversy.” *Id.* 23(b)(3). The test of Rule
19 23(b)(3) is “far more demanding,” than that of Rule 23(a). *Wolin v. Jaguar Land Rover N. Am.*,
20 *LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S.
21 591, 623-24 (1997)).

22 “The party seeking class certification bears the burden of demonstrating that the
23 requirements of Rules 23(a) and (b) are met.” *United Steel, Paper & Forestry, Rubber, Mfg.*
24 *Energy, Allied Indus. & Serv. Workers Int’l Union, AFL-CIO C.L.C. v. ConocoPhillips Co.*, 593
25 F.3d 802, 807 (9th Cir. 2010). This burden is real; Rule 23 embodies more than a “mere pleading
26 standard.” *Wal-Mart*, 564 U.S. at 350. The party must “prove that there are *in fact* sufficiently
27 numerous parties, common questions of law or fact, etc.” *Id.* (emphasis in original). The trial
28 court must then conduct a “rigorous analysis” of whether the party has met its burden, *id.*, and

1 “analyze each of the plaintiff’s claims separately,” *Berger v. Home Depot USA, Inc.*, 741 F.3d
2 1061, 1068 (9th Cir. 2014) (citing *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809
3 (2011)). The court must verify the putative class’s “actual, not presumed, conformance with Rule
4 23(a)” *Wal-Mart*, 564 U.S. at 351 (alterations omitted) (quoting *Gen. Tel. Co. of Sw. v.*
5 *Falcon*, 457 U.S. 147, 160 (1982)). This inquiry often overlaps with considering the merits of the
6 plaintiffs’ substantive claims. *Wal-Mart*, 564 U.S. at 351-52. Indeed, “a district
7 court *must* consider the merits if they overlap with the Rule 23(a) requirements.” *Ellis v. Costco*
8 *Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (emphasis in original) (citing *Wal-Mart*, 564
9 U.S. at 351-52); *see also Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013) (“[O]ur cases
10 requir[e] a determination that Rule 23 is satisfied, even when that requires inquiry into the merits
11 of the claim.”). These same “analytical principles” also apply to the court’s analysis of whether
12 the plaintiff meets its burden under Rule 23(b). *Comcast*, 569 U.S. at 34.

13 III. DISCUSSION

14 A. Motion to Amend

15 Plaintiffs move for leave to file the TAC located at ECF No. 71-2. *See* ECF
16 No. 71-1. Plaintiffs assert the proposed amendments “do not substantially change the character of
17 the plaintiffs’ theories of liability, but rather seek to expand coverage under the TAC to all of the
18 areas in which defendants own and operate properties accepting housing choice voucher
19 (commonly known as “Section 8”) tenants, rather than just to their Sacramento-area properties.”
20 ECF No. 71-1 at 2. Plaintiffs direct the court’s attention to the assigned magistrate judge’s
21 having granted expanded “class discovery to cover all Wasatch-owned properties over the
22 western states.” *Id.* Plaintiffs note the proposed TAC “simply conforms the allegations to
23 evidence discovered—a classic reason for amendment.” *Id.* Additionally, plaintiffs contend there
24 is no undue delay or other prejudice to defendants, “no trial date has been set, and class
25 certification has yet to be decided” *Id.* at 3.

26 In opposition, defendants contend plaintiffs “offer no explanation for their failure
27 to include the proposed expansion of their class in the Second Amended Complaint” and granting
28 this motion would permit plaintiffs “a second opportunity to seek class certification.” ECF

1 No. 77 at 3. Defendants contend granting leave to amend “would cause substantial delay” and
2 expense, and plaintiffs had “full knowledge of [d]efendants’ other properties” when they last
3 amended their complaint. *Id.*

4 Plaintiffs reply that their second amended complaint was limited to the
5 amendments “addressed in the order on” defendant’s motion to dismiss, “and that a plaintiff is not
6 free to further amend without being granted further leave to amend by the Court.” ECF No. 79 at
7 2. Additionally, plaintiffs contend the deadline to file their prior amended complaint within 14
8 days was a relatively short time frame and fell ten days before the close of class discovery. *Id.*
9 According to plaintiffs, “approximately half of [d]efendants’ total [document] production”
10 occurred “in the final two weeks of the class period.” Plaintiffs moved for leave to file the TAC
11 “just days later, on August 25, 2017.” *Id.* at 3. Plaintiffs also assert defendants suffered no
12 prejudice because the TAC “was filed concurrently with the class certification motion,” which
13 permitted defendants the “full briefing period and opposition brief to address the new,
14 geographically expanded allegations in the proposed TAC.” *Id.* Plaintiffs contend they have
15 good cause for leave to file the TAC because it incorporates class discovery and they “could not
16 reasonably have moved to amend any earlier, until the evidence was in.” *Id.* at 4.

17 The court finds good cause to grant leave to plaintiffs to file the TAC. Plaintiffs
18 have shown diligence by filing their motion to amend only 11 days after the close of class
19 discovery, which was only 12 days after “depositions of [d]efendants’ persons-most-
20 knowledgeable.” *Id.* at 2; ECF No. 54 (granting joint request to modify scheduling order in part
21 to set class certification discovery deadline of August 14, 2017); *see Kendrick v. Cty. of San*
22 *Diego*, No. 15-cv-2615-GPC (RBB), 2017 WL 2692903, at *4 (S.D. Cal. June 22, 2017) (party
23 was diligent when it filed motion to amend when “less than a month passed”). Additionally,
24 plaintiffs are correct that the magistrate judge ordered document production and discovery
25 responses for all of defendants’ properties, not just for defendants’ properties in Sacramento. *See*
26 ECF No. 48 (ordering that “defendants shall produce further responses and documents covering
27 the past six (6) years for all of defendants’ facilities,” nearly five months before plaintiffs filed the
28 motion to amend). Defendants did not move for reconsideration of the magistrate judge’s ruling,

1 and additional discovery has occurred. Plaintiffs' new allegations in the TAC coincide with
2 evidence supplied in their motion for class certification involving tenants at defendant properties
3 throughout California. *Compare* TAC ¶¶ 44-45 (class definitions expanded to all of California),
4 *and* Lavine Decl. Exs. A-J (including documents related to tenants at defendants' properties in
5 Fresno, Hanford, Kingsburg, Norco, Rancho Cordova, Sacramento, San Diego and Spring Valley,
6 California), *with* Second Amended Complaint (SAC) ¶ 41 (ECF No. 66) (class definition limited
7 generally to "Northern California").

8 Because the court finds good cause to grant plaintiffs leave to file the TAC, the
9 court next considers any "undue prejudice" to defendants, bad faith by plaintiffs, futility in
10 amendment, or undue delay created. *See Ascon Props.*, 866 F.2d at 1160. Defendants contend
11 granting this request would cause "substantial delay" and "undue delay and expense" throughout
12 their opposition but do not actually explain what this means. ECF No. 2-3. The only argument
13 resembling an explanation is defendants' position that they have already "invested substantial
14 time and expense during this briefing process" and granting leave to amend would "essentially hit
15 the reset button on the entire certification process." *Id.* at 3. But as plaintiffs noted, they filed
16 their motion to amend and motion to certify class on the same day. *Compare* ECF No. 71 (filed
17 August 25, 2017), *with* ECF No. 72 (filed August 25, 2017). The court's own examination of the
18 TAC reveals nothing that would delay consideration of plaintiffs' motion for class certification,
19 necessitate additional briefing by defendants or delay the case. Defendants' arguments against
20 certification, discussed more fully below, *see generally* Opp'n, would not materially differ based
21 on the new TAC allegations. *See, e.g.*, TAC ¶¶ 7-8 (modifying paragraphs and adding a new
22 paragraph speaking more generally about Section 8 tenants located at defendants' properties); *id.* ¶¶ 63-
23 ¶¶ 41-42 (quoting HAP contract sections already at dispute from the onset of this case); *id.* ¶¶ 63-
24 85 (outlining defendants' practices and standard forms). The new class definitions plaintiffs
25 propose have three primary differences that do not prejudice defendants in their opposition to
26 plaintiffs' motion for class certification. *Compare* TAC ¶¶ 44-45, *with* SAC ¶ 41. First, plaintiffs
27 have shortened the proposed class period by two years. Second, plaintiffs have changed language
28 from "additional rent payments" to "additional charges set forth in Additional Services

1 Agreements” to better clarify the claims at issue. Third, plaintiffs have split the singular, more
2 convoluted class definition in the SAC to two separate definitions in the TAC to delineate
3 between a Rule 23(b)(3) class for damages or restitution and a Rule 23(b)(2) class for declaratory
4 and injunctive relief. And fourth, plaintiffs have expanded the class definition from Northern
5 California to all of California. Defendants’ arguments are somewhat more persuasive when
6 applied to plaintiffs’ new class definition covering all of California, but as explained below, those
7 arguments do not create an insufficient obstacle to class certification.

8 Beyond the changes noted above, many other aspects of the TAC remain nearly
9 identical to the SAC. *Compare, e.g.*, SAC ¶¶ 104-15 (class allegations), *with* TAC ¶¶ 128-39
10 (class allegations expanded to all of California); *compare* SAC ¶¶ 116-170 (relief and claims,
11 causes of action, request for jury trial, and prayer for relief), *with* TAC ¶¶ 140-194 (substantially
12 identical (relief claims, causes of action, request for jury trial, and prayer for relief). The same
13 exhibits are attached to the SAC and TAC as well. *Compare* SAC Exs. A-K, *with* TAC Exs. A-
14 K.

15 Because the court observes no prejudice, bad faith, futility or delay occasioned by
16 the proposed amendment, plaintiffs’ motion to amend is GRANTED.

17 The court therefore considers the motion for class certification as based on the
18 TAC and construes defendants’ opposition accordingly. *See Stuart*, 2009 WL 281941, at *1-4, 6,
19 13-14, 18 (granting leave to amend where plaintiff moved to file new complaint after moving for
20 class certification and defendant “pointed out [plaintiff] was asking for certification of a class
21 different from that alleged in his complaint,” then relying on new complaint when addressing
22 motion for class certification); *cf. In re TFT–LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583,
23 590-91 (N.D. Cal. 2010) (allowing modification of class definition during class certification
24 briefing because “the proposed modifications are minor, require no additional discovery, and
25 cause no prejudice to defendants”); *Patten v. Vertical Fitness Grp., LLC*, No. 12CV1614-LAB
26 (MDD), 2013 WL 12069031, at *4 (S.D. Cal. Nov. 8, 2013) (considering the class definition
27 embodied in a motion for class certification because defendant suffered no prejudice despite
28 plaintiff’s offering “one class definition in a complaint, a different class definition in a subsequent

1 motion for class certification, and essentially the original class definition in a *subsequent* first
2 amended complaint”) (emphasis in original).

3 B. Motion for Class Certification

4 Plaintiffs seek certification of two classes. First, plaintiffs seek certification of a
5 Rule 23(b)(3) class for damages or restitution defined as:

6 All persons who, in the time period starting four years prior to the
7 date of filing this Complaint through the final resolution of this
8 matter, (1) have been tenants at any of Defendants’ California
9 properties; (2) have participated in the “Section 8” Housing Choice
10 Voucher Program in connection with their tenancies at the California
11 properties; and (3) have paid additional charges set forth in
12 Additional Services Agreements in excess of their individual
13 portions of the contract set forth in the HAP Contracts.

14 Mot. at 9; TAC ¶ 44.

15 Second, plaintiffs seek certification of a Rule 23(b)(2) class for declaratory and
16 injunctive relief defined as:

17 All persons who: (1) are or will become tenants at any of Defendants’
18 California properties; (2) participate or will participate in the
19 “Section 8” Housing Choice Voucher Program in connection with
20 their tenancies at the California properties; and (3) pay or will pay
21 additional charges set forth in Additional Services Agreements in
22 excess of their individual portions of the contract rent set forth in the
23 HAP Contracts.

24 Mot. at 9; TAC ¶ 45.

25 Plaintiffs seek to certify these classes as to plaintiffs’ California state law claims
26 for breach of contract, violation of the Consumer Legal Remedies Act (Cal. Civ. Code § 1750 *et*
27 *seq.*) and violation of the Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.*). Mot.
28 at 12-18. Plaintiffs do not seek class certification on their False Claims Act claim. *Id.* at 1.

Plaintiffs rely on several declarations. *See* ECF Nos. 72-2, 72-3, 72-4, 72-5. For
example, named plaintiff Roy Huskey III’s declaration describes his own experience of paying
“additional rent payments, or ‘side payments,’ not set forth in [his] HAP Contract or yearly
subsidy adjustment notices,” including “in-unit washer and dryer appliances, and for renter’s
insurance, as reflected in [his] rent ledger” Huskey Decl. ¶ 6, ECF No. 72-2. Huskey’s
declaration incorporates several attached documents, including Huskey’s Lease Supplemental

1 Agreement with attached Tenancy Addendum, HAP Contract and Residential Rental Agreement.
2 *See id.* Ex. A. Huskey refers to a Wasatch Property Management Resident Ledger, also attached
3 to his declaration as an exhibit. *See id.* Ex. B.

4 Named plaintiff Denika Terry makes similar contentions in her own declaration,
5 specifically referencing extra “rent payments, or ‘side payments,’ in the form of “in-unit washer
6 and dryer appliances, for covered parking, and for renter’s insurance” Terry Decl. ¶ 6, ECF
7 No. 72-3. Terry’s declaration also contains a Lease Supplemental Agreement, HAP Contract and
8 Wasatch Property Management Resident Ledger. *Id.* Exs. A-B.

9 Plaintiffs’ attorneys have submitted declarations explaining their experience. Jesse
10 Newmark has submitted a declaration as attorney of record for plaintiffs explaining his
11 organization’s experience and his own experience in “significant class action and complex
12 litigation” as well as experience with low-income tenants. Newmark Decl. ¶ 3, ECF No. 72-4;
13 *see also id.* ¶¶ 2-23. David Lavine has submitted a declaration that details in part his experience
14 and his firm’s experience with low-income tenant cases and class action suits. Lavine Decl. ¶¶ 3-
15 6, ECF No. 72-5.

16 Lavine’s declaration also attaches and authenticates a multitude of exemplar
17 documents related to tenants at defendants’ properties. *See id.* Exs. A-K (including HAP contract
18 examples, Additional Services Agreements, Resident Ledgers and 3-Day Notices to Perform
19 Financial Covenant of Lease or Quit that include parking charges, washer and dryer rental and
20 rental insurance calculated as the amount owed).

21 Plaintiffs have submitted excerpts of Rule 30(b)(6) deposition transcripts of Dave
22 Tanforan, the regional manager overseeing nine properties in the Sacramento area and “Bay
23 Area,” Janae Jarvis, a vice president, Shawn Fetter, another vice president, and Sylvia Gamboa, a
24 property manager of multiple Sacramento properties. *Id.* Exs. L-O; Tanforan Decl. ¶ 1, ECF No.
25 78-1.

26 The core of plaintiffs’ motion for class certification is their assertion that this case
27 involves standard form contracts and additional side payments improperly and illegally treated as
28 rent. Mot. at 3-5. Specifically, plaintiffs contend the HAP Contracts and other documents

1 attached to the Terry and Huskey declarations are “standard form HAP contracts and standard
2 forms used by [d]efendants at all of their California properties.” *Id.* at 3. According to plaintiffs,
3 “[d]efendants use company-wide software at their properties to generate identical forms.” *Id.* at
4 3. Among these forms are Additional Services Agreements, confirmed by deposition testimony
5 as part of the lease. *Id.* at 4; *see* Tanforan Dep. at 65:13-66:4, 139:11-140:2 (confirming
6 Additional Services Agreements are part of the lease throughout all of Tanforan’s employment).
7 The Additional Services Agreements include charges for items such as renter’s insurance, in-unit
8 washers and dryers and parking. Mot. at 5. Based on deposition testimony and defendants’ own
9 forms, defendants would subtract the amount past due on additional charges from the next
10 monthly rental payment, resulting in a default in rent. *Id.*; *see, e.g.*, Tanforan Dep. at 76:3-77:9.
11 Through standard 3-Day Notices to Perform Financial Covenant of Lease or Quit, defendants
12 would demand tenants comply with the lease or quit for past due amounts, which included
13 parking charges, washer and dryer rental and rental insurance. *See* Lavine Decl. Ex. J; Jarvis
14 Dep. at 234:24-235:7 (noting if delinquency for payment “exceeded a hundred dollars, a 3-day
15 notice to pay or quit would go out”). Whether the additional charges were preconditions of
16 leasing an apartment or optional, defendants “had a policy of treating all additional charges as
17 rent,” which included “using unpaid additional charges as grounds for eviction.” Mot. at 7; *see*
18 Tanforan Dep. at 156:8-11; Lavine Decl. Ex. J (Three-Day Notices to Perform or Quit including
19 parking charges, renter’s insurance, and washer and dryer rental).

20 The court addresses the parties’ specific contentions below to determine if
21 plaintiffs have satisfied Rule 23(b)(3)’s requirements to certify a class, as to each class covered
22 by their motion.

23 1. Numerosity

24 Plaintiffs contend they have satisfied the numerosity requirement of Rule 23(a).
25 Mot. at 9. Defendants do not disagree.

26 Under the numerosity requirement, a class must be “so numerous that joinder of all
27 members is impracticable.” Fed. R. Civ. P. 23(a)(1). This requirement is presumptively satisfied
28

1 when there are at least forty members. *See Jordan v. Los Angeles Cty.*, 669 F.2d 1311, 1319 (9th
2 Cir.1982), *vacated on other grounds by Cty. of Los Angeles v. Jordan*, 459 U.S. 810 (1982).

3 Plaintiffs have indicated an inability to compile a class list despite multiple
4 discovery requests to defendants. Lavine Decl. ¶ 8. According to plaintiffs, “opposing counsel
5 has replied that plaintiffs’ counsel should compile such a class list ourselves based on the
6 document production” despite “deposition testimony . . . that certain Section 8 tenant files could
7 not be located, and thus were not provided.” *Id.* Plaintiffs have therefore estimated class size
8 “until the matter maybe pressed during merits discovery.” *Id.* Regardless, plaintiffs assert the
9 class size exceeds 150 members “in four Sacramento properties alone,” and the court finds the
10 evidence provided supports this assertion. *See* TAC ¶ 132; Lavine Decl. Exs. A-K. Plaintiffs
11 have satisfied the numerosity requirement. *See Westfall v. Ball Metal Beverage Container Corp.*,
12 No. 2:16-cv-02632 KJM GGH, 2018 WL 705534, at *5 (E.D. Cal. Feb. 5, 2018) (finding
13 “approximately 140 to 150 members of the proposed class. . . . satisfies the numerosity
14 requirement”).

15 2. Typicality

16 Generally speaking, plaintiffs contend the HAP Contracts and other documents
17 attached to the Terry and Huskey declarations are “standard form HAP contracts and standard
18 forms used by [d]efendants at all of their California properties.” Mot. at 3. According to
19 plaintiffs, “[d]efendants use company-wide software at their properties to generate identical
20 forms.” Mot. at 3; *see* Tanforan Dep. at 66:18-67:8, 71:11-15, 223:22-224:24 (observing multiple
21 standard forms including the Rental Agreement, Lease Agreement and Additional Services
22 Agreements; confirming there are no differences in them property to property); Jarvis Dep. at
23 148:2-13 (confirming the Additional Services Agreement is a form out of a software system
24 assigned code number “207.02”); Fetter Dep. at 95:2-11 (confirming software believed to be used
25 “across Wasatch” and confirming the same software has been seen in California). In addition to
26 these “nearly identical form contracts with [d]efendants,” both named plaintiffs have paid
27 “additional charges,” and have suffered “the same injury” of “being charged more rent than
28 allowed under federal law and HAP Contracts.” Mot. at 10.

1 For the Rule 23(b)(3) class, defendants assert named plaintiffs' claims are not
2 typical of the class because the named plaintiffs "are subject to unique defenses that other
3 putative class members currently living in Wasatch properties would not be subject to." Opp'n at
4 14-15. For Terry, this would include "the affirmative defense of *res judicata*" because she was
5 evicted in a judicial proceeding for failure to pay rent and perjury at her deposition. *Id.* at 15. For
6 Huskey, unique defenses would include his eviction for "repeated racist conduct" and his
7 voluntarily signing up for additional service or appliances. *Id.*

8 The "claims or defenses of the representative parties [must be] typical of the
9 claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The court finds the claims of the
10 named plaintiffs typical of the claims and defenses of the class. Here, plaintiffs claim defendants
11 treated additional charges as rent in violation of state law and contrary to standard form contracts
12 between defendants and their Section 8 tenants. The contracts for Terry, Huskey and the other
13 tenants are substantially identical. *Compare* Terry Decl. Ex. A, *and* Huskey Decl. Ex. A, *with*
14 Lavine Decl. Exs. A-C. Defendants' use of standard forms for these contracts supports typicality.
15 Defendants' treatment of Terry's and Huskey's additional charges does not appear to differ from
16 defendants' treatment of additional charges for other potential class members. *Compare* Terry
17 Decl. Ex. B (Resident Ledger not differentiating washer and dryer rental and renter's insurance
18 from rent itself), *and* Huskey Decl. Ex. B (Resident Ledger), *with* Lavine Decl. Exs. D-E, J
19 (example Resident Ledgers, Monthly Cost Breakdowns and Monthly Statements of Rental
20 Accounts including additional service charges, and 3-Day Notices to Perform Financial Covenant
21 of Lease or Quit including parking charges, washer/dryer rental and rental insurance). Here, there
22 is no concern about variation in named plaintiffs' damages from class members' damages because
23 "it is sufficient for typicality if the plaintiff endured a course of conduct directed against the
24 class." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1118 (9th Cir. 2017).

25 Defendants specifically contend Terry owed \$316 for "rent to owner . . . distinct
26 and separate from . . . additional services," Opp'n at 14, and review of Terry's Resident Ledger
27 shows \$310.25 was due on February 4, 2013 without differentiation between contract rent and
28 unpaid additional charges, such as the washer/dryer rental charge from February 1, 2013 and

1 renter’s insurance charge from February 1, 2013, Terry Decl. Ex. B. Defendants’ Three-Day
2 Notice to Pay Rent or Quit does not differentiate the \$310.25 between overdue rent or overdue
3 additional charges. *See* Tanforan Decl. Ex. 3, ECF No. 78-1 at 22. Defendants’ asserted unique
4 defense, to the extent it has any merit, is therefore not relevant to plaintiffs’ putative class claim.
5 *See Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 n.9 (9th Cir. 2011) (“Differing factual
6 scenarios resulting in a claim of the same nature as other class members does not defeat
7 typicality.”); *O’Connor v. Uber Techs.*, No. C-13-3826 EMC, 2015 WL 5138097, at *10 (N.D.
8 Cal. Sept. 1, 2015) (“Rule 23(a)(3)’s test of typicality is not whether there are *any* differences
9 between the representative plaintiffs and the class members they seek to represent. . . . the
10 typicality requirement simply measures whether the named [p]laintiffs’ *legal claims* all arise from
11 essentially the same conduct . . . and whether their fellow class members suffered the same legal
12 injury.”) (emphasis in original).

13 Defendants’ argument that Terry’s eviction operates as *res judicata* here also is
14 unavailing because an unlawful detainer action would not preclude plaintiffs’ putative class
15 action claims. *See Vella v. Hudgins*, 20 Cal. 3d 251, 255 (1977) (noting unlawful detainer actions
16 are “summary in character” and therefore usually have “very limited *res judicata* effect” bearing
17 only on the right of possession that “will not prevent one who is dispossessed from bringing a
18 subsequent action to resolve questions of title, . . . or to adjudicate other legal and equitable
19 claims between the parties”); *Malkoskie v. Option One Mortg. Corp.*, 188 Cal. App. 4th 968, 975-
20 76 (2010) (finding subsequent claims challenging the validity of a foreclosure sale barred where,
21 in the unlawful detainer action, bank based its right of possession of the property on its “duly
22 perfected” legal title obtained in the nonjudicial foreclosure sale). Plaintiffs’ putative class action
23 claims do not involve the right of possession or any claims related to title.

24 Additionally, Huskey’s voluntary signing up for additional services would not and
25 did not change how defendants handled any past due amounts in relation to a tenant’s rent
26 obligations, default, and notices to perform or quit. Nor would the defendants’ basis for their 3
27 Day Notice to Perform or Quit serve as a “unique defense” that will “become the focus of the
28 litigation” over defendants’ alleged treatment of additional charges as rent. *See Hanon*, 976 F.2d

1 at 508. These “legally irrelevant” differences, along with the legally irrelevant basis for Huskey’s
2 eviction, do not render Huskey’s or Terry’s claims atypical. *See O’Connor*, 2015 WL 5138097,
3 at *10.

4 Finally, defendants’ attacks on Terry and Huskey’s credibility do not affect their
5 status as typical representatives of the class. *See O’Connor*, 2015 WL 5138097, at *11
6 (deposition testimony was “far less damning than [defendant’s] brief implies”; rejecting
7 defendant’s typicality argument on this basis). Named plaintiffs are inadequately typical based
8 on questionable credibility only when, unlike here, credibility issues are “directly relevant to the
9 litigation or there are confirmed examples of dishonesty, such as criminal conviction for fraud.”
10 *Harris v. Mktg. Corp.*, 753 F. Supp. 2d 996, 1015 (N.D. Cal. 2010). Whether Terry owned a car
11 or not is not relevant to plaintiffs’ putative class claims; whether defendants treated Terry’s
12 additional charges for parking as rent is relevant.

13 Furthermore, the court does not find the Terry deposition testimony clear enough
14 to establish Terry lied, much less engaged in dishonesty akin to a “criminal conviction for fraud.”
15 *Id.* Terry did testify that she purchased a car in 1999 and responded “Yes” when asked if she
16 owned that car continuously until it was towed away in March 2013. Terry Dep. at 222:10-18,
17 225:9-15, ECF No. 78-3. But that testimony does not necessarily contradict Terry’s assertions
18 that she “had no car” but was still being charged for the parking. *Id.* at 125:19-20. Nor does
19 Terry’s testimony about owning a car from 1999 to 2013 necessarily contradict her statement that
20 she “no longer had a vehicle,” did not have a vehicle “at all” when she “first moved there, and
21 never had a car but her “mother had a car.” *Id.* at 47:18-21, 83:15-17. Nothing in Terry’s
22 testimony indicates her ownership of the car involved possession of that car at her residence or
23 use of the parking spot for which she was charged.

24 Defendants’ concerns about Huskey’s credibility are not relevant because they
25 involve the circumstances of his eviction, not additional charges treated as rent. Furthermore,
26 Huskey has denied an accusation by a defense witness and the court at this time has no basis on
27 which to determine who is correct. *Compare* Huskey Dep. at 66:23-67:4, ECF No. 78-3 (Huskey
28

1 denying he called downstairs tenant racial epithet or any names at all), *with* Smith Decl. ¶ 16-20,
2 ECF No. 78-2.

3 Rather, Huskey’s deposition testimony debatably squares with the stated reasons
4 for his Three-Day Notice to Perform Covenant of Lease or Quit: loud music, playing instruments
5 and other loud noise starting around 11:45 at night. *Compare* Huskey Dep. at 65:5-14 (admitting
6 to purposely stomping around to make noise when he was told to leave), *with* Smith Decl. Ex. 6.
7 If anything, Smith’s declaration is not consistent with the Three-Day Notice to Huskey.

8 3. Adequacy

9 Plaintiffs contend putative class members “have suffered the same injuries from
10 [d]efendants’ unlawful actions” as named plaintiffs: “being charged more rent than allowed under
11 federal law and the HAP Contracts.” Mot. at 10. Additionally, plaintiffs contend no evidence
12 shows named plaintiffs “have any interest that is antagonistic to the interests of the class.” *Id.* at
13 11. Last, plaintiffs contend their counsel “are highly qualified, experienced, and knowledgeable
14 in the issues raised in this litigation, and have shown themselves to be fiercely dedicated to the
15 tenants they represent.” *Id.* Defendants do not directly address adequacy in their opposition.

16 Class representatives must be able to “fairly and adequately protect the interests of
17 the class.” Fed. R. Civ. P. 23(a)(4). “Resolution of two questions determines legal adequacy: (1)
18 do the named plaintiffs and their counsel have any conflicts of interest with other class members
19 and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of
20 the class?” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

21 The court has reviewed declarations submitted by plaintiffs’ counsel. *See*
22 Newmark Decl. ¶¶ 2-23; Lavine Decl. ¶¶ 3-6. There are no conflicts of interest with other
23 potential class members based on these declarations and the rest of the evidence before the court.
24 Counsel’s credentials reflect long-standing advocacy for low-income tenants and sufficient
25 familiarity with class action litigation. *See, e.g.*, Newmark Decl. ¶¶ 2, 9-12, 17-18; Lavine Decl.
26 ¶¶ 4, 6.

27 Although defendants do not expressly contend the named plaintiffs are not
28 adequate to represent the class, defendants do refer to deposition testimony in which Terry admits

1 she did not read the complaint in this case and believed the class action complaint involved the
2 same claims as her state habitability lawsuit. Opp’n at 3 (citing Terry Dep. at 36:7-40:21, 108:2-
3 12, 201:22-202:17). Terry did testify that she understood this lawsuit to be mostly, if not
4 completely, about her eviction from the apartment complex and the physical condition of the
5 apartment complex. Terry Dep. at 36:7-40:21. Terry had not reviewed at least one document and
6 appeared to be unfamiliar with Centro Legal de la Raza’s representation of her. *Id.* at 108:2-
7 110:15.

8 But supplemental deposition transcripts provided by plaintiffs provide the full
9 context of Terry’s understanding of her position as a class representative. For instance, Terry
10 understood she was not “the only person that will possibly be going through the things that [she
11 is] going through.” Terry Dep. at 44:20-24, ECF No. 80-1. Terry also clearly stated an
12 understanding of the lawsuit involving “Section 8, things like insurance.” *Id.* at 45:7-13. Terry
13 noted she paid for insurance, for “the washers, dryers, things of that nature that was required that
14 . . . had nothing to do with Section 8—that they were charging us for . . .” *Id.* at 45:8-12. Terry
15 noted “more fees and more fees being added that had nothing to do with the fees that were
16 requested underneath the contract of Section 8.” *Id.* at 46:3-6. Terry even confirmed her
17 understanding of questioning during the deposition as involving discussion of charges for things
18 Terry did not think were correct, including the washer and dryer, parking and rental insurance.
19 *Id.* at 201:1-12. Terry’s knowledge of the facts therefore far exceeds that of someone “startlingly
20 unfamiliar” with her case. *See Moeller v. Taco Bell Corp.*, 220 F.R.D. 604, 611 (N.D. Cal.
21 2004), *amended in part*, No. C 02-5849 PJH, 2012 WL 3070863 (N.D. Cal. July 26, 2012) (“The
22 threshold of knowledge required to qualify a class representative is low; a party must be familiar
23 with the basic elements of her claim. . . . [The party] will be deemed inadequate only if she is
24 ‘startlingly unfamiliar’ with the case.”). Terry sufficiently explained “the factual basis for the
25 lawsuit and why [she] believed [she] was wronged.” *Johnson v. Hartford Cas. Ins. Co.*, No. 15-
26 CV-04138-WHO, 2017 WL 2224828, at *14 (N.D. Cal. May 22, 2017) (citation omitted).

27 The court further finds Terry likely will “prosecute the action vigorously on behalf
28 of the class.” *Hanlon*, 150 F.3d at 1020. At deposition, Terry testified she is looking at being a

1 potential class representative as “a person trying to just say the truth and basically be a head of
2 something.” Terry Dep. at 202:5-7. Terry is “kind of here to really get the justice.” *Id.* at
3 202:16-17.

4 Plaintiffs have satisfied the adequacy requirement.

5 4. Commonality and Predominance

6 For their breach of contract claim, plaintiffs contend the “core issue common to
7 the class is whether the side payments for additional charges constitute additional rent prohibited
8 under the HAP Contracts and leases.” Mot. at 12. Additionally, common factual issues are
9 “whether the additional charges set forth in the side agreements constitute unlawful rent in breach
10 of the contract.” *Id.* at 13. Additional common issues include whether defendants breached the
11 leases by charging or accepting payment for appliances such as in-unit laundry machines, or by
12 imposing additional charges as a precondition to tenancy. *Id.* According to plaintiffs, defendants
13 raise a common issue in their “main defense” when asserting “that federal law does not regulate
14 additional charges, the local housing agencies do not prohibit these charges, and thus such
15 charges are subject to arms-length negotiations between [d]efendants and each Section 8 tenant.”
16 *Id.*

17 For their CLRA claim, plaintiffs contend defendants violated the statute because
18 they were “prohibited by law from charging additional rent beyond the contract rent” and
19 therefore misrepresented an obligation to tenants prohibited by law. *Id.* at 15 (citing Cal. Civ.
20 Code § 1770(a)(14)). Plaintiffs also direct the court’s attention to defendants’ assertion of a
21 defense “common to the class: that the charges do not constitute rent.” *Id.* at 16 (citing ECF
22 No. 26 at 6-7).

23 For their UCL claim, plaintiffs assert common issues predominate in part because
24 the UCL claims here are based on defendants’ unlawful business act or practice of “charging and
25 collecting additional side payments from Section 8 tenants,” a policy that “violates federal law
26 prohibiting an owner from charging or accepting rent beyond the contract rent.” *Id.* at 17 (citing
27 42 U.S.C. § 1437 f(c); 24 C.F.R. § 982.451(b)(4)(i)-(ii)); *see also* Cal. Bus. & Prof. Code § 1700
28 (prohibiting any “unlawful, unfair, or fraudulent business act or practice”). Common questions

1 therefore include “whether federal law prohibits” defendants from charging or accepting rent
2 beyond the contract rent and whether the additional charges constitute rent. *Id.* Plaintiffs also
3 contend their UCL claim relies on their federal False Claims Act claim because defendants
4 “submitted claims to the government for payment of rent while knowingly violating these federal
5 regulations and HAP Contracts” *Id.* Plaintiffs also rely on the “fraudulent” and “unfair”
6 UCL prongs. *Id.*; see Cal. Bus. & Prof. Code § 17200.

7 Defendants argue that making the determination “as to whether the additional
8 charges agreed to in the [Additional Services Agreements] constitute added rent that is prohibited
9 under the HAP Contracts and leases” would require “answers to dozens of individualized
10 questions” that would only apply “to the specific tenant and question, and that specific unit for a
11 finite period of time.” Opp’n at 10. According to defendants, “a particular item within an
12 [Additional Services Agreement] might be valid for a unit one day, and yet be different a month
13 or two later.” *Id.* Market changes could require an owner to “include or remove certain amenities
14 into a base rent to stay consistent with the market for that locality.” *Id.* Defendants assert these
15 individual issues reveal no common issue common to the class for all three of plaintiffs’ putative
16 class action claims. *Id.* at 12. Additionally, defendants contend showing materiality or actual
17 reliance by tenants on any purportedly deceptive, unlawful, unfair or fraudulent acts—required
18 elements for a CLRA or UCL claim—would involve individualized showings not appropriate for
19 class certification. *Id.* at 12-13. Defendants assert “there is no classwide proof that all tenants
20 who purchased the additional services were forced to do so” and that tenants might have signed
21 up for additional services “because they wanted them.” *Id.* at 13-14 (footnote omitted).

22 Plaintiffs contend individualized damages calculations are not a bar to class
23 certification on the common issues predominating in this case. Mot. at 13. Plaintiffs argue that
24 showing likely deception under the UCL “is an objective standard” with a modest burden of
25 proof, and actual reliance maybe inferred from a material misrepresentation to establish both the
26 CLRA and UCL claims. *Id.* at 17-18. In reply, plaintiffs contend defendants ignore plaintiffs’
27 chosen theory of liability. Reply at 4. Additionally, that some tenants voluntarily chose some
28 optional charges is irrelevant to plaintiffs’ theories because defendants treat additional charges

1 “as rent uniformly across their properties once the tenant incurs the charges.” *Id.* Additionally,
2 defendants “ignore[d] the cases showing that causation can be determined classwide.” *Id.* at 5.

3 As explained below, the court finds plaintiffs have shown questions of law and
4 fact common to the class and shown these questions predominate over any questions affecting
5 only individual class members.

6 Rule 23(a) requires “questions of law or fact common to the class.” Fed. R. Civ.
7 P. 23(a)(2). These questions exist where class members suffer the same alleged injury, *Falcon*,
8 457 U.S. at 156, such that simultaneous litigation is productive, *Wal-Mart*, 564 U.S. at 350.
9 “This does not mean merely that [class members] have all suffered a violation of the same
10 provision of law.” *Id.* Rather, the claims “must depend upon a common contention,” the nature
11 of which “is capable of classwide resolution.” *Id.* Common litigation must “resolve an issue that
12 is central to the validity of each one of the claims in one stroke.” *Id.* Although just one common
13 question could suffice to establish commonality, *id.* at 359, the true inquiry is into “the capacity
14 of a classwide proceeding to generate common *answers* apt to drive the resolution of the
15 litigation,” *id.* at 350 (emphasis in original) (citation and internal quotation marks omitted). But
16 “[d]issimilarities within the proposed class . . . have the potential to impede the generation of
17 common answers.” *Id.* (citation and internal quotation marks omitted).

18 After establishing the existence of common questions of law or fact, the proponent
19 of a putative class also must establish that these questions “predominate over any questions
20 affecting only individual members.” Fed. R. Civ. P. 23(b)(3). “The predominance analysis
21 under Rule 23(b)(3) focuses on ‘the relationship between the common and individual issues in the
22 case and ‘tests whether proposed classes are sufficiently cohesive to warrant adjudication by
23 representation.’” *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 545 (9th Cir. 2013) (quoting
24 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998)). Some variation is permitted
25 among individual plaintiffs’ claims, *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 963 (9th
26 Cir. 2013), but Rule 23(b)(3) is “more demanding than Rule 23(a),” *Comcast*, 569 U.S. at 34.
27 Courts are thus required “to take a ‘close look’ at whether common questions predominate over
28 individual ones,” *id.* (citation omitted), “begin[ning] . . . with the elements of the underlying

1 cause of action,” *Erica P. John Fund, Inc.*, 563 U.S. at 809. Plaintiffs need not show at the
2 threshold certification stage predominant questions will be answered in their favor. *Amgen, Inc.*
3 *v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 468 (2013). The court considers the merits of
4 the plaintiff’s underlying claim only to the extent required by Rule 23. *Id.* at 466 (citing *Wal-*
5 *Mart*, 564 U.S. at 351 n.6); *Comcast*, 569 U.S. at 33-34 (“Such an analysis will frequently entail
6 ‘overlap with the merits of the plaintiff’s underlying claim’ . . . because the ‘class determination
7 generally involves considerations that are enmeshed in the factual and legal issues comprising the
8 plaintiff’s cause of action.’”) (quoting *Falcon*, 457 U.S. at 160).

9 To prevail on a motion to certify a class under Rule 23(b)(3), the party seeking
10 certification must show: “(1) that the existence of individual injury resulting from the alleged . . .
11 violation . . . [is] capable of proof at trial through evidence that is common to the class rather than
12 individual to its members; and (2) that the damages resulting from that injury [are] measurable on
13 a class-wide basis through use of a common methodology.” *Comcast*, 569 U.S. at 30 (citation
14 and internal quotation marks omitted). “Rule 23(b)(3), however, does not require a plaintiff
15 . . . to prove that each elemen[t] of [her] claim [is] susceptible to classwide proof.” *Amgen*, 568
16 U.S. at 469 (emphasis and alterations in *Amgen*) (citation and internal quotation marks omitted).
17 Similarly, because “‘individualized monetary claims belong in Rule 23(b)(3),” “‘the presence of
18 individual damages cannot, by itself, defeat class certification” *Leyva*, 716 F.3d at 514
19 (quoting *Wal-Mart*, 564 U.S. at 362).

20 Here, plaintiffs have established common questions of law that apply to all class
21 members’ claims. Plaintiffs’ claims all involve the resolution of whether defendants’ “additional
22 charges set forth in Additional Services Agreements” violated defendants’ HAP Contract
23 provisions with Section 8 tenants or federal law. *See* TAC ¶¶ 44-45. Resolving this issue would
24 resolve plaintiffs’ breach of contract claim, CLRA claim, UCL claim under any prong, and even
25 the non-class False Claims Act claim. Defendants have not contested plaintiffs’ substantial
26 evidence that defendants used the same standard forms for the various agreements that apply to
27 all potential class members. *See, e.g.*, Lavine Decl. Exs. A-K; Tanforan Dep. at 65:13-66:4,
28 139:11-140:2 (confirming Additional Services Agreements are part of the lease throughout all of

1 Tanforan’s employment); Tanforan Dep. at 76:3-77:9 (confirming regular practice of defendants
2 subtracting the amount past due on additional charges from the next monthly rental payment,
3 resulting in a default in rent); Jarvis Dep. at 234:24-235:7 (noting if delinquency for payment
4 “exceeded a hundred dollars, a 3-day notice to pay or quit would go out”); Tanforan Dep. at
5 156:8-11; Lavine Decl. Ex. J (Three-Day Notices to Perform or Quit including parking charges,
6 renter’s insurance, and washer and dryer rental); Lavine Decl. Ex. J (standard 3-Day Notices to
7 Perform Financial Covenant of Lease or Quit demanding tenants comply with the lease or quit for
8 past due amounts, which included parking charges, washer and dryer rental and rental insurance).

9 Defendants’ assertion that resolving the above question would involve
10 individualized assessments on a tenant-by-tenant and unit-by-unit basis does not hold up under
11 close examination of the record. *See, e.g.*, Lavine Decl. Ex. D (examples of defendants’ Resident
12 Ledgers, detailing defendants’ tracking of additional charges such as washer/dryer rental, renter’s
13 insurance and parking charges as part of the same running total along with rent); *id.* Ex. F
14 (examples of monthly statements including additional charges with monthly rent charges); *id.* Ex.
15 J (examples of Three-Day Notice to Perform Financial Covenant of Lease or Quit including
16 renter’s insurance, parking charges and washer/dryer rental as part of the obligation “to cure the
17 breach of the lease agreement”). Defendants’ treatment of these additional charges is consistent
18 in the record before the court. And federal law prohibits an owner from exceeding the maximum
19 monthly rent laid out in the HAP Contract, a contract that is a constant (among other agreement
20 forms) for the proposed class. *See* 42 U.S.C. § 1437f(c)(1)(A) (HAP Contract “shall establish the
21 maximum monthly rent (including utilities and all maintenance and management charges) which
22 the owner is entitled to receive”); 24 C.F.R. § 982.451(b)(3), (b)(4)(i) (total rent paid by
23 tenant plus government housing assistance paid by owner may not be more than rent to owner).
24 In the record before the court, whether the market dictated providing free parking at one location
25 or additional charges for parking at another location does not alter how defendants treated those
26 additional charges. Lavine Declaration exhibits D, F and J all serve as examples of “proof at trial
27 through evidence that is common to the class rather than individual to its members . . .” *Comcast*,
28 569 U.S. at 30 (citation and internal quotation marks omitted). As plaintiffs have noted, “What

1 matters is the overarching issue of whether the side agreements are subject to federal regulation
2 because they contain rent payments beyond the tenant’s share of the contract rent, not the local
3 administration of those rent payments.” Mot. at 14 (citations omitted).

4 To the extent calculations would vary across tenants and different properties, those
5 calculations would reflect differences in entitlement to damages. Because “‘individualized
6 monetary claims belong in Rule 23(b)(3),” “the presence of individual damages cannot, by itself,
7 defeat class certification” *Leyva*, 716 F.3d at 514 (quoting *Wal-Mart*, 564 U.S. at 362).
8 “[T]he rule is clear: the need for individual damages calculations does not, alone, defeat class
9 certification.” *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016).
10 Defendants’ own records will facilitate any individual damages calculations. *See, e.g., Brown v.*
11 *Hain Celestial Grp., Inc.*, No. C 11-03082 LB, 2014 WL 6483216, at *16 (N.D. Cal. Nov. 18,
12 2014) (observing defendant’s records “allow the parties to readily tell which products meet the
13 [relevant] threshold,” observing “[t]o the extent that this raises individual issues, then, those
14 issues are easily tamed” and reasoning those issues “do not predominate over the several key
15 shared issues that dominate this case”).

16 Regardless, any “fortuitous non-injury to a subset of class members does not
17 necessarily defeat certification of the entire class” in part because “the district court is well
18 situated to winnow out those non-injured members at the damages phase of the litigation, or to
19 refine the class definition.” *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1137 (9th Cir. 2016);
20 *see also Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590, 609-10 (C.D. Cal.
21 2015).

22 Plaintiffs have shown that any “damages resulting from th[eir] injury [are]
23 measurable on a class-wide basis through use of a common methodology.” *Comcast*, 569 U.S. at
24 30 (citation and internal quotation marks omitted). Here, damages are measurable based on
25 reference to defendants’ own records and any eventual determinations whether, if any, additional
26 charges were prohibited under federal law. *See, e.g., Lavine Decl. Ex. D; Leyva*, 716 F.3d at 514
27 (calculating damages “based on the wages each employee lost due to [defendant’s] unlawful
28 practices”); *Pena v. Taylor Farms Pac., Inc.*, 305 F.R.D. 197, 219 (E.D. Cal. 2015), *order*

1 *clarified*, No. 2:13-cv-01282-KJM-AC, 2015 WL 12550898 (E.D. Cal. Mar. 30, 2015), *aff'd*, 690
2 F. App'x 526 (9th Cir. 2017), and *cert denied sub nom. Taylor Farms Pac., Inc. v. Del Carmen*
3 *Pena*, 138 S. Ct. 976 (2018) (“Damages may also be susceptible to calculation through a common
4 methodology on the basis of time records such as those already produced.”).

5 California district courts commonly certify classes for breach of contract claims.
6 *See, e.g., Ellsworth v. U.S. Bank, N.A.*, No. C 12-02506 LB, 2014 WL 2734953, at *1, 22 (N.D.
7 Cal. June 13, 2014) (granting motion to certify class based in part on “breach of [plaintiffs’] form
8 mortgage contracts by [defendant]” and observing “[t]hese are identical form mortgage contracts
9 involving identical harm with relatively small damages, precisely the sort of contract claims that
10 lend[] themselves to class treatment”); *In re Med. Capital Secs. Litig.*, No. SAML 10-2145 DOC
11 (RNBx), 2011 WL 5067208, at *3 (C.D. Cal. July 26, 2011) (“[c]ourts routinely certify class
12 actions involving breaches of form contracts”; collecting cases); *Menagerie Prods. v. Citysearch*,
13 No. CV 08-4263 CAS (FMO), 2009 WL 3770668, at *9 (C.D. Cal. Nov. 9, 2009) (““When
14 viewed in light of Rule 23, claims arising from interpretations of a form contract appear to present
15 the classic case for treatment as a class action, and breach of contract cases are routinely certified
16 as such.”) (citing *Kleiner v. First Nat. Bank of Atlanta*, 97 F.R.D. 683, 692 (N.D. Ga. 1983)).

17 Defendants rely on *Caro v. Proctor & Gamble*, 18 Cal. App. 4th 644 (1993), to
18 support their contention that “[a] single determination of materiality is not possible here.” Opp’n
19 at 13 (internal quotation marks omitted). But defendants’ reliance on this case is misplaced.
20 There, a California Court of Appeal affirmed the lower court’s denial of class certification for
21 claims including a CLRA claim. *Caro*, 18 Cal. App. 4th at 653-55. The *Caro* court
22 acknowledged that “a misrepresentation’s materiality involves an objective inquiry susceptible to
23 common proof.” *Id.* at 667. The named plaintiff himself did not believe defendants’ product to
24 be fresh, as it was advertised to be. *Id.* at 668. The court reasoned “it would be a matter of
25 individualized proof” whether class members believed defendants’ product was fresh or whether
26 class members who actually read portions of the label stating “from concentrate” found
27 misleading a claim that the product contained “no additives.” *Id.* at 668.

1 The California Court of Appeal has clarified the meaning of *Caro*, stating “nothing
2 we said in *Caro* undermines the general rule permitting common reliance where material
3 misstatements have been made to a class of plaintiffs.” *Massachusetts Mut. Life Ins. Co. v.*
4 *Superior Court*, 97 Cal. App. 4th 1282, 1294 (2002), *as modified on denial of reh’g* (May 29,
5 2002). Instead, “our holding in *Caro* merely stands for the self-evident proposition that such an
6 inference [of common reliance] will not arise where the record will not permit it.” *Id.*

7 Here, there are no such issues precluding an inference of common reliance.
8 Nothing in the record indicates class members read only some portions of their series of standard
9 form agreements. Additionally, California courts do not view “failure to read a contract before
10 signing” as a reason alone “to refuse its enforcement.” *Frame v. Merrill Lynch, Pierce, Fenner &*
11 *Smith, Inc.*, 20 Cal. App. 3d 668, 671 (1971); *see also Rosenthal v. Great W. Fin. Sec. Corp.*, 14
12 Cal. 4th 394, 423 (1996) (negligent failure to read a contract will not eliminate the signing party’s
13 assent to the contract). The alleged misrepresentations of tenant obligations prohibited by law
14 were in the agreements themselves. Nothing in the record indicates class members paid for
15 additional charges despite not believing they had a legal obligation to pay.

16 Rather, “California courts often find predominance satisfied in CLRA cases
17 because ‘causation, on a classwide basis, may be established by materiality, meaning that if the
18 trial court finds that material misrepresentations have been made to the entire class, an inference
19 of reliance arises as to that class[.]’” *Spann v. J.C. Penney Corp.*, 307 F.R.D. 508, 522 (C.D. Cal.
20 2015), *modified*, 314 F.R.D. 312 (C.D. Cal. 2016) (citing *Tait v. BSH Home Appliances Corp.*,
21 289 F.R.D. 466, 480 (C.D. Cal. 2012) (collecting cases)); *see In re ConAgra Foods, Inc.*, 90 F.
22 Supp. 3d 919, 982 (C.D. Cal. 2015), *aff’d sub nom. Briseno v. ConAgra Foods, Inc.*, 844 F.3d
23 1121 (9th Cir. 2017), and *aff’d*, 674 F. App’x 654 (9th Cir. 2017) (observing California’s UCL,
24 CLRA and False Advertising Law allow “plaintiffs to establish materiality and reliance (i.e.,
25 causation and injury) by showing that a reasonable person would have considered the defendant’s
26 representation material”). Here, plaintiffs allege the misrepresentations occurred in the standard
27 form agreements and other documents, including Three-Day Notices to Perform Financial
28 Covenant of Lease or Quit, misrepresenting to class members their obligation to pay additional

1 charges prohibited by federal law. *See* Lavine Decl. Exs. A-K. All evidence before the court
2 indicates all members of plaintiffs’ proposed class received these same standard forms, including
3 deposition testimony from defendants’ witnesses. *See, e.g.,* Tanforan Dep. at 65:13-66:4, 139:11-
4 140:2.

5 No issues pertaining to commonality preclude class certification of plaintiffs’ UCL
6 claim. To the extent plaintiffs’ claims rely on the UCL’s unlawful prong, the court has already
7 addressed common issues above because the breach of contract claim overlaps with asserted
8 federal law violations and defendants’ violating the CLRA would satisfy the unlawful prong.
9 Plaintiffs’ False Claims Act claim involves the same issue, namely conduct violating the HAP
10 Contract provisions prohibiting defendants from charging additional rent above the contract rent.
11 *See* Mot. at 17.

12 Defendants’ contentions about materiality and reliance related to the CLRA are
13 unavailing as well when applied to plaintiffs’ UCL claims. *See, e.g., ConAgra Foods, Inc.*, 90 F.
14 Supp. 3d 919 at 982. Claims under the fraudulent and unfair prongs of the UCL statute require a
15 plaintiff to satisfy a “modest” burden of proof: “the representative plaintiff must show that
16 members of the public are likely to be deceived by the practice.” *Friedman v. AARP, Inc.*, 855
17 F.3d 1047, 1055 (9th Cir. 2017) (quoting *Prata v. Superior Court*, 91 Cal.App.4th 1128, 1144
18 (2001)). Courts “assess likelihood of deception under a ‘reasonable consumer standard.’” *Id.* at
19 1055 (citation omitted). All evidence currently before the court indicates named plaintiffs, class
20 members and defendants all expected the tenant class members to pay their additional charges or
21 face eviction. No evidence suggests class members believed they were not obligated to pay
22 additional charges, including mandatory additional charges or optional charges once the tenant
23 chose those options.

24 5. Superiority: Rule 23(b)(3) Class

25 Plaintiffs contend a class action suit is superior to other methods here in part
26 because “the individual damages are really small” and “would be outweighed by the expense and
27 burden of separate lawsuits” that cannot be sustained by low-income individuals receiving rent
28 subsidies under Section 8. Mot. at 18. Plaintiffs’ counsel are not aware of any other related

1 litigation, concentrating the litigation will be efficient and avoid inconsistent rulings, and any
2 difficulties in managing the class action may be mitigated by a separate liability phase and
3 separate damages phase for trial. *Id.* at 18-19.

4 Defendants contest plaintiffs' claims that the litigation "would devolve into a
5 series of individualized mini-trials" and would involve presentation of "historic market data,
6 comparable property data, what was considered the 'locality,' vacancy rates, 30 day notice rates,"
7 and other evidence that "would be daunting for even the most enthusiastic juror." Opp'n at 16.
8 Defendants argue plaintiffs have failed to provide "any roadmap for how their claims would be
9 litigated." *Id.* Additionally, defendants contend "the superior method for resolving the
10 [Additional Services Agreement] issue lies with" the local housing and redevelopment agency,
11 for example the Sacramento Housing and Redevelopment Agency, for relevant defendant
12 properties. *Id.* Defendants assert the court should defer to the local housing and redevelopment
13 agency's review and approval of Section 8 tenants' leases. *Id.* at 17.

14 Because predominance of common questions does not alone justify approval of a
15 Rule 23(b)(3) class action, a court must determine if "another method of handling the [case] may
16 be available which has greater practical advantages." Fed. R. Civ. P. 23(b)(3) advisory
17 committee's note to 1966 amendment. Rule 23(b)(3) requires a court find a class action is the
18 "superior" method of resolution. *Id.* This constraint is meant to lead the court "to assess the
19 relative advantages of alternative procedures for handling the total controversy." *Id.* Rule
20 23(b)(3) provides that superiority is determined by considering, for example,

21 (A) the class members' interests in individually controlling the
22 prosecution or defense of separate actions;

23 (B) the extent and nature of any litigation concerning the controversy
24 already begun by or against class members;

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

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

27 *Id.*; see also *Zinser v. Accuflix Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001).

28

1 The Supreme Court has acknowledged that Rule 23(b)(3) contemplates the
2 “vindication of the rights of groups of people who individually would be without effective
3 strength to bring their opponents into court at all.” *Amchem*, 521 U.S. at 617 (citation and
4 internal quotation marks omitted). “The policy at the very core of the class action mechanism is
5 to overcome the problem that small recoveries do not provide the incentive for any individual to
6 bring a solo action. . . . A class action solves this problem by aggregating the relatively paltry
7 potential recoveries” *Id.*

8 The court first assesses the proposed Rule 23(b)(3) class against the factors
9 described in Rule 23(b)(3). For the first factor, “the class members’ interests in individually
10 controlling the prosecution or defense of separate claims,” Fed. R. Civ. P. 23(b)(3)(A), when
11 smaller dollar amounts are in controversy, this factor generally favors certification. *Zinser*, 253
12 F.3d at 1190- 91. Resolution of this factor takes into account the policy noted above of
13 incentivizing legitimate claims even when, as here, individual damages are modest. *Amchem*, 521
14 U.S. at 617; *see* Mot. at 18 (“[H]ere, the individual damages are relatively small.”). Large,
15 complex claims do not fit so well in a class as do smaller, simpler claims. *See Zinser*, 253 F.3d at
16 1190-91.

17 Here, the individual damages are quite low. *See* TAC ¶¶ 100, 121 (“additional
18 rent payments” of \$1,953.89 for named plaintiff Terry and “at least \$2,239.98” for named
19 plaintiff Huskey); *Pena*, 305 F.R.D. at 221 (finding damages estimates of \$224, less than \$5,528
20 and less than \$16,168 “small claims” that “do not make individual litigation attractive or
21 sustainable, especially when success will require analysis of large volumes of electronic
22 timekeeping data”). Additionally, putative class members, as members of the Section 8 program,
23 are low-income tenants who likely “lack the resources to finance and direct individual suits.”
24 *Pena*, 305 F.R.D. at 221; *see* Mot. at 18. This factor favors certification.

25 The second factor, the “extent and nature of any litigation concerning the
26 controversy already commenced by or against members of the class,” Fed. R. Civ. P. 23(b)(3)(B),
27 is meant to “assur[e] judicial economy and reduc[e] the possibility of multiple lawsuits.” *Zinser*,
28 253 F.3d at 1191 (quoting 7A Charles Alan Wright, et al., *Federal Practice and*

1 *Procedure* § 1780 (2d ed. 1986)); *see* 7A Charles Alan Wright, et al., *Federal Practice and*
2 *Procedure* § 1780 (3d ed. 2018) (same). Here, “[p]laintiffs’ counsel are not aware of any other
3 related litigation.” Mot. at 18 (citing Lavine Decl. ¶ 7). Defendants do not assert any concerns
4 about related litigation. This factor favors certification.

5 The third factor is “the desirability or undesirability of concentrating the litigation”
6 in this forum. Fed. R. Civ. P. 23(b)(3)(C). The putative Rule 23(b)(3) class comprises only those
7 current and former tenants located in California, coinciding with California state law claims.
8 Mot. at 9; TAC ¶ 44. This factor favors certification.

9 The fourth factor weighs the “likely difficulties in managing the class
10 action.” Fed. R. Civ. P. 23(b)(3)(D). As discussed previously, defendants’ concerns about
11 “individualized mini-trials” in essence repeat their concerns about individualized damages, not
12 individual determinations of liability. *See Leyva*, 716 F.3d at 514 (“[T]he presence of individual
13 damages cannot, by itself, defeat class certification . . .”). As recognized by other federal courts,
14 the fourth factor “overlaps with the [c]ourt’s commonality and typicality analysis.” *Huynh v.*
15 *Harasz*, No. 14-CV-02367-LHK, 2015 WL 7015567, at *12 (N.D. Cal. Nov. 12, 2015). Here, the
16 court’s commonality and typicality analyses identify no difficulties in managing the class action
17 that would cause this factor to weigh against certification.

18 Additionally, defendants’ contention that the Ninth Circuit requires a “trial plan” is
19 not accurate. Defendants’ cited case, *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th
20 Cir. 1996), does not refer to a “trial plan.” There, the Ninth Circuit observed there was “no
21 showing by [p]laintiffs of how the class trial could be conducted.” *Id.* The Ninth Circuit has
22 clarified *Valentino* when it rejected a defendant’s “suggestion that the district court’s failure to
23 adopt a trial plan or articulate how the class action would be tried was an abuse of discretion.”
24 *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 n.4 (9th Cir. 2005). “*Valentino* does not stand
25 for this proposition. . . . Nothing in the Advisory Committee Notes suggests grafting a
26 requirement for a trial plan onto the rule.” *Id.* Here, plaintiffs have taken the position that
27 liability “can be determined with common proof” and “damages can be easily determined based
28 on the side agreements.” Mot. at 19. Without predetermining the question, the court’s ability to

1 bifurcate a liability phase from a damages phase appears sufficient to ameliorate defendants'
2 concerns. *See id.*

3 On balance, the four factors suggest a class action is the superior means to try the
4 common questions of law and fact that predominate here.

5 The Ninth Circuit also requires district courts to consider alternative means of
6 litigating a proposed class action. *See Valentino*, 97 F.3d at 1234-35 (“A class action is the
7 superior method for managing litigation if no realistic alternative exists.”). In particular,
8 individual litigation, joinder, multidistrict litigation or an administrative or other non-judicial
9 solution may be superior. *See* 7A Charles A. Wright, et al., *Federal Practice and Procedure*
10 § 1779 (3d ed. 2018).

11 Because class members here have modest claims, individual litigation is unlikely
12 to present a viable means of recovery. The number of potential plaintiffs, more than 150, also
13 makes joinder impracticable. Although multidistrict litigation could theoretically “present an
14 advantage,” the court finds “the value of the claims is still small enough to suggest individual
15 actions would be inefficient.” *Greer v. Dick’s Sporting Goods, Inc.*, No. 215CV01063KJMCKD,
16 2017 WL 1354568, at *10 (E.D. Cal. Apr. 13, 2017), *pet. denied*, No. 17-80075, 2017 WL
17 5053965 (9th Cir. July 28, 2017). And as the *Greer* plaintiff relied on company policy as
18 evidence, so too do plaintiffs here rely on standard form documents produced by defendants that
19 do not differ throughout the geographic limits of the proposed class. Even if multidistrict
20 litigation were a superior option, the court is aware of no activity related to this case on behalf of
21 the judicial panel on multidistrict litigation or any motion requesting transfer filed by defendants
22 on the docket. *See* 28 U.S.C. § 1407(c)(i)-(ii).

23 Defendants’ proposal that local housing and redevelopment agencies are
24 alternative fora for litigating plaintiff’s claims also is not a viable alternative. Defendants rely on
25 “evidence of this remedy” as “past dialog between the [housing and redevelopment agency] and
26 Wasatch management, which resulted in a fair, fast and efficient resolution—including cash
27 reimbursement to tenants—when [the housing and redevelopment agency] had a concern about
28 Wasatch’s advertising.” *Opp’n* at 16-17. Defendants also direct the court’s attention to approvals

1 of Section 8 tenant’s leases, and argue these agency approvals “represent an established practice
2 of permitting these [Additional Services Agreements]” *Id.* at 17. Defendants contend this
3 court should afford agency deference to these approvals and the perspective of Shannon Fox, an
4 employee with the Sacramento Housing and Redevelopment Agency. *Id.* at 18.

5 But defendants point to no resolution mechanism made available to the parties by
6 local housing and redevelopment agencies. For instance, Shannon Fox does not indicate tenants
7 have any formal recourse through the Sacramento Housing and Redevelopment Agency. *See,*
8 *e.g.*, Fox Decl. ¶ 5, ECF No. 78-5 (explaining agency’s rights and legal options based on what the
9 agency “believes” or “determines”). Defendants themselves refer to having “a history of working
10 with” their local housing and redevelopment agency to at most “informally resolve issues.”
11 Opp’n at 2. This court has already provided multiple examples of courts handling the type of
12 claims at issue here, and holding “that extra charges, even when labeled as additional amenities,
13 can constitute illegal side payments.” ECF No. 61 at 6-7 (citations omitted). And Fox’s mere
14 declaration does not address a core issue in this case: defendants’ alleged treatment of charges for
15 parking, renter’s insurance and washer and dryer rental as part of a tenant’s rent in documents
16 generated after a tenant’s lease begins. *Compare* Lavine Decl. Ex. D (examples of defendants’
17 Resident Ledgers, detailing defendants’ tracking of additional charges such as washer/dryer
18 rental, renter’s insurance and parking charges as part of the same running total along with rent),
19 *id.* Ex. F (examples of monthly statements including additional charges with monthly rent
20 charges), *and id.* Ex. J (examples of Three-Day Notice to Perform Financial Covenant of Lease or
21 Quit including renter’s insurance, parking charges and washer/dryer rental as part of the
22 obligation “to cure the breach of the lease agreement”), *with* Fox Decl. ¶¶ 5-9 (referring to “a
23 proposed lease,” “separate agreements,” “a written agreement” and “Additional Service
24 Agreements” but not to defendants’ documents generated after the lease begins to track amounts
25 tenants owe). The court need not resolve whether any deference is owed to the agency here in
26 order to certify plaintiffs’ Rule 23(b)(3) class, and the court declines to do so. *See Amgen*, 568
27 U.S. at 466 (“Merits questions may be considered to the extent—but only to the extent—that they
28

1 are relevant to determining whether the Rule 23 prerequisites for class certification are
2 satisfied.”).

3 The court finds the Rule 23(b)(3) class satisfies the superiority requirement.

4 6. Ascertainability

5 Defendants contend the class definition is “so overbroad it violates the
6 ascertainability requirement of a certifiable class.” Opp’n at 19. According to defendants, HUD
7 regulations permit the Additional Services Agreements “so long as they do not charge for items
8 customarily included in base rent in the locality.” *Id.* at 20 (citing 24 C.F.R. § 982.510). Thus,
9 “[d]etermining which class members, if any, were party to invalid [Additional Services
10 Agreements] would be problematic” *Id.* Plaintiffs contend defendants “ignore the clear,
11 objective class definition in the proposed [TAC] and moving papers: Section 8 tenants at
12 [d]efendants’ California properties who have paid additional charges during a specific time
13 period.” Reply at 1. “Proposed class members are therefore readily determined from
14 [d]efendants’ records.” *Id.* at 3.

15 The court finds plaintiffs’ definition satisfies the ascertainability requirement.
16 Plaintiffs’ proposed class definition “will allow the court to efficiently and objectively ascertain
17 whether a particular person is a class member” based on defendants’ records. *See Westfall*, 2018
18 WL 705534, at *2. And defendants’ concerns about “additional rent payments” as part of the
19 definition is already resolved by plaintiffs’ change in the definition to “additional charges set
20 forth in Additional Services Agreements.” TAC ¶¶ 44-45.

21 7. Injunctive Relief Class under Rule 23(b)(2)

22 Plaintiffs acknowledge they have both moved from defendant’s properties, “and
23 thus request leave to amend the complaint to name a current tenant as a new representative of the
24 Rule 23(b)(2) class, to support injunctive relief.” Mot. at 20. Plaintiffs contend the court may
25 grant certification conditioned on substituting a named plaintiff who is a current tenant. *Id.*
26 Defendants argue neither named plaintiff has standing to seek injunctive relief. Opp’n at 2, 9 n.3,
27 15. In reply, plaintiffs confirm that they seek class certification under both Rule 23(b)(2) and
28 Rule 23(b)(3). Reply at 10 (citing Mot. at 19-20).

1 Defendants are correct that the named plaintiffs cannot serve as representative
2 plaintiffs for a Rule 23(b)(2) class here. *See Wal-Mart*, 564 U.S. at 360 (“Rule 23(b)(2) applies
3 only when a single injunction or declaratory judgment would provide relief to each member of the
4 class.”). But as plaintiffs request, courts may condition the grant of a motion to certify a class on
5 plaintiffs’ substituting an appropriate class representative. *See Nat’l Fed’n of Blind v. Target*
6 *Corp.*, 582 F. Supp. 2d 1185, 1209 (N.D. Cal. 2007) (granting motion to certify class but ordering
7 plaintiffs “to substitute a new class representative with respect to one claim within thirty (30)
8 days of this order” because “the court may certify the class condition upon the substitution of
9 another plaintiff”) (citing *Kremens v. Bartley*, 431 U.S. 119 (1977) and *Gibson v. Local 40*, 543
10 F.2d 1259, 1263 (9th Cir. 1976)). Additionally, “it is appropriate for the [c]ourt to certify one
11 class for injunctive relief under Rule 23(b)(2) and a separate class for other remedies under Rule
12 23(b)(3).” *Nozzi v. Hous. Auth. of the City of Los Angeles*, No. CV 07-380 PA (FFMX), 2016
13 WL 2647677, at *5 (C.D. Cal. May 6, 2016) (citing *Kartman v. State Farm Mut. Auto Ins. Co.*,
14 634 F.3d 883, 895 (7th Cir. 2011)); *ConAgra Foods, Inc.*, 90 F. Supp. 3d at 977 (“[T]he court can
15 separately certify an injunctive relief class and, if appropriate, also certify a Rule
16 23(b)(3) damages class.”). The court finds plaintiffs’ proposed definition for a Rule23(b)(2) class
17 satisfies the requirements of Rule 23(b)(2) because plaintiffs’ definition refers to “additional
18 charges set forth in Additional Services Agreements in excess of their individual portions of the
19 contract rent set forth in the HAP Contracts,” which generally apply to the Section 8 tenants who
20 would compose the members of this class and be eligible for injunctive relief if plaintiffs prevail
21 on the merits. *See* TAC ¶ 45.

22 The court therefore CONDITIONALLY GRANTS plaintiffs’ motion for class
23 certification as to its proposed Rule 23(b)(2) class, conditioned on plaintiffs substituting a new
24 class representative who has standing for injunctive or declaratory relief under Rule 23(b)(2),
25 within thirty (30) days.

26 IV. CONCLUSION

27 Plaintiffs’ motion to amend is GRANTED. Plaintiffs’ motion for class
28 certification as to the Rule 23(b)(3) class is GRANTED. Plaintiffs’ motion for class certification

1 as to the Rule 23(b)(2) class is CONDITIONALLY GRANTED, conditioned on plaintiffs
2 substituting a new class representative who has standing for injunctive or declaratory relief under
3 Rule 23(b)(2) within thirty (30) days.

4 This order resolves ECF Nos. 71 and 72.

5 IT IS SO ORDERED.

6 DATED: July 30, 2018.

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UNITED STATES DISTRICT JUDGE