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Court of Appeals

of the

State of New York

THERESA MADDICKS, JOHN AMBROSIO, PAUL WILDER, SAMUEL WILDER, ALYSSA O'CONNELL, JOHANNA S. KARLIN, BRIAN WAGNER, TYLER STRICKLAND, DANIEL ROBLES, ELENA RICARDO, LIAM CUDMORE, JENIFER MAK, JOSHUA BERG, ANISH JAIN, JOHN CURTIN, JONATHAN FIEWEGER, MARIA FUNCHEON, JORDANI SANCHEZ, MELLISA MICKENS, M.D. IVEY, DEVIN ELTING, SEMI PAK, KAITLIN CAMPBELL, SARAH NORRIS, MIKIALA JAMISON, SHERESA JENKINS-RISTEKI, YANIRA GOMEZ and KRISTEN PIRO, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

– against –

BIG CITY PROPERTIES, LLC and XYZ CORPORATIONS 1-99,

Defendants,

(For Continuation of Caption See Inside Cover)

BRIEF FOR *AMICI CURIAE* RENT STABILIZATION ASSOCIATION OF NYC, INC. AND COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC. IN SUPPORT OF DEFENDANTS-APPELLANTS

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Dated: January 30, 2019

– and –

BIG CITY REALTY MANAGEMENT, LLC, BIG CITY ACQUISITIONS, LLC, 145 PINEAPPLE LLC, 2363 ACP PINEAPPLE, LLC, 408-412 PINEAPPLE, LLC, 510-512 YELLOW APPLE, LLC, 513 YELLOW APPLE, LLC, 535-539 WEST 155 BCR, LLC, 545 EDGECOMBE BCR, LLC, 603-607 WEST 139 BCR, LLC, 106-108 CONVENT BCR, LLC, 110 CONVENT BCR, LLC, 3660 BROADWAY BCR, LLC, 3750 BROADWAY BCR, LLC, 559 WEST 156 BCR LLC, 605-607 WEST 141 BCR, LLC, 605 WEST 151 BCR, LLC and 580 ST. NICHOLAS BCR, LLC,

Defendants-Appellants.

CORPORATE DISCLOSURE STATEMENT

The only subsidiaries of the Rent Stabilization Association of NYC., Inc. are Realty Services of America, Inc., RSA Insurance Agency, Inc., and RSA Mortgage Brokerage, Inc. The sole subsidiary of the Community Housing Improvement Program, Inc. is Associated Builders and Owners of Greater New York.

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The Rent Stabilization Association of New York City, Inc. ("RSA") and the Community Housing Improvement Program, Inc. ("CHIP"; collectively, the "*Amici*") respectfully submit this brief as *amici curiae* in support of Defendants-Appellants Big City Realty Management, LLC, *et al.* ("Appellants"). For the reasons detailed below – in addition to those detailed in Appellants' own briefing – the Order of the Appellate Division, First Department (the "Order," R.301-307[1]) should be reversed.

PRELIMINARY STATEMENT

This lawsuit is one in a series of putative class actions – which so far includes at least 23 others – all recently brought by counsel for Respondents in a coordinated effort to drive enforcement of the Rent Stabilization Law ("RSL") out of the Division of Housing and Community Renewal ("DHCR")[2] and into the courts.[3] Many of these lawsuits (including this one) were compiled with the

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[1] References to "R.__" are to the printed Record on Appeal. References to "Resp. Br." are to the brief of plaintiffs-respondents ("Respondents").

[2] DHCR is one of five agencies that comprise New York State Homes and Community Renewal. (*See* www.nyshcr.org/AboutUs/AgencyDescription.htm, last viewed January 29, 2019).

[3] The 23 other class actions recently filed by counsel for Respondents are: *Blubaum, et al. v. 2680 30th Street LLC*, Index No. 700749/2019 (Sup. Ct. Queens Co.); *Gridley, et al. v. Turnbury Village LLC*, Index No. 700027/2019 (Sup. Ct. Queens Co.); *Gunther, et al. v. 29th Street PVP, LLC*, Index No. 717673/2018 (Sup. Ct. Queens Co.); *Seide, et al. v 25-21 31st Avenue, LLC*, Index No. 717276/2018 (Sup. Ct. Queens Co.); *Gomes, et al. v. Vermyck LLC*, Index No. 713219/2018 (Sup. Ct. Queens Co.); *Sczesnik, et al. v. 111-32 76th Avenue LLC*, Index No.

assistance of an organization called Housing Rights Initiative ("HRI"); according to its website, HRI "launch[es] door-to-door canvassing operations across New York City" to find tenants with possible overcharge claims and then connects them with "legal support."[4] In keeping with HRI's stated mission to drive enforcement of the RSL away from DHCR (which it views as too "reactive" and somehow incapable of addressing building-wide issues) and into the courts,[5] the express aim of these cases – which Respondents' counsel has characterized in the press as a

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708225/2018 (Sup. Ct. Queens Co.); *Andermanis, et al. v. Godwin Realty LLC, et al.*, Index No. 20843/2018E (Sup. Ct. Bronx Co.); *Thome, et al. v. The Jack Parker Corporation, et al.*, Index No. 152510/2018 (Sup. Ct. N.Y. Co.); *Chaifetz, et al. v. Weinreb Management LLC,* Index No. 20844/2018E (Sup. Ct. Bronx Co.); *Hess, et al. v. EDR Assets, LLC, et al.*, Index No. 160494/2017 (Sup. Ct. N.Y. Co.); *Montera et al. v. KMR Amsterdam LLC*, Index No. 160550/2017 (Sup, Ct. N.Y. Co.); *Stafford, et al. v. A&E Real Estate Holdings, LLC, et al.*, Index No. 655500/2016 (Sup. Ct. N.Y. Co.); *Mahmood, et al. v. Mason Mgmt. Servs. Corp.*, *et al.*, Index No. 153574/2017 (Sup. Ct. N.Y. Co.); *Chang, et al. v. Bronstein Properties, LLC, et al.*, Index. No. 156665/2017 (Sup. Ct. N.Y. Co.); *Chang, et al. v. Bronstein Properties, LLC, et al.*, Index No. 153031/2018 (Sup. Ct. N.Y. Co.); *Yang, et al. v. Creative Indus. Corp.*, Index No. 155681/2017 (Sup. Ct. N.Y. Co.); *Quinn, et al. v. Parkoff Operating Corp., et al.*, Index No. 155195/2017 (Sup. Ct. N.Y. Co.); *Connors, et al. v. Kushner Cos., et al.,* Index No. 522076/2017 (Sup. Ct. Kings Co.); *Fabo, et al. v. Kushner Cos., et al.*, Index No. 515806/2017 (Sup. Ct. Kings Co.); *Najera-Ordonez, et al. v. 260 Partners L.P., et al.*, Index No. 160546/2017 (Sup. Ct. N.Y. Co.); *Woodson, et al.,* v. *Convent 1 LLC, et al.*, Index No. 160547/2017 (Sup. Ct. N.Y. Co.); *Leake, et al.*, *v. 55 Cooper Assocs., et al*., Index No. 160549/2017 (Sup. Ct. N.Y. Co.); and *Simpson, et al. v. 16-26 East 105, LLC, et al.*, Index No. 160737/2017 (Sup. Ct. N.Y. Co.).

[4] *See* https://housingrightsny.org/about/ (last viewed January 29, 2019).

[5] *See* Nathan Tempey, *"We're not anti-landlord, we're anti-stealing": Talking to a self-appointed enforcer of NY's rent laws*, Brick Underground, Oct. 23, 2017 (available at https://www.brickunderground.com/rent/housing-rights-initiative-aaron-carr-rent-fraud-NYC, last viewed January 29, 2019).

"novel movement"[6] – is to transform the courts into an outside auditor tasked with sifting through the rental histories of virtually every apartment in hundreds of high-rise residential buildings in New York City to search for overcharges. In keeping with that aim, the relief Respondents seek in this case includes a request that the court appoint (and presumably pay) an "independent individual or entity to audit and undertake an accounting of" every single apartment in the buildings owned or managed by Appellants to see *whether* violations of the RSL have taken place. (R.60). Each of the other putative class action complaints filed by Respondents' counsel in the matters listed above in footnote 3 seeks the same sweeping injunction; they seek, in other words, to shift DHCR's fact-finding and adjudicative function to the courts.[7]

In the early going, some HRI-initiated claims were brought not as putative class actions, but as individual or group actions. *See, e.g., Collazo, et al. v. Netherland Property Assets LLC, et al.*, Index No. 157486/2016 (Sup. Ct. N.Y. Co.). After some of those cases were dismissed under the doctrine of primary jurisdiction so that the plaintiffs' RSL claims could be adjudicated by DHCR in the

[6] *See* Josh Barbanel, *New York Tenants-Rights Group Lifts Profile but Has Little Success in Court*, Wall St. J., Aug. 2, 2018 (available at https://www.wsj.com/articles/new-york-tenants-rights-group-lifts-profile-but-has-little-success-in-lawsuits-1533207600?mod=searchresults&page=1&pos=4, last viewed January 29, 2019).

[7] In many of those cases, the defendants are members of the RSA or CHIP; some of those defendants are represented by the undersigned counsel.

first instance (subject to Article 78 review by the courts),[8] HRI and the lawyers with whom it worked began styling all or virtually all of their cases as putative class actions. It is clear that part of their purpose in doing so was to attempt to insulate them from primary jurisdiction dismissal: courts have on occasion cited the fact that an action is styled as a class action as a basis for declining to dismiss it under that doctrine. *See, e.g., Dugan v. London Terrace Gardens, L.P.,* 101 A.D.3d 648 (1st Dept. 2012). This case is part of that wave of putative class actions.

To the extent that the Appellate Division's Order suggests that the pleading standards for class allegations should be more lenient than the pleading standards for other kinds of allegations, it opens the floodgates to innumerable rent overcharge cases styled as putative class actions (to say nothing of those already pending, *see supra,* n.3) – with the courts arguably powerless to resolve them at the pleading stage regardless of how facially insufficient the class allegations may be.

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[8] Under the doctrine of primary jurisdiction, where a claim is subject to the concurrent jurisdiction of a court and an administrative agency with adjudicative powers, the court has discretion to dismiss so that the agency can adjudicate the claim in the first instance, subject to Article 78 review. *See generally Capital Tel. Co. v. Pattersonville Tel. Co.*, 56 N.Y.2d 11, 22 (1982) (collecting authorities). RSL claims that are *not* asserted as class actions are subject to dismissal under that doctrine where the other prerequisites for its application are met. *See, e.g., Olsen v. Stellar W. 110, LLC*, 96 A.D.3d 440, 441–42 (1st Dept. 2012); *accord Collazo v. Netherland Prop. Assets LLC*, 2017 N.Y. Slip Op. 31709, 2017 WL 947618 (Sup. Ct. N.Y. Co. Mar. 7, 2017), *aff'd*, 155 A.D.3d 538 (1st Dept. 2017), *lv. granted*, 31 N.Y.3d 910 (2018).

The Order may thus enable would-be plaintiffs to evade *both* DHCR's primary jurisdiction *and* an otherwise potent pre-answer motion to dismiss by the simple expedient of purporting to sue on behalf of a class.

As detailed below, the CPLR on its face requires a different result. (Point I). Moreover (and although we respectfully submit that this would be enough to warrant reversal), where (as here) a plaintiff has added class allegations to a claim that would otherwise be subject to dismissal under the doctrine of primary jurisdiction, depriving the courts of the ability to scrutinize those allegations under the same CPLR standards that apply to other kinds of allegations may force the courts to adjudicate matters they would otherwise properly defer to an agency under that doctrine. This, in turn, destroys the balance and efficiency that the doctrine was designed to create. (Point II). The federal cases in which Respondents ask this Court to find "persuasive guidance" do not support the result Respondents advocate: not only do they lie on the *minority* side of a split in the federal courts; they also turn on the application of the *federal* rules and standards for motions to dismiss, which differ from state practice in ways that highlight the reasons why CPLR 3211(a) absolutely *should* apply to class allegations. (Point III). For any or all of these reasons (in addition to those Appellants articulate), this Court should reverse the First Department's Order and clarify that class allegations

are subject to the same pleading standards as other allegations and can be dismissed on a pre-answer basis if they do not meet those standards.

INTERESTS OF THE *AMICI*

The *Amici* are New York real estate industry membership organizations, which together represent tens of thousands of small, medium and large property owners and managers of over one million rent regulated apartments throughout the City of New York. They provide educational, legal and legislative advocacy, and other services to their members concerning the vast regulatory system affecting their properties under the various rent laws of New York.

Indicative of the *Amici's* interest in and expertise on legal and public policy issues affecting private regulated housing is the large number of major cases where one or both of the *Amici* have participated as parties, intervenors or *amicus/amici curiae.* They include, but are not limited to, *Altman v. 285 West Fourth LLC*, 31 N.Y.3d 178 (2018) (inclusion of 20% statutory vacancy increase in calculation of rent for purposes of determining whether deregulation threshold is met); *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270 (2009) (reinterpretation of the luxury deregulation law with respect to owners that received J-51 tax benefits); *Matter of Casado v. Markus*, 16 N.Y.3d 329 (2011) (NYC Rent Guidelines Board orders providing for minimum dollar increases on rent stabilized apartments for long-term tenants); *Matter of Mengoni v. New York*

State Div. of Hous. & Comm. Renewal, 97 N.Y.2d 630 (2001) (retroactive application of four-year statute of limitations for rent overcharge claims); *Matter of Ansonia Residents Assn. v. New York State Div. of Hous. & Comm. Renewal,* 75 N.Y.2d 206 (1989) (permanency of rent increases for major capital improvements under the Rent Stabilization Code); *Myers v. Frankel,* 292 A.D.2d 575 (2d Dept. 2002) (relevance of rent registration to the four-year statute of limitations for rent overcharge claims); *Matter of Aguayo v. New York State Div. of Hous. & Comm. Renewal*, 150 A.D.2d 565 (2d Dept. 1989) (due process rights of owners in administrative proceedings); *8200 Realty Corp. v. Lindsay*, 27 N.Y.2d 124 (1970) (constitutionality of the Rent Stabilization Law of 1969); and, most recently, *Collazo v. Netherland Prop. Assets LLC*, APL-2018-00108, currently pending before this Court (application of the doctrine of primary jurisdiction to claims under the RSL and Rent Stabilization Code).

The Appellate Division's Order directly impacts the membership of the *Amici* organizations, all of whom own and operate residential buildings containing units subject to rent stabilization, and some of whom are currently facing putative class actions similar to this one. Inasmuch as the Appellate Division's Order appears to lower the standard of review applicable to class allegations on a motion to dismiss, it negatively impacts members of *Amici* who are currently parties to putative rent overcharge class actions and hamstrings the ability of such

members – when circumstances would otherwise call for it – to seek dismissal of such actions going forward.

ARGUMENT

I. A JUDICIALLY-CREATED RULE THAT EXEMPTS CLASS ALLEGATIONS FROM SCRUTINY UNDER CPLR 3211(a) WOULD BE INCONSISTENT WITH THE CPLR

The First Department's Order should be reversed for the fundamental reason that, to the extent it treats class allegations differently from other allegations, it is inconsistent with the CPLR. In particular, inasmuch as the requirements of CPLR § 901(a) are among the "material elements" that a class action plaintiff "intend[s] to . . . prove[]," the CPLR on its face requires such a plaintiff to include them in the putative class complaint. *See* CPLR § 3013. There is nothing in the CPLR that suggests that they should not be subject to the same rules as any other pleading – including the possibility of dismissal on a pre-answer motion if they are not adequately pleaded or are barred by documentary evidence. The Fourth Department's confirmation in *Wojceichowski v. Republic Steel Corp.*, 67 A.D.2d 830, 830-31 (4th Dept. 1979) – and the First Department's previous acknowledgement in *Downing v. First Lenox Terrace Assocs.*, 107 A.D.3d 86, 91 (1st Dept. 2013), *aff'd sub nom Borden v. 400 East 55th Street Assocs., L.P.*, 24 N.Y.3d 382 (2014) – that facially defective class allegations may be disposed of by a pre-answer motion is a straightforward application of black-letter principles

governing *all* pleadings: *no* allegations will be "assumed to be true" or "afforded every favorable inference" if they "consist[] of bare legal conclusions [or] factual claims flatly contradicted by documentary evidence." *Simkin v. Blank*, 19 N.Y.3d 46, 52 (2012) (citations and internal quotations omitted). There is no basis in the CPLR for treating class allegations any differently.

The First Department repeated its acknowledgement that these standards apply to class allegations in *Adler v. Ogden CAP Props., LLC*, 126 A.D.3d 544 (1st Dept. 2015). There, the lower court – citing *Downing* and *Wojceichowski* – noted that "classes which are so legally defective on their face as to not even merit class-discovery" may be disposed of on a motion to dismiss the class allegations as a matter of law; on this basis, it declined to dismiss the class allegations outright but imposed certain limits on the proposed class and expressed "grave[]" doubt as to whether such a class could ultimately be certified. *See Adler v. Ogden CAP Props., LLC*, 42 Misc.3d 613, 625, 629 (Sup. Ct. N.Y. Co. 2013). Affirming, the First Department stated: "We have considered plaintiffs' remaining arguments, including that the court improperly limited the proposed class of plaintiffs, and find them unavailing." 126 A.D.3d at 545.

The First Department's Order in this case, however, suggests that allegations in any putative class action complaint purporting to plead the required elements of CPLR § 901(a) are somehow immune from the standards governing every other

type of allegation *even if* they do not actually allege all of those elements, are pleaded as pure legal conclusions, or are flatly contradicted by documentary evidence. Respondents openly ask this Court to hold as much. (*See, e.g.,* Resp. Br. at 22-23). This, we submit, would render meaningless the fundamental requirement that class allegations appear in a putative class action complaint in the first place: if they are not subject to any enforceable pleading standards, there would be no reason require them.

The First Department majority's concern that dismissal of class allegations may be "premature, before discovery" (R.305) ignores the express provisions of CPLR 3211. That Rule specifies that a plaintiff may respond to a motion to dismiss by making a particularized showing, through "affidavits," that "facts essential to justify opposition may exist but cannot then be stated"; where such a showing is made, the court may deny the motion, "order a continuance" pending disclosure, or "make such other order as may be just." CPLR 3211(d). Respondents here did not attempt any such showing with respect to their class allegations; to the contrary, they submitted no affidavit material at all in response to the motion to dismiss, responding only with a memorandum of law. (*See* R.i-iii, Table of Contents).[9]

[9] Although Respondents did cite CPLR 3211(d) in their memorandum of law in the lower court, (a) they did so only with respect to their fraud claim, and not with

Faced with a proper invocation of CPLR 3211(d), a court determining a motion to dismiss class allegations under CPLR 3211(a) would have to determine whether the plaintiff has offered a basis to believe that discovery may in fact enable it to plead the elements of a class claim in a way that is not foreclosed by whatever documentary evidence has been submitted on the motion.[10] If the plaintiff makes such a showing, the motion can be denied on that ground. There is no basis in the CPLR for exempting class allegations from this specified procedure, which on its face ensures that claims will not be dismissed if there is any legitimate reason to believe that discovery will bear them out.

We respectfully submit that *this* case – one of more than twenty instigated by the same organization and styled as class actions for the express purpose of avoiding the primary jurisdiction of DHCR – is a strong example of why the provisions of CPLR 3211 should apply with equal force to class allegations. As the First Department dissent observed, both in their complaint and in opposition to Appellants' motion to dismiss their class allegations Respondents failed "to

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respect to their class allegations (*see* R.253-54); and (b) they did not submit the "affidavit[]" material that is expressly contemplated under CPLR 3211(d).

[10] As a practical matter we submit that it is unlikely that a party would be able to show a particularized need for discovery in order to *plead* the elements necessary to survive a motion to dismiss under CPLR 3211(a)(7), as distinct from showing such a need in order to respond to documentary evidence submitted under CPLR 3211(a)(1). The procedures set forth in CPLR 3211(d), however, apply equally to motions under both sub-sections, and any potential distinction in that regard is not before the Court on this appeal.

identify any question of fact or law common to the class." (R.320; *accord* R.310-11). The First Department majority similarly identified no such question. (*See id.*). Respondents do no better in this Court: their brief speaks of "subclasses" and "issue" classes, but identifies no question or issue that is or even could be common to the *entire* class they seek to certify. (*See* Resp. Br. at 30-33). An argument that multiple subclasses may meet the requirements of CPLR § 901(a) puts the cart before the horse: it is axiomatic that before there can be subclasses there must be a *class*. Before there can be a class there must – at a minimum – be at least one issue of law or fact that is common to all of its members. A "class" complaint that does not allege such an issue fundamentally fails to state a claim for class relief.

A rule that exempts class allegations from pre-answer dismissal under CPLR 3211 (or subjects them to a different standard under that Rule) will force courts to oversee class discovery and related motion practice in the service of class allegations that, even if proven, cannot possibly support class certification. Likewise, where there is no basis in the complaint to believe that the requirements for class certification could be met (or where documentary evidence properly before the court makes clear that they cannot be met), forcing a defendant to proceed with discovery even "limited" to issues relating to such certification needlessly imposes what can amount to an extraordinary burden. This is exactly the kind of waste of judicial and party resources that CPLR 3211 exists to avoid,

and it has no basis anywhere in the CPLR.[11] For these reasons alone, the Appellate Division's Order should be reversed to the extent it endorsed such a rule.

II. A JUDICIALLY-CREATED RULE THAT EXEMPTS CLASS ALLEGATIONS FROM SCRUTINY UNDER CPLR 3211(a) WOULD SUBSTANTIALLY SHIFT TO THE COURTS MATTERS THAT SHOULD BE DETERMINED IN THE FIRST INSTANCE BY AGENCIES UNDER THE DOCTRINE OF PRIMARY JURISDICTION

As noted above, this case is one of many in which plaintiffs have tried to insulate their claims from discretionary dismissal under the doctrine of primary jurisdiction by styling them as class actions. (*See supra* at 3-4). In such cases, if (as here) the complaint's allegations make clear on their face that the claims *as pleaded* do not involve a common issue of fact or law across all members of the putative class (or if documentary evidence that is properly before the court pursuant to CPLR 3211(a)(1) makes clear that this or any other prerequisite to class treatment is absent as a matter of law), allowing a court to dismiss the class allegations on a pre-answer basis serves an especially meaningful purpose: it restores to the court the discretion to dismiss the claims under the doctrine of primary jurisdiction, thereby allowing DHCR (with its expertise in the area) to determine them in the first instance as that doctrine contemplates. To the extent

[11] It also runs contrary to the goals of the Excellence Initiative that Chief Judge DeFiore announced immediately upon being sworn in, which include "improv[ing] promptness and productivity, [and] eliminat[ing] case backlogs and delays." *See* The State of Our Judiciary 2018, Excellence Initiative: Year Two (February 2018), at i (available at https://www.nycourts.gov/Admin/stateofjudiciary/B18_SOJ-Report.pdf, last viewed January 29, 2018).

that the First Department's Order limits a court's ability to do so, it substantially disrupts the balance that the doctrine strikes between the courts and the agencies.

This disruption is not limited to rent overcharge claims; its effects will be widespread. Courts throughout this State regularly exercise their discretion under the doctrine of primary jurisdiction to dismiss claims in favor of initial determination by various agencies, including not only DHCR but also the Public Service Commission,[12] the New York City Department of Housing Preservation and Development ,[13] and the Commissioner of Education,[14] to name only a few.[15]

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[12] *See, e.g., Brownsville Baptist Church v. Consol. Edison Co. of New York, Inc.*, 272 A.D.2d 358, 359 (2d Dept. 2000); *Lamparter v. Long Island Lighting Co.*, 90 A.D.2d 496 (2d Dept. 1982); *Filler v. Consolidated Edison*, 39 Misc.3d 128(A), 2013 WL 1234935 (App. Term 2d, 11th and 13th Dist. 2013).

[13] *See, e.g., Wong v. Gouverneur Gardens Housing Corp.*, 308 A.D.2d 301, 303-04 (1st Dept. 2003).

[14] *See, e.g., Matter of Markow-Brown v. Bd. of Educ., Port Jefferson Pub. Schools*, 301 A.D.2d 653, 653-54 (2d Dept.), *lv. denied*, 100 N.Y.2d 512 (2003); *Matter of DiTanna v. Bd. of Educ. of Ellicottville Cent. School Dist.*, 292 A.D.2d 772 (4th Dept.), *lv. denied*, 98 N.Y.2d 605 (2002); *Matter of Hessney v. Bd. of Educ. of Public Schools of the Tarrytowns*, 228 A.D.2d 954 (3d Dept.), *lv. denied*, 89 N.Y.2d 801 (1996); *Matter of deVente v. Bd. of Educ.*, 15 A.D.3d 716, 718 (3d Dept. 2005); *Matter of Langston v. Iroquois Cent. School Dist.*, 291 A.D.2d 845 (4th Dept. 2002).

[15] Others include local zoning authorities (*see Massaro v. Jaina Network Systems, Inc.*, No. 17256/10, 2012 WL 760506 (Sup. Ct. N.Y. Co. Feb. 17, 2012) (staying a single cause of action based on primary jurisdiction, while allowing others to proceed), *aff'd as modified*, 106 A.D.3d 701 (2d Dept.) (primary jurisdiction ruling affirmed), *lv. dism'd*, 21 N.Y.3d 1057 (2013)), the New York City Board of Standards and Appeals (*see Haddad v. Salzman*, 188 A.D.2d 515, 517 (2d Dept. 1992)), and the Department of Transportation (*see Albany-Binghamton Express, Inc. v. Borden, Inc.*, 192 A.D.2d 887, 888 (3d Dept. 1993)).

A party should not be able to deprive a court of that discretion simply by alleging that its claims are brought on behalf of a class and taking the position that this makes the doctrine inapplicable, without meeting at least some minimal requirement of pleading the prerequisites for class treatment. The only way to ensure that such minimal requirements are met is to subject class allegations to challenge under CPLR 3211(a), just like any other aspect of a complaint.

This very case sharply illustrates the point. Those Respondents who allege improper rent increases based on particular improvements to *individual* apartments[16] allege *only* that (a) certain increases to the rent on their respective individual apartments would have required their landlord to spend certain amounts on improvements; and (b) based on their own subjective individual assessments (made years after the improvements and without having seen what the apartment looked like before the improvements), each apartment does not look like the landlord spent that much money on improvements. (*See, e.g.,* R.33-39). Based on nothing more, they want to take discovery to determine, in essence, *whether* they have a basis for an overcharge claim. That, however, is one of the functions of *DHCR*: it is specifically authorized to conduct exactly the kind of investigation

[16] The acronym "IAI" stands for *individual* apartment improvements.

these Respondents seek, subject to Article 78 review.[17] The courts, on the other hand, are not.

If the First Department's Order is allowed to stand, a plaintiff can insulate a claim like this from dismissal in favor of investigation and adjudication by DHCR by simply including class allegations whose sufficiency cannot be challenged at the pleading stage. Plaintiffs asserting claims more properly investigated and adjudicated by various other agencies can presumably do the same. Such a result is inconsistent with the principles that underlie CPLR 3211, the doctrine of primary jurisdiction, and the Chief Judge's Excellence Initiative (*see supra* at 13, n.11). Consistent with those principles, class allegations should be subject to the same rigors as any other under CPLR 3211(a): no more, but certainly no less.

III. FEDERAL JURISPRUDENCE DOES NOT CHANGE THE ANALYSIS

Any argument that this Court should affirm the First Department's Order based on federal precedent is misguided.[18] While it is true that this Court has looked to federal jurisprudence under Fed. R. Civ. P. 23 for assistance in

[17] In DHCR's Form RA-89 "Rent Overcharge Application," which is available online at http://www.nyshcr.org/Forms/Rent/ra89.pdf (last viewed January 29, 2019), a tenant is asked to set forth a number of basic details regarding his or her own rental history, so that DHCR can *investigate* to determine *whether* that tenant has been overcharged.

[18] No argument based on federal precedent was made in the court of first instance (*see* R.262-65), and the First Department did not rely on such precedent. Respondents, however, invoke it in their brief before this Court.

interpreting CPLR Article 9, cases that address pre-answer motions seeking to test the sufficiency of class allegations are *not* decided under Fed. R. Civ. P. 23 or CPLR Article 9. Instead, they are decided under Fed. R. Civ. P. 8 and 12 (in the federal courts) or CPLR § 3013 and 3211(a) (in the courts of this State). There is no need for this Court to look to Fed. R. Civ. P. 8 or 12 for any kind of guidance as to how to apply CPLR § 3013 and 3211(a).

More specifically, the federal courts are split on the question of how to assess a pre-answer motion addressed to the sufficiency of class allegations. Some of those courts analyze such motions under Fed. R. Civ. P. 12(f), which permits a federal court to "strike from a pleading" *only* "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." As those courts have noted, motions under Fed. R. Civ. P. 12(f) are "generally looked upon with disfavor." *See, e.g., Mayfield v. Asta Funding, Inc.*, 95 F. Supp.3d 685, 696 (S.D.N.Y. 2015) (citation and internal quotations omitted); *accord Calibuso v. Bank of Amer. Corp.*, 893 F.Supp.2d 374, 383 (E.D.N.Y. 2012) (same language); *Winfield v. Citibank, N.A.*, 842 F.Supp.2d 560, 573 (S.D.N.Y. 2012) ("Motions to strike are generally disfavored, and should be granted only when there is a strong reason for doing so.") (citation and internal quotations omitted). As a result,

motions to strike class allegations under Fed. R. Civ. P. 12(f) are infrequently granted.[19]

Other federal courts, however, have held that a pre-answer motion challenging the sufficiency of class allegations is more properly analyzed under Fed. R. Civ. P. 12(b)(6) – which, in parallel to CPLR 3211(a)(7), permits a court to dismiss a claim for "failure to state a claim upon which relief can be granted." Courts that analyze such motions under this rubric hold that class allegations are subject to the pleading standard generally applicable under Fed. R. Civ. P. 8 (sometimes called the "*Iqbal/Twombly*" standard, which requires that a plaintiff plead factual allegations sufficient to "state a claim to relief that is plausible on its face"[20]), and readily dismiss them when they do not meet that standard.[21] The view that Fed. R. Civ. P. 8 and 12(b)(6) provide the proper rubric for this analysis

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[19] *See generally* 5C Fed. Prac. & Proc. Civ. § 1380 ("motions to strike are viewed with disfavor by the federal courts and are infrequently granted") (collecting numerous cases; footnotes and citations omitted).

[20] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[21] *See, e.g., Lafferty v. Sherwin-Williams Co.*, CV No. 1:17-06321-RBK/AMD, 2018 WL 3993448, *5-6 (D.N.J Aug. 21, 2018); *Flores v. Starwood Hotels & Resorts Worldwide Inc.*, Case No. SACV 14-1093 AG (ANx), 2015 WL 12912338, *3-4 (C.D. Cal. May 18, 2015); *In re Cirillo*, Bkrtcy. No. 09-10324, Adv. No. 13-01002, 2014 WL 1347362, *5 (Bkrtcy. S.D. Tex. Apr. 3, 2014); *In re Pradaxa Products Liability Litig.*, MDL No. 2385, 2013 WL 3791509, *4 (S.D. Ill. Jul. 18, 2013); *Nicholas v. CMRE Financial Svcs., Inc.*, Civil Action No. 08-4857 (JLL), 2009 WL 1652275, *4 (D.N.J. Jun. 11, 2009).

has recently been described as the "majority" view.[22] As one court applying that rubric explained: "If courts ignore the sufficiency of class allegations until plaintiffs move for conditional class certification, class allegations that fail to meet the minimum pleading standards under *Twombly* and *Iqbal* could nevertheless survive." *Huchingson v. Rao*, CV No. 5:14-CV-1118, 2015 WL 1655113, *3 (W.D. Tex. Apr. 14, 2015).

The difference in outcomes under Fed. R. Civ. P. 8 and 12(b)(6) (on the one hand) and Fed. R. Civ. P. 12(f) (on the other) stems from the different analyses applicable under those Rules. As explained in one of the cases on which Respondents rely, on a motion to strike class allegations under Fed. R. Civ. P. 12(f) "the plaintiff has the burden to *prove* that the requirements of Rule 23 are met, and the court must accordingly apply Rule 23." *Royal Mile Co., Inc. v. UPMC*, 40 F.Supp.3d 552, 578 (W.D. Pa. 2014) (emphasis added). The question is not whether the prerequisites for class treatment are adequately alleged, but rather "whether class treatment is *actually* appropriate in the case." *Id.* at 579 (emphasis in original). It is therefore hardly surprising that federal courts analyzing class allegations under Fed. R. Civ. P. 12(f) often find it "premature" to perform that analysis before there has been any discovery.

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[22] *See Villegas-Rivas v. Odebrecht Constr., Inc.*, Civil Action No. 4:18-CV-1181, 2018 WL 4921922, *3 (S.D. Tex. Oct. 10, 2018) (collecting cases; citations and internal quotations omitted).

In contrast, a motion under Fed. R. Civ. P. 12(b)(6) "tests the legal sufficiency of a pleading [whose] factual sufficiency will be tested later"; the question, in other words, is only whether the plaintiff has adequately *alleged* the required elements for class treatment. *Id.* (citations and internal quotations omitted). This is a question of pleading that, like any challenge to the sufficiency of a complaint's allegations, can generally be determined without discovery.

New York State practice does not have an equivalent to Fed. R. Civ. P. 12(f).[23] As a result, a defendant seeking to challenge class allegations proceeds under CPLR 3211(a)(7); the argument is that if those allegations are facially insufficient, the complaint fails to state a cognizable claim to the extent that it is asserted on behalf of anyone other than the named plaintiffs, and should therefore be dismissed to that extent. CPLR 3211(a)(7) is parallel to Fed. R. Civ. P. 12(b)(6), *not* 12(f). *See generally* 2 N.Y. Prac., Comm. Litig. in New York State Courts § 12:28 ("Other than the state court usage of 'causes of action' and the federal court reference to 'claims' – terms derived from the respective forms of pleading – the procedure [with respect to motions under CPLR 3211(a)(7) and Fed. R. Civ. P. 12(b)(6)] is roughly equivalent."). Accordingly, to the extent that the

[23]CPLR 3024(b), which permits a court to strike only "scandalous or prejudicial matter unnecessarily inserted in a pleading," is substantially narrower than Fed. R. Civ. P. 12(f) and has, to the best of our knowledge, never been suggested as the proper rubric for analyzing the facial sufficiency of class allegations.

Court looks to federal jurisprudence at all, it should look to the cases that analyze pre-answer challenges to class actions under Fed. R. Civ. P. 12(b)(6), *not* those that apply Fed. R. Civ. P. 12(f).

There is another factor that materially distinguishes practice under CPLR 3211 from practice under Fed. R. Civ. P. 12. As noted above, CPLR 3211(d) specifies that where a party makes a sufficient showing through "affidavits" that "facts essential to justify opposition" to a motion under CPLR 3211(a) "may exist but cannot then be stated," the court may deny the motion or hold it in abeyance pending specified discovery. (*See supra* at 10). Thus, if a putative class plaintiff faced with a motion to dismiss class allegations under CPLR 3211(a) truly needs discovery in order to adequately allege that the prerequisites for class treatment are met (or to meet a challenge based on documentary evidence under CPLR 3211(a)(1)), the plaintiff can resist the motion on that basis *within* the confines of CPLR 3211. In contrast, absent conversion to summary judgment (*see* Fed. R. Civ. P. 12(d)), Fed. R. Civ. P. 12 has no equivalent.[24] Federal cases finding motions challenging class allegations under Fed. R. Civ. P. 12 "premature" before discovery are thus doubly inapposite under CPLR 3211, whose specific mechanism

[24] *See* 2 N.Y. Prac., Comm. Litig. in New York State Courts § 12:28 ("State court procedure (CPLR 3211(d)) allows a party to defend a motion directed at its pleading on the grounds, established by affidavit, that it needs discovery to obtain information relevant to the motion. The federal court equivalent, Rule 56(f), applies only in opposition to a motion for summary judgment.").

for addressing any actual need for discovery requires that any such need be shown in a particularized manner through "affidavits."

Respondents here submitted no affidavit material in response to Appellants' motion to dismiss their class allegations. (*See supra* at 10). Instead, their opposition consisted exclusively of a memorandum of law, in which their only argument about the sufficiency of their class allegations was that CPLR 3211(a) was "not the correct mechanism" by which to evaluate them. (R.262-64). As detailed above, however, CPLR 3211(a) is exactly the correct mechanism. Federal cases that evaluate a materially *different* mechanism under Fed. R. Civ. P. 12 are beside the point.

We make one more observation. Federal courts struggling with the question of whether to analyze a pre-answer challenge to the sufficiency of class allegations under Fed. R. Civ. P. 12(f) or under Fed. R. Civ. P. 12(b)(6) have emphasized that application of Fed. R. Civ. P. 12(b)(6) subjects such allegations to the "plausibility" requirement of the *Iqbal/Twombly* standard. Those that have rejected the Fed. R. Civ. P. 12(b)(6) approach have done so at least in part because of a reluctance to subject class allegations to that particular standard.[25] The courts

[25] *Compare, e.g., Royal Mile, supra,* 40 F.Supp.3d at 579 ("the Rule 12(b)(6) pleading standards set forth in *Iqbal* and *Twombly* do not apply with respect to plaintiffs' class allegations") *with Cirillo, supra*, 2014 WL 1347362, *5 ("there still have to be sufficient factual allegations that support the existence of a class under the *Iqbal/Twombly* standard") *and Pradaxa, supra*, 2013 WL 3791509, *4

of this State, however, have never adopted that "plausibility" requirement.[26] As a result, a holding that the standards generally applicable under CPLR § 3013 and 3211 apply to class allegations will *not* subject them to any such requirement. In other words, at least one of the policy considerations that seems to be driving those federal courts that reject application of Fed. R. Civ. P. 8 and 12(b)(6) to class allegations is absent in the state court system. This fact further weighs against following that (minority) federal position here.

The fact that the question before this Court involves interpretation of CPLR § 3013 and 3211 (rather than CPLR Article 9) should compel the conclusion that federal precedent has no place in the analysis: there is not, and never has been, any reason to look to federal precedent for guidance on how to apply New York's own

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("the class allegations are so woefully deficient that dismissal is required under Rule 12(b)(6) and the *Iqbal/Twombly* standard").

[26] *See generally* 2 N.Y. Prac., Comm. Litig. in New York State Courts § 12:44 (listing "Key Distinctions Between Commercial Litigation Practice in Federal and State Court" as including the fact that, unlike the standard in state court under CPLR 3211(a)(7), the federal standard on a motion to dismiss "includes 'plausibility' requirement of *Twombly* and *Iqbal*"); *accord, e.g., Brown v. City of New York*, 56 Misc.3d 1218(A), 2017 WL 3708697, *13 (Sup. Ct. Bronx Co. Aug. 25, 2017) ("While it is often argued that in cases alleging a violation of 42 USC § 1983 any motion to dismiss should be decided under the federal pleading standards, particularly those promulgated by *Ashcroft v. Iqbal* (556 U.S. 662, 678 [2009]), it is well settled that even after *Ashcroft,* this State's courts have consistently applied the standards promulgated by New York State case law when confronted with a motion seeking dismissal of a cause of action pursuant to 42 USC § 1983, on grounds that the complaint fails to state a cause of action.") (collecting cases; citations omitted).

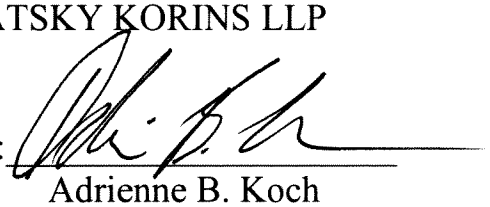
pleading rules. But to the extent that the Court nevertheless considers such precedent, it fully supports the rule we advocate here: class allegations should be subject to challenge for facial sufficiency on a pre-answer basis, pursuant to the same standard that applies to any other allegation.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Appellants' own briefing, the Appellate Division's Order should be reversed to the extent it holds that class allegations are subject to a different standard on a pre-answer motion to dismiss than any other kind of allegation.

Dated: New York, New York
January 30, 2019

Respectfully submitted,
KATSKY KORINS LLP

By: 

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CERTIFICATION OF COMPLIANCE

I, Adrienne B. Koch, a member of Katsky Korins LLP and counsel to the Proposed *Amici Curiae*, do hereby certify pursuant to 22 NYCRR § 500.13(c)(1) that the foregoing brief was prepared on a computer using Microsoft Word 2007.

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Dated: New York, New York
January 30, 2019

ADRIENNE B. KOCH