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| YAZMIN VAZQUEZ,<br>Plaintiff<br><br>v.<br><br>MARC A. GILBERT and<br>OBARA INVESTMENT REALTY<br>ADVISORS, LLC<br>Defendants. | COURT OF COMMON PLEAS<br><br>PHILADELPHIA COUNTY<br><br>CIVIL DIVISION<br><br>AUGUST TERM, 2016<br><br>NO. 537 |

**ORDER**

AND NOW, this _____ day of _____, 2016, upon consideration of Defendants' Preliminary Objections and Plaintiff's Answer thereto, it is ORDERED that the Preliminary Objections are OVERRULED. Defendants shall file an Answer within twenty days of this Order.

BY THE COURT:

_____
J.

ATTEST:

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**PLAINTIFF YAZMIN VAZQUEZ'S ANSWER TO DEFENDANTS' PRELIMINARY OBJECTIONS**

1. Admitted.

2. Denied. Plaintiff admits that Defendant Marc Gilbert was the owner of the property at issue, while Defendant Obara Investment Realty Advisors, LLC was the property manager for the final months of Ms. Vazquez's tenancy.

3. Admitted.

4. Denied. Ms. Vazquez admits she brings claims under the Philadelphia Code. Ms. Vazquez's suit, however, is also based on, among other things, breach of contract, the Fair Credit Extension Uniformity Act, the Unfair Trade Practices and Consumer Protection Law, the Dragonetti Act and common law Abuse of Process. *See* Compl. 12-18.

5. Admitted. The Philadelphia Code sets a number of standards for "the practice of offering property for rent in Philadelphia." The Code is not, however, the exclusive source of law for the legal duties and responsibilities of property owners, and it does not preempt standards or eliminate remedies under statute or common law.

6. No response required.

7. No response required.

8. Admitted.

9. Admitted.

10. Denied. The Philadelphia Code does not specify or limit what remedies are available for tenants, but principles of statutory construction make clear that a refund is available under the law.

11. Admitted.

12. Denied. The Philadelphia Code does not specify or limit what remedies are available for tenants, but principles of statutory construction make clear that a refund is available under the law.

13. Denied. Plaintiff brought a claim alleging an unfair housing practice before the Fair Housing Commission ("the Commission"). The Commission agreed with the Plaintiff and entered a Final Order stating the same.

14. Denied. Previous to this action, Plaintiff did not pursue her "full and adequate remedy at law." The Commission is not a court of general jurisdiction and is not a court of equity, but is an administrative agency that may find unfair rental practices under Philadelphia Code § 9-801, *et seq*., and enter protective orders effectuating those findings, i.e., prohibiting unfair evictions or the collection of rent in certain circumstances.

15. No response required.

16. Denied.[1] Ms. Vazquez admits that an action was filed in front of the Commission which alleged an unfair rental practice, but she denies that the Commission has "the power to enforce the [Code]." The Commission has the power to find unfair rental practices, as that term is described in § 9-804 of the Code, and to enter protective orders effectuating those findings. *See* Phila. Code § 9-804.

17. Denied. Ms. Vazquez admits that an action was filed in front of the Commission which alleged an unfair rental practice, but she denies that the Commission has "the power to enforce the [Code]." The Commission has the power to find unfair rental practices, as that term is described in § 9-804 of the Code, and to enter protective orders effectuating those findings. *See* Phila. Code § 9-804.

18. Admitted.

19. Denied. The Commission has the ability to find unfair rental practices as defined by the Philadelphia Code, *see* Phila. Code § 9-804, and thus may issue an order determining whether rent may be legally collected or whether a tenant may or may not be evicted. It is not a Court of general jurisdiction, and cannot generally enforce the Code.

[1] Paragraph 16 and paragraph 17 appear to have been inadvertently separated by Defendants.

20. Denied. Defendants filed their action in landlord-tenant court knowing that Ms. Vazquez had moved from the Apartment, surrendered her keys, and was thus no longer a tenant. Defendants' inaccurate averments to that effect caused Landlord-Tenant Court to accept the filing of the eviction action even though, by definition, it no longer had jurisdiction over the matter. Defendants continued to pursue the eviction action, and only upon learning that Ms. Vazquez secured counsel, withdrew it minutes before it was to be heard.

21. Admitted.

22. Admitted. By way of further answer, Defendants appear to be conflating claim preclusion with issue preclusion.

23. Denied. Ms. Vazquez admits that the Commission determined there was not compliance with the Code. Ms. Vazquez is not clear what "issues" are described by the averment's description of "the issue[s] complained of."

24. Denied. Defendants filed their action in landlord-tenant court knowing that Ms. Vazquez had moved from the Apartment, surrendered her keys, and was thus no longer a tenant. Defendants' inaccurate averments to that effect caused Landlord-Tenant Court to accept the filing of the eviction action even though, by definition, it no longer had jurisdiction over the matter. Defendants continued to pursue the eviction action, and only upon learning that Ms. Vazquez secured counsel, withdrew it minutes before it was to be heard.

25. Denied. Ms. Vazquez did not receive a full remedy for the actions of Defendants. Moreover, this instant suit brings claims other than those relying on a violation of the Code.

26. Denied.[2] By way of further response, Ms. Vazquez notes that such an argument—which would eliminate all eviction actions in the City of Philadelphia—is disclaimed by the Code itself, which states, that while tenants have a private right of action, "such private right of action neither limits nor expands the rights of private parties to pursue any legal rights and claims they may possess under a written agreement. . . ." Phila. Code § 9-3901.

26. Denied. Ms. Vazquez admits the Commonwealth follows res judicata, but denies it applies to bar any claims before this Court.

27. Denied. Res judicata bars claims that could have been raised in a previous proceeding. None of the claims here could have been raised at the Commission.

28. Denied. None of the claims at issue were before the Commission and none were disposed by the Commission. Defendants are conflating issue preclusion and claim preclusion.

29. Denied. None of the claims at issue were before the Commission and none were disposed by the Commission. Defendants are conflating issue preclusion and claim preclusion.

30. Denied. None of the claims at issue were before the Fair Housing Commission, and Ms. Vazquez denies that "the remaining counts . . . necessarily rely on counts 1 & 2."

**NEW MATTER**

31. Defendants failed to attach a memorandum of law or brief that complies with the Rules of Civil Procedure.

32. Defendants failed to attach a notice to plead, as required by the Rules of Civil Procedure.

33. Defendants failed to ask Ms. Vazquez for an extension of time to file a brief.

34. Defendants failed to move this Court for an extension of time to file a brief.

[2] Defendants' objections appear to inadvertently contain two paragraphs numbered 26. Plaintiff addresses them in order.

WHEREAS Defendants' Preliminary Objections are legally insupportable, Ms. Vazquez requests that they be overruled.

Respectfully submitted,

Dated: September 26, 2016

/s/ Daniel Urevick-Ackelsberg
Daniel Urevick-Ackelsberg, Esquire

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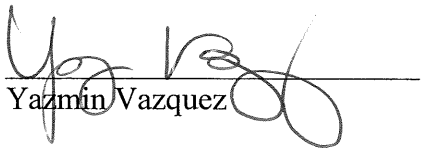
**VERIFICATION**

I, Yazmin Vazquez, depose and state subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities that I am the Plaintiff in this matter and the allegations set forth herein are true and correct to the best of my knowledge, information, and belief.



Yazmin Vazquez

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**PLAINTIFF YAZMIN VAZQUEZ'S MEMORANDUM OF LAW IN SUPPORT OF HER ANSWER TO DEFENDANTS' PRELIMINARY OBJECTIONS**

## I. MATTER BEFORE THIS COURT

Preliminary Objections of Defendants Marc A. Gilbert and Obara Investment Realty Advisors, LLC ("Obara Investment").

## II. STATEMENT OF QUESTIONS INVOLVED

1. Should this Court overrule preliminary objections when Defendants failed to include a memorandum of law that provides facts, questions for the court, and controlling authority, and failed to include a notice to plead, all in violation of the Rules of Civil Procedure?

Suggested answer: Yes.

2. To the extent this Court gets to the merits of these questions, does the Philadelphia Code provide a private of action for tenants against landlords who illegally collected rent?

Suggested answer: Yes.

3. To the extent this Court gets to the merits of these questions, does res judicata preclude a plaintiff who has alleged an unfair rental practice before the Fair Housing Commission from bringing separate claims in a court of general jurisdiction?

Suggested answer: No.

## III. FACTS

### A. Introduction

Each year, approximately 30,000 Philadelphians are sued in landlord-tenant court. Compl. ¶ 1. They are often poor, unrepresented, and unequipped to assert their legal rights under state and local law. *Id.* That these tenants regularly proceed without counsel creates a dramatic power imbalance in both landlord-tenant court and in the Philadelphia rental market. *Id.* at ¶ 2. Landlords, their attorneys, or their property managers may demand money and possession when they have no legal right to do so, all the while making clear misstatements about the conditions of substandard properties in which tenants live. *Id.* And with few lawyers regularly representing poor tenants, little about this dynamic changes. *Id.*

The underlying eviction suit against the plaintiff in this action is emblematic of this problem. *Id.* at ¶ 3. In December 2013, Yazmin Vazquez, a low-income Philadelphian and caregiver for her then-newborn nephew, rented an apartment from Marc Gilbert, a New York-based landlord. *Id.* That apartment was unlicensed, vermin-infested, without working heat, and had raw sewage leaking in the basement. *Id.* When Ms. Vazquez complained about the unsanitary and unsafe conditions of her apartment—both to Philadelphia officials and to Gilbert and his property management company—the defendants engaged in a harassment campaign against her, attempting to dispossess her through self-help measures outside of the law, and when that failed, by filing an eviction complaint against her that contained multiple misrepresentations and demanded rent and other charges that she did not owe. *Id.*

**B. <u>The Parties and the Property Conditions</u>**

Ms. Vazquez is a low-income resident of Philadelphia, who spent approximately two years as caregiver for her nephew, doing so from the time he was one month old, and caregiver for her mother, a woman who suffers from diabetes, asthma, and cardiac ailments. *Id.* In December of 2013, she rented a second floor apartment ("the Apartment") at 1122 W. Loudon Street, Philadelphia, PA 19141 from Gilbert, the record owner of the property. *Id.* Gilbert is an owner of various properties in low-income neighborhoods in Philadelphia, and on at least seven occasions he has been sued by the City of Philadelphia for his failure to comply with Philadelphia laws regulating the licensing and maintenance of his rental properties. *Id.* at ¶¶ 7-8.

When Ms. Vazquez moved in, Defendant Gilbert did not have a rental license for the Apartment, as required by Philadelphia law, *see* Phila. Code § 9-3902(1)(a), nor did he ever provide Ms. Vazquez a Certificate of Rental Suitability, an attestation as to the suitability of the

unit, or the Partners for Good Housing Handbook, also as required by the Code, *see id.* § 9-3903(1)(a). *Id.* at ¶¶ 11-15.

By the end of her first night in the property, Ms. Vazquez realized that the heating system was not properly heating the Apartment, and told this to Gilbert. *Id.* at ¶ 16. Soon thereafter, Gilbert arrived at the Apartment to collect a security deposit and rent. *Id.* at ¶ 17. Instead of using this visit as an opportunity to repair the malfunctioning radiators, Gilbert brought Ms. Vazquez a single space heater, to heat the four room, one bathroom apartment. *Id.* at ¶ 18. And while Ms. Vazquez continued to ask Gilbert to repair the heating system, he never did, and over the course of three winters, Ms. Vazquez obtained warmth from up to five space heaters at the same time, four of which she paid for herself, paying ever higher electrical bills along the way. *Id.* at ¶ 19.

The lack of heat was far from the only defective condition in the Apartment: It was infested by mice and roaches, windows were cracked, light fixtures were defective, the stove did not work properly, smoke detectors were not properly installed, and for months, raw sewage was leaking in the basement. *Id.* at ¶ 20. Ms. Vazquez notified Gilbert of these conditions, but he failed to remedy them. *Id.* at ¶ 21.

Defendant Gilbert also failed to comply with the lease governing the rental. That lease provides that utilities were to be paid for by Gilbert. *Id.* at ¶ 23. Gilbert did not, in fact, pay the electrical or gas service. *Id.* at ¶ 24. And in spring 2015, as Ms. Vazquez was unable to keep up with her gas bills, PGW turned off her service. *Id.* at ¶ 25. For months thereafter, Ms. Vazquez, already consistently without working heat, lost her hot water, too, causing her to bathe herself with water heated from an electric stove. *Id.*

Until in or around fall 2015, Gilbert actively managed the property and personally collected the rent. *Id.* at ¶ 28. At that point he hired Defendant Obara Investment Realty

Advisors, LLC ("Obara Investment") to manage the property, conduct needed repairs, and collect rent. *Id.* at ¶ 29. Most of Obara Investment's work was carried out by its employee and authorized agent, Kwame Johnson. *Id.* at ¶ 30. As she did with Gilbert, Ms. Vazquez made repeated requests to Johnson that he repair the heater and other deficiencies in the Apartment, but he failed to do so. *Id.* at ¶ 31. Thus, during the entire period of Ms. Vazquez's tenancy, the heating system failed to heat the Apartment. *Id.* at ¶ 32.

**C. <u>The Effect on Ms. Vazquez's Well-Being</u>**

The conditions in the Apartment affected Ms. Vazquez's mental and physical health. *Id.* at ¶ 33. When, for example, the weather turned cold or when the sewage smell grew stronger, she was forced to place her nephew at night in the care of others, so that he could sleep in a warm room, be bathed in warm running water, and would not have to inhale the smell of sewage. *Id.* at ¶¶ 27, 37. This caused her intense anguish. *Id.* at ¶ 36.

The smell of raw sewage also made Ms. Vazquez sick to her stomach, and made her feel depressed and isolated, because she was embarrassed to have anyone come into her home. *Id.* at ¶¶ 34-35. She believes the cold of the Apartment caused her mother to become ill, and forced her into the hospital. *Id.* at ¶ 38. This also caused Ms. Vazquez to feel anger, guilt, and shame. *Id.* In total, the conditions of the Apartment made Ms. Vazquez physically ill, unable to sleep, gave her nightmares, caused her to cry frequently and to gain weight, and otherwise made her feel extremely depressed and anxious. *Id.* at ¶ 41.

**D. <u>Ms. Vazquez Asserts her Rights to Safe Housing</u>**

In January 2016, Ms. Vazquez complained to the City of Philadelphia's Department of Licenses and Inspections ("L&I") about the defendants' failure to remedy the Apartment's substandard conditions. *Id.* at ¶ 42. As a result, on February 4, 2016, an inspector from L&I

visited the property, and found numerous violations, including, among other things, vermin infestation and inadequate heat. *Id.* at ¶ 44.

During the same period, Ms. Vazquez emailed Johnson, informing him that she would move out of the Apartment by the end of February 2016. *Id.* at ¶ 43. In response, Johnson visited her Apartment and tried to convince her to stay, telling her that the defendants wanted her to continue living there, and offering that they would lower her rent, while promising to make needed repairs. *Id.* at ¶ 46. On that basis, Ms. Vazquez agreed to remain in the Apartment. *Id.*

On the same day as her meeting with Johnson, L&I reinspected the Apartment, and cited its inoperable heater, mice and roach infestations, a malfunctioning stove and light fixtures, cracked windows, and raw sewage in the basement. *Id.* at ¶ 47. Based upon these violations, L&I found the property to be "unfit for human occupancy," and sent these notices to Gilbert. *Id.* at ¶ 48.

### E. Defendants Begin Retaliation Campaign against Ms. Vazquez

In early March, Johnson returned to the property and told Ms. Vazquez that Defendant Gilbert had rejected the proposal that Johnson had made for Ms. Vazquez to stay, and that they would instead find a tenant who would pay rent and not complain. *Id.* at ¶¶ 50-51. Soon thereafter, L&I returned to the property and found the same conditions. *Id.* at ¶52. L&I sent a "final warning" to Gilbert on March 15, 2016. *Id.* at ¶ 53. Ten days later, Johnson delivered a notice to quit the Apartment to Ms. Vazquez, alleging that she was delinquent in her rent. *Id.* at ¶ 54. The notice was signed by Obara Investment Managing Partner Joe Quinones and threatened that if Ms. Vazquez did not pay within three days, an eviction would be filed against her, and that she would be responsible for court costs, plus an "eviction filing fee of $150 and court

appearance fee of $250." *Id.* at ¶ Finally, the letter also threatened that an eviction would be a "**permanent mark on [her] credit**." *Id.* at ¶ 57.

There was no legal authority for the defendants to give Ms. Vazquez only three days notice, because the written lease expressly provided that Ms. Vazquez was to receive thirty days notice. *Id.* at ¶ 60. Defendants, however, illegally acted before three days expired. *Id.* at ¶ 61. On or around the early morning hours of the next day, March 23, an Obara Investment employee arrived at the Apartment, and attempted to change Ms. Vazquez's locks and lock her out of the Apartment. *Id*. When Ms. Vazquez threatened to call the police, the employee left. *Id.* at ¶ 62.

Around this time, Ms. Vazquez went to a tenants' rights organization, which informed her of Philadelphia landlord-tenant laws. *Id.* at ¶ 64. With knowledge of Philadelphia law, and in response to the actions of the defendants, Ms. Vazquez filed a complaint with the Philadelphia Fair Housing Commission against the defendants. *Id.* at ¶ 65. She alleged unfair rental practices, based upon the conditions of her Apartment and based upon alleged retaliation for her reporting of violations to L&I. *Id.*

When Ms. Vazquez returned to the Apartment after filing the Fair Housing Commission complaint, Johnson and Quinones were both there, and were attempting to change her locks illegally for a second time. *Id.* at ¶ 66. Ms. Vazquez pleaded for them to leave and informed them that she had filed the Fair Housing Commission complaint. *Id.* at ¶ 67. After a prolonged confrontation and under duress, she promised to move out of the Apartment on March 28, 2016 and Johnson and Quinones left the premises. *Id.* at ¶ 68.

### F. Ms. Vazquez Moves out, but Defendants, without a Legal Basis, Sue her Anyway

On March 28, 2016, Ms. Vazquez moved out of the Apartment. While she was moving out, an Obara Investment employee inspected the Apartment, and relayed the conditions to

Johnson over the phone, and upon completion of the inspection, she handed over her keys, surrendering possession of the unit. *Id.* at ¶¶ 69-70.

On April 1, 2016, Gilbert, through Johnson, filed an eviction suit against Ms. Vazquez. *Id.* at ¶ 71. The complaint falsely stated that Gilbert had no knowledge of any outstanding L&I violations, that the Apartment was fit for its intended use, and that Ms. Vazquez refused to surrender possession of the property. *Id.* at ¶ 74. Moreover, the complaint demanded rent that was not owed, and demanded the same "eviction fee" and "court appearance fee" with which Obara Investment had threatened Ms. Vazquez. *Id.* at ¶ 77. Making the intent of the eviction suit clear, Johnson told Ms. Vazquez that he would withdraw it if she withdrew her complaint with the Fair Housing Commission. *Id.* at ¶ 78.

On May 11, 2016, the Fair Housing Commission heard testimony and entered an order against Gilbert and Obara Investment. *Id.* at ¶ 79. Among other things, the Commission stated that the eviction was retaliatory, that the Apartment was unlicensed for most of Ms. Vazquez's tenure, that Ms. Vazquez was never given a Certificate of Rental Suitability, and that the defendants constructively evicted her. *Id.* at ¶ 80. The Commission also noted that Ms. Vazquez had presented troubling testimony that could give rise to other claims against Gilbert, and that a court—not the Commission—should consider those. Compl. Ex. G ¶ 29. Defendants did not appeal that decision within thirty days, rendering it final and unappealable. Compl. ¶ 81.

On May 20, 2016, Ms. Vazquez appeared in landlord-tenant court to defend herself against Gilbert's eviction. Mr. Johnson appeared and sat in court for approximately fifteen minutes. *Id.* at ¶ 83. Upon being notified that Ms. Vazquez had counsel, and minutes before a judge was to appear, he withdrew the case and left court. *Id.* at ¶ 85. Upon information and belief

he stated to court staff that he had a family emergency. *Id*. To this date, the eviction complaint against Ms. Vazquez has not been re-filed. *Id.* at ¶ 86.

### G. Ms. Vazquez Brings the Instant Case

On August 4, 2016, Ms. Vazquez filed the instant suit. She brought claims against the Defendants for Gilbert's violation of the Philadelphia Code, including the Rental Suitability law; Gilbert's breach of multiple provisions of the lease; Gilbert's violation of the Commonwealth's consumer protection law, through numerous deceptive and misleading acts; Gilbert's and Obara Investment's violation of state debt collection law, through their demand for illegal fees and charges not permitted under contract or statute; Gilbert's and Obara Investment's violation of the Dragonetti Act, for their wrongful use of civil proceedings to punish Ms. Vazquez; and, Gilbert's and Obara Investment's violation of the common law tort of abuse of process for that same wrongful use of civil process. *Id.* at 12-18.

## IV. ARGUMENT

Defendants seek to dismiss Ms. Vazquez's complaint with preliminary objections that make a number of assertions without a single citation to any case law and without a notice to plead, both in violation of the Rules of Civil Procedure. On the basis of that failure alone, this Court should overrule the objections. The Court also should overrule the objections because they are without legal basis.

### A. Defendants' Failure to Include a Compliant Memorandum of Law, or Any Supporting Authority Whatsoever, Fails to Provide a Basis for Dismissing this Action

Philadelphia Rule of Civil Procedure 1028(c) requires that any preliminary objections "shall be filed . . . with . . . a Brief or Memorandum of Law, as set forth in [Philadelphia Rule] 210." Phila. Civ. R. 1028(c). Rule 210, in turn, requires that each brief "shall contain" a

statement of questions involved, facts, and argument. Phila. Civ. R. 210. While Defendants attached a document to their objections entitled "memorandum of law," it is anything but, providing no statement of questions presented, no facts, and under the argument section, explaining only that "[c]ase law was not available at the time of filing because the attorney was not hired until near the deadline for this filing" and that Defendants "will submit case law . . . if the Court so allows." Def.s' Mem. 2. Putting aside when case law was "available," Defendants did not seek an extension of time from Ms. Vazquez before filing or seek her consent to file a memorandum after filing, nor did they file a motion for an extension of time from this Court, before or after filing their objections. Instead, they rest upon a "memorandum of law" that fails to point to a single case for the proposition that Ms. Vazquez's complaint should be dismissed. This Court should overrule the objections.

As the Supreme Court has admonished, "[i]t is self-evident that our Rules of Civil Procedure are essential to the orderly administration and efficient functioning of the courts." *Womer v. Hilliker*, 908 A.2d 269, 276 (Pa. 2006). For that reason, courts "expect that litigants will adhere to procedural rules as they are written, and take a dim view of litigants who flout them." *Id*. And while equitable considerations should prevent technical violations from dooming claims, those considerations do not "excuse[]a party who does nothing that a rule requires, but whose actions are consistent with the objectives he believes the rule serves." *Id*. at 271; *accord Leckey v. DOT*, 599 A.2d 856, 856-57 (Pa. 2008) (Per Curiam) (reinstating trial court order of nonsuit for failure to file the Rules, noting that excuse is "available to party a who makes substantial attempt to conform to rule of civil procedure, not to a party who disregards rule's terms entirely and determines for himself what steps he can take to satisfy rule's requirements").

Requiring a party to supply actual case law is not a mere formality. It gives an opposing litigant fair notice of the actual basis for a motion, and gives a court case law by which it can make an accurate determination of the issues before it. For that reason, the failure to provide law or analysis dooms a litigant's argument. *See Umbelina v. Adams*, 34 A.3d 151, 161 (Pa. Super. Ct. 2011) ("As the [Appellants] offer no citation to authority or further analysis, we find [their] claims to be waived for lack of development."); *Commonwealth v. Kane*, 10 A.3d 327, 333 (Pa. Super. Ct. 2010) (denying an appellant's argument which "consists principally of bald assertions, unsupported by citation to the record in violation of" the Rules); *see also United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam) ("A skeletal 'argument,' really nothing more than an assertion, does not preserve a claim . . . . Judges are not like pigs, hunting for truffles buried in briefs."). As a consequence, Courts of the First Judicial District routinely deny motions, preliminary objections, and petitions when they flout the rules, as Defendants have done here. *See Smith v. Morrell Beer Distrib.*, No. 618, 2010 Phila. Ct. Com. Pl. LEXIS 254, at *2 (C.P. Phila. Aug. 24, 2010) (noting petition for relief was denied for failure to follow Rules); *Feingold v. Berger*, No. 2406, 2009 Phila. Ct. Com. Pl. LEXIS 238, at *3 (C.P. Phila. Nov. 17, 2009) (noting that Court had "overruled all of Defendants' Preliminary Objections on the grounds that Defendants' Memorandum of Law failed to comply with the requirements of Phila. Civ. R. 210"); *Arnold v. Dorsey*, No. 0345, 2008 Phila. Ct. Com. Pl. LEXIS 262, at *7 (C.P. Phila. Nov. 17, 2008); (noting a Court previously "had dismissed Plaintiff's motion for failure to file a brief, and had not considered the merits of the claim").

Philadelphia Rules 1028(c) and 210 serve an obvious purpose: a party that seeks the stark remedy of placing a litigant out of court must fully explain its rationale. Defendants have failed to do that here, have not sought an extension from Ms. Vazquez, and have not sought leave from

this Court to file a brief out of time. They have thus failed their burden, and their objections should be overruled.[3]

### B. The Philadelphia Code Provides A Private Right Of Action against Landlords that Have Illegally Collected Rent

Defendants' first preliminary objection, brought under Rule 1028(c)(4), makes a sweeping, internally inconsistent argument that tenants are barred from bringing suit against a landlord, despite clear statutory language to the contrary.[4] To the extent the Court reaches the merits of this issue, that objection, which is to one of the complaint's six counts, should be overruled.

When considering a demurrer "the trial court must accept as true all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts." *Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425, 436 (Pa. 2004) (internal quotation marks omitted). A court "may not sustain a demurrer unless the *law provides with certainty* that no recovery is possible, and the complaint is clearly insufficient to establish *any right to relie*f." *Bronson v. Investigations Div., Bureau of Special Servs., Dep't of Corr.*, 650 A.2d 1160, 1162 (Pa. Commw. Ct. 1994) (emphasis added). Finally, "[a]ny doubts about sustaining the demurrer are to be resolved against the objecting party." *Parker v. Commonwealth*, 540 A.2d 313, 323 (Pa. Commw. Ct. 1988). When considering the demurrer here, it is clear that it should be overruled,

[3] A similar failure specifically bars Defendants' second preliminary objection, brought under Rule 1028(a)(1): the failure to include a notice to plead. That failure relieves Ms. Vazquez from even the duty to respond to those objections. *See* Pa. R.C.P. 1028, note ("Preliminary objections raising an issue an issue under subdivision (a)(1) . . . cannot be determined from the facts of record. In such a case, the preliminary objections must be endorsed with a notice to plead or no response will be required under Rule 1029(d)."); Phila. Civ. R. 1028(c)(3) ("An answer to preliminary objections is required . . . only to preliminary objections raising an issue under Pa.R.C.P. 1028(a)(1), (5), (6), provided a notice to plead is attached to the preliminary objections.").

[4] While both Defendants seek to dismiss this claim, it was brought against Gilbert only.

for Gilbert's own objections note what is explicit: the Code provides tenants with a right to relief.

Section 9-3903 of the Code requires that a landlord "shall, at the inception of each tenancy, provide to the tenant a Certificate of Rental Suitability that was issued by the Department no more than sixty days prior to the inception of the tenancy," along with "a copy of the owner's attestation to the suitability of the dwelling unit as received by the Department pursuant to § 9-3903(2)(b)(iii), and a copy of the 'City of Philadelphia Partners for Good Housing Handbook.'" *Id.* at § 9-3903(1)(a). These are not mere hortatory requirements. The failure to comply prohibits a landlord from "collecting rent during or for the period of noncompliance," *id.* at § 9-3901(4)(e), and then provides "[a]ny tenant of any property subject to the provisions of [the certificate law] shall have the right to bring an action against the owner of such property to compel compliance . . . .," *id.* at § 9-3901(4)(f).

"Pennsylvania law long has rejected interpretations of the law that result in a right without a corresponding remedy," *Glover v. Udren Law Offices, P.C.*, 92 A.3d 24, 37 (Pa. Super. Ct. 2014) (Wecht, J., dissenting), *rev'd and remanded*, 139 A.3d 195, 196 (Pa. 2016), and here the Code specifically assigns a burden to property owners, a penalty for the failure to do so, and the ability of tenants like Ms. Vazquez to enforce that law. In the face of this clear language, Gilbert does not dispute there *is* a right to relief, an admission which should resolve the demurrer. *See, e.g.*, *Bronson*, 650 A.2d at 1162 (demurrer inappropriate unless "complaint is clearly insufficient to establish any right to relief"). Instead, he argues about the scope of remedy. But as the United States Supreme Court has "often stated, the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from

the issue of whether such a right exists in the first place." *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 65-66 (1992).[5]

Gilbert acknowledges, as he must, that Ms. Vazquez has a right to relief under the Code. His objection should therefore be overruled.[6]

[5] This conflation between a right to relief versus the scope of available remedies lays bare the problem with Gilbert's objection, but even there, he is internally inconsistent, arguing on the one hand, that the Code does not allow for money damages, *see* Prelim. Objs. ¶¶ 12, 14, while stating, on the other, that damages *are* available, just only available from the Fair Housing Commission, *id.* ¶ 19. Ms. Vazquez agrees that money damages—specifically including the right to recoup illegally collected rent—are available, but as explained in section C of this memorandum, Gilbert's belief that the Commission is a court of general jurisdiction to hear all of these claims is not grounded in law.

[6] To the extent the scope of remedies is appropriately raised by Gilbert at a later stage of this matter, Ms. Vazquez is confident that principles of statutory construction will demonstrate that the Code allows—or more specifically, does not preclude—the recovery of illegally collected rent. *See, e.g.*, *Phoenixville Hosp. v. Workers' Comp. Appeal Bd. (Shoap)*, 623 Pa. 25, 41-42, 81 A.3d 830, 840 (2013) (discussing considerations for statutory construction analysis). And pursuant to those principles, allowing for a refund of illegally collected rent "is consistent with the underlying purposes of the legislative scheme." *Schappell v. Motorists Mut. Ins. Co.*, 934 A.2d 1184, 1189 (Pa. 2007). The Code prohibits owners from collecting rent when they have failed to comply with the law, and lets tenants enforce it. Allowing a tenant to make that requirement effective, rather than merely hortatory, requires that tenants be allowed to seek a refund of illegally collected rent. That is, repayment of rent "bolster[s] the legislature's objective" in enacting the law. *Id.* at 1190.

The implication of any other interpretation—that owners are allowed to collect illegal rent so long as they don't alert a tenant to the existence of a disclosure law—flies in the face of the law itself, as well as common sense. Moreover, a court always has the equitable power to order disgorgement of illegally collected rent. *See, e.g.*, *Hughey v. Robert Beech Assocs.*, 378 A.2d 425, 427 (Pa. Super. Ct. 1977) (noting "a long line of decisions to the following effect: Where one has in his hands money which in equity and good conscience belongs and ought to be paid to another, an action for money had and received will lie for the recovery thereof.") (internal quotation marks omitted). For the same reason, a refund should be available for the failure to seek a housing license. But because this violation is subsumed by the period of time that there was no certificate, overruling the objection on the certificate issue has the same effect.

### C. The Philadelphia Code Expressly Provides A Private Right Of Action To Compel Compliance, Including Against Landlords That Have Illegally Collected Rent

Defendants second preliminary objection, brought under Rule 1028(a)(1), argues that res judicata, or claim preclusion, precludes all the counts in Ms. Vazquez's complaint and deprives this Court of jurisdiction. It does neither.

"[C]laim preclusion[] prohibits parties involved in prior, concluded litigation from subsequently asserting *claims* in a later action that were raised, or could have been raised, in the previous litigation." *In re Stevenson*, 40 A.3d 1212, 1227 (Pa. 2012) (emphasis added). Defendants' objection rests upon a misunderstanding of the power of the Fair Housing Commission and a misunderstanding of the claims they face in this suit.

The Fair Housing Commission is a statutorily created administrative agency that has an important, but limited, role: hearing claims of "unfair rental practices," as that term is defined by its authorizing law, and issuing protective orders to restrain illegal lease terminations and other unfair rental practices. *See* Phila. Code. § 9-804. Its power and jurisdiction stop and start with § 9-800. *See also The Philadelphia Fair Housing Commission*, http://www.phila.gov/FairHousingCommission/pdf/FHCPamphlet.pdf ("What We Do: The City's Fair Housing Commission (FHC) enforces the Philadelphia Fair Housing Ordinance, Chapter 9-800 of the Philadelphia Code.").

While the Commission serves an important role, it is important to understand what it is not: a court of general jurisdiction, and it thus has no power to hear any case outside its grant of statutory authority, including in particular any of the claims asserted here. It may not generally enforce the Code, it may not enforce breach of contract claims, it may not enforce debt collection and consumer laws, and it may not hear claims of common law torts. Put simply, there is not a single count of the complaint that could have been raised before the Commission. In fact, the

Final Order demonstrates the Commission's own familiarity with the limitations of that power: It noted, for example, that it heard troubling testimony from Ms. Vazquez about suspected theft of her utilities by Gilbert, and suggested that *a Court* should consider that claim. *See* Fair Housing Commission Final Order, Compl. Ex G, ¶ 29. But it did not rule on that potential claim, because it had no power to do so.

Practically speaking, the error of Defendants' argument can be examined by probing the substance of Ms. Vazquez's claims here, and what a trier of fact will ultimately need to determine. For instance, Ms. Vazquez brings a claim under the Pennsylvania Fair Credit Extension Uniformity Act (FCEUA), 73 P.S. §§ 2270.1-5, the Commonwealth's state debt collection law. A fact finder will need to determine, among other things, a) whether each defendant was a debt collector or creditor under the law, *see id.* § 2270.3, b) whether the notice to quit and eviction complaint were debt collection communications, *see id.*, c) whether the demands in the notice to quit and statements in the complaint were "false, deceptive or misleading representations . . . in connection with the collection of [a] debt," *id.* § 2270.4(b)(5), d) whether, like federal debt collection law, the FCEUA applies to misleading statements in complaints, *see, e.g.*, *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168, 176 (3d Cir. 2015), and, e) to the extent Defendants qualify as debt collectors rather than creditors, whether there was a violation of the federal Fair Debt Collection Practices Act, which is itself a violation of the FCEUA, *id.* § 2270.4(a). Put simply, this is not what the Commission does. *See* Phila. Code. § 9-804.

Defendants' mistake appears to rest upon a conflation of claim preclusion with the separate legal doctrine of issue preclusion, which "bars relitigation *of an issue of law or fact* in a subsequent action when all of the following factors are demonstrated: (1) the legal or factual

issues are identical; (2) they were actually litigated; (3) they were essential to the judgment; (4) and they were material to the adjudication." *Temple Univ. v. Workers' Comp. Appeal Bd. (Parson)*, 753 A.2d 289, 292 (Pa. Commw. Ct. 2000) (emphasis added); *see also* Defs.' Preliminary Objections ¶ 23 ("The *issue* complained of . . .") (emphasis added). In other words, unlike claim preclusion:

> The phrase "collateral estoppel," also known as "issue preclusion," simply means that when an issue of law, evidentiary fact, or ultimate fact has been determined by a valid and final judgment, that issue cannot be litigated again between the same parties in any future lawsuit. Collateral estoppel does not automatically bar a subsequent prosecution, but rather, it bars redetermination in a second prosecution of those issues *necessarily* determined between the parties in a first proceeding that has become a final judgment.

*Commonwealth v. Holder*, 569 Pa. 474, 479-80, 805 A.2d 499, 502 (2002) (internal citation omitted).

Issue preclusion will indeed be raised in this matter—by Ms. Vazquez. The Commission, in order to administer §9-800 of the Code, often will need to make a factual determination that other sections of the Code have been violated, *see* Phila. Code § 9-804, as it did here. Thus, pursuant to principles of issue preclusion, Defendants will be precluded from arguing that their attempt to evict Ms. Vazquez was anything but retaliatory, or that they complied with the certificate law. *See* Fair Housing Commission Final Order, Complaint Ex. G at ¶ 27. But those *issues and factual determinations*, which Ms. Vazquez intends to affirmatively raise at the summary judgment stage, do not preclude her *claims*, since those claims could never have been brought before the Commission in the first instance. Accordingly, res judicata bars none of Ms. Vazquez's claims.[7]

[7] Defendants also state that an entirely separate legal doctrine—preemption—bars all breach of contract actions between landlords and tenants. *See* Prelim. Objs. ¶ 26 ("Contracts between landlords and tenants in Philadelphia are governed by the PMC; therefore no separate

## IV. CONCLUSION AND RELIEF SOUGHT

Defendants' preliminary objections are unsupported by a single citation to case law, and, in any case, are legally unsupportable. They should be overruled.

Respectfully submitted,

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right of action in contract exists."). This assertion would, among other things, bar every single eviction complaint in the City of Philadelphia. Not only is such a sweeping claim unsupported, it is specifically disclaimed by the Code itself. *See* Phila. Code § 9-3901 ("Such private right of action neither limits nor expands the rights of private parties to pursue any legal rights and claims they may possess under a written agreement . . . .").