UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ALESSANDRO DEMARCO, AMANDA BAYER, DIGNA GUTIERREZ, ROBERT LOPOSKY, RICHARD KEMP, and EBONY COOLEY on behalf of themselves and all others similarly situated, Plaintiffs, v. AVALONBAY COMMUNITIES, INC., ABC CORPORATIONS 1-10, and JOHN DOES 1-10, Defendants.	:	Civil Action No.: 15-628 (JLL)(JAD)

BRIEF OF PLAINTIFFS IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

LITE DEPALMA GREENBERG, LLC
Bruce D. Greenberg
Mayra V. Tarantino
570 Broad Street, Suite 1201
Newark, NJ 07102
Telephone: (973) 623-3000
Facsimile: (973) 623-0858
bgreenberg@litedepalma.com
mtarantino@litedepalma.com

Interim Co-Lead Counsel for Plaintiffs
(Other Co-Lead Counsel on Signature Page)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTORY STATEMENT

As stated in Plaintiffs' Consolidated Amended Complaint ("CAC") (*see* accompanying Declaration of Bruce D. Greenberg ("Greenberg Decl."), Exhibit A (Docket Entry No. 26)), on January 21, 2015, a fire occurred at the apartment complex known as Avalon at Edgewater, located in Edgewater, New Jersey. The fire completely destroyed the Russell Building, a structure of several hundred apartments that comprised part of the complex. Fortunately, there were no personal injuries, but everyone who lived in that building lost essentially everything in their units (including, in some instances, their pets). That same fire adversely affected those who lived in the hundreds of apartments in the River Building, the other component of the Avalon at Edgewater complex, as well. Living conditions there have been intolerable, including a pervasive odor caused by the fire, and many tenants have had to incur the expense of relocation as a result.

This is a classic case for class certification. Each of the hundreds of persons who lived in each building suffered economic harm from the same fire, which Plaintiffs allege was caused by the negligence of Defendant AvalonBay Communities, Inc. ("AvalonBay"), the builder, owner, and manager of the complex. Whether Defendant was negligent is, by itself, a predominant common issue for trial. The named Plaintiffs include tenants of both the Russell and River

buildings, so there are typical and adequate class representatives for both buildings.

Finally, a class action is superior to multiple individual trials, each of which would require the same expert and other evidence. The class is easily ascertainable from AvalonBay's own leasing records. Accordingly, Plaintiffs respectfully submit that the Court should grant their motion for class certification.

STATEMENT OF FACTS[1]

A. The Avalon at Edgewater Complex

As noted above, the Avalon at Edgewater is a complex consisting of two buildings, the Russell and River Buildings. The two buildings contained a total of 408 luxury apartment units, which rented for approximately $2,100-$3,195 per month. Over 1,000 people were living at the complex as of January 2015. AvalonBay has a standardized lease that it has used for all apartments at the complex. That form of lease identifies, as to each unit, the names of both "Residents" (defined in the lease as parties to that lease) and "Occupants" (other persons who live in the apartment).

B. The Destructive January 21, 2015 Fire

On January 21, 2015, the Russell Building caught fire. The fire was caused by AvalonBay maintenance workers who were using a highly dangerous acetylene torch while doing plumbing repairs inside the wall of in the Russell Building.

[1] The facts are largely drawn from the CAC, Docket Entry No. 26.

Those workers were reportedly not licensed to perform the work that they were doing.

The fire was first reported at 4:22 P.M. on January 21, a time at which many tenants were at work or otherwise not at home. Evidently in denial at first, Defendant did not take prompt action in response to the fire. For example, neither the AvalonBay workers who caused the fire nor anyone else at AvalonBay ever called 9-1-1. And AvalonBay did not notify tenants about the fire until two hours later when, at about 6:25 P.M., Defendant sent a blast e-mail stating that there was merely a "minor fire" at the complex.

Despite Defendant's characterization of the fire in that e-mail as "minor," tenants were not permitted to enter the complex to save their belongings, pets, or other property. Instead, as the e-mail stated, the Fire Department had mandated the total evacuation of the Russell Building. The Mayor of Edgewater stated at a news conference late on January 21 that approximately 500 residents had been permanently displaced and about another 520 residents from other buildings had been temporarily displaced as a result of the fire.

The fire was, thus, far from "minor." Five hundred firefighters from 35 towns fought the inferno well into the night of January 21. Ultimately, the fire totally destroyed the Russell Building, and the Borough of Edgewater later required that the remains of that building be demolished. Residents of that

building lost virtually all of their belongings. Over 225 apartments were reduced to rubble.

Those who lived in the River Building, all of whom Defendant has admitted were forced out of their homes for at least 48 hours (*See* Defendant's Answer to Plaintiffs' Request for Admission #24, Greenberg Decl., Exhibit B), were later allowed to return there. However, a pervasive foul smell, potentially from toxic materials, has pervaded the River Building. Many tenants have been forced to move out (*See* Defendant's Answers to Interrogatories, Greenberg Decl., Exhibit C, state that 74 units in the River Building have been vacated since the date of the fire, and that 69 leases in that building have been terminated in the time since the fire occurred, *see* Answers to Interrogatories #9 and 10), and all persons who lived there have suffered inconvenience and other damage. Moreover, some tenants of the River Building, including Plaintiffs DeMarco and Bayer, lost property that was located in storage units in the Russell complex.

C. <u>Defendant's Pattern of Negligent Conduct</u>

Defendant's failure to timely call 9-1-1 or notify tenants of this fire was only the latest manifestation of AvalonBay's negligent conduct at this property and elsewhere. AvalonBay's construction choices contributed to the rapid spread of the fire and the total devastation of the Russell Building. Edgewater's Fire Chief said at a news conference that the fire swept through the complex quickly because

of its lightweight wood construction and truss-style roof. It has also been reported that the apartments were not constructed with adequate sprinklers.

Defendant has an extensive history of disastrous fires at this property and others. In 2000, a fire that local fire officials labeled "the worst fire [they] had seen in decades" broke out at this very property and caused mass evacuations. AvalonBay reportedly paid significant sums to settle litigation arising out of that fire, but then, according to published reports, "got back to work with the same lightweight wood construction they had been using—faster to build with, but also more flammable."

A 2012 fire at an AvalonBay property on Long Island resulted in the destruction of that building's roof. Another apartment complex constructed by AvalonBay in Massachusetts was destroyed by a fire whose spread was later determined to have been related to Defendant's faulty construction. And, AvalonBay has repeatedly been fined by governmental agencies for fire code violations and other "lax fire protection" at its developments.

D. <u>The Legal Proceedings Following the Fire</u>

Plaintiffs Robert Loposky and Richard Kemp, both of whom were tenants at the Russell Building, filed a putative class action Complaint in the Superior Court of New Jersey, Bergen County, on January 26, 2015. Defendant removed that case to this Court on February 20, 2015. In the interim, two other putative class

action cases, *DeMarco v. AvalonBay Communities, Inc*., No. 15-628(JLL)(JAD), whose named Plaintiffs were River Building tenants, and *Gutierrez v. AvalonBay Communities, Inc*., No. 15-1069(JLL)(JAD), filed by another Russell Building tenant, were filed as original actions in this Court.

Plaintiffs in the three cases moved jointly to consolidate the cases and to appoint as interim co-lead counsel the three firms that filed those Complaints. This Court granted both consolidation and the appointment of interim co-lead counsel. Thereafter, a putative class action that was filed in Superior Court by two tenants on behalf of River Building tenants only, *Voronov v. AvalonBay Communities, Inc*., No. 15-2740(JLL)(JAD), was removed to this Court by AvalonBay.

The docket of this Court shows no other cases involving this fire. According to Defendant's answer to Plaintiffs' interrogatory #3 (*See* Greenberg Decl., Exhibit C) and Plaintiffs' own research, there are about a dozen individual actions pending in Bergen County Superior Court arising out of this fire.[2] Those actions encompass approximately 49 apartments, just 12% of the total at the Avalon.

AvalonBay has offered tenants some limited compensation for their damages

[2] In addition, two individual actions for personal injuries have been filed in Superior Court. The consolidated actions in this Court, however, expressly exclude personal injury claims, so those two state court personal injury cases have no bearing on whether classes should be certified here.

through a "claims process." That claims process does not afford treble damages, as class members might recover in this action, and imposes steep discounts for depreciation, burdensome requirements to provide documentation or proof of losses, and the like. Defendant also requires tenants who settle their claims to sign general releases.

Given those onerous terms, tenants of only 26 Russell and 3 River apartments have settled their claims in that process, according to Defendant's answer to Plaintiffs' interrogatory #1 (*See* Greenberg Decl., Exhibit C) and Plaintiffs' own research. Those figures represent less than 12% of the total number of Russell units occupied at the time of the fire, only 2% of the total number of occupied River units, and just over 7% of all the units at Avalon at Edgewater. The vast bulk of the class members are looking to this litigation for relief.

PROPOSED CLASS DEFINITION

Plaintiffs propose two classes: (a) All persons who were, as of January 21, 2015, tenants of any apartment in the Russell Building in the complex known as Avalon at Edgewater, or were occupying any apartment in the Russell Building under the rights of any tenant, and (b) All persons who were, as of January 21, 2015, tenants of any apartment in the River Building in the complex known as Avalon at Edgewater, or were occupying any apartment in the River Building

under the rights of any tenant.

ARGUMENT

THE COURT SHOULD GRANT CLASS CERTIFICATION

For a court to certify a class action, Plaintiffs must satisfy the four requirements of Rule 23(a), and one of the subparts of Rule 23(b), by a preponderance of the evidence. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008). The court may resolve factual or legal disputes only "when necessary to determine whether a class certification requirement is met," *id.* at 316, and the court should consider merits inquiries only to the extent "they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1195 (2013). Plaintiffs here seek class certification under Rules 23(a) and (b)(3).

A. Each Class, Numbering Several Hundred, is Sufficiently Numerous

Plaintiffs satisfy Rule 23(a)'s numerosity requirement where "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "No minimum number of Plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of Plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001).

"Joinder of a class that numbers in the hundreds will normally be found

impracticable, although the numerosity requirement is usually satisfied with much smaller classes." *Schwartz v. Avis Rent a Car Sys*., LLC, 2014 U.S. Dist. LEXIS 121322, at *20 (D.N.J. Aug. 28, 2014). The fact that all class members lived at the same complex does not make joinder more practicable. *See Mehl v. Canadian Pacific Railway*, 227 F.R.D. 505, 510 (D.N.D. 2005) (in single incident mass catastrophe case, rejecting contention that geographic proximity of class members made joinder practicable).

Here, the CAC alleges that there were hundreds of persons in each of the affected buildings, and the total number of apartments at the complex exceeds 400. AvalonBay's own records, including the signed, standard form leases that list the names of both "Residents" and "Occupants" of each apartment (an example of which is attached to the Greenberg Decl. as Exhibit D), will confirm those facts.

In *In re Paulsboro Derailment Cases*, 2014 U.S. Dist. LEXIS 115542 (D.N.J. Aug. 20, 2014), another single incident mass catastrophe case, numerosity was lacking because the Plaintiffs failed to show that enough class members who suffered damage remained after deducting for those who had settled their claims, filed their own individual lawsuits, or availed themselves of benefits offered by the Defendants there. *Id*. at *28-41. Here, even after excluding the relatively small number of tenants who have filed individual actions or settled their claims, hundreds of viable class members remain in each of the two proposed classes.

AvalonBay's answers to Plaintiffs' requests for admission, #4 and 5 (*See* Greenberg Decl., Exhibit B), concede that there are at least 100 units in each building that have neither brought individual lawsuits nor settled their claims with Defendant. Each of the classes thus far exceeds the 40 members that the Third Circuit in *Stewart* found to presumptively satisfy the numerosity requirement. *See also Chemi v. Champion Mortg. Co.*, 2:05-cv-1238 (WHW), 2009 U.S. Dist. LEXIS 44860, at *17-18 (D.N.J. May 26, 2009) ("class of 40 or more raises the presumption that numerosity requirement met").

And, unlike in *Paulsboro*, where it was not necessarily clear who sustained damage, it is self-evident that every occupant of the Russell Building, which was totally destroyed and later demolished by government order, suffered losses. Similarly, every person who lived at the River Building has been damaged, among other ways, by the temporary displacement that followed the fire, and the pervasive odor from the fire that has pervaded that building, and many of those tenants have had to incur the costs of moving elsewhere. Defendant's answers to interrogatories #9 and 10 state that 74 units were vacated and 69 leases were terminated in the River Building since the date of the fire. (*See* Greenberg Decl., Exhibit C.)

Accordingly, numerosity is present here.

B. <u>Commonality, Typicality and Adequate Representation Are Satisfied</u>

Plaintiffs also meet Rule 23(a)'s remaining requirements—commonality,

typicality, and adequacy. The typicality and commonality analyses "tend to merge" into a single inquiry, *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982), and the adequacy requirement "tends to merge" with commonality and typicality. *Amchem Prods v. Windsor*, 521 U.S. 591, 626 n.20 (1997). *Accord Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) ("The concepts of commonality and typicality are broadly defined and tend to merge").

Commonality is shown if the named plaintiff "share[s] at least one question of fact or law with the grievances of the prospective class." *Baby Neal*, 43 F.3d at 56. Typicality addresses whether the class representative's claims or defenses resemble those of the class. *Id*. at 57-58. Finally, adequacy concerns whether the class representative and class counsel will sufficiently protect class members' interests. *See In re Prudential Ins. Co. of America Sales Practices Litig.*, 148 F.3d 283, 312 (3d Cir. 1998) (adequacy requirement tests counsel's qualifications and reveals conflicts of interest between named parties and the class).

Plaintiffs satisfy Rule 23's commonality and typicality requirements because class members have in common, among many other questions discussed below, the central issue of whether AvalonBay's negligence caused the fire and class members' resulting damages. Even a single common question may be sufficient to satisfy commonality. *See In re Merck & Co.*, No. 08-2177, 2012 U.S. Dist. LEXIS 138080, at *10 (D.N.J. Sept. 25, 2012) ("[T]he commonality requirement will be

satisfied if the named Plaintiffs share at least one question of fact or law with the grievances of the prospective class") (quoting *Baby Neal*, 48 F.3d at 56)); *In re Honeywell Int'l Sec. Litig.*, 211 F.R.D. 255, 260 (D.N.J. 2002) ("The commonality requirement will be satisfied if the named Plaintiffs share at least one question of fact or law with the grievances of the prospective class") (citation omitted).

As Judge Kugler noted in finding commonality for a class of individuals in *Paulsboro*, "[t]he question of Defendant['s] negligence is common to all class members." *Paulsboro*, 2014 U.S. Dist. LEXIS 115542, at *43. That principle is merely a more specific application of the rule that common questions are present where class members' claims arise out of a common course of conduct by the Defendant. *Prudential*, 148 F.3d at 310. Thus, other single incident mass catastrophe cases have found that commonality exists. *E.g.*, *Mehl*, 227 F.R.D. at 510-11 (toxic spill resulting from railway accident); *Black v. Rhone-Poulenc, Inc.*, 173 F.R.D. 156, 161 (S.D. W.Va. 1996) (release of toxic gases from industrial facility).

Similarly, "[a]s the named Plaintiffs and class members all seek to recover based upon negligence theories for damages sustained at the same time as a result of the same accident, typicality exists." *Paulsboro*, 2014 U.S. Dist. LEXIS 115542, at *49. That was so even though the named Plaintiffs in *Paulsboro* lacked documentation of their damages. *Id.*, at *49-50; *see also Schwartz*, 2014 U.S. Dist.

LEXIS 121322, at *40 ("Typicality lies where there is a strong similarity of legal theories or where the claims of the class representatives and the class members arise from the same alleged course of conduct by the Defendant.").

As to adequacy, Plaintiffs' interests in recovering damages, and their legal theories, are identical to the interests and legal theories of class members. Absent an actual conflict of interest between the class representatives on the one hand and class members on the other hand, adequacy is satisfied. *In re Pet Food Products Liab. Litig.*, 629 F.3d 333, 348 (3d Cir. 2010). There is no such conflict here. Plaintiffs Loposky, Gutierrez, and Cooley, as former Russell Building tenants, and Plaintiffs DeMarco and Bayer, as tenants of the River Building who have since moved, have precisely the same interests as do other tenants of those buildings.

In considering the adequacy of Plaintiffs' counsel, Rule 23(g) instructs the court to consider: (1) the work counsel has done in identifying or investigating potential claims; (2) counsel's experience in handling class actions and the types of claims asserted; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class. Many of these same factors underlay the Court's decision to appoint Plaintiffs' counsel as interim co-lead counsel. *See* Docket Entry No. 18. Those counsel have only done more work since then.

The firm résumés of Plaintiffs' counsel demonstrate their experience in and

knowledge of class actions, and the law firms are committed to devoting the necessary resources to this matter. For all those reasons, adequacy, like commonality and typicality, is satisfied here.

C. Common Issues of Law and Fact Predominate

Rule 23(b)(3)'s predominance inquiry asks whether the proposed class is "sufficiently cohesive to warrant adjudication by representation, and assesses whether a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." *Sullivan v. DB Inv., Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) (internal quotation marks omitted). But while this inquiry involves examining the elements of a plaintiff's claims "through the prism of Rule 23," *Summerfield v. Equifax Info. Servs. LLC*, 264 F.R.D. 133, 142 (D.N.J. 2009) (internal quotation marks omitted), Rule 23(b)(3) "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof." *Amgen*, 133 S. Ct. at 1196 (emphasis in original, internal quotation marks and brackets omitted). Rather, Rule 23(b)(3) merely requires "that common questions *predominate* over any questions affecting only individual class members." *Id.* (emphasis in original, quotation marks omitted). *See also Prudential*, 148 F.3d at 315 ("[T]he presence of individual questions does not *per se* rule out a finding of predominance.").

The issue of whether Defendant was negligent, by itself, predominates over

any individual issues that AvalonBay might conjure up. But other questions, such as (a) whether the buildings were constructed in accordance with applicable codes, (b) if they were, whether that represents a defense to liability, and (c) whether the failure of AvalonBay to call 9-1-1 and/or Defendant's unreasonable delay in notifying tenants about the fire, proximately caused damage to Plaintiffs and class members, are also common and add to the predominance of common issues.

The CAC alleges negligence, nuisance, and consumer fraud. The elements of negligence are a duty of care owed by defendant to plaintiff, a breach of that duty, and injury proximately caused by that breach. *E.g.*, *Polzo v. Essex Cty.*, 196 N.J. 569, 584 (2008). Each of those elements applies (or does not apply) in exactly the same way to each tenant.

The same is true of the elements of private nuisance. Private nuisance is an invasion that is "either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." *Birchwood Lakes Colony Club v. Medford Lakes*, 90 N.J. 582, 592 (1982). The CAC alleges that Defendant's misconduct satisfies any or all of those tests, and whether that contention is correct will be the same for every tenant.

Finally, consumer fraud consists of unlawful conduct by the Defendant, ascertainable loss by the plaintiff, and a causal connection between the two.

Schwartz, 2014 U.S. Dist. LEXIS 121322, at *22-23. Again, these elements are the same as to every tenant, since the same allegedly unlawful conduct by AvalonBay caused the same types of ascertainable loss to each tenant. As the Third Circuit has stated, the focus of the "inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Sullivan*, 667 F.3d at 298.

Moreover, AvalonBay's defenses likewise will apply classwide and further enhance the predominance of common questions over any individual issues. *See In re Prudential Ins. Co. of America Sales Practices Litig*., 962 F. Supp. 450, 512 (D.N.J. 1997) ("Certification would be justified if only to prevent relitigating [affirmative] defenses over and over."), *aff'd in part, rev'd in part on other grounds*, 148 F.3d 283 (3d Cir. 1998) (citation omitted). For all these reasons, courts in single incident mass catastrophe cases alleging negligence and/or nuisance have easily found that common issues predominate, particularly where, as here, any potential claims for personal injuries are excluded.[3]

The fact that individual class members' damages may vary in amount does not defeat predominance. *Paulsboro*, 2014 U.S. Dist. LEXIS 115542, at *43 ("The need for individual damages determinations does not, by itself, defeat class

[3] *E.g*., *Watson v. Shell Oil Co*., 979 F.2d 1014, 1016-22 (5th Cir. 1992) (oil refinery explosion); *Sterling v. Velsicol Chem. Corp*., 855 F.2d 1188, 1196-98 (6th Cir. 1988) (chemical spill); *Black*, 173 F.R.D. at 158 (toxic gas leak); *Sala v. National R.R. Passenger Corp*., 120 F.R.D. 494, 499 (E.D. Pa. 1988) (train derailment).

certification …."); *see also Sterling*, 855 F.2d at 1197; *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 388-89 (D. Colo. 1993) (both to the same effect as *Paulsboro*). Individual issues of damages can be handled in a claims administration process that would follow the end of this litigation. *See City Select Auto Sales, Inc. v. David Randall Assocs., Inc.*, 296 F.R.D. 299, 322 (D.N.J. 2013) ("an eventual distribution of any recovery … can be easily handled in the claims administration process"); *see also Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 671 (7th Cir. 2004) ("it may be that if and when the Defendants are determined to have violated the law separate proceedings of some character will be required to determine the entitlements of the individual class members to relief," but that would not defeat class certification).

In *Florence v. Board of Chosen Freeholders*, 2008 U.S. Dist. LEXIS 22152, at *38-39 (D.N.J. March 20, 2008), *rev'd on other grounds*, 621 F.3d 296 (3d Cir. 2010), Judge Rodriguez discussed various ways that courts have dealt with individual damage issues in the class certification context:

> (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

Id. (citation omitted). This Court likewise has available these and other tools to deal with any potential individualized issues related to class members' damages.

See also Glazer v. Whirlpool Corp. (In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.), 722 F.3d 838, 860-861 (6th Cir. 2013), *cert. denied sub nom. Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014) ("A class may be divided into subclasses, Fed. R. Civ. P. 23(c)(4)-(5), or, as happened in this case, 'a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings.'") (citing *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1437 (2013)). Thus, at a minimum, the Court should grant class certification as to liability. *See* Fed. R. Civ. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues.").

As regards this class of individual persons, none of whom suffered personal injury or seek damages for business losses, common issues of law and fact unquestionably predominate. Class certification should be granted.

D. <u>A Class Action is the Superior Method of Adjudication</u>

In addition to predominance, Rule 23(b)(3) requires "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The rule asks [a court] to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *Georgine v. Amchem Prods.*, 83 F.3d 610, 632 (3d Cir. 1996) (internal quotation marks and citation omitted).

Rule 23(b)(3) states that "matters pertinent to" an analysis of superiority

include "the class members' interests in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing a class action." All of those considerations weigh in favor of class treatment, and there is no alternative that is superior to class litigation in this Court.

Class members have little interest in bringing individual actions. Doing so means that each tenant must hire his or her own counsel, respond individually to discovery, and otherwise shoulder the full burden of litigation that, in a class case, is borne by the class representatives on behalf of everyone. *See, e.g.*, Federal Judicial Center, *Manual for Complex Litigation (Fourth*), §21.41 (2010) (noting that absent class members are normally not subject to discovery). Indeed, only about 12% of all apartments have brought their own individual cases, totaling only about a dozen cases, so that the "extent" of such cases is minimal. By contrast, these Rule 23(b)(3) opt-out classes would cover all putative class members who do not timely exclude themselves.

It is desirable to concentrate the litigation in this Court, as both sides have recognized (Plaintiffs by filing two of the Complaints here, and AvalonBay by removing the *Loposky* and *Voronov* actions from state court to this Court).

Litigating the issues once in this Court, rather than multiple times in different venues, also advances judicial efficiency and reduces the expense to the parties, especially the cost of expert witnesses for Plaintiffs in separate cases.

Finally, there are no unusual difficulties in managing this case. "The Court must query not whether there will be any manageability problems, but whether reasonably foreseeable difficulties render some other method of adjudication superior to class certification." *Schwartz*, 2014 U.S. Dist. LEXIS 121322, at *36-37. This Court is highly experienced in managing complex litigation, and the present case poses no foreseeable manageability problems.

There are no realistic alternatives to class litigation. AvalonBay's claims process offers only limited recompense, not the full compensation (including treble damages under the Consumer Fraud Act) that this litigation affords. As a result, relatively few tenants have settled claims in that process. *Cf. Varacallo v. Mass. Mut. Life Ins. Co.*, 332 N.J. Super. 31, 52 (App. Div. 2000) (defendant's internal claims process was not superior to class action treatment); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 415 (S.D.N.Y. 2015) (rejecting argument that defendant's offer of a refund was superior to class suit since it did not offer multiple damages as did the consumer fraud statute at issue there). Besides, such a claims process is not a means of "adjudication" within the meaning of Rule 23(b)(3) and therefore could not be considered in a superiority analysis even if the claims process offered

all the recovery available in court. *Scotts*, 304 F.R.D. at 415 (only alternatives that constitute "adjudication" can be considered in a superiority analysis).

Renters' insurance, for those tenants who purchased it, has an artificially low cap and is not intended to cover all damages that tenants suffer when their home and all its contents are destroyed, as occurred here. Finally, as discussed above, the fact that only about 12% of the several hundred affected tenants have filed individual actions shows that individual lawsuits are not superior to a class action.[4]

E. <u>The Class is Ascertainable</u>

Certified classes must be "objectively ascertainable." *E.g.*, *Carrera v. Bayer Corp.*, 727 F.3d 300, 305 (3d Cir. 2013). In *Paulsboro*, the court found that classes of individual Plaintiffs affected by the rail accident and chemical leak there were ascertainable. *Paulsboro*, 2014 U.S. Dist. LEXIS 115542, at *20-22. Judge Kugler rejected defense arguments that "no complete, reliable record of all evacuees exists, nor is there an independent method of verifying whether individuals and businesses actually suffered lost income, although they may have addresses within the well-defined affected areas." *Id.*, at *21.

Here, where every class member had an address "within the well-defined

[4] Class certification is also appropriate for another reason: to protect putative class members from attempts by Avalon to "pick them off" by extending individual settlements. Though Plaintiffs believe that such individual offers would not moot the class claims made here, *see Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004), they nevertheless file this motion in an abundance of caution to ensure that the interests of putative class members are fully protected.

affected areas" of Avalon at Edgewater, the class is far more readily ascertainable. Defendant has lease records that identify all the occupants of each apartment. As to the Russell Building, which was completely destroyed, there is no doubt that every resident of that building suffered damage. Likewise, everyone in the River Building has been adversely affected by, among other things, being displaced from their homes after the fire, and the pervasive stench that the fire caused.

In connection with ascertainability, "[t]he controlling requirement is not that no fact-finding be necessary, but that extensive individualized fact-finding cannot be required if a class is to be readily ascertainable." *Id*., at *21 (emphases in original); *see also Byrd v. Aaron's, Inc*., 784 F.3d 154, 170 (3d Cir. 2015) (where "the location of household members is already known (a shared address with one of the 895 owners and lessees identified by the [Plaintiffs])," class was sufficiently ascertainable, since "[t]here will always be some level of inquiry required to verify that a person is a member of a class"). No extensive fact-finding is required to determine who the tenants at Avalon at Edgewater were as of January 21, 2015, or who were "occupants" who lived with them, persons whose names Defendant collects just as it collects names of tenants. (*See* Greenberg Decl., Exhibit D (form lease that requires identification of "occupants" as well as "tenants")).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully submit that their motion for class certification should be granted.

Dated: June 8, 2015

LITE DEPALMA GREENBERG, LLC

s/ Bruce D. Greenberg
Bruce D. Greenberg
Mayra V. Tarantino
570 Broad Street, Suite 1201
Newark, NJ 07102
Telephone: (973) 623-3000
Facsimile: (973) 623-0858
bgreenberg@litedepalma.com
mtarantino@litedepalma.com

CHIMICLES & TIKELLIS LLP
Joseph G. Sauder
Benjamin F. Johns
One Haverford Centre
361 West Lancaster Avenue
Haverford, PA 19041
Telephone: (610) 642-8500
Facsimile: (610) 649-3633
JGS@chimicles.com
BFJ@chimicles.com

WILENTZ, GOLDMAN & SPITZER P.A.
Daniel R. Lapinski
Philip A. Tortoreti
90 Woodbridge Center Drive
Woodbridge, NJ 07095
Telephone: (732) 855-6066
Facsimile: (732) 726-4735
dlapinski@wilentz.com
ptortoreti@wilentz.com
Interim Co-Lead Counsel for Plaintiffs