UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALECHEA TONEY-DICK, individually and on behalf of all others similarly situated, et al., Plaintiffs, -v- ROBERT DOAR, in his official capacity as Commissioner of the New York City Human Resources Administration, et al., Defendants.	12 Civ. 9162 (KBF) MEMORANDUM DECISION & ORDER

KATHERINE B. FORREST, District Judge:

This action involves the Disaster Supplemental Nutrition Assistance Program ("D-SNAP") that was implemented in New York City following Hurricane Sandy ("the Sandy D-SNAP Program"). Plaintiffs Alechea Toney-Dick ("Toney-Dick"), X.T., Renee Moore ("Moore"), and Sherry Hanan ("Hanan"), individually and on behalf of all others similarly situated (collectively, "Plaintiffs"), allege that Defendants Robert Doar, in his official capacity as Commissioner of the New York City Human Resources Administration ("HRA") and HRA (together, "the City Defendants"), Kristin M. Proud, in her official capacity as Acting Commissioner of the New York State Office of Temporary and Disability Assistance ("OTDA") and OTDA (together, "the State Defendants"), and Tom Vilsack, in his official capacity as Secretary of the United States Department of Agriculture ("USDA") and USDA (together, "the Federal Defendants"), designed, approved, implemented, and

administered the Sandy D-SNAP Program in a discriminatory manner, violating local, state, and federal law. (See Compl.[1] ¶ 2.)

Specifically, Plaintiffs allege that all of the Defendants violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 794, et seq., that the City and State Defendants violated the Americans with Disabilities Act, 42 U.S.C. §§ 12131, et seq. and the Food Stamp Act, 7 U.S.C. § 2020 and its implementing regulations, and that the City Defendants violated the New York State Human Rights Law § 296-2(a), the New York State Social Services Law § 331, 18 N.Y.C.R.R. § 303.1(a)-(b), and the New York City Human Rights Law. (See id. ¶ 64.)

On May 13, 2013, Plaintiffs brought a Motion for Class Certification, pursuant to Federal Rule of Civil Procedure 23(a) and Rules 23(b)(2) and 23(b)(1)(A). (See Pls.' Mem.[2] at 3.) After carefully considering the parties' arguments, the Court hereby GRANTS Plaintiffs' Motion for Class Certification, with certain changes to the proposed class as discussed below.[3]

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[1] Citations to "Compl." refer to the Second Amended Complaint, filed on March 29, 2013.

[2] Citations to "Pls.' Mem." refer to Plaintiffs' Memorandum of Law in Support of their Motion for Class Certification, filed on May 13, 2013.

[3] Class certification "may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1); see also In re Bank of Am. Corp. Secs., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig., 281 F.R.D. 134, 138 (S.D.N.Y. 2012) (explaining that the Court has discretion regarding class certification and that it may alter or modify a class as it sees fit) (citation omitted). The Court may reassess the propriety of this certification as the factual record is developed. See Boucher v. Syracuse Univ., 164 F.3d 113, 118 (2d Cir. 1999) (citations omitted). The parties may request leave to file a Motion to Modify or to Decertify the Class at any time.

FACTUAL BACKGROUND

I. D-SNAP

D-SNAP is a federal public benefits program designed to provide temporary food assistance benefits to individuals affected by disasters. (Compl. ¶ 3.) D-SNAP benefits are provided as a one-time SNAP/Food Stamp award that is intended to assist eligible individuals pay for one month's supply of food.[4] (Id.) Pursuant to the USDA guidelines, state agencies design their own general D-SNAP plans and must update them annually. (See Stephens Decl.,[5] Ex. 7 at 15.) After a disaster, each state determines whether a D-SNAP program is necessary and if so, submits to the USDA a request to operate a D-SNAP program.[6] (Id.) If approved, the USDA provides funding for 100% of disaster benefits and 50% of administrative costs incurred by the state. (Id. at 6.)

II. The Hurricane Sandy D-SNAP Program

On October 30, 2012, President Barack Obama declared New York a major disaster area due to the devastating impact of Hurricane Sandy on many parts of the State. (See Compl. ¶ 53.) Approximately one month later, on November 28, 2012, OTDA submitted a request on behalf of the HRA to the USDA, seeking permission to operate a D-SNAP program for the benefit of individuals living in areas particularly hard-hit by Hurricane Sandy. (Id. ¶¶ 9, 56.)

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[4] D-SNAP benefits are determined by household size. (See Compl. ¶ 4.) For example, an eligible family of three receives $526; an eligible single person receives $200. (Id.)

[5] Citations to "Stephens Decl." refer to the Declaration of Kenneth Stephens filed in Support of Plaintiffs' Motion to Certify Class, filed on May 13, 2013.

[6] The Food and Nutrition Service ("FNS"), a division of the USDA, administers D-SNAP. (See Compl. ¶ 7.)

The USDA approved the State's request and on December 12, 2012, a seven-day application period for the Sandy D-SNAP Program began.[7] (Compl. ¶¶ 14, 55.) The main application site was located in Fort Greene, Brooklyn, and a part-time satellite location was located in Staten Island. (Id. ¶¶ 15, 58.)

In their Complaint, Plaintiffs allege that in planning, advertising for, implementing, and administering the Sandy D-SNAP Program, the City, State, and Federal Defendants failed to provide reasonable accommodations for individuals with disabilities. (Id. ¶¶ 65, 66.) Specifically, Plaintiffs allege that the initial application for the Sandy D-SNAP Program, submitted by the State to the USDA, failed to account for or address the needs of individuals with disabilities. (Id. ¶¶ 16, 85.) Additionally, Plaintiffs allege that Defendants took all of the following actions in designing and implementing the Sandy D-SNAP Program, which resulted in an unlawful failure to provide reasonable accommodations for individuals with disabilities:

- Opened only two application sites, one of which was opened only on a part-time basis and only for four days;[8] (see id. ¶¶ 19, 58)
- Located one application site in Fort Greene, which was allegedly difficult for many individuals eligible to apply (most notably, those with disabilities) to access; (see id. ¶¶ 15, 20, 58, 59, 77, 78, 79, 80, 81)

[7] The application period ran from December 12, 2012 to December 18, 2012. (See Compl. ¶ 14.)

[8] The application site in Staten Island was open on a part-time basis from December 14, 2012 through December 17, 2012. (See Compl. ¶ 58.)

- Created an inflexible application system whereby individuals had to apply either in person or through an authorized representative who needed to "possess extensive and intimate knowledge of the applicant's personal and financial affairs;" (see id. ¶¶ 11, 12, 20, 57, 69, 82, 83, 84, 91)
- Allowed for only a short period of time during which individuals could apply for benefits; (see id. ¶¶ 20, 90, 91)
- Failed to consult with community-based organizations familiar with the needs of individuals with disabilities; and (see id. ¶ 67)
- Failed to conduct sufficient outreach or provide adequate information about the application process to individuals with disabilities. (See id. ¶¶ 20, 88, 89.)

According to Plaintiffs, Defendants had and currently have adequate resources to provide reasonable accommodations, and "[a]s a result of the cumulative effect of Defendants' actions and inactions, many would-be applicants with disabilities have been denied access to much-needed emergency benefits through the [Sandy] D-SNAP [P]rogram to help feed themselves and their families."[9] (Id. ¶¶ 87, 88, 93.) Plaintiffs contend that Defendants' failure to allow individuals with disabilities to retroactively apply for benefits constitutes a continuing violation of the law. (Id. ¶¶ 96-98.) Plaintiffs allege that Defendants'

[9] Plaintiffs argue that OTDA and HRA estimated that there would be up to 30,000 applicants for the Sandy D-SNAP Program, but less than 6,000 households actually applied as of December 18, 2012, the date upon which the application period closed. (See Compl. ¶¶ 38-39.)

failure to provide reasonable accommodations in the general D-SNAP plan constitutes a continuing violation of the law, as well.[10] (Id. ¶ 99.)

III. Requested Relief

Based upon these allegations, Plaintiffs seek class certification, declaratory, injunctive, and possibly compensatory relief; reasonable attorneys' fees and costs; and for the Court to retain jurisdiction over this matter until there is "reasonable assurance" that Defendants will continue to comply with the relief afforded into the future. (Id. ¶¶ 161-68.) With respect to the Motion for Class Certification currently before the Court, Plaintiffs seek certification of the following class, pursuant to Rule 23 of the Federal Rules of Civil Procedure:

> All individuals who (a) have or had a physical or mental impairment that substantially limits one or more major life activities within the meaning of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §[§] 12101, et seq., or have a record of such an impairment; (b) are or were eligible to apply for benefits from a New York City [HRA D-SNAP], including the D-SNAP benefits offered in response to "Superstorm Sandy;" (c) reside or resided in the covered zip codes for an HRA D-SNAP Program; and (d) need or needed reasonable accommodations to enable them to apply for D-SNAP benefits.

(Pls.' Mem. at 2.)

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[10] Specifically, Plaintiffs allege: "Defendants' policies, practices[,] and procedures are likely to create obstacles and barriers for people with disabilities to apply for or benefit from any future D-SNAP program." (See Compl. ¶ 99.)

PROCEDURAL HISTORY

On December 17, 2012, Plaintiff Toney-Dick filed this action, individually and on behalf of all others similarly situated, against the City Defendants. On December 21, 2012, Plaintiffs X.T., Hanan, and Moore filed a related First Amended Complaint. On January 8, 2013, Plaintiffs filed a Motion for Preliminary Injunction and a Motion to Certify the Class, and on January 17, 2013, the City Defendants filed a Motion to Dismiss the First Amended Complaint.

On March 18, 2013, the Court dismissed Plaintiffs' Amended Complaint, with leave to file a Second Amended Complaint. Since there was no valid Complaint at that point, the Court dismissed as moot Plaintiffs' pending Motions for a Preliminary Injunction and for Class Certification.

On March 29, 2013, Plaintiffs filed a Second Amended Complaint (hereafter, "the Complaint"). On May 13, 2013, Plaintiffs filed the Motion for Class Certification currently before this Court. Thereafter, on June 12, 2013, the City Defendants filed an Answer to the Complaint. Also on June 12, 2013, the Federal Defendants filed a Motion to Dismiss. The following day, on June 13, 2013, the State Defendants filed a Motion to Dismiss. On July 12, 2013, the City Defendants filed a Motion for Judgment on the Pleadings.

DISCUSSION

Class certification is governed by Rule 23 of the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 23. To be certified, a proposed class must meet the four prerequisites included in Rule 23(a), and additionally, must meet the

requirements contained in at least one Rule 23(b) subsection. See Wal-Mart Stores, Inc. v. Dukes, – U.S. – , 131 S. Ct. 2541, 2548 (2011).

I. Legal Standards

Pursuant to Rule 23(a), a plaintiff seeking certification first must demonstrate that: (1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. See Fed. R. Civ. P. 23. These requirements are colloquially referred to, respectively, as numerosity, commonality, typicality, and adequacy. The party seeking class certification must demonstrate by a preponderance of the evidence that it has met the elements of Rule 23(a). Novella v. Westchester Cty., 661 F.3d 128, 149 (2d Cir. 2011).

As for Rule 23(b), Plaintiffs allege that they have met the requirements of two independent subsections of Rule 23(b) – Rule 23(b)(2) and Rule 23(b)(1)(A). (See Pls.' Mem. at 3.) Rule 23(b)(2) applies to situations where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "'Rule 23(b)(2) is designed to assist and is most commonly relied upon by litigants seeking institutional reform in the form of injunctive relief.'" Stinson v. City of New York, 282 F.R.D. 360, 379 (S.D.N.Y. 2012) (quoting Marisol A. v. Giuliani, 929 F. Supp. 662, 692 (S.D.N.Y. 1996), aff'd, 126 F.3d 372 (2d Cir. 1997)). Rule 23(b)(2) relief is particularly suitable

in actions involving civil rights. See id. (citing Loper v. New York City Police Dep't, 135 F.R.D. 81, 83 (S.D.N.Y. 1991)). As the Supreme Court explained: "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Wal-Mart Stores, Inc., 131 S. Ct. at 2557 (internal quotation marks and citations omitted).

Rule 23(b)(1)(A) applies when prosecuting separate actions on behalf of each plaintiff by him or herself would create a risk of "inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). "Rule 23(b)(1)(A) 'takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver or owners).'" Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614, 117 S. Ct. 2231 (1997) (quoting Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 388). As such, "'[c]ourts in this Circuit have repeatedly recognized that certification under subsection (b)(1)(A) is limited to claims for equitable relief." Oakley v. Verizon Commc's, Inc., No. 09 Civ. 9175, 2012 WL 335657 (S.D.N.Y. Feb. 1, 2012) (citation omitted).

ANALYSIS

I. Rule 23(a)

a. Numerosity

In this Circuit, "numerosity is presumed at a level of 40 members." Consolidated Rail Corp. v. Town of Hyde Park, 47 F.3d 473, 483 (2d Cir. 1995) (citations omitted). "Plaintiffs need not set forth an exact class size to establish numerostiy." In re Bank of Am. Corp., 281 F.R.D. at 138.

i. Parties' Arguments

Plaintiffs assert that their proposed class achieves the required numerosity because "Defendants' own data reflect that the numerosity element is satisfied." (Pls.' Mem. At 14.) Specifically, Plaintiffs assert that the United States Attorney for this district recently stated:

> New York City contains a sizeable community of individuals with disabilities; although precise numbers are difficult to obtain, according to the City, "it is estimated that there are 889,219 individuals with disabilities, making up 11% of the population . . . . Within Zone A, which was subject to a mandatory evacuation order during Hurricane Sandy, there are at least 118,000 people with disabilities.

(Id.) (citing Statement of Interest of the United States at 2, Brooklyn Ctr. for Independence of the Disabled v. Bloomberg, No. 11 Civ. 6690 (S.D.N.Y. May 10, 2013), ECF No. 151 (citing trial evidence)). Plaintiffs reason that because 30,000 people were expected to apply for the Sandy D-SNAP Program and only 6,000

actually did,[11] a substantial number of individuals with disabilities are members of the class. (See id.)

In response, the City Defendants argue that Plaintiffs sweep too broadly in their estimation of the number of individuals affected by the alleged lack of reasonable accommodations provided by the Sandy D-SNAP Program. (See City Defs.' Mem.[12] at 5-6.) The City Defendants assert that the class is only comprised of those individuals with disabilities who are not in receipt of SNAP,[13] are 250% below the federal poverty line, are so impaired that they could not travel to the D-SNAP site on their own, and do not have someone who could act as an authorized representative. (Id.) The City Defendants further argue that Plaintiffs have failed to meet the numerosity requirement because despite widespread outreach, Plaintiffs have only identified four purported members of the proposed class. (See id. at 5.)[14]

Plaintiffs dispute the City Defendants' arguments by explaining again that approximately 24,000 more applicants were expected to apply for Sandy D-SNAP Program benefits than actually did; assuming that the same percentage of disabled

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[11] While Plaintiffs' Memorandum of Law suggests that 6,000 individuals applied for Sandy D-SNAP Program benefits during the application window (see Pls.' Mem. at 14), Plaintiffs' Complaint states that 6,000 households – rather than individuals – applied during that period. (See Compl. ¶ 39.)

[12] Citations to "City Defs.' Mem." refer to the City Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Certify a Proposed Class, filed on June 12, 2013.

[13] According to the City Defendants, "any individual with a disability in receipt of SSI [Supplemental Security Income] who lives alone is categorically eligible for SNAP . . . ." (City Defs.' Mem. at 6.)

[14] The Court notes that the class action vehicle eliminates the need to join all potential class members as "named plaintiffs." Therefore, whether one, four, or 13 were named, that fact is irrelevant to the instant analysis.

individuals exists in the eligible population as in the City at large, Plaintiffs contend that at least 2,400 potential class members exist. (Pls.' Reply[15] at 3.) Plaintiffs further argue that having only four named Plaintiffs does not defeat numerosity because Rule 23(a) only requires a single class representative. (Id.)

ii. Analysis

While the Court recognizes that data illustrating the precise number of eligible individuals for D-SNAP program benefits may be unavailable, Plaintiffs' extrapolations from the data provided persuades the Court by a preponderance of the evidence that there are at least 40 members of the proposed class. See Novella, 661 at 144 (finding that "the 'numerosity' requirement is satisfied when the class comprises 40 or more members" (quotation marks and citations omitted)). Given the number of individuals living with disabilities in this City and the fact that the Sandy D-SNAP Program covered a number of zip codes,[16] it seems likely that there are at least 40 class members who were eligible to apply for Sandy D-SNAP Program benefits but could not because of Defendants' alleged failure to comply with the law. Moreover, all individuals who are disabled and in need of reasonable accommodations at the time of the next D-SNAP program are encompassed in the class for purposes of the requested injunctive relief, and this group of class members is likely to be comprised of more than 40 individuals.

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[15] Citations to "Pls.' Reply" refer to Plaintiffs' Reply Memorandum of Law in Support of Motion for Class Certification, filed on July 19, 2013.

[16] HRA requested permission to have the Sandy D-SNAP Program cover 10 full zip codes and two partial zip codes particularly hard-hit by Hurricane Sandy. (See Stephens Decl., Exs. 1, 3.)

Accordingly, the Court finds beyond a preponderance of the evidence that the proposed class is sufficiently numerous to satisfy Rule 23(a).

b. Commonality

To establish commonality, Plaintiffs must prove that "the class members have suffered the same injury." Wal-Mart Stores, Inc., 131 S. Ct. at 2551 (internal quotation marks and citation omitted). As the Supreme Court explains: "This does not mean merely that [all class members] have all suffered a violation of the same provision of the law." Id. Rather, what is at issue is whether the proposed class action has the capacity "'to generate common answers apt to drive the resolution of the litigation.'" Id. (quoting Nagareda, Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. Rev. 97, 131-32 (2009)). In other words, Plaintiffs must assert that there is a "common contention . . . capable of class-wide resolution – which means that its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." Id. at 2561-62.

i. Parties' Arguments

Although even a single question of law or fact will suffice to satisfy the commonality requirement, see Marisol A. by Forbes v. Giuliani, 126 F.3d at 376, Plaintiffs allege that there are numerous common questions among the class members, including "whether Defendants provided accommodations sufficient to meet their obligations under federal, state, and local discrimination laws, what accommodations were provided, whether they provided 'meaningful access' to disabled individuals, and whether other accommodations Defendants failed to make would have been 'reasonable' under the governing statutes." (Pls.' Mem. at 17.)

ii. Analysis

Neither the State nor the City Defendants[17] oppose Plaintiffs' assertion that the proposed class satisfies the commonality requirement. Nonetheless, it appears that while there is at least one central common question at issue in this case – whether the Federal, State, and City Defendants violated the law by failing to provide reasonable accommodations to individuals with disabilities – that question is logically separated into two subparts: (1) whether the general D-SNAP plan – and therefore future D-SNAP programs – provides for the legally-required reasonable accommodations to individuals with disabilities; and (2) whether the legally-required reasonable accommodations were provided specifically by the Sandy D-SNAP Program to individuals with disabilities.

Both of these issues satisfy the commonality requirement. However, it is necessary to split the class into two subclasses: (1) disabled individuals who were eligible to apply for Sandy D-SNAP Program benefits; and (2) disabled individuals who are likely to meet the eligibility requirements for future D-SNAP programs. See In re Bank of Am. Corp., 281 F.R.D. at 138 (explaining that the court "has discretion on questions of class certification 'because the district court is often in the best position to assess the propriety of the class and has the ability . . . to alter or modify the class, create subclasses, and decertify the class whenever warranted'") (quoting Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd., 262 F.3d 134, 139 (2d Cir. 2001)).

[17] The Federal Defendants did not file papers in opposition to Plaintiffs' Motion for Class Certification.

Provided that Plaintiffs' proposed class is divided into these two subclasses, the Court finds by a preponderance of the evidence that the commonality requirement of Rule 23(a) has been met.

c. Typicality

In the Second Circuit, typicality is satisfied when "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." In re Flag Telecom Holdings, Ltd. Secs. Litig., 574 F.3d 29, 35 (2d Cir. 2009). While there may be variations in fact pattern as between the named plaintiffs and the other members of the class, if the same allegedly unlawful conduct was directed at or affected them, the typicality requirement is usually met. See Robidoux v. Celani, 987 F.2d 931, 936-37 (2d Cir. 1993). The possibility that damages may have to be determined on an individualized basis is not itself a bar to class certification. See Seijas v. Republic of Arg., 606 F.3d 53, 58 (2d Cir. 2010); see also New Jersey Carpenters Health Fund v. Residential Capital, LLC, 272 F.R.D. 160, 165 (S.D.N.Y. 2011) ("Even if . . . many putative class members suffered no injury, such an infirmity would not defeat typicality in light of the fact that a showing of the typicality requirement is not demanding." (citation omitted)), aff'd, 477 F. App'x 809 (2d Cir. 2012).

i. Parties' Arguments

Plaintiffs argue that the named Plaintiffs in this action have been injured by the Defendants' alleged failure to provide reasonable accommodations in designing and implementing the Sandy D-SNAP Program. (See Pls.' Mem. at 19.)

In response, both the City and State Defendants argue that the typicality requirement is not met here because the named Plaintiffs are all disabled individuals who allegedly could not access Sandy D-SNAP Program benefits due to a lack of reasonable accommodations, yet Plaintiffs' proposed class includes individuals who, for a variety of reasons, were not eligible to apply for the Sandy D-SNAP Program but are possibly eligible for future D-SNAP programs. (See State Defs.' Mem.[18] at 4-5; City Defs.' Mem. at 7-8.)

Plaintiffs reject the State and City Defendants' contention, arguing that the typicality requirement is satisfied because "including currently harmed residents in the class is an accepted method of ensuring that prospective relief inures to the benefit of all those who need its protection, including those who were not previously harmed." (See Pls.' Reply at 6.) Moreover, Plaintiffs assert that the injury to the named Plaintiffs is ongoing insofar as the policies in place today allegedly fail to provide the legally required reasonable accommodations. (See id. at 2.)

ii. Analysis

While the proposed class includes two different sets of interests, those interests are plainly intertwined and thus, the different interests are not fatal to class certification. First, the class members – both those who were eligible to apply for Sandy D-SNAP Program benefits and those who may be eligible for future D-SNAP Programs (which could include a number of individuals in the first group) – share a concern about whether the past or the future D-SNAP programs (based on a

[18] Citations to "State Defs.' Mem." refer to the State Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification, filed on June 12, 2013.

pre-established D-SNAP plan) will provide reasonable accommodations during any application period for eligible disabled individuals. Second, all class members essentially seek the same thing: an opportunity to apply for D-SNAP benefits for which they are eligible, with any legally-required reasonable accommodations provided. On the current record, whether securing the opportunity to apply for such benefits is made retroactively or prospectively is inapposite insofar as typicality is concerned. Third, to the extent that the precise issues regarding the reasonable accommodations provided and the types of relief being sought diverge, certifying one class with two subclasses, as previously explained, adequately addresses the issue. See In re Bank of Am. Corp., 281 F.R.D. at 138 (citation omitted).

Accordingly, the Court finds that the typicality requirement of Rule 23 is satisfied provided that the class is certified with two subclasses – one class for disabled individuals who were eligible to apply for benefits from the Sandy D-SNAP Program, and another class for disabled individuals who may be eligible to apply for future D-SNAP programs.

d. Adequacy

To satisfy the adequacy requirement, Plaintiffs must prove both that the interests of the named Plaintiffs are not antagonistic to other members of the class, and that Plaintiffs' attorneys are qualified, experienced, and able to conduct the litigation. See In re Flag Telecom, 574 F.2d at 35. Courts generally have found that if the named plaintiffs' claims satisfy the typicality requirement, those named plaintiffs are also adequate to represent the class. Damassia v. Duane Reade, Inc., 250 F.R.D. 152, 158 (S.D.N.Y. 2008); see also Hicks v. Morgan Stanley & Co., No. 01

Civ. 10071, 2003 WL 21672085, at *3 (S.D.N.Y. July 16, 2003) (finding class representatives were adequate when the complaint alleged a common course of conduct and unitary legal theory for the entire class period).

i. Parties' Arguments

Plaintiffs argue that the named Plaintiffs' interests are fully aligned with the interests of the other class members. (See Pls.' Mem. at 21.) Specifically, Plaintiffs state that "[t]he named Plaintiffs seek injunctive relief to assure that Defendants provide reasonable accommodations and meaningful access to apply for D-SNAP benefits in a manner consist with anti-discrimination laws." (Id.) While the State Defendants argue that there are two different sets of interests in play, and accordingly, Plaintiffs fail to meet the adequacy requirement of Rule 23(a), the State Defendants do not explain how the interests of the named Plaintiffs are antagonistic to those of the proposed class members. (See State Defs.' Mem. at 4.)

ii. Analysis

In this case, the named Plaintiffs are capable of adequately representing the interests of both subclasses because the named Plaintiffs seek both retroactive relief for injuries suffered as a result of the Sandy D-SNAP Program's alleged failure to provide reasonable accommodations,[19] and they seek injunctive relief with respect

[19] Specifically, Plaintiffs request, among other things, that the Court: "Permanently enjoin Defendants, their agents, employees[,] and all persons acting in concert with them from discriminating against Plaintiffs and class members by requiring them to (a) accommodate all class members by allowing them alternatives to the in-person requirement, including but not limited to telephone, mail, internet, facsimile[,] or authorized representatives who are not themselves required to attest to the truth of an application and when these methods are not viable, home visits, and extend the D-SNAP application period so that all class members may have an

to future D-SNAP programs because the named Plaintiffs, like all other members of the proposed class, face the possibility that they will be unable to access future D-SNAP benefits because of the alleged failure by Defendants to provide reasonable accommodations.

Accordingly, since it is apparent by a preponderance of the evidence that the named Plaintiffs are positioned to represent the interests of the class as a whole, and because there is no question that the Legal Aid Society is experienced in litigating these types of matters and is capable of representing the interests of all of the class members in this case, the Court hereby finds that the Rule 23(a) adequacy requirement has been satisfied.

e. Ascertainability

While not expressly stated in Rule 23, some courts "have found an implied requirement of ascertainability to the express requirements set forth in Rule 23(a)." Stinson v. City of New York, 282 F.R.D. 360, 373 (S.D.N.Y. 2012) (citations omitted). "The class that plaintiffs seek to certify must be readily identifiable so that the court can determine who is in the class, and thus, who is bound by the ruling." McBean v. City of New York, 228 F.R.D. 487, 492 (S.D.N.Y. Apr. 27, 2005) (citations omitted). In other words, ascertainability is satisfied if "the class

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equivalent period of time to apply for D-SNAP once reasonable accommodations are implemented; or (b) allow all class members the opportunity to apply and obtain D-SNAP benefits retroactively; or (c) otherwise compensate all class members with equivalent SNAP benefits or cash payments." (Compl. ¶ 163.) In other words, Plaintiffs request that Defendants provide either: (a) an opportunity to apply for equivalent benefits to those available under the Sandy D-SNAP Program, with reasonable accommodations provided; (b) that the Sandy D-SNAP Program application period be re-opened, with reasonable accommodations provided; or (c) compensation in the form of either SNAP benefits or cash payments.

description is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." Casale v. Kelly, 257 F.R.D. 396, 405 (S.D.N.Y. 2009) (internal quotation marks and citations omitted). A class is sufficiently ascertainable if objective criteria can be used to identify its members. Id. (citations omitted).

i. Parties' Arguments

In this case, the City Defendants argue that the proposed class "lacks any objective criteria regarding reasonable accommodations, i.e., any criteria with which to measure what accommodations would be reasonable and for whom." (City Defs.' Mem. at 8.) The City Defendants contend that "[t]he lack of any specifics about the type of reasonable accommodation or objective criteria for what it means to need a reasonable accommodation renders the potential class members unidentifiable and thus renders plaintiffs' proposed class inappropriate for class certification." (Id.)

Plaintiffs contend that the City Defendants have failed to provide any "plausible reason why this requirement is unmet here." (See Pls. Reply at 9.) Plaintiffs explain that the phrase "reasonable accommodation" is "the very definition of an objective criteria – it does not depend on Plaintiffs' own assessment of their needs, and courts consistently certify classes defined in similar terms." (Id. (citing cases)).

ii. Analysis

Plaintiffs seek to certify a class that essentially is comprised of individuals who have a disability (as that term is defined by the Americans with Disabilities Act), who were eligible to apply for the Sandy D-SNAP Program or who are eligible

to apply for future D-SNAP programs, and who "need or needed reasonable accommodations to enable them to apply for D-SNAP benefits." (See Pls.' Mem. at 2.) The Court modifies the proposed class by separating it into two subclasses: (1) disabled individuals who were eligible to apply for benefits from the Sandy D-SNAP Program; and (2) disabled individuals who may be eligible to apply for future D-SNAP programs.

While the Court is not persuaded by the City Defendants' contention that defining class members based on whether they needed and/or will need reasonable accommodations to apply for D-SNAP benefits renders the class unascertainable, Plaintiffs' use of "reasonable accommodations" is misplaced. Specifically, the class members are entitled to reasonable accommodations by virtue of their being disabled, as such term is defined by the law; requiring reasonable accommodations is not what qualifies them for the relief being sought.

Nonetheless, because of the otherwise valid nature of Plaintiffs' request for certification, the Court simply strikes subpart (d).

f. Conclusion

After using its discretion to dividing the proposed class into two subclasses, and striking subpart (d) from the proposed class definition, the Court finds that the modified proposed class satisfies the requirements of Rule 23(a).

II. Rule 23(b)

Since the Court has found that the proposed class, as modified into two subclasses and without proposed subsection (d), meets the requirements of Rule 23(a), the Court turns to the question of whether the class meets the requirements

of at least one subsection of Rule 23(b). Plaintiffs contend that class certification is permissible pursuant to Rule 23(b)(2) and Rule 23(b)(1)(A). (See Pls.' Mem. at 22.)

In Wal-Mart, Inc. v. Dukes, the Supreme Court provides a thorough analysis of when it is appropriate to certify a class pursuant to Rule 23(b)(2). 131 S. Ct. at 2557. In Wal-Mart, several named plaintiffs brought a class action lawsuit on behalf of all female employees of Wal-Mart nationwide. Id. at 2547. Plaintiffs claimed that there was a pattern and practice whereby Wal-Mart managerial employees would exercise discretion regarding pay and promotion to the alleged disadvantage of women, in violation of Title VII of the Civil Rights Act. Id. at 2548.

Acknowledging its statement in Amchem Products, Inc. v. Windsor that civil rights cases alleging class-wide discrimination are prime examples of what Rule 23(b)(2) was intended to cover, 521 U.S. 591, 117 S. Ct. 2231 (1999), the Court also noted that the Advisory Committee notes accompanying the Rule reflected a series of decisions challenging racial segregation – "conduct that was remedied by a single classwide order." 131 S. Ct. at 2557-58. The Court explained that while Rule 23(b)(2) may be used to certify a class when a single injunction or declaratory judgment "would provide relief to each member of the class," Rule 23(b)(2) is not appropriate for cases in which individualized claims for compensatory relief are asserted. Id. at 2557.

The Supreme Court held that because the individual class members in Wal-Mart sought back pay that was not incidental to injunctive or declaratory relief, class certification pursuant to Rule 23(b)(2) was improper. Id. at 2557. The Court explained: "When a class seeks an indivisible injunction benefitting all its members

at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute." Id. In contrast, individualized claims for compensatory relief require further inquiry to determine whether a class action is warranted, making class certification pursuant to Rule 23(b)(2) inappropriate. Id.

i. Parties' Arguments

Here, Plaintiffs claim that their proposed class falls under Rule 23(b)(2) because "Defendants' discriminatory actions are generally applicable to the class," and "Plaintiffs are seeking final injunctive and declaratory relief that would apply equally to the class as a whole." (Pls.' Mem. at 23 (citation omitted)).

The State Defendants contend that pursuant to Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1973), certification of the proposed class is unnecessary because the sought-after relief will apply to the proposed class members even if the class is not certified. (See State Defs.' Mem. at 7-8.) The State Defendants argue that if the injunctive relief is granted – namely, that reasonable accommodations are added to the general D-SNAP plan (and as a result, future D-SNAP programs) – that relief will run to all eligible individuals, whether or not they are members of a class action. (See id.) The State Defendants further contend that Galvan v. Levine suggests that no class certification is necessary because the Sandy D-SNAP Program ended months ago. (See id. at 7.)

In response, Plaintiffs argue that Galvan v. Levine does not apply to this case because the factual circumstances of Galvan were such that the entity being challenged had already promised to change its conduct, rendering class certification

a mere "formality." (See Pls.' Mem. at 24; Pls.' Reply at 9.) Plaintiffs point out that in this case, Defendants have made no such representation. (See Pls.' Mem. at 24.) Moreover, Plaintiffs argue that their demand that class members who were eligible to apply for Sandy D-SNAP Program benefits be given an opportunity to retroactively apply for either those or equivalent benefits, with reasonable accommodations provided, renders class certification necessary. (See Pls.' Reply at 9.)

ii. Analysis

In this case, class certification is warranted pursuant to Rule 23(b)(2). First, the Court is not persuaded that the nature of the relief being sought here would make class certification unnecessary. "In Galvan, discovery was complete and the defendant had already withdrawn the challenged policy prior to any judgment." Daniels v. The City of New York, 199 F.R.D. 513, 515 n.5 (S.D.N.Y. 2001). In this case, Defendants have not made any suggestion to this effect. Moreover, the relief being sought by class members who were eligible to apply for Sandy D-SNAP Program benefits requires those individuals to have an opportunity to apply for either the Sandy D-SNAP Program benefits (if the application period is re-opened) or for equivalent benefits. In order to provide this requested relief, class certification is necessary. Accordingly, the State Defendants' reliance on Galvan is unpersuasive.

Second, the requested relief is essentially declaratory and injunctive in nature,[20] such that the facts of this case are distinguishable from those of Wal-Mart. (See Pls.' Mem. at 23, n.5; Pls.' Reply at 9.) At its core, Plaintiffs' Complaint requests that the general D-SNAP plan and the Sandy D-SNAP Program be deemed unlawful for failing to provide the legally-required reasonable accommodations to individuals with disabilities, that eligible individuals with disabilities be allowed to apply for either Sandy D-SNAP Program benefits (if the application period is re-opened) or for equivalent benefits, and to require that the general D-SNAP plan be amended to ensure reasonable accommodations are provided for in future D-SNAP programs. To the extent that Plaintiffs seek compensatory relief (see Compl. ¶ 163), that request is incidental and secondary. Moreover, in contrast to Wal-Mart, where the Court stated that a class action would prevent Wal-Mart from making "individualized determinations of each employee's eligibility for backpay," the primary relief requested in this case does not deny Defendants the opportunity to make individual determinations about each class members' D-SNAP eligibility. By making the opportunity to apply their core requested relief, Plaintiffs provide the Defendants with an opportunity to determine D-SNAP eligibility on an individualized, case-by-case basis.

[20] The State Defendants seem to acknowledge this fact. (See State Defs.' Mem. at 8 (stating that "[t]he gravamen of Plaintiffs' prayer for relief is focused on . . . declaratory and injunctive relief."))

For all of these reasons, the Court finds that class certification is appropriate pursuant to Rule 23(b)(2).[21]

III. Standing

The constitutional requirement of standing applies in class actions just as it does in all other matters. Lewis v. Casey, 518 U.S. 343, 357, 116 S. Ct. 2174 (1996) (citations omitted). To have standing pursuant to Article III, "a plaintiff must allege, inter alia, that he [or she] has suffered an 'injury in fact' which is (1) concrete and particularized and (2) actual or imminent, not conjectural or hypothetical." MacNamara v. City of New York, 275 F.R.D. 125, 141 (S.D.N.Y. 2011) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130 (1992)).

The Second Circuit has recently distinguished between Article III standing and class standing. See NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co., 693 F.3d 145, 158 (2d Cir. 2012). The Second Circuit stated in NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co. that "class standing" exists if a named plaintiff "plausibly alleges (1) that he 'personally has suffered some actual . . . injury as a result of the putatively illegal conduct of the defendant,' and (2) that such conduct implicates 'the same set of concerns' as the conduct alleged to have caused injury to the other members of the putative class by the same defendants." 693 F.3d at 162 (reviewing Blum v. Yaretsky, 457 U.S. 991, 102 S. Ct. 2777 (1982), Lewis v. Casey, 518 U.S. 343, 116 S. Ct. 2174 (1996), and Gratz v. Bollinger, 539 U.S. 244, 123 S. Ct. 2411 (2003)).

[21] Since the Court certifies the class pursuant to Rule 23(b)(2), an analysis of the class under Rule 23(b)(1)(A) is unnecessary at this time.

Here, both the State and the City Defendants argue that the proposed class should not be certified because it includes individuals who allegedly lack standing insofar as they were not eligible for the Sandy D-SNAP Program. (See State Defs.' Mem. at 4 (citing Denney v. Deutsche Bank AG, 443 F.3d 253, 263 (2d Cir. 2006) for the proposition that a class may not be certified if it contains members that lack standing); City Defs.' Mem. at 7.) The City Defendants explain: "An individual who did not have a disability before or during Sandy but has a disability now lacks any injury traceable to the Sandy D-SNAP [Program] and so, like an individual who now lives in a Sandy-affected zip code but did not before, would lack standing to obtain any of the retroactive relief plaintiffs seek in this action." (See City Defs.' Mem. at 7-8.) Similarly, the State Defendants argue that "[t]he class definition employed by Plaintiffs necessarily includes individuals whose alleged injury, at best, would be tenuously based on another natural disaster striking the designated zip codes sometime in the future." (See State Defs.' Mem. at 5.)

Despite these concerns, the Court finds that there is no problem of standing in this case.[22] Both the named Plaintiffs and the proposed members of the class suffer an actual, ongoing, injury – namely, that the Sandy D-SNAP Program and the general D-SNAP plan allegedly failed and continue to fail to provide reasonable accommodations for individuals with disabilities. Moreover, the injuries suffered by the named Plaintiffs raise the same set of concerns regarding defendants' conduct as those raised by the other class members.

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[22] There may be notice issues, but those are separate from the concerns about standing raised by the City and State Defendants.

CONCLUSION

The Court hereby GRANTS Plaintiffs' request for class certification, except that it divides the proposed class into two subclasses and strikes subsection (d) from the proposed class definition. One subclass shall consist of disabled individuals who were eligible to apply for benefits from the Sandy D-SNAP Program. The other subclass shall consist of individuals who may be eligible to apply for benefits from a future D-SNAP program and who will need reasonable accommodations because of a disability (or disabilities).

The Clerk of Court is hereby directed to terminate Docket No. 47.

SO ORDERED.

Dated: New York, New York
September 13, 2013

KATHERINE B. FORREST
United States District Judge