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Court of Appeals

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 similary situated,

Plaintiffs-Respondents,

against

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

Defendants,

(Caption Continued on the Reverse)

BRIEF FOR PLAINTIFFS-RESPONDENTS

NEWMAN FERRARA LLP
Attorneys for Plaintiffs-Respondents
1250 Broadway, 27th Floor
New York, New York 10001
212-619-5400
rsachar@nfllp.com

Of Counsel:

Lucas Ferrara
Jarred Kassenoff
Roger Sachar

Date Completed: January 15, 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.

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PRELIMINARY STATEMENT

In this putative class action (the "Action") 28 tenants, Plaintiffs-Respondents ("Respondents"), who reside (or resided) in buildings owned by Defendants-Appellant Big City Acquisitions LLC ("Big City Acquisitions") through single purpose-entity LLCs, managed by Defendant-Appellant Big City Realty Management, LLC ("Big City Realty Management"), assert a common rent-regulation scheme, which not only affected them, but hundreds of similarly situated current and former tenants in buildings owned and operated by Defendants-Appellants ("Appellants").[1]

Respondents' rent histories, on file with New York State Homes and Community Renewal,[2] demonstrate that Appellants' scheme took three forms. First, in roughly half the apartments at issue, there were multi-year failures to register, including registration omissions in buildings participating in the J-51 tax benefits program. (R. 33-40).

Second, in violation of the governing regulations, when Appellants' apartments exited rent-control, they improperly provided the first tenant with a

[1] As referred to herein, Appellants include Big City Acquisitions, Big City Realty Management, and each of the LLCs listed in Respondents' Complaint. (R. 2, 40-43). Defendant Big City Properties, was dismissed from the action.

[2] The Division was formally known as the "Division of Housing and Community Renewal" but continues to be colloquially known by its acronym, "DHCR." In conformance with the prevailing nomenclature, it is referred to herein as "DHCR."

lower preferential rent, and a higher legal regulated rent, and then took rent increases on based off of the latter number. (R. 33-34).

Finally, the DHCR rent histories for some of Respondents' apartments reveal an alarming pattern: during periods of apartment vacancies, rent-stabilized rents experienced significant rent spikes, many in excess of 100%, and some as high as 254%. (R. 33-40). After accounting for all other bases upon which rent could be legally increased (such as vacancy increases, and Major Capital Improvements ("MCIs")), those Respondents were able to determine, with a high degree of certainty, the amount of Individual Apartment Improvements ("IAIs") [3] required to justify their rents. As IAIs are performed on the honor system, it is the landlord's responsibility to put forth specific documentary evidence, in the form prescribed by DHCR, demonstrating that IAIs were performed in such requisite amounts. Appellants not only did not put forth that requisite documentary evidence, they proffered no evidence, at all.

On behalf of themselves, and a putative class of Appellants' current and former tenants, Respondents sought lease reformations to reflect the proper rent regulatory status of their apartments, and a refund of rent overcharges. (R. 54-57). Appellants filed a motion to dismiss Respondents' complaint, pursuant to CPLR

[3] Typical IAIs include new kitchen appliances and cabinets, bathroom fixtures, and new flooring if a subflooring is installed. A landlord may take an increase in the monthly rent based on the amount of IAIs performed (1/40th if the buildings or complex has thirty-five (35) or less units, and 1/60th if it has more than that number of units. (Rent Stabilization Code [9 NYCRR] § 2522.4)

3211. And, on November 8, 2017, the court of first instance erroneously granted Appellants' motion.

While Respondents' complaint had named every building comprising the real estate portfolio managed by Big City Realty Management, Appellants only sought to dismiss the eight LLCs which owned the buildings for which there was no representative tenant. Appellants did not dispute that Big City Acquisitions, Big City Realty Management, and the remaining LLCs were properly joined. (R. 223). Yet, the court of first instance not only dismissed the claims against the eight LLCs, but, *sua sponte*, dismissed the claims against the remaining LLCs, Big City Acquisitions, and Big City Realty Management, and held that Respondents "failed to properly assert how Defendants are factually or legally related or bound in this action." (R. 12). In sum, the court of first instance ignored the holding company structure. On appeal, the Appellate Division, First Department, reversed. (R. 302). Notably, Appellants' brief does not address that aspect of the decision rendered below, presumably in recognition that dismissal on those grounds had been improvidently granted.

The court of first instance further held, at the motion-to-dismiss stage, before Appellants answered, before discovery, and prior to a motion for class certification, that Respondents could not maintain their class claims, for failure to establish the class action prerequisites of commonality, typicality, and superiority.

On appeal, the Appellate Division, First Department, reversed with regard to the class claims. Unanimously, the First Department held that those tenants raising J-51 claims should be allowed to file an amended complaint, and seek class certification. The justices of the First Department differed, however, with regard to the remaining Respondents (those that raised failure to register claims outside of the J-51 context, the incorrectly decontrolled tenants, and the IAI tenants). The majority wrote:

> It simply is premature, before discovery and before a class certification motion has been made, to rule out the class claims in their entirety. Although there may be some differences in the documents to be examined for each apartment, whether individual issues will predominate over class concerns can be fleshed out once plaintiffs make a motion for class certification and defendants oppose it …. At this stage when defendants have not answered, we do not know what documents they have, if any, to justify the increases or what explanations they have for the purported failures to register the apartments. If their defenses are the same for many of the units, then the scheme alleged by plaintiffs may have relevance, and the potential members of the class should not, as a matter of law, be precluded from raising these claims as a group.

(R. 305).

The dissent disagreed, and found it "irrelevant" whether Appellants had engaged in a systematic effort to evade the rent regulations. The dissent asserted that an analysis of individual apartment rent histories would be required to determine liability and, as a consequence, common issues could never predominate over individual issues. Thus, as a matter of law, the dissent contended that

dismissal was appropriate because the CPLR 901 prerequisites could never be established. (R. 320). Appellants' briefing urges this Court to adopt the dissent's position.

Appellants are wrong for three reasons.

First, prior to an answer, discovery, and a motion for class certification, any determination of whether the class action prerequisites were met was premature. Dismissing class claims at such a preliminary stage would be highly unusual, and has never been countenanced by this Court. The First and Second Departments have uniformly held that a determination of whether the class action prerequisites have been satisfied, prior to class certification, is inappropriate. The federal courts, up to and including the United States Supreme Court, in analyzing Federal Rules of Civil Procedure rule 23 ("Rule 23"), unequivocally hold that striking class allegations at a preliminary stage, is inappropriate. Indeed, in all of this state's entire appellate authority, only one decision (a 1979 case from the Fourth Department),[4] has ever held that it was proper for a court to strike class action claims prior to a class certification motion. Indeed, whether that case even remains good law is open to question - - since the Fourth Department issued a contrary ruling in 2015.[5]

[4] *Wojciechowski v Republic Steel Corp.*, 67 AD2d 830 [4th Dept 1979].

[5] *Deluca v Tonawanda Coke Corp.*, 134 AD3d 1534 [4th Dept 2015].

Second, the argument that class claims can be dismissed on predominance grounds,[6] at the motion-to-dismiss stage, would render the class action mechanisms, available under CPLR 906(1) and (2), a nullity.

Under CPLR 906(1), predominance is not a factor, and courts can certify class-wide resolution of certain common issues, even in cases where an entire class action cannot be certified because commonality is not established. There is federal court precedent for doing precisely that, in litigation where a landlord has engaged in a widespread scheme to evade the rent regulation, such as has been alleged in this case.[7]

CPLR 906(2) allows for the creation of subclasses. Under that latter section, the class is broken into smaller chunks, and a class action plaintiff would then need to demonstrate that each subclass meets the CPLR 901(a) requirements. Here, for example, the "failure to register" class members could be in one subclass, the "IAI" class members in another, and the "preferential rent" class in a third. Given this Court's opinion in *Borden*,[8] the failure to register and decontrol claims may be

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[6] Appellants ignore that the court of first instance also questioned whether the CPLR 901(a) prerequisites of typicality and superiority had been established. Although Appellants seem to have abandoned those arguments, Respondents address those issues, briefly, below. *See* Sect. V, *infra*.

[7] *Charron v Pinnacle Group N.Y. LLC*, 269 FRD 221 [SD NY 2010]. There, the court utilized the federal corollary to CPLR 906(1), Rule 23(c)(4).

[8] *Borden v 400 E 55th Street Assocs.*, 24 NY3d 382 [2014]

certifiable under CPLR 901(a), and the IAI claims separately certifiable under CPLR 906(1). Alternatively, subclasses may be appropriate under CPLR 906(2).

Thus, allowing dismissal of a putative class action, on a failure to establish the CPLR 901(a) grounds, solely based upon what is alleged in the complaint, would effectively nullify CPLR 906.

Third, even it were appropriate to consider whether predominance existed at the motion-to-dismiss stage, the First Department majority recognized that Respondents had sufficiently established that that prerequisite was at least arguably present, which was all that was required. (R. 304-305).

The dissent, on the other hand, drew artificial distinctions regarding the types of rent overcharge claims brought by Respondents. Recognizing the binding authority of *Borden*, the dissent held that J-51 tenants could seek class certification status for Appellants' failure to register, because the J-51 Program was building-wide. But, the dissent then held that other tenants, whose apartments were not registered, and whose regulated status was not dependent on participation in the J-51 program, could not seek class action treatment, because individual analysis of their rent histories was required. A J-51 failure to register claim, and a general failure to register claim, is a distinction without a difference - - in both situations, a review of individual apartment rent histories is required. So, too, with the

preferential rent claims. In the latter instance, a similarly brief review of a rent history is required.

Even relative to the IAI claims, liability determinations are straightforward. Because IAIs are on the honor system, landlords are required to maintain documentary evidence demonstrating that they performed the requisite improvements to establish the legal regulated rent or, alternatively, justifying the apartment's deregulation. All that is necessary to determine whether an overcharge occurred is to compare the demonstrable amount of IAIs with the amount required to justify the rent increase, to see if they match.

Indeed, in almost any damages class action, there is almost always some individual analysis required to determine liability to an individual class member. The question (usually resolved at class certification) is whether that individual component predominates over common issues. Appellants' simplistic position - - that any time an individual analysis to determine liability is required a class action is inappropriate and can be dismissed at the outset - - would render gender and racial discrimination class actions, fraud class actions, employment class actions, and environmental class actions, as well as rent overcharge class actions, not only impossible to certify, but dismissible at the pre-answer stage. Appellants should not be permitted to eviscerate New York's class action mechanism.

The order of the Appellate Division should be affirmed. The complaint should be reinstated, and Respondents allowed to proceed with discovery, and their motion for class certification.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

Question: Was the order of the Appellate Division, First Department, which modified the order of the Supreme Court to the extent of reinstating certain class allegation claims which had been dismissed, pre-answer, pre-discovery, and prior to any class certification motion, properly made?

Answer: Yes.

JURISDICTION STATEMENT

Appellants' brief does not include the statement required by this Court's Rule 500.13(a), "showing that the Court has jurisdiction to entertain the appeal and to review the questions raised, with citations to the pages of the record or appendix where such questions have been preserved for this Court's review." *See* (Rules of Ct of Appeals [22 NYCRR] § 500.13.)

While Respondents do not take issue with this Court's jurisdiction, we do note that many of the arguments Appellants now make were not sufficiently raised in the court of first instance. In marked contrast to the more than 20 pages their brief now devotes to discussing IAI claims, their underlying briefing in support of their motion to dismiss contained only two cursory paragraphs on IAIs (one in each brief), with nary a case citation. (R. 232, 289). Similarly, for the first time before this Court, Appellants argue that a "common scheme," such as that alleged by Respondents, is not appropriate for class certification.[9]

Respondents respectfully submit that, to the extent that Appellants are now attempting to present arguments they did not make in the court of first instance, such arguments are not preserved for this Court's review. For the avoidance of doubt, however, in the sections that follow we respond to all of Appellants' arguments.

[9] App. Br. at 18.

COUNTERSTATEMENT OF THE FACTS OF THE CASE AND BACKGROUND LAW

The complaint in this action asserts rent overcharge and lease reformation claims against Big City Acquisitions, a holding company comprised of LLCs, which directly owns over 20 New York City apartment buildings. (R. 29, 33-43). Respondents occupy or occupied 24 apartments in eleven of those buildings and assert claims on behalf of current and former tenants in all buildings within the Big City Acquisitions holding company structure. (R. 29, 33-43). Appellants' pattern and practice of skirting rent regulation took three forms.

I. FAILURES TO REGISTER

Of the 24 apartments occupied by Respondents, thirteen were not properly registered with DHCR, as required by law. (R. at 33-40). For instance, Jonathan Fieweger and Maria Funcheon reside in [redacted], in Manhattan. [redacted] was not registered with DHCR from 2002 to 2010, and 2012 to 2015, notwithstanding that that unit was subject to rent-stabilization for these periods. (R. 37). Some, but not all, of these failure to register claims are attributable to Appellants' failure to follow the J-51 Program's requirements. (R. at 33-40).

II. IMPROPER SETTING OF FIRST RENTS

Two Respondents raised claims related to the decontrol of their units. For example, Respondent Theresa Maddicks's apartment at [redacted] Avenue was purportedly decontrolled in 2011. (R. 33). The first rent-stabilized tenant of her

apartment was given a rent stabilized lease with a legal regulated rent of $1,657.60, and a preferential rent of $1,100.00. That was patently improper. Pursuant to Rent Stabilization Code (9 NYCRR) § 2521.1(a)(1) the legal regulated rent for the first tenant following decontrol is to be the fair market rent negotiated between the landlord and tenant. (R. 46). For this Respondent, and for similarly situated class members, the fair market rent was the lower, preferential rent, and all subsequent increases were to be based on that lower figure. (R. 33). So, while taking into account Rent Guidelines Board increases from the first preferential rent, Maddicks's rent should be $1,178.55, rather than $1,707.56. (R. 33).

III. IAI-RELATED CLAIMS

Nine of the 24 apartments occupied by Respondents had significant rent spikes. In the normal course, increases of rent-stabilized rents are allowed only in limited circumstances, one of which is the performance of IAIs. (R. 30, 45-46).[10] Typical IAIs include items such as new kitchen appliances and cabinets. An examination of Respondents' rent histories reveals an alarming pattern: during apartment vacancies, rent-stabilized rents experienced significant rent spikes, many in excess of 100%. (R. 33-40). After accounting for all other bases upon which rent could be legally increased (such as vacancy increases, and MCI increases), Respondents can determine, with a high degree of certainty, the amount of IAIs required to justify the

[10] *See* fn. 3, *supra*

rents charged. For instance, the 254% rent increase at Respondent Sarah Norris's unit at [redacted]y required $56,700 in IAIs. (R. 39). Deregulating Kristen Piro's apartment at [redacted]ue 2013, necessitated $81,700 in IAIs. (R. 40). Since they occupy the units, Respondents have good cause to believe that IAIs were not performed in the amounts required to justify current rent levels.

IAIs are performed on the honor system, almost always while the apartment is vacant and, as such, are often an open invitation to fraud. Accordingly, the burden is on the landlord to preserve and present evidence of IAIs, when questioned. *985 Fifth Ave. Inc. v State Div. of Hous. & Community Renewal*, 171 AD2d 572, 574 [1st Dept 1991] (When challenged regarding an IAI related increase, the landlord is required to put forth documentary evidence, such as invoices and cancelled checks.).[11] Pursuant to Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 25-516(g), for apartments that have been deregulated pursuant to an IAI, that proof must be kept in perpetuity, and for apartments whose legal regulated rents were increased

[11]According to DHCR: "Any claimed individual apartment improvement cost must be supported by adequate documentation which should include at least one of the following:

> cancelled checks contemporaneous with the completion of the work; (2) invoice receipt marked paid in full contemporaneous with the completion of the work; (3) signed contract agreement; (4) contractor's affidavit indicating that the installation was completed and paid in full. Where proof is not adequately substantiated, the difference between the claimed cost and the substantiated cost will be disallowed."

See DHCR Operation Bulletins 90-10 and 2016-1.

pursuant to an IAI, the documentary evidence must be kept for four years from the date following the registration demonstrating that an IAI was performed.

For example, if a landlord deregulated an apartment in 2010 based on IAIs, the "most recent registration or annual statement for such accommodation" would be the final deregulation statement filed in 2010, and the landlord would be required to maintain, at a minimum, and in perpetuity, the documentary IAI support from 2006 to 2010 to support the deregulation. For an IAI performed in 2013 that did not result in a deregulation, but only an increased legal regulated rent, the documentary proof was required to be retained until at least 2017.

Two cases from the First Department demonstrate how the IAI burden of proof functions. In *Taylor v 72A*, 151 AD3d 95 [1st Dept 2017], a landlord deregulated an apartment in 1999 based on IAIs, while the building was receiving J-51 benefits.[12] In that litigation, the tenant challenged the amount of IAIs performed, and at summary judgment, the landlord:

> [p]rovided business records she claims were maintained in the owner's files by her now deceased father, the managing agent at the time. The records include bills, statements and invoices from contractors, service providers and suppliers, either marked paid, or supported by cancelled checks providing payment. [The landlord] contends the records support the owner's claim that it spent $18,343.07 in improvements to the apartment before [the tenant] moved in.

[12] *Taylor* at 98.

Taylor at 99. The tenant contested the sufficiency of the proof presented but that challenge was found to be inappropriate, because the landlord had proffered adequate documentary evidence in the form required by the rent regulations. The First Department noted, "[b]y providing records that include itemized bills from contractors, and records of payments, such as cancelled checks, the owner has produced sufficient information and detail to validate the 1/40th increase in the rent attributable to those improvements." *Taylor* at 104.

The IAI proof in *Taylor* can be compared to the deficiencies in *72A v Lucas*, 101 AD3d 401 [1st Dept 2012], an earlier decision involving the same landlord. *Taylor* at 103, n. 7 ("In this regard we distinguish our earlier ruling in *Lucas*, although it involved the same owner and building, but a different tenant. In *Lucas*, the owner failed to support its claimed apartment renovations with sufficient documentary evidence."). There, the only IAI evidence that the landlord could muster was an affidavit, attesting to the performance of $30,000 worth of renovations. *Id.* at 402. Because the *Lucas* landlord failed to present the proper documentary evidence, the court disallowed the rent increase. *Id.*

The Appellants here not only failed to proffer the level of proof found sufficient in *Taylor*, but they did not even provide the level of proof utilized in

Lucas. In fact, although Appellants could have put forth evidence of the performed IAIs in support of their motion to dismiss, they provided no proof at all.[13]

LEGAL STANDARDS

On a motion to dismiss pursuant to CPLR 3211, the pleading under attack is afforded a liberal construction (*see* CPLR 3026). As this Court has expressly guided, "[w]e accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 [1994].

With regard to motions made pursuant to CPLR 3211(a)(7), the "s*ole* criterion … is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail." *Id.* (internal citation omitted; emphasis added). CPLR 3211(a)(7) limits the court to "an examination of the pleadings to determine whether they state a cause of action." *Miglino v Bally Total Fitness of Greater N.Y., Inc*., 20 NY3d 342, 351 [2013].

[13] As discussed more fully below, that failure is what distinguishes the IAI claims, here, from *Boyd v N.Y. State Div. of Hous. & Comm. Renewal*, 23 NY3d 999 [2014]. In *Boyd*, an appeal from an Article 78 proceeding, this Court held that DHCR's refusal to consider a rent history beyond the four-year statutory period was neither arbitrary nor capricious. *Id.* at 1001. While *Boyd* did raise claims about IAIs, it did so in the context of whether it was "arbitrary and capricious" for DHCR not request the documentary evidence relating to the performance of IAIs. There is a difference between the "arbitrary and capricious" standard in an Article 78 proceeding (where discovery is not allowed), and this action, where Appellants are required to provide documentary evidence in discovery, of IAIs sufficient to support the rent being charged.

Further, as to CPLR Article 9, that statute "is to be liberally construed and any error should be resolved in favor of allowing the class action." *Liechtung v Tower Air, Inc.* 269 AD2d 363, 364 [2d Dept 2000]; *see also City of N.Y. v Maul*, 14 NY3d 499, 513 [2000] (CPLR Article 9 "should be broadly construed" because, *inter alia*, "it is apparent the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation that preceded it.")

PROCEDURAL BACKGROUND

I. THE ORDER APPEALED FROM

The court of first instance, finding that Respondents could not raise class action claims opined, as follows:

> Plaintiffs' [sic] failed to properly assert a class action. Based on the facts of this case, the court determines that this suit fails as a class action because the questions of law or fact common to the class do not predominate over questions affecting only individual members, the claims of defenses may not be typical of the class and a class action is not superior to other available methods of adjudication.

(R. 12). In other words, the court below held that Respondents had failed to establish the CPLR 901(a) requirements of predominance, typicality, and superiority.

With regard to predominance, the court below held that "in cases involving alleged rent overcharges a class action suit may be proper if it meets the criteria under CPLR 901 when the action involves the same allegation of wrongdoing,

plaintiffs who are current and former tenants of the same building, and defendants who are current and prior owners of the building." (R. 12).

As to typicality, the court's analysis can be divided into two parts. The first part of the court's decision dealt with perceived "differences" between the claims. (R. 12-13). The second part raised hypothetical concerns, holding, for instance, that a review of rent histories "could be onerous." (R. 13). The court then used these hypothetical concerns to find that class certification was inappropriate because typicality had not been established.

Finally, the court of first instance held that a class action would not be superior, because "individual class members may wish to pursue administrative remedies ... or individual suit. Since the class representatives may not reflect the interest of the class based on the different theories a class action may not be the superior manner in which to bring Plaintiffs' claims." (R. 13).

II. THE APPELLATE DIVISION OPINION

Respondents immediately appealed the dismissal to the Appellate Division, First Department. All five justices agreed that the J-51 failure to register claims should have survived dismissal, but disagreed regarding the remaining claims.

A. THE MAJORITY OPINION

A three-justice majority held that dismissal - - pre-answer, pre-discovery, and prior to a plaintiffs' motion for class certification - - was "premature."

First, the majority noted that CPLR 902 requires that a motion for class certification be made 60 days after a defendant answers, and "[b]ecause the time to make such a motion had not occurred, it was premature, in this case, for the court to engage in a detailed analysis of whether the requirements for class certification were met (*see Ackerman v New York Hosp. Med. Ctr. of Queens*, 127 Ad3d 794, 796 [2d Dept 2015])." (R. 303).

Second, the majority noted the allegations that "the setting of the improper rents in these apartments was part of a systematic effort by Big City Acquisitions to avoid compliance with the rent stabilization laws," and that if such a scheme existed, it would "support a class action and make one tenant's proof relevant to that of other tenants." (R. 304-305). The majority further observed that a "common scheme" could be appropriate for class certification. (R. 306).

Third, the majority recognized that there was no cognizable distinction between the type of analysis required for J-51 class action claims (upon which this Court has granted its imprimatur), and the other types of claims alleged. The majority held:

> the dissent acknowledges that the J-51 claims might be appropriate for class relief. We see no reason, at this pre-answer stage, to distinguish between those claims and the other aspects of the purported scheme asserted by plaintiffs. The J-51 claims will involve the review of individual documents, and the assessment of individual rent histories. If those claims are potentially appropriate for class action relief, the others should be too, at least for pleading purposes.

(R. 306-307).

Finally, the majority noted that the question of predominance should be determined after discovery, at the class certification stage. The majority wrote:

> It simply is premature, before discovery and before a class certification motion has been made, to rule out the class claims in their entirety. Although there may be some differences in the documents to be examined for each apartment, whether individual issues will predominate over class concerns can be fleshed out once plaintiffs make a motion for class certification and defendants oppose it …. At this stage when defendants have not answered, we do not know what documents they have, if any, to justify the increases or what explanations they have for the purported failures to register the apartments. If their defenses are the same for many of the units, then the scheme alleged by plaintiffs may have relevance, and the potential members of the class should not, as a matter of law, be precluded from raising these claims as a group.

(R. 305).

Accordingly, the majority held that Respondents should be permitted to take discovery, and then move for class certification.

B. THE DISSENTING OPINION

The dissent, authored by Justice Friedman, and joined by Justice Andrias, held that it was "irrelevant" whether Appellants had engaged in a common scheme to evade the rent regulations - - because some analysis of individual apartment rent histories would be required to determine liability, common issues could never predominate over individual issues. The dissent opined that, "regardless of any plan by defendants or any overcharges of other tenants, each class member either

was or was not overcharged – a question that can only be determined by looking at the evidence concerning that tenant's individual unit[.]" (R. 316). Thus, the dissent contended that, as a matter of law, dismissal was appropriate because CPLR 901(a) predominance requirement could never be established.

The dissent then attempted to distinguish the instant case from J-51 class actions, by pointing out that J-51 class actions involved the improper registration of some apartments, when the entire building should be stabilized, while the non-J-51 claims involved the improper registration of some apartments, when the entire building is not stabilized. (R. 312-313). Thus, the dissent concluded that while J-51 class action claims involving apartment deregulation claims might be permissible (if brought on a building-by-building or complex-by-complex basis), all other rent overcharge claims were inappropriate for class certification, regardless of a common scheme to evade the rent regulations, because determining whether "any particular tenant has actually been overcharged can be determined only by examining the evidence pertaining to that individual apartment." (R. 311).

ARGUMENT

I. APPELLANTS' CLASS ACTION ATTACK IS PREMATURE

The manner in which Appellants laid out their briefing before this Court is telling. Appellants' argument section - - entitled "Plaintiffs-Respondents' Class Action Allegations Fail as a Matter of Law" - - simply jumps into the question of

whether Respondents have adequately established the CPLR 901(a) factors, and asserts that Respondents' claims should be dismissed *en toto*. In other words, Appellants seek to apply a motion-to-dismiss standard to the CPLR 901(a) prerequisites.

Appellants conflate two distinct litigation phases. A class action defendant can always attempt to resolve a case at a preliminary stage -- and it usually does so by attacking the named plaintiffs' standing to bring the case. In a typical J-51 claim, for example, the landlord could demonstrate that the apartment was, in fact, registered with DHCR, and the landlord provided a tenant with a rent-stabilized lease. Similarly, with a named plaintiff raising IAI-related claims, the landlord could proffer the documentary proof (which they are legally required to retain), demonstrating they performed the requisite IAIs. That is why CPLR 3211(a)(1) exists, so that a defendant can put forth documentary evidence demonstrating that a plaintiff has not asserted a cognizable basis for relief. Notably, in response to Respondents' allegations of wrongdoing, the landlord here chose to put forth no documentary proof, whatsoever.

However, when the alleged wrongdoing is not competently challenged, a named plaintiff is permitted to proceed to class discovery, and to make a class certification motion. Class actions are representative actions, and named plaintiffs seek to represent parties other than themselves. Because the claims they raise are

representative, named plaintiffs may not have the information sufficient to establish that the CPLR 901(a) prerequisites are met, and class discovery allows them to seek that information, and establish their entitlement to certification.

A. APPELLATE AUTHORITY HAS DECLINED TO ADDRESS THE CPLR 901(A) PREREQUISITES ON A MOTION TO DISMISS

This Court has never addressed whether class action complaints may be dismissed, pre-answer, pre-discovery, and prior to a class certification motion, for failure to establish the CPLR 901(a) prerequisites. The First and Second Departments have unequivocally held that dismissal at the pre-certification stage is inappropriate.

In *Bernstein v Kelso & Co., Inc.*, 231 AD2d 314 [1st Dept 1997], the First Department asserted that the court below "erred in prematurely dismissing the class action allegations in the complaint before an answer had been served." *Id.* at 323. In that case, the First Department reiterated that "full pleadings and discovery" were required before a decision on class certification was appropriate. *Id.* at 324.[14]

[14] In *Downing v First Lenox*, 107 AD3d 86 [1st Dept 2013], the First Department did posit that class claims could conceivably be dismissed at the motion-to-dismiss stage. What was at issue in *Downing*, however, was whether CPLR 901(b)'s "no penalty" provision, not CPLR 901(a), could require dismissal at the threshold stage. In sum, *Downing* had nothing to do with whether prerequisites such as typicality and commonality had been met, but whether the class plaintiffs could waive the "treble damages" penalty. *Id.* at 90.

The Second Department has been even more adamant. In *Ackerman*, the court wrote "to the extent that the Hospital contends that the class action allegations should be dismissed pursuant to CPLR 3211(a)(7) on the ground that the plaintiff failed to actually demonstrate the prerequisites for class certification enumerated under CPLR 901(a), that contention is without merit …. Here, the Hospital's motion pursuant to CPLR 3211(a)(7) was made prior to the service of the answer and, thus, the issue of whether class certification should, or should not, be granted is not properly raised in the context of such a motion." *Ackerman*, 127 Ad3d at 796, *internal citations omitted*; *see also In re Long Is. Power Auth. Hurricane Sandy Litig.*, 134 AD3d 1119, 1120 [2d Dept 2015] ("Those branches of the defendants' motions which were to dismiss or strike the class action allegations for failure to establish the statutory prerequisites for class certification (*see* CPLR 901[a]) were properly denied by the Supreme Court as premature."), *internal citations omitted.*

The sole exception to the foregoing line of cases is *Wojciechowski*, the only appellate authority, in the entire corpus of New York State class action jurisprudence, where a decision to dismiss class claims at the motion-to-dismiss stage was upheld.

In *Wojciechowski*, the Fourth Department affirmed a decision to dismiss the class action allegations of the complaint because "the record establishe[d]

conclusively that the two central issues ... (i.e., whether [the damages alleged were caused by defendants] and, if so, the extent [thereof]) are questions which require individual investigation and proof and which must be decided separately with respect to each individual claim." *Id.* The *Wojciechowski* complaint contained allegations of damage in specific amounts to residential properties owned by certain named plaintiffs situated in the South District of Buffalo, allegedly because defendants allowed precipitator dust to become airborne, causing discoloration in exterior paint of particular residences. *Id.* In other words, the court in *Wojciechowski* was called upon to determine if precipitator dust had discolored the houses of each individual class member, and if so, the damages caused by that discoloration. Because the pleadings *conclusively* established that the action was unsuitable for class treatment under CPLR 901 (namely, that common questions of law and fact did not predominate over any questions affecting only individual members), the court deemed it appropriate to dismiss class claims. *Id.* Yet, despite upholding the dismissal, the Fourth Department recognized it was issuing an opinion that was out of step with the usual course, opining that "a decision as to the propriety of the class would ordinarily follow a motion and hearing under CLPR 902," *Id.* at 831.

It bears noting, too, that the Fourth Department would likely not decide *Wojciechowski* the same way, today. In *Deluca*, that court held that "[c]ontrary to

defendants' contention, plaintiff established that there are common questions of law or fact whether defendants negligently discharged chemicals into the atmosphere and whether such negligent conduct caused decreases in property values or quality of life in the affected area." *Deluca*, 134 AD3d. at 1535. Thus, there is now Fourth Department authority upholding class certification in an action alleging that airborne pollutants caused damage to individual properties, and it appears that the Fourth Department has overruled *Wojciechowski* by implication. At a minimum, in any event, it is difficult to a contemplate how *Wojciechowski* can support dismissal of an airborne pollutant class action at the pre-answer, pre-discovery, pre-certification stage, while *Deluca* demonstrates that airborne pollutant class actions are certifiable under CPLR 901(a).

Even if *Wojciechowski* is still good law, Respondents respectfully urge this Court to hold, in accordance with well settled law from the First and Second Departments that, "[i]t is simply premature, before discovery, and before a class certification motion has been made, to rule out the class claims in their entirety." (R. 305).

B. FEDERAL JURISPRUDENCE REINFORCES THAT DISMISSAL WAS PREMATURE

This Court has advised that in class action litigation, analogous Rule 23 class action jurisprudence provides persuasive guidance. *See Colt Indus. Shareholder Litig. v Colt Indus. Inc.*, 77 NY2d 185, 194 [1991]. And, the rule in the federal

courts is universal: Pre-discovery dismissal of class allegations is appropriate only if a defendant can "demonstrate from the face of the Complaint that it would be impossible to certify the alleged class regardless of the facts Plaintiffs may be able to obtain during discovery." *See Mayfield v Asta Funding, Inc.*, 2015 WL 1501100, at *6 [SD NY 2015], *emphasis added*, internal citations omitted; *see also Romano v Motorola, Inc.*, 2007 WL 4199781, at *2 [SD Fla 2007], *emphasis added* ("Defendants, in contending that class certification in this case is precluded as a matter of law, have the burden of demonstrating from the face of plaintiffs' complaint that it will be impossible to certify the classes alleged by the plaintiffs regardless of the facts the plaintiffs may be able to prove.").

The United States Supreme Court has explained that while class certification may be possible to determine from the face of the complaint, demonstrating class certification is evidentiary, and usually requires "the court to probe behind the pleadings before coming to rest on the certification question." *Comcast Corp. v Behrend*, 569 US 27, 33–34 [2013]. As the Eleventh Circuit Court of Appeals recently held, "the determination (of whether a class action is appropriate) usually should be predicated on more information than the complaint itself affords. The court may, and often does, permit discovery relating to issues involved in maintainability, and a preliminary evidentiary hearing may be appropriate or essential …." *Herrera v JFK Med. Ctr. Ltd. Partnership*, 648 Fed Appx 930, 934

[11th Cir 2016], *quoting Huff v N.D. Cass Co. of Ala.*, 485 F2d 710, 713 [5th Cir 1973] [en banc] (internal citation and footnote omitted).

Other courts agree, including:

- the Southern District of New York, in *Winfield v Citibank, NA*, 842 F Supp 2d 560, 573 [SD NY 2012] ("[D]istrict courts in this Circuit have frequently found that a determination of whether the Rule 23 requirements are met is more properly deferred to the class certification stage, where a more complete factual record can aid the court in making this determination.");

- the Eastern District of New York, in *Calibuso v Bank of Am. Corp.*, 893 F Supp 2d 374, 383 [ED NY 2012] (Motions directed to the sufficiency of the class allegations are "disfavored because it requires a reviewing court to 'preemptively terminate the class aspects of ... litigation, solely on the basis of what is alleged in the complaint, and before plaintiffs are permitted to complete the discovery to which they would otherwise be entitled on questions relevant to class certification.");

- the Western District of Pennsylvania, in *Royal Mile Co., Inc. v UPMC* 40 F Supp 3d 562, 579 [WD Pen 2014] ("It would be error for a court to apply the Rule 12(b)(6) plausibility standard set forth in *Twombly*[15] and *Iqbal*[16] to 'dismiss' class action allegations in a complaint.")

- the Fourth Circuit Court of Appeals in *Shelton v Pargo, Inc.*, 582 F2d 1298, 1315 [4th Cir 1978] ("Because certification is so important in terms of the district judge educating himself and making some very crucial findings required by the Rule, the court should insist on a fully informative presentation. Thus, I am sympathetic toward the growing practice of insisting on

[15] *Bell Atl. Corp. v Twombly*, 550 US 544 [2007]

[16] *Ashcroft v Iqbal*, 556 US 662 [2009]

some discovery relating to the propriety of class action treatment, particularly with regard to such issues as adequacy of representation, predominance of the common questions, and the superiority of the class action procedure."), *quoting* Wright, Miller and Kane, Fed. Prac. & Proc. Civ. § 1797 (3d ed.);

- the Sixth Circuit Court of Appeals in *Weathers v Peters Realty Corp.*, 499 F2d 1197, 1200 [6th Cir 1974] ("Maintainability [of a class action may be determined by the court on the basis of the pleadings, if sufficient facts are set forth, but ordinarily the determination should be predicated on more information than the pleadings will provide."); and

- the Ninth Circuit Court of Appeals in *Vinole v Countrywide Home Loans, Inc.* 571 F3d 935, 942 [9th Cir 2009] ("Our cases stand for the unremarkable proposition that often the pleadings alone will not resolve the question of class certification and that some discovery will be warranted.").

There are a myriad of cases, in virtually every court throughout the country, which reach exactly the same conclusion. In sum, Respondents respectfully assert that dismissing a complaint for failure to establish the CPLR 901(a) perquisites - - pre-answer, pre-discovery, and prior to Respondents' motion for class certification - - was inappropriate; a position on all fours with federal court jurisprudence interpreting Rule 23.

II. DISMISSING CLASS CLAIMS FOR FAILURE TO ESTABLISH THE CPLR 901(A) PREREQUISITES WOULD RENDER CPLR 906 A NULLITY

Appellants' premise - - that a court may dismiss a complaint if it fails to establish the CPLR 901(a) prerequisites - - ignores that CPLR Article 9 provides alternative mechanisms for class certification: CPLR 906(1) and (2).

A. CPLR 906(1) ALLOWS FOR "ISSUE" CLASSES

CPLR Article 9, akin to Rule 23, posits two "types" of class actions. One is the traditional CPLR 901(a) class action, the New York equivalent of a Rule 23(b) class case, where certification is appropriate for both liability and damages, whenever "questions of law or fact common to class members predominate over any questions affecting only individual members." CPLR 901(a)(3). Clearly then, a balancing test is posited, and discovery aids a class action plaintiff in demonstrating that the nature of his/her individual claim (one that has survived a motion to dismiss) has common elements, and that those elements predominate over individual aspects.

But, discovery may also evince that individual issues predominate over common issues. Under such a scenario, CPLR 906(1) certification, the New York equivalent of FRCP 23(c)(4), may be appropriate. CPLR 906(1) provides that "an action may be brought or maintained as a class action with respect to particular

issues." Appellate interpretation of CPLR 906(1) in this state is all but nonexistent, but the federal courts' interpretation of FRCP 23(c)(4), provides guidance.

The Second,[17] Fourth,[18] Sixth,[19] Seventh,[20] and Ninth[21] Circuit Courts of Appeals have all held that courts can certify class-wide resolution of certain common issues even in cases in which, because of predominance considerations, an entire class action cannot be certified. As the Ninth Circuit explained, "[e]ven if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(a) and proceed with class treatment of these particular issues." *Valentino* at 1234 [9th Cir 1996]; *see also Gunnells* at 439 (holding that courts may employ Rule 23(c) to certify a class as to one claim even though all of plaintiffs' claims, taken together, do not satisfy the predominance requirement).

CPLR 906(1) can be used to resolve the IAI claims, as *Charron* demonstrates. There, with respect to the IAI-based claims, the court certified a

[17] *In re Nassau County Strip Search Cases*, 461 F3d 219 [2d Cir 2006]

[18] *Gunnells v Healthplan Servs., Inc.*, 348 F3d 417 [4th Cir 2003]

[19] *Martin v Behr Dayton Thermal Products LLC*, 896 F3d 405 [6th Cir 2018]

[20] *McReynolds v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F3d 482 [7th Cir 2012]

[21] *Valentino v Carter–Wallace, Inc.*, 97 F3d 1227 [9th Cir 1996]

liability class under FRCP 23(c)(4) - - the federal equivalent of CPLR 906(1) - - and reserved the issue of damages for a later time.[22] *Charron* 269 FRD at 227, 242-243.

If Respondents choose to follow the course outlined in *Charron* with regard to the IAI claims (they need not make any election until they move for class certification), they would use discovery to demonstrate Appellants' common pattern and practice of inflating IAIs, and then seek certification under CPLR 906(1), reserving the question of how to determine damages for a later time. The *Charron* court noted, "in the event Defendants' liability is established, the Court will consider the various options for resolving the individualized damages questions - - for example, the Court could appoint a magistrate judge or special master to preside over individual damages proceedings." *Id.* at 240.

Appellants' position (and that of the First Department dissent) requires that a class action plaintiff's complaint demonstrate, on its face, that common issues predominate, or face dismissal. That position fails to account for CPLR 906(1), which allows for certification of distinct liability issues, even if predominance is not present. Dismissal for failure to establish the CPLR 901(a) prerequisites of predominance, such as that urged by Appellants here, completely ignores the possibility that a CPLR 906(1) issue class may be utilized, a choice Respondents need not make until they move for class certification.

[22] The damage issue was never resolved, as the parties settled the action. *Charron v Pinnacle Grp.*, 874 F Supp 2d 179 [SD NY 2012].

B. CPLR 906(2) ALLOWS FOR THE CREATION OF SUBCLASSES

Similarly, Appellants' position would render CPLR 906(2) ineffective. That provision of the Code provides that "a class may be divided into subclasses and each subclass treated as a class." While that provision has never been subject to more than a cursory mention by any appellate authority in this State, it clearly provides that class action plaintiffs confronted with a broad class that may not be certifiable, may instead present subclasses as a viable option, and may subdivide classes into smaller, multiple chunks. A class action plaintiff would then demonstrate that each subclass meets the CPLR 901(a) requirements. *See e.g. Retired Chicago Police Ass'n v City of Chicago*, 7 F3d 584, 599 [7th Cir 1993] ("Subclasses must satisfy the class action requirements ...."); *Betts v Reliable Collection Agency*, 659 F2d 1000, 1005 [9th Cir 1981] ("[E]ach subclass must independently meet the requirements of Rule 23 ....").

Here, three subclasses may be appropriate; one for the failure to register claims, one for the improper decontrol claims, and one for the IAI claims. Or, alternatively, the failure to register and decontrol claims may be certifiable under CPLR 901(a), and the IAI claims should proceed under CPLR 906(1).

Until pre-certification discovery is complete, and a motion for class certification is filed, any determination on how the class should be certified would be entirely speculative.

III. RESPONDENTS SUFFICIENTLY ESTABLISHED PREDOMINANCE

Appellants assert that the majority erred by finding that a "common scheme" could establish predominance. Citing to case law from this Court interpreting the former CPLR 1005 (and claiming that that case law remains applicable), Appellants posit that allegations of a "systematic effort" are insufficient to establish predominance. Appellants are incorrect: "common scheme" cases are regularly certified.

A. APPELLANTS' CPLR 1005 AUTHORITY IS NO LONGER APPLICABLE

Appellants assert that this Court has established that "'separate wrongs to separate persons, even if committed by similar means and pursuant to a single plan, do not alone create a common interest to sustain a class action." App. Br. at 18, *citing Ray v Midland Grace Trust Co.* 35 NY2d 147, 151 [1974], *citing Gaynor v Rockefeller*, 15 NY2d 120 [1965]; *Society Milion Athena v National Bank of Greece*, 28 NY 282 [1939]; and *Brenner v Title Guar. & Trust Co.*, 276 NY 230 [1937].

That authority, however, analyzed the predecessor to CPLR Article 9, CPLR 1005; a difference Appellants obfuscate in a footnote. App. Br. at 18. Indeed, after noting that the cited authority interpreted CPLR Article 9's predecessor, Appellants assert that case law interpreting that statute "remains equally

applicable." To support that position, Appellants point to a lone Fourth Department case,[23] which cited *Gaynor* in passing, and contained no analysis regarding the interplay between the former CPLR 1005 and CPLR Article 9. *Id.*

Contrary to Appellants' argument, CPLR 1005 case law is inapplicable. Under that former provision, which was little changed from the Field Code of 1848, "class actions were viewed as requiring a sort of unity among class members bordering on the nebulous concepts of 'privity' or 'joint tenancy.'" *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 91 [2d Dept 1980]. By 1973, this Court had noted that times had changed, and that while the rigid interpretation of CPLR 1005 had eased slightly, there was a still "general and judicial dissatisfaction with the existing restrictions on class action which in many instances may mean a total lack of remedy, as a practical matter, for wrongs demanding correction." *Moore v Metro. Life Ins. Co.*, 33 NY2d 304, 313 [1973]. This Court further urged the legislative adoption of "limitations and safeguards which would be highly desirable in broadening the jurisdiction of the courts of this State over class actions." *Id.*

Subsequently, the legislature adopted the far more class-friendly CPLR Article 9, substantively modeled on Rule 23. "Courts have recognized that the criteria set forth in CPLR 901(a) should be broadly construed not only because of

[23] *Rife v Barnes*, 48 AD3d 1228, 1230 [4th Dept 2008].

the general command for liberal construction of all CPLR sections (*see* CPLR 104), but also because it is apparent that the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it." *Maul*, 14 NY3d at 508-09 [2010], *citing Friar* at 91 [2d Dept 1980].

B. COMMON SCHEMES DEMONSTRATE PREDOMINANCE

Since the adoption of CPLR Article 9, this Court has recognized the validity of class certification in cases involving systemic failures to follow the law, or corporate policies that cause individual harm. In *Maul*, the plaintiffs, representing at least 150 children with developmental disabilities, asserted that two New York State agencies failed to fulfill their statutory and regulatory duties with regard to foster care placement. *Id.* at 505-506. The Appellate Division had qualified the lawsuit as a class action, and this Court analyzed whether commonality had been established.

In so doing, this Court identified four common allegations which evidenced a systemic course of conduct: for example, the regular submission of outdated referral packets; and the repeated failures to provide permanency planning obligations. *Maul* at 512. This Court held that "these allegations, if true, would tend to establish a de facto policy followed by ACS of delaying the receipt of services as a result of its practices. Plaintiffs seek to represent class members falling into each of these four categories of injury and ask for declaratory and

injunctive relief on their behalf." *Id*. Accordingly, because a common practice was established, this Court was of the view that predominance had been sufficiently established.

While in *Corsello v Verizon New York* 18 NY3d 777 [2012] the action was not found to be appropriate for class certification (on clearly distinguishable grounds), the language contained in that decision supports a finding of predominance here. In *Corsello*, the plaintiffs' complaint described Verizon's corporate practice of affixing telephone transmission boxes to class members' buildings, misleading class members regarding their right to compensation, and failing to provide notice that boxes had been attached. *Id.* at 791. Reviewing that description of common corporate wrongdoing, the Court opined "from this assertion, it would be reasonable to infer that the case will be dominated by class-wide issues – whether Verizon's practice is lawful, and if not, what the remedy should be." *Id.* Accordingly, this Court found that the scheme alleged "seems on its face well-suited to class action treatment." *Id.* [24]

Weinberg v Hertz Corp., 116 AD2d 1, 2-3 [1st Dept 1986], *affd*, 69 NY2d 979 [1987] also demonstrates that common schemes establish predominance. There, the plaintiff established that Hertz had engaged in acts and practices that

[24] This Court ultimately held that class status should be denied, because Verizon put forth evidence demonstrating that it had not engaged in the wrongdoing alleged. *Id.* at 791. Here, of course, Appellants failed to put forth any evidence at all refuting Respondents' allegations of wrongdoing.

were "alleged to be unfair, deceptive and in breach of contract," which included allegations related to "(1) defendant's service charges for refueling returned rental cars; (2) the daily charges for insurance coverage in the nature of collision damage waiver (CDW) and personal accident insurance (PAI); and (3) the hourly charges added when a vehicle was returned in New York State beyond the contractual return date." *Id.* The plaintiff sought to certify a class defined as "'all those who have rented automobiles from Hertz and were subject to, or had imposed upon them, the illegal charges described [above], within the State of New York.'" *Id.*

In conducting a fulsome predominance analysis, the First Department noted that "to the extent that there may be variations among the members of the class because not all sustained the same type of alleged overcharge, the authorities are clear that the Trial Judge may, in appropriate circumstances, carve out subclasses without destroying the action as a class action." *Id.* at 6. The court further held that:

> This rationale fits rather nicely into the predominance requirement that "questions of law or fact common to the class … predominate over any questions affecting only individual members" (CPLR 901 [a] [2]). The statute clearly envisions authorization of class actions even where there are subsidiary questions of law or fact not common to the class *(King v. Club Med*, supra.*)*. It is undisputed that the various charges complained of were imposed by defendant. That individuals who are members of the class might have been subjected to less than all of the conduct complained of is not a ground for denying class action. Whatever differences there are do not override the common questions of law and fact. As noted, subclasses may be created to deal with the differences, if needed.

Id. at 6. On appeal, this Court upheld the First Department's decision. *Weinberg v Hertz Corp.*, 69 NY2d 979 [1987].

There is also federal court precedent, in a case remarkably similar to the present action. In *Charron,* a class of tenants asserted claims under the Racketeer Influenced and Corrupt Organizations Act, and the New York Consumer Protection Act, claiming that the "Pinnacle Enterprise" (a collection of some 80 buildings managed by a single management company) misrepresented the legal regulated rent, the cost of IAIs, and provided false information to DHCR, among other allegations. *Charron*, 269 FRD at 225-6. At the time the plaintiffs therein moved for class certification, there were five class plaintiffs asserting claims arising out of the management and ownership of the many LLCs. *Id.* at 225-6, 236. That court held "there *is* something that binds together the rent-regulated tenants inhabiting Pinnacle apartments. While the Pinnacle Enterprise may use different tactics on different tenants, all rent-regulated tenants … either have been subjected to, or are at risk of being subjected to, the same general course of allegedly fraudulent and harassing conduct, the same pattern of racketeering." *Id.* at 226-227, emphasis in the original.

Maul, *Corsello*, *Weinberg* and *Charron* all stand for the principle that a common scheme, or corporate policy of wrongdoing, can be utilized to demonstrate predominance, regardless of whether or not all class members were

harmed.[25] While such a standard may not have been cognizable under the arcane provisions of the Field Code of 1848, and CPLR 1005, it is certainly cognizable under Article 9. Here, Respondents have alleged a *de facto* policy, followed by Appellants, of failing to adhere to the rent regulations. Especially at the motion-to-dismiss stage, that is more than enough to meet the prerequisite of commonality.

C. AN INDIVIDUAL ANALYSIS DOES NOT DEFEAT PREDOMINANCE

Appellants, echoing the Appellate Division dissent, posit that the failure to register claims (other than the J-51 claims), the impermissible decontrol claims, and the IAI claims are inappropriate for class certification, because some individual inquiry is required. That argument fails, because it requires the drawing of artificial distinctions with regard to the workload related to each type of claim.

Recognizing that *Borden* was binding, the dissent held that J-51 tenants could seek class certification status for Appellants' failure to register, because J-51 applied, building-wide. But, the dissent then held that other tenants, whose rent stabilization status was not dependent on J-51 participation, could not seek class action treatment, because some individual analysis of their rent histories was required. The distinction between J-51 failure to register claims, and failure to

[25] Indeed, there is no requirement that individual class members even need to be damaged. *See e.g. In re Nexium Antitrust Litig.* 777 F3d 9, 21-22 [1st Cir 2015] ("[I]t is difficult to understand why the presence of uninjured class members at the preliminary stage should defeat class certification. Ultimately, the defendants will to pay, and the class members will not recover, amounts attributable to uninjured class members, and judgment will not be entered in favor of such members."

register claims, generally, is artificial - - in both situations, a review of individual apartment rent histories is required.

Nor is there an evidentiary difference between J-51 claims, and preferential rent claims. To ascertain if a tenant was improperly deregulated while a landlord was participating in the J-51 Program, the fact finder need only look at the rent history to see if the apartment was registered. Similarly, to determine if a landlord improperly provided a lower preferential rent, and a higher legal regulated rent, for a unit exiting rent control, the fact finder need only take a momentary glance at the rent history to see if the apartment was first registered with a preferential rent. Again, the dissent drew a distinction without a difference. Tellingly, Appellants spend almost no time discussing the failure to register claims and the preferential rent claims.

What Appellants do spend an inordinate amount of time doing is discussing the IAI related claims. Appellants assert that class treatment is inappropriate because it would require "hundreds if not thousands of individual inspections of renovated units, registration histories, and the specific representations made to, and knowledge of, each potential claimant. Similarly, allegations concerning whether or not consent was or was not given by any particular tenant would also require an analysis limited to the particular tenant at issue."

That is entirely makeweight. IAIs come down to specific, demonstrable written proof, which Appellants are required to produce, on demand. Either Appellants have that proof (that they performed the IAIs in a given amount), or they do not. Tellingly, they submitted no proof in support of their motion to dismiss, although they certainly could have done so.

In any event, the amount of IAIs that can be demonstrated is compared with the amount statutorily required. There are no inspections, nor does it matter what representations were made to each potential plaintiff. While a review of rent histories is required, that is no different than the type of analysis necessary in a wage case, or a J-51 case, like *Borden.* As for consent (an argument that Appellants raise for the first time before this Court), that concern remains hypothetical, as Appellants have proffered no evidence that they received any written consents.[26] Resolving the IAI claims is a function of basic math which an elementary student could perform with ease. Surely, it is not, as Appellants seem to

[26] In that regard, *Elisofon v N.Y. State Div. of Hous. and Community Renewal*, 262 AD2d 40 [1st Dept 1999], upon which Appellants place much reliance, is inapposite. In that action, the tenant asserted that the IAIs took place after he signed his lease, but before he entered occupancy, and asserted that his written consent was required, pursuant to RSC § 2522.4. *Id.* at 40. Here, there has been no demonstration that any class member consented in writing to an increase while in occupancy. And, if such writing exists, Respondents will be able to produce them in discovery. In any event, resolving that issue should be relatively straightforward, and should not cause undue concern until such a time as Respondents proffer evidence that any hypothetical consents exist.

assert, unduly burdensome for a court (or more likely a Special Referee) to compare two numbers to see if they match.[27]

As a final note, it bears remembering, that Respondents may decide not to certify a 901(a) class with regard to IAIs, and could follow the course laid out in *Charron*. There, with respect to the IAI based claims, the court certified a liability class under FRCP 23(c)(4) - - the federal equivalent of CPLR 906(1) - - and reserved the issue of damages for a later time.[28] *Id.* at 227, 242-243.

With respect to IAIS, if Respondents were to follow the latter course - - and, again, they need not make any election until they move for class certification - - they would use discovery to demonstrate Appellants' common pattern and practice of inflating IAIs, seek certification under CPLR 906(1), and reserve the question of how to determine damages for a later time. As the *Charron* court observed, "in the event Defendants' liability is established, the Court will consider the various options for resolving the individualized damages questions—for example, the Court could appoint a magistrate judge or special master to preside over individual damages proceedings." *Id.* at 240. If proceeding in that manner was permissible in *Charron*, than dismissal here, at the pre-answer, pre-discovery stage was manifestly improper.

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[27] Indeed, that kind of analysis would be similar to the basic due diligence performed when a landlord purchases a building.

[28] As noted, the damage issue was never resolved, as the parties settled the action. *See* fn.22, *supra*.

IV. APPELLANTS' REMAINING ARGUMENTS ARE UNAVAILING

Sprinkled throughout Appellants' brief are arguments of dubious legal merit. Respondents address them here, *seriatim.*

A. APPELLANTS' *BORDEN* ANALYSIS IS ERRANT

Appellants assert that *Borden* is inapposite to the present action because that case, "involved allegations concerning a single, common specific program, namely the J-51 program. Moreover, in *Borden* unlike here, each of the three actions considered by this Court and consolidated into that decision, involved a single property or complex." App. Br. at 20. Under Appellants' analysis, Respondents should have filed four separate cases for those buildings with J-51 claims, and additional actions should have been filed for those tenants with other failure to register claims, two more cases for the tenants with decontrol claims, and yet further suits for those tenants whose class claims arose out of Appellants' IAI-inflation scheme.

Appellants' preferred course of conduct makes little sense, and is demonstrably not superior to consolidating all the victims of their misconduct in a single case. Moreover, Appellants' assertion that each building should be a separate suit, rather than one consolidated action, is laughable. *Downing*, for example, involved a "single residential complex" owned by separate LLCs, each of which received J-51 benefits. Why would it be allowable to have a class action for

a multi-building complex, but not permissible to have a multi-building class action, when the buildings are not part of a complex? Appellants do not address why such a distinction is necessary or even why they would prefer a multiplicity of suits, but if there are any concerns regarding different actions, and different buildings, those are easily resolved through the utilization of subclasses, as discussed above.

B. THE STATUTE OF LIMITATIONS CANNOT BE UTILIZED AS GROUNDS TO DENY CLASS CERTIFICATION

Appellants next assert (apparently with regard to the IAI claims), that "the legal analysis with respect to each claim subject to dismissal based upon the statute of limitations, will necessarily require an individual and separate inquiry." App. Br. at 28. Thus, they posit that class certification would be inappropriate.

As a threshold matter, a statute of limitations defense cannot to serve to bar class claims. *See e.g. Williams v Sinclair*, 529 F2d 1383, 1387 [9th Cir 1975] ("The existence of a statute of limitations issue does not compel a finding that individual issues predominate over common ones."); *In re Monumental Life Ins. Co.*, 365 F3d 408, 421 [5th Cir 2004] ("Though individual class members whose claims are shown to fall outside the relevant statute of limitations are barred from recovery, this does not establish that individual issues predominate, particularly in the face of defendants' common scheme of fraudulent concealment.").

Setting that aside, Appellants impermissibly lump together deregulated occupants and those tenants whose apartments were not deregulated (but who

suffered a rent spike), and attempt to apply the same statute of limitations analysis to both types of tenancies. The statute of limitations does not function in that simplistic way.

With regard to the tenants whose apartments were deregulated, they may bring their claims at any time.[29] The First Department has made it unequivocally clear that "a tenant should be able to challenge the deregulated status of an apartment at any time during the tenancy. Indeed, courts have uniformly held that landlords must prove the change in an apartment's status from rent stabilized to unregulated even beyond the four-year statute of limitations." *Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 199 [1st Dept 2011], *emphasis added.* In *Rosa v Koscal*, 2018 NY Slip Op 04109 [1st Dept 2018], issued only a few months ago, the First Department reiterated that an "apartment's rental history may be examined beyond four years to determine its rent-stabilization status." Similarly, in *Parkside Group v Leader*, 58 Misc 3d 160(A) [App Term, First Dept 2018], the Appellate Term, First Department, held that a subject apartment was impermissibly deregulated, because a landlord failed to present IAI evidence supporting a deregulation that purportedly took place in 1993. *Id.* at *2. So long as a deregulation transpired, it does not matter if it happened four years ago, or fourteen. A tenant can challenge

[29] These tenants include John Ambrosio (deregulated in 2010 after an improper preferential rent) (R. 33); Paul and Samuel Wilder (deregulated in 2011) (R. 34); Yanira Gomez (deregulated in 2009)(R.40); and Kristin Piro (deregulated in 2013). (R.40).

deregulation, at any time, and landlords are obligated to put forth evidence of any claimed IAIs. The same analysis is called for with respect to those tenants whose apartments were deregulated within the four-year period preceding the complaint.

Presumably, had Defendants performed IAIs sufficient to support deregulation, they would have preserved the required proof, as the law requires. The fact that they failed to present that proof - - which they are required to have in their possession, and which they could have proffered under CPLR 3211(a) (1) and (e) - - only serves to reinforce that these purported IAIs were never performed, and that discovery will demonstrate a similar absence of proof throughout the buildings at issue in this litigation.

As for those few remaining tenants for whom the IAIs were performed more than four years ago,[30] as Appellants rightly recognize, in *Grimm v State Div. of Hous. & Cmty. Renewal Office of Rent Admin*, 15 NY3d 358 [2010], this Court held that the four year "look back" rule did not bar an examination of the rent history prior to the four years preceding the action's filing when a tenant was able to allege fraudulent conduct on the part of the landlord. *Id.* at 366. In particular, this Court held that "where the overcharge complaint alleges fraud, as here, DHCR has an obligation to

[30] These tenants are Alyssa O'Connell (IAIs purportedly performed in 2010)(R.34); Liam Cudmore (IAIs purportedly performed in 2010); and Yanira Gomez (IAIs purportedly performed in 2009) (R.40). There may be additional tenants whose IAIs were performed (if they were performed at all) more than four years ago; for example, the IAIs in Sarah Norris' apartment were purportedly made sometime in 2012 (R.39), but it is unknown, pre-discovery, whether or not those IAIs took place before or after the statute of limitations cutoff of December 6, 2012.

ascertain whether the rent on the base date [*i.e.*, the date four years prior to the commencement of the overcharge proceeding] is a lawful rent." *Id.* Thus, when a tenant can point to "substantial indicia of fraud," the tribunal reviewing the overcharge complaint is required to consider the evidence presented in order to determine the legal regulated rent, even if that rent increase occurred more than four years prior to the complaint's filing. *Id.*[31]

At this preliminary stage, there is evidence of a fraudulent scheme to evade the rent regulations. For example, Respondent Alyssa O'Connell resides in Apartment 11 at 110 Convent Avenue. In 2013, the rent for her apartment increased by 136%, which would have required over $30,000 in IAIs.[32] Following the Court of Appeals' ruling in *Grimm*, courts have recognized that sizable increases in rent, when coupled with a larger scheme to evade the rent regulations, such as those alleged are themselves "substantial indicia of fraud." *See e.g. Altschuler v Jobman 478/480, LLC*, 2013 NY Slip Op 30208[U] [Sup Ct, NY County 2013], *affd sub nom Altschuler v Jobman 478/480, LLC.*, 2016 NY Slip Op 00035 [1st Dept, 2016] (sizable rent increase and failures to register indicate fraud); *Butterworth v 281 St. Nicholas Partners, LLC*, 2016 WL 6912721 [Sup Ct, NY County 2016], *affd as*

[31] *See also Thornton v Baron*, 5 NY3d 175, 181 [2005] ("[A] landlord whose fraud remained undetected for four years – however willful or egregious the violation – would, simply by virtue of having filed a registration statement, transform an illegal rent into a lawful assessment that would form the basis for all future rent increases.").

[32] (R. 34).

mod and remanded, 2018 NY Slip Op 02395 [1st Dept, 2018] (indicia of fraud, because landlord failed to explain 68% increase in rent, taken more than six (6) years prior to complaint); *Morton v 338 West 46th Street Realty, LLC*, 45 Misc 3d 544, 544 [Civ Ct, NY County, 2014] (sizable increases when coupled with registration failures would be indicia of fraud).

Boyd, in which Appellants put so much stock, is not to the contrary. There, in a 79-word (excluding citations) opinion rendered in an Article 78 proceeding, this Court held that DHCR's refusal to consider a rent history beyond the four-year statutory period was neither arbitrary nor capricious. *Boyd*, 23 NY3d at 1001. While *Boyd* did raise claims about IAIs, there is a vast difference between the "arbitrary and capricious" standard utilized in an Article 78 proceeding arising from an administrative agency (where discovery is not allowed), and the standard applicable to a regular civil action (where a plaintiff is permitted to seek discovery, and where landlord is required to maintain, and put forth, documentary evidence of IAIs). The evidence must establish that Appellants performed IAIs in a sufficient amount to justify the rents being charged. To date, Appellants have not only failed to put forth sufficient evidence, they have proffered absolutely no evidence, whatsoever.

In any event, it is improper to view these claims in isolation, instead of as part of a larger scheme. Respondents' allegations, together with Appellants' failure to

introduce any documentary evidence of IAIs performed in support of their dismissal motion, lead to the inescapable conclusion that the IAIs for these tenants' apartments were not performed at all, let alone in the amount required to justify thet rents charged.

C. IMPROVEMENTS NEED NOT BE IN AN IDENTICAL AMOUNT

Appellants point to language in the majority opinion, reading "[defendant] charged all the tenants the same fraudulent and inflated amounts" and assert that that decision somehow requires Respondents to demonstrate that each IAI overcharge was in an identical amount. App. Br. at 19. Evidencing mock confusion, they assert that because the IAIs here are in differing amounts, Respondents cannot even meet the standard put forth by the Appellate Division majority. *Id.*

"Same and fraudulent amounts" does not mean each IAI must be an identical charge. If that is what the majority meant, it would have used the word "amount" not "amounts." The language does not require each IAI overcharge to be identical, but merely requires that, at the time of class certification, that there be a demonstrable overcharge scheme.

D. RESPONDENTS SUFFICIENTLY STATE IAI CLAIMS

As a final salvo, Appellants assert that Respondents have failed to state a claim regarding IAIs, and fault Respondents for not affirmatively demonstrating that the

IAIs performed were inadequate to justify deregulation, or the rents being charged. App. Br. at 30. As noted previously, that is not Respondents' burden. Because IAIs are performed on the honor system, and are not publicly recorded or otherwise available, the burden is on Appellants, not Respondents, to affirmatively demonstrate that they performed the requisite work or improvements. *See 985 Fifth Ave.* (Burden of proof is on landlord to show that IAIs were performed); *Taylor* (same).

V. TYPICALITY AND SUPERIORITY ARE ESTABLISHED

Although the court of first instance also held that the complaint should be dismissed for failure to establish typicality and superiority, Appellants do not reference these prerequisites in their brief. Nevertheless, Respondents briefly address them, here.

Typicality is satisfied if the "plaintiff's claim derives from the same practice or course of conduct that gave rise to the remaining claims of other class members and is based upon the same legal theory." *Friar* at 99. There need not be an exact parallel between the claims of representative plaintiffs and class members, and the fact that a defendant may have different defenses to the claims of representatives and class members will not defeat typicality. *See Pruitt v Rockefeller Ctr. Properties, Inc.*, 167 AD2d 14, 22 [1st Dept 1991] (claims need not be identical to be typical), and *Pludeman v N. Leasing Sys., Inc.*, 74 AD3d 420, 424 [1st Dept 2010] ("Identity of issues is not required and that the underlying facts of each

individual plaintiff's claim vary, or that [defendant's] defenses vary, does not preclude class certification.)." Here, each of the putative class members were subjected to Appellants' pattern and practice of violating the rent stabilization law, and Respondents' claims are premised on the identical legal arguments. Certainly, at the pleading stage, that is more than sufficient to demonstrate typicality.

With regard to superiority, the court of first instance held that "individual class members may wish to pursue administrative remedies ... or individual suit. Since the class representatives may not reflect the interest of the class based on the different theories a class action may not be the superior manner in which to bring Plaintiffs' claims." (R. 13).

That holding is also manifestly errant. First, the determination that a class action is not superior because some class members *may* want to pursue their own remedies before DHCR, or file their own individual claims, is contrary to this Court's holding in *Borden*, which specifically held that class actions are cognizable in rent overcharge claims, despite the waiver of treble damages, so long as putative class members are afforded appropriate notice. *Borden* at 398 (tenants may waive treble damages in rent overcharge class action claims by choosing not to opt out of a rent overcharge class action after receiving notice). Indeed, in every class action, individuals may wish to opt-out, which is precisely why they are given two opportunities (after certification and after resolution) to do so.

Secondly, the holding that "class representatives *may* not reflect the interest of the class" because their claims are based on different theories is inappropriate. As noted previously, Respondents' claims are based on precisely the same theory – that Appellants are participating in a unitary course of conduct of evasion of the rent stabilization laws, and Respondents are injured in a similar manner - - by Appellants charging rents being charged rent in excess of legally permissible amounts. Moreover, as noted above, the use of the qualifier *may* demonstrates how inappropriate it was for the court below to decide the class claims at the motion-to-dismiss stage - - before Respondents had an opportunity to demonstrate, via a motion for class certification, that class treatment was appropriate.

CONCLUSION

Appellants attempt to turn back the clock nearly fifty years, and urge this Court to utilize CPLR 1005 jurisprudence to determine whether Respondents have adequately alleged class claims. It is no longer 1974, and the legislature has since replaced CPLR 1005 with CPLR Article 9, which it intended "to be a liberal substitute for the narrow class action legislation that preceded it." *Maul* at 513. Under Article 9 jurisprudence, common schemes to evade the law, such as those alleged in Respondents' complaint, have been determined to be appropriate for class certification.

More troubling than Appellants' invocation of restrictive, pre-Article 9 jurisprudence, is their assertion that it is appropriate to reach a determination on whether a class plaintiff has satisfied the CPLR 901(a) prerequisites based on the complaint alone, and prior to an answer, discovery, and a motion for class certification. At the outset, Appellants' misguided notion of class action jurisprudence would require ignoring CPLR 906, the federal analogue of which has been found to provide certification authority in cases such as that presented by Respondents here.

Setting that aside, Appellants' position is at odds not only with federal jurisprudence (up to and including guidance from the United States Supreme Court), but with longstanding case law from the First and Second Departments. Indeed, the lone appellate authority holding that pre-answer dismissal is appropriate for failure to meet the CPLR 901(a) requirements - - a 1970s case from the Fourth Department - - appears to have been superseded.

Appellants' aim is clear. They seek not only to bring back the restrictive CPLR 1005 jurisprudence that predated CPLR Article 9, but wish to tilt the class certification balance in a defendant's favor, requiring that courts conduct a CPLR 901 analysis at the motion-to-dismiss stage, any time class claims are raised. Adopting Appellants' position would not only upend the legislature's intent that

CPLR Article 9 be liberally construed, but would instantly transform this state into the most difficult jurisdiction for class action jurisprudence in the country.[33]

This Court should reject Appellants' invitation to turn back the clock. The class action remedy, which allows individuals to join together and seek a redress for systemic and pervasive wrongs, whether they be rent overcharge claims, employment lawsuits, claims for environmental damages, or racial discrimination claims, should be left undisturbed.

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NEWMAN FERRARA LLP

By: _____

Lucas A. Ferrara
Jarred I. Kassenoff
Roger A. Sachar Jr.
1250 Broadway, 27th Floor
New York, New York 10001
(212) 619-5400
lferrara@nfllp.com
jkassenoff@nfllp.com
rsachar@nfllp.com

[33] Excepting only Virginia and Mississippi, which do not allow class actions at all.

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

A proportionally spaced typeface was used, as follows:

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Respectfully submitted,

NEWMAN FERRARA LLP
Attorneys for Plaintiffs-Respondents
1250 Broadway, 27th Floor
New York, New York 10001
212-619-5400