SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

Maoli Soriano and Shealean Smith, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

- against -

Index No. 450315/2021

New York State Office of Temporary and Disability Assistance; Michael P. Hein, as Commissioner of the New York State Office of Temporary and Disability Assistance,

Defendants.

----------X

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Government Data

Plaintiffs Maoli Soriano and Shealean Smith, by and through their undersigned attorneys, respectfully submit this reply memorandum of law in further support of their motion for certification of a proposed class consisting of all individuals residing in New York City who are eligible to receive FHEPS[1] benefits but for the fact that their landlords have not sued them for eviction for failure to pay rent (the "Class").

PRELIMINARY STATEMENT

Defendants' enforcement of the Lawsuit Requirement during the COVID-19 pandemic has unlawfully barred thousands of New York City families from receiving rental assistance they desperately need. Without class-wide relief at this stage of the litigation, those families will suffer imminent, irreparable harm, as set forth in Plaintiffs' briefs in support of their motion for a preliminary injunction. To prevent that result, the Court should certify the Class.

Defendants' arguments against Class certification are meritless. The fact that Plaintiffs filed this motion prior to Defendants serving their Answer—in order to obtain relief before the Class suffered imminent harm—does not strip the Court of its ability to decide the motion. The Court is empowered to either disregard that minor procedural irregularity or defer decision on this motion until April 1, 2021, when Defendants' Answer is due.

Contrary to Defendants' contentions, the Class plainly satisfies the numerosity requirement for certification, which requires only 40 or more class members. Here, the number of individuals residing in New York City who have begun receiving cash assistance since the beginning of the pandemic is more than 46,000, a significant percentage of which would be eligible for FHEPS relief but for the Lawsuit Requirement. Defendants argue that there are

1. Capitalized terms and abbreviations not defined herein have the meaning ascribed to them in Plaintiffs' opening memorandum of law in support of its motion for class certification and a preliminary injunction.

likely no remaining Class members given that Defendants have now issued a temporary waiver of the Lawsuit Requirement until May 1, 2021 or the end of any further eviction moratorium based on the COVID-19 Emergency Eviction and Foreclosure Prevention Act (the "Limited Waiver"). However, the Limited Waiver is set to expire in a matter of weeks and does not grant full relief to the Class. Accordingly, there will be many Class members who will continue to be ineligible for FHEPS as a result of Defendants' unlawful enforcement of the Lawsuit Requirement.

Defendants also argue that the predominant legal and factual issues in the case are not common to all Class members. That is incorrect. The minor factual differences between Class members that Defendants identify have no bearing on the claims in this case or on the predominant legal question in this action: whether Defendants' enforcement of the Lawsuit Requirement during the COVID-19 pandemic complies with their statutory and constitutional obligations. The claims of all Class members, including Plaintiffs, arise out of the same course of conduct by Defendants and are based on the same legal theory. Thus, the key issues are common to the Class, and Plaintiffs' claims are typical of the claims of the Class. Plaintiffs' reply affidavits make clear that they understand the legal issues in this case, are committed to pursuing this litigation, and will adequately represent the Class.

Finally, Defendants argue that, pursuant to the "governmental operations rule," this dispute should not be heard as a class action, but as a series of multiple, identical Article 78 proceedings. That argument ignores the fact that the governmental operations rule does not apply where, as here, (i) Class members are indigent individuals who do not have the resources to pursue individual actions, and (ii) it would be inefficient and impose an unreasonable burden on the parties and the Court to require each Class member to pursue their claim individually,

particularly as the core legal question in this case is identical across all Class members. A class action for declaratory judgment is the superior method for adjudicating this dispute, and the Class should be certified.

ARGUMENT

I. THE COURT MAY RULE ON CLASS CERTIFICATION.

Defendants argue that the Court may not rule on Plaintiffs' request to certify the Class because Plaintiffs made their motion for class certification prior to service of Defendants' answer. Given the exigencies in this matter, Plaintiffs moved for class certification and preliminary injunctive relief as soon as possible after they served the Summons and Complaint in order to ensure that such relief would be available to the entire Class in this action and not only to the named Plaintiffs. In any event, the Court may disregard the irregularity in the timing of Plaintiffs' motion. *See David B. Lee & Co. v. Ryan*, 266 A.D.2d 811, 812 (4th Dep't 1999) (a court may "disregard[ ] the irregularity [of a class certification motion filed before a defendant's answer is due] . . . and afford[ ] defendants the opportunity to oppose"). Alternatively, the Court may reserve its decision on class certification until after Defendants serve their answer on April 1, 2021. *See Dabrowski v. ABAX Inc.*, 64 A.D.3d 426, 427 (1st Dep't 2009) (holding that trial court properly reserved resolution of class certification issue "until after the answer ha[d] been served"). In either event, the mere fact that Plaintiffs filed this motion in the short period before the filing of Defendants' answer does not impact the Court's ability to decide the motion and grant preliminary injunctive relief to the entire Class.

II. THE PROPOSED CLASS MEETS THE NUMEROSITY REQUIREMENT.

The proposed Class in this action consists of all individuals residing in New York City who are eligible to receive FHEPS benefits but for the fact that their landlords have not sued them for eviction for failure to pay rent. There is no legitimate question that the Class satisfies

the numerosity requirement, which is "presumed at a level of 40 [class] members." *Borden v. 400 E. 55th St. Assoc., L.P.*, 24 N.Y.3d 382, 399 (2014). The number of New York City residents who receive cash assistance has increased by more than 46,000 since the beginning of the pandemic in March 2020. *Compare March 2020 HRA Monthly Fact Sheet*, NYC Human Resources Administration, https://www1.nyc.gov/assets/hra/downloads/pdf/facts/hra_facts/2020/hra_facts_2020_03.pdf *with January 2021 HRA Monthly Fact Sheet*, NYC Human Resources Administration, https://www1.nyc.gov/assets/hra/downloads/pdf/facts/hra_facts/2021/hra_facts_2021_01.pdf. The numerosity requirement would be established if even a tiny fraction of those 46,000 individuals met the Class definition; in reality, given that FHEPS is open to all families with minor children who are receiving cash assistance, have rents below the maximum threshold established in the program, and cannot pay those rents, the number of individuals who would be eligible for FHEPS but for their inability to satisfy the Lawsuit Requirement is likely to be in the thousands. The fact that Plaintiffs cannot establish the exact number of Class members is immaterial. *See, e.g.*, *Smith v. Berlin*, 43 Misc.3d 1209(A), 2013 WL 8210836, at *8 (Sup. Ct. Aug. 14, 2013) (finding that petitioners established numerosity based on figures from New York City's Human Resources Administration and noting that "at this early stage of the litigation petitioners need not show the exact number of class members").

Defendants argue that, as a result of the Limited Waiver, there may no longer be any individuals who meet the Class definition. Def. Mem. at 4. As discussed in Plaintiffs' accompanying reply brief in further support of their motion for a preliminary injunction, Defendants' Limited Waiver, which will be in effect for only another five weeks, does not moot the ultimate issue in this case or deal with the exigencies facing the Class members. Pl. Prelim. Inj. Reply Br. at 3-9. There are serious questions as to whether any significant proportion of the

Class will learn of the Limited Waiver and be able to file for FHEPS before the Limited Waiver expires. *Id*. at 6. In addition, the Limited Waiver does not provide any relief to Class members whose arrears have accumulated beyond the $9,000 eligibility threshold for FHEPS because of Defendants' enforcement of the Lawsuit Requirement. *Id*. at 3-4. There should be little doubt that, out of a Class of several thousand individuals, well more than 40 will have accumulated arrears over the last year that exceed the $9,000 eligibility threshold or will be unable to file for FHEPS in the short time period available to do so before the Limited Waiver expires.

III. THE PREDOMINANT LEGAL AND FACTUAL ISSUES IN THIS CASE ARE COMMON TO ALL CLASS MEMBERS.

Defendants argue that the predominant legal issue in this case is not common to all Class members because some Class members may be SNA, rather than FA, recipients and therefore not have standing to challenge the adequacy of the FHEPS allowances. Def. Mem. at 5. The fact that Class members receiving SNA benefits may not have standing to make one of the legal arguments at issue in this case does not destroy commonality, as they are aligned with FA recipients with respect to the constitutional challenge to the Lawsuit Requirement. *See Brad H. v. City of New York*, 185 Misc.2d 420, 424 (Sup. Ct. 2000) ("Even though there may be some questions of law or fact which affect some individual members of the class but not others . . . that is not a reason to deny class certification."). Moreover, as Defendants implicitly concede, the legal issues across Class members receiving FA benefits are identical.

The predominant factual issues in this case are also common among proposed Class members. Defendants state, without any basis, that Plaintiffs "cannot establish the essential common facts that all potential Class members would be defendants in an eviction proceeding but for the Lawsuit Requirement and/or the eviction moratorium." Def. Mem. at 5. Proposed Class members would, by definition, be individuals who could not afford their rent and would

therefore be at risk of eviction. Any individuals who could not establish those facts would not be members of the Class.

Defendants also argue that minor factual differences between Class members—such as the amount of rental arrears they owe, their personal health information, and their living, work, and childcare arrangements—destroy commonality. *Id*. They do not. To establish that Defendants' conduct is unlawful, Plaintiffs do not have to show a particular amount of arrears; any particular living, work, or childcare arrangements; or the existence or non-existence of any medical condition. The factual differences that Defendants identify do not change the claims of Class members or the relief to which the proposed Class is entitled. *See DeLuca v. Tonawanda Coke Corp.*, 134 A.D.3d 1534, 1536 (4th Dep't 2015) (individual differences between Class members did not defeat commonality where "the important legal or factual issues involving liability [were] common to the class"); *City of New York v. Maul*, 59 A.D.3d 187, 189 (1st Dep't 2009). Accordingly, Plaintiffs satisfy the commonality requirement.

IV. THE CLAIMS OF THE CLASS REPRESENTATIVES ARE TYPICAL OF THE CLAIMS OF THE CLASS.

As discussed above, the Limited Waiver does not provide Plaintiffs with the full relief they seek or moot their claims in this action because Plaintiffs are now ineligible for FHEPS because they have accrued arrears in excess of $9,000 during the time Defendants insisted on enforcement of the Lawsuit Requirement. Thus, their claims remain the same and are typical of the claims of the Class.

Defendants argue that Plaintiffs have not established that their claims are typical of the claims of the Class because they have not identified the amount of their rental arrears and because they allege individual health characteristics, and living, work, and childcare arrangements. Def. Mem. at 7. Defendants do not explain, however, how any of these issues

purportedly affect the typicality of Plaintiffs' claims. As noted above, they do not. Plaintiffs' claims arise "out of the same course of conduct [by Defendants] and are based on the same theories as the other class members," and are therefore typical of the claims of the Class. *Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 201 (1st Dep't 1998).

V. THE NAMED PLAINTIFFS WILL ADEQUATELY REPRESENT THE CLASS.

As set out in Plaintiffs' reply affidavits, Plaintiffs understand the issues in this case, are committed to pursuing their claims, and are able to meaningfully participate in this litigation. Soriano Reply Aff. ¶¶ 4-6; Smith Reply Aff. ¶¶ 4-6. Thus, Plaintiffs have established that they will adequately represent the Class.

VI. CLASS ADJUDICATION OF PLAINTIFFS' CLAIMS IS SUPERIOR TO REQUIRING INDIVIDUAL ACTIONS BY MULTIPLE, INDIGENT PLAINTIFFS.

Defendants argue that this class action should not be certified because an Article 78 proceeding would be a superior method of adjudication. That is not correct. "[W]here, as here, plaintiffs have sued on behalf of a class of persons and challenge an administrative determination impacting upon the entire class, a declaratory judgment action is a proper procedural device." *Conrad v. Regan*, 155 A.D.2d 931, 932 (4th Dep't 1989); *see also Allen v. Blum*, 58 N.Y.2d 954, 956 (1983) ("[B]ecause the action seeks review of a continuing policy, a declaratory judgment class action rather than individual article 78 proceedings is proper."). It would be grossly inefficient and unnecessarily burden the Court and the parties for each individual Class member to pursue their claim individually, particularly where those individual cases could result in inconsistent judgments.

Defendants rely on the "governmental operations rule" to argue that a class action is inappropriate here because any relief awarded to the named Plaintiffs would adequately protect similarly situated persons under the principle of *stare decisis*. Def. Mem. at 8-9. Defendants

overlook the fact that courts do not apply the governmental operations rule where the proposed Class members are indigent individuals "for whom the commencement of individual actions . . . would be oppressively burdensome" or where it would be "impracticable and inefficient for each individual who has been adversely affected by [the government's action] . . . to institute litigation in order to obtain reimbursement." *Tindell v. Koch*, 164 A.D.2d 689, 695 (1st Dep't 1991); *Seittelman v. Sabol*, 158 Misc.2d 498, 512 (Sup. Ct. 1993). Here, all Class members are, by definition, indigent individuals for whom a requirement that they could not access FHEPS benefits without pursuing an individual claim based on Defendants' across-the-board enforcement of the Lawsuit Requirement would be oppressively burdensome, impractical, and inefficient, not to mention that any such relief would likely come too late for those Class members to avoid eviction from their homes. Accordingly, the governmental operations rule does not apply.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court certify the proposed Class.

Dated: New York, New York
March 23, 2021

HUGHES HUBBARD & REED LLP

By: /s/ Fara Tabatabai
Fara Tabatabai
Brittany R. Cohen
One Battery Park Plaza
New York, NY 10004
Tel: (212) 837-6000
fara.tabatabai@hugheshubbard.com
brittany.cohen@hugheshubbard.com

THE LEGAL AID SOCIETY

Lilia I. Toson
Supervising Attorney, Civil Law Reform

Susan C. Bahn
Amber Marshall
Kat Meyers
Brooke Drew
Sharone Miodovsky
Staff Attorneys

199 Water Street, 3rd Floor
New York, NY 10038
Tel: (646) 952-1792
LToson@legal-aid.org

Attorneys for Plaintiffs

CERTIFICATION OF WORD COUNT

Pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court, I hereby certify that the foregoing memorandum of law contains 2,374 words, exclusive of the caption, table of contents, table of authorities, and signature block, and therefore complies with the word count limit under Rule 202.8-b.

/s/ Fara Tabatabai
Fara Tabatabai