SUPREME COURT FOR THE STATE OF NEW YORK
NEW YORK COUNTY

In re Gateway Plaza Residents Litigation.	Index. No.: 651023/2014 Motion Seq. 005 Hon. Eileen A. Rakower

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
EMERGENCY MOTION FOR CEASE AND DESIST ORDER AND RELATED RELIEF

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INTRODUCTION AND SUMMARY

This consolidated action has been pending since April 2014. It involves claims that Defendants have breached the warranty of habitability by failing to provide adequate heat to the tenants of Gateway Plaza, a large apartment complex in Lower Manhattan. In particular, the complex suffers from serious structural defects that cause dangerously frigid conditions in the apartments. To alleviate these conditions, even marginally, the tenants regularly incur exorbitant electrical bills – several times more than what they would pay in comparable but habitable units.

After more than two years of litigation, motion practice, and substantial discovery, the case is on the verge of class certification proceedings.

But a dangerous pattern has emerged. One by one, numerous Plaintiffs and potential Plaintiffs – including Barbara Stoebel, David Spencer, and Pauline Wolf – have dropped out of the case. Most recently, just days after enlisting as a party Plaintiff, putative class plaintiff Ninfa Segarra has informed Counsel that she was contacted by Glenn Plaskin, the President of Gateway Plaza's Tenant's Association. According to Ms. Segarra, Mr. Plaskin found out she was a proposed plaintiff and then tracked her down and threatened her that her lease would not be renewed if she participated in this lawsuit. Plaintiffs believe Mr. Plaskin is acting as Defendants' surrogate to intimidate tenant members of the putative class who either assist or are involved in this action.

Defendants' and Mr. Plaskin's conduct violates N.Y. Real Property L. §§ 223-b and 235, undermines the Court's authority and its ability to manage the action, and interferes with the tenants' substantive rights under Real Property L. § 235-b as well as their right of access to the courts to seek redress for their grievances.

In order to preserve the integrity of the litigation, swift and decisive action is needed. In

particular, the Court should:

(a) Issue a cease and desist order and/or other injunction to restrain Defendants and their agents and surrogates from communicating with Plaintiffs and other class members on the subject of this litigation, and require Defendants to serve the order on Mr. Plaskin;

(b) Prohibit Defendants from discriminating or retaliating against Plaintiffs or class members in any fashion, including by evicting tenants who participate in the case or by terminating or refusing to renew their leases;

(c) Issue a corrective notice to all class members at Defendants' expense, informing the tenant class that no one may threaten, intimidate, or otherwise target them for participating in this action and that any such retaliation or harassment is unlawful and will invite heavy sanctions from the Court;

(d) Authorize Plaintiffs to conduct discovery regarding Defendants' and Mr. Plaskin's actions and, thereafter, to amend their Complaint to assert additional causes of action, including retaliation, against both Defendants and Mr. Plaskin;

(e) Grant further sanctions as the Court deems appropriate.

FACTUAL BACKGROUND

On April 5, 2016, Mr. Plaskin contacted class counsel Jeffrey Norton. *See* Affidavit of Jeffrey M. Norton, attached hereto as Exhibit A at ¶ 2. Mr. Plaskin claimed that the lawsuit was interfering with his efforts as GPTA President and asserted that Plaintiffs would lose the case. *Id.* at ¶ 4. Upon information and belief, Mr. Plaskin has used his authority as President of the GPTA to belittle both class counsel and the merits of this action.

To date, two named Plaintiffs and one proposed intervenor plaintiff have either ceased

cooperating or have abruptly sought to withdraw as representatives of the proposed class. On August 15, 2016, class counsel filed its Motion to Intervene and/or Substitute Named Plaintiffs, seeking to substitute Ninfa Segarra and Pauline Wolf as intervenor Plaintiffs. The same day, Plaintiffs' counsel was informed that Ms. Wolf no longer wished to participate as plaintiff. Four days later, Ms. Segarra was approached by Mr. Plaskin. *See* Segarra Affidavit, attached hereto as Exhibit B, at ¶ 4. Mr. Plaskin explained that he had learned that Ms. Segarra had been proposed as a substitute as a Plaintiff and falsely (and bizarrely) claimed that previous plaintiffs had been added to the case without their knowledge. *Id.* at ¶ 6. Moreover, Mr. Plaskin then proceeded to threaten her that participation in the case was dangerous, would "cause problems" for Ms. Segarra, and that she would not be entitled to a lease renewal on her home if she continued. *Id.* at ¶ 8. Ms. Segarra felt threatened and intimidated by Mr. Plaskin and became very concerned about her home and personal security. *Id.*

ARGUMENT

A. The Court Has Broad Authority to Manage Class Action Litigation Under CPLR 907 and its Inherent Powers

The class action device serves vital purposes in our justice system. It "facilitate[s] the bringing of suits based on small claims in order to deter business activities harmful to a large number of individuals." And, it provides such individuals "a quasi-constitutional right to participate meaningfully in the legal process." *Carnegie v. H&R Block, Inc.*, 180 Misc.2d 67, 70-71 (Sup. Ct. N.Y. Cty 1999).

NY CPLR 907, which is modeled after Fed. R. Civ. P. 23(d), vests judges with "broad powers to control the course of class action litigation." *In re Colt Indus. Shareholder Litig.*, 155 A.D.2d 154, 159-60 (1st Dep't 1990)(citations omitted); *see also Alfaro v. Vardaris Tech., Inc.*,

No. 109673/2005, 2009 N.Y. Misc. LEXIS 4738, at *13-14 (Sup. Ct. N.Y. Cty. Mar. 11, 2009) ("The Court's authority to control the course of a class action and to impose conditions on the parties and their attorneys is broad and flexible."), *aff'd in relevant part*, 69 A.D.3d 436 (1st Dep't 2010); *Carnegie*, 180 Misc.2d at 71. Under these Rules, a court is empowered to take corrective action against communications between parties and potential class members that likely interfere with class members' rights. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99-102 (1981); *Carnegie*, 180 Misc.2d at 71-72; *Alfaro*, 2009 N.Y. Misc. LEXIS 4738 (vacating opt-out letters and affidavits elicited by defendants from class members through improper contacts; restricting defendant's further communications with class members; and issuing corrective notice).[1]

"Courts have long been involved with the management of class actions to ensure that the conduct of parties and counsel is appropriate." *Borden v. 400 E. 55th St. Assocs., L.P.*, No. 650361/2009, 2014 N.Y. Misc. LEXIS 4353, at *12 (Sup. Ct. N.Y. Cty. Sept. 30, 2014). "The test for whether a party, with or without aid of its counsel, has had impermissible conduct with potential members of the plaintiff class is whether the contact is coercive, misleading, or an attempt to affect a class member's decision to participate in the litigation." *Id.* at *13 (citing *Carnegie*, 180 Misc.2d at 71). *See also, e.g., Agerbrink v. Model Serv. LLC*, No. 14 Civ. 7841, 2015 U.S. Dist. LEXIS 145563, at *7 (S.D.N.Y Oct. 27, 2015) ("A district court may prevent confusion and unfairness by prohibiting and correcting communication that is inaccurate, unbalanced, misleading, or coercive, or which improperly attempts to encourage class members not to join the suit.")(collecting cases). Ultimately, "courts have a responsibility to restrict communications that are potentially coercive or misleading." *Zamboni v. Pepe West 48th St.*

[1] *See further, e.g., Weinstein v Jenny Craig Operations, Inc.*, 132 A.D.3d 446 (1st Dept. 2015)(invoking court's authority "to protect putative class members and the fairness of the process" and upholding decision to invalidate arbitration agreements imposed and signed after commencement of the suit).

LLC, 12 Civ. 3157, 2013 U.S. Dist. LEXIS 34201, at *9-10 (S.D.N.Y. Mar. 12, 2013)(collecting cases). "It is the Court's responsibility as a neutral arbiter... to insure that the class members' decision to participate or opt out be made freely and without coercion and without misleading or false information." *Alfaro*, 2009 N.Y. Misc. LEXIS 4738, at *12.

Further, a court has inherent power to sanction abusive litigation conduct, including by "punish[ing] those who impede justice." *In re Diane D.*, 161 Misc.2d 861, 864-65 (Sup. Ct. N.Y. Cty. 1994); *see also, e.g., Herman v. Herman*, No. 650205/2011, 2015 N.Y. Misc. LEXIS 2447, at *38-39 (Sup. Ct. N.Y. Cty. July 13, 2015)("The court also has inherent power to impose sanctions for actions that undermine truth seeking and the integrity of courts")(citing *CDR Creances S.A.S. v Cohen*, 23 N.Y.3d 307, 318 (2014)); *Matter of Richard N.*, 45 Misc. 3d 632 (Sup. Ct. Queens Cty. 2014)(inherent power to impose sanctions "to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice.")(quoting *CDR Creances*); *People v. Prince*, 132 Misc. 2d 718, 721 (Sup. Ct. N.Y. Cty. 1986)(court can impose sanctions under its "inherent power to insure fairness and to preserve the integrity of the fact-finding process"). On the Court's inherent powers, *see generally Alvarez v. Snyder*, 264 A.D.2d 27, 35-36 (1st Dept. 2000) (court properly exercised inherent power to prevent interference with criminal trial); *People v. Cruz*, No. 8312/2010, 2013 N.Y. Misc. LEXIS 1668, at *13 (Sup. Ct. Kings Cty. Mar. 6, 2013); *People v. Green*, 170 Misc. 2d 519, 522-24 (Sup. Ct. Bronx Cty. 1996).[2]

[2] Defendants' litigation practices are also sanctionable under 22 NYCRR § 130-1.1. Plaintiffs contend that this conduct is frivolous under the Rule because it is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." § 130-1.1(c)(2). This conduct delays and prolongs the litigation because it requires Counsel to repeatedly identify and substitute new plaintiffs during the course of the action. It harasses and maliciously injures the parties subject to Defendants' abusive and coercive communications as well as the class at large. Mr. Plaskin's conduct in opposition to the lawsuit is hardly clandestine; class tenants are made aware that if they assert their rights, they will become a target of Defendants' ire and subject to harsh retribution.

B. Plaskin's Communications With Plaintiffs and Potential Plaintiffs are Misleading, Coercive, and Otherwise Improper

Here, Defendants' surrogate, Mr. Plaskin, long-time President of the Gateway Plaza Tenants Association, has attempted to coerce and intimidate Plaintiffs to abandon their claims against Defendants and withdraw from this action. Mr. Plaskin had at least apparent agency to carry out his threats; otherwise they would have been meaningless and futile. Several Plaintiffs have dropped out of the case, potentially leaving the class without a representative. Further, Defendants' communications are aimed at suppressing participation in this action more broadly. Even as absent class members, tenants deterred by Mr. Plaskin's threats would be less willing to support the case – including by providing information and evidence in support of the class' claims – and more likely to opt-out of the class.

Mr. Plaskin's contacts with Plaintiffs and other tenants are abusive and improper in several respects.

First, individuals, such as Ms. Segarra, are clearly represented parties and it is impermissible for Defendants to contact them on an *ex parte* basis. *See* N.Y. Rule of Professional Conduct 4.2. Nor may Defendants do so through surrogates. *See* Rule 8.4(a).

Second, Mr. Plaskin's communications with tenants such as Ms. Segarra are coercive. As courts have emphasized, where there is an ongoing business relationship between the parties, unilateral communications between defendant and the class are inherently coercive and ripe for potential abuse. *See, e.g.*, *Alfaro*, 2009 N.Y. Misc. LEXIS 4738, at *12 (citing *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1202-1203 (11th Cir. 1985)). Many cases involve the employment context, but the landlord-tenant relationship is equally, if not more, coercive. *Cf. Sorrentino v. ASN Roosevelt Ctr., LLC*, 584 F. Supp.2d 529, 533 (E.D.N.Y. 2008)(finding "risk

of coercion" in light of previous landlord-tenant relationship and impending offer to return); *Alfaro*, 2009 N.Y. Misc. LEXIS 4738, at *12 (noting that "relationship has strong potential for coercion where one party relies on the other for livelihood")(citation omitted). Tenants rely on their landlords for housing, a basic necessity of life, and it may be just as difficult – especially in New York – to obtain suitable and affordable replacement housing as it is a new job.

Here, Mr. Plaskin played on his ostensible power over tenants to the utmost. Tenants have an understanding that Mr. Plaskin is aligned with Defendants and can speak on their behalf. He directly deployed his relationship with Defendants to coerce them into foregoing their claims.

Courts routinely intercede when a defendant or its agents attempt to intimidate or threaten potential plaintiffs and class members into abandoning their claims or otherwise declining to participate in a class or collective action. No finding of intent is required; intervention is warranted if the communications have the likely *effect* of chilling the plaintiffs' or class members' exercise of their rights. *See, e.g.*, *Urtubia v. B.A. Victory Corp.*, 857 F. Supp. 2d 476, 484-85 (S.D.N.Y. 2012)(plaintiff alleged that another employee had agreed to be a co-plaintiff but decided not to participate after defendant threatened to have him reported to immigration authorities and possibly deported); *Wright v. Adventures Rolling Cross Country, Inc.*, No. C-12-0982, 2012 U.S. Dist. LEXIS 83505, at *12-13 (N.D. Cal. June 15, 2012)("Plaintiffs have established that, at the very least, Defendants' communications were improper because they plausibly could have a chilling effect on participation in the class action. Most problematic in Defendants' communications to Plaintiffs are the comments about how Plaintiffs' lives will be subject to public scrutiny as a result of the litigation — including future employers."); *Li v. A Perfect Day Franchise, Inc.*, 270 F.R.D. 509, 517-19 (N.D. Cal. 2010) (defendants solicited opt-outs in coercive manner); *Ojeda-Sanchez v. Bland Farms*, 600 F. Supp.2d 1373, 1380-81 (S.D.

Ga. 2009)(defendant's agents visited plaintiffs in Mexico and allegedly threatened them; even if there was no intentional coercion, court held that there was a "potentially abusive situation" warranting court intervention: "Should these types of communications continue, they would threaten the ability of plaintiffs and potential plaintiffs to assert their rights through this litigation."); *Belt v. Emcare Inc.*, 299 F. Supp. 2d 664 (E.D Tex. 2003)(granting relief where defendant-employer sent letter to potential class members containing numerous improper statements which would deter participation in the case, including a suggestion that the action could threaten their employment); *Hampton Hardware v. Cotter & Co.*, 156 F.R.D. 630 (N.D. Tex. 1994)(defendants warned of potential costs and consequences of participating in the suit).[3]

Third, Mr. Plaskin's contacts with the members of the putative class are misleading and deceptive. By informing tenants like Ms. Segarra that Defendants would discontinue or refuse to extend their leases if they joined or participated in the case, Mr. Plaskin led individuals to believe (i) that it was permissible and lawful for Defendants to retaliate against them and (ii) that it could get away with doing so.

But, any such retaliation for pursuing this matter would clearly and directly violate Real Property L. § 223-b. Moreover, by cornering Ms. Segarra (and perhaps others) and threatening them into dropping their claims for failure to provide adequate heat, Mr. Plaskin – as

[3] *See further Romano v. SLS Residential, Inc.*, 253 F.R.D. 292 (S.D.N.Y. 2008)(defendants engaged in scheme to elicit opt-outs by providing false and misleading information about negative consequences of class membership while omitting positive benefits); *Recinos-Recinos v. Express Forestry, Inc.*, Civ. No. 05-1355, 2006 U.S. Dist LEXIS 2510, at *24 (E.D. La. Jan. 23, 2006)(prohibiting defendants from contacting potential opt-in plaintiffs in FLSA collective action after defendants' agents engaged in a "campaign of intimidation": "A protective order is necessary to halt any improper communications and to diffuse the atmosphere of threats and coercion so as to allow the orderly progress of this litigation."); *Roslies-Perez v. Superior Forestry Serv.*, 652 F. Supp. 2d 887, 891 (M.D. Tenn. 2009) (noting that court had previously "barred communications by Defendants, their employees, agents and intermediaries with the Plaintiffs and putative class members about this lawsuit... based upon proof that an SFSI crew leader had engaged in acts of coercion and retaliation against opt-in-Plaintiffs" and that the court had "also barred future acts of intimidation or coercion").

Defendants' agent – has willfully and intentionally interfered with the tenants' quiet enjoyment of their leased premises. Mr. Plaskin and Defendants are therefore guilty of a violation of Real Property L. § 235. In addition, Defendants and Mr. Plaskin are impermissibly attempting to coerce Plaintiffs and other tenants into waiving or modifying their rights to a habitable residence. *See* Real Property L. § 235-b(2). Finally, as discussed herein, the Court has broad authority to sanction retaliatory conduct that undermines Plaintiffs' and the class members' rights and threatens the integrity of the litigation.[4]

Accordingly, by suggesting that Defendants could freely retaliate against and punish Plaintiffs for pursuing this case, Mr. Plaskin grossly misinformed Ms. Segarra (and presumably others) about their legal rights. One of the policies behind Rule 23, and, by extension CPLR Article 9, is "the protection of class members from 'misleading communications from the parties or their counsel.'" *In re WorldCom. Inc. Sec. Litig.*, No. 02 Civ. 3288, 2003 U.S. Dist. LEXIS 20748, at *22 (S.D.N.Y. Nov. 17, 2003) (quoting *Erhardt v. Prudential Group*, 629 F.2d 843, 846 (2d Cir.1980)).

Fourth, Mr. Plaskin's conduct jeopardizes the functioning of this litigation by influencing Plaintiffs' and class members' decisions to pursue their claims against Defendants. Defendants' threats to retaliate against tenants who participate in this action interfere with the administration of justice and with tenants' right of access to the courts.[5] *See Agerbrink*, 2015 U.S. Dist. LEXIS

[4] Defendants' and Mr. Plaskin's conduct also violates federal law. For example, 42 U.S.C. § 1985 provides an cause of action for a conspiracy to interfere with an individual's civil rights – here, the right of access to the courts and the ability to testify in judicial proceedings. RICO, 18 U.S.C. §§ 1961, *et seq.*, may also be implicated.

[5] Plaintiffs note that actual waivers of the right access to the courts and trial by jury are disfavored. Waivers must be knowing and voluntary. *See, e.g., Nat'l Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977)("It is elementary that the... right to a jury is fundamental and that its protection can only be relinquished knowingly and intentionally. Indeed, a presumption exists against its waiver."); *Robinson v. Finkel*, 194 Misc.2d 55, 73-74 (Sup. Ct. N.Y. Cty. 2009). *See generally Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 968 (1988) ("Waiver is an intentional relinquishment of a known

145563, at *6-7 ("[J]udicial intervention is warranted when communications pose a serious threat to the fairness of the litigation process, the adequacy of representation and the administration of justice generally.")(citation omitted). It is established that "when a defendant contacts putative class members for the purpose of altering the status of a pending litigation, such communication is improper without judicial authorization." *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 253 (S.D.N.Y. 2005) (precluding enforcement of arbitration clauses imposed after commencement of litigation). Here, Defendants do not merely seek to curtail the claims of individual absent class members; they aim to end this litigation by chopping off its head. Defendants' communications with tenants – meant to fundamentally alter the status of the action by picking off any potential Named Plaintiffs – are necessarily improper.

Taken as a whole, judicial intervention is warranted because – in the context of this litigation – Defendants' communications with Plaintiffs and the class members (through Mr. Plaskin) are undeniably misleading and coercive and clearly have the "potential to chill participation" in the case. *See Agerbrink*, 2015 U.S. Dist. LEXIS 145563, at *28-30. Indeed, unless the Court grants the requested relief, Defendants' will continue their efforts to deprive the action of a Named Plaintiff and thereby thwart the litigation completely. This could leave Plaintiffs and the class without a remedy for Defendants' alleged violations of the warranty of

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right and should not be lightly presumed."). New York courts carefully guard against inadvertent, indefinite, or unknowing waivers. *See, e.g., Waldron v. Goddess*, 61 N.Y.2d 181, 183 (1984) ("It is settled that a party will not be compelled to arbitrate and, thereby, to surrender the right to resort to the courts, absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. The agreement must be clear, explicit and unequivocal and must not depend upon implication or subtlety."); *Levy v. N.Y. Majestic Corp.*, 3 A.D.2d 477 (1st Dept. 1957) (provision "purporting to waive the right to trial by jury must be strictly construed against the landlord who draws and proffers the lease containing such a clause."); *2475 Hughes Ave. Realty Corp. v. Gonzalez*, 28 Misc. 3d 266, 267 (Civil Ct. Bronx Cty. 2010) ("Because the right to trial by jury is so fundamental, courts should indulge every reasonable presumption against waiver and should strictly construe jury waiver clauses.").

Interference with these rights through illegitimate threats and intimidation is all the more pernicious.

habitability. Defendants' "one-sided, misleading" communications with Plaintiffs and potential class members "could easily have the effect of tainting the entire class and jeopardizing the entire litigation." *Longcrier v. HL-A Co., Inc.*, 595 F. Supp.2d 1218, 1227 n.12 (S.D. Ala. 2008) (citation omitted).

C. The Court Should Prohibit Defendants and Mr. Plaskin From Communicating With Any Plaintiff or Class Member on the Subject of this Action

1. A Limitation is Warranted Under Gulf Oil and its Progeny

Under *Gulf Oil*, "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." 452 U.S. at 101. *Gulf Oil* "does not, however, require a finding of actual harm; it authorizes the imposition of a restricting order to guard against the 'likelihood of serious abuses.'" *In re School Asbestos Litig.*, 842 F.2d 671, 683 (3d Cir. 1988)(citing *Gulf Oil*). As set forth in the cases cited above, courts frequently impose communications restrictions where a party's conduct threatens the administration of justice including by sabotaging class members' rights to freely participate in the action. *See, e.g., Alfaro*, 2009 N.Y. Misc. LEXIS 4738, at *12-15 (ordering that "neither defendants nor their attorneys may contact class members or potential class members about this action or the claims made therein without first obtaining the Court's permission"); *Urtubia*, 857 F. Supp.2d at 485 (prohibiting defendants not only from "retaliating, or threatening retaliation, directly or indirectly, against any potential class member" but also from "communicating with any potential class member regarding this lawsuit and its subject matter other than through the class member's counsel, if any, absent prior permission from the Court."); *Wright*, 2012 U.S. Dist. LEXIS 83505, at *15 (barring defendants "from communicating with potential class members regarding this litigation.").

Here, the need for a reasonable limitation on Defendants' and Mr. Plaskin's communications with Plaintiffs and class members is evident. Unless the Court exercises its authority to rein in Defendants' and Mr. Plaskin's abuses, Defendants will continue to threaten and intimidate Plaintiffs and other tenants and interfere with this action. Defendants' conduct will subvert both Article 9 and NY Real Property L. § 235-b and foreclose Plaintiffs' and the class' ability to seek relief.

In contrast, there is no reason for Defendants and their agents and surrogates to be contacting Plaintiffs and class members on the subject of this litigation. There is no reason for Defendants to be bullying or intimidating tenants in connection with this action, to be interfering with their quiet enjoyment of the premises, and to be threatening unlawful retaliation. (This is especially the case with Plaintiffs, who are undoubtedly represented parties). Plaintiffs' proposed order is "carefully drawn" to "limit[] speech as little as possible, consistent with the rights of the parties under the circumstances." *Gulf Oil*, 452 U.S. at 102.

2. *Even Assuming that Plaintiffs Must Satisfy the Standard for a Preliminary Injunction, Plaintiffs Easily Do So Here*

Assuming that the Court applies the standard for a preliminary injunction, Plaintiffs also satisfy that test. *See Borden*, 2014 N.Y. Misc. LEXIS 4345, at *8-14; *Clincy v. Galardi S. Enters., Inc.*, 2009 U.S. Dist. LEXIS 78845 (N.D. Ga. Sept. 2, 2009)(granting preliminary injunction where defendants retaliated against plaintiffs by terminating them for their involvement in the case).

First, Plaintiffs have a likelihood of success on the merits of her claim that Defendants have improperly contacted Plaintiffs and other tenants concerning this litigation. As set forth above, Defendants' communications (through Mr. Plaskin) were abusive and threaten the proper functioning of this litigation.

Second, there will be irreparable injury if the injunction is withheld. Defendants' and their agents will continue to intimidate tenants and this action will be seriously disrupted, if not thwarted altogether. *See Borden*, 2014 N.Y. Misc. LEXIS 4345, at *12-13. This would defeat the purposes of class actions under CPLR Article 9, including (i) allowing individuals to obtain relief on small value claims and (ii) fostering efficiency and judicial economy. The tenants would be cowed into submission and left without a remedy for Defendants' alleged breaches of the warranty of habitability.

Third, the balance of equities strongly weighs in favor of Plaintiffs and the class. *See Borden*, 2014 N.Y. Misc. LEXIS 4345, at *13-14. The burden on Defendants and their agents to refrain from improper communications (including intimidation and threats) concerning this lawsuit is minimal. Largely, the proposed order would simply reinforce that Defendants have to comply with the law, which they have apparently failed to take to heart. As discussed above, the proposed restrictions are reasonable and proper under the circumstances. The risk and harm from continued unilateral communications is far greater than any burden to be imposed on Defendants.

D. The Court Should Issue an Order Prohibiting Defendants From Retaliating Against Plaintiffs or Class Members in Any Manner, Including By Evicting them from the Complex or Terminating or Refusing to Renew Their Leases

In *Urturbia*, plaintiff alleged that defendant-employer induced a potential co-plaintiff to drop out of the case by threatening to report him to immigration. Plaintiff further alleged that several current employees told him that they were forced by defendant to sign affidavits on its behalf. In addition to imposing a restriction on the employer's communications with potential class members, the court issued an order prohibiting defendants from "retaliating, or threatening retaliation, directly or indirectly, against any potential class member for considering or asserting claims regarding Defendants' compliance with wage and hour laws." 857 F. Supp.2d at 484-85. *See*

also, e.g., *Clincy*, 2009 U.S. Dist. LEXIS 78845 (ordering defendants to immediately reinstate plaintiffs terminated for their involvement in the case and prohibiting defendants from retaliating or discriminating in any way against plaintiffs or other similarly-situated workers).

Similarly, here, retaliation is unlawful under the Landlord-Tenant Law as discussed above. Defendants' threats of illegal retaliation have intimidated Plaintiffs and class members and jeopardized the litigation. Further, if Defendants follow through on its threats to oust participants in the lawsuit, it would send a powerful message to the tenant class and put the icing on the cake. The damage will be done and it will be virtually impossible to resurrect the action. Accordingly, the Court should issue an order prohibiting Defendants and their agents and surrogates from threatening or retaliating against Plaintiffs and the class in any way, including by ending their tenancies. There is no burden on Defendants from an order requiring it to comply with the law. And it just may take such a direct order to get Defendants to take heed and to give the tenants a measure of comfort.

E. The Court Should Order Corrective Notice to the Class

An order restricting Defendants' future actions and communications is necessary, but not sufficient, to remedy the effects of its conduct in this action. Plaintiffs and other tenants have been deterred from participating in this action and the litigation is currently left without a willing Plaintiff. Unless Plaintiffs and the class members receive corrective notice, this state of affairs will be perpetuated and Defendants will reap the fruits of their conduct.

Where defendants engage in improper communications with class members, courts frequently order appropriate corrective notice. *See, e.g.*, *Alfaro*, 2009 N.Y. Misc. LEXIS 4738, at *15; *Carnegie*, 180 Misc.2d at 73-74; *Agerbrink*, 2015 U.S. Dist. LEXIS 145563, at *30-34; *Zamboni*, 2013 U.S. Dist. LEXIS 34201, at *11-12. Here, the Court should grant curative notice tailored to Defendants' violations and their effects on this litigation. The notice should inform

class members (a) that neither Defendants nor its agents or surrogates (including Mr. Plaskin) may harass, threaten, or retaliate against them in any way in connection with this action, such as by terminating or refusing to renew their leases and (b) that the Court has entered an Order prohibiting any such conduct. Further, the Court's Order restricting Defendants' communications with the class and prohibiting retaliation should be attached as an exhibit to the notice.

Courts have routinely issued corrective notice to address communications that might engender fears of retaliation. For example, in *Camp v. Alexander*, 300 F.R.D. 617 (N.D. Cal. 2014), the court granted curative notice where defendants a disseminated letter to class employees warning them that if employees participated in the suit, the business would close and they would lose their jobs, "a dramatic statement of the potential loss of employment should employees join the lawsuit." *Id.* at 624. As the court stated: "Regardless of whether the Letter was well intentioned, the communications' one-sidedness discourages participation.... Most importantly, the repeated warning that the practice would close and employees would lose their jobs if the litigation proceeded is highly inflammatory." *Id.* at 625. *See also, e.g.*, *Maddy v. GE*, Civ. No. 14-490, 2015 U.S. Dist. LEXIS 35686, at *6-10 (D.N.J. Mar. 15, 2015) (ordering curative notice where defendant disseminated a time-keeping email which "threatens discipline, up to and including termination, for the activity to which [class employees] would necessarily admit by joining the collective action."); *Wright*, 2012 U.S. Dist. LEXIS 83505, at *15-18 (corrective notice including strong statements about retaliation); *Li*, 270 F.R.D. at 518-19 (same);[6] *Belt*, 299 F. Supp.2d at 669-70, 676 (same).

[6] The notice in *Li* stated in part: "You are also notified that A Perfect Day Spa is prohibited by law from retaliating against you for participating in this class action. This means that A Perfect Day Spa may not reduce your work, fire you, report you to the IRS or immigration authorities, or otherwise threaten you in retaliation for participating in the case. If you believe you have been retaliated against in connection with

Defendants should be required to pay the costs of distributing notice (*see, e.g., Belt*, 299 F. Supp.2d at 670) and should do so both by mail and email (to the extent class members' email addresses are known). Further, Defendants should be required to prominently post the corrective notice in each of the Gateway buildings.

Finally, to counteract Defendants' efforts to stymie this litigation by depriving the class of a Named Plaintiff, the Court should also order that corrective notice take the form of direct contact between Plaintiffs' counsel and potential class members. *See, e.g., Roslies-Perez v. Superior Forestry Serv., Inc.*, 652 F. Supp. 2d 887, 892 (M.D. Tenn. 2009). This form of relief is frequently ordered in National Labor Relations Act cases,[7] and, by analogy, is appropriate here. Plaintiffs submit that such relief is necessary in this case given the pervasive and insidious nature of Defendants' communications with Plaintiffs and class members, and asks the Court to order Defendants' cooperation in securing meetings with Defendants' tenants.

F. The Court Should Authorize Discovery from Defendants and Mr. Plaskin Regarding Their Communications With Class Members and, Following Such Discovery, Amendment of the Complaint to Include Claims of Retaliation

As set forth above, Defendants' and Mr. Plaskin's conduct constitutes unlawful retaliation and harassment and gives rise to several potential causes of action. *Cf. Torres v. Gristede's Operating Corp.*, 628 F. Supp.2d 447, 471-75 (S.D.N.Y. 2008)(granting summary judgment to plaintiffs on retaliation claim premised on defendant's assertion of retaliatory counterclaims in the action). Accordingly, the Court should allow Plaintiffs to take discovery from Defendants and Mr.

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this lawsuit, you should contact a lawyer. If you choose, you may contact attorneys for Plaintiffs in the class action."

[7] *See, e.g., Montgomery Ward & Co. v. NLRB*, 339 F.2d 889, 894 (6th Cir. 1965) (where employer attempted to dissuade employees from union affiliation, granting union access to address employees); *Monfort, Inc. v. NLRB*, 965 F.2d 1538, 1548 (10th Cir. 1992); *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952 (2d Cir. 1988); *Teamsters Local 115 v. NLRB*, 640 F.2d 392, at *24-26 (D.C. Cir. 1981); *J. P. Stevens & Co. v. NLRB*, 623 F.2d 322, 328 (4th Cir. 1980).

Plaskin regarding their communications with each other and with Plaintiffs and potential class members and related conduct. Such discovery may include an in-court examination. Following a reasonable discovery period, the Court should allow Plaintiffs to amend the complaint to assert retaliation claims against Defendants and Mr. Plaskin. *Cf.* CPLR 3025(b)(party may, with leave of court, supplement the pleadings to set forth post-filing transactions or occurrences, and leave shall be freely given).

G. The Court May Impose Other Sanctions in its Discretion

Defendants' conduct may also warrant other sanctions. For example, the Court may award Plaintiffs all reasonable attorney's fees and costs associated with this motion including those incurred in relation to the corrective notice. *See Belt*, 299 F. Supp.2d at 670; *see also* 22 NYCRR § 130-1.1 (discussed in n.2, *supra*).

CONCLUSION

The Court has an obligation to protect Plaintiffs and the class members from coercive and misleading communications and to preserve the integrity of this action. Through a known intermediary, Defendants have engaged in abusive litigation conduct which threatens the rights of the tenant class and jeopardizes the functioning of the litigation.[8] The Court should step in and correct these abuses by granting the relief requested in this Motion.

[8] Even in the unlikely event that Mr. Plaskin was operating entirely independently and without Defendants' actual or constructive knowledge or acquiescence, it would not affect the bulk of the relief requested in this motion. Defendants would still benefit from his conduct. Regardless, pursuant to its inherent powers the Court possesses broad authority to regulate the conduct of third parties who subvert the administration of justice.

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