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Court of Appeals

of the

State of New York

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Plaintiffs-Appellants,

– against –

NETHERLAND PROPERTY ASSETS LLC
and PARKOFF OPERATING CORP.,

Defendants-Respondents.

BRIEF OF DEFENDANTS-RESPONDENTS IN RESPONSE TO BRIEF OF *AMICI CURIAE* CONSUMER ADVOCACY ORGANIZATIONS

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DISCLOSURE OF PARENTS, SUBSIDIARIES AND AFFILIATES

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Defendants-Respondents Netherland Property Assets LLC and Parkoff Operating Corp. (collectively, "defendants") respectfully submit this brief in response to the brief of the Brooklyn Bar Association Volunteer Lawyers Project and various others (collectively, the "*Amici*") as *amici curiae*.[1]

PRELIMINARY STATEMENT

The *Amici*'s argument that General Business Law ("GBL") § 349 applies to the conduct alleged here disregards both the text of that statute and the allegations of the complaint in this case. GBL § 349 prohibits only conduct that is "deceptive"; to be actionable, the conduct complained of must be "materially misleading," and no GBL § 349 claim lies unless the plaintiff suffered injury "as a result of" the alleged deception. *City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 621 (2009). The injury plaintiffs allege here simply does not meet those criteria: because their claim is only that their apartments were not treated as rent stabilized when they should have been, their alleged injury stems *not* from any alleged deception, but rather from an alleged violation of the Rent Stabilization Law ("RSL"). As detailed in Respondents' Brief, any attempt to bootstrap this straightforward claim under the RSL into a GBL § 349 claim is foreclosed by

[1] References to "*Amici* Br." are to the brief submitted by the *Amici*; references to "Respondents' Brief" or "Resp. Br." are to defendants' principal brief on this appeal; references to "Add-__" are to the Addendum attached to that brief; References to "R.__" are to the printed Record on Appeal.

Schlessinger v. Valspar Corp., 21 N.Y.3d 166, 172-73 (2013). (*See* Resp. Br. at 38-43).

Importantly, plaintiffs' complaint does not allege that defendants did anything wrong *other* than fail to treat their apartments as rent stabilized when they should have been so treated. The only damage plaintiffs claim to have suffered is a rent overcharge actionable under the RSL, and the recovery they seek on their RSL claim (including treble damages and attorneys' fees) is the same as the recovery they seek on their GBL § 349 claim. (*Compare* R.33, ¶ 185 and R.34, ¶¶ "(b)" and "(c)" *with* R.33-34, ¶ 187 and R.35, ¶ "(d)").[2] Plaintiffs' additional assertion that defendants "represented" that their apartments were not rent stabilized (R.15, ¶ 31) and that this was "misleading" (R.17, ¶ 42) is circular: "representing" that the apartments were not rent stabilized was part of treating them as not rent stabilized. If that "representation" could form the basis for a GBL § 349 claim, then every alleged violation of the RSL would automatically give rise to a GBL § 349 claim unless the landlord specifically told its tenants that it was violating the statute. As this Court made clear in *Schlessinger*, "[i]f the Legislature had intended this result,

[2] Plaintiffs' request for equitable relief is moot inasmuch as, in accordance with DHCR directives, the apartments in their building were registered as rent stabilized years ago and renewal leases were thereafter issued on rent stabilized forms. (R.88-94; *see* R.70).

it would not have enacted a statute limited to '[d]eceptive acts or practices' in the first place." 21 N.Y.3d at 173 (second alteration in *Schlessinger*).

The *Amici* tellingly fail to address *Schlessinger*. Instead, they (a) cite a string of cases where the courts of other states have applied the consumer protection statutes of those states to claims against landlords, and argue that this Court should follow suit (*Amici* Br. at 16-20); (b) argue that because the Attorney General treats GBL § 349 as applicable to "deceptive landlord conduct" this Court should do the same (*id.* at 20-22); (c) argue that if GBL § 349 does not apply to such conduct low income tenants will suffer (*id.* at 23-26); and (d) argue that *Aguaiza v. Vantage Properties, LLC*, 69 A.D.3d 422 (1st Dept. 2010), which the Appellate Division cited in its Order (*see* R.100-01), "misinterprets" the law and should be rejected (*Amici* Br. at 26-29).

As detailed below, none of those arguments supports reversal here. Almost all of the cases the *Amici* cite from other jurisdictions interpreted statutes that were *not* expressly limited to "deceptive" conduct, as GBL § 349 unquestionably is. Moreover, none of those cases involved alleged conduct that was wholly within the scope of another statutory scheme, as the conduct alleged here is. Accordingly, none of those cases supports the result the *Amici* advocate here. (Point I.A).

The *Amici*'s argument about the Attorney General fares no better. Their contentions concerning the views of that office are not based on any formal

statement; they are deductions they urge the Court to make from litigation positions they largely mischaracterize and a website that – far from indicating a view that "housing issues" are a concern that the Attorney General addresses through the Bureau of Consumer Fraud and Protection (as the *Amici* assert – *see* *Amici* Br. at 21) – directs people with questions about housing to the website of the Division of Housing and Community Renewal ("DHCR"). But more importantly, as the question before this Court is one of pure statutory interpretation, the Attorney General's view would be entitled to no deference even if it were clear that the *Amici* were correctly describing it. Because plaintiffs' alleged injury arises from a claimed violation of the RSL rather than from deception, GBL § 349 does not apply. (Point I.B).

The *Amici*'s argument that the interpretation they urge is necessary to protect low income tenants from harassment and other ills rails against a set of hypothetical facts that are not before the Court in this case. Because there was and is no argument in this case that any of the plaintiffs is a low income tenant or was subject to the kinds of harassment the *Amici* posit, the question of whether or not GBL § 349 would apply to a claim that alleged such harm is not at issue here. The issue here is only whether a claimed violation of the RSL automatically gives rise to a GBL § 349 claim. A finding that it does not will have no bearing on the

question of whether the low income tenants in the scenarios the *Amici* describe will have such a claim. (Point I.C).

Finally, the *Amici* ask this Court to reject *Aguaiza*, on which the Appellate Division relied, on the ground that it "misinterpreted and misapplied" GBL § 349. (*See Amici* Br. at 27). This argument, however, is based primarily on a contention that GBL § 349 should have applied to the facts alleged in the *Aguaiza* complaint because the conduct at issue there exceeded the scope of the RSL. The fundamental problem with this argument is that it was not preserved (and in fact contradicts the position plaintiffs took) in the court of first instance. But while it can and should be rejected for this reason alone, we note in addition that the question of whether a GBL § 349 claim should be available on facts anything like those alleged in *Aguaiza* is *not* before this Court. *Aguaiza*'s basic holding – that claims seeking to enforce rights that arise *solely* under the RSL are not cognizable under GBL § 349 – is sound, is consistent with this Court's later pronouncement in *Schlessinger*, and does not open the floodgates to any of the kinds of harms plaintiffs warn about because those harms depend on materially different facts. (Point II).

In sum, none of the arguments the *Amici* advance supports reversal here.

ARGUMENT

I. THE *AMICI*'S ARGUMENTS IGNORE BOTH THE FACTS OF THIS CASE AND THE LANGUAGE OF GBL § 349

A. The *Amici*'s Argument About Cases From Other Jurisdictions Misreads Those Cases And The Statutes They Interpret

The *Amici*'s argument that this Court should apply GBL § 349 here because courts in other states have applied the consumer protection statutes of those states to landlord-tenant disputes misses the mark. Almost all of the cases they cite in support of this argument involved statutes that (unlike GBL § 349) were *not* expressly limited to "deceptive" conduct.[3] This alone would greatly limit their value as precedent here. *See Schlessinger, supra*, 21 N.Y.3d at 172-73 (emphasizing that GBL § 349 is "limited to" deceptive conduct); *Smokes-Spirits.Com*, 12 N.Y.3d at 621 (only "materially misleading" conduct is actionable

[3] *See, e.g., Com. by Creamer v. Monumental Props., Inc.*, 459 Pa. 450, 457 (1974) (statute prohibited "unfair or deceptive acts or practices"); *Conaway v. Prestia*, 191 Conn. 484, 491 (1983) (statute prohibited "unfair or deceptive acts or practices"); *McGrath v. Mishara*, 386 Mass. 74, 78-79, 82-93 (1982) (statute prohibited any "unfair, deceptive, or unreasonable attempt to collect a debt" and any "unfair or deceptive" act or practice); *Burbach v. Investors Mgt. Corp. Intern.*, 326 S.C. 492, 497 (1997) (statute prohibited "unfair or deceptive acts or practices"; *see* S.C. Code Ann. § 39-5-20(a)) (internal quotations and alteration omitted); *Love v. Pressley*, 34 N.C. App. 503, 515 (1977) (statute prohibited "unfair or deceptive acts or practices"); *49 Prospect Street Tenants Ass'n v. Sheva Gardens, Inc.*, 227 N.J. Super. 449, 463 (N.J. Super. App. Div. 1988) (in addition to "deception," statute prohibited "any unconscionable commercial practice" and specifically applied to "real estate"); *Hernandez v. Stabach*, 145 Cal.App.3d 309, 314 (1983) (statute provided for injunctive relief against any "act of unfair competition"); *Thueson v. Swinger*, 2006 MT 250N, 149 P.3d 912 (Table), 2006 WL 2847244 (citing MT ST 30-14-103, which prohibits "unfair or deceptive acts or practices").

under GBL § 349). But wholly apart from this fact, *none* of the cases the *Amici* cite held that any such statute could apply where – as here – the only misconduct alleged was a straightforward violation of a separate statutory scheme that governed the landlord-tenant relation and itself provided a private right of action.

To the contrary, each of those cases involved conduct that was *not* found to be actionable under any other statute. *See Creamer, supra*, 459 Pa. at 454-55, 474-78 (conduct at issue – use of confusing and misleading form leases – not actionable under any other law); *Conaway, supra*, 191 Conn. at 491, 493 (statute "*creates* a private right of action" for violations of prohibition against collecting rent without a certificate of occupancy) (emphasis added); *49 Prospect Street, supra*, 227 N.J. Super. at 468-69 (state had "no single administrative forum regulating all of the acts and practices in the landlord-tenant area, nor a single forum to provide relief"; "the Consumer Fraud Act will only apply to extreme conduct of landlords"); *Burbach, supra*, 326 S.C. at 498-99 (applying unfair trade practices statute to landlord's practice of withholding security deposits for pretextual reasons; no argument that any other statute would provide a remedy); *Love v. Amsler*, 441 N.W.2d 555, 557-559 (Minn. Ct. App. 1989) (applying Consumer Fraud Act to landlord's practices of charging tenants for water bills without backup, charging tenants for property damage without ascertaining whether any such damage had occurred, and charging tenants for attorneys fees when he proceeded *pro se*; no

suggestion that this conduct would otherwise be actionable under any other statute); *Hernandez, supra*, 145 Cal. App.3d at 314-15 (landlord's "business practice" of retaliatory eviction enjoined under statute permitting court to enjoin "an act of unfair competition"; no suggestion that any other statutory scheme could provide such a remedy); *Love v. Pressley, supra*, 34 N.C. App. at 509, 515-16 (landlord's practice of removing tenants' personal property from premises prior to termination of lease violated statute prohibiting "unfair" business practices); *accord McGrath, supra*, 386 Mass. at 78-79 (landlord's repeated service of notices to quit based on false claims that rent was owed "constituted an unfair, deceptive, or unreasonable attempt to collect a debt" within the meaning of statute prohibiting such conduct, but gave rise to no recovery because plaintiffs' alleged injury arose from improper deductions from their security deposits rather than from the notices to quit)[4]; *see also Thueson, supra*, 2006 WL 2847244, *1-2 (holding without analysis – in an order that specifies that it "shall not be cited as precedent" – that lower court's findings were supported by substantial evidence and supported the

[4] The *McGrath* court also addressed a separate claim that the landlord's attempts to collect rent to which it was not entitled separately violated another statute that prohibited "unfair or deceptive" acts and practices; however, there was no dispute over the applicability of that statute. *See* 386 Mass. at 82-83. Accordingly, the *Amici* do not appear to be relying on this portion of *McGrath*. (*See Amici* Br. at 18).

conclusion that landlord had violated consumer protection statute that prohibited "unfair" business practices (*see* MT ST 30-14-103)).

None of these cases speaks to conduct anything like what is at issue here: a garden variety claim under the RSL, where plaintiffs' alleged damage arises solely from an alleged violation of that statute rather than from any alleged deception. None of them provides a basis for this Court to reverse.

B. The *Amici*'s Arguments About The Attorney General Are Similarly Misplaced

The *Amici* next argue that this Court should apply GBL § 349 here because the Attorney General would do so. But their arguments about the Attorney General's alleged position are based on their own extrapolation: they do not cite any specific guidance, interpretation or regulation that could arguably be entitled to deference in interpreting the statute. Moreover, given that the question at issue here is one of pure statutory interpretation, the Attorney General's position would not be entitled to such deference in any event. *See Matter of DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006).

Although this would be enough to dispose of the *Amici*'s argument on this score, we note in addition that their core assertion – that the Attorney General "promotes housing issues as a category of enforcement under the Bureau of Consumer Fraud and Protection" (*Amici* Br. at 21) – is directly belied by the website material they cite in purported support of it. The url they cite in their brief,

https://ag.ny.gov/consumer-frauds/housing-issues (last viewed February 27, 2019), leads to a portion of the Attorney General's website that begins as follows:

> Please know that the Division of Housing and Community Renewal http://www.nyshcr.org/ (DHCR) is responsible for the supervision, maintenance and development of affordable low- and moderate-income housing in New York State.

It then goes on to describe the "activities" of DHCR at length and to provide a link to DHCR's contact information. In other words, the very web page the *Amici* cite as evidence of the Attorney General's activity in this area refers the user to DHCR. Far from evidencing an interest in becoming involved in these matters under the rubric of consumer protection, the Attorney General's website appears to evidence a view that these matters are properly addressed by DHCR under the RSL.[5]

The cases the *Amici* cite in this regard similarly fail to support their argument that GBL § 349 should apply *in this case*. In *State of New York v. Winter*, 121 A.D.2d 287 (1st Dept. 1986), and *State of New York v. Wolowitz*, 96

[5] We note in addition that the *Amici*'s complaint that DHCR "takes two years on average" to resolve claims (*Amici* Br. at 25) ignores the amount of time it takes to resolve claims in the courts. As defendants pointed out in the lower court, one of the very cases on which plaintiffs relied in their briefing in that court took more than three years to get to trial, while its companion cases took more than four years to get to trial. (*See* R.85-87). There is, in short, no reason to believe that the courts can handle these matters any more quickly than DHCR. Moreover, this very case – where the apartments of plaintiffs and others were registered as rent stabilized pursuant to a building-wide directive issued by DHCR (*see* R.53-71; R.88-94) – demonstrates that the *Amici*'s portrayal of that agency as feckless (*see Amici* Br. at 25-26) is inaccurate.

A.D.2d 47 (2d Dept. 1983), the Attorney General brought suit *not* under GBL § 349, but rather under Executive Law § 63(12) (which allows the Attorney General to bring suit for "repeated fraudulent or illegal acts"). The fact that the Attorney General did *not* invoke GBL § 349 in those cases suggests the opposite of what the *Amici* argue: the Attorney General did not see that statute as applicable.[6]

We emphasize that the operative question before this Court is not whether the Attorney General views GBL § 349 as applicable to the kind of conduct alleged in plaintiffs' complaint. The statute's applicability is a question for the Court to decide. We respectfully submit that – regardless of whether the statute might in theory apply to deceptive conduct that went beyond a simple violation of the RSL – the conduct alleged here is not covered by it.

C. The Concerns The *Amici* Raise About Low Income Tenants Are Not At Issue Here

The *Amici*'s argument that application of GBL § 349 is essential to protect low income tenants from various forms of harassment, including "mass, often frivolous, lawsuits", "illegal repairs that disturb quiet enjoyment", and "baseless

[6] The *Amici* also cite the complaints in two cases brought more recently by the Attorney General where (among many other claims based on allegations of widespread fraud) the Attorney General included one or more claims under GBL § 349. (*See Amici* Br. at 21). Wholly apart from the question of whether those complaints could constitute precedent, neither of them suggests that the Attorney General has ever treated a garden variety rent overcharge/failure to register claim as a violation of GBL § 349 – much less provides a basis for this Court to do so.

evictions" (*see Amici* Br. at 25), is similarly misplaced. None of the plaintiffs here – most of whom allege that their apartments were removed from rent stabilization based on "high rent vacancy deregulation" before they moved into those apartments[7] – claims to be a low income tenant, and none of them claims to have been subject to any of the kinds of conduct the *Amici* describe. To the contrary, plaintiffs affirmatively allege that they paid all of the rent called for in their leases and were consistently offered renewal leases. (*See* R.16, ¶ 36; R.19-32). The question of whether GBL § 349 could apply to claims involving tenant harassment or any of the other conduct the *Amici* postulate is not before this Court on plaintiffs' appeal, and it cannot be injected through an *amicus* brief. *See* 22 N.Y.C.R.R. § 500.23(a)(4) (*amicus curiae* "shall not present issues not raised before the courts below.").[8]

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[7] *See* R.13-14, ¶1 9; R.19, ¶¶ 55-56 and 60; R.20-21, ¶¶ 64-65, 68, 70, and 75; R.22, ¶¶ 84, 86-87, and 89; R.24, ¶¶ 105-06; R.25, ¶ 114; R.26, ¶ 122; R.27, ¶ 128; R.27-28, ¶¶ 136 and 144; R.29, ¶¶ 150 and 154; R. 30, ¶¶ 156 and 160; R.31, ¶¶ 165, 168, and 170-71; R.32, ¶¶ 176, 177, and 182. Other plaintiffs concede that their apartments have been treated as rent stabilized at all relevant times. (*See* R.23, ¶¶ 91-98; R.24, ¶¶ 99-104; R.27, ¶¶ 130-35).

[8] *Accord Merrill v. Albany Med. Ctr. Hosp.*, 71 N.Y.2d 990, 991 (1988) ("While the Appellate Division has jurisdiction to address unpreserved issues in the interest of justice, the Court of Appeals may not address such issues in the absence of objection in the trial court."); *see generally* A. Karger, The Powers of the New York Court of Appeals, § 14:1 (2017) ("The Court's power of review is further limited by the requirement that a claim of error of law on the part of the courts below must, in general, have been duly preserved for review by appropriate

The *Amici* make one more point in this regard: GBL § 349 should apply here, they argue, because GBL § 349-c specifies that in determining whether to assess an additional civil penalty for "consumer frauds against elderly persons" a court should consider (among other things) whether the conduct "caused an elderly person or persons to suffer severe loss or encumbrance of a primary residence." (*Amici* Br. at 26, quoting GBL § 349-c(b)(2)). To trigger this penalty, however, conduct must violate GBL § 349 in the first place; that is, it must be deceptive and the plaintiff must allege injury arising from that deception. (*See supra* at 1-3, 6-9). The provision in GBL § 349-c that a consumer fraud that "cause[s] an elderly person or persons to suffer severe loss or encumbrance of a primary residence" is subject to a heightened penalty does not and cannot mean that every alleged violation of the RSL – regardless of whether or not it involves alleged deception, and regardless of whether or not it impacts any elderly person – is subject to GBL § 349. If anything, it supports the opposite conclusion. *See* McKinney's Cons. Laws of NY, Book 1, Statutes § 240 ("where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded").

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motion, objection or other action in the *nisi prius* court in order to be reviewable as a question of law.") (collecting cases; footnote omitted).

II. THE *AMICI*'S ARGUMENT ABOUT *AGUAIZA* DOES NOT CHANGE THE ANALYSIS

Finally, the *Amici* argue that the Appellate Division's Order should be reversed because it relied on *Aguaiza*, which (they say) "[m]isinterprets" GBL § 349. (*See Amici* Br. at 26; *id.* at 27-28). They make this argument based largely on the *Aguaiza* complaint, which they refer to as "Exhibit [A]" (*see id.* at 27) because it was *not* before the lower court in this case (where plaintiffs made no argument that *Aguaiza* was wrongly decided and instead argued only that it was "easily distinguished" – *see* Add-23). The *Amici*'s argument is not properly before this Court, and would not warrant reversal even if it were.

The *Amici*'s argument is not properly before this Court because plaintiffs did not preserve it. (*See supra* at 12 and n.8). Importantly, the *Amici* do not assert (much less meet their burden of demonstrating) that the question of whether *Aguaiza* should be rejected presents a pure question of law that could not have been obviated if it were raised below. *See* Karger, *supra*, § 17:2, nn.8 and 9 and accompanying text (a party seeking to raise a legal issue not raised below bears the burden of making such a showing; the point "will not be considered if it *might* have been avoided or countered by factual showings or legal countersteps had it been raised below") (collecting cases; internal quotations omitted, emphasis in original). To the contrary, relying on a document (their "Exhibit [A]") that is not even part of the record, they argue that the *facts* of *Aguaiza* warranted a result

different from the one the Appellate Division reached in that case. We respectfully submit that this argument is too far afield from the record for this Court to consider, particularly given that it contradicts the position plaintiffs took below. *See* Karger, § 17:2 n.12 and accompanying text.

In all events, what is before this Court is *not* the conduct that was at issue in *Aguaiza*; what is before this Court is the conduct alleged in plaintiffs' complaint. Whether *Aguaiza*'s fundamental holding – that claims seeking to enforce rights that arise *solely* from the RSL are not cognizable under GBL § 349 (*see* Resp. Br. at 19) – should actually have barred the claims the plaintiffs made in that case is not at issue here. At issue here is whether GBL § 349 provides *these* plaintiffs with a separate cause of action based on the very same conduct alleged to violate the RSL. For the reasons detailed above and in the Respondents' Brief (at 38-43, and nn.44-46), it does not.

CONCLUSION

None of the *Amici*'s arguments should change the result in *this* case: on the facts as alleged, plaintiffs' GBL § 349 claim was properly dismissed. The Appellate Division's Order should be affirmed.

Dated: New York, New York
February 28, 2019

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: February 28, 2019

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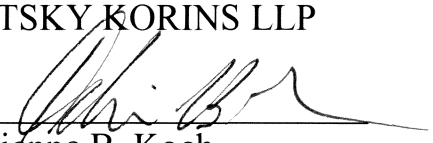
By: 

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