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

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EVAN RICHARDS, JOSE HERNANDEZ-ORTIZ and KEVIN SARDELLI, individually and on behalf of all other similarly situated Plaintiffs,

INDEX NO. 158155/2012

The Hon. Ellen Coin

v.

2 GOLD, LLC, 201 PEARL, LLC, TF CORNERSTONE, INC., GOLD/PEARL PARKING CORP., IMPERIAL PARKING SYSTEMS, INC., FRANK D. VASTA, and KEVIN P. SINGLETON,

Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION, TO APPOINT PLAINTIFFS AS CLASS REPRESENTATIVES AND TO APPOINT CLASS COUNSEL

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Plaintiffs Jose Hernandez-Ortiz and Kevin Sardelli ("Plaintiffs"), individually and on behalf of the proposed Class, by and through their attorneys, submit this memorandum of law in support of their motion for class certification pursuant to CPLR 901, *et seq*.

I. INTRODUCTION

This lawsuit was commenced on behalf of all residents of 2 Gold Street and 201 Pearl Street, New York, New York 10038 (the "Premises"), against Defendants to seek damages for their claims arising out of Defendants' failure to exercise due care to adequately secure or protect the Premises prior to Hurricane Sandy, despite multiple warnings regarding the severity of the storm issued by the National Hurricane Center and by New York City government officials. Plaintiffs also claim that following the storm, the Defendants negligently failed to properly mitigate the damages sustained or otherwise negligently caused additional harm to the property.

2 Gold Street and 201 Pearl Street are adjacent apartment buildings situated within Zone A, an area designated by New York City officials as low lying areas within the five boroughs that are prone to flooding. On the night of October 29, 2012, Hurricane Sandy made landfall in lower Manhattan. Water filled the streets located within Zone A, and eventually entered the buildings at 2 Gold Street and 201 Pearl Street. Excessive amounts of water flowed into the cellar and sub-cellars of the Premises and caused significant damage to the buildings' critical mechanical systems.

On October 30, 2012, the New York City Department of Buildings ("DOB") designated 2 Gold Street and 201 Pearl Street as uninhabitable, and the residents were forced to evacuate the Premises. The Premises remained uninhabitable until February 15, 2013. Plaintiffs allege that Defendants failed to take any affirmative precautions to prevent water from entering the Premises or to adequately secure the mechanical systems from exposure to the flood waters and that this

negligence caused the Premises to be rendered uninhabitable for almost four months. Asserting claims for negligence, gross negligence and breach of the implied warranty of habitability under RPL §235-b, Plaintiffs seek to recover from Defendants the substantial costs that they and Class members were forced to incur as a result of the loss of the use of their apartments from October 30, 2012 through February 15, 2013.

Accordingly, Plaintiffs seek to certify a putative Class of all individuals who resided at 2 Gold Street or 201 Pearl Street on October 29, 2012.[1] The Defendants are the owners of the Premises, 2 Gold, L.L.C. ("2 Gold") and 201 Pearl, L.L.C. ("201 Pearl"), the property management company, TF Cornerstone, Inc. ("TF Cornerstone"), and the owners and the operators of the parking garage facility located within the Premises, Gold/Pearl Parking Corp. ("Gold/Pearl"), and Imperial Parking Systems, Inc. ("Imperial"). As detailed below, Plaintiffs easily satisfy all of the statutory prerequisites for the use of the class action mechanism in this case. Class certification will further the policy underlying Article 9 by promoting an efficient means to fairly and adequately adjudicate over eight hundred thirty-nine (839) individual claims, and avoid an unnecessary waste of judicial resources.

II. BACKGROUND

A. Procedural History

Plaintiffs commenced this action on November 20, 2012. Nine days after the lawsuit was filed, Plaintiffs filed an Order to Show Cause to enjoin Defendants from attempting to coerce putative Class members to release their class action claims. (Doc. No. 5). Plaintiffs alleged that immediately after they filed the complaint, Defendants attempted to eliminate putative Class

[1] Excluded from the Class are Defendants and its affiliates, parents, subsidiaries, employees, officers, agents, and directors; government entities or agencies, its affiliates, employees, officers, agents, and directors in their governmental capacities; any judicial officer presiding over this matter and the members of their immediate families and judicial staff; and class counsel.

members by improperly pressuring them to sign waivers that released all potential causes of action against Defendants, including their class action claims. In exchange for the waivers, Defendants agreed to not seek legal fees or retain security deposits for those Class members who wanted to terminate their leases effective October 31, 2012. Pursuant to CPLR 907, Plaintiffs requested Court intervention to protect the Class and the proper and fair prosecution of this action. The motion was fully briefed, and following a conference with the Court on January 16, 2013, was resolved by stipulation. (Doc. No. 48); see Exhibits D and E, attached to the Affirmation of Jeanne Christensen ("Christensen Aff.").

An amended complaint (the "Complaint") was filed on December 11, 2012. See Ex. A, Christensen Aff. Defendants 2 Gold, 201 Pearl and TF Cornerstone, (the "2 Gold Defendants"), filed an answer on January 30, 2013. Ex. B, Christensen Aff. Defendant Imperial filed an answer on February 25, 2013. Ex. C, Christensen Aff. Thereafter, the parties engaged in extensive discovery. In October 2013, both representative Plaintiffs were deposed. Several depositions of Defendants have been conducted and additional depositions are scheduled over the course of the next month.

B. Facts Supporting Class Certification

1. Real Property Located at 2 Gold Street and 201 Pearl Street

2 Gold Street and 201 Pearl Street are located in lower Manhattan, in Zone A. 2 Gold Street is a 52-story apartment building with 650 residential apartments and two subsurface levels. 201 Pearl Street is a 28-story apartment building with 189 apartments and one subsurface level. The two buildings are adjacent to one another, connected by a walkway, and share common spaces, including the main entrance, lobby and sub-cellar space. Importantly, the critical mechanical systems located in the sub-cellars, including heat, electric and plumbing, serve both buildings.

Both buildings are occupied by commercial space on the first and second stories with residential space beginning at the third story of each building and terminating at each building's respective top floor. There is also a shared parking garage underneath 201 Pearl Street.

2. Hurricane Sandy

At issue in this case is whether Defendants exercised reasonable care to adequately prepare and protect the Premises from potential damage caused by Hurricane Sandy. At all relevant times, Defendant TF Cornerstone was the managing agent for the Premises. In this capacity, TF Cornerstone was responsible for securing, preparing or otherwise protecting the Premises prior to the storm. Defendant TF Cornerstone was also responsible for communicating with all Class members before and after Hurricane Sandy regarding all relevant issues surrounding the storm.

On October 22, 2012, the National Hurricane Center ("NHC") issued its first forecast and public advisories regarding Hurricane Sandy. Thereafter, NHC issued multiple advisories on a daily basis regarding the storm's strength and its predicted path. By Thursday, October 25, 2012, the NHC warned that the entire eastern coast of the United States should be closely monitoring the progress of Hurricane Sandy.

On or about October 26, 2012, TF Cornerstone sent the following communication regarding Hurricane Sandy to all tenants, which stated in its entirety:

> Please be advised that the National Weather Service forecast that Sandy may reach the New York metropolitan area early next week, bringing tropical storm conditions which can include heavy rain and strong winds. Please take all necessary precautions, including: remove or secure items on private terraces, close and lock all windows and terrace doors, and keep blinds or other window coverings closed. We will provide further information on Monday as new information becomes available.

This was the only communication sent to Class members prior to Hurricane Sandy.

On Saturday, October 27, 2012, the NHC and National Weather Service ("NWS") began predicting levels of storm surges along New Jersey and Long Island Sound as high as eleven (11) feet. National weather forecasters were repeatedly warning New York and New Jersey government officials and residents that maximum precautionary measures should be taken.

On Sunday, October 28, 2012, at or about 11:00 a.m., Mayor Bloomberg ordered residents of Zone A to evacuate by 7:00 p.m. At the mandatory evacuation press conference, Mayor Bloomberg warned Zone A property owners, businesses and residents that "tides overnight tonight will lead to coastal flooding in Zone A...We anticipate the surge will hit a lot of low lying areas, and the possibility of flooding will continue into Tuesday afternoon." Despite issuing the evacuation order, however, Mayor Bloomberg repeatedly assured residents at press conferences that no one would be criminally charged or issued a penalty if they failed to evacuate.[2]

Sandy made landfall in lower Manhattan late Monday evening, October 29, 2012. Sometime after the storm surges caused water to overflow onto the streets of lower Manhattan late Monday night, October 29, 2012, water entered the Premises through various points in the perimeter, including the entrance of the below-ground parking garage, a span of approximately ten (10) to fifteen (15) feet. As a consequence, water flooded the cellars and sub-cellars of both buildings. The salt water, which crystallized, caused significant damage to all of the mechanical systems located in the sub-cellars, leaving the Premises without any operating systems.

[2] Mayor Bloomberg was vested with the power to order the evacuation pursuant to New York Executive Law § 24(1), by declaring a state of emergency in New York City. New York Executive Law includes a provision that violations of an Executive Order may be prosecuted as a Class B misdemeanor. N.Y. Exec. Law § 24(5). In response to news reports that police may issue penalties to individuals who failed to evacuate, Mayor Bloomberg repeatedly told residents that no such action would take place. For instance, at one press conference in response to questions about possible misdemeanor charges, Mayor Bloomberg responded, "[w]e have mandatory evacuations in Zone A, but there are no penalties." At another press conference, he stated that there would be no arrests, but people who refuse to leave "are being, I would argue, very selfish."

The buildings' shared facilities included a 20,000-gallon heating oil tank located in the sub-cellar. The pressure of the flood water caused the oil tank to rupture and released heating oil into the flood waters. The oil spill was significant and had to be reported to government officials by Defendants, which placed increased restrictions upon the removal of the water at the Premises. Further, as a result of the compromised oil tank, heating oil fumes permeated the Premises, including floors, walls, ceilings, furniture and clothing located in the apartments throughout the Premises. All vehicles located in the underground parking garage were fully submerged and rendered unsalvageable.

In the Complaint, Plaintiffs allege that the Defendants received multiple warnings from NYC government offices, as well as the NHC, regarding the predicted path of the storm and its severity, including predicted storm surge levels. Despite the actual and constructive notice, Plaintiffs allege that the Defendants failed to take any effective precautions with respect to the garage entrance and the perimeter of the Premises prior to Hurricane Sandy. Specifically, Plaintiffs allege that Defendants failed to use even one sandbag in front of any of the entrances, including the parking garage.

3. The Premises Were Uninhabitable from October 30, 2012 through February 15, 2013

On October 30, 2012, the New York City Department of Buildings ("DOB") designated 2 Gold and 201 Pearl as uninhabitable, and the tenants were forced to evacuate the Premises. The Premises remained uninhabitable until February 15, 2013. Plaintiffs allege that the Defendants' negligence or failures to act directly and proximately caused the Premises to be rendered uninhabitable and to remain uninhabitable for almost four months.

On November 13, 2012, following the storm, TF Cornerstone held a "town hall" meeting for the tenants. At the meeting, one tenant asked what precautions were taken by Defendants to

prevent the flooding. In response, an agent for Defendant TF Cornerstone replied that the buildings were designed to withstand the "100 year storm level of flooding," but that the flood gates were breached by the storm surge. Other than referring to the design of the building and the elevation of sidewalks, there was no reference to any preventative actions that were taken immediately prior to the storm with respect to securing the perimeter of the buildings, including the parking garage entrance.

In fact, at the town hall meeting, tenants were told that the cellar and sub-cellars were flooded as a direct result of the water that entered through the parking garage entrance. Another TF Cornerstone agent admitted to tenants that the Defendants "did not anticipate a crisis of this magnitude." At the meeting, tenants were told that Defendants could not predict when the Premises would be operational, but estimated a return date of on or about March 1, 2013.

The Premises were uninhabitable from October 30, 2012 to February 15, 2013. All Class members were prevented from residing in their apartments for this period of time. During this period of displacement, Class members were forced to find alternative living arrangements. Moreover, Class members' personal belongings were trapped inside the restricted buildings. When the Defendants were finally able to permit tenants to return to collect personal belongings, the buildings were still without power and tenants could only access their apartments by climbing the stairs of the 52-story and 28-story buildings. Further, there were no lights in the stairwells, and tenants could only remove personal belongings that could be safely carried down the unlit stairs. As such, even though Class members found temporary housing, their furniture remained in the Premises, along with the majority of their clothing and personal items.

Plaintiffs, individually and on behalf of the Class, commenced this action to recover the significant costs associated with the almost four months of displacement from their homes.

III. ARGUMENT

A. Plaintiffs Satisfy The Prerequisites Of Article 9

Class actions are a procedural device created to manage a large number of claims quickly, efficiently and economically. CPLR Article 9 governs the class action device.[3] Courts place a liberal construction on Article 9, and are authorized to err on the side of allowing class certification. *In re Colt Industries Shareholder Litigation*, 155 A.D.2d 154, 159 (1st Dept. 1990), *aff'd as mod*., 77 N.Y.2d 185 (1991); *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 91 (2d Dept. 1980) ("the Legislature intended Article 9 to be a liberal substitute for the narrow class action legislation which preceded it"); *Englade v. HarperCollins Publs., Inc*., 289 A.D.2d 159, 159 (1st Dept. 2001) (courts must interpret the statute to "favor the maintenance of class actions."). Provided that the party seeking certification satisfies the prerequisites of Article 9, the decision to certify or not is discretionary for the court. *Feder v. Staten Island Hosp.*, 304 A.D.2d 470, 471 (1st Dept. 2003); *Englade*, 289 A.D.2d at 159.

The only question at class certification "is whether [plaintiffs] may pursue those claims on behalf of a class of similarly situated persons, or whether they must do so as individuals." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc*., 546 F.3d 196, 204 (2d Cir. 2008). Accordingly, courts must "assure that a class certification motion does not become a pretext for a partial trial on the merits." *Id*.; *DeMarco v. Robertson Stephens Inc*., 228 F.R.D. 468, 476 (S.D.N.Y. 2005) (class certification "is emphatically not an opportunity for a second round of review, at a higher standard no less, of the substantive merits of plaintiffs' underlying claims."); *Simon v. Cunard Line*, 75 A.D.2d 283, 288 (1st Dept. 1980) (certification does not depend on the

[3] Article 9 is modeled on Rule 23 of the Federal Rules of Civil Procedure, which governs class actions in the federal courts. *Brandon v. Chefetz*, 106 A.D.2d 162, 168 (1st Dept. 1985). In this regard, New York courts rely on federal precedent when interpreting the class action provisions of CPLR Article 9. *Carnegie v. H&R Block*, 180 Misc.2d 67, 71 (N.Y. Sup. 1999).

merits of the claims); *Cox v. Microsoft Corp*., 2005 WL 3288130, *3 (N.Y. Sup. 2005) (at the class certification stage, inquiry into the merits is limited "to whether on the surface there appears to be a cause of action which is not a sham") (*citing Brandon v. Chefetz*, 106 A.D.2d 162, 168 (1st Dept. 1985)).

At the same time, in considering whether certification is proper, "the court may go beyond the pleadings and consider the range of proof necessary to support class certification." *Daniels v. City of New York*, 198 F.R.D. 409, 413, n. 5 (S.D.N.Y. 2001); *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd*., 262 F.3d 134, 139 (2d Cir. 2001) ("the district court is often in the best position to assess the propriety of the class and has the ability . . . to alter or modify the class, create subclasses, and decertify the class whenever warranted."). At all times, the burden of demonstrating the statutory prerequisites for class certification rests with the plaintiff. *Emilio v. Robison Oil Corp*., 63 A.D.3d 667, 668 (2d Dept. 2009); *CLC/CFI Liquidating Trust v. Bloomingdale's, Inc.*, 50 A.D.3d 446, 447 (1st Dept. 2008).

CPLR 901(a) establishes the five prerequisites which must be satisfied before the factors in CPLR 902 can be addressed. To qualify for class action treatment, a lawsuit must satisfy the following: (1) that the proposed class is so numerous that joinder of all members is impracticable; (2) that common questions of law or fact predominate among the class members; (3) that the claims brought by the proposed representatives are typical of the claims of the class; (4) that the proposed representatives are able to fairly and adequately protect the interests of the class; and (5) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Plaintiffs satisfy all five prerequisites and a class action is the appropriate mechanism for the resolution of the claims in this case.

(1) Numerosity

CPLR 901(a)(1) provides that the party seeking certification must show that the "proposed class is so numerous that joinder of all members is impracticable." There are 650 residential apartments in 2 Gold Street and 189 apartments in 201 Pearl Street. The eight hundred thirty-nine (839) apartments include studios, as well as one, two and three bedroom apartments. Accordingly, the Class is easily in excess of eight hundred thirty-nine (839) members. The Second Circuit has held that a proposed class of more than forty (40) members presumptively satisfies the numerosity requirement. *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Recent cases in this Circuit have reaffirmed that principle. *See, e.g., New Jersey Carpenters Health Fund v. Residential Capital, LLC,* 272 F.R.D. 160, 163 (S.D.N.Y. 2011); *Jacob v. Duane Reade, Inc.*, 289 F.R.D. 408, 413 (S.D.N.Y. 2013) (internal citations omitted); *see also Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) (surveying numerosity requirements). "Moreover, plaintiffs need not provide a precise quantification of their class, since a court may make 'common sense assumptions' to support a finding of numerosity." *Pecere v. Empire Blue Cross & Blue Shield*, 194 F.R.D. 66, 70 (E.D.N.Y. 2000) (*citing LeGrand v. New York City Transit Auth*., 1999 WL 342286, at *3 (E.D.N.Y. 1999)). Accordingly, with more than eight hundred thirty-nine (839) Class members, the presumption of numerosity is met.

(2) Commonality

Under CPLR 901(a)(2), the court must be satisfied that questions of law or fact common to the class predominate over any question affecting only individual members. This issue is not determined by any mechanical test, but rather, the focus is on whether class treatment will achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated. *Friar*, *supra,* 78 A.D.2d at 97. Commonality requires a showing that the action involves

the adjudication of similar, but not necessarily identical, claims for which uniformity of decision is important. *Id.* at 98 ("the [commonality] rule requires predominance, not identity or unanimity, among class members"); *CLC/CFI Liquidating Trust*, *supra*, 50 A.D.3d at 447 (to be certified, the class members' claims must be similar enough to render group determinations practical and feasible) (*citing Weinberg v. Hertz Corp*., 116 A.D.2d 1, 6 (1st Dept. 1986), *aff'd* 69 N.Y.2d 979 (1987)). In *Casey v. Whitehouse Estates, Inc.*, 2012 WL 3168689, at *5 (N.Y. Sup. 2012), a case brought by residential tenants against the owners of a building to recover rent overcharges and to require the landlord to offer lease renewals at regulated rent levels, the court held that "[i]t is clear that common questions of law and fact predominate in the instant case. The litigation involves a single building and a single landlord."

Similarly, in this case, common questions of law and fact predominate because the causes of action all arise from the Defendants' "common course of conduct with respect to plaintiffs." *Freeman v. Great Lakes Energy Partners, L.L.C.*, 12 A.D.3d 1170, 1171 (4th Dept. 2004). The question of the Defendants' liability for their conduct is identical for all Class members. Specifically, whether the Defendants negligently failed to protect or prepare the Premises before Hurricane Sandy, given the multiple warnings more than five (5) days before the storm made landfall, is a question of liability that is equally applicable to the claims of all Class members. The common issues affecting each Class members include, *inter alia*, whether the Defendants were:

a. negligent with respect to their duty to maintain the property in a reasonably safe condition given Defendants' actual and/or constructive notice of the potential flooding from Sandy;

b. negligent in their evaluation and assessment of potential flood damage exposure given the historical information on the location, including past use, zoning designation, flood plain designation and events of past flooding, including but not limited to Hurricane Irene;

c. negligent with respect to the design and construction of the Premises based upon the assessment of potential flood exposure;

d. negligent in their implementation, if any, of flood preventive measures throughout the Premises prior to Sandy on October 29, 2012;

e. negligent with respect to measures taken, if any, to adequately secure the Premises during the four to five days of actual and/or constructive notice of the impending storm from the National Hurricane Center and city officials, and following the approximate thirty-six (36) hour period subsequent to the Zone A mandatory evacuation order;

f. negligent in their failure to use sandbags or other flooding barriers in front of all ground level doors and windows at the Premises;

g. negligent in their failure to use sandbags or other flooding barriers across the entrance of the parking garage;

h. negligent in their failure to create an effective storm preparedness plan, and/or revise said plan subsequent to Hurricane Irene or in the four to five days following official storm warnings;

i. negligent in their failure to follow their storm preparedness plan following the thirty-six (36) hour period subsequent to the Zone A mandatory evacuation order;

j. negligent in their failure to properly secure the operational, mechanical and electrical equipment located in the sub-cellars of the Premises; and

k. negligent in their failure to mitigate damages immediately after Hurricane Sandy.

Because the Defendants owed a duty to all Class members equally on October 29, 2012, the above questions of fact and law predominate. The Plaintiffs and Class members were injured by the same course of conduct engaged in by the Defendants during the 5 days before Sandy made landfall, as well as the days immediately following the storm. Everything the Defendants did, or failed to do, with respect to protecting the property from potential flood waters is the same for all Class members. Similarly, the Defendants' conduct relating to the flood remediation and the mitigation of damages after Hurricane Sandy also impacted all Class members equally.

Plaintiffs sufficiently demonstrate that as a result of Defendants' conduct, the buildings were rendered uninhabitable from October 30, 2012, through February 15, 2013. All Class members were prevented from residing in their apartments for the same period of time and were similarly damaged. Accordingly, because Plaintiffs have sufficiently shown that they were injured by the same course of conduct engaged in by the Defendants, commonality is satisfied.

(a) Subsidiary questions of law or fact do not preclude a finding of commonality

Where common questions predominate, the existence of subsidiary questions of law or fact not common to the class do not preclude a finding of commonality. *See e.g., King v. Club Med, Inc.*, 76 A.D.2d 123, 126 (1st Dept. 1980) (CPLR 901 clearly envisions authorization of class actions even where there are questions of law or fact not common to the class); *Brandon,* 106 A.D.2d at 168 (that individuals who are members of the class might have been subjected to less than all of the conduct complained of is not a ground for denying class action); *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267, 302 (S.D.N.Y. 2003) (collecting cases) (common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues).

The court in *In re Coordinated Title Ins. Cases*, 2004 WL 690380, *9 (N.Y.Sup. 2004), reasoned:

> The statute clearly envisions authorization of class actions even where there are subsidiary questions of law or fact not common to the class. If the defense does have legitimate affirmative defenses to the claims of various members, those defenses may be interposed subsequent to class certification …. Individual issues will often be present in a class action, especially in connection with individual defenses against class plaintiffs, rights of individual class members to recover in the event a violation is established, and the type or amount of relief individual class members may be entitled to receive.

(citing Conte and Newberg, 1 Newberg on Class Actions, 4th Ed., § 3:12 (2002)); *see also Green v. Wolf Corporation*, 406 F.2d 291, 300-01 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969)

("individualized proof required on issues such as damages or reliance of each class member does not preclude a finding that common questions of law or fact pre-dominate over individual questions and, further, that such issues may, if necessary, be tried separately").

Plaintiffs and Class members were all similarly harmed by the Defendants' conduct because the Premises were rendered uninhabitable for the same period of time for all residents, October 30, 2012, through February 15, 2013. Whether Plaintiffs and Class members incurred different amounts of expenses during the displacement period is an issue relating to a damages assessment, not class certification. With regard to individual damages, Article 9 of the CPLR is more broadly construed than FRCP 23, and Plaintiffs and Class members do not need to demonstrate on an individual basis that the Defendants' conduct caused the same or substantially similar injuries in order for an action to be certified (even though here, Defendants did cause similar types of injuries). In *Cox v. Microsoft Corp*., *supra*, the defendant presented evidence that some class members may not have been injured *at all* by their conduct. Rejecting this as a basis to defeat class certification, the court held:

> [T]his argument goes to the amount of dollar damages individual class members suffered and is not determinative of the question of class certification. Where there are differences in the amount of damages the individual class members suffered, the court may try the class aspects first and create subclasses or appoint a special master to hear the individual damage claims, …. individual issues regarding the amount of damages will not prevent class action certification.

Id. at 5 (citations omitted).

In *Godwin Realty Associates v. CATV Enterprises, Inc*., 275 A.D.2d 269, 270 (1st Dept. 2000), a class action by building owners seeking to recover damages for alleged misappropriation and conversion of electricity and physical damage to certain apartment buildings by the use, installation and removal of cable television equipment, the appellate court affirmed the decision to grant class certification:

> To the extent that there may be differences among the class members as to the degree in which they were damaged, the court may try the class aspects first and have the individual damage claims heard by a special master or create subclasses.

*Id.*at 270 (*citing Weinberg, supra*, 116 A.D.2d at 6-7; *Sanders v. Faraday Laboratories, Inc*., 82 F.R.D. 99, 101 (E.D.N.Y. 1979).

Reversing a denial of class certification, the court in *Weinberg, supra*, held that "to the extent that there may be variations among the members of the class **because not all sustained the same type of alleged [injury]**, the authorities are clear that the trial judge may carve out subclasses without destroying the action as a class action …. the statute clearly envisions authorization of class actions even where there are subsidiary questions of law or fact not common to the class." 116 A.D.2d at 6-7 (emphasis added); *see also Osarczuk v. Associated Universities, Inc*., 82 A.D.3d 853, 855 (2d Dept. 2011) (holding same).

In this case, all Class members were prevented from residing in their apartments for the same period of time. All Class members suffered from the breach of the habitability of their apartments and all suffered this same loss of building services. Plaintiffs have sufficiently alleged that they were injured by the same course of conduct engaged in by the Defendants and commonality is satisfied.

(3) Typicality

CPLR 901(a)(3) requires that, "the claims or defenses of the representative parties are typical of the claims or defense of the class." Typicality is satisfied where the plaintiffs' claims derive from the same practice or course of conduct that gives rise to the claims of the other class members and is based upon the same legal theory. *See Friar, supra*, 78 A.D.2d at 98; *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) ("Typicality . . . is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability."). Here, pursuant to CPLR 901(a)(3), the lead Plaintiffs'

representative claims are typical of class members' claims because they are based upon the same conduct, events and legal theories – in particular, all of the common questions noted above at pages 11-12. *Cox, supra,* 2005 WL 3288130 at *3; *Ackerman v. Price Waterhouse,* 252 A.D.2d 179, 201 (1st Dept. 1998); *Casey, supra,* 2012 WL 3168689 at *4 ("the class representatives' claims are based on the same conduct by the landlord; assert the same legal theory; and are based on the same cause of action. Accordingly, the typicality requirement has been satisfied.").

The typicality requirement is satisfied because both the lead Plaintiffs' and Class members claims are based on the same conduct of the Defendants immediately before and after Hurricane Sandy made landfall on October 29, 2012. The lead Plaintiffs assert the same legal theories as those of the Class members and suffered the same types of harm from Defendants' conduct. As such, Plaintiffs' claims are typical of the class.

(4) Adequacy

Plaintiffs also satisfy the requirements of CPLR 901(a)(4), which requires "the proposed representatives" to demonstrate that they will "fairly and adequately protect the interests of the class." Courts consider three factors relevant to the determination of adequacy of representation: (i) whether any conflict of interest exists between the representatives and the class members; (ii) the representatives' familiarity with the lawsuit; and (iii) the competence and experience of class counsel. *Pruitt v. Rockefeller Center Properties, Inc.,* 167 A.D.2d 14, 24 (1st Dept. 1991); *Ackerman, supra,* 252 A.D.2d at 202.

Plaintiffs are adequate representatives of the Class. They have no interests antagonistic to the Class members, and are ready, willing and able to assume the responsibilities and duties of a class representative. *See* Affidavit of Kevin Sardelli, ¶¶ 10-12; Affidavit of Jose Hernandez-Ortiz, at ¶¶ 10-12, stating that they will not compromise the interests of the Class members for their own

personal gain, Class counsel has explained the rights and responsibilities of Class representatives and they fully understand the facts and issues involved in this litigation); *see also In re Lloyd's American Trust Fund Litigation*, 1998 WL 50211, at *12 (S.D.N.Y. 1998) (a party "will be deemed inadequate only if she is startlingly unfamiliar with the case."); *Casale v. Kelly*, 257 F.R.D. 396, 406 (S.D.N.Y. 2009) (class representative status is properly granted except where the class representative has "so little knowledge that [she] would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys."). There is no dispute that Plaintiffs have sufficient knowledge of the case. Plaintiffs participated in discovery, produced documents in support of their claims and were both deposed by Defendants. Sardelli Aff, ¶ 11; Hernandez-Ortiz Aff., ¶ 11.

In addition, Plaintiffs' interests are aligned with the interests of other Class members because the same alleged conduct that injured the Plaintiffs, also injured all Class members. *Cox, supra*, 2005 WL 3288130 at *3; *see also Casey, supra*, 2012 WL 3168689 at *4-5 ("the named plaintiffs and the putative class members share a common goal - namely, ensuring that the landlord charges tenants of the apartment building no more than the maximum legal rent; that they be afforded the protections of the [rent stabilization laws]; and that they receive compensation for past overcharges….[u]nder such circumstances, there is no discernable conflict of interest.")

Finally, Plaintiffs' counsel are experienced and qualified to litigate this action. Class counsel has represented plaintiffs in numerous consumer class actions and has substantial experience in complex litigation. Christensen Aff., ¶¶ 10-11; Affirmation of Hunter Shkolnik, ¶¶ 6-8 ("Shkolnik Aff."). Since the case was filed in November 2012, counsel has vigorously and effectively prosecuted this case on behalf of the Class, conducted pre-filing investigation, prepared and filed a detailed complaint, an amended complaint, an order to show cause on behalf of the

entire Class, and conducted extensive discovery and depositions. Christensen Aff., ¶¶ 8-9; Shkolnik Aff., ¶¶ 4-5.

Accordingly, pursuant to CPLR 901(a)(4), Class counsel and the representative Plaintiffs will fairly and adequately protect the interests of the Class.

(5) Superiority

To satisfy CPLR 901(a)(5), Plaintiffs must show that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." Pursuant to this requirement, use of the class action mechanism in this case will promote both efficiency and fairness. First, litigating over eight hundred thirty-nine (839) claims individually, instead of deciding the matter of liability once, is prohibitively inefficient. A class action is a far superior (and the best) method to fairly and expeditiously resolve the Class members' claims and to keep the courts from becoming overburdened by a large number of repetitive cases. Because the legal issues and liability determinations in this case are the same for Plaintiffs and Class members, adjudication of the common issues as part of one class action will further judicial economy. *See Casey, supra*, 2012 WL 3168689 at *5 ("the alternatives to a class action would be individual actions by tenants or administrative proceedings…[i]t is clear that this class action lawsuit conserves judicial resources by avoiding a multiplicity of lawsuits involving the same basic facts.").

Second, the requirement for fairness is satisfied because proceeding as a class action eliminates the possibility of inconsistent outcomes for those similarly situated. Further, as a practical matter, it is likely that numerous Class members would have difficulty retaining a law firm to accept an individual case due to the high costs needed to properly litigate this case and the absence of causes of action with statutory provisions for attorneys' fees and costs. Plaintiffs expect

to retain several experts and this cost alone is likely in excess of an average Class members' claim. Moreover, numerous depositions are required and would have to be repeated in each individual case.

Courts consider the class action mechanism superior where the damages sustained by any one class member will almost certainly be insufficient to justify the expenses inherent in any individual action. *See e.g., Cox, supra*, 2005 WL 3288130 at *5 ("[c]learly, the difficulty and expense of proving the dollar amount of damages an individual consumer suffered, versus the comparatively small amount that any one consumer would expect to recover, indicates that the class action is a superior method to adjudicate this controversy."); *Weinberg, supra*, 116 A.D.2d at 6. The ability to concentrate these claims in a single forum confirms the superiority of a class action.

In sum, class treatment presents a superior mechanism for fairly resolving the issues and claims in this case without repetitious and wasteful litigation. Plaintiffs have satisfied each of the requirements of CPLR 901(a).

B. CPLR 902 Analysis

Once the prerequisites of CPLR 901(a) are satisfied, the court must consider the factors set out in CPLR 902, relating to the possible interest of Class members in maintaining separate actions, the existence of pending litigation regarding the same controversy, the desirability of the proposed class forum and the difficulties likely to be encountered in the management of a class action. CPLR 902. As set forth above, Class members do not have a strong interest in proceeding individually against the Defendants given the high costs of this particular litigation relative to the values of individual damages. Further, it is also unlikely that Class members will be able to retain counsel to pursue their claims on an individual basis. In such instances, courts consider a class action

appropriate. *In re Coordinated Title Ins. Cases*, *supra*, 2004 WL 690380 at *18 (where interest in the pursuit of individual claims is low, "[m]embers of the putative class are likely to be well-served by vigorous representation by named plaintiffs and class counsel in these cases.").

Second, no other class litigation regarding this matter is currently pending against the Defendants. Thus, certifying this Class will not interfere with any other courts or ongoing class actions. *Brody v. Catell*, 2007 WL 1865080, at *4 (N.Y. Sup. 2007) ("there is no indication of other pending litigation and no expressed interest by any other class member in controlling the litigation."). Finally, there are no apparent issues relating to the management of this case as a class action, and in fact, the management of hundreds of individual cases in an already overloaded court system arguably creates more difficulties than the management of this one case. *Casey*, *supra*, 2012 WL 3168689, at *6 ("a consideration of the factors contained in CPLR 902 does not warrant a different result. Among the factors for the court to consider in determining whether the action may proceed as a class action under CPLR 902 are the inefficiency of prosecuting separate actions … this class action will avoid a multiplicity of lawsuits by individual tenants, conserving scarce judicial resources.").

Because the class is composed of tenants who resided at the Premises on October 29, 2012, the Defendants are already in possession of the contact information for Class members, which makes issues relating to the identification of potential Class members and class notice manageable. Moreover, the case has already proceeded through significant discovery without any problems managing this litigation.

In sum, there have not been, and there are not anticipated to be, any difficulties in the management of this action as a class action; the individual members of the Class have little economic incentive in individually controlling the prosecution of separate actions; and, to the best

of Plaintiffs' knowledge, there is no other class litigation concerning this controversy. Moreover, this Court is an appropriate forum to preside over the claims of New York residents against New York defendants concerning apartment buildings located in lower Manhattan. Accordingly, the considerations of CPLR 902 support Plaintiffs' request to proceed as a Class.

C. Plaintiffs' Counsel Should Be Appointed Class Counsel

Named Plaintiffs' counsel should be appointed Class Counsel because they are "competent, skilled, and experienced in class action litigation, and will adequately represent the interests of all Class members." *Fiala v. Metropolitan Life Ins. Co*., 2006 WL 6190175 (Sup. Ct. N.Y. Co. 2006); *see also Pruitt v. Rockefeller Ctr. Properties, Inc*., 167 A.D.2d 14, 24 (1st Dept. 1991) (factors to consider are the "competence, experience and vigor of the representative's attorneys"). Napoli Bern Ripka Shkolnik and Imbesi Christensen have significant experience in class action and complex litigation and the joint efforts of both firms will ensure that the Class will receive the best possible representation. Christensen Aff. ¶¶ 8-12; Shkolnik Aff., ¶¶ 6-8; *See* Newberg on Class Actions § 22:7 (4th ed.) ("the appointment of multiple lead counsel may better protect the interests of the plaintiff class . . . .").

Napoli Bern Ripka Shkolnik, LLP and Imbesi Christensen are jointly representing individuals in several class action cases currently pending, including *Matthew Bobrow v. Ocean Prime, LLC, et al.*, Index No. 150612/13, and *Kevin Clark, et al. v. Quik Park Tribeca II, LLC, et al*., Index No. 151476/13. Earlier this month in another class action, the firms received a final order approving a class action settlement, certifying the class for settlement and awarding attorneys' fees and costs. *See Abraham Lee, et.al. v. Cherry Street, LLC, et al*., Index No.: 158883/2012. Christensen Aff. ¶ 11; Shkolnik Aff., ¶ 8.

This action was commenced on November 20, 2012. To date, proposed Class Counsel have diligently investigated and prosecuted the claims at issue in the action and demonstrated their knowledge of the relevant facts and law. Additionally, proposed Class Counsel have already dedicated substantial resources to the prosecution of the case. The interests of the Class would be well-served by this joint representation.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for class certification, appoint Plaintiffs as Class representatives and appoint Napoli Bern Ripka Shkolnik, LLP and Imbesi Christensen as Class Counsel.

Dated: New York, New York
December 23, 2013

Respectfully submitted,

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