SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

In the Matter of the Application of: PARTNERSHIP FOR THE PUBLIC GOOD, INC., HOUSING OPPORTUNITIES MADE EQUAL, INC., PEOPLE UNITED FOR SUSTAINABLE HOUSING, INC., CENTER FOR ELDER LAW & JUSTICE, INC., DOROTHY OATMEYER, KRYSTAL CRUZ, DENITA ADAMS, and VICTORIA RING, on behalf of themselves and of all others similarly situated, Petitioners-Plaintiffs, v. CITY OF BUFFALO, BYRON BROWN, MAYOR OF THE CITY OF BUFFALO, in his Official Capacity, and CATHERINE AMDUR, COMMISSIONER OF PERMIT AND INSPECTION SERVICES FOR THE CITY OF BUFFALO, in her Official Capacity, Respondents-Defendants, For a Judgment Pursuant to § 3001 and Articles 9 and 78 of the Civil Practice Law and Rules.	Index No. 809862/2024 Hon. Michael Siragusa Part 29

PETITIONERS-PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Statutes, Rules, and Other Authorities

Page(s)

Plaintiffs Dorothy Oatmeyer, Krystal Cruz, Denita Adams, and Victoria Ring ("Plaintiffs") respectfully submit this memorandum in support of their motion for class certification.

PRELIMINARY STATEMENT

This hybrid Article 78 Proceeding and Class Action challenges the City's failure to conduct proactive inspections of rental units in the Buffalo Rental Registry as required by Buffalo's Proactive Rental Inspection Law. The Rental Registry contains approximately 36,000 rental units situated in around 24,000 unique properties. (O'Brien Affidavit, NYSCEF No. 13, ¶ 5.) The PRI Law was specifically designed and intended to prevent lead poisoning, as well as other unhealthy and unsafe housing conditions, and thereby improve the overall quality of Buffalo rental housing and protect the health and safety of Buffalo tenants. These conditions affect the interior as well as the exterior environment in and around affected properties. Plaintiffs claim that the City's failure to conduct the proactive inspections that the PRI Law requires violates their rights under the Green Amendment to New York's Constitution, which guarantees every New Yorker's right to "clean air and water, and a healthful environment." Accordingly, Plaintiffs seek to represent a class consisting of all individuals who reside or seek to reside in one- or two-family non-owner-occupied rental housing in the City of Buffalo. Because this class satisfies all the requirements for class certification under CPLR Article 9, the Court should certify this action as a class action.

BACKGROUND

In 2020, the Buffalo Common Council enacted the Proactive Rental Inspection ("PRI") Law. (*See* Lipsitz Affirm., NYSCEF No. 3, Ex. 1, NYSCEF No. 4.) Among the stated purposes of the Law are to achieve the complete remediation of lead-based paint hazards, the

correction and prevention of unsafe and unhealthy housing conditions, and the restriction and revocation of rental privileges to property owners who fail to maintain safe and healthy housing. Buffalo Code § 264-1. This law represented the first attempt at primary prevention of lead poisoning in the City of Buffalo after decades of advocacy during which the high incidence of lead poisoning among Buffalo children was widely recognized as a public health crisis. (Fahey Aff., NYSCEF No. 20, ¶¶ 8, 10; Cameron Aff., NYSCEF No. 24, ¶¶ 23-25.)

The problems of lead poisoning and other substandard housing conditions are pervasive and inescapable in Buffalo's low-income communities. Lead poisoning affects entire neighborhoods because nearly all of Buffalo's low-income housing stock is contaminated, both inside and outside, and lead paint on exterior surfaces deteriorates and contaminates the air and soil in those neighborhoods. (Glick Aff., NYSCEF No. 22, ¶ 11; Cameron Aff., NYSCEF No. 24, ¶ 19.)

Pursuant to the PRI Law, all rental dwelling units subject to its provisions must be inspected for lead paint hazards and other health and safety violations before an application to be certified in the rental registry may be approved. Buffalo Code § 264-8. Rental of a unit not included in the registry is unlawful, and units found to have active lead-paint hazards must undergo remediation before they may be certified. *Id.* § 264-16. The PRI Law also introduces a new requirement that any landlord seeking to rent a unit covered by the PRI Law obtain a certificate of rental compliance ("CRC"), which may only be granted after an interior and exterior inspection confirms that the unit is free from any unsafe conditions and housing code violations. Buffalo Code §§ 264-20, 264-22(A)(4). In furtherance of the CRC program, the Law also requires the City's Commissioner of Permit and Inspection Services to establish a process to apply for these CRCs, including promulgating a form application. Buffalo Code § 264-24(A).

Although Respondents acknowledge that they were required by the 2020 law to conduct inspections of all 36,000 properties in the rental registry every three years (Amdur Report, NYSCEF No. 38), they have actually only conducted 4,827 inspections during the nearly four years that have elapsed since the law went into effect, and have not implemented a regime of *proactive* inspections at all, instead inspecting in response to requests or complaints. (*Id*.)

Through their complete failure to implement and enforce the PRI Law, Respondents have entirely thwarted the proactive rental inspections program and its intended purpose to discover and remediate health and safety hazards that contaminate the environment in and around covered rental properties. Plaintiffs therefore brought this putative class action and seek to compel Respondents to implement and enforce the PRI Law. Plaintiffs assert that Respondents' failure violates their rights under the Green Amendment to New York's constitution, New York State Constitution Article I, Section 19, which provides that "each person shall have a right to clean air and water, and a healthful environment."

STANDARD ON THIS MOTION

The decision whether to certify a class under CPLR Article 9 is within the sound discretion of the trial court. *Small v. Lorillard Co.*, 94 N.Y.2d 43, 52 (1999); *CLC/CFI Liquidating Trust v. Bloomingdale's, Inc.*, 50 A.D.3d 446, 447 (1st Dept. 2008); *Wilder v. May Dept. Stores Co.*, 23 A.D.3d 646, 649 (2d Dept. 2005). In determining whether an action should proceed as a class action, the underlying facts as alleged in the complaint are accepted as true. *Dabrowski v. Abax*, 2010 N.Y. Misc. LEXIS 3507, at *3 (Sup. Ct. N.Y. County 2010), *aff'd*, 84 A.D.3d 633 (1st Dept. 2011). Thus, the Court does not address the merits of the underlying causes of action on a motion for class certification as long as "on the surface there appears to be a cause of action which is not a sham." *Pludeman v. N. Leasing Sys., Inc.*, 74 A.D.3d 420, 422 (1st Dep't 2010) (*citing Brandon v. Chefetz*, 106 A.D.2d 162, 168 (1st Dept. 1985)).

In exercising its discretion, the Court must construe CPLR Article 9 liberally to allow class actions, and must always err on the side of certifying a class. *Kudinov v. Kel-Tech Constr. Inc.*, 65 A.D.3d 481, 481 (1st Dep't 2009) ("Whether a particular lawsuit qualifies as a class action rests within the sound discretion of the trial court. In exercising this discretion, a court must be mindful of our holding that the class certification statute should be liberally construed."); *Englade v. Harper Collins Publs., Inc.*, 289 A.D.2d 159, 159 (1st Dept. 2001) (citing *Pruitt v. Rockefeller Center Properties, Inc.*, 167 A.D.2d 14, 21 (1st Dept. 1991) ("Appellate courts in this state have repeatedly held that the class action statute should be liberally construed . . . any error, if there is to be one, should be . . . in favor of allowing the class action"), and *Brandon*, 106 A.D.2d at 168-69 ("The policy of this rule is to favor the maintenance of class actions and for a liberal interpretation.")); *see Jenack v. Goshen Ops., LLC*, 222 A.D.3d 36, 45 (2d Dep't 2023) (relying on "notion that CPLR 901(a) is to be liberally construed" and affirming certification of class); *Hurrell-Harring v. State of N.Y.*, 81 A.D.3d 69, 75-76 (3d Dept 2011) ("Mindful of the liberal construction we must give to CPLR article 9, and reiterating that any error should be resolved in favor of granting class action certification," court reversed denial of class certification.); *Pasucci v. Absolute Ctr. for Nursing & Rehab. at Allegany, LLC*, 2014 N.Y. Misc. LEXIS 5834, at *40 (Sup. Ct. Erie County Jan. 10, 2014) ("[T]he courts recognize that article 9 of the CPLR was enacted to liberalize the narrow class action legislation which preceded it by providing a flexible, functional scheme for certification of class actions."; internal quotation marks omitted), *aff'd for reasons stated by lower court*, 125 A.D.3d 1313 (4th Dep't 2015).

That is because "the legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it." *City of New York v. Maul*, 14 N.Y.3d 499, 509 (2010); *accord Maddicks v. Big City Props., LLC*, 34 N.Y.3d 116, 125 (2019); *Friar v.*

Vanguard Holding Corp., 78 A.D.2d 83, 91 (2d Dept 1980); *Stecko v. RLI Ins. Co.*, 121 A.D.3d 542, 543-544 (1st Dept. 2014); *Liechtung v. Tower Air, Inc.*, 269 A.D.2d 363, 364 (2d Dept 2000). New York courts accordingly do not apply the same degree of "rigorous analysis" that a federal court would apply to a motion to certify under the federal rules of civil procedure, and are more liberal in certifying classes than federal courts applying Fed. R. Civ. P. 23. *Stecko*, 121 A.D.3d at 543-44.

ARGUMENT

CLASS TREATMENT IS APPROPRIATE UNDER CPLR ARTICLE 9.

Plaintiffs seek to represent a class consisting of all individuals who reside or seek to reside in one- or two-family non-owner-occupied rental housing in the City of Buffalo.

CPLR 901(a) sets forth five requirements that Plaintiffs must meet to bring this case as a class action:

1. The class must be so numerous that joinder of all members is impracticable;
2. There must be questions of law or fact common to the class which predominate over any questions affecting only individual members;
3. The claims and defenses of the representative parties must be typical of the claims or defenses of the class;
4. The plaintiffs must fairly and adequately protect the interests of the class; and
5. A class action must be superior to other available methods for the fair and efficient adjudication of the controversy.

Applying New York's liberal standard for class certification, it is clear that each of these requirements is satisfied in this case, and the Court should certify the class.

I. THE PROPOSED CLASS MEETS THE NUMEROSITY REQUIREMENT.

There are 36,000 rental units in Buffalo's Rental Registry, all of which by the terms of the registry should be one- or two-family non-owner-occupied rental units to which the PRI Law applies. (O'Brien Affidavit, NYSCEF No. 13, ¶ 5.) Acknowledging that some of these

properties at any given time are vacant and that there may be some errors in the Registry, it is clear that the proposed class consisting of all individuals renting or seeking to rent one of these units contains at least thousands and likely tens of thousands of individuals.

A class of this size easily satisfies the requirement that the class be so numerous that joinder of all members is impracticable. CPLR 901(a)(1). The Court of Appeals has made clear that dozens would normally suffice. *Borden v. 400 E. 55th St. Assoc., L.P.*, 24 N.Y.3d 382, 399 (2014) ("legislature contemplated classes with as few as 18 members"); *see also Zeitlin v. N.Y. Islanders Hockey Club, L.P.*, 49 Misc. 3d 511, 515-17 (Sup. Ct. Nassau County 2015) (canvassing cases and concluding that lower limit for class size is approximately 20 members). There is no question that a class of thousands satisfies the numerosity requirement. *Cherry v. Res. Am., Inc.*, 15 A.D.3d 1013, 1013 (4th Dep't 2005) (holding class of 471 members sufficiently numerous); *Freeman v. Great Lakes Energy Partners, L.L.C.*, 12 A.D.3d 1170, 1171 (4th Dept 2004) (holding 1,500 class members sufficiently numerous); *Felder v. Foster*, 71 A.D.2d 71, 74 (4th Dept 1979) ("2,000 members of the class are too numerous for joinder . . . ."); *Brown v. Wing*, 170 Misc. 2d 554, 561 n.3 (Sup. Ct. Monroe County 1996) ("5,000 people affected – surely a large enough group . . . ."), *aff'd*, 241 A.D.2d 956 (4th Dept 1997); *see also Maul*, 14 N.Y.3d at 513 (where class size was under 200, this presented a "compelling case to proceed as a class action"); *Fleming v. Barnwell Nursing Home & Health Facilities, Inc.*, 309 A.D.2d 1132, 1133 (3d Dep't 2003) ("A class of over 200 is so numerous as to render joinder of all individuals impracticable.").

Thus, as the Third Department concluded in *Hurrell-Haring*, "[t]here can be no serious dispute that the proposed class, consisting of potentially tens of thousands of individuals, meets the numerosity requirement . . . ." 81 A.D.3d at 72.

II. THERE ARE COMMON QUESTIONS OF LAW AND FACT THAT PREDOMINATE OVER ANY INDIVIDUAL QUESTIONS.

Where a common question of law predominates, a class action is appropriate because, as here, it will "achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated." *Friar*, 78 A.D.2d at 97. What is required is "predominance, not identity or unanimity," and thus some variation in individual circumstances will not defeat class certification so long as there is a common thread, such as where defendants have engaged in a common course of conduct towards the plaintiff class members. *Cherry*, 15 A.D.3d at 1013; *Freeman*, 12 A.D.3d at 1171.

This case transparently presents common questions of law and fact that predominate over any individual questions. The common factual and legal questions that affect each of the four Plaintiffs and every class member is whether Respondents have failed to conduct proactive rental inspections mandated by the PRI Law and whether the failure to conduct those inspections and thereby to protect Buffalo renters from lead poisoning and other unhealthy conditions in and around their rental housing violates Buffalonians' rights under the Green Amendment.

The fundamental issue posed by commonality is "whether the group asserting class status is seeking to remedy a common legal grievance." *Lamboy v. Gross*, 129 Misc. 2d 564, 572 (Sup. Ct. N.Y. County 1985) (citing *Friar*, 78 A.D.2d at 98), *aff'd*, 126 A.D.2d 265 (1st Dept 1987). The Court evaluates commonality "in light of the elements of the causes of action asserted." *Morrissey v. Nextel Partners, Inc.*, 72 A.D.3d 209, 213 (3d Dep't 2010). Where the "paramount issue" in a case is whether the defendants failed to perform a duty enjoined upon them by law resulting in class-wide injury, common questions of law and fact do predominate. *Friar*, 78 A.D.2d at 98.

That is transparently the case here: the class members all assert the same cause of action with the same elements under the Green Amendment and proof of these elements will not require reference to their own individual circumstances but instead relies on Respondents' common course of conduct towards all class members. The "paramount issue" in the case is whether Respondents' failure to enforce the PRI Law violated the rights of Plaintiffs and equally of all class members under the Green Amendment by causing there to be a contaminated environment in and around Buffalo rental housing that would not exist had Respondents not failed to implement and enforce the PRI Law. That is what Plaintiffs' case is about, and because the conduct of Respondents that violated the class members' rights was generalized and not directed at particular individuals, the question will be evaluated in an identical manner as to every class member and presents virtually no individual questions at all. If this question is resolved in favor of the named Plaintiffs, then it will also be resolved in favor of the class generally.

Plaintiffs are not challenging the conduct or result of any specific inspection of any specific property, including the properties that they themselves rent. Beyond being class members, the specific living situation of any given class member is irrelevant to the predominant question of whether Defendants acted improperly by failing to perform their statutory duties under the PRI Law, and whether that conduct violated the amendment. Because that question is common to all class members and is the only significant question posed by the case, it is clear that commonality and predominance are satisfied. *See Doe v. Greco*, 62 A.D.2d 498, 502 (3d Dept 1978) (affirming class certification when "the only important question . . . is one common to all members of the class"); *Hurrell-Harring*, 81 A.D.3d at 73 ("inasmuch as the named plaintiffs' claims derive from the same course of conduct that gives rise to the claims of the other class members and is based upon the same legal theory, the prerequisite of typicality is also

satisfied."); *see also*, *e.g.*, *Maul*, 14 N.Y.3d at 513 (affirming class certification where the case presents narrow and discrete common questions to all class members); *Fleming*, 309 A.D.2d at 243 (commonality present where all class members asserted violation of same statute); *Vickers v. Home Federal Savings & Loan*, 56 A.D.2d 62, 65 (4th Dep't 1977) ("Since the elements of the named plaintiffs' causes of action are substantially identical to those of the class, a sufficient commonality of interest has been established to warrant class action certification.").

III. THE REPRESENTATIVE PLAINTIFFS' CLAIMS ARE TYPICAL OF THE CLASS.

The claims of the representative Plaintiffs are typical and indeed identical to those of the putative class members, satisfying the typicality requirement of CPLR 901(a)(3). The typicality requirement is met when the claims of the representative Plaintiffs derive "from the same practice or course of conduct that gave rise to the claims of other class members and [are] based upon the same legal theory." *Freeman*, 12 A.D.3d at 1171; *accord Friar*, 78 A.D.2d at 99. The named Plaintiffs' claims here assert that Respondents' failure to conduct the proactive inspections mandated by the PRI Law and thereby to protect Buffalo renters from lead poisoning and other unhealthy conditions in and around their rental housing as required by that law violates Buffalonians' rights under the Green Amendment. Every class member's claim is identical to those of the representative Plaintiffs and so there is no question that typicality is satisfied.

IV. THE REPRESENTATIVE PLAINTIFFS WILL FAIRLY AND ADEQUATELY PROTECT THE INTERESTS OF THE CLASS.

As set forth in their accompanying Affirmations in support of this motion, in vigorously prosecuting their own claims, the named Plaintiffs will simultaneously advance the

claims of the class, which are identical to their own.[1] The representatives are aware of the duties to the class that they will assume as class representatives and will fairly and adequately protect the interests of the absent class members. There is no conflict of interest among members of the class since the representatives and other class members have identical claims and seek identical relief and a successful outcome to this action will simply ensure that Respondents implement the PRI law and establish the required regime of proactive inspections and certificates of rental compliance that will confer the same benefits on all class members. Thus, the representative Plaintiffs satisfy the requirement of CPLR 901(a)(3). *See Hurrell-Harring*, 81 A.D.3d at 73 (adequacy shown where plaintiffs' affidavits "established that they are familiar with the litigation and understand the issues involved, and several also indicated that they joined in the lawsuit" to achieve systemic change, and no conflicts of interest were identified).

Plaintiff's counsel will also fairly and adequately represent the interests of the class. Plaintiffs are represented by attorneys from the National Center for Law and Economic Justice, the Western New York Law Center, and the law firm Lipsitz & Ponterio, P.C. As set forth in detail in the accompanying Affirmation of John Lipsitz in support of this motion, Plaintiffs' attorneys have extensive experience in class action litigation and other complex litigation, have the resources needed to pursue this action as a class action, and intend to zealously prosecute this matter on behalf of the class. *Id*. (class counsel's adequacy found where they submitted evidence they were experienced in class litigation and possessed sufficient resources).

[1] Due to a family emergency, Plaintiff Krystal Cruz was unable to execute an affirmation before this motion was filed. Plaintiffs expect to submit her affirmation in advance of the return date in substantially the same form as the other named Plaintiffs' affirmations.

V. A CLASS ACTION IS A SUPERIOR METHOD OF RESOLVING THIS CONTROVERSY.

A class action is the superior method for resolving the class members' claims that Respondents' failure to conduct the proactive inspections required by the PRI Law results in class members' exposure to lead poisoning and other unhealthy conditions in and around Buffalo rental housing and thereby violates their rights under the Green Amendment to "clean air and water and a healthful environment." There is no other method for resolving these claims for all class members. Joinder of each individual class member is impractical because there are likely tens of thousands of class members; moreover, many of the class members are low-income individuals that lack the financial resources to commence their own individual actions. Unless a class is certified, there will be no way for the thousands of affected individuals to remedy and effectively correct Respondents' violation of their rights under the Green Amendment.

The fact that Respondents are government actors does not modify this result. Class actions are appropriate against the government in "proper instances," such as where, as here, there are large numbers of affected individuals, and all the other criteria for a class action are met. *Felder*, 71 A.D.2d at 74. This is particularly so where the affected individuals tend to be indigent and would be unable as a practical matter to pursue their own individual matters. *See Velasquez v. State*, 226 A.D.2d 141, 142 (1st Dept 1996) (class certification was appropriate where class members were indigent and "may . . . face serious difficulties in asserting their rights individually."); *Wing*, 170 Misc. 2d at 560 (class action against government was superior to individual actions because class consisted of "indigent elderly individuals for whom the commencement of individual actions . . . would be oppressively burdensome"; internal quotation marks omitted); *see also Allen v. Blum*, 58 N.Y.2d 954, 956 (1983) (because government policy

was continuing and affected class members generally, class action was superior to having individual plaintiff class members each file their own individual article 78 proceeding).

Indeed, as the Third Department noted in *Hurrell-Harring*, actions challenging systemic deficiencies such as Respondents' complete failure to comply with the PRI Law here are precisely what the class action device exists to facilitate, and no other device exists that can achieve such results. 81 A.D.3d at 75 ("our research has failed to identify a single case involving claims of systemic deficiencies which seek widespread, systematic reform that has not been maintained as a class action."). Given New York's liberal approach to class certification, which must always err in favor of certifying, a class action should be held to be superior in this case. *Id*.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiff's motion for class certification.

Dated: September 27, 2024

Respectfully submitted,

Claudia Wilner, Esq.
Carmela Huang, Esq.
NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE
50 Broadway, Suite 1500
New York, NY 10004
(212) 633-6967
wilner@nclej.org
huang@nclej.org

Matthew A. Parham, Esq.
WESTERN NEW YORK LAW CENTER
37 Franklin Street, 2nd Floor
Buffalo, NY 14202
(716) 828-8422
mparham@wnylc.net

s/John Ned Lipsitz
John Ned Lipsitz, Esq.
LIPSITZ, PONTERIO & COMERFORD, LLC
424 Main Street, Suite 1500
Buffalo, NY 14202
(716) 849-0701 x201
jnl@lipsitzponterio.com

Counsel for Petitioners-Plaintiffs