To be Argued by:
ADRIENNE B. KOCH
(Time Requested: 30 Minutes)

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

Court of Appeals

of the

State of New York

DANIEL COLLAZO, MICHELLE COLLAZO, CHRISTOPHER ORTIZ, ANGELA WU, RENANA BEN-BASSAT, JONATHAN ROSS, BENJAMIN SHEFTER, MICHAEL SUH, JOHN WEISS, HOLLY WEISS, GABRIEL KRETZMER-SEED, NINA KRETZMER-SEED, CATHERINE ELLIN, NURIKA PADILLA, ALYSSA HENSKE, DANIEL ABAROA, DIANA POTTS, TIA TRATE, TYSON COLLAZO, RITA LOMBARDI, YANIRA SANCHEZ, DARIEL RODRIGUEZ, MEIR LINDENBAUM, SHARON GORDON, RUSSELL POLTRACK, MEGAN BOYCE, ELAN KATTAN, SHOSHANA COHEN, JONATHAN ABIKZER and ALEXANDRA ABIKZER,

Plaintiffs-Appellants,

– against –

NETHERLAND PROPERTY ASSETS LLC
and PARKOFF OPERATING CORP.,

Defendants-Respondents.

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DISCLOSURE OF PARENTS, SUBSIDIARIES AND AFFILIATES

None.

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Defendants-Respondents Netherland Property Assets LLC ("Netherland") and Parkoff Operating Corp. ("Parkoff"; collectively, "defendants") respectfully submit this brief in opposition to plaintiffs' appeal from the Order of the Appellate Division, First Department (R.100-01[1]), which unanimously affirmed the Order of the Supreme Court, New York County (R.6-8), dismissing their Verified Complaint in its entirety. For the reasons detailed below, the Order of the Appellate Division should be affirmed.

PRELIMINARY STATEMENT

Plaintiffs' core claims in this case arise under the Rent Stabilization Law ("RSL") and Rent Stabilization Code ("RSC"): they argue that they were charged rent in excess of what that statute and those regulations permit. Their apartments are currently rent stabilized; all of them have been registered as such pursuant to a program sponsored by the Division of Housing and Community Renewal ("DHCR") for re-registering apartments that were deregulated based on DHCR's longstanding guidance before this Court's decision in *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270 (2009).[2] What plaintiffs seek through this action

[1] References to "R.__" are to the printed Record on Appeal; references to "Add.__" are to the Addendum attached to this brief, which includes all of the parties' briefs in the lower court (for purposes of showing preservation or lack thereof); references to "App. Br." are to the opening brief of Plaintiffs-Appellants ("plaintiffs").

[2] In *Roberts*, this Court held that for as long as an apartment is the subject of a J-51 tax abatement (a tax exemption authorized by Real Property Tax Law § 489, which

is to have a court examine the rental and improvement history of 18 apartments (including each apartment's relevant DHCR records) in order to determine (a) what the proper "base rent" should be for each one and what periodic increases were permissible (so that, in turn, it can be determined whether any plaintiff has actually been charged a rent in excess of the proper stabilized rent in any relevant year); and (b) whether any overcharge (if there was any) was willful.

These *factual* determinations are within the particular technical expertise of DHCR, which the Legislature has specifically charged with administering the RSL and RSC. For this reason, the doctrine of primary jurisdiction – which, as detailed below, is a doctrine of broad application that is implicated any time a court is called upon to determine matters that are within the special competence of an agency upon which the Legislature has conferred concurrent jurisdiction – specifically allowed the lower court to dismiss plaintiffs' claims without prejudice

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provides property owners who perform certain capital improvements with tax exemptions and/or abatements that continue for a period of years), the procedures that would otherwise permit it to be removed from the rent stabilization system when it reaches a certain rent level and either becomes vacant or is occupied by tenants who exceed a certain income level (commonly referred to as "luxury deregulation") do not apply. Prior to *Roberts*, if a building was rent-stabilized *before* the owner began receiving a J-51 tax abatement, luxury deregulation was available – even while the abatement remained in place – as long as the applicable thresholds were met. *See Roberts*, 13 N.Y.3d at 282-83. The apartments at issue here had been so deregulated prior to *Roberts* and before any involvement by defendants, when the building was owned by someone else. In light of *Roberts* and its progeny, all of them have now been re-registered as rent stabilized. (*See infra* at 9-10).

so that DHCR can make those determinations in the first instance (subject to judicial review under Article 78 if any party so desires). The lower court correctly did so, and the Appellate Division properly affirmed.

Plaintiffs' brief reflects a wish-list of limits they would like this Court to place on the doctrine of primary jurisdiction so that it will not apply to their claims. It should not apply, they argue, if the "only" basis for it is the agency's expertise. Instead, they urge that it should apply only if the agency is or has been involved in the dispute already. As well, they suggest that the agency should not be considered to have special competence (and the doctrine accordingly should not apply) if any court has ever adjudicated a claim similar to the one at hand. Nor, in their view, should the doctrine apply if it would deprive a plaintiff of the absolute right to choose a forum.

Plaintiffs' arguments run afoul of decades of State-wide jurisprudence, including the jurisprudence of this Court. That jurisprudence unanimously holds that the doctrine of primary jurisdiction (a) "comes into play *whenever* enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body" (*Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 156 (1988) (emphasis added)); and (b) once triggered, "generally enjoins courts having concurrent jurisdiction to refrain from adjudicating disputes within an

administrative agency's authority, particularly where the agency's specialized experience and technical expertise is involved," unless there is a good reason for the court, in the exercise of its discretion, to adjudicate the dispute (*Sohn v. Calderon*, 78 N.Y.2d 755, 768 (1991) (citation omitted)). *See Capital Tel. Co. v. Pattersonville Tel. Co.*, 56 N.Y.2d 11, 22 (1982) ("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.") (citations omitted). Plaintiffs offer no reason why RSL claims should be treated differently from claims under other statutory schemes that are administered by an agency, and in fact there is none: to the contrary, application of the doctrine to RSL claims is emphatically supported both by the case law and by the relevant statutory language. The lower court was, in short, correct in its view that the doctrine was fully applicable here. (Point I.A).

The lower court also applied the doctrine correctly. Plaintiffs' RSL claims call for determinations – including the correct amount of their "base rent" and whether any overcharge was willful – that are squarely within the special

competence of DHCR. Plaintiffs' argument that their claims raise legal issues that should be resolved by the courts in the first instance fails: every legal issue they identify has *already* been resolved (with binding effect) by the courts. Every other issue plaintiffs contend their claims raise is squarely within DHCR's special competence as a matter of established precedent. As a result (and under equally-established precedent), dismissal in favor of DHCR was a proper exercise of the lower court's discretion *unless* other discretionary factors weighed against it. The record reveals no such factors; instead, the only discretionary factors offered below weighed in favor of such dismissal. As a result, the lower court acted entirely within its discretion in so dismissing plaintiffs' RSL claims. This Court should not disturb that result. (Point I.B).

We pause to address one further point. Plaintiffs' argument that dismissal was improper on this record amounts to a request that this Court create a new set of rules for primary jurisdiction. This would upend long-standing jurisprudence that goes far beyond rent regulation and applies in every area of law in which the Legislature has vested an agency with adjudicative powers. Plaintiffs have not even come close to offering the kind of reason that could support such a result (let alone a reason that was preserved below). Accordingly, this Court should decline their invitation to change the law. (Point I.C).

The lower court also correctly dismissed plaintiffs' claim under General

Business Law ("GBL") § 349. Plaintiffs' claim is not that they were damaged as a result of misrepresentations about the rent or status of their apartments; rather, their claim is that for some period of time their apartments *should have been* (but were not) rent stabilized and therefore their rent *should have been* (but was not) lower. Their alleged injury stems from claimed violations of the RSL and RSC, not from any misrepresentation. As a result, both under the Appellate Division precedent that plaintiffs now argue (for the first time) "was wrongly decided and should not be followed" and under the binding precedent of this Court, their claim was properly dismissed. *See Schlessinger v. Valspar Corp.*, 21 N.Y.3d 166, 172-73 (2013) (conduct that violates another statute does not become the basis for a GBL § 349 claim by virtue of the defendant's failure to "admit the transgression"). None of the authority plaintiffs cite is to the contrary. As a result, this Court should affirm the dismissal of their GBL § 349 claim as well. (Point II).

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Under the doctrine of primary jurisdiction, where a claim raises issues that are within the special competence of an agency, does not require determinations that are beyond the scope of that special competence, and raises no novel or unsettled legal questions – and where the plaintiff offers no factors weighing against a dismissal of the claim so that it can be adjudicated in the first instance by the agency – may the court dismiss the claim without prejudice to

(a) its adjudication before the agency, and (b) Article 78 review?

The lower court correctly answered this question in the affirmative, and the Appellate Division affirmed.

2. Is a claim under General Business Law § 349 properly dismissed where it relates only to a private dispute between a landlord and its tenants that is governed entirely by the Rent Stabilization Law?

The lower court correctly answered this question in the affirmative, and the Appellate Division affirmed.

JURISDICTIONAL STATEMENT

Plaintiffs' brief does not include the statement required by Rule 500.13(a) of this Court, "showing that the Court has jurisdiction to entertain the appeal and to review the questions raised, with citations to the pages of the record or appendix where such questions have been preserved for the Court's review." *See* 22 N.Y.C.R.R. § 500.13(a). While we do not take issue with the Court's jurisdiction to hear this appeal generally, we do note that many of the arguments plaintiffs now raise were not raised in the court of first instance. In particular, with respect to their RSL claims plaintiffs argued in the lower court only that "to cede jurisdiction of these claims to the DHCR would constitute an error of law." (R.84). In marked contrast to the 30 pages they devote to their discussion of primary jurisdiction in their brief in this Court, their brief in the lower court offered only five pages of

argument on this subject and argued only that the doctrine "does not apply to J-51 cases." (Add.26-30). Similarly, with respect to their GBL § 349 claim, in the lower court plaintiffs conceded the applicability of *Aguaiza v. Vantage Properties, LLC*, 69 A.D.3d 422 (1st Dept. 2010), and argued that it is "easily distinguished" (Add.23) – a very different argument from their current position that that case "was wrongly decided and should not be followed" (App. Br. at 45-46).

We respectfully submit that, to the extent that plaintiffs are now attempting to present arguments they did not make in the court of first instance, such arguments were not preserved for this Court's review.[3] For the avoidance of doubt, however, in the sections that follow we respond to all of plaintiffs' arguments.

COUNTERSTATEMENT OF THE NATURE AND FACTS OF THE CASE

The facts alleged in plaintiffs' Complaint and otherwise submitted by them below are different in many respects from what they now recite in their brief on appeal. The facts presented to the lower court are as follows.

[3] *See Merrill by Merrill v. Albany Med. Cntr. Hosp.*, 71 N.Y.2d 990, 991 (1988) ("While the Appellate Division has jurisdiction to address unpreserved issues in the interest of justice, this Court 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 motion, objection, or other action in the *nisi prius* court in order to be reviewable as a question of law.") (collecting cases; footnote omitted).

Plaintiffs are 30 individuals who reside or resided in 18 apartments located in a building at 3300 Netherland Avenue (the "Building") that is currently owned by Netherland and managed by Parkoff. (R.12-13, 19-32). Contrary to what they now say in their brief, according to their Complaint six plaintiffs occupy apartments (6H, 1F, and 3L) that were continuously treated as rent stabilized. (*See* R.14, ¶ 23; R.15, ¶¶ 25-26, 28-30; *accord* R.23; R.24; R.27). Another two plaintiffs occupy an apartment (3B) that was rent controlled until 2015. (R.29). Those two plaintiffs have filed a Fair Market Rent Appeal with DHCR, challenging their apartment's initial rent following its exit from rent control. (Add.29-30, n.4). Two other plaintiffs occupy an apartment (6D) that was listed as exempt from rent regulation from 2007 until 2013, re-registered as rent stabilized in 2014, but "not registered" in 2015. (*See* R.19). The remaining plaintiffs claim that in or before August 2012 – that is, prior to Netherland's acquisition of the Building in 2013 (*see* R.13, ¶ 12) – defendants' predecessor improperly deregulated their apartments (through luxury deregulation and otherwise) while the Building was the subject of a J-51 tax abatement, and those apartments remained deregulated through 2015.[4]

[4] *See* R.20 (Apartment 3A listed as exempt from 2004 until 2015); R.21 (Apartment 5B listed as exempt from 2009 until 2015); R.22, 26, 27, 30, 31 (Apartments 1K, 4B, 4A, 5A, and 6K listed as exempt from 2008 until 2015); R.22, 28 (Apartments 5G and 5F listed as exempt from 2010 until 2015); R.25 (Apartment 6E listed as exempt from 2012-2015); R.29 (Apartment 6G listed as

All of the subject apartments were registered as rent stabilized for 2016. (R.88-94).[5] Nevertheless, plaintiffs now claim that their rent should be lower. They seek a determination of the proper amount of their rent, together with damages for any overcharge. (R.34).[6] Based on the same alleged facts, they also seek damages under GBL § 349 and an order enjoining any violations of that statute. (R.33-34, ¶ 187; *see* R.35).

Plaintiffs assert that (a) a calculation of the proper rent for each apartment requires an examination of its rental history dating back as far as *eighteen to twenty* years; and (b) this requires a review of DHCR's records for that period. (*See, e.g.*, R.30, ¶¶ 157-164; R.21, ¶¶ 74-79). Indeed, the description of the rental history of each of the 18 apartments spans fourteen pages of the Complaint and comprises the bulk of its factual allegations. (*See* R.19-32). Because the analysis of these facts is within the special expertise of DHCR, defendants moved to dismiss plaintiffs' claims under the doctrine of primary jurisdiction so they could be determined in

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exempt from 2012 until 2015); R.32 (Apartment 2C registered as exempt in 2013 and "not registered" in 2014 or 2015, and Apartment 6B listed as exempt from 2007 until 2015).

[5] Contrary to plaintiffs' repeated assertion (*see* App. Br. at 32; *id.* at 37 n.4), there is no evidence in the record that any plaintiff's apartment (let alone all of them) remained unregistered by the time the Complaint was filed in September 2016. The Complaint's recital of each apartment's registration history does not assert that any apartment was unregistered after 2015. (*See supra* at 9-10 and nn.4-5).

[6] They also seek certain declarations concerning the rent stabilized status of their apartments; however, that status is not in dispute. (*See* R.88-94).

the first instance by that agency – which was created to do so more efficiently and with less expense to all concerned – subject to Article 78 review. At the same time, defendants sought dismissal of the GBL § 349 claim because, as a matter of law, that statute does not apply to the conduct plaintiffs allege. (*See* R.61-62). The lower court granted that motion (R.6-8), and the Appellate Division, First Department, unanimously affirmed (R.100-01). This Court granted plaintiffs' motion for leave to appeal. (R.99).

ARGUMENT

I. THE DISMISSAL OF PLAINTIFFS' RSL CLAIMS WAS CONSISTENT WITH THE GOVERNING STATUTES AND ESTABLISHED PRECEDENT

A. Pursuant To The Governing Statutes And Decades Of Unanimous Precedent Throughout The State, RSL Claims Are Subject To Dismissal Under The Doctrine Of Primary Jurisdiction *Unless* They Raise Issues Outside Of DHCR's Special Competence

1. The Doctrine Of Primary Jurisdiction Applies Whenever A Claim Calls For A Determination Of Issues That Are Within The Special Competence Of An Administrative Body

The Appellate Division's invocation of the doctrine of primary jurisdiction was fully in line with decades of established precedent, which calls for its application *any* time a court is called upon to determine issues that are "within the special competence of an administrative body." *Staatsburg*, 72 N.Y.2d at 156 (citation and internal quotations omitted). Plaintiffs' arguments assume a very different version of the doctrine of primary jurisdiction than the one that actually

exists in the jurisprudence. Notwithstanding plaintiffs' assertion (App. Br. at 26), there is no "[e]stablished precedent" to support their position that the doctrine comes into play only where there is an administrative proceeding already pending, a need for an interpretation of an agency order, or an "otherwise factually unique situation."

To the contrary, as noted above, the actual doctrine as it has been consistently applied "generally enjoins courts having concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency's authority, particularly where the agency's specialized experience and technical expertise is involved." *Sohn*, 78 N.Y.2d at 768 (citation omitted). Although it is "not without exceptions" and permits courts, in the exercise of discretion, to consider factors that may counsel in favor of court intervention (*id.*), absent such factors courts "may not resolve in the first instance" controversies to which the doctrine applies. *People v. Correa*, 15 N.Y.3d 213, 228 n.2 (2010).[7]

Under this precedent, courts throughout the State regularly exercise their discretion to dismiss or stay claims in favor of initial determination by various

[7] Plaintiffs' assertion (App. Br. at 22) that courts apply a three-factor test to determine whether the doctrine applies finds no support in the cases they cite. Instead, each of the "factors" they list is simply a different way of saying the same thing: the doctrine applies whenever a claim calls for a determination of matters that are within an agency's particular competence. It is therefore not surprising that they cite different cases for each supposed "factor."

agencies, including the Public Service Commission ("PSC"),[8] the New York City Department of Housing Preservation and Development ("HPD"),[9] and the Commissioner of Education,[10] to name only a few.[11] The common thread of these

[8] *See, e.g., Township of Thompson v. New York State Elec. & Gas Corp.*, 25 A.D.3d 850, 851-52 (3d Dept.), *lv. denied*, 6 N.Y.3d 713 (2006); *Brownsville Baptist Church v. Consol. Edison of New York, Inc.*, 272 A.D.2d 358, 359 (2d Dept. 2000; *Blair v. NYNEX Corp.*, 246 A.D.2d 336 (1st Dept. 1998); *Lamparter v. Long Island Lighting Co.*, 90 A.D.2d 496 (2d Dept. 1982); *Filler v. Consolidated Edison*, 39 Misc.3d 128(A), 2013 WL 1234935 (App. Term 2d, 11th and 13th Dist. 2013).

[9] *See, e.g., Wong v. Gouverneur Gardens Housing Corp.*, 308 A.D.2d 301, 303-04 (1st Dept. 2003).

[10] *See, e.g., Markow-Brown v. Bd. of Educ., Port Jefferson Public Schools*, 301 A.D.2d 653, 653-54 (2d Dept.), *lv. denied*, 100 N.Y.2d 512 (2003); *Di Tanna v. Bd. of Educ. of Ellicottville Cent. School Dist.*, 292 A.D.2d 772 (4th Dept.), *lv. denied*, 98 N.Y.2d 605 (2002); *Hessney v. Bd. of Educ. of Public Schools of the Tarrytowns*, 228 A.D.2d 954 (3d Dept.), *lv. denied*, 89 N.Y.2d 801 (1996); *deVente v. Bd. of Educ.*, 15 A.D.3d 716, 718 (3d Dept. 2005); *Langston v. Iroquois Central School Dist.*, 291 A.D.2d 845 (4th Dept. 2002); *accord Patti Ann H. v. New York Medical College*, 88 A.D.2d 296, 300-01 (2d Dept.) (student's proceeding to annul her expulsion should have been dismissed under the doctrine of primary jurisdiction; although court had concurrent jurisdiction, student should have been "instructed to seek review by the Commissioner of Education" first because the matter was within his "special competence"), *aff'd*, 58 N.Y.2d 734 (1982) (affirming based on alternative ground for dismissal; primary jurisdiction not addressed).

[11] Others include local zoning authorities (*see Massaro v. Jaina Network Systems, Inc.*, No. 17256/10, 2012 WL 760506 (Sup. Ct. N.Y. Co. Feb. 12, 2012) (staying a single cause of action based on primary jurisdiction, while allowing others to proceed), *aff'd as modified*, 106 A.D.3d 701 (2d Dept.) (primary jurisdiction ruling affirmed), *lv. dism'd*, 21 N.Y.3d 1057 (2013)), the New York City Board of Standards and Appeals (*see Haddad v. Salzman*, 188 A.D.2d 515, 517 (2d Dept. 1992)), the Food and Drug Administration (*see Heller v. Coca-Cola Co.*, 230 A.D.2d 768, 768-69 (1st Dept. 1996), *lv. dism'd in part, denied in part*, 89 N.Y.2d

rulings – which this Court has repeatedly declined to disturb[12] – is that the doctrine's *only* requirement is that the claim involve a question within the specialized knowledge and expertise of the agency. Where that is the case, a court will dismiss or stay the action unless there is some reason *not* to do so.[13]

As the authority cited in footnotes 8-11, above, amply demonstrates, the long-standing legal principles governing primary jurisdiction are simply not as plaintiffs describe them in their brief. In accordance with the doctrine as it has always been applied in this State, once the lower court determined that plaintiffs' claims were within the expertise of DHCR (*see* R.8), dismissal was within the bounds of its discretion.[14]

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856 (1996)), and the Department of Transportation (*see Albany-Binghamton Express, Inc. v. Borden, Inc.*, 192 A.D.2d 887, 888 (3d Dept. 1993)).

[12] *See, e.g., Township of Thompson, supra* (n.8); *Markow-Brown, Di Tanna, Hessney*, and *Patti Ann H., supra* (n.10); *Massaro* and *Heller, supra* (n.11).

[13] *See generally* 2 N.Y. Jur.2d Administrative Law §328 ("The doctrine of primary jurisdiction enjoins courts sharing concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency's authority, particularly where the agency's specialized experience and technical expertise is involved.") (footnote omitted); *id.* § 329 ("In the absence of a clear contractual right the enforcement of which justifies court intervention, a court should decline to take initial jurisdiction of a matter within the competence of an administrative agency specially created to handle such matters.") (footnotes omitted).

[14] Although in most of the cases cited above in footnotes 8 through 11 (including many that this Court declined to review) the courts dismissed claims, in some the claims were stayed rather than dismissed. The choice between stay and dismissal is subject to the discretion of the court of first instance. *See Marsico v. Armstrong*, 111 A.D.3d 736, 737 (2d Dept. 2013) (lower court could have dismissed petition under the doctrine of primary jurisdiction; having stayed it instead, however, lower

2. The Doctrine Of Primary Jurisdiction Applies With Full Force To Claims Under The RSL

To the extent that plaintiffs' brief may be read to suggest that RSL claims should be treated differently from claims under other statutory schemes that are administered by an agency, they offer no reason for such differentiation and none exists. To the contrary, for such claims the governing statutes make clear that the Legislature intended primary jurisdiction dismissal to be fully available. Specifically, under the Emergency Tenant Protection Act of 1974, as amended (the "ETPA," codified at McKinney's Unconsol. Laws §§ 8621, *et seq.*), outside of New York City (that is, "in a city having a population of less than one million or a town or village")[15]: (a) DHCR has the authority to adjudicate claims (*see*

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court should have permitted petitioner to amend following an administrative determination of the relevant issues). A stay may be more appropriate where, for example, a proceeding includes additional claims that will not be resolved by an agency determination (*see, e.g., Haddad, supra; Massaro, supra*), the plaintiff is entitled to preliminary injunctive relief pending the administrative determination (*see, e.g., Nasaw v. Jemrock Realty Co.*, 225 A.D.2d 385, 386 (1st Dept. 1996)), or dismissal might cause an otherwise-timely claim to become time-barred (*see, e.g., Guglielmo v. Long Island Lighting Co.*, 83 A.D.2d 481, 489 (2d Dept. 1981)). Here, however, no party asked either the lower court or the Appellate Division to stay the action rather than dismiss it. And in all events, dismissal without prejudice to the commencement of an administrative proceeding (and subsequent Article 78 review) – just as the dismissal was here – is entirely consistent with this Court's description of the doctrine as a "postpone[ment]" of judicial action so that the agency's views can be made "available to the court." *Capital Tel.*, 56 N.Y.2d at 22.

[15] The ETPA applies only in the City of New York and in municipalities within the counties of Nassau, Westchester and Rockland where an emergency has been declared. *See* McKinney's Unconsol. Laws § 8634.

McKinney's Unconsol. Laws § 8632(a)(1)(a)-(e)), but (b) as long as the tenant has not commenced a DHCR proceeding, the tenant has the absolute right to "commenc[e] an action or interpose[e] a counterclaim in a court of competent jurisdiction for damages" (*id.*§ 8632(a)(1)(f)), and (c) in any such court proceeding, the court "may at any stage certify" the matter to DHCR, and DHCR may intervene in any such proceeding (id. § 8632(a)(7)).[16] In contrast, for New York City (that is, "a city having a population of one million or more") the statute provides only that DHCR's enforcement powers shall be as provided in the RSL; it contains *no* specification that a tenant retains the absolute right to sue in court and, correspondingly, no provision for certification to (or intervention by) DHCR. *Id.* § 8632(b). The RSL (which applies only in New York City – *see* RSL § 26-501), in turn, contains language virtually identical to § 8632(a)(1)(a)-(e) describing DHCR's enforcement power, but it contains *no* equivalent to § 8632(a)(1)(f) specifying that a tenant has the absolute right to proceed in court in the first instance or § 8632(a)(7) providing for certification to (or intervention by) DHCR.

[16] Sections 8632(a)(1)(f) and 8632(a)(7) were added to the statute in 1983, when DHCR's administrative jurisdiction was expanded to include New York City (where the statute had previously been administered by the New York City Conciliation and Appeals Board). *See* L. 1983 c. 403, § 4. In the same enactment, the CPLR was amended to add section 213-a, which provides a statute of limitations for rent overcharge claims. *See* L. 1983 c. 403, § 35.

See RSL § 26-516.[17]

Although this has been held not to signify an intent to confer *exclusive* jurisdiction on DHCR for RSL claims,[18] it indicates a clear statutory intent that – in contrast to claims under the ETPA arising outside of New York City (where the RSL does not apply and the statute expressly gives the tenant a choice of forum) – claims under the RSL are subject to the *primary* jurisdiction of DHCR. Had the Legislature intended to give tenants an absolute choice of forum for RSL claims, it would have provided as much in the ETPA at the same time it amended that statute to give tenants outside of New York City such an absolute choice. (*See supra*, n.16). Plaintiffs' insistence that the Legislature "chose not to deprive them of" that choice (*see* App. Br. at 20) is thus *exactly* backwards.[19] Accordingly, a claim

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[17] The applicable regulations set up a similar dichotomy. The Emergency Tenant Protection Act Regulations (9 N.Y.C.R.R. §§ 2500, *et seq.*) – which apply only in the Counties of Nassau, Rockland and Westchester (*see* 9 N.Y.C.R.R. § 2500.8), where the RSL does not apply – specify that unless a tenant has filed a complaint with DHCR and has not withdrawn it, the tenant has a right to proceed in court. *See* 9 N.Y.C.R.R. § 2506.1(h). The parallel provision in the RSC (9 N.Y.C.R.R. § 2520, *et seq.*) – which applies in New York City, where the RSL applies (*see* 9 N.Y.C.R.R. § 2520.11) – contains no such specification. *See* 9 N.Y.C.R.R. § 2526.1.

[18] *See Rockaway One Co., LLC v. Wiggins*, 35 A.D.3d 36, 39 (2d Dept. 2006).

[19] *See Thoreson v. Penthouse Int'l, Ltd.*, 80 N.Y.2d 490, 498 (1992) (fact that Legislature had amended Executive Law to provide for punitive damages for housing discrimination supported inference that "such damages were not then recoverable in other areas including employment") (citation omitted); *accord Vatore v. Comm'r of Consumer Affairs of the City of New York*, 83 N.Y.2d 645, 650 (1994); *Tze Chun Liao v. New York State Banking Dept.*, 74 N.Y.2d 505, 510-

under the RSL is subject to dismissal under the doctrine of primary jurisdiction in any instance where the key questions are within DHCR's special competence. *See, e.g., 520 East 81st Street Assocs. v. Lenox Hill Hosp.*, 38 N.Y.2d 525, 527 (1976) (ruling, under prior law, that "once it was determined [by the lower court] that the Rent Stabilization Law of 1969 was applicable, issues arising under the provisions of that law would be required to be passed upon administratively until that remedy be exhausted").[20]

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11 (1989); *Eaton v. New York City Conciliation and Appeals Bd.*, 56 N.Y.2d 340, 345-46 (1982). By the same token, the Legislature's express provision for a choice of forum for claims outside of New York City evidences an understanding that absent such a provision there would be no such choice; otherwise, the provision would be superfluous. *See Reed v. State*, 78 N.Y.2d 1, 9 (1991) (statute should not be construed in a way that renders any of its sections superfluous).

[20] *Accord Olsen v. Stellar West 110, LLC*, 96 A.D.3d 440, 442 (1st Dept. 2012) (directing that RSL claims be dismissed under the doctrine of primary jurisdiction; "DHCR, given its expertise in rent regulation," can "investigate plaintiffs' fraud allegations, determine the regulatory status of the apartment, and, if warranted, apply the default formula . . . to determine the base rate"), *lv. dism'd*, 20 N.Y.3d 1000 (2013); *Davis v. Waterside Housing Co., Inc.*, 274 A.D.2d 318, 319 (1st Dept.) (RSL claims should have been dismissed under the doctrine of primary jurisdiction; "The IAS court erred in ruling that the doctrine does not apply in this instance because the issues before the court were not within DHCR's specialized field and do not involve that agency's technical expertise. To the contrary, the Legislature has specifically authorized that agency to administer questions relating to rent regulation.") (citation and internal quotations omitted), *lv. denied*, 95 N.Y.2d 770 (2000); *see also Wilcox v. Pinewood Apt. Assoc. Inc.*, 100 A.D.3d 873, 874 (2d Dept. 2012); *390 W. End Assocs. v. Nelligan*, 35 A.D.3d 306 (1st Dept. 2006); *390 W. End Assocs. v. Zouker*, 302 A.D.2d 227, 228 (1st Dept. 2003); *Friscia v. Lem Lee 13th Ltd. P'ship*, No. 108123/05, 2006 WL 4937209 (Sup. Ct. N.Y. Co. Jan. 31, 2006) (dismissing RSL claims under the doctrine of primary jurisdiction; "the Legislature has specifically authorized DHCR to administer

None of the cases plaintiffs cite is to the contrary. In particular: (a) in some of the cases, an appellate court found the doctrine of primary jurisdiction inapplicable because the central question was one of law, such as whether *Roberts* should be applied retroactively, how to apply the statute of limitations, and/or whether class certification would be appropriate[21]; (b) in some of the cases, an appellate court found the doctrine inapplicable because one or more of the claims at issue was not actually within DHCR's expertise under the RSL, and/or a rent overcharge claim was asserted as a counterclaim or offset against a non-RSL claim[22]; (c) in some of the cases, a lower court simply exercised its discretion – in

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questions regarding rent regulation status and such questions are peculiarly and routinely within DHCR's area of expertise") (citation and internal quotations omitted), *aff'd*, 37 A.D.3d 168 (1st Dept. 2007).

[21] These cases are *Dugan v. London Terrace Gardens, L.P.*, 101 A.D.3d 648 (1st Dept. 2012) ("the actions raise legal issues, including class certification and applicable limitations periods, that should be addressed in the first instance by the courts"), *aff'g* 34 Misc.3d 1240(A), 2011 WL 7553528, *7, *9 (Sup. Ct. N.Y. Co. Jun. 6, 2011) (noting that following determination of issues outside DHCR's special competency, "it then may be necessary to determine the initial regulated rent to which the rent level must be restored and when, annual increases, and increases based on major capital improvements or on individual apartment improvements," at which that point a dismissal or stay under the doctrine of primary jurisdiction might be appropriate); *Gerard v. Clermont York Assocs., LLC*, 81 A.D.3d 497, 497-98 (1st Dept. 2011) (primary jurisdiction dismissal inappropriate because the action "presents legal issues left open after the Court of Appeals' decision in [*Roberts*], including whether that decision is to be applied retroactively or prospectively").

[22] These cases are *Rockaway One, supra*, 35 A.D.3d at 42-43 (in landlord's summary proceeding to recover possession of tenant's apartment, civil court erred in dismissing tenant's counterclaim for rent overcharge; "[p]erhaps most

light of all of the circumstances – *not* to dismiss on the basis of primary jurisdiction, and that determination was not appealed[23]; and (d) in the balance of the cases – including *Downing v. First Lenox Terrace Assocs.*, 107 A.D.3d 86, 91 (1st Dept. 2013), *aff'd sub nom Borden v. 400 East 55th Street Assocs L.P.*, 24 N.Y.3d 382 (2014), where (contrary to plaintiffs' assertion – *see* App. Br. at 4-5; *id.* at 7) the lower court dismissed *not* based on primary jurisdiction, but based on an erroneous view (reversed by the Appellate Division) that DHCR had *exclusive*

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important," dismissal of the counterclaim was "inconsistent with the proper adjudication of a summary proceeding" because it "essentially permitted judgment to be entered against the tenant for what may be an illegal rent"); *Missionary Sisters of the Sacred Heart v. Meer*, 131 A.D.2d 393, 396 (1st Dept. 1987) (Civil Court did not err in declining to dismiss counterclaim under doctrine of primary jurisdiction, where counterclaim sought only damages measured by difference between price of alternative garage space and price tenant would have paid for landlord's space – which DHCR could not have provided); *State by Abrams v. Winter*, 121 A.D.2d 287, 288 (1st Dept. 1986) (primary jurisdiction dismissal not appropriate where action was brought by Attorney General and sought to enjoin "persistent illegal conduct pursuant to Executive Law § 63(12)" consisting of repeated violations of regulations and of General Obligations Law § 7-103); *157 Broadway Assocs., LLC v. Edouard*, 28 Misc.3d 140(A), 2010 WL 3431685 (App. Term 1st Dept. 2010) (in summary nonpayment proceeding, Civil Court properly declined to strike tenant's affirmative defense of rent overcharge).

[23] These cases are *Nezry v. Haven Ave. Owner LLC*, 28 Misc.3d 1226(A), 2010 WL 3338545, *9-10 (Sup. Ct. N.Y. Co. Jul. 9, 2010); *Nieborak v. W54-7 LLC*, 2016 N.Y. Slip Op. 31040(U), 2016 WL 540692, *6-7 (Sup. Ct. N.Y. Co. Jan. 22, 2016); *Dodd v. 98 Riverside Drive, LLC*, 2011 N.Y. Slip Op. 32708(U), 2011 WL 5117699 (Sup. Ct. N.Y. Co. Oct. 18, 2011); *Vazquez v. Sichel*, 12 Misc.3d 604, 611-12 (Civ. Ct. N.Y. Co. 2005); *Contempo Acquisition LLC v. Dawson*, 2015 N.Y. Slip Op. 32312(U), 2015 WL 8161746, *5 (Sup. Ct. N.Y. Co. Nov. 20, 2015).

jurisdiction – the doctrine of primary jurisdiction was not at issue at all.[24] These cases are no different from cases in other areas where the doctrine applies: if the gravamen of the complaint is not actually within the agency's expertise, a motion to dismiss on primary jurisdiction grounds will generally be denied.[25]

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[24] Apart from *Downing, supra*, the other cases plaintiffs cite in this category are *Altman v. 285 West Fourth LLC*, 31 N.Y.3d 178 (2018); *Leight v. W7879 LLC*, 27 N.Y.3d 929 (2016); *Conason v. Megan Holding, LLC*, 25 N.Y.3d 1 (2015); *Scott v. Rockaway Pratt, LLC*, 17 N.Y.3d 739 (2011); *Roberts v. Tishman Speyer Props., L.P.*, 13 N.Y.3d 270 (2009); *Jazilek v. Abart Holdings LLC*, 10 N.Y.3d 943 (2008); *Thornton v. Baron*, 5 N.Y.3d 175 (2005); *Altschuler v. Jobman 478/480, LLC*, 135 A.D.3d 439 (1st Dept. 2016), *lv. denied*, 29 N.Y.3d 903 (2017); *Taylor v. 72A Realty Assocs., L.P.*, 151 A.D.3d 95 (1st Dept. 2017); *72A Realty Assocs. v. Lucas*, 101 A.D.3d 401 (1st Dept. 2012); *Gordon v. 305 Riverside Corp.*, 93 A.D.3d 590 (1st Dept. 2012); *Gersten v. 56 7th Ave., LLC*, 88 A.D.3d 189 (1st Dept. 2011); *Wolfisch v. Mailman*, 196 A.D.2d 466 (1st Dept. 1993), *lv. denied*, 82 N.Y.2d 661 (1993); *Crimmins v. Handler & Co.*, 249 A.D.2d 89 (1st Dept. 1998); and *Pascaud v. B-U Realty Corp.*, 2017 N.Y. Slip Op. 31482(U), 2017 WL 2998843 (Sup. Ct. N.Y. Co. Jul. 14, 2017). In *Casey v. Whitehouse Estates, Inc.*, 2017 WL 1161744 (Sup. Ct. N.Y. Co. Mar. 23, 2017), the court – after adjudicating motions for summary judgment, injunctive and other relief in a matter had been certified as a class action (*see* 36 Misc.3d 1225(A), 2012 WL 3168689 (Sup. Ct. N.Y. Co. Aug. 6, 2012)) – dismissed a long list of affirmative defenses including "lack of subject matter jurisdiction" and failure to "exhaust administrative remedies"; however, the decision makes clear that the defendant made no real attempt to press any of those defenses. *See* 2017 WL 1161744, *18-19.

[25] *See, e.g., Neumann v. Wyandanch Union Free School Dist.*, 84 A.D.3d 816, 818 (2d Dept. 2011); *Verdon v. Dutchess County Bd. of Cooperative Educ. Svcs.*, 47 A.D.3d 941, 942-43 (2d Dept. 2008); *Good v. Amer. Pioneer Title Ins. Co.*, 12 A.D.3d 401, 402 (2d Dept. 2004); *People v. Port Distrib. Corp.*, 114 A.D.2d 259, 265-67 (1st Dept. 1986); *see generally* 2 N.Y. Jur.2d Administrative Law § 330 ("The doctrine of primary administrative jurisdiction does not apply where only a question of law is involved and there are no facts to consider or other considerations to weigh, particularly if resort to the administrative tribunal and the

The doctrine itself thus fully accommodates all of the concerns to which plaintiffs point as alleged reasons why it should not apply to RSL claims, and excluding such claims from the doctrine would be inconsistent with the statutory scheme. Accordingly, the doctrine applies to RSL claims with full force.

B. Plaintiffs' RSL Claims Were Properly Dismissed

1. The Doctrine Of Primary Jurisdiction Applies To Plaintiffs' Claims Because The Issues They Raise Are Within DHCR's Special Competence

Once the Court concludes – as we submit it must – that the doctrine of primary jurisdiction applies to RSL claims, it should affirm the dismissal of plaintiffs' RSL claims. Despite plaintiffs' contention (*see, e.g.*, App. Br. at 20), those claims were not dismissed merely because of DHCR's "concurrent jurisdiction"; they were dismissed because "the questions raised about the applicability of the rent stabilization law and the proper amount of rent [are] within the agency's specialized experience and technical expertise." (R.8). Absent countervailing considerations (which, as detailed below, were absent here – *see infra* at 30-33), that is all that is required to make dismissal a proper exercise of a court's discretion under the doctrine of primary jurisdiction. (*See supra* at 11-14). Dismissal was thus wholly proper.

Plaintiffs' assertion (App. Br. at 24) that their RSL claims are somehow *not*

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limited judicial review accorded its determination are regarded as not affording an adequate remedy.") (footnotes omitted).

within DHCR's special competence is entirely unsupported. Those claims call for factual determinations of (a) each plaintiff's "base date" rent (including, according to plaintiffs (*see* App. Br. at 39-40) whether to apply the "default formula" applicable in instances where there has been a showing of a fraudulent scheme or the lease history is unavailable or unreliable, pursuant to RSC § 2522.6(b)(2) and (3)); (b) permissible increases since that "base date" (including any increases based on individual apartment improvements (*see* RSC § 2522.4(a)(1)), vacancies (RSC § 2522.8), and other factors (*see, e.g.,* RSC §§ 2522.4(a)(2)), as well as "the equities involved" (RSC § 2522.7; *accord* RSL § 26-516(a))); and (c) whether, to the extent the calculation reveals that there has been an overcharge, any such overcharge was willful (*see* RSC § 2526.1(a)). These factual determinations – which must be made in light of the complex statutory and regulatory scheme that governs this area – are *exactly* the kind that DHCR, as the "sole administrative agency to administer the regulation of residential rents under the rent control and rent stabilization statutes," exists to make. *Rent Stabilization Ass'n of New York City, Inc. v. Higgins*, 83 N.Y.2d 156, 165 (1993) (citation and internal quotations omitted). DHCR unquestionably has "expertise in evaluating" the kinds of "factual data" that will inform these determinations. *See Ansonia Residents Ass'n v. New York State Div. of Housing and Comm. Renewal*, 75 N.Y.2d 206, 213

(1989).[26]

Plaintiffs argue that "DHCR does not have any special competence to address" the issues of "a tenant's regulatory status, the amount of the legal rent, or the amount of the overcharges." (*See* App. Br. at 21). But none of the cases they cite actually supports that assertion:

(a) In *Rockaway One, supra,* the Appellate Division held that primary jurisdiction dismissal was inappropriate chiefly (in the words of the Appellate Division, "most importantly") because – given that the tenant had asserted rent overcharge claims as a defense to a summary proceeding in which the landlord sought to evict her for non-payment of rent – "declining jurisdiction" was "inconsistent with the proper adjudication of" that proceeding and "permitted judgment to be entered against the tenant for

[26] *Ansonia* related specifically to DHCR's "expertise in evaluating factual data" relating to major capital improvements. The agency, however, is broadly charged by statute with administering the RSL (*see* McKinney's Unconsolidated Laws § 8628(c)); the RSL, in turn, expressly contemplates that DHCR will make factual determinations regarding all matters related to rent overcharge. *See, e.g.*, RSL § 26-516. Courts have, as a result, uniformly recognized DHCR's expertise on these matters. (*See supra* at 17-18 and n.20). *Accord, e.g., Gracecor Realty Co., Inc. v. Hargrove,* 90 N.Y.2d 350, 357 (1997) ("the question of whether a particular space is subject to rent stabilization falls within DHCR's administrative expertise"); *Dugan, supra,* 2011 WL 7553528, *9 (noting, in declining to dismiss or stay based on primary jurisdiction, that once certain legal issues were resolved "it then may be necessary to determine the initial regulated rent to which the rent level must be restored and when, annual increases, and increases based on major capital improvements or on individual apartment improvements," at which point such a dismissal or stay might be appropriate).

what may be an illegal rent." 35 A.D.3d at 43. This is entirely consistent with the principle, applicable in all areas where the doctrine of primary jurisdiction applies, that the doctrine will not support dismissal if the case involves issues that are outside the agency's jurisdiction or competence or where other considerations are present. (*See supra* at 11-15 and nn. 7-14).

(b) In *Missionary Sisters, supra*, DHCR had already determined the issues within its special competence (that is, whether the landlord was obligated to offer garage spaces to its tenants before leasing them to others); the tenant's counterclaim in the landlord's summary non-payment proceeding required a determination of whether the tenant "was entitled to money damages for the substantial expenses he incurred because of the landlord's denial to him of a [garage] space in the building," an issue *outside* the scope of the RSL and therefore properly ruled upon by the court in the first instance. 131 A.D.2d at 395-96.

(c) In *Wolfisch, supra,* the lower court initially dismissed the plaintiffs' claims based on a finding that they were subject to the *exclusive* jurisdiction of DHCR; the Appellate Division reversed, finding that the Supreme Court had "statutory jurisdiction" (*Wolfisch v. Mailman*, 182 A.D.2d 533, 533 (1st

Dept. 1992))[27]; the lower court then adjudicated the plaintiffs' claims on the merits; and the Appellate Division affirmed the result as modified. *See* 196 A.D.2d at 466. The issue of DHCR's special competence for purposes of primary jurisdiction was not before the courts.

(d) Similarly, in *Crimmins, supra,* no issue of primary jurisdiction or of DHCR's special competence was raised; rather, the question was whether the tenant's claims were time-barred. *See* 249 A.D.2d at 91.[28]

None of these cases casts doubt on the core proposition that DHCR has special knowledge and expertise in all issues arising under the RSL – something that the Legislature itself confirmed in specifically consigning those issues to DHCR in the

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[27] For this determination, the Appellate Division relied on (a) McKinney's Unconsol. Laws § 8632(a)(1)(f) – which, by its express terms, applies only in municipalities outside of New York City, where the RSL does not apply (*see supra* at 15); (b) *Smitten v. 56 MacDougal Street Co.*, 167 A.D.2d 205, 206 (1st Dept. 1990), which in turn also relied on that same statutory provision; and (c) CPLR 213-a, which simply provides a statute of limitations for rent overcharge claims to which § 8632(a)(1)(f) does apply. Although we do not here argue that DHCR's jurisdiction over rent overcharge claims within New York City is exclusive, we respectfully submit that the Appellate Division was mistaken in its apparent belief that § 8632(a)(1)(f) applied in the case before it, which originated in New York County (*see* 196 A.D.2d at 466) and is therefore governed not by § 8632(a) but rather by § 8632(b) and the RSL. It is not clear whether the result in *Wolfisch* would have been different if the Appellate Division had applied the correct statutory provision.

[28] Because *Crimmins* originated in New York County (*see* 249 A.D.2d at 89), the court's reliance on § 8632(a) to support its conclusions (*see* 249 A.D.2d at 91) was error; the applicable section was § 8632(b). (*See supra* at 15-17). Again, we take no position on whether application of the correct statute should have changed the result.

first place (*see supra* at 15-18 and n.19), and the courts have similarly confirmed in deferring these issues to DHCR under the doctrine of primary jurisdiction (*see supra* at 17-18 and n.20).

Plaintiffs next argue that primary jurisdiction should not apply because this case involves "legal issues left unresolved in the wake of *Roberts*" that need to be "addressed by the courts in the first instance." (*See, e.g.*, App. Br. at 29). But plaintiffs do not identify a single legal issue at stake here that has not *already* been addressed by the courts; instead, they identify numerous legal issues and then cite the cases where the courts have addressed them. (*See id.*; *accord id.* at 36). Plaintiffs' own brief thus makes clear that for all of these issues we are past the "first instance" and DHCR now has guidance from the courts with respect to any aspects of the law as to which such guidance was once needed.

Plaintiffs appear to assume that the mere fact that a case may involve a legal dispute as well as a factual one somehow makes the doctrine of primary jurisdiction inapplicable. But there is no such rule. Rather, where (as here) a dispute calls for the application of law in light of an "evaluation of factual data and the inferences to be drawn therefrom," courts "regularly defer to the governmental agency charged with the responsibility for administration of the statute" and uphold that agency's interpretation if it "is not irrational or unreasonable."[29] The

[29] *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980).

same is true where (as here) a dispute revolves around the "specific application of a broad statutory term" (as we submit the term "willful," as used in RSL § 26-516(a) and RSC § 2506.1(a)(1), is).[30] Moreover, a court would unquestionably owe deference to DHCR's interpretation of the RSC, to which plaintiffs repeatedly refer in their Complaint (*see, e.g.*, R.18, ¶ 51; R.33, ¶¶ 184-185).[31] And in all events, to the extent that plaintiffs' claims might also require "pure statutory interpretation" as to which the courts do not owe deference to DHCR, that simply means that in an Article 78 review of the agency's determination the court will not defer to the agency with respect to those aspects of the determination.[32]

Finally, in an effort to find *something* in this case that falls outside the scope of DHCR's expertise, plaintiffs argue that their claims also require determinations of:

> (i) the consequences to a landlord who represents to dozens of new tenants who move in after *Roberts* that their apartment[s] are unregulated, and not advising those tenants of the existence of J-51 benefits; (ii) the methodology for calculating the legal rents that should be applied in such a case; (iii) the consequences to a landlord who does not restore apartments to stabilization and does not register them with DHCR until late 2016, long after this Court ruled that *Roberts* applies retroactively; (iv) whether treble damages should be assessed in such a case.

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[30] *See O'Brien v. Spitzer*, 7 N.Y.3d 239, 242 (2006) (deferring to Attorney General's interpretation of the statutory terms "employee" and "independent contractor").

[31] *See Aponte v. Olatoye*, 30 N.Y.3d 693, 698 (2018).

[32] *O'Brien*, 7 N.Y.3d at 242.

(App. Br. at 31-32). Nothing on this list changes the analysis.

For at least eight of the plaintiffs, the Complaint makes clear that none of the items on this list is even applicable. (*See supra* at 9-10). For the others, items "(i)," "(iii)" and "(iv)" are all different ways of saying the same thing: their claims call for a determination of whether – to the extent any of them has been overcharged for rent – any such overcharge was willful. If it was, treble damages should be assessed. The RSL and RSC expressly authorize DHCR to make factual determinations with respect to willfulness (*see* RSL § 26-516(a); *accord* RSC § 2522.70), and such determinations are exactly the kind that DHCR has the expertise to make. (*See supra* at 23-24 and n.26).

As for item "(ii)," DHCR's methodology for calculating the legal rents for apartments that are re-registered pursuant to its J-51 initiative has recently been subjected to judicial review. Although DHCR had been calculating such rents by going back to the last regulated lease and applying all permissible increases since that time (*see* R.69-70), in *Matter of Regina Metro. Co., LLC v. New York State Div. of Housing and Comm. Renewal*, __ A.D.3d __, 2018 WL 3886121 (1st Dept. Aug. 16, 2018), as part of Article 78 review, the Appellate Division held that, absent a showing of a fraudulent scheme, it is improper to look back more than four years to determine the "base date" rent. There is, accordingly, nothing left to determine with respect to "methodology": if plaintiffs can demonstrate a fraudulent

scheme, DHCR will apply its "default formula" to determine the "base date" rent; if they cannot, it will apply the straightforward four-year look-back mandated by *Regina Metro*.[33] This, again, is a factual determination that is squarely within DHCR's expertise. (*See supra* at 23-24 and n.26).[34]

In short, every issue to which plaintiffs point in this proceeding is squarely within DHCR's competence. Accordingly, the lower court and the Appellate Division were correct in concluding that the doctrine of primary jurisdiction fully applies here.

2. <u>Dismissal Was A Proper Exercise Of The Lower Court's Discretion</u>

Plaintiffs did not argue below that even if the doctrine of primary jurisdiction applies dismissal would be an improper exercise of discretion (*see* Add.17-31), and they do not do so here. For the avoidance of doubt, however, we

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[33] The fact that the Appellate Division rejected the methodology that DHCR had theretofore been using (*see* 2018 WL 3886121 at *5-6) does not change the analysis: DHCR's methodology has been subjected to judicial review, and (absent a further appeal in *Regina Metro*) DHCR is now obligated to comply with *Regina Metro*. We note as well that *Regina Metro* would also be binding in the Supreme Court, New York County (where this case originated), as that court is within the First Department of the Appellate Division. *See D'Alessandro v. Carro*, 123 A.D.3d 1, 6 (1st Dept. 2014); *accord* 28 N.Y. Jur.2d Courts and Judges § 221.

[34] Moreover, if the "default formula" applies (and we emphasize that plaintiffs have given no concrete reason why it would), the necessary factual determinations would require even *more* of DHCR's expertise. *See* RSC § 2522.6(b)(3) (providing that in such cases the legal regulated rent must be determined through a comparison of four separate calculations, one of which is "based on data compiled by the DHCR, using sampling methods determined by the DHCR, for regulated housing accommodations").

note that this Court should not disturb that discretionary ruling unless it was arbitrary or without rational basis.[35] There is no room for such a finding here.

To the contrary, any factors that might appropriately have weighed in the lower court's exercise of its discretion *all* favor dismissal. In particular:

(a) Contrary to plaintiffs' repeated assertion (*see, e.g.*, App. Br. at 28; *id.* at 29), there was and is a proceeding pending before DHCR in which that agency is already called upon to adjudicate many of the facts that the Complaint insists are "common" to all of their claims (*see* R.12-18), and this fact was pointed out to the lower court by *both* sides. (*See* Add.29-30 n.4, 46). While the existence of such a proceeding was not a prerequisite to dismissal based on primary jurisdiction, it certainly weighed in favor of such dismissal.

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[35] *See generally* A. Karger, The Powers of the New York Court of Appeals, § 16:1 (Court may review "a claim that a particular exercise of discretion is so arbitrary and egregious as to constitute an abuse of discretion as a matter of law") (collecting cases; footnote omitted); *id.* § 16:4 (test for abuse of discretion "generally appears to be whether the particular exercise of discretion is so arbitrary and without rational basis as to amount to abuse as a matter of law, or whether the result reached is so outrageous as to shock the conscience"; "it is clear that a holding of abuse will be made only in a case involving extraordinary circumstances") (collecting cases; footnotes and internal quotations omitted); *accord Denio v. State*, 7 N.Y.3d 159, 171 (2006) (no abuse of discretion where "the record supports" the result reached by the lower court, even though it might also support a different result); *Patron v. Patron*, 40 N.Y.2d 582, 585 (1976) (discretionary determinations not reviewable because there were no "legal propositions advanced which raise any substantial question of abuse as a matter of law; the results are not so outrageous as to shock the conscience; [and] there are no extraordinary circumstances, factual or procedural").

(b) Plaintiffs asserted that a calculation of the proper rent for each apartment requires (among other things) review of DHCR's records, and that if the "default formula" applies that review may have to go back as far as eighteen to twenty years. (*See supra* at 10). The fact that DHCR already has these records further favored dismissal to allow DHCR to determine the factual issues in the first instance.[36]

(c) Plaintiffs now appear to argue that the fact that this is a "multi-plaintiff action" weighs against dismissal. (*See* App. Br. at 5; *id.* at 29). But in a multi-plaintiff action, the claims of individual plaintiffs may be severed into separate actions in the court's discretion,[37] and in a DHCR proceeding their claims may be consolidated either upon DHCR's own initiative or upon an application by any one of the plaintiffs. *See* RSC § 2527.5(i). Plaintiffs thus have no less "right" to proceed collectively before DHCR than they do in a court.

(d) The fact that this action involves 18 apartments (each of which will require individual determinations concerning, at a minimum, "base date" rent and permissible increases since that date) does have bearing here, however. In the lower court, defendants submitted evidence that, based on prior experience, to

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[36] *See, e.g., Wang v. Jedmon Realty Corp.*, No. 453248/2015, 2017 WL 5270683, *2 (Sup. Ct. N.Y. Co. Nov. 13, 2017) (primary jurisdiction dismissal based not only on DHCR's expertise, but also on "its access to records").

[37] *See* CPLR 603.

try this case would take an average of 3.5 trial days *per apartment*. (*See* R.85-87). This suggests a 63-day trial for this 18-apartment case – a period that does not even include pretrial proceedings (which, based on the same prior experience, could be expected to take years). (*See id.*). DHCR, in contrast, has streamlined procedures for making the factual determinations at issue. The efficiency achieved by allowing DHCR to make those determinations in the first instance (subject to Article 78 review) further supported dismissal here.

We emphasize that in the lower court plaintiffs presented *no* factor that could weigh against dismissal; instead, they argued only that dismissal was not available as a matter of law. (Add.26-30). As a result, once the lower court rejected that legal argument there was nothing in the record to suggest that dismissal might be inappropriate in this case. On that record, it cannot possibly be said that the lower court abused its discretion by dismissing the action.

C. The Court Should Decline To Change The Jurisprudence On Primary Jurisdiction By Engrafting Additional Requirements

As detailed above, plaintiffs' repeated refrain that the doctrine of primary jurisdiction should require something more than a finding that the matter calls for a determination that is within the agency's expertise (and, in particular, their argument that it should require prior agency involvement) is contrary to existing

law.[38] Plaintiffs thus ask this Court to change the law by imposing additional requirements. But because to do so would upend decades of jurisprudence that goes far beyond the area of rent regulation, the Court should not take such a step without good reason.[39] Plaintiffs offer none.

Instead, plaintiffs raise only makeweight arguments. First, plaintiffs complain that the doctrine of primary jurisdiction improperly deprives them of their ability to choose the forum in which their RSL claims are adjudicated. (App. Br. at 19). That, however, is the nature of the doctrine: it is "intended to co-ordinate the relationship between courts and administrative agencies" (*Capital Tel.*, *supra*, 56 N.Y.2d at 22), not to ensure that plaintiffs have an unfettered choice of forum. Under it, where the Legislature has created an agency with expertise in the

[38] With the exception of *Township of Thompson* and *Heller*, none of the cases cited in footnotes 8-11, above, involved pre-existing agency proceedings; the courts nevertheless dismissed or stayed claims under the doctrine of primary jurisdiction in every one of them. In *Township of Thompson*, the plaintiffs argued that a prior determination by the PSC resolved the material issues in their case; the court *disagreed*, and found that the matter had to be dismissed under the doctrine of primary jurisdiction because PSC had not resolved those issues in the prior proceeding. 25 A.D.3d at 851-52. In *Heller*, the FDA had previously promulgated labeling requirements for Aspartame (*see* 230 A.D.2d at 769) but was not currently reviewing or adjudicating any aspect of the plaintiffs' claims; nevertheless, the court dismissed those claims under the doctrine of primary jurisdiction on the ground that the plaintiffs should present their claims to the FDA. *Id.* at 769-70.

[39] *See generally Higby v. Mahoney*, 48 N.Y.2d 15, 18-20 and n.1 (1979) (discussing the reasons for judicial reluctance to overturn precedent – even in the face of "strong arguments" that "support a different result" – in an area where the Legislature could change the law if it so desired).

relevant field and given it adjudicative powers, courts decline to exercise jurisdiction until the agency has had an opportunity to adjudicate the matter. Absent a clear statutory provision that preserves the plaintiff's choice of forum (as exists, for example, for rent overcharge claims outside New York City – *see supra* at 15-17 – or for claims under the Human Rights Law[40]), where an agency exists a plaintiff simply does not have an unfettered right to choose to litigate in court. The fact that plaintiffs here do not have that choice is a result of the Legislature's decision not to provide for it in the ETPA or the RSL.

Plaintiffs next argue that the absence of "standards" governing the exercise of discretion will mean as a practical matter that judges can do whatever they wish. (App. Br. at 20). Not so. As explained above, if a court is presented with a good reason why it should exercise jurisdiction over a claim that is otherwise within the expertise of an agency, it has discretion to do so. *See Sohn*, *supra*, 78 N.Y.2d at 768. Otherwise, the claim should be dismissed or stayed. (*See supra* at 11-15). That has been the standard for decades in *all* areas of agency expertise, and it is not difficult to follow.

Plaintiffs go on to say that primary jurisdiction dismissal should not be

[40] *See* Executive Law § 297(9) ("Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages . . . and such other remedies as may be appropriate, . . . unless such person has filed a complaint hereunder or with any local commission on human rights . . . .").

available because it would deprive them of discovery. (App. Br. at 29-30). But DHCR has broad subpoena power and other investigative tools. *See, e.g.*, RSL § 26-516(f); RSC §§ 2526.4, 2526.6. There is no reason to believe that it will not perform its statutory function to gather the relevant records – many of which, as noted above, are its own records. (*See supra* at 10). Moreover, the difference between the kind of disclosure afforded in an agency proceeding and the kind of disclosure afforded by the courts is *always* in play when a court dismisses or stays a claim under the doctrine of primary jurisdiction; if it were enough to make the doctrine inapplicable, it would never apply. But it does, despite the differences between agency disclosure mechanisms and court ones.[41] Plaintiffs have not explained how their purported need for discovery differs from that of any other claimant, and in fact it does not.

Next, plaintiffs speculate that they may need a preliminary injunction to avoid becoming subject to non-payment or holdover proceedings in Housing Court. (App. Br. at 30). But because it is undisputed that plaintiffs' apartments are rent stabilized, there is no risk that defendants will "threaten to commence" holdover proceedings upon the expiration of plaintiffs' leases rather than offering

[41] *See Wong*, *supra*, 308 A.D.2d at 305 ("We are equally unpersuaded by plaintiff's argument that Supreme Court's exercise of jurisdiction is necessary given her need for discovery regarding the allegations of fraud in the Notice. The detailed procedures in the City Rules afford plaintiff the right to a fair hearing and judicial review by way of a CPLR article 78 proceeding.").

them renewal leases, as defendants have undisputedly done for each of these plaintiffs on a regular basis since the beginning of each tenancy.[42] Nor is there any risk of a non-payment proceeding: to the contrary, in the (verified) Complaint plaintiffs affirmatively assert that they have paid all of the rent called for under their leases. (R.16, ¶ 36). Plaintiffs' suggestion that things might change at some future point (and that in that event they will be able to meet all of the criteria for a preliminary injunction) is nothing more than wild speculation. And if things actually *do* change in this regard, there would be nothing to prevent plaintiffs from coming back to court to seek injunctive relief based on that change.

Finally, although they do not come out and say it, plaintiffs appear to suggest that the mere fact that they are able to point to some cases where courts have decided RSL claims necessarily means that such claims are not within DHCR's special competence. (*See, e.g.*, App. Br. at 23). But this does not follow at all. As detailed above, in each of those cases (a) there was a specific reason *not* to apply the doctrine of primary jurisdiction; (b) the doctrine was not raised; or (c) a lower court's discretionary determination to retain jurisdiction was not reviewed. (*See supra* at 24-26). The fact that courts decide RSL claims in such instances is simply a function of the contours of the doctrine and its discretionary

[42] This is clear from the Complaint's recitation of the lease history of each plaintiff, most of whom have received multiple "renewal lease[s]" and none of whom claims ever to have been denied a "renewal lease." (*See* R.19-32).

nature; if that were enough to render the doctrine inapplicable, it would eventually evolve out of existence in *every* area where it currently applies.[43]

Rent regulation in New York City is a complex regulatory area in which DHCR expertly and routinely adjudicates claims, as it is tasked by the Legislature to do. Under decades of State-wide jurisprudence, that is all that is required to justify the dismissal, under the doctrine of primary jurisdiction, of *any* RSL claim unless it centers on issues outside that core competence or the court is otherwise presented with a good reason to retain jurisdiction. Plaintiffs offer no valid reason to upend that jurisprudence. This Court should therefore decline to do so.

II. THE APPELLATE DIVISION WAS SIMILARLY CORRECT IN AFFIRMING THE DISMISSAL OF PLAINTIFFS' GBL § 349 CLAIM

Plaintiffs' GBL § 349 claim was properly dismissed for the simple reason that plaintiffs allege injury *not* from a deceptive act aimed at consumers, but rather as a result of defendants' alleged violation of the RSL. More specifically, plaintiffs' alleged harm does not result from an "advertisement and rental of rent stabilized apartments" that defendants "falsely claim[ed] . . . were market-rate

[43] For example, courts also do decide disputes under the Education law relating to the calculation of seniority. *See, e.g., Bubel v. Bd. of Educ. of the Saugerties Central School Dist.*, 152 A.D.3d 944 (3d Dept. 2017); *Alessi v. Bd. of Educ., Wilson Central School Dist.*, 105 A.D.3d 54 (4th Dept. 2013); *Kransdorf v. Bd. of Educ. of the Northport-East Northport Union Free School Dist.*, 181 A.D.2d 771 (2d Dept. 1992), *aff'd*, 81 N.Y.2d 871 (1993). But this fact does not prevent them from deferring such disputes to the Commissioner of Education under the doctrine of primary jurisdiction when the circumstances otherwise so warrant. (*See supra*, n.10).

apartments" (as they argue in their brief – *see* App. Br. at 46); it results from the defendants' rental to them of apartments that (according to plaintiffs) *were* market-rate but *should have been* rent stabilized. Their contention, in other words, is not that they were misinformed about their rent or about the status of their apartments; it is that the rent and/or status should have been different.

The lower court and the Appellate Division were absolutely correct in concluding that this simply does not state a GBL § 349 claim. That statute does not apply because the rights plaintiffs seek to enforce are rights they enjoy "not because of [their] status as . . . consumer[s] of housing services, but rather because of the[] prescribed statutory protections [of the RSL and RSC]." *Aguaiza v. Vantage Properties, LLC*, No. 105197/08, 2009 WL 1511791, *5 (Sup. Ct. N.Y. Co. May 21, 2009), *aff'd*, 69 A.D.3d 422 (1st Dept. 2010). If the conduct plaintiffs allege could state a claim under GBL § 349, then any plaintiff who had cause of action for violation of the RSL (or, for that matter, of any other statute) would also have a GBL § 349 claim to the extent that the defendant did not expressly tell the plaintiff that he or she was violating the statute. As *Aguaiza* makes clear, that is not the law.[44]

[44] *Accord Dodds v. 1926 Third Avenue Realty Corp.*, No. 100602/10, 2010 WL 4954068 (Sup. Ct. N.Y. Co. Nov. 24, 2010) ("The rent regulations protect the plaintiffs if, in fact, they can prove their claims. Thus, plaintiffs' actual claim is not that they were misled into paying higher rent, but that defendants violated the law. Therefore, plaintiffs' GBL § 349 claim is indistinguishable and, therefore,

Plaintiffs no longer argue that their GBL § 349 claim can survive *Aguaiza*; as defendants explained in the lower court, it cannot. (*See* Add.10-11). Obviously recognizing as much, plaintiffs now argue that *Aguaiza* "was wrongly decided and should not be followed." (App. Br. at 46; *see id.* at 45). But wholly apart from the fact that they made no such argument below (*cf.* Add.17-31), their position is inconsistent with this Court's precedent. As this Court held in *Schlessinger, supra*, 21 N.Y.3d at 172-73:

> [GBL § 349] cannot fairly be understood to mean that everyone who acts unlawfully, and does not admit the transgression, is being "deceptive." Such an interpretation would stretch the statute beyond its natural bounds to cover virtually all misconduct by businesses that deal with consumers. If the legislature had intended this result, it would not have enacted a statute limited to "[d]eceptive acts or practices" in the first place.

This common-sense admonition forecloses plaintiffs' argument that defendants violated GBL § 349 simply by engaging in conduct prohibited by the RSL and not telling plaintiffs they were violating that statute. It should, accordingly, end the inquiry.

All of the cases plaintiffs cite to support their argument that GBL § 349 should apply because tenants are "consumers" (*see* App. Br. at 44) pre-date both

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redundant of their rent regulation claim [citation omitted]."); *see DBL Realty Corp. v. Zavala*, 166 Misc.2d 736, 738 (App. Term 1st Dept. 1995) (noting, in dismissing "a claim for rent overcharge in the guise of a General Business Law § 349(h) claim", that "there is a specific statutory and administrative framework in place for the redress of tenant's particular complaint").

Aguaiza and *Schlessinger*. All of them are distinguishable on that ground alone. But none of them supports plaintiffs' position in any event:

(a) *23 Realty Associates v. Teigman*, 213 A.D.2d 306 (1st Dept. 1995), did not involve a claim under GBL § 349 at all. Nor did it involve a claim against a landlord. Rather, the plaintiffs in that case alleged that a real estate broker advertised and marketed as "apartments" dwelling units that "were actually hotel rooms." 213 A.D.2d at 308-09. On that basis, they sued under § 20-700 of the New York City Administrative Code – a provision that has been expressly interpreted to regulate the conduct of "broker[s]" in connection with "the offering of rental housing." *Id.* at 308. Based on this interpretation, the court allowed the claim to proceed under that code provision. Plaintiffs' claims here involve neither that code provision nor any claim of deceptive advertising by a broker.[45]

(b) In *Lozano v. Grunberg*, 195 A.D.2d 308 (1st Dept. 1993), the lower court had dismissed the plaintiff's complaint based on a determination that it should

[45] To the contrary, at least nine of the plaintiffs were already tenants in the Building *before* July 2013 – the date when (by plaintiffs' own admission) defendants took ownership and/or control of the Building. (*See* R.13,¶ 12; R.20, ¶ 70; R.23, ¶ 91; R.24, ¶ 105; R.25, ¶ 116; R.27-28, ¶ 136; R.32, ¶ 178). Plaintiffs have not explained how defendants could be liable under GBL § 349 (as distinct from the RSL) for any alleged conduct by their (unidentified) "predecessors." (*See* R.13, ¶ 15). Rather, the most any defendant did with respect to these plaintiffs was offer them renewal leases at a time when they were *already* tenants and thus indisputably *not* members of the general public.

proceed in the Housing Part of the Civil Court; the First Department reversed on the ground that the complaint sought injunctive relief, which was unavailable in that forum. There was no discussion whatsoever of whether the plaintiff's claims were actually cognizable under GBL § 349 (or, for that matter, any other theory).

(c) Finally, in *Meyerson v. Prime Realty Services, LLC*, 7 Misc.3d 911 (Sup. Ct. N.Y. Co. 2005), the plaintiff's GBL § 349 claim was based on an accusation that the landlord had falsely told tenants that they were required by law to reveal their social security numbers in connection with lease renewals. The court *declined to address* the defendants' "belated objection that plaintiff lacks a proper claim under GBL § 349 because the defendants' activity was not directed to the 'public at large,'" finding that argument "not properly before the court because raised only in reply papers." 7 Misc.3d at 920-21. As a result, *Meyerson* does not and cannot support the proposition that this objection – which defendants here have timely raised – is invalid.

Plaintiffs' inability to find better or more current authority for their position is telling, but not surprising. The law is clear: as the courts of this State have held in case after case following *Aguaiza* (and as this Court confirmed in *Schlessinger, supra*), claims like those at issue here rise and/or fall under the Rent Stabilization

Law, *not* GBL § 349.[46] As a result, plaintiffs' GBL § 349 claim was properly dismissed.

CONCLUSION

Plaintiffs' first through third causes of action (for alleged violations of the RSL and RSC) were properly dismissed under the doctrine of primary jurisdiction, their fourth cause of action (under GBL § 349) was properly dismissed as legally deficient, and their fifth cause of action (for attorneys' fees) was properly dismissed for want of a viable substantive claim to which such fees could attach.

[46] *See, e.g., Worth v. 281 St. Nicholas Partners, LLC*, 2014 N.Y. Slip Op. 31981(U), 2014 WL 3728496, at *1 (Sup. Ct. N.Y. Co. Jul. 22, 2014) (dismissing GBL § 349 claim where underlying allegations were, as here, that landlord had misrepresented the regulated status of the apartment and overcharged tenants; such allegations were not within the scope of the statute, which addresses "misrepresentations made to the public at large, and do[es] not cover private disputes"); *Dodds* (*see supra*, n.44); *Decatrel v. Metro Loft Management, LLC*, 30 Misc.3d 1212(A), 2010 WL 5592130, at *4 (Sup. Ct. N.Y. Co. Nov. 24, 2010) (in a class action, dismissing claim under GBL § 349 based on deceptive conduct in connection with alleged violations of the "Roommate Law" on the ground that the allegations presented only private disputes between landlords and tenants); *Nezry, supra*, 2010 WL 3338545, at *10 (claim in putative class action alleging that plaintiffs were improperly charged market rent despite landlord's receipt of J-51 benefits was a "private landlord-tenant dispute" that did "not fall within the ambit of GBL § 349 as a matter of law").

As a result, the Appellate Division acted correctly in affirming the lower court's Order. The Appellate Division's Order should similarly be affirmed.

Dated: New York, New York
September 26, 2018

Respectfully submitted,

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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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FILED: NEW YORK COUNTY CLERK 10/31/2016 11:28 AM INDEX NO. 157486/2016
NYSCEF DOC. NO. 9 RECEIVED NYSCEF: 10/31/2016

MEMORANDUM OF LAW

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

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Index Number: 157486/2016

Plaintiffs,

- against –

NETHERLAND PROPERTY ASSETS LLC AND PARKOFF OPERATING CORP.,

Defendants.

----------X

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

Defendants submit this memorandum in support of their motion for an order: (a) dismissing the Complaint's[1] fourth cause of action seeking damages under New York General Business Law § 349, on the ground that it fails to state a cognizable claim, and (b) dismissing the remainder of the Complaint (the first, second, third and fifth causes of action), on the ground that such claims should be determined by the New York State Division of Housing and Community Renewal ("DHCR") pursuant to the doctrine of primary jurisdiction.

BACKGROUND

This action is brought by 30 plaintiffs concerning 18 separate apartments and arises from the assertion that defendants (the current owner and manager of 3300 Netherland Avenue, a building in the Bronx) (the "building") and their predecessor improperly deregulated apartments in the building -- through "luxury deregulation"[2] and otherwise, while receiving J-51 tax benefits.[3] Based on the allegations of the Complaint, the 30 plaintiffs are seeking to have this Court determine (i) whether each of the apartments, depending on their particular and unique circumstances, is currently subject to the Rent Stabilization Code, (ii) whether and when each such apartment should have been listed with the DHCR, (iii) what the base rent should be for each particular plaintiff-tenant, (iv) the amount of the proper increases over the base rent for each apartment, on a year by year basis, and (v) whether there were any rent overcharges respecting each of the separate apartments.

---

[1] A copy of the Complaint is annexed as Exhibit 1 to the accompanying affidavit of Allison Foldvary.

[2] The term "luxury deregulation", is the shorthand appellation for "high rent/high income deregulation" (NYC Administrative Code § 26-504.1) and "high rent/vacancy deregulation" (NYC Administrative Code § 26-504.2).

[3] The New York City J-51 program is a tax exemption authorized by Real Property Tax Law § 489 and codified in NYC Administrative Code § 11-243. It provides property owners who perform certain capital improvements and renovation with tax exemptions and/or abatements that continue for a period of years.

In the Complaint's first count, each of the 30 plaintiffs seeks a declaratory judgment that his or her apartment is subject to the Rent Stabilization Law and Code. In the Complaint's second count, each plaintiff seeks a declaratory judgment respecting the proper amount of his or her rent. In the Complaint's third count, each of the 30 plaintiffs seeks recovery of overcharges respecting his or her particular apartment and rental history. And in the Complaint's fifth count, plaintiffs seek their attorneys' fees.

It bears emphasis that, on the face of the Complaint, plaintiffs allege that in order to arrive at the proper rental, one must examine the rental history of each apartment dating back as far as *twenty* years, and that this requires a review of DHCR's records for such period. (*See, e.g.*, Complaint ¶ 162: "the DHCR registration for Apartment 5A provided that in 1996 the legal regulated rent was $422.10 per month"; Complaint ¶ 164: "[i]n 1998 the registered rent increased to $1,043.80 per month with a purported preferential rent of $825.00 per month"; Complaint ¶ 77: "The apartment was registered with the DHCR in 1998 as rent stabilized at a legal regulated rent of $573.83 per month"; Complaint ¶ 79: "In 2000 the apartment was registered at a rent of $1,170.04 per month with a purported preferential rent of $1,100"). *In fact, the description of the rental history of each of the 18 apartments comprises the bulk of the Complaint* (*see* pages 9-22 of the 25 page Complaint).[4]

We note additionally that these matters are peculiarly within the province of the DHCR. In fact, the DHCR has been addressing the very issues concerning how landlords should be handling the registration of apartments in the wake of the Court of Appeals' decision in *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270 (2009) (holding for the first time that

[4] Defendants vigorously deny that any relief to which plaintiffs are entitled should be based on records dating back more than four years. Defendants further contend that when the correct records are examined, a finding will ultimately be made in nearly every case that each plaintiff was not overcharged and that those apartments that should have been registered with the DHCR as rent stabilized in fact have been registered. However, inasmuch as this is a motion to dismiss, the allegations of the Complaint must be treated as true.

landlords receiving J-51 tax benefits were not entitled to utilize luxury deregulation to raise the rents on various apartments). As evidenced by its January 6, 2016 letter to defendants respecting this very building (Mov. Aff. Ex. 2), the DHCR has been issuing guidelines advising landlords such as defendants what they should and should not do in order to bring themselves into compliance in light of the *Roberts* ruling.

Simply stated, plaintiffs' claims would require this Court -- for 30 different plaintiffs and 18 separate apartments with unique facts for each -- to painstakingly make detailed findings as to (i) what the base rent should be for each of the apartments, (ii) how that amount should have been increased on a year by year basis in accordance with regulations of the DHCR, (iii) whether individual apartment improvements ("IAIs") were made to particular apartments and, if so, the amount of the IAIs, on an apartment by apartment basis (which, if proven, would have to be factored in to determine the appropriate rent),[5] (iv) whether as a consequence of the foregoing, any particular plaintiff's rent was greater than the rent that should have been charged (and, if so, the amount of such overcharge), (v) whether any such overcharges were willful,[6] and (vi) whether and to what extent any individual plaintiff is entitled to any remedy.

SUMMARY OF ARGUMENT

The fact-specific determinations called for by the Complaint are peculiarly within the specialized knowledge and expertise of the DHCR which has concurrent jurisdiction over these types of disputes and, as set forth below, this action should be dismissed under the doctrine of primary jurisdiction. In fact, Justice Kalish's recent decision in *Davidson vs. 730 Riverside*

[5] Rent Stabilization Code Section 2522.4(a)(1), also known as 9 NYCRR Part 2522.4(a)(1)..

[6] As the Complaint recites (at ¶ 12), defendant 3300 Netherland Property Assets LLC ("3300 Netherland") did not even acquire the building until July 2013.

Drive, LLC, 2015 WL 5171072 (Sup. Ct. N.Y. Co. 2015)[7] is directly on point. In that case, the plaintiff – represented by the *very same law firm* as is representing plaintiffs here – brought nearly identical claims against his landlord based on identical theories. The only material difference between this case and *Davidson* is that *Davidson* involved a single plaintiff and a single apartment; in this case, of course, there are 30 plaintiffs and 18 apartments. In dismissing the rent overcharge claim in *Davidson*, Justice Kalish stated, with language equally applicable here: "[p]ursuant to the doctrine of primary jurisdiction, the instant matter should be determined by DHCR, given its expertise in rent regulation [citations omitted]. DHCR can investigate Plaintiff's fraud allegations, determine the regulatory status of the Premises, and, if warranted, apply the default formula . . . to determine the base rent".

Apparently recognizing the dispositive nature of *Davidson*, (and in an effort to escape the same result here), plaintiffs have additionally asserted a claim under New York General Business Law § 349 (over which the DHCR does not have jurisdiction), claiming that the acts that defendants allegedly engaged in (i.e., allegedly charging more than should have been charged in rent under the various leases with each plaintiff) gives rise to a claim under that statute. The law is clear, however, that inasmuch as this dispute centers on private contracts between defendants and plaintiffs, a rent overcharge claim cannot magically be transformed into a GBL § 349 violation. Consequently, the GBL § 349 claim (the fourth cause of action) should be dismissed. (Point I, *infra*). And the remaining causes of action – where the relief sought is peculiarly within the expertise of the DHCR – as in *Davidson,* should be dismissed under the doctrine of primary jurisdiction. (Point II, *infra*).

---

[7] For the Court's convenience, a copy of the *Davidson* decision is attached to the accompanying affidavit as Exhibit 3.

ARGUMENT

I. THE FOURTH CAUSE OF ACTION SHOULD BE DISMISSED BECAUSE GENERAL BUSINESS LAW § 349 DOES NOT APPLY TO PRIVATE LANDLORD-TENANT DISPUTES

Plaintiffs' fourth cause of action should be dismissed pursuant to CPLR § 3211(a)(7) for failure to state a cognizable claim. In that cause of action, plaintiffs seek damages and other relief under New York General Business Law § 349 (the Martin Act). However, GBL § 349 is a Statute designed to protect consumer-oriented conduct aimed at the public at large. It has no applicability where, as here, the deceptive acts and practices alleged present only private disputes between landlords and tenants. *See, e.g., Aguaiza v. Vantage Properties, LLC*, 69 A.D.3d 422 (1st Dept. 2010) ("Plaintiffs' allegations of unlawfully deceptive acts and practices under General Business Law § 349 presented only private disputes between landlords and tenants, and not consumer-oriented conduct aimed at the public at large, as required by the Statute"); *Worth v. 281 St. Nicholas Partners, LLC*, 2014 N.Y. Misc. Lexis 3379 (Sup. Ct. N.Y. Co. 2014); *North Driggs Holdings, LLC v. Burstiner*, 44 Misc.3d 318 (Civ. Ct. Kings Co. 2014).

This is particularly the case where the allegations underlying the GBL § 349 claim are based on the landlord's allegedly having filed improper rent registrations with DHCR and allegedly having overcharged tenants in rent. *Worth v. 281 St. Nicholas Partners, LLC*, *supra* (dismissing GBL § 349 claim where the underlying allegations were, as here, that the landlord misrepresented the regulated status of the apartment and overcharged the tenants: "Some of the allegations in the complaint do not support claims recognized in the courts of New York, to wit, claims eight and nine, sounding in misrepresentation as to the regulated status of the subject apartment, and violation of the Martin Act (GBL 349(g)). Martin Act violations are to address misrepresentations made to the public at large, and do not cover private agreements"); *North Driggs Holdings, LLC v. Burstiner*, *supra* ("Respondents' allegation that the petitioner violated

GBL § 349, by failing to disclose that the apartment was rent regulated at the initial signing of the lease, is improperly raised in this proceeding, as a violation of this law does not give rise to an independent private cause of action"). *See also*, *Decatrel v. Metroloft Management, LLC*, 30 Misc. 3d 1212(A) (Sup. Ct., N.Y. Co. 2010) ("The cause of action for (sic) under GBL § 349 is, however, dismissed because plaintiff alleges the landlord engaged in a deceptive practice by telling plaintiff that her occupancy of the apartment would be unlawful unless she became a party to the lease and, by implication, that she could not be a roommate under RPL § 235-f. In the recent First Department case of *Aguaiza v. Vantage Properties, LLC*, 69 AD3d 422, 893 N.Y.S.2d 19 [1st Dept 2010], [***12] the court held that allegations of unlawfully deceptive acts and practices under General Business Law § 349 presented only private disputes between landlords and tenants, and not consumer-oriented conduct aimed at the public at large, as required by the statute (see also, *City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616, 621, 911 N.E.2d 834, 883 N.Y.S.2d 772 [2009]). Thus, plaintiff's facts do not support a consumer-related transaction within the ambit of GBL § 349 and, therefore, defendants' motion is granted and the second cause of action is dismissed") (underlining in original).

Nor are these decisions surprising. As made clear in the Complaint, plaintiffs are alleging the *identical* conduct that, according to them, constitutes violations of the Rent Stabilization Law and accompanying regulations, *also* constitutes violations of GBL § 349. If such a position were sustained, it would effectively allow any plaintiff respecting any alleged violation of any law, to additionally assert a claim under GBL § 349. As made clear from the authorities cited above, the courts have repeatedly rejected efforts of plaintiffs to do so, especially in the landlord tenant context where the rent regulatory scheme provides a complete remedy. To the same effect, *see DBL Realty Corp. v. Zavala*, 166 Misc.2d 736 (App. T. 1st Dept. 1995) ("We reject tenant's interposition of a clam for rent overcharge in the guise of a General

Business Law § 349(h) claim. . . there is a specific statutory and administrative framework in place for the redress of tenant's particular complaint"); *Dodds v. 1926 Third Avenue Realty Corporation*, 2010 WL 49554068 (Sup. Ct. N.Y. Co. 2010) ("Plaintiffs are tenants/occupants of space they claim is protected by the rent regulations. According to plaintiffs, defendants used illusory tenants to charge the plaintiffs rent that is in excess of what is permitted by law. The rent regulations protect the plaintiffs if, in fact, they can prove their claims. Thus, plaintiffs' actual claim is not that they were mislead into paying higher rent, but that defendants violated the law. Therefore, plaintiffs' GBL § 349 claim is indistinguishable and, therefore, redundant of their rent regulation claim"). The situation here is identical.

Inasmuch as the conduct complained of was not aimed at the public at large but rather arises out of private leases between plaintiffs and defendants, and the rent regulatory scheme provides plaintiffs with a complete and adequate remedy should they prevail, the fourth cause of action should be dismissed.[8]

II. THE COMPLAINT'S OTHER CLAIMS SHOULD BE DISMISSED BECAUSE THE DHCR HAS PRIMARY JURISDICTION OVER THEM

As noted, all of the Complaint's other claims (the first, second third and fifth causes of action) are based on alleged violations of the Rent Stabilization Law and Code, and of DHCR's regulations and procedures. As such, under the doctrine of primary jurisdiction, this action should be dismissed so that DHCR can determine the matters at issue.

In *Davis v. Waterside Housing Company*, 274 A.D.2d 318, 711 N.Y.S.2d 4 (1st Dept. 2000), a case involving the rent regulatory status of the premises, the First Department reversed supreme court, holding that the doctrine of primary jurisdiction applied and that the action

[8] Alternatively, in the unlikely event that this claim is not dismissed, it should be held in abeyance pending adjudication by the DHCR of the complaint's remaining claims (Point II, *infra*). Perhaps to state the obvious, any relief to which plaintiffs might be entitled under GBL § 349 – assuming it states a valid claim, which it does not – will depend on a finding by the DHCR that defendants violated the Rent Stabilization Laws. Consequently, should the § 349 claim not be dismissed outright, its disposition should await the conclusion of the DHCR proceedings.

should have been stayed pending a determination by the DHCR. The Court stated:

> 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. (citation omitted) *While concurrent jurisdiction does exist, where there is an administrative agency which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort to a judicial tribunal should be withheld pending resolution of the administrative proceeding.* [citation omitted]
>
> Deference to primary administrative review is particularly important where the matters under consideration are inherently technical and peculiarly within the expertise of the agency. (citation omitted) The IAS court erred in ruling that the doctrine does not apply in this instance because the issues before the court were 'not within the DHCR's specialized field and do not involve that agency's technical expertise.' (emphasis added)

The Court there went on to state that the "Legislature has specifically authorized that agency (DHCR) to administer questions related to rent regulation" and that the case involved "factual evaluations within the agency's area of expertise (see, Flake v. Onondaga Landfill Sys., 69 NY2d 355)."

More recently, in *Olsen v. Stellar West 110, LLC,* 96 A.D.23d 440 (1st Dept. 2012), the complaint alleged that (i) the plaintiffs were tenants in a building that had been owned by defendant's predecessor when they moved in, (ii) all of the leases "indicate that the tenant was non-stabilized", (iii) "[d]efendant's predecessor never notified plaintiffs of the change in the status of the apartment [or] the initial registered legal regulated rent", "all in violation of the Rent Stabilization Law and Rent Stabilization Code (*see* Administrative Code for the City of New York § 26-513[d]; 9 NYCRR 2523.1). Nor did defendant's predecessor ever file a report of

vacancy decontrol, or the initial registration documents with DHCR". The Complaint there further alleged that although the apartment had been registered with DHCR in April 1984, no annual registration statements with DHCR had been filed from 1986 through 2007.

There, as here, the plaintiffs tenants commenced an action against the defendant seeking a declaration that their tenancy was subject to the Rent Stabilization Law, that defendant must offer the plaintiffs a regulated rent, and that the base rent should be calculated pursuant to DHCR's formula for doing so. With language equally applicable here, after noting that the court had jurisdiction over the matter, the First Department nevertheless dismissed it so as to let the DHCR determine the issues, based on the doctrine of primary jurisdiction:

> "The court has jurisdiction over this rent overcharge matter [citations omitted]. However, pursuant to the doctrine of primary jurisdiction, we believe that the matter should be determined by DHCR, given its expertise in rent regulation [citations omitted]. DHCR can investigate plaintiff's fraud allegations, determine the regulatory status of the apartment, and, if warranted, apply the default formula . . . to determine the base rate".

See also Haddad Corp. vs. Cal. Redmond Studio, 102 A.D.2d 730 (1st Dept. 1984) ("while concurrent jurisdiction does exist, where there is an administrative agency which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort to a judicial tribunal should be withheld pending resolution of the administrative proceeding"). The same result should obtain here.

Just last year, Justice Kalish decided *Davidson vs. 730 Riverside Drive, LLC*, 2015 WL 5171072 (Sup. Ct. N.Y. Co. 2015) (Exhibit 3) which is dispositive. In that case, the plaintiff – represented by the *very same law firm* as is representing plaintiffs here – brought nearly identical claims respecting rent against his landlord based on identical theories. As here, the complaint relied upon a long train of DHCR records dating back to 2005, and asserted that a new base rent should be set by the Court and that the plaintiff be awarded rent overcharges and attorneys'

fees.[9] Indeed, the only material difference between this case and *Davidson* is that *Davidson* involved a *single* plaintiff and a *single* apartment; by contrast, in this case, of course, there are 30 plaintiffs and 18 apartments. In dismissing the complaint in *Davidson* and directing that the plaintiffs file their complaints with DHCR, Justice Kalish stated, with language equally applicable to this action:

> The Court recognizes that it has concurrent jurisdiction with the DHCR to entertain an action to recover rent overcharges [citations omitted]. The Court further recognizes that the Plaintiff has chosen to bring the instant action before this Court as opposed to bringing it before the DHCR, which is the agency designated to address conflicts relating to rent control issues and overcharges. In point of fact, the Appellate Division, First Department has specifically stated that '[e]ven assuming, arguendo, that the Legislature did not place exclusive original subject matter jurisdiction in DHCR to decide luxury deregulation matters, it is reasonably inferred from the applicable provisions of the Rent Stabilization Law that the doctrine of primary jurisdiction enjoins courts sharing 'concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency's authority, particularly where the agency's specialized experience and technical expertise is involved' (Katz 737 Corp. v Cohen, 104 A.D. 3d 144, 150, 957 N.Y.S.2d 295 (N.Y. App. Div. 1st Dept 2012) *citing* Sohn v. Calderon, 78 NY2d 755, 587 N.E. 2d 807, 579 N.Y.S. 2d 940 (NY 1991)). *As such, the First Department has specifically recognized that "luxury deregulation matters" such as the Plaintiff's first cause of action, fall within the DHCR's 'specialized experience and technical expertise".* (emphasis added).

Thus, in dismissing the rent overcharge claim and directing the plaintiff to file an appropriate claim with the DHCR for the alleged overcharge, the Court held:

> Pursuant to the doctrine of primary jurisdiction, the instant matter should be determined by DHCR, given its expertise in rent regulation [citations omitted]. DHCR can investigate Plaintiff's fraud allegations, determine the regulatory status of the Premises, and, if warranted, apply the default formula . . . to determine the base rent (citations omitted).

---

[9] Consistent with one of defendants' defenses to plaintiffs' claims here, the landlord there argued that the prior owner had to have reasonably believed that the premises were properly deregulated upon a tenant's vacatur in 2006 "due to the uncertainty of the law and lack of judicial guidance on this issue prior to (sic) Court of Appeals decision in *Roberts v. Tishman SpeyerProperties,.LLP*, *supra.* As such, any failure by the prior owner to provide the subsequent tenants with rent stabilized leases, rent stabilized riders, or any information pertaining to the Building's receipt of J-51 benefits was based upon the prior owner's reasonable though mistaken belief that said tenants were market tenants." Moreover, consistent with one of defendants' defenses to plaintiffs' claims here, the landlord asserted in *Davidson* that once the base rent was properly computed and lawful increases were applied, there were in fact no rent overcharges.

Respectfully, here, where there are thirty (30) plaintiffs alleging overcharges in eighteen (18) apartments at the subject premises, each with its own convoluted rental history, and IAI history, it is clear that this Court should defer to the DHCR, which has the specialized experience and technical expertise to determine the issues raised in the Complaint. Consequently, this action should be dismissed.

CONCLUSION

For the reasons set forth herein, defendants' motion to dismiss the Complaint should be granted.

Dated: New York, New York
October 31, 2016

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FILED: NEW YORK COUNTY CLERK 11/15/2016 04:38 PM INDEX NO. 157486/2016
NYSCEF DOC. NO. 13 RECEIVED NYSCEF: 11/15/2016

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DANIEL COLLAZO, MICHELLE COLLAZO, CHRISTOPHER ORTIZ, ANGELA WU, RENANA BEN-BASSAT, JONATHAN ROSS, BENJAMIN SHEFTER, MICHAEL SUH, TOBIN JAMES WEISS, HOLLY WEISS, GABRIEL KRETZMER-SEED, NINA KRETZMER-SEED, CATHERINE ELLIN, NIURKA PADILLA, DIANA POTTS, TIA TRATE, TYSON COLLAZO, RITA LOMBARDI, YANIRA SANCHEZ, DARIEL RODRIGUEZ, YISRAEL MEIR LINDENBAUM, SHARON GORDON, RUSSELL POLTRACK, MEGAN BOYCE, ELAN KATTAN, SHOSHANA COHEN, DUSTIN GUTIERREZ, MELISSA SCHOLTEN-GUTIERREZ, JONATHAN ABIKZER AND ALEXANDRA ABIKZER,

Plaintiffs,

-against-

NETHERLAND PROPERTY ASSETS LLC AND PARKOFF OPERATING CORP.,

Defendants.

Index No. 157486/16

Motion Seq. #001

MEMORANDUM OF LAW IN OPPOSITION TO MOTION

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PRELIMINARY STATEMENT

This memorandum of law is respectfully submitted on behalf of plaintiffs in opposition to the motion by defendants for an order: (a) pursuant to Civil Practice Law and Rules ("CPLR") 3211(a)(7) dismissing the complaint's fourth cause of action, on the ground that it fails to state a claim upon which relief can be granted; (b) pursuant to CPLR 3211(a)(2), dismissing the complaint's remaining claims (i.e. the first, second, third and fifth causes of action), on the ground that the New York State Division of Housing and Community Renewal ("DHCR") has primary jurisdiction respecting the adjudication of such claims, and (c) granting such other and further relief as this Court deems appropriate.

STATEMENT OF FACTS

Plaintiffs in this action are, or were, tenants of 18 separate apartments of the subject rental apartment building. Defendant 3300 NETHERLAND PROPERTY ASSETS LLC, a New York limited liability company, has been the owner of the building since July 24, 2013. Defendant PARKOFF OPERATING CORP., a New York corporation, is the management company of the building. The building was built prior to 1947; it is not owned as a condominium or a cooperative; and it contains 67 apartments. Despite the owner's receipt of J-51 tax benefits from 1990 to 2016, plaintiffs' apartments were deemed deregulated and they were given "market" leases. Defendants and their predecessors-in-interest represented to plaintiffs, and to many other tenants renting apartments in the building, that their apartments were unregulated despite the fact that defendants were receiving J-51 tax benefits.

Defendants and their predecessors continued this conduct for several years after the Court of Appeals monumental ruling on October 22, 2009, in *Roberts v. Tishman Speyer*, 13 N.Y.3d 270 (2009), holding that the provisions of luxury deregulation do not apply where an owner

receives J-51 tax benefits, even if the apartments was subject to rent stabilization for another reason prior to the owner's receipt of the J-51 tax benefits, and even if the receipt of J-51 tax benefits was not the sole reason why the apartment was subject to rent stabilization.

Plaintiffs commenced this action by the filing of a Summons and Verified Complaint with this Court on September 7, 2016. The complaint sets forth five causes of action: (1) a cause of action for a declaratory judgment determining that plaintiffs' apartments are subject to the Rent Stabilization Law and Code and determining the amounts of the legal regulated rents for the respective apartments; (2) a cause of action for a declaratory judgment determining that any leases and/or lease renewals are invalid to the extent that they state that the apartments are not subject to rent stabilized; and determining that plaintiffs are not required to pay any renewal lease increase unless and until a valid lease renewal offer is made; (3) a cause of action for rent overcharge in violation of the Rent Stabilization Law and Code; (4) a cause of action for monetary and injunctive relief pursuant to General Business Law ("GBL") §349; and (5) a cause of action for attorneys' fees.

Defendants, through their attorney, have filed the instant pre-answer motion seeking dismissal of the GBL §349 claim on the alleged ground that it fails to state a claim upon which relief can be granted, and dismissal of the remaining claims on the alleged ground that the New York State Division of Housing and Community Renewal ("DHCR") has primary jurisdiction.

Plaintiffs oppose this motion in all respects, and they respectfully argue that their fourth cause of action pursuant to GBL §349 does state a claim upon which relief can be granted, and that their first, second, third and fifth causes of action are properly brought in the Court, rather than the DHCR, and that it would be an error of law for this Court to cede jurisdiction of those claims to the DHCR.

ARGUMENT

I. PLAINTIFFS' GBL §349 CLAIM STATES A VALID CAUSE OF ACTION FOR CONSUMER-ORIENTED DECEPTIVE BUSINESS PRACTICES, DIRECTED AT THE PUBLIC AT LARGE

The complaint in this action alleges, in relevant part, that defendants are the owner of the subject building consisting of 65 rental apartments; that all the apartments were subject to rent regulation; that plaintiffs are or were tenants of 18 of those apartments; that defendants deceptively represented to plaintiffs that their apartments and tenancies were not covered by rent regulation due to luxury deregulation; that these actions and practices of defendants were and continue to be consumer-oriented and aimed at the public at large; that defendants' actions were and continue to be misleading in a material way; and that plaintiffs have suffered injuries as a result of these deceptive acts and practices of defendants.

As stated, the complaint sets forth a valid cause of action for deceptive business practices pursuant to General Business Law §349. Defendants' motion to dismiss this cause of action should be denied.

The case cited by defendants, *Aguaiza v. Vantage Properties, LLC*, 69 A.D.3d 422, 423 (1st Dept. 2010), is easily distinguished from this case. In *Aguaiza*, the tenants' allegations of unlawfully deceptive acts and practices "presented only private disputes between landlords and tenants, and not consumer-oriented conduct aimed at the public at large, as required by the statute." In contrast, plaintiffs herein have alleged a consumer-oriented pattern of deceptive conduct by defendants, namely, the provision of "market" leases and the making of false representations that apartments are luxury deregulated when in fact they are subject to rent regulation. Plaintiffs have alleged that this conduct is a pattern and practice of defendants, who manage and operate a substantial number of rent regulated apartments.

The standard of review on a motion to dismiss for failure to state a cause of action is very familiar. On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. The courts must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994).

General Business Law §349(a) provides: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." GBL §349(h) goes on to provide that persons injured as a result of a violation may bring an action:

> "In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful conduct or practice, an action to recover his action damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff."

There are three elements of a cause of action pursuant to GBL §349(h): "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act." *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000).

"Consumers" under GBL §349 are "those who purchase goods and services for personal, family or household use." *Medical Society of the State of New York v. Oxford Health Plans, Inc.*, 15 A.D.3d 206, 207 (1st Dept. 2005). GBL §349 applies "to virtually all economic activity, and [its] application has been correspondingly broad." *Karlin v. IVF America, Inc.*, 93 N.Y.2d 282, 290 (1999). Conduct has been held to be sufficiently consumer-oriented to satisfy the statute

where it constituted a standard or routine practice that was "consumer-oriented in the sense that it potentially affected similarly situated consumers." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 27 (1995).

It has been held repeatedly that tenants are "consumers" pursuant the consumer-protection laws. *23 Realty Associates v. Teigman,* 213 A.D.2d 306, 308 (1st Dept. 1995)[1]; *Lozano v. Grunberg*, 195 A.D.2d 308 (1st Dept. 1993) (repeated issuance of false threatening eviction notices was a violation of GBL §349); *Myerson v. Prime Realty Services, LLC*, 7 Misc.3d 911, 921 (Sup. Ct. NY Co. 2005) (repeated false demands that tenants were required to disclose their social security numbers was a violation of GBL §349). As the Court in *Myerson* explained:

> "The Court observes that plaintiff pleads that defendants own and manage a substantial number of rent-regulated apartments, and use the challenged forms for all lease renewals, so that the dispute is not simply a private contract dispute and generally claims involving residential units are a type of claim recognized under the statute."

The key for application of GBL §349 is that the conduct complained of be "consumer-oriented," and targeting the public at large. In this case, plaintiffs have alleged that defendants' conduct of the repeated issuance of market leases and repeated false representations that the apartments it rents are luxury deregulated, when in fact they are subject to rent regulation, are deceptive business practices, which have injured plaintiffs and have affected the public at large. Accordingly, defendants' motion to dismiss the fourth cause of action should be denied.

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[1] "A residential lease is, after all, a purchase of services from the landlord....An apartment dweller is today viewed, functionally, as a consumer of housing services – as much as a consumer as the purchaser of any other goods or services." *23 Realty*, 213 A.D.2d at 308.

II. IT WOULD BE ERROR FOR THIS COURT TO CEDE JURISDICTION TO THE DHCR BECAUSE THE DOCTRINE OF PRIMARY JURISDICTION DOES NOT APPLY TO J-51 CASES

The second branch of defendants' motion, seeking dismissal of the first, second, third and fifth causes of action, should be denied because the Appellate Division has ruled repeatedly that the doctrine of primary jurisdiction does not apply to J-51 cases, and that the courts, not the DHCR, should decide the legal issues raised in these cases.

The decision of the Court of Appeals in *Roberts* was issued on October 22, 2009. *Roberts v. Tishman Speyer Properties*, 13 N.Y.3d 270 (2009). In the wake of *Roberts*, numerous lawsuits have been filed in this Court by tenants who were illegally classified as unregulated tenants despite the owner's receipt of J-51 tax benefits. In the years since the *Roberts* decision, the Appellate Division has issued three rulings denying motions to dismiss by defendants-owners, rejecting the claim that the New York State Division of Housing and Community Renewal should hear these cases based on the doctrine of primary jurisdiction. *Downing v. First Lenox Terrace Assoc.*, 107 A.D.3d 86 (1st Dept. 2013), *affirmed sub nom. Borden v. 400 E. 55th St. Assoc.*, 24 N.Y.3d 382 (2014); *Dugan v. London Terrace Gardens, L.P.*, 101 A.D.3d 648 (1st Dept. 2012), *affirming* 2011 NY Slip Op 52501(U) (Sup. Ct. NY Co.); *Gerard v. Clermont York Assoc., LLC*, 81 A.D.3d 497 (1st Dept. 2011).

In *Downing*, 107 A.D.3d at 91, the Court reasoned as follows:

> "The argument that the individual claims must be dismissed because the legislature intended that they be brought on an individual basis before DHCR is unavailing. Supreme Court has concurrent jurisdiction with DHCR to entertain an action to recover rent overcharges (see *Wolfisch v. Mailman*, 196 A.D.2d 466 [1st Dept. 1993], *lv denied*, 82 N.Y.2d 661 [1993]; see also

> *Nezry v. Haven Ave. Owner LLC*, 28 Misc.3d 1226[A] (Sup. Ct. NY Co. 2010])."[2]

Similarly, in *Dugan*, 101 A.D.3d at 649, the Court held that "Supreme Court properly declined to cede primary jurisdiction of these actions to DHCR, since the actions raise legal issues, including class certification and applicable limitations periods, that should be addressed in the first instance by the courts." The lower court in *Dugan* noted the DHCR's limited authority, and noted that the Court of Appeals in *Roberts*

> "has interpreted the statutory requirements at issue and left no room for DHCR's variance from those strictures....DHCR's interpretation of those statutory requirements *was* at variance from those strictures....Where the issue requires accurate reading and analysis of statutes and apprehension of legislative intent, there is no basis for reliance on an administrative agency's expertise....In this precise situation ...the court, specifically and definitively, is unauthorized to allocate primary jurisdiction to DHCR....To apply the doctrine of primary jurisdiction to legal issues left open after the Court of Appeals' decision in *Roberts* ...would be an abuse of discretion." *Dugan*, 2011 NY Slip Op 50521(U) at 6-7 (emphasis in original).

In *Gerard v. Clermont, supra*, 81 A.D.3d at 497-498, the Appellate Division held that the lower court "abused its discretion in dismissing the complaint under the doctrine of primary jurisdiction." Further, the Court noted that the action presented legal issues left open after the Court of Appeals' decision in *Roberts*....It is the courts, not the [DHCR], that should address these issues in the first instance."

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[2] The Appellate Division in *Downing* certified the following question to the Court of Appeals: "Was the order of this Court, which inter alia, reversed the order of the Supreme Court, properly made?" The Court of Appeals held that the order of the Appellate Division in *Downing* should be affirmed, and the certified question answered in the affirmative. *Borden*, 24 N.Y.3d at 400. Thus, the Appellate Division's ruling in *Downing* on primary jurisdiction (reversing the lower court, which had dismissed on primary jurisdiction grounds, and reinstating the complaint) was affirmed by the Court of Appeals.

The Appellate Division has issued rulings on several of the legal issues raised in the wake of *Roberts*. Thus, the Appellate Division has held numerous times that the *Roberts* decision is to be applied retroactively. See e.g. *Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189, 196-197 (1st Dept. 2011). Similarly, the Appellate Division has held that tenants are not barred by the statute of limitations from raising a legal challenge as to the deregulated status of an apartment. See e.g. *Gersten* at 198-199.

With regard to the methodology for calculating the overcharge, and whether the courts should adopt the illegal market rent charged on the four-year look-back date, the courts have issued rulings as well. See CPLR 213-a; N.Y.C. Admin. Code §§26-516(a) and 26-516(e); see cases cited *infra*; see also *Altman v. 285 West Fourth LLC*, 2016 NY Slip Op 06438 (App. Div. 1st Dept.) (holding that Supreme Court properly disregarded the rent charged four years before the filing of the complaint and looked back to the last rent registered with the DHCR since the unreliability of the apartment's rental history within four-year limitations period was caused by [the owner's] failure to file annual rent registrations").

In support of their motion to dismiss, defendants rely upon a lower court decision, *Davidson v. 730 Riverside Drive, LLC*, 2015 NY Slip Op 31714(U) (Sup. Ct. NY Co.), an incorrect ruling which this Court is not bound by, and which this Court should not follow. The Court in *Davidson* improperly cited *Downing, supra*, for the proposition that the Court has concurrent jurisdiction with the DHCR to entertain an action to recover rent overcharges; the Court in *Davidson* ignored the second prong in *Downing* and the other Appellate Division cases on J-51 benefits, namely that because J-51 overcharge cases involve statutory interpretation, it is an abuse of discretion to cede jurisdiction to the DHCR. Also, the Court in *Davidson* cited as authority the very different case of *Katz 737 Corp. v. Cohen*, 104 A.D.3d 144, 150 (1st Dept.

2012); *Katz* dealt with an issue of high-income deregulation, which has a completely different statutory scheme and which provides for the DHCR's exclusive jurisdiction. Compare N.Y.C. Admin. Code §26-504.3, conferring exclusive jurisdiction on the DHCR for high-income deregulation matters, with N.Y.C. Admin. Code §26-504.2, which does not confer exclusive jurisdiction on the DHCR for high-rent/high-income deregulation matters. Accordingly, it is respectfully submitted that the Court in *Davidson* misunderstood the foregoing decisions and accordingly the *Davidson* case should not be followed here.

The case *Olsen v. Stellar W. 110 LLC*, 96 A.D.3d 440 (1st Dept. 2012), also cited by defendants, involved a very fact-specific situation of incoming tenants who moved into an apartment after a rent controlled tenant moved out; nine years after moving in, the incoming tenants filed suit claiming that they were defrauded by the owner because they were never notified that the previous tenant was rent controlled, or that they had the right to file a fair market rent appeal with the DHCR.[3] The Court in *Olsen, supra* at 441-442, held that the matter should be determined by DHCR to investigate the plaintiffs' fraud allegations, determine the regulatory status of the apartment, and if appropriate apply the default formula adopted in *Thornton v. Baron*, 5 N.Y.3d 175 (2005). *Olsen* did not involve the issues of statutory interpretation typical of J-51 cases; it involved a particular claim of fraud of a type that is commonly investigated by the DHCR.[4]

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[3] See N.Y.C. Admin. Code §26-513(b), providing that a tenant of an apartment that was rent controlled, may file an application for adjustment of the initial legal regulated rent commonly known as a fair market rent appeal ("FMRA"). An FMRA must be filed within 90 days after notice has been received from the owner or, in any case, within four years from the date the apartment is no longer subject to rent control. See Rent Stabilization Code §2522.3(a).

[4] In contrast, none of the plaintiffs in this action have a fact pattern similar to the tenants' in *Olsen, supra*. Of the 18 apartments in this action, only one has a rent history showing that the previous tenant was rent controlled. In that case (Yanira Sanchez and Dariel Rodriguez, Apt.

The issues of the application of the four-year rule and the methodology for calculating the amount of the overcharges in J-51 situations have been the subject of recent court rulings. See e.g. *Todres v. W7879 LLC*, 137 A.D.3d 597 (1st Dept. 2016); *Altschuler v. Jobman 478/480, LLC*, 135 A.D.3d 439 (1st Dept. 2016), *leave to appeal dismissed*, 28 N.Y.3d 945 (2016); *72A Realty Assoc. v. Lucas*, 101 A.D.3d 401 (1st Dept. 2012); see also *Altman v. 285 West Fourth LLC*, *supra* (holding that Supreme Court properly looked back more than four years because of owner's failure to file DHCR registrations). It is mainly the courts, rather than the DHCR, that have issued rulings on the critical issues relating to the methodology for calculating the amount of the overcharges which have become central to these cases.

In summary, there is absolutely no legitimate reason for this Court ceded its jurisdiction to the DHCR in this case. It is the Court, not the DHCR, which has primary authority to decide the legal issues raised in this case, including but not limited to, the application of the four-year rule, the methodology for calculating the legal rent, and the methodology for calculating the amount of the overcharges.

3B), the tenants are within the four-year statute of limitations and have filed a fair market rent appeal with DHCR.

CONCLUSION

Plaintiffs respectfully request that the motion by defendants be in all respects denied, along with costs and such other and further relief as this Court may deem just and proper.

Dated: New York, NY
November 15, 2016

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FILED: NEW YORK COUNTY CLERK 12/06/2016 10:47 AM INDEX NO. 157486/2016
NYSCEF DOC. NO. 15 RECEIVED NYSCEF: 12/06/2016

SUPREME COURT OF THE STATE OF NEW YORK
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Plaintiffs,

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NETHERLAND PROPERTY ASSETS LLC and PARKOFF OPERATING CORP.,

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Defendants submit this reply memorandum of law in further support of their motion to dismiss the Complaint.[1]

PRELIMINARY STATEMENT

As explained in the Moving Brief, through this action plaintiffs ask this Court to examine the rental history of 18 apartments – including each apartment's relevant DHCR records and improvement history – in order to determine what the proper "base rent" should be for each one so that, in turn, it can be determined whether any plaintiff has actually been charged a rent in excess of the proper stabilized rent.[2] Plaintiffs pointedly do not deny that these *factual* determinations are within the particular technical expertise of the DHCR, which is better suited to make them efficiently. Nor do they deny that the doctrine of primary jurisdiction allows courts to dismiss claims over which they have concurrent jurisdiction with an agency (as this Court has with the DHCR here), so that the agency can make such factual determinations. Rather, plaintiffs' sole argument that this Court should not apply the doctrine here is that "J-51 cases" in general raise *legal* issues that should be resolved by "the courts." (*See* Opp. Br. at 6).

As detailed below, plaintiffs misapprehend the authority on which they rely – where courts have held only that certain fundamental legal issues initially left open in the wake of *Roberts* (such as whether *Roberts* should have retroactive effect and what impact it should have on the accrual of the statute of limitations) should be decided by the courts "in the first instance." *Every single* legal issue that plaintiffs identify in their Opposing Brief either has been resolved

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[1] Terms not otherwise defined herein have the meanings assigned to them in defendants' moving brief (the "Moving Brief," or "Mov. Br."). References to Opposing Brief or "Opp. Br." are to plaintiffs' memorandum of law in opposition to the motion.

[2] As detailed in the accompanying Reply Affidavit of Allison Foldvary (the "Foldvary Aff."), there is no dispute that each of the apartments at issue is, and should be, rent stabilized. All of them have been registered as such pursuant to the DHCR's program for re-registering apartments that were mistakenly deregulated before the Court of Appeals' decision in *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270 (2009) – as these apartments had been prior to any involvement by defendants with the building. (*See* Foldvary Aff. ¶¶ 2-6 and Exh. 4; Mov. Aff. Exh. 2).

(with binding effect) in the very cases they cite or is undisputedly *not* at issue here because this is not a putative class action. Accordingly, there is no legal issue at stake here that has not *already* been resolved "in the first instance" by the courts, and no impediment exists to this Court's exercise of its discretion to dismiss this case under the doctrine of primary jurisdiction. (Point II.A). The facts of this case (which, as detailed below, involve technical determinations that will likely consume more than 60 trial days to resolve) make this precisely the kind of case for which the doctrine exists. In the exercise of the discretion that the doctrine gives it, this Court should dismiss. (Point II.B).

Plaintiffs' inclusion of a claim under GBL § 349 in their Complaint should not change this result. As explained in the Moving Brief (at 6-8), the First Department has squarely held that this statute does not apply to landlord-tenant disputes. As detailed below, none of the cases plaintiffs cite in response is to the contrary. Nor do plaintiffs cite any case that supports their attempt to sidestep the settled rule that, because the Rent Stabilization Law provides a complete remedy for the conduct of which they complain in the event they are able to prove their allegations, they are not entitled to a separate cause of action under GBL § 349. Plaintiffs' GBL § 349 claim cannot survive this precedent. (Point I).

ARGUMENT

I. PLAINTIFFS' GBL § 349 CLAIM SHOULD BE DISMISSED

In the Moving Brief we explained that – in case after case – the courts of this State have rejected attempts to package rent overcharge claims as causes of action under GBL § 349. As detailed in the Moving Brief, the reason for this is twofold: first, GBL § 349 covers only conduct aimed at the public at large and by definition does not apply to private disputes between landlords and tenants; second, with respect to rent overcharge claims in particular, a separate

statutory and regulatory scheme provides a complete remedy. (*See* Mov. Br. at 6-8 and cases cited therein). Plaintiffs do not cite a single case to the contrary.

Rather (and at best), plaintiffs appear to argue that this case is unlike any other case where a plaintiff attempted to dress up a rent overcharge claim as a claim under GBL § 349 because (according to them) defendants' alleged misconduct in issuing market-rate leases for apartments that should have been rent regulated occurred "repeated[ly]." (Opp. Br. at 5; *accord id.* at 3). This, however, changes nothing: as the cases cited in the Moving Brief make clear, the inclusion of multiple plaintiffs – however numerous – does not transform a rent overcharge claim into a claim under GBL § 349.

In *Aguaiza v. Vantage Properties, LLC*, No. 105197/08, 2009 WL 1511791 (Sup. Ct. N.Y. Co. May 21, 2009), for example, the plaintiffs were ten individual tenants residing in five different buildings that were managed by one of the co-defendants.[3] As the court described the plaintiffs' allegations:

> The subject buildings are part of a substantial portfolio of Queens, New York properties [defendant] Vantage acquired in 2006. To generate a return on their substantial investment, *viz.*, maximize the vacancy rate and profits via luxury deregulation, Vantage directed [the single-purpose entities that owned the buildings] to pursue a scheme to displace rent stabilized tenants from their buildings [citation omitted]. With this profit motive fueling Defendants' actions, Plaintiffs allege a fact pattern of deceptive/harassing activities specific to each Plaintiff. And the common threads collectively binding Plaintiffs *inter alia* involve Defendants commencing baseless non-payment proceedings [citation omitted], arbitrarily refusing to accept timely tendered rent payments [citation omitted], prosecuting bogus non-primary residency and/or illegal sublet holdover proceedings [citation omitted], making baseless refusals to offer lease renewals and arbitrarily demanding proof of identity from Plaintiffs without good cause to maintain their rent stabilized tenancy rights [citation omitted].

2009 WL 1511791 at *3. Based on these allegations, the plaintiffs asserted claims under GBL § 349. The lower court dismissed those claims and the First Department affirmed, agreeing that

[3] The other co-defendants were the five single-purpose entities that owned the buildings and the individual who was the president of all of the six entity co-defendants.

the allegations "presented only private disputes between landlords and tenants, not consumer-oriented conduct aimed at the public at large." *Aguaiza v. Vantage Properties, LLC*, 69 A.D.3d 422, 423 (1st Dept. 2010). *Accord Decatrel v. Metro Loft Management, LLC*, 30 Misc.3d 1212(A), 2010 WL 5592130, *4 (Sup. Ct. N.Y. Co. Nov. 24, 2010) (in a class action, dismissing claim under GBL § 349 based on deceptive conduct in connection with alleged violations of the "Roommate Law" on the ground that the allegations presented only private disputes between landlords and tenants).

Plaintiffs' attempt to distinguish *Aguaiza* is circular: they say only that *Aguaiza* is inapposite because in that case the plaintiffs' allegations presented only private disputes while their own allegations, in contrast, show consumer-oriented conduct. (Opp. Br. at 3). But saying this does not make it so. The allegations that were found to amount only to "private disputes between landlords and tenants" in *Aguaiza* were no less consumer-oriented than those at issue here; indeed, if anything they were *more* so, involving as they did an alleged "scheme" affecting numerous buildings.[4] Accordingly, just as in *Decatrel* (which plaintiffs do not even attempt to distinguish), the result here should be the same.

Each of the cases on which plaintiffs rely predates the First Department's holding in *Aguaiza* and is distinguishable on that basis alone. But none of them would change the analysis in any event:

[4] In this regard, plaintiffs' bald assertion in the Opposing Brief (at 3) that defendants "manage and operate a number of rent regulated apartments" appears to be an attempt to suggest that the conduct of which they are complaining is more widespread than they have alleged in the Complaint. But plaintiffs do not support that assertion with any citation to the Complaint or to anything else. This is not surprising: the Complaint itself nowhere alleges that the defendants manage or operate a single building other than the one where plaintiffs reside, let alone that they have engaged in any improper conduct with respect to any tenant other than plaintiffs or any apartment other than the ones at issue in this action. Although under *Aguaiza* such allegations would be of no moment, we emphasize that there are no such allegations even at issue here.

- *23 Realty Associates v. Teigman*, 213 A.D.2d 306, 308 (1st Dept. 1995) (cited in Opp. Br. at 5), did not involve a claim under GBL § 349 at all. Nor did it involve a claim against a landlord. Rather, the plaintiffs in that case alleged that a real estate broker advertised and marketed as "apartments" dwelling units that "were actually hotel rooms." On that basis, they sued under § 20-700 of the New York City Administrative Code – a provision that has been expressly interpreted to regulate the conduct of "broker[s]" connection with "the offering of rental housing". Based on this interpretation, the court allowed the claim to proceed under that code provision. Plaintiffs' claims here involve neither that code provision nor any claim of deceptive advertising by a broker.[5]
- In *Lozano v. Grunberg*, 195 A.D.2d 308 (1st Dept. 1993) (cited in Opp. Br. at 5), the lower court had dismissed the plaintiff's complaint based on a determination that it should proceed in the Housing Part of the Civil Court; the First Department reversed on the ground that the complaint sought injunctive relief, which was unavailable in that forum. There was no discussion whatsoever of whether the plaintiff's claims were actually cognizable under GBL § 349 (or, for that matter, any other theory).
- Finally, in *Meyerson v. Prime Realty Services, LLC*, 7 Misc.3d 911 (Sup. Ct. N.Y. Co. 2005) (cited in Opp. Br. at 5), the plaintiff's GBL § 349 claim was based on an accusation that the landlord had falsely told tenants that they were required by law to reveal their social security numbers in connection with lease renewals. The court *declined to address* the defendants' "belated objection that plaintiff lacks a proper claim under GBL § 349 because the defendants' activity was not directed to the 'public at large,'" finding that argument "not

[5] To the contrary, at least nine of the plaintiffs were already tenants at the building *before* July 2013 – the date when (by plaintiffs' own admission) defendants took ownership and/or control of the building. (*See* Opp. Br. at 1; Compl. ¶¶ 12, 70, 91, 105, 116, 136, 178). Plaintiffs have not explained how defendants could be liable under GBL § 349 (as distinct from the Rent Stabilization Law) for any alleged conduct by their (unidentified) "predecessors." (*See* Compl. ¶ 15; Opp. Br. at 1).

properly before the court because raised only in reply papers." 7 Misc.3d at 920-21. As a result, *Meyerson* does not and cannot support the proposition that this objection – which defendants here have timely raised – is invalid. Moreover, unlike the conduct alleged here, the conduct at issue in *Meyerson* was not regulated pursuant to a statutory scheme that itself provided a remedy. *See* 7 Misc.3d at 912 (calling the question at issue – which the court described as "whether, as between two private citizens or entities where no statute nor governmental regulation requires disclosure, a state consumer protection statute may be utilized to assert a claim that a social security number be protected from disclosure as confidential information" – one "of nationwide first impression"). *Meyerson* is inapposite for this separate reason as well.[6] It is of no avail to plaintiffs here.[7]

Plaintiffs' inability to find better or more current authority for their position is telling, but not surprising. The law is clear: claims like those at issue here rise and/or fall under the Rent Stabilization Law, *not* GBL § 349. Accordingly, plaintiffs' fourth cause of action should be dismissed.[8]

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[6] *See DBL Realty Corp. v. Zavala,* 166 Misc.2d 736, 738 (App. Term 1st Dept. 1995) (noting, in dismissing "a claim for rent overcharge in the guise of a General Business Law § 349(h) claim", that "there is a specific statutory and administrative framework in place for the redress of tenant's particular complaint"); *Dodds v. 1926 Third Avenue Realty Corp.*, No. 100602/10, 2010 WL 4954068 (Sup. Ct. N.Y. Co. Nov. 24, 2010) ("The rent regulations protect the plaintiffs if, in fact, they can prove their claims. Thus, plaintiffs' actual claim is not that they were misled into paying higher rent, but that defendants violated the law. Therefore, plaintiffs' GBL § 349 claim is indistinguishable and, therefore, redundant of their rent regulation claim [citation omitted].").

[7] As well, the court "observe[d]" that the complaint specifically alleged that the defendants "own[ed] and manage[d] a substantial number of rent-regulated apartments," and that the conduct at issue was directed at all of the defendants' tenants. 7 Misc.3d at 921. Again, under *Aguaiza* (which was decided years later) this may not have mattered. But in all events it stands in sharp contrast to the allegations at issue here, which relate only to the specific apartments occupied by plaintiffs.

[8] As noted in the Moving Brief (at 8, n.8), if the Court declines to dismiss this claim it should sever and stay it pending a determination by the DHCR of the complicated factual matters that, as discussed below in Point II (and in the Moving Brief at 8-12), are more appropriately left to the technical expertise of that agency.

II. THE BALANCE OF PLAINTIFFS' CLAIMS SHOULD BE DISMISSED UNDER THE DOCTRINE OF PRIMARY JURISDICTION

As explained in the Moving Brief, once plaintiffs' GBL § 349 claim is dismissed (or severed – *see supra,* n.8), the balance of their claims should be dismissed under the doctrine of primary jurisdiction because the factual issues they raise – which require, among other things, an examination of the rent history of each plaintiff's apartment in order to determine the proper base rent and annual increases, factoring in (among other things) individual improvements to each apartment – are peculiarly within the specialized knowledge and expertise of the DHCR. (*See* Mov. Br. at 2-5 and 8-12, and cases cited therein). In response, plaintiffs do not dispute that the DHCR is best situated to resolve these *factual* issues. Rather, they argue only that the case presents *legal* issues that must be decided by "the courts," suggesting that as a result this Court lacks the discretion to dismiss under the primary jurisdiction doctrine. (Opp. Br. at 6-7; *accord id.* at 10). This argument is without merit.

A. Plaintiffs Have Identified No Legal Issue At Stake In This Case That Has Not Already Been Resolved By The Courts

Fundamentally, plaintiffs have not identified any unresolved legal issue that they claim is at stake in *this* proceeding. Rather, they cite cases in which courts determined that certain issues – including the retroactivity of the Court of Appeals' decision in *Roberts,* the proper statute of limitations, and questions of class certification – should be determined by the courts "'in the first instance.'" (*See* Opp. Br. at 7 (quoting *Dugan v. London Terrace Gardens, L.P.*, 101 A.D.3d 648, 649 (1st Dept. 2012), and *Gerard v. Clermont*, 81 A.D.3d 497, 497-98 (1st Dept. 2011)). But none of those issues is at stake here:

- This proceeding is not a putative class action, as were *Dugan* and *Downing v. First Lenox Terrace Assoc.*, 107 A.D.3d 86 (1st Dept. 2013), *aff'd sub nom. Borden v. 400 E. 55th St. Assoc.*, 24 N.Y.3d 382 (2014), on which plaintiffs also rely (*see* Opp. Br. at 6-7). As the

lower court noted in *Dugan*, "DHCR is unauthorized to decide whether to certify a class, determine its parameters, or adjudicate plaintiffs' claims for classwide relief." *Dugan v. London Terrace Gardens, L.P.*, 34 Misc.3d 1240(A), 2011 WL 7553528, *9 (Sup. Ct. N.Y. Co. Jun. 6, 2011), *aff'd*, 101 A.D.3d 648 (2012). Those issues, however, are absent here.

- This proceeding does not require a determination of whether *Roberts* is retroactive, as did *Dugan*[9] and *Gerard.*[10] As plaintiffs themselves acknowledge, the courts have already determined that it is. *See Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189, 197-98 (1st Dept. 2011) (cited in Opp. Br. at 8).
- This proceeding similarly does not raise the related question (also at issue in *Dugan*) of whether the statute of limitations can completely bar a claim that an apartment has been improperly deregulated (as distinct from limiting the period for which damages can be recovered). Again, as plaintiffs acknowledge, the courts have already determined that a challenge to an apartment's underlying regulated status is not subject to any time limit. *See Gersten*, 88 A.D.3d at 198-201 (cited in Opp. Br. at 8).[11]
- Nor does this proceeding raise any question of "the lawfulness of decontrol in proportion to a reduction in J-51 tax benefits," "the preclusive effect of prior judicial or DHCR decisions," or (upon the dismissal of the GBL § 349 claim) "grounds for relief beyond the Rent

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[9] *See* 2011 WL 7553528, *3-4.

[10] *See* 81 A.D.3d at 497-98.

[11] *Compare Dugan,* 2011 WL 7553528, *2 (noting that the case presented a question of "when plaintiffs' claims accrued and whether they survive under the applicable statute of limitations," which was "[r]elated to [the] retroactivity [of *Roberts*]" – a question also at issue in the case) *with Dugan v. London Terrace Gardens LLP*, No 603469/2009, 2013 WL 4878363, *4 (Sup. Ct. N.Y. Co. Aug. 16, 2013) (subsequent decision after remand, noting that in the interim the Appellate Division had decided that *Roberts* is retroactive and that no statute of limitations bars a challenge to the rent-regulated status of an apartment that has been improperly deregulated).

Stabilization and Rent Control Law," as did *Dugan*.[12] Plaintiffs notably do not claim otherwise.

Thus, far from pointing to any unresolved legal issue that is controlling here, plaintiffs have simply flagged legal issues that – to the extent they are even arguably relevant here – have already been resolved by the very cases they cite. Dismissal under the doctrine of primary jurisdiction is entirely consistent with the notion that those issues should be resolved by the courts "in the first instance." Now that they have in fact been resolved, this Court can and should allow the DHCR to do what it knows best: apply those now-resolved legal principles to the complex set of facts that this case raises.

Indeed, *Dugan* – on which plaintiffs heavily rely – fully supports dismissal here. In that case, the lower court concluded its decision by noting:

> Denying defendant's current motion to dismiss or stay the action does not mean that the court, having set the parameters of retroactivity, the statute of limitations, the lawfulness of decontrol in proportion to a reduction in tax benefits, and the preclusive effect of prior judicial or DHCR decisions, might not then remand the action to DHCR. In deciding these issues, the court may determine whether each apartment included in these actions was subject to rent stabilization or control over a past period. Plaintiff tenants are entitled to the court's determination of their rent regulatory status and whether they have been overcharged for rent.
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> ***
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> Yet for each apartment returned to a prior regulated status, it then may be necessary to determine the initial regulated rent to which the rent level must be restored and when, annual increases, and increases based on major capital improvements or on individual apartment improvements. *Once the court makes the first category of more broadly applicable determinations, for which an administrative agency is not well suited, the agency may be more suited to the second category of determinations on the measure of damages to each plaintiff, by reconstructing the base rent and allowable rent increases specific to individual units.*

2011 WL 7553528, *9 (emphasis added).

[12] *See* 2011 WL 7553528, *7.

Here, the case presents itself to this Court in precisely the posture that the *Dugan* court indicated would warrant reconsidering dismissal in favor of a determination by DHCR: it has already been determined that *Roberts* is retroactive; there are no corresponding issues regarding the statute of limitations[13]; there is no issue of any attempt to decontrol certain units based on an allocation of J-51 benefits[14]; there is no putative class action; and there is no prior ruling as to which any party is seeking preclusive effect.[15] Under *Dugan* itself – as well as under *Olsen v. Stellar West 110 LLC*, 96 A.D.3d 440, 441-42 (1st Dept. 2012), *Davis v. Waterside Housing Co.*, 274 A.D.2d 318 (1st Dept. 2000), and *Davidson v. 730 Riverside Drive, LLC*, No. 150341/2014, 2015 WL 5171072 (Sup. Ct. N.Y. Co. Sep. 1, 2015) (all discussed in the Moving Brief at 8-12) – this case is ripe for dismissal under the doctrine of primary jurisdiction.

B. This Court Should Exercise Its Discretion To Dismiss In Favor Of The DHCR's Primary Jurisdiction

We recognize that dismissal under the doctrine of primary jurisdiction is a matter of discretion. We respectfully submit, however, that here dismissal is the best exercise of that discretion. In that regard, we note:

- The factually complicated matters at issue here – involving, among other things, an examination of the rental and improvement history of 18 apartments (occupied by 30 plaintiffs) in order to determine the proper "base rent" for each one and all permissible increases – are within the particular province of the DHCR, which (with its specialized experience and technical expertise) can resolve them far more efficiently than this Court can.

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[13] In *Dugan*, it was not clear "when plaintiffs' claims accrued and whether they survive under the applicable statute of limitations," which the court noted was an issue "[r]elated to [the] retroactivity" of *Roberts*. 2011 WL 7553528, *2; *cf. Dugan,* 2013 WL 4878363, *4 (discussed above in n.11).

[14] In *Dugan*, the landlord argued that it should be permitted to decontrol units for which no J-51 benefits were used. *See* 2011 WL 7553528, *2.

[15] Nor is there any question of the rent regulated status of plaintiffs' apartments: pursuant to the DHCR initiative described in Exhibit 2 to the moving papers, *all* of plaintiffs' apartments have now been registered as rent stabilized. (*See* Foldvary Aff. ¶¶ 2-6 and Exh. 4).

As explained in the accompanying Affirmation of Robert H. Berman ("Berman Aff."), *Todres v. W7879*, 137 A.D.3d 597 (1st Dept. 2016), which plaintiffs cite as an example of a case where a court entertained a rent overcharge claim in a "J-51 situation[]" (*see* Opp. Br. at 10), actually illustrates this point. *Todres* was one of five cases brought by tenants of the same building in mid-2010 – none of which involved a request by any party to dismiss under the doctrine of primary jurisdiction. (Berman Aff. ¶ 3). Although those cases concerned a total of only six apartments (and although four of the cases were consolidated for trial after a three-day trial of the first one resolved certain issues common among them), they collectively consumed a total of 21 trial days – representing an average of 3.5 days of trial per apartment. (Berman Aff. ¶¶ 5-6). This suggests a 63-day trial for this 18-apartment case – a time period that does not even include pretrial proceedings (which, for *Todres* and its companion cases, took more than three years). In contrast, the DHCR has a much more streamlined procedure that will bring the issues involved in this action (which are "inherently technical and peculiarly within the province of the agency") to a conclusion in a less burdensome and less costly manner for all parties. *See Davis*, 274 A.D.2d at 319.

- As plaintiffs now suddenly admit in their opposing papers, two of them have filed a fair market rent appeal with the DHCR challenging the initial stabilized rent of their apartment. (*See* Opp. Br. at 9, n.4). In that proceeding, the DHCR will (and must) investigate the matters alleged in paragraphs 8 through 54 of the Complaint (its "Statement of Facts Common to All Plaintiffs") as well as those alleged in the three paragraphs (147-149) that are unique to those plaintiffs. The fact that these matters are *already* before the DHCR by plaintiffs' own doing weighs even more heavily in favor of dismissal here. *See Olsen*, 96 A.D.3d at 441-42.

- The DHCR itself is also addressing more broadly the issues of how registrations should be handled in light of the retroactivity of *Roberts*, and defendants are currently participating in the DHCR's initiative in that regard with respect to these very apartments. (*See* Mov. Aff. Exh. 2; Foldvary Aff. ¶ 4 and Exh. 4).

In short, this case presents an even stronger argument for dismissal under the doctrine of primary jurisdiction than did *Davidson*, *supra* – where the court dismissed on that basis even though the dispute involved only a single apartment as to which there was no parallel DHCR proceeding pending. *See* 2015 WL 5171072, *9-10. As in that case, plaintiffs' claims here should be adjudicated in the first instance by the DHCR.

Plaintiffs' only response to *Davidson* is to argue that it was wrongly decided because (a) it did not recognize that "J-51 overcharge cases involve statutory interpretation"; and (b) it improperly relied on *Katz 737 Corp. v. Cohen*, 104 A.D.3d 144 (1st Dept. 2012), which dealt with a situation where (unlike here) under the applicable regulations the DHCR's jurisdiction was exclusive rather than concurrent with this Court. (*See* Opp. Br. at 8-9). Neither of these criticisms is valid.

As to "statutory interpretation," the *Davidson* court expressly noted that, as explained above, the retroactivity of *Roberts* had already been decided. *See* 2015 WL 5171072, *8. With that legal question no longer open, all that was left was a determination of the proper "base rent" for the plaintiff's apartment, the permissible increases for each year, and whether there was any difference between those amounts and the amounts actually paid by the plaintiff. *See id.* at *4-6. This determination, the court held, required an analysis that was particularly within the technical expertise of the DHCR. *Id.* at *10. The same is true here.

As to *Katz*, plaintiffs miss the point for which the *Davidson* court cited that decision. In the portion cited, the *Katz* court noted that "*[e]ven assuming, arguendo, that the Legislature did not place exclusive original subject matter jurisdiction in DHCR to decide luxury deregulation matters,* it is reasonably inferred from the applicable provisions of the Rent Stabilization Law that the doctrine of primary jurisdiction enjoins courts sharing 'concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency's authority, particularly where the agency's specialized experience and technical expertise is involved.'" 104 A.D.3d at 150 (emphasis added; quoting *Sohn v. Calderon*, 78 N.Y.2d 755, 768 (1991); additional citation omitted). The *Katz* court thus indicated that *even if* the DHCR's jurisdiction over the matter at issue had been concurrent rather than exclusive, dismissal would *still* be warranted under the doctrine of primary jurisdiction. That pronouncement was, on its face, squarely applicable to the facts before the *Davidson* court (which, as plaintiffs note, involved a matter of concurrent jurisdiction). Accordingly, the *Davidson* court properly relied on it. Again, the same result is warranted here.

None of the other cases plaintiffs cite – *Todres, supra, Altschuler v. Jobman 478/480, LLC*, 135 A.D.3d 439 (1st Dept.), *lv. dism'd*, 28 N.Y.3d 945 (2016), *Altman v. 285 West Fourth LLC*, 143 A.D.3d 415 (2016), and *72A Realty Assocs. v. Lucas*, 101 A.D.3d 401 (2012) (all cited in Opp. Br. at 10) – involved any request to dismiss under the doctrine of primary jurisdiction. Accordingly, none of them requires (or even suggests) a different result.

* * * * *

In sum, as a matter of law this Court has discretion to dismiss this case under the doctrine of primary jurisdiction, and under these facts it should exercise that discretion to grant such a dismissal.

CONCLUSION

The Court should dismiss plaintiffs' GBL § 349 claim and, upon such dismissal, should dismiss the balance of plaintiffs' claims under the doctrine of primary jurisdiction.

Dated: New York, New York
December 6, 2016

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