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

STELLA QUINATOA and ANA CABRERA, on behalf of themselves and others similarly situated,	Index No. 151132/2018
Plaintiffs,	Part 55
-against-	Hon. James d'Auguste
	Motion Sequence No. 002
HEWLETT ASSOCIATES, LP; KALED MANAGEMENT CORPORATION; CITY OF NEW YORK; MARIA TORRES SPRINGER; JACK JIHA,	**ORAL ARGUMENT REQUESTED**
Defendants.	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO LANDLORD DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

This putative class action arises out of a landlord's decades-long pattern and practice of reaping substantial tax benefits while systematically failing to abide by its corresponding obligations under New York's rent stabilization laws. As a result of that pattern and practice, the Landlord Defendants[1]—an owner and managing agent of a residential apartment building in Queens—have fleeced not only the taxpayers of New York City, but more importantly the Plaintiffs in this action and other members of the putative class, all tenants of modest means in the apartment building in question.

The Landlord Defendants' motion to dismiss (the "Motion") does not appear to dispute the conduct alleged in the Complaint, going so far as to argue that certain of Plaintiffs' claims were mooted by the Landlord Defendants' admissions in correspondence with the tenants that they failed to treat the building as rent-stabilized and that they overcharged the tenants. Rather, the Motion focuses on avoiding class action liability by seeking to force each individual tenant into one-by-one administrative proceedings the Landlord Defendants surely know the tenants cannot afford, with the obvious goal of deterring the tenants from pursuing the damages and other relief to which they are legally entitled. But the legal arguments marshalled in defense of this unsavory strategy are without merit, and the Motion should be denied.

First, the Landlord Defendants adopt the unusual strategy of seeking to cut off class action treatment of Plaintiffs' claims ***at the pleading stage***—an exceedingly rare remedy available to defendants only when it is conclusively clear on the face of the pleadings and as a matter of law that a plaintiff could never satisfy the prerequisites to class certification. Unfortunately, this rent

[1] All capitalized terms not otherwise defined herein have the meaning ascribed to them in the Class Action Complaint filed by Plaintiffs in this action (the "Complaint").

overcharge action is far from the rare case—the Landlord Defendants' conduct is all too common—and New York courts routinely adjudicate similar disputes on a class basis. There is no deficiency in the class action allegations here. Contrary to the Landlord Defendants' arguments, the Complaint adequately alleges that common issues of law and fact predominate because Plaintiffs' claims arise from the same uniform course of conduct at the same building during the same time period, such that adjudication of the Landlord Defendants' liability will affect all class members in the same manner. Nor are there pleading deficiencies relating to typicality or superiority, as Plaintiffs' claims are directly representative of those of other putative class members, and class action treatment is the only viable way of pursuing adequate relief. As in virtually all putative class actions, Plaintiffs here should be afforded the opportunity to pursue pre-class certification discovery and present their case as to certification of the class at the appropriate time. There is no basis for the Court to prejudge those issues—which in any event are uncontroversial in a case of this sort—at the pleading stage. (*See infra* Point I.)

The Landlord Defendants' argument that the doctrine of primary jurisdiction requires Plaintiffs to litigate their claims before DHCR likewise fails. The doctrine of primary jurisdiction provides that, as a prudential matter, New York courts may exercise their discretion to decline jurisdiction in cases where administrative proceedings either are or were already pending, and where the issues presented require the application of particularized administrative expertise that courts of general jurisdiction lack. Neither circumstance is present here: There have never been any competing administrative proceedings relating to the Landlord Defendants' misconduct, and no administrative expertise is required, as reflected in the fact that New York courts routinely handle rent overcharge class actions of this sort. Moreover, because class actions may not be

brought before DHCR, courts decline to invoke the doctrine of primary jurisdiction where, as here, claims are brought on behalf of a class rather than individually. (*See infra* Point II.)

The notion that administrative expertise is necessary here is further rebutted by the Landlord Defendants' third asserted basis for dismissal—mootness. Their mootness theory is that, because they have admitted that they failed to abide by their rent stabilization obligations, penance is complete and the declaratory and injunctive relief sought by Plaintiffs is no longer necessary. If the Landlord Defendants are conceding that they have failed to abide by their rent stabilization obligations—a welcome concession that is nonetheless insufficient to resolve this case—then equally concededly there is no need for DHCR involvement. In any event, the Landlord Defendants' admission that they flouted their legal obligations does not resolve the question of damages, nor does it obviate the need for the declaratory and injunctive relief sought in the allegedly mooted claims given the Landlord Defendants' flagrant, decades-long misconduct and the artfully ambiguous nature of their written admissions. (*See infra* Point III.)

The Landlord Defendants' attempt to exculpate the managing agent, Kaled Management Corporation, fares no better. The argument that Kaled is not monetarily liable because it was acting on behalf of a "disclosed principal" ignores the fact that, even if this disputed fact-intensive defense had merit, that would not serve as a basis for dismissal of Plaintiffs' claims for injunctive and declaratory relief against Kaled. In any event, there is no basis in the pleadings or judicially noticeable facts that Hewlett Associates, LP, the principal, was actually disclosed (and indeed the exhibits attached to the Motion suggest that Kaled, not Hewlett, was the tip of the spear in communications with tenants regarding the issues presented by the Complaint), and Kaled's conclusory assertion to the contrary raises, at most, a fact-based defense inappropriate on a motion to dismiss. Moreover, the pleadings and judicially noticeable facts indicate that Kaled was acting

as an alter ego of Hewlett and accordingly should be held liable to the same extent as its principal. (*See infra* Point IV.)

In sum, there is no serious question that this case is appropriate for class action treatment in New York courts of general jurisdiction, and the Landlord Defendants' mootness argument only serves to highlight their violations of Plaintiffs' legal rights, violations that were caused by ***both*** Landlord Defendants. The Motion should accordingly be denied.

FACTUAL BACKGROUND[2]

A. The Parties

Plaintiffs are tenants of the Trafalgar Apartments, a residential apartment building located at 42-52 Union Street in Flushing, Queens. (¶¶ 8, 9, 36.) The Trafalgar Apartments were constructed in 1973[3] and contain 113 units. (¶ 36.)

The Landlord Defendants consist of Defendant Hewlett Associates, LP ("Hewlett") and Defendant Kaled Management Corporation ("Kaled"). Hewlett is a limited partnership organized under New York law that has been the owner and landlord of the Trafalgar Apartments since their

[2] Citations to "¶ __" are to the Complaint. Citations to "Ex. __" are to exhibits to the Affirmation of Jonathan Ohring in Support of Plaintiffs' Memorandum of Law in Opposition to Landlord Defendants' Motion to Dismiss, filed contemporaneously herewith.

[3] The Landlord Defendants state in a footnote that "[i]n fact, the building did not receive a Certificate of Occupancy until January of 1974." (Mot. at 4 n.3.) It is unclear why the Landlord Defendants interpose this factual issue, as they do not argue that any aspect of their Motion turns on it. The Court is thus free to disregard it. Should it prove relevant at a subsequent stage of the proceedings, however, Plaintiffs note that the Certificate of Occupancy which the Landlord Defendants submitted as an exhibit to the Motion expressly states that the building was completed on December 26, 1973 (Mot. Ex. 3), and New York courts look to the date of completion, rather than the date of the issuance of the certificate, to determine whether a building is subject to the protections of the Emergency Tenant Protection Act of 1974 ("ETPA"). *See, e.g.*, *Estate of Romanow v. Heller*, 121 Misc. 2d 866, 891 (Civ. Ct. 1983), *aff'd* 134 Misc. 2d 606 (1st Dep't 1987); *KSLM-Columbus Apartments, Inc. v. DHCR*, 6 A.D.3d 28, 38 (1st Dep't 2004), *aff'd as modified*, 5 N.Y. 3d 303 (2005); *Randall Assocs., LLC v. Fylypowcyz*, 16 Misc. 3d 1107(A), 2007 WL 1953418, at *1 (Civ. Ct. 2007); *Bridgeview Garden Apartments LLC v. DHCR*, 4 Misc. 3d 1023(A), 2004 WL 2059552, at *3 (Sup. Ct. Richmond Cty. 2004); *Perth Realty Co. v. Dovoll*, 79 Misc. 2d 514, 517 (Civ. Ct. 1974). To the extent the Landlord Defendants take any action or assert any position in the future with respect to the Trafalgar Apartments premised on their mistaken position as to the issuance of the Certificate of Occupancy—whether in this action or outside of it—Plaintiffs reserve all rights to seek any and all appropriate relief, including by way of amendment of the pleadings or a petition or motion for expedited relief.

construction. (¶ 10.) Kaled is a corporation organized under New York law that at all relevant times has served as the manager of the Trafalgar Apartments. (¶ 11.) Public records indicate that Kaled and Hewlett share the same corporate address, that Kaled is Hewlett's designated agent for service of process, and that the Chief Executive Officer of Kaled, Edward Kalikow, shares the same address as Kaled and Hewlett and owns at least a partial interest in Hewlett. (Exs. A, B; *see also In re Kalikow*, 58 A.D.3d 846, 847 (2d Dep't 2009).)

B. The Relevant Statutory and Regulatory Framework

The ETPA, Rent Stabilization Law ("RSL"), and Rent Stabilization Code ("RSC") (together, the "Rent Stabilization Laws") limit the rent that landlords can charge and require landlords to register rents annually. *See* N.Y.C. Admin. Code § 26-517(f).

The 421-a program, named by reference to Section 421-a of the New York Real Property Tax Law, was established by the Legislature in 1971. (¶ 25.) Units in a building covered by the 421-a tax exemption are subject to rent stabilization for the entire period during which the property is receiving tax benefits, and may be deregulated no earlier than the expiration of the tax benefit period. (¶¶ 27-28.) To deregulate a unit prior to vacancy, owners must provide in every lease and lease renewal a notice informing the tenant that the apartment shall become deregulated upon the expiration of the last lease entered into during the tax benefit period. (¶ 28.)

After the enactment of Section 489 of the RPTL in 1955, New York City adopted Section J51-2.5 (now Section 11-243) of the Administrative Code (the "J-51 program"). The J-51 program provides owners with real property tax exemption and abatement benefits to offset the cost of residential major capital improvements. (¶¶ 29-30.) As a condition of receiving benefits pursuant to the J-51 program, a building owner must provide its tenants with the protections of the Rent Stabilization Laws, including the right to a renewal lease on the same terms and conditions as the previous lease; limitations on rent increases; and access to programs that provide benefits to

disabled and elderly families who are rent-burdened. (¶ 32.) Owners of buildings which became eligible for J-51 program benefits after 1974 are required to provide in every lease and lease renewal a notice informing the tenant that the apartment shall become deregulated upon the expiration of the last lease entered into during the tax benefit period. (¶ 34.)

In addition, in 1970, New York City adopted the Senior Citizen's Rent Increase Exemption ("SCRIE") program to protect seniors living on fixed income from increases in their rents. (¶ 35.) The SCRIE program exempts households headed by persons over the age of 62 and with annual household income of $50,000 or less from paying any future rent increases. (*Id.*) Owners of units subject to SCRIE receive tax credits for any rent increase. (*Id.*)

C. The Landlord Defendants' Violation of the Rent Stabilization Laws

For years, the Landlord Defendants have received tax benefits in varying amounts through the 421-a and J-51 programs—benefits which are under the law intrinsically linked to the Landlord Defendants' obligation to maintain properly rent stabilized and regulated apartments. (¶¶ 38-39.) However, the Landlord Defendants have systematically violated their obligations under the Rent Stabilization Laws in connection with the Trafalgar Apartments, all while reaping substantial tax benefits under the 421-a and J-51 programs. (¶ 40.) They have done so in at least three respects: (i) by failing to register the rents charged and collected at the Trafalgar Apartments; (ii) by failing to provide tenants at the Trafalgar Apartments with notice in their leases and/or lease renewals that their units were subject to the Rent Stabilization Laws; and (iii) by charging tenants at the Trafalgar Apartments rents well in excess of lawfully permitted rents. (*Id.*)

DHCR records indicate that, as early as 1984, when the Trafalgar Apartments were subject to the 421-a program, the Landlord Defendants failed to register rents for at least some of the subject units, and that the failure to register continued with respect to other units over a period of decades. (¶ 41.) Most recently, under the J-51 program, which has applied since the Landlord

Defendants applied for J-51 benefits in 2008, all 113 units at the Trafalgar Apartments were and are required to be registered as rent stabilized, but the Landlord Defendants have failed to register nearly a hundred units. (¶ 42.)

During the same time period, the Landlord Defendants have failed to provide tenants with legally required notice that the Trafalgar Apartments are subject to the Rent Stabilization Laws and that any deregulation is not permitted to occur until the expiration of the last lease entered into during the applicable tax benefit period. (¶ 43.) As a result, the Landlord Defendants have received hundreds of thousands of dollars in rent income to which they were not lawfully entitled. (¶ 48.) In addition, this deception deprived Plaintiffs of the opportunity to obtain benefits under the SCRIE program. (¶ 45.)

The Landlord Defendants have already admitted to their noncompliance. (¶ 49.) In an August 2017 letter sent to Plaintiffs and other tenants of the Trafalgar Apartments, the Landlord Defendants stated that the recipient's apartment was subject to rent stabilization, and admitted that the recipient's rights as occupants of rent stabilized units "were not memorialized" in previous leases. (¶ 50.) The Landlord Defendants purported to offer compensation for the overcharge by enclosing with the letters a check which they claimed "reflect[ed] the amount" of excess rent for the previous four years, but the amount set forth in the checks did not accurately reflect the amount of the overcharge. (¶¶ 52-53.) Accordingly, the overcharge remains unremedied.

D. Plaintiffs' Claims Against the Landlord Defendants

Plaintiffs bring this action as a putative class action on behalf of all tenants at 42-52 Union Street living, or who had lived, in apartments that were deregulated during the period when J-51 tax benefits were being received by the owner of 42-52 Union Street (the "Class"). (¶ 90.) Plaintiffs assert three counts against the Landlord Defendants: (1) a claim for damages arising from the illegal rent overcharge in violation of ETPA § 6; (2) a claim for declaratory and injunctive

relief arising from the Landlord Defendants' violation of ETPA § 6; and (3) a claim for estoppel, seeking an award of damages and injunctive relief arising from the Landlord Defendants' deprivation of Plaintiffs' ability to obtain benefits under the SCRIE program. (¶¶ 103-27.)[4]

STANDARD OF REVIEW

On a motion to dismiss pursuant to CPLR § 3211, the pleading is "to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). Courts must "accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every favorable possible inference and determine only whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss must be denied. *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002).

ARGUMENT

I. PLAINTIFFS ADEQUATELY PLEAD THEIR CLASS ALLEGATIONS AND DISMISSING THOSE ALLEGATIONS WOULD BE PREMATURE.

Under CPLR § 902, "[a] court may not determine whether an action is entitled to class action status until a plaintiff applies for class action certification . . . ." *Downing v. First Lenox Terrace Assocs.*, 107 A.D.3d 86, 92 (1st Dep't 2013), *aff'd sub nom. Borden v. 400 E. 55th St. Assocs.*, 24 N.Y.3d 382 (2014). Thus, courts generally recognize that dismissal of class action allegations is "premature in the absence of any discovery" on whether the requirements of class certification have been met. *Tokhtaman v. Human Care, LLC*, 2016 WL 4439990, at *2 (Sup. Ct.

[4] Plaintiffs also assert a claim against the City of New York, the Commissioner of the New York City Department of Housing and Public Development, and the Commissioner of the New York City Department of Finance (collectively, the "City Defendants") for violation of the General Municipal Law in connection with their provision of an unconstitutional gift to the Landlord Defendants in the form of unwarranted tax breaks. The City Defendants' motion to dismiss that claim is the subject of separate briefing in this action. (*See* Dkt. Nos. 9, 13, 29, 30.)

N.Y. Cty. Aug. 22, 2016), *aff'd*, 149 A.D.3d 476 (1st Dep't 2017).[5] Indeed, the Landlord Defendants themselves acknowledge (Mot. at 6) that a motion to dismiss class action allegations may be granted only 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." *Downing*, 107 A.D.3d at 91 (emphasis added) (citation omitted).[6]

The Landlord Defendants do not come close to meeting that high bar. As discussed in greater detail below, on each of the class requirements prematurely challenged by the Landlord Defendants—predominance, typicality, and superiority—Plaintiffs' allegations easily make out a *prima facie* case. In arguing otherwise, the Landlord Defendants raise fact-based challenges based on their assertions concerning whether the class certification requirements can be met. But whether Plaintiffs will be able to ***prove after discovery*** that the class certification requirements have been met should be determined at the class certification stage, not on this motion to dismiss, where the Court must "accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every favorable possible inference and determine only whether the facts as alleged fit within any cognizable legal theory." *Sokoloff*, 96

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[5] *See also Cambridge House Tenants' Ass'n v. Cambridge Dev., L.L.C.*, 2010 WL 331978 (Sup. Ct. N.Y. Cty. Jan. 22, 2010) ("In this case [before pre-certification discovery has been taken], it would be inappropriate to dismiss the class action allegations since the allegations in the verified class action complaint provide a potential basis for a class action."); *Troshin v. The Stella Orton Home Care Agency, Inc.*, 2018 WL 2197837, at *6 (Sup. Ct. N.Y. Cty. May 11, 2018) ("[B]efore any pre-certification discovery, it is premature for defendant to argue that the plaintiffs' lack of commonality precludes a class action.").

[6] *Downing*, cited in the Motion (at 6), in fact counsels in favor of class relief here. In *Downing*, the plaintiffs commenced a putative class action seeking treble damages for violations of certain rent stabilization laws. 107 A.D.3d at 88. The Supreme Court held, however, that a class action suit seeking treble damages could not be maintained as a matter of law since such damages were not expressly authorized by the applicable statute, and accordingly dismissed the action. *Id.* at 89. The First Department reversed, holding that because the plaintiffs had decided to waive their claim for punitive damages, the Supreme Court should have merely stricken the claim for punitive damages rather than dismissing the action. *Id.* at 91. Thus, *Downing* does not remotely stand for the proposition that the court should make a premature determination as to whether the class certification requirements have been met. Rather, *Downing* simply recognizes that class allegations may be dismissed if they cannot possibly fit a cognizable legal theory. Indeed, *Downing* recognized that the plaintiffs should be permitted to proceed to discovery, and also rejected the argument—made by the Landlord Defendants here—that the plaintiffs' claims should have been brought before DHCR.

N.Y.2d at 409; *see also Greenaway v. Tri-State Consumer Ins. Co.*, 2014 WL 12768854, at *2 (Sup. Ct. Nassau Cty. Sept. 16, 2014) ("[T]he standard on a motion to dismiss for failure to state a cause of action . . . differs from the standard applicable to a motion seeking class certification, in which the plaintiff seeking certification bears the initial burden of establishing by competent evidence in admissible form that the prerequisites of CPLR 901(a) have been met.").

A. Plaintiffs Adequately Allege That Common Questions of Law and Fact Relating to the Landlord Defendants' Uniform Unlawful Course of Conduct Predominate Over Any Individualized Inquiries.

Contrary to the Landlord Defendants' contention that Plaintiffs "assert in conclusory fashion" that common questions of law and fact predominate over any questions affecting only individual members (*see* Mot. at 10), Plaintiffs' Complaint identifies a number of common questions appropriate for resolution on a classwide basis:

- whether the Landlord Defendants have acted or refused to act on grounds generally applicable to Plaintiffs and the Class;
- whether the Landlord Defendants have established a pattern, practice, or policy of misrepresenting tenants' rent stabilization status, failing to provide required notice, unlawfully deregulating apartments, or overcharging rent;
- whether the Landlord Defendants' conduct violates the Rent Stabilization Laws; and
- to what extent Plaintiffs and members of the Class are entitled to damages or declaratory and injunctive relief.

(¶ 102(a)-(i).) At bottom, these questions boil down to a single common inquiry: whether the Landlord Defendants engaged in a uniform, unlawful course of conduct in violation of the Rent Stabilization Laws that resulted in excessive and unlawful rents being charged to Plaintiffs and the putative class members. The answer to this question will determine in one stroke whether Plaintiffs and the putative class members will be entitled to the relief they seek—precisely the sort of case that is appropriately brought as a class action.

Notwithstanding their predominance challenge, the Landlord Defendants struggle to identify any individualized questions that would predominate over common questions. In fact, they point to just one example of a purportedly individualized question: that Plaintiffs seek, among other things, injunctive relief appointing an independent individual or entity to audit and undertake an accounting of the Trafalgar Apartments and reform leases to comply with the Rent Stabilization Laws, where necessary. (*See* Mot. at 10 (citing ¶ 117).) In doing so, the Landlord Defendants assert that such an audit would be required "just to determine who is a member of the putative class" and who was eligible for SCRIE benefits. (*Id.*) But this assertion does not constitute a showing that there is "as a matter of law no basis for class action relief." *Downing*, 107 A.D.3d at 91. Moreover, it is incorrect. Determining members of the putative class and whether certain tenants were eligible for SCRIE benefits will require no more than simple discovery of the Landlord Defendants' books and records. Dismissing Plaintiffs' claims on such grounds prior to any discovery would be premature. *See Tokhtaman*, 2016 WL 4439990, at *2.

Consistent with the foregoing, courts routinely certify classes in rent overcharge cases such as this one. *See Borden v. 400 E. 55th St. Assocs.*, 105 A.D.3d 630 (1st Dep't 2014) (affirming class certification for tenants seeking reimbursement for rent overcharges in unlawfully deregulated J-51 apartments); *Gerard v. Clermont York Assocs. LLC*, 143 A.D.3d 478 (1st Dep't 2016) (same); *Dugan v. London Terrace Gardens, L.P.*, 45 Misc. 3d 362, 385 (Sup. Ct. N.Y. Cty. 2013) (certifying class of "all past and current tenants . . . who have been charged or continue to be charged deregulated rents during defendant's receipt of J-51 tax benefits"); *Casey v. Whitehouse Estates, Inc.*, 36 Misc. 3d 1225(A), 2012 WL 3168689 (Sup. Ct. N.Y. Cty. 2012) (certifying class of former and current tenants of a single building whose apartments were deregulated while

defendants received J-51 tax benefits). The Landlord Defendants' contention that Plaintiffs' class allegations must be stricken at the pleading stage should be rejected *a fortiori*.

Each of the cases relied upon by the Landlord Defendants is readily distinguishable, and none supports the conclusion that Plaintiffs here cannot recover on behalf of a class as a matter of law. For example, in each of *Quinn*, *Maddicks*, and *Chang*—all heavily relied upon by the Landlord Defendants throughout their brief (*see* Mot. at 2, 7, 11, 12)—the plaintiffs sought to certify a single class spanning multiple buildings, against different landlords, alleging misconduct over different time periods, and raising different theories of recovery.[7] The problems identified in those cases pose no obstacle to the claims in this action, which are brought on behalf of tenants in a single building, against a single landlord, asserting a common factual and legal theory over a single time period.

Wojciechowski v. Republic Steel Corp., 67 A.D.2d 830 (4th Dep't 1979), also relied upon by Plaintiffs (*see* Mot. at 8-9), is similarly off-point. That case involved claims on behalf of a class of residential property owners (spread out over a particular region) whose property had been discolored by pollution from a nearby plant. *Id.* at 830. There, "membership in the class necessarily presuppose[d] proof of one of the contested elements in each claim," specifically, "that a purported member's property sustained damage," which required "individual investigation and proof and which must be decided separately with respect to each individual claim . . . ." *Id.* Here,

[7] *See Quinn v. Parkoff Operating Corp.*, 59 Misc. 3d 1202(A), 2018 WL 1387085, at *7 (Sup. Ct. N.Y. Cty. 2018) ("Here, there are two main categories of claims as to the nature of the liability. Each category involves several [buildings], different defendant-landlords, disparities in relevant time periods, and variations in the fraudulent [rent overcharge] related claims."); *Maddicks v. Big City Props., LLC*, 2017 WL 5499213, at *3 (Sup. Ct. N.Y. Cty. 2017), ("There are different buildings involved, different owners, different dates when the owners acquired the property, different prior owners, different registration periods and since there are different theories of recovery, each theory requires different defenses and evidence."); *Chang v. Bronstein Props., LLC*, Index No. 1566651/2017 (Sup. Ct. N.Y. Cty.), Tr. of Proceedings before Hon. Shlomo Hagler held on March 26, 2018, attached to the Bailey Affirmation as Ex. 2 at 7:15-17 ("Here, there are 26 [buildings] that are listed in the complaint and even if we get to the amended complaint aspect of it they want to jack it up to like a hundred.").

the case turns principally on a single issue—whether the Landlord Defendants failed to abide by their rent stabilization obligations—the resolution of which will determine the Landlord Defendants' liability to the Class as a whole.[8]

The Landlord Defendants also rely on *Daniel v. DHCR*, 179 Misc. 2d 452 (Sup. Ct. N.Y. Cty. 1998) (Mot. at 9-10), but again make no attempt to connect the significantly different facts of that case to this dispute. There, in an Article 78 proceeding, the petitioners sought "class action certification and reversal of thousands of decisions made by DHCR which denied overcharges based on events occurring more than four years prior to the filing of the action." *Id.* at 455. The court held that, *inter alia*, because the petitioners were seeking the reversal of ***thousands*** of DHCR decisions, "unique factual circumstances concerning the denials of the various overcharge complaints are not common to all members of the class." *Id*. But Plaintiffs here are not seeking the reexamination of thousands of DHCR rulings turning on many different factual scenarios and procedural histories. Rather, Plaintiffs are seeking a finding of liability on a single course of conduct: the Landlord Defendants' scheme to unlawfully overcharge the putative class members and profit from that scheme.

B. Plaintiffs Adequately Allege That Their Claims Are Typical of the Class Because Their Claims Arise Out of the Same Unlawful Conduct.

A plaintiff's claims are "typical" of the claims of the class for purposes of class certification if "the named plaintiffs' and the class' claims derive from the same course of conduct and are based on the same legal theory." *Dugan*, 45 Misc. 3d at 377. Here, there can be little doubt that named Plaintiffs adequately allege that their claims arise from the same course of conduct and are

[8] To the extent the Landlord Defendants are challenging whether the members of the class are ascertainable (*see* Mot. at 10), that challenge is not credible. Determining membership in the class is as simple as identifying the tenants of the affected units. This ministerial inquiry—which should be readily answered based on the Landlord Defendants' own records—is plainly not a bar to class treatment.

based on the same legal theory as the claims of the class—*i.e.*, the Landlord Defendants' unlawful deregulation of apartments while receiving J-51 benefits. *See id.* (plaintiff tenants' claims, seeking the same declaratory and injunctive relief for illegal deregulation of apartments as the rest of the class, were typical of the class); *Borden*, 105 A.D.3d at 631 (plaintiff's claims were "typical of the claims of all class members in that each flows from defendant's alleged unlawful deregulation of apartments while receiving J-51 benefits"). Plaintiffs' allegations, "accepted as true" and "given every favorable possible inference," clearly establish typicality. *Sokoloff*, 96 N.Y.2d at 409.

The Landlord Defendants argue that the "claims asserted by the named plaintiffs are not typical of each other, let alone anyone else[,]" because one named Plaintiff seeks relief based on eligibility for SCRIE benefits in addition to seeking relief for violations of the ETPA, while the other named Plaintiff seeks relief only for violations of the ETPA. (*See* Mot. at 11.) But the relevant question for purposes of typicality is whether "the claims or defenses of the representative parties are typical of the claims or defenses of the class[,]" CPLR § 901(a), ***not whether the named plaintiffs' claims are identical to each other***.[9] Here, the Complaint clearly alleges that the claims of both named Plaintiffs derive from the same uniform course of conduct by the Landlord Defendants and rest on the same legal theories as those applicable to the Class as a whole. At the pleading stage, this is more than sufficient.

Even if, after discovery, it is determined that there is some unanticipated divergence between the claims of former and current Trafalgar residents who were eligible for SCRIE benefits and those who were not, the proper remedy would be to define subclasses at that time. *See* CPLR § 906. Where, as here, "questions relating to liability are common and predominate for the entire

[9] In fact, "it is not necessary that the claims of the named plaintiff be identical [even] to those of the class[,]" *Pruitt v. Rockefeller Ctr. Props. Inc.*, 167 A.D.2d 14, 22 (1st Dep't 1991) (citing *Super Glue Corp. v. Avis Rent a Car Sys.*, 132 A.D.2d 604, 607 (2d Dep't 1987)), and the typicality requirement "is satisfied even if the class representative cannot personally assert all the claims made on behalf of the class," *id.* (citation omitted).

class," a class action remains the proper and superior tool to adjudicate these claims "even if determining damages requires the use of subclasses or a special master to assess individualized facts." *Dugan*, 45 Misc. 3d at 380.[10]

C. Plaintiffs Adequately Allege That a Class Action Will Be Superior to Other Available Methods of Resolving the Dispute for All Class Members.

"In determining superiority, courts consider a number of factors, including the possibility of excessive costs and delays resulting from multiple lawsuits seeking the same or similar relief, inconsistent rulings, and whether the aggregation of the claims will allow individuals with small claims judicial relief that would otherwise be impractical." *Onadia v. City of New York*, 56 Misc. 3d 309, 321-22 (Sup. Ct. N.Y. Cty. 2017).

Contrary to the Landlord Defendants' contention (*see* Mot. at 11-12), the Complaint clearly sets forth the case for why class action treatment is superior to resolving the class members' claims on an individual-by-individual basis. Through this class action, Plaintiffs seek to resolve the claims of at least one hundred—and potentially hundreds—of class members, each of whom would otherwise be forced to pursue similar remedies in their own individual actions, either in court or with DHCR. The superiority of pursuing these claims as a class action is particularly obvious where, as here, the Court may swiftly resolve the question of liability, which has essentially been conceded. *See Dugan*, 45 Misc. 3d at 380 (finding class action superior to individual actions in a J-51 rent overcharge case because "the expenses entailed in bringing separate, individual actions outweigh any anticipated difficulties in managing a class action"). Moreover, should the tenants of the Trafalgar Apartments (many of whom are low income tenants) be denied class relief, it is

[10] The Landlord Defendants' reliance on *Quinn* (*see* Mot. at 11) is off-base because, as discussed previously, in that case, the plaintiffs sought to certify a single class spanning multiple buildings, against different landlords, alleging misconduct over different time periods, and raising different theories of recovery. (*See supra* at 12.) This case poses no such issues.

likely that many will not be compensated for their injuries, given that the amount of damages on an individual basis may not be sufficient to justify the costs of pursuing an individual action in court or with DHCR. *See Casey*, 2012 WL 3168689, at *5 ("In some individual instances, the amount of damages may be so low that individual tenants would be discouraged from hiring a lawyer to pursue their claims. A class action affords such tenants who have been overcharged nominal amounts a means to be compensated.").

The Landlord Defendants' assertion that "each tenant can commence a proceeding at DHCR by filling out a form" (Mot. at 12) ignores the costs for an individual to pursue a case with DHCR and fails to explain how the multiplication of those costs (for all parties) across potentially hundreds of cases would somehow be fairer or more efficient than the class mechanism. It plainly would not be. Instead, "[t]o litigate this issue [hundreds of] times would be an obvious waste of judicial resources[,]" and "to deprive a potential group of [hundreds of] litigants of a practical means to recover would frustrate the intent" of the Rent Stabilization Laws. *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 98–99 (2d Dep't 1980).[11]

II. PLAINTIFFS ARE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES BEFORE SEEKING RELIEF FROM THIS COURT.

The Landlord Defendants appear to concede that DHCR does not have exclusive jurisdiction over rent overcharge cases,[12] arguing instead that Plaintiffs should be required as a

[11] The Landlord Defendants' reliance—once again—on *Quinn*, *Maddicks*, and *Chang* in support of their premature challenge to superiority is unavailing in light of the drastic differences between those cases and this one. (*See supra* at 12.)

[12] To the extent the Landlord Defendants do not concede concurrent jurisdiction, their position is flatly belied by New York statutory and decisional law. *See* N.Y. Unconsol. Laws § 8632(a)(1)(f) (McKinney) ("Unless a tenant shall have filed a complaint of overcharge with the division which complaint has not been withdrawn, nothing contained in this section shall be deemed to prevent a tenant or tenants, claiming to have been overcharged, from commencing an action or interposing a counterclaim in a court of competent jurisdiction for damages…"); *Nezry v. Haven Ave. Owner LLC*, 28 Misc. 3d 1226(A), 2010 WL 3338545, at *8 (Sup. Ct. N.Y. Cty. 2010) ("It is uncontested that the Supreme Court and DHCR have concurrent jurisdiction over the rent overcharge claims…"); *Downing*, 107 A.D.3d at 88 ("Supreme Court has concurrent jurisdiction with DHCR with respect to overcharge claims.").

prudential matter to proceed in the first instance before DHCR. (Mot. at 12-16.) This argument, purportedly premised on the doctrine of primary jurisdiction, is without merit because that doctrine applies primarily in situations where, unlike here, an administrative proceeding was previously or currently pending, and is clearly inapplicable in situations such as this one where class relief would be unavailable in the relevant administrative forum.

Under the doctrine of primary jurisdiction, "the court, while not without authority to adjudicate the dispute, declines as a matter of discretion to do so in order that the agency may have the initial opportunity to address an issue which is within the area of its expertise, and the court may thus have the benefit of the agency's wisdom before it addresses the issue." *Rockaway One Co. v. Wiggins*, 35 A.D.3d 36, 42 (2d Dep't 2006). However, the principles underlying the doctrine of primary jurisdiction do not support its application to this case.

First, courts recognize that the doctrine of primary jurisdiction most appropriately applies in cases where parallel proceedings have been brought before DHCR. The decision in *Dugan v. London Terrace Gardens, L.P.*, 34 Misc. 3d 1240(A), 2011 WL 7553528 (Sup. Ct. N.Y. Cty. 2011), *aff'd*, 101 A.D.3d 648 (1st Dep't 2012), is instructive. There, the plaintiffs brought a class action against a landlord that had deregulated apartments under luxury decontrol regulations and received market rent while still receiving J-51 tax benefits, and the landlord defendant sought to dismiss or stay the action under the primary jurisdiction doctrine. *Id.* at *1. The court observed that

> [n]o authority, however, supports the dismissal or stay of a court action until an administrative proceeding resolves the issues raised, except in the following circumstances: (1) the legislature specifically has conferred ***exclusive***, rather than ***primary***, jurisdiction on the administrative agency to resolve the issues in the first instance. (2) Plaintiffs seek referral to the agency for resolution of their claims. (3) An administrative proceeding relating to the issues ***preceded*** the court action or still is pending.

Id. at *5 (third emphasis added) (internal citations omitted). Finding that none of the circumstances was present (as is the case here), the court held that "without such a proceeding previously or currently pending, none of the factors that militate in favor of DHCR's primary jurisdiction carries any force." *Id.* at *6. This was because "no coordination between the court and the DHCR[] [was] necessary," and "[t]here [was] no risk of inconsistent dispositions, nor [would] any DHCR determinations be forthcoming to inform the court." *Id.*; *see also Nezry v. Haven Ave. Owner LLC*, 28 Misc. 3d 1226(A), 2010 WL 3338545, at *8 (Sup. Ct. N.Y. Cty. 2010) ("[W]here the tenant has filed a complaint with DHCR in the first instance, then the DHCR has 'primary jurisdiction' . . . . As it is uncontested that plaintiffs have not filed an overcharge complaint with the DHCR, this is not an instance wherein this action would be stayed or dismissed, and plaintiffs need not exhaust any administrative remedies before seeking relief before this court." (citation omitted)).

Second, this is not a case where deference to DHCR is necessary to provide the agency an "initial opportunity to address an issue which is within the area of its expertise." *Rockaway One*, 35 A.D.3d at 42. As noted above (*see supra* at 11-12), courts regularly adjudicate rent overcharge claims. "Such decisions are the normal business of the courts," and "[t]here is nothing inherent in [a rent overcharge claim] . . . that requires the initial expertise of the DHCR." *Id.*; *see also Vazquez v. Sichel*, 12 Misc. 3d 604, 612 (Civ. Ct. 2005) (declining to defer to DHCR because calculation of damages in rent overcharge cases "is not complicated[,]" and "[a]scertaining and applying it do not require expertise or resources beyond the court's competence").

Third, deference to DHCR would be inappropriate because DHCR does not have authority to issue classwide relief. *See Dugan*, 2011 WL 7553528, at *9 ("[I]t is undisputed that DHCR is unauthorized to decide whether to certify a class, determine its parameters, or adjudicate plaintiffs' claims for classwide relief."). Accordingly, the class members would not be able to pursue their

claims collectively before DHCR, and many if not most class members likely would never be able to recover at all. In such circumstances, courts have declined to invoke the doctrine of primary jurisdiction. *See id.* ("Even if DHCR were to address the named plaintiffs' claims, their co-tenants would be without redress unless they commenced their own actions.").

Fourth, this Court is a more appropriate forum because it may be the only one that can grant Plaintiffs and the putative class members all the relief they seek. Some courts have observed that DHCR is not authorized to adjudicate claims under statutes that do not expressly reference rent stabilization, including claims for "equitable relief" such as requests for injunctive relief. *Id.* at *8. Plaintiffs here have asserted claims for declaratory and injunctive relief and estoppel, which some courts have held to be outside of DHCR's authority. Thus, even if the Court were to defer to DHCR to adjudicate Plaintiffs' rent overcharge claims, Plaintiffs might still need to pursue their claims for equitable and declaratory relief here.

The cases relied upon by the Landlord Defendants do not support their argument that this Court should defer to DHCR. First, the Landlord Defendants rely (*see* Mot. at 13) on cases where courts applied the doctrine of primary jurisdiction due to a pending or prior proceeding at DHCR. *See Katz 737 Corp. v. Cohen*, 104 A.D.3d 144, 148 (2d Dep't 2012) (affirming decision declining to exercise jurisdiction where "DHCR had already ruled on [the plaintiff's] attempts to deregulate the unit and had denied the requested relief"); *cf. Davis v. Waterside Hous. Co.*, 274 A.D.2d 318, 319 (1st Dep't 2000) (affirming decision declining to exercise jurisdiction due to a pending proceeding at DHCR).

Second, the Landlord Defendants rely on primary jurisdiction cases that were brought as individual actions, rather than class actions like this one which may not be brought before DHCR. *See Olsen v. Stellar*, 96 A.D.3d 440 (1st Dep't 2012). Plaintiffs' reliance on the individual action

Collazo v. Netherland Property Assets, LLC, 2017 WL 947618 (Sup. Ct. N.Y. Cty. Mar. 17, 2017), *aff'd*, 155 A.D.3d 538 (1st Dep't 2017), *leave to appeal granted*, 2018 WL 2977764 (N.Y. June 14, 2018), is particularly remarkable given that, in dismissing the action under the doctrine of primary jurisdiction, the court there expressly noted that in each of the cases relied upon by the plaintiffs, "the Appellate Division stated that there was a specific reason to retain jurisdiction, namely that the cases were putative class actions and DHCR cannot certify a class action[,]" and that because the case before it was ***not*** a class action, it was appropriate to defer to DHCR. *Id.* at *2-3. Thus, this putative class action is precisely the situation from which the *Collazo* court distinguished its holding.[13]

Finally, the Landlord Defendants' reliance on *Sohn v. Calderon*, 78 N.Y.2d 755 (1991), is misplaced. *Sohn* concerned whether a landlord satisfied the regulatory condition for obtaining certificates of eviction to demolish a building containing protected units. The court in *Rockaway One* expressly distinguished *Sohn* and held that it is inapplicable to rent overcharge cases, concluding that, unlike in cases involving a landlord's right to demolish a regulated building, "there is no reason to read the statute as requiring tenants to seek DHCR's review before they can challenge [a rent] increase in court." *Rockaway One*, 35 A.D.3d at 42.

III. PLAINTIFFS' CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF AND REFORMATION ARE NOT MOOT.

The Landlord Defendants take the unusual position that certain of Plaintiffs' claims are now moot because the Landlord Defendants have conceded that they violated the Rent

[13] The Court of Appeals recently granted the *Collazo* plaintiffs leave to appeal the Appellate Division's affirmance of the Supreme Court's order granting the defendants' motions to dismiss on primary jurisdiction grounds. *Collazo v. Netherland Prop. Assets LLC*, 2018 WL 2977764 (N.Y. June 14, 2018). The principal issue in that appeal, however, is whether the fact that the *Collazo* action was brought as an individual action warranted deferral to DHCR. That issue is not presented in this class action. Thus, this Court's ruling on the Landlord Defendants' primary jurisdiction argument is unlikely to be affected by the Court of Appeals' eventual decision in *Collazo*.

Stabilization Laws. (*See* Mot. at 18.) Specifically, the Landlord Defendants contend that Counts Two and Three of the Complaint, which request declaratory and injunctive relief for violations of ETPA § 6 (Count Two) and damages and injunctive relief for the Landlord Defendants' charging of excessive rents for SCRIE-eligible units (Count Three), no longer present a justiciable controversy because the Landlord Defendants submitted a letter to Plaintiffs "acknowledg[ing] that the tenants' apartments were and are subject to rent stabilization, acknowledging that the legal rents needed to be adjusted, and enclosing refund checks for past rent overcharges." (Mot. at 18.) Although Plaintiffs welcome the Landlord Defendants' acknowledgment of their own liability,[14] that admission does not suffice to render Counts Two and Three moot for at least two reasons.

First, the issues of whether the Trafalgar Apartments are subject to rent stabilization and whether Plaintiffs are entitled to a rent-stabilized lease in the form promulgated by DHCR are not the only issues presented in Count Two. (*See* ¶ 114(a)-(b).) Rather, Count Two additionally seeks a declaratory judgment (i) setting forth the amount of the legal regulated rent for the apartments of Plaintiffs and the class members; (ii) providing that any leases offered by the Landlord Defendants to Plaintiffs and the class members are invalid and unlawful unless they are offered on lease forms and terms prescribed by DHCR; and (iii) that Plaintiffs and members of the class are not required to pay any rent increases unless and until legally permissible rent-stabilized lease offers are made to, and accepted by, Plaintiffs and the class members. (*See* ¶ 114(c)-(e).) Moreover, Count Two seeks injunctive relief against additional violations by the Landlord Defendants. (*See* ¶ 117.)

Second, without derogating from the significance of the Landlord Defendants' admission, their argument asks Plaintiffs and ultimately the Court to accept that, after decades of failing to

[14] Importantly, the Landlord Defendants do not contend that Count One, seeking damages for the Landlord Defendants' illegal rent overcharge, is moot. Nor could they, as the Complaint alleges that the amount set forth in the checks sent to Plaintiffs did not accurately reflect the amount of the overcharge (¶¶ 52-53), and factual issues therefore remain with respect to this claim.

treat the Trafalgar Apartments in the rent-stabilized manner required by law—and indeed affirmatively misrepresenting that rent-stabilized status in response to tenant inquiries (¶ 44)—the Landlord Defendants should be trusted to comply with their obligations under the Rent Stabilization Laws based on ambiguous statements made in a letter to tenants. Absent declaratory and injunctive relief, the Landlord Defendants will be free to revert to the unlawful course of conduct that created the need for this action in the first place. *See Owner Operator Indep. Drivers Ass'n v. N.Y. State Dep't of Taxation & Fin.*, 42 Misc. 3d 1223(A), 2014 WL 553200, at *2 (Sup. Ct. Albany Cty. 2014) (denying motion to dismiss claim for declaratory and injunctive relief to end "ongoing" violations).[15]

IV. PLAINTIFFS STATE VIABLE CLAIMS AGAINST KALED.

The Landlord Defendants argue that the claims asserted against Kaled must be dismissed because it acted as a managing agent for a disclosed principal and, accordingly, cannot be held liable for rent overcharges. The Landlord Defendants' argument fails for three reasons.

First, while it is true that, in most instances, a managing agent for a disclosed principal may not be held personally liable for a ***rent overcharge***, *see Crimmins v. Handler & Co.*, 249 A.D.2d 89, 91-92 (1st Dep't 1998) ("the managing agent of the premises ... is not liable for any portion of the [rent] overcharge"), there is no prohibition on a managing agent being the subject of a claim for declaratory or injunctive relief seeking to require the managing agent to comply with the Rent Stabilization Laws following years of noncompliance. For this reason alone, dismissal of Plaintiffs' claims against Kaled would be improper.

[15] For similar reasons, the Landlord Defendants offer no reason why Count Three, which seeks damages and injunctive relief for the Landlord Defendants' charging excessive rents for SCRIE-eligible units, is moot. Nor can they. The Complaint plainly alleges that the amount set forth in the checks sent to Plaintiffs did not accurately reflect the amount of the overcharge (¶¶ 52-53), and factual issues therefore remain with respect to Plaintiffs' request for damages in connection with this claim. Likewise, Plaintiffs' request for injunctive relief with respect to Count Three is not moot because injunctive relief is appropriate for the same reasons as with respect to Count Two.

Second, factual issues requiring discovery preclude dismissal. For one, a factual issue exists as to whether Hewlett was truly a "disclosed" principal. Indeed, the letter sent to the class members by Kaled contains no mention of Hewlett, and the checks were payable from Kaled. (*See* Mot. Ex. 4.) Dismissal of the claims against Kaled would be inappropriate based solely on Kaled's raising of a fact-based defense and before discovery on this issue. In addition, the Court of Appeals has held that an agent for a disclosed principal ***may*** be personally liable if "there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal." *Crimmins*, 249 A.D.2d at 91-92. Discovery into Kaled's corporate documents is therefore appropriate to determine the full scope of its relationship with Hewlett.

Third, there is evidence that Kaled acted as the alter ego of Hewlett, and dismissal of the claims against Kaled would therefore be improper on a motion to dismiss. An entity can be liable as the alter ego of another entity when the "owners of the entity, through their domination of it, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against the party asserting the claim such that a court in equity will intervene." *Tap Holdings LLC v. Orix Fin. Corp.*, 109 A.D.3d 167, 174 (1st Dep't 2013); *see also Last Time Beverage Corp. v. F & V Distrib. Co.*, 98 A.D.3d 947, 950 (2d Dep't 2012) ("The corporate or limited liability company veil will be pierced to achieve an equitable result, among other instances, when a corporation or limited liability company has been so dominated by another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego." (internal alterations, quotation marks, and citations omitted)). In determining whether to pierce an entity's corporate veil, courts consider a non-exhaustive list of factors "such as the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office

space or telephone numbers; the degree of discretion demonstrated by the alleged dominated corporation; whether the corporations are treated as independent profit centers; and the payment or guarantee of the corporation's debts by the dominating entity . . . [n]o one factor is dispositive." *Tap Holdings*, 970 N.Y.S.2d at 183 (citation and internal quotation marks omitted).

While Plaintiffs do not have access to Kaled's or Hewlett's corporate records, the Court may take judicial notice of several facts that support a finding that Kaled is an alter ego of Hewlett,[16] including: (1) Kaled and Hewlett share the same corporate address; (2) Kaled is Hewlett's designated agent for service of process; (3) the CEO of Kaled, Mr. Kalikow, shares the same address as Kaled and Hewlett and owns at least a partial interest in Hewlett; and (4) Kaled held itself out as the building's contact by communicating with Plaintiffs directly on at least one occasion—in its letter acknowledging rent overcharge—using solely Kaled contact information and Kaled letterhead, with the checks payable from Kaled, and with no reference to Hewlett. (*See supra* at 4-5, 23.) These facts suggest that discovery may reveal other critical aspects of the corporate relationship.

Plaintiffs should be permitted to proceed to discovery on these issues. Courts have recognized that questions of alter ego liability are "fact-laden and not well suited for summary judgment resolution," *Emposimato v. CIFC Acquisition Corp.*, 89 A.D.3d 418, 420 (1st Dep't 2011), let alone for resolution on a motion to dismiss before discovery, *see AY Bank Ltd. v. JPMorgan Chase & Co.*, 2006 WL 6846592, at *7 (Sup. Ct. N.Y. Cty. Dec. 7, 2006) ("Fundamentally, the question of whether plaintiff can ultimately establish that there was a

[16] In the context of a motion to dismiss, the court may take judicial notice of undisputed records and files, even if not attached to the complaint. *See All. Network, LLC v. Sidley Austin LLP*, 43 Misc. 3d 848, 852 n.1 (Sup. Ct. N.Y. Cty. 2014) ("it is well established that a court may take judicial notice of undisputed court records and files") (internal citation omitted); *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 20 (2d Dep't 2009) (the test for judicial notice is "whether the fact rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven").

piercing of the corporate veil is not the standard on a motion to dismiss."). Indeed, "a plaintiff opposing a motion to dismiss need only show that facts unavailable to the plaintiff ***may*** exist which will justify denial of the motion, and need not demonstrate the actual existence of such facts. . . . [D]iscovery may reveal evidence supporting a conclusion that one company was acting as the alter ego of the other." *Id.* at *7 (emphasis added) (internal citation omitted).

Here, where there are already facts supporting the inference that Kaled is an alter ego of Hewlett, and Plaintiffs do not have access to the Landlord Defendants' books and records, dismissal of Plaintiffs' claim against Kaled would be inappropriate before they have had the opportunity to pursue discovery on the relationship between Kaled and Hewlett. *See AY Bank*, 2006 WL 6846592, at *7-8 (denying motion to dismiss claim under alter ego theory where plaintiff alleged that defendants had overlapping operations, management, and business locations, and noting that dismissal was "particularly [inappropriate] where, as here, the corporate relationships are complex and the relevant facts are exclusively within the control of the party seeking dismissal of the action"); *Emposimato*, 89 A.D.3d at 420 (alter ego claim could proceed where "issues of fact exist[ed] as to whether JCP is the alter ego of CIFC"); *2406-12 Amsterdam Assocs. LLC v. Alianza LLC*, 136 A.D.3d 512, 512-13 (1st Dep't 2016) (affirming holding that complaint and affidavits sufficiently alleged alter ego liability). Alternatively, in the event that the Court determines that Plaintiffs have not adequately alleged a basis for alter ego liability, Plaintiffs should be afforded an opportunity to amend the Complaint to plead additional facts showing that Kaled was the alter ego of Hewlett.

CONCLUSION

For the foregoing reasons, the Landlord Defendants' motion to dismiss should be denied.

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