APL-2023-_____
Appellate Division, First Department
Docket Nos. 2021-03399, 2021-03400, 2022-00030
New York County Clerk's Index No. 157631/15

Court of Appeals
STATE OF NEW YORK

In the Matter of

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Petitioner,

—against—

JPMORGAN CHASE BANK, N.A.,

Respondent-Appellant,

THE DAKOTA, INC.,

Respondent-Respondent,

ALPHONSE FLETCHER, JR.,

Respondent,

FLETCHER INTERNATIONAL LTD., MASSACHUSETTS BAY TRANSPORTATION AUTHORITY RETIREMENT FUND, FLETCHER FIXED INCOME ALPHA FUND LTD., FIA LEVERAGED FUND, and FLETCHER INCOME ARBITRAGE FUND,

Intervenors-Respondents.

MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

ZACHARY G. NEWMAN
THOMPSON COBURN HAHN & HESSEN LLP
488 Madison Avenue
New York, New York 10022
Telephone: (212) 478-7200
Facsimile: (212) 478-7400

ALAN E. SCHOENFELD
WILMERHALE
7 World Trade Center
250 Greenwich Street
New York, New York 10007
Telephone: (212) 230-8800
Facsimile: (212) 230-8888

JAMES BERG
PARKER IBRAHIM & BERG LLP
270 Davidson Avenue, 5th Floor
Somerset, New Jersey 08873
Telephone: (908) 725-9700
Facsimile: (212) 596-7036

Attorneys for Respondent-Appellant

STATE OF NEW YORK
COURT OF APPEALS

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP, *Petitioner*,	:	New York County
-against-	:	Index No.: 157631/15
JPMORGAN CHASE BANK, N.A., *Respondent-Appellant*,	:	**CORPORATE DISCLOSURE STATEMENT**
-and-	:	
THE DAKOTA, INC., *Respondent-Respondent*,	:	
-and-	:	
ALPHONSE FLETCHER, JR., *Respondent*,	:	
-and-	:	
FLETCHER INTERNATIONAL, LTD., MASSACHUSETTS BAY TRANSPORTATION AUTHORITY RETIREMENT FUND, FLETCHER FIXED INCOME ALPHA FUND, LTD., FIA LEVERAGED FUND LTD., and FLETCHER INCOME ARBITRAGE FUND, LTD., *Intervenors-Respondents*.	:	

JPMorgan Chase Bank, N.A. is a wholly owned subsidiary of JPMorgan Chase & Co. JPMorgan Chase & Co. is a publicly held corporation. JPMorgan Chase & Co. does not have a parent corporation and no publicly held corporation

owns 10% or more of its stock. However, the Vanguard Group, Inc., an investment adviser which is not a publicly held corporation, has reported that registered investment companies, other pooled investment vehicles, and institutional accounts that it or its subsidiaries sponsor, manage, or advise have aggregate ownership under certain regulations of 10% or more of the stock of JPMorgan Chase & Co.

STATE OF NEW YORK
COURT OF APPEALS

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP, *Petitioner*,	:	New York County
-against-	:	Index No.: 157631/15
JPMORGAN CHASE BANK, N.A., *Respondent-Appellant*,	:	**NOTICE OF MOTION**
-and-	:	
THE DAKOTA, INC., *Respondent-Respondent*,	:	
-and-	:	
ALPHONSE FLETCHER, JR., *Respondent*,	:	
-and-	:	
FLETCHER INTERNATIONAL, LTD., MASSACHUSETTS BAY TRANSPORTATION AUTHORITY RETIREMENT FUND, FLETCHER FIXED INCOME ALPHA FUND, LTD., FIA LEVERAGED FUND LTD., and FLETCHER INCOME ARBITRAGE FUND, LTD., *Intervenors-Respondents*.	:	

PLEASE TAKE NOTICE that, upon the annexed affirmation of Alan E. Schoenfeld, dated February 16, 2023 ("Schoenfeld Affirmation"), and the exhibits attached thereto; the memorandum of law in support of this motion; the record on

review submitted to the Appellate Division, First Department, and the briefs of Respondent-Appellant and Respondent-Respondent in that court; and upon all prior pleadings and proceedings herein, Respondent-Appellant will move this Court, at Court of Appeals Hall, Albany, New York, on Monday, February 27, 2023, for an order under N.Y. C.P.L.R. § 5602(a) granting Respondent-Appellant's permission to appeal to this Court from the October 18, 2022 Decision and Order of the Appellate Division, First Department, to the extent that the Decision and Order held that an assignee must intervene or be bound by the judgment in suits involving assignors to which the assignee was not a party, in which the assignee was not involved, and that began after the assignment, and for such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that the annexed memorandum of law sets forth a concise statement of the question presented for review, a statement of the procedural history of the case and the timeliness of this motion, a showing that this Court has jurisdiction over this motion and over the proposed appeal, a corporate disclosure statement, and argument showing why the question presented merits review by this Court, pursuant to Rule 500.22(b) of the Rules of the Court of Appeals of the State of New York.

PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 500.21(c) of the Rules of the Court of Appeals of the State of New York, answering papers, if any,

must be served and filed on or before the return date of this motion. This motion shall be submitted to the Court without oral argument.

Dated: February 16, 2023

Respectfully submitted.

WILMER CUTLER PICKERING
HALE AND DORR LLP

Alan E. Schoenfeld
7 World Trade Center
250 Greenwich St.
New York, NY 10007
(212) 937-7518
alan.schoenfeld@wilmerhale.com

THOMPSON COBURN HAHN &
HESSEN LLP
Zachary G. Newman, Esq.
488 Madison Avenue
New York, New York 10022
(212) 478-7200
znewman@thompsoncoburn.com

PARKER IBRAHIM & BERG LLP
James Berg, Esq.
270 Davidson Avenue, 5th Floor
Somerset, New Jersey 08873
(908) 725-9700
james.berg@piblaw.com

Attorneys for Respondent-Appellant

STATE OF NEW YORK
COURT OF APPEALS

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP, *Petitioner*,	x :	
-against-	:	Index No.: 157631/15
JPMORGAN CHASE BANK, N.A., *Respondent-Appellant*,	:	
-and-	:	
THE DAKOTA, INC., *Respondent-Respondent*,	:	
-and-	:	
ALPHONSE FLETCHER, JR., *Respondent*,	:	
-and-	:	
FLETCHER INTERNATIONAL, LTD., MASSACHUSETTS BAY TRANSPORTATION AUTHORITY RETIREMENT FUND, FLETCHER FIXED INCOME ALPHA FUND, LTD., FIA LEVERAGED FUND LTD., and FLETCHER INCOME ARBITRAGE FUND, LTD., *Intervenors-Respondents*.	:	

AFFIRMATION IN SUPPORT OF MOTION OF RESPONDENT-APPELLANT FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

ALAN E. SCHOENFELD, an attorney duly admitted to practice in the State of New York, affirms the truth of the following under penalty of perjury pursuant to C.P.L.R. § 2106:

1. I am a partner at the law firm of Wilmer Cutler Pickering Hale and Dorr LLP, attorneys for Respondent-Appellant JPMorgan Chase Bank, N.A., in this action. I am fully familiar with the facts and proceedings pertinent to this motion, having reviewed the record on appeal.

2. I submit this Affirmation in support of the motion of Respondent-Appellant pursuant to C.P.L.R. § 5602(a) for an order granting leave to appeal to the New York Court of Appeals from the October 18, 2022 Decision of the Appellate Division, First Department, which affirmed the Judgment of the New York Supreme Court.

3. In connection with the motion for leave to appeal to the Court of Appeals, Respondent-Appellant places before this Court true and correct copies of the following exhibits:

A. Order of the Supreme Court, dated August 4, 2021, and Judgment of the Supreme Court, dated November 8, 2021, with notices of entry.

B. Decision and Order of the Appellate Division, First Department, dated October 18, 2022, with notice of entry.

C. Decision and Order of the Appellate Division, First Department, dated January 17, 2023, denying Respondent-

Appellant's motion for reargument or, in the alternative, motion for leave to appeal to the Court of Appeals, with notice of entry.

Dated: New York, New York
February 16, 2023

Alan E. Schoenfeld

EXHIBIT A

DECISION AND ORDER OF THE HONORABLE LEWIS J. LUBELL ("MOTION SEQUENCE NO. 13"), DATED AND ENTERED ON AUGUST 4, 2021, APPEALED FROM, WITH NOTICE OF ENTRY [17 - 26]

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

PRESENT: HON. LEWIS J. LUBELL, J.S.C. PART IAS MOTION 29

---x

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Petitioner(s),

-against-

JPMORGAN CHASE BANK, N.A., THE DAKOTA, INC., and ALPHONSE FLETCHER, JR.,

Respondent(s),

-and-

FLETCHER INTERNATIONAL, LTD, MASSACHUSETTS BAY TRANSPORTATION AUTHORITY RETIREMENT FUND, FLETCHER FIXED INCOME ALPHA FUND, LTD, FIA LEVERAGED FUND LTD., and FLETCHER INCOME ARBITRAGE FUND, LTC.,

Intervenor(s)-Respondent(s).

---x

INDEX NO.: 157631/2015

MOTION DATE: 4/30/21

MOTION SEQ. NO(s).: 13

Respondent JPMorgan Chase Bank, N.A. (Chase) moves (Motion #13) for summary judgment.

The following papers filed on NYSCEF were read on the motion:	**Doc. Nos.**
Notice of Motion (#13), Aff'ns (3), Exhibits (31), and Memo of Law	243-278
Affirmation in Opposition, Exhibits (2), and Memo of Law	281-284
Affirmation in Reply, Exhibits (6), and Memo of Law	301-308

Upon the foregoing papers, it is ordered that the motion is decided in accordance with the annexed decision and order.

Dated: New York, New York
August 4, 2021

HON. LEWIS J. LUBELL, J.S.C.

CHECK ONE:	☒ CASE DISPOSED		☐ NON-FINAL DISPOSITION	
	☐ GRANTED	☒ DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE

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

PRESENT: HON. LEWIS J. LUBELL, J.S.C. PART IAS MOTION 29

---x

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Petitioner(s),

-against-

JPMORGAN CHASE BANK, N.A., THE DAKOTA, INC., and ALPHONSE FLETCHER, JR.,

Respondent(s),

-and-

FLETCHER INTERNATIONAL, LTD, MASSACHUSETTS BAY TRANSPORTATION AUTHORITY RETIREMENT FUND, FLETCHER FIXED INCOME ALPHA FUND, LTD, FIA LEVERAGED FUND LTD., and FLETCHER INCOME ARBITRAGE FUND, LTC.,

Intervenor(s)-Respondent(s).

---x

INDEX NO.: 157631/2015

DECISION & ORDER ON MOTION

Background

By way of background, defendant The Dakota, Inc. (Dakota) is a residential cooperative corporation that owns the building located at One West 72nd Street, New York, New York. In 2001, respondent Alphonse Fletcher, Jr. (Fletcher) acquired certain shares of capital stock (Shares) allocated to and associated with Fletcher's two apartments (that is, apartments 52 and PHB) in the Dakota and the related proprietary lease (Lease).

On or about February 8, 2008, Fletcher executed and delivered to Chase two notes in the aggregate amount of $11,250,000.00 (collectively, the Notes). The Notes were secured by two separate loan security agreements dated February 8, 2008 and executed by Fletcher in favor of Chase to create a security interest in, and lien on the Shares and Lease (Loan Security Agreements). Fletcher also assigned to Chase all of his right, title and interest in the Lease through a formal assignment that was executed and notarized on February 8, 2008 (Assignment of Lease). On or about February 8, 2008, Fletcher, Chase, and the Dakota executed an agreement, which addressed various aspects of the signatories' relationship in connection with one of the Notes (Recognition Agreement). The Recognition Agreement provided, among other things, that:

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> "2. (a) [The Dakota] will not consent to any further encumbrances, subletting, termination, cancellation, surrender or modification of the Apartment by the Lessee without [Chase's] approval, which [Chase] will not unreasonably withhold but this provision shall not apply to any modification or termination which, by the terms of the Lease, may be effective against a Lessee when approved by a fixed percentage of other holders of [the Dakota's] shares, or which may be effective in the event of condemnation or casualty.
>
> * * * *
>
> 4. While [Chase has] the right but no obligation to cure the Lessee's defaults under the Lease, if [Chase does] not do so within the time provided for herein, [the Dakota] shall have no obligation to [Chase], except that in the event of sale or subletting the Apartment, [the Dakota] shall recognize [Chase's] rights as lienor against the net proceeds of any sale or subletting (after reimbursement to [the Dakota] of all sums which are due to [the Dakota] under the Lease)."

In 2011, Fletcher commenced an action with the filing of a summons and complaint, later amended, against, among others, the Dakota in connection with the Dakota's denial of Fletcher's application to purchase another apartment (Fletcher Action).[1] The amended complaint set forth several causes of action for discrimination and retaliation as well as two claims for breach of fiduciary duty (that is, the First and Second Causes of Action). The First Cause of Action alleged, among other things, that each member of the Board and the Finance Committee of the Dakota owed Fletcher a fiduciary duty to Fletcher as a shareholder of the Dakota and the Second Cause of Action alleged, among other things, that the Dakota breached its fiduciary duty to Fletcher by refusing to comply with an internal policy, which made it easier for existing shareholders to purchase apartments in the building than for non-shareholders. The Dakota interposed an answer along with various counterclaims, including the first counterclaim (First Counterclaim) which alleged that the Lease provides, among other things, that "if the Dakota defends any action, proceeding, or claim therein commenced by Fletcher, Fletcher shall reimburse all reasonable expenses, including reasonable attorneys' fees and disbursements, thereby incurred by the Dakota." Petitioner represented Fletcher for some period of time during the Fletcher Action.

On July 15, 2015, petitioner commenced the instant proceeding against Fletcher for an order to seize and sell Fletcher's right, title, and interest in the Shares and the Lease. The petition alleges that petitioner had previously obtained a money judgment

[1] The Fletcher Action was commenced in the Supreme Court, New York County and was entitled *Alphonse Fletcher, Jr. and Fletcher Asset Management, Inc. v The Dakota, Inc., Bruce Barnes and Peter Nitze*, Index No. 101289/2011.

(Kasowitz Judgment) in the amount of $2,748,244.03 against Fletcher in an action[2] to recover attorney's fees for its representation of Fletcher in the Fletcher Action. The Dakota interposed an answer along with, among other things, a cross-claim for a declaratory judgment that the Dakota's rights and interest in the Shares and Lease are superior to those of Chase. Chase also interposed an answer along with, among other things, a cross-claim for a declaratory judgment that Chase's rights and interest in the Shares and Lease are superior to those of the Dakota as well as 19 affirmative defenses.

On December 26, 2017, a judgment was entered in the Fletcher Action in favor of the Dakota and against Fletcher on the First Counterclaim in the amount of $3,118,076.26, plus post-judgment interest at the rate of 9% per annum from the entry of judgment (Bluth Judgment).

At this time, the Dakota and Chase are the sole remaining parties to this proceeding. Now, the Dakota and Chase move for summary judgment.

In support of its motion, the Dakota proffers evidence that it is owed $4,542,151.61 as of November 30, 2020. The Dakota notes that the bulk of this amount is derived from the Bluth Judgment along with the post-judgment interest, which amounted to $831,885.66 as of November 30, 2020. The Dakota contends that, pursuant to its governing documents and the New York Uniform Commercial Code (UCC), its lien is entitled to priority vis-à-vis Chase's lien.

In response, Chase puts forward various arguments for its position that the Dakota's claim for priority is unavailing for several reasons. Initially, Chase concedes that UCC § 9-322 (h) (1) provides a cooperative organization security interest priority with respect to all amounts secured, but, Chase contends, the same provision limits the security interests to those "obligations incident to ownership of that cooperative interest." Chase contends that the Bluth Judgment is not incident to Fletcher's ownership of that cooperative interest, but rather is incident to Fletcher's claims of discrimination as a prospective buyer and is not an "indebtedness" based on Fletcher's obligations to the Dakota as an existing stockholder. Next, Chase asserts that the Bluth Judgment is based on an erroneous reading of Paragraph 15th of the Lease. Chase argues that this provision only provides for an award of attorney's fees when the lessee is in default, which was not the case in the Fletcher Action. Indeed, Chase asserts that an explanatory comment, which circulated among shareholders before the applicable language of Paragraph 15th was finalized, clarifies that recovery should be limited to instances in which a shareholder is in default. In addition, Chase asserts that, as interpreted by the Dakota, Paragraph 15th of the Lease would be unconscionable because it would permit the Dakota to recover attorney's fees irrespective of whether it was the defaulting party and whether it was the prevailing party. Further, Chase contends that the Recognition Agreement does not

[2] Petitioner commenced the action to recover attorney's fees in the Supreme Court, New York County, which was entitled *Kasowitz, Benson, Torres & Friedman LLP v Alphonse Fletcher, Jr. and Fletcher Asset Management, Inc.*, Index No. 158590/2013.

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provide the Dakota with a priority lien, but merely recognized that the Dakota could reimburse itself with proceeds from a sale, before Chase, for sums due under the Lease. Regardless, Chase contends the Recognition Agreement was executed with respect to only one of the Notes and thus has no bearing on the other note or on Chase's rights as assignee of the Kasowitz Judgment, which takes priority since it preceded the Bluth Judgment. Next, Chase asserts that it may challenge the propriety of including the Bluth Judgment in the Dakota's lien as Chase was not a party to the Fletcher Action and could not have intervened. As such, Chase contends, its arguments here are not a collateral attack on the Bluth Judgment. Lastly, Chase contends that the Dakota's assertion of a lien (that is, its priority claim in the instant proceeding) constitutes a breach of the Recognition Agreement wherein the Dakota agreed not to further encumber the Shares and Lease without Chase's permission.

Analysis of the Issues Presented

Whether the Dakota's security interests are superior to those of Chase

A cooperative organization's security interest, which is created by a cooperative record "that provides that the owner of a cooperative interest has an obligation to pay amounts to the cooperative organization incident to ownership of that cooperative interest and which states that the cooperative organization has a direct remedy against that cooperative interest if such amounts are not paid," is governed by Article 9 of the UCC (*see* UCC §§ 9-102 [a] [74] and 9-109 [a] [7]). A "cooperative organization" refers to "an organization which has as its principal asset an interest in real property in this state and in which organization all ownership interests are cooperative interests" (UCC § 9-102 [a] [27-c]). A "cooperative interest" refers in part to "an ownership interest in a cooperative organization, which interest, when created, is coupled with possessory rights of a proprietary nature in identified physical space belonging to the cooperative organization" (UCC § 9-102 [a] [27-b]). A "cooperative organization security interest" refers to a "security interest which is in a cooperative interest, is in favor of the cooperative organization, is created by the cooperative record, and secures only obligations incident to ownership of that cooperative interest" (UCC § 9-102 [a] [27-d]). A "cooperative record" refers to "those records which, as a whole, evidence cooperative interests and define the mutual rights and obligations of the owners of the cooperative interests and the cooperative organization" (UCC § 9-102 [a] [27-e]). "A cooperative organization security interest becomes perfected when the cooperative interest first comes into existence and remains perfected so long as the cooperative interest exists" (UCC § 9-308 [h]). This "cooperative organization security interest has priority over all other security interests in a cooperative interest" (UCC § 9-322 [h] [1]).

Here, Art. VI, § 6 of the Dakota's bylaws (Bylaws) provides in pertinent part:

> "Corporation's Lien. The corporation shall at all times have a lien upon the shares of stock owned by each stockholder to

> secure the payment by such stockholder of all rent to become payable by such stockholder under the provisions of any proprietary lease issued by the corporation and at any time held by such stockholder and for all other indebtedness from such stockholder to the corporation and to secure the performance by the stockholder of all the covenants and conditions of said proprietary lease to be performed and complied with by the stockholder. . . ."

The Lease provides, among other things, that, "FIRST: [Fletcher] will pay the rent or maintenance charge, and any other assessment, charge or imposition imposed by the [Dakota] upon its shareholders (such assessments, charges and impositions 'additional rent') to the [Dakota] . . . ." By creating a first lien on the Shares in order to secure payment of all rent and other indebtedness, the Bylaws establish the Dakota's "direct remedy" against Fletcher's "cooperative interest" if the Lease obligations are not paid. Thus, the Bylaws and the Lease constitute a "cooperative record" that grants the Dakota a perfected cooperative organization security interest in the Shares (*see* UCC §§ 9-102 [74], 9-102 [27-d], 9-308 [h]). As a claim secured by a perfected cooperative organization security interest, the Dakota's claim has priority over any other claims secured by the Shares (*see* UCC § 9-322 [h] [1]). Thus, the Dakota's security interest in the Shares and Lease is superior to those of Chase. Next, the Court considers whether the Bluth Judgment is properly considered part of this superior security interest.

Whether the Bluth Judgment is properly considered part of the Dakota's superior security interests

The Lease provides that:

> "FIFTEENTH: If [Fletcher] shall at any time be in default hereunder, and the [Dakota] shall take any action against [Fletcher] based upon such default, or if the [Dakota] shall defend any action or proceeding (or claim therein) commenced by [Fletcher], [Fletcher] will reimburse the [Dakota] for all expenses (including, but not limited to attorneys' fees and disbursements) thereby incurred by the [Dakota], so far as the same are reasonable in amount, and the [Dakota] shall have the right to collect the same as additional rent or damages."

This provision clearly and unambiguously provides that the Dakota may recover, among other things, attorney's fees in two situations: (1) if the Dakota commences an action against Fletcher because he is in default under the Lease and (2) if Fletcher commences any action or proceeding against the Dakota. As it finds Paragraph 15th to be clear and unambiguous, the Court will not consider parol evidence to create an ambiguity

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(*see Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 55 [1st Dept 2015]).

Chase's contention that this provision is unconscionable is unavailing for several reasons. First, Chase did not plead that the Lease was unconscionable. CPLR 3018 provides in relevant part that "[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading." Generally, an affirmative defense is deemed waived if not raised in the pleading (*see Citicorp Leasing, Inc. v U.S. Auto Leasing, Inc.*, 58 AD3d 479 [1st Dept 2009]; *Butler v Catinella*, 58 AD3d 145, 150 [2d Dept 2008]; 5A Carmody-Wait 2d § 30:47). That some portion of the Lease is substantively unconscionable is undoubtedly a defense, which would take the Dakota by surprise and would raise issues of fact not appearing on the face of a prior pleading (*see Inc. Vil. of Philmont v X-Tyal Intern. Corp.*, 67 AD2d 1039, 1040 [3d Dept 1979]).[3] As the Court of Appeals has explained, "[a] determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made—*i.e.*, some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 10 [1988] [internal quotation marks omitted]). As Chase did not plead unconscionability as an affirmative defense, that defense is deemed waived.

Second, the Court notes that it is not at all clear that Chase is entitled to challenge the validity of the Lease, a contract to which it is not a party (*Decolator, Cohen & DiPrisco, LLP v Lysaght, Lysaght & Kramer, P.C.*, 304 AD2d 86, 90 [1st Dept 2003] ["It is well settled that in order to have standing to challenge a contract, a non-party to the contract must either suffer direct harm flowing from the contract or be a third-party beneficiary thereof"]). Although Chase's recovery would be diminished by the Dakota's recovery of attorney's fees in the Fletcher Action, Chase will not suffer a direct harm as a result of this provision. In addition, there is nothing to indicate that Chase was a third-party beneficiary under the cooperative record.

Third, the forgoing notwithstanding, the Court does not find the subject provision to be unconscionable. In *Krodel v Amalgamated Dwellings Inc.*, the First Department was presented with a lease, which provided that the Lessor would recover, among other things, attorney's fees in any action based on the Lessor's default (166 AD3d 412, 412 [1st Dept 2018]). In *Krodel*, the Lessee alleged the Lessor's default, the Lessee prevailed, and the Lessor still sought to recover its attorney's fees (*id.* at 413). The First Department found that the trial court properly declined to enforce that provision of the contract as unconscionable (*id.*). The First Department explained that in making this finding, the

[3] The Court has found no authority for this precise point in the First Department. However, in such situations, the "Court is bound by the doctrine of *stare decisis* to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals" (*D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]).

Court must "giv[e] due consideration to the nature of the contract and the circumstances" (*id.*). Here, by contrast, the Lease does not provide that the Dakota may recover attorney's fees in situations where it does not prevail. Rather, the Lease is silent as to whether it may do so. It is well settled that "a construction of a contract that would give one party an unfair and unreasonable advantage over the other, or that would place one party at the mercy of the other, should, if at all possible, be avoided" (*ERC 16W Ltd. Partnership v Xanadu Mezz Holdings LLC*, 95 AD3d 498, 503 [1st Dept 2012]). As *Krodel* demonstrates, to permit the Dakota to recover attorney's fees in an action with its residents even when it does not prevail would produce an unconscionable result. And, as the Lease does not expressly provide that the Dakota could recover its attorney's fees in an action where it does not prevail, such a construction must be avoided. Regardless, as the Dakota prevailed in the Fletcher Action, the Court may avoid the issue altogether (*see 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Ass'n, Inc.*, 24 NY3d 528, 535 [2014]).

Chase's contention that the Fletcher Action was unrelated to Fletcher's position as a shareholder of the Dakota is also unavailing. As noted above, the First and Second Causes of Action in the Fletcher Action are plainly grounded in Fletcher's position as a shareholder of the Dakota. Thus, the Court may also avoid the potentially closer issue of whether the Dakota would be entitled to recover attorney's fees in an action commenced by Fletcher that was truly unrelated to Fletcher's position as a shareholder of the Dakota. Accordingly, the Bluth Judgment, constituting the Dakota's expenses for the successful defense of the Fletcher Action, is an obligation incident to Fletcher's ownership of his cooperative interest in the Dakota and properly considered part of the Dakota's superior security interest and not a further encumbrance in violation of the Recognition Agreement.

Conclusion

To the extent not specifically addressed herein, the Court finds the remaining arguments of Chase to be without merit. Based on the foregoing, it is hereby

ORDERED that the Dakota's motion (Motion #12) is GRANTED in its entirety; and it is further

ORDERED that the Dakota shall submit a proposed judgment within 30 days hereof; and it is further

ORDERED that Chase's motion (Motion #13) is DENIED.

Dated: New York, New York
August 4, 2021

HON. LEWIS J. LUBELL, J.S.C.

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

----------X

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Petitioner,

-against-

JPMORGAN CHASE BANK, N.A. THE DAKOTA, INC., and ALPHONSE FLETCHER, JR.,

Respondents,

-and-

FLETCHER INTERNATIONAL, LTD., MASSACHUSETTS BAY TRANSPORTATION AUTHORITY RETIREMENT FUND, FLETCHER FIXED INCOME ALPHA FUND, LTD., FIA LEVERAGED FUND LTD., and FLETCHER INCOME ARBITRAGE FUND LTD.,

Intervenor-Respindents.

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Index No. 157631/2015

IAS Part 29

Mot. Seq. No. 013

NOTICE OF ENTRY

PLEASE TAKE NOTICE that annexed hereto is a true and correct copy of the decision and order of the Supreme Court of the State of New York, New York County, dated August 4, 2021 in the above-captioned action, and duly filed in the Office of the Clerk of the Supreme Court, New York County on August 4, 2021.

Dated: New York, New York
August 4, 2021

SMITH, GAMBRELL & RUSSELL, LLP

By: /s/ John Van Der Tuin
John Van Der Tuin
1301 Avenue of the Americas, 21st Floor
New York, New York 10019
Tel: (212) 907-9700
Attorneys for Respondent, The Dakota, Inc.

SGR/24656480.1

To: **THOMPSON COBURN HAHN & HESSEN LLP**
Zachary G. Newman, Esq.
Steven R. Aquino, Esq.
Jonathan A. Samper, Esq.
488 Madison Avenue
New York, New York 10022
Tel: (212) 478-7200

Co-Counsel for Respondent and Assignee, JPMorgan Chase Bank, N.A.

PARKER IBRAHIM & BERG LLP
James P. Berg, Esq.
Mitchell Kurtz, Esq.
270 Davidson Avenue, 5th Floor
Somerset, New Jersey 08873
Tel: (908) 725-9700

Co-Counsel for Respondent and Assignee, JPMorgan Chase Bank, N.A.

At IAS Part 45 of the Supreme Court of the State of New York, County of New York on the 8 Day of ~~August~~ November, 2021

PRESENT: Hon. Lewis J. Lubell, J.S.C.

----------X

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Index No. 157631/2015

Petitioner,

-against-

JPMORGAN CHASE BANK, N.A. THE DAKOTA, INC., and ALPHONSE FLETCHER, JR.,

JUDGEMENT and ORDER

Respondents,

-and-

FLETCHER INTERNATIONAL, LTD, MASSACHUSETTS BAY TRANSPORTATION AUTHORITY RETIREMENT FUND, FLETCHER FIXED INCOME ALPHA FUND, LTD, FIA LEVERAGED FUND LTD., and FLETCHER INCOME ARBITRAGE FUND, LTC.,

Intervenors-Respondents.

----------X

UPON the Verified Petition dated July 23, 2015, the Verified Answer and Counter/Cross-claims of JP Morgan Chase Bank, N.A., dated December 18, 2018, the Verified Answer and Counter/Cross-claims of The Dakota, Inc, dated July 25, 2018, the Orders of this Court dated October 20, 2015, and February 29, 2016, appointing Jeffrey L. Goldman, Esq., as temporary receiver of the shares of The Dakota Inc., owned by Alphonse Fletcher, Jr., and the proprietary leases of apartments 52 and PHB to which the shares are appurtenant, with directions to market and sell the apartments 52 and PHB and to hold the proceeds of sale pending further order of this Court, and upon the Decision and Order of this Court dated August 4, 2021, granting the summary

judgment motion of The Dakota, Inc, and denying the summary judgment motion of JP Morgan Chase Bank, N.A., and

UPON the prior dismissal or withdrawal of claims of all parties other than JP Morgan Chase Bank, N.A., for itself and as assignee of Kasowitz, Benson, Torres and Friedman, LLP, and The Dakota, Inc.; and

UPON application of The Dakota, Inc., 1 West 72nd Street, New York, New York,

IT IS ADJUDGED AND DECLARED on the COUNTER/CROSS CLAIM of The Dakota, Inc., against JP Morgan Chase Bank, N.A., that the lien of the cooperative security interest of The Dakota, Inc., in the amount of $4,542,151.61 as of November 30, 2020, on the proceeds of sale of apartments 52 and PHB held by Jeffrey L. Goldman, Esq., as receiver is prior in seniority to the lien on said proceeds of sale of JP Morgan Chase Bank, N.A., as lender and as assignee of the claim and lien of petitioner, Kasowitz, Benson, Torres & Friedman, LLP; and

IT IS ORDERED that receiver, Jeffrey L. Goldman, Esq., shall forthwith disburse the escrowed proceeds of sale of apartments 52 and PHB, first to pay the expenses of the receivership, second to The Dakota, Inc., in the sum of $4,542,151.61 plus simple interest at the statutory 9% rate on the principal amounts of the December 14, 2017, judgment for attorneys' fees and of the unpaid maintenance and assessments constituting the claim of The Dakota, Inc., accruing from November 21, 2020, through the date of payment, and third the balance of the escrowed proceeds of sale to JP Morgan Chase Bank, N.A.; and

IT IS ORDERED that the receiver Jeffrey L. Goldman, Esq., shall account to The Dakota, Inc., and JP Morgan Chase Bank, N.A., for the funds received and disbursed and, upon such accounting without written objection within ten days, shall be discharged of any further duties as receiver.

Dated: November 8 2021
New York, NY

ENTER:

HON. LEWIS J. LUBELL

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

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Petitioner,

-against-

JPMORGAN CHASE BANK, N.A. THE DAKOTA, INC., and ALPHONSE FLETCHER, JR.,

Respondents,

-and-

FLETCHER INTERNATIONAL, LTD., MASSACHUSETTS BAY TRANSPORTATION AUTHORITY RETIREMENT FUND, FLETCHER FIXED INCOME ALPHA FUND, LTD., FIA LEVERAGED FUND LTD., and FLETCHER INCOME ARBITRAGE FUND LTD.,

Intervenor-Respondents.

Index No. 157631/2015

IAS Part 29

NOTICE OF ENTRY

PLEASE TAKE NOTICE that annexed hereto is a true and correct copy of the judgment and order (NYSCEF Doc. No. 330) of the Supreme Court of the State of New York, New York County, dated November 8, 2021 in the above-captioned action, and duly filed in the Office of the Clerk of the Supreme Court, New York County on November 8, 2021.

Dated: New York, New York
November 10, 2021

SMITH, GAMBRELL & RUSSELL, LLP

By: /s/ John Van Der Tuin
John Van Der Tuin
1301 Avenue of the Americas, 21st Floor
New York, New York 10019
Tel: (212) 907-9700
Attorneys for Respondent, The Dakota, Inc.

SGR/24656480.1

To: **THOMPSON COBURN HAHN & HESSEN LLP**
Zachary G. Newman, Esq.
Steven R. Aquino, Esq.
Jonathan A. Samper, Esq.
488 Madison Avenue
New York, New York 10022
Tel: (212) 478-7200

Co-Counsel for Respondent and Assignee, JPMorgan Chase Bank, N.A.

PARKER IBRAHIM & BERG LLP
James P. Berg, Esq.
Mitchell Kurtz, Esq.
270 Davidson Avenue, 5th Floor
Somerset, New Jersey 08873
Tel: (908) 725-9700

Co-Counsel for Respondent and Assignee, JPMorgan Chase Bank, N.A.

BELKIN BURDEN GOLDMAN, LLP
Jeffrey L. Goldman, Esq.
60 East 42nd Street, 16th Floor
New York, NY 10165
Tel: (212) 867-4466

Receiver

EXHIBIT B

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Acosta, P.J., Renwick, Singh, Scarpulla, JJ.

16482-16483

In the Matter of KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,
Petitioner,

-against-

JPMORGAN CHASE BANK, N.A.,
Respondent-Appellant,

THE DAKOTA, INC.,
Respondent-Respondent,

ALPHONSE FLETCHER, JR.,
Respondent,

FLETCHER INTERNATIONAL, LTD., et al.,
Intervenors-Respondents.

Index No. 157631/15
Case Nos. 2021-03399
2021-03400
2022-00030

Thompson Coburn Hahn & Hessen LLP, New York (Zachary G. Newman of counsel), and Parker Ibrahim & Berg LLP, New York (James P. Berg of counsel), for appellant.

Smith, Gambrell & Russell, LLP, New York (John Van Der Tuin of counsel), for The Dakota Inc., respondent.

Judgment, Supreme Court, New York County (Lewis J. Lubell, J.), entered November 8, 2021, declaring that the lien of The Dakota, Inc. is prior to that of JPMorgan Chase Bank, N.A., unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about August 4, 2021, which granted the Dakota's summary judgment motion and denied Chase's summary judgment motion, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The portion of the Dakota's lien that is based on a 2017 judgment is a "cooperative organization security interest" under Uniform Commercial Code (UCC) § 9-322(h)(1). It is undisputed that Alphonse Fletcher, Jr.'s Dakota shares constituted a cooperative interest (*see also* UCC 9-102[27-b]), that the Dakota is a cooperative organization (*see also* UCC 9-102[27-c]), and that the Dakota's security interest was created by the cooperative record (*see also* UCC 9-102[27-e]).

Chase contends that the Dakota's judgment (for legal fees it incurred defending against a prior action brought by Fletcher) is not an obligation incident to ownership of Fletcher's cooperative interest. However, article II, paragraph fifteenth of the proprietary lease says, "if the Lessor [*i.e.,* the Dakota] shall defend any action or proceeding . . . commenced by the Lessee [*e.g.,* Fletcher], the Lessee will reimburse the Lessor for all expenses (including . . . attorneys' fees and disbursements) thereby incurred by the Lessor, . . . and the Lessor shall have the right to collect the same as additional rent." In addition, article VI, section 6 of the Dakota's by-laws, which is reproduced on the back of Fletcher's stock certificate, says, "The corporation [*i.e.,* the Dakota] shall at all times have a lien upon the shares of stock owned by each stockholder to secure the payment by such stockholder of all rent . . . and for all other indebtedness from such stockholder to the corporation." Thus, unless paragraph 15th does not mean what it says, the judgment is incident to Fletcher's ownership of his Dakota shares.

Chase contends that paragraph 15th applies only if a lessee is in default. However, this is an impermissible collateral attack on the Dakota's judgment. Unlike Chase's argument about whether the judgment is incident to the ownership of a cooperative interest, which goes to priority, its contention that paragraph 15th applies only to defaulting lessees would destroy the judgment altogether because the Dakota does not

claim Fletcher was in default. This argument should have been made by Fletcher after the Dakota's counterclaims against him were severed.

"It is elementary that a final judgment . . . represents a valid and conclusive adjudication of the parties' substantive rights, unless and until it is overturned on appeal" (*Da Silva v Musso,* 76 NY2d 436, 440 [1990]). If Chase wants to vacate the Dakota's judgment, it must move before "[t]he court which rendered [the] judgment" (CPLR 5015[a]; *see James v Shave,* 62 NY2d 712, 714 [1984] ["a motion to vacate the prior judgment, if available at all, would be made pursuant to CPLR 5015"]).

Chase contends that if paragraph 15th is not limited to lessees who are in default, it is unconscionable and unenforceable under *Matter of Krodel v Amalgamated Dwellings Inc.* (166 AD3d 412 [1st Dept 2018], *lv denied* 33 NY3d 910 [2019]). The Dakota contends that Chase waived this argument by failing to include it as an affirmative defense. Although Chase did not waive this argument (*see Edwards v New York City Tr. Auth.,* 37 AD3d 157, 158 [1st Dept 2007]), it is an impermissible collateral attack on the Dakota's judgment. Again, unlike Chase's argument about priority, its contention that paragraph 15th is unenforceable would destroy the judgment altogether. As Fletcher's assignee, Chase could have sought to intervene in his action against the Dakota to argue that paragraph 15th was invalid (*see Decolator, Cohen & DiPrisco v Lysaght, Lysaght & Kramer,* 304 AD2d 86, 90 [1st Dept 2003]).

Finally, Chase contends that the portion of the Dakota's lien that is not based on its judgment was not supported by admissible evidence. However, the Dakota submitted affidavits from its managing agent, detailing the amounts due for unpaid maintenance, electrical usage, etc. This suffices (*see Roshodesh v Plotch,* 35 Misc 3d 1241[A], 2012 NY Slip Op 51104[U], *2-3 [Sup Ct, Queens County 2012] [co-op met its burden on

summary judgment by submitting affidavit from employee of managing agent]; *Whitney Condominium v Tempesta,* 2008 WL 8115125 [Sup Ct, NY County 2008]). Although it might have been better had the Dakota submitted business records with its initial motion papers, CPLR 3212(b) does not absolutely require a movant to submit business records.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: October 18, 2022

Susanna Molina Rojas
Clerk of the Court

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

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Petitioner,

- against -

JPMORGAN CHASE BANK, N.A., THE DAKOTA, INC., and ALPHONSE FLETCHER, JR.,

Respondents

-and-

FLETCHER INTERNATIONAL LTD., MASSACHUSETTS BAY TRANSPORTATION AUTHORITY RETIREMENT FUND, FLETCHER FIXED INCOME ALPHA FUND LTD., FIA LEVERAGED FUND., and FLETCHER INCOME ARBITRAGE FUND

Intervenor-Respondents.
- X

New York County Supreme
Court Index No.: 157631/2015

Appellate Division
Case Nos. 2021-03399
2021-03400
2022-00030

NOTICE OF ENTRY

PLEASE TAKE NOTICE that, annexed hereto is a true and complete copy of a Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, duly entered in the Office of the Clerk of that Court on October 18, 2022.

Dated: New York, New York
October 19, 2022

SMITH, GAMBRELL & RUSSELL, LLP

By: /s/ John Van Der Tuin
John Van Der Tuin, Esq.

Attorneys for Respondent
The Dakota, Inc.
1301 Avenue of the Americas, 21st Floor
New York, New York 10019
Tel: (212) 907-9700

SGR/41373801.1

To: Zachary G. Newman, Esq.
Steven R. Aquino, Esq.
Jonathan A. Samper, Esq.
THOMPSON COBURN
HAHN & HESSEN, LLP
488 Madison Avenue
New York, New York 10022
Attorneys for Respondent-Appellant
JPMorgan Chase Bank, N.A.,

James P. Berg, Esq.
Mitchell Kurtz, Esq.
PARKER IBRAHIM & BERG, LLP
270 Davidson Avenue, 5th Floor
Somerset, New Jersey 08873
Attorneys for Respondent-Appellant
JPMorgan Chase Bank, N.A.,

EXHIBIT C

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Present – Hon. Rolando T. Acosta, Presiding Justice,
Dianne T. Renwick
Anil C. Singh
Saliann Scarpulla, Justices.

In the Matter of Kasowitz, Benson, Torres & Friedman, LLP, Petitioner,	Motion No.	2022-04588
	Index No.	157631/15
	Case Nos.	2021-03399
		2021-03400
-against-		2022-00030
JPMorgan Chase Bank, N.A., Respondent-Appellant,		
The Dakota, Inc., Respondent-Respondent,		
Alphonse Fletcher, Jr., Respondent,		
Fletcher International, Ltd., et al., Intervenors-Respondents.		

Respondent-appellant having moved for reargument of, or in the alternative, for leave to appeal to the Court of Appeals, from the decision and order of this Court, entered on October 18, 2022 (Appeal Nos. 16482, 16483),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED: January 17, 2023

Susanna Molina Rojas
Clerk of the Court

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

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,	
Petitioner,	Index No.: 157631/2015
- against -	Appellate Division Case Nos.: 2021-03399
JPMORGAN CHASE BANK, N.A., THE DAKOTA, INC., and ALPHONSE FLETCHER, JR.,	2021-03400 2022-00030
Respondents,	**NOTICE OF ENTRY**
FLETCHER INTERNATIONAL LTD., MASSACHUSETTS BAY TRANSPORTATION AUTHORITY RETIREMENT FUND, FLETCHER FIXED INCOME ALPHA FUND LTD., FIA LEVERAGED FUND, and FLETCHER INCOME ARBITRAGE FUND,	
Intervenors-Respondents.	

PLEASE TAKE NOTICE that, annexed hereto is a true and complete copy of an Order of the Supreme Court of the State of New York, Appellate Division, First Department, duly entered in the Office of the Clerk of that Court on January 17, 2023.

Dated: New York, New York
January 17, 2023

SMITH, GAMBRELL & RUSSELL, LLP

By: /s/ *Daniel S. Goldstein*
Daniel S. Goldstein

Attorneys for Respondent
The Dakota, Inc.
1301 Avenue of the Americas, 21st Floor
New York, New York 10019
Tel: (212) 907-9700
Fax: (212) 907-9800
dgoldstein@sgrlaw.com

SGR/41971269.1

APL-2023-_____
Appellate Division, First Department
Docket Nos. 2021-03399, 2021-03400, 2022-00030
New York County Clerk's Index No. 157631/15

Court of Appeals
STATE OF NEW YORK

In the Matter of

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Petitioner,

—against—

JPMORGAN CHASE BANK, N.A.,

Respondent-Appellant,

THE DAKOTA, INC.,

Respondent-Respondent,

ALPHONSE FLETCHER, JR.,

Respondent,

FLETCHER INTERNATIONAL LTD., MASSACHUSETTS BAY TRANSPORTATION AUTHORITY RETIREMENT FUND, FLETCHER FIXED INCOME ALPHA FUND LTD., FIA LEVERAGED FUND, and FLETCHER INCOME ARBITRAGE FUND,

Intervenors-Respondents.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

ZACHARY G. NEWMAN
THOMPSON COBURN HAHN & HESSEN LLP
488 Madison Avenue
New York, New York 10022
Telephone: (212) 478-7200
Facsimile: (212) 478-7400

ALAN E. SCHOENFELD
WILMERHALE
7 World Trade Center
250 Greenwich Street
New York, New York 10007
Telephone: (212) 230-8800
Facsimile: (212) 230-8888

JAMES BERG
PARKER IBRAHIM & BERG LLP
270 Davidson Avenue, 5th Floor
Somerset, New Jersey 08873
Telephone: (908) 725-9700
Facsimile: (212) 596-7036

Attorneys for Respondent-Appellant

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CASES

DOCKETED CASE

STATUTES, RULES, AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The First Department in this case bound Chase to a judgment entered against a wholly separate party in a totally distinct litigation in which Chase was never involved. That decision cannot stand. "One of the most fundamental principles of our system of justice is that every person is entitled [to] a day in court notwithstanding that the same issue of fact may have been previously decided between strangers. Generally, therefore, a person may not be precluded from litigating issues resolved in an action in which that person was not a party." *Gramatan Home Invs. Corp. v. Lopez*, 46 N.Y.2d 481, 485-86 (1979).

While that broad prohibition is subject to some narrow exceptions, "the consequences of a determination that a party is collaterally estopped from litigating a particular issue are great," so "strict requirements for application of the doctrine must be satisfied to insure that a party not be precluded from obtaining at least one full hearing on his or her claim." *Id.* at 485. "In properly seeking to deny a litigant two 'days in court', courts must be careful not to deprive him of one." *Reilly v. Reid*, 45 N.Y.2d 24, 28 (1978). The First Department's decision in this case effects precisely that forbidden deprivation.

New York law—as well as bedrock due process principles—confirm that absent parties are not required affirmatively to intervene in litigation to protect their rights. If their rights may be inequitably affected, then mandatory joinder rules

protect them. Moreover, this Court and the United States Supreme Court have made clear that judgments against assignors in post-assignment cases do not bind absent assignees. The two are not privies after the assignment because assignors have already transferred their rights to the assignee, who can neither benefit from nor be harmed by judgments in later suits.

The Appellate Division ignored this Court's precedent and held that assignees must either risk preclusion or intervene in every suit against an assignor that might be relevant in some later, hypothetical litigation. Since other courts have faithfully applied this Court's prior rulings, this decision also creates a split among New York appellate courts on a frequently occurring issue. And because mandating unnecessary and costly monitoring and intervention will burden future courts, institutional actors, and consumers, the decision will have far-reaching and deleterious consequences. To resolve this split, ensure lower courts respect its precedent, and avoid future harms, this Court should grant leave to appeal.

PROCEDURAL HISTORY AND TIMELINESS OF MOTION

In 2015, a law firm filed a petition seeking the seizure and sale of property owned by Alphonse Fletcher, Jr. to satisfy a judgment for unpaid legal fees. The firm named as respondents The Dakota, Inc. and JPMorgan Chase Bank, N.A. ("Chase"), due to Chase's recorded security interest and The Dakota's claimed rights to the property under the operative proprietary lease. *See* R. at 60-67. Chase and

The Dakota moved for summary judgment to hold their respective liens senior and superior against the other. *See* R. at 307-308, 917-919. The supreme court granted summary judgment to The Dakota. *See* R. at 5-12, 17-24. Chase timely appealed. Chase was served with the Appellate Division's order affirming the supreme court's judgment on October 18, 2022. *See* Aff. of Alan E. Schoenfeld, Ex. B ("Op."). Chase served its motion for reargument or, in the alternative, for leave to appeal to the Court of Appeals on the other parties on November 18, 2022. Chase was served with the Appellate Division's order denying that motion on January 17, 2023.

CORPORATE DISCLOSURE STATEMENT

JPMorgan Chase Bank, N.A. is a wholly owned subsidiary of JPMorgan Chase & Co. JPMorgan Chase & Co. is a publicly held corporation. JPMorgan Chase & Co. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock. However, the Vanguard Group, Inc., an investment adviser which is not a publicly held corporation, has reported that registered investment companies, other pooled investment vehicles, and institutional accounts that it or its subsidiaries sponsor, manage, or advise have aggregate ownership under certain regulations of 10% or more of the stock of JPMorgan Chase & Co.

JURISDICTIONAL STATEMENT

The Appellate Division's decision and order affirming the Judgment of the Supreme Court, New York County and declaring that the lien of The Dakota is prior

to that of Chase, is a final determination of all causes of action. This Court has jurisdiction over this motion and proposed appeal under C.P.L.R. § 5602(a)(1)(i).

QUESTION PRESENTED FOR REVIEW

In *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481 (1979), this Court held that "an assignee is not privy to a judgment where the succession to the rights affected thereby has taken place prior to the institution of the suit against the assignor." *Id.* at 487. In this case, the question of law sought to be presented is:

> (1) Whether the Appellate Division was correct that assignees are required to intervene in post-assignment suits involving their assignors on penalty of being bound by the judgment in that suit in future litigation.

BACKGROUND

A. Chase's Priority Security Interest And The Fletcher Case

In 2008, Chase agreed to loan Alphonse Fletcher, Jr. $11,250,000, secured by the assignment to Chase of Fletcher's right, title, and interest in the 965 shares of capital stock associated with certain apartment units in The Dakota, as well as the associated proprietary lease ("Lease", and collectively with the apartment units, capital stock, and associated stock certificates, the "Property"). *See* R. at 139-156, 958 (¶¶ 2, 6), 963 (¶¶ 2, 6), 968-971. The assignment took effect immediately, with

no precondition of default. R. at 970-971. Chase perfected its interest, securing a priority security interest in and lien on those units. *See* R. at 972-1012.

In 2011, Fletcher sued The Dakota on various grounds arising from The Dakota's alleged racially discriminatory refusal to allow Fletcher to purchase an additional apartment and shares in the building—an apartment and shares separate from those previously assigned to Chase. *See generally Fletcher v. The Dakota, Inc.*, Index No. 101289/11 (Sup. Ct. N.Y. Cnty.) (the "Fletcher Suit"). The Dakota counterclaimed for its legal fees and costs, vaguely citing the "proprietary lease between plaintiff Fletcher and defendant Dakota." R. at 510-511.

On September 11, 2015, the supreme court granted summary judgment to The Dakota, dismissed Fletcher's claims, and referred the counterclaims to mediation. *See* R. at 775 (¶¶ 21-22), 790-791 (2:13-3:6), 797-798 (4:7-5:8); 2066-2067. Fletcher failed to appear, which led to an inquest as to only the reasonableness of the legal fees—not the validity of The Dakota's claim or the meaning of any terms of the Lease. *See* R. at 775 (¶¶ 21-22), 790-793 (2:21-5:17), 797-799 (4:16-6:23). On May 18, 2017, the referee issued a report finding the fees reasonable, and on June 5, 2017, The Dakota moved for an order confirming the report and entering judgment in its favor. *See* R. at 776-778 (¶¶ 24-27), 844-852. Fletcher again did not meaningfully object, and on December 14, 2017, the court issued a judgment granting the award of attorneys' fees to The Dakota. *See* R. at 855-860.

Article II, paragraph 15th of the Lease ("Paragraph 15th"), on which The Dakota now relies, was not at issue in Fletcher's claims against The Dakota. *See* R. at 191-192 (¶ 1), 241-253 (¶¶ 189-263, a-j). It was only made inferentially relevant by a single vague counterclaim buried dozens of pages into The Dakota's answer. And Fletcher did not argue before the mediator, the referee, or the supreme court that Paragraph 15th did not entitle The Dakota to legal fees. *See* R. at 775-777 (¶¶ 21-26). In fact, Fletcher's counsel expressly stated that he was "not contesting" The Dakota's entitlement to the fees. R. at 821-822 (7:26-8:4). There was thus never any meaningful litigation about the meaning of Paragraph 15th, much less about the superiority of any lien on the Property premised on that paragraph. No court in the Fletcher Suit ever held that Paragraph 15th allowed The Dakota to recover the fees it was awarded. No court even addressed that issue. Nor did any party ever raise—or have reason to raise—whether the lien resulting from this judgment would be superior to any other, much less Chase's prior lien from 2008.

It is undisputed that Chase was never joined as a party to the Fletcher Suit, did not intervene in the Fletcher Suit, and did not otherwise participate in the Fletcher Suit, formally or informally.[1]

[1] The First Department, in the decision below, precluded Chase from making, and so it did not consider, the argument that Paragraph 15th did not entitle The Dakota to legal fees. The First Department instead insisted that Chase should move to vacate the judgment in the Fletcher Suit to which Chase was not a party. *See* Op. 3. For

B. Proceedings Before The Supreme Court

In 2015, the law firm Kasowitz, Benson Torres & Friedman, LLP filed a petition seeking the seizure and sale of the Property to satisfy a judgment in its favor for unpaid legal fees from the Fletcher Suit. *See* R. at 60-67. Kasowitz named Chase and The Dakota as Respondents due to Chase's recorded security interest and The Dakota's rights under the Lease. *See* R. at 61-62, 64-65 (¶¶ 7, 20, 23). They are the only two remaining parties, as Fletcher represented that he has no interest in the litigation, R. at 2103, and Kasowitz assigned its rights to Chase, R. at 2094-2096.

The Dakota moved the court to appoint a receiver for the sale of the Property. R. 567-572. In support, it observed that it was "unclear whether the creditor parties will have disputes among themselves with respect to either the priorities or *bona fide* amounts of liens," R. 570 ¶ 10, because "any potential dispute as to priority of liens, *bona fides* of claims or proper distribution of the proceeds of sale of the Stock and Lease may be irrelevant if the proceeds of sale are sufficiently large," R. 571 ¶ 13.

The sale of one apartment closed on June 26, 2018, and the sale of the other on June 9, 2020. R. 310 ¶ 3. That is respectively six months and two-and-a-half

---

that reason, Chase is seeking vacatur of that judgment in tandem with the instant direct appeal of the First Department's decision. That Chase must move to vacate the long-ago judgment of a case to which it was never a party to obtain relief underscores just how unwieldy the First Department's decision is. Unless corrected, the new rule in the First Department will continue to pit the core protections of due process against the interest of finality, meriting this Court's review.

years *after* judgment was entered in the Fletcher Action. The proceeds amounted to $9,274,239.89. R. at 45-49; 940 (¶¶ 9-10), 954-956. Only then did it become clear that the proceeds were insufficient to satisfy both Chase's and The Dakota's asserted liens. *See* R. at 307-308, 917-919, 940 (¶ 10), 954-956.

In The Dakota's answer—filed six months after it was awarded legal fees in the Fletcher Suit and three months after the sale of the first apartment—The Dakota asserted that it held a superior lien on the Property arising from, in relevant part, the legal fees incurred in defending the Fletcher Suit. R. at 97-109, 180-183. Dakota relied on Paragraph 15th. It reads:

> If the Lessee shall at any time be in default hereunder, and the Lessor shall take any action against the Lessee based upon such default, or if the Lessor shall defend any action or proceeding (or claim therein) commenced by the Lessee, the Lessee will reimburse the Lessor for all expenses (including but not limited to attorneys fees and disbursements) thereby incurred by the Lessor, so far as the same are reasonable in amount, and the Lessor shall have the right to collect the same as additional rent or damages.

R. at 698, 712.[2] The Dakota argued that Paragraph 15th permitted it to obtain legal fees when it either (1) sued a shareholder who was in default or (2) defended itself in any suit brought by a shareholder, regardless of whether they were in default.

[2] Before it was amended in 2000, Paragraph 15th read:

> If the Lessee shall at any time be in default hereunder, or if the Lessor shall institute an action or summary proceeding against the Lessee based upon such default, the Lessee will reimburse the Lessor for the expense of attorneys fees and disbursements thereby incurred by the

Chase, by contrast, argued that Paragraph 15th allows The Dakota to obtain legal fees when it either (1) takes any action against a shareholder who is in default or (2) defends itself in any suit brought by a shareholder who is in default. Either way, default is a precondition for an award of fees. The Dakota offered this same interpretation when it explained the proposed amendment to its shareholders:

> This change enhances the Shareholders' ability … to recover our attorney[s'] fees and all other expenses which we incur as a result of an individual shareholder defaulting, or should litigation be commenced against us by an individual shareholder *who is in default*. To protect an individual shareholder, our ability to recover such expenses is limited to those instances when the shareholder is actually in default.

R. at 131 (¶ 19) (emphasis added). Chase further argued that The Dakota's reading rendered Paragraph 15th unconscionable because it would permit recovery of fees regardless of the case outcome or whether the shareholder was in default. *See Krodel v. Amalgamated Dwellings Inc.*, 166 A.D.3d 412, 413-414 (1st Dep't 2018).

In an interim ruling, the supreme court held that the judgment in the Fletcher Suit did not preclude Chase from arguing that Paragraph 15th did not entitle The Dakota to legal fees. *See* R. at 616. Following discovery, both parties moved for summary judgment. *See* R. at 307-308, 917-919. The supreme court, in an abbreviated decision that grappled with neither the evidence nor the legal arguments

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> Lessor, so far as the same are reasonable in amount, and the Lessor shall have the right to collect the same as additional rent or damages.

R. at 130-131 (¶¶ 18, 22).

Chase advanced, granted summary judgment to The Dakota, holding in relevant part that Paragraph 15th unambiguously allowed The Dakota to recover attorneys' fees from the Fletcher Suit and was not unconscionable. *See* R. at 5-12, 17-24.

C. Proceedings Before The Appellate Division

Chase timely appealed, *see* R. at 27-28; *see also* 3-4; 15-16, and the First Department affirmed. But not because it agreed with the lower court's reading of Paragraph 15th or its unconscionability analysis. The court instead held that Chase's arguments "should have been made by Fletcher after the Dakota's counterclaims against him were severed." Op. 3. Alternatively, "[a]s Fletcher's assignee, Chase could have sought to intervene in his action against the Dakota to argue that paragraph 15th was invalid." *Id.* Finally, the court observed that Chase's principal contentions were "impermissible collateral attack[s] on the Dakota's judgment" in the Fletcher Suit because they "would destroy the judgment altogether." Op. 2-3.

The Appellate Division thus held that Chase was bound by the judgment in the Fletcher Suit even though Chase was not a party, did not control Fletcher's litigation, did not agree to be bound by the outcome of that litigation, and did not otherwise fall into any recognized category of privity for purposes of preclusion. Rather, the court held that Chase was precluded from making its arguments simply because Fletcher could have independently done so in the prior litigation and because it believed Chase could have in theory intervened in that suit.

Chase moved the Appellate Division for reargument or for leave to appeal its decision to this Court on November 18, 2022. The Appellate Division denied that motion on January 17, 2023. *See* Aff. of Alan E. Schoenfeld, Ex. C.

ARGUMENT

Leave to appeal is warranted because the Appellate Division's decision "present[s] a conflict with prior decisions of this Court," "involve[s] a conflict among the departments of the Appellate Division," and raises issues "of public importance." N.Y. Comp. Codes R. & Regs., tit. 22, § 500.22(b)(4). The Appellate Division's decision—that assignees must affirmatively intervene in suits involving assignors that arise *after* the assignment or be forever bound by an outcome in which they had no say—is contrary to law, isolates it from other appellate courts in the state and across the country, and would have grave public consequences.

I. THE FIRST DEPARTMENT'S DECISION REQUIRING ASSIGNEES TO INTERVENE IN ASSIGNORS' SUITS, ON PAIN OF PRECLUSION, CONFLICTS WITH THIS COURT'S PRIOR DECISIONS

The Appellate Division's holding—that Chase is precluded from arguing that Paragraph 15th does not entitle The Dakota to attorneys' fees because (1) Fletcher "should have … made" these arguments in the Fletcher Suit and (2) Chase "could have sought to intervene" in the Fletcher Suit, Op. 3—turns black letter law on its head. Unless this Court grants leave to appeal and corrects this decision, courts in the First Department will treat assignees and assignors as privies even in post-

assignment cases, impose an affirmative duty to intervene that is contrary to law, and deny parties the day in court to which they are constitutionally entitled.

A. The First Department's Decision Ignored This Court's Clear Precedent Holding That Assignees Are Not Bound By Post-Assignment Judgments Against Assignors

This Court's precedent forecloses the First Department's decision binding *Chase* to the outcome of litigation to which it was not a party because *Fletcher* "should have" made these arguments. "Considerations of due process prohibit personally binding a party by the results of an action in which that party has never been afforded an opportunity to be heard." *Gramatan*, 46 N.Y.2d at 486. Of course, the absence of a party's name from the docket is not necessarily determinative, as "collateral estoppel bars not only parties from a previous action from litigating an issue decided therein, but those in privity with them as well." *Id.* For preclusion purposes, an absent party is in privity with a litigant if they "were connected with it to such an extent that they are treated as if they were parties." *Id.*

This Court has clearly held that assignors and assignees are privies for estoppel purposes only with regard to judgments that pre-date the assignment. In *Gramatan*, the defendant homeowners sought to preclude the assignee of their retail installment contract and mortgage from asserting the contract's validity because of a finding of fraud against the assignor in a prior suit by the Attorney General in which the assignee was not a party. *Id.* at 484. The Attorney General's suit,

however, was instituted "[a]lmost two years after the assignment." *Id.* And "[i]n the assignor-assignee relationship, privity must have arisen *after* the event out of which the estoppel arises." *Id.* at 486 (emphasis added). "Conversely, an assignee is *not* privy to a judgment where the succession to the rights affected thereby has taken place *prior* to the institution of the suit against the assignor." *Id.* at 487 (citations omitted, emphases added). An assignee can therefore be bound by the judgment in a suit involving the assignor *only* if "the action against the assignor is commenced before there has been an assignment." *Id.* 486-487. Because there was "no dispute that the assignment was made well before commencement of the … action against plaintiff's assignor, plaintiff [was] not bound by the terms of that judgment." *Id.* at 487.

The decision in *Gramatan* was grounded in a century of consistent caselaw, both state and federal. This Court held in *Masten v. Olcott*, 101 N.Y. 152 (1886), that the "rule that estoppels bind parties and privies … applies only to a privity arising after the event out of which the estoppel arises." *Id.* at 161. Shortly thereafter, the United States Supreme Court similarly explained that "nothing which the grantor can do or suffer after he has parted with the title can affect rights previously vested in the grantee, for there is no longer privity between them." *Postal Tel. Cable Co. v. City of Newport, Ky.*, 247 U.S. 464, 475 (1918); *see also Dull v. Blackman*, 169 U.S. 243, 248 (1898) ("It is well understood … that no one is privy

to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit."). Courts therefore "cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against" a grantor in a case against a grantee, unless the initial case arose before the transfer. *Postal Tel. Cable Co.*, 247 U.S. at 476.

Like this Court, numerous others have recognized that this principle readily applies in the context of assignors and assignees. *See, e.g., Perry v. Globe Auto Recycling, Inc.*, 227 F.3d 950, 953 (7th Cir. 2000) (assignor was not precluded by judgment in post-assignment suit because the assignor "had the right to bring his own claim" at the time of the assignment, so "that is what he conveyed"); *Mecosta Cnty. Med. Ctr. v. Metro. Grp. Prop. & Cas. Ins. Co.*, 2022 WL 2104120, at *7-*8 & nn.4-5 (Mich. June 10, 2022) (same and collecting cases and literature in support). A decision in an action involving "either assignee or assignor is not preclusive against the other" unless "an action has been brought by the assignor before the assignment and a subsequent action is brought by the assignee on the same obligation." Restatement (Second) of Judgments § 55. In that circumstance (and only that circumstance) "the assignee is precluded … from relitigating the issues determined … in the action by the assignor." *Id.*

The Appellate Division ignored all this and denied Chase the opportunity to make its case because it believed that Chase's arguments "should have been made

by Fletcher after the Dakota's counterclaims against him were severed." Op. 3. The court thus bound Chase to Fletcher's arguments in a case where Chase was not a party. That decision would be constitutionally defensible only if Fletcher and Chase were privies in the Fletcher Suit. *Gramatan* makes clear they were not. As in *Gramatan*, there is no dispute that Fletcher assigned the interest in the Property to Chase years before the Fletcher Suit began. And there is no claim that Chase and Fletcher are privies for any reason other than their assignee/assignor relationship.

In every meaningful way, the decision in this case squarely conflicts with a foundational, forty-year-old decision of this Court and departs from more than a century of well-established nationwide caselaw. Chase and Fletcher were not privies, so Chase is not accountable for Fletcher's litigation mistakes. Leave to appeal should be granted to correct that critical error.

B. Controlling Precedent And Law Foreclose The First Department's Imposition Of An Affirmative Duty to Intervene

The First Department's holding that Chase is bound by the outcome in a prior case to which was not a party because it "could have sought to intervene," Op. 3, is likewise squarely contrary to controlling precedent. The United States Supreme Court long ago recognized that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. … Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his

legal rights." *Chase Nat'l Bank v. City of Norwalk, Ohio*, 291 U.S. 431, 441 (1934). As it more recently held, "[j]oinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree." *Martin v. Wilks*, 490 U.S. 755, 765 (1989).

New York law recognizes this fundamental principle by requiring *joinder*, not intervention, when "[p]ersons … who might be inequitably affected by a judgment in the action" are not included at the outset. CPLR § 1001(a). As promised by the due process protections of the state and federal constitutions, New Yorkers need not worry that their rights are being litigated in their absence—if they "might be inequitably affected," then they will be joined. *Id.* Of course, strangers to the litigation are free to *choose* to intervene. New York law outlines when absent parties "shall be permitted to intervene," *id.* § 1012, and "may be permitted to intervene," *id.* § 1013. But no rule mandates that absent parties *must* intervene, even if they might be inequitably affected by the judgment. As the law makes clear, that is the job of mandatory joinder.

The First Department's decision in this case rewrites those rules and conflicts with binding United States Supreme Court precedent. Rather than require the parties to join everyone whose rights might be affected under § 1001(a), the lower court's decision shifts the burden to absent parties: Anyone who *can* intervene under § 1013

now *must* do so or risk preclusion in later litigation to which they are actually a party. That is not the law. But absent review and correction by this Court, lower courts in the First Department will apply this erroneous decision and deny the parties before them the due process of law, binding them to decisions in which they had no say.

C. The Holding Below That Chase Impermissibly Seeks To Destroy A Prior Judgment Conflicts With Clear Court Of Appeals Precedent

The Appellate Division's conclusion that a finding in Chase's favor as to the meaning or validity of Paragraph 15th "would destroy the judgment [against Fletcher] altogether," Op. 2, 3, likewise conflicts with controlling law. The Dakota's judgment against Fletcher will stand no matter the outcome of this case, and Fletcher is precluded from challenging it in any later litigation. Chase does not seek to destroy the judgment in the Fletcher Suit, which was solely against Fletcher. Chase asks only not to be bound by the judgment in a case to which it was not a party.

This principle is well-settled. "[W]hen a car and bus collide and the car driver, suing the bus company in tort, is found innocent of comparative fault and wins, the driver still cannot defend with that victory a later action brought against him by a bus passenger. The passenger was not a party to the earlier suit." Siegel, N.Y. Prac. § 458 (6th ed.) (discussing *Neenan v. Woodside Astoria Transp. Co.*, 261 N.Y. 159, 161 (1933)). That is so even though "the jury in the second action may, disagreeing with the jury in the first, find that the car driver was at fault. It may, indeed. Inconsistencies like that are always a possibility when not all claims arising from a

single occurrence are tried together." *Id.* A second jury's determination in a suit between the car driver and a passenger that the driver was at fault thus does not "destroy" the first jury's contrary judgment in a suit between the car driver and the bus company, which remains binding on the parties actually involved in that case.

Or consider *Gramatan* itself. A court had previously held that the contract at issue was invalid, but this Court nonetheless held that the assignee was free to argue its validity in the subsequent suit because it was neither a party nor privy to any party in the original action. 46 N.Y.2d at 487. A finding in that second suit involving *the assignee* that the contract was valid would not "destroy" the prior judgment against *the assignor*. That judgment against the assignor would continue to bind the assignor. But the judgment against the assignor would not bind the assignee.

Different courts reaching different conclusions in different cases on the same or similar questions is hardly rare. "Indeed, it is routine for institutions like banks or insurance companies to take assignments of large numbers of claims arising out of a single transaction or occurrence, and given the vagaries of litigation they undoubtedly win some and lose some." *Perry*, 227 F.3d at 953. That is a predictable and valuable function of giving each person a chance to make their case, rather than binding everyone to the choices of strangers who happen to be in court first.

Nothing in this case threatens The Dakota's judgment against Fletcher. For example, had the Property been sold for an amount that exceeded Chase's interest,

Fletcher would be precluded from arguing that he, rather than The Dakota, is entitled to the balance. Nor can he raise such an argument if The Dakota seeks to enforce its judgment against him through any other means. Fletcher had his day in court. The meaning and validity of Paragraph 15th is finally decided as between Fletcher and The Dakota, as indeed is every issue that Fletcher raised or could have raised in the Fletcher Suit. And it will stay that way regardless of the outcome in this suit between Chase and The Dakota. True, a court in this case might (and should) ultimately interpret Paragraph 15th in a way that would have prevented The Dakota's judgment against Fletcher had Fletcher made the same arguments. But that does not destroy The Dakota's judgment against Fletcher, which will remain fully enforceable *as against Fletcher*. Because Chase never had its day in court, the meaning and validity of Paragraph 15th insofar as it affects *Chase's* rights has not been finally determined.

Just as the bus company cannot relitigate the car driver's fault, so too Fletcher cannot relitigate the underlying judgment. And just as the car driver cannot use the judgment against the bus company to deny bus passengers their day in court, so too The Dakota cannot use the judgment in the Fletcher Suit to deny Chase its opportunity to be heard. It is a feature of our legal system, not a bug, that different courts and juries reach different conclusions when presented with different evidence and argument. Leave to appeal should be granted to correct the First Department's conclusion to the contrary, which conflicts with well-established law.

II. THE FIRST DEPARTMENT'S DECISION MANDATING INTERVENTION IN POST-ASSIGNMENT SUITS ON PENALTY OF PRECLUSION CREATES A SPLIT AMONG THE APPELLATE DIVISION DEPARTMENTS

Given that the decision below squarely conflicts with controlling law, it is no surprise that it also creates a conflict among the departments of the Appellate Division—a conflict that will continue absent this Court's review.

The First Department's decision holding that assignees and assignors are in privity even in post-assignment suits conflicts with other appellate decisions consistently holding, as this Court did in *Gramatan*, that "an assignee is not a privy to a judgment entered in litigation to which his or her assignor was a party where the assignee's succession to the rights affected by the judgment took place before the institution of the suit against the assignor." 73A N.Y. Jur. 2d Judgments § 365.

The Fourth Department, for example, relied on *Gramatan* to hold that claim preclusion did not bar the assignee of a trust deed (Niagara) from asserting the validity of the underlying note in a foreclosure action even though a court had held the note invalid in a prior suit by the assignor (Exchange) in a foreclosure action in Illinois against another property pledged as collateral for the same loan. *Exchange Nat'l Bank of Chicago v. Ferridge Props. of New York, Inc.*, 112 A.D.2d 33, 35 (4th Dep't 1985). Because "the Illinois action was instituted after Exchange assigned the trust deed to Niagara," the Court held, Niagara was free to "assert the validity of the note because there is no privity between it and Exchange." *Id.*

Numerous Appellate Terms of the Supreme Court have likewise relied on *Gramatan* to hold that post-assignment judgments against assignors did not preclude later litigation on the same issues by assignees. *See, e.g.*, *Gentlecare Ambulatory Anesthesia Servs. v. MVAIC*, 64 Misc. 3d 130(A) (N.Y. App. Term. 2019); *J.K.M. Med. Care, P.C. v. Ameriprise Ins. Co.*, 54 Misc. 3d 54, 56 (N.Y. App. Term. 2016); *Ideal Med. Supply v. Mercury Cas. Ins. Co.*, 39 Misc. 3d 15, 16 (N.Y. App. Term. 2013); *Smooth Dental, P.L.L.C. v. Preferred Mut. Ins. Co.*, 37 Misc. 3d 67, 68 (N.Y. App. Term. 2012); *Magic Recovery Med. & Surgical Supply Inc. v. State Farm Mut. Auto. Ins. Co.*, 27 Misc. 3d 67, 69 (N.Y. App. Term. 2010); *Mid-Atl. Med., P.C. v. Victoria Select Ins. Co.*, 20 Misc. 3d 143(A) (N.Y. App. Term. 2008).

The First Department's decision here also conflicts with other appellate courts' faithful application of the well-established principle that absent parties have no affirmative obligation to intervene. *See, e.g.*, *Dalton v. Dalton*, 174 A.D.3d 499, 500 (2d Dep't 2019) ("Contrary to the defendant's contention, that the plaintiffs did not seek to intervene in the prior divorce action involving their son and the defendant does not collaterally estop them from maintaining this action to impose a constructive trust on real estate sale proceeds."); *Colella v. GEICO Gen. Ins. Co.*, 164 A.D.3d 745, 746 (2d Dep't 2018) ("Contrary to the plaintiff's contention, GEICO is not collaterally estopped from contesting her right to recover SUM benefits even though it did not intervene in the underlying personal injury action that

she brought against Moran"); *Searles v. Main Tavern Inc.*, 28 A.D.2d 1136, 1136 (2d Dep't 1967) ("plaintiff was not precluded from bringing an independent action by her failure to intervene in the prior declaratory judgment action").

Moreover, on both issues, the First Department's decision isolates it from state and federal courts throughout the country on the meaning and contours of the federal constitutional right to due process. *See, e.g., Mecosta Cnty. Med. Ctr.*, 2022 WL 2104120, at *7-*8 & nn.4-5 (collecting cases consistent with *Gramatan*); 18A Fed. Prac. & Proc. § 4452 & n.15 (3d ed.) (collecting cases refusing to hold that a party is precluded by judgment in a prior suit to which it was not a party simply because it could have intervened). This split, with the First Department standing against the rest of the state and country, justifies this Court's intervention.

III. THE FIRST DEPARTMENT'S DECISION WILL BURDEN FUTURE COURTS, UNSETTLE PROCEDURAL RULES, PREJUDICE LITIGANTS, AND INCREASE COSTS WITH NO COMMENSURATE BENEFITS

If left in place, the consequences of the First Department's decision will be broad and troubling. The decision radically increases the stakes of all litigation in which any absent party could intervene, since failure to do so might give rise to later preclusion. Mass intervention by unnecessary parties would greatly impede dispute resolution. Multiplication of parties breeds complexity, delay, and expense. Participation by intervenors, seeking only to protect against later preclusion, will lead to difficult questions of venue and jurisdiction. Intervenors will seek discovery

and discovery will be demanded of them, leading to further disputes. Intervenors will seek and defend against unique dispositive motions. They will present their own evidence and have unique evidence presented against them, the admissibility of which may vary as between parties, requiring imperfect limiting instructions. And they will require separate entries on verdict forms, with separate instructions.

The Appellate Division's decision will also wreak havoc on the finality of judgments in the First Department. No longer can litigants trust that they will have their own chance to make their case, regardless of any past judgments against other parties in other cases. Absent parties who realize they have failed to intervene will instead have to move to vacate the judgment, potentially unraveling the final decision as between the actual litigants who had their day in court. Litigants in the First Department therefore cannot trust that final judgments are in fact final.

All this added delay, complexity, and risk of prejudice would provide no commensurate benefits. The law already requires that everyone (1) necessary to afford complete relief to the parties or (2) "who might be inequitably affected by a judgment in the action" be *joined*. CPLR § 1001(a). An additional *intervention* requirement serves only to compel participation of persons who are *not* necessary or will *not* be inequitably affected. "Such concerns have played an important role in limiting mandatory joinder decisions" under the analogous federal rules. 18A Fed.

Prac. & proc. Juris. § 4452 (3d ed). If let stand, the First Department's decision will judicially rewrite those rules and undo the considered balance that § 1001(a) struck.

The First Department's decision will also invite gamesmanship. Parties can target assignors for whom the relevant issue is less important or who are more likely to default. If the case escapes the assignee's notice—as it likely would if the assignor simply defaults—then the strategic plaintiff can wield the judgment against the assignee in a new lawsuit with higher stakes. The plaintiff can thus sidestep the crucible of litigation entirely and skip straight to collection.

More broadly, institutional actors will affirmatively have to monitor the courts to see if a case in which they "could have sought to intervene" might possibly lead to a judgment that could affect their rights. Op. 3. Although the First Department's decision will apply to everyone, its impact on assignees alone will be intolerably severe. Unless this Court steps in, every bank assigned a property interest as collateral must monitor the borrower who assigned them that interest. Every loan service provider assigned a mortgage must monitor the original mortgagee. Every tenant who assigns their rights in a property must monitor the new tenant. And if they *can* intervene in any case tangentially involving the relevant property, then they *must*, or risk forfeiting their rights. If they fail to intervene in time, then they must move to vacate the judgment. Assignees who must engage in additional monitoring and prophylactic intervention will pass those costs on to consumers, needlessly

rendering the underlying transactions more expensive, with all the attendant inequitable results one would expect.

There is no justification for these costs. New Yorkers should be able to trust that they will only be bound by decisions in cases to which they are a party or in privity with a party. This Court should grant leave to appeal to prevent these harms from coming to pass, and to clarify to courts and litigants in the First Department that all New Yorkers—including assignees—are entitled to their day in court.

CONCLUSION

For the reasons stated above, the Court should grant Chase's motion for leave to appeal.

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Respectfully submitted.

WILMER CUTLER PICKERING
HALE AND DORR LLP

Alan E. Schoenfeld
7 World Trade Center
250 Greenwich St.
New York, NY 10007
(212) 937-7518
alan.schoenfeld@wilmerhale.com

THOMPSON COBURN HAHN &
HESSEN LLP
Zachary G. Newman, Esq.
488 Madison Avenue
New York, New York 10022

(212) 478-7200
znewman@thompsoncoburn.com

PARKER IBRAHIM & BERG LLP
James Berg, Esq.
270 Davidson Avenue, 5th Floor
Somerset, New Jersey 08873
(908) 725-9700
james.berg@piblaw.com

Attorneys for Respondent-Appellant