To be Argued by:
SIMCHA D. SCHONFELD
(Time Requested: 25 Minutes)

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Court of Appeals

of the

State of New York

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

Plaintiffs-Respondents,

– against –

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

Defendants,

(For Continuation of Caption See Inside Cover)

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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Dated: January 29, 2018

– and –

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

Defendants-Appellants.

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PRELIMINARY STATEMENT

In their opening brief, Defendants-Appellants established that the Appellate Division Order should be reversed for two reasons. First, by their very nature, the class action allegations require fact-specific analyses and do not present common questions of fact or law. Second, the Complaint failed to state a claim upon which relief could be granted.

In opposition, Plaintiffs-Respondents submitted a lengthy brief that fails to address the salient issue before this Court and the basis for the Dissent and the arguments submitted by the Defendants-Appellants, namely that as stated by Justice Friedman, the decisive factor here "is not that the common questions will not predominate; it is that questions common to the class, predominant or otherwise, simply do not exist" (R. 311).

The crux of Plaintiffs-Respondents' position is that this Court should engage in unwarranted judicial activism, usurp the role of the legislature and hold that as a matter of law, an entire class of litigants, namely parties alleging improper rent-overcharges, is outside the scope of CPLR 3211 and not subject to a motion to dismiss, no matter how facially deficient their pleadings may be.

To support this argument, Plaintiffs-Respondents falsely claim that the "First and Second Departments have unequivocally held that dismissal at the pre-

certification stage is inappropriate (Plaintiffs-Respondents' Brief at 23). As noted below, this assertion, although ultimately immaterial, is untrue.

Plaintiffs-Respondents also repeatedly misstate the position of the Defendants-Appellants to create a strawman argument that they proceed to beat as if it were a lifeless mare. For example, Plaintiffs-Respondents frame the position of Defendants-Appellants as "that a court may dismiss a complaint if it *fails to establish* the CPLR 901(a) prerequisites" (Plaintiffs-Respondents' Brief at 30, see also page 7) (emphasis added). That is not, nor has it ever been the position of the Defendants-Appellants and neither did such position form the basis of the Supreme Court Order or of the Dissent.

The argument set forth in the opening brief as well as by the Dissent and Justice Edwards, is that the allegations in the Complaint cannot be adjudicated on a class-wide basis because they are incapable of satisfying the requirements of CPLR 901. That is, the question is not whether the Complaint *did* satisfy the criteria for class certification, but whether it *can* satisfy the criteria for class certification. The former question is one reserved for a motion for class certification. The latter question is the one presented here.

It has never been stated by anyone other than Plaintiffs-Respondents that a Complaint must "establish" anything at all to survive the motion now before this Court. The question posed here, as it is in any analysis of a motion made pursuant

to CPLR 3211 is "whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994) *citing Morone v. Morone*, 50 N.Y.2d 481, 484, 429 N.Y.S.2d 592, 413 N.E.2d 1154 (1980) *and Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 N.Y.S.2d 314, 357 N.E.2d 970 (1976).

Plaintiffs-Respondents also consistently argue that the Defendants-Appellants are guilty of failing to provide evidence, such as receipts or other documentary proof, that IAIs were performed on the units at issue (*See* Plaintiffs-Respondents' Brief at 15, 16, 22, 42). This argument, stated repeatedly throughout their submission, is confounding.

The basis of the Supreme Court Order, the Dissent and the arguments stated in the opening brief is that the allegations are not appropriate for class relief. At no time have Defendants-Appellants ever moved for dismissal based upon the allegation that they have a defense to the claims made (which they do). The sole matter before this Court is whether the claims set forth in the Complaint are capable of being considered (i.e. before potential defenses are asserted) on a class-wide basis.

Documentary evidence of IAIs is not relevant to the matter now presented for this Court's review. They were not raised before the lower courts and have no place here. Plaintiffs-Respondents' repeated references to the lack of a defense

offered by the Defendants-Appellants is a complete misstatement of the facts, the law and the matters relevant to this Court's analysis.

Plaintiffs-Respondents also argue that Defendants-Appellants introduced a new argument not properly preserved. Specifically, Plaintiffs-Respondents stated that "for the first time before this Court, Appellants argue that a 'common scheme' such as that alleged by Respondents is not appropriate for class certification" (Plaintiffs-Respondents' Brief at 10 *citing* Defendants-Appellants' brief at page 18). No such novel argument was made and in fact the words "common scheme" do not appear on the cited page of Defendants-Appellants' brief. Moreover, discussion on page 18 of the aforesaid brief related to language found in the Appellate Division Order. No argument was raised for the first time there.

The arguments advanced by Plaintiffs-Respondents are based upon misstatements of fact and law. Plaintiffs-Respondents mischaracterize Defendants-Appellants' position, misstate the relevant standards, mischaracterize relevant caselaw and, based upon all of those errant tactics, urge this Court to take the drastic role of usurping the legislature and imposing judicially created limitations on CPLR 3211 that appear nowhere in its text.

It is respectfully submitted that for the reasons set forth in the Dissent, as well as those stated in the Supreme Court Order and, in addition, for the reasons set forth in the opening brief and below, the Appellate Division Order should be

reversed insofar as it reinstated the class allegation claims against the Defendants-Appellants, and the Complaint should be dismissed.

The question certified by the Appellate Division, First Department to this Court, should be answered in the negative.

JURISDICTION

The jurisdiction of this Court is based upon the Order of the Appellate Division dated September 27, 2018, granting Defendants-Appellants' motion for leave to appeal to this Court (R. 299). Although the aforesaid order was referenced repeatedly in the opening brief, Plaintiffs-Respondents correctly note that a separate statement of such jurisdiction was not set forth in the brief. This was the result of an oversight and the undersigned apologizes to the Court for the omission.

ARGUMENT

I. THE MOTION TO DISMISS WAS NOT PREMATURE.

In their first point of argument, Plaintiffs-Respondents argue that the motion to dismiss was "premature" as a matter of law, because it was made prior to a motion for class certification. By so doing, Plaintiffs-Respondents are urging this Court to take the extraordinary step of deeming an entire class of litigants beyond the scope of CPLR 3211.

Should this Court agree with the arguments set forth by the Plaintiffs-Respondents, no class action complaint, no matter how lacking or deficient, could ever be dismissed in the pre-answer stage and the courts – and the litigants – would have to be burdened with proceedings and actions that would waste the resources of all involved without justification.

Should this Court adopt the position advocated by the Plaintiffs-Respondents, a Complaint that seeks class action relief against the entire population of the United States for unspecified claims of intentional infliction of emotional distress, would be beyond the reach a motion to dismiss pursuant to CPLR 3211. This argument, which admittedly falls comfortably within the description of *reductio ad absurdum*, demonstrates the folly of the position advocated by the Plaintiffs-Respondents.

CPLR 3211 serves an important function, one which is applicable in class action cases just as it is in any other. If, as Defendants-Appellants contend here, a Complaint fails to allege (not "establish") facts and claims sufficient to merely state a claim for class action relief, then dismissal is warranted. Mandating further discovery and motion practice would be counterintuitive.

Plaintiffs-Respondents misstate Defendants-Appellants' position by positing that the argument submitted in favor of reversal "simply jumps into the question of whether Respondents *have* adequately established the CPLR 901(a) factors" (Plaintiffs-Respondents' Brief at 21-22) (emphasis added). In fact, just the opposite is true. The question presented here is not whether Plaintiffs-Respondents *have* established the CPLR 901(a) requirement, but whether they *can* establish those requirements at all. This distinction is crucial to the Court's analysis.

Defendants-Appellants argue repeatedly – and the Supreme Court and Dissent agreed – that dismissal was appropriate because the requirements for class certification "cannot" be – not "have not" been – established (see e.g. Opening Brief at 15). This question is precisely the question for which CPLR 3211 analysis is appropriate.

A. Appellate Courts have consistently considered the sufficiency of pleadings in considering motions to dismiss class action complaints.

In support of their mischaracterized argument, Plaintiffs-Respondents falsely claim that the "First and Second Departments have unequivocally held that dismissal at the pre-certification stage is inappropriate" (Plaintiffs-Respondents' Brief at 23). In fact, the appellate courts have concluded precisely to the contrary.

Plaintiffs-Respondents cite to *Bernstein v. Kelso & Co.*, 231 A.D.2d 314 (1st Dept. 1997) as standing for the proposition that dismissal of a class action in the pre-answer stage is premature as a matter of law (Plaintiffs-Respondents' Brief at 23). In fact, *Bernstein* held that in that case, unlike here, the "claims of plaintiff are typical of the claims of the class and plaintiff can fairly and adequately protect the interest of the class ... [and therefore] at this early stage of the proceeding, it appears that a class action will be superior to other available methods for the fair and efficient adjudication of the controversy." *Id*. at 324. Plaintiffs-Respondents' argument that *Bernstein* forecloses analysis of a class action complaint in the pre-answer stage is to blatantly misstate the very clear terms of the Appellate Division's holding.

The very fact that the Appellate Division conducted an analysis in *Bernstein* and did not merely hold that denial of the motion was appropriate as "premature" is itself confirmation that prematurity is not a basis by which denial of a motion for class certification would be proper.

Similarly, in *Downing v. First Lenox Terrace Assocs.*, 107 A.D.3d 86, 91 (1st Dept. 2013), the First Department held that "a motion to dismiss may be made before a motion to determine the propriety of the class and a hearing under CPLR 902 where it appears conclusively from the complaint and from the affidavits that there was as a matter of law no basis for class action relief." The First Department did not state, and does not hold, that a pre-answer motion to dismiss a class certification complaint must be denied as premature.

Plaintiffs-Respondents also cite *Ackerman v. New York Hosp. Med. Ctr. of Queens*, 127 A.D.3d 794 (2d Dept. 2015) as proof that the Second Department is "even more adamant" that pre-answer motions to dismiss should be denied as premature in class action litigation (Plaintiffs-Respondents' Brief at 24). However, in *Ackerman*, the Appellate Division first analyzed the sufficiency of the pleadings and concluded – citing *Bernstein* - that "the complaint included factual allegations addressing each of the five prerequisites to class certification (see CPLR 901 [a]). Accordingly, the class action allegations in the complaint were adequately pleaded." *Ackerman*, 127 A.D.3d at 796. Crucially, the court did not, as Plaintiffs-Respondents would have this Court hold, rule that the mere fact that the motion was made prior to a motion for class certification, rendered it premature as a matter of law.

Moreover, the portion of *Ackerman* cited in Plaintiffs-Respondents' brief, stands for exactly the opposite proposition that Plaintiffs-Respondents cited it for. That is, the court stated that to the extent that defendant's motion was based on the claim that "plaintiff failed to actually demonstrate the prerequisites for class certification" – i.e. the matters to be considered on a motion for class certification – "the issue of whether class certification should or should not be granted is not properly raised in the context of such a motion." *Id.* Defendants-Appellants fully agree.

The issue raised on the motion before this Court is most emphatically not "whether class certification should or should not be granted." Indeed, any such argument would be improperly raised on a pre-answer motion to dismiss. Plaintiffs-Respondents' citation of *Ackerman* as evidence that the Second Department is "adamant" the pre-answer motions to dismiss should be denied as premature is profoundly misguided. In reality, *Ackerman* stands for the opposite proposition as evidenced by its analysis of the sufficiency of the pleadings at issue there.

While Plaintiffs-Respondents concede that the Fourth Department, in *Wojciechowski v. Republic Steel Corp.*, 67 AD2d 830, 831 (4th Dept. 1979) upheld

dismissal of a class action based upon CPLR 3211, they argue[1] that this Court should nonetheless hold that, as a matter of law, "it is simply premature, before discovery, and before a class certification motion has been made, to rule out the class claims in their entirety" (Plaintiffs-Respondents' Brief at 26). Should this Court so hold, it would be ruling contrary to every court that has considered such motions and has granted or denied them based on the sufficiency of the pleadings as opposed to a blanket rule, not appearing in the CPLR, that no such motion may ever be entertained in a class action.

B. *Federal jurisprudence confirms that pre-answer dismissal is appropriate when warranted based upon the pleadings.*

Plaintiffs-Respondents argue that federal case law supports their argument that a pre-answer motion to dismiss a class action complaint should be denied as premature as a matter of law. However, the case law cited in their brief, including the specific quotations, confirms that the contrary is true.

For example, Plaintiffs-Respondents cite *Mayfield v. Asta Funding, Inc.*, 95 F.Supp.3d 685[2] (S.D.N.Y. 2015) as holding that in order to grant a pre-answer

[1] Plaintiffs-Respondents also speculate that the Fourth Department would overrule itself today, based upon its holding in *Deluca v. Tonawanda Coke Corp.*, 134 A.D.3d 1534 (4th Dept. 2015). However, *Deluca* was an analysis of a motion for class certification pursuant to CPLR 901(a). There was no discussion of CPLR 3211 or the sufficiency of the pleadings. The relevance of *Deluca* is unclear.

[2] Cited as 2015 WL 150110 in Plaintiffs-Respondents' Brief at 27.

motion to dismiss a class action complaint, "Defendants would have to demonstrate from the face of the Complaint that it would be impossible to certify the alleged class regardless of the facts Plaintiffs may be able to obtain during discovery." This standard is analogous to the analysis required by this Court, specifically "whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994).

None of the federal cases cited by Plaintiffs-Respondents stand for the proposition that a pre-answer motion to dismiss a class action complaint, whether made pursuant to CPLR 3211, FRCP 23 or FRCP 12(b)(6), should be denied by virtue of the fact that it is filed prior to a motion for class certification.

It is indeed rare that pre-answer motions to dismiss class action complaints are granted. However, if ever there was a case in which such relief was appropriate, it is this one, in which twenty-six proposed claimants residing in eleven separately-owned apartment buildings alleged various forms of intensely fact-specific wrongs and seek exceedingly broad classes.

The jurisprudence of this Court, this State and non-controlling companion jurisdictions all confirm that no court has ever held that a pre-answer motion to dismiss a class action complaint must be denied merely by virtue of it being "premature" without analyzing the sufficiency of the pleading. As each of the cases cited by Defendants-Appellants, Plaintiffs-Respondents and the lower courts

confirms, such motions must be considered on their respective merit and decided accordingly. Plaintiffs-Respondents' request that this Court rule, for the first time in any federal or state jurisdiction, that any pre-answer motion to dismiss a class certification complaint should be denied on its face, is without basis in law or at equity.

II. DEFENDANTS-APPELLANTS DO NOT ADVOCATE DISMISSAL FOR FAILURE TO ESTABLISH THE PREREQUISITES OF CPLR 901(A).

In their second point of argument, Plaintiffs-Respondents argue that "dismissing class claims for failure to *establish* the CPLR 901(a) prerequisites would render CPLR 906 a nullity" (Plaintiffs-Respondents' Brief at 30) (emphasis added). Defendants-Appellants agree and have never stated otherwise. Nor has the Supreme Court or the Dissent.

To be clear, and as stated above, it is not the position of the Defendants-Appellants, nor was it the conclusion of the Supreme Court or the Dissent, that dismissal was appropriate because Plaintiffs-Respondents failed to establish satisfaction of the CPLR 901(a) requirements. Rather, as appropriate for a motion pursuant to CPLR 3211, the argument is, and remains, that Plaintiffs-Respondents cannot (as opposed to have not) establish those requirements.

Plaintiffs-Respondents seek to conflate the analysis under CPLR 3211 with that under CPLR 901(a). They do so because they must. That is, unable to sustain

the pleadings on their face, Plaintiffs-Respondents seek further discovery to plead facts they have not alleged, subclasses they have not sought, and relief they have not requested. By so doing, Plaintiffs-Respondents ignore the sufficiency of their pleadings, which must first be established before the action may proceed.

Plaintiffs-Respondents argue, citing no New York State caselaw because they concede that none exists, that CPLR 906(1) can allow for "issue classes" to be created and used as a shield for otherwise defective pleadings. Plaintiffs-Respondents cite the holding in *Charron v. Pinnacle Group N.Y. LLC*, 269 FRD 221 (S.D.N.Y. 2010) for such purposes. *Charron* only undermines Plaintiffs-Respondents' argument.

At the outset, it must be noted that in *Charron*, unlike here, the defendants were explicitly "alleged to consist of several companies that are directly controlled" by the underlying owner. Each of the entities that held title to a particular property was "jointly owned by other limited liability companies and/or partnerships among [the individual defendant] and various [defendant] principals." *Charron*, 269 FRD at 225.

Moreover, in *Charron*, the plaintiffs sought certification of a class consisting of "[t]enants who have received notices from the [defendant] misrepresenting the legal rent by over-inflating the cost or value of renovations/capital improvements made to the apartment." *Id.* at 239. The court explicitly denied certification of that

class, noting that "Plaintiffs who claim that they were fraudulently induced to pay illegally inflated rents will need to show, on a lease-by-lease basis, what they were charged by Defendants, whether they paid that rent, and what their rent lawfully should have been." *Id.* at 240.

Although the court in *Charron* did certify classes based upon specific issues, it is notable that *none* of those classes included the claims noted above, which are identical to those alleged here. Specifically, the court certified classes specifically relating to 18 U.S.C. § § 1961(1), 1961(4), 1962(c), GBL § 349 and "whether the challenged act or practice was consumer-oriented." *Id.* at 239. Thus, even if this Court were to use *Charron* as a guide, and even if this Court were to rule – for the first time – that the possibility of "issue" classes suffices to establish the sufficiency of an otherwise defective pleading, the claims advanced here would not fit within an appropriate class, just as they did not in *Charron*, because here, as there, "Plaintiffs who claim that they were fraudulently induced to pay illegally inflated rents will need to show, on a lease-by-lease basis, what they were charged by Defendants, whether they paid that rent, and what their rent lawfully should have been." *Id.* at 240.

Even if "issue classes" could be created by the trial court at a later date, that approach would not be available here, since the claims of liability are each independently fact-specific. In *Geiger v. American Tobacco Co.*, 181 Misc.2d 875

(N.Y. County 1999), a trial court denied a request to create subclasses based on a particular issue, holding that "certification of a class with respect to particular issues is not appropriate because few, if any, truly common issues remain in the case after the plaintiffs' withdrawal of certain causes of action and because some issues alleged to be common would subsequently reappear at the individual trials." Precisely the same is true here. Certifying a particular "issue" here would only increase, not decrease, the likelihood of additional individual litigation.

On appeal, the First Department affirmed *Geiger*, holding that "[a]lthough a court has the power to sever issues and try the remaining matters as a class action, it does not appear that judicial economy would be served by following that course of conduct in this case." *Geiger v. American Tobacco Co.*, 277 A.D.2d 420, 421 (1st Dept. 2000). The same holds true here. For all of the reasons stated by the Supreme Court and the Dissent, severing issues would be equally as problematic as proceeding with a broad broad class.

Plaintiffs-Respondents also argue, without support, that pursuant to CPLR 906(2), subclasses may be created that could remedy the defective pleading. However, as this Court has repeatedly held, evaluation of the sufficiency of a pleading on a pre-answer motion to dismiss, requires an analysis limited to "the four corners" of the complaint. *See 511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, at 152, 773 N.E.2d 496, 746 N.Y.S.2d 131 (2002),

*citing Polonetsky v. Better Homes Depo*t, 97 N.Y.2d 46, 54, 735 N.Y.S.2d 479, 760 N.E.2d 1274 (2001), *quoting Guggenheimer v. Ginzbur*g, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17 (1977).

Whether a trial court can or cannot, will or will not, may or may not, create issue classes, subclasses or otherwise modify the pleadings in the future has no bearing on the matter before this Court – the sufficiency of the Complaint as filed and as it exists today. Indeed, it is telling that these arguments were never raised below, never considered by the lower courts and not offered by the Majority as further justification for its holding.

III. PLAINTIFFS-RESPONDENTS HAVE NOT ESTABLISHED PREDOMINANCE.

Plaintiffs-Respondents argue that predominance is established because (1) CPLR 1005 is no longer applicable and (2) "'common scheme' cases are regularly certified.'" (Plaintiffs-Respondents' Brief at 34). These contentions are simply inaccurate.

A. This Court's holding in Ray v. Midland Grace Trust Co. remains controlling.

In their opening brief, Defendants-Appellants cited *Ray v. Midland Grace Trust Co.*, 35 N.Y.2d 147, 151 (1974) in which this Court noted that it has "repeatedly held that separate wrongs to separate persons, even if committed by similar means and pursuant to a single plan, do not alone create a common interest

to sustain a class action." *Id. citing Gaynor v. Rockefelle*r, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627 (1965); *Society Milion Athena v. National Bank of Greece,* 281 N.Y. 282, 292—293, 22 N.E.2d 374, 376—377 (1939); and *Brenner v. Title Guar. & Trust Co.*, 276 N.Y. 230, 11 N.E.2d 890 (1937). As noted in footnote 7, although the analysis in *Ray* was conducted under CPLR 1005, the predecessor to CPLR 901, the principle remains equally applicable under the present statutory scheme.

Plaintiffs-Respondents argue that *Ray* and the cases it cites are now irrelevant, under the superseding CPLR 901 framework. Plaintiffs-Respondents do not cite a single case demonstrating that this Court's holdings noted above were rendered inapplicable by the adoption of CPLR 901 in 1975. Rather, Plaintiffs-Respondents simply cite boilerplate caselaw discussing the construction of CPLR 901 without reference to this specific point.

In truth, since the enactment of CPLR 901 in 1975, the courts have continued to apply this Court's holdings. *See e.g. Rife v. Barnes Firm, P.C.*, 48 A.D.3d 1228, 1230, 852 N.Y.S.2d 551, 553 (4th Dept. 2008) quoting and citing *Gaynor* in analyzing CPLR 901, *Cullen v. Margiotta*, 81 Misc.2d 809, 811 (Nassau County Special Term, Part I 1975) (citing *Society Milion Athena*), *Vincent Petrosino Seafood Corp. v. Consolidated Edison Co. of New York, Inc.*, 97 Misc.2d 110, 113 (N.Y. County Special Term, Part I 1978) (same), *McBarnette v. Feldman*,

153 Misc.2d 627, 638 (Suffolk County 1992) (same), *Gilman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 93 Misc.2d 941, 944 (N.Y. County Special Term, Part I 1978) (same).

Society Milion Athena and its progeny, including *Ray*, remain controlling even in the era of CPLR 901. In addition to the absence of caselaw establishing otherwise, the fundamental purpose of CPLR 901 – to "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated[3]" – underscores that this bedrock principle of class action litigation remains in full force and effect.

B. "Common schemes" alleged between multiple, independent defendants, relating to separate properties and requiring separate analyses do not demonstrate predominance.

Plaintiffs-Respondents argue that an allegation of a "common scheme" suffices to demonstrate predominance. However, each of the cases cited by Plaintiffs-Respondents confirms that the facts of this case as alleged in the Complaint at issue here, do not demonstrate predominance.

Plaintiffs-Respondents cite this Court's holding in *City of New York v. Maul*, 14 N.Y.3d 499, 511 (2010) as supportive of their position. It must be noted at the outset that in *Maul*, this Court reaffirmed that the "determination of whether a

[3] *Mimnorm Realty Corp. v. Sunrise Federal Savings and Loan Association*, 83 A.D.2d 936, 938, 442 N.Y.S.2d 780 (2d Dept. 1980).

lawsuit qualifies as a class action under the statutory criteria ordinarily rests within the sound discretion of the trial court." *Id.* at 509 *quoting Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 52, 698 N.Y.S.2d 615, 720 N.E.2d 892 (1999).

Contrary to the position of the Plaintiffs-Respondents, the holding in *Maul* mandates reversal of the Appellate Division Order below. In *Maul*, this Court noted that "plaintiffs in this case focus on four recurring and interrelated harms that are common across the class" and that "specialized proof will largely be unnecessary to resolve these common allegations." *Maul* at 513. None of this holds true in the case at bar.

The various allegations of legal wrongdoing here are not "common across the class". For example, a claimant alleging violation of the J-51 program, advances claims separate and distinct from a tenant alleging inadequate IAIs to justify decontrol. Similarly, unlike in *Maul*, "specialized proof" will be absolutely necessary to analyze the claims of each tenant with respect to both liability and damages.

Similarly, in *Weinberg v. Hertz. Corp.*, 116 A.D.2d 1 (1st Dept. 1981), the allegations of liability, as opposed to damages, were consistent across the class. Here, liability itself requires separate and distinct analyses for each claimant. Moreover, in *Weinberg*, the court's decision was based, in part, on the fact that "most of the individuals having claims averaging less than $31 would have no

realistic day in court if a class action were not available." *Id.* at 7. Conversely, here, each claimant has the option to pursue their claims in the DHCR and, based upon the allegations in the pleadings, would have claims far in excess of that amount.

Finally, Plaintiffs-Respondents cite *Charron* and call it "remarkably similar to the present action" (Plaintiffs-Respondents' Brief at 39). For the reasons stated above, *Charron* only demonstrates the folly of Plaintiffs-Respondents' arguments and does not justify the Majority's position.

C. Individual analyses predominate.

Plaintiffs-Respondents argue at page 42 of their brief that "IAIs come down to specific, demonstrable written proof" and no inspections or examination of representations to individual claimants are necessary. Plaintiffs-Respondents cite no support for this novel argument, one never made before, because none exists.

The Complaint itself makes apartment-specific allegations. See e.g. R. 30 at ¶ 12 ("There is no evidence that IAIs in that amount were implemented ... and in fact, an inspection of that apartment *suggests* to the contrary" (emphasis added). It is inconceivable that determination of (1) whether IAIs were done, (2) at what point, (3) for what value, and similar related analyses can be done without apartment-specific inspections. *See generally Bronx Boynton Avenue LLC v. New York State Division of Housing & Community Renewal*, 158 A.D.3d 589, 590, 71

N.Y.S.3d 472 (1st Dept. 2018) ("DHCR's assessment that the defects observed in the apartment were inconsistent with the alleged IAIs was reasonable under the particular circumstances of this case").

The basis for Plaintiffs-Respondents' haphazard dismissal of the individual analyses relating to whether each claimant alleging inadequate IAIs provided written consent to the landlord, is unclear. An element of a claim for improper overcharges is lack of consent. *See* RSC § 2552.4(a)(1). Although Plaintiffs-Respondents argue that "Appellants have proffered no evidence that they received any written consents" that fact is irrelevant since, as noted above, the basis of the motion was not the existence of a valid defense, but the lack of common issues of fact and law. The analysis of whether consent was given by each tenant and if not, whether it was required, based on the date of the completion of improvements, compared with the date of the commencement of the tenancy at issue is yet another portion of this analysis that must be conducted on a case-by-case basis.

In sum, Plaintiffs-Respondents cannot satisfy the "predominance" requirement. Their claims are case-specific and the cases they rely upon serve only to undermine their position.

IV. PLAINTIFFS-RESPONDENTS' REMAINING ARGUMENTS ARE WITHOUT MERIT.

In their final argument, Plaintiffs-Respondents scatter a potpourri of claims and positions with varying degrees of enthusiasm. Insofar as these positions have been addressed in the opening brief as well as above, each will be responded to with the appropriate brevity below.

A. Defendants-Appellants' analysis of Borden is correct.

Although Plaintiffs-Respondents posit that Defendants-Appellants' analysis of *Borden v. 400 E. 55th St. Assoc.*, L.P., 24 N.Y.3d 382 (2014) is "errant" they fail to explain why. The arguments set forth in the opening brief concerning *Borden* are simply statements of fact. While Plaintiffs-Respondents find it "laughable" that separate claims against separate defendants should be asserted separately, the fact remains that – as stated in the opening brief - in *Borden*, unlike here, each of the three actions considered by this Court and consolidated into that decision, involved a single property or complex.

Plaintiffs-Respondents offer sarcastic hyperbole but nothing in the way of a substantive rebuttal to the arguments set forth in the opening brief with respect to *Borden*. That, by itself, should suffice to establish the accuracy of the arguments in the opening brief.

B. Defenses based upon statute of limitations require fact-specific analyses.

As noted at length in the opening brief, the determination of whether a defense based upon the statute of limitations applies will require analyses specific to each claimant. Plaintiffs-Respondents cite numerous cases that, they posit, narrow the scenarios in which such a defense is available. Even assuming that every such limitation applies, the fact remains that some members of the putative classes may be subject to a defense based upon the statute of limitations and some may not.

In a twist of irony, Plaintiffs-Respondents complain that Defendants-Appellants "impermissibly lump together deregulated occupants and those tenants whose apartments were not deregulated" (Plaintiffs-Respondents' Brief at 45). In fact, it was Plaintiffs-Respondents who are responsible for this purported lumping, by including all of these parties in the same class.

Plaintiffs-Respondents again complain that Defendants-Appellants failed to present proof of IAIs (Plaintiffs-Respondents' Brief 47). As noted repeatedly above, this argument misstates the burden and the standard in play for the motion now before this Court.

C. Plaintiffs-Respondents did not properly allege their IAI claims.

In their opening brief, Defendants-Appellants demonstrated that Plaintiffs-Respondents failed to *allege* a proper cause of action with respect to IAIs. In

response, Plaintiffs-Respondents drastically misstate Defendants-Appellants' position, by stating that they "fault Respondents for not *affirmatively demonstrating* that the IAIs performed were inadequate to justify deregulation, or the rents being charged (Plaintiffs-Respondents' Brief at 50-51) (emphasis added).

To be clear, the argument set forth in the opening brief is that by stating repeatedly in the Complaint that "an inspection of that apartment *suggests*" that the IAIs necessary to justify the rent charged to them was not completed, see e.g. R. 30 at ¶ 12 (emphasis added) Plaintiffs-Respondents failed to state a claim. That is, a suggestion of impropriety as not actionable.

Plaintiffs-Respondents do not address this rather critical point. Instead they seek to make light of it by belittling this point as a mere "final salvo" and proceed reframe the argument as a failure by them to "affirmatively demonstrate" – which, by all accounts, no plaintiff is ever required to do in their initial pleading.

Plaintiffs-Respondents never once affirmatively stated that the IAIs necessary to justify the rent charged for a particular apartment were not completed. The mere *suggestion* that wrongdoing may – or for that matter also may not - have occurred, does not constitute allegations that "fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511 (1994).

D. "Typicality" and "superiority" are not present.

The plethora of different legal issues presented has been discussed above. To suggest that the claims against the sixteen property owners grounded on numerous unrelated alleged violations, are premised on "identical legal arguments" (Plaintiffs-Respondents' Brief at 52) is to strain credulity.

Claims grounded in IAIs will necessarily require an analysis of whether any improvements were done, if so the value of such improvements, the appropriate increase in proportion to such repairs and similar related inquiries. Similarly, claims relating to improper registration will require a fact-specific analysis as to each allegation and tenant as will allegations concerning whether or not consent was or was not given by any particular tenant.

The entirety of Plaintiffs-Respondents' argument with respect to superiority is its reliance on *Borden*. However, for the reasons stated at length above, *Borden* does not support Plaintiffs-Respondents' position.

As the Supreme Court correctly noted, the various and competing claims, accusations of legal wrongdoing, fact-specific allegations, and theories of recovery made against eighteen separate and distinct Defendants-Appellants relating to sixteen separate properties with disparate histories of operation and ownership, demonstrate that a class action would not be the superior method for adjudicating these individual claims.

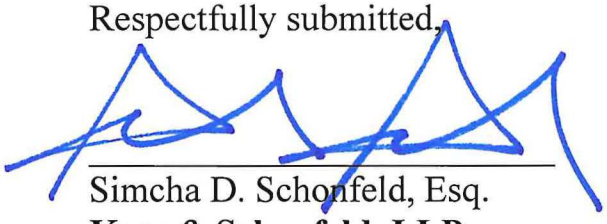
CONCLUSION

Defendants-Appellants respectfully submit that the facts of this case demonstrate that the claims of Plaintiffs-Respondents cannot proceed as a class action. The claims of the parties and potential class members and the potential defenses available to the Defendants-Appellants, raise separate and distinct issues of fact and law. As the Dissent correctly noted: "questions common to the class, predominant or otherwise, simply do not exist" (R. 311). In their brief, Plaintiffs-Respondents have not demonstrated otherwise.

Therefore, and for the reasons set forth in the Dissent, by the Supreme Court and in the opening brief, it is respectfully submitted that the Order appealed from should be reversed, and the Complaint dismissed.

Dated: January 29, 2019
New York, NY

Respectfully submitted,



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ATTORNEY CERTIFICATION

I, Simcha D. Schonfeld, Esq., a member of the firm of Koss & Schonfeld, LLP and counsel to Defendants-Appellants, do hereby certify pursuant to 22 NYCRR § 500.13(c)(1) that the foregoing brief was prepared on a computer using Microsoft Word.

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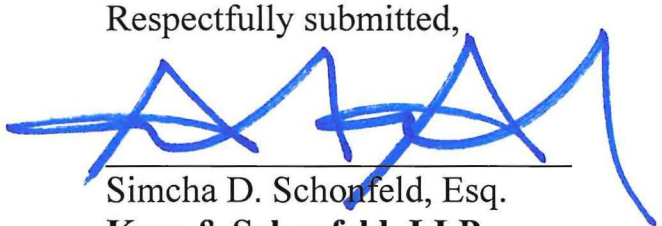
Dated: January 29, 2019
New York, NY

Respectfully submitted,



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