X07-HHD-CV-19-6115255-S

SUPERIOR COURT

LATONNA COLLIER, ET AL.

JUDICIAL DISTRICT OF HARTFORD

V.

COMPLEX LITIGATION DOCKET

ADAR HARTFORD REALTY, LLC, ET AL.

APRIL 1, 2025

MEMORANDUM OF DECISION ON RENEWED MOTION FOR CLASS CERTIFICATION No. 366.00

The plaintiffs move for certification of a class of "all persons who lived at Barbour Gardens any time between January 1, 2015 and the date on which the last tenant(s) evacuated Barbour Gardens in 2019." This is a shorter time period than the 2004 to 2019 timeframe the plaintiffs sought in their previous motion for class certification no. 301.00. In this renewed motion, they also have narrowed the causes of action to breach of lease (fifth count), breach of the management agreement (seventh count), unjust enrichment (eighth count), and violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. ("CUTPA") (ninth count). Third amended complaint no. 298.00. At oral argument, the plaintiffs also indicated that they would drop their claims for compensatory damages in order for the court to certify this proposed class.

Two of the defendants, Adar Hartford Realty, LLC and Arco Management Corporation, oppose this motion. They argue that even with these limitations on the proposed class and the issues, the plaintiffs cannot establish that questions of law or fact that are common to the whole class predominate over the questions affecting only individual members. They also argue that the plaintiffs cannot prove that a class action is superior to other methods of adjudicating these causes of action fairly and efficiently.

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This court analyzes whether the plaintiffs have established predominance and superiority for a proposed class that is constrained to this shorter timeframe, pursues only these four causes of action, and does not seek compensatory damages. It concludes that if the causes of action are further limited to claims arising out of the Barbour Gardens common areas, a class should be certified.

FACTS

The following facts are based on the allegations of the third amended complaint, the submissions by the parties, and the Supreme Court's statement of the facts in its decision earlier in this case, *Collier v. Adar Hartford Realty, LLC*, 349 Conn. 822, 322 A.3d 1041 (2024).

The plaintiffs were residents of Barbour Gardens, a four building, eighty-four unit, federally subsidized housing complex located in Hartford. The property was owned by Adar from 2004 until 2019, and managed by Arco from 2005 until at least 2018.

The plaintiffs allege in their complaint that Barbour Gardens was regulated by the federal Department of Housing and Urban Development ("HUD"), which subsidized the rental units at Barbour Gardens through the Section 8 Project-Based Rental Assistance (PBRA) program benefiting low income families. See 42 U.S.C. § 1437f (2018). "PBRA benefits are tied to a specific property, and recipients cannot move without losing their federal housing subsidy." *Collier v. Adar Hartford Realty, LLC*, supra, 349 Conn. at 826. Adar, through its site manager Arco, collected rental subsidies from HUD, plus supplemental payments from tenants. In return, they were obligated to provide safe and sanitary housing.

The leases between Adar and the Barbour Gardens tenants were "model" leases on HUD forms. They were accompanied by a "unit inspection report" on a HUD form that the tenant had to fill out and sign at the same time as entering into the lease. They also referred to the fact that HUD makes

monthly payments to the landlord on behalf of the tenant. The leases required Adar to "regularly clean all common areas of the project, maintain the common areas and facilities in a safe condition," "maintain all equipment and appliances in safe and working order," "make necessary repairs with reasonable promptness," "provide extermination services, as necessary," and provide other services.

In 2005, Adar and Arco entered into a "Management Agreement HUD Subsidized Rental Property" ("management agreement") for Barbour Gardens. That management agreement began with an acknowledgement that Barbour Gardens would be operated "in accordance with applicable laws, rules and regulations, including, but not limited to, 'Section 8 Housing Assistance Payment Contract' provided by HUD." It also stated that Adar was "obligated to provide for management of the project in a manner satisfactory to the Secretary [of HUD]." It went on to state that Arco must "comply with all pertinent requirements of the Regulatory Agreement, the Rent Supplement Contract, and the directives of the Secretary." If any instruction from Adar was in contravention to those requirements, the management agreement provided that the requirements would prevail over Adar's instruction.

Federal regulations that applied to Adar and Arco mandated that Barbour Gardens "be functionally adequate, operable, and free of health and safety hazards." 24 C.F.R. § 5.703 (a). This general duty entailed providing common areas and rental units free of dangers relating to "carbon monoxide, electrical hazards, extreme temperature, flammable materials or other fire hazards, garbage and debris, handrail hazards, infestation, lead-based paint, mold and structural soundness." Id. § 5.703 (e) (1). Those federal regulations required compliance with state or local housing codes. Id. § 5.703 (f) (2). In turn, Connecticut state law required that apartment buildings' common areas, internal systems, and other aspects be kept sanitary and in working order. See General Statutes §§ 47a-7 and 47a-51.

"HUD regulations require the Real Estate Assessment Center (REAC), a unit within HUD's Office of Public and Indian Housing, to inspect Section 8 properties every one to three years. See 24 C.F.R. § 200.857 (b) (1) (2023) . . . . REAC inspectors may award inspection scores ranging from 1 to 100, and any score below 60 is considered deficient. See Consolidated and Further Continuing Appropriation Act, 2015, Pub. L. No. 113-235, § 226 (a), 128 Stat. 2130, 2755. A score below 30 may result in the imposition of civil penalties or the abatement of the Section 8 contract. See id., § 226 (b) (2) (A) and (B), 128 Stat. 2755." (Citations omitted.) *Collier v. Adar Hartford Realty, LLC*, supra, 349 Conn. at 826.

"Under the defendants' stewardship, Barbour Gardens fell into a state of egregious disrepair." *Collier v. Adar Hartford Realty, LLC*, supra, 349 Conn. at 826. In June 2014, in anticipation of a HUD REAC inspection, Arco conducted a pre-REAC inspection. This resulting report gave both defendants an understanding of the conditions of the property and a basis for predicting the HUD inspection's results. Among the "generalized deficiencies that should be addressed" were stairwell doors that would not latch, exposed wires in many corridors, abundant nonfunctioning lights in stairwells and basements, fire extinguishers without current inspection tags, overgrown vegetation (due to a lack of a lawn mower), peeling paint on all building foundations, erosion all over the property and broken glass and garbage all over the property. All of these defects were in the common areas. In a sampling of individual apartments, windows, doors, outlets and toilets were broken. Although all of the apartments were not inspected, Arco stated in the report that "most units" were like those sampled. The HUD inspections themselves extrapolated from the inspection of a sample of units to all of the units.

The pre-REAC inspection noted a sewage flood in the basement of Building Four. One month later, in July 2014, the depth of the sewage backup had reached about four feet. The fire department

was "worried that the water would reach the electrical panels." That building's sump pump did not work, and the superintendent had a sump pump brought over from another building to pump the water out into the parking lot, which Arco admitted was "not a good place." Representatives of the water company attributed the sewage backup to a "large sink hole" that the defendants kept "refilling every year." That sink hole continued to expand in the parking lot.

The defendants' response to this pre-REAC inspection and report was to delay the HUD inspection from September 2014 to April 2015. In March 2015, the property manager told an Arco executive that they were likely to score "about a 15c" out of 100 points if the HUD inspection went forward the next month. "The REAC inspection was rescheduled for August 29, 2015, and, after an Arco employee again expressed concern that, if the property was inspected '[o]n that day [it] would get a FAIL,' the inspection ultimately was postponed until October 1, 2015." (Footnote omitted.) *Collier v. Adar Hartford Realty, LLC*, supra, 349 Conn. at 827.

As Arco struggled to prepare Barbour Gardens for that October 2015 inspection, one of its executives lamented that Adar "want[ed] to spend as little as humanly possible to prepare," but that it would take "[a]t least $40,000 for a passing score." Ultimately, Arco had a contractor on site with a crew of five plus a supervisor for nine days. When HUD inspected the site, Barbour Gardens received a passing score of 78c.[1]

In September 2017, Arco learned that HUD would return for an inspection in February 2018. Adar and Arco tried to have that inspection cancelled, but they were not successful. Once again, Arco conduced a pre-REAC inspection. Many of the same conditions reported in the 2014 pre-REAC inspection were still present – lights out in the common areas, entry doors not closing or locking, and broken exit signs with exposed wires.

[1] The lower case c refers to the presence of "one or more exigent/fire safety" risks that require "immediate attention or remedy."

"Prior to the 2018 inspection, Arco employees were aware that '[a]lmost 100 [percent] of [the] windows' were 'impossible to lock,' causing 'a pretty big security issue' and 'a tremendous' loss of heat. One Arco employee described Barbour Gardens as 'a mold and cockroach infested slum with major plumbing leaks all over the property' and as '[m]issing shower walls, etc.' To pass inspection, Arco employees decided to take about one 'half the place . . . [offline],'" meaning to exempt it from inspection. Despite these problems, Barbour Gardens received a passing score of 81 out of 100 on its REAC inspection.

"Local community activists and Barbour Gardens residents knew that the score did not reflect the true conditions at Barbour Gardens. Due to pressure from the community, the Licenses and Inspections Division of the city's Department of Development Services inspected the property on September 12, 2018. The city inspection uncovered more than 200 violations of the Hartford Municipal Code, including (1) '[b]owing, deflected or sagging floors,' (2) '[w]ater damaged ceilings,' (3) '[w]ater damaged walls,' (4) '[m]ice infestations,' (5) '[b]edbug infestations,' (6) '[r]oach infestations,' (7) '[f]lea infestations,' (8) '[i]noperable electric[al] outlets,' (9) '[t]hermostats in disrepair,' (10) '[i]noperable heating facilities,' (11) '[b]roken or inoperable appliances,' (12) '[p]eeling paint,' (13) '[d]oors that will not latch,' (14) '[w]indows that will not stay open,' (15) '[m]issing window screens,' and (16) '[i]mproperly installed plumbing fixtures, including dysfunctional toilets.'

"On October 17, 2018, the city's fire marshal inspected Barbour Gardens to evaluate the safety of the building. The fire marshal discovered that emergency exit lights were not operational, apartment doors did not close, smoke alarms were missing from apartments, and there were no maintenance records for the property's fire system. The fire alarm panels were not operational, and a Barbour Gardens maintenance staff member asserted that he had never seen them operational. Due to the

significant risk to the residents' health and safety posed by fire, the fire marshal placed Barbour Gardens on an around-the-clock fire watch.

"HUD scheduled another REAC inspection for October 30, 2018. Prior to this inspection, one Arco employee predicted that Barbour Gardens 'will come back as possibly the lowest score ever received.' This prediction proved accurate; Barbour Gardens received a score of 9c—the lowest score received by any project in Connecticut's history. During the inspection of 20 rental units, 138 health and safety deficiencies were observed, including electrical hazards, inoperable windows and doors, mold and mildew, water damage, and a bedbug infestation. REAC inspectors noted that, '[i]f all buildings and units were inspected, it is projected that a total of 423 health and safety deficiencies would apply to the property.' Because the residents at Barbour Gardens were 'not receiving the quality of housing to which they [were] entitled,' REAC referred Barbour Gardens to HUD's Departmental Enforcement Center for an enforcement action.

"The defendants did not correct any of the deficiencies documented by the city or the REAC inspectors. As a result, the city instituted criminal proceedings against the owners of Barbour Gardens, and HUD cancelled Barber Gardens' participation in the PBRA program. The residents of Barbour Gardens no longer were eligible to receive a project based federal subsidy and needed to find new housing. Given the limited number of housing units that qualify for federal subsidies, the low income residents at Barbour Gardens struggled to find affordable housing. Many residents who had nowhere else to go were forced to remain at Barbour Gardens, despite the deplorable living conditions.

"In June, 2019, three feet of standing waste water flooded into the basement of one of Barbour Gardens' four buildings. The plumbing system pumped the sewage from one building into another. As a result, the city evacuated the families who had remained at Barbour Gardens while awaiting the opportunity to transition to safe and habitable affordable housing. HUD deemed the property too

unsafe for residents to return, and these families were permanently displaced." (Footnotes omitted.) *Collier v. Adar Hartford Realty, LLC*, supra, 349 Conn. at 827-30.

PROCEDURAL HISTORY

The plaintiffs initiated this action in August 2019. On the same date that they filed their third amended complaint that is at issue here, the plaintiffs filed their first motion for class certification. That motion sought certification of a class of "all persons who lived at Barbour Gardens" for a longer period of time – "between June 24, 2004 and October 13, 2019." It also sought class certification on all nine causes of action asserted in that third amended complaint. The defendants opposed class certification, and the court (Noble, J.) issued a memorandum of decision no. 350.00 that denied class certification. The court held that the plaintiffs had established all four of the Practice Book § 9-7 criteria – numerosity, commonality, typicality and adequacy of representation. Id., pp. 11-16. However, the court agreed with the defendants that the plaintiffs failed to establish the requirement of Practice Book § 9-8 (3) that questions of law or fact common to the class members predominate over the questions affecting only individual members. Id., pp. 16-33. The court reached this result for all nine causes of action, including the four causes of action on which the plaintiffs rely for their present class certification motion. Id., pp. 26-33. For each cause of action, the court concluded that the generalized proof of the overall conditions at Barbour Gardens would not suffice to establish that each individual unit met one or more elements, and therefore that the common issues did not predominate. Id. at 19, 26-33. The court did not address the other requirement of Practice Book § 9-8 (3) that a class action be superior. Id., p 16.

The plaintiffs took an interlocutory appeal. During the pendency of that appeal, they filed a motion for articulation. The court (Noble, J.) granted that motion and addressed the issue of

superiority. No. 353.86. After setting forth the Practice Book criteria for superiority and finding that a number of them favored class certification, the court stated that it "nevertheless" was "obliged to conclude that superiority is not present due to the highly individualized proof required to establish liability." Id., p. 2.

On appeal, our Supreme Court affirmed. *Collier v. Adar Hartford Realty, LLC*, 349 Conn. 822, 322 A.3d 1041 (2024). After setting forth the purpose of the predominance and superiority requirements and the three-part inquiry for predominance, the court analyzed whether the predominance requirement was met for the plaintiffs' nine causes of action. Id. at 836-40. The Supreme Court observed that "[a]lthough the essential elements of each of these causes of action differ, the facts on which the plaintiffs rely to support their claims are the same, namely, the defendants' alleged failure to maintain Barbour Gardens in a safe and habitable condition and their pattern and practice of delaying REAC inspections, concealing the health and safety hazards at Barbour Gardens, and violating federal, state, and local housing laws." Id. at 839. It therefore did not engage in an analysis of the elements of each of the causes of action, and instead considered all of the claims together. Id. The Supreme Court next pointed out that the plaintiffs primarily relied on the defendants' own records from 2015 to 2019 to support their claims. Id. at 840. Unlike the trial court, which was concerned that "generalized proof will not suffice to establish conditions present in each apartment or whether they rendered the unit uninhabitable," Memorandum of Decision no. 350.00, p. 19; the Supreme Court focused on the timeframe:

> "[T]he plaintiffs sought 'a broad certification for tenants over a period of many years, including all past tenants' going back to 2004. For many past residents during this proposed class period, there is no generalized evidence in the record regarding the allegedly uninhabitable conditions at Barbour Gardens or the defendants' misconduct. In light of the absence of such evidence prior to 2015 at the earliest, the vast majority of the proposed class members would need to adduce individualized proof to establish the defendants' liability, and there is no evidentiary basis to support the conclusion that common questions of law or fact will be the object of most of the efforts of the litigants and the court . . . ."

(Internal quotation marks omitted.) *Collier v. Adar Hartford Realty, LLC*, supra, 349 Conn. at 840. The Supreme Court concluded that "the proposed class of plaintiffs is overbroad, and the predominance requirement is not satisfied." Id.

The Supreme Court also addressed whether the class could be redefined. It observed that when a federal court denies class certification because the proposed class definition is overbroad, "the movant must be given a reasonable opportunity to propose a narrower class or subclasses that are certifiable." *Collier v. Adar Hartford Realty, LLC*, supra, 349 Conn. at 845 n.13. As to this case, it stated that its affirmance "does not preclude the plaintiffs on remand from seeking to certify a narrower class or subclasses, because class certification [decisions] are always interlocutory and may be altered or amended at a later date . . . ." (Internal quotation marks omitted.) Id. The court explicitly stated that it "express[ed] no opinion" on the merits of such a motion. Id.

The Supreme Court encouraged trial courts "sua sponte to consider redefining the scope of the class if the proposed definition in the operative complaint and motion for class certification is overbroad . . . ." *Collier v. Adar Hartford Realty, LLC*, supra, 349 Conn. at 841. It held:

> "Our rules of practice, . . . vest the trial court with broad discretion to make class certification decisions. This broad discretion encompasses the authority to control proceedings and frame issues for consideration . . . . The trial court also can certify a partial class action or create subclasses with respect to discrete issues. . . . A trial court's discretion to manage the class is ongoing, and it is within the purview of the trial court to revisit the issue of class certification, and, if facts require, to alter the definition of the class as developments dictate . . . . [A] trial court's order respecting class status is not final or irrevocable, but rather, it is inherently tentative . . . because the court remains free to modify it . . . ."

(Citations omitted; internal quotation marks omitted.) Id. at 841-42.

LEGAL ANALYSIS

On remand to this court, the plaintiffs move for certification of a class of "all persons who lived at Barbour Gardens any time between January 1, 2015 and the date on which the last tenant(s) evacuated Barbour Gardens in 2019." They seek class certification for four causes of action in the third amended complaint: breach of lease, breach of management agreement, unjust enrichment and violation of CUTPA.[2]

I. Standards for Analyzing Motions for Class Certification

Our Supreme Court has set forth standards for what this court must review and how it should conduct that review:

> "It is the class action proponent's burden to prove that all of the requirements have been met. . . . To determine whether that burden has been met, we have followed the lead of the federal courts . . . directing our trial courts to undertake a rigorous analysis. . . .
>
> "[A] rigorous analysis ordinarily involves looking beyond the allegations of the plaintiff's complaint. The [rigorous analysis] requirement means that a class is not maintainable merely because the complaint parrots the legal requirements of the [class action] rule. . . .
>
> "In applying the criteria for certification of a class action, the [trial] court must take the substantive allegations in the complaint as true, and consider the remaining pleadings, discovery, including interrogatory answers, relevant documents, and depositions, and any other pertinent evidence in a light favorable to the plaintiff. However, a trial court is not required to accept as true bare assertions in the complaint that [class certification] prerequisites were met. . . . Class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. . . .
>
> Consequently, a rigorous analysis frequently entail[s] overlap with the merits of the plaintiff's underlying claim. . . . In determining the propriety of a class action, [however] the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of [the class action rules] are met. . . . Although no party has a right to proceed via the class mechanism . . . doubts regarding the propriety of class certification should be resolved in favor of certification."

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[2] At oral argument, plaintiffs' counsel stated that if this court grants class certification, the plaintiffs would further amend their complaint to drop the other claims.

(Citations omitted; internal quotation marks omitted.) *Rodriguez v. Kaiaffa, LLC*, 337 Conn. 248, 256-57, 253 A.3d 13 (2020). In addition, the allegations of the complaint should be read liberally and realistically. *Collins v. Anthem Health Plans, Inc.*, 266 Conn. 12, 35, 836 A.2d 1124 (2003) (*Collins I*). Connecticut courts also look to federal law for guidance in construing class certification requirements. Id. at 33.

II. The Practice Book Requirements for Class Certification

Connecticut state courts undertaking a class certification analysis must follow a "two-step process" to determine whether an action or claim qualifies for class action status. *Rodriguez v. Kaiaffa, LLC*, supra, 337 Conn. at 255. In the first step, the court must determine whether the four prerequisites of Practice Book § 9-7 (numerosity, commonality, typicality and adequacy of representation) are satisfied. Id. at 255-56. If those criteria are satisfied, the court should proceed to the second step, which requires an evaluation of the requirements of Practice Book § 9-8 (3). Id. at 256. "These requirements are: (1) predominance – that questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) superiority – that a class action is superior to other available methods for the fair and efficient adjudication of the controversy . . . ." (Internal quotation marks omitted.) Id.

Although the plaintiffs briefed a full argument that their proposed class meets the requirements of Practice Book § 9-7, the defendants do not challenge this. Their arguments are restricted to the Practice Book § 9-8 requirements of predominance and superiority. Adar Memorandum no. 379.00, p. 2; Arco Memorandum no. 378.00, p. 3. Therefore, this court will limit its analysis to predominance and superiority.

III. Predominance

A. Standards for Predominance

Predominance requires that common issues of law or fact predominate over questions affecting only individual members. Practice Book § 9-8 (3).[3] "The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." (Internal quotation marks omitted.) *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016). "[T]he fundamental purpose of the predominance inquiry is to determine whether the economies of class action certification can be achieved . . . without sacrificing procedural fairness or bringing about other undesirable results." (Internal quotation marks omitted.) *Collier v. Adar Hartford Realty, LLC*, supra, 349 Conn. at 836.

Common issues predominate if resolution of the legal and factual issues for the elements of a cause of action can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof. *Collier v. Adar Hartford Realty, LLC*, supra, 349 Conn. at 837. If common issues of fact and law have a direct impact on every class member's effort to establish liability, they predominate. *Rodriguez v. Kaiaffa, LLC*, supra, 337 Conn. at 279. If, on the other hand, the plaintiffs cannot establish liability without introducing "a great deal

[3] The predominance requirement is distinct from the Practice Book § 9-7 commonality requirement. To establish commonality, a plaintiff only needs to "demonstrate that 'there are questions of law or fact common to the class,' which 'is easily satisfied because there need only be one question common to the class . . . the resolution of which will advance the litigation.'" *Rodriguez v. Kaiaffa, LLC*, supra, 337 Conn. at 264. Predominance, on the other hand, requires a "probing inquiry to determine whether the common issues that are subject to generalized proof are more substantial that the issues subject only to individualized proof." (Internal quotation marks omitted.) *Ahmad v. Yale-New Haven Hospital, Inc.*, 104 Conn. App. 380, 390-91, 933 A.2d 1208 (2007).

of individualized proof or argu[ing] a number of individualized legal points to establish most or all of the elements of their individual[ized] claims, such claims are not suitable for class certification . . . ." (Internal quotation marks omitted.) *Collier v. Adar Hartford Realty, LLC*, supra, 349 Conn. at 837.

The determination of whether common questions predominate over individual questions requires a three-step process:

1. The court should "*review* the elements of the causes of action that the plaintiffs seek to assert on behalf of the putative class."

2. The court should "*determine* whether generalized evidence could be offered to prove those elements on a class-wide basis or whether individualized proof will be needed to establish each class member's entitlement to monetary or injunctive relief."

3. The court should "*weigh* the common issues that are subject to generalized proof against the issues requiring individualized proof in order to determine which predominate."

(Emphasis added.) *Rodriguez v. Kaiaffa, LLC*, supra, 337 Conn. at 265. "Only when common questions of law or fact will be the object of most of the efforts of the litigants and the court will the predominance test be satisfied." (Internal quotation marks omitted.) Id. at 265-66.

B. Application of the Three-Step Process to the Plaintiffs' Causes of Action

The court will apply these three steps to each of the four causes of action for which the plaintiffs seek class certification. At oral argument, the plaintiffs conceded that the element of compensatory damages in their claims for breach of lease, breach of management agreement and violation of CUTPA would require individualized proof. They indicated that they were prepared to limit class certification to liability only on the breach of lease and breach of management agreement claims, and to waive their claims to compensatory damages under CUTPA. This concession by the plaintiffs streamlines the court's analysis.

1. Breach of Lease (Fifth Count)

The plaintiffs are suing Adar for breach of lease. The first step this court must undertake is to identify the elements of that cause of action. "[A] lease is a contract under which an exclusive possessory interest in property is conveyed." (Internal quotation marks omitted.) *300 State, LLC v. Hanafin*, 140 Conn. App. 327, 330, 59 A.3d 287 (2013). Therefore, the elements of a claim for breach of lease are the same as those for breach of contract – "formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) Id.

The second step this court must take is to analyze whether the plaintiffs can prove each of these elements by generalized proof for the entire proposed class or whether each individual plaintiff must put on his or her individual proof. The plaintiffs have provided the court with a single lease that was entered into between Adar and named plaintiff David Merritt. As noted above, the face of the lease indicates that it is a "model" and that it is "Form HUD-90105a," which was created December 2007, before the start date of the class. Adar does not argue that the would-be class members had different language in their leases.[4] If the plaintiffs introduce evidence that this same form of lease was used for all of the class members, they could establish the formation of the lease element with generalized evidence. They also could establish the terms of the lease by generalized evidence.

This lease creates a tenancy for a one-year term with successive one-year terms. It requires the payment of rent on the first day of the month, with a blank for the amount. In Mr. Merritt's case, the rent was $0.00. The rent paragraph indicates that the monthly rent is below market because HUD is either subsidizing the mortgage or making tenant assistance payments on behalf of the tenant.

[4] If the proposed class members had different leases, that could defeat predominance. See, e.g., *Noel v. MHC Heritage Plantation, LLC*, United States District Court, Docket No. 21-14492-CV (S.D. Fla. February 24, 2023) (2023 WL 2633328); *Spencer v. Hartford Financial Services Group, Inc.*, 256 F.R.D. 284, 303-04 (D. Conn. 2009).

Insofar as plaintiffs' rent was covered by HUD subsidies, that could be established by generalized proof.

Beyond the payments by HUD, the remaining issues related to the tenants' performance of their obligations under the lease would require individualized proof. Paragraph 6 of the lease includes the statement that "[b]y signing this Agreement, the Tenant acknowledges that the unit is safe, clean and in good condition." It refers to an inspection report that accompanies the lease. The inspection form that was filled out by Mr. Merritt when he signed his lease required the tenant to check off whether particular items in the apartment were "acceptable," and to make notes of any repairs needed. Each tenant had ongoing obligations during the term of the lease. In paragraph 10, the tenant makes certain commitments as to the care of his individual unit, including giving Adar "prompt notice of any defects in the plumbing, fixtures, appliances, heating and colling equipment of any other part of the unit or related facilities . . . ."

The issue of whether Adar breached the terms of the lease with any or all of the tenants must be broken down between the common areas and individual units. The court (Noble, J.) found that the common issues did not predominate for all nine claims in the third amended complaint on the grounds that each of those causes of action would require individual proof of the condition of their individual units. Much of that analysis was based on whether those individual units were or were not habitable. The claim breach of the warranty of habitability was set forth in count six, which the plaintiffs have dropped from this motion. Nevertheless, Adar continues to argue that the condition of each individual unit would require individual proof to determine whether there was a breach as to that tenant. The cases where tenants of HUD-subsidized apartments have sought class certification for claims against building owners and managers support that position. See, e.g., *Akeem v. Dasmen Residential, LLC*, United States District Court, Docket No. 19-13650 (E.D. La. October 14, 2021) (2021 WL 4804049)

(breach of lease claim); *Riley v. PK Management, LLC*, United States District Court, Docket No. 18-2337-KHV (D. Kan. December 20, 2019) (2019 WL 6998757) (breach of contract claim).

On the other hand, Adar also promised in paragraph 10 of the lease to maintain the common areas. The issue of whether Adar breached the lease by failing to maintain the common areas can be established by generalized evidence. At oral argument and in their reply memorandum, the plaintiffs emphasized that 58 points out of the 100 points on the HUD inspection are for the common areas. Several courts considering claims by tenants about their housing have indicated that proof relating to the common areas can be generalized. See, e.g., *Riley v. PK Management, LLC*, supra, United States District Court, Docket No. 18-2337-KHV (holding that common issues did not predominate on breach of contract and unjust enrichment claims because of questions about individual units, but stating that "this problem may be curable" by "narrow[ing] claim to the common areas"); *Thames River Apartment Tenants v. New London Housing Authority*, Superior Court, judicial district of Middlesex, Docket No. CV-06-4006233-S (November 13, 2007, *Beach, J.*) (recognizing that conditions of individual units required individualized proof, but stating that "it seems clear that the conditions of the premises – at least as to common areas – are subject to generalized evidence . . . .").

Our Supreme Court has empowered this court on remand to act sua sponte to redefine the class. *Collier v. Adar Realty, LLC*, supra, 349 Conn. at 841-43. This court exercises that authority to redefine the class claims to those arising out of the condition of the common areas.

Adar argues that even the breach of lease claims arising out of the condition of the common areas would require individualized proof of how each tenant was affected by those conditions. The court disagrees. This is the type of case where the effect of the breach on each tenant can be established with generalized proof. This is illustrated by two of our Supreme Court's decisions that discussed predominance in the context of breach of contract claims.

The Supreme Court affirmed a trial court's determination that class-wide issues of law and fact predominated for a breach of contract claim in *Standard Petroleum Co. v. Faugno Acquisition, LLC*, 330 Conn. 40, 191 A.3d 147 (2018). In that case, service station operators claimed that a wholesale supplier of gasoline overcharged them for state and federal taxes on the products. The Supreme Court held that the plaintiffs' performance would require individualized proof that the class members paid for the gasoline, but it noted that the issue would be largely provable by common evidence from the defendant. Id. at 68. The court also held that the element of the plaintiffs' performance did not predominate over the other elements of the cause of action. Id. As to the element of the defendant's breach, the court found that because it was class-wide, it could be established by common proof. Id. It therefore concluded that common issues predominated as to the breach of contract claim. Id.

In the other case, *Collins v. Anthem Health Plans, Inc.*, 275 Conn. 309, 880 A.2d 106 (2005) (*Collins II*), the Supreme Court reversed a trial court's grant of partial class certification. The plaintiffs were orthopedic surgeons who entered into written contracts with the defendant health insurer to provide medical services to people enrolled in the defendant's health insurance plans. Id. at 313-14. The alleged breaches at issue were (1) a profiling policy that purportedly could harm the doctors by threatening them with underpayment and termination, (2) improper denials of authorization for covered medical services because of a bonus incentive, (3) a failure to maintain books and records resulting in the plaintiffs receiving improper payments based on the claim codes submitted, and (4) failure to provide a doctor on call on nights and weekends to preauthorize procedures. Id. at 324, 336-37, 339, & 343. In *Collins II*, unlike in *Standard Petroleum Co.*, the issues requiring individualized proof did not relate merely to the amount of damages the plaintiffs suffered, but also to the defendant's liability to the class because of the many specific issues about the patients, their conditions, the treatment and the doctors' billing practices. *Collins II*, supra, 275 Conn. at 336. The court held that

the generalized evidence of these breaches would not predominate over the individualized evidence necessary to establish whether each class member suffered an injury in fact and whether the challenged business policies were the cause of that injury in fact. Id. at 336 & 340.

This court finds that the factual and legal issues here are more consistent with *Standard Petroleum Co. v. Faugno Acquisition, LLC* than with *Collins II.* The most substantial issue here is whether Adar breached the leases by failing to properly maintain the common areas. Unlike in *Collins II*, the questions of whether those breaches caused the class members to suffer an injury in fact will not require lengthy and detailed individual proof. Therefore, the court concludes that the common issues predominate over the individual issues if the breach of lease claim is limited to failures to maintain the common areas.

Adar also argues that its special defenses require individualized proof. "Although the existence of a defense potentially implicating different class members differently does not *necessarily* defeat class certification . . . it is . . . well established that courts must consider potential defenses in assessing the predominance requirement. . . . ." (Emphasis in original; internal quotation marks omitted.) *Standard Petroleum Co. v. Faugno Acquisition, LLC*, supra, 330 Conn. at 71. Our appellate courts have not decided how exactly the burden is allocated on a class certification motion when a defendant raises special defenses. Id. at 71-72 (disregarding the special defenses because they did not even meet pleading requirements). Moreover, as Adar conceded at oral argument, the existence of special defenses typically does not prevent a court from finding that common issues predominate. See, e.g., *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 233 (2d Cir. 2008).

Adar directs the court to the fourth through sixth and the eighth through tenth special defenses in their answer no. 308.00. The fourth, fifth and sixth special defenses speak to obligations the tenants undertook in their leases for their individual units. Those defenses will not be relevant if a class is

certified solely as to claims arising out of the common areas. The eighth special defense seeks to bar recovery if a tenant failed to put trash in a designated area, the ninth special defense seeks to bar recovery if a guest causes damage, and the tenth special defense invokes the tenants' responsibilities under paragraph 10 of the lease, which was discussed above. Although these special defenses could be invoked if a class is certified as to claims arising out of the common areas, but Adar has not provided the court with any evidence to support these defenses, and they appear to be insignificant when weighed against the claims and evidence put forward by the plaintiffs. The court concludes that the common issues predominate over the individual issues for a class certified as to liability only on the breach of lease claim arising out of the condition of the common areas.

2. Breach of the Management Agreement (Seventh Count)

The plaintiffs allege in the seventh count that there was a management agreement between Adar and Arco as to which of the plaintiffs were third-party beneficiaries. They allege that both Adar and Arco breached that management agreement. The elements of that claim are those for breach of contract – "formation of an agreement, performance by one party, breach of the agreement by the other party and damages." (Internal quotation marks omitted.) *300 State, LLC v. Hanafin*, supra, 140 Conn. App. at 330.

There is one more element -- the plaintiffs also must establish that as tenants, they were intended beneficiaries of the management agreement. See, e.g., *Gateway Co. v. DiNoia*, 232 Conn. 223, 230, 654 A.2d 342 (1995). A person has a right of action as an intended beneficiary if both parties to the contract intended that the promisor should assume a direct obligation to that beneficiary. *Grigerik v. Sharpe*, 247 Conn. 293, 311-12, 721 A.2d 526 (1998). "[T]he intention of the parties to a contract is to be determined from the language used interpreted in the light of the situation of the

parties and the circumstances connected with the transaction. The question is not what intention existed in the minds of the parties but *what intention is expressed in the language used . . . .*" (Emphasis in original; internal quotation marks omitted.) *United Cleaning & Restoration, LLC v. Bank of America, N.A.*, 225 Conn. App. 702, 718, 317 A.2d 2 (2024). Because that question turns on the language of the management agreement, it can be established by generalized proof. In its previous decision on class certification, the court (Noble, J.) also found that it is likely that the plaintiffs would be able to establish this element by generalized proof. Memorandum of Decision no. 350.00, p. 32.

Returning to the elements of breach of contract, the predominance analysis is very similar to that for the breach of lease cause of action. Formation of the agreement between Adar and Arco may be established by generalized proof. The plaintiffs allege the following breaches: (1) "Arco breached the management contract with Adar when it failed to maintain Barbour Gardens pursuant to HUD standards;" (2) "Arco . . . failed to authorize emergency repairs for the preservation and safety of Barbour Gardens tenants;" and (3) "Adar breached the management agreement contract with Arco when it failed to provide adequate funds for the maintenance and repair of Barbour Gardens." Third amended complaint, ¶¶ 202-204. These alleged breaches, if limited to the common areas, could be established by generalized proof. On the other hand, any harm suffered by the plaintiffs that was caused by those breaches would have to be established by individual proof. The most substantial issues would be whether the class members were intended beneficiaries of the management agreement and whether the defendants breached that management agreement. If the claim is limited to liability for failures to maintain the common areas, the common issues predominate.

3. Unjust Enrichment

In their eighth count, the plaintiffs assert that they are entitled to restitution and disgorgement based on the unjust enrichment of the defendants. "Unjust enrichment applies wherever justice requires compensation to be given for property or services rendered under a contract, and no remedy is available by an action on the contract. . . . A right of recovery under the doctrine of unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another." (Internal quotation marks omitted.) *Vertex, Inc. v. Waterbury*, 278 Conn. 557, 573, 898 A.2d 178 (2006). To recover, the plaintiffs must prove the following elements: "(1) that the defendants were benefitted; (2) that the defendants unjustly did not pay for the benefits; and (3) that the failure of payment was to the plaintiffs' detriment." (Internal quotation marks omitted.) Id.

Arco points out that there can be no recovery for unjust enrichment if the plaintiff is able to recover for breach of contract. See, e.g., *Vertex, Inc. v. Waterbury*, supra, 278 Conn. at 573. In *Vertex*, the unjust enrichment claim went to the jury after the trial court dismissed the plaintiff's breach of contract claim. Id. at 560-61. "[L]ack of a remedy under the contract is a precondition for recovery based upon unjust enrichment." *Gagne v. Vaccaro*, 255 Conn. 390, 401, 766 A.2d 416 (2001). As discussed in the previous two sections of this decision, the plaintiffs are pursuing two breach of contract claims. If all of these claims survive until trial, the plaintiffs may not be able to recover for unjust enrichment. Nevertheless, a plaintiff may plead in the alternative. See, e.g., *Dreier v. Upjohn Co.*, 196 Conn. 242, 245, 492 A.2d 164 (1985); *Crist v. O'Keefe & Associates*, Superior Court, judicial district of Waterbury, Docket No. CV-03-87651-S (May 1, 2002, *Gallagher, J.*).[5] Furthermore, the

[5] Although Arco correctly argues that the plaintiffs have not properly pleaded unjust enrichment because they have incorporated the allegations of their breach of contract counts in their unjust enrichment count; see, e.g., *O'Malley v. Devito*, Superior Court, judicial district of New Britain, Docket No. CV-09-4019885 (May 7, 2010, *Trombley, J.*); that is an argument for a motion to strike rather than for a motion for class certification.

issue for a motion for class certification is "not whether the . . . plaintiffs have stated a cause of action or will prevail on the merits . . . ." (Internal quotation marks omitted.) *Rodriguez v. Kaiaffa, LLC*, supra, 337 Conn. at 257. Instead, the issue is whether the requirements of the class action rules are met. Id.

In their third amended complaint, the plaintiffs allege that the defendants' conduct benefitted themselves "by allowing them to spend less than what was necessary to ensure the safety and habitability of the apartments." Third amended complaint, ¶ 208. They also allege that Adar further benefitted from the sale of the property. Id. They allege that the defendants' conduct deprived the plaintiffs and the class of the "benefits they were entitled to as residents of the Barbour Gardens complex to their detriment." Id., ¶ 207.

The plaintiffs explain their theory in their supporting memorandum:

> "[D]efendants unjustly benefitted from receiving ongoing rental payments and subsidies generated by Barbour Gardens' continued operation as a project-based, public-housing complex. This entire benefit came 'at the expense of the plaintiff[s],' . . . whose physical presence defendants exploited. . . . While not giving the proposed class members the benefit of their bargain, defendants lined their pockets with ill-gotten gains."

(Emphasis omitted; citation omitted.) Plaintiffs' memorandum no. 367.00, p. 31.

If the plaintiffs were to prevail on their unjust enrichment claim, their remedy would be restitution. See, e.g., *Walpole Woodworkers, Inc. v. Manning*, 307 Conn. 582, 588, 57 A.3d 730 (2012). In paragraph 209, the plaintiffs allege that "[p]laintiffs are entitled in equity to restitution and disgorgement as a result of the defendants' unjust enrichment," and in paragraph 39, they seek an order "to compel the defendants to disgorge the amounts they obtained from their unjust enrichment from taxpayer funds." However, they do not actually seek this in their prayer for relief, which instead seeks common law compensatory damages.

Compensatory damages are not the same as restitution:

> "Damages are intended to provide a victim with monetary compensation for an injury to his person, property or reputation; . . . whereas restitution aims to deprive a defendant of unjustly obtained benefits. . . . The restitution claim stands in flat contrast to the damages action. . . . The damages recovery is to compensate the plaintiff, and it pays him . . . for his losses. The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep."

(Citations omitted; internal quotation marks omitted.) *New Hartford v. Connecticut Resources Recovery Authority*, 291 Conn. 433, 460, 970 A.2d 592 (2009).

Setting aside the inconsistency between the third amended complaint and the plaintiffs' supporting memorandum as to what that benefit was, the plaintiffs could use generalized proof to establish how much money Adar received in HUD subsidies and any additional rental payments made by the class members, how much Adar received for the sale of the property, how much Adar saved by not spending on maintenance, and how much money Arco received under the management agreement. However, the amount that these benefits should be reduced because they were unjust, and the other two elements – that the defendants unjustly did not provide the services for those benefits and that the failure to provide those services was to the plaintiffs' detriment – cannot be entirely established with generalized proof if the claim includes the individual units. At most, only the failure to maintain the common areas could be established by class-wide evidence. Compare *Mahon v. Chicago Title Ins. Co.*, 296 F.R.D. 63, 77 (D. Conn. 2013) (finding predominance for an unjust enrichment claim where the defendant received from each plaintiff inflated title insurance premiums that were prohibited by statute) with *Agrella v. Ford Motor Co.*, Superior Court, judicial district of Waterbury, Docket No. CV-02-0184712-S (May 18, 2006, *Sheedy, J.*) (holding that there was no predominance for unjust enrichment claim by purchasers of Ford Explorers who claimed defects because the claim was too fact-intensive).

Cases that have considered whether classes of tenants may be certified on unjust enrichment claims have held that individual questions predominate over general questions. In *Riley v. PK*

Management, LLC, supra, United States District Court, Docket No. 18-2337-KHV, HUD Section 8 tenants sought class certification on claims for breach of contract and unjust enrichment. Like the plaintiffs here, they complained of mold, water leaks and various infestations. Id. The court found that for each class member, the court would have to inquire into a number of facts and circumstances. Id. As noted above, however, the court suggested that if the class was narrowed to a claim about the common areas, the common issues might predominate.

Another federal court did not even reach the issue of predominance. In *Cox v. Stone Ridge at Vinings, LLC*, United States District Court, Docket No. 1:12-CV-2633-AT (N.D. Ga. September 30, 2014) (2014 WL 12663763), the court held that the proposed class failed the commonality and typicality requirements even though there was "a disturbing pattern of serious mold, water leakage, and maintenance issues" in a "host of residents' units." Id. The court denied class certification because the evidence and allegations were "insufficient as a matter of law to establish that these apartment conditions are both the result of a common systematic source and also similarly impact members of the putative plaintiff class." Id. The discussion in that case focused on conditions in individual apartments.

The issues that are common to the proposed class only predominate if the unjust enrichment claim is based upon the payments received, the services not provided, and the detriment suffered by the class members that were attributable to the common areas of Barbour Gardens.

4. Violation of CUTPA

The ninth count purports to allege a private cause of action under CUTPA, which states that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." General Statutes § 42-110b (a). CUTPA specifically

authorizes class actions, General Statutes §§ 42-110g (b) and 42-110h; but, like the common law claims discussed above, certification of such a class is subject to the Practice Book rules, including predominance.

A private cause of action for a CUTPA violation requires that the plaintiffs plead and prove that there has been (1) an unfair method of competition or unfair or deceptive act or practice, (2) committed by the defendants in the conduct of trade or commerce, (3) that causes the plaintiffs to sustain an ascertainable loss. General Statutes §§ 42-110b (a) and 42-110g (a). The plaintiffs' allegations are not helpful here as they do not explicitly allege these elements except the conclusory statement that the "[d]efendants knew or should have known that their conduct constituted unfair or deceptive practices." Third amended complaint, ¶ 211. The plaintiffs do, however, incorporate the previous paragraphs of the complaint, and the court will read those broadly.

To determine whether an act or practice is "unfair," this court must apply the so-called cigarette rule criteria: "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise – whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers[, competitors or other businessmen]." (Internal quotation marks omitted.) *Conaway v. Prestia*, 191 Conn. 484, 492-93, 464 A.2d 847 (1983) (quoting *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)). "All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three . . . ." (Internal quotation marks omitted.) *Ulbrich v. Groth*, 310 Conn. 375, 409, 78 A.3d 76

(2013).[6] In *Conaway v. Prestia*, our Supreme Court held that the defendant landlords' receipt of rents from the class of plaintiff tenants while violating statutes that required the landlords to obtain certificates of occupancy "unquestionably offended public policy." *Conaway v. Prestia*, supra, 191 Conn. at 493. At least as to the first two prongs of the cigarette rule, the plaintiffs should be able to use class-wide evidence.

"Trade and commerce" is defined as "the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value in this state." General Statutes § 42-110a (4). The issue or whether Adar and Arco's actions occurred in trade or commerce can be established by generalized proof.

The defendants do not challenge the notion that the elements of an unfair trade practice and trade or commerce may be established by generalized proof. Instead, they focus on the requirement that any unfair trade practice caused each proposed class member to suffer an ascertainable loss.

Although the statute does not define "ascertainable loss," our Supreme Court has defined it as "a loss that is capable of being discovered, observed or established. . . . The term 'loss' necessarily encompasses a broader meaning than the term 'damage,' and 'has been held [to be] synonymous with deprivation, detriment and injury." (Internal quotation marks omitted.) *Fairchild Heights Residential Assn., Inc. v. Fairchild Heights, Inc.*, 310 Conn. 797, 822-23, 82 A.3d 602 (2014). "To establish an ascertainable loss, a plaintiff is not required to prove actual damages of a specific dollar amount. . . .

[6] Although the plaintiffs allege that the practices are unfair or deceptive, the court does not construe the third amended complaint as alleging deceptive acts. To be deceptive under CUTPA, an act or practice must meet three requirements: (1) "a representation, omission, or other practice likely to mislead consumers"; (2) the consumer "interpret[s] the message reasonably under the circumstances"; and (3) "the misleading representation, omission, or practice [is] material—that is, likely to affect consumer decisions or conduct." *Smithfield Associates, LLC v. Tolland Bank*, 86 Conn. App. 14, 28, 860 A.2d 738 (2004), cert. denied, 273 Conn. 901, 867 A.2d 839 (2005). The court will restrict its class certification analysis to the claim that there was an unfair trade practice.

[A] loss is ascertainable if it is measurable even though the precise amount of the loss is not known." (Internal quotation marks omitted.) Id. at 823.

"The ascertainable loss requirement . . . is a threshold barrier which limits the class of persons who may bring a CUTPA action . . . ." (Internal quotation marks omitted.) *Marinos v. Poirot*, 308 Conn. 706, 713, 66 A.3d 860 (2013). This is because the portion of the CUTPA statute that creates a private cause of action states that "[a]ny person who suffers an ascertainable loss of money or property, real or personal, *as a result of* the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action . . . to recover actual damages." (Emphasis added.) General Statutes § 42-110g (a). Our Supreme Court has interpreted this statutory language to mean that if an unfair trade practice "directly and proximately caused" a person to suffer an ascertainable loss, that person has standing to bring a CUTPA claim. See, e.g., *Soto v. Bushmaster Firearms International, LLC*, 331 Conn. 53, 94, 202 A.3d 262 (2019). Because standing is essential for subject matter jurisdiction, the plaintiffs must establish that any unfair trade practice directly and proximately caused each class member to suffer an ascertainable loss. The question before the court is whether this can be done by generalized evidence or if it requires individualized proof.

Two themes emerge from our Supreme Court's decisions that have considered what proof is necessary to establish that an unfair trade practice caused an ascertainable loss. First, the more individualized the impact of an alleged unfair trade practice on prospective class members, the more likely it is to require individualized evidence. Second, the language "as a result of" in § 42-110g (a) applies not only to ascertainable loss but to the recovery of actual damages. Based on this statutory language, the Supreme Court has held that individualized proof is more necessary when plaintiffs are seeking compensatory damages, rather than class-wide relief.

The Supreme Court did a predominance analysis of the element of an ascertainable loss resulting from an unfair trade practice in *Artie's Auto Body, Inc. v. Harford Fire Ins. Co.*, 287 Conn. 208, 947 A.2d 320 (2008). In that case, individual auto body shops and an association of auto body shops brought a class action against an insurer, claiming that the insurer established an artificially low hourly rate for reimbursement to auto shops that were not in the insurer's network of preferred shops. Id. at 211. The defendant argued, as do the defendants here, that causation and ascertainable loss may be proven only by examining individualized evidence. Id. at 219. The Supreme Court rejected that argument, holding that the plaintiff class had sufficient evidence from the defendant to establish that the labor rates were a substantial factor in steering insureds to the preferred shops. Id. at 225.

The Supreme Court went on to distinguish its earlier decision heavily relied upon by Adar here – *Collins II*, supra, 275 Conn. 309. In *Collins II*, the plaintiffs were orthopedic surgeons suing an insurer of their patients for various business practices that the plaintiffs alleged violated CUTPA. The Supreme Court held that individualized proof would be necessary to establish that unfair trade practices caused the doctors to suffer an ascertainable loss. Id. at 336. In *Artie's Auto Body, Inc. v. Harford Fire Ins. Co.*, supra, 287 Conn. at 229, the court said that *Collins II* was distinguishable because the relationship between the insurer and the individual class members in *Artie's Auto Body, Inc.* was "not complicated by numerous distinctions among class members that require individualized proof, such as the particular services that class members provide," which was the case in *Collins II*.[7] The relative uniformity of how the alleged unfair trade practice affected the *Artie's Auto Body, Inc.* plaintiffs made it easier for them to use generalized proof that each class member suffered an ascertainable loss as a result of an unfair trade practice.

[7] See discussion of *Collins II*, supra, 275 Conn. 309 at pp. 18-19.

Key to the *Collins II* decision, which was discussed above in the breach of lease section, was that "the issues requiring individualized proof do not relate merely to the *amount* of damages that each class member has suffered, but also to the defendant's *liability* to each class member with respect to all four causes of action." (Emphasis in original.) *Collins II*, supra, 275 Conn. at 336. The court elaborated on the liability issues: "the injury and causation elements alone are so extensive that they substantially outweigh any efficiencies that might be achieved by adjudicating common issues of law or fact in a class action." Id. For example, as to the CUTPA claim that was based on the defendant's alleged profiling practice, the *Collins II* court held that individualized proof, not generalized proof, would be necessary to show that a class member was threatened by the profiling policy and that because of that threat, the class member suffered an ascertainable loss. Id. at 344-45. The court pointed out that whether or not an individual feels threatened by the profiling policy cannot be established on a representative basis using generalized proof. Id. at 345.

Adar also brings to the court's attention the Appellate Court's decision in *Ahmad v. Yale-New Haven Hospital, Inc.*, 104 Conn. App. 380, 933 A.2d 1208 (2007). In both *Collins II* and *Ahmad*, the plaintiffs argued that the predominance requirement was met because the defendants had a systemic policy. On appeal, the courts held that a systemic policy was not sufficient for predominance where the plaintiffs needed to prove causation and injury for each class member. *Collins II*, supra, 275 Conn. at 342; *Ahmad v. Yale-New Haven Hospital, Inc.*, supra, 104 Conn. App. at 390. In *Ahmad*, the Appellate Court affirmed a trial court denial of class certification on the grounds that common issues did not predominate, including on the CUTPA claim. It noted that the trial court found that the plaintiffs would have to put on individualized evidence that "they were eligible for free care funds and would have applied and received funds had notice of their availability been provided by the defendants;" and "each plaintiff was uninsured as defined by the collecting at cost statute and that they

each paid more than cost on the basis of the relevant cost to charge ratio in effect at the time they were treated." Id. at 390. The trial court also found that each prospective class member would be subjected to different affirmative defenses. Id.

The second theme in the Supreme Court caselaw is that CUTPA plaintiffs seeking actual damages must do so with individualized proof. When they are not seeking actual damages, it is much more likely that the court will find that individualized proof is not necessary to establish that the unfair trade practice resulted in an ascertainable loss.

Before conducting its predominance analysis in *Artie's Auto Body, Inc. v. Harford Fire Ins. Co.*, supra, 287 Conn. 208, the court distinguished between those situations where the plaintiffs are seeking money damages and those situations where the plaintiffs are seeking equitable relief. Id. at 218-19. "When plaintiffs seek money damages, the language 'as a result of' in § 42-110g (a) requires a showing that the prohibited act was the proximate cause of a harm to the plaintiff . . . ." (Internal quotation marks omitted.) Id. at 218. On the other hand, "[w]hen plaintiffs seek only equitable relief, ascertainable loss and causation may be proven by establishing, through a reasonable inference, or otherwise, that the defendant's unfair trade practice has caused the plaintiff [injury]." (Internal quotation marks omitted.) Id. at 218-19.

This contrast is apparent in *Conaway v. Prestia*, supra, 191 Conn. 484. In that housing case, our Supreme Court held that the class of plaintiff tenants had satisfied the "threshold requirement" of ascertainable loss by proving that the defendants had received the plaintiffs' rent payments. Id. at 494. However, that court reversed and remanded the trial court's award of "actual damages," and held that the plaintiffs "must present sufficient evidence to enable the trier to ascertain with reasonable certainty the diminution of the rental value occasioned by the defendants' wrongful conduct." (Footnote omitted.) Id. at 495. The court went on to say that that trial would be limited "solely to the issue of

damages as to each member of the plaintiff class," implying that this would require individualized evidence. Id.

In *Fairchild Heights Residential Assn., Inc. v. Fairchild Heights, Inc.*, supra, 310 Conn. 797, an association of forty-five mobile home owners alleged violations of CUTPA based on the defendant's failure to comply with statutory maintenance requirements. Id. at 801. Although this was not a class action lawsuit, the court focused on the third prong of the test for associational standing, which requires that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit . . . ." (Internal quotation marks omitted.) Id. at 821. The analysis of whether individual class members had to participate in the lawsuit is similar to this analysis of whether an ascertainable loss requires individualized proof.

The Supreme Court began by recognizing that "each class member claiming entitlement to relief under CUTPA has suffered an ascertainable loss of money or property as a result of the defendant's acts or practices." (Internal quotation marks omitted.) *Fairchild Heights Residential Assn., Inc. v. Fairchild Heights, Inc.*, supra, 310 Conn. at 822. It held that the form of relief requested could determine whether individualized proof was necessary. Id. at 823-24. In the case before it, the plaintiffs were seeking prospective relief in the form of an injunction, which would "inure to the benefit of all injured association members and thus would not indispensably require the testimony of each individual member." Id. at 824-25. The court went on to hold that an award of punitive damages, attorneys' fees and costs also would not require individualized proof. Id. at 825. By contrast, if the plaintiff association had been seeking "actual damages" under CUTPA, "proof relating solely to the variant experiences of each member" would have been necessary.[8] Id. at 824.

[8] The Supreme Court noted that monetary damages under CUTPA must be proved with "reasonable certainty." *Fairchild Heights Residential Assn., Inc. v. Fairchild Heights, Inc.*, supra, 310 Conn. at 826 n.7.

The Supreme Court concluded that "the individual members' participation was unnecessary to establish ascertainable loss." *Fairchild Heights Residential Assn., Inc. v. Fairchild Heights, Inc.*, supra, 310 Conn. at 827. It explained:

> "[T]he allegations that the association's members were not receiving the benefits to which they were entitled as tenants and for which they made monthly rental payments are sufficient under this standard because the alleged violations were such that they affected the mobile home park as a whole, and, therefore, all of the association members received something less than what they bargained for. We therefore conclude that the association did not require the participation of all its individual members to allege ascertainable loss for the purpose of obtaining injunctive and other equitable relief under CUTPA."

Id. at 829.

In this case, although the plaintiffs have made a demand for compensatory damages pursuant to General Statutes § 42-110g (a) in their prayer for relief, they withdrew that demand at oral argument on this motion. Instead, they are only pursuing punitive damages and attorneys' fees on their CUTPA claim. They are not seeking any injunctive or declaratory relief. If their class claim is restricted to injury to the common areas of Barbour Gardens and does not include injury to individual apartments, the liability issues should be more susceptible to the generalized proof at issue in *Artie's Auto Body, Inc. v. Hartford Fire Ins. Co.*, supra, 287 Conn. 208, *Fairchild Heights Residential Assn., Inc. v. Fairchild Heights, Inc.*, supra, 310 Conn. 797, and *Conaway v. Prestia*, supra, 191 Conn. 484, rather than the individualized proof at issue in *Collins II*, 275 Conn. 309 and *Ahmad v. Yale-New Haven Hospital, Inc.*, supra, 104 Conn. App. 380. Therefore, the court finds that the common issues predominate over the individual issues for a CUTPA claim based on the condition of the common areas that does not seek compensatory damages.

IV. Superiority

The second requirement of Practice Book § 9-8 (3) is superiority, which requires that a class action be "superior to other available methods for the fair and efficient adjudication of the

controversy." Our Supreme Court often has referred to the superiority requirement as "intertwined" and "overlapping" with the predominance requirement. See, e.g., *Collier v. Adar Hartford Realty, LLC*, supra, 349 Conn. at 836-37. Indeed, the Supreme Court did not conduct a separate analysis of superiority when it decided the appeal in this case. Id. It did state that "the fundamental purpose of the superiority requirement is to ensure that a class action is the most 'fair and efficient' means of resolving the case." Id. at 836. In an earlier decision, our Supreme Court recognized that class actions can "(1) promote judicial economy and efficiency; (2) protect defendants from inconsistent obligations; (3) protect the interests of absentee parties; and (4) provide access to judicial relief for small claimants." *Grimes v. Housing Authority*, 242 Conn. 236, 244, 698 A.2d 302 (1997).

Practice Book § 9-8 (3) lists the following factors to consider when analyzing superiority: "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."[9] These factors are similar to the factors in rule 26 (b) (3) of the Federal Rules of Civil Procedure, which have been held to be non-exhaustive. *Anchem Products, Inc. v. Windsor*, 521 U.S. 591, 615-16, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

This court agrees with the prior findings by the court (Noble, J.) that the first three factors all favor certifying the class. See order no. 353.86, p. 2. As for the fourth factor, Judge Noble previously found that, because individual issues predominated, there would be difficulties in managing this case as a class action. Because this court has found that a more limited class than that considered by Judge Noble meets the predominance requirement, it is appropriate to reconsider this factor because this

[9] The factors also may be used to determine predominance, but as a practical matter they typically have been used by courts to determine superiority. 2 W. Rubenstein, Newberg and Rubenstein on Class Actions (6th Ed. 2023) § 4:68.

more limited class action likely would have far fewer difficulties to manage. The class this court is prepared to certify has a much shorter time period (starting is 2015 rather than 2004), only involves four causes of action as opposed to nine causes of action, restricts those causes of action to claims arising out of the condition of the common areas, and only addresses liability, and if liability on CUTPA is found, punitive damages and attorneys' fees on that claim, and if liability on the unjust enrichment is found, restitution on that claim.

The court will consider alternatives to a class action to determine whether there is a better way to manage this litigation. Arco proposes consolidation. Practice Book § 9-5 provides that "whenever there are two or more separate actions which should be tried together, the judicial authority may . . . order that the actions be consolidated for trial." If each class member brought its own separate claim, the court could consolidate them for trial and effectively only try the issues described above for the proposed class one time, just as in the class action scenario. However, the consolidation approach would not be superior to a class action because it would require each class member to file his or her own suit, and it would require both sides to engage in additional discovery and motion practice in each of those separate suits. Therefore, consolidation for trial would not improve judicial efficiency and likely would result in many would-be class members not filing suit. For similar reasons, the "test case" approach and the use of joinder would not be superior. Certifying a class would be the best approach to managing this litigation.

Based on this analysis of the four factors and the court's findings as to predominance, the court finds that class certification would be superior.

CONCLUSION

The motion for class certification is granted as to the following class: "all persons who lived at Barbour Gardens any time between January 1, 2015 and the date on which the last tenant(s) evacuated Barbour Gardens in 2019" as to the liability only on the following causes of action: breach of lease, breach of management agreement, unjust enrichment and violation of CUTPA based on alleged failures to maintain common areas of Barbour Gardens. If the class prevails on its unjust enrichment claim, the class also is certified as to any total amount of restitution. If the class prevails on liability on its CUTPA claim, the class also is certified as to any classwide award of punitive damages or attorneys' fees.

BY THE COURT,

/s/ #438580

Hon. Elizabeth J. Stewart