To Be Argued By:
ALAN E. SCHOENFELD
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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,

(*Caption continued on inside cover*)

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December 12, 2023

ALPHONSE FLETCHER, JR.,

Respondent,

—and—

FLETCHER INTERNATIONAL LTD., *et al.*,

Intervenors-Respondents.

CORPORATE DISCLOSURE STATEMENT

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INTRODUCTION

The question presented on this appeal is whether the First Department correctly held that a judgment against Alphonse Fletcher, Jr., precludes Chase from arguing in a later action that the lease did not permit a fee award to The Dakota, despite the fact that Chase was not a party to the prior action. As Chase showed in its opening brief, the First Department's decision is squarely contradicted by the black letter rule that assignees are not bound by post-assignment judgments against assignors, *see Gramatan Home Invs. Corp. v. Lopez*, 46 N.Y.2d 481, 486-487 (1979), and nothing about this case justifies deviation from that precedent.

In its limited discussion of the question actually presented, The Dakota offers three reasons why this Court should hold that Chase and Fletcher were privies in the Fletcher Suit. *First*, The Dakota contends that parties with concurrent property interests arising from a secured loan are privies for nonparty preclusion purposes. That argument contradicts an unambiguous, century-long national consensus. The Dakota offers no reason why New York should become the only jurisdiction in the country to adopt such a rule, and federal due process principles would prohibit it. *See infra* § I.A.1. *Second*, The Dakota argues that the "Recognition Agreement" signed by Chase, Fletcher, and The Dakota somehow rendered Chase and Fletcher privies for nonparty preclusion purposes. But The Dakota never offers any reason why that contract matters, nor does it cite any case

supporting that novel theory. There is no such reason, and there is no such case. *See infra* § I.A.2. *Finally*, The Dakota argues that Chase was on notice of The Dakota's claim for fees in the Fletcher Suit. But the United States Supreme Court has held that due process does not permit a nonparty to be bound simply because it had "notice of the original suit." *Taylor v. Sturgell*, 553 U.S. 880, 897 (2008). *See infra* § I.A.3.

Rather than defend the merits of the First Department's decision, The Dakota largely relies on a series of procedural arguments. They are equally meritless. The Dakota argues the appeal is moot, but simply never addresses Chase's argument to the contrary: As Chase explained in its opening brief, the appeal is not moot because a decision in Chase's favor will allow unobstructed appellate review of the merits by obviating the need for Chase to make any showing under CPLR 5015(a)(1)-(5) and foreclosing several other procedural arguments that The Dakota made in opposition to Chase's motion to intervene. That concrete, practical effect means the case is not moot. *See infra* § II.

Finally, The Dakota tries to rewrite the First Department's decision in two ways, each contradicted by a plain reading of the opinion. The Dakota first claims that the First Department ruled on the underlying merits, siding with The Dakota as to the meaning and validity of Paragraph 15th. In the guise of defending the judgment below, The Dakota then devotes much of its brief to arguing the

underlying merits of the case. But the First Department never reached the question of whether Paragraph 15th permits fees when the shareholder is not in default. The only merits question the First Department reached was as to Chase's separate argument about the priority of the lien, which has nothing to do with whether The Dakota can recover attorneys' fees from shareholders who are not in default. Plaintiffs' contractual interpretation arguments are thus irrelevant here and will be decided on remand. *See infra* § III.A. Chase next asserts that the question presented on this appeal—whether Chase is precluded from contesting The Dakota's reading of the relevant lease provision—was not raised before the First Department. But the First Department's decision rested on precisely that basis. *See infra* § III.B. The Court should reject Plaintiffs' effort to rewrite a decision they cannot defend, vacate the First Department's decision, and remand.

ARGUMENT

I. THE DAKOTA OFFERS NO MEANINGFUL DEFENSE OF THE FIRST DEPARTMENT'S DECISION BINDING CHASE TO THE DAKOTA'S JUDGMENT AGAINST FLETCHER

The First Department precluded Chase from arguing that Paragraph 15th did not permit the fee award for three related reasons: (1) Fletcher should have raised those arguments in the prior suit, (2) Chase should have intervened in the Fletcher Suit, and (3) Chase's challenge would collaterally attack and destroy the validity of the prior judgment against Fletcher. In its opening brief, Chase explained first why

clear and binding precedent contradicts each point, and then why affirming the First Department would "frustrate the very purpose of res judicata to reduce contention and dispute. Instead of more litigation later, there will be more litigation now." *Gilberg v. Barbieri*, 53 N.Y.2d 285, 294 (1981) (citation omitted). In response, The Dakota largely abandons the second and third of these reasons, and its argument that Chase and Fletcher were privies during the Fletcher Suit is meritless.

A. Chase And Fletcher Were Not In Privity For Purposes Of Non-Party Preclusion

"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 485-486. Whether a nonparty had the required opportunity to be heard in a previous action turns on whether they "were connected with it to such an extent that they are treated as if they were parties." *Id.* at 486. That connection can be direct, where a nonparty agrees to be bound by the determination, assumes control over the litigation, or attempts to relitigate through a proxy. *See Taylor*, 553 U.S. at 893-895; *see also Green v. Santa Fe Indus., Inc.*, 70 N.Y.2d 244, 255 (1987). It can be indirect if there are "special procedures to safeguard the interests of absentees," *Taylor*, 553 U.S. at 898, as in class actions and suits brought by certain fiduciaries, *id.* at 894, or in bankruptcy or probate proceedings, *id.* at 895; *see also Green*, 70 N.Y.2d at 253-254 (listing similar

circumstances and holding that shareholders were not bound by judgment against other shareholders who "sued in their own behalf" and where "attempts at class certification were denied"). Or it can arise directly from the operation of property law, meaning transferees and assignees cannot relitigate pre-transfer or pre-assignment cases that define the property right they acquired. *Taylor*, 553 U.S. at 894; *see also Gramatan*, 46 N.Y.3d at 486-487.

In arguing that Chase is bound by the judgment against Fletcher, The Dakota makes three points: (i) that Chase "had a continuing shared and common interest with Fletcher in the shares and lease that secured its loan," (ii) that Chase "entered into a written Recognition Agreement with both Fletcher and Dakota as to their respective rights and priorities regarding the shares and lease," and (iii) that Chase had notice of The Dakota's claim for fees in the Fletcher Suit. Opp. 20-21.

Taking all that as true, The Dakota never explains why any of it matters. Chase still did not play any role in the Fletcher Suit. Fletcher still did not understand himself "to be acting in a representative capacity" in the Fletcher Suit, and there still were no "special procedures to safeguard the interests of absentees" like Chase. *Taylor*, 553 U.S. at 898. And Fletcher's assignment of the security interest to Chase still occurred "prior to the institution of the" Fletcher Suit. *Gramatan*, 46 N.Y.3d at 487. The Dakota does not argue otherwise. More broadly, The Dakota nowhere explains how these three points render Chase so

connected to the Fletcher Suit that it is fair to treat Chase as a party to that litigation such that its failure to intervene means it is now bound by that judgment.

1. Chase was not in privity with Fletcher simply because they had concurrent property interests stemming from Fletcher's assignment of a security interest to Chase

The Dakota makes much of the fact that, as a secured lender, Chase had "a continuing shared and common interest with Fletcher in the shares and lease that secured its loan." Opp. 20; *see also id.* at 22 (attempting to distinguish *Gramatan* because it "involved a true assignment, not just assignment of a security interest in the asset at issue"); *id.* at 26 (attempting to distinguish *Neenan v. Woodside Astoria Transp. Co.*, 261 N.Y. 159 (1933), because "[t]here was no asset in which both parties shared an interest"). That argument flouts over a century of settled law refusing to find privity based solely on concurrent property interests.

"When two or more persons have concurrent ownership interests in property, a judgment for or against one of them concerning his interest does not have effects under the rules of res judicata on another such owner," absent some additional fiduciary relationship. Restatement (Second) of Judgments § 54 (1982). In other words, "[t]he basic rule has been that concurrent property relationships do not justify nonparty preclusion." 18A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 4461 (3d ed.) ("Wright & Miller"). *See also David v. Biondo*, 92 N.Y.2d 318, 324 (1998) (relying on the Restatement's recitation of

privity principles). Indeed, this Court long ago held that "the broad principle of justice that a person ought not to be bound by the result of a litigation to which he was not a party" means that "[a] judgment against a tenant … does not bind the landlord unless the landlord has been brought in and made a party in fact or in substance to the litigation." *Masten v. Olcott*, 101 N.Y. 152, 160-161 (1886).

In a footnote, The Dakota asks this Court to ignore *Masten* because renting a property "does not involve [an] assignment of [a] security interest." Opp. 23 n.37. That is a distinction without a difference. The rule that "an action maintained by or against one co-owner leaves other co-owners legally unaffected" applies equally to "the interests of mortgagor and mortgagee and owners of comparable equity and security interests" just as it applies to "the interests of landlord and tenant." Restatement (Second) of Judgments § 54 cmt. a; *see also* Wright & Miller § 4461 ("a mortgagor's loss in litigation affecting the mortgaged property does not bind the mortgagee," and the same rule covers "[m]any … relationships of joint ownership, subordinate reversionary interests, and security interests").

Consistent with that rule, numerous courts have held that mortgagors and mortgagees are not in privity for purposes of nonparty preclusion despite their concurrent property interests rooted in security for a loan. That includes the Supreme Court of the United States at least three times. *See Chase Nat'l Bank v. City of Norwalk, Ohio*, 291 U.S. 431, 438-439 (1934); *Old Colony Trust Co. v.*

City of Omaha, 230 U.S. 100, 122 (1913) (judgment against a mortgagor was not "conclusive upon the trust company as mortgagee" because the "trust company's rights … were not acquired during or since that suit, but long prior thereto"); *Keokuk & W. R. Co. v. State of Missouri*, 152 U.S. 301, 314 (1894) ("While a mortgagee is privy in estate with a mortgagor as to actions begun before the mortgage was given, he is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the execution of the mortgage").

That age-old consensus is clearly correct. A loan agreement secured by a property interest is not an agreement for either party to represent the other in litigation. It does not create a fiduciary relationship. And it certainly does not guarantee adequate representation, as lenders and borrowers have many inherent conflicts of interest such that one may not have the "incentive to litigate thoroughly or as thoroughly as he might if more were at stake." *Gilberg*, 53 N.Y.2d at 293 (holding that a prior minor criminal conviction did not collaterally estop even the very same party in a later high-stakes civil suit). For example, a borrower that cannot afford to keep a property will not care about any additional liens on that property or the relative priority of existing liens.

The Dakota ignores those well-settled rules and never explains why a judgment against a mortgagor should bind an absent mortgagee (or a judgment

against Fletcher should bind Chase) if a judgment against a tenant cannot bind a landlord. It instead simply cites two non-binding cases with no defense of their holdings. *See* Opp. 19. In the first, *Altegra Credit Company v. Tin Chu*, 29 A.D.3d 718 (2d Dep't 2006), the Second Department held that a foreclosure action was precluded because the mortgagee was in privity with the putative mortgagor, who had been convicted of forging the deed he then used to obtain the mortgage. *Id.* at 718-719. The Court found privity solely because the fraudulent mortgagor in the criminal case and the mortgagee in the foreclosure action each "had a stake in establishing the validity of the mortgage/deed transaction." *Id.* at 720. *Altegra* was clearly incorrect under *Gramatan*, and it has been superseded by the U.S. Supreme Court's decision that nonparty preclusion based solely on "identity of interests" violates federal constitutional guarantees of due process. *Taylor*, 553 U.S. at 901. In the second case, *In re 56 Walker, LLC*, 2014 WL 1228835 (Bankr. S.D.N.Y. Mar. 25, 2014), a bankruptcy court held that several unsecured creditors were bound by a prior ruling against the debtor affirming the validity of a mortgagee's lien on the debtor's property. *Id.* at *2. If that case was correctly decided, it is because of factors unique to the bankruptcy context; privity between debtors, trustees, and creditors' committees presents complex issues not present here. *See id.* (relying on two bankruptcy-specific cases).

In any event, both of those cases found privity only after concluding that the parties' interests were "fully aligned." *In re 56 Walker*, 2014 WL 1228835, at *2; *see also Altegra*, 29 A.D.3d at 720 (finding a "unity of interest"). Not so here. No court has ever found that Fletcher's and Chase's interests were fully aligned, and The Dakota does not argue that their interests were aligned. Indeed, the record conclusively establishes they were not. Paragraph 15th was not at issue in Fletcher's claims against The Dakota, *see* R. 191-92, 241-253; Fletcher did not argue before the mediator, the referee, or the supreme court that Paragraph 15th did not entitle The Dakota to such fees, *see* R. 775-777; and Fletcher's counsel expressly stated on the record that he was "not contesting" The Dakota's entitlement to or the reasonableness of the fees, *see* R. 821-822.

2. The Recognition Agreement establishes at most *contractual* privity, not privity for purposes of nonparty preclusion

The Dakota's contention that "Chase entered into an express three-way contractual relationship with Fletcher and Dakota as to the relative interests and priorities in the shares and lease of each of them" is irrelevant. Opp. 20; *see id.* at 23 (attempting to distinguish *Gramatan* because "there was no three-way express contractual allocation of rights and priorities"); *id.* at 26 (attempting to distinguish *Neenan* on the ground that "[t]here was no contractual agreement as to priorities (or liabilities) between the parties"). The Dakota nowhere explains *why* the Recognition Agreement might affect the preclusion analysis. Chase did not agree,

as part of the Recognition Agreement, to be bound by a judgment against Fletcher, nor did Fletcher agree to represent Chase's interests in any future litigation.

It is possible that The Dakota has conflated the concept of privity of contract with privity for nonparty preclusion purposes. *See, e.g.*, Opp. 20 (arguing Chase is a "contractual privy" of Fletcher); *id.* 21 (arguing Chase was in "contractual privity with Fletcher and Dakota"). "[I]t is clear that the term 'privity,' as used in the phrase 'privity of contract' has a very different meaning from the term 'privity' as used in the law of judgments and in particular in the collateral estoppel context." *IOENGINE, LLC v. PayPal Holdings, Inc.*, 607 F. Supp. 3d 464, 518 (D. Del. 2022) (collecting cases); *see also Phil Crowley Steel Corp. v. Sharon Steel Corp.*, 702 F.2d 719, 722 (8th Cir. 1983) ("'Privity' is a term with different meanings in different contexts; for example, the concept of 'privity of parties' is not the same as the concept of 'privity of contract.'"). Contractual privity is the relationship between parties to a contract that allows them to sue each other to enforce the contract. It has nothing to do with the privity that permits nonparty preclusion.

3. The constitutional guarantee of due process does not permit nonparty preclusion based solely on notice of the prior suit

Finally, The Dakota argues that Chase is bound by the judgment against Fletcher because it had notice of The Dakota's claim for fees in that action. *See* Opp. 20-22. Chase disagrees as a factual matter, but in any event unambiguous Supreme Court precedent squarely forecloses that argument on the law. In *South*

Central Bell, Alabama courts held that the plaintiffs were precluded from bringing a Commerce Clause challenge against a particular state tax because different taxpayers had previously brought the same challenge and lost. *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 167 (1999). The Alabama courts relied in part on the fact "the plaintiffs here were aware of the earlier … litigation." *Id.* at 168. The Supreme Court disagreed, holding that this "created no special representational relationship between the earlier and later plaintiffs" that might give rise to res judicata, and that the Alabama courts' holding that nonparty notice justified nonparty preclusion was "inconsistent with … the Fourteenth Amendment's due process guarantee." *Id.*

The Supreme Court reiterated this holding in *Taylor*, where it rejected "[a]n expansive doctrine of virtual representation … based on identity of interests and some kind of relationship between parties and nonparties shorn of [constitutionally required] procedural protections." 553 U.S. at 901. In the course of its ruling, the Supreme Court described *South Central Bell* as holding that "the application of res judicata" simply because "the nonparty had notice of the original suit ... violated due process." 553 U.S. at 897. The Court's inquiry "came to an end when [it] determined that the original plaintiffs had not understood themselves to be acting in a representative capacity and that there had been no special procedures to

safeguard the interests of absentees." *Id.* at 897-898. That holding alone is fatal to The Dakota's position in this appeal.

B. The Dakota Concedes That There Is No Duty To Intervene

The First Department held that Chase was precluded from arguing that Paragraph 15th is unconscionable if it is not limited to lessees who are in default in part because "Chase could have sought to intervene in his action against the Dakota to argue that paragraph 15th was invalid." Op. 3. As Chase explained, New York law imposes no such affirmative duty to intervene and due process would not permit preclusion on that basis. *See* Chase Br. § II. The Dakota does not defend that portion of the First Department's decision, conceding that "Chase had the *option*, not the duty, to intervene." Opp. 23. Chase fully agrees. That concession should resolve the case. The Dakota (like the First Department) faults Chase for not intervening in the litigation between Fletcher and The Dakota, suggesting that preclusion is an appropriate consequence. *See, e.g.*, Opp. 24. But if The Dakota wanted to bind Chase to a judgment against Fletcher, then the burden was on *The Dakota* to *join* Chase to that litigation under CPLR 1001(a). It did not.[1]

[1] The Dakota goes on to argue that "a party who delays unreasonably in asserting its intervention rights, pursuant to CPLR 1012 or CPLR 5015(a) thereby waives them." Opp. 24. That is entirely irrelevant on this appeal, which does not present the question of whether any intervention was timely or otherwise appropriate, but rather asks whether the law required Chase to intervene on pain of preclusion.

C. The Dakota Does Not Argue That A Judgment In Chase's Favor Would Destroy The Dakota's Judgment Against Fletcher

The First Department also held that Chase's arguments about the meaning and validity of Paragraph 15th were "impermissible collateral attack[s] on the Dakota's judgement" in the Fletcher Suit because they would "destroy the judgment altogether." Op. 2-3. As Chase explained, a judgment in its favor would not affect the validity or enforceability of The Dakota's judgment against Fletcher. Chase Br. § III. The Dakota does not contest that it can enforce its judgment against Fletcher regardless of the outcome of this case, and so effectively abandons this portion of the First Department's holding. That the funds from the sale of the relevant property may not satisfy Fletcher's obligations to Chase and then The Dakota's judgment against Fletcher does not somehow render a judgment against Fletcher enforceable against Chase.[2]

II. THE DAKOTA DOES NOT DISPUTE THAT A DECISION IN CHASE'S FAVOR WOULD ELIMINATE AN OBSTACLE TO APPELLATE REVIEW OF THE MERITS, WHICH MEANS THE CASE IS NOT MOOT

As The Dakota notes, "a matter is 'moot when a determination is sought on an issue which, if rendered, could not have any practical effect on the existing controversy.'" Opp. 28 (quoting 1 New York Appellate Practice § 3.15). And as

[2] The Dakota goes on to argue that its' liens are granted priority under the UCC. Opp. 24. That argument is also irrelevant to the question presented on this appeal, which does not ask the Court to rule on the relative priority of any putative liens.

Chase explained in its opening brief, "[r]eversing the First Department's erroneous decision in this case would allow Chase to obtain unencumbered appellate review of the merits on remand, without having to first make the heightened procedural showing necessary to succeed on a motion to vacate and without having to address The Dakota's other various non-merits arguments." Chase Br. 28. The Dakota simply never addresses those concrete "practical effects." It instead attacks a straw man, arguing that the "capable of repetition yet evading review" exception does not apply. *See* Opp. 30-32. Chase never relied on that exception.

The First Department held that, "[i]f Chase wants to vacate the Dakota's judgment, it must move before the court which rendered the judgment." Op. 3 (cleaned up). Chase promptly followed that directive to protect its rights in case this Court denied leave to appeal. To forestall any argument that it acted with undue delay, Chase moved without waiting for this Court to rule on the petition for leave to appeal. Chase then appealed Justice Bluth's decision to further preserve its rights, as a failure to appeal would have resulted in a final judgment in The Dakota's favor that would actually have mooted this case.

Chase simply seeks clean appellate review of the merits of its arguments. If Chase prevails on this appeal, it will obtain that review on remand (of course taking all appropriate steps to consolidate the two pending appeals). Absent a favorable decision from this Court, Chase can only obtain that appellate review on

the merits by first establishing one of the narrow bases for vacating a final judgment in CPLR 5015(a)(1)-(5). The Dakota argued before Justice Bluth that Chase could not do so, and for some reason repeats those arguments here. *See* Opp. 24. The Dakota further argued before Justice Bluth that the motion should be denied as untimely and barred by res judicata based on the supreme court's decision in the case now on appeal before this Court. A decision in Chase's favor on this appeal would do away with those potential procedural barriers.

In short, a favorable decision on this appeal—as in many appeals—would finally resolve a disputed issue that was the sole basis for the ruling below, thereby narrowing the questions for resolution on remand. It is not moot.

III. THE DAKOTA'S EFFORTS TO REWRITE THE PLAIN WORDS OF THE FIRST DEPARTMENT'S DECISION SHOULD BE REJECTED

Because The Dakota cannot defend the First Department's ruling on the merits, it attempts to rewrite that decision by asserting that (1) the First Department held that default is not a precondition to an award of attorneys' fees under Paragraph 15th nor is Paragraph 15th unconscionable under that interpretation, and (2) the issue of whether Chase is bound by the judgment against Fletcher was somehow never presented before the First Department. Neither argument withstands even a cursory skim of the First Department's decision.

A. The First Department Did Not Decide The Meaning Or Validity Of Paragraph 15th, As It Must Do On Remand

The Dakota spends a significant chunk of its brief arguing that Paragraph 15th entitles it to attorneys' fees from litigation even against shareholders that are not in default, and that such an interpretation does not render the provision unconscionable under *Krodel v. Amalgamated Dwellings Inc.*, 166 A.D.3d 412, 413-414 (1st Dep't 2018). *See* Opp. § I. Those arguments are irrelevant to this appeal, which presents the separate question of whether Chase is precluded from making those arguments at all. To smuggle in these irrelevant arguments, The Dakota asserts in several places that the First Department agreed with The Dakota as to the meaning and validity of Paragraph 15th. *See* Opp. 2, 10, 11 & n. 21, 13, 16. It did not. To the contrary, and as is plain from the decision, the First Department rejected those arguments solely on the ground that the judgment in the Fletcher Suit precluded Chase from raising them here.

The Dakota points to just a single sentence from the First Department decision: "Thus, unless paragraph 15th does not mean what it says, the judgment is incident to Fletcher's ownership of his Dakota shares." Op. 2. But that sentence was part of a *separate* holding rejecting a *separate* argument that has nothing to do with the parties' competing interpretations of the meaning of Paragraph 15th. The UCC gives priority to "cooperative organization security interests," which must "secure[] only obligations incident to ownership of that cooperative interest."

UCC § 9-102(27-d). Chase argued before the First Department that "the judgment in the Fletcher Suit falls outside the narrow confines of the UCC's grant of super-priority liens … [r]egardless … of how the Lease and Paragraph 15th are construed." Reply Add. 50; *see also id.* 144 ("Even if The Dakota could assert the Legal Fees as a lien under the Lease … , there would not be a super-priority 'Cooperative Organization Security Interest' under the UCC"). The First Department rejected that contention, relying on the language of Paragraph 15th to conclude that "the judgment is incident to Fletcher's ownership of his Dakota shares." Op. 2. That argument—and the entire paragraph of the First Department's decision addressing it, including the single sentence The Dakota repeatedly quotes—had nothing to do with whether Paragraph 15th permits The Dakota to obtain legal fees from shareholder plaintiffs who are not in default.

The balance of the opinion underscores the point. The First Department did not hold that Paragraph 15th applied even if the lessee was not in default. It held that Chase's "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." Op. 2-3. Nor did the First Department hold that The Dakota's interpretation of Paragraph 15th did not render it unconscionable. It held that Chase's "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." *Id.* at 3. Chase challenges precisely these holdings on this appeal.

The Dakota's irrelevant arguments on the merits are also wrong. Paragraph 15th is facially ambiguous. It simply is not clear whether the first clause—"If the Lessee shall at any time be in default hereunder"—establishes a prerequisite for an award of attorneys' fees that applies only to the first of the following two conditions—"and the Lessor shall take any action against the Lessee based upon such default"—or if it also applies to the second condition—"or if the Lessor shall defend any action or proceeding (or claim therein) commenced by the Lessee." R. 698, 712. Justice Kalish recognized that ambiguity and ordered discovery. R. 593, 601-616 (9:5-24:11), 667-668 (75:1-76:7), 673-676 (81:4-84:15).[3] That discovery uncovered, among other things, a memorandum that The Dakota sent to its shareholders explaining the import of *this very language* before they voted on its adoption. R. 1040-48. That memo explained in no uncertain terms that the change meant that The Dakota's "ability to recover … expenses is limited to those instances when the shareholder is actually in default." R. 131 (¶ 19), 1048.

[3] Justice Lubell, who reached the opposite conclusion at summary judgment, was assigned the case after Justice Kalish's retirement.

Moreover, The Dakota's reading of Paragraph 15th would render it equivalent to a requirement "that the tenant must pay attorneys' fees if it commences an action against the landlord based upon the default of the landlord," which "is unconscionable and unenforceable as a penalty." *Krodel*, 166 A.D.3d at 414.

If the Court would like supplemental briefing on the underlying merits of this case, then Chase would be happy to provide it. But the merits of the contract interpretation dispute should be decided on remand following a ruling from this Court reversing the First Department and holding that Chase is not bound by the judgment against Fletcher.

B. The Question Presented Was Raised Below, And Indeed Was The Sole Basis Of The First Department's Decision

The Dakota also argues that this Court should reverse its grant of the motion for leave to appeal because the question presented was purportedly not presented to the supreme court or the First Department. Opp. 32-34. That is wrong. As just explained, the First Department expressly held that Chase's arguments were precluded because (1) "Chase could have sought to intervene in [Fletcher's] action against the Dakota to argue that paragraph 15th was invalid," Op. 3; (2) those arguments "should have been made by Fletcher after the Dakota's counterclaims against him were severed," *id.*; and (3) they were "impermissible collateral attack[s] on the Dakota's judgment" in the Fletcher Suit that "would destroy the judgment altogether," *id.* 2-3. Chase challenges precisely those holdings here.

Ignoring all that, The Dakota relies solely on paragraphs 46 and 49 of an affidavit from Chase's counsel that accompanied Chase's motion to intervene and vacate the judgment in the Fletcher Suit. Opp. 8-9, 33-34 (citing Add. 23-24). Paragraph 46 describes the bases for the competing motions for summary judgment before the supreme court in the case now on appeal. Those motions did not address whether the judgment in the Fletcher Suit precluded Chase's arguments because the supreme court had already held long before summary judgment that it did not. *See* R. 616. Indeed, the very same declaration that The Dakota selectively quotes recites this exact history. *See* Add. 21-22 (¶¶ 40-43).

Paragraph 49 of the declaration summarizes the grounds for Chase's appeal. Because the supreme court held that the judgment against Fletcher did not preclude Chase from making its arguments, Chase naturally did not appeal that issue. The Dakota, however, led its brief in the First Department with the preclusion point, *see* Reply Add. 79-81, 90-94, and Chase addressed that argument in its reply, *see* Reply Add. 139-143. The issue was thus squarely presented, which explains why it was the sole basis for the First Department's decision. The declaration that The Dakota selectively quotes also recites this obvious fact. *See* Add. 24 ¶¶ 51-52.

CONCLUSION

For the reasons stated above, the Court should reverse the First Department's decision and remand for further proceedings.

Dated: December 12, 2023

Respectfully submitted.

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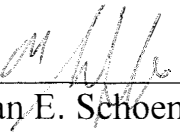

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CERTIFICATION

I certify pursuant to 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the statement of the corporate disclosure statement; the table of contents, the table of cases and authorities; and any addendum containing material required by subsection 500.1(h) of this Part is 5,258 words.

Dated: December 12, 2023
New York, New York

Respectfully submitted,

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REPLY ADDENDUM

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To be Argued by:
ZACHARY G. NEWMAN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Petitioner,

– against –

JPMORGAN CHASE BANK, N.A.,

Respondent-Appellant,

– and –

THE DAKOTA, INC.,

Respondent-Respondent,

(For Continuation of Caption See Inside Cover)

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

BRIEF FOR RESPONDENT-APPELLANT

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New York County Clerk's Index No. 157631/15

– 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.

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PRELIMINARY STATEMENT

Appellant JPMorgan Chase Bank, N.A. ("Chase") respectfully submits this brief in support of its appeal of the lower court's judgement and order ("Judgment and Order") that (a) denied Chase's motion for summary judgment against Respondent The Dakota, Inc. ("The Dakota"), by which Chase sought to declare its lien on certain capital stock ("Shares") in The Dakota – a historical landmark cooperative apartment building on Central Park West – to be superior and senior to The Dakota's alleged lien; and (b) granted summary judgment in favor of The Dakota by ruling that it held a senior lien on the Shares even though it was largely comprised of legal fees incurred by The Dakota in a separate action concerning claims The Dakota racially discriminated against a shareholder in his bid to buy separate and unrelated shares in the building.

The lower court's ruling was clear error. For several reasons, Chase's lien takes priority over The Dakota. First, the lower court substantially and erroneously misinterpreted *Krodel v. Amalgamated Dwellings Inc.*, 166 A.D.3d 412 (1st Dep't 2018) ("*Krodel*") in granting The Dakota a super-priority lien under the proprietary lease ("Lease") because The Dakota sought legal fees based on a legally defective and unenforceable provision that, under The Dakota's interpretation, permits the cooperative to recover legal fees win or lose. The Dakota incurred these fees defending against racial discrimination claims brought by the former owner of the

Shares concerning completely separate shares in the co-op. Nevertheless, the lower court held the Lease enabled The Dakota to recoup attorneys' fees from "any action or proceeding" brought by a shareholder, regardless of whether the shareholder was in default.

This Court, in *Krodel*, held such fee-shifting provisions unconscionable and unenforceable. Otherwise, lessors like The Dakota would have free reign to punish shareholders merely for bringing colorable claims, even if the shareholder is not in default and the claims are not related to the shareholder's property. Yet, that is exactly what the lower court permitted in granting The Dakota super-priority.

Second, even if this Court were to distinguish *Krodel*, there are several other reasons as to why Chase's lien must take priority over The Dakota's claim to the proceeds from the $9.27 million sale of the Shares. The plain language of the lease associated with the Shares and The Dakota's own admissions with respect to said language support Chase's claim and warrant a reversal of the lower court's decision. The unambiguous language of the Lease only allows The Dakota to recover legal fees from shareholders who are in default. The Dakota even admitted this in "explanatory comments" to shareholders before they adopted the fee-shifting provision in question. More specifically, the explanatory comments from The Dakota's Board noted that shareholder default was a prerequisite to both its recoupment of legal fees against the shareholder and to claim a lien for such unpaid

fees against the shareholders' co-op interests. The Dakota does not dispute these facts, and it even represented to the lower court that its lien was not dependent on (or otherwise tied to) shareholder default. Still, the lower court refused to recognize these admissions, misconstrued the plain language of the lease and entered an order that seriously undermines *Krodel*. This Court should not follow suit.

Third, the lower court's ruling also ignored the plain terms of the New York Uniform Commercial Code ("UCC") by holding that The Dakota's illegitimate lien had super-priority status. The UCC reserves such priority "only" for co-op security interests that are tied to charges incidental to ownership. The Dakota's alleged lien clearly fails this test since it allegedly arose out of legal fees incurred from claims that it discriminated against a member of a protected class in his bid to purchase additional shares in the building. These additional shares were distinct and separate from the Shares associated with The Dakota's purported lien and thus were not exclusively incidental to ownership of the Shares. Without super-priority status, The Dakota's "lien" stands behind Chase's perfected security interests.

For these and the reasons set forth herein, the Judgment and Order should be reversed and summary judgment granted in Chase's favor.

QUESTIONS PRESENTED

1. Whether the lower court erred in granting summary judgment to the Respondent cooperative corporation – without a hearing – by enforcing a lease fee-shifting provision in favor of Respondent when presented with two interpretations of the provision that both compel a ruling for Appellant: (1) the provision enables Respondent cooperative corporation to recover its legal fees in any circumstance and regardless of whether it was successful or not, thereby becoming unenforceable under this Court's holding in *Krodel v. Amalagated Dwellings, Inc.*, 166 A.D.3d 412 (1st Dep't 2018), or (2) the provision's plain language – as acknowledged by the Respondent in its admission to shareholders – limited Respondent's recovery of legal fees only to instances of shareholder default, which would warrant a ruling in favor of Appellant since Respondent admitted the shareholder was not declared to be in default.
2. Whether the lower court erred in holding that Respondent is entitled to a super-priority lien under the UCC for legal fees incurred while defending against a shareholder's claims that were not related or incidental to the shareholder's proprietary lease and shares, but arose out of the co-op's alleged racial discrimination against the shareholder in denying his bid to purchase of wholly separate shares in the co-op.

3. Whether the lower court erred by ruling *sua sponte* that the Appellant waived the argument that Respondent's lease was unenforceable under prevailing First Department case law when Appellant's argument had been previously raised through discovery such that Respondent not only had notice thereof, but preemptively addressed the argument in its motion for summary judgment.
4. Whether the lower court erred by finding that the Appellant did not have standing to challenge Respondent's ability to recover attorneys' fees under the lease when those fees formed Respondent's lien in this priority dispute.
5. Whether the lower court erred in awarding the Respondent those maintenance fees and charges that were not related to the litigation against Alphonse Fletcher, Jr. without first conducting an evidentiary hearing.

STATEMENT OF THE CASE

A. Chase's Loans to Fletcher and Priority Lien on the Property

Chase's priority lien on the Property dates back nearly fifteen years. In 2008, Chase agreed to loan Alphonse Fletcher, Jr. ("Fletcher") a total of $11,250,000. *See* Record on Appeal ("R.") at 139-156, 958-971. In connection with the loan agreements, Fletcher executed and delivered to Chase two notes ("Notes") on February 8, 2008. *See* R. at 139-156. Two separate loan security agreements, each dated February 8, 2008 and signed by Fletcher, secured the Notes. *See* R. at 958-967. In connection with the agreements, Fletcher gave Chase a security interest by

assigning to Chase all of his "right, title and interest" in his Shares – namely the 965 shares of capital stock associated with Units 52, 270-271 and PHB 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 958 (¶¶ 2, 6), 963 (¶¶ 2, 6), 968-971.

Chase perfected its security interest in the Property on March 5, 2008 by filing two separate UCC financing statements with the City Register (the "March 5, 2008 UCCs"). *See* R. at 985-1012. Prior to the filing of the March 5, 2008 UCCs, and in connection with a prior loan granted to Fletcher, Chase had recorded a separate UCC financing statement dated January 17, 2007 (the "January 17, 2007 UCC," and together with the March 5, 2008 UCCs, the "Chase UCCs") to secure a priority security interest in and lien on Property. *See* R. at 972-984.

As of March 5, 2008, there were no other liens on the Property. *See* R. at 942 (¶ 16), 311-313 (¶ 5), 680-682 (¶ 7), 742-745. Indeed, The Dakota recognized Chase's lien and interests in the Property from the primary Note (comprising $6.1 million) through a February 6, 2008 agreement, which Fletcher, Chase and The Dakota signed (the "Recognition Agreement"). *See* R. at 157-158. The terms of the Recognition Agreement expressly provide that The Dakota would not encumber the Property or terminate the Lease without Chase's approval:

> [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.

See R. at 157 (¶ 2A). The Dakota does not dispute these terms, its recognition of Chase's rights, or that Chase never breached the Recognition Agreement. *See* R. at 768 (¶ 6).[1]

B. Fletcher Sues The Dakota for Racial Discrimination

Years later, in 2011, Fletcher sued The Dakota for racial discrimination, defamation, and tortious interference after The Dakota refused to allow Fletcher to buy an additional apartment and shares in the building. *See* R. at 191-192 (¶ 1), 244-251 (¶¶ 217-263); *Fletcher v. The Dakota, Inc.*, Index No.: 101289/11 (Sup. Ct. N.Y. Cnty.) (the "Fletcher Suit"). Fletcher also alleged that The Dakota breached its fiduciary duty to Fletcher as a shareholder by blocking the sale of the additional apartment to him. *See* R. at 191-192 (¶ 1), 241-244 (¶¶ 189-203). Justice Eileen Rakower, who presided over the Fletcher Suit, summarized the lawsuit as:

> an action for discrimination, retaliation, defamation, and tortious interference based on the board of directors of a cooperative apartment building's failure to approve an existing shareholder's application to purchase additional shares…

[1] While the Recognition Agreement also noted The Dakota's ability to recover "sums due [] under the Lease," Chase contends that The Dakota's lien falls outside the bounds of these rights afforded by the Lease. *See* R. at. 157 (¶ 2E); *see also* 871-877 (§ 2), 925-935 (§ I).

See R. at 2020. In response to Fletcher's claims, The Dakota – relying on the fee-shifting provision in the Lease (that is the crux of this dispute) and New York anti-discrimination statutes – asserted counterclaims against Fletcher for all of its legal costs incurred in the litigation. R. at 2021 (fn. 1). That issue was severed from Fletcher's affirmative causes of action following their resolution. *See* R. at 2066-2067.

Ultimately, Justice Rakower dismissed all of Fletcher's causes of action in September 2015. *See* R. at 2066-2067. Justice Rakower's order notably confined her analysis to only Fletcher's allegations of discrimination, retaliation, defamation, and tortious interference. *See generally* R. at 2066-2067. There was no discussion or analysis of Fletcher's claim that The Dakota breached its fiduciary duties to him as a shareholder. *See generally* R. at 2019-2072. The court also severed The Dakota's counterclaims and referred them to mediation. *See* R. at 775 (¶¶ 21-22), 790-791 (2:13-3:6), 797-798 (4:7-5:8), 2066.

Following Justice Rakower's dismissal of Fletcher's claims, there was no examination as to the merit of The Dakota's counterclaims for legal fees. Fletcher failed to appear for the mediation ordered by Justice Rakower, which led to an inquest only as to the reasonableness of the legal fees sought by The Dakota. *See See* R. at 775 (¶¶ 21-22), 790-793 (2:21-5:17), 797-799 (4:16-6:23). Retired Justice Ira Gammerman (acting as a judicial hearing officer) performed said inquest and

issued a report concluding only that said fees were reasonable, not that The Dakota was entitled to the legal fees under the Lease. *See* R. at 379-389, 775-776, ¶¶ 22-24. The Dakota then moved (before Justice Arlene Bluth) for an order confirming the report and to enter judgment in its favor for the legal fees, but omitted the Lease from its motion, as well as any argument about The Dakota's rights thereunder. *See* R. at 776-777 (¶ 25), 844-852. By The Dakota's own admission, Fletcher was never "in default or declared by The Dakota to be in default of the [] [L]ease." *See* R. at 950 (¶ 35), 1014 (¶ 1), 1017 (¶ 5). Justice Bluth subsequently entered judgment that awarded The Dakota with legal fees without any discussion or analysis of The Dakota's rights under the Lease. *See* R. at 776-778 (¶¶ 25-27), 855-860.

When The Dakota made its motion before Justice Bluth, Fletcher had, for all intents and purposes, stopped participating in the action and did not contest the amount of legal fees sought by The Dakota. *See* R. at 402-403, 776-777 (¶¶ 24-25). Also, The Dakota did not join Chase as a party to the Fletcher Suit. *See* R. at 785-788, 939 (fn. 1). Thus, without any substantive opposition, inquiry, or analysis of the Lease, Justice Bluth awarded The Dakota $3,949,961.92 in legal fees ("Legal Fees") it incurred in the Fletcher Suit and that were not reimbursed by its insurer. *See generally* R. at 776-778 (¶¶ 24-27), 380-381 (fn. 2), 385.

C. Through This Action, The Dakota First Asserts a Lien on the Property

In 2015, Kasowitz, Benson Torres & Friedman, LLP ("Kasowitz"), claiming Fletcher owed legal fees from its representation of him during the Fletcher Suit, commenced this action by filing a petition for a court order to seize and sell the Property. *See* R. at 60-67. Kasowitz named Chase and The Dakota as Respondents in the petition due to Chase's recorded security interest in the Property and The Dakota's rights under the Lease. *See* R. at 61-62, 64-65 (¶¶ 7, 20, 23).

It was only then – nearly a decade after Chase perfected its lien in the Property and The Dakota executed the Recognition Agreement – that The Dakota first asserted a competing lien in any amount. *See* R. at 97-109, 157-158, 985-1012. The Dakota claimed its lien consisted of charges allegedly due under the Lease, none of which arose until 2014 (at the earliest). R. at 102-103 (¶¶ 40-50), 311-313 (¶ 5), 680-682 (¶ 7), 742-745, 942 (¶ 16). These charges included maintenance fees, assessments, taxes, electricity usage, and the Legal Fees The Dakota incurred in the Fletcher Suit. *See* R. at 102-103 (¶¶ 40-50), 311-313 (¶ 5), 680-682 (¶ 7), 742-745.

D. Chase Asserts Its First-Priority Lien and the Inapplicability of the Lease

In its answer, Chase pleaded that Kasowitz and The Dakota "had notice and knowledge of [Chase's] first priority perfected security interest in and lien on the Subject Property," and tortuously interfered with Chase's rights in the Property by also asserting first-priority liens. *See* R. at 133 (¶¶ 37-40). Chase also pleaded that

The Dakota had no basis to assert a priority lien for the Legal Fees because the Fletcher Suit was "not contemplated (and specifically excluded) by the Lease." *See* R. at 131 (¶ 22). Chase disputed The Dakota's claim that it was entitled to the Legal Fees under the 2000 amendments to Article II, paragraph 15th of the Lease ("Paragraph 15th"), which provided:

> **If the Lessee shall at any time be in default hereunder**, [or if the Lessor shall institute an action or summary proceeding] 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 [the expense of] all expenses (including but not limited to) attorneys [sic] 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.[2] (Emphasis in original.)

See R. at 130-131 (¶¶ 18, 22). Chase highlighted The Dakota's own explanation of Paragraph 15th to its shareholders that made "it clear that recovery of such fees can only be had if and when Fletcher is in default and declared to be in default":

> *Explanatory Comment – This change enhances the Shareholders' ability [] to recover our attorney 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.*

[2] The underlines in the proposed amendment reflect added language while the bracketed language reflects deleted language. *Compare* R. at 1236 (¶ FIFTEENTH) with R. at 712 (¶ FIFTEENTH); s*ee also* R. at 1273 (165:6-165:16), 1329 (221:16-221:25).

See R. at 131 (¶ 19). Chase further noted that "The Dakota did not prove, or even allege, in the Discrimination Litigation that Fletcher was in default under the Lease," and thus the "Legal Fees were incurred in connection with a litigation not contemplated (and specifically excluded) by the Lease." *See* R. at 131 (¶¶ 20, 22).

E. Chase and The Dakota Become the Only Parties in This Action

Chase and The Dakota are the only remaining parties in this action. While Fletcher and the various funds he previously managed were named respondents, they have since withdrawn from the matter. *See* R. at 2097-2108. Fletcher's counsel specifically noted that Fletcher "no longer has any substantive interest in the litigation" as of June 12, 2018. *See* R. at 2103. Kasowitz also assigned its rights in the Property to Chase and have since withdrawn. *See* R. at 2094-2096.

The lower court appointed a receiver for the sale of the Property, which was eventually sold for a total of $9,274,239.89 ("Proceeds"). *See* R. at 45-49, 316 (¶ 6); 940 (¶¶ 9-10), 954-956. The total amount of the Proceeds is insufficient to satisfy both of the Parties' liens asserted against the Property. *See* R. at 307-308, 917-918, 940 (¶ 10), 954-56.

F. The Lower Court Rejects The Dakota's Claim That the Lease Unambiguously Allows It to Recover the Legal Fees

In April 2019, Justice Robert D. Kalish – who presided over the matter at the time[3] – directed The Dakota to engage in discovery regarding the adoption of Paragraph 15th and The Dakota's intent behind the language. Justice Kalish denied The Dakota's Order to Show Cause for a protective order against (among other things) depositions of The Dakota's board members at the time of Paragraph 15th's adoption and a subpoena for documents concerning the adoption of Paragraph 15th. *See* R. at 592, 601-616 (9:5-24:11), 667-668 (75:1-76:7), 673-676 (81:4-84:15).

Justice Kalish rejected the notion that Paragraph 15th unambiguously allowed The Dakota to recover fees in any action – regardless of shareholder default. The Dakota argued that Paragraph 15th unambiguously allowed The Dakota to recover legal fees in two scenarios: (1) "where there has been shareholder default" and "there's litigation over default" and (2) "where the shareholder has commenced an action or proceeding against the corporation." *See* R. at 593, 601-602 (9:22-10:7). According to The Dakota, their unambiguous interpretation of Paragraph 15th meant that any discovery as to its meaning was inappropriate. *See* R. at 593, 601 (9:14-9:24). Justice Kalish rejected this argument by allowing the aforementioned depositions and documents (among other discovery) to proceed. *See* R. at 593, 601-

[3] Justice Lewis J. Lubell replaced Justice Kalish in 2021.

616 (9:5-24:11), 667-668 (75:1-76:7), 673-676 (81:4-84:15). In so doing, he noted: "What I am going to litigate is whether or not that … amount of [Legal Fees] … is to be considered as additional rent under … [P]aragraph 15th." *See* R. at 610 (18:9-18:14).

In addition, Justice Kalish challenged The Dakota's interpretation that would allow them to recover attorneys' fees from any action, even those unrelated to the Property:

> So, let me ask you something counsel. So, shareholder Jones slips and falls in the lobby of the building. … Defendant Dakota wins, jury doesn't believe it. But you, as good counsel, putting up the defense, you have attorneys[']s fees that you charged to [The] Dakota, are you telling me that those attorney[s'] fees you're going to charge as rent, because the person happens to live there? Is that what you actually think this paragraph means?
>
> I just want to make sure that we're all on the same page, because you seem to think that this paragraph includes any type of litigation.

See R. at 593, 602-603 (10:12-11:5). Justice Kalish's concern stemmed from The Dakota's assertion that it could recover attorneys' fees from any shareholder action or proceeding. *See* R. at 593, 601-603 (NYSCEF No. 267, 9:22-11:5).

G. The Court-Ordered Discovery Confirmed The Dakota's Representation to Its Own Shareholders That the Lease Only Allows the Co-Op to Recoup Legal Fees Incurred Upon a Shareholder's Default

The Dakota's discovery demonstrated that its own board of directors described Paragraph 15th to its shareholders as limiting The Dakota's recovery of attorneys' fees only to instances of shareholder default. The Dakota's board of

directors provided an explanatory comment ("Explanatory Comment") alongside a draft of Paragraph 15th (as a proposed amendment to the Lease) in a notice dated April 5, 2000 to shareholders, which stated:

> If the Lessee shall at any time be in default hereunder, [or if the Lessor shall institute an action or summary proceeding] 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 [the expense of] all expenses (including but not limited to) attorneys [sic] 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.[4]
>
> *(Explanatory Comment – This change enhances the Shareholders' ability [] to recover our attorney [sic] 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.)*

See R. at 1040, 1048. The Dakota's Board President and attorney at the time both acknowledged that the Explanatory Comment made shareholder default the intended prerequisite for The Dakota to collect attorneys' fees incurred during a shareholder lawsuit. *See* R. at 1248, 1339-1343 (231:6-235:24), 1542, 1726 (185:4-185:25). Both Paragraph 15th and the Explanatory Comment were provided to The Dakota's shareholders ahead of their vote on whether to adopt the proposed amendment into

[4] The underlines in the proposed amendment reflect added language while the bracketed language reflects deleted language. Compare R. at 1236 (¶ FIFTEENTH) with R. at 712 (¶ FIFTEENTH); *see also* R. at 1273 (165:6-165:16), 1329 (221:16-221:25).

the Lease (during a stockholder meeting held on May 3, 2000). *See* R. at 1040-1043, 1048. According to Aaron Shmulewitz, the attorney who drafted both the Explanatory Comment and Paragraph 15th, the Explanatory Comment acted as "legislative history" to explain in "plain English" *[sic]* the purpose behind the lease amendment. *See* R. at 1248, 1326-1327 (218:18-219:4). After the shareholders received the April Notice, they voted to adopt the proposed amendment into the Lease as Paragraph 15th, which was reflected in a memorandum prepared by The Dakota's agent after the May 3, 2000 shareholder meeting. *See* R. at 1814, 1817.

The draft Paragraph 15th and Explanatory Comment that the shareholders accepted were the product of several rounds of review by The Dakota's board of directors who (in turn) provided comments to Aaron Shmulewitz for further edits to his drafts of the new lease provisions and related explanatory comments. *See* R. at 1248, 1273 (165:9-165:14), 1323-1325 (215:20-217:8), 1352-1353 (244:4-245:14); 1364-1365 (256:9-257:25), 1369-1373 (261:19-265:2), 1824-1833. Aaron Shmulewitz acknowledged that no one from The Dakota ever instructed him to draft Paragraph 15th so that The Dakota could recover its legal fees against non-defaulting shareholders. *See* R. at 1248, 1457 (349:4-349:9). In fact, Mr. Shmulewitz had recommended the previous year to The Dakota's managing agent that Paragraph 15th be drafted in a manner that only allowed The Dakota to recover attorneys' fees from shareholders in default. *See* R. at 2009, 2015, 2017. Not surprisingly, each

draft of the Explanatory Comment similarly explained that The Dakota would be precluded from recovering legal fees as additional rent unless the attorneys' fees were related to shareholder default:

> The foregoing amendment is intended to enhance the ability of the Apartment Corporation to recover all expenses (not just attorneys[']) fees) incurred as a result of a shareholder default, or should a defaulting shareholder otherwise commence litigation against the Apartment Corporation. In order for the Apartment Corporation to be able to recover such expenses, a shareholder must have been in default.
>
> The foregoing amendment is intended to enhance the ability of The Dakota to recover all expenses (not just attorneys[']) fees) incurred as a result of a shareholder default, or should a defaulting shareholder otherwise commence litigation against The Dakota. In order for The Dakota to be able to recover such expenses, a shareholder must have been in default.
>
> This change enhances the ability [of] the Shareholders to recover our attorney fees and all other expenses which we incur as a result of a an *[sic]* 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 instance[s] when the individual shareholder is actually in default.

See R. at 1508, 1524, 1531, 1824, 1833. In a discovery status conference on January 7, 2020, The Dakota's counsel "represent[ed] and warrant[ed] that Alphonse Fletcher, Jr. was not in default or declared by [T]he Dakota to be in default of the proprietary lease" and "that any default by Mr. Fletcher was not the basis of [T]he Dakota's claims against him for legal fees in the action he brought against The Dakota." *See* R. at 1014, 1017 (¶ 5).

The Explanatory Comment's description of The Dakota's limited ability to recover attorneys' fees is consistent with the other provisions of the Lease that do not allow The Dakota to recover expenses that arise from its own fault or wrongdoing. *See, e.g.*, R. at 700, 702 (Art. I, ¶ 1st) (requiring Lessor to bear cost of repairs to areas under its control, including damage "caused by the Lessor"). Some of these provisions go a step further and explicitly carve out The Dakota's negligence as an exception to The Dakota's immunity from (a) liability to shareholders for its failure to provide essential services or damage stemming from the elements, building or other persons in the building and (b) making repairs to damages caused while exercising the right of entry. *See* R. at 700, 711-712 (Art. II, ¶ 12th), 712-713 (Art. II, ¶ 16th). These provisions stand in stark contrast to The Dakota's position which would enable it to recoup attorneys' fees incurred in any shareholder lawsuit – even when The Dakota is at fault. *See* R. at 593, 601-602.

Mr. Shmulewitz admitted that Chase's interpretation of Paragraph 15th is reasonable whereas a lease provision that allows a defaulting co-op to recoup attorneys' fees – *i.e.* The Dakota's interpretation of Paragraph 15th – is unenforceable. During his deposition, Mr. Shmulewitz was presented with an article he drafted in which he discussed this Court's holding in *Krodel v. Amalgamated Dwellings Inc.*, 166 A.D.3D 412 (1st Dep't 2018) and noted that *Krodel* rendered "unconscionable and unenforceable" lease clauses that require a "shareholder to pay

co-op's legal fees even if co-op is in default." *See* R. at 1248, 1460-1461 (352:21-353:14), 1841, 1843. Chase's counsel then asked Mr. Shmulewitz how Paragraph 15th – that he drafted – could be interpreted. *See* R. at 515, 519-520 (42:16-43:22). Critically, Mr. Shmulewitz admitted that Paragraph 15th could be read to require "the shareholder [to] be in default [] for the Dakota to recoup legal fees if the shareholder initiates suit against the Dakota." *See* R. at 515, 519-520 (42:16-43:22).

H. <u>The Lower Court's Priority Determination</u>

Following the close of discovery, both The Dakota and Chase moved for summary judgment to hold their respective liens on the Property senior and superior against one another. *See* R. at 307-308, 917-918. Chase's motion made four primary arguments. First, Chase argued that Paragraph 15th, to the extent it allowed The Dakota to recover the Legal Fees in connection with a lawsuit concerning its own alleged discrimination and default, was unconscionable under *Krodel*. *See* R. at 863, 876-877 (§ I.B.2(c)), 920, 930-932 (§ I.B). Second, Chase argued that Paragraph 15th unambiguously requires shareholder default as a prerequisite for The Dakota to collect the Legal Fees. *See* R. at 863, 871-873 (§ I.B.2(a)), 920, 926-930 (§ I.A). Given The Dakota's admission that Fletcher never defaulted under the Lease, The Dakota had no viable lien against the Proceeds arising from the Legal Fees. *See* R. at 1040, 1048. Third, Chase noted that, even if Paragraph 15th were ambiguous, the extrinsic evidence – indeed, The Dakota's own admissions – indisputably

demonstrated that the provision was only applicable in actions concerning a shareholder default. *See* R. at 863, 873-876 (§ I.B.2(b)), 920, 932-935 (§ I.C). Finally, Chase argued that even if The Dakota was entitled to the Legal Fees under Paragraph 15th, those fees were not exclusively incidental to the Property since the Fletcher Suit involved claims of racial discrimination, retaliation, defamation, and tortious interference in connection with shares separate and apart from the Property. *See* R. at 863, 868-869 (§ I.A), 1959, 1970. Therefore, the Legal Fees could not be afforded super priority status as a cooperative organization security interest under the UCC. *See* R. at 863, 868-869 (§ I.A), 1959, 1970.

In a decision and order dated August 4, 2021 ("Summary Judgment Order"), the lower court granted The Dakota's motion for summary judgment and denied Chase's motion. *See* R. at 5-12, 17-24. The Summary Judgment Order stated that Paragraph 15th unambiguously conformed to The Dakota's interpretation in that it allowed The Dakota to recover attorneys' fees from "any action or proceeding" commenced by Fletcher "against The Dakota." *See* R. at 5, 10, 17, 22. In reaching this conclusion, the lower court did not mention or address (a) Chase's arguments concerning the plain language of Paragraph 15th and the other provisions of the Lease, or (b) Justice Kalish's rejection of The Dakota's application for a protective order in April 2019 (which argued for the same interpretation). *COMPARE* R. at 5,

10, 17, 22 *WITH* R. at 593, 601-602 (9:14-10:7), 667-668 (75:1-76:7), 673-675 (81:4-83:15) *AND* 863, 871-873 (§ I.B.2(a)), 920, 926-930 (§ I.A).

The lower court also concluded that Paragraph 15th was not unconscionable for three reasons. First, Chase purportedly did not plead that the Lease was unconscionable, "which would take the Dakota by surprise and would raise issues of fact not appearing on the face of a prior pleading." *See* R. at 5, 11, 17, 23. The Summary Judgment Order did not specify though whether The Dakota was in-fact surprised or which new facts were raised by Chase's argument concerning unconscionability. *See* R. at 5, 11, 17, 23; *see also* R. at 118, 130-131 (¶¶ 18-20, 22).[5] Second, Chase allegedly lacked standing to challenge the Lease even though Chase is an assignee of Fletcher's rights in the Property and Chase's recovery of the Proceeds "would be diminished by [T]he Dakota's recovery of attorney's fees in the Fletcher Action." *See* R. at 5, 11, 17, 23, 958 (¶¶ 2, 6), 963 (¶¶ 2, 6), 968-971. Third, *Krodel* was supposedly distinguishable from Paragraph 15th because The Dakota prevailed in the Fletcher Suit and the Lease was purportedly silent on whether The Dakota "may recover attorneys' fees in situations where it does not prevail." *See* R. at 5, 11-12, 17, 23-24. The lower court did not reconcile this characterization of the

[5] The Summary Judgment Order's discussion of waiver did not address the evidentiary record, including (1) The Dakota's own affirmations (on the summary judgment motions) that never alleged any surprise by Chase's arguments on summary judgment, and (2) the deposition of Aaron Shmulewitz and deposition Exhibit 44 which both raised *Krodel* and the issue of unconscionability with respect to Paragraph 15th. *See* R. at 309-325, 882-888, 1248, 1460-1461 (352:21-353:15), 1841, 1843, 1865-1878.

Lease with its own interpretation that Paragraph 15th "unambiguously" allowed The Dakota to recover attorneys' fees from "any" action commenced by a shareholder. *See* R. at 5, 10-12, 17, 22-24.

The Summary Judgment Order concluded with an assessment that the Legal Fees constituted "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." *See* R. at 5, 12, 17, 24. The lower court described the first and second causes of action in the Fletcher Suit as "grounded in Fletcher's position as a shareholder of The Dakota," even though those causes of action were allegedly caused by The Dakota's actions with respect to cooperative interests separate and apart from the Property. *See* R. at 5, 12, 17, 24, 191, 241-244 (¶¶ 190, 193, 196, 199, 201, 203). Critically, the lower court did not address the seven other causes of action in the Fletcher Suit (racial discrimination, retaliation, defamation and tortious interference) that had no connection to the Property, and which were the only causes of action addressed on summary judgment. *See* R. at 244-251.

The lower court also granted summary judgment on The Dakota's fees and interest separate and apart from the Legal Fees, but without any discussion of these amounts. *See* R. at 5, 12, 17, 24 (granting The Dakota's motion "in its entirety"). The Dakota's affidavits by Robert McFarland and Samantha Signorella were

submitted in support of The Dakota's purported lien of $592,189.69 owed under the Lease. *See* R. at 309-313, 679-682, 886-888. However, the only primary source for the amounts allegedly owed (that was created at or around the time of the charges) was an invoice cited in the McFarland Affidavit without any indication as to whether it was made in the regular course of business or delivered to Fletcher or Chase. *See* R. at 726. The affidavits of Samantha Signorella cited to exhibits without discussion of when they were created or whether the affiant had first-hand knowledge of all the relevant years in question. *See* R. at 309-313, 886-888. These exhibits also failed to explain how the sum total of categorical charges were calculated. *See* R. at 679-745, 889-898. Yet, the lower court simply accepted these figures as true, without even holding an evidentiary hearing to address these issues. *See* R. at 5, 12, 17, 24.

I. The Judgment and Chase's Appeal Therefrom

After entry of the Summary Judgment Order, the parties submitted competing proposed forms of judgment to the lower court for its consideration. *See* R. at 33-36, 39-42. Again, the lower court declined to conduct a hearing to determine the validity or accuracy of the proposed figures in the judgment, and instead, on November 8, 2021, entered The Dakota's proposed form of judgment ("Judgment"). *See* R. at 29-30. On November 10, 2021, the Dakota served the Judgment with Notice of Entry. *See* R. at 31-32. Chase timely appealed. *See* R. at 27-28; *see also* 3-4; 15-16.

ARGUMENT

The lower court erred as a matter of law in several ways. First, the lower court's reading of the Lease is unenforceable under this Court's binding precedent, which was properly raised by Chase. *See infra*, §§ I, IV, V. Second, the lower court's interpretation is undermined by the clear and unambiguous language of the Lease and The Dakota's own admissions as to its meaning. *See infra*, § II. Third, The Dakota's purported lien would have no priority under the UCC since the Legal Fees were incurred in a separate action concerning distinct and unrelated shares in the cooperative. *See infra*, § III. Finally, the Court failed to address the portion of The Dakota's purported lien that was comprised entirely of inadmissible affidavits and documents for which no evidentiary hearing was held. *See infra*, § IV.

I. THE LOWER COURT ERRED AS A MATTER OF LAW BY ENFORCING A LEASE'S FEE-SHIFTING PROVISION IN A MANNER THAT CONTRAVENES THIS COURT'S CLEAR AND BINDING PRECEDENT

The lower court committed a critical error in declaring that The Dakota possessed a lien on the Property pursuant to Paragraph 15th of the Lease. To that end, the lower court failed to recognize the plain language of the Lease and The Dakota's own admissions that limited The Dakota's recovery of Legal Fees to instances of shareholder default. *See* R. at 5, 10-11, 17, 22-23; *see also infra* § II. Instead, the lower court blindly enforced The Dakota's interpretation of Paragraph 15th that removed the condition of shareholder default. *See* R. at 5, 10-11, 17, 22-

23. In doing so, the Summary Judgment Order concluded that The Dakota could recoup the Legal Fees in "any action or proceeding." *See* R. at 5, 10, 17, 22. This misreading of Paragraph 15th breaks the shackles of any potential constraint on The Dakota's recovery of Legal Fees, thus allowing for any lessee to be burdened with The Dakota's legal expenses once they initiate litigation, even if The Dakota is ultimately at fault. As explained herein, Paragraph 15th cannot be enforced in this manner, thereby denying any basis for The Dakota's alleged lien. *See infra* § I.

A. The Law – As Provided for in *Krodel* – Renders Unconscionable and Unenforceable Those Fee-Shifting Clauses in Residential Leases That Make It Possible for Lessees to Pay the Lessor's Legal Fees Regardless of Who Prevails

The law in this Department is clear that a fee-shifting provision in a proprietary lease is unenforceable and must be disregarded when the language creates the possibility that the lessee shareholder would have to pay the co-op's legal fees after litigation, irrespective of either party's fault, because it can deter shareholders from seeking redress from the corporation in court. In *Krodel v. Amalgamated Dwellings Inc.*, the petitioner-shareholder brought several claims against her co-op, including a claim that the co-op failed to transfer additional shares to her. 166 A.D.3d 412, 412 (1st Dep't 2018); *see also Krodel v. Amalgamated Dwellings, Inc.*, No. 152176/2014 (Sup. Ct. N.Y. Cnty.), NYSCEF No. 92. The co-op asserted a counterclaim for its attorneys' fees and costs, as provided for in the proprietary lease, and the co-op's defense ultimately succeeded as the shareholder's

statutory claim was defeated and her remaining claims had been rendered moot. *See* *Krodel*, No. 152176/2014, NYSCEF No. 268; *Krodel v. Amalgamated Dwellings, Inc.*, 2017 WL 4539253, at *1 (Sup. Ct. N.Y. Cnty. Oct. 11, 2017). However, the Supreme Court refused to enforce the fee-shifting provision in support of the co-op's counterclaims. *Krodel*, 166 A.D.3d at 413. This Court affirmed and held that the clause was "unconscionable and unenforceable" because it had the potential to "permit" a co-op "to recover attorneys' fees when the [lessee] brings an action against the landlord even when the landlord is in default." 166 A.D.3d at 414. To enforce such a clause, as this Court noted, would create an "unjust result" that "would dissuade aggrieved parties from pursuing litigation and preclude tenant-shareholders from making meaningful decisions about how to vindicate their rights in legitimate instances of landlord default." *Id*.[6]

Perhaps the most notable aspect of the Court's holding in *Krodel* is the notion that a fee-shifting clause's unconscionability is not dependent on whether the co-op seeking to enforce it has won or lost in the underlying litigation. Indeed, Krodel lost her case.[7] Even so, the Court declared the fee-shifting clause unconscionable

[6] The Dakota's own counsel wrote the following about this ruling in a publication: "proprietary lease clause requiring shareholder to pay co-op's legal fees even if co-op is in default is unconscionable and unenforceable" and noted that this "Court emphasized fundamental fairness, and stated that such clauses, if not struck down, would chill challenges to Boards," which was "a very important and potentially far -reaching decision." *See* R. at 1841, 1843.

[7] While *Krodel's* claim was reinstated by this Court, *see* *Krodel v. Amalgamated Dwellings, Inc.*, 139 A.D.3d 572, 572-73 (1st Dep't 2016), the Supreme Court ultimately decided the claim against her on the merits more than a year before this Court handed down its decision as to the

because of its possible deterrent "effect" on prospective tenant claims – by "permit[ting] the [landlord] to exact tribute from the [tenant] for the [landlord's] legal proceedings, successful or not." *Krodel*, 166 A.D. at 413-14 (quoting *Weidman v. Tomaselli*, 81 Misc. 2d 328, 334 (Rockland Cnty. Ct. 1975)).[8] Likewise, in *East 55th St. Joint Venture v. Litchman*, 122 Misc. 2d 81, 86-87 (N.Y. Cnty. Civ. Ct. 1983), on which *Krodel* relied, the landlord prevailed in a prior proceeding with the tenant, but the court still refused to enforce the lease provision awarding the landlord counsel fees for "'defending' any action or proceeding" because "a tenant might be intimidated by this threat of potential financial liability from seeking, in good faith, to have his rights determined." In this vein, one Supreme Court Justice has noted that the "salient" concern for unconscionability is "whether the provision 'permits' a lessor to recover its attorney's fees in an action concerning its own default." *1885-93 7th Ave. Housing Dev. Fund Corp. v. Hall*, No. 159087/2019, 2020 WL 1158808, at *1 (Sup. Ct. N.Y. Cnty. Mar. 6, 2020) (citing *Krodel*, 166 A.D.3d at 414).[9]

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enforceability of the fee-shifting provision. *See Krodel v. Amalgamated Dwellings, Inc.*, 2017 WL 4539253, at *1 (Sup. Ct. N.Y. Cnty. Oct. 11, 2017); *Krodel*, 166 A.D.3d at 413-414. That decision on the merits was never overturned. *See generally Krodel*, No. 152176/2014 (Docket).

[8] Notably, the lease provision the Supreme Court struck down in *Weidman* did not go so far as to state that the landlord could recoup legal fees, even if at fault. It instead conditioned recovery on the landlord merely commencing a civil action "by reason of [tenant's] default." *Weidman*, 81 Misc. 2d at 334. That alone was enough to render the clause unconscionable. *See id*.

[9] This comports with the unconscionability doctrine's preoccupation with a contract's formation – not events subsequent to it. *See Krodel*, 166 A.D.3d at 413 (unconscionability is tied to the terms of the contract and "an absence of meaningful choice on the part of one of the parties").

These authorities create a straightforward principle: A lease fee-shifting provision is unconscionable and therefore unenforceable when it could deter lessees from bringing claims in good-faith against the landlord by forcing the tenant to reckon with the possibility of paying the landlord's legal fees for a suit arising from allegations of landlord default, statutory violation, or misconduct, whether or not the tenant ultimately prevails. *See* *Krodel*, 166 A.D.3d at 414; *Hall*, 2020 WL 1158808, at *1; *Weidman*, 81 Misc. 2d at 334; *Litchman*, 122 Misc. 2d at 87.

B. *Krodel*'s Holding Bars the Lower Court's Interpretation of the Lease Thereby Requiring Reversal on The Dakota's Lien

Krodel's holding is clear; the lower court simply misinterpreted it. The Summary Judgment Order stated that Paragraph 15th of the Lease:

> …clearly and unambiguously provides that the Dakota may recover … 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.

See R. at 5, 10, 17, 22. Under the lower court's reading – endorsed by The Dakota – the Lease allows The Dakota to collect fees in "any" action in which a shareholder, like Fletcher, presses a colorable claim against the co-op for a violation of their rights. In effect, then, the Lease functions as a tax on shareholder suits and, given that The Dakota asserted a counsel-fee claim of more than $4 million against Fletcher, an extremely penalizing one. *Krodel* and its related authorities absolutely bar this outcome. *See* *Krodel*, 166 A.D.3d at 414 (lease provision cannot be enforced

if it would "permit" a co-op "to recover attorneys' fees when the [lessee] brings an action against the landlord even when the landlord is in default"); *Hall*, 2020 WL 1158808, at *1 ("salient" factor for enforceability is "whether the provision 'permits' a lessor to recover its attorney's fees in an action concerning its own default"); *Litchman*, 122 Misc. 2d at 87 (striking down fee-shifting provision in favor of prevailing landlord because it may "intimidate[]" a tenant "by [] threat of potential financial liability from seeking, in good faith, to have his rights determined"). Paragraph 15th, insofar as the lower court read it to allow The Dakota to collect fees "if Fletcher commences any action or proceeding against" the co-op, is therefore unconscionable and unenforceable. *See* R. at 5, 10, 17, 22.

In spite of this binding authority, the lower court gave effect to Paragraph 15th and recognized The Dakota's purported lien for millions of dollars in legal fees that it allegedly incurred in defending Fletcher's racial-discrimination claims. *See* R. at 5, 10-12, 17, 22-24.[10] The lower court thus gave The Dakota – and all similarly situated co-ops – the unlimited ability to impose millions of dollars' worth of legal fees in "any action or proceeding" against its own shareholders, even though the prospect of paying such a staggering (and perhaps bankruptcy-inducing) amount of costs – regardless of outcome – will undoubtedly serve as a deterrent and prohibit

[10] The Dakota actually incurred nearly $8 million in legal fees from the Fletcher Suit but recovered $5 million of its costs from an insurer. *See* R. at 1027, 1036. It is, in effect, using the Lease's fee-shifting provision to close the coverage gap for its extravagant counsel costs.

potential claimants from making "meaningful decisions about how to vindicate their rights." *See* *Krodel*, 166 A.D.3d at 414; *see also* R. at 5, 10, 17, 22. The deterrence is particularly egregious when prospective plaintiffs seeking to enforce their rights against unlawful discrimination (exactly the types of claims brought in the Fletcher suit) have to grapple with paying the co-op's fees for vindicating their rights.[11] The lower court's reading of Paragraph 15th creates the exact type of fee-shifting provision – and detrimental effects – that *Krodel* forbids.

In reaching its conclusion, the lower court did not qualify or otherwise narrow its understanding that the Lease allows The Dakota to recoup legal fees whenever Fletcher (or any other shareholder) commences an action. *See* R. at 5, 10, 17, 22. Instead, the trial court noted that the Lease was "silent" as to The Dakota's ability to recoup its legal fees after a shareholder suit, whether the co-op prevails or not. R. at 5, 12, 17, 24. But that silence is dangerous because it allows for a reading of the Lease – which the lower court itself adopted – that enables The Dakota to recoup attorneys' fees in "any action" commenced by Fletcher (or any other shareholder) –

[11] It is hardly controversial to note that the history of housing discrimination in this City is long and pernicious, with its deleterious effects stretching across generations. *See, e.g.*, Rosemarie Maldonado & Robert D. Rose, *The Application of Civil Rights Laws to Housing Cooperatives: Are Co-Ops Bastions of Discriminatory Exclusion or Self-Selecting Models of Community-Based Living*, 23 Fordham Urban L.J. 1245, 1248-1250, 1261-1266 (1996) (discussing racial discrimination by co-ops and cases in which the co-ops were found to have discriminated against applicants). It is precisely these types of claims that should not be discouraged by penalizing fee-shifting provisions. Plainly inherent in *Krodel* is a concern over discouraging tenants from bringing any colorable claim against lessors, including allegations of discrimination.

regardless of outcome. *See* R. at 5, 10, 17, 22; *see also* *Sutton v. E. River Sav. Bank*, 55 N.Y.2d 550, 555 (1982) (when interpreting contracts, "not merely literal language, but whatever may be reasonably implied therefrom must be taken into account").

It follows, then, that the same "unjust result" in *Krodel* arises herein as the lower court's interpretation of Paragraph 15th forces the lessee to grapple with the potential payment of millions of dollars of legal fees before even bringing claims against The Dakota. *See* *Krodel*, 166 A.D.3d at 414 (holding lease provision to be unconscionable and unenforceable for dissuading "aggrieved parties from pursuing litigation and…making meaningful decisions about how to vindicate their rights in legitimate instances of landlord default"). Paragraph 15th – and the lower court's interpretation of it – is therefore unconscionable and unenforceable as a matter of law. *See* *Krodel*, 166 A.D.3d at 414; *Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, Nat'l Ass'n v. Nomura Credit & Cap., Inc.*, 30 N.Y.3d 572, 581 (2017) ("a contract must be construed in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect") (quotation omitted); *See* *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10 (1988) (unconscionable contract is "unenforc[ea]ble according to its literal terms") (quotations and citations omitted). The Dakota simply cannot rely on it to recover its counsel fees from the Fletcher Suit as additional rent.

It is irrelevant that The Dakota prevailed on Fletcher's discrimination claims. The lower court attempted to distinguish its Judgment and Order from *Krodel* by stating the concerns raised by this Court did not apply because The Dakota sought attorneys' fees related to litigation in which it prevailed. *See* R. at 5, 12, 17, 24 ("as The Dakota prevailed in the Fletcher Action, the Court may avoid the issue altogether")]. However, the co-op in *Krodel* also prevailed, as the shareholder's claims (some of which, like Fletcher, concerned the transfer of shares related to a separate apartment in the building) were dismissed or rendered moot. *See* *Krodel v. Amalgamated Dwellings, Inc.*, No. 152176/2014 (Sup. Ct. N.Y. Cnty.), NYSCEF No. 92; *Krodel v. Amalgamated Dwellings, Inc.*, 2017 WL 4539253, at *1 (Sup. Ct. N.Y. Cnty. Oct. 11, 2017); *Krodel*, 166 A.D.3d at 412-13 Yet, even after the co-op won, the Court declined to enforce the fee-shifting provision in her proprietary lease. *See* *Krodel*, 166 A.D.3d at 414. The Court's main concern was not who won the lawsuit, but the possible deterrent effect on prospective claimants weighing whether to bring their claims to litigation. *See* *id*. The lower court's reading of the Lease obviously undermines that policy goal even though Fletcher himself was not dissuaded from bringing claims. While shareholders beholden to Paragraph 15th cannot know for certain whether their claims will be considered "legitimate" by courts or juries before suit, they will undoubtedly be dissuaded by the specter of shouldering a landlord's counsel fees *ab initio*.

The lower court also erred in distinguishing *Krodel* by narrowing unconscionability to only those lease provisions that explicitly state a defaulting landlord can recoup its legal fees from tenants or co-op shareholders. *See* R. at 5, 12, 17, 24 ("[A]s the Lease does not expressly provide that the Dakota could recover its attorneys' fees in an action where it does not prevail, such a construction must be avoided")]. However, this reading removes from scrutiny those lease provisions that do not explicitly state – but in effect allow – a co-op to recover attorneys' fees irrespective of fault. *See* *Krodel*, 166 A.D.3d at 414. Thus, to affirm the Judgment and Order would undermine the holding of *Krodel* by incentivizing landlords to craft leases that do not expressly provide that the lessor can recover counsel fees, win or lose, but which otherwise allow that result regardless of who prevails.

For the reasons stated above, this derogation of *Krodel* is clear error: The "unjust result" at issue is not forcing a shareholder to pay a winning landlord's legal fees, but the "dissua[sion of] aggrieved parties" from "pursuing litigation and preclud[ing] tenant-shareholders from making meaningful decisions about how to vindicate their rights in legitimate instances of landlord default." *See* *Krodel*, 166 A.D.3d at 414. That is precisely why, even after the co-op in *Krodel* won, this Court refused to award it attorneys' fees. *See* *id*. These concerns arise before any litigation even begins and underpin the "American Rule" that places a "high priority" on avoiding "barriers in the way of those desiring judicial redress of wrongs." *A.G.*

Ship Maint. Corp. v. Lezak, 69 N.Y.2d 1, 5 (1986). The lower court's misapplication of *Krodel* undermines these principles and, respectfully, should be reversed.

Even if this Court were to find that *Krodel* does not apply, the lower court's decision should be reversed for the additional reasons below.

II. THE LOWER COURT'S READING OF THE LEASE IS UNENFORCEABLE PURSUANT TO THE PLAIN LANGUAGE OF THE LEASE AND THE DAKOTA'S OWN ADMISSIONS

Since The Dakota's and lower court's interpretation of Paragraph 15th is not enforceable, it must be avoided. *See* *Spaulding v. Benenati*, 57 N.Y.2d 418, 425 (1982) (an interpretation that "would operate to leave [a] provision of the contract … without force and effect … should be avoided"); *Rivereast Apartments Inv'rs LLC v. Gladstone*, 135 A.D.3d 558, 558 (1st Dep't 2016) ("An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation."). The only other alternative interpretation of Paragraph 15th is that the shareholder must be in default in order for The Dakota to recoup attorneys' fees – a reading that is supported by the plain language of the provision, the other terms of the Lease, and The Dakota's own internal documents construing Paragraph 15th. *See infra* §§ II.A; II.B. Since Fletcher was never declared to be in default under the Lease, Paragraph 15th simply does not cover or create a lien for The Dakota.

A. The Plain Language of Paragraph 15th Does Not Support The Dakota's Claim to the Legal Fees

The plain language of Paragraph 15th provides that the shareholder must be in default in order for The Dakota to recoup attorneys' fees from the shareholder. Paragraph 15th states:

> [Opening] If the Lessee shall at any time be in default hereunder, and [A] the Lessor shall take any action against the Lessee based upon such default, or [B] 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.

See R. at 712 (brackets added for clarification). Without any analysis, the lower court concluded that clause B enabled The Dakota to recover attorneys' fees if Fletcher commenced "any action or proceeding against The Dakota." *See* R. at 5, 10, 17, 22. However, this interpretation ignores the opening conditional clause that establishes the requirement of shareholder default, as it qualifies both clauses A and B. If clause B of Paragraph 15th were meant to stand alone as a condition to recoup legal fees (as the lower court concluded), there would not be a comma before clause A. *See* *Jaronczyk v. Nassau County Interim Finance Authority*, No. 12934-13, 2014 WL 2826893, at *28-29 (Sup. Ct. N.Y. Cnty. Mar. 13, 2014) (interpreting a disputed sentence against petitioner, in part, because the comma use – or lack thereof – did

not comport with petitioner's reading). The comma and the word "or" before clause B only support the following proper reading of Paragraph 15th:

> [Opening] "If the Lessee shall at any time be in default hereunder [] and [A] the Lessor shall take any action against the Lessee based upon such default" *OR* [Opening] "If the Lessee shall at any time be in default hereunder [ ] and...[B] if the Lessor shall defend any action or proceeding (or claims therein) commenced by the Lessee."

See *Major Oldsmobile, Inc. v. Gen. Motors Corp.*, No. 93 CIV. 2189 (SWK), 1995 WL 326475, at *6 (S.D.N.Y. May 31, 1995), *aff'd*, 101 F.3d 684 (2d Cir. 1996) ("[i]t is well established that" courts will frequently interpret the word "or" in contracts to mean both "and" and "or") (quoting *Dumont v. United States*, 98 U.S. 142, 143 (1878)) (citing additional cases); *see also* *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 (2021) ("As several leading treatises explain, '[a] qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one.' ") (quoting treatises). In other words, Paragraph 15th unambiguously states that a shareholder must be in default before The Dakota can recoup legal fees. *See* *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002) ("a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its term."). The lower court, in its decision, neglected these points altogether. *See* R. at 6-12 18-24. Even the attorney who drafted the provision, Aaron Shmulewitz, admitted Paragraph 15th could be read to require "the

shareholder [to] be in default [] for the Dakota to recoup legal fees if the shareholder initiates suit against the Dakota." *See* R. at 515, 519-520 (42:16-43:22).

The lower court also ignored how the other provisions of the Lease support Chase's interpretation of Paragraph 15th. It is well settled that a contract provision must be interpreted in light of the whole of the document. *See, e.g.*, *Westmoreland Coal Co. v. Entech, Inc.*, 100 N.Y.2d 352, 358 (2003) (part of contract must be interpreted in relation to whole, as its meaning may be misconstrued when courts rely on individual words or phrases); *Glob. Reinsurance Corp. of Am. v. Century Indem. Co.*, 30 N.Y.3d 508, 519 (2017) ("Ambiguity is ascertained by reading the terms of the agreement, not in isolation, but as a whole") (citations omitted). In contrast to the lower court's interpretation of Paragraph 15th, the other provisions in the Lease impose on The Dakota costs that arise from its own fault or negligence. *See* R. at 700, 702 (Art. I, ¶ 1st), 711-712 (Art. II, ¶ 12th), 712-713 (Art. II, ¶ 16th). The lower court's read of Paragraph 15th, removed from its context, created a "misconstru[ction]" that must be avoided. *Westmoreland*, 100 N.Y.2d at 358.

Finally, the lower court ignored law of the case by failing to reconcile its interpretation of Paragraph 15th with Justice Kalish's previous ruling on The Dakota's motion for a protective order. Justice Kalish rejected The Dakota's argument that discovery with respect to Paragraph 15th should be barred because it unambiguously allowed The Dakota to recover its legal fees. *See* R. at 593, 601-602

(9:22-10:7). Hence, Justice Kalish ordered further discovery to proceed regarding the adoption of Paragraph 15th, including depositions of The Dakota's board members at the time of adoption. *See* R. at 593, 601-616 (9:5-24:11), 667-676 (75:1-84:15). The Dakota had a full and fair opportunity to litigate that their interpretation of Paragraph 15th was unambiguous and barred discovery of extrinsic evidence, but that argument and related motion were outright rejected thus becoming law of the case. *See* R. at 593, 601-616 (9:5-24:11), 667-676 (75:1-84:15); *see* *Carmona v. Mathisson*, 92 A.D.3d 492, 493 (1st Dep't 2012) (stating that, under the law of the case doctrine, parties or their privies are 'preclude[d from] relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue' ") (*quoting Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 40 A.D.3d 1177, 1179 (3d Dep't 2007). The Summary Judgment Order simply ignored that prior ruling. *See* R. at 5-12, 17-24.

B. Even If Paragraph 15th Were Ambiguous, Other Provisions of the Lease and The Dakota's Own Admissions Expressly Bar Its Claim

Even if Paragraph 15th were deemed ambiguous – and it is not – all evidence shows Paragraph 15th required Fletcher to be in default in order for The Dakota to recoup the Legal Fees.[12] Indeed, when it adopted Paragraph 15th, The Dakota noted

[12] Any doubt as to the meaning of Paragraph 15th must be resolved against The Dakota, the Lease's drafter. *See* *Rentways, Inc. v. O'Neill Milk & Cream Co.*, 308 N.Y. 342, 343 (1955) ("Any fair doubt as to the meaning of the contract should be resolved against lessor, since the contract was embodied in a printed form prepared specifically by lessor.").

in contemporaneous documents that it could use Paragraph 15th to recover legal fees only in situations involving shareholder default. Shortly before shareholders adopted Paragraph 15th, The Dakota's Board of Directors sent them the following Explanatory Comment (along with the language of Paragraph 15th):

> This change enhances the Shareholders' ability to recover our attorney 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.

See R. at 1040, 1048. Aaron Shmulewitz, the attorney who drafted the provision, acknowledged that the Explanatory Comment acted as "legislative history" in that it explained the purpose of Paragraph 15th to shareholders. *See* R. at 1248, 1326-1327 (218:18-219:4).

Even after this litigation began, The Dakota never disputed that the Explanatory Comment limits recovery of legal fees to instances in which a shareholder is in default. To the contrary, The Dakota's witnesses – including its former Board President and Aaron Shmulewitz (*i.e.*, author of Paragraph 15th and the Explanatory Comment) – acknowledged that the Explanatory Comment made shareholder default the intended prerequisite for The Dakota to collect attorneys' fees. *See* R. at 1248, 1339-1343 (231:6-235:24), 1542, 1726 (185:4-185:25) (including The Dakota's former Board President acknowledging that explanatory comment requires shareholder default). Thus, by The Dakota's own admission,

Paragraph 15th requires shareholder default and prevents The Dakota from asserting a claim to the Proceeds given Fletcher's lack of default.

The intent and meaning behind the Explanatory Comment is further supported by the numerous drafts of the text that were circulated to and reviewed by The Dakota's Board. Shmulewitz drafted at least three versions of the comment, all of which explicitly stated that a shareholder must be in default in order for The Dakota to recover legal expenses:

> (Explanatory comment—The foregoing amendment is intended to enhance the ability of the Apartment Corporation to recover <u>all</u> expenses (not just attorneys['] fees) incurred as a result of a shareholder default, or should a defaulting shareholder otherwise commence litigation against the Apartment Corporation. In order for the Apartment Corporation to be able to recover such expenses, a shareholder <u>must</u> have been in default.)
>
> (Explanatory comment—The foregoing amendment is intended to enhance the ability of The Dakota to recover <u>all</u> expenses (not just attorneys['] fees) incurred as a result of a shareholder default, or should a defaulting shareholder otherwise commence litigation against The Dakota. In order for The Dakota to be able to recover such expenses, a shareholder <u>must</u> have been in default.)
>
> (Explanatory comment— This change enhances the ability [of] the Shareholders to recover our attorney fees and all other expenses which we incur as a result of a an [*sic*] 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 instance[s] when the shareholder is actually in default.)

See R. at 1508, 1524, 1531, 1824, 1833. Shmulewitz provided these drafts of the Explanatory Comment to The Dakota's Board for review, after which the Board

provided comments to Shmulewitz for further revisions. *See* R. at 1248, 1273 (165:9-165:14), 1323-1325 (215:20-217:8), 1352-1353 (244:4-245:14); 1364-1365 (256:9-257:25), 1369-1373 (261:19-265:2), 1824-1833. Thus, if the Explanatory Comments truly were mistakes, they were mistakes The Dakota repeated over and over, and then circulated to all shareholders for an affirming vote. The evidence is clear, however, that it was not an error. The Explanatory Comment unquestionably establishes The Dakota's intent – through Paragraph 15th – to limit its ability to recover legal fees to instances of shareholder default. *See* at 1040, 1048; *James v. Jamie Towers Hous. Co.*, 294 A.D.2d 268, 270-71 (1st Dep't 2002) (granting summary judgment where "uncontradicted extrinsic evidence allow[ed] for only one interpretation of the contract [and] resolve[d] any ambiguity that might otherwise exist as to the contract's meaning"); *Dilek v. Rozenholc*, 167 A.D.3d 437, 437-38 (1st Dep't 2018) (same). Because The Dakota never declared Fletcher to be in default, Paragraph 15th – under The Dakota's own admissions – does not apply here.

III. THE UCC DOES NOT GIVE THE DAKOTA A SUPER-PRIORITY LIEN

In granting summary judgment to The Dakota, the lower court concluded that the judgment awarding The Dakota with Legal Fees constituted a "cooperative organization security interest" in favor of The Dakota that is entitled to super-priority status over Chase's interest in the Property. *See* R. at 5, 12, 18, 24. This is incorrect. While the UCC gives such "cooperative organization security interests" "priority

over all other security interests in a cooperative interest" "with respect to all amounts secured," its reach is limited. UCC § 9-322(h)(1). A co-op lien only qualifies as a "cooperative organization security interest" if it secures an obligation exclusively incidental to ownership of the cooperative interest. *See* UCC § 9-102(27-d) (defining "cooperative organization security interest" as "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.").

The lower court found that the Lease constituted a cooperative organization security interest under the UCC because of Fletcher's asserted claims that The Dakota breached its fiduciary duties to him as a shareholder. *See* R. at 5, 12, 18, 24. Yet these claims were only two of Fletcher's nine causes of action. The other claims were based on allegations related only to Fletcher's status as a prospective holder of additional shares for separate apartments, over which The Dakota had no cognizable lien. *See* R. at 244-251. Indeed, in granting summary judgment in the Fletcher Suit, Justice Rakower noted that Fletcher's claims were "for discrimination, retaliation, defamation, and tortious interference based on [The Dakota's] failure to approve [Fletcher's] application to purchase additional shares." *See* R. at 2020. Analyzed as a whole and in its full substance, Fletcher's complaint and the resulting judgment were not tied "only [to] obligations incident to ownership of that cooperative

interest" Fletcher held in the Property. UCC § 9-102(27-d) (emphasis added). Accordingly, the judgment in the Fletcher Suit falls outside of the narrow confines of the UCC's grant of super-priority liens to cooperative corporations and, therefore, cannot prime Chase's prior-perfected security interest in the Property. Regardless, then, of how the Lease and Paragraph 15th are construed, The Dakota's claim for a priority lien fails, warranting reversal.

IV. CHASE PLAINLY PRESERVED ITS UNCONSCIONABILITY DEFENSE, WHICH THE PARTIES LITIGATED THROUGH YEARS OF DISCOVERY

The lower court also erred in ruling, *sua sponte*, that Chase waived its right to assert that Paragraph 15th was unconscionable and unenforceable to the extent it supported The Dakota's lien for the Legal Fees. *See* R. at 5, 11, 18, 23. Chase never waived any such argument. While Chase's Answer did not specifically use the term "unconscionable," Chase expressly questioned the enforceability of Paragraph 15th in its pleadings and extensively explored the issue of unconscionability during discovery. *See* R. at 130-131 (¶¶ 18-20, 22); *see also* R. at 1248, 1460-1461 (352:21-353:15), 1841, 1843, 1865-1878. Thus, Chase preserved and raised all the relevant facts and issues for this defense in its pleading, and The Dakota suffered no harm or prejudice by virtue of Chase's pursuit of the defense on summary judgment.

Generally, parties do not waive defenses by omitting them from their pleading when the other party cannot claim prejudice or surprise. *See* CPLR 3018(b) (party

must plead matters that would likely "take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading"); *Brodeur v. Hayes*, 305 A.D.2d 754, 755 (3d Dep't 2003) ("Even an unpleaded defense may be raised on a summary judgment motion, as long as it would not be likely to surprise the adverse party or raise issues of fact not previously apparent."). In *Edwards v. New York City Transit Authority*, this Court held that an affirmative defense was not waived, even though it was not pled, because plaintiffs knew of the relevant facts concerning the defense through a deposition, thus "vitiating any later claim of surprise by plaintiff." 37 A.D.3d 157, 158 (1st Dep't 2007). Likewise, in *Kaneb v. Lamay*, the Third Department held that defendants did not waive an affirmative defense when the plaintiffs did not claim surprise or prejudice and instead indicated that they had been aware of the defense and related facts. *See* 58 A.D.3d 1097, 1098 (3d Dep't 2009) (court did not err in considering affirmative defense that "was invoked before trial based on the "parties' opening statements" and where "plaintiffs [did] not claim surprise or prejudice" since "defendants pleaded the relevant facts").

Here, The Dakota cannot claim surprise or prejudice by Chase's argument that Paragraph 15th is unconscionable under The Dakota's alleged meaning. First, Chase expressly pled in its Answer that Paragraph 15th, based on the Dakota's interpretation of it, was inapplicable and unenforceable against Chase's lien on the Property. *See* R. at 130-131 (¶¶ 18-20, 22). Thus, the fact that Chase raised the

issue of unconscionability on summary judgment did not raise any novel facts or law that the parties did not already explore during the litigation. *See* *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 404 n. 2 (1968) ("the issue of unconscionability is a matter of law for the court").

Second, the parties undertook extensive discovery on the issue of unconscionability, so The Dakota was well aware of Chase's arguments under *Krodel* long before the parties filed their motions for summary judgment. During his deposition, the attorney who drafted Paragraph 15th for The Dakota was repeatedly asked about *Krodel* and its relation to the clause.[13] *See* R. at 1248, 1460-1461 (352:21-353:15), 1841, 1843; *see* *Edwards*, 37 A.D.3d at 158 (plaintiff could not be surprised by defense explored during depositions). And Chase specifically sought discovery as to the amount of the Legal Fees and their enforceability as a lien, in response to which Justice Kalish noted: "What I'm going to litigate is whether or not that … amount of [Legal Fees] … is to be considered as additional rent under … [P]aragraph 15th." *See* R. at 593, 610 (18:9-18:13). In fact, The Dakota was so familiar with Chase's arguments under *Krodel* that its opening summary judgment brief preemptively claimed that Paragraph 15th was conscionable and enforceable. *See* R. at 14 (n. 16); *see also* *Kaneb*, 58 A.D.3d at

[13] Counsel's own analysis of *Krodel* and the unconscionability of similar lease provisions was even marked as deposition exhibit 44. *See* R. at 1248, 1460-1461 (352:21-353:15), 1841, 1843.

1098 (court did not err in considering affirmative defense when the relevant facts were pled and plaintiff's opening statements addressed the defense). Far from being "surprised" by Chase's unconscionability defense, The Dakota was fully prepared to address it. The waiver doctrine therefore does not apply as a matter of law under CPLR 3018(b).

The lower court's decision, however, did not address any of the aforementioned facts or law. Instead, it relied upon a single Third Department decision to state that a party must plead a defense stating "[t]hat some portion of the Lease is substantively unconscionable." *See* R. at 5, 11, 18, 23 (citing *Inc. Vill. of Philmont v. X-Tyal Int'l Corp.*, 67 A.D.2d 1039, 1040 (3d Dep't 1979)). However, *Philmont* did not even concern a contract's alleged substantive unconscionability. Rather, the defendant failed to plead that plaintiff "acted unconscionably" by commencing an arbitration that may cause defendant to "pay[] taxes on real property it does not own." *See* 67 A.D.2d at 1040. The Third Department found the defendant waived the defense by not including it in a prior pleading. *Id*. That claim involved a wide range of facts that are remarkably distinguishable from the terms of Paragraph 15th, which Chase expressly pled, fully litigated, and are the only relevant facts for Chase's assertion that Paragraph 15th is unconscionable. The lower court erred in concluding that Chase waived the defense.

V. CHASE'S STANDING TO CHALLENGE THE DAKOTA'S CLAIM IS CLEAR: IT HOLDS RIGHTS TO THE PROPERTY AND SUFFERED A SIGNIFICANT INJURY FROM THE LOWER COURT'S RECOGNITION OF THE DAKOTA'S LIEN

The lower court clearly erred in finding that Chase lacked standing to challenge The Dakota's interpretation of Paragraph 15th. *See* R. at 5, 11, 18, 23. As an assignee of Fletcher's rights in the Property, Chase clearly has the right to attack The Dakota's claim for a recovery that would diminish the value of Chase's lien on the Property. *See* R. at 958 (¶¶ 2, 6), 963 (¶¶ 2, 6), 968-971. The lower court based its standing determination solely on *Decolator, Cohen & DiPrisco, LLP v. Lysaght, Lysaght & Kramer, P.C.*, 304 A.D.2d 86 (1st Dep't 2003), which actually supports Chase's position. *See* R. at 5, 11, 18, 23. In *Decolator*, the Court explicitly stated therein that a non-party to a contract did not have standing (in part) because it was not an assignee of the party's rights to the contract. *See Decolator*, 304 A.D.2d at 90 ("Since, however, DCD is neither a party, an assignee nor an intended third-party beneficiary of the Lysaght/TCB contract, it lacks standing to challenge the validity of the contract."). In contrast, Chase is an assignee of Fletcher's rights in the Property, which was never acknowledged in the Summary Judgment Order – a clear error. *See* R. at 5, 11, 17, 23, 958 (¶¶ 2, 6), 963 (¶¶ 2, 6), 968-971.

Lastly, the lower court's decision regarding Chase's standing is internally inconsistent and self-defeating. The lower court correctly noted that Chase's "recovery would be diminished by The Dakota's recovery of attorneys' fees in the

Fletcher Action," yet nevertheless concluded that Chase lacked standing to challenge The Dakota's ability to recover the Legal Fees under the Lease because Chase "will not suffer a direct harm as a result of this provision." *See* R. at 5, 11, 17, 23. Lessening the value of Chase's lien is a harm that flows directly from The Dakota's and the lower court's interpretation of Paragraph 15th. *See* *Decolator*, 304 A.D.2d at 91 (noting that the petitioner did not suffer direct harm, in part, because the contract at issue "did not change the value of [petitioner's] lien"). The Dakota's demand for attorneys' fees had the potential to – and, ultimately, did – diminish the value of Chase's Property lien by more than $4 million, which clearly gives Chase standing as the assignee of Fletcher's right in the Property to oppose The Dakota's claim. *See* R. at 29-30.

VI. THE LOWER COURT ERRED IN GRANTING THE DAKOTA JUDGMENT ON COSTS UNRELATED TO THE FLETCHER SUIT

Finally, the lower court erred by not holding a hearing and simply granting The Dakota judgment on $592,189.69 of unpaid assessments, charges and interest that are independent from the Legal Fees. *See* R. at 29-30. The Dakota did not submit admissible evidence that established the validity of these charges or proved that Chase received notice of such charges. The Dakota offered only the affidavits of Samantha Signorella and Robert McFarland, neither of which substantiate the $592,189.69 amount of charges. *See* R. at 309-313, 679-745, 886-898. Mr. McFarland's affidavit (the "McFarland Affidavit") purports to reflect the

outstanding fees and expenses on Fletcher's Property as of May 2018, but the only document cited in support was an invoice summarizing amounts due on Fletcher's Property by May 1, 2018. *See* R. at 726. The McFarland Affidavit makes no indication or assertion that this invoice was "made in the regular course of any business[,] that it was the regular course of such business to make it[]," or that the invoice was made at or around the time that these charges were imposed on Fletcher. *See* CPLR 4518; R. at 679-682. Thus, the invoice is not admissible as a business record. *See* *People v. Kennedy*, 68 N.Y.2d 569, 579-80 (1986) (documents must satisfy all three criteria to be admissible).

The affidavits of Samantha Signorella (the "Signorella Affidavits") do not rectify these deficiencies or provide admissible documents that substantiate the $592,189.69 amount the lower court awarded to The Dakota as additional rent. *See* R. at 309-313, 742-745. The initial Signorella Affidavit attached nothing more than a compilation of unpaid fees without any mention of how the information was collected or any indication that the document qualifies as a business record, making it inadmissible. *See* R. at 309-313, 742-745; *see also* CPLR 4518; *Residential Credit Sols., Inc. v. Gould*, 171 A.D.3d 638, 643 (1st Dep't 2019) (affidavit based on unproduced underlying record was "conclusory and of no probative value"); *JPMorgan Chase Bank, N.A. v. Clancy*, 117 A.D.3d 472, 472 (1st Dep't 2014) (exhibits to employee affidavit were inadmissible). And while Ms. Signorella's

reply affidavit attempted to cure these issues by claiming that the ledgers constituted business records, The Dakota still failed to demonstrate that she had the requisite personal knowledge to attest to this fact or that the ledgers were accurate, especially since they dated as far back as 2014. *See* R. at 886-888. More specifically, Ms. Signorella failed to disclose how long she had been managing The Dakota or how her position as an assistant made her privy to the documents' creation (and storage) and all of the information exchanged between The Dakota and its property manager. *See* R. at 309-313, 886-888. This, too, undermines the admissibility of the ledgers. *See* *People v. Kennedy*, 68 N.Y.2d 569, 575 n. 2 (1986).

The content of the ledgers also raises several issues that can only be resolved through an evidentiary hearing. According to the invoice attached to McFarland's Affidavit, Unit 52 of the Property accumulated $3,671,237.29 of charges as of May 1, 2018, but the ledger for Unit 52 reflected a balance of $3,579,876.49 prior to May 2018 and $3,675,599.26 by the close of May 1st. *COMPARE* R. at 726 *WITH* R. at 889-895. And the ledgers failed to segregate payments toward the expenses that were separate from the Legal Fees, thus depriving the court – and Chase – of any means to verify the full $592,189.69 amount at issue. *See* R. at 889-895. These matters should be resolved in court through testimony. *See, e.g.*, *Prentice v. Levy*, 27 A.D.3d 970, 972 (3d Dep't 2006) (hearing required where amount of lien "[could] not be established without testimony or other evidence").

VII. TO AFFIRM THE LOWER COURT'S ORDER WILL PLACE AN EXTRAORDINARY BURDEN ON CO-OP LENDERS AND THUS CREATE A CHILLING EFFECT ON COOPERATIVE LENDING

Beyond perpetuating the errors committed in the Judgment and Order, an affirmation will raise considerable risks for co-op based lending in New York State. Many co-op leases provide for the recovery of legal fees against shareholders, and the Summary Judgment Order has deemed such provisions enforceable even if they are so broad as to apply when the co-op does not prevail, the fees are incurred nearly a decade after the loan becomes secured, and where the subject matter of the litigation is not related to the collateral of the loan. The sheer scope of The Dakota's (and now the lower court's) interpretation of the lease cannot be understated. Indeed, Justice Kalish even asked The Dakota:

> So, let me ask you something counsel. So, shareholder Jones slips and falls in the lobby of the building. … Defendant Dakota wins, jury doesn't believe it. But you, as good counsel, putting up the defense, you have attorneys['] fees that you charged to [The] Dakota, are you telling me that those attorney[s'] fees you're going to charge as rent, because the person happens to live there? Is that what you actually think this paragraph means?
>
> I just want to make sure that we're all on the same page, because you seem to think that this paragraph includes any type of litigation.

R. at 593, 602-603 (10:12-11:5). The question was particularly salient since The Dakota can now recoup attorneys' fees in this scenario according to the Summary Judgment Order. Thus, an affirmation from this Court will mean that all loans

secure(d) by co-op shares with similar leases will become subordinate to any legal fees incurred by the co-op in any type of litigation against the borrower.

This immense risk to lenders cannot be alleviated with recognition agreements. Even though recognition agreements provide the lender with a superior right to that of the cooperative in the event of default by the borrower, cooperatives agree to them because, as was the case here, they enable cooperatives to still recoup amounts due under the lease. *See, e.g.*, R at 157 (¶ 2); s*ee also* (1A Warren's Weed, New York Real Property, Cooperatives § 6.02, n 12.). However, under the Summary Judgment Order, the scope of the co-op's recovery through its lease strips away the protection intended for lenders to finance these assets and to maintain their superior liens.

To minimize its exposure, lenders will have to exert an exorbitant amount of resources to monitor and (if possible) intervene in every dispute between co-ops and borrowers who hold shares in the co-op. This requirement is borne by the fact that Chase was never named as a party to the Fletcher Suit. The burden imposed on lenders to monitor cases to which they are not a party, coupled with the risk of subordination, will create a chilling effect and dissuade lenders from issuing loans that would be secured by co-op property. Given the active co-op financing market in New York City, affirming the lower court's ruling will endanger this source of financing and discourage lenders to provide such loans. This effect detracts from

the U.C.C.'s goal of permitting "the continued expansion of commercial practices through custom, usage, and agreement of the parties." U.C.C. § 1-103(a)(2).

CONCLUSION

The Judgment and Order committed several critical errors that each – independent of one another – demand a reversal. First, the Summary Judgment Order violated this Court's holding in *Krodel* by enforcing a lease provision that would permit co-ops and landlords to extract a litigation tax on shareholders and tenants from any type of claim brought – regardless of who prevails. In so doing, the lower court perpetuated a fee-shifting rule that clearly undermines the critical policy consideration underpinning this Court's clear holding, and the American Rule, that such clauses are unconscionable and unenforceable for their deterrent effect on a lessee's decision to seek relief against a lessor.

Second, the Summary Judgment Order ignored that the Legal Fees were incurred from claims of discrimination and various other torts in connection with Fletcher's bid to purchase additional shares in the building. Therefore, the Legal Fees are not entitled to the priority afforded by the UCC to co-op security interests that are "only" tied to charges incidental to ownership.

Third, the unambiguous language of the Lease only allows The Dakota to recover legal fees from shareholders who are in default, which is supported by The

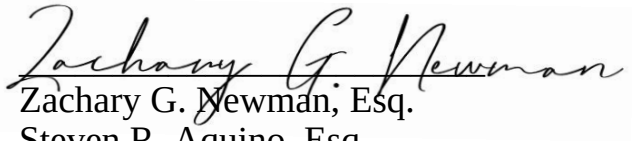
Dakota's own admissions to its shareholders (via the Explanatory Comment) before they adopted the fee-shifting provision in question.

Fourth, the Judgment and Order awarded The Dakota with $592,189.69 of unpaid assessments, charges and interest (independent from the Legal Fees) without conducting an evidentiary hearing, even though the only purported evidence consisted of inadmissible affidavits and documents that failed to substantiate the amounts alleged. *See* R. at 29-30.

Accordingly, the judgment should, respectfully, be reversed.

Dated: New York, New York
March 21, 2022

THOMPSON COBURN HAHN & HESSEN LLP



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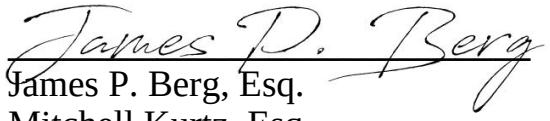

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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: March 21, 2022

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Petitioner,

– against –

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.

1. The index number of the case in the court below is 157631/15.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The proceeding was commenced in Supreme Court, New York County.

4. The proceeding was commenced on or about July 24, 2015 by filing of an Article 52 Petition. Issue was joined by filing of a Verified Answer by Respondent The Dakota, Inc. on or about July 25, 2018. Issue was joined by filing of a Verified Answer, Affirmative Defenses, Cross-Claims and Counter-Claims by Respondent JPMorgan Chase Bank, N.A. on or about December 18, 2018.

5. The nature and object of the special proceeding is Article 52.

6. This appeal is from the Decisions and Orders of the Honorable Lewis J. Lubell, J.S.C., dated and entered on August 4, 2021, and the Judgment and Order of the Honorable Lewis J. Lubell, J.S.C., dated and entered on November 8, 2021, which (i) Granted Defendant The Dakota, Inc.'s Motion for Summary Judgment, (ii) Denied Defendant JPMorgan Chase Bank, N.A.'s Motion for Summary Judgment, and (iii) Awarded Judgment to Respondent The Dakota, Inc. in the Amount of $4,542,151.61 Plus Interest, Attorneys' Fees and Unpaid Maintenance and Assessments Accruing from November 21, 2020 and as of November 30, 2020.

7. This appeal is on the full reproduced record.

To be Argued by:
JOHN VAN DER TUIN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Petitioner,

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– and –

ALPHONSE FLETCHER, JR.,

Respondent,

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

(For Continuation of Caption See Inside Cover)

BRIEF FOR RESPONDENT-RESPONDENT

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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.

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Additional Question Presented

Whether Appellant may collaterally attack the judgment entered December 26, 2017 by Hon. Arlene Bluth that granted Respondent The Dakota's counterclaim for legal fees pursuant to its proprietary lease in the 2011 action brought against The Dakota by its shareholder, Alphonse Fletcher, Jr., (i) where Appellant Chase was in privity with Fletcher in his rights as a shareholder and lessee of The Dakota, (ii) where Appellant Chase was on notice as to Respondent Dakota's counterclaim for legal fees, and (iii) where Appellant Chase took no steps either to intervene in the fee dispute pre-judgment or to seek relief from Justice Bluth as an "interested party" pursuant to CPLR 5015 post-judgment? The Court below did not reach this question.

Appellant's Questions Presented

Appellant's questions are premised upon mischaracterizations of the facts and record as shown in Respondent's Statement of Facts and Argument hereafter.

PRELIMINARY STATEMENT

Respondent, The Dakota, Inc. ("The Dakota"), submits this brief in support of affirmance of the decision and order (the "Order") of Hon. Lewis J. Lubell, dated and entered August 4, 2021,[1] that granted the summary judgment motion of The Dakota and denied the summary judgment motion of Appellant JP Morgan Chase Bank, N.A. ("Chase") and of the final order and judgment (the "Judgment") dated and entered November 8, 2021, upon the Order.[2]

SUMMARY OF ARGUMENT

In a strategy worthy of *Jarndyce and Jarndyce*,[3] Appellant's principal argument is that Justice Lubell erred in this proceeding in 2021 by failing to grant Chase's collateral attack on a judgment for legal fees entered by Justice Bluth in December 2017 in a separate action that had been litigated since 2011, *Fletcher v. The Dakota, et al.,* Index No. 11289/2011 (Sup. Ct. N.Y. Cnty.). Chase embarked on its belated collateral attack notwithstanding that (i) it was in privity with its borrower, Plaintiff Fletcher, against whom the judgment was entered, in relation to his proprietary lease and shares in The Dakota, (ii) Chase was on specific, detailed

[1] R. 6.
[2] R. 29. The Order adjudicated the disputed lien priorities of The Dakota and Chase in the proceeds of sale of the Fletcher apartment held by the court-appointed receiver and directed The Dakota to submit a judgment, which The Dakota thereafter did.
[3] *See* Charles Dickens' *Bleak House*. "The case is a central plot device in the novel and has become a byword for seemingly interminable legal proceedings." Jarndyce and Jarndyce - Wikipedia.

notice of The Dakota's lease-based fee claim in the *Fletcher* action prior to the fee application and judgment, but failed to intervene or assert its interest, and (iii) Chase then also failed to apply to Justice Bluth for relief from the fee judgment as an "interested party" pursuant to CPLR 5015 in the four years between entry of Justice Bluth's fee judgment and Justice Lubell's Order.

Therefore, as shown in Point I, below, the arguments made by Appellant in Points I, II, IV and V of its Brief, even if they had substantive merit, which they do not, were simply made too late and in the wrong court. These arguments all depend on the contention that Justice Lubell should have allowed Chase to avoid the UCC priority granted to The Dakota by re-litigating Justice Bluth's 2017 judgment awarding The Dakota reimbursement of its legal fees pursuant to its proprietary lease and bylaws. Chase's contention as to its "significant injury" upon which its standing argument is premised in Point V simply demonstrates that it could have and should have sought relief in connection with The Dakota's fee claim in the proceedings before Justice Bluth, either pre-judgment when The Dakota made its fee application, or post-judgment pursuant to CPLR 5015 as an "interested party." Chase's strategy to wait to launch a collateral attack in this proceeding is too late and in the wrong court.

In addition to its procedural failure, Chase's arguments fail on the substance.

As shown in Point II, below, answering Appellant's Point I, this Court's 2018 *Krodel* decision does not invalidate Justice Bluth's 2017 judgment. *First*, *Krodel* cannot be applied retroactively to invalidate an earlier final judgment. *Second*, *Krodel* is distinguishable both factually and as to good policy. *Krodel* addressed the unconscionability of awarding fees as a penalty to a cooperative board pursuant to a lease provision that did not require the board to have prevailed and where the board was in default and the shareholder had prevailed. By contrast, in the present case, The Dakota was not in default and prevailed completely in obtaining dismissal of Fletcher's claims against it – after a long litigation at great expense to Fletcher's fellow shareholders. Furthermore, Chase's argument is disingenuous in that it fails to mention that a significant portion of the claim for which it seeks priority is based on the fact that it is the assignee of the Kasowitz law firm's $2.7 million judgment against Fletcher for legal fees, obtained on default, for representing Fletcher in pursuing and losing the meritless *Fletcher v. Dakota* litigation.[4] Chase, who has stepped into the shoes of Kasowitz, would thus have the loser's fees in the action paid out of the pocket of the winner. *Third*, as Justice Lubell reasoned, Chase did

[4] Chase also continues to suggest that The Dakota's $3.1 million fee claim and judgment (that it misstates as $3.9 million, Appellant's Brief at p.9) was excessive. The fee claim was for eight years of litigation with Fletcher. The Kasowitz firm's judgment for unpaid fees against Fletcher, that was assigned to Chase, by contrast, was for $2.7 million on top of $1 million that Fletcher paid Kasowitz, for less than a year and half's losing participation in the litigation. (R. 392, 395, 397-398.)

not even raise its present *Krodel*-based unconscionability contention as an affirmative defense to The Dakota's Answer and Cross-Claims in this case. As shown in Point II(C), the Court below properly reasoned that Chase waived its *Krodel*-based unconscionability affirmative defense by failing to plead it either originally as one of its 19 affirmative defenses, or by amendment to its pleading. *Finally*, Chase's contention that the lease provision at issue does not require The Dakota to prevail in shareholder litigation to collect fees is also without merit. The lease allows reimbursement only of "reasonable" fees. Under well-established law, a party must have prevailed before its fee claim can be reasonable and The Dakota's lease therefore requires a party to have prevailed to be entitled to a fee award and is not unconscionable.[5]

In Point III below, answering Appellant's Point II, we show that the Court below properly held that Chase's grammatical contortions and reliance on a twenty-year-old internal memorandum in an effort to create ambiguity or uncertainty in the express and plain terms of the attorneys' fees provision of the lease must be rejected.

[5] Although this Court need not reconsider its *Krodel* 'unconscionability' analysis to decide the present case, it is difficult to understand how a lease provision that is adopted by a group of cooperative lessees for their mutual benefit and that applies to each of them equally can be held to be 'unconscionable' under any application of the law of unconscionability, especially when the provision at issue explicitly imposes a reasonability standard. It is not a circumstance in which one party with unequal bargaining power imposed a contractual term to the detriment of another.

In Point IV below, we show that Chase's contention at Point III of its Brief that the UCC does not give priority to The Dakota's lien for unpaid sums owed pursuant to the proprietary lease and corporate bylaws is simply wrong. The UCC clearly and expressly grants priority. Indeed, as the Court below properly reasoned, Chase expressly agreed to The Dakota's priority in the Recognition Agreement Chase made in 2008 with Fletcher, its borrower, and The Dakota, as lessor to Fletcher.

In Point V below, responding to Appellant's Point VI, we show that the portion of the Court's judgment based on unpaid monthly maintenance, an assessment and other charges was well-supported by admissible evidence that Chase did not bother to controvert below. The Dakota made its *prima facie* case; Chase submitted no evidence to create any material factual dispute.

In Point VI below, responding to Appellant's Point VII, we show that Chase's Chicken Little "the sky is falling" policy argument is both irrelevant and baseless. In the UCC, the NY Legislature allocated the rights and priorities among competing lienors; the Court below correctly applied them. There is no basis for this Court to ignore the statutory priorities to relieve Chase from its decisions as to how to assert or protect its rights – whether made intentionally or by oversight – that did not pan out. There is no basis for this Court to re-allocate the statutory rights and priorities to give additional protection to the mortgage banking industry.

The Order and Judgment should be affirmed in all respects.

Statement of Facts

In 2001 The Dakota issued Fletcher a proprietary lease (the "Lease") and shares (the "Shares") for apartments 52 and PHB in its building.[6] As discussed below, the corporate bylaws[7] and the share certificate[8] granted The Dakota a lien as to all amounts owed to it by Fletcher as a proprietary lessee and shareholder. The lien is perfected, by the terms of the New York Uniform Commercial Code, as of the date of issuance of the Shares and Lease. The Court below properly held that a judgment for attorneys' fees as additional rent granted to The Dakota in December 2017 against Fletcher arising from The Dakota's successful defense of a suit against it by Fletcher has priority over Chase's subsequent security interest.

In 2008, Fletcher pledged the Shares and Lease as security for the loans from Appellant Chase.[9] As discussed further below, Chase also agreed to the priority of The Dakota's lien in the Recognition Agreement made among Chase, The Dakota and Fletcher in connection with the loans.[10]

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[6] R. 264 (Lease) and 377 (Shares certificate). Fletcher had been a shareholder and proprietary lessee of The Dakota since 1992 (R.196, Fletcher Second Amended Complaint in *Fletcher Suit* at ¶ 10) and changed apartments in 2001.
[7] R. 339 at Art. VI, Section 6.
[8] R. 377-78.
[9] R. 425-431, Loan Security Agreement, Stock Power and Assignment of Lease.
[10] R. 157, Recognition Agreement.

Chase's Attack on The Dakota's Lien Was Untimely and in the Wrong Court

In 2011, Fletcher, who had been a shareholder (and director) of The Dakota for many years, filed suit against it, *Fletcher v. The Dakota, et al.,* Index No. 101289/2011 (Sup. Ct. N.Y. Cnty.) (the "*Fletcher Suit*"), after its board of directors denied his application to purchase a third apartment to join with his existing two apartments. He claimed, both in a pre-suit demand letter from his attorney[11] and in his Complaint,[12] that the board had breached its fiduciary duty to him, violated board policies regarding the purchase of apartments by existing shareholders, defamed him, interfered with his contract to purchase the third apartment and discriminated against him on account of his race.[13] After extensive litigation, over five years, summary judgment was granted to The Dakota dismissing Fletcher's claims in a 56 page decision and order dated September 11, 2015.[14]

The Dakota had asserted three counterclaims against Fletcher for the attorneys' fees incurred in defending against Fletcher's claims, a First Counterclaim based on the contractual provision in the Lease as to recovery of fees (Art. II,

[11] R. 449. Fletcher will sue to "vindicate his rights" as a shareholder based on the board's alleged "violation of the fiduciary duty to treat all shareholders equally" in its application of board policy and discrimination against him on the basis of race.
[12] R. 1879 at ¶¶ 1, 2, 7 and 136 – 175.
[13] He added claims of racial discrimination notwithstanding that he had previously been approved for three apartment purchases, had been elected to board of directors by the shareholders and that the board had elected him its president. (R. 1884, *Fletcher* Complaint at ¶11.) His mother, who is also African-American, also resided in the building in a separate apartment. (R. 188 at ¶ 26.)
[14] R. 2019.

Fifteenth) and Second and Third Counterclaims based on the statutory provisions of the anti-discrimination statutes.[15] The attorneys' fees claims were contested by Fletcher and referred to retired Justice Ira Gammerman to hear and report. After an evidentiary hearing[16] and briefing, Justice Gammerman recommended that the fees be awarded,[17] and motions to confirm the report (by The Dakota) and to reject the report (by Fletcher) were filed with Justice Arlene Bluth in June 2017.[18]

After argument of the motions in October 2017, Justice Bluth issued a judgment dated December 14, 2017, granting the award of attorneys' fees on The Dakota's First Counterclaim, based on the Lease.[19]

Chase had been fully informed, two years earlier, of the basis for and the amount of The Dakota's fee claim and that The Dakota asserted a first priority lien against the Shares and Lease for the unpaid fees:

- The Kasowitz firm had commenced the instant proceeding against Chase, The Dakota and Fletcher in July 2015.[20] In an affirmation dated August 28, 2015, filed in this proceeding and in an email to counsel for Kasowitz and Chase dated August 27, 2015, the amount, legal basis and priority of

[15] R. 510-511, Counterclaims.
[16] R. 815-842, transcript.
[17] R. 379, Report.
[18] R. 844, Dakota motion to confirm.
[19] R. 858 at 859 "…Supplemental Judgement on its First Counterclaim against Plaintiff."
[20] R. 60, Petition. Other creditors of Fletcher subsequently intervened, including a number of pension funds whose money he managed, and lost, and the Internal Revenue Service for unpaid income taxes. The Dakota Board's concerns about Fletcher's finances had been correct.

The Dakota's fee claim were spelled out.[21]

- Chase's counsel also followed the course of the litigation of The Dakota's fee claim against Fletcher, inquired about the motion to confirm the fee award, and, by email from The Dakota's counsel dated June 12, 2017, was provided with a copy of The Dakota's motion papers, well before the motion was heard, on October 3, 2017, and before the judgment awarding fees was issued in December 2017.[22]

Notwithstanding that Chase was on explicit and detailed notice of both the amount, basis and priority of The Dakota's fee claim and of The Dakota's motion for a judgment as to its fees, Chase took no steps to dispute the claim or assert its interests before Justice Bluth. It did not seek to intervene on The Dakota's motion between June and December 2017. It did not move pursuant to CPLR 5015 as an "interested person" for relief from the December 2017 judgment.[23] Instead it has sought only to collaterally attack the judgment in this proceeding.

[21] R. 567, Affirmation at ¶ 9, and R. 573-577, letter to counsel with documents supporting Dakota fee claim.

[22] R. 578-579, email dated June 12, 2017. The judgment, R. 858 at 859, recites that the parties were heard on the motions to confirm and reject on October 3, 2017, four months after the motion papers were forwarded to Chase's counsel.

[23] Any contention that it lacked the standing or right to seek timely relief in the correct forum by way of intervention or post-judgment CPLR 5015 relief is contradicted by its argument in this Court, Appellant's Brief at Point V, that it "holds rights to the property [the Shares and Lease]" and suffered injury from the recognition of The Dakota's lien and priority, and by the assignment to it, in 2008, of the Shares and Lease as security for its loan to Fletcher. (R. 425-431, Loan Security Agreement, Stock Power and Assignment of Lease.)

The Dakota Was Properly Awarded Fees in the *Fletcher Suit*

Even if Chase's untimely collateral attack is examined on the merits, it fails.

Justice Bluth's December 2017 judgment granted The Dakota's First Counterclaim for fees based on the fee provision in the Lease.[24] The language of the relevant provision, Art. II (Fifteenth)[25] is not simple, but it is not ambiguous. It reads:

> **If** the Lessee [*i.e.,* Fletcher] shall at any time be in default hereunder, and the Lessor [*i.e.,* The Dakota] shall take any action against the Lessee based upon such default, **or if** the Lessor shall defend any action or proceeding (or claims 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.

(Emphasis added.) The language describes two circumstances in which The Dakota may recover expenses including legal fees: (i) "if" a shareholder is in default and The Dakota takes some action (not necessarily a lawsuit) and incurs expenses, or (ii) "if" The Dakota incurs expenses, including legal fees, in defending against a suit brought against it by a shareholder. In both instances the legal fees or other expenses must be "reasonable in amount."

Chase concedes that the provision is unambiguous (Appellant's Brief at p.38,

[24] R. 180, Judgment at p.181 "IT IS ADJUDGED that Defendant … have Supplemental Judgement on its First Counterclaim against Plaintiff…."
[25] R. 455 at 468, Proprietary Lease.

subsection "B") but then, both below and in this Court, seeks to find an ambiguity in the language by two attacks. First, it offers a tortured analysis of the meanings of "and" and "or" and butchers the grammar and placement of emphasis. (Appellant's Brief at pp. 35-36). But there is no "or" in Art. II (Fifteenth) that, if converted or read as "and," makes any grammatical sense or reaches Chase's desired interpretation. The attempt to find ambiguity in the language is tortured and baseless.

Second, Chase points to a twenty-year-old memorandum prepared in 2000 in advance of a later shareholders meeting that adopted Art. II (Fifteenth). The memorandum suggested fees could be recovered only where a lessee is alleged to be in default. The Dakota does not dispute the existence of this memorandum, nor that the memorandum states that attorneys' fees could be recovered only where the litigation concerns a shareholder default. However, Art. II (Fifteenth), not the memorandum, was adopted by the shareholders in 2000. In a fruitless effort to wring concessions that the memorandum should overrule the Lease language, Chase deposed Mr. Shmulewitz, the former counsel who drafted the 2000 memorandum, at length over two days. It also deposed Toni Sosnoff, who was The Dakota's president in 2000, Robert McFarland, the management executive for The Dakota in 2000, board member Mark Myers and then current president Arthur Chu (who was

not a shareholder in 2000).[26] Each of the witnesses who were deposed (except Mr. Myers who had no recollection of the events two decades previously) disputed Chase's argument as to the meaning of the provision and the intent at the time it was adopted in 2000. Ms. Sosnoff testified that the Board intended – and she interpreted the lease to mean – that The Dakota "always came first in the recovery of monies,"– *i.e.*, it can recover its fees if it starts a lawsuit based on a shareholder default or if the shareholder starts the lawsuit The Dakota must defend, and that the language of the memorandum was a mistake.[27] Robert McFarland testified that in his thirty years of experience – with all of the buildings with which he has been associated (including The Dakota) – the "building has the right to make itself whole" with respect to legal fees resulting from shareholder disputes.[28] Mr. Shmulewitz testified that, while Art. II (Fifteenth) of the Lease "could be subject to different interpretations," the interpretation he intended – which was to "maximize the ability of the The Dakota to recoup legal fees" – is that The Dakota can "recoup legal fees under certain circumstances even if the shareholder is not in default."[29] Mr. Chu testified that the provision is "clear"; The Dakota is not limited to recovery in proceedings in which

[26] The Dakota did not take any depositions below, given its view of the relevant law and facts. Justice Kalish, in his rulings on April 23, 2019, to which Chase now seeks to attribute dispositive substantive weight, simply allowed Chase the extensive discovery that Chase sought in its effort to avoid the plain language of the Lease, Justice Bluth's ruling and the statutory priority of liens set forth in the UCC. R. 593, *et seq.*

[27] R. 524, Sosnoff at 69:12-19, 70:16-71:13, 137:4-25.

[23] R. 534, McFarland at 71:9-25; 78:13- 79:15; 88:16-90:12; 92:23-93:4.

[29] R. 515, Shmulewitz at 41:2-42:9; 42:20-43:25; 231:6-232:10.

the shareholder is in default.[30] No witness, over five days of vigorous examination by Chase's counsel, agreed with or adopted the interpretation desired by Chase.

Thus, even if this Court were to entertain re-litigation of The Dakota's fee claim and the judgment of Justice Bluth, Chase's tortured interpretation of The Dakota's rights should be rejected. It is contrary to the language of Art. II (Fifteenth), contrary to the litigated result of the fee claim in 2017, and contrary to the understanding and intent of the persons involved in 2000.

The Priority of The Dakota's Claim

Art. VI, §6 of The Dakota's bylaws[31] provides that The Dakota has a lien on Fletcher's Shares to secure all of his rent and other indebtedness and obligations:

> 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*. . . .

(Emphasis added.) Likewise, The Dakota's certificate of incorporation[32] provides:

> If a stockholder shall be indebted to the corporation, the directors may refuse to consent to a transfer of his stock until such indebtedness is paid, provided a copy of this section or the substance thereof is written or printer upon the certificate of stock.

[30] R. 548, Chu at 164:25-166:5; 170:10-15; 184:9-185:9.
[31] R. 348
[32] R. 354 at Art. "TWELFTH"

The Dakota's share certificates,[33] in turn, on their reverse side display a restrictive legend that repeats and recites this lien.

As shown in Point IV below, the New York Uniform Commercial Code provides that the lien established by these cooperative governing documents arises and is perfected at the time of issuance of the shares and lease, *i.e.*, 2001, with respect to Fletcher's Shares and Lease.

In fact, Chase agreed in 2008 that The Dakota's interest was superior in the Recognition Agreement it entered into with Fletcher and The Dakota.[34] In each instance in which the Recognition Agreement addresses the priority of payment from any proceeds of sale of the Fletcher Shares and Lease it provides that The Dakota is to be paid before Chase is paid:

> 2(e) [The Dakota] shall recognize [Chase's] right as lienor against the Apartment pursuant to the Security, and, if the Lease be terminated and/or shares cancelled, against the net proceeds of any sale or subletting of the apartment, *after reimbursement to [The Dakota] of all sums due [The Dakota] under the Lease.*
>
> and
>
> 3(c)(2) If [The Dakota] ha[s] already sold or contracted to sell the Apartment [without notice to Chase], that [The Dakota] pay [Chase] the net proceeds of such sale (*after reimbursing [The Dakota] for all sums due [The Dakota*]) . . .

[33] R. 378. Chase, of course, took possession of the Fletcher share certificate at the time of the 2008 loan; hence the Kasowitz firm's commencement of the proceeding below for turnover of the certificate from Chase.

[34] R. 157, Recognition Agreement.

and

> 4. While [Chase] ha[s] the right but no obligation to cure the Lessee's defaults under the Lease, if we [Chase] do 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)*.

(Emphasis added.)

Chase's Mistaken Reliance on *Krodel*

Chase places heavy reliance on this Court's *Krodel* decision. In *Krodel,* the underlying substantive dispute concerned the cooperative board's default in honoring its obligation to transfer cooperative shares from the petitioner's husband to petitioner. This Court's *Krodel* decision assumes, though it did not decide, that the board was in default and that an award of fees to it would therefore be punitive and unconscionable. This decision was a year after the *Fletcher* judgment awarding fees that Chase seeks to retroactively invalidate on this appeal. *Krodel* also, on its face, announced new law ("this Court has not previously addressed . . . "),[35] and applies a rule from precedents involving a relationship between a for-profit private landlord and indigent rental tenants[36] to the very different circumstances of a cooperative relationship among proprietary lessees who have adopted a lease

[35] 166 A.D.3d at 413.
[36] Each of the cases cited in this Court's *Krodel* decision involved such a relationship.

provision as to fees for their mutual benefit and protection and equally applicable to all of them.

Furthermore, unlike in *Krodel,* there is no escaping the fact that The Dakota prevailed fully in the underlying *Fletcher* litigation at great cost to Mr. Fletcher's fellow cooperators and that there is no basis to conclude that the award of fees was unconscionable or a penalty, as the Court below properly reasoned.[37]

As the Court below also reasoned, Chase did not assert an affirmative defense of unconscionability or unenforceable penalty in any of its nineteen affirmative defenses, either in its initial pleading[38] or in any amended pleading.

Krodel cannot belatedly save Chase.

The Unpaid Maintenance and Assessments

A portion of The Dakota's priority claim in this proceeding was for unpaid maintenance and assessments unrelated to the fee judgment in *Fletcher.*[39] The Dakota submitted ample, admissible evidence of these amounts on the motions below, consisting of the affidavits of The Dakota's management company personnel

[37] Indeed, as noted above at p. 4 and n.4, denying The Dakota's claim in favor Chase's would be inequitable, if not unconscionable, where Chase is the assignee of the fee claim of the Kasowitz firm for its representation of *Fletcher* in losing the *Fletcher* litigation.
[38] R. 118 *et seq.* Chase Answer, Cross-claims and Affirmative Defenses.
[39] R. 97, Answer at ¶¶ 43-50.

responsible for compiling, billing and tracking the lessee accounts and various corporate documents substantiating the amounts.[40]

Chase submitted no evidence in opposition, even though it had deposed Mr. McFarland, from The Dakota's management company, at length,[41] and no arguments concerning these sums in its memorandum of law in opposition to The Dakota's motion below.[42]

For the reasons set forth below, Justice Lubell's decision and order should be affirmed in all respects.

[40] R. 309, *et seq.,* affidavit of Samantha Signorella, R. 679 *et seq.,* affidavit of Robert McFarland, and R. 886, *et seq.,* Reply Affidavit of Samantha Signorella, and exhibits thereto.
[41] R. 534, Excerpts of McFarland deposition, though there was no questioning as to the sums at issue.
[42] R. 864, Table of Contents of Chase Memorandum of Law below.

ARGUMENT

POINT I

THE LOWER COURT'S DECISION SHOULD BE AFFIRMED BECAUSE APPELLANT'S ATTACK ON JUSTICE BLUTH'S DECEMBER 2017 JUDGMENT IS PROCEDURALLY IMPROPER AND BARRED BY *COLLATERAL ESTOPPEL*

Three of Chase's first four points on appeal[43] depend on the argument that Justice Bluth's December 2017 judgment in the *Fletcher Suit* awarding The Dakota legal fees as the prevailing party was erroneous. Because Appellant's collateral attack on the 2017 Bluth judgment is procedurally improper and barred by collateral estoppel each of Chase's three points of appeal fail.

A. Chase's Collateral Attack on Justice Bluth's 2017 Judgment is Procedurally Improper.

Putting aside Chase's decision not to intervene in the fee application before Justice Bluth in the first instance, CPLR 5015, "Relief from Judgment or Order," sets forth the procedure for an interested person to obtain relief from a judgment after the fact. The Court of Appeals has long held that an interested person "need not have been a party to the original action." *Oppenheimer v. Westcott*, 47 N.Y.2d 595, 600 (1979). "[A]ll that is necessary is that some legitimate interest of the moving party will be served and that judicial assistance will avoid injustice." *Id.* (*citing* 5 Weinstein-Korn-Miller NY Civ Prac § 5015.15). Chase admits that it is an

[43] Points I, II and IV.

interested party to the 2017 judgment. *See, e.g.* App. Brief at Point V (arguing Chase "clearly has the right" to attack The Dakota's claim for legal fees that would diminish the value of Chase's lien on the Property).

A final judgment represents a conclusive adjudication of rights, unless and until it is overturned on appeal or vacated pursuant to CPLR 5015. *Neville v. Martin*, 38 A.D.3d 386, 387 (1st Dep't 2007) ("it is elementary that a final judgment or order represents a valid and conclusive adjudication of the parties' substantive rights, unless and until it is overturned on appeal," and "a motion to vacate a prior judgment, if available at all, had to be made pursuant to CPLR 5015"); *James v. Shave*, 62 N.Y.2d 712 (1984) (a motion to vacate the prior judgment, if available at all, must be made pursuant to CPLR 5015); *Imbesi v. First Fed. Sav. & Loan Ass'n of Rochester*, 229 A.D.2d 471 (2d Dep't 1996) (plaintiff's motion for summary judgment "was properly denied, since the underlying action was improper. Rather than commence a plenary action to vacate the judgment of foreclosure and sale, the plaintiff should have made a motion to vacate in the foreclosure action.").

Chase failed to move to vacate the December 2017 judgment. The judgment was not reversed on appeal. Chase's collateral attack on Justice Bluth's 2017 judgment, in a separate proceeding and before a different judge, is procedurally improper under the CPLR.

B. Chase, in Privity with Fletcher, is Collaterally Estopped from Attacking the 2017 Judgment.

Collateral estoppel precludes a party from re-litigating in a subsequent action an issue raised in a prior action and decided against that party or those in privity. *Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d 494, 500 (1984); *In re Hofmann*, 287 A.D.2d 119, 123 (1st Dep't 2001). It applies, *inter alia*, when a different judgment in a second action "would destroy or impair rights or interests established by the first." *Ryan*, 62 N.Y.2d at 500-01. The policies underlying its application are avoiding re-litigation of a decided issue and the possibility of an inconsistent result. *Buechel v. Bain*, 97 N.Y.2d 295, 303-04 (2001).

Privity, for collateral estoppel purposes, exists between a mortgagor and mortgagee to bind the mortgagee to the results of legal proceedings in which the mortgagee had a stake and was unified in interest with the mortgagor. *Altegra Credit Co. v. Tin Chu*, 29 A.D.3d 718 (2d Dep't 2006) (holding mortgagee was collaterally estopped from re-litigating issue determined in mortgagor's separate proceeding when there was a "unity of interest," inasmuch as both parties had a stake in establishing the validity of the mortgage); *In Re 56 Walker, LLC*, 2014 WL 1228835, at *3 (Bankr. S.D.N.Y. Mar. 25, 2014) (holding creditors, who were not parties to prior action, are bound to decision by collateral estoppel because they "are in privity with the Debtor" and the interests of the debtor and its creditors were fully aligned

for preclusion purposes). In this case, the interests of Chase and Fletcher were fully aligned in that they both had the same interest in defeating The Dakota's claim for fees, that Fletcher, in fact, opposed vigorously.

Chase does not deny that it is in privity with Fletcher regarding The Dakota's legal fee claim. *See, e.g.,* App. Brief at 47 ("As an assignee of Fletcher's rights in the Property, Chase clearly has the right to attack The Dakota's claim for a recovery that would diminish the value of Chase's lien on the Property."). There was also express contractual privity among Chase, Fletcher and Dakota by reason of the Recognition Agreement.

Chase also had detailed notice of the nature and amount of The Dakota's fee claim, and of the motions to confirm and reject the recommendation of JHO Gammerman.[44]

Chase is collaterally estopped from re-litigating the December 2017 judgment in the *Fletcher Suit*. The December 2017 judgment was entered by Justice Bluth after a contested evidentiary hearing and motions to confirm and reject. Chase was on notice of the nature and amount of The Dakota's claim and of the motions to confirm and reject.[45] Chase had a full and fair opportunity to intervene and litigate

[44] *See* 2015 letter to Chase's counsel and affirmation filed in the proceeding, both detailing The Dakota fee claim, R. 573-77 and 567, and email exchange in June 2017 providing Chase's counsel with copy of The Dakota fee application to Justice Bluth, R. 578-79.

[45] In opposition to The Dakota's summary judgment motion, on the issue of collateral estoppel, Chase relied on *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481 (1979). To the extent

in the *Fletcher Suit* to protect its interests if it thought Fletcher was not doing so. Chase and Fletcher's interests in opposing The Dakota's fee application were fully aligned. Chase is in privity with Fletcher regarding The Dakota's claim for legal fees under the Lease. Accordingly, Chase is barred by collateral estoppel from re-litigating The Dakota's legal fees granted in the 2017 judgment in the *Fletcher Suit*.

POINT II

THIS COURT'S 2018 DECISION IN *KRODEL* DOES NOT INVALIDATE JUSTICE BLUTH'S 2017 JUDGMENT IN THE *FLETCHER SUIT*

Chase's first point of appeal contends that this Court's decision in *Krodel v. Amalgamated Dwellings Inc.*, 166 A.D.3d 412 (1st Dep't 2018) requires reversal of Justice Lubell's order. *Krodel,* however, has no bearing on the present case and appeal because: (i) *Krodel* cannot be applied retroactively to invalidate an earlier final judgment, (ii) *Krodel* is distinguishable factually and as to policy, (iii) application of *Krodel* would lead to an absurd and inequitable result in this case where The Dakota prevailed in the *Fletcher Suit* and Chase asks this Court to apply *Krodel* to benefit Chase as the assignee of the non-prevailing party, (iv) Chase did not assert its *Krodel*-based unconscionability argument as an affirmative defense,

---

Chase again relies on *Gramatan* in reply, it is inapposite. The *Gramatan* Court emphasized that the party in the latter case had no knowledge of the prior litigation, unlike the present case where Chase was fully on notice of the *Fletcher Suit* and Dakota's claim as to the priority it would have *vis-a-vis* Chase with respect to the Judgment. Further, the predecessor had no interest in the property at the time of the prior litigation, unlike the present case where both Fletcher and Chase had an interest in the Shares and Lease at the time of the fee application.

and (v) the Lease provision here at issue, under well-established law, does require The Dakota to prevail in order to collect prevailing party fees.

A. *Krodel* Cannot Be Applied Retroactively to Invalidate the 2017 Judgment in the *Fletcher Suit*.

It is settled law that "the conclusive effect of a final disposition is not to be disturbed by a subsequent change in decisional law." *Gowan v. Tully*, 45 N.Y.2d 32, 36 (1978); *Slater v. Am Minerals Spirits Co.*, 33 N.Y.2d 443, 447-48 (1974).

In *Pelt v. Police Dep't, City of N.Y.*, 258 A.D.2d 382, 382 (1st Dep't 1999), this Court affirmed dismissal of a second proceeding following a final disposition of the first, since a final disposition is not to be disturbed by a subsequent change in decisional law, and thus, "the issuance of *Gould v. New York City Police Dept.*, 89 N.Y.2d 267, subsequent to the disposition of the first proceeding, cannot serve to resurrect petitioner's previously-dismissed claim." See also *Charles v. Chase Manhattan Bank, N.A.*, 254 A.D.2d 321 (2d Dep't 1998) (granting Chase's motion for summary judgment to dismiss a second action based on *res judicata* when the second action was commenced after an appellate court decision effecting a change in the law); *Wilk v. Genesee & Wyoming Railroad Co.*, 45 A.D.3d 1274, 1275-76 (4th Dep't 2007) ("plaintiffs did not take an appeal from the order dismissing the first action and it thus is a judicial decision upon a question of fact or law which is not provisional and subject to change and modification in the future by the same

tribunal. . . . . Retroactivity analysis does not permit application of new law to cases already resolved.") (internal citations and quotations omitted).[46]

Chase argues that Justice Bluth's 2017 judgment should be re-visited and invalidated based on the subsequently-decided *Krodel* case. The lower court properly rejected this argument. The final disposition of Justice Bluth's 2017 judgment is *res judicata* and not to be disturbed by a subsequent change in decisional law. *Krodel* cannot be applied retroactively to invalidate a case that has already been resolved by a final judgment.

B. *Krodel* is Distinguishable, and Applying its Narrow Holding to this Case Would Produce an Absurd and Inequitable Result .

In *Krodel* the court rejected the fee claim of a cooperative corporation, based on a proprietary lease provision that did not require the corporation to prevail, against its proprietary lessee who claimed that the corporation had defaulted in its obligation to recognize the transfer of the apartment at issue from the plaintiff's husband to the plaintiff. The underlying merits of the dispute had not yet been adjudicated and the corporation made a pre-emptive motion for its fees. The court applied an unconscionability/penalty analysis previously used in disputes between

[46] Furthermore, this Court's decision in *Krodel* was not a mere application of then-existing law and could not have been predicted in 2017 when the *Fletcher* fee application was litigated. *Krodel* relied on and extended decisional law made in fee disputes between adverse for-profit landlords and indigent rental tenants to the very different circumstances of a fee provision adopted by cooperators for their mutual benefit and protection and applicable to all of them equally.

for-profit landlords and indigent rental tenants to likewise invalidate the fee provision in the *Krodel* proprietary lease as an unconscionable penalty.[47]

In *Glaze Teriyaki, LLC v. Macarthur Prop. I, LLC*, 2021 WL 5449595 (Sup. Ct. N.Y. Cnty. Nov. 22, 2021), decided post-*Krodel*, the plaintiff-tenant, who did not prevail in the action, argued, as Chase does here, that the fee-shifting provision of the lease should not be enforced to award fees to the prevailing party. Justice Ostrager rejected this expansion of *Krodel* to deny a prevailing party legal fees under a lease. Justice Ostrager noted that the holding in *Krodel* was "specific" and "limited" to actions for breach of the lease, and refused to expand its reach when – as in this case – the tenant did not sue the landlord for breach of the lease.[48] *See* *Glaze*, 2021 WL 5449595 at * 3 ("The Tenant did not sue the Owner for breach of the Lease. Therefore, *Krodel* has no application here.")[49] Further, as here, the

[47] This Court need not revisit *Krodel* to affirm Justice Lubell's decision and order in the present case. But it is difficult to see how a lease provision adopted by cooperators for their mutual benefit and protection, equally applicable to all of them and explicitly incorporating a reasonability requirement, can be viewed as an unconscionable penalty. The Court of Appeals has held, "[a]n unconscionable contract has been defined as one which is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal term." *Gillman v Chase Manhattan Bank, NA.*, 73 NY2d 1, 10 (1988) (internal quotations omitted). "The doctrine, which is rooted in equitable principles, is a flexible one and the concept of unconscionability is intended to be sensitive to the realities and nuances of the bargaining process." *Id*. (internal quotations omitted). 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." *Id*.

[48] R. 191-255.

[49] None of the causes of action of Fletcher's Complaint, Amended Complaint or Second Amended Complaint sounded in breach of the Lease.

landlord was the prevailing party in *Glaze,* and the policy concern of *Krodel* – awarding the losing party its attorneys' fees – was not implicated.

Krodel is likewise distinguishable from the present case. The Dakota was not sued for default, and it was indeed the prevailing party. Furthermore, it would be unjust to allocate the limited funds available from the sale of Fletcher's apartments to deny The Dakota, the prevailing party in the *Fletcher Suit*, recovery of its fees, and instead grant recovery to Chase, the assignee of the default judgment obtained by the Kasowitz law firm that represented Fletcher, the losing party in the *Fletcher Suit*. Justice Lubell's order granting The Dakota its attorneys' fees as the prevailing party is consistent with long-standing authority that a prevailing party may recover fees, *Matter of Wiederhorn v. Merkin*, 98 A.D.3d 859, 862-63 (1st Dep't 2012), and the policy concerns of *Krodel* are not implicated here.

C. Chase Failed to Assert Unconscionability as an Affirmative Defense

The lower court correctly held that Chase waived its *Krodel*-based unconscionability affirmative defense by failing to plead it as one of its nineteen affirmative defenses.

The affirmative defense of unconscionability is waived if not raised in the pleading and 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. *Citicorp Leasing, Inc. v Us. Auto Leasing, Inc.*, 58 A.D.3d 479 (1st Dep't 2009); *Butler v Catinella*, 58

A.D.3d 145, 150 (2d Dep't 2008); *Wells Fargo Fin. Leasing, Inc. v. Kokoon, Inc.*, 2013 WL 391439, at *7 (Sup. Ct. N.Y. Cnty. Jan. 25, 2013) ("defendant has waived the *unconscionability* defense as it did not assert it in its answer, pursuant to CPLR 3018 (b)") (italics in original); *Garber v. Stevens*, 2011 WL 10796714, at *5 (Sup. Ct. N.Y. Cnty. June 06, 2011) (defendants did not plead unconscionability as an affirmative defense and it was not explored in discovery; accordingly, it may not be considered).

D. Under Well-Established Law, The Lease Does Require The Dakota to Prevail to Collect Legal Fees .

Article II (Fifteenth) of the Lease limits recovery to "reasonable" fees. In the context of recovery of attorneys' fees in litigation, "reasonable" by implication requires that the party have prevailed. See *Firemen's Ass'n of State of N.Y. v. Washington, LLC*, 73 A.D.3d 1320, 1323-24 (3d Dep't 2010) (where license agreement grants plaintiff right to recover "reasonable" attorneys' fees but is silent as to whether such right is contingent upon the merits, "we agree with Supreme Court that the requirement that plaintiff prevail in the litigation may be reasonably inferred."); *437 West 16th Street LLC v. 17th and 10th Assoc. LLC*, 2017 WL 1001601, at *3 (Sup. Ct. N.Y. Cnty. Feb. 15, 2017) (holding that the indemnification agreement, which does not mention the term "prevailing party," conditions plaintiffs' entitlement to attorney's fees on prevailing party status.).

Awarding legal fees to the losing party would not be reasonable. *Krodel's* result is consistent with longstanding authority that only a prevailing party may recover fees, even if a fee provision does not so provide. *See, e.g., Matter of Wiederhorn v. Merkin*, 98 A.D.3d 859, 862-63 (1st Dep't 2012), *lv. denied* 20 N.Y.3d 855; *Nestor v. McDowell*, 81 N.Y.2d 410, 415-16 (1993) (only a prevailing party is entitled to attorney's fees); *E. 55th St. Joint Venture v. Litchman*, 122 Misc. 2d 81, 85 (Civ. Ct. N.Y. Cnty. 1983) (Saxe, J.), *aff'd,* 126 Misc. 2d 1049 (App. Term 1984) ("The purpose of awarding counsel fees, whether mandated by statute, agreement or otherwise, is to recompense a successful litigant for the costs of litigation, *not to compensate an unsuccessful party*. . . . An award of counsel fees to a non-prevailing party would be an absurd and oppressive result.") (emphasis in original). Indeed, in this proceeding, Kasowitz – who represented the non-prevailing party, Fletcher, in the *Fletcher Suit*, and Chase as the assignee of the Kasowitz claim – seek exactly that "absurd and oppressive" result. It seeks to have the limited funds from the proceeds of sale of the Fletcher apartments credited to Kasowitz's $2.7 million claim for unpaid fees that Kasowitz charged Fletcher in representing him in losing the *Fletcher Suit*, while depriving the prevailing party in that suit, The Dakota, any recovery of fees.

POINT III

THE LOWER COURT CORRECTLY FOUND THAT ARTICLE II (FIFTEENTH) OF THE LEASE IS CLEAR AND UNAMBIGUOUS

Justice Bluth's 2017 judgment granted The Dakota's counterclaim for legal fees under Article II (Fifteenth) of the Lease for prevailing in the *Fletcher Suit*. As shown above: (i) the judgment is *res judicata*, (ii) Chase failed to move to vacate the judgment under CPLR 5015, (iii) the *Krodel* decision cannot apply retroactively to invalidate the earlier judgment, and even if it could, (iv) *Krodel* is legally and factually distinguishable. Notwithstanding, if Chase's improper attempt to re-litigate the interpretation of Article II (Fifteenth) is considered on appeal, the lower court properly found that the provision is "clear and unambiguous," and Chase's reliance on a twenty-year-old memorandum, in an effort to create ambiguity or uncertainty in the express and plain terms of Article II (Fifteenth), must be rejected.

Courts must first examine the contractual language itself, without consideration of extrinsic evidence. Where the language is unambiguous, it should be applied as written. *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990); *Riverside South Planning Corp. v. CRP/Extell Riverside, L.P.*, 60 A.D.3d. 61, 66 (1st Dep't 2008).

Article II (Fifteenth) provides, in full:

> *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 claims 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.

(Emphasis added.)

As the lower court properly held, this provision clearly and unambiguously provides that The Dakota may recover attorney's fees in two situations: (1) if The Dakota commences an action against Fletcher because he is in default under the Lease, or (2) if Fletcher commences an action or proceeding against The Dakota. In either event, the fees must be reasonable.

The agreement among The Dakota's shareholders – that reasonable legal fees incurred by the cooperative in defending a suit by a shareholder should be reimbursed – has ample justification. The Dakota is not a for-profit landlord; it is a group of cooperators and neighbors. Where one of them inflicts legal costs on the others by pursuing a suit, the parties' agreement that such person should reimburse the reasonable fees incurred by the cooperative should be honored as written. There is no ambiguity in their agreement and no basis to look outside the four corners of Art. II (Fifteenth) to create an ambiguity.

Chase attempts to create an ambiguity in this provision by two attacks. First, it offers a tortured analysis of the meanings of "and" and "or." But there is no "or" in Art. II (Fifteenth) that, if converted or read as "and," makes any grammatical sense or reaches Chase's desired interpretation. The attempt to find ambiguity in the language is baseless.

Second, Chase relies on a memorandum distributed to shareholders twenty years ago in advance of a later shareholders meeting that adopted Art. II (Fifteenth). Any conflict between the memorandum and the language of the provision actually subsequently approved by the shareholders should, as with statutory provisions, be resolved in favor of the text as the "clearest indicator of legislative intent." *DaimlerChryler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006). The Lease provision was passed by the shareholders, not the earlier memorandum. Each of the witnesses who were deposed – Mr. Shmulewitz, Mr. Chu, Mr. McFarland and Ms. Sosnoff - (except Mr. Myers who had no recollection of the events two decades previously) disputed Chase's argument as to the meaning of the provision and the intent at the time it was adopted in 2000.[50] No witness, over five days of vigorous examination by Chase's counsel, agreed with or adopted the interpretation desired by Chase

Accordingly, even if this Court disregards the 2017 Bluth judgment and re-adjudicates The Dakota's legal fee claim under Article II (Fifteenth), Chase's

[50] *See* pp. 12-14 *ante* and deposition excerpts referenced therein.

tortured interpretation of the provision should be rejected. It is contrary to the clear and unambiguous language of Article II (Fifteenth), contrary to the litigated result of the fee claim in 2017, and contrary to the understanding and intent of the persons involved in 2000.

POINT IV

PURSUANT TO THE UCC, THE COOPERATIVE RECORD, AND THE RECOGNITION AGREEMENT, THE DAKOTA'S 2001 LIEN HAS PRIORITY OVER CHASE'S 2008 LIEN

The Dakota's governing documents grant a lien on the Shares, perfected by statute at the time the cooperative interest is established. The lower court correctly held that The Dakota's claim, secured by a perfected cooperative organization security interest, has priority over any other claims under the UCC.

A. The UCC Cooperative Organization Security Interest Secures The Dakota's Lien Priority .

UCC §9-102(74) establishes a statutory "cooperative organization security interest" that secures all obligations of the shareholder to the cooperative created by the cooperative record. UCC § 9-308(h) provides, in turn, that the security interest is perfected at the time that the shareholder takes ownership, and "remains perfected so long as the cooperative interest exists." In this case, the cooperative security

interest was established at the time the Shares were issued to Fletcher, in 2001, prior to the lien granted to Chase by Fletcher at the time of Chase's loans in 2008.

Pursuant to UCC § 9-322(h)(1), "a cooperative security interest has priority over all other security interests in a cooperative interest." (Emphasis added.) As summarized by the leading cooperative and condominium treatise:

> Article 9 provides that a "cooperative record" (i.e. governing documents such as the proprietary lease) that states the owner of a cooperative unit has an obligation to pay amounts to the cooperative corporation incident to ownership and that the cooperative corporation has a direct remedy against the cooperative interest in the event of default constitutes a "security agreement" under Article 9. The cooperative corporation's security interest has priority over all other security interests in the cooperative unit.

Vincent DiLorenzo, *New York Condo. and Coop. Law* § 11.6 Lien on Shares and Proprietary Lease (2016-2017 Suppl.); *see also* Talel & Siegler, *Priority of Liens – Evolving Rules for Condominiums & Lenders*, N.Y.L.J. (Sept 7, 2016) ("Cooperative housing corporations have a first lien on shares and appurtenant proprietary leases for co-op apartments").

Here, The Dakota's cooperative record grants The Dakota a first priority lien on the shares appurtenant to the Lease:

Article II (First) of the Lease obligated Fletcher to pay any "rent or maintenance charge, any other assessment, charge or imposition imposed by the Lessor upon its shareholders," "late charges," and "charges and obligations, if any

incurred by the Lessee for telephone or other services."[51] The Dakota's claim for unpaid monthly maintenance, the December 2015 assessment, the late charges, and other miscellaneous charges are within this secured obligation.

Article II (Fifteenth) of the Lease required Fletcher to pay, as "additional rent," reasonable legal fees incurred by The Dakota in defending against any action or proceeding he brought against The Dakota.[52] The 2017 legal fees judgment was expressly based on The Dakota's First Counterclaim for legal fees as additional rent pursuant to Art. II (Fifteenth).

Article VI § (6) of The Dakota's bylaws provides that The Dakota has a "lien upon the shares of stock" to secure (i) payment of all rent due under the proprietary lease, (ii) "for all other indebtedness" of the shareholder, and (iii) for the performance of all other covenants and conditions of the lease.[53]

The Dakota's certificate of incorporation provides, "[i]f a stockholder shall be indebted to the corporation, the directors may refuse to consent to a transfer of his stock until such indebtedness is paid, provided a copy of this section or the substance thereof is written or printer upon the certificate of stock."[54]

[51] R. 461.
[52] R. 468.
[53] R. 348.
[54] R. 351, 354.

A legend giving notice of The Dakota's lien is emblazoned on the stock certificate.[55]

The 2017 judgment for attorney's fees constitutes an "indebtedness" of Fletcher for additional rent secured by these lien rights. The lower court correctly found that The Dakota's judgment for legal fees under Article 15 of the Lease, a claim secured by a perfected cooperative organization security interest, has priority over any other claims secured by the Shares and Lease, and therefore, the Dakota's security interest in the Shares and Lease is superior to those of Chase.

B. The Recognition Agreement Further Supports The Dakota's Priority Lien.

In 2008, Chase recognized that The Dakota's lien is superior to Chase's cooperative loan lien. The Recognition Agreement made among Chase, Fletcher and The Dakota provides:

> 2(e) [The Dakota] shall recognize [Chase's] right as lienor against the Apartment pursuant to the Security, and, if the Lease be terminated and/or shares cancelled, against the net proceeds of any sale or subletting of the apartment, after reimbursement to [The Dakota] of all sums due [The Dakota] under the Lease.
>
> ***
>
> 3(c)(2) If [The Dakota] ha[s] already sold or contracted to sell the Apartment [without notice to Chase], that [The Dakota] pay [Chase] the net proceeds of such sale (after reimbursing [The Dakota] for all sums due [The Dakota]), . . .

[55] R. 378.

***

> 4. While [Chase] ha[s] the right but no obligation to cure the Lessee's defaults under the Lease, if we [Chase] do 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.

(Emphasis added.)

Thus, in each provision of the Recognition Agreement that addresses the priority of payment from the proceeds of sale, as between Chase and The Dakota, Chase recognizes that payment to The Dakota has priority. Chase agreed to and recognized The Dakota's priority separate from, and in addition to, the priority granted pursuant to the UCC.

C. The 2017 Bluth Judgment Was Properly Considered Part of The Dakota's Security Interest.

Chase argues that the 2017 judgment does not form part of The Dakota's cooperative organization security interest because Fletcher's liability to The Dakota for its legal fees in the *Fletcher Suit* is not incidental to the Lease. This argument is both incorrect in substance, and procedurally barred because it requires invalidating the 2017 fee judgment that awarded fees as additional rent pursuant to the Lease.

At the time he commenced his suit, Fletcher had been a shareholder of Dakota for over a decade (in addition to having been a director and President of the Board).

In his pre-suit demand letter,[56] Fletcher expressly asserted that his purported right as an existing shareholder to submit a purchase application without financial disclosures was violated. In his subsequent Complaint,[57] he describes his suit as one to vindicate his rights as a shareholder. He alleges violation by board members of The Dakota's policies for the benefit of existing shareholders and he principally asserts claims available only to existing shareholders – breach of fiduciary duty, violation of board policies benefitting shareholders, and differential treatment of him and white shareholders. Chase's contention that the *Fletcher Suit* was unrelated to his ownership interest in the cooperative is contrary to the facts.

As noted, Article II (Fifteenth) of the Lease provides that if The Dakota shall defend any action or proceeding commenced by Fletcher, Fletcher will reimburse The Dakota for all expenses, including but not limited to reasonable attorneys' fees and disbursements, thereby incurred by The Dakota, and that The Dakota "shall have the right to collect the same as additional rent or damages." Likewise, the Bylaws, Art. VI, Section 6, provide that The Dakota has a lien on Fletcher's Shares to secure his rent and all other indebtedness and obligations:

> 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

[56] R. 449.
[57] R. 191-255.

> 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.

(Emphasis added.) These provisions establish that The Dakota's judgment for legal fees is secured by, and incidental to, the cooperative record. The Dakota's cooperative organization security interest is not limited to rent or to a shareholder obligation reflected in any particular cooperative document. The cooperative is protected with respect to all shareholder obligations arising from or related to the cooperative relationship.

POINT V

THE DAKOTA SUFFICIENTLY DEMONSTRATED, AND CHASE FAILED TO REFUTE, THE DAKOTA'S CLAIMS FOR UNPAID MAINTENANCE AND ASSESSMENTS

Chase argues that The Dakota has not demonstrated that the maintenance and assessment amounts it claims are unpaid. The argument is meritless.

Contrary to Chase's contentions, The Dakota submitted the affidavits of persons with knowledge of the maintenance and other charges owed by Mr. Fletcher and the documents upon which the claims were based. Mr. McFarland, The Dakota's management account executive until June 2019, provided his May 11, 2018, affidavit as to the amounts due at that point in time, and supporting documents.[58] Ms. Signorella, a current management executive, submited her

[58] R. 679.

affidavit sworn to November 30, 2020,[59] and a compilation[60] that brought Mr. McFarland's compilation current through November 30, 2020. Their affidavits and exhibits amply fulfilled The Dakota's burden on these motions. *See Whitney Condo. v. Tempesta*, 2008 WL 8115125, *1 (Sup. Ct. N.Y. Cnty. 2008); *Roshodesh v. Plotch*, 2012 WL 2295441, *2-3 (Sup. Ct. Queens Co. 2012). Chase offered no contrary evidence, even though Mr. McFarland was deposed by Chase at length. Its argument is without merit and the Court below properly granted summary judgment.

POINT VI

CHASE'S "CHICKEN LITTLE" POLICY ARGUMENT – THAT AFFIRMING THE LOWER COURT WILL CREATE A CHILLING EFFECT ON COOPERATIVE LENDING – IS BASELESS

Chase's Chicken Little "the sky is falling" policy argument is both irrelevant and baseless. In the UCC, the New York Legislature allocated the rights and priorities among competing lienors; the Court below correctly applied them. There is no basis for this Court to ignore the statutory priorities to relieve Chase from its decision as to how to assert or protect its rights – whether made intentionally or by oversight - that did not pan out. There is no basis for this Court to re-allocate the statutory rights and priorities to give additional protection to the mortgage banking industry.

[59] R. 309
[60] R. 886-898.

CONCLUSION

For the reasons set forth above, the Order dated and entered August 4, 2021, and Judgment dated and entered November 8, 2021, should be affirmed.

Dated: May 31, 2022

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To be Argued by:
ZACHARY G. NEWMAN
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,

Petitioner,

– against –

JPMORGAN CHASE BANK, N.A.,

Respondent-Appellant,

– and –

THE DAKOTA, INC.,

Respondent-Respondent,

(For Continuation of Caption See Inside Cover)

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

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– 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.

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REPLY ARGUMENT

The Lower Court failed to address or grapple with Chase's reasonable and conflicting interpretation of the Lease, which (at the very least) required denial of summary judgment and a trial of the disputed interpretations. Instead, as demonstrated by its single-sentence analysis of the lease dispute, the Lower Court impulsively issued a decision without oral argument or consideration of prior rulings and The Dakota's unrefuted admissions that contradicted its interpretation. The Lower Court also failed to observe First Department precedent that renders The Dakota's interpretation of Paragraph 15th unconscionable and unenforceable. For these reasons, and as further supported by the arguments below, Chase respectfully requests this Court to reverse the Lower Court's decision and remand the disputed factual issues for trial.

I. THE LOWER COURT HAD NO BASIS TO RULE THAT PARAGRAPH 15TH UNAMBIGUOUSLY SUPPORTED THE DAKOTA IN LIGHT OF CHASE'S REASONABLE AND CONFLICTING INTERPRETATION

The Lower Court failed to explain how it reconciled two competing interpretations of Paragraph 15th. *See infra*, § I.A. Instead, the Lower Court simply stated the clause "clearly and unambiguously provides that the Dakota may recover…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." *See infra,* § I.A. As The

Dakota conceded Fletcher was not in default, the Lower Court concluded that the Lease empowers The Dakota to recover its legal expenses if any shareholder commences any action against it, regardless of whether The Dakota was at fault or the action related to the cooperative unit in question. *See infra,* § I.A. The Court provided no further analysis or reasoning to support its conclusion, and failed to address the language within the Lease that supported Chase's competing interpretation. *See infra*, § I.A.

By adopting The Dakota's interpretation, the Lower Court ignored Chase's plain and more reasonable interpretation of the Lease. *See infra*, § I.A. Chase explained that Paragraph 15th, by its terms and grammatical structure, was intended to (and does) limit The Dakota's recovery of legal fees from only tenant-shareholders "in default []under" the Lease. *See infra,* § I.A. Yet, the Lower Court gave no credit to this interpretation or explanation even though The Dakota's own corporate counsel, who drafted the Lease, admitted under oath this was a reasonable reading. *See infra,* § I.A. Furthermore, the other parts of the Lease sustain Chase's interpretation as they consistently limit The Dakota's recovery of legal fees to situations only involving shareholder default. *See infra*, § I.A. Yet, the Lower Court made no attempt to reconcile its reading with the plain language and grammatical structure of the clause or these other informative provisions of the Lease. *See infra*, § I.A.

The Lower Court also committed reversible error by failing to address The Dakota's own documents, admissions, and prior interpretation of the Lease that emphatically refute The Dakota's interpretation and corroborate Chase's interpretation. *See infra*, § I.B. Having just been reassigned the case from the Honorable Robert D. Kalish, the Lower Court not only failed to address, recognize, or credit this material and compelling evidence, but also failed to hold oral argument on the competing summary judgment motions and to credit Justice Kalish's prior rulings in Chase's favor as to the provision at issue. *See infra*, § I.C.

A more careful review of the record would have revealed explanatory comments that The Dakota included with the Lease when advocating for its adoption and signature. *See infra*, § I.B. These explanatory comments, alone, were sufficient to deny The Dakota any summary judgment relief. In fact, The Dakota's Board of Directors expended significant resources to preview and interpret Paragraph 15th for the tenant-shareholders through the corresponding Explanatory Comment, which was meant to educate tenant-shareholders prior to their vote to adopt the revisions and to inform future tenant-shareholders. *See infra*, § I.B. The Dakota assured its shareholders (via the Explanatory Comment) that Paragraph 15th limited the co-op's recoupment only to instances of shareholder default – the very interpretation put forward by Chase here. The Dakota now advocates that the Lower Court correctly

ignored these contemporaneous contract supplements and admissions. *See infra*, § I.B.

The Lower Court's dismissal of this evidence as inadmissible, extrinsic evidence is contrary to law especially given that the Lease contains no integration clause. At the very least, The Dakota's communications concerning its interpretation of the very provision that it seeks to enforce here should go to a jury for decision. Yet, the Lower Court summarily dismissed the evidence, failing to consider or factor it into deciding the proper interpretation and intent of the parties. *See infra*, § I.B. And instead of weighing these critical admissions and challenging The Dakota's present insincerity, the Lower Court limited its discussion to one conclusory finding that The Dakota's read was the proper interpretation. *See infra*, § I.A.

Lastly, the Lower Court violated earlier rulings by Justice Kalish. When Chase sought discovery on the meaning and intent behind the provision at issue, The Dakota objected on the basis that the Lease unambiguously supported its present interpretation. *See infra*, § I.C. Justice Kalish rejected that argument and allowed extensive discovery. *See infra*, § I.C. The Lower Court made no mention of this

decision, or why it failed to observe the law of the case, in its conflicting ruling. Accordingly, the Lower Court's decision should, respectfully, be reversed.[1]

A. The Dakota and the Lower Court Cannot Refute the Plain Language of the Lease That Supports Chase's Reading

Neither the Lower Court nor The Dakota reconciled their interpretation of Paragraph 15th with the actual language of that provision, which is entirely consistent with Chase's interpretation that The Dakota can only recover legal costs from shareholders in default:

> 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.

See R. at 698, 712. The Dakota argued, and the Lower Court concluded, that the language allows The Dakota to recover legal fees incurred in any action or proceeding commenced by a shareholder. *See* R. at 5, 10, 17, 22; *see also* Brief for Respondent-Respondent [NYSCEF Doc. No. 13] ("Respondent's Brief"), p. 31. However, the opening clause *"IF THE LESSEE SHALL AT ANY TIME BE IN DEFAULT HEREUNDER*" qualifies both subsequent clauses: (1) when The Dakota

[1] All capitalized terms that are not defined herein share the same definitions as Appellant's initial brief. *See* NYSCEF Doc. No. 10.

takes an action against the Lessee and (2) when The Dakota defends against any action or proceeding (emphasis added):

> [Opening] "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
> [Opening] "If the Lessee shall at any time be in default hereunder [ ] and...if the Lessor shall defend any action or proceeding (or claim therein) commenced by the Lessee,…"

See R. at 5, 10, 17, 22; *see also* *Major Oldsmobile, Inc. v. Gen. Motors Corp.*, No. 93 CIV. 2189 (SWK), 1995 WL 326475, at *6 (S.D.N.Y. May 31, 1995), *aff'd*, 101 F.3d 684 (2d Cir. 1996) ("[i]t is well established that" courts will frequently interpret the word "or" in contracts to mean both "and" and "or") (citations omitted).

Otherwise, there is no discernable purpose for the first two commas of the paragraph. *Jaronczyk v. Nassau County Interim Finance Authority*, No. 12934-13, 2014 WL 2826893, at *28-29 (Sup. Ct. Nassau Cnty. Mar. 13, 2014) (interpreting a disputed sentence against petitioner, in part, because the comma use – or lack thereof – did not comport with petitioner's reading). The Lower Court failed to address this grammatical structure and instead concluded, without explanation, that Paragraph 15th is "clear and unambiguous." *See* R. at 5, 10, 17, 22; *see also* Respondent's Brief, pp. 30-32.

In fact, the Lease, as a whole, contradicts the Lower Court's and The Dakota's reading of Paragraph 15th and, instead, supports Chase's understanding that The Dakota's recovery is limited to instances of shareholder default. *See, e.g.,*

Westmoreland Coal Co. v. Entech, Inc., 100 N.Y.2d 352, 358 (2003) (part of contract must be interpreted in relation to whole, as its meaning may be misconstrued when courts rely on individual words or phrases); *Glob. Reinsurance Corp. of Am. v. Century Indem. Co.*, 30 N.Y.3d 508, 519 (2017) ("Ambiguity is ascertained by reading the terms of the agreement, not in isolation, but as a whole") (citations omitted).

None of the other provisions of the Lease that allocate costs allow The Dakota to recoup expenses that arise from its own fault or wrongdoing. *See* R. at 700, 711-712 (Art. II, ¶ 12th), 712-713 (Art. II, ¶ 16th). For instance, The Dakota is immune from liability to shareholders for its failure to provide essential services or damage stemming from the elements except when such damage is "caused by or due to the negligence of" The Dakota. *See* R. at 700, 712-713 (Art. II, ¶ 16th). Similarly, The Dakota is not obligated to repair any damage caused to a shareholder's apartment while exercising its right of entry, unless the harm resulted from "the negligence of [The Dakota] or its employees." *See* R. at 700, 711-712 (Art. II, ¶ 12th). The Lower Court never addressed that these other provisions of the Lease are inconsistent with its interpretation of Paragraph 15th. *See* R. at 5, 10-12, 17, 22-24.

Even Aaron Shmulewitz – The Dakota's prior counsel who authored Paragraph 15th – testified that Paragraph 15th could be reasonably understood as requiring "the shareholder [to] be in default [] for the Dakota to recoup legal fees if

the shareholder initiates suit against the Dakota." *See* R. at 515, 519-520 (42:16-43:25), 1248, 1339 (231:6-231:9). Given the language of the Lease and the clear record, which support Chase's reasonable interpretation, the Lower Court's holding was error. *See* R. at 5, 10, 17, 22; *see also* *Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004) ("Had the contract been susceptible to more than one reasonable interpretation, it would have been ambiguous."); *Brad H. v. City of New York*, 17 N.Y.3d 180, 186 (2011) ("Ambiguity is present if language was written so imperfectly that it is susceptible to more than one reasonable interpretation").

B. Chase's Interpretation of Paragraph 15th Is the Same One That The Dakota's Board of Directors Adopted and Presented to Shareholders for Ratification

Mr. Shmulewitz is not alone in his view that Chase's interpretation of Paragraph 15th is reasonable. The Dakota's Board of Directors previously represented the same interpretation to the co-op's shareholders when they adopted the provision into the Lease. *See* R. at 1040-1043, 1048. Indeed, only one interpretation of Paragraph 15th was presented to shareholders by The Dakota's Board of Directors when the shareholders voted upon, and subsequently incorporated, the paragraph into the Lease. *See* R. at 1040-1043, 1048. In a memorandum to the co-op's shareholders dated April 5, 2000, The Dakota's Board of Directors provided an "Explanatory Comment" alongside the language of Paragraph 15th, as a proposed amendment to the Lease, which explicitly limited The

Dakota's recoupment of legal fees from only shareholders in DEFAULT:

> (Explanatory Comment – This change enhances the Shareholders' ability [] to recover our attorney [sic] 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.)

See R. at 1040, 1048. Thus, The Dakota advocated to its shareholders that this provision "protect[s]" them because shareholder default would be a prerequisite to The Dakota's recovery of legal fees. *See* R. at 1040, 1048. Shortly after receiving this interpretation, the shareholders adopted Paragraph 15th. *See* R. at 1814, 1817.

The Dakota now puts forward a different interpretation of Paragraph 15th, expanding The Dakota's recovery of attorneys' fees to include any action or proceeding commenced by shareholders *regardless* of shareholder default. *See* Respondent's Brief, p. 31. Yet, nothing has changed in the cooperative record since the co-op's adoption of Paragraph 15th more than twenty years ago. Tellingly, the Dakota *only* took the position it does now after incurring millions of dollars in legal fees by fighting discrimination claims from Fletcher, who – in The Dakota's own words – "was not in default or declared by [T]he Dakota to be in default of the proprietary lease." *See* R. at 1014; 1017 (¶ 5); *see also* Brief for Respondent-Appellant [NYSCEF Doc. No. 10] ("Appellant's Brief"), pp. 10-12. The Dakota further admitted that "any default by Mr. Fletcher was not the basis of The Dakota's

claims against him for legal fees in the action he brought against The Dakota." *See* R. at 1014. Thus, without The Dakota's newly revised interpretation, they have no basis to assert a lien by virtue of their $3.1 million in legal fees. *See* Appellant's Brief, p. 10.

The Lower Court should not have permitted The Dakota to escape these contract supplements and admissions as to the meaning of Paragraph 15th. Toni Sosnoff (The Dakota's president at the time) and Mr. Shmulewitz (the attorney who drafted both Paragraph 15th and the Explanatory Comment) both acknowledged that the Explanatory Comment presented shareholder default as the intended prerequisite for The Dakota to collect attorneys' fees incurred during a shareholder lawsuit. *See* R. at 1248, 1339-1343 (231:6-235:24), 1542, 1726 (185:4-185:25). Mr. Shmulewitz even admitted that the Explanatory Comment acted as "legislative history" to explain in "plain English" the purpose behind the lease amendment. *See* R. at 1248, 1326-1327 (218:18-219:4).[2]

Moreover, the presentation to shareholders of the Explanatory Comment, alongside Paragraph 15th, was the result of an extensive review process. The Dakota's counsel provided several drafts of the Explanatory Comment and Paragraph 15th to a committee of The Dakota's Board members who (in turn)

[2] Mark Myers, a Dakota board member in the year 2000, similarly described the purpose of the explanatory comment as reducing "legalese to non-expert, everyday language" and as a "data point" that shareholders would rely upon when voting on language to be adopted into the lease. *See* R. at 1119 (65:19-65:24), 1122-1123 (68:23-69:13),1123-1124 (69:25-70:17).

provided feedback for further edits. *See* R. at 1248, 1273 (165:9-165:14), 1323-1325 (215:20-217:8), 1352-1353 (244:4-245:14); 1364-1365 (256:9-257:25), 1369-1373 (261:19-265:2), 1824-1833. All of these drafts in the record explicitly and clearly limit The Dakota's recovery of legal fees to instances of shareholder default. *See* R. at 1508, 1524, 1531, 1824, 1833. This pattern is not surprising since Mr. Shmulewitz told The Dakota's managing agent that he would draft Paragraph 15th in a manner that restricted The Dakota's recovery of attorneys' fees to only shareholders in default. *See* R. at 2009, 2015, 2017. The Dakota's Board, in turn, expressed no opposition to this interpretation after the Board – in the President's own words – "intensively reviewed" the language of Paragraph 15th and the Explanatory Comment that were presented and recommended to shareholders. *See* R. at 1040, 1048.

In response, The Dakota deflects, claiming the Explanatory Comment cannot create an "ambiguity or uncertainty in the express and plain terms of" Paragraph 15th. *See* Respondent's Brief, pp. 5, 31-32. The Lower Court made the same error by treating the Explanatory Comment as mere extrinsic evidence. *See* R. at 5, 10-11, 18, 22-23. However, The Lower Court and The Dakota both ignore the fact that the Explanatory Comment can and should be considered part of the Lease that accurately reflects the intent of the parties. The Dakota drafted the Lease, yet neglected to include a merger or integration clause, and the aforementioned

circumstances surrounding the adoption of Paragraph 15th strongly suggest that Explanatory Comment was an integral and inseparable part of the contract that must be considered. *See* R. at 699-720; *see also* *Saxon Cap. Corp. v. Wilvin Assocs.*, 195 A.D.2d 429, 430 (1st Dep't 1993) (noting lack of merger clause, plaintiff's role in drafting the contract, and circumstances surrounding formation of agreement meant extrinsic evidence would be admissible to supply terms that parties intended to incorporate into their agreement). The Dakota cannot now claim, decades after adopting Chase's interpretation of the Lease – and only after The Dakota was faced with the opportunity to recover millions of dollars in legal costs after being sued for alleged discrimination – that shareholder default is not a prerequisite to its ability to recover its attorneys' fees from a shareholder. Rather, as was the case in the year 2000, the Lease mandates default before The Dakota can seek legal fees. Because Fletcher was not in default, The Dakota has no basis for recovery against Chase's collateral and security interest, and the Lower Court erred in finding otherwise.

C. Justice Robert D. Kalish Previously Rejected The Dakota's Interpretation of Paragraph 15th

Justice Kalish, who presided over the vast majority of the underlying action, rejected The Dakota's interpretation of Paragraph 15th.[3] In a motion for a protective order, The Dakota argued to Justice Kalish, as it did later to Justice Lubell, that

[3] The matter was reassigned after Justice Kalish's retirement in or about 2021.

Paragraph 15th unambiguously entitles it to recoup attorneys' fees from any action or proceeding commenced by a shareholder, and that discovery as to the meaning and intent behind the language was precluded. *See* R. at 593, 600-602 (8:2-10:7); 667 (75:9-75:19). Justice Kalish rejected this argument and directed discovery on the proper interpretation of Paragraph 15th:

> The scope of the deposition should be what we've discussed all along...even though I follow what you're saying, that, [Paragraph 15th] speaks for itself. But, what was the amendment? How did the amendment come about? Whether there was a discussion about the amendment. What they took away from it as to how it would be applied…

See R. at 593, 600-602 (8:2-10:7) 649 (57:6-57:24), 654 (62:6-62:16), 658 (66:13-66:16) 664 (72:5-72:15) 667-669 (75:4-77:24).

The parties then engaged in discovery for several months. The documents produced by The Dakota supported and corroborated Chase's interpretation of Paragraph 15th, including (but not limited to) the shareholder communications and explanatory comments referred to in Point I.B., *supra*, in which The Dakota repeatedly assured its shareholders that shareholder default was a precondition to its ability to recover legal fees under Paragraph 15th. *See supra* § I.B. This is perhaps why The Dakota failed to cite any document to support its own reading of Paragraph 15th (other than the Lease itself, which, as also noted above, does not support its reading). Tellingly, none of The Dakota's witnesses could refute the documentary evidence. *See* R. at 1248, 1339-1343 (231:6-235:24), 1542, 1726 (185:4-185:25).

Without Justice Kalish's ruling against The Dakota's allegedly unambiguous current reading of the Lease, none of these facts would have come to light. Yet, not only did the Lower Court ignore the evidence, it wholly failed to reconcile its holding with the law of the case established by Justice Kalish. *See* R. at 5-12, 18-24; *see also* *People v. Evans*, 94 N.Y.2d 499, 503 (2000) (referring to law of the case "as a concept regulating pre-judgment rulings made by courts of coordinate jurisdiction in a single litigation"); *A.H. v. Y.G.*, 72 Misc. 3d 1225(A), at *7 (Sup. Ct. Kings Cnty. 2021) (stating that the court was constrained by previous order from different Justice in the same matter because it was law of the case). For that reason, too, the Lower Court erred, warranting reversal.

II. THE LOWER COURT ERRED IN INTERPRETING THE LEASE IN A MANNER THAT VIOLATES THIS COURT'S *KRODEL* RULING

In addition to the fact that summary judgment should have been unavailable to The Dakota given the competing interpretations, the Lower Court should have ruled The Dakota's interpretation of Paragraph 15th is barred and rendered unconscionable under First Department precedent. As already noted, the Lower Court found that the clear and unambiguous language of Paragraph 15th enables the co-op to recoup legal fees in *any* action brought by a shareholder. *See* R. at 5, 10, 17, 22; *see also* Respondent's Brief, p. 31. Thus, under The Dakota's interpretation of Paragraph 15th, as adopted by the Lower Court, the co-op can recoup legal fees even if it is at fault. Such an interpretation falls squarely within the First

Department's precedent in *Krodel v. Amalgamated Dwellings Inc*., which renders such provisions "unconscionable and unenforceable as a penalty." 166 A.D.3d 412, 413-14 (1st Dep't 2018). The unconscionability stems from the language's effect of "dissuad[ing] aggrieved parties from pursuing litigation and preclud[ing] tenant-shareholders from making meaningful decisions about how to vindicate their rights in legitimate instances of landlord default." *Krodel*, 166 A.D.3D at 414. Both the Lower Court and The Dakota failed to observe *Krodel*.

A. *Krodel* Is Binding and Precludes the Lower Court's Interpretation of Paragraph 15th

Krodel cannot be avoided or distinguished. There, the plaintiff (a shareholder) sued the cooperative for its failure to transfer her husband's shares in a separate apartment to her. *Krodel v. Amalgamated Dwellings, Inc.*, No. 152176/2014 (Sup. Ct. N.Y. Cnty.), NYSCEF No. 92; *Krodel*, 166 A.D.3d at 412-13. Similarly, here, Fletcher sued The Dakota for its alleged failure to transfer to him shares associated with a separate apartment that he intended to purchase. *See* R. at 244-251.

This Court correctly noted in *Krodel* that broad language in a lease which enables the co-op to recover *reasonable* attorneys' fees, even when the co-op "is in default," will deter potential claimants (as previously noted). *See Krodel*, 166 A.D.3d at 414. This Court cited to *McClelland-Metz Mgt. v Faulk*, 86 Misc 2d 778, 781 (Nassau Dist. Ct. 1976), which similarly rendered a lease provision to be unconscionable for enabling a landlord to recoup attorneys' fees regardless of

outcome, even though the provision stated the landlord could recoup its "reasonable" fees. *McClelland-Metz*, 86 Misc 2d at 779-81; *see also Krodel*, 166 A.D.3d at 413. The same concerns apply to Paragraph 15th.

Contrary to The Dakota's assertions, Paragraph 15th's qualification of recoverable attorneys' fees as "reasonable" cannot save or support The Dakota's interpretation. Both Paragraph 15th and the lease provision at issue in *Krodel* qualified the recoverable attorneys' fees as "reasonable." *See* R. at 712 ("…the Lessee will reimburse the Lessor for all expenses [including, but not limited to attorneys' fees and disbursements] thereby incurred, so far as the same are reasonable in amount…"); *Krodel*, 166 A.D.3d at 412 (If the Lessor [respondent] shall incur any cost, fee or expense…including reasonable legal fees…"). This Court wisely did *not* rule in *Krodel* that such a qualification saved the lease provision or otherwise conditioned the co-op's recovery on prevailing. *See Krodel*, 166 A.D.3d at 413-14; *cf.* Respondent's Brief, pp. 28-29.

Nor is it material that the co-op prevails. In both *Krodel* and the Fletcher Suit, the co-ops prevailed against the shareholders. *Krodel*, No. 152176/2014, NYSCEF No. 371 (dismissing action); *see also* R. at 2019, 2066 (granting The Dakota summary judgment and denying Fletcher's cross-motion). The fact that the co-op prevailed did not deter this Court from invalidating the fee provision.

B. *Glaze Teriyaki* Is Irrelevant to This Case

The Dakota also attempts to avoid *Krodel* by suggesting that *Glaze Teriyaki* supports the Lower Court's ruling. *See* Respondent's Brief, pp. 26-27. It does not. The negotiating parties and contract language in *Glaze Teriyaki* bear no resemblance to the underlying dispute and, importantly, do not invoke any of the concerns raised by this Court in *Krodel*. As this Court recently ruled, the contract language at issue in *Glaze* was in a commercial lease that resulted from arms-length negotiations between "sophisticated entities." *Glaze Teriyaki LLC v. MacArthur Properties I LLC*, 168 N.Y.S.3d 687, 688 (1st Dep't 2022). In contrast, both Paragraph 15th and the lease provision at issue in *Krodel* were in residential leases between co-ops and their tenant-shareholders.[4] *Krodel*, 166 A.D.3d at 412; *see also* Appellant's Brief, pp. 14-19. Unlike the "sophisticated entities" in *Glaze Teryaki*, the tenant-shareholders of The Dakota were provided explanatory comments that presented the lease amendments in "plain English" (including the language of Paragraph 15th). *See* R. at 1248, 1326-1327 (218:18-219:4);[5] *cf.* *Glaze*, 168 N.Y.S.3d at 688. As discussed, the Explanatory Comment for Paragraph 15th explained to tenant-shareholders that The Dakota could only recoup attorneys' fees from those in default,

[4] Chase had no say or involvement in Paragraph 15th's adoption. Rather, in conjunction with the loans it made to Fletcher, Chase was assigned Fletcher's rights in the property in 2008.

[5] The Dakota's managing agent in the year 2000 noted that the explanatory comments were given to the shareholder so they can understand [] the [lease] amendments [] being proposed." *See* R. at 2005 (134:8-134:17).

which supports Chase's interpretation and is squarely at odds with The Dakota's interpretation. *See supra*, § I.B.

Furthermore, the lease provision at issue in *Glaze Teriyaki* did not raise the same concerns as those discussed in *Krodel* and that are triggered by The Dakota's interpretation of Paragraph 15th. In *Glaze Teriyaki*, the commercial landlord sought to recover legal fees incurred from successfully evicting the commercial tenant upon the tenant's default, and the commercial lease provision at issue specifically allowed the landlord to recoup attorneys' fees in connection with the tenant's default. *See* *Glaze Teriyaki, LLC v. Macarthur Properties I, LLC*, No. 653883/2013, 2021 WL 5449595, at *1-*2 (Sup. Ct. N.Y. Cnty. Nov. 22, 2021). Thus, the lease provision at issue in *Glaze Teriyaki* conforms to Chase's interpretation of Paragraph 15th because it conditioned the landlord's recoupment of attorneys' fees on tenant default. *See* *Glaze Teriyaki*, 2021 WL 5449595, at *1; *see also supra*, § I.A. With this prerequisite, tenants situated similarly to those in *Glaze Teriyaki* (such as The Dakota's tenant-shareholders under Chase's interpretation of Paragraph 15th) would *not* be dissuaded from bringing meritorious claims. *Cf.* *Krodel*, 166 A.D.3d at 414.

In contrast, The Dakota argues that Paragraph 15th allows The Dakota to recover attorneys' fees from *any* action commenced by the shareholder, and they specifically reject Chase's interpretation that limits The Dakota's recoupment to instances of shareholder default. *See* Respondent's Brief, pp. 30-32. The Dakota's

interpretation of the Lease is thus much broader than the lease provision at issue in *Glaze Teriyaki* and raises the very same concerns described by the Court in *Krodel*, namely dissuading "aggrieved parties from pursuing litigation and preclud[ing] tenant-shareholders from making meaningful decisions about how to vindicate their rights in legitimate instances of landlord default." *Krodel*, 166 A.D.3d at 414.

C. Chase Did Not Waive Any Arguments Concerning Unconscionability

Krodel cannot be ignored based on unsubstantiated assertions that Chase waived arguments concerning unconscionability. *See* R. at 5, 11, 17, 23. The Dakota does not deny that it had notice of Chase's unconscionability defense during discovery – months ahead of the motions for summary judgment.[6] The Dakota's brief in support of its motion before the Lower Court explicitly referenced *Krodel* and the issue of unconscionability prior to reviewing Chase's motion papers. *See* R. at 746, 763 (n. 16). The Dakota's counsel was able to anticipate the unconscionability issue because it was discussed at length during court conferences, court arguments, and depositions. *See* R. at 309-325, 882-888, 1248, 1460-1461 (352:21-353:15), 1841, 1843, 1865-1878. During one deposition, Mr. Shmulewitz was asked about his understanding of *Krodel*, as it relates to Paragraph 15th, and his own written analysis of the decision that was publicized as a warning to other co-

[6] The order appealed from decided both parties' motions for summary judgment. *See* R. at 5, 17.

ops (marked as deposition Exhibit 44). *See* R. at 1248, 1460-1461 (352:21-353:15), 1841, 1843. Not surprisingly, The Dakota never even argued that it was prejudiced by Chase's argument, and the Lower Court's *sua sponte* suggestion that the pleadings required a more robust disclosure is unfair and contrary to the well-established record. *See* R. at 746-765, 899-916, 1940-1958; *see also* *Sadkin v. Raskin & Rappoport, P.C.*, 271 A.D.2d 272, 273 (1st Dep't 2000) ("A motion for summary judgment…does not provide a basis for searching the record and granting summary judgment on an unrelated claim or defense").

III. THE 2017 JUDGMENT DOES NOT BIND CHASE

The Dakota butchers the concept of privity to make two erroneous arguments that (1) Chase's appeal and argument constitute a collateral attack on the 2017 Bluth Judgment, and (2) *Krodel* cannot be applied retroactively to the same judgment. *See* Respondent's Brief, pp. 19-25. Neither are true since Chase was neither a party to the Fletcher Suit (which resulted in the 2017 Bluth Judgment) nor in privity with Fletcher in connection with the Fletcher Suit.

The Fletcher Suit was between Fletcher and The Dakota. The Decision and Order concerning summary judgment described Fletcher's claims against The Dakota as "discrimination, retaliation, defamation, and tortious interference." *See* R. at 2020. In response, The Dakota issued counterclaims for its legal costs based on anti-discrimination statutes and the Lease. *See* R. at 2021 (fn. 1). Upon dismissal

of Fletcher's claims, The Dakota's counterclaims were referred to mediation and then an inquest only as to the reasonableness of the fees. *See* R. at 775 (¶¶ 21-22), 790-791 (2:13-3:6), 797-798 (4:7-5:8), 2019, 2066-2067. The inquest only determined the fees were reasonable. *See* R. at 379-389, 775-776, ¶¶ 22-24. Nonetheless, The Dakota relied upon the report to obtain the 2017 Judgment, and Fletcher did not oppose their ability to recoup legal fees under the Lease. Thus, Justice Bluth subsequently entered the 2017 Judgment awarding The Dakota legal fees without any substantive opposition, inquiry, or analysis of the Lease or cooperative record. *See* R. at 776-778 (¶¶ 24-27), 844-852, 380-381 (fn. 2), 385. The Dakota never joined Chase to the Fletcher Suit (and Chase had no basis to intervene) so the 2017 Judgment was only entered against Fletcher. *See* R. at 785-788, 939 (fn. 1).[7]

Moreover, Chase was not in privity with Fletcher in relation to the 2017 Judgment so Chase had no obligation to intervene in the Fletcher Action as that judgment only binds Fletcher. Assignees are only bound to judgments that were rendered against their assignors before the assignment of rights. *See* *Gramatan Home Inv'rs Corp. v. Lopez*, 46 N.Y.2d 481, 486-87 (1979) (assignee not bound by judgment against assignor that arose from an action that commenced after the assignment to plaintiff); *see also* *Kolel Damsek Eliezer, Inc. v. Schlesinger*, 90

[7] *See* R. at 1978-1983 (describing Fletcher Suit).

A.D.3d 851, 855 (2d Dep't 2011) ("collateral estoppel applies only to a privity arising after the event out of which the estoppel arises"). The 2017 Judgment, in contrast, was rendered nearly 10 years after Fletcher assigned his rights to Chase. *See* R. at 776-778 (¶¶ 24-27), 958 (¶¶ 2, 6), 963 (¶¶ 2, 6), 968-971. Thus, the 2017 Judgment remains a valid judgment against Fletcher, but is otherwise separate from this action and thus has no effect on Chase's efforts to litigate The Dakota's ability to recover its legal fees under the Lease. As Justice Kalish noted, the issue to be decided here would be the issue of priority based on the language of the Lease:

> Mr. Newman: Mr. Van Der Tuin, on behalf of [The] Dakota, did make the argument, in their papers, that Chase should be bound under the law of privity to the fact that those fees are chargeable to the lease and as additional rent. And, is it correct that the Court's ruling is saying that it's either declining to rule on privity or it's saying, "I'm only determining that those amounts are reasonable for purposes of the amount and nothing else?"
>
> Court: …The issue before me will be one of priority. That's where I want to get to. I want to get to the priority issue. And I don't want to foreclose you. If these documents have some bearing on attempting to show that you have priority, fine. That's the whole point of this … That's why we're here.

See R. at 648-49 (56:21-57:24). The ruling in this action and on appeal will thus only affect the underlying action, not the 2017 Judgment.

The Dakota attempts to distinguish *Gramatan* by pointing to Chase's interest in Fletcher's property during the Fletcher Suit, but that is irrelevant. *See*

Respondent's Brief, pp. 22-23 n. 45. The Court of Appeals was not concerned with the degree to which the assignee owned property at issue during the time of litigation against assignor. *See* *Gramatan*, 46 N.Y.2d at 486-87. Instead, the Court's ruling was based on the fact that the assignee – like Chase – obtained the rights to a contract (in addition to a mortgaged security) *prior* to the start of litigation involving the assignor. *See id*; *see also* R. at 958 (¶¶ 2, 6), 963 (¶¶ 2, 6), 968-971.

The Dakota also tries to distinguish *Gramatan* through Chase's purported notice of a competing claim in Fletcher's property at the time The Dakota moved for the 2017 Judgment. *See* Respondent's Brief, pp. 22-23 n. 45. However, the Court of Appeals did not hold or otherwise state that an assignee's notice of a potential competing claim will be sufficient to establish privity between an assignee and assignor. *See* *Gramatan*, 46 N.Y.2d at 486-87. Regardless, The Dakota misstates the facts. Chase had no knowledge or notice of The Dakota's intent to assert a priority lien in Fletcher's Property at the time it moved for the 2017 Judgment. *See* R. at 1978, 1981-1982 (¶¶ 11-16). In fact, The Dakota's competing claim arose long after 2017 when Fletcher's shares in The Dakota were sold and it became clear that the proceeds would not be sufficient to satisfy both Chase's and The Dakota's liens. *See* Appellant's Brief, p. 10.

Furthermore, Chase had no basis to intervene in the Fletcher Suit because its lack of privity with Fletcher meant the 2017 Judgment did not adversely impact

Chase. Chase's interests in the underlying proceeding (*Kasowitz, Benson, Torres & Friedman LLP v. JPMorgan Chase Bank, N.A.*) are vastly different from its interests in the Fletcher Suit. Chase is a named party in this action, and The Dakota has asserted a lien in direct violation of Chase's rights to the Proceeds. *See* R. at 958 (¶¶ 2, 6), 963 (¶¶ 2, 6), 968-971. Since The Dakota's purported lien would diminish Chase's recovery to the Proceeds and said lien is based on the Lease, Chase has standing to contest The Dakota's ability to recoup the attorneys' fees under Paragraph 15th. *Cf.* *Decolator, Cohen & DiPrisco, LLP v. Lysaght, Lysaght & Kramer, P.C.*, 304 A.D.2d 86, 90 (1st Dep't 2003) ("standing to challenge a contract [requires] a non-party to the contract [to] either suffer direct harm flowing from the contract or be a third-party beneficiary thereof").

IV. THE LOWER COURT ERRED IN CONCLUDING THAT THE 2017 JUDGMENT CONSTITUTED A LIEN UNDER THE BY-LAWS AND A SUPERIOR SECURITY INTEREST UNDER THE UCC

The Lower Court correctly limited the scope of potential liens under The Dakota's by-laws to "Lease obligations [that] are not paid." *See* R. at 5, 10, 17, 22. This Court has restricted a similar co-op by-law provision, which allowed for the recoupment of "all other indebtedness from [] shareholders," to the language and intent behind the related lease. *See* *Darnet Realty Assocs., LLC v. 136 E. 56th St. Owners, Inc.*, 246 A.D.2d 312, 312-13 (1st Dep't 1998) (rejecting a construction of a by-law provision that would negate the intention and language of the related lease,

despite the by-law provision's reference to the co-op's ability to recover "all other indebtedness from such shareholder"). Thus, the by-laws only enable The Dakota to assert a lien for attorneys' fees incurred in connection with a shareholder's default – as provided for in Paragraph 15th. *See supra*, § I.A.

Otherwise, The Dakota could recoup legal fees under "any" litigation since "indebtedness" would be unchained and free from any limiting context. *See* R. at 5, 9-10, 17, 21-22. Justice Kalish challenged this view:

> The Court: So, shareholder Jones slips and falls in the lobby in the building. It's a long protracted tort matter, long protracted court matter. Defendant Dakota wins, jury doesn't believe it. But you, as good counsel, putting up the defense, you have attorneys[']s fees that you charged to [The] Dakota, are you telling me that those attorney[s'] fees you're going to charge as rent, because the person happens to live there? Is that what you actually think this paragraph means? … [Y]ou seem to think that this paragraph includes any type of litigation.

See R. at 593, 602-603 (10:12-11:5). Even if The Dakota could assert the Legal Fees as a lien under the Lease or by-laws, there would not be a super-priority "Cooperative Organization Security Interest" under the UCC because the Fletcher Suit and related legal fees were not *exclusively* incidental to Fletcher's ownership of the shares. *See* U.C.C. § 9-102(27-d) (limiting "cooperative security interests" to those which "secure[] only obligations incident to ownership of that cooperative interest").

The Fletcher Suit and the 2017 Judgment are not *exclusively* incidental to Fletcher's ownership of his shares due to the nature of Fletcher's various claims and given that they were predicated on another co-op unit. Fletcher's claims were based on allegations related only to Fletcher's status as a prospective holder of additional shares for separate apartments, which were distinct and detached from the Shares associated with The Dakota's purported lien. *See* R. at 191-192 (¶ 1), 241-244 (¶¶ 189-203). Indeed, in granting summary judgment in the Fletcher Suit, Justice Rakower noted that Fletcher's claims were "for discrimination, retaliation, defamation, and tortious interference based on [The Dakota's] failure to approve [Fletcher's] application to purchase additional shares." *See* R. at 2020. As for The Dakota's counterclaims, two out of three were based on anti-discrimination statutes. *See* R. at 2021 (fn. 1). Thus, Fletcher's claims were not *exclusively* incidental to Fletcher's ownership of his shares. *See* U.C.C. § 9-102(27-d). Accordingly, the 2017 Judgment is not a "cooperative organization security interest" under the UCC, and, in any event, The Dakota's failure to name Chase as a party precludes it from arguing that the judgment therein binds Chase.

V. THE RECOGNITION AGREEMENT DOES NOT SUPPORT THE DAKOTA'S PRIORITY CLAIM

Without any recourse under the U.C.C., the Cooperative Record, or the 2017 Judgment, The Dakota tries to latch onto the Recognition Agreement to claim it supports The Dakota's priority claim. *See* Respondent's Brief, pp. 36-37. It does

not. Though the Recognition Agreement references The Dakota's ability to recoup expenses due under the Lease, it does not change the fact that The Dakota cannot recover the Legal Fees. *See supra* § I; R. at 157 (¶ 2). In any case, the Recognition Agreement does not give The Dakota priority. Rather, it exists for *Chase's* benefit by securing The Dakota's representations that it will not interfere with Chase's rights in the Property, thus protecting Chase's lien. *See* R. at 157-158. In addition, the Recognition Agreement has no effect on Chase's rights with respect to Chase's separate $5 million loan to Fletcher or Kasowitz's assignment of its rights to Chase. *See* Appellant's Brief, p. 6.

VI. THE LOWER COURT AND THE DAKOTA FAILED TO ADDRESS THE DEFICIENCIES IN THE DAKOTA'S AFFIDAVITS CONCERNING UNPAID MAINTENANCE AND ASSESSMENTS

The Dakota failed to adequately rectify the inadmissibility of its evidence in support of The Dakota's claims for unpaid maintenance and assessments. The Dakota's affidavits by Robert McFarland and Samantha Signorella were submitted in support of The Dakota's purported lien of $592,189.69. *See* R. at 309-313, 679-682, 886-888. However, the only primary source for the amounts allegedly owed (that was created at or around the time of the charges) was an invoice without any indication as to whether it was made in the regular course of business or delivered to Fletcher or Chase. *See* R. at 726. The affidavits of Samantha Signorella attempt to rectify this deficiency by asserting that all cited documents were business records,

but she failed to clarify when the documents were created or whether she had first-hand knowledge for all the relevant years in question. *See* R. at 309-313, 886-888. These documents also failed to explain how the sum total of categorical charges were calculated. *See* R. at 679-745, 889-898. Yet, the Lower Court simply accepted these figures as true, without even holding an evidentiary hearing. *See* R. at 5, 12, 17, 24. This, Chase submits, was error, and The Dakota makes no credible argument to the contrary. *See generally* Respondent's Brief.

VII. THE POTENTIAL CHILLING EFFECT ON CO-OP LENDING IS REAL

The Dakota also offers no counterargument to the potential chilling effects on co-op lending Chase raised in its opening brief. Instead, The Dakota simply dismisses this considerable concern as "Chicken Little." *See* Respondent's Brief, p. 40. The impact of the Lower Court's ruling on potential liens available to co-ops cannot be understated. Under the Lower Court's decision and order, a co-op can retroactively assert priority liens over lenders even if (a) the co-op does not prevail, (b) the fees are incurred nearly a decade after the loan becomes secured, and (c) the subject matter of the litigation is not related to the collateral of the loan. *See supra*, §§ II.A, III, IV. The resulting costs imposed on lenders in order to monitor and minimize risk would be immense, thus leading to only one outcome – less (or more costly) co-op financing in New York City.

CONCLUSION

The Judgment should, respectfully, be reversed.

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