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Court of Appeals

of the

State of New York

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Plaintiffs-Appellants,

– against –

NETHERLAND PROPERTY ASSETS LLC and PARKOFF OPERATING CORP.,

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS IN RESPONSE TO BRIEF OF *AMICI CURIAE* LAWRENCE CHAIFETZ, ET AL.

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DISCLOSURE OF PARENTS, SUBSIDIARIES AND AFFILIATES

None.

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Defendants-Respondents Netherland Property Assets LLC and Parkoff Operating Corp. (collectively, "defendants") respectfully submit this brief in response to the brief of Lawrence Chaifetz, Dawn Fadely, Michelle Hodkin, Hajera Dehqanzada-Lyle, and Clement Chan (collectively, the "Chaifetz *Amici*") as *amici curiae*.[1]

PRELIMINARY STATEMENT

The Chaifetz *Amici* primarily seek an advisory ruling on issues that are undisputedly not at stake in this appeal, in order to benefit themselves in actions they are litigating in the lower courts against parties who are not before this Court to present their own arguments. We respectfully submit that this is not a proper purpose for an *amicus curiae* brief. The Chaifetz *Amici*'s arguments should be rejected for that reason alone. (*See infra* at 5-6).

Wholly apart from this fundamental failing, the Chaifetz *Amici*'s arguments are without merit. Their brief argues: (a) that the Housing Stability and Tenant Protection Act of 2019 (L. 2019 ch. 36; hereinafter, the "2019 Act") "eliminates" the doctrine of primary jurisdiction in rent overcharge cases (Chaifetz Br., fifth-sixth pages[2]); and (b) that if this Court disagrees, it should "make clear" that

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[1] References to "Chaifetz Br." are to the brief submitted by the Chaifetz *Amici*. References to "Respondents' Brief" or "Resp. Br." are to defendants' principal brief on appeal. References to "Supplemental Brief" or "Supp. Br." are to defendants' Supplemental Brief dated August 2, 2019.

[2] The pages of the Chaifetz Brief are not numbered.

dismissal under that doctrine is never available in any action where the plaintiffs "seek[] class certification" (*id*., sixth-eighth pages). As detailed below and in defendants' Supplemental Brief, however, the first of these arguments finds no support in the text of the 2019 Act, its legislative history, or the applicable principles of statutory construction – all of which make clear that the 2019 Act did *not* abrogate the common-law doctrine of primary jurisdiction. The single, unreported lower court decision on which the Chaifetz *Amici* rely for their contrary argument does not change the analysis. (*See infra*, Point I).

The Chaifetz *Amici*'s second argument is based on flawed logic. It is undisputed that DHCR cannot adjudicate a class action. But the mere fact that a complaint "seeks" class certification does not mean that such certification is warranted. It therefore similarly does not mean that the claims asserted in such a complaint are necessarily beyond DHCR's purview. Where class treatment is not actually warranted, there is no reason why a request for such treatment should make dismissal under the doctrine of primary jurisdiction unavailable. To the contrary, CPLR § 901(a)(5) requires a court determining a motion for class certification to consider whether class treatment is "superior" to other means of adjudication. It thus directs precisely the analysis contemplated by the doctrine of primary jurisdiction.

Moreover, as detailed below, the 2019 Act itself specifies that where an apartment's individual rent history does not contain a rent that is "reliable" within the meaning of the statute, *only* DHCR can determine the proper legal rent. In a putative class action, the likelihood that this requirement will be triggered with respect to one or more of the apartments involved is naturally higher simply by virtue of the involvement of numerous apartments. The triggering of that requirement for one or more apartments in the case may weigh not only against class treatment, but also in favor of dismissal under the doctrine of primary jurisdiction.

Accordingly, if the Court agrees that the doctrine of primary jurisdiction remains available after the 2019 Act, it should do exactly the opposite of what the Chaifetz *Amici* advocate: it should make clear either (a) that a claim contained in a complaint styled as a class action is *not* necessarily immune from dismissal under the doctrine of primary jurisdiction; or (b) that it is not deciding that issue because the issue is not fully briefed before it. (*See infra*, Point II).

ARGUMENT

I. THE 2019 ACT DOES NOT "ELIMINATE PRIMARY JURISDICTION"

As explained at length in defendants' Supplemental Brief, as a matter of black-letter law the 2019 Act's statement that the courts and DHCR "shall have concurrent jurisdiction, subject to the tenant's choice of forum" cannot be read as

abrogating the common-law doctrine of primary jurisdiction that vests the courts with discretion to dismiss rent overcharge cases in favor of adjudication by DHCR in the first instance. (*See* Supp. Br. at 12-22). Nevertheless, the Chaifetz *Amici* open their argument with an assertion that the 2019 Act somehow makes "abundantly clear" that it "eliminates primary jurisdiction." (Chaifetz Br., Point I, fifth page). Their position is without basis in the language or legislative history of the 2019 Act or in any conceivably applicable principle of statutory construction.

The Chaifetz *Amici* cite no such principle in support of their position. Instead, they note that "just a few weeks ago" one Justice of the Supreme Court, New York County cited the 2019 Act in declining to dismiss a complaint based on the doctrine of primary jurisdiction. (Chaifetz Br., fifth-sixth pages). The unpublished decision they cite, however, included no statutory construction analysis whatsoever. *See Stafford v. A & E Real Estate Holdings, LLC,* 2019 N.Y. Slip Op. 33039(U), 2019 WL 5098782, *6 (Sup. Ct. N.Y. Co. Oct. 11, 2019). Moreover, the court's main basis for declining to dismiss was its conclusion that it "may properly decline[] to cede primary jurisdiction" to DHCR because – unlike this case (*see* Resp. Br. at 22-33) – the matter before it raised "exactly the kind of legal issues that must be addressed by the courts, not the DHCR, such as class certification." *Stafford,* 2019 WL 5098782, *6 (citation and internal quotations

omitted; alteration in *Stafford*). For either or both of these reasons, that unpublished decision is not an appropriate source of guidance for this Court here.

The Chaifetz *Amici* rely on nothing else. Nor do they address any aspect of the statutory analysis set forth in defendants' Supplemental Brief. That analysis is the correct one, and it points to only one conclusion: the 2019 Act did not abrogate the common-law doctrine of primary jurisdiction or overrule the precedent under which that doctrine applies to rent overcharge claims.

II. THE COURT SHOULD SPECIFICALLY DECLINE TO ISSUE AN ADVISORY RULING THAT DISMISSAL UNDER THE DOCTRINE OF PRIMARY JURISDICTION IS UNAVAILABLE IN ANY CASE IN WHICH THE PLAINTIFFS SEEK CLASS CERTIFICATION

The Chaifetz *Amici*'s second argument asks this Court to issue an advisory ruling on a matter that is undisputedly *not* at stake in this appeal: whether the mere presence of class allegations in a complaint precludes dismissal under the doctrine of primary jurisdiction. Although this case is not a putative class action and does not call upon the Court to decide any issues relating to class actions, the Chaifetz *Amici* ask this Court to "make clear" that dismissal under the doctrine of primary jurisdiction is unavailable in any action in which the plaintiffs seek class certification. (Chaifetz Br., last page). They request such a statement because it would be helpful to them in their own cases (each of which is pending in the lower courts), which are all styled as putative class actions. (*Id.*, third-fifth pages).

This amounts to a request for an *ex parte* advisory ruling from this Court: advisory because the issue on which the Chaifetz *Amici* seek "clarification" is not before this Court on this appeal; *ex parte* because the defendants in the respective actions where it is at stake (where the Chaifetz *Amici* are plaintiffs) are similarly not before this Court to present their own arguments in opposition to the Chaifetz *Amici*'s position. We respectfully submit that this is not a proper purpose for an amicus submission, and that this Court should reject the Chaifetz *Amici*'s request for this reason alone.

Putting this aside, the Chaifetz *Amici*'s position is based on a gap in logic: "[c]ases *seeking* class certification," they assert "cannot be sent to DHCR, because that agency has no authority to entertain a class action." (Chaifetz Br., sixth page, emphasis added). But the mere fact that DHCR cannot actually "entertain" a class action plainly does not mean that every case in which a plaintiff *seeks* class certification is automatically beyond the scope of the doctrine of primary jurisdiction. As this Court unanimously confirmed in October of this year, for example, "there is no per se bar to a pre-answer motion pursuant to CPLR 3211(a) seeking an order dismissing a class action allegation." *Maddicks v. Big City Properties, LLC*, __ N.Y.3d __, 2019 WL 5353010, *3 (Oct. 22, 2019); *see Maddicks*, 2019 WL 5353010, *6 (dissenting opinion, agreeing with the majority that "when it is clear from the face of a pleading and any supporting affidavits that

a class cannot be certified, the class allegations in that pleading must be dismissed upon a motion made pursuant to Civil Practice Law and Rule 3211(a)(7)"). If a putative class action complaint does not actually state a valid basis for class treatment, the fact that the plaintiffs "seek" such treatment should be no bar to dismissal under the doctrine of primary jurisdiction if the criteria for such dismissal are otherwise met.

As well, class treatment is not appropriate unless (among other things) "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." CPLR § 901(a)(5). As a result, even if the complaint in a putative class action states a valid basis for class relief, no class can be certified unless the plaintiffs can also demonstrate that proceeding as a class is "superior to" all other means of adjudication – including proceeding before an agency that has concurrent jurisdiction with the courts. In some cases, the answer may be that a class action is not "superior" precisely because DHCR is better able to adjudicate the relevant facts. In such cases, dismissal under the doctrine of primary jurisdiction would be appropriate.

Finally in this regard, the 2019 Act expressly provides that under certain circumstances *only* DHCR can determine the legal rent for purposes of an overcharge claim. Specifically, after setting forth a formula for determining that rent based on an historical rent figure that is "reliable" within the meaning of the

statute (*see* 2019 Act, Part F, § 4(a)[3]), the statute goes on to provide that if the relevant "prior rent cannot be established, such rent *shall be established by the division [i.e., DHCR]*" (*id.*, emphasis added). Importantly, although elsewhere in the 2019 Act the Legislature pointedly specified that certain determinations may be made by DHCR "or a court of competent jurisdiction,"[4] in the portion addressing how the legal rent must be determined in the absence of a "reliable" historical rent number or a prior rent that can be "established" the Legislature was equally pointed in *omitting* any reference to the courts and specifying that the rent must be "established by the division" – that is, DHCR. This evidences a deliberate choice to give the courts concurrent jurisdiction with DHCR *only* where the relevant rent history includes sufficiently "reliable" numbers to allow application of the statutory formula (and/or the "prior rent" can be established), and to leave determination of the legal rent in the absence of such figures exclusively to DHCR. *See Thoreson v. Penthouse Int'l, Ltd.*, 80 N.Y.2d 490, 498 (1992) (fact that

[3] The amendments set forth in this section of the 2019 Act now appear in Rent Stabilization Law § 26-516(a).

[4] *See, e.g.*, *id.* ("The division of housing and community renewal *or a court of competent jurisdiction*, in investigating complaints of overcharge and in determining legal regulated rent, shall consider all available rent history which is reasonably necessary to make such determination.") (emphasis added); *id.* § 4(a)(1) ("The order of the state division of housing and community renewal *or a court of competent jurisdiction* shall apportion the owner's liability between or among two or more tenants found to have been overcharged by such owner during their particular tenancy of a unit.") (emphasis added).

Legislature had amended the Executive Law to specify that punitive damages are available in housing discrimination cases supported the inference that such damages were *not* available for other types of discrimination); *see generally* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 240 ("where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded").

This choice takes on special significance in a putative class action, which may involve numerous apartments – any one of which may lack a "prior rent" that can be "established." For any such apartment, the statute would require the court to defer a determination of the proper legal rent to DHCR. Although this is a matter of exclusive jurisdiction rather than primary jurisdiction, the presence of one or more such apartments in the putative class (and the corresponding need for DHCR to determine the legal rent for one or more of the apartments at issue in the action) would plainly impact the analysis of whether class treatment is appropriate under CPLR § 901(a)(3) (which asks whether a class representative's claims are "typical" of those of other class members), CPLR § 901(a)(5) (which asks whether class treatment is "superior" to other methods of adjudication), and CPLR § 902 (which requires a court to consider various other factors, including "the extent and nature" of other related litigation). In a putative class action, these factors may

very well weigh not only against class certification, but also in favor of dismissal under the doctrine of primary jurisdiction once such certification is denied.[5]

We emphasize that *none* of these issues are before the Court on this appeal. The Chaifetz *Amici* are asking this Court to rule on them only because if the Court adopts the position the Chaifetz *Amici* advocate it will help them in their own cases that are pending at various stages in the lower courts. We respectfully submit, however, that the Court should do exactly the opposite: if it finds that the doctrine of primary jurisdiction remains available after the 2019 Act (as we submit it should if it reaches the issue[6]), it should make clear either (a) that a claim contained in a complaint that is styled as a putative class action is not necessarily immune from dismissal under the doctrine of primary jurisdiction; or (b) that it is *not* opining on this issue because the question is not properly before it.

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[5] Because – for these reasons or others – a complaint that "seeks" class treatment may not actually result in the certification of a class, the Chaifetz *Amici*'s purported concerns about "absent class members" (Chaifetz Br., seventh page) puts the cart before the horse: if no class is certified, there are no "absent class members" whose interests might be affected by a dismissal under the doctrine of primary jurisdiction. But we note in addition that "absent" members of any putative class of plaintiffs claiming violation of the Rent Stabilization Law have a right to seek relief before DHCR – and the 2019 Act gives them a longer window in which to do so. *See* 2019 Act, Part F, § 4(a)(2).

[6] As detailed in defendants' Supplemental Brief, under the plain language of the 2019 Act its provisions respecting rent overcharge claims do not apply to the claims at issue on this appeal. (*See* Supp. Br. at 5-12).

CONCLUSION

For the reasons detailed in defendants' prior briefing, the Appellate Division's Order should be affirmed. For the reasons detailed above, in connection with such an affirmance the Court should either (a) hold that a claim contained in a complaint that is styled as a class action may nevertheless be subject to dismissal under the doctrine of primary jurisdiction in appropriate circumstances; or (b) make clear that this question is not properly before it on this appeal and is therefore left open for future litigation.

Dated: New York, New York
December 18, 2019

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing opposition was prepared on a computer using Microsoft 2018.

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