APL-2018-00108
New York County Clerk's Index No. 157486/16

Court of Appeals
of the
State of New York

DANIEL COLLAZO, *et al.*,

Plaintiffs-Appellants,

– against –

NETHERLAND PROPERTY ASSETS LLC, and PARKOFF OPERATING CORP.,

Defendants-Respondents.

BRIEF FOR *AMICI CURIAE* RENT STABILIZATION ASSOCIATION OF NYC, INC. AND COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC. IN OPPOSITION TO PLAINTIFFS-APPELLANTS

ROSENBERG & ESTIS, P.C.
Attorneys for Amici Curiae
Rent Stabilization Association of NYC, Inc. and Community Housing Improvement Program, Inc.
733 Third Avenue
New York, New York 10017
Tel.: (212) 867-6000
Fax: (212) 551-8484

Of Counsel:
JEFFREY TURKEL

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CORPORATE DISCLOSURE STATEMENT

The sole subsidiaries of the Rent Stabilization Association of NYC, Inc. are Realty Services of America, Inc., RSA Insurance Agency, Inc., and RSA Mortgage Brokerage, Inc. The only subsidiary of the Community Housing Improvement Program, Inc. is Associated Builders and Owners of Greater New York.

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BRIEF FOR PROPOSED *AMICI CURIAE* RENT STABILIZATION ASSOCIATION OF NYC, INC. AND COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC. IN OPPOSITION TO THE APPEAL

PRELIMINARY STATEMENT

Amici curiae Rent Stabilization Association of NYC, Inc. and Community Housing Improvement Program, Inc. (collectively, "Amici") submit this brief in opposition to the appeal of defendants-appellants Daniel Collazo *et al.* (Tenants) from a November 28, 2017 order of the Appellate Division, First Department.

As is relevant herein, the First Department affirmed a March 6, 2017 order of Supreme Court, New York County (Cohen, J.), whereby Supreme Court, invoking the doctrine of primary jurisdiction, dismissed Tenants' rent regulatory causes of action. Supreme Court held that the New York State Division of Housing and Community Renewal (DHCR) should decide those causes of action in the first instance.

For the reasons set forth herein, the First Department's order should be affirmed in all respects.

INTEREST OF *AMICI CURIAE*

Most of Amici's members own buildings containing apartments subject to the Rent Stabilization Law (RSL) (Administrative Code of City of NY § 26-501 *et seq.*) and the Emergency Tenant Protection Act (L. 1974, ch 576, § 6) (ETPA). As such, many of those members will be directly affected by this Court's determination as to whether, and under what circumstances, Supreme Court Justices can invoke the doctrine of primary jurisdiction to (1) dismiss declaratory judgment actions relating to rent regulatory disputes; and (2) direct the plaintiff in such cases -- whether landlord or tenant -- to prosecute such claims before DHCR. DHCR is the expert administrative agency designated by the New York State Legislature to adjudicate rent regulatory disputes in New York City (*see Rent Stabilization Assn. of N.Y. City v Higgins*, 83 NY2d 156, 165 [1993]).

Amici's members are parties to, literally, thousands of proceedings each year before DHCR, as well as many actions in Supreme Court, relating to rent regulatory disputes involving the RSL, the implementing Rent Stabilization Code, and the ETPA. The issues litigated in those disputes are similar to those herein, *i.e.,* whether a particular apartment is rent stabilized, and/or whether the rent charged for an apartment is legal.

Amici's members have a vital interest in the orderly administration of rent regulatory disputes, as well as consistency and uniformity in rent regulatory policies, procedures, and determinations.

ARGUMENT

POINT I

THE DOCTRINE OF PRIMARY JURISDICTION ADVANCES THE VITAL POLICY GOAL OF JUDICIAL ECONOMY

The Court of Appeals has observed in a variety of contexts that judicial economy is a vital to the administration of justice (*see e.g. Malay v City of Syracuse*, 25 NY3d 323, 329 [2015] ["In interpreting the statute we are also mindful of judicial economy"]; *Xiao Yang Chen v Fischer*, 6 NY3d 94, 98 [2005] [promoting judicial economy is one of the "primary purposes of res judicata"]; *McCoy v Feinman*, 99 NY2d 295, 302 [2002] [enforcing stipulations promotes judicial economy]; *Britt v Legal Aid Society Inc.*, 95 NY2d 443, 448-49 [2000] [statute of limitations promotes judicial economy]).

Judicial economy is a central focus of Chief Judge DiFiore's 2016 Excellence Initiative. Among the goals of the Excellence Initiative are "improving disposition rates and times, reducing backlogs, resolving the oldest cases, increasing trial capacity, and providing better and more comprehensive service to the public." *Amici* respectfully submit that the doctrine of primary jurisdiction, when properly applied, advances all of these goals.

In *Capital Tel. Co. v Pattersonville Tel. Co., Inc.* (56 NY2d 11, 22 [1982]), this Court held that the doctrine of primary jurisdiction:

> "is intended to co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective the statutes with which both are concerned, and to the extent that the matter before the court is within the agency's specialized field, to make available to the court in reaching its judgment the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency."

Six years later, in *Staatsburg Water Co. v Staatsburg Fire Dist.* (72 NY2d 147, 156 [1988]), this Court wrote:

> "The doctrine of primary jurisdiction applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views" (internal citations omitted).

Pursuant to L. 1983, ch 403, § 3, the New York State Legislature designated DHCR as the sole administrative agency to administer the regulation of residential rents under the rent control and rent stabilization statutes (*see Higgins*, 83 NY2d at 164). Citing the doctrine, the First and Second Departments have routinely held that DHCR should decide rent regulatory disputes in the first instance (*see e.g. Katz 737 Corp. v Cohen*, 104 AD3d 144, 150 [1st Dept 2012], *lv denied* 21 NY3d 864 [2013];

Wilcox v Pinewood Apt. Assoc., Inc., 100 AD3d 873, 874 [2d Dept 2012]; *150 Greenway Terrace, LLC v Gole*, 37 AD3d 792, 792-93 [2d Dept 2007]; *Friscia v Lem Lee 13th LP*, 37 AD3d 168 [1st Dept 2007]; *Davis v Waterside Housing Co., Inc.*, 274 AD2d 318, 318-19 [1st Dept 2000], *lv denied* 95 NY2d 770 [2000]; *Nasaw v Jemrock Realty Co.*, 225 AD2d 385, 385-86 [1st Dept 1996]).

Courts have also invoked the doctrine in matters involving a variety of administrative agencies with jurisdiction concurrent with Supreme Court (*see e.g. Township of Thompson v New York State Elec. and Gas Corp.*, 25 AD3d 850, 851-52 [3d Dept 2006], *lv denied* 6 NY3d 713 [2006] [Public Service Commission]; *Wong v Gouverneur Gardens Hous. Corp.*, 308 AD2d 301, 303-04 [1st Dept 2003] [Department of Housing Preservation and Development]; *Markow-Brown v Bd. of Educ., Port Jefferson Pub. Schs.*, 301 AD2d 653, 653-54 [2d Dept 2003], *lv denied* 100 NY2d 512 [2003] [Commissioner of Education]; *Heller v Coca-Cola Co.,* 230 AD2d 768, 768-61 [2d Dept 1996], *lv dismissed and denied* 89 NY2d 856 [1996] [Food and Drug Administration]; *Haddad v Salzman*, 188 AD2d 515, 517 [1st Dept 1992] [Board of Standards and Appeals]).

The proper exercise of the doctrine conserves scarce judicial resources and furthers the goals of the Excellence Initiative. By affirming, this Court will enable Supreme Courts to resolve cases, manage their caseloads, reduce backlogs, increase their trial capacity, and better serve the public.

Notably, the doctrine does *not* apply where there is no specialized administrative agency with concurrent jurisdiction over a particular cause of action. Thus, in the vast majority of cases before Supreme Court -- such as commercial disputes, matrimonial matters, personal injury claims, and insurance disputes -- Supreme Court has no choice but to determine motions, supervise discovery, hold hearings, and try cases. The doctrine thus allows overburdened courts that have concurrent jurisdiction with an administrative agency to focus on those cases where the court has *exclusive* jurisdiction.

In rent regulatory matters, the flexibility afforded by the doctrine is more important than ever. Over the past two years, there has been an explosion of litigation involving rent stabilization status and legal rents. The chosen forum of tenant attorneys has been Supreme Court; the chosen action is one seeking a purported declaration as to statutory coverage and the computation of purported overcharges.

Supreme Court Justices, in order to coordinate with DHCR and obtain the benefit of DHCR's expertise, have dismissed these actions under the doctrine of primary jurisdiction (*see e.g. 560-568 Audubon Tenants Assn. v 560-568 Audubon Realty, LLC*, Sup Ct, NY County, September 13, 2018, index No. 154661/16; *Payton v First Lenox Terrace Assocs. LLC*, 2018 NY Slip Op 31442[U] [Sup Ct, NY County 2018]; *Daniels v RH 520 W. 159 St. LP*, Sup Ct, NY County, April 27, 2018, Freed,

J., index No. 152925/17; *Quinn v Parkoff Operating Corp.*, 59 Misc 3d 1202[A] [Sup Ct, NY County 2018]; *Burton v 198 W. 19th Street LLC*, 2018 NY Slip Op 31591[U] [Sup Ct, NY County 2018]; *Lamb v 118 2nd Ave., NY, LLC*, 2017 WL 6039503 [Sup Ct, NY County 2017]; *Napoliatano v 118 2nd Ave., NY, LLC*, 2017 WL 6039502 [Sup Ct, NY County 2017]; *Wang v Jedmon Realty Corp.*, 2017 WL 5270683, *2 [Sup Ct, NY County 2017]; *Wright v 116 Ave. C Investors LLC*, 2017 WL 5270661, *2 [Sup Ct, NY County 2017]; *Comfort v 118 2nd Ave. NY, LLC*, 2017 WL 4708067 [Sup Ct, NY County 2017]; *Mintzer v 510 W. 184th St., LLC*, 2017 WL 4217272 [Sup Ct, NY County 2017]; *Chester v Cleo Realty Assoc., LP*, 2017 NY Slip Op 31673[U] [Sup Ct, NY County 2017]; *Renate Von Boyens v 12 East 86th Street LLC*, Sup Ct, NY County, Mar. 26, 2018, Cohen, J., index No. 159302/17; *Siguencia v BSF 519 W. 143rd St. Holding LLC*, 2018 WL 1627246 [Sup Ct, NY County 2018]).

Compounding the burden on the Courts, there are an abundance of putative class actions involving rent regulatory issues (at least 18 as of this date) which are part of a coordinated effort to drive enforcement of the rent laws out of DHCR and into the courts.[1] Many of these lawsuits have resulted from the efforts of an

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[1] *See Quinn v Parkoff Operating Corp.*, 59 Misc 3d 1202(A)(Sup Ct, NY County 2018); *Sczesnik et al. v 111-32 76th Avenue LLC*, Index No. 708225/2018 (Sup Ct, Queens County); *Andermanis, et al. v Godwin Realty LLC, et al.*, Index No. 20843/2018E (Sup Ct, Bronx County); *Thome, et al. v The Jack Parker Corporation, et al.*, Index No. 152510/2018 (Sup Ct, NY County); *Chaifetz, et al. v Weinreb Management LLC*, Index No. 20844/2018E (Sup Ct, Bronx County); *Hess, et al. v EDR Assets, LLC, et al.*, Index No. 160494/2017 (Sup Ct, NY

organization called Housing Rights Initiative (HRI). According to its website, HRI "launch[es] door-to-door canvassing operations across New York City" to find tenants with possible overcharge claims and then connect such tenants with "legal support" (HOUSING RIGHTS INITIATIVE, https://housingrightsny.org/about/, last visited Aug. 28, 2018).

In keeping with HRI's stated mission to divert cases from DHCR -- which agency HRI views as too "reactive" -- the relief sought in the complaints in these actions includes a request that Supreme Court appoint (and presumably pay) an "independent individual or entity to audit and undertake an accounting" of hundreds of apartments, and to determine whether overcharges exist (*see* n 1, *supra*). Ironically, the Legislature intended that DHCR would perform this function.

A declaratory judgment action should not be used to wrest DHCR of its primary jurisdiction (*see Davis v Waterside Hous. Co., Inc.*, 274 AD2d at 319; *Grestone Mgt. Corp. v Conciliation & Appeals Bd.*, 94 AD2d 614, 616 [1st Dept

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County); *Stafford, et al. v A&E Real Estate Holdings, LLC, et al.*, Index No. 655500/2016; *Mahmood, et al. v Mason Mgmt. Servs. Corp., et al.*, Index No. 153574/2017 (Sup Ct, NY County); *Chang, et al. v Bronstein Properties, LLC, et al.*, Index. No. 156665/2017 (Sup Ct, NY County); *Chang, et al. v Bronstein Properties, LLC, et al.*, Index No. 153031/2018 (Sup Ct, NY County); *Yang, et al. v Creative Indus. Corp.*, Index No. 155681/2017 (Sup Ct, NY County); *Connors, et al. v Kushner Cos., et al.*, Index No. 522076/2017 (Sup Ct, Kings County); *Fabo, et al. v Kushner Cos., et al.*, Index No. 515806/2017 (Sup Ct, Kings County); *Najera-Ordonez, et al. v 260 Partners L.P., et al.*, Index No. 160546/2017 (Sup Ct, NY County); *Woodson, et al., v Convent 1 LLC, et al.*, Index No. 160547/2017 (Sup Ct, NY County 2017); *Leake, et al., v 55 Cooper Assocs., et al.*, Index No. 160549/2017 (Sup Ct, NY County); *Simpson, et al. v 16-26 East 105, LLC, et al.*, Index No. 160737/2017 (Sup Ct, NY County); and *Maddicks, et al. v Big City Props., LLC, et al.*, Index No. 656345/2016 (Sup Ct, NY County).

1983], *affd* 62 NY2d 763 [1984]). The doctrine of primary jurisdiction allows courts to prevent litigants from evading DHCR's jurisdiction, expertise, and experience.

Any party aggrieved by the agency's final order can seek judicial review in an Article 78 proceeding and will have his or her day in court. A court reviewing an agency determination exercises a genuine judicial function and does not confirm a determination simply because it was made by an agency (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]).

Accordingly, Supreme Court, under appropriate circumstances, and with appropriate guidelines, should be permitted to employ the doctrine of primary jurisdiction to promote judicial economy.

POINT II

AN AFFIRMANCE WOULD NOT PREJUDICE LOW INCOME TENANTS

Legal Services NYC and the Legal Aid Society (collectively, Legal Aid) have moved this Court to appear as *amici curiae* in support of Tenants' appeal. Amici will briefly address Legal Aid's argument that an affirmance would cause widespread prejudice to low income tenants.

The crux of the argument is that tenants who have filed overcharge complaints with DHCR might be evicted in non-payment proceedings before DHCR has a chance to determine whether the rents demanded are legal. Legal Aid's claim is without merit, and does not warrant eviscerating the doctrine of primary jurisdiction.

First, the hypothetical that Legal Aid posits -- where a tenant is evicted for non-payment of rent before DHCR determines the lawful rent for the apartment -- potentially applies to all such tenants, irrespective of whether (1) the tenant filed a complaint with DHCR in the first instance; or (2) Supreme Court directed the tenant to file with DHCR. The Tenants' hypothetical is not unique to those instances where Courts have invoked the doctrine of primary jurisdiction.

Second, Legal Aid presents virtually no evidence that such evictions are or have taken place. Citing three Appellate Term cases from the 1980s, Legal Aid asserts that Courts have denied stays "even where the tenant will be evicted before an administrative ruling on her overcharge claim" (*Melohn Found. v Bruck*, NYLJ, Nov. 20 1986 at 7, col 1 [App Term, 1st Dept 1986]; *Fromme v Perper*, NYLJ, May 6, 1987 at 12, col 1 [App Term, 1st Dept 1987]; *Obstfeld v Roth*, NYLJ, Mar. 1, 1989, at 2 col 6 [App Term, 2nd & 11th Jud Dists 1989]). This did not occur in *Obstfeld v Roth*, a small claims action wherein the tenant prevailed on her harassment claim. On appeal, Appellate Term dismissed the tenant's claim for rent overcharge because the tenant had a pending complaint before DHCR. She was not evicted.

In both *Fromme v Perper* and *Melohn Found. v Bruck*, Appellate Term declined to stay the non-payment proceedings pending DHCR's determination of the tenant's overcharge complaint. Notwithstanding, the Courts added that should the

tenant ultimately secure a favorable determination from the agency, the tenant could commence a plenary action for the amount of any overcharge, offset rent in an appropriate amount, or obtain a lump sum payment from the landlord. There was no eviction in either case.

Far more common is the granting of a stay. In *Reynolds v New York State Div. of Hous. & Community Renewal* (199 AD2d 15 [1st Dept 1993]), the First Department affirmed a Supreme Court order that (1) granted the tenant a preliminary injunction restraining the landlord from pursuing eviction proceedings; (2) consolidated the Supreme Court action with a related Civil Court proceeding; and (3) stayed the trial of the consolidated action pending DHCR's determination of tenant's pending overcharge complaint (*see also Union Theological Seminary v Harris*, 1 Misc 3d 902[A] [Civ Ct, NY County 2003]).

As this Court has held, the doctrine of primary jurisdiction is intended to coordinate the relationship between courts and administrative agencies (*see Capital Tel. Co., Inc. v Pattersonville Tel. Co., Inc.*, 56 NY2d at 22). Any tenant with an overcharge complaint pending before DHCR who is facing eviction for non-payment can move Civil Court for a stay. Should Civil Court deny the motion, the tenant can seek a stay pending appeal from Appellate Term.

One last point should be made. If anyone benefits from DHCR's jurisdiction over rent disputes, it is low income tenants. Proceedings before DHCR do not

require an attorney, and there is no filing fee. Once a tenant alleges rent overcharge, the landlord has the burden of proving that the rent charged was legal (*see Bondam Realty Assoc, L.P. v New York State Div. of Hous. & Community Renewal*, 71 AD3d 477, 477-78 [1st Dept 2010)]; *DeSilva v New York State Div. of Hous. and Community Renewal*, 34 AD3d 673 [2nd Dept 2006]). In a declaratory judgment action the tenant, as the plaintiff, has the burden of establishing what the legal rent should be, and whether an overcharge has occurred.

POINT III

AT MOST, THE APPELLATE DIVISION'S ORDER SHOULD BE MODIFIED SUCH THAT THE DISMISSAL IS WITHOUT PREJUDICE TO RESTORE

Although this Court has explained the rationale underlying the doctrine of primary jurisdiction, the mechanics of implementing the doctrine are less clear. In *Capital Tel., Co,* this Court held that where the doctrine is applied, "the court *postpones* its action until it has received the agency's views" (56 NY2d at 23) (emphasis supplied, citation omitted). In *Staatsburg Water Co.*, this Court held that "the judicial process is *suspended* pending referral of such issues to the administrative body" (72 NY2d at 156) (emphasis supplied).

In light of this language, some Courts have either dismissed the action without prejudice to restore, or maintained jurisdiction pending the agency's determination (*see Schwartz v East Ramapo Cent. Sch. Dist.*, 127 AD3d 763, 764-65 [2d Dept

2015] [staying the proceeding "so that the parties could bring the issue before the Commissioner" of Education]; *EPDI Assoc. v Conley*, 7 AD3d 755 [2d Dept 2004] [dismissal "without prejudice to restoring action following resolution of the administrative proceeding"]; *Eli Haddad Corp. v Cal Redmond Studio*, 102 AD2d 730, 730 [1st Dept 1984] ["application of the doctrine … mandates a stay pending disposition of the issue at the administrative level"]; *Nasaw v Jemrock Realty Co.,* 225 AD2d at 386 ["the action was properly stayed rather than dismissed"]; *Haddad v Salzman,* 188 AD2d at 517 ["disposition of the action is stayed pending … administrative determination"]).[2]

In most cases, however, as in the instant case, courts have dismissed declaratory judgment actions, albeit without prejudice to commence an Article 78 proceeding if the plaintiff is aggrieved by the agency's final order (*see e.g. Ferencik v Bd. of Educ. Amityville Union Free Sch. Dist.*, 69 AD3d 938 [2d Dept 2010]; *Friscia v Lem Lee 13th LP*, 37 AD3d at 168; *deVente v Bd. of Educ., Broome-Tioga Bd. of Coop. Educ. Servs.*, 15 AD3d 716, 718 [3d Dept 2005]; *DiTanna v Bd. of Educ. of Ellicottville Cent. Sch. Dist.*, 292 AD2d 772 [4th Dept 2002], *lv denied* 98 NY2d 605 [2002]).

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[2] In those instances where the Supreme Court action is stayed pending an administrative determination, it is unclear whether the administrative determination would be an advisory opinion, which Supreme Court could affirm or disaffirm, or a final determination, which might result in an Article 78 proceeding.

If dismissing an action without prejudice to proceeding before DHCR is the appropriate procedure, the Appellate Division's order should be affirmed. If not, the order should be modified such that the action, pending DHCR's determination, is either stayed or dismissed without prejudice to restore.

Staying the matter, or dismissing without prejudice to restore, effectively negates two of Tenants' primary arguments on appeal. First, Tenants claim that Appellate Division's order has denied them their choice of forum. Although DHCR will issue an interim determination upon referral, Tenants will nevertheless remain in Supreme Court.

Second, the doctrine reduces the possibility of divergent or inconsistent opinions. As the sole administrative agency determining hundreds if not thousands of rent regulatory disputes in the first instance, DHCR will have to adopt uniform, carefully considered policies and procedures. DHCR must then either issue consistent determinations or explain why it has altered its stated course (*see Matter of Charles A. Field Delivery Serv.* (*Roberts*), 66 NY2d 516, 520 [1985]). DHCR's failure to do so would render such a determination arbitrary and capricious (*see 20 Fifth Ave., LLC v New York State Div. of Hous. & Community Renewal*, 109 AD3d 159, 163-64 [1st Dept 2013]). DHCR, unlike a court, cannot overrule its prior determinations *sub silentio*.

CONCLUSION

The order of the Appellate Division should be affirmed.

Respectfully submitted,

Dated: New York, New York
September 28, 2018

ROSENBERG & ESTIS, P.C.
Counsel for Proposed Amici Curiae Rent Stabilization Association of NYC, Inc. and Community Housing Improvement Program, Inc.

By: _____
Jeffrey Turkel
733 Third Avenue
New York, New York 10017
(212) 867-6000

JEFFREY TURKEL
Of Counsel

CERTIFICATE OF COMPLIANCE

I, Jeffrey Turkel, the attorney for the Proposed Amici Curiae, hereby certifies that this brief is in compliance with Rule 500.13(c)(1). The brief was prepared using Microsoft Word 2010. The typeface is Times New Roman. The main body of the brief is in 14 pt. Footnotes and Point Headings are in compliance with Rule 500.1. The brief contains 3,365 words as counted by the word processing program.

Dated: New York, New York
September 28, 2018

Jeffrey Turkel