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In the
Supreme Court of the United States

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ENRIQUE SUAREZ, HAMIDA MOUMOUNI, DIOGENES ABREU,
Petitioners,

— v. —

MARJORIE CHARRON, THEODORE CHARRON, ANDRES MARES-
MURO, RAYMOND ANDREW STAHL-DAVID, and KIM POWELL,
on Behalf of Themselves and All Others Similarly Situated,
BUYERS AND RENTERS UNITED TO SAVE HARLEM, ANTHONY
CASASNOVAS, KAREN FLANNAGAN, TRACEY MOORE, RUSSELL
TAYLOR, DIANE TRUMMER, and ALL OTHERS SIMILARLY
SITUATED, JOEL WIENER, PINNACLE GROUP NY LLC, PINNA-
CLE GROUP CORPORATION, PINNACLE GROUP, LLC,
Respondents.

◆
On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

◆

PETITION FOR A WRIT OF CERTIORARI

◆

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QUESTIONS PRESENTED

1. In *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), this Court appeared to hold that, where a class action settlement distributed its benefits unequally among different subgroups of class members, the district court was required both to determine whether that differential recovery bore a reasonable relationship to the strength of the subgroups' claims, and to appoint subclasses with separate counsel to aid it in that process. Did the Second Circuit establish a precedent in this case that eviscerated those principles by holding them binding only in cases where the proponents of a class action settlement sought settlement approval simultaneously with class certification, and optional in cases where the court had already, i.e., prior to the motion for approval of the settlement, issued an order certifying the action as a class action?
2. In determining that the class action settlement in this case was fair, adequate, and reasonable under the standards of *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), did the Second Circuit incorrectly assess the importance of the Class Counsel's decision not to conduct any merits discovery, and did it err by concluding that this Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) posed an excessive risk of decertification?

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REPORTED OPINIONS BELOW

Charron v. Wiener is reported at 731 F.3d 241 (2d Cir. 2013) and reprinted in the Appendix ("App.") at App. 1.

Charron v. Pinnacle Group N.Y. LLC is reported at 874 F. Supp. 2d 179 (S.D.N.Y. 2012) and reprinted at App. 25.

Charrons v. Pinnacle Group NY LLC, 269 F.R.D. 221 (S.D.N.Y. 2010)

Buyers and Renters United to Save Harlem v. Pinnacle Group NY LLC, 575 F. Supp.2d 499 (S.D.N.Y. 2008)

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 30, 2013. On November 19, 2013, the Second Circuit denied a timely petition for rehearing and rehearing en bank. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure ("FRCP"), Rule 23 (App. 92)

Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S. Code § 1962 (App. 97).

New York Consumer Protection Act ("NYCPA"), New York General Business Law § 349 (App. 98)

STATEMENT OF THE CASE

Petitioners respectfully submit this Petition for *certiorari* to the Second Circuit of the decision in *Charron v. Wiener*, 731 F.3d 241 (2d Cir. 2013) (App. 1) (the “Second Circuit decision” or “*Charron*”), which affirmed the decision in *Charron v. Pinnacle Group NY LLC*, 874 F. Supp. 2d 179 (S.D.N.Y. 2012) (App. 25) (the “district court decision”) that approved settlement of this class action. Petitioners are class members who objected to the settlement.

This case poses the question of whether a district court is required to create subclasses, and appoint independent counsel for them, when a proposed class action settlement trades away the admittedly viable claims of at least 77% of the class members (including all the named class representatives) in favor of a minority of class members possessing arguably stronger claims. As the district court itself acknowledged, that is precisely what happened here:

... Class Counsel engaged in vigorous negotiations with Defendants over *otherwise viable* pre-2004 and Prior Owner Claims, but this was eventually a point on which Class Counsel had to yield in exchange for agreement on the comprehensive package of compensation and structural reform contained in this Settlement.

App. 82 (emphasis added).

The Second Circuit decision does violence to the salutary principle established by this Court’s decisions in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527

U.S. 815 (1999). These decisions require subclassing and appointment of counsel whenever there is a significant disparity in the benefits afforded different subgroups of class members – even when (indeed, because) the different subgroups possess claims of varying strength. *Charron* also departs from prior precedent in the same Circuit, including *Literary Works in Elec. Databases v. Thompson Corp.*, 654 F.3d 242 (2d Cir. 2011), which was fully consistent with *Amchem* and *Ortiz*.

The *Charron* court held that a fundamental conflict among subgroups over distribution of settlement funds – sufficient to require appointment of separate counsel if settlement approval had been sought simultaneously with class certification – would not require separate counsel because the class certification had preceded the settlement by a significant interval. Under *Charron*, notwithstanding *Amchem* and *Ortiz*, so long as time has passed between the district court's decision approving counsel and certifying the class and Class Counsel's proposal of a settlement that affords substantial recovery to a minority subgroup of class members (and little or none to the rest of the class), the settlement can be approved without giving the disadvantaged class members an opportunity to be heard through their own separate counsel in connection with that proposal. The Second Circuit reached this result even though Class Counsel engaged in *no* merits discovery and never sought to justify the disparity of recoveries in terms of the relative strength of the claims. Lacking any basis in the record to do so, the district court itself made no findings on that question. The Second Circuit's decision thus permits the wholesale evisceration of perfectly "viable" (and valuable) claims of thousands

of class members – based on the sole and unreviewed judgment of unitary class counsel. That leaves class action law in a state of considerable confusion, and, we submit, is not what this Court intended or what the law as to adequacy of representation requires.

The Court should grant the Petition, not simply in order to eliminate the conflict created by the existence of these irreconcilable holdings, but to insure that the fiduciary obligation Rule 23(a)(4) imposes on class counsel is not reduced to a meaningless catch phrase. As the Sixth Circuit recently explained:

In class-action settlements, the adversarial process – or what the parties here refer to as their "hard-fought" negotiations – extends only to the amount the defendant will pay, not the manner in which that amount is allocated between the class representatives, class counsel, and unnamed class members. For the economic reality is that a settling defendant is concerned only with its total liability, and thus a settlement's allocation ... is of little or no interest to the defense. Hence – unlike in virtually every other kind of case – in class-action settlements the district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation – namely, the class. Instead, the law relies upon the fiduciary obligations of the class representatives and, especially, class counsel, to protect those interests. And

that means the courts must carefully scrutinize whether those fiduciary obligations have been met.

Greenberg v. Procter & Gamble Co. (In re Dry Max Pampers Litig.), 724 F.3d 713, 717-18 (6th Cir. 2013) (internal quotations and citations omitted).

In *Amchem*, this Court disapproved a settlement where "The settling parties...achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected." 521 U.S. at 627. Two years later, in *Ortiz*, the Court rejected a proposed settlement class that was divided along two fault lines: first, as in *Amchem*, "between holders of present and future claims," and second, between holders of "more valuable" and less valuable claims. 527 U.S. at 856-57. As in *Amchem*, the lower courts in *Ortiz* did not accommodate those disparate interests by requiring subclasses. In reversing, this Court held that such conflicts among class members fell "well within the requirement of structural protection recognized in *Amchem*," and should have been redressed by way of "reclassification with separate counsel." *Id.* at 857.

Before *Charron*, a Second Circuit panel had recognized, in *Literary Works in Elec. Databases v. Thompson Corp.*, that *Amchem* and *Ortiz* impose both substantive and procedural requirements on the class settlement process. Substantively, the Second Circuit held that significant differences in the amount of recovery allotted to different subgroups of class members in a class action settlement *must* accurately reflect the relative strength of each subgroup's claims. *Id.*, 654 F.3d at 253-54. The decision also suggests that the valuation of any class

member's claim at zero *ipso facto* runs afoul of that requirement. *Id.* at 253.

Procedurally, *Literary Works* determined that, where there are significant differences in subgroup recovery, independent counsel *must* be provided to each subgroup to ensure its ability to participate fairly in the valuation process, *id.* at 253-55. Otherwise, the district court is essentially flying blind:

We know that Category C claims are worth less than the registered claims, but not by how much. Nor can we know this in the absence of independent representation. The Supreme Court counseled in *Ortiz* that subclasses may be necessary when categories of claims have different settlement values. The rationale is simple: how can the value of any subgroup of claims be properly assessed without independent counsel pressing its most compelling case?

654 F.3d at 253.

Charron throws this approach over entirely. In terms of substance, the district court ignored the requirement to assess the relative value of subgroup claims, and the Second Circuit panel refused to require such an assessment. Procedurally, *Charron* held, in effect, that a circuit court could determine the settlement value of subgroup claims *de novo* and dispense with the participation of both the district court and the subgroups themselves in any related fact-finding process. Without the benefit of *any* adversary exposition or merits discovery as to the relative strengths of the claims — and indeed,

contrary to the findings of the district court — the Second Circuit ruled that the claims possessed by disfavored subgroups were “relatively weak” and “far more tenuous” than those of the favored subgroup:

We find that given the increased difficulty of litigating the Excluded Overcharge Claims, their exclusion from the settlement was reasonable and does not create serious intra-class conflicts or indicate inadequate representation by Class Counsel.

App. 23.

The Second Circuit’s decision was all the more remarkable because the disfavored claimants comprised the vast majority of the entire class (including *all five class representatives*),¹ because they recovered not just *less* than the favored minority claimants but *nothing*, and because their claims, though arguably weaker than those of the favored minority claimants, were more than “viable.” (Ironically, one segment of the disfavored majority possessed claims *exactly* as strong as the favored minority: Class Counsel agreed to exclude those claims in the settlement only because of a mistake as to the applicable statute of limitations.) Even if a reasonable tribunal could have concluded that the claims of the disfavored majority had a relatively low settlement value, that circumstance, far from excusing the participation of independent counsel, is precisely what, under *Amchem* and *Ortiz*, should trigger the requirement that counsel be appointed.

1. All five class representatives opposed the settlement and appealed to the Second Circuit.

PROCEDURAL HISTORY

This case was brought in 2007 by nine individual tenants and a non-profit organization alleging that Pinnacle Group NY LLC and its principal owner, Joel Wiener (“Defendants” or “Pinnacle”) had engaged in a conspiracy to fraudulently increase regulated rents in more than 400 apartment buildings owned or controlled by them in New York City. App. 3.² Defendants were charged with unlawfully inflating rents, refusing to make repairs, filing meritless eviction suits, and otherwise harassing tenants, all with the goal of raising rents above legally permissible limits. One of the ultimate objectives was to drive low-income tenants out of their buildings, ultimately freeing the buildings from rent-regulation and permitting Defendants to charge market-rate rents. App. 4. According to the Complaint, Pinnacle’s conduct violated RICO and the NYCPA. Plaintiffs asked the district court to certify a class consisting of the current and former residents of over 20,000 Pinnacle-owned apartments under F.R.C.P. Rules 23(b)(2) and 23(b)(3). App. 4

The complaint survived a motion to dismiss in 2008, *Buyers and Renters United to Save Harlem v. Pinnacle*, 575 F. Supp.2d 499 (S.D.N.Y. 2008), and in April of 2010 the district court certified two classes: an injunctive class, consisting of all persons currently residing in rent-regulated apartments in

2. The claims of the non-profit organization were dismissed by the district court for lack of standing in its decision of September 5, 2008. *Buyers and Renters United to Save Harlem v. Pinnacle*, 575 F. Supp.2d 499, 501 (S.D.N.Y. 2008). Four of the original plaintiffs settled their claims with Pinnacle individually prior to class certification. *Charrons v. Pinnacle Group NY LLC*, 269 F.R.D. 221, 236 (S.D.N.Y. 2010).

buildings owned by defendants, and a liability class, comprised of

all persons who, at any time between July 11, 2004 and the date of this opinion [April 27, 2010], were tenants in rent-regulated apartments in New York City directly or indirectly owned in whole or in part by [Pinnacle].

Charron, App. 5 (quoting *Charrons v. Pinnacle Group NY LLC*, 269 F.R.D. 221, 224 (S.D.N.Y. 2010)).

Settlement negotiations were in progress even before the class certification decision was issued, and — after no merits discovery whatsoever — Class Counsel and Defendants reached a preliminary settlement in June of 2011 (over the objections of *all* the class representatives) and moved for preliminary approval in August of 2011. The settlement received final approval by the district court on June 15, 2012. *Charron v. Pinnacle Group N.Y. LLC*, App. 25.

For present purposes, the settlement's most important feature was a claims process that would allow Pinnacle tenants to prosecute rent overcharge and other claims before a court-appointed Claims Administrator who would be empowered to award damages for rent overcharges and tenant harassment. App. 7.

Significantly, *by the terms of the settlement*, two subgroups of class members were excluded from the claims process for rent overcharge claims: The first group, "prior owner tenants," were tenants whose rent had been illegally set at any time by a prior landlord from whom Pinnacle had acquired the building. (The complaint specifically alleged that Pinnacle had acquired these buildings with

knowledge that many rents were illegal and with intent to collect them anyway.) The second group, “pre-2004 tenants,” were tenants whose rents had been illegally set by Pinnacle itself prior to a cutoff date of July 11, 2004. App. 7-8.³

The size of these excluded sub-groups was never delineated or even explored in discovery. Indeed, at the initial appearance before a Magistrate Judge to discuss Objectors' contentions on October 7, 2011, Class Counsel admitted that *they had no idea* how many class members were excluded from the claims process under the proposed settlement. However, the sub-groups were clearly large because *every one of the five class representatives* remaining at the time the settlement was proposed belonged to one disadvantaged sub-group or the other, or both.⁴ Following a status conference on October 28, 2011, the district court, responding to concerns voiced by Objectors, directed Pinnacle to conduct a survey of 18 representative buildings to determine the approximate percentage of class members in the two excluded sub-groups. In response, Pinnacle estimated (in an unsworn letter) that 77% of class members were excluded as prior owner claimants and 73% as pre-2004 claimants. The percentage of

3. This date, exactly three years before the complaint was filed, was selected because of a mistaken belief that the RICO statute of limitations was three years. It is in fact four. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987).

4. Plaintiffs Marjorie and Theodore Charron's original lease was with Pinnacle in June 2001; Plaintiff Andres Mares-Muro's original lease in September 2003 was with a prior owner; Plaintiff Raymond Andres Stahl-David's initial lease in September 2005 was with a prior owner; Plaintiff Kim Powell's lease dated back to 1978.

tenants excluded *either* as prior owner claimants *or* as pre-2004 tenants is unknown, but logically must be higher than 77%.⁵

No justification for these distinctions among class members was ever advanced, much less analyzed or discussed, by the proponents of the settlement or in the district court's opinion. Indeed, in their definitive memorandum of law in support of settlement approval, Class Counsel acknowledged that prior owner and pre-2004 class members possessed perfectly viable claims, and explained that their claims had been sacrificed, not because they were worthless, but because that is what it took to get the deal:

... Class Counsel engaged in contentious negotiations with Defendants over *otherwise viable pre-2004 claims and prior owner claims*, but this was eventually a point on which Class Counsel had to yield in exchange for agreement on the comprehensive package of compensation and structural reform contained in the Settlement.

5. The Second Circuit decision questions whether the percentage of excluded claimants was in fact as high as the 77% claimed by Objectors. App. 18-19. That figure, however, was provided by Pinnacle itself. Objectors argued that Pinnacle's 77% *understated* the true figure, and the district court *refused* to permit discovery on the issue, plainly accepting 77% as a working figure. App. 83. Objectors, of course, had no earlier opportunity to procure this information because, prior to receiving notice of the proposed settlement, they were unaware of the existence of the lawsuit.

(emphasis added).⁶ Thus, to put it simply: no effort was ever made to present any justification for the exclusion of prior-owner claimants and pre-2004 claimants in terms of the relative settlement value of their claims.

Both the Second Circuit decision and the district court's decision made much of the fact that both prior-owner tenants and pre-2004 tenants might benefit from the settlement's injunctive relief,⁷ from the ability to file harassment claims without limitation, and even from the ability to file rent overcharge claims if, in addition to their excluded claims, they also happened to possess claims for rent overcharges imposed by Pinnacle itself after July 11, 2004. App. 18-19, 22; App.72-74.⁸ The undeniable fact remains, however, that class members who possess only pre-2004 or prior owner claims received no rent overcharge relief whatsoever, and that those who possess both excluded claims and included claims, unlike favored class members, were only eligible to recover a fraction of their damages.

6. Memorandum of Law in Support of Motion for Final Approval of Settlement and in Response to Objections to the Settlement Agreement, p. 45, D.Ct. Docket # 181, filed March 16, 2012. The district court incorporated this language virtually verbatim in explaining its reasoning for approving the settlement. App. 82.

7. Although, at oral argument in the circuit, Class Counsel conceded that class members who had moved from Pinnacle-owned buildings (or reside in buildings Pinnacle no longer owns) receive no benefit whatsoever.

8. For example, a hypothetical tenant overcharged by Pinnacle for six months in 2002 who was also separately overcharged for ten months in 2008.

REASONS FOR GRANTING THE PETITION**I. THE APPROVAL OF THE SETTLEMENT SETS A PRECEDENT THAT CANNOT BE SQUARED WITH THIS COURT'S DECISIONS IN *AMCHEM PRODS., INC.* AND *ORTIZ*, WHICH REQUIRE THAT DISPARATE TREATMENT OF CLASS MEMBERS BE JUSTIFIED BASED ON THE DIFFERENTIAL STRENGTH OF THEIR CLAIMS**

In *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), this Court reviewed a class action settlement reached on behalf of hundreds of thousands of persons exposed to asbestos. Some had already manifested asbestos-related injuries; others had not yet manifested injury and perhaps never would. 521 U.S. at 607-08. The former group was interested in generous immediate payment from a limited fund; the latter in the reservation of ample funds for possible future claims. *Id.* at 626. Despite this basic conflict, the class was represented only by individuals purporting to speak for the class as a whole. Quoting the Second Circuit's decision in *In re Joint Eastern and Southern Dist. Asbestos Litigation*, 982 F.2d 721, 742-42 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993), the Court found this impermissible under Rule 23(a)(4):

Where differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses

on the basis of consents by members of a unitary class. ... The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups.

521 U.S. at 627.

The Court reaffirmed its *Amchem* holding two years later in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), another asbestos case. *Ortiz* involved the same conflict present in *Amchem* between already-injured and exposure-only claimants, and this conflict dictated the same result. 527 U.S. at 856-57. In addition, there was a conflict, reminiscent of one in this case (between holders of pre-2004 and later claims), between pre- and post-1959 claimants because the defendant asbestos manufacturer had carried liability insurance until 1959, making the claims of persons injured or exposed in 1959 or earlier much more valuable. 527 U.S. at 857. This conflict also required "the structural protection recognized in *Amchem*," viz., the formation of subclasses. *Id.*

The implications of *Ortiz* are thus both substantive and procedural for cases involving sub-groups of class members with claims of varying strength: Substantively, the varying benefits of the settlement to subgroups must be justified based upon the relative strength of their claims. Procedurally,

that allocation must be arrived at through the participation of independent counsel dedicated to putting forward each subgroup's best case.

This Court's holdings in *Amchem* and *Ortiz* – until the Second Circuit's holding in *Charron* – seem to have been consistently followed by the Second Circuit and other circuit and district courts. See, e.g., *Literary Works*; *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 187-88 (3rd Cir. 2012); *Callendar v. Coastal Int'l Sec., Inc.*, 2012 U.S. Dist. LEXIS 32692 (W.D. Ky. 2012).

In *Literary Works*, a class action for copyright infringement was brought by freelance authors who had sold works to print publishers – works which the publishers had begun to publish online without compensation. The settlement identified three different types of claims of varying strength, known as Categories A, B, and C. Significantly, many individual authors and class members held claims in more than one category, just as some *Charron* class members might hold both excluded and included claims. *Literary Works*, 654 F.3d at 246, 251-52.

Under the proposed settlement, which had been negotiated for the class as a whole without separate representation for holders of the different categories of claim, Category A claims received the most generous compensation, Category B claims less, and Category C claims least. *Id.* at 246. In addition, there was an overall damages cap such that payments were reduced if total claims exceeded \$18 million. Instead of reducing each claimant's share *pro rata*, the entire reduction was to be born by Category C claimants. *Id.*

The Second Circuit refused to approve that

settlement – but not because it was improper to award Category A claims more than Category B claims, and B Claims more than C Claims. Indeed, the court held that failing to award benefits unequally would have been unfair to Category A and B claimants. *Id.* at 253. Instead, the settlement could not be approved because each category of claimant required its own representative to make the best case possible for its group. Without separate representation, there was no assurance that the claims valuation arrived at by unitary class counsel “appropriately reflect[ed]” the strengths and weaknesses of the competing claims. *Id.*

Literary Works expressly rejected any suggestion that a circuit court could or should uphold the settlement because the court itself thought it fair:

Even if we were to conclude that, as a matter of deferential review, the Settlement fairly compensates Category C claims, we cannot rely on that fact to affirm class certification, because doing so would conflate Rule 23(a)(4)’s adequacy of representation analysis with Rule 23(e)(2)’s fairness, adequacy, and reasonableness analysis.... [W]e must ask independently whether the interests of all class members were adequately represented.

654 F.3d at 254.

In a similar vein, in *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d at 189, the Third Circuit, relying on *Amchem* and *Ortiz*, rejected a class settlement where a unitary class was – by the

terms of the settlement – divided into two subgroups (without separate counsel) that would receive different benefits, even though the subcategories (unlike here) were asserted to have been "drawn up based on empirical data."

The problem with dividing the class without having any representation from one of the groups becomes clearly untenable in this case because of who drew the line.... [T]he line "was decided by the lawyers."

Id., 681 F.3d at 188-89.

In default of any supporting case law, *Charron* relied on a series of characteristics which supposedly distinguished this case from *Amchem*, *Ortiz*, and *Literary Works*. None can withstand careful scrutiny:

First, *Charron* states that the adequacy of representation concerns so forcefully articulated by the courts in *Amchem*, *Ortiz*, and *Literary Works* do not apply, or do not apply with much force, where approval of a settlement is sought after, as opposed to simultaneously with, class certification. App.16. It also suggests that Objectors were somehow remiss in belatedly "asserting conflicts never raised at the certification stage." *Id.*

A number of courts have suggested that a class action settlement proposed *simultaneously* with the motion for class certification requires *heightened* scrutiny. See, e.g., *Greenberg*, 724 F.3d at 721; *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995), *cert. den.* 516 U.S. 824 (1995). But the *Charron* court has derived from this unremarkable proposition a corollary that where the

settlement proposal *follows* class certification, the fairness concerns carefully delineated in *Amchem* and *Ortiz* can be relaxed to the vanishing point, even “before any discovery on the merits of the claims had taken place.” App. 6, 15. In effect, the Second Circuit would seem to be suggesting that had the settling parties in *Amchem* or *Ortiz* simply bifurcated their requests for class certification and class settlement – with a short interval between – this Court might have found the proposed settlements procedurally and substantively unobjectionable.

Surely, this is wrong. There is arguably some justification for merely “ordinary” scrutiny in a case where the district court has already granted certification and, in doing so, necessarily determined (at least provisionally) that the adequacy of representation requirement of Rule 23(a)(4) has been satisfied. Usually any such determination will have been arrived at in a litigation context where adequacy of representation was hotly contested, and a full record developed. In such a case, if the parties are later able to reach agreement on a settlement, the court’s confidence in the established competence and *bona fides* of class counsel might reasonably lead it to be less exacting in examining the substantive fairness of the settlement under the factors outlined in *Detroit v. Grinnel Corp.*, 495 F.2d 448 (2d Cir. 1974), and to accept more readily than otherwise counsel’s assessment of such factors as litigation risks, the reasonableness of the settlement fund, etc.

But the court obviously must not relax its vigilance when it comes to the issue of adequacy of representation itself. Where, as here, the proposed settlement – negotiated entirely by Class Counsel without the approval (indeed, *over the opposition*) of

the class representatives – violates established legal norms for what constitutes adequacy of representation, it is, frankly, senseless to ignore those norms even though the district court, at an earlier date, determined that Class Counsel appeared adequate.

Courts already face serious constraints upon their ability to review class action settlements so as to curb abuse, and this requires an increased dependence on the role of counsel. As the Fifth Circuit cautioned in *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1169 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1978), "lacking a fully developed evidentiary record, both the trial court and the appellate court [are] incapable of making the independent assessment of the facts and law required in the adjudicatory context." *Id.* at 1169. This absence of a full evidentiary record is due to the lack of a true adversary process in the context of a class action settlement, for "when a class settlement is presented to a court for approval, there may be no 'opposing party'. The settling parties are aligned, and there may be no objector represented at the fairness hearing." Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045, 1126 (1995). Even when an objector does appear to oppose a settlement,

this does not transform a fairness proceeding into an ordinary adversary proceeding. Fairness hearings are not supposed to resemble full blown trials, and they do not. Objectors are rarely allowed to conduct extensive discovery on the compromises made by the settling parties in their negotiations.

Even when the court is persuaded to allow discovery into the negotiation process to expose collusion or other evidence of unfairness, it is highly unlikely to order the depositions of class counsel or defendants' lawyers. Thus, objectors are routinely denied the best evidence by which to establish their position.

Id. at 1126-27 (footnotes omitted).⁹

This state of affairs makes it essential that the courts exercise heightened vigilance to provide the procedural and substantive protections of separate representation to subgroups that are in danger of disparate treatment — because, inherently, even class counsel that have been found adequate to conduct a litigation are conflicted when it comes to making later decisions about which class members should get how much of the settlement pie. The principles of *Anchem* and *Ortiz* indicate that at least normal — if not heightened — scrutiny was required here: the district court was *required* to assess the relative strengths of the subgroup claims and, to assist it in that process, should have appointed advocates for each competing subgroup.

Instead, the district court did not even demand from Class Counsel a justification for the settlement's allocation of benefits to class members

9. See, also, Wolfman, *Judges! Stop Deferring to Class-Action Lawyers*, 2 U. Mich J.L. Reform 80A, 86A (2013), citing *Charron v. Pinnacle Group* as its example of where courts "have deferred to the views of counsel [and] have not provided a detailed rationale — sometimes saying only that settlement is a good thing and counsel is more familiar with the nuances of the case than they are."

and ventured no justification of its own – simply repeating the facile conclusion that the "otherwise viable pre-2004 and Prior Owner claims" had to be "yield[ed] in exchange for" a deal. App. 82. By this logic, a settlement that traded away the rights of all class members but one in order to make a deal would raise no concerns, either.

As to Objectors' failure to complain about unequal treatment earlier, they obviously had no notice even of the lawsuit's existence at the time of certification in 2010 and, as the Second Circuit itself somewhat grudgingly acknowledged, the conflict among subgroups in this case did not precede the settlement, but was instead *created* by it. App. 16.

Second, the Second Circuit attached significance to the fact that Objectors were unable to precisely quantify how many pre-2004 claimants and prior-owner claimants had possessed only excluded rent overcharge claims, and noted that even those tenants might still be able to claim damages for harassment. App. 19. But as the *Literary Works* court held, even if *some* undetermined number of disadvantaged claimants might get *some* benefit from the settlement, that does not cure its fundamental unfairness or vitiate the need for independent counsel. 654 F.3d at 251-52.

Third, *Charron* states:

[W]hile the settlement does not provide relief for the Excluded Overcharge Claims, it does not *extinguish* them, or release Pinnacle from liability for overcharge claims under New York City rent regulations.

App.19 (emphasis in original). To begin with, this is

flatly wrong: the settlement, *by its explicit terms, completely extinguishes* all of the pre-2004 and prior-owner RICO and NYCPA claims possessed by disadvantaged subgroup members. The only claims preserved for those class members are potential claims under New York State's rent-regulation laws, which were never asserted by plaintiffs in the litigation, and most of which may well now be barred by the statute of limitations. In any event, the Second Circuit's *Charron* decision utterly fails to explain how the unfairness of zero recovery for some class members can be cured by telling them – seven years after this case was filed – they can go off and file state-law based suits elsewhere. No case has ever justified differential treatment of class members on this basis, and it sets a truly regrettable precedent.

Fourth, the Second Circuit decision seeks to justify the total exclusion of prior-owner and pre-2004 claims on the grounds of their relative weakness. Not only does this approach miss the whole point of *Ortiz*, *Amchem*, and *Literary Works*, it strains to suggest that Objectors' claims are much weaker than they actually are.

Take prior-owner claims first.¹⁰ These are claims in which the illegal rent was initially set by a predecessor landlord from whom Pinnacle acquired the building. It was the theory of the Complaint that Pinnacle violated RICO and the NYCPA by acquiring buildings with knowledge that illegal rents were being charged and in order to benefit from and perpetuate that practice. This is a perfectly viable

10. Of the five named class representatives, two are "prior owner" claimants, the other three are pre-2004 claimants (one of the five is in both subgroups). *See supra*, note 4.

claim, *albeit* one which would require proof of fact beyond those required in cases where Pinnacle itself had set the initial illegal rent. But this would not be an especially heavy lift. In parallel proceedings under N.Y. State law, the courts routinely impose liability on landlords who charge illegal rents initially set by predecessor landlords. The logic is simple: a successor landlord will almost always know if the rent it is charging is legal. As the New York Court of Appeals explained in *Gaines v. New York State Division of Housing and Community Renewal*, 90 N.Y.2d 545, 686 N.E.2d 1343, 664 N.Y.S.2d 249 (1997):

The rationale for carryover liability was derived from the requirement of section 42(A) of the former Rent Stabilization Code which mandated that landlords keep and preserve sufficient records to determine the legal rent at all times. Hence, a successor would always be able to ascertain whether the previous owners had been guilty of overcharges and protect itself accordingly

Id. 90 N.Y.2d at 549 (*citation omitted*). Thus, the subgroup of prior owner tenants were not asserting an implausible “carryover liability” theory that sounds in negligence,” App. 21, but were making an accusation of precisely the kind of “conscious wrongdoing” RICO requires. The proof essential to establish the basic RICO conspiracy would *ipso facto* entitle prior-owner claimants to recover for their injuries.

A similar analysis applies to pre-2004 claimants: their claims are only weaker than those of

post-2004 claimants to the extent that they might be barred by the statute of limitations. Under civil RICO, however, the statute of limitations only begins to run from the date when the plaintiff knew, or should have known, of the injury; and it is moreover subject to equitable tolling for fraudulent concealment. See, *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. den.*, 490 U.S. 1007 (1989) (discovery accrual rule); *Corcoran v. N.Y. Power Auth.*, 202 F.3d 530, 543 (2d Cir. 1999), *cert. den.*, 529 U.S. 1109 (2000) (equitable tolling). Since the principal thrust of the Complaint is that defendants have engaged in a conspiracy to fraudulently conceal illegal rent overcharges from class members, proof of that conspiracy at trial should almost automatically establish the conditions for extending the civil RICO limitations period to all pre-2004 claimants. The supposed weakness of pre-2004 RICO claims is thus far more theoretical than real.

It is important in this connection to bear in mind that the proponents of the settlement themselves, i.e., Class Counsel and Pinnacle, *never* denied that both pre-2004 and prior-owner claimants possessed perfectly viable claims. As the district court itself expressly acknowledged, the two groups were excluded from the settlement, not because their claims were weak, but because that is what it took to get the deal. App. 82. This case is thus here because unitary Class Counsel traded the rent overcharge claims of pre-2004 and prior-owner tenants to obtain better relief for a favored minority. It is inconceivable that this would have occurred had these subgroups been independently represented.

Finally on this subject, a few words must be

devoted to the fate of those claimants who had rents illegally set by Pinnacle between July 11, 2003, and July 11, 2004. As we have seen, and as the Second Circuit acknowledged, they were excluded from participation in the rent overcharge claims process, not because their claims were barred by the RICO statute of limitations, but because Class Counsel got the RICO statute of limitations wrong. App. 21 n.9. Yet even this aspect of the settlement was approved; the Second Circuit appeared to throw up its hands, as if to say, “Well, mistakes were made.” App. 21-22. But surely an appellate court is not powerless to remedy such mistakes. And clearly, if they had been separately represented, hundreds or even thousands of class members would not have been improperly excluded from participation in the claims process on this basis with no opportunity to object prior to the *fait accompli* of the settlement. As to them, the settlement cannot possibly qualify as “fair, reasonable, and adequate” under Rule 23(e)(2).

II. THE SECOND CIRCUIT’S ANALYSIS OF THE SUBSTANTIVE FAIRNESS OF THE SETTLEMENT WAS SUPERFICIAL AND INADEQUATE

A proposed settlement is substantively fair if the nine factors outlined in *Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) are met. Objectors analyzed these factors at some length in their appellate brief below and the Second Circuit challenged that analysis in only two respects. Its treatment of these two issues was superficial and inadequate.

Objectors pointed out that Class Counsel had engaged in no merits discovery whatsoever (*Grinnell* factor 3), and that this failure infected the district court's analysis of virtually every other *Grinnell* factor. That is, because Class Counsel undertook no merits discovery, they were unable to apprise the district court of the strengths and weaknesses of the liability claims (*Grinnell* factor 4), or of the damages case (*Grinnell* factor 5), or to analyze the complexity, expense, and likely duration of the litigation (*Grinnell* factor 1), and consequently to analyze the adequacy of the recovery in light of those strengths and weaknesses (*Grinnell* factor 9).

The Second Circuit chose simply to misconstrue Objectors' complaint, not as referring to Class Counsel's failure to conduct merits discovery, but as referring to the district court's refusal to permit Objectors to conduct discovery on the precise number of class members harmed by the settlement. App. 11-12. Objectors never sought review of the district court's refusal to permit such discovery for the simple reason that the settlement's unfairness to prior-owner claimants and pre-2004 claimants was perfectly obvious already.

The Second Circuit's discussion of the risk to maintaining the case as a class action (*Grinnell* factor 6) posed by this Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541 (2011) was likewise seriously deficient. App. 12-13. The Second Circuit declined to second guess the district court's conclusion — supposedly arrived at “after examining the facts of the case and recent jurisprudence interpreting *Dukes*” — that *Dukes* posed such a risk. App. 12. But the district court never analyzed that jurisprudence. It simply (and

repeatedly) *posited* that such a risk existed, and therefore must weigh heavily in favor of approving the settlement. Although the district court did not say so explicitly, it implied that even the 77% of the class that received no rent overcharge relief would be better off if the settlement were approved than if it were not, since they would at least benefit from other aspects of the settlement, such as the "best practices" the settlement bound Pinnacle to observe or the right to bring harassment claims before the Claims Administrator.

Objectors, for their part, specifically addressed whether *Dukes* posed an actual decertification risk and offered a cogent analysis of why it did not. Their analysis, summarized below, was never challenged by the proponents of the settlement, by the district court, or by the court of appeals itself:

First, *Dukes* denied certification because the plaintiffs in that case had failed to make a preliminary factual showing that a companywide policy of sex discrimination existed, since its stores were decentralized and individually managed. The result was that there simply were no common questions of law or fact. *Dukes*, 131 S. Ct. at 2553-57. In this case, by contrast, the district court had found that plaintiffs had made a convincing, albeit preliminary, showing that defendants were operating a centrally-directed racketeering enterprise in which apartment rents were illegally inflated and tenants improperly evicted in order to convert rent-regulated apartments into highly profitable condominiums and market rate apartments. *Charrons*, 269 F.R.D. at 225-26. This aspect of *Dukes* posed no threat of decertification.

Second, *Dukes* also indicated that the Court would not countenance any attempt to replace individualized determinations of proximate cause and damages with a "Trial by Formula" in which a district court samples a percentage of an unmanageably large number of claims and then applies the result to remaining class members. *Id.*, 131 S. Ct. at 2556-61. But the district court never contemplated any such "Trial by Formula" in this case, indicating instead that it would either devise a manageable method of conducting individualized factual determinations or, failing that, only adjudicate defendants' liability on a class-wide basis — and would relegate issues of proximate cause and damages to separate proceedings initiated by class members in forums of their choice. *Charrons*, 269 F.R.D. at 243-44. *Dukes* in no way suggests that it would be improper to proceed in this manner.

Third, *Dukes* also held that courts may not certify claims for back pay under Rule 23(b)(2) because such claims are, in effect, damage claims. Therefore, permitting the case to proceed under Rule 23(b)(2) would deprive class members of the "procedural protections attending the (b)(3) class — predominance, superiority, mandatory notice, and the right to opt out ..." 131 S. Ct. at 2558. Even given its most expansive possible reading, this aspect of the Court's decision would not call into question the district court's well-settled ability in a case such as this to devise creative solutions to the determination of individual issues of proximate cause and injury for a (b)(3) class by utilizing a magistrate judge, special master or claims administrator. So, as Objectors explained to the district court, any perceived difficulties on this score

are largely illusory. But even if the problems of separate proof of damages were insurmountable, absolutely nothing in *Dukes* would prevent this case from proceeding as a claim for class-wide injunctive relief under Rule 23(b)(2) and as a damages class action at least on issues of liability under Rules 23(b)(3) and 23(c)(4).

Finally, on the topic of decertification risk, it should have been perfectly plain that Pinnacle's numerous threats to decertify, encouraged by the district court, were largely bombast. *Dukes* predated the settlement in this case by nearly two months. If Pinnacle thought that *Dukes* offered a meaningful prospect of decertification, it obviously would have sought decertification before agreeing to the settlement. The conclusion is fairly inescapable that Pinnacle knew that such a motion would fail – or knew that the settlement so advantageously reduced its damages exposure at comparatively minimal cost that it was worth entering into anyway.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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