At an IAS Term, Part 83, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21st day of August, 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

----------X

RUTH MARANTZ and ANTONIO CHECCO, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

MD CBD 180 FRANKLIN LLC,

Defendant.

----------X

DECISION AND ORDER

Index No. 521055/20

Motion #4

The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	97-100
Opposing Affidavits (Affirmations)	
Affidavits/ Affirmations in Reply	116

Upon the foregoing papers, plaintiffs Ruth Marantz and Antonio Checco, on behalf of themselves and all others similarly situated, move for an order: (a) certifying this action as a class action pursuant to CPLR article 9, on behalf of current and former tenants of the subject building at 180 Franklin Avenue in Brooklyn; (b) appointing plaintiffs as lead plaintiffs and class representatives; (c) appointing the law firm of Newman Ferrara LLP as counsel for the class; (d) directing that the proposed notice be provided to the class; and (e) requiring defendant MD CBD 180 Franklin LLC to provide the names, and contact information of the class members.

Plaintiffs commenced this putative class action to recover rent overcharge awards and injunctive relief as the result of defendant's alleged violation of the Rent Stabilization Law (RSL) and Code (RSC) with respect to registering initial rents for new buildings receiving tax benefits under Real Property Tax Law § 421-a (Section 421-a). Construction of defendant's building commenced in 2014 and a temporary certificate of occupancy was issued in March 2016. As owner of a newly constructed residential building, defendant was eligible to receive Section 421-a tax benefits, under which the building was made subject to the RSL and RSC for the pendency of the benefits period. As a Section 421-a participant, defendant was required to register the rents charged to and paid by the building's first tenants as the initial legal regulated rents. Under the RSL and RSC, the owner of a Section 421-a building cannot register an amount as the initial legal rent but charge the first tenant a lower "preferential rent"; the lower preferential rent charged to the tenant must be registered as the initial regulated rent. The

essential claim of plaintiffs involves defendant's allegedly fraudulent use of rent concessions to market the apartments to tenants using a "net effective" rent (total rent of lease term divided by the number of months in the term), and registering the legal regulated rent as the higher, undiscounted monthly figure in the lease, thereby avoiding registration of the initial regulated rents at the lower preferential amounts.

"In determining whether an action should proceed as a class action, it is appropriate to consider whether the claims have merit. However, this inquiry is limited and such threshold determination is not intended to be a substitute for summary judgment or trial. Class action certification is thus appropriate if on the surface there appears to be a cause of action which is not a sham" (*Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010] [citations and internal quotation marks omitted]). It has been held that a rent overcharge action properly lies where an owner uses prorated discounts disguised as one-time monthly concessions as a way to manipulate the initial legal regulated rent for an accommodation in a Section 421-a building (*see Bascom v 1875 Atl. Ave Dev., LLC*, 227 AD3d 767 [2d Dept 2024]; *Wise v 1614 Madison Partners, LLC*, 214 AD3d 550 [1st Dept 2023]; *Chernett v Spruce 1209, LLC*, 200 AD3d 596 [1st Dept 2021]). Class certification is not precluded here based on lack of merit since this court previously determined that plaintiffs stated a cognizable claim for rent overcharge.

CPLR 901 (a) provides:

> "a. One or more members of a class may sue or be sued as representative parties on behalf of all if:
> "1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
> "2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
> "3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> "4. the representative parties will fairly and adequately protect the interests of the class; and
> "5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

The above factors "are commonly referred to as the requirements of numerosity, commonality, typicality, adequacy of representation and superiority" (*City of New York v Maul*, 14 NY3d 499, 508 [2010]). The application of CPLR 901 (a) to the facts of a particular case ordinarily rests "within the sound discretion of the trial court" (*Small v Lorillard Tobacco Co.*, 94 NY2d 43, 52 [1999]). The statute must be liberally construed (*see Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129 [2d Dept 2008]; *Beller v William Penn Life Ins. Co. of N.Y.*, 37 AD3d 747, 748 [2d Dept 2007]; *Friar v Vanguard Holding Corp.*, 78 AD2d 83, 93 [2d Dept 1980]). Moreover, "CPLR article 9 affords the trial court considerable flexibility in overseeing a class action," and the court could even "decertify the class at any time before a decision on the merits if it becomes apparent that class treatment is inappropriate" (*City of New York*, 14

NY3d at 513-514). Nevertheless, "[t]he proponent of class certification bears the burden of establishing the criteria promulgated by CPLR 901 (a) and must do so by the tender of evidence in admissible form" (*Pludeman*, 74 AD3d at 422] [internal citations omitted]).

CPLR 901 (a) (1) does not specify a minimum number of class members needed to satisfy the numerosity requirement, and there is no mechanical test to determine whether the members of a putative class are sufficiently numerous (*see Globe Surgical Supply*, 59 AD3d at 137-138; *Friar*, 78 AD2d at 96). "Each case depends upon the particular circumstances surrounding the proposed class and the court should consider the reasonable inferences and common sense assumptions from the facts before it" (*Friar*, 78 AD2d at 96). There is also no requirement that the exact number of class members be immediately known (*see Smith v Atlas International Tours*, 80 AD2d 762 [1st Dept 1981]). It has been held that "'the threshold for impracticability of joinder seems to be around forty'" (*Galdamez v Biordi Constr. Corp.*, 13 Misc 3d 1224[A], 2006 NY Slip Op 51969[U], *2 [Supreme Court, New York County 2006], quoting *Dornberger v Metropolitan Life Ins. Co.*, 182 FRD 72, 77 [SDNY 1999]; *see also Klakis v Nationwide Leisure Corp.*, 73 AD2d 521, 522 [1st Dept 1979] [class certification properly denied where putative class consisted of only 21 individuals]; *Caesar v Chemical Bank*, 118 Misc 2d 118, 119 [Sup Ct, New York County 1983] [certifying class consisting of 39 bank employees]; *Cannon v Equitable Life Assur. Soc. of U. S.*, 106 Misc 2d 1060, 1065 [Sup Ct, Queens County 1980], *revd on other gds.* 87 AD2d 403 [2d Dept 1983] [there has been a trend "to regard classes of approximately 30 or less as not being sufficiently numerous, although there are exceptions"] [citations and internal quotations omitted]).

> "[T]he legislature contemplated classes involving as few as 18 members (Mem of St Consumer Protection Bd at 8 n 11, Bill Jacket, L 1975, ch 207) where the members would have difficulty communicating with each other, such as where 'barriers of distance, cost, language, income, education or lack of information prevent those who are aware of their rights from communicating with others similarly situated' (Mem of St Consumer Protection Bd at 3, Bill Jacket, L 1975, ch 207)" (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399 [2014]).

Such reasoning could apply to a rent overcharge class action where tenants have moved out of the building (*id.*).

In support of their motion with respect to numerosity, plaintiffs submit a notice to admit which requested an admission from defendant that 1) for more than forty (40) apartments at the building, defendant utilized a concession the first time the apartment was rented; 2) for more than forty (40) apartments in the building, defendant utilized a concession within one year prior to June 14, 2019, or at

any time thereafter; and 3) for more than forty (40) apartments in the building, defendant has utilized a concession, after the issuance of the building's final Certificate of Occupancy.

CPLR 3123 provides, in relevant part, that "a party may serve upon any other party a written request for admission by the latter . . . of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry" (CPLR 3123 [a]). If the requested admission is not denied or otherwise explained "within twenty days after service thereof or within such further time as the court may allow," then the requested admission will be deemed admitted (id.). "The purpose of a notice to admit is only to eliminate from the issues in litigation matters which will not be in dispute at trial" (*DeSilva v Rosenberg*, 236 AD2d 508, 508 [2d Dept 1997]; *see Rosenfeld v Vorsanger*, 5 AD3d 462, 462 [2d Dept 2004]). "It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial" (*DeSilva*, 236 AD2d at 508). "Also, the purpose of a notice to admit is not to obtain information in lieu of other disclosure devices, such as the taking of depositions before trial" (*id.* at 509). "A notice to admit which goes to the heart of the matters at issue is improper" (*id.* at 508; *see Tolchin v Glaser*, 47 AD3d 922 [2d Dept 2008]; *Glasser v City of New York*, 265 AD2d 526 [2d Dept 1999]).

There is no dispute that defendant did not respond or object to the notice to admit within 20 days of service and, therefore, defendant is deemed to have admitted to the statements contained therein. Contrary to the argument of defendant, the court does not find that the admissions requested are improper as they seek quantifiable and ascertainable information regarding the number of apartments for which defendants offered a rent concession. The request for admissions simply with respect to the number of apartments for which a concession is sought, while relevant to class certification, would not otherwise be the subject of a dispute at trial, nor would the admissions cover ultimate conclusions or go to the heart of the matters at issue regarding rent overcharge.

As plaintiffs have established that the number of class members will exceed the "threshold" to make joinder impracticable, the court finds that plaintiffs have satisfied the numerosity requirement of CPLR 901 (a) (1).

A party seeking class certification must establish more than that issues exist which are common to the entire class and that they are substantial and significant; the party must show that these common issues predominate over unique circumstances that may pertain to each individual's situation (*Alix v Wal–Mart Stores, Inc.*, 57 AD3d 1044 [3d Dept 2008]). "[W]hether there are common predominating questions of fact or law so as to support a class action should not be determined by any mechanical test, but rather, whether the use of a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated" (*Friar*, 78 AD2d at 97] [internal quotation marks

and citations omitted]). "[T]he fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action. Rather, it is predominance, not identity or unanimity, that is the linchpin of commonality" (*City of New York*, 14 NY3d at 514 [citations and internal quotation marks omitted]).

The significant issue in this matter, whether the rent concessions offered to defendants' initial tenants were a fraudulent guise to register inflated initial regulated rents are not only common to the entire class but predominate over any individual peculiar question involving each class member. The only apparent peculiar question would involve the individual calculation of rent overcharge. That the amount of damages and facts of individual claims may vary from individual tenant to individual tenant is not dispositive as to the commonality question (*Borden*, 24 NY3d at 399). Thus, the court finds plaintiffs have demonstrated commonality of issues among the class.

"Typical claims are those that arise from the same facts and circumstances as the claims of the class members" (*Globe Surgical Supply*, 59 AD3d at 143; *Ackerman v Price Waterhouse*, 252 AD2d 179, 201 [1st Dept 1998] [since claims "arose out of the same course of conduct and are based on the same theories as the other class members, they are plainly typical of the entire class"]; *Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 22 [1st Dept 1991]). To be typical, "it is not necessary that the claims of the named plaintiff be identical to those of the class" (*Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604, 607 [2d Dept 1987]). "Since the typicality requirement relates to the nature of the claims and the underlying transaction, not the amount or measure of damages, that plaintiff's damages may differ from those of other members of the class is not a proper basis to deny class certification" (*Pruitt*, 167 AD2d at 22, citing *Vickers v Home Fed. Sav. & Loan Assn. of East Rochester*, 56 AD2d 62, 65 [4th Dept 1977]).

The claims of the representative class members here are typical of, if not identical to, those of the putative class - that defendant skirted the requirements of the Section 421-a program by offering rent concessions resulting in a lower net effective rent, yet registering the higher rent charged in the initial lease. Thus, the typicality requirement is established.

The three essential factors to consider in determining adequacy of representation are potential conflicts of interest between the representative and the class members, personal characteristics of the proposed class representative (e.g. familiarity with the lawsuit and his or her financial resources), and the quality of the class counsel (*see Cooper v Sleepy's, LLC*, 120 AD3d at 743-744 [2d Dept 2014]; *Ackerman*, 252 AD2d at 179; *Pruitt*, 167 AD2d at 25–26). In order to be found adequate in representing the interests of the class, class counsel should have some experience in prosecuting class actions (*see Globe Surgical Supply*, 59 AD3d at 144).

The affidavits submitted by the two plaintiffs/proposed class representatives demonstrate that plaintiffs, who attest to receiving advanced education, are familiar with and will be present during the

litigation, and that no conflicts of interest will arise during the course of the litigation. Plaintiffs have further demonstrated the quality of their counsel, Newman Ferrara, LLP, which has significant experience in prosecuting class actions involving owners' violation of the RSL and RSC and which asserts in its supporting affirmation will assume full financial risk of this litigation. Accordingly, the adequacy requirement has been met.

A class action is a device which would allow "one action to do the job, or a good part of it, that would otherwise have to be done by many" (*Friar*, 78 AD2d 83, 98). Insofar as common questions arise in this case regarding the improper use of rent concessions to circumvent the requirements of the RSL and RSC regarding registration of initial regulated rents in a Section 421-a building, which practice is alleged to involve a substantial number of present and previous tenants of defendant's building, and with an eye toward preserving judicial resources, the court finds class action treatment is superior to individual adjudication (*see Borden*, 24 NY3d at 400; *Hess v EDR Assets LLC*, 171 AD3d 498 [1st Dept 2019]).

CPLR 901 (b) provides that "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action." "The language of CPLR 901 (b) itself says it is not dispositive that a statute imposes a penalty so long as the action brought pursuant to that statute does not seek to recover the penalty" (*Borden*, 24 NY3d at 393). The complaint in the instant action does not seek to recover treble damages as normally available to a rent overcharge claimant where the overcharge is deemed willful. Further, each of the named plaintiffs have submitted an affidavit wherein they acknowledge that treble damages are unavailable in a class action and will not seek same in this litigation.

CPLR 902 provides:

> "Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:
> "1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
> "2. The impracticability or inefficiency of prosecuting or defending separate actions;
> "3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

"4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;
"5. The difficulties likely to be encountered in the management of a class action."

Plaintiffs sufficiently demonstrate that the factors of CPLR 902, as relevant here, weigh in favor of a class action in this forum rather than individual actions.

Finally, the proposed class notice adequately explains to the class the nature of the lawsuit, description of the class, and instructions to members on how to exclude themselves from the class and ramifications of exclusion. The notice also explains that by remaining with the class, members would not be entitled to recover treble damages.

Accordingly, it is hereby

ORDERED that this action is certified as a class action pursuant to CPLR article 9, on behalf of current and former tenants at the subject building; and it is further

ORDERED that plaintiffs are appointed as lead plaintiffs and class representatives; and it is further

ORDERED that the law firm of Newman Ferrara LLP is appointed as counsel for the class; and it is further

ORDERED that the proposed notice be distributed to the class by first class mail; and it is further

ORDERED that defendant shall provide the names and contact information of the class members, through a current rent roll as to current tenants, and the last known contact information, including email addresses, if available, of former tenants.

The foregoing constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice