SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-003225-23T4

HOBOKEN BARBELL, LLC, on behalf of itself and those similarly situated, Plaintiff-Appellant, v. 38 JACKSON, LLC; ANTHONY NICHOLAS PETRUZZELLI; 135 WASHINGTON STREET, LLC; GLASS AND VAPOR HOUSE LLC A/K/A GLASS & VAPOR HOUSE, INC. A/K/A GLASS AND VAPOR HOUSE, INC.; CIGAR AND TOBACCO WAREHOUSE, INC., A/K/A THE CIGAR AND TOBACCO WAREHOUSE, INC.; ASLAM PANJWANI; ALL-SAFE FIRE SPRINKLER CO., INC.; UNLMTD REAL ESTATE GROUP, LLC; RITCO SECURITY SYSTEMS, INC.; THE TAURASI GROUP, INC.; GARY JOSEPH MEZZATESTA; LOCONTE MAINTENANCE, INC; ANTHONY LOCONTE; JOHN DOES 1-25; and ABC COMPANIES 1-25, Defendants-Respondents.	**CIVIL ACTION** ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, HUDSON COUNTY Trial Court Dkt. No. HUD-L-4450-23 Sat Below: HON. ANTHONY V. D'ELIA, J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

(Submitted December 2, 2024)

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PRELIMINARY STATEMENT

This appeal concerns the premature striking of class claims based on the face of the Complaint. Plaintiff Hoboken Barbell, LLC, a commercial tenant in a Hoboken warehouse, sued on behalf of itself and all but one of its fellow warehouse tenants for claims arising for losses in a December 20, 2021 fire.

Plaintiff alleges that materials improperly maintained by one of the tenants, Defendant Cigar and Tobacco Warehouse, Inc. ("C&T") caused the fire and the building did not have fire control and fire warning systems. Plaintiff asserts claims for negligence, breach of contract, and violations of the Consumer Fraud Act.

Defendants 38 Jackson, LLC, 135 Washington Street, LLC, The Taurasi Group, Inc., and its principals, Anthony Nicholas Petruzzelli and Gary Joseph Messatesta are alleged to the owners and landlords.

Defendants All-Safe Fire Sprinkler Co., Inc., Ritco Security Systems, Inc., UNLMTD Real Estate Group, LLC, and Loconte Maintenance, LLC (including its chief officer, Anthony Loconte) are alleged to be entities responsible to the building's maintenance including its fire suppression and fire alarm systems.

Prior to answering the Complaint, those Defendants filed their respective motion to dismiss the class claims. Granting those motions, the motion court

dismissed the class claims with prejudice *R. 4*:6-2(e). Hence, this Court reviews the Orders dismissing the class claims under the *de novo* standard. Because the Complaint's alleged facts, with reasonable inferences favorable to Plaintiff, are accepted as true, the Complaint demonstrates at least one issue common among the class members which could be maintained as a class action. Thus, the motion court should not have dismissed the class claims. Instead, it should have determined whether to certify this case as a class action under *R. 4*:32 *after* the parties developed the evidential record.

Plaintiff asks that the dismissal orders be reversed and the motion court directed to take up the class certification question after the parties are afforded a reasonable opportunity to discover facts relevant to *R. 4*:32.

PROCEDURAL HISTORY

On December 19, 2023, Plaintiff filed its Class Action Complaint. Pa1.

On January 24, 2024, the trial court entered an Order on consent dismissing Defendant Aslam Panjwani without prejudice. Pa71.

On the following dates, the identified Defendants filed their respective motions to dismiss the Complaint under *R. 4*:6-2(e) for failure to state a claim including dismissal of the class claims. The motion court granted the motions with respect to the class claims with prejudice in each of the designated Orders.

Defendant	*Motion filed*[1]	*Order*	
		Filed	*Location*
38 Jackson, 135 Washington, Petruzzelli, and Mezzatesta	Jan 17, 2024	Apr 18, 2024	Pa41
Taurasi, Petruzzelli, and Mezzatesta[2]	Jan 25, 2024	Apr 18, 2024	Pa43
C&T	Jan 25, 2024	Apr 18, 2024	Pa45
Ritco	Feb 9, 2024	Apr 18, 2024	Pa47
Loconte Maintenance and Loconte	Mar 14, 2024	Apr 18, 2024	Pa49
Unlmtd Real Estate	Apr 19, 2024	Jun 10, 2024	Pa51
All-Safe	Apr 30, 2024	Jun 10, 2024	Pa53

[1] Filing dates of these motions can be found in the eCourt's Case Summary located at Pa74 *et seq.*

[2] Messrs. Petruzzelli and Mezzatesta are the alleged principals of Taurasi, 38 Jackson, and 135 Washington. Counsel for Taurasi, on behalf of Taurasi *and* the two principals, sought dismissal by way of a cross-motion to C&T's motion while counsel for 38 Jackson and 135 Washington, on behalf of those two companies as well as the same two principals, also filed a cross-motion to C&T's motion. *See*, 1T12:18-1T13:3.

For the motions resulting in the April 18, 2024 Orders, the motion court set forth its reasons on the record earlier that day. 1T8:10-1T12:6. And, for the June 10, 2024 Orders, the record of the June 6, 2024 motion hearing references the reasons for entering the April 18 Orders. 2T6:1-4.

On June 10, 2024, the Court denied the Plaintiff's May 8 motion for leave to appeal noting Plaintiff could appeal as of right. Pa73. Plaintiff filed its Notice of Appeal on June 19. Pa55.

STATEMENT OF FACTS

Plaintiff Hoboken Barbell, LLC is a New Jersey limited liability company. Pa2 at ¶3.

On December 20, 2021, Plaintiff was a commercial tenant in a warehouse building in Hoboken. Pa5 at ¶23. On that day, there was a fire affecting that building and others on the same block. *Id.* It is alleged that the fire started because Defendant C&T unsafely stored LED rolling trays which spontaneously combusted. Pa6 at ¶¶29-32.

The Defendants are alleged to be the owner or entities responsible for controlling and maintaining the premises. Pa5 at ¶24. As such, they are alleged to be "responsible for the operation, maintenance, supervision and control of the premises, as well as the safety of the tenants [including the provision of] safe and proper fire safety/prevention measures for tenants." Pa5 at ¶25. Defendants are also alleged to have failed to maintain the emergency sprinkler system and the smoke alarm system. Pa6 at ¶¶27, 28. Consequently, the sprinkler and smoke alarm systems failed to work and delayed a timely alert to local fire authorities. Pa7 at ¶33.

"As a result, thereof, Plaintiff and the Class Members suffered severe damage to their businesses, including loss of sales and revenue, ongoing loss of business value, loss of physical goods, loss of property fixtures and

equipment, physical injury, and loss of life." Pa7 at ¶35.

Plaintiff seeks to represent a class consisting of:

> All persons, entities, tenants, leaseholders, lessors, sublessors, residents, occupants, or owners of any business or personal property located on any property that is wholly or partially within the boundary in Figure 1 below [Pa8]; that (1) experienced fire activity during the December 20, 2021, to December 22, 2021 fires; and (2) who has been harmed or damaged during, or as a result of, those fires.

Pa7 at ¶37.

The Complaint alleges that the members of the Class are "so numerous that joinder of all members is impracticable." Pa8 at ¶38. It alleges nine common issues of law and fact including Defendants' duty to maintain the fire safety and alert systems, whether the LED trays were properly stored, and whether Defendants' conduct was negligent or breached a contractual obligation owed to the tenants. Pa9 at ¶42. It also alleges that Plaintiff's claims are typical of the class members' claims "since all such claims arise out of the same incident." Pa8 at ¶39. Plaintiff avers it has no interests antagonistic to the Class's interests and that it will fairly and adequately protect those interests. Pa9 at ¶¶40, 41.

LEGAL ARGUMENT

POINT I. The Standard of Review (Not raised below.)

The motion court dismissed Plaintiff's class claims with prejudice on Defendants' motions to dismiss pursuant to *R. 4*:6-2(e). Pa41-Pa54. This Court's review of such motions is *de novo*, "affording no deference to the trial court's determination." *Pace v. Hamilton Cove*, 258 N.J. 82, 95–96 (2024) (citing *Baskin v. P.C. Richard & Son, LLC*, 246 N.J. 157, 171 (2021)).

A court must assume the facts asserted in the complaint are true, *Lembo v. Marchese*, 242 N.J. 477, 481 (2020), and the "plaintiff is entitled to the benefit of every reasonable inference as we 'search[ ] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" *Id.* (quoting *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 746 (1989) quoting *Di Cristofaro v. Laurel Grove Mem'l Park*, 43 N.J. Super. 244, 252 (App. Div. 1957)).

In *Baskin*, 246 N.J. at 172, the Supreme Court held that the same *R.* 4:6-2(e) which applies to the sufficiency of pleadings asserting causes of action also applies to determine "whether plaintiffs sufficiently pled the class certification requirements to survive a motion to dismiss." "Accordingly, 'a court should be slow to hold that a suit may not proceed as a class action' and

should rarely deny a class action based on the face of the complaint." *Id.* (quoting *Riley v. New Rapids Carpet Ctr.*, 61 N.J. 218, 228 (1972)).

POINT II. This Court Should Reverse the Orders Dismissing the Class Claims with Prejudice Because the Complaint Alleged Facts Which Satisfy Each Requirement for Class Certification. (1T7:19-1T12:6)

The Supreme Court's decision in *Baskin* is dispositive. There, the Law and Appellate Divisions dismissed the class claims on a motion to dismiss pursuant to *R.* 4:6-2(e). The Supreme Court reversed as to some of the claims.

At the pleading stage, class claims should not be dismissed unless, when viewed indulgently under *R. 4*:6-2(e) standard, the complaint does not set forth any basis for certifying a class. When considered under that standard, the Complaint here alleges facts which could satisfy *R.* 4:32's requirements for class certification.

The motion court erroneously concluded that the Complaint failed to allege facts needed to satisfy five of *R. 4*:32's requirements. More specifically, the motion court found there was numerosity [1T9:24-1T10:6] but not commonality [1T10:15-1T11:5]. Then, considering typicality and adequacy together and then superiority and predominance together, concluded that none were present.

There were only two facts which underlie the motion court's decision.

The primary fact was that each putative class member's damages differs from the others. 1T10:23-1T12:6. Secondarily, the motion court noted that Plaintiff failed to satisfy its burden to show that, at the time of the fire, each tenant's lease agreement contained similar material terms. 1T10:15-22. Those facts do not impact that there exists common issues which can be resolved on a class basis. They include the cause of the fire, the adequacy of the fire suppression and notification systems, and the liability (or not) among the various Defendants. Each of those issues is the same for each tenant. For those common issues, there exists commonality, typicality, adequacy, predominance, and superiority. Therefore, the Complaint did allege facts which could be the basis for satisfying *R. 4*:32's requirements for class certification.

A. The Requirements for Class Certification.

> The class action device "furthers numerous practical purposes, including judicial economy, cost-effectiveness, convenience, consistent treatment of class members, protection of defendants from inconsistent obligations, and allocation of litigation costs among numerous, similarly-situated litigants." In light of those objectives, our courts have "consistently held that the class action rule should be liberally construed."

Dugan v. TGI Fridays, Inc., 231 N.J. 24, 46-47 (2017) (citations omitted).

The requirements for class certification are well-established.

> *Rule* 4:32-1 sets forth the requirements for maintaining a class action. Subsection (a) of that rule requires a

putative class to satisfy four general prerequisites in order to sue as a class:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[*R. 4*:32-1(a).]

Those prerequisites are "frequently termed 'numerosity, commonality, typicality and adequacy of representation.'" *Dugan v. TGI Fridays, Inc.*, 231 N.J. 24, 47 (2017) (quoting *Lee*, 203 N.J. at 519).

In addition to the prerequisites of subsection (a), plaintiffs pursuing class certification must also satisfy one of the three requirements of subsection (b). Of importance to this case are the subsection (b)(3) requirements, pursuant to which the court must

> find[] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The factors pertinent to the findings include:
>
> > (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
> >
> > (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

> (C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and
>
> (D) the difficulties likely to be encountered in the management of a class action.
>
> [*R. 4*:32-1(b)(3).]

Baskin, 246 N.J. at 173 (parallel citations omitted).

Expounding on the requirements for predominance under *R. 4*:32-1(b)(3), *Baskin* instructs:

> "To determine predominance under *Rule* 4:32-1(b)(3), the court decides 'whether the proposed class is "sufficiently cohesive to warrant adjudication by representation."'" *Dugan*, 231 N.J. at 48 (quoting *Iliadis*, 191 N.J. at 108). That determination requires
>
> > a court [to] conduct a "pragmatic assessment" of various factors. One inquiry is the significance of the common questions. That inquiry involves a qualitative assessment of the common and individual questions rather than a mere mathematical quantification of whether there are more of one than the other. The second inquiry is whether the "benefit" of resolving common and presumably some individual questions through a class action outweighs doing so through "individual actions." A third inquiry is whether a class action presents a "common nucleus of operative facts."
> >
> > [*Lee*, 203 N.J. at 519-20 (citations omitted) (quoting *Iliadis*, 191 N.J. at 108).]
>
> *Baskin*, 246 N.J. at 174-75.

B. The Presence of Individualized Damages is Not an Absolute Bar to Class Certification.

The primary basis for the motion court's dismissal of the class claims is that each tenant's damages will likely be different. 1T10:23-1T11:21. The damages issue was the basis for the motion court's conclusions as to the absence of commonality, typicality, adequacy, superiority, and predominance. The motion court did not recognize that a class can be certified as to liability issues without addressing individual damages issues. As *Baskin* teaches:

> Class certification is not necessarily precluded when individual class members' degree of damages will require individualized proof. […] Additionally, a proposed class may limit how individualized questions about the type or extent of harm suffered by individual class members will factor into the predominance and superiority assessments by limiting the relief sought to a type that will not be affected by the resolution of individualized questions."

Id., at 175.

The presence of individual issues is not a bar to certifying a class to adjudicate classwide issues. "Significantly, however, to establish predominance, plaintiff does not have to show that there is an absence of individual issues or that the common issues dispose of the entire dispute, or that all issues are identical among class members or that each class member is affected in precisely the same manner." *Baskin*, 246 N.J. at 175 (internal quotation marks and editing omitted).

Certifying a class as to only particular issues, such as to liability, is also contemplated by *R.* 4:32-2(d). That Rule expressly authorizes class actions "with respect to particular issues." Here the common factual issues include how the fire started and whether adequate systems were in place to suppress it and to alarm occupants and fire fighters and how those facts impact on each Defendant's liability. Thus, after considering a complete record on a class certification motion, a court could certify those liability issues for class resolution and avoid the problems envisioned by the motion court from different damage claims. *See*, Gilles, Myriam and Gary Friedman, *The Issue Class Revolution*, 101 B.U.L. Rev. 133, 136 (Jan. 2021) ("Where plaintiffs prevail at an issue class trial, each class member effectively receives a judicial declaration of key liability issues that she can then take into her local court or other forum to claim damages.") Therefore, it was improper for the motion court to dismiss the class claims at the pleading stage.

Furthermore, at the pleading stage, the motion court should not have speculated as to whether the terms in each tenant's lease might be so disparate as to affect any liability issue. In discovery, the landlords can be compelled to produce all the leases. Moreover, in response to a class certification motion under *R.* 4:32, the landlords can make their arguments as to whether the lease terms would impact a liability issue. But, under *R.* 4:6-2(e), Plaintiff should

enjoy the inference that the leases did not somehow exculpate the landlords from liability for failure to maintain a safe building.

CONCLUSION

For the foregoing reasons, Plaintiff Hoboken Barbell, LLC respectfully requests this Court to reverse the motion court's Orders dismissing Plaintiff's class claims with prejudice and instructing that the class certification question be addressed on a motion for class certification after a reasonable opportunity to discovery of facts relevant to *R. 4*:32.

Respectfully submitted,

/s/ Philip D. Stern

Dated: December 2, 2024

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HOBOKEN BARBELL, LLC, *on behalf of itself and those similarly situated*, Plaintiff-Appellant, vs. 38 JACKSON, LLC; ANTHONY NICHOLAS PETRUZZELLI; 135 WASHINGTON STREET, LLC; GLASS AND VAPOR HOUSE LLC a/k/a GLASS & VAPORHOUSE, INC., a/k/a GLASS AND VAPOR HOUSE INC.; CIGAR AND TOBACCO WAREHOUSE, INC., a/k/a THE CIGAR AND TOBACCO WAREHOUSE, INC.; ASLAM PANJWANI; ALL-SAFE FIRE SPRINKLER CO., INC.; UNLMTD REAL ESTATE GROUP, LLC; RITCO SECURITY SYSTEMS, INC.; THE TAURASI GROUP, INC.; GARY JOSEPH MEZZATESTA; LOCONTE MAINTENANCE, LLC; ANTHONY LOCONTE; JOHN DOES 1-25; and ABC COMPANIES 1-25, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION *Civil Action* Docket No. A-003225-23T4 ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY Trial Court Docket No.: HUD-L-4450-23 Sat Below: HON. ANTHONY V. D'ELIA, J.S.C.

CIGAR AND TOBACCO DEFENDANTS-RESPONDENTS' BRIEF IN OPPOSITION TO APPEAL

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PRELIMINARY STATEMENT

Plaintiff-Appellant Hoboken Barbell, LLC, filed suit seeking compensation for property damage and loss of income it incurred as a result of a warehouse fire. But Hoboken Barbell is not content to pursue its own claims in the regular course of litigation. Instead, it asks this Court to sanction conversion of its commonplace fire liability and damage claims into a class action on behalf of itself and other tenants of the warehouse, although the other tenants can themselves pursue any claims they have, and many of them have done so. As the trial court ruled correctly, Plaintiff's Complaint does not state a valid class action under the applicable New Jersey Court Rule.

Plaintiff alleges diverse causes of action against a diverse group of defendants, on behalf of diverse class members capable of representing their own interests. Plaintiff has not cited a single case where a class action has been permitted under similar circumstances. Not one of Plaintiff's causes of action is applicable to all the Defendants, and the members of the class cannot allege the same claims Plaintiff has made against every Defendant named in the Complaint. Defendants are variously charged based on disparate relationships with the class members, disparate alleged duties, and disparate alleged breaches and violations. No precedent exists for the class action Plaintiff pursues, no advantage for the purported members of the class, and no judicial efficiency in

the class action litigation device. This Court has previously denied class certification in an analogous case arising out of fire damage to a similar number of identifiable properties.

This brief is submitted on behalf of two related entities that will be jointly designated here as "Cigar & Tobacco." Plaintiff's Complaint alleges that the fire started in the rented premises of these Cigar & Tobacco Defendants at the warehouse. The Complaint further alleges in its Second Count that Cigar & Tobacco negligently caused the fire by the manner in which it stored its property at the warehouse.

Cigar & Tobacco was a tenant at the warehouse, as was Plaintiff. None of the other ten Defendants named in the Complaint were tenants. None of the other Defendants are charged with the same or a similar negligence claim as Plaintiff alleges against Cigar & Tobacco. Conversely, none of the other three counts of the Complaint charge Cigar & Tobacco with the causes of action Plaintiff has pled against the other Defendants. Rather, the other counts charge breach of contract, statutory Consumer Fraud Act violations, and distinguishable forms of negligence by Defendants that were not tenants. The diverse allegations of the Complaint in themselves demonstrate that this is not a proper class action.

Also, the members of the alleged plaintiff class do not uniformly have the same claims of liability against the multiple Defendants charged in the Complaint. Furthermore, if the putative class members still have damage claims after being compensated by their own insurers for their fire losses, those claims will require individual adjudication, both as to liability and as to damages. Or, their insurers may have subrogation rights that would replace the putative tenant class members with their insurers.

Plaintiff has not and cannot meet the legal requirements of a class action. The trial court correctly dismissed Plaintiff's class action claims, and did so without affecting Plaintiff Hoboken Barbell's individual claims. Plaintiff may still pursue its own fire damage claims against the several diverse Defendants as to which it alleges distinguishable causes of action.

PROCEDURAL HISTORY

Plaintiff filed its Class Action Complaint on December 19, 2023, against thirteen named Defendants, as well as "John Doe" and "ABC Company" unidentified defendants. Pa1, 79.

The two Cigar & Tobacco entities named as Defendants in the Complaint are Cigar and Tobacco Warehouse, Inc., a/k/a The Cigar and Tobacco Warehouse, Inc.; and Glass and Vapor House, LLC, a/k/a Glass and

Vaporhouse, Inc., a/k/a Glass and Vapor House, Inc. Pa1, 3, 4. The Complaint originally named a third related Cigar & Tobacco Defendant, an individual named Aslam Panjwani who was alleged to be the chief officer, registered agent, and/or registered owner of Cigar and Tobacco Warehouse, Inc. Pa1, 3. With Plaintiff's consent, the claims against Panjwani were dismissed without prejudice by order of the trial court dated January 24, 2024. Pa71-72.

In four counts, the Complaint alleges negligence of some of the Defendants in failing to prevent or adequately protect against the fire, negligence of only Cigar & Tobacco in causing the fire and affecting its spread and intensity, violation of the Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. (CFA) by some but not all Defendants, and breach of contract by some but not all Defendants. Pa11-14. No single count of the Complaint jointly charges all the Defendants with the same cause of action. See ibid.

Other actions arising from the same warehouse fire have been filed in the Superior Court, including by the same attorney that represents Plaintiff in this case.[1]

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[1] In accordance with R. 4:5-1(b)(2), the Complaint lists two related cases filed in the Superior Court, Hudson County. Pa14-15. Since the time of the Complaint, two other related cases have been filed. Because the other cases are a matter of public record of New Jersey State and federal courts, this Court can take judicial notice of them. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (courts on a motion to dismiss may consider "allegations in the complaint, exhibits attached to the complaint, matters of public record, and

On January 17, 2024, in lieu of an Answer, Cigar & Tobacco filed a motion to dismiss the class action claims pursuant to Rule 4:6-2(e). Pa80; Ja1. Four other Defendants or jointly represented Defendants also filed motions or cross-motions to dismiss under the same Rule. Pa81-82; Ja59-68. The trial court heard argument on the motions on April 18, 2024, and orally placed on the record its reasons for granting the motions. T9:16-12:6. The court entered five orders the same day dismissing Plaintiff's class action claims with prejudice. Pa41-50.

On May 8, 2024, Plaintiff filed a motion for leave to appeal before this Court from the dismissal Orders dated April 18, 2024. Ja81. By Order dated June 10, 2024, this Court denied Plaintiff's motion for leave to appeal, stating:

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documents that form the basis of a claim." (citation omitted)); see also N.J.R.Evid. 201(b)(4); Buck v. Hampton Twp. School Dist., 452 F.3d 256, 260 (3d Cir. 1999) (judicial notice of court records on motion to dismiss under F.R.Civ.P. 12(b)(6); In re Rockefeller Ctr. Props., Inc. Sec. Litig., 184 F.3d 280, 287 (3d Cir. 1999) (same).

The four related cases are: New England HVAC Services, Inc., et al. v. 38 Jackson, LLC, et al., HUD-L-468-23 (the "NE HVAC Action"); Estate of Rosemarie Vos, et al. v. 38 Jackson, LLC, et al., HUD-L-1462-23 (the "Vos Action"); Eagle Language Services, LLC v. 38 Jackson, LLC, et al., HUD-L-4376-23 (the "Eagle Services Action"); and Glass & Vaporhouse, Inc., et al. v. 38 Jackson, LLC, et al., HUD-L-2011-24 (the "CTW Subrogation Action") Ja86-139. The NE HVAC, Eagle Services, and CTW Subrogation Actions assert property damage sustained by a total of five tenants in the warehouse. Ja86, Ja124, Ja135. The Vos Action, instituted by counsel for the present Plaintiff Hoboken Barbell, is a wrongful death and survival claim regarding the death of an individual residing at the premises. Ja91.

"The appeal can proceed as of right. A timely notice of appeal must be filed within ten days." Pa73.

Also on June 10, 2024, the trial court issued two additional orders dismissing with prejudice Plaintiff's class action claims, as well as specified additional counts and claims, against two of the Defendants. Pa51-54. Plaintiff filed a timely Notice of Appeal on June 19, 2024, from the April 18, 2024 Orders. Pa55. Although Plaintiff's Notice of Appeal does not list the June 10, 2024 Orders, they are designated in Plaintiff's brief among the Orders dismissing Plaintiff's class action claims. Pbv.

Only the class action claims were dismissed by the Orders from which this appeal is taken. Plaintiff's own individual claims for recovery remain to be litigated against Defendants, and, on June 19, 2024, Plaintiff submitted for filing a First Amended Class Action Complaint. See Pa41-54; Pa19, 85. The litigation in the trial court continues while this appeal as of right is heard by this Court. See Pa84-93; R. 2:2-3(b)(9).

STATEMENT OF FACTS

The Complaint alleges that Plaintiff and the class members sustained property damage and lost revenue in a warehouse fire that ignited on December 20, 2021. Pa2 ¶1, 5 ¶23, 7 ¶37. It alleges that, at the time of the fire, Plaintiff was a tenant operating as a commercial gym in the Hoboken warehouse; that it sustained damage to its premises, fixtures, and physical goods; and that it lost business revenue. See Pa5-14 ¶¶ 23, 26, 50, 54, 61, and 67. The Complaint additionally alleges that the members of a putative class suffered similar damages. Pa5-7 ¶¶ 26, 34, 35. The Complaint purports to represent the following class members:

> **Class:** All persons, entities, tenants, leaseholders, lessors, sublessors, residents, occupants, or owners of any business or personal property located on any property that is wholly or partially within the boundary in Figure 1 below; that (1) experienced fire activity during the December 20, 2021, to December 22, 2021 fires; and (2) who has been harmed or damaged during, or as a result of, those fires.

Pa7 ¶ 37. The Figure 1 referenced is an aerial photograph that appears to be of a Hoboken city block. Pa8. However, in its brief before this Court, Plaintiff describes the putative class more narrowly as Plaintiff "and all but one of its fellow warehouse tenants . . . ." Pb1.

The motion record includes documentation showing that, at the time of the fire on December 20, 2021, approximately 70 tenants occupied the

warehouse, 30 with leases and the others without effective leases. See, Ja3-58. The commercial leases held by some of the tenants varied from others. See Ja3-58.

The Complaint charges the following Defendants as liable for Plaintiff's and the putative class members' damages, alleging causes of action as designated for each:

- The two **Cigar & Tobacco** Defendants -- charged only in the **Second Count** (Negligence), and alleged to be **tenants** at the warehouse that kept combustible merchandise stacked too closely to sprinkler heads, which merchandise spontaneously combusted, **caused the fire,** and interfered with the sprinkler system in the building. Pa3-12 ¶¶ 12-16; 29-32; 51-54;

- Five Defendants -- 38 Jackson, LLC; Anthony Nicholas Petruzzelli; Gary Joseph Mezzatesta; The Taurasi Group; and 135 Washington Street, LLC, -- alleged to be **the owners** of the premises, charged in the **First Count** (Negligence), **Third Count** (CFA), and **Fourth Count** (Breach of Contract), with failing to control and maintain **the condition of the property**, and with making certain **misrepresentations to the tenants**. Pa 2-14 ¶¶ 4-11, 23-28, 48-50, 55-61, 62-67;

- One Defendant -- All-Safe Fire Sprinkler Co., Inc. -- charged in the **First Count** (Negligence) and **Third Count** (CFA), with failing to **maintain the emergency sprinkler system** in the building, and with making certain **misrepresentations**. Pa4-13 ¶¶ 17, 27, 31, 48-50, 55-61;

- One Defendant -- Ritco Security Systems, Inc. -- charged in the **First Count** (Negligence) and **Third Count** (CFA), with negligently **operating and maintaining the premises**, and with making certain **misrepresentations**. Pa4-13 ¶¶ 19, 31, 48-50, 55-61;

- Two Defendants -- Loconte Maintenance, LLC and Anthony Loconte -- charged in the **First Count** (Negligence) and **Third Count** (CFA), with

negligently **operating and maintaining the premises**, and with making certain **misrepresentations**. Pa4-13¶¶ 20-21, 48-50, 55-61; and

- One Defendant -- UNLMTD Real Estate Group, LLC -- charged in the **First Count** (Negligence), **Third Count** (CFA), and **Fourth Count** (Breach of Contract), but with **no specific factual allegations** in the Complaint as to its role with respect to the warehouse or the nature of its liability. Pa4-14 ¶¶ 31, 48-50, 55-61, 62-67.

After the fire, Cigar & Tobacco submitted a property damage claim to its insurance company and was indemnified for its losses in accordance with its insurance policy, and Cigar & Tobacco's property insurer has since filed the CTW Subrogation Action. Ja71-74, Ja135. A number of other tenants also received compensation from their own property insurers, and some of those insurers have asserted their contractual right to bring subrogation actions to recover those payments. See Ja75-80.

LEGAL ARGUMENT

I. This Court Applies a Plenary Standard of Review to the Trial Court's Rule 4:6-2(e) Determination That Plaintiff's Complaint Fails to State a Class Action Claim Upon Which Relief Can Be Granted.

(Pa45-46; T9:16-12:6)

Cigar & Tobacco moved under Rule 4:6-2(e) to dismiss Plaintiff's class action claims on the ground that the Complaint fails to meet the requirements of Rule 4:32 for class actions.

This Court reviews *de novo* a trial court's orders granting Rule 4:6-2(e) motions to dismiss, including appeals from class action claims. Pace v. Hamilton Cove, 258 N.J. 82, 95 (2024); Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021). The Court "must examine 'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Baskin, 246 N.J. at 171 (quoting Dimitrakopoulos v. Borrus, Golding, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107 (2019). "Nonetheless, if the complaint states no claim that supports relief, and discovery will not give rise to such a claim, the action should be dismissed." Baskin, 246 N.J. at 171.

Here, Plaintiff's Complaint does not state a claim that supports class action relief, and discovery will not cure the impropriety of the pleading.

II. The Trial Court Correctly Dismissed the Putative Class Action Because the Complaint Failed to Meet the Requirements of Rule 4:32-1.

(Pa45-46; T9:16-12:6).

A. The Requirements of Rule 4:32-1.

Rule 4:32-1 establishes the requirements for maintaining a class action. See Int'l Union of Operating Engrs. Local No. 68 Welfare Fund v. Merck & Co., Inc., 192 N.J. 372, 382 (2007). Subsection (a) of the Rule lists four prerequisites to maintain a class action, "frequently termed 'numerosity, commonality, typicality and adequacy of representation.'" Dugan v. TGI Fridays, Inc., 231 N.J. 24, 47 (2017) (quoting Lee v. Carter-Reed Co., LLC, 203 N.J. 496, 505 (2010)); In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 424 (1983) (same). The four prerequisites are:

(1) the class is so numerous that joinder of all members is impractical ["numerosity"];

(2) there are questions of law or fact common to the class ["commonality"];

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ["typicality"]; and

(4) the representative parties will fairly and adequately protect the interests of the class ["adequacy of representation"].

Rule 4:32-1(a). All four requirements of subsection (a) must be satisfied to maintain a class action. Baskin, 246 N.J. at 173.

In addition, subsection (b) of the Rule requires one of three alternatives to be satisfied:

> (1) prosecution of separate actions would create the risk of inconsistent adjudications for members of the class or impair other class members' interests; or
>
> (2) the party opposing the class refused to act, making injunctive relief appropriate; or
>
> (3) there are predominantly common questions of law and fact, and proceeding as a class is superior to other methods of adjudication.

See ibid.; In re Cadillac, 93 N.J. at 425-26. Plaintiff contends its Complaint meets the requirements of subsection (b)(1) and (3). Subsection (b)(2) is not applicable in this case.

The party seeking class certification bears the burden of proof in establishing all the requirements of Rule 4:32-1. Myska v. N.J. Mfrs. Ins. Co., 440 N.J. Super. 458, 475 (App. Div. 2015), app. dism., 224 N.J. 523-24 (2016). The trial court "must undertake a rigorous analysis to determine if the Rule's requirements have been satisfied." Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 106-107 (2007). The court's objective in assessing the propriety of class action is to "promote the purposes of the underlying rule." Id. at 104 (quoting 5 James W. Moore et al., Moore's Federal Practice – Civil § 23.03 (3d ed. 1997)). If,

upon review, the allegations of the Complaint do not properly lend themselves to class certification, dismissal is appropriate. Riley v. New Rapids Carpet Center, 61 N.J. 218, 225 (1972). Here, the allegations of Plaintiff's Complaint do not lend themselves to a class action.

B. Plaintiff Cannot Satisfy the Requirements of Rule 4:32-1(a).

(1) Plaintiff Cannot Establish Numerosity.

A class action is appropriate only where the class is so numerous that joinder of all members is impractical. R. 4:32-1(a)(1). Here, joinder of those members of the class that have claims against these Defendants is not impractical. Or alternatively, the limited number of cases brought on separate claims can be efficiently adjudicated separately. In fact, this putative class action is already one of five cases pending in the Superior Court that arise from the same warehouse fire.

"The [class action] device 'was an invention of equity' that enabled litigation to proceed 'in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable.'" Iliadis, 191 N.J. at 103 (quoting Hansberry v. Lee, 311 U.S. 32, 41 (1940)). Class actions typically involve large numbers of potential claimants. E.g., Dugan, 231 N.J. at 64 (263,000); Lee, 203 N.J. at 512 (10,000); In re Cadillac, 93 N.J. at 425 (7,500); Delgozzo v. Kenny,

266 N.J. Super. 169, 184 (App. Div. 1993) (35,000); Atlantic Ambulance Corp. v. Cullum, 451 N.J. Super. 247, 252 (App. Div. 2017) (36,000); Lusky v. Capasso Bros., 118 N.J. Super. 369, 372 (App. Div.) (7,000), certif. denied, 60 N.J. 466 (1972). In this case, the number of potential class members is not large, and likely much fewer than all the tenants that suffered fire loss at the warehouse.

When considering a smaller number of class members, the court must consider whether joinder of all members of the proposed class is "impracticable." R. 4:32-1(a). "Mere conclusory or speculative allegations that joinder is impractical are not sufficient to satisfy the numerosity requirement." Liberty Lincoln Mercury v. Ford Mktg. Corp., 149 F.R.D. 65, 74 (D.N.J. 1993).[2] As the court explained in Liberty Lincoln:

> Practicability of joinder depends on a number of factors, including: the size of the class, ease of identifying members and determining addresses, ease of service on members if joined, geographical dispersion and whether proposed members of the class would be able to pursue remedies on an individual basis.

Ibid., citing numerous cases. In Liberty Lincoln the court found that a proposed class of either 38 or 123 members was "not so large as to preclude joinder of all

[2] New Jersey courts consider federal case law interpreting F.R.Civ.P. 23 to be relevant authority. See, e.g., In re Cadillac, 93 N.J. at 424-25; Riley, 61 N.J. at 226 ("Our class-action rule, R. 4:32, is a replica of Rule 23 of the Federal Rules of Civil Procedure.").

potential plaintiffs. . . ." Ibid. Since all 123 car dealership potential class members were (1) known and identifiable by name and address, (2) easily subject to service of process, and (3) confined geographically to New Jersey, numerosity was not established. See also West Morris Pediatrics, P.A. v. Henry Schein, Inc., 385 N.J. Super. 581, 599 (Law Div. 2004) ("joinder of all thirty-seven customers is not 'impracticable' because their identity is known, they are all in New Jersey and, thus, can be joined in one suit."), aff'd on other grounds, 2006 N.J. Super. Unpub. LEXIS 104 (N.J. App. Div. Mar. 30, 2006); Hannoch Weisman v. Brunetti, 14 N.J. Tax 346, 253 (1993) (class certification unwarranted: "The case before the court involves tenants for a specified period in one garden apartment complex, all readily identifiable from records maintained by the landlord").

Plaintiff cannot satisfy the numerosity requirement, both in terms of numbers and impracticability. All the tenants of the warehouse are identified and all their tenancies were at the same location in Hoboken. The potential class members are known to both Defendants and Plaintiff. Plaintiff's counsel is also counsel for plaintiffs in the Vos Action, and discovery exchanged in that case, which is part of the motion record in this case, establishes that there were 70 tenants in the warehouse on the date of the fire. Ja3-58. Some of those 70 tenants, or their insurers who have the contractual right to bring their own

subrogation claims, are unlikely to participate as class members. The actual size of the participating class is much smaller than 70 and thus not impractical for joinder in this litigation.

Critically, the Complaint does not address the size of the class and concedes in effect that the impracticability component is not satisfied: "Members of the Class are readily identifiable from information in Defendants' possession, custody and control." Pa8 ¶ 38. The tenants do not number in the thousands, are known and capable of recourse to New Jersey courts, and potential joinder is not impractical. In sum, the requirement of numerosity has not been satisfied.

(2) Plaintiff Cannot Establish Commonality.

The commonality requirement initially asks whether a "common nucleus of operative facts" controls the claims. In re Cadillac, 93 N.J. at 431. "Although all issues need not be identical among all class members, common questions must predominate." Carroll v. Cellco Partnership, 313 N.J. Super. 488, 499 (App. Div. 1998).

In paragraph 42 of its Complaint, Plaintiff lists nine allegedly "common questions of law and fact affecting the rights of all class members," Pa9-10, but the list is comprised of issues that do not apply to all Defendants or to all purported members of the class. Cigar & Tobacco is charged only in the Second

Count of the Complaint, which alleges negligent storage of materials that initially caused the fire. No other Defendant is sued for the same alleged negligent acts. At the same time, Cigar & Tobacco is not charged with any other wrongdoing, as alleged in the other three counts of the Complaint.

Plaintiff alleges breach of contract claims only against owners, landlords, and a realty company. However, even as to that group of Defendants, some tenants on the date of loss did not have lease contracts in effect, see Ja3-9, and their proofs on breach of contract would differ from those that had leases in effect. Plaintiff sues the alarm company, the security company, and the fire sprinkler company alleging negligence, presumably from a failure to alert tenants to the fire and to stop its spread. The owners and landlords, and Cigar & Tobacco as a tenant, had no similar duties.

Also, some but not all Defendants are sued for alleged misrepresentations in violation of the CFA. But the alleged misrepresentations cannot be identical since different Defendants had different relationships with the tenants and different functions as to the warehouse. Also, the members of the class are likely to have variable proofs as to their reliance on such different misrepresentations. In sum, the claims against the Defendants are wholly different and require different proofs.

Furthermore, the damages claims also lack commonality. Most tenants, like Cigar & Tobacco, will have been reimbursed under their fire insurance policies for the property damage they sustained. Ja3-5 ¶5, Ja75-80. Any subrogation claims of their own insurers will involve liquidated damages, and the insurance companies that paid those claims are capable of pursuing their own subrogation claims without class representation, as Cigar & Tobacco's insurer has already done by filing the CTW Subrogation Action. Some tenants, however, may claim they were not 100% reimbursed and may seek damages above what they recouped in insurance monies. Other tenants, presumably like Plaintiff, may not have had any insurance and will need to individually identify what was stored on the premises and lost in the fire and will also need to prove the value of such property and any consequent lost profits. The damages proofs are anything but uniform and will require a massive undertaking by the jury to sift through the differing claims.

Although Plaintiff makes general reference on appeal to its list of nine purported common issues, its actual argument is reduced to a much-narrower number of allegedly common issues: "the cause of the fire, the adequacy of the fire suppression and notification systems, and the liability (or not) among the various Defendants." Pb6, 9. None of these are common issues of law or fact as to all Defendants that are material to the various causes of action alleged in

the Complaint. Whatever may have been the cause and origin of the fire, Plaintiff's claims of inadequate fire suppression and notification systems and its claims of alleged CFA violations will not be affected by the cause and origin of the fire. Whatever the cause and origin, Defendants other than Cigar & Tobacco will be required to defend each claim brought against them in Counts One, Three, and Four of the Complaint. At the same time, Plaintiff's allegation that Cigar & Tobacco negligently caused the fire is not affected by the claims Plaintiff has made against the other Defendants. Cigar & Tobacco is not alleged to have had responsibility for fire suppression and notification. It is also not alleged to have made any misrepresentations to the putative plaintiff class that could be a violation of the CFA.

As to "liability (or not) among the various Defendants," the tenants had varying relationships with the several Defendants charged in the Complaint, and the apportionment of liability as to all purported class members cannot be determined in a single class action.

Research reveals no case granting class certification where multiple defendants are sued on differing causes of action, based on alleged distinct wrongdoing by separate defendants.[3] Class actions almost uniformly proceed

[3] Matter of Integrity Ins. Co., 240 N.J. Super. 480 (App. Div. 1990), was an action brought on behalf of and against multiple parties by the State Commissioner of Insurance to liquidate an insurance company. Although the

against one or more defendants undertaking the same action against all class members. Here, the lack of commonality is glaringly clear from the Complaint itself. The several Defendants are differently situated and charged with distinct means of liability for the damages caused by the fire. Class actions do not involve mixed claims of tort, contract, and statutory fraud filed against different parties alleged to have committed different harms.

The commonality required by Rule 4:32-1(a) does not exist in the circumstances alleged in Plaintiff's Complaint.

(3) **Plaintiff Cannot Establish Typicality**.

"Typicality" requires that the claims asserted by the plaintiff "have the essential characteristics common to the claims of the class." In re Cadillac, 93 N.J. at 425. This requirement is sorely lacking in the present case.

As already noted, many tenants will likely have been paid for their property damage claims and no longer have standing to pursue a cause of action against Defendants. Plaintiff, on the other hand, may not have insurance coverage and may not have been reimbursed for its damages. Plaintiff is in a different position from those other potential class members. Unlike claims where property insurers have paid their insureds, Plaintiff's damages are not

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Court's opinion discussed class action requirements and standards, id. at 501, the case was not a class action but rather a cause of action authorized by statute.

fixed and liquidated. Furthermore, its proofs will be different from the proofs submitted by any insurer that seeks to pursue a subrogation action.

In addition, to the extent class members may assert that they should be paid on uncovered claims, they have potential actions against insurers, and those claims involve different proofs, which also sets them apart from Plaintiff. Faced with a similar issue, this Court in Myska denied class certification of claimed insurance improprieties finding no typicality because of the "individualized facts and circumstances between each insurer and its insured." 440 N.J. Super. at 480.

(4) **Plaintiff Cannot Establish Adequacy of Representation.**

Plaintiff is not an adequate representative of the proposed class. In asserting a breach of contract claim based on its lease, Plaintiff stands on different footing from those tenants that did not have leases and is not in a position to represent adequately their interests. Also, Plaintiff has not sued all the potential responsible parties. There are parties in the NE HVAC Action and the Vos Action that are not named as Defendants in this case. Plaintiff has not included defendants already sued in other cases that are alleged to have caused or contributed to the fire.

In assessing representation, courts also consider whether the members of the putative class have individual recourse to represent their own interests.

Class actions are appropriate where individuals' claims "are, in isolation, too small" to warrant recourse to litigation. Iliadis, 191 N.J. at 104. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997), see also Iliadis, 191 N.J. at 104 (class action is a procedural "device intended to remedy the incentive problem facing litigants who seek only a small recovery"). A corollary to this is the aim of equalization of adversaries, "a purpose that is even more compelling when the proposed class consists of people with small claims." Amchem Prods., 521 U.S. at 617. Equalization "remedies the incentive problem facing litigants who seek only a small recovery." Muhammad v. County Bank of Rehoboth Beach, 189 N.J. 1, 17 (2006). A class action solves the incentive problem "aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." Iliadis, 191 N.J. at 105.

These aims are not furthered by the proposed class in this case. Based on the claims already in suit in the five pending litigations (this action, the NE HVAC case, the Vos case, the Eagle Services case, and the CTW Subrogation Action) the damages sought are not "paltry." Plaintiff, admits that the sums involved are large, alleging that "the economic damages suffered by the

individual Class Members are significant." Pa10 ¶ 43. This case presents no need for class certification to equalize adversaries. The Complaint provides no basis to conclude that the members of the putative class face unequal litigation resources from the Defendants Plaintiff has sued.

Moreover, to the extent the tenants' claims were settled by insurance recoveries, any subrogation action will be maintained by an insurance company—an entity capable of retaining counsel, instituting litigation, and prosecuting its own claim. As with Cigar & Tobacco's insurer that already instituted suit with attorneys of its own choosing, most insurance companies have subrogation counsel and it is probable that those insurers (to the extent they intend to seek recovery) will use their own lawyers and not have unknown counsel pressed upon them. To the extent there was no insurance recovery, the potential dollars involved are more than sufficient to justify retaining counsel to pursue such tenant's claim. Plaintiff's Complaint does not establish adequacy of its representation of the purported class.

C. Plaintiff Cannot Satisfy the Requirements of Rule 4:32-1(b).

(1) Separate Actions Will Not Impair the Ability of Other Parties to Protect Their Interests.

In addition to satisfying all the requirements of subsection (a) of Rule 4:32-1, Plaintiff must satisfy at least one of the three alternatives of subsection (b) of the Rule. There is no reason to speculate that separate adjudications by

individual tenants will "impair or impede the[] ability of the other [class] members to protect their interests." R. 4:32-1(b)(1)(B). Nothing in the Complaint demonstrates that Plaintiff seeks class certification to protect the interests of other class members. This is not "akin to a limited fund case," see Saldana v. City of Camden, 252 N.J. Super. 188, 195 (App. Div. 1991), where a class action will protect the ability of all potential claimants to recover some compensation. Plaintiff provides no evidence that Defendants lack sufficient insurance coverage to meet the losses of potential claimants. Also, as already stated, some of the tenants may have been compensated through their own property insurance policies. As to those tenants, it is the insurers' potential subrogation rights that may be affected by the limits of Defendants' insurance policies. The insurers are fully capable of allocating available insurance funds to address policy limits. This case is no different from other multi-claimant tort cases where individual claimants pursue their own claims and seek recovery from the defendants' insurance policies.

Nor does the risk of inconsistent verdicts satisfy the requirements of class certification. In Saldana, 252 N.J. Super. at 195, a putative class action also based on fire losses, this Court said that "the mere stare decisis effect of an individual adjudication is not ordinarily enough as a practical matter to be dispositive of other members' interest . . . . " (citation omitted). In this case, an

action by one tenant will not impair the rights of another tenant. In Saldana, the court found no indication that the defendant or its insurer had limited resources and no showing that adjudication of one case would dispose of the claims of other class members. Subsection (b)(1) was thus inapplicable. Id. at 195-96. The same considerations are applicable here.

(2) Plaintiff Cannot Establish the Predominance and Superiority of Common Questions of Fact and Law.

Subsection (b)(3) of Rule requires that Plaintiff demonstrate both the predominance of the common issues it lists and the superiority of a class action over other available means of adjudication. Saldana, 252 N.J. Super. at 196.

(i) Plaintiff Cannot Establish Predominance.

Predominance is legally distinct from the commonality requirement of Rule 4:32-1(a). Beegal v. West Park Gallery, 394 N.J. Super. 98, 111 (App. Div. 2007). It is "far more demanding." Dugan, 231 N.J. at 48. Predominance considers whether the issues common to the class outweigh those that are not. Ibid.; Saldana, 252 N.J. Super. at 197. To determine predominance, the court decides "whether the proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" Iliadis, 191 N.J. at 108 (citation omitted).

Here, Plaintiff alleges multiple causes of action -- tort, contract, and statutory violation. The claims are asserted against multiple defendants, with

some asserted against all defendants except Cigar & Tobacco and some asserted against some of the other Defendants but not others. Cigar & Tobacco is charged alone in the Second Count, and in no other count of the Complaint. The very nature of the pleading itself demonstrates a lack of predominant common issues. Diverse claims against multiple defendants asserting different causes of actions are not suitable for class action lawsuits. Plaintiff has cited no case that says otherwise.

Plaintiff alleges negligence against Cigar & Tobacco, the owner-landlord, the maintenance company, the security company, the sprinkler company, the realty company, and various individuals associated with some of those entities. But the allegations of negligence against each of these Defendants cannot be the same. While there may be some overlap, these Defendants served different functions and had different alleged duties to the tenants of the warehouse. In addition, Cigar & Tobacco had none of the same duties as the other Defendants. The liability issues are diverse; they are not predominant.

Also, no overarching evidence establishes damages applicable to all members of the putative class. If any tenant or any insurer wants to recoup damages, it has every right to do so standing on its own footing, asserting its own cause of action, and putting on its own proofs through the efforts of its own

counsel. It should not be tied to the presentation of evidence made by this Plaintiff.

In Saldana, 252 N.J. Super. 188, this Court reversed class certification on behalf of property owners whose buildings were damaged by fires originating in distressed vacant properties owned by the City of Camden. In assessing the predominance of common issues, the Court stated: "commonality becomes obscured when the probable unique issues of liability, causation and damages in each case are considered, requiring individualized treatment at trial." Id. at 197. The same considerations apply equally to the negligence claims asserted against Cigar & Tobacco. The individual issues of any tenant or its insurer predominate over the issues affecting the property as a whole.

(ii) **Plaintiff Cannot Establish Superiority.**

The second prong under Rule 4:32-1(b)(3) is that the class action be "superior" to other available means of adjudication. Superiority involves "a comparison with alternative procedures." In re Cadillac, 93 N.J. at 436. That comparison requires:

> (1) and informed consideration of alternative available methods of adjudication of each issue, (2) a comparison of the fairness to all whose interests may be involved between such alternative methods and a class action; and (3) a comparison of the efficiency of adjudication of each method.

Ibid., quoting Katz v. Carte Blanche Corp., 496 F.2d 747, 757 (3d Cir.), cert. denied, 419 U.S. 152 (1974).

In Saldana, this Court found there was no superiority in proceeding by class action on behalf of a class of plaintiffs that had incurred fire losses. The Court stated:

> [W]e cannot conclude that the interest of economy makes the class action "superior" to other available means of adjudicating the controversy. This is not a case where, because the individual claims are too small to warrant recourse to case-by-case litigation, the "wrongs would go without redress" if the class action certification is not granted. See In re Cadillac, 93 N.J. at 435. Each class member asserts substantial damage or total destruction of his or her dwelling, a virtual "taking" of property, and thus has sufficient stake to prosecute his or her claim individually or with a group of other plaintiffs.

Saldana, 252 N.J. Super. at 200.

In Int'l Union of Operating Engrs., 192 N.J. 372, the Supreme Court denied class certification to a health benefits fund alleging that it was improperly overcharged for the drug Vioxx and alleging that the defendant concealed the drug's health and safety risks. The Court found no superiority, noting that the plaintiff and all members of the class "allege they have been damaged in large sums"; "are well-organized institutional entities" with no "disparity in bargaining power and no likelihood that the claims are individually so small that they will not be pursued." Id. at 394.

In the present case, a class action is not a superior method of adjudication. To reiterate, the claims of negligence against Cigar & Tobacco are distinct from those against other Defendants. The proofs on the breach of contract claims will differ between tenants with leases and those without and will also differ according to the terms of each tenant's individual lease. The CFA claims will involve individualized evidence regarding the tenants' dealings with the landlord and any other Defendant, and possibly the reliance placed on any alleged omissions by individual members of the putative class.

Also, the damages proofs will be widely disparate depending on the tenant's individualized status. The proofs on a subrogation claim will be completely different in degree and kind from proofs offered by tenants whose losses have not been paid, or paid in full. Any individual tenant that has uncompensated damages or any insurance company with a subrogation claim can file its own suit. The losses are known and the tenants, having sustained loss in New Jersey, can turn to the courts directly for recourse. More than two years have passed since the fire and, to date, five tenant claims are in suit, putting lie to the fear that there will be dozens of separate lawsuits defying the court's ability to manage the cases.

In sum, a class action is not an appropriate vehicle for resolving disputes regarding the warehouse fire in Hoboken. Plaintiff is unable to meet the

requirements of Rule 4:32-1. The alleged class claims were correctly dismissed. Plaintiff's own claims remain unaffected and can proceed in due course, but the claims of the other tenants who were affected by the fire should be left to those tenants to pursue if they choose.

III. Plaintiff's Class Action Claim Was Properly Stricken on a Motion to Dismiss Pursuant to Rule 4:6-2(e).

(Pa45-46; T9:16-12:6)

Plaintiff will not, indeed cannot, meet the requirements of Rule 4:32-1 to maintain a class action. In a pinch to save its mispleaded claim, Plaintiff resorts to a purely procedural argument before this Court, that the trial court acted prematurely in dismissing its class action claims on the basis of the pleadings in its Complaint. Pb2. Plaintiff requests that this Court reverse that ruling and allow discovery to proceed pending a motion for class certification. Pb15.

But discovery will not rescue Plaintiff's class action claims. Discovery cannot change the essential nature and irregularity of Plaintiff's pleading -- varied claims against various and insufficiently related Defendants, brought on behalf of dissimilarly situated members of the putative plaintiff class. The trial court did not act prematurely in recognizing the impropriety of Plaintiff's class claims and dismissing them at the pleading stage.

Rule 4:32-2(a) states that the court shall "at an early practicable time" determine if a putative class action should be certified. This determination need not await discovery, or even a motion for certification of the class. Baskin, 246 N.J. at 172 ("pre-discovery dismissal of a class action is permitted if the court determines that discovery would not provide a basis for relief"). "No precise procedures are established for granting or denying class certification at the incipient state of litigation." Myska, 440 N.J. Super. at 476.

The court may properly consider class issues on a Rule 4:6-2(e) motion to dismiss. See id. at 477 (affirming trial court dismissal of class certification under Rule 4:6-2(e)). In Myska, the plaintiffs challenged dismissal of their putative class action on a motion, arguing as Plaintiff does here that discovery was a necessary predicate to class certification. This Court disagreed. It held, "we do not abide a view that precludes dismissal, following the required analysis, when a court determines alleged claims do not properly lend themselves to class certification." 440 N.J. Super. at 477. The Court went on to state:

> [T]he test [for class certification] does not merely turn on the stage of the litigation. Rather, dismissal is dependent on the nature of the claims and the propriety of the presentation as a class action, in accordance with the provisions of Rule 4:32-1. We flatly reject the plaintiffs' urging to impose a bright line rule prohibiting the examination of class certification until discovery is undertaken.

Id. at 478. The Court also found "no error" in the trial court's review of documents beyond the four corners of the Complaint in considering the Rule 4:6-2(e) motion. Id. at 482. This Court's opinion in Myska was subsequently endorsed by the Supreme Court in Baskin, 246 N.J. at 172.

This Court has affirmed Rule 4:6-2(e) dismissals of putative class actions in other cases where the claims were not legally viable. See Sparroween, LLC v. Twp. of West Caldwell, 452 N.J. Super. 329, 340 (App. Div. 2017) (no need for discovery where "controlling issue," validity of an ordinance, "was an issue of law"); Local Baking Prods., Inc. v. Kosher Bagel Munch, Inc., 421 N.J. Super. 268, 280 (App. Div.), certif. denied, 209 N.J. 96 (2011) (statutory private right of action could not meet predominance and superiority requirements of a class action); J.D. ex rel. Scipio-Derrick v. Davy, 415 N.J. Super. 375, 397-98 (App. Div. 2010) (Rule 4:6-2(e) dismissal affirmed where no viable equal protection claim was presented based on Legislature's allocation of lesser funds to charter schools); Camden Cty. Energy Recovery Assocs., L.P. v. N.J. Dept. of Env. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd o.b., 170 N.J. 246 (2001) ("Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory.").

Like this Court's prior decisions, the motion to dismiss before the trial court presented a question of law – may a class action be pursued in accordance with the

requirements of Rule 4:32 where diverse defendants have been sued on diverse causes of action that are not uniformly applicable to all the defendants. The answer is that it may not. Plaintiff's class action claims in this case are not legally viable. The discovery Plaintiff asks this Court to allow would lead to facts supporting or opposing a legally invalid theory for a class action. The Court should not require the parties to engage in such wasteful discovery and delay a legally mandated outcome.

The trial court properly addressed Plaintiff's class action claims pursuant to Rule 4:6-2(e) with consideration of undisputed documents related to the Complaint that referenced potential members of the class. It correctly dismissed the class action claims and allowed Plaintiff to pursue its own individual claims in the normal course of Plaintiff's fire damage claims.

CONCLUSION

The Orders of the trial court dismissing with prejudice Plaintiff's class action cause of action should be affirmed.

/s/ Anne M. Mohan

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Dated: December 18, 2024

4902-3867-0339, v. 4

HOBOKEN BARBELL, LLC, *on behalf of itself and those similarly situated*, Plaintiff-Appellant, vs. 38 JACKSON, LLC; ANTHONY NICHOLAS PETRUZZELLI; 135 WASHINGTON STREET, LLC; GLASS AND VAPOR HOUSE LLC a/k/a GLASS & VAPORHOUSE, INC., a/k/a GLASS AND VAPOR HOUSE INC.; CIGAR AND TOBACCO WAREHOUSE, INC., a/k/a THE CIGAR AND TOBACCO WAREHOUSE, INC.; ASLAM PANJWANI; ALL-SAFE FIRE SPRINKLER CO., INC.; UNLMTD REAL ESTATE GROUP, LLC; RITCO SECURITY SYSTEMS, INC.; THE TAURASI GROUP, INC.; GARY JOSEPH MEZZATESTA; LOCONTE MAINTENANCE, LLC; ANTHONY LOCONTE; JOHN DOES 1-25; and ABC COMPANIES 1-25, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION *Civil Action* Docket No. A-003225-23T4 ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY Trial Court Docket No.: HUD-L-4450-23 Sat Below: HON. ANTHONY V. D'ELIA, J.S.C.

BRIEF OF DEFENDANT-RESPONDENT ALL SAFE FIRE SPRINKLER CO. INC

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PRELIMINARY STATEMENT

Plaintiff, Hoboken Barbell, LLC, (hereinafter "Plaintiff" or "Appellant" or "Hoboken Barbell") was a commercial tenant at premises known as 38 Jackson Street, Hoboken, New Jersey (hereinafter "the Premises" or "38 Jackson Street") when on December 20, 2021 a large warehouse fire occurred at the Premises causing various damages, including the deaths of two persons illegally residing at the Premises, property damage, and various other losses incurred by the tenants and businesses at this location.

As a result, Plaintiff sought to bring a class action complaint on behalf of other occupants, tenants, or businesses at this location that were harmed by this fire. Plaintiff's complaint pled various causes of action, under different theories of liability, with plaintiffs sustaining different types of damages, against multiple separate and distinct defendants - each of whom is alleged to have owed different duties at the Property. The class action status of Plaintiff's complaint was immediately challenged by all the defendants on motions to dismiss the complaint for failure to state a claim. All of these motions were granted.

Appellant now argues that the trial court erred by finding that the absence of similar lease agreements and similar damages precluded class certification. However, Appellant's argument is without merit. Respondent submits that the trial court appropriately found that the requirements for class certification were

not satisfied because the common issues and common facts did not outweigh the individualized differences among the class members, damages, and liability claims.

PROCEDURAL HISTORY

Plaintiff filed its initial class action complaint on December 19, 2023. (Pa 1-18). Appellant alleged that Respondent All Safe Fire Sprinkler Co. Inc. (hereinafter "Respondent" or "All Safe") negligently failed to maintain the fire sprinkler suppression system at the Premises and that All Safe misrepresented, concealed, or otherwise omitted information about the poor state of the fire suppression system at the Premises in violation of New Jersey's Consumer Fraud Act.

Initial motions to dismiss the class action claims pursuant to Rule 4:6-2(e) were filed by Cigar and Tobacco Warehouse, Inc (hereinafter "Cigar Tobacco"); 38 Jackson, LLC (hereinafter "38 Jackson"); 135 Washington Street, LLC (hereinafter "135 Washington"); The Taurasi Group, Inc. (hereinafter "Taurasi"); Anthony Nicholas Petruzzelli (hereinafter "Petruzzelli"); Gary Joseph Mezzatesta (hereinafter "Mezzatesta"); Ritco Security Systems, Inc. (hereinafter "Ritco"); and Loconte Maintenance, LLC (hereinafter "Loconte"). These motions were all granted by the trial court on April 18, 2024. (T1) (Pa 41-

50). Thereafter, a subsequent round of motions to dismiss the class action claims were filed by UNLMTD Real Estate Group, LLC (hereinafter "UNLMTD") and All Safe. These motions were both granted by the trial court on June 6, 2024. (T2) (Pa 51-54). The trial court explicitly stated that the second round of motions to dismiss the class claims was granted for the same reasons set forth by the court on the initial motions to dismiss. (2T 4:19-6:16). These reasons were set forth by the trial court on April 18, 2024. (T1).

STATEMENT OF FACTS

On December 19, 2023, Plaintiff filed a class action lawsuit arising out of a fire that occurred on or about December 20, 2021. (Pa 1-18). Plaintiff alleged that "the fire had destroyed a large swath of the Property and its various units, most of which were leased by local businesses and persons that make up our putative class." (Pa 7).

The allegations are different for each group of defendants. Plaintiff alleged 38 Jackson, 135 Washington, Taurasi, and UNLMTD all owned and maintained the premises, that they negligently maintained the premises and negligently maintained the sprinkler and fire alarm systems at the Premises, and breached the lease agreement owed to the class members. (Pa 5-6, 13). Plaintiff then alleged that Cigar Tobacco, a tenant, negligently stored and

stacked boxes of merchandise and negligently stored flammable materials causing an LED rolling tray to spontaneously combust. (Pa 6, 11-12). Plaintiff then alleged that Ritco and All Safe negligently maintained the alarm and sprinkler systems such that they were non-operational. (Pa 6).

In this complaint, Plaintiff further defined the class as follows: "All persons, entities, tenants, leaseholders, lessors, sublessors, residents, occupants, or owners of any business or personal property located on any property … that 1) experienced fire activity during the December 20, 2021 to December 22, 2021 fires; and 2) who has been harmed or damaged during, or as a result of, those fires." (Pa 7).

As to numerosity, Plaintiff alleged that joinder of all class members was impracticable given the large number of those harmed by the fire, but concurrently alleged that the members of the class were readily identifiable. (Pa 8). As to commonality, Plaintiff alleged the following common questions of law and fact: 1) whether Defendants violated the Consumer Fraud Act; 2) whether Defendants had a duty to maintain the fire safety and alert systems; 3) and whether they breached that duty; 4) whether Defendants improperly stored merchandise or flammable materials; 5) whether Defendants had a contractual duty to safeguard the class members and their property; 6) and whether

Defendants breached this contractual duty; 7) whether Defendants otherwise acted negligently. (Pa 9).

Ultimately, as to this Respondent, in Count One of the Complaint, Plaintiff alleged negligence against All Safe and others for carelessly operating or maintaining the Property. (Pa 11-13). In Count Three, Plaintiff alleged a violation of the Consumer Fraud Act against All Safe for concealing the poor state of the fire prevention and alert systems at the Premises. (Pa 11-13).

Plaintiff further alleged a separate breach of contract (lease) claim only against the owner group of defendants – 38 Jackson, 135 Washington, Mezzatesta, Petruzzelli, UNLMTD and Taurasi.

This complaint is just one of other related lawsuits that arise out of this same warehouse fire – 1) New England HVAC Services, Inc. and The Good Old Motor-Cycle Parts Co. v. 38 Jackson, LLC, et al., Docket No. HUD-L-468-23, filed on February 7, 2023 (hereinafter the "NEHVAC Action") (Ja 86), and 2) Estate of Rosemarie Vos by Administratrix Ad Prosequendum Barbara Stise, et al. v. 38 Jackson, LLC, et al., HUD-L-1462-23, filed on April 25, 2023 (hereinafter the "Vos Action" or "wrongful death action") (Ja 91), which was instituted by the same counsel for the present Plaintiff. The NEHVAC Action asserts property damage sustained by two tenants in the warehouse and the Vos Action is a wrongful death and survival claim regarding the death of an

individual residing at the premises. (Pa 15) (Ja 86, 91).

Since the filing of Plaintiff's complaint, two additional lawsuits arising out of this same fire have been filed in the Superior Court of New Jersey, Law Division – 1) Eagle Language Services v. 38 Jackson, LLC, Docket No. HUD-L-4376-23, filed on December 13, 2023 (Ja 124); and 2) Glass & Vaporhouse v. 38 Jackson, LLC, et. al., Docket No. HUD-L- 2011-24, filed on May 29, 2024 (Ja 135).

LEGAL ARGUMENT

Point I The Standard of Review

Rule 4:6-2(e) motions to dismiss for failure to state a claim upon which relief can be granted are reviewed de novo. Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91 (2019). A reviewing court must examine "the legal sufficiency of the facts alleged on the face of the complaint," giving the plaintiff the benefit of "every reasonable inference of fact." Id. at 107 (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). The complaint must be searched thoroughly "and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Printing Mart, 116 N.J. at 746. "Nonetheless, if the complaint states

no claim that supports relief, and discovery will not give rise to such a claim, the action should be dismissed." Dimitrakopoulos, 237 N.J. at 107.

Here, there is additional nuance to this standard because plaintiffs seek review as a class action. By way of background, "[a] class action, generally, permits one or more individuals to act as plaintiff or plaintiffs in representing the interests of a larger group of persons with similar claims." Lee v. Carter–Reed Co., 203 N.J. 496, 517 (2010) (emphasis added). Class actions permit claimants to band together and, in doing so, gives them a measure of equality against a corporate adversary, thus providing a procedure to remedy a wrong that might otherwise go unredressed. Id. at 517–18; Myska v. New Jersey Mfrs. Ins. Co., 440 N.J. Super. 458, 473 (App. Div. 2015). Put simply, the class action device permits an otherwise vulnerable class of diverse individuals with small claims access to the courthouse. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 172 (2021)

While the motion to dismiss is reviewed de novo, class certification decisions rest on the sound discretion of the trial court. Myska v. New Jersey Mfrs. Ins. Co., 440 N.J. Super. 458, 474 (App. Div. 2015). The analysis must be rigorous and look beyond the pleadings to understand the claims, defenses, relevant facts, and applicable substantive law. Id. The rigorous analysis requirement means that a class is not maintainable merely because the complaint

parrots the legal requirements of the class-action rule. Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 107 (2007). In reviewing the grant or denial of class certification, "an appellate court must ascertain whether the trial court has followed Rule 4:32–1 standards and properly exercised its discretion. Id. An abuse of discretion arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis. Id.

No precise procedures are established for granting or denying class certification at the incipient stage of litigation such as the case here. Rather, our rules state the court shall, at an early practicable time, determine by order whether to certify the action. Rule 4:32–2(a); Myska v. New Jersey Mfrs. Ins. Co., 440 N.J. Super. 458, 476 (App. Div. 2015). Courts must liberally view class allegations and allow reasonable inferences to be gleaned from the complaint's allegations and search for a possible basis for class relief so as to avoid premature dismissals. Id. Yet, our courts do not endorse a view that precludes dismissal, following the required analysis, when a court determines alleged claims do not properly lend themselves to class certification. Myska v. New Jersey Mfrs. Ins. Co., 440 N.J. Super. 458, 476–77 (App. Div. 2015). In addition, pre-discovery dismissal of a class action is permitted if the court

determines that discovery would not provide a basis for relief. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 172 (2021).

When distilled, the standard of review is after accepting as true all of the allegations in a complaint, and considering the issues in the context of a challenge to class certification, the central inquiry remains: whether the putative class raises questions of law or fact common to the members of the class that predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Myska v. New Jersey Mfrs. Ins. Co., 440 N.J. Super. 458, 478 (App. Div. 2015); Rule 4:32–1(b)(3).

POINT II The trial court's dismissal of the class claims should be affirmed as Appellant has failed to demonstrate commonality, typicality, predominance or superiority.

Per Rule 4:32-1(a), there are four prerequisites to class action certification: (1) the class is so numerous that joinder of all members is impractical ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy of representation"). Dugan v. TGI Fridays, Inc., 231 N.J. 24, 47

(2017) (the prerequisites are frequently termed numerosity, commonality, typicality and adequacy of representation). All four requirements of subsection (a) of the Rule must be satisfied. Baskin v. P.C. Richard & Son, 246 N.J. 157, 173 (2021).

If all four Rule 4:32-1(a) prerequisites to class certification are met, the plaintiff seeking certification must prove that the lawsuit satisfies one of the possible types of class actions delineated in Rule 4:32-1(b). Here, Plaintiff is ostensibly seeking certification under R. 4:32-1(b)(3) which requires plaintiff to demonstrate both: (1) predominance—questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) superiority—a class action is superior to other available methods for the fair and efficient adjudication of the controversy. R. 4:32-1(b)(3).

In this matter, Appellant is unable to adequately set forth commonality, typicality, predominance and superiority which requires this Court to affirm the dismissal of the class claims. These requirements will be discussed separately below.

A. Commonality

Commonality involves a consideration of whether there is a "common nucleus of operative facts." In re Cadillac, 93 N.J. 412, 431 (1983).

"Although all issues need not be identical among all class members, common questions must predominate." Carroll v. Cellco Partnership, 313 N.J. Super. 488, 499 (App. Div. 1998). "Commonality becomes obscured when the probable unique issues of liability, causation and damages in each case are considered, requiring individualized treatment at trial." Saldana v. City of Camden, 252 N.J. Super. 188, 197 (App. Div. 1991). The commonality requirement dictates that there be "some question of fact or law common to the members of the class." Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp., 149 F.R.D. 65, 74-75 (D.N.J. 1993). It is not necessary that all questions of fact or law raised be common. Id; W. Morris Pediatrics, P.A. v. Henry Schein, Inc., 385 N.J. Super. 581, 600 (Law. Div. 2004), aff'd, No. A-3595-04T1, 2006 WL 798952 (App. Div. 2006). However, simply alleging the same theory of recovery for all class members does not guarantee the existence of legal or factual commonality. Id.

Moreover, when the resolution of a common legal issue is dependent upon factual determinations that will be different for each purported class plaintiff, courts have consistently refused to find commonality and have declined to certify a class action. Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp., 149 F.R.D. 65, 76 (D.N.J. 1993). Along those lines, "[a]n individual question is one where members of a proposed class will need to present

evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016). In addition, "common questions" must be capable of generating common, class-wide answers. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) ("[w]hat matters to class certification is not the raising of common questions -- even in droves -- but, rather, the capacity of a class wide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.").

Now we must refer back to the allegations of Appellant's complaint to determine whether the allegations about the putative class and the alleged common questions of law and fact pass muster as to commonality. Appellant defined the class as "all persons, entities, tenants, leaseholders, lessors, sublessors, residents, occupants, or owners of any business or personal property… that 1) experienced fire activity during the December 20, 2021 to December 22, 2021 fires; and 2) who has been harmed or damaged during, or as a result of, those fires." (Pa 7). As to commonality, Appellant alleged the following common questions of law and fact: 1) whether Defendants violated

the Consumer Fraud Act; 2) whether Defendants had a duty to maintain the fire safety and alert systems; 3) and whether they breached that duty; 4) whether Defendants improperly stored merchandise or flammable materials; 5) whether Defendants had a contractual duty to safeguard the class members and their property; 6) whether Defendants breached this contractual duty; 7) whether Defendants otherwise acted negligently. (Pa 9).

Here, no commonality exists among the proposed class members or the various defendants. While there is a common nucleus of operative facts insofar as all the claims of the class members arise out of the same warehouse fire, there is no commonality of issues because the legal theories are different depending upon the status and position of each class member and depending upon the status and position of the defendant. As a threshold matter, Appellant has asserted different legal causes of action against each group of defendants. Negligence has been alleged against all the defendants, but the factual underpinnings of the negligence claims are entirely different. For example, against the ownership entities (135 Washington, 38 Jackson, UNLMTD, Taurasi, Mezzatesta, and Petruzzelli), Appellant asserted that these defendants negligently maintained, operated and administered the Premises so as to cause the fire. (Pa 11). However, as to the alarm contractor defendants (Ritco and All Safe), Appellant has alleged that these defendants negligently maintained or operated the alarm

and sprinkler systems. (Pa 6). The negligence claim against Cigar Tobacco revolves around their improperly stacking cardboard boxes and storing flammable hazardous materials, such as the LED rolling tray which spontaneously combusted. (Pa 6). The proofs required to show negligence against each defendant group would vary from group to group. For example, it would be anticipated that property management agreements and testimony about specific maintenance responsibilities would have to be elicited from the ownership group. Yet, the proofs to establish liability against Ritco and All Safe would ostensibly require two separate expert liability reports discussing the maintenance of the alarm system and sprinkler system, respectively, and technical discovery regarding the installation and operation of these systems. Whereas, the proofs to establish negligence against Cigar Tobacco would require testimony regarding their storage methods, what was stored, and discovery into whether the lease permitted storage of hazardous and flammable materials. Clearly, the proofs required for Appellant to establish negligence would vary from defendant to defendant. Each defendant is differently situated, owes different duties, which makes the issue of negligence highly individualized and inappropriate for class treatment. Such individualized proofs as to liability preclude a finding of commonality.

Moreover, the fact that Appellant has asserted different theories of

liability for certain defendants further preclude a finding of commonality. Again, negligence is asserted against all the defendants, but the same cannot be said about the consumer fraud claim or breach of contract claim. Consumer fraud is not alleged against Cigar Tobacco and the breach of contract/lease claim is only asserted against the ownership defendant group. Since Plaintiff asserts different causes of action against only a subset of defendants obviously means that Plaintiff's proofs will vary from defendant to defendant. Certainly, the proofs to show a breach of the lease agreement will be different than the proofs required to show a misrepresentation or omission.

In addition, commonality cannot be established since there are significant dissimilarities among the proposed class members. By plaintiff's own definition, the proposed class ostensibly could include those persons who suffered personal injury as a result of the fire. The class could also include those businesses that were uninsured or underinsured who suffered damages as a result. At the same time, the class could include supposed residents who did not suffer a business loss or interruption and only lost personal property. The class could also include tenants who had formal lease agreements and other tenants who did not have written leases. (Ja 3-59). Clearly, these proposed class members have dissimilar interests and stakes in the litigation. Most tenants likely have been indemnified by their respective insurance companies and would not join the litigation. Yet,

others who were uninsured or underinsured may join, but their proofs would be entirely different depending on their policy, claims adjustment, and specific property damaged. In addition, those tenants with leases may be on a different footing versus those without written lease agreements, which would obviously require individualized testimony about their tenancies and/or leases. Plus, those tenants who did not operate a business, but "resided" at the warehouse would have substantially different damages than businesses who lost revenue or otherwise interrupted their business. Lastly, those persons who have been physically harmed from the fires would have an entirely different set of proofs than the other class members. All of this goes to show that the differences among the class members' status, situation, and damages requires a highly specific plaintiff by plaintiff analysis and precludes a class wide analysis. This individualized treatment and analysis of the class members clearly precludes a finding of commonality.

B. Typicality

Typicality means that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." R. 4:32-1(a)(3). While commonality focuses on the characteristics of the proposed class, typicality focuses on the proposed class representative. Goasdone v. Am. Cyanamid Corp., 354 N.J. Super. 519, 529–30 (Law. Div. 2002). Typicality requires that the

claims of the class representatives must "have the essential characteristics common to the claims of the class." In re Cadillac, 93 N.J. at 425. The typicality requirement is designed to "ensur[e] that the class representatives are sufficiently similar to the rest of the class—in terms of their legal claims, factual circumstances, and stake in the litigation—so that certifying those individuals to represent the class will be fair to the rest of the proposed class." In re Schering Plough Corp., 589 F.3d 585, 597 (3d Cir. 2009). In determining whether there is typicality, courts must consider the attributes of the proposed representatives, the class as a whole, and the similarity between the proposed representatives and the class. This investigation properly focuses on the similarity of the legal theory and legal claims; the similarity of the individual circumstances on which those theories and claims are based; and the extent to which the proposed representative may face significant unique or atypical defenses to her claims. Id. at 597-98. Typicality does not require that claims of all of the class members be identical to that of the class representatives. Baby Neal v. Casey, 43 F.3d 48, 56 (3d. Cir. 1994).

To meet the requirement of typicality, the claims of the class members and class representatives must arise from the same event or practice or course of conduct and must be based on the same legal theory. Id. The expectation is a

harmony of interest between the class action representatives and the class members, so that the class representatives by furthering their own goals are also furthering the goals of the class. Goasdone v. Am. Cyanamid Corp., 354 N.J. Super. 519, 529–30, 808 A.2d 159, 165 (Law. Div. 2002). Typicality is intended "to screen out class actions involving legal or factual positions of the class representative which are markedly different from those of other class members." Liberty Lincoln Mercury v. Ford Marketing, 149 F.R.D. 65, 77 (D.N.J.1993). Where the legal or factual positions of the class representatives are markedly different from those of the putative class members, typicality will not be satisfied. W. Morris Pediatrics, P.A.v. Henry Schein, Inc., 385 N.J. Super. 581, 603 (Law. Div. 2004), aff'd, 2006 WL 798952 (App. Div. 2006). Thus, the typicality requirement will not be met when the named plaintiff's individual circumstances are markedly different or the legal theory upon which the claims are based differs from that upon which the claims of other class members will be based. Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp., 149 F.R.D. 65, 77 (D.N.J. 1993).

Here, Appellant is Hoboken Barbell, a commercial tenant that operated a weightlifting gym at the Premises that was uninsured for its business losses. However, the majority of tenants ostensibly had insurance and were likely indemnified by their own carriers which would explain why there are so few

lawsuits filed by the tenants to date. This makes Appellant's individual circumstance different from the majority of tenants. Moreover, the fact that there is so much dissimilarity among the proposed class members precludes a finding of typicality. As set forth above, the putative class members can range from physically injured persons, residents at the warehouse who lost personal property, commercial tenants and businesses who lost business income and property, tenants that had a lease and other tenants that did not have a written lease agreement, entities that have already been indemnified and others that were uninsured or underinsured. All of these differences among the class members renders the class highly specific and individualized and without a typical class member that represents the whole. Given the numerous types of plaintiffs encompassed by the class definition, it is impossible to hone in on a typical class member that adequately represents the whole group.

Moreover, typicality requires the class representative to have similar claims and legal theories as the entire class. This is not the case here. The record has shown that some tenants had written leases and others did not. This means that some tenants would be able to pursue a breach of contract claim, but others would not be able to. Likewise, as to the consumer fraud claim there is no typicality there since there is no single or uniform representation made to each class member. What was allegedly represented to Hoboken Barbell by All Safe

about the sprinkler system is not necessarily the same across the board for all tenants. For example, some tenants that used or stored flammable materials may have been told one thing by All Safe, but yet a tenant like Appellant may not have received the same representation. This is a not a case involving a single representation such as a product label or car warranty.

As such, Appellant's claims, theories, proofs and damages are not typical of the entire class, which precludes a finding of typicality. If anything, the record shows that Appellant is atypical since appear to be one of the few or only uninsured tenants.

C. Predominance

Predominance is perhaps the paramount factor in a class certification determination and the trial court's rationale on this factor was correct. The lower court held that the common issues held by the class did not outweigh individual differences in liability and damages among the class members, especially since the class members are in different positions and have different damages. (1T 11:17-21).

To establish predominance, a class representative must demonstrate "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Rule 4:32–1(b)(3). That inquiry tests whether the proposed class is "sufficiently cohesive to warrant

adjudication by representation." Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 108–09 (2007). Some general principles guide us in this pragmatic assessment. First, the number and, more important, the significance of common questions must be considered. Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 108–09 (2007); Carroll v. Cellco, 313 N.J. Super. 488, 499 ("Predominance is not, however, determined by adding up the number of common and individual issues and determining which is greater"). Second, a court must decide whether the benefit from the determination in a class action of common questions outweighs the problems of individual actions. In re Cadillac, supra, 93 N.J. at 430; Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 108–09 (2007). Third, predominance requires, at minimum, a "common nucleus of operative facts." Id. Notably, predominance does not require the absence of individual issues or that the common issues dispose of the entire dispute. Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 108–09 (2007). Notably, the predominance prong is far more demanding than Rule 4:32-1(a)(2)'s requirement that there be questions of law or fact common to the class. Dugan v. TGI Fridays, Inc., 231 N.J. 24, 48 (2017).

Appellant now raises for the first time on appeal the possibility of certifying the class as to liability only, and pursuing damages separately by each class member in their local court. This argument must be rejected. Initially, plaintiff never raised this issue before the trial court in any of its oppositions to

the various motions to dismiss the class claims. Brock v. PSE&G, 149 N.J. 378 (1997) (an issue not raised below will not be considered for the first time on appeal). Moreover, logistically, Appellant has not expounded or detailed how the matter would be bifurcated and then separately pursued. Even assuming that liability could be parsed out for class certification, would this include class certification of all the various legal theories – negligence, breach of contract, and consumer fraud. The problem with this approach has already been set forth above. Without belaboring the point, when the theories of liability are different among the class members and when these theories are not uniformly asserted against all defendants, there is no real commonality.

In addition, the lower court's focus upon the potential for individualized analysis given the different tenancy status of each class member was sound. Again, some tenants had written leases, others did not. Certainly, this places tenants on different footing and establishes different duties among defendants. Clearly, the results would vary wildly depending upon the individual lease terms.

Ultimately, the predominance requirement requires the court to weigh whether the benefit of resolving common and even some individual questions through a class action outweighs doing so through individual actions. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 174–75 (2021). Even assuming there

are common questions as to how the fire started, whether there was adequate maintenance, and adequate fire alarm and sprinkler systems, certifying a class for this limited liability question does not actually limit individualized claims or create judicial economy when damages would have to be pursued individually in separate lawsuits, at least under Appellant's new proposition. This creates just as many individual damages lawsuits, while also creating a class action among dissimilar plaintiffs and defendants. The fact of the matter is that the individualized legal theories, differences among the class members, and uneven assertion of these legal theories against defendants clearly requires highly specific and individualized analysis that is not appropriate for class action treatment.

D. Superiority

In addition to predominance, Rule 4:32–1(b)(3) requires the party seeking certification to demonstrate that class litigation is "superior to other available methods for the fair and efficient adjudication of the controversy." That requirement necessarily "implies a comparison with alternative procedures," In re Cadillac, supra, 93 N.J. at 436, and mandates assessment of "the advantages and disadvantages of using the class-action device in relation to other methods of litigation." Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 114–15 (2007).

More specifically, our analysis demands "(1) an informed consideration

of alternative available methods of adjudication of each issue, (2) a comparison of the fairness to all whose interests may be involved between such alternative methods and a class action, and (3) a comparison of the efficiency of adjudication of each method." In re Cadillac, supra, 93 N.J. at 436. In addition, the class members "lack of financial wherewithal" is an "important factor" in the superiority analysis. Saldana v. City of Camden, 252 N.J. Super. 188, 200 (App. Div.1991). Because of the very real likelihood that class members will not bring individual actions, class actions are "often the superior form of adjudication when the claims of the individual class members are small." Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 114–15 (2007)

As implied earlier in the predominance section, Appellant cannot establish that a class action lawsuit is preferable to individual lawsuits. Appellant has suggested for the first time on appeal that the matter can be certified as a class action for liability purposes only, and that individual plaintiffs could then bring individual damages lawsuits in their local courts. Such a procedure is not efficient and is not preferable to individual lawsuits. Under this scheme, both a class action lawsuit and numerous individual lawsuits are contemplated. Clearly, there is no judicial efficiency in this model with just as many individual lawsuits created. If individual lawsuits are to be pursued for damages purposes, there is no reason why these individual plaintiffs would want to forego pursing

liability individually as well. If an individual lawsuit is going to be filed for damages, it reasonably follows that these claimants would not want to bifurcate the liability portion into a class action. There is no incentive to join a class action when the class member would still have to file separate individual lawsuits for damages.

In addition, Appellant has suggested that a class action is preferable because joinder of all members is impracticable. (Pa 8, 10). Yet, at the same time, Appellant admits that members of the class are readily identifiable (Pa 8), and Cigar Tobacco has even produced a lease directory, rent rolls and some lease agreements identifying all potential class members. (Ja 3-59). The class members are a small finite group and they are more than capable of filing individual lawsuits here, especially when the alleged damages sustained by each individually are significant. (Pa 10). The fact of the matter is that several individual lawsuits have already been filed as set forth above, which suggests that a class action is not preferable or superior.

Moreover, the purpose of class actions is to permit claimants to band together and give them a measure of equality against a corporate adversary, thus providing a procedure to remedy a wrong that might otherwise go unredressed. Lee v. Carter-Reed Co., 203 N.J. 496, 517 (2010). Class actions make sense when class members are not inclined to bring individual actions because the

individual claim is small. Iliadis, 191 N.J. at 114-15. That concern is not implicated here. By Plaintiff's own admission in the complaint, the damages suffered by each class member is significant. (Pa 10). Given the fact that several individual lawsuits have already been filed by potential class members and since the damages are not minimal, the facts here do not lend itself to class certification or a finding of superiority.

CONCLUSION

For all of these reasons, and also for the reasons cited by co-defendants in their own respondent briefs, All Safe Sprinkler Co, Inc. respectfully requests this Court to affirm the trial court's dismissal of Plaintiff's class claims with prejudice.

Respectfully submitted,

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Dated: December 23, 2024

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HOBOKEN BARBELL, LLC, *on behalf of itself and those similarly situated,* Plaintiff, v. 38 JACKSON LLC; ANTHONY NICHOLAS PETRUZZELLI; 135 WASHINGTON STREET, LLC; GLASS AND VAPOR HOUSE LLC a/k/a GLASS & VAPORHOUSE, INC. a/k/a GLASS AND VAPOR HOUSE INC.; CIGAR AND TOBACCO WAREHOUSE, INC., a/k/a THE CIGAR AND TOBACCO WAREHOUSE, INC.,; ASLAM PANJWANI; ALL-SAFE FIRE SPRINKLER CO. INC.; UNLMTD REAL ESTATE GROUP, LLC; RITCO SECURITY SYSTEMS, INC.; THE TAURASI GROUP; GARY JOSEPH MEZZATESTA; LOCONTE MAINTENANCE, LLC; ANTHONY LOCONTE; JOHN DOES 1-25; and ABC COMPANIES 1-25, Defendants, & GLASS AND VAPOR HOUSE, LLC A/K/A GLASS AND VAPORHOUSE, INC., CIGAR AND TOBACCO WAREHOUSE, INC. A/K/A THE	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: AM-000457-23 **On Appeal from the Superior Court of New Jersey, Law Division, Hudson County** **Docket No. HUD-L-4450-23** **Sat below:** **Hon. Anthony D. Elia,**

CIGAR AND TOBACCO WAREHOUSE, INC., Defendants/Third Party Plaintiffs, v. HIT GALLERY STUDIOS, LLC, SOUNDWARS STUDIO, LLC MARCOS A. DE PAZ, K&C ELECTRICAL SECURITY, LLC, UNLIMITED BUILDING MANAGEMENT CORP; and LYDIA SECURITY MONITORING d/b/a C.O.P.S, Third Party Defendants, -And- LYDIA SECURITY MONITORING d/b/a C.O.P.S., Third Party Defendant/Fourth Party Plaintiff, v. 38 JACKSON, LLC 135 WASHINGTON STREET, LLC, RITCO SECURITY SYSETME, INC., -And- RITCO SECURITY SYSTEMS, INC. Defendant/Fifth Party Plaintiff, vs.	

HIT GALLERY STUDIOS, LLC, SOUNDWARS STUDIOS LLC, MARCOS DE PAZ, K&C ELECTRICAL SECURITY, LLC, UNLIMITED BUILDING MANAGEMENT CORP.; and LYDIA SECURITY MONITORING d/b/a C.O.P.S. Fifth Party Defendant.	

BRIEF OF DEFENDANT/RESPONDENT RITCO SECURITY SYSTEMS, INC.

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I. PROCEDURAL HISTORY

On or about December 19, 2023, Plaintiff filed a Class Action Complaint against Ritco, among multiple other Defendants. (Pa11[1]). On or about January 17, 2024, Defendant Cigar and Tobacco Warehouse, Inc. filed a Motion to Dismiss Plaintiff's Class Action claims. (Pa29-75). On or about January 25, 2024, Defendants the Taurasi Group, Gary J. Mezzatesta, Anthony Nicholas Petruzzelli, 38 Jackson Street and 135 Washington Street filed Cross-Motions to Dismiss. (Pa87-96). On February 9, 2024 Ritco filed a Motion to Dismiss Plaintiff's Class Action claims, punitive damages claims, and allegations under the Consumer Fraud Act. (Pa97-140). On March 14, 2024, Loconte Maintenance, LLC and Anthony Loconte filed a Cross Motion to Dismiss Plaintiff's Class Action claims, punitive damages claims, and allegations under the Consumer Fraud Act. (Pa152-156).

On April 14, 2024 the Honorable Anthony D'Elia granted the five pending Motions to Dismiss, including Ritco's Motion to Dismiss. (Pa1-Pa9). Judge D'Elia granted Ritco's Motion to Dismiss the Class Action Claims with Prejudice, to Dismiss the Punitive Damages Claims without prejudice, and to Dismiss the Consumer Fraud Act Allegations without prejudice. (Pa7)[2].

II. COUNTER STATEMENT OF FACTS

Plaintiff Hoboken Barbell, LLC named multiple Defendants in this lawsuit with

[1] Pa shall refer to Plaintiff's appendix.
[2] Please note that there is nothing in the transcript that requires referencing with respect to the procedural history.

varying, if any, relationship to the Plaintiff arising out of a fire or series of fires that started on December 20, 2021, in Hoboken, New Jersey. The named entities include the alleged building owners, 38 Jackon, LLC, and 135 Washington Street, LLC, the alleged property manager Unlmtd. Real Estate Group, LLC, former and current tenants of the building, including Glass and Vapor House, LLC, and contractors that completed variable work on the building, including Ritco Security Systems, Inc. (Pa1). Plaintiff defined its class as its class multiple different people including:

> "All persons, entities, tenants, leaseholders, lessors, sublessors, residents, occupants, or owners of any business or personal property located on any property that is wholly or partially within the boundary in Figure 1 below…" during, or as a result of, those fires. (Pa1).

Of note, there are also substantial variations within Plaintiff's sub-class. For example, with respect to the tenants and occupants of the building ("occupants"), multiple occupants had formal leasing agreements, all with different term dates, while others merely occupied the building pursuant to a letter of intent to lease (Ja011-Ja058).

There are also substantial variations among the Defendants, which will require individualized treatment. Specifically, there will be different theories of liability asserted against the building owners and lessors in contrast to those asserted against the Cigar and Tobacco entity Defendants, whose liability stems from the storage of

various products in their unit. Similarly, there will be different theories of liability asserted against the building owners, from the contractors who completed work at the Property. There will also be further subdivisions of liability issues within each of these groups of Defendants, particularly with the contractors who performed work on the Property, as each contractor had at least one contract pertaining to work performed at the Property. Multiple entities and individuals that are included within Plaintiff's definition have already filed suit and/or their insurers have expressed an intent to file suit. (Ja074, Ja80, Ja86-Ja90, Ja91-139).

III. LEGAL ARGUMENT

The New Jersey Appellate Division reviews motions to dismiss de novo. *Sashihara v. Nobel Learning Communities, Inc.*, 461 N.J. Super. 195, 200. However, any determinations of fact, including those pertaining to class certification are reviewed on an abuse of discretion basis. *International Union of Operating Engineers Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 192 N.J. 372, 386.

Pursuant to Rule 4:5-2(e), a claimant is required to plead facts to support any claims for relief requested in the Complaint. The court rules provide an avenue for dismissal where a claimant has failed to do so. A party may move to dismiss a pleading under R. 4:6-2(e) where there is a "failure to state a claim upon which relief can be granted." On motions to dismiss under R. 4:6-2(e), the complaint must be searched in depth and with liberality to determine if a cause of action can be gleaned.

Printing Mart-Morristown v. Sharp Electronics, 116 N.J. 739, 746 (1989). "The inquiry is limited to 'examining the legal sufficiency of the facts alleged on the face of the complaint." *State v. Cherry Hill Mitsubishi, Inc.*, 439 N.J. Super. 462, 467 (quoting *Printing Mart-Morristown*, 116 N.J. at 746). Accordingly, the Supreme Court in *Ashcroft v. Iqbal* distinguished between facts and legal conclusions contained in a Complaint, holding that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (U.S. 2009). The Court further noted that "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 555, 127 S. Ct. 1955, (2007).

While every reasonable inference is accorded in the plaintiff's favor, dismissal of the complaint is appropriate when no basis for relief is provided. See *Energy Rec. v. Dept. of Env. Prot., 320 N.J. Super.* 59, 64 (App. Div. 1999), aff'd o.b. 170 N.J. 246 (2001). A dismissal under R. 4:6-2(e) with prejudice is "mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted,' or if 'discovery will not give rise to such a claim [.]'" *Mac Prop. Grp. LLC*, 473 N.J. Super. at 17 (quoting *Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman and Stahl, P.C.*, 237 N.J. 91, 107 (2019)).

Rule 4:32-1(a) governs class actions claims and provides that Plaintiff must initially demonstrate:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law and fact common to the class.

(3) the claims or defenses of the representative party are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the class.

While the court may look at the number of potential members in a class when evaluating numerosity under R. 4:32-1(1)(a), numerosity "is more than a mere numbers game." *W. Morris Pediatrics, P.A. v. Henry Schein, Inc*., 385 N.J. Super. 581, 595 (Super. Ct. 2004) citing *Liberty Lincoln Mercury v. Ford Mktg. Corp.*, 149 F.R.D. 65 (D.N.J. 1993). Instead, the court must analyze ""the difficulty and or inconvenience of joining all members of the class calls for class certification." Id. at 596 citing *Lerch v. Citizens First Bancorp., Inc*., 144 F.R.D. 247 (D.N.J. 1992). Accordingly, the court in *Hannoch Weisman v. Brunetti*, found that numerosity was not met where, "The case …involves tenants for a specified period in one garden apartment complex, all readily identifiable from records maintained by the landlord and, in all likelihood, by the Association as well." *Hannoch Weisman v. Brunetti*, 13 N.J. Tax 346, 350 (1993).

In analyzing commonality, New Jersey courts have looked at whether "Plaintiff's theory is applicable to an entire class." *Lee v. Carter-Reed Co., L.L.C.*, 203 N.J. 496, 512 (2010). While this does not mean that all questions need be common, "commonality becomes obscured when the probable unique issues of liability, causation and damages in each case are considered, requiring individualized treatment at trial." *Fink v. Ricoh Corp*., 365 N.J. Super. 520, 58-559 (Super. Ct. 2003) citing *Saldana v. City of Camden*, 252 N.J. Super. 188, 599 (Super. Ct. App. Div. 1991). Moreover, New Jersey courts have held that the element of commonality was not met where the circumstances giving rise to the claims of individual class members varied. *See Myska v. N.J. Mfrs. Ins. Co*., 440 N.J. Super. 458, 480 (Super. Ct. App. Div. 2015), *Kleinman v. Merck & Co*., 417 N.J. Super. 166, 8 A.3d 851 (Super. Ct. 2009).

Courts find typicality where "Plaintiff's claims arise from the same general circumstances as other class members. *Lee v. Carter-Reed Co., L.L.C.*, 203 N.J. 496, 512 (2010). Courts have found that there is no typicality where different potential class members had varying degrees of insurance coverage, resulting in different circumstances between class members. *See Myska v. N.J. Mfrs. Ins. Co.,* 440 N.J. Super. 458, 114 A.3d 761 (Super. Ct. App. Div. 2015).

Finally, adequacy of representation requires that the class representative "fairly and adequately protect the interests of the class." 4:23-1(a). In determining adequacy

of representation, the court must determine that "(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." *Delgozzo v. Kenny*, 266 N.J. Super. 169, 628 A.2d 1080 (Super. Ct. App. Div. 1993).

Further, the burden for maintaining a class certification is on the Plaintiff. *Muise v. GPU, Inc.*, 371 N.J. Super. 13, 32. The decision as to whether to grant class certification "lies with the sound discretion of the Court. *Myska v. New Jersey Mfrs. Ins. Co.*, 440 N.J. Super. 458, 474. New Jersey courts have refused to apply a "bright line rule prohibiting an examination of the propriety of class action certification until discovery is undertaken." *Id.* at 478.

Rule 4:32-1(b) further sets forth that the conditions for maintaining a class action, and provides in relevant part that a class action is maintainable "if the prerequisites of paragraph (a) are satisfied and in addition:

1. The prosecution of separate actions by or against individual members would create a risk of either of:
    a. Inconsistent or varying adjudications with respect to individual class members of the class that would establish incompatible standards of conduct for the party opposing the class, or
    b. Adjudications with respect do individual members of the class that would as a practical matter be dispositive of the interests of the other

members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

2. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
3. The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The factors pertinent to the findings include:
   A. The interest of members of the class in individually controlling the prosecution or defense of separate actions.
   B. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class.
   C. The desirability or undesirability in concentrating the litigation of claims in the particular forum; and
   D. The difficulties likely to be encountered in the management of a class action." *Id*.

Rule 4:32-1(b) (3), or the predominance requirement, was put in place to "save time and money for the parties and the public and promote consistent decisions for people with similar claims." *In re Cadillac*, 93 N.J. at 430, 461 A.2d 736. In applying the predominance standard, the court is required to "make a qualitative assessment of the common and individual questions rather than a mere mathematical quantification of whether there are more of one than the other." *Little v. Kia Motors Am., Inc.,* 242 N.J. 557, 591. The court must then also consider "whether a class action presents a common nucleus of operative facts." *Id.* at 592.

In *Myska v. New Jersey Mfrs. Ins. Co.*, 440 N.J. Super. 458 the court analyzed whether there was predominance where the proposed class consisted of at least two class members who were challenging their insurers denial of a diminution in value payment following motor vehicle accidents covered under their uninsured and underinsured policies. The court noted that "the individualized facts and circumstances of the relationship between each insurer and its insured …precludes predominance." *Id.* at 773. To that end, the court noted that "the individualized nature of the parties' automobile insurance contracts and the circumstances giving rise to their respective claims for reimbursement predominates over possible common questions among class members." *Id.* at 774. Here, as each member of the proposed class has varying individualized leases, Plaintiff cannot meet the burden of predominance.

POINT I

PLAINTIFF'S UNDERLYING COMPLAINT WAS PROPERLY DISMISSED AS PLAINTIFF'S CLAIMS DO NOT SATISFY THE REQUIREMENTS OF R. 4:32-1

The Superior Court correctly decided that Plaintiff failed to meet the elements of the class action claims set forth under R. 4-32(1)(a). First, while Plaintiff alleges that the Superior Court found that Plaintiff had met the requirement of numerosity, the record reflects otherwise. With respect to the numerosity claim, Judge D'Elia analyzed whether there were any difficulties in joining all members of the class and determined that joinder was not impractical noting that "not only are individual lawsuits possible, they are already pending and they will be pending when these subrogation claims are filed as well." *See* Hearing (Vol001) (04/18/24) at T10:11-12. Indeed, not only are there already at least two pending subrogation claims, filed by Plaintiffs New England HVAC Services, Inc., and the Good Old Motorcycle Parts Company, as well as by Eagle Language Services, but Defendant Nautilus Insurance Company has already indicated its intent to pursue separate subrogation claims on behalf of its insureds. (Ja011-Ja058).

Judge D'Elia further analyzed whether there were probably unique issues of damages for purposes of evaluating commonality, holding "commonality of damages claimed obviously cannot be even presumed in this case and is actually irrefutably refused by the fact that multiple other tenants with other attorneys

representing them are pursuing their own damage claims." *See* Hearing (Vol001) (04/18/24) at T10:23-T:11:2. The Superior Court's assessment is accurate, as indicated by the separate claims filed by New England HVAC Services, Inc. and the Good Old Motorcycle Parts Company, as well as by Eagle Language Services. (Ja011-Ja058).

When evaluating typicality, Judge D'Elia analyzed whether Plaintiff's claims arose from the same general circumstances as other class members, noting "All the tenants stand in different positions and have different damage claims." *See* Hearing (Vol001) (04/18/24) at T11:18-21. Judge D'Elia's assessment is accurate as, of the estimated 70 claimants, it is unclear how many claimants have insurance covering any losses and how many have been reimbursed by insurance.

The court did not abuse its discretion in referencing damages in its commonality, predominance, and typicality analysis. While Plaintiff cites *Baskin v. P.C. Richard & Son, LLC*, 246 N.J. 157 for the proposition that damages do not result in a wholesale bar to class action certification, *Baskin* is easily distinguished from the present case. First, the *Baskin* court found that Plaintiffs met the other requirements for class certification, including numerosity. The *Baskin* case also did not involve multiple potential class members or multiple potential class members' insurers filing cases on their own behalf. Further, the *Baskin* court held that there was predominance specifically "*because plaintiffs are only seeking only statutory*

and punitive damages." *Id.* at 166. As Plaintiff is seeking additional damages beyond statutory and punitive damages, *Baskin* is inapplicable to the present case.

Plaintiff further argues that there is adequacy because there are common issues of liability while completely disregarding the court's analysis on adequacy. Judge D'Elia further found that there was no adequacy noting that he was not convinced that "only these two commercial tenants out of all of them" would be able to represent the class noting that "many of the other tenants have already been reimbursed via the subrogation claims." *Id.* at T11:7-10. Of note, Cigar and Tobacco Warehouse, Inc. noted in their first reply in support of their underlying Motion to Dismiss that it had already been reimbursed by their insurance company.

CONCLUSION

The Superior Court correctly determined that Plaintiff did not meet all of the requirements to maintain a class action lawsuit under R. 4:43-1(a), let alone the requirements to maintain a class action under R. 4:43-1(b). Based on the foregoing, Ritco is respectfully requesting that this Court deny Plaintiff's appeal.

BY: *s/Courtney E. Darmofal, Esq.*
Courtney E. Darmofal, Esq.
Attorneys for Defendant Ritco Security Systems, Inc.

Dated: December 19, 2024

Plaintiff/Appellant, HOBOKEN BARBELL, LLC, ON BEHALF OF ITSELF AND THOSE SIMILARLY SITUATED vs. *Defendants/Respondents*, 38 JACKSON, LLC; ANTHONY NICHOLAS PETRUZZELLI; 135 WASHINGTON STREET, LLC; GLASS AND VAPOR HOUSE LLC A/K/A GLASS & VAPORHOUSE, INC., A/K/A GLASS AND VAPOR HOUSE INC.; CIGAR AND TOBACCO WAREHOUSE, INC., A/K/A THE CIGAR AND TOBACCO WAREHOUSE, INC.; ASLAM PANJWANI; ALL-SAFE FIRE SPRINKLER CO., INC.; UNLMTD REAL ESTATE GROUP, LLC; RITCO SECURITY SYSTEMS, INC.; THE TAURASI GROUP, INC.; GARY JOSEPH MEZZATESTA; LOCONTE MAINTENANCE, LLC; ANTHONY LOCONTE; JOHN DOES 1-25; AND ABC COMPANIES 1-25	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003225-23T4 On Appeal From Interlocutory Orders entered in the Superior Court, Law Division, Hudson County *Sat Below:* Honorable Anthony V. D'Elia, J.S.C. Hudson County Superior Court Docket No. HUD-L-004450-23

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS, LOCONTE MAINTENANCE, LLC AND ANTHONY LOCONTE IN OPPOSITION TO PLAINTIFF'S APPEAL

.

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PRELIMINARY STATEMENT

Defendant-Respondents Anthony Loconte and Loconte Maintenance, LLC hereby accepts and adopts the procedural history and statement of facts set forth in Defendants-Respondents Glass and Vapor House LLC a/k/a Glass & Vaporhouse, Inc., a/k/a Glass and Vapor House, Inc, and Tobacco Warehouse, Inc., a/k/a The Cigar and Tobacco Warehouse, Inc.'s Brief in Opposition to Plaintiff-Appellant Hoboken Barbell LLC's Appeal. Defendant-Respondents Anthony Loconte and Loconte Maintenance, LLC hereby submit the following additional statement of facts for the Court's consideration.

STATEMENT OF FACTS

This matter arises out of a fire which took place on or about December 15, 2021 which engulfed the interior of the property located at 38 Jackson Street in Hoboken New Jersey. In turn, Plaintiff-Appellant Hoboken Barbell, LLC, a former tenant of the building, has brought suit against the various Defendant-Respondents alleging class action claims of negligence, breach of contract, and consumer fraud. On April 18, 2024, following oral argument of all of the Defendant-Respondent's motions to dismiss Plaintiff-Appellant's class action claims and consumer fraud claims, the Honorable Anthony D'Elia, J.S.C. granted all of the Defendants-Respondent' motions, thus dismissing Plaintiff-Appellant's class action claims and dismissing Plaintiff-Appellant's consumer fraud claims against the Defendant-Respondents that also moved to dismiss those claims. Judge D'Elia found that in light of the fact that there are two other plaintiffs already separately pursuing claims against several of the Defendant-Respondents to this action, and in light of the fact that there will be subrogation claims filed by insurance companies, it was proper to dismiss Plaintiff-Appellant's class action claims. The Court further held that Plaintiff-Appellant's class action claims failed to meet the requirements imposed by R. 4:32-1. Later, on June 10, 2024 the Court granted two other Defendant-Respondents motions to dismiss Plaintiff-Appellant's class action claims Plaintiff-Appellant now appeals the Court's decision to dismiss these class action claims. However, the facts of this matter demonstrate, as the Court correctly found, that proceeding with this matter structured

as a class action claim is improper. Instead, Plaintiff's claims should proceed forward individually. It is clear that Plaintiff cannot meet the requirements imposed by R. 4:32-1 and that the Court properly decided to dismiss these claims[1].

[1] Plaintiff's consumer fraud claims and punitive damages claims were also dismissed against several Defendants, including the Respondents Anthony Loconte and Loconte Maintenance. However, Plaintiff appeals only the Court's decision to dismiss the class action claims and does not otherwise seek to appeal the dismissal of the consumer fraud claims or punitive damages against the Respondents.

LEGAL ARGUMENT

POINT I

A PLENARY STANDARD OF REVIEW IS APPLIED TO THE TRIAL COURT'S RULE 4:6-2(e) RULING THAT PLAINTIFF'S COMPLAINT FAILED TO PROPERLY STATE CLASS ACTION CLAIM UPON WHICH RELIEF MAY BE GRANTED

Defendant-Respondents Anthony Loconte and Loconte Maintenance, LLC moved pursuant to New Jersey Court Rule 4:6-2(e) to dismiss Plaintiff-Appellant class action, consumer fraud, and punitive damages claims. As noted within Defendant-Respondent's preliminary statement, the Trial Court granted said motions and dismissed the class action claims with prejudice, and dismissed the consumer fraud act and punitive damages claims without prejudice which are not a part of this appeal. In this matter the Trial Court appropriately dismissed Plaintiff-Appellant's class action claims pursuant to R. 4:6-2(e). Such decisions are reviewed *de novo* by the Appellate Division. Pace v. Hamilton Cove, 258 N.J. 82, 95 (2024); Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021). If [Plaintiff-Appellant's] complaint states no claim that supports relief, and discovery will not give rise to such a claim, the action should be dismissed. Baskin, supra 246 N.J. at 171. Plaintiff-Appellant's complaint fails to state a class claim upon which relief may be granted and therefore was properly dismissed by the underlying Trial Court.

POINT II

THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF'S CLASS ACTION CLAIMS

A. Standard of Review:

The certification of a class within a class action matter lies within the sound discretion of the trial court. Myska v. New Jersey Mfrs. Ins. Co., supra 440 N.J. Super. 458, 475 (App. Div. 2015). In reviewing the grant or denial of class certification, "an appellate court must ascertain whether the trial court has followed [Rule 4:32-1(b)(3)'s] standards and properly exercised its discretion." Lee v. Carter-Reed Co., LLC, 203 N.J. 496, 506 (2010). An "abuse of discretion . . . arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (citation and internal quotation marks omitted)).

As noted within Plaintiff-Appellant's appellant brief, the underlying motions to dismiss are governed by R. 4:6-2(e). A complaint must be dismissed pursuant to Rule 4:6-2(e) if, when searching the complaint in depth, a cause of action cannot be gleaned even from an obscure statement therein. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989). While plaintiffs are entitled to every reasonable inference of fact under this analysis, the complaint must be dismissed if the Court fails to determine that there exists a cause of action against the defendant. See id; Edwards v. Prudential Property & Cas. Co., 357 N.J. Super. 196, 202 (App. Div.

2003) (stating that a motion to dismiss for failure to state a claim "should be granted if even a generous reading of the allegations does not reveal a legal basis for recovery"). Indeed, to survive a motion to dismiss, the complaint must present essential facts to support the cause of action. Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 192 (App. Div. 2012). "[C]onclusory allegations are insufficient." Id. (citing Printing Mart-Morristown, 116 N.J. at 768).

Further, motions to dismiss for failure to state a claim "may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for plaintiffs' claim must be apparent from the complaint." Edwards, 357 N.J. Super at 202; see also Camden County Energy Recovery Assoc. L.P. v. New Jersey Dept. of Envtl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999) ("Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory.").

New Jersey class action matters are governed by R. 4:32-1 and R. 4:32-2. Pursuant to R. 4:32-1(a) there are four perquisites for a class action lawsuit. The rule states:

(a) General Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are

typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. R. 4:32-1(a).

Likewise, R. 4:32-2 governs the actual certification of a class action suit. It provides in part that:

(a) Order Determining Maintainability; Certifying Class. When a person sues or is sued as a representative of a class, the court shall, at an early practicable time, determine by order whether to certify the action as a class action. An order certifying a class action shall define the class and the class claims, issues or defenses, and shall appoint class counsel in accordance with paragraph (g) of this rule. The order may be altered or amended prior to the entry of final judgment. R. 4:32-2(a).

Moreover, as noted above, trial courts may properly dismiss class action complaints upon the submission of a R. 4:6-2(e) motion to dismiss. Myska, supra 440 N.J. Super. at 477. As such, the dismissal of Plaintiff-Appellant's class action claims against the Defendant-Respondents was procedurally proper under both R. 4:6-2(e) and R. 4:32-2.

B. Plaintiff-Appellant fails to meet the numerosity requirement of R. 4:31-1(a).

As set forth by R. 4:32-1(a), the first requirement of any class action suit is the numerosity requirement. Said rule does not specify an actual numerical requirement. Instead, New Jersey courts have frequently described the numerical requirement

without numerical precision. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 174 (2021).

Within the instant matter, Plaintiff-Appellant's Complaint fails to meet R. 4:32-1(a)'s numerosity threshold. However, the total possible number of Plaintiffs is identifiable. The total amount of possible Plaintiffs would at most, be comprised of the actual tenants and persons directly affected by the fire. This information is readily available to Plaintiff-Appellant, and has already been provided. See Ja006 of the Joint Defendant-Respondent Appendix. Defendant-Respondent Cigar & Tobacco Warehouse, LLC has provided to Plaintiff-Appellant a list of the tenants, thereby establishing the likely number of possible plaintiffs. This number is not so great as to mandate a class action claim rather than individual lawsuits. Moreover, as noted by the Trial Court during oral argument, there are already other pending litigations regarding this fire that will remain as separate matters. (T7:19-8:1). Additionally, the Trial Court further noted that there will be subrogation claims, thus rendering Plaintiff's class action claims unviable. Id. The Trial Court correctly noted that individual lawsuits related to the subject fire are possible, as evidenced by the fact that Plaintiff-Appellant's counsel already represents plaintiffs in both this action and in a separate action related to the subject fire. (T10:7-14). Finally, this matter is not the typical class action claim where there are potentially thousands of affected customers who could potentially serve as plaintiffs. Instead, the number of potential parties is

clearly limited to the persons, tenants, and businesses which held some form of interest in the subject property before the December 15, 2021 fire.

C. Plaintiff-Appellant fails to meet the commonality requirement of R. 4:31-1(a).

Commonality is the second element of any New Jersey based class action claim. Although all issues need not be identical among all class members, common questions must predominate. Carroll v. Cellco Partnership, 313 N.J. Super. 488, 499 (App. Div. 1998). Likewise, commonality becomes obscured when the probable unique issues of liability, causation, and damages in each case are considered, requiring individualized treatment at trial. Saldana v. City of Camden, 252 N.J. Super. 188, 197 (App. Div. 1991).

The Trial Court correctly found that the commonality element is absent in this matter. As an initial matter, it is notable that Plaintiff-Appellant has included Defendant-Respondent Cigar & Tobacco Warehouse, LLC as a Defendant in this matter despite the fact that they were also a tenant of the 38 Jackson Street property and otherwise fit within the Complaint's class definition of, "all persons, entities, tenants, leaseholders, lessors, sublessors, residents, occupants, or owners of any business".

Another issue that the Trial Court found to preclude Plaintiff-Appellant from pursuing class action claims in the presence of impending subrogation actions. As noted by the Trial Court during oral argument, several insurance companies have

already indicated that they plan on pursuing litigation. (T7:19-8:1). To allow Plaintiff-Appellant to pursue class action claims, thereby cutting off these valid subrogation claims are incoming would be improper. Additionally, the Trial Court specifically noted that the element of commonality is lacking in this matter. (T10:16-17). Critically the Court noted that, "commonality of damages claimed obviously cannot be even presumed in this case and is actually irrefutably refuted by the fact that multiple other tenants with other attorneys representing them are pursuing their own damage claims. So, I can't say that there's multiple similar damage claims, including the subrogation claims, which, obviously, are a lot different than what are alleged in this case." (T10:23-T11:5). As noted by the Trial Court, there are no commonality of damages between the putative class members. Some tenants presumably were governed by leases and others were not. As such, breach of contract claims would be valid for some putative class members, but invalid for tenants who did not have leases, thereby demonstrating the lack of commonality. Finally, as noted by the Court, the damages and proofs of Plaintiff's claims and any subrogation claims are different, thereby rendering Plaintiff's class action claims improper. As such, Plaintiff's proposed class action claims fail to meet the essential commonality requirement, and the Trial Court correctly held that this element is lacking within Plaintiff's claims.

D. Plaintiff-Appellant fails to meet the typicality requirement of R. 4:31-1(a).

The next essential element of a New Jersey class action claim is the typicality requirement. This element requires that the claims asserted by the plaintiff, "have the

essential characteristics common to the claims of the class." In re Cadillac V8-6-4 Class Action, 93 N.J. 412, 425 (1983). As referenced above, many of the tenants of the subject property will have already received insurance payouts for any damages that they sustained and are consequently unable to bring suit any longer. Accordingly, Plaintiff-Appellant's claims lack typicality with these other tenants. As noted earlier, Plaintiff-Appellant cannot presume to subsume the pending subrogation claims into a class action suit. In the aforementioned Myska v. New Jersey Mfrs. Ins. Co., matter, the Appellate Division found that denial of class certification regarding claimed insurance improprieties was proper due to the individualized facts and circumstances between each insurer and its insured. See Myska, supra 440 N.J. Super. at 480. Additionally, as previously noted, the different tenants and occupants of the property are differently situated; some maintained leases and others did not. Certification of consumer fraud act claims is inappropriate when there is the potential for class members to react differently towards misrepresentations or omissions. International Union of Operating Engineers v. Merck, 192 N.J. 372, 391 (2007). As each tenant of the property negotiated its lease individually there would be no common proofs between all of the potential class members. In other words, each class member would have relied upon different alleged misrepresentations made to induce them into renting the property, and their resulting damages would be different. As such, the presence of potential subrogation claims and the lack of typicality between the putative class members negates Plaintiff-Appellant's assertion of typicality.

E. Plaintiff-Appellant fails to meet the adequacy of representation requirement of R. 4:31-1(a).

The final element necessary to maintain a class action claim is the element of the adequacy of the plaintiff's representation of the putative class. R. 4:32-1(a). As noted above, not all of the putative class members maintained written contracts or leases with the owner of the subject property. As such, there will be different sets of proofs between them with regards to any such claims for breach of contract or consumer fraud violations. Moreover, the Trial Court correctly noted that this element was also lacking within this matter. More specifically, the Court found that Plaintiff-Appellant, out of all of the tenants and occupants of the property were not able to adequately address common class issues. (T11:7-10). The Court noted that other tenants are already pursuing their own damages claims, which may or may not be similar to those of Plaintiff in this matter, and so held that adequacy of representation is not present in this matter. (T11:11-16). As noted above, many of the tenants and occupants of the subject property are differently situated. Some held leases and others did not. Some tenants have already received insurance payouts whereas others have not. In some instances insurance carriers have already indicated that they will be pursuing litigation. As such, in light of these facts, it is apparent that the Trial Court correctly found that there was a lack of adequate representation to represent all of these different concerns.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that Plaintiff-Appellant's Appeal to reverse the trial court's April 18, 2024 Orders and June 10, 2024 Order be denied in its entirety. The Trial Court correctly found that Plaintiff-Appellant cannot meet the strict requirements set forth by R. 4:32-1.

Respectfully submitted,

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Attorneys for Defendants/Respondents, Loconte Maintenance, LLC and Anthony Loconte

By: *Andrew Kristofick /s/*
ANDREW KRISTOFICK

Dated: December 23, 2024

HOBOKEN BARBELL, LLC, *on behalf of itself and those similarly situated*,

Plaintiff/Appellant,

v.

38 JACKSON, LLC; ANTHONY NICHOLAS PETRUZZELLI; 135 WASHINGTON STREET, LLC; GLASS AND VAPOR HOUSE LLC a/k/a GLASS & VAPORHOUSE, INC., a/k/a GLASS AND VAPOR HOUSE INC.; CIGAR AND TOBACCO WAREHOUSE, INC., a/k/a THE CIGAR AND TOBACCO WAREHOUSE, INC.; ASLAM PANJWANI; ALL-SAFE FIRE SPRINKLER CO., INC.; UNLMTD REAL ESTATE GROUP, LLC; RITCO SECURITY SYSTEMS, INC.; THE TAURASI GROUP, INC.; GARY JOSEPH MEZZATESTA; LOCONTE MAINTENANCE, LLC; ANTHONY LOCONTE; JOHN DOES 1-25; and ABC COMPANIES 1-25,

Defendants/Respondents.

Civil Action

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-003225-23

On Appeal From:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY
DOCKET NO.: HUD-L-4450-23

Sat Below:

Hon. Anthony V. D'Elia, J.S.C.

BRIEF OF DEFENDANT/RESPONDENT, UNLMTD REAL ESTATE GROUP, LLC

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Ja	Defendants'/Respondents' Joint Appendix filed by Defendants/Respondents, Glass and Vapor House LLC a/k/a Glass & Vaporhouse, Inc., a/k/a Glass and Vapor House, Inc., and Cigar and Tobacco Warehouse, Inc., a/k/a The Cigar and Tobacco Warehouse, Inc., on December 19, 2024.
1T	Transcript of the April 18, 2024, Oral Argument before the Honorable Anthony V. D'Elia, J.S.C.
2T	Transcript of the June 6, 2024, Oral Argument before the Honorable Anthony V. D'Elia, J.S.C.

PRELIMINARY STATEMENT

Defendant/Respondent, UNLMTD Real Estate Group, LLC ("UNLMTD"), respectfully submits this Brief in response to Plaintiff/Appellant, Hoboken Barbell, LLC's ("Plaintiff" or "Hoboken Barbell") appeal of the Honorable Anthony V. D'Elia, J.S.C.'s June 10, 2024, Order granting UNLMTD's Motion to Dismiss Plaintiff's putative class action claims with prejudice. For the reasons detailed below, Judge D'Elia's decision should be affirmed in its entirety.

This action arises out of a warehouse fire in Hoboken, New Jersey (the "Premises"). Plaintiff's Complaint asserts a myriad of differing putative class action claims against 13 separate and distinct Defendants sounding in negligence, breach of contract, and violations of the Consumer Fraud Act ("CFA"). Those claims are advanced against property owners, property managers, maintenance contractors, fire protection vendors, and even other commercial tenants, each of whom/which is alleged to have owed and breached considerably different duties and responsibilities at the Premises. Moreover, the putative class that Plaintiff is inappropriately attempting to represent is comprised of a diverse group of individuals and entities that: (1) advance different theories of liability premised on unique bodies of evidence; and (2) allegedly suffered distinct and particularized damages ranging from lost property, sales, profits, revenue, and business value, to damages for physical injury and loss of life.

Consequently, this lawsuit does not come close to satisfying the R. 4:32-1(a) prerequisites to maintaining a class action and is inundated with highly individualized legal and factual issues that undermine the predominance and superiority requirements of R. 4:32-1(b)(3). As such, UNLMTD respectfully submits that this Court should affirm the trial court's well-supported decision dismissing Plaintiff's putative class claims with prejudice.

PROCEDURAL HISTORY

In the interest of brevity, UNLMTD incorporates the Procedural History set forth in the Appellate Brief filed on December 19, 2024, by Defendants/Respondents, Glass and Vapor House LLC a/k/a Glass & Vaporhouse, Inc., a/k/a Glass and Vapor House, Inc., and Cigar and Tobacco Warehouse, Inc., a/k/a The Cigar and Tobacco Warehouse, Inc. (hereinafter, "Cigar & Tobacco").

STATEMENT OF FACTS

This lawsuit is the result of a fire that occurred on December 20, 2021, at premises located at 38 Jackson Street, Hoboken, New Jersey 07030 (the "Premises"). Pa5, ¶ 23. Incidentally, Plaintiff's Complaint is tellingly devoid of any specific factual allegations that support UNLMTD's liability because—although UNLMTD was a property manager at the Premises—UNLMTD performed off-site financial and administrative tasks (e.g., administering bank accounts, collecting rent, paying bills, etc.) on behalf of the property owners and

was not obliged to perform any of the on-site inspections, maintenance work, and/or repairs performed by some of the Co-Defendants. See, e.g., Pa2–7, ¶¶ 3–35. The fire is believed to have originated in a stack of cardboard boxes near the south side wall of Unit C102, which was leased by Co-Defendants, Cigar & Tobacco. See, e.g., Pa6, ¶¶ 29–30, 32. Investigators believe the fire was likely caused by the failure of lithium-ion batteries located in LED rolling trays and/or single use vape cartridges stored in one of Cigar & Tobacco's leased units. See, e.g., Pa6, ¶ 32.

Plaintiff's Complaint advances various causes of action against 13 different Defendants, each of whom/which is alleged to have owed different duties at the Premises. For example, the First Count of Plaintiff's Complaint asserts negligence allegations against 10 alleged property owners, managers, maintenance contractors, and/or fire detection/suppression vendors that were purportedly negligent in their operation, administration, and/or maintenance of the Premises. Pa11, ¶¶ 48–50. The Second Count pleads negligence claims against the Cigar & Tobacco entities (tenants at the Premises) and their principal for negligently operating, maintaining, and storing flammable materials in their leased unit. Pa11–12, ¶¶ 51–54. The Third Count vaguely and amorphously alleges that 10 owners, managers, contractors, and/or fire detection/suppression vendors are somehow liable for violating New Jersey's Consumer Fraud Act. Pa12–13, ¶¶ 55–61. The Fourth Count asserts

breach of contract claims against six individuals and entities premised on a "leasing contract for Plaintiff's leased commercial space." Pa13–14, ¶¶ 62–67. The Complaint also includes a claim for punitive damages. Pa14.

Plaintiff's putative class allegations are advanced on behalf of a diverse set of individuals and entities that "suffered severe damage to their businesses, including loss of sales and revenue, ongoing loss of business value, loss of physical goods, loss of property fixtures and equipment, physical injury, and loss of life." Pa7, ¶ 35. When distilled to its essentials, the proposed class is broadly defined to include "[a]ll persons, entities, tenants, leaseholders, lessors, sublessors, residents, occupants, or owners of any business or personal property located on [the Premises] . . . [that were] harmed or damaged during, or as a result of" the fire. Pa7, ¶ 37. Thus, the relatively small putative class that Hoboken Barbell is currently attempting to represent: (1) includes individuals, entities, and mere occupants of the Premises that have unique and particularized claims; (2) subsumes persons—not just tenants—that had any type of personal property at the Premises; (3) advances different theories of liability that will ultimately hinge on different bodies of evidence and different substantive laws (e.g., wrongful death claims, personal injury claims, property damage claims, claims for lost business revenue and value, etc.); (4) asserts claims against 13 separate and distinct Defendants that purportedly owed and breached different duties at the Premises; and (5) seeks

various forms of damages that will need to be proven and evaluated on a case-by-case basis. Pa7, ¶¶ 35, 37. Accordingly, and as detailed below, the trial court correctly ruled that this lawsuit simply does not—and cannot—satisfy the R. 4:32-1 requirements for maintaining a class action.

LEGAL ARGUMENT

I. Standard of Review.

Trial court orders granting "motion[s] to dismiss for failure to state a claim, or alternatively, to strike plaintiffs' class action allegations," are subject to de novo review by the Appellate Division. Pace v. Hamilton Cove, 258 N.J. 82, 95 (2024) (citing Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021)). De novo review requires the Appellate Division to "examine the legal sufficiency of the facts alleged on the face of the complaint." Id. at 96 (citations and internal quotations omitted). The seminal decision on a motion to dismiss for failure to state a claim pursuant to R. 4:6-2(e) states that the Complaint must be searched in depth, and with liberality, in order to determine if a cause of action may be gleaned. Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989).

A "motion to dismiss on the pleadings is not . . . converted into a summary judgment motion by filing with the court a document referred to in the pleading." Pressler & Verniero, Current N.J. Court Rules, cmt. 4.1.2 on R. 4:6-2 (2024) (citations omitted). Rather, "[i]n evaluating motions to dismiss, courts consider

allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." Myska v. N.J. Mfrs. Ins. Co., 440 N.J. Super. 458, 482 (App. Div. 2015) (quoting Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005)) (additional citations omitted). Plaintiffs are entitled to every reasonable inference of fact. Independent Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956). Dismissal is appropriate when the complaint states no basis for relief and discovery would not provide one. See Baskin, 246 N.J. at 171; Energy Rec. v. Dept of Env. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999). Furthermore, it is eminently proper for the court to evaluate and dismiss unsustainable putative class claims in response to a motion to dismiss. See, e.g., Baskin, 246 N.J. at 172 ("pre-discovery dismissal of a class action is permitted if the court determines that discovery would not provide a basis for relief."); Myska, 440 N.J. Super. at 473–81 (affirming pre-discovery dismissal of putative class action claims that—like those advanced here—were distinct and individualized, premised on non-uniform contracts, and sought different damages that were "not so small as to disincentivize suit."); Local Baking Prods., Inc. v. Kosher Bagel Munch, Inc., 421 N.J. Super. 268, 271, 280 (App. Div. 2011) (affirming dismissal of putative class claims pursuant to R. 4:6-2(e)), certif. denied, 209 N.J. 96 (2011).

Here, for the reasons outlined in the Preliminary Statement and examined in further detail below, Plaintiff's putative class claims do not come close to satisfying R. 4:32-1's rigorous requirements for class certification and were therefore properly dismissed by the trial court. Since no amount of discovery would enable Plaintiff to satisfy the stringent class certification prerequisites of R. 4:32-1, this Court should affirm Judge D'Elia's decision.

II. The Trial Court Properly Dismissed Plaintiff's Putative Class Claims Because this Matter does not Satisfy the Requirements for Class Certification (Pa51–52; 1T9:16–12:6; 2T5:14–6:16).

The face of Plaintiff's Complaint establishes that this lawsuit is unavoidably saturated with highly individualized legal and factual issues that prevent this action from satisfying the R. 4:32-1 requirements for class certification. Since discovery will not alter that reality, UNLMTD respectfully submits that Judge D'Elia properly dismissed Plaintiff's class claims.

A. Class Certification is Only Appropriate when all Four "Prerequisites" of Rule 4:32-1(a) are Satisfied and the Lawsuit is Properly "Maintainable" as One of the Types of Class Actions Delineated in Rule 4:32-1(b) (Pa51–52; 1T9:16–12:6; 2T5:14–6:16)

To qualify as a class action in the State of New Jersey, "a lawsuit must meet the requirements of R. 4:32-1, which is modeled after Rule 23(a) and (b) of the Federal Rules of Civil Procedure." Matter of Cadillac V8-6-4 Class Action, 93 N.J. 412, 424–25 (1983); see also Riley v. New Rapids Carpet Ctr., 61 N.J. 218, 226

(1972) ("[o]ur class-action rule, R. 4:32, is a replica of Rule 23 of the Federal Rules of Civil Procedure . . . ."); Muise v. GPU, Inc., 371 N.J. Super. 13, 31 (App. Div. 2004) ("[c]onstruction of the federal rule may be considered helpful, if not persuasive, authority."); Delgozzo v. Kenny, 266 N.J. Super. 169, 188 (App. Div. 1993) ("our courts have consistently looked to the interpretations given the federal counterpart for guidance."); Saldana v. City of Camden, 252 N.J. Super. 188, 194 n.1 (App. Div. 1991) ("[s]ince R. 4:32 is modeled after Fed.R.Civ.P. 23(a) and (b), treatises discussing the federal rule and federal cases may, although not binding, be considered persuasive authority.").

The language used to describe the R. 4:32-1(a) "[p]rerequisites" to class certification is properly characterized as exclusionary. Indeed, the Rule begins by stating that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if" four prerequisites are satisfied. See R. 4:32-1(a) (emphasis added). Those "prerequisites" are: (1) numerosity—"the class is so numerous that joinder of all members is impracticable"; (2) commonality—"there are questions of law or fact common to the class"; (3) typicality—"the claims or defenses of the representative parties are typical of the claims or defenses of the class"; and (4) adequacy of representation—"the representative parties will fairly and adequately protect the interests of the class." R. 4:32-1(a).

If all four R. 4:32-1(a) prerequisites to class certification are met, the plaintiff seeking certification must then prove that the lawsuit satisfies one of the possible types of class actions delineated in R. 4:32-1(b). Here, Plaintiff is ostensibly seeking certification under R. 4:32-1(b)(3). Pa9–10, ¶¶ 42–44. In order to maintain that type of a class action, Plaintiff must establish: (1) predominance—"questions of law or fact common to the members of the class predominate over any questions affecting only individual members"; and (2) superiority—"a class action is superior to other available methods for the fair and efficient adjudication of the controversy." R. 4:32-1(b)(3) (emphasis added).

As stated by our Supreme Court, a court confronted with a request to certify a R. 4:32-1(b)(3) class "must understand and analyze the claims, defenses, relevant facts, and applicable substantive law in determining whether a class action: (1) presents common issues of fact and law that predominate over individual ones, (2) is a superior means of achieving efficient and just results, and (3) is manageable." Lee v. Carter-Reed Co., 203 N.J. 496, 506 (2010) (citation and internal quotations omitted); see also Int'l Union of Operating Engineers Loc. No. 68 Welfare Fund v. Merck & Co., 192 N.J. 372, 384–85 (2007) ("some proposed class actions may present management issues of such magnitude that certification should be withheld . . . .") (citation omitted). Significantly, "[i]f proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable."

In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008), as amended (Jan. 16, 2009) (quoting Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 172 (3d Cir. 2001), as amended (Oct. 16, 2001)).

It is well-established that "[p]laintiffs seeking class certification have the burden of proof as to each of the rule's requirements." Myska, 440 N.J. Super. at 475 (citing Muise, 371 N.J. Super. at 32 ("A party seeking class certification has the burden of proof.")). Furthermore, "[a] party's assurance to the court that it intends or plans to meet the requirements is insufficient." Hydrogen Peroxide, 552 F.3d at 318. Rather, "actual, not presumed, conformance with [the class certification requirements] remains . . . indispensable." Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 160 (1982). To prevent misuse, the class action rule "imposes stringent requirements for certification that in practice exclude most claims." Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 234 (2013).

Here, a review of the underlying allegations advanced in the Complaint confirms that this action does not—and cannot—satisfy the class certification requirements of R. 4:32-1. Among other fatal flaws, this lawsuit is flooded with highly individualized legal and factual issues that undermine the commonality, typicality, and adequacy requirements of R. 4:32-1(a). Those same issues prevent this action from ever satisfying the more stringent predominance and superiority

requirements of R. 4:32-1(b)(3). Simply stated, common legal and factual issues do not predominate, and a class action is not the superior means of adjudication.

B. Plaintiff Failed to Satisfy any of the Rule 4:32-1(a) Prerequisites to a Class Action (Pa51–52; 1T9:16–12:6; 2T5:14–6:16)

i. Numerosity

R. 4:32-1(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." Numerosity may be satisfied under the appropriate circumstances when the putative class contains at least 41 members but is rarely ever satisfied when the class consists of 20 or fewer putative members. See In re Modafinil Antitrust Litig., 837 F.3d 238, 250 (3d Cir. 2016), as amended (Sept. 29, 2016) (recognizing the "general rule" that "a class of 20 or fewer is usually insufficiently numerous" and "a class of 41 or more is usually sufficiently numerous . . . ."); 5 William B. Rubenstein, Newberg on Class Actions § 3:12 ("a class that encompasses fewer than 20 members will likely not be certified absent other indications of impracticability of joinder . . . ."). Moreover, "[a] party's assurance to the court that it intends or plans to meet the [class certification] requirements is insufficient." Hydrogen Peroxide, 552 F.3d at 318.

Here, there were approximately 70 tenants of the Premises at the time of the alleged fire. Ja3–9. At least five of those tenants—including Hoboken Barbell—have already filed lawsuits in the Hudson County Superior Court. See New England HVAC Services, Inc., and The Good Old Motorcycle Parts Co. v. 38

Jackson, LLC, et al., Docket No.: HUD-L-468-23; Estate of Rosemarie Vos and Barbara Stise v. 38 Jackson, LLC, et al., Docket No.: HUD-L-1462-23; and Eagle Language Services v. 38 Jackson, et al., Docket No.: HUD-L-4376-23. Moreover, several insurance carriers of the respective tenants at the Premises have already settled claims filed by their insureds and are in the process of pursuing subrogation actions to recover claim payments. Ja71–76, Ja135–139. Those facts amplify the following propositions: (1) class treatment is unwarranted because the tenants' alleged damages claims are purportedly significant enough to be pursued in individual lawsuits; and (2) the proposed class—which will almost certainly distil to far fewer than 70 tenants—is not so numerous that joinder of all members is impracticable. Indeed, at the outset of its decision, the trial court noted that the request for class certification is clearly belied by the fact that other lawsuits related to the alleged fire are already pending in the Superior Court and/or about to be filed:

> "in light of the fact that there's . . . other plaintiffs pursuing separate claims. You don't represent them. In light of the fact that we're going to have subro claims being filed by insurance companies, don't -- wouldn't you agree that you should voluntarily withdraw the class action claim here in this? It seems -- it seems kind of obvious on its face to me."
>
> [1T7:19–8:1 (emphasis added).]

Furthermore, Plaintiff's alleged damages—if proven—are purportedly substantial enough to be pursued outside of a class action. By way of just one example, the Complaint contends that "Plaintiff and the Class Members suffered severe damage to their businesses, including loss of sales and revenue, ongoing loss of business value, loss of physical goods, loss of property fixtures and equipment, physical injury, and loss of life." Pa7, ¶ 35. If those allegations are accepted as true, then by Plaintiff's own admissions, the damages are not so insubstantial as to effectively prevent litigation if this matter is not certified as a class action. See, e.g., Amchem Prods. v. Windsor, 521 U.S. 591, 617 (1997) ("[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") (citation omitted); Saldana, 252 N.J. Super. at 200 (reversing a trial court order certifying a class of property owners whose premises were destroyed by a fire because, among other reasons: "[t]his is not a case where, because the individual claims are too small to warrant recourse to case-by-case litigation, the wrongs would go without redress if class action certification is not granted.") (citations and internal quotations omitted); Myska, 440 N.J. Super. at 481 (denying class certification and noting that "the damage claims asserted by the [] plaintiffs are not nominal" when they approached the $15,000.00 limit of New Jersey's Special Civil Part.); Merck, 192 N.J. at 394

(concluding that the "large sums" of damages alleged in the Complaint and the lack of disparity in bargaining power meant that there was "no likelihood that the claims are individually so small that they will not be pursued.").

Additionally, it is reasonable to presume that: (1) the few tenants that intended to file lawsuits connected to a fire that occurred more than three years ago have already filed suit (as evidenced by the pending lawsuits cited above); and (2) the balance of tenants have already been compensated by their respective insurance carriers (as evidenced by the above-referenced subrogation actions). The claims of five tenants of the Premises—or even 20 tenants—do not satisfy R. 4:32-1(a)(1)'s requirement that the putative class be "so numerous that joinder of all members is impracticable." There is nothing "impracticable" about joining five parties to a lawsuit or litigating separate and distinct lawsuits filed by the above-referenced tenants. As such, "numerosity" cannot be demonstrated on the facts of this case.

ii. Commonality

R. 4:32-1(a)(2)'s commonality prerequisite requires "questions of law or fact common to the class." Plaintiff contends that commonality is satisfied because there are "common questions of law and fact affecting the rights of all class members," which are delineated in the Complaint. Pa9–10. However, Plaintiff overlooks the glaring reality that the purportedly "common questions" cited in the Complaint necessarily invoke a series of individual legal and factual questions that

are not common to the class as a whole. Several examples of that unavoidable fact are detailed below, and additional examples can be found in Point II(C)(i), which analyzes R. 4:32-1(b)(3)'s predominance requirement.

"An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016) (citations and internal quotations omitted). Moreover, and significantly, "common questions" must be capable of generating common, class-wide answers. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) ("[w]hat matters to class certification is not the raising of common questions -- even in droves -- but, rather, the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.") (citation and internal quotations omitted). Here, the common issues identified by Plaintiff are not capable of being resolved via common evidence, and it is difficult to overstate the myriad of dissimilarities among the putative class members—and the respective Defendants—that will unquestionably impede the generation of common answers.

Indeed, a finding that a particular tenant was damaged by a particular Defendant's alleged negligence, CFA violation, or breach of contract does not mean that any other tenants were necessarily damaged by that alleged conduct, nor does it mean that any of the other Defendants are liable for the same alleged conduct. For example, a finding that "Defendant A" made a fraudulent statement that caused ascertainable loss to "Tenant A" does not necessarily mean that any other tenant has a viable CFA claim. Instead, the Court will need to conduct a case-by-case analysis of each and every allegedly fraudulent statement or unlawful act/omission, determine whether any of those purported statements/acts/omissions are actionable against any of the Defendants, and independently examine the alleged impact and result of each statement/act/omission identified on the tenant claiming a CFA violation. Thus, the very first "common question" identified in Plaintiff's Complaint—whether any of the 13 Defendants violated the CFA: (1) is a highly fact-sensitive issue that will need to be resolved on a tenant by tenant and Defendant by Defendant basis; and (2) will not generate common answers necessary to resolve this matter. See, e.g., Dukes, 564 U.S. at 350; see also Merck, 192 N.J. at 389–391 (reversing certification of CFA claims because, among other reasons, the putative class was comprised of diverse members that had different reactions to the allegedly unlawful conduct).

Furthermore, a finding that "Defendant B" breached a contract with "Tenant B" would not have any impact on whether "Defendant B" breached a contract with any of the other tenants at the Premises. That proposition is amplified by the fact that—as recognized by the trial court—the commercial leases at the Premises are not identical. See Ja11–55; 1T10:15–22; see also Myska, 440 N.J. Super. at 479 (denying class certification because, among other reasons, the contracts that allegedly supported the putative class members' claims were not identical.).

Additionally, if "Defendant C's" purported negligence is determined to have caused damage to "Tenant C," that does not necessarily mean that "Defendant C's" negligence was a proximate cause of any other tenant's purported damages. By way of just one example, a finding that the Defendant sprinkler company negligently maintained a particular emergency sprinkler in "Tenant C's" leased unit will not have any impact on whether that entity negligently maintained the sprinklers in any other tenant's leased unit. The lack of common questions capable of generating common answers prevents Plaintiff from ever satisfying the commonality prong of R. 4:32-1(a). See Hydrogen Peroxide, 552 F.3d at 311 ("[i]f proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable.").

It is critically important to recognize that the claims of the putative class members are premised on distinct, unique, and particularized evidence that will

vary from tenant to tenant. For example, the evidence on which Hoboken Barbell will rely—to establish the type, presence, and value of weightlifting equipment and other property that was purportedly in its leased unit at the time of the fire, alleged damage to that property, purported damage to the value of its business, and/or allegedly lost revenue—will be separate and distinct from the evidence used by the other tenants at the Premises to establish a right to relief and to prove their purported damages. Moreover, a finding that Hoboken Barbell sustained damage to the value of its business as a result of the fire will not have any impact on the purported business loss of any other tenant, which will be subject to unique and individualized proofs. As noted by the trial court:

> commonality of damages claimed obviously cannot be even presumed in this case and is actually irrefutably refuted by the fact that multiple other tenants with other attorneys representing them are pursuing their own damage claims. So, I can't say that there's multiple similar damage claims, including the subrogation claims, which, obviously, are a lot different than what are alleged in this case.
>
> [1T10:23–11:5.]

The lack of commonality is underscored by the fact that Hoboken Barbell is not only purporting to represent the tenants advancing business loss claims, but also individuals that may have sustained "physical injury[] and loss of life." Pa7, ¶ 35. Indeed, the evidence and experts on which Hoboken Barbell will rely to prove its claims for alleged property damage and other business loss will be separate and

distinct from the evidence and experts that will be necessary to establish, for example, conscious pain and suffering and/or loss of life. Concisely stated, the "same evidence will [not] suffice for each member to make a prima facie showing [and] the issue[s are not] susceptible to generalized, class-wide proof." Tyson Foods, 577 U.S. at 453. As such, and for the additional reasons set forth in Point II(C)(i), below, the trial court correctly determined that commonality is not satisfied in this case.

iii. Typicality

Under R. 4:32-1(a)(3), "the claims . . . of the representative parties [must be] typical of the claims . . . of the class." The typicality requirement is designed to "ensur[e] that the class representatives are sufficiently similar to the rest of the class—in terms of their legal claims, factual circumstances, and stake in the litigation—so that certifying those individuals to represent the class will be fair to the rest of the proposed class." In re Schering Plough Corp. ERISA Litig., 589 F.3d 585, 597 (3d Cir. 2009) (citations omitted). As articulated by the Third Circuit:

> [s]ince one cannot assess whether an individual is sufficiently similar to the class as a whole without knowing something about both the individual and the class, courts must consider the attributes of the proposed representatives, the class as a whole, and the similarity between the proposed representatives and the class. This investigation properly focuses on the similarity of the legal theory and legal claims; the similarity of the individual circumstances on which those theories and claims are based; and the extent to which the proposed

> representative may face significant unique or atypical defenses to her claims.
>
> [Id. at 597-98 (citations omitted).]

"Where the legal or factual positions of the class representatives are markedly different from those of the putative class members, typicality will not be satisfied." W. Morris Pediatrics, P.A. v. Henry Schein, Inc., 385 N.J. Super. 581, 603 (Law. Div. 2004), aff'd, 2006 WL 798952 (N.J. Super. Ct. App. Div. Mar. 30, 2006).

Typicality is not satisfied here for many of the same reasons that commonality is not satisfied: (1) the legal and factual circumstances of each putative class member's claim vary widely from tenant to tenant; (2) the legal and factual circumstances of each Defendant's alleged role, duties, and obligations at the Premises vary tremendously from Defendant to Defendant; and (3) application of the relevant laws to Plaintiff's various claims will yield different results from Plaintiff to Plaintiff and Defendant to Defendant. To be certain, Plaintiff's proposed class is broadly defined to subsume "[a]ll persons, entities, tenants, leaseholders, lessors, sublessors, residents, occupants, or owners of any business or personal property located on [the Premises] . . . [that were] harmed or damaged during, or as a result of" the fire. Pa7, ¶ 37. That means Hoboken Barbell—a physical fitness center—is attempting to represent a class comprised of: (1) entities that conduct entirely separate and distinct businesses seeking unique and particularized relief for "severe damage to their businesses, including loss of sales

and revenue, ongoing loss of business value, loss of physical goods, [and] loss of property fixtures and equipment[;]" (2) persons that sustained physical injuries; and (3) persons that allegedly perished as a result of the fire. Pa7, ¶ 35. Stated differently, Hoboken Barbell is endeavoring to represent a class of individuals and entities that: (1) used the Premises for many different purposes; (2) advance different theories of liability; (3) seek different forms of relief; (4) assert claims premised on different bodies of evidence; (5) rely on different substantive laws; and (6) are pursuing claims against 13 different Defendants that allegedly owed different duties at the Premises. The discrete circumstances on which the putative class members' theories of liability are based, the evidence submitted in support of those theories, and the defenses that will be asserted in response to those claims will differ from tenant to tenant and Defendant to Defendant. For those reasons and many more, the trial court correctly held that Plaintiff cannot demonstrate typicality in this case.

iv. Adequacy

The adequacy prong of R. 4:32-1(a) requires Plaintiff to demonstrate that the putative class representatives "will fairly and adequately protect the interests of the class." R. 4:32-1(a)(4). That Rule, and the Fourteenth Amendment's "Due Process Clause of course require[] that the named plaintiff[s] at all times adequately represent the interests of the absent class members." Phillips Petroleum Co. v.

Shutts, 472 U.S. 797, 812 (1985) (citation omitted). The Constitutional requirement is predicated on the fact that "a valid adverse judgment" is binding on all members of the class. Id. at 808, 810; see also Hansberry v. Lee, 311 U.S. 32, 42 (1940). For that reason, class action defendants have a "substantial interest" in ensuring the adequacy-of-representation requirement is met. If a class is certified, and the defendant prevails in the action, that defendant will want to ensure that all class members are bound by the judgment. See Carrera v. Bayer Corp., 727 F.3d 300, 310 (3d Cir. 2013).

In order "[t]o satisfy [the adequacy] requirement, 'the plaintiff must not have interests antagonistic to those of the class.'" Laufer v. U.S. Life Ins. Co. in City of New York, 385 N.J. Super. 172, 182 (App. Div. 2006) (quoting Delgozzo v. Kenny, 266 N.J. Super. 169, 188 (App. Div. 1993)). To that end, the adequacy "inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent." Amchem, 521 U.S. at 594 (citations omitted). "Representatives must be part of the class and possess the same interest and suffer the same injury as the class members." Id. at 594–95 (citation omitted) (emphasis added).

Here, significant conflicts of interest among the named Plaintiff and the putative class it seeks to represent thwart a finding of adequacy. By way of just some examples, Hoboken Barbell is choosing to litigate claims that many other

putative class members cannot because those tenants have already been paid by their insurers and are not entitled to a double recovery. See, e.g, Bunk v. Port Auth., 144 N.J. 176, 193 (1996) (acknowledging New Jersey's "longstanding equitable bar against double recovery."). Several of those insurers are already pursuing independent subrogation actions. Ja71–76, Ja135–139.

Additionally, Hoboken Barbell does not "possess the same interest" nor did it "suffer the same injury" as any of the personal injury plaintiffs or decedents that it is currently attempting to represent. Furthermore, the type and alleged value of any Hoboken Barbell property purportedly present at the Premises and damaged in the fire will necessarily be different than the type and alleged value of any other tenant's property that was allegedly damaged in the fire. To be clear, those differences are not merely related to the calculation of each tenant's alleged damages, but also the proofs that each tenant will be required to submit to even establish a basis for damages (e.g., each tenant will need to prove what items were stored in their unit at the time of the fire, the condition and value of those items, the type and value of damage to those items, the associated impact—if any—on the value of each tenant's business, and whether each tenant committed any acts or omissions that render the tenant liable for its own loss).

While the foregoing examples are certainly not exhaustive, they are useful in illustrating the considerable variations among putative class members that give rise

to material conflicts of interest between Plaintiff and the proposed class it seeks to represent. Those conflicts undoubtedly undermine Plaintiff's adequacy as class representative. Plaintiff's interests are not "co-extensive" with those of the putative class and present clear "potential antagonism." Rebish v. Great Gorge, 224 N.J. Super. 619, 623–25, (App. Div. 1988). As such, and as recognized by the trial court, none of the R. 4:32-1(a) "prerequisites" to class certification are satisfied in this case:

> I don't find that the common issues held by the class in general outweigh any individual differences in damages and liability claims from the various tenants. All the tenants stand in different positions and have different damage claims. So, for those reasons, I'm going to grant this motion to dismiss the class action claims . . . .
>
> [1T11:17–23.]

C. Plaintiff Failed to Satisfy the Predominance and Superiority Requirements of Rule 4:32-1(b)(3)

Since the trial court correctly determined that this lawsuit did not satisfy the "General Prerequisites to a Class Action" delineated in R. 4:32-1(a), there was no need for the court to determine whether the matter satisfies the predominance and superiority requirements of R. 4:32-1(b)(3). See, e.g., R. 4:32-1(a) (noting that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if" all four "prerequisites" of R. 4:32-1(a) are satisfied) (emphasis added). However, even a cursory review of R. 4:32-1(b)(3)—and the

case law interpreting and applying the Rule—confirms that Plaintiff cannot satisfy predominance or superiority in the context of this action.

i. Common Legal and Factual Issues do not Predominate

To establish predominance, a putative class representative is required to demonstrate "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 108 (2007) (quoting R. 4:32-1(b)(3)). "In making the predominance (and superiority) assessment, a certifying court must undertake a 'rigorous analysis' to determine if the Rule's requirements have been satisfied." Id. at 106–07 (citation omitted). That inquiry tests whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." Id. at 108 (quoting Amchem, 521 U.S. at 623). "A plaintiff must demonstrate that the element[s] of the legal claim[s are] capable of proof at trial through evidence that is common to the class rather than individual to its members." Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 600 (3d Cir. 2012) (citations and internal quotations omitted).

Notably, R. 4:32-1(b)(3)'s predominance requirement is "far more demanding" than the commonality requirement of R. 4:32-1(a). Amchem, 521 U.S. at 624; see also Muise, 371 N.J. Super. at 37. The mere existence of common legal or factual issues is insufficient if those common issues to not predominate over

individual questions. See, e.g., Myska, 440 N.J. Super. at 480 (affirming the denial of class certification because, inter alia, "the individualized nature of the parties' automobile insurance contracts and the circumstances giving rise to their respective claims for reimbursement predominates over possible common questions among class members."). "Even where the individual issues are fewer than common issues, it is the significance of the uncommon issues that sways the pendulum. The individual differences . . . must be of lesser overall significance and they must be manageable in a single class action." Debra F. Fink, D.M.D., MS, PC v. Ricoh Corp., 365 N.J. Super. 520, 568 (Law. Div. 2003). To be certain, R. 4:32-1(b)(3)(D) declares that "the difficulties likely to be encountered in the management of a class action" must be considered when assessing predominance. See also Matter of Cadillac, 93 N.J. at 435–36 ("a class action should be viewed . . . as a means of providing a procedure that is fair to all parties and promotes judicial efficiency. The relevant considerations include, therefore, not only the interests of class members and other parties but also the effect of class certification on efficient judicial management.").

When conducting a "pragmatic assessment" of the predominance requirement, trial courts should be guided by the following: (1) "the number and, more important, the significance of common questions"; (2) whether the benefits of class-wide resolution of common questions outweighs the problems inherent in

individual actions; and (3) whether there is a "common nucleus of operative facts." Merck, 192 N.J. at 383 (citations and internal quotations omitted). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." Hydrogen Peroxide, 552 F.3d at 311 (quoting Newton, 259 F.3d at 172). Thus, "[a] critical need is to determine how the case will be tried." Id. at 312 (citation omitted). An examination of whether the predominance requirement is satisfied in a particular matter may ultimately hinge on "a close analysis of the facts and law" rather than "recourse to reported decisions." Matter of Cadillac, 93 N.J. at 434. Hence, the court's predominance "analysis" must be "rigorous" and "search[] beyond the pleadings to gain an understanding of the claims, defenses, relevant facts, and applicable substantive law." Merck, 192 N.J. at 382–83 (quoting Iliadis, 191 N.J. at 106–07) (internal quotations omitted).

For the reasons detailed throughout this Brief, and as recognized by the trial court, it cannot be credibly argued that the commonality "prerequisite" of R. 4:32-1(a)(2) is satisfied on the facts of this case. However, even if Hoboken Barbell was able to meet its burden of establishing commonality, it is undisputable that any common issues pale in comparison to the breadth of uncommon issues that permeate this litigation. Simply stated, questions of law and fact common to the putative class members do not predominate over questions affecting only

individual members. A brief review of the relevant case law is useful in underscoring that point.

In Myska, a group of insureds instituted a putative class action challenging NJM's denial of their claims for diminished value damages following automobile accidents. 440 N.J. Super. at 465. Plaintiffs sought certification of a class defined as all NJM insureds that "were denied coverage or compensation . . . for diminution of value of their vehicles" under their respective NJM policies. Id. at 478. The Appellate Division affirmed denial of class certification because, among other reasons, "the distinct vehicle damage[] and the specific calculation of damages alleged . . . require separate litigation of every action." Id. at 466. Stated differently, the "individualized nature of the parties' automobile insurance contracts and the circumstances giving rise to their respective claims for reimbursement predominates over possible common questions among class members." Id. at 480. The Appellate Division agreed with the trial court's rationale that "plaintiffs' allegations [were] individual to each plaintiff, such that the factual basis for each claim was dependent on a specific individual experience and not common to the claims of the other plaintiffs . . . . This separateness of each claim precludes class certification." Id. at 481. The court held that "neither the commonality requirement of R. 4:32-1(a)(2) nor the predominance provision of R. 4:32-1(b)(3) were satisfied." Ibid.

Our Appellate Division's reasoning in Myska is quite persuasive in the context of this action. The Myska court determined that individualized issues connected to each putative class member's contract and damages claim were sufficient to defeat the commonality and predominance requirements of R. 4:32-1(a)(2) and (b)(3). Here, just like in Myska, Plaintiff's claims require an examination of the specific circumstances applicable to each and every tenant Hoboken Barbell is seeking to represent. The respective tenants of this case have separate and individualized contracts at the Premises (or, in the case of mere "occupants," no contract at all), used the Premises for different purposes, stored different items at the Premises, and purportedly sustained different damages. For those reasons, class certification is inappropriate under the reasoning of Myska.

Additionally, and in light of Plaintiff's CFA claim, the class allegations of this lawsuit necessarily compel an examination of the unique facts and circumstances surrounding each and every purportedly fraudulent statement (or unlawful act/omission) allegedly made by a Defendant. Since each tenant will have a different account of (and reaction to) allegedly fraudulent statements made by a Defendant, a series of mini trials will be necessary to examine: (1) each supposedly unlawful communication; (2) whether each statement identified was, in fact, false, misleading, or otherwise unlawful; (3) the tenant(s) to whom/which each statement was made; (4) each tenant's reaction and response; (5) whether the statement

constitutes actionable unlawful conduct under the CFA; and (6) whether each tenant suffered ascertainable loss that is causally related to an allegedly unlawful statement. See, e.g., Merck, 192 N.J. at 389–391 (citations and internal quotations omitted). This action is therefore saddled with many of the very same individualized legal and factual issues that were present in Myska, a case in which class certification was denied.

Furthermore, in Merck, a group of plaintiffs instituted a putative class action against a prescription drug manufacturer that was premised on alleged violations of the CFA. 192 N.J. at 377. The Supreme Court reversed a class certification order after concluding that common issues did not predominate in CFA claims. Id. at 388–89. The Court recognized that the putative class members were a "diverse group of entities" that did not "react[] in a uniform or even similar matter" in response to the defendant's conduct. Id. at 390–91. The alleged "commonality of defendant's behavior [was] but a small piece of the required proofs." Id. at 391. Thus, common issues "would not predominate." Ibid.

Merck is one of many decisions underscoring the proposition that common legal and factual issues frequently do not predominate in the context of CFA claims. In In re LifeUSA Holding Inc., 242 F.3d 136 (3d Cir. 2001), purchasers of annuity contracts brought a putative class action against the seller alleging fraudulent misrepresentations. The Third Circuit held that commonality was not

satisfied because—like in this case—the plaintiffs' claims did not arise "out of one single event or misrepresentation," but rather, stemmed from representations made in connection with many individual transactions. Id. at 146. Simply stated, the information provided to each of the plaintiffs was "not identical." Ibid. The same conclusion applies here because: (1) the respective tenants' dealings with the respective defendants, if any, were "not identical"; and (2) there is no uniformity with respect to each tenant's specific response to those dealings. Thus, "common questions cannot predominate over individual issues because . . . each individual plaintiff's claim raises radically differing factual and legal issues from those of other plaintiffs." Id. at 147.

In W. Morris Pediatrics, 385 N.J. Super. at 581, a group of health care providers instituted a putative class action against a vaccine distributor as a means of challenging the distributer's vaccine charges. The court denied class certification of plaintiffs' CFA claims because there was no "uniform misrepresentation, omission or fraudulent practice common to all class members. Instead, [the record] is replete with just the opposite. Simply because the plaintiffs have alleged the same legal theories for all class members does not change the fact that each theory is dependent upon categorically individualized factual scenarios." Id. at 602 (emphasis added). Since "individual mini-trials would be necessary," the

court held that the matter did not satisfy the commonality and predominance requirements. Id. at 603, 606–07.

In Saldana—a case advancing negligence allegations connected to fires that damaged over 80 privately-owned dwellings—the Appellate Division found that predominance was not satisfied based on the "unique issues of liability, causation and damages." 252 N.J. Super. at 197. The court's reasoning supports the proposition that the negligence allegations of this matter are similarly unsuitable for class treatment:

> As we have stated, the centerpiece of plaintiffs' theory of liability is that the properties of prospective class members were damaged or destroyed by fire caused by defendants' failure to implement or administer a policy concerning City-owned structures. This theory is clearly common to all class members. However, commonality becomes obscured when the probable unique issues of liability, causation and damages in each case are considered, requiring individualized treatment at trial. . . . The cause of each fire, and whether the absence of a City protective or maintenance policy contributed to it will, no doubt, be fact-sensitive issues resolved by fact-specific proofs. Resolution of the issue of proximate cause in each case as well will depend on the unique circumstances of each case, such as the presence or absence of intervening causes or factors over which defendants had no control.
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> [Id. at 197–98 (emphasis added).]

For those reasons and others, the Appellate Division unambiguously "conclude[d] that plaintiffs failed to satisfy the 'predominance' prong under R. 4:32-1(b)(3)." Id. at 199.

Here, this action is similarly flooded with a bevy of individualized legal and factual issues that will need to be addressed and resolved on a tenant by tenant, Defendant by Defendant basis—confirming that common issues do not predominate. See, e.g., Marcus, 687 F.3d at 600 ("plaintiff must demonstrate that the element[s] of the legal claim[s are] capable of proof at trial through evidence that is common to the class rather than individual to its members.") (citations and internal quotations omitted). The causes of action alleged in the Complaint irrefutably and unavoidably require an examination of each tenant's particular claim.

It is also important to note that each putative class member must prove that he/she/it sustained damages due to Defendants' alleged conduct. See, e.g., Cromartie v. Carteret Sav. & Loan, 277 N.J. Super. 88, 103 (App. Div. 1994); Stanley Co. of Am. v. Hercules Powder Co., 16 N.J. 295, 314 (1954) (noting that lost profits damages must be: (1) "based on sound fact and not on mere opinion evidence without factual support"; and (2) proven with "a reasonable degree of certainty.") (citations and internal quotations omitted). In order to determine the nature and extent of each tenant's alleged damages, the Court will need to

independently examine: (1) each and every tenant's unique facts and circumstances; (2) any evidence establishing the specific property stored by each tenant at the Premises at the time of the fire; (3) any evidence establishing the value of all property stored by each tenant at the Premises at the time of the fire; (4) the alleged value of lost property, sales, and/or revenue; (5) whether each tenant was responsible—in whole or in part—for causing their own alleged damages; (6) highly individualized issues connected to any putative class members advancing personal injury and/or wrongful death claims; (7) the appropriate measure of damages—if any—to which each putative class member is allegedly entitled; and (8) which Defendants named in this litigation—if any—are liable for those damages. Those are just some of the many reasons why class certification was properly denied. See, e.g., Myska, 440 N.J. Super. at 481 (class certification denied due to "the parties' distinct claims for damages resulting from separate accidents covered under their individualized policies"); Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013) (noting that predominance was not satisfied because damages were not "capable of measurement on a classwide basis[,]" and as such, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."); Kleinman v. Merck & Co., 417 N.J. Super. 166, 183–84 (Law. Div. 2009) ("[t]he issue of causal nexus between the loss sustained by each member of the class and the consumer fraud, however, creates an

insurmountable barrier to a class action."). Since common issues do not predominate, this Court should affirm the trial court's dismissal of the class claims.

ii. A Class Action is not the Superior Means of Adjudicating this Controversy

R. 4:32-1(b)(3) not only requires that common issues predominate, but also that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." When assessing superiority, the court should conduct "a comparison with alternative procedures . . . to evaluate both fairness and efficiency of the class action proceeding." Merck, 192 N.J. at 383 (citations and internal quotations omitted). That analysis requires reviewing courts to perform: "(1) an informed consideration of alternative available methods of adjudication of each issue, (2) a comparison of the fairness to all whose interests may be involved between such alternative methods and a class action, and (3) a comparison of the efficiency of adjudication of each method." Id. at 384 (citation and internal quotation omitted). The court must also consider the putative class members' "financial wherewithal" and determine whether individual class members would not pursue their claims in the absence of a class action. Ibid. (citation omitted).

A class action is simply not the superior means of adjudicating the type of exceedingly fact-sensitive issues infused in this litigation for the reasons analyzed throughout this Brief. See, e.g., Lee, 203 N.J. at 506 (noting that a class action

must be "a superior means of achieving efficient and just results" and "manageable."); Merck, 192 N.J. at 384–85 ("some proposed class actions may present management issues of such magnitude that certification should be withheld . . . ."). There is nothing efficient or manageable about forcing a trial court to conduct a series of fact-sensitive mini-trials necessary to determine: (1) the property that was allegedly stored at the Premises by each tenant; (2) the value of that property; (3) the nature, extent, and value of any damage to the property or business; (4) whether any of the tenants are responsible for their own damages; (5) whether any of the tenants have advanced viable breach of contract claims, which are presumably premised on their individual leases at the Premises; (6) the nature and extent of any injuries sustained by the personal injury plaintiffs Hoboken Barbell is currently attempting to represent (as well as the impact of any prior or subsequent injuries sustained by each such individual); and (7) a host of legal and factual issues connected to the claims of the alleged decedents and their representatives. Class certification should be denied insofar as there is no administratively feasible, practical, or efficient manner in which to litigate class claims of this type.

Moreover, and as detailed above, the alleged damages being sought in this case are purportedly significant enough to be pursued outside of a class action. If Plaintiff's allegations are accepted as true, then by Hoboken Barbell's own

admissions, their alleged damages—and those of the putative class it is seeking to represent—are not so insubstantial so as to prevent collection efforts if this matter was not certified by the court. See, e.g., Myska, 440 N.J. Super. at 481; Merck, 192 N.J. at 394. In fact, our Appellate Division reached the same conclusion when reversing certification of the fire loss claims at issue in Saldana:

> We recognize that the lack of financial wherewithal on the part of potential class members has been an important factor in causing the named plaintiffs to move for class action. Such an action would permit plaintiffs' counsel to pool available resources and present their proofs, expert or otherwise, in a single case. Counsels' motive is both practical and laudable. However, in the circumstances present here, we cannot conclude that the interest of economy makes the class action "superior" to other available means of adjudicating the controversy. This is not a case where, because the individual claims are too small to warrant recourse to case-by-case litigation, the "wrongs would go without redress" if class action certification is not granted. Each class member asserts substantial damage or total destruction to his or her dwelling, a virtual "taking" of property, and thus has a sufficient stake to prosecute his or her claim individually or with a group of other plaintiffs.
>
> [Saldana, 252 N.J. Super. at 200 (emphasis added).]

Finally, the Plaintiff tenants certainly have the "financial wherewithal" to pursue their purported damages, as evidenced by the fact that five such tenants have already filed separate and distinct lawsuits. Since neither the predominance nor the superiority requirement of R. 4:32-1(b)(3) is satisfied in this case, Plaintiff's putative class claims were properly dismissed with prejudice.

CONCLUSION

For all of the reasons set forth above, UNLMTD respectfully submits that the trial court's Order dismissing Plaintiff's putative class claims should be affirmed.

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Michael D. Celentano

Dated: January 22, 2025

HOBOKEN BARBELL, LLC, *on behalf of itself and those similarly situated*, Plaintiff/Appellant, vs. 38 JACKSON, LLC; ANTHONY NICHOLAS PETRUZZELLI; 135 WASHINGTON STREET, LLC; GLASS AND VAPOR HOUSE LLC a/k/a GLASS & VAPORHOUSE, INC., a/k/a GLASS AND VAPOR HOUSE INC.; CIGAR AND TOBACCO WAREHOUSE, INC., a/k/a THE CIGAR AND TOBACCO WAREHOUSE, INC.; ASLAM PANJWANI; ALL-SAFE FIRE SPRINKLER CO., INC.; UNLMTD REAL ESTATE GROUP, LLC; RITCO SECURITY SYSTEMS, INC.; THE TAURASI GROUP, INC.; GARY JOSEPH MEZZATESTA; LOCONTE MAINTENANCE, LLC; ANTHONY LOCONTE; JOHN DOES 1-25; and ABC COMPANIES 1-25, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-003225-23T4 Civil Action ON PLAINTIFF'S APPEAL OF VARIOUS ORDERS DISMISSING CLASS ACTION CLAIMS SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO.: HUD-L-4450-23 SAT BELOW: HON. ANTHONY V. D'ELIA, J.S.C.

AMENDED BRIEF ON BEHALF OF DEFENDANTS/RESPONDENTS, 38 JACKSON, LLC; 135 WASHINGTON STREET, LLC; THE TAURASI GROUP, INC.; ANTHONY NICHOLAS PETRUZZELLI; AND GARY JOSEPH MEZZATESTA, IN OPPOSITION TO PLAINTIFF'S APPEAL OF VARIOUS ORDERS DISMISSING CLASS ACTION CLAIMS

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PRELIMINARY STATEMENT

The trial court properly dismissed class action claims as the Complaint fails to allege any facts upon which reasonable inferences could be drawn in favor of maintaining a class action lawsuit. Causation and liability issues alone are not sufficient for a class action suit to proceed against multiple defendants against whom plaintiff alleged separate, differing causes of action. Not only are there diverse claims against the various defendants, but the tenants also allege damages that vary significantly among the plaintiffs. Moreover, some of the claims brought on behalf of some of the tenants in this Complaint are duplicative of claims already brought separately by the tenant or their insurance carrier in a subrogation claim.

Plaintiff failed to demonstrate the size of the proposed class and was unable to establish before the trial court that it is "impracticable" to join all members of the proposed class. The claims also lack commonality as they involve a mix of tort, contract, and statutory fraud. Critically, not all allegations are directed to all defendants. Each defendant is alleged to have caused different harms under different causes of action. The claims against the defendants are wholly different and require different proofs. Even the damages claims of each putative class member also lack commonality as some tenants would be excluded from the class for having been already reimbursed by their insurance carrier or which have pursued recovery of their own damages. Business losses will vary among the

various businesses as would claims of displacement.

The common issues held by the class in general do not outweigh any individual differences in damages and liability claims from the various tenants, thereby defeating any argument of predominance. All the tenants stand in different positions and have different damages claims. Further, plaintiff failed to establish that a class action is superior to individual recovery for each tenant as the claims against the defendants are a diverse mix of causes of action and the damages sought will vary significantly.

Further discovery will not aid plaintiff to develop any additional facts with regard to class certification in this matter. The irregularity of plaintiff's pleading will remain the same and no discovery can change the varied and dissimilar claims asserted against the various defendants who had different causes of action alleged against them. Herein, plaintiff failed to meet the stringent requirements of R. 4:32-1 to survive a motion to dismiss the class action claims. Therefore, the trial court properly dismissed the class action claims thereby allowing plaintiff's claims on its own behalf to proceed.

PROCEDURAL HISTORY

In the interests of brevity and judicial economy, Defendants, 38 Jackson, LLC; 135 Washington Street, LLC; The Taurasi Group, Inc.; Anthony Nicholas Petruzzelli; and Gary Joseph Mezzatesta (hereinafter collectively referred to as "38 Jackson"), adopt and rely upon the Procedural History as set forth in the Brief of defendants/respondents, Cigar & Tobacco Warehouse ("Cigar & Tobacco").

38 Jackson's Motion to Dismiss was heard on oral argument on April 18, 2024 (1T) and granted by Order of the same date (Pa41).

In addition, The Taurasi Group, Inc. along with its co-owners/co-managers, Anthony Nicholas Petruzzelli; and Gary Joseph Mezzatesta, filed its own Motion to Dismiss before the trial court as it is a separate and distinct entity that had no ownership interest, involvement or affiliation with the subject property located at 38 Jackson Street, Hoboken, New Jersey. Taurasi's Motion to Dismiss was heard on oral argument on April 18, 2024 (1T) and granted by Order of the same date (Pa43).

This firm represents both 38 Jackson and Taurasi and submits this Amended Brief on behalf of both defendants.

STATEMENT OF UNDISPUTED MATERIAL FACTS

In the interests of brevity and judicial economy, 38 Jackson adopts and relies upon the Statement of Facts as set forth in the Brief of defendant/respondent, Cigar & Tobacco.

In addition, 38 Jackson adds that the Complaint alleges different causes of action against each of the differently-situated defendants (Pa1). While it is alleged that the fire started because due to spontaneous combustion of LED rolling trays stored in the space leased by defendant Cigar & Tobacco (Pb5), the other causes of action alleged include negligence claims separately alleged against Cigar & Tobacco and the other defendants (Pb11) in different counts, Consumer Fraud Act against only some defendants (Pa12), and breach of contract against only some defendants (Pa13).

Beyond the diverse claims against the various defendants, the plaintiffs also allege damages that vary significantly among the plaintiffs. Moreover, some of the claims brought on behalf of some of the tenants in this Complaint are duplicative of claims brought separately by the tenant or their insurance carrier in a subrogation claim. For example, New England HVAC and Good Old Motorcycle Company have filed their own lawsuit to seek recovery for their own damages under Docket Number HUD-L-468-23 (Ja86). In addition, Eagle Language Services also filed its own lawsuit under Docket No. HUD-L-4376-23 (Ja124).

There is also no dispute that Cigar & Tobacco, a defendant that was also a tenant, was compensated for its losses through its insurance carrier (Ja135). It is anticipated that there are other similarly situated tenants and plaintiff cannot intend to also include Cigar & Tobacco and other already-compensated tenants in its putative class. In addition, plaintiff's Complaint repeatedly refers to two fatalities resulting from the fire in describing the damages suffered by the putative class (Pa1). Not only would such claims be inappropriate for a class action suit, but a wrongful death and survivor action has already been filed in the matter of Estate of Vos by Admin ad pros Barbara Stise, HUD-L-1462-23 (Ja91).

The claims herein do not even amount in the thousands, are readily identifiable, amenable to service, and capable of seeking recourse in New Jersey courts. Therefore, this matter is not suited to proceed by way of class action and the Order entered on April 18, 2024 dismissing class claims was proper.

LEGAL ARGUMENT

POINT I

CLASS ACTION CLAIMS WERE PROPERLY DISMISSED AS PLAINTIFF FAILED TO MEET THE STRINGENT REQUIREMENTS OF R. 4:32 (1T9:16-12:17)

Although the Appellate Division reviews a trial court's decision to deny class action certification *de novo* without any deference to the trial court's determination, a dismissal of class action claims must stand where plaintiff has failed to meet the requirements set forth in R. 4:32 for class certification. While the trial court's inquiry under R. 4:6-2(e) is liberal and all reasonable inferences are given to the plaintiff, dismissal is appropriate where the complaint clearly does not set forth grounds for relief under the law. See Printing Mart v. Sharp Electronics, 116 N.J. 739 (1989); Camden Cty. Energy Rec. Assocs. L.P. v. Dept. of Env. Prot., 320 N.J. Super. 59, 64-68 (App. Div. 1999), aff'd o.b., 170 N.J. 246 (2001). Dismissal is mandated where the facts alleged are "palpably insufficient to support a claim upon which relief can be granted." Reider v. State Dep't. of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). Further, dismissal with prejudice is warranted where the failure to state a claim is the absence of a cognizable cause of action and not the result of some technical deficiency that may be cured, for example by an amendment to the Complaint. See, e.g., Johnson v. Glassman, 401 N.J. Super. 222, 231 (App. Div. 2008) (trial court did not abuse

discretion dismissing complaint with prejudice where further amendment would not be fruitful); see also Kanter v. Barella, 489 F.3d 170, 181 (3rd Cir. 2007) (affirming denial of leave to amend following grant of motion to dismiss where further amendment would be futile).

On a motion to dismiss, the trial court's inquiry is limited to "examining the legal sufficiency of the facts alleged on the face of the complaint." State v. Cherry Hill Mitsubishi, Inc., 439 N.J. Super. 462, 467 (quoting Printing Mart-Morristown, 116 N.J. at 746). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (U.S. 2009), citing Bell Atlantic Corp. v. Twombly, 550 U.S. 555, 127 S. Ct. 1955, (2007). Although every reasonable inference is accorded in the plaintiff's favor, dismissal of the complaint is appropriate when no basis for relief is provided. See Energy Rec. v. Dept. of Env. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd o.b. 170 N.J. 246 (2001).

As pertains to class allegations, R. 4:32-2(a) states that the court shall "at an early practicable time" determine if a putative class action should be certified. This determination need not await discovery, or even plaintiff's class certification motion. The court may properly consider class issues on a motion to dismiss. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 172 (2021); Local Baking Products, Inc. v. Kosher Bagel Munch, Inc. 421 N.J. Super. 268, 280 (App. Div.),

certif. den. 209 N.J. 96 (2011) (affirming trial court dismissal of class certification on R. 4:6-2(e) motion).

Herein, plaintiff has failed to meet the stringent requirements of R. 4:32-1 to survive a motion to dismiss the class action claims. Therefore, the trial court properly dismissed the class action claims thereby allowing plaintiff's claims on its own behalf to proceed. (1T9:16-12:17).

POINT II

PLAINTIFF FAILED TO MEET THE LEGAL STANDARDS FOR CLASS CERTIFCATION UNDER R. 4:32-1 (1T9:16-12:17)

The New Jersey Supreme Court has laid out, consistent with R. 4:32-1(a) and its federal analogs, the initial four factors required to meet the legal standards for class certification as follows:

(1) Numerosity – the number of persons is so extensive that individual claims are impractical

(2) Commonality – among all class members regarding questions of law and/or fact

(3) Typicality – the lead plaintiff's claims are representative of all class members

(4) Adequacy of representation - of class representatives and counsel to properly prosecute the case, including without conflict

Once plaintiff satisfies these four standards, the court must then move to assess whether overall a class should be certified applying the standards of R. 4:32-

1(b)(3), which contains the additional requirements of:

> (5) Superiority – of the class action process, over individualized claims; and
>
> (6) Predominance – of the class claims over uniquely individual damages and claims.
>
> See also Dugan v. TGI Fridays, Inc., 231 N.J. 24, 47 (2017).

Further, as the Appellate Division held in Muise v. GPU Inc., 371 N.J. Super. 13, 32 (App. Div. 2004), "[a] party seeking class certification has the burden of proof. The burden of persuasion remains with the party which desires to maintain certification." Further, unlike a motion for summary judgment, "[t]he deferential standard by which the court views the facts alleged . . . does not apply to a plaintiff's assertion that a given case is appropriate for class certification." Dugan, 231 N.J. at 49. The Muise Court held that since R. 4:32 is an almost verbatim adoption of F.R.C.P. 23 (the federal class action rule), the holdings of federal cases, while not legally binding, are considered significant persuasive authority. Muise, 371 N.J. Super. at 31. Dugan obligates the court to "rigorously" assess whether all of the criteria of R. 4:32 have been satisfied:

> In determining a motion for class certification, a court "must 'accept as true all of the allegations in the complaint,' and consider the remaining pleadings, discovery (including interrogatory answers, relevant documents, and depositions), and any other pertinent evidence in a light favorable to plaintiff." *The deferential standard by which the court views the facts alleged, however, does not apply to a plaintiff's assertion that a given case is appropriate for class certification. To the contrary, a court deciding class certification "must undertake a 'rigorous analysis' to determine if the Rule's requirements have been satisfied."*

Dugan, 231 N.J. at 49 (emphasis added).

The Supreme Court cautioned that the trial court is not a rubber stamp for plaintiff's allegations as, in both Dugan and Muise, those Courts found that the class action format was not appropriate and class certification was denied. In re Cadillac, 93 N.J. at 437. If the allegations do not properly lend themselves to class certification, dismissal is appropriate. Riley v. New Rapids Carpet Center, 61 N.J. 218, 225 (1972).

The crux of plaintiff's argument is that class certification is warranted based on common issues of liability (Pb9). This argument is without merit and not a proper basis for expanding class action law in New Jersey. Plaintiff has failed to satisfy its burden of establishing that class certification is proper given the varied causes of action asserted against a diverse group of defendants. The liability alleged against each defendant varies and requires different proofs. There is no precedent in New Jersey that common issues of liability are a proper basis for certifying a class and plaintiff's Brief is devoid of any such citation. Any liability issues can easily be addressed by consolidation or case management as is routinely done for other similar cases. Instead of common liability issues, the Court Rules require that plaintiff must establish that the putative class meets the requirements of numerosity, commonality, typicality, and adequate representation. Once those

requirements are met, plaintiff must then establish additional requirements of predominance and superiority.

A. Plaintiff failed to establish the numerosity requirement of R. 4:32-1(a) (1T9:24-10:13)

Class certification is appropriate only where the class is so numerous that joinder of all members is impractical. R. 4:32-1(a)(1). The Rule "does not specify a minimum number of class members necessary to satisfy the numerosity requirement" but an understanding of the size of the proposed class is necessary. Baskin, 246 N.J. at 173. Class actions typically involve an extremely large number of potential claimants. See e.g., Dugan, 231 N.J. at 64-65 (proposed class of 263,000); Lee Carter-Reed Co., LLC, 203 N.J. 496, 512 (2010) (proposed class of "well over 10,000 members"). Herein, addressing "numerosity" (factor #1) is challenging, if not really impossible, without having any idea about how many businesses were impacted by the fire, the magnitude of damage suffered by each business, the duration of any displacement, and the length of time which damages were suffered. Plaintiff has not specified same (Pa1).

A necessary consideration of the numerosity requirement is whether joinder of all members of the proposed class is "impracticable." R. 4:32-1(a); Liberty Lincoln Mercury v. Ford Mktg. Corp., 149 F.R.D. 65, 74 (D.N.J. 1993) ("Mere conclusory or speculative allegations that joinder is impractical are not sufficient to satisfy the numerosity requirement." Id.

In the present matter, plaintiff failed to satisfy the numerosity requirement of R. 4:32-1(a)(1) as plaintiff failed to demonstrate the size of the proposed class and was unable to establish before the trial court that it is "impracticable" to join all members of the proposed class. Plaintiff provided no approximation of the class size and admits in the Complaint that class members "are readily identifiable from information in Defendants' possession, custody, and control." (Pa8).

The tenant lists and rent rolls produced in discovery identify the tenants that could be putative class members (Ja6). They do not even amount in the thousands, are readily identifiable, amenable to service, and capable of seeking recourse in New Jersey courts. In fact, some of those tenants have, in fact, sought recovery for their own damages, such as New England HVAC and Good Old Motorcycle Company, HUD-L-468-23 (Ja86) and Eagle Language Services v. 38 Jackson, et al., HUD-L-4376-23 (Ja124). Both of those Complaints allege negligence, breach of contract, loss of property, loss of revenue, loss of business opportunity, and other business losses, all of which are also being sought in the class action. The claims asserted by plaintiff Hoboken Barbell in the Class Action Complaint on behalf of all putative class members are duplicative of the ones asserted by Eagle Language, New England HVAC, and Estate of Vos.

Cigar & Tobacco was also a tenant but was compensated for its losses through its insurance carrier. It is anticipated that there would be other similarly

situated tenants. It cannot be anticipated that plaintiff herein intends to also include Cigar & Tobacco and other already-compensated tenants in its putative class. In addition, plaintiff's Complaint repeatedly refers to two fatalities resulting from the fire in describing the damages suffered by the putative class (Pa1). Not only would such claims be inappropriate for a class action suit, but a wrongful death and survivor action has already been filed in the matter of Estate of Vos by Admin ad pros Barbara Stise, HUD-L-1462-23 (Ja91).

While some unknown number of businesses were allegedly impacted by the fire, the length of displacement for each is unknown as is the type and amount of business damages suffered. Plaintiff has offered no evidence at all, other than a bare and unsupported assertion that plaintiff and the putative class "did suffer severe harm (including two deaths) and damage to their businesses and property, including loss of sales and revenue, ongoing loss of business value, loss of physical goods, and loss of property fixtures and equipment." (Pa1). Such an assertion provided the trial court with absolutely no basis to delineate a class using a 'rigorous analysis' of the R. 4:32 factors where the burden rests with plaintiff.

In fact, the trial court found that "individual lawsuits are not only possible, but they are already pending and they will be pending when these subrogation claims are filed as well." (1T10:1-12). Therefore, plaintiff has failed to meet the numerosity requirement to maintain a class action claim.

B. Plaintiff failed to establish the commonality requirement of R. 4:32-1(a) (1T10:15-11:5)

Plaintiff has also failed to meet the element of "commonality" (factor #2) as there has been no definition of a class with "common" legal or factual issues. Plaintiff cannot reasonably identify who is in and who is out of the class based upon whether their business was negatively affected by the fire, whether and for how long they were displaced, or whether they actually suffered any damages at all. Such failure presents a challenge to assess whether all class members' claims share "commonality" under the Rule. With regard to commonality, the trial court ruled that [i]t is clear from this motion record it has not been established by the party that has the burden that commonality exists . . . ." (1T10:15-20).

Commonality involves a consideration of whether there is a "common nucleus of operative facts." In re Cadillac, 93 N.J. at 431. The issues "need not be identical among all class members" but "common questions must predominate." Carroll v. Cellco Partnership, 313 N.J. Super. 488, 499 (App. Div. 1998). "Commonality becomes obscured when the probable unique issues of liability, causation and damages in each case are considered, requiring individualized treatment at trial. Saldana, 252 N.J. Super. at 197.

Herein, the Complaint includes a multitude of defendants, all of whom are differently situated. Moreover, the claims alleged involve a mix of tort, contract, and statutory fraud but, critically, not all allegations are directed to all defendants.

Each defendant is alleged to have caused different harms under different causes of action. The claims against the defendants are wholly different and require different proofs (Pa1). The trial court specifically found that plaintiff failed to establish that there are written leases that re similar to all different parties in place at this time." (1T10:19-22).

Moreover, the damages claim of each putative class member also lacks commonality. Plaintiff failed to identify which of the tenants are excluded from the class for having been reimbursed by their insurance carrier for their losses or which have pursued recovery of their own damages. Plaintiff's Complaint seeks damages for "damage to their business, including loss of sales and revenue, ongoing loss of business value, loss of physical goods, and loss of property fixtures and equipment." (Pa1). Undoubtedly, each business will suffer varying amounts of the aforementioned losses. It would also be expected that the loss of sales and revenue, loss of business value, loss of inventory, etc. would vary significantly among the various businesses. With regard to displacement, some tenants may still be displaced and would be claiming loss of sales and revenue as well as loss of business value to date while others may have set up their businesses elsewhere, thereby utilizing a different calculation for business losses.

To this end, the trial court stated that "commonality of damages claimed obviously cannot even be even presumed in this case and is actually irrefutably

refuted by the fact that multiple other tenants with other attorneys representing them are pursuing their own damage claims." (1T10:23-11:2).

The damages claims herein are not uniform and do not lend themselves to a class action suit. Therefore, the trial court properly dismissed the class claims as plaintiff failed to establish the requisite commonality required under R. 4:32-1(a).

C. Plaintiff failed to establish the typicality requirement of R. 4:32-1(a) (1T11:6-21)

The "typicality" criteria (factor #3) presents similar issues, and is probably the factor which plaintiff failed to meet most overtly. This proposed individual class representative has not alleged any facts that even suggest the putative class members have typical claims. "Typicality" requires that the claims asserted "have the essential characteristics common to the claims of the class." In re Cadillac, 93 N.J. at 425, citing 3B Moore's Federal Practice, ¶23.0602 (1982).

As indicated above, some, if not most, of the tenants will likely have been fully or partially reimbursed by their respective insurers. Those that have been fully paid do not have standing in this matter. Those that have been partially paid would have different claims from each other and from those that had no insurance and received no insurance payments. In Myska, the Appellate Division denied class certification of claimed insurance improprieties upon finding no typicality due to the "individualized facts and circumstances between each insurer and its insured." Id. 440 N.J. Super. at 480.

In addition, the Consumer Fraud Act (CFA) claims alleged by plaintiff (Pa12) also defeat the "typicality" requirement as individual issues of "causation" and "ascertainable loss" resulting from an "unlawful practice" would not be uniform among the class members. Indeed, the lease negotiations and any alleged "unlawful practice" would differ among the tenants. Likewise, the breach of contract claim (Pa13) does not lend itself to a class action lawsuit as the plaintiffs do not have contracts with all of the defendants.

Certification of CFA class claims is not appropriate when there is a potential for class members to react differently to a misrepresentation and/or omission. See e.g. International Union of Operating Engineers, 192 N.J. at 391; Marcus v. BMW of North America, LLC, 687 F.3d 583, 608-09 (3d Cir. 2012) (noting "certification of a CFA class is not proper when class members do not react to misrepresentations or omissions in a sufficiently similar manner"). Herein, there is no typicality of representations made to the putative class members since no single representation was made to each member. Each tenant negotiated its own lease, each of which was entered into different dates and with different terms. There would also be no common proofs to establish how each of the tenants reacted to any alleged representations, whether they relied on the representations, and whether they can prove any ascertainable loss under the CFA caused by the alleged representations.

Additionally, as set forth above, the business losses would involve different proofs for each class member and plaintiff's damages are not typical of the other putative class members. Therefore, plaintiff's claim does not meet the typicality requirement under R. 4:32-1(a) and the trial court properly dismissed the class action claims. (1T11:6-10).

D. Plaintiff failed to establish adequacy of representation as required under R. 4:32-1(a)

With regard to the final requirement (factor #4), this plaintiff is not an adequate class representative. Not only are plaintiff's claims not typical, but they also have differing interests than other putative class members. In assessing representation, courts consider whether members of the class have individual recourse to represent their own interests. The Supreme Court has held that "[w]hen making certification decisions, the 'best policy' is to interpret the class-action rule 'so as to promote the purposes underlying the rule." Iliadis, 191 N.J. at 104. Those purposes include allocation of litigation costs among numerous, similarly situated litigants. Class actions are appropriate where individuals' claims "are, in isolation, too small" to warrant recourse to litigation. Id. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997).

A corollary to this is the aim of equalization of adversaries, "a purpose that is even more compelling when the proposed class consists of people with small claims." Id. Equalization "remedies the incentive problem of facing litigants who seek only a small recover." Muhammad v. County Bank of Rehoboth Beach, 189 N.J. 1, 17 (2006). "In short, the class action's equalization function opens the courthouse doors for those who cannot enter alone." Iliadis, 191 N.J. at 104. Those aims are not furthered by the proposed class in this matter. Based on the claims already in the three pending lawsuits, there are potentially substantial damages at issue. The recoveries sought are not small – the putative class plaintiffs seek damages for loss of business revenue, inventory, and other business losses (Pa1).

There is also no need for class certification to equalize adversaries here. To the extent the tenants' claims were settled by insurance recoveries, any subrogation action will be maintained by the respective insurance companies. To the extent that there was no insurance recovery, the potential damages involved are sufficient to justify each tenant pursuing its own claim for business losses.

Plaintiff's efforts to prosecute its own claims here, particularly the breach of contract claims, will not benefit all tenants equally and, therefore, disqualifies it as an adequate representative. As indicated above, the contracts all had different terms and conditions and the diversion of counsel's interest to one contract claim at the expense of another does not further the purposes of class representation.

Plaintiff herein also fails to establish that it is an adequate representative because its own loss was not indemnified by insurance, its damages are not liquidated, and its proofs will differ from the proofs submitted by insurers for other tenants seeking to pursue a subrogation action.

The Class Action Complaint also failed to include all necessary potential defendants. Numerous potential responsible parties were omitted from the pleading, which evidences that plaintiff is not an adequate representative of the class since it has not considered defendants already named in other matters which arose out of the same fire (Pa1).

For these reasons, plaintiff was unable to establish factor #4 for "adequacy of representation" of the class representatives and the trial court properly dismissed the class action claims. The trial court noted that many of the other tenants have already been reimbursed by their respective insurers and many of the other tenants are pursuing their own damage claims. Therefore, there is no adequacy of representation. (1T11:10-16).

POINT III

PLAINTIFF FAILED TO MEET THE "PREDOMINANCE" AND "SUPERIORITY" STANDARDS OF R. 4:32-1(b)(3) (1T9:16-12:6)

As fully outlined above, plaintiff failed to meet the requirements of R. 4:32-1(a) for class certification, which negates the need to engage in the second step of

the class action analysis. Nevertheless, even if the Court were to undertake this analysis, plaintiff cannot establish "predominance" and "superiority" as required for class certification. Under R. 4:32-1(b)(3), the plaintiff must demonstrate both predominance of the common issue and the superiority of a class action over other available trial techniques. Saldana, 252 N.J. Super. at 196. Plaintiff here failed to establish either. Subsection (b)(3) states in pertinent part:

* * *

> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The factors pertinent to the findings include:
>
> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> (C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and
> (D) the difficulties likely to be encountered in the management of a class action.
>
> R. 4:32-1(b)(3).

A. Plaintiff failed to establish predominance under R. 4:32-1(b)(3) because individual issues predominate over class issues

Predominance is legally distinct from the commonality requirement of R. 4:32-1(a). Begal v. West Park Gallery, 394 N.J. Super. 98, 111 (App. Div. 2007).

Predominance is, in fact, "far more demanding" and considers whether the issues common to the class outweigh those that are not. Dugan, 231 N.J. at 48. "It is not the number of common issues, but rather their significance, that 'sways the pendulum.'" Id. Predominance requires plaintiff to prove that issues common to the class outweigh those that are not. Saldana, 252 N.J. Super. at 197. To determine predominance, the court decides "whether the proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" Iliadis, 191 N.J. at 108 (citation omitted). Predominance "begins, of course, with the elements of the underlying cause of action." Neale v. Volvo Cars of N. Am., LLC, 794 F.3d 353 (3d Cir. 2015). ". . . the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008) (quoting Blades v. Monsanto Co.,400 F.3d 562, 566(8th Cir. 2005).

The trial court here specifically found that the common issues held by the class in general do not outweigh any individual differences in damages and liability claims from the various tenants. All the tenants stand in different positions and have different damages claims. Therefore, predominance does not exist. (1T11:17-21).

In this matter, there are multiple causes of action, some sounding in tort, some in contract, and some of which are statutory (Pa1). In addition, the claims

are asserted against a diverse group of defendants, with some causes of action asserted against all defendants and some against only certain defendants, but not others (Pa1). The very nature of plaintiff's Complaint demonstrates a lack of predominant common issues and not suitable for class action classification.

B. A class action is not superior to other forms of litigation since individual claimants have the right and ability to pursue their own claims

In addition to predominance, plaintiff must also establish superiority in order to qualify for class action certification. In other words, plaintiff must establish that a class action is "superior" to other available means of adjudication. Superiority involves "a comparison with alternative procedures." In re Cadillac, 93 N.J. at 436. That comparison requires:

> (1) an informed consideration of alternative available methods of adjudication of each issue, (2) a comparison of the fairness to all whose interests may be involved between such alternative methods and a class action; and (3) a comparison of the efficiency of adjudication of each method.
>
> Id., quoting Katz v. Carte Blanche Corp., 496 F.2d 747, 757 (3d Cir.), cert. denied 419 U.S. 152 (1974).

In Saldana, the proposed class included premises owners whose properties were destroyed by fires originating in abandoned buildings owned by the City of Camden. In reversing the trial court grant of class certification, the Appellate Division found that there was no superiority, even though plaintiffs' counsel could pool resources and use a single liability expert, holding:

> . . . we cannot conclude that the interest of economy makes the class action "superior" to other available means of adjudicating the controversy. This is not a case where, because the individual claims are too small to warrant recourse to case-by-case litigation, the "wrongs would go without redress" if the class action certification is not granted. See In re Cadillac, 93 N.J. at 435. Each class member asserts substantial damage or total destruction of his or her dwelling, a virtual "taking" of property, and thus has sufficient stake to prosecute his or her claim individually or with a group of other plaintiffs.
>
> Saldana, 252 N.J. Super. at 200.

In Int'l Union of Operating Engrs., the Supreme Court denied class certification to a health benefits fund that alleged improper overcharge for the drug Vioxx and that the defendant concealed the drug's health and safety risks. The Court found no superiority, noting that the plaintiff and all members of the class "allege they have been damaged in large sums;" "are well-organized institutional entities" with no "disparity in bargaining power and no likelihood that the claims are individually so small that they will not be pursued. In short, we find no ground on which to conclude that this nationwide class meets the test for superiority that we have traditionally required." Id. 192 N.J. at 394.

In the present matter, a class action is not a superior method of adjudication for all of the reasons discussed above. Among other things, the proofs on the breach of contract claims will differ between tenants with leases and those without. The proofs will also differ according to the terms of each tenant's individual leases. The CFA claims will involve individualized evidence regarding the

tenants' dealings with the landlord and/or management company and any other defendant. Critically, the damages proofs will be widely disparate depending on the tenant's individualized status. The proofs on a subrogation claim will be completely different in nature and kind from proofs offered by tenants whose losses have not yet been paid. Most importantly, there is no reason for any individual tenant or subrogor not to file its own lawsuit. The loss is clearly known and the tenants, having sustained losses in New Jersey, can seek recourse directly from New Jersey courts. To date, only three tenants have filed suit, putting lie to the fear that there will be many separate lawsuits defying the court's ability to manage the cases. This also suggests that many tenants have already been paid for their losses and have no need to resort to litigation. Should recovery be sought for those losses, they would be pursued separately by the subrogation carrier.

Based on the foregoing, this matter is not suitable for adjudication by way of class action. Plaintiff failed to meet the requirements of R. 4:32-1 and the alleged class claims were properly dismissed. The trial court permitted plaintiff's own individual claims to proceed.

In addition to the foregoing, 38 Jackson and Taurasi also adopt and rely upon the legal arguments made in the Brief submitted on behalf of defendant/respondent, Cigar & Tobacco.

CONCLUSION

For the foregoing reasons, defendants, 38 Jackson, LLC; 135 Washington Street, LLC; The Taurasi Group, Inc.; Anthony Nicholas Petruzzelli; and Gary Joseph Mezzatesta; respectfully submit that plaintiff herein has failed to meet the necessary requirements to maintain a class action suit. The trial court properly dismissed the class action claims, leaving the individual claims asserted by plaintiff Hoboken Barbell unaffected to proceed on its own.

Respectfully submitted,

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Attorneys for Defendants/Respondents, 38 Jackson, LLC; 135 Washington Street, LLC; The Taurasi Group, Inc.; Anthony Nicholas Petruzzelli; and Gary Joseph Mezzatesta

BY: *Mark Bongiovanni*_____
MARK BONGIOVANNI, ESQ.

DATED: January 23, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-003225-23T4

HOBOKEN BARBELL, LLC, on behalf of itself and those similarly situated, Plaintiff-Appellant, v. 38 JACKSON, LLC; ANTHONY NICHOLAS PETRUZZELLI; 135 WASHINGTON STREET, LLC; GLASS AND VAPOR HOUSE LLC A/K/A GLASS & VAPOR HOUSE, INC. A/K/A GLASS AND VAPOR HOUSE, INC.; CIGAR AND TOBACCO WAREHOUSE, INC., A/K/A THE CIGAR AND TOBACCO WAREHOUSE, INC.; ASLAM PANJWANI; ALL-SAFE FIRE SPRINKLER CO., INC.; UNLMTD REAL ESTATE GROUP, LLC; RITCO SECURITY SYSTEMS, INC.; THE TAURASI GROUP, INC.; GARY JOSEPH MEZZATESTA; LOCONTE MAINTENANCE, INC; ANTHONY LOCONTE; JOHN DOES 1-25; and ABC COMPANIES 1-25, Defendants-Respondents.	**CIVIL ACTION** ON APPEAL FROM THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, HUDSON COUNTY Trial Court Dkt. No. HUD-L-4450-23 Sat Below: HON. ANTHONY V. D'ELIA, J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

(Submitted February 18, 2025)

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PRELIMINARY STATEMENT

This appeal arises from the motion court's premature dismissal of Plaintiff's class claims. The claims arise from a building-destroying fire in a converted warehouse occupied by 70 tenants. The claims assert liability for those tenants' losses against (*i*) Cigar & Tobacco, the tenant alleged to have caused the fire and (*ii*) those responsible for providing and maintaining adequate fire suppression and alarm systems including the building owners.

The facts and legal theories supporting each Defendant's liability to each injured tenant is the same. Thus, Defendants do not dispute: (*i*) if Cigar & Tobacco is liable to Plaintiff for starting the fire, it is also liable to every other tenant for their losses caused by the fire; and (*ii*) if any of the remaining Defendants are liable to Plaintiff for not providing or maintaining adequate fire suppression and alarm systems, they are also liable to every other tenant for their losses cause by those inadequate systems.

Understandably, Defendants focus on the differences between Plaintiff and some class members. But those differences do not overcome that the facts—which are limited by the *R.* 4:6-2(e) standard to assuming the truth of the Complaint's factual allegations and drawing reasonable inferences from those allegations which favor Plaintiff—satisfy the requirements in *R.* 4:32-1(a) and (b) for certifying as issue class.

LEGAL ARGUMENT

A. The Motion Court Prematurely Dismissed the Class Claims at the Pleading Stage.

The motion court dismissed Plaintiff's class claims at the pleading stage under *R. 4*:6-2(e). The Defendants do not dispute that appellate review is *de novo*, "affording no deference to the trial court's determination." *Pace v. Hamilton Cove*, 258 N.J. 82, 95–96 (2024) (citing *Baskin v. P.C. Richard & Son, LLC*, 246 N.J. 157, 171 (2021)). Hence, the facts asserted in the Complaint are assumed to be true, *Lembo v. Marchese*, 242 N.J. 477, 481 (2020), and the "plaintiff is entitled to the benefit of every reasonable inference as we 'search[ ] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" *Id.* (quoting *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 N.J. 739, 746 (1989) quoting *Di Cristofaro v. Laurel Grove Mem'l Park*, 43 N.J. Super. 244, 252 (App. Div. 1957)).

The Supreme Court held that the *R.* 4:6-2(e) standard which applies to a challenge that a complaint fails to state a claim upon which relief can be granted equally applies to determine "whether plaintiffs sufficiently pled the class certification requirements to survive a motion to dismiss." *Baskin*, 246 N.J. at 172. "Accordingly, 'a court should be slow to hold that a suit may not

proceed as a class action' and should rarely deny a class action based on the face of the complaint." *Id.* (quoting *Riley v. New Rapids Carpet Ctr.*, 61 N.J. 218, 228 (1972)).

The six opposition briefs filed by Defendants give lip service to this standard while arguing as if they were opposing Plaintiff's motion for class certification under *R.* 4:32-2. A class certification motion is adjudged and reviewed on appeal by more demanding standards than the *R.* 4:6-2(e) standard mandated under *Baskin*. Thus, the class claims here should not have been dismissed unless the Complaint's allegations fail as a matter of law to set forth any basis for class certification. Because the Complaint adequately alleges the bases for certifying an issue class as to each Defendant's liability to each class member, the class claims should not have been dismissed at the pleading stage.

B. The Class and the Class-worthy Claims.

The Class includes the 70 tenants who, along with Plaintiff, suffered some loss as a result of the fire.

Plaintiff asserts negligence against Defendant Cigar & Tobacco for causing the fire. Plaintiff also asserts negligence, breach of contract, and Consumer Fraud Act claims against those who owned and controlled the property including those responsible for providing and maintaining the fire suppression and fire alarm systems.

The facts and legal theories as to each Defendant's liability are the same for Plaintiff and for each member of the Class. Thus, those issues can be resolved on a class basis in lieu of 70 separate trials each adjudicating—perhaps differently—the same legal and factual issues.

Plaintiff never contended and does not now contend that its and each Class member's damages can be resolved on a class basis. Defendants, like the motion court, point to the unique facts relevant to each tenant's damages. But a class can be certified to resolve non-damages issues. *See*, *Little v. Kia Motors Am., Inc.*, 242 N.J. 557, 584 (2020) (adopting standard for adjudicating damages on a class basis). Hence, differences as to each class member's damages is not a bar as a matter of law to certifying the common issues.

As discussed in Plaintiff's opening brief, this case can be certified as an "issue class." *See,* Gilles, Myriam and Gary Friedman, *The Issue Class Revolution*, 101 B.U.L. Rev. 133, 136 (Jan. 2021) ("Where plaintiffs prevail at an issue class trial, each class member effectively receives a judicial declaration of key liability issues that she can then take into her local court or other forum to claim damages.").

An issue class can be maintained under *R.* 4:32-1(b)(1) or (2)—so-called "B1 Class" or "B2 Class—which, unlike a "B3 Class," does not require a showing of the predominance or superiority factors. Instead, to maintain a B1

Class, it must be shown that adjudicating the common issues in separate trials creates a risk of imposing incompatible standards on each Defendant. Such a risk is patently obvious if a Defendant's conduct, based on the facts presented in one class member's lawsuit, is adjudicated to give rise to liability while the same conduct, based on the facts presented in another class member's lawsuit, is adjudicated to not give rise to any liability. Moreover, under the R. 4:6-2(e) standard, Plaintiff enjoys the benefit of the reasonable inference as to the presence of such a risk. Hence, this class action could be maintained under R. 4:32-1(b)(1) if the four prerequisites under R. 4:32-1(a) are present.

To maintain a B2 Class, it must be shown that each Defendant acted "on grounds generally applicable to the class, thereby making appropriate… declaratory relief with respect to the class as a whole." *R.* 4:32-1(b)(2). Here, each Defendant's conduct was the same with respect to each class member thereby making it appropriate to declare each Defendant's liability *vel non* with respect to all class members.

C. The Four Prerequisites for Class Certification.

One or more of the Defendants have also challenged whether the Complaint alleges facts which could satisfy the four requirements under R. 4:32-1(a)—namely, numerosity, commonality, typicality, and adequacy.

Citing relatively old, nonbinding authorities, some of the Defendants

challenge numerosity. Despite its name, numerosity is not purely a question of numbers. Instead, it is a qualitative determination as to the practicality (or not) of joining each class member. Citing trial court decisions from 1993[1] as examples when numerosity was lacking, Defendants overlook our Supreme Court's more recent binding decision governing the numerosity question. Generally, "classes of 20 are too small, classes of 20-40 may or may not be big enough depending on the circumstances of each case, and classes of 40 or more are numerous enough." *Baskin*, 246 N.J. at 174. It is undisputed that the class consists of approximately 70 members. Thus, numerosity is met.

Commonality merely requires a single common fact or legal issue. *Strougo v. Ocean Shore Holding Co.*, 457 N.J. Super. 138, 156 (Ch. Div. 2017) citing *Delgozzo v. Kenny*, 266 N.J. Super. 169, 185 (App. Div. 1993). Here, there are several common issues including (1) what caused the fire and who is at fault for causing the fire, (2) what fire suppression systems existed, whether that system was sufficient for the building, whether it was in proper working order, and who was responsible for providing a proper working fire suppression system, and (3) what fire alarm systems existed, whether that system was sufficient for the building, whether it was in proper working order,

[1] *Liberty Lincoln Mercury v. Ford Mktg. Corp.*, 149 F.R.D. 65 (D.N.J. 1993); and *Hannoch Weisman v. Brunetti*, 13 N.J. Tax 346 (1993).

and who was responsible for providing a proper working fire alarm system. Thus, the Complaint adequately alleges commonality.

Regarding typicality, the Appellate Division explained:

> The claims of a putative class representative are typical if they "have the essential characteristics common to the claims of the class." *In re Cadillac*, *supra*, 93 N.J. at 425, 461 A.2d 736 (quoting 3B James W. Moore et al., *Moore's Federal Practice* § 23.06-2 (2d ed. 1982)). "Since the claims only need to share the same essential characteristics, and need not be identical, the typicality requirement is not highly demanding." 5 James W. Moore et al., *Moore'ss Federal Practice* § 23.24[4] (3d ed. 1997). "If the class representative's claims arise from the same events, practice, or conduct, and are based on the same legal theory, as those of other class members, the typicality requirement is satisfied." Moore, *supra*, § 23.24[2]. "[C]ases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims." *Baby Neal v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994).

Laufer v. U. S. Life Ins. Co. in City of N.Y., 385 N.J. Super. 172, 180-81 (App. Div. 2006).

Typicality is not undermined by the fact that individual class members suffered different forms of damages. "It is not uncommon for courts to certify class actions involving products or hazards that, in addition to causing economic damage, may have also caused personal injury to some of those exposed." *Delgozzo*, 266 N.J. Super. at 187.

Defendants' arguments on adequacy also miss the mark. To satisfy adequacy, "the plaintiff must not have interests antagonistic to those of the class." *Delgozzo v. Kenny*, 266 N.J. Super. 169, 188 (App. Div. 1993) (quoting *In re Asbestos Sch. Litig.*, 104 F.R.D. 422, 430 (E.D.Pa.1984)). "However, this does not mean that 'the interests of the class representative and the absentee class members [must] be identical.' . . . '[T]he named representative only needs to be adequate[.]'" *Laufer*, 385 N.J. Super. at 182.

> Although Laufer would be required to prove the damages she suffered as a result of that alleged violation to obtain monetary relief, there is no basis for concluding that her need to prove damages would in any way detract from her ability to represent the other class members. Moreover, even though Laufer does not seek injunctive relief on her own behalf, the pursuit of that relief on behalf of other class members is not antagonistic to Laufer's pursuit of monetary relief for herself. It also would require only limited, if any, additional work on the part of class counsel. Therefore, Laufer has established the adequacy of representation requirement of Rule 4:32-1(a)(4).

For these reasons, the Complaint, when viewed under the R. 4:6-2(e) standard, sufficiently alleges each of the four prerequisites for a class action under *R.* 4:32-1(a).

D. Defendants' Factual Challenges Fall Outside the Scope of a Motion to Dismiss for Failure to Adequately Allege Class Claims.

Defendants raise factual issues which are outside the scope of the

pleadings and, therefore, are not relevant to whether the class claims can be dismissed under *R.* 4:6-2(e). For example, one or more Defendants note that tenants had different lease terms, but they do not show that any variation would yield a different result. Such an argument could not apply to the claims against Cigar & Tobacco for starting the fire because there is no contention that there was any contractual relationship between Cigar & Tobacco and any other tenant. The argument could conceivably apply to those responsible for providing and maintaining the fire suppression and fire alarm systems but, even then, it is difficult to imagine an enforceable disclaimer of the duty to properly maintain a safe building. But such issues should be fleshed out in discovery and should not be a bar to class claims at the pleading stage.

Defendants also point to class members who recovered from their own insurers and that some insurers have asserted subrogation claims. They also point to the four other lawsuits each brought by a tenant or its insurer. The fact that four out of seventy tenants brought individual lawsuits does not affect whether the numerosity, commonality, typicality, and adequacy prerequisites have been adequately alleged in the Complaint. Instead, the plaintiffs in those other cases can make an informed decision whether to opt out of the class or, perhaps, to intervene so that there is a single forum for adjudicating each Defendant's liability.

CONCLUSION

For the foregoing reasons, Plaintiff Hoboken Barbell, LLC respectfully requests this Court to reverse the motion court's Orders dismissing Plaintiff's class claims with prejudice and instructing that the class certification question be addressed on a motion for class certification after a reasonable opportunity to discover facts relevant to *R. 4*:32.

Respectfully submitted,

/s/ Philip D. Stern

Dated: February 18, 2025

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