To be Argued by:
RONALD S. LANGUEDOC
(Time Requested: 15 Minutes)

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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.

BRIEF FOR PLAINTIFFS-APPELLANTS

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STATEMENT OF RELATED CASES

Pursuant to 22 N.Y.C.R.R. §500.13(a), there are no related cases.

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STATUTES AND OTHER REGULATIONS

This brief is respectfully submitted on behalf of Plaintiffs, all of whom are Appellants in this matter, in support of their appeal from the Decision and Order of the Appellate Division, First Department, entered November 28, 2017, which affirmed the Decision and Order of the Supreme Court, New York County (David Cohen, J.), entered March 6, 2017, which granted Defendants' pre-answer motion to dismiss this action.

QUESTIONS PRESENTED

1. Did the Appellate Division err in affirming the dismissal of Plaintiffs' causes of action for rent overcharge and for a determination of their regulatory status based on the doctrine of primary jurisdiction, as a provident exercise of the Supreme Court's discretion, despite the long history of the Courts declining to dismiss these types of cases for that reason, and despite the fact that the Supreme Court did not articulate any reasons for deferring to the administrative agency?
2. Did the Appellate Division err affirming the Supreme Court's dismissal of Plaintiffs' cause of action for deceptive business practices pursuant to General Business Law §349 based upon the Complaint's allegations of consumer-oriented misrepresentations made regarding the regulatory status of the apartments, and the legality of the rents charged?

NATURE OF THE CASE

For many years, the Courts of New York State have continually adjudicated claims by tenants as to rent regulatory status and rent overcharge, without requiring that such claims be determined in the first instance by the New York State Division of Housing and Community Renewal ("DHCR"). This case is a departure from this longstanding practice. Plaintiffs urge this Court to reverse the decision of the Appellate Division, holding that the dismissal of these claims based on the doctrine of primary jurisdiction was a provident exercise of the Supreme Court's discretion, even though tenants have historically been afforded the choice of whether to pursue these types of claims in Supreme Court or at the DHCR, and even though no reasons were articulated by the Supreme Court as to why this practice should be deviated from here.

In September 2016, thirty individuals, all tenants of a rental apartment building at 3300 Netherland Avenue, Bronx, New York, commenced this action. Plaintiffs are or were tenants of eighteen separate apartments in the building. Their twenty-five page complaint is verified individually by Plaintiffs, and contains detailed allegations, which reveal a pattern and practice by which Defendants denied Plaintiffs their stabilized status and charged excessive rents throughout the building.

The common claims of Plaintiffs are that they all entered into leases for their apartments while the owner was receiving J-51 tax benefits, and all were given "non-stabilized" leases charging rents in excess of the amount last registered with the DHCR. Moreover, all Plaintiffs except Rita Lombardi moved in after this Court's decision in *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270 (2009), made clear that Plaintiffs' apartments were not lawfully deregulated. (Ms. Lombardi moved into her apartment on or about September 1, 2009, the month before *Roberts* was decided.)

This Court's decision in *Roberts* left open various issues, such as the methodology for calculating the legal regulated rent, the applicability of the four-year rule, and whether the tenants are entitled to treble damages. As a result of this Court's decision in *Roberts*, a number of tenants have brought actions in Supreme Court for a determination of their regulatory status and their legal rent amounts as well as recovery of monetary damages for rent overcharge.

There is a long history of the Courts in this state exercising their concurrent jurisdiction over rent overcharge and regulatory status claims. While tenants have the option of filing complaints with the DHCR and having the agency rule on these matters, tenants have always had the option

of raising these claims in the Courts in the first instance, without any prior administrative review. Many Court decisions have correctly recognized that overcharge and regulatory status claims do not require the particular expertise of the DHCR such as to result in these claims being dismissed pursuant to the doctrine of primary jurisdiction.

The number of cases currently pending in the Courts, at the trial court level as well as the appellate court level, is impressive, especially cases dealing with the wrongful deregulation of apartments while landlords were receiving J-51 tax benefits. Like this case, those cases were all commenced in the Court without any DHCR involvement. There is only one factor distinguishing those cases from this case: The Supreme Court here decided, based upon no articulated reasons, that Plaintiffs' claims should be heard at the DHCR. The Appellate Division affirmed, stating only that the Supreme Court providently exercised its discretion, without explaining why this case is any different from the dozens of pending cases in the Courts.

The last time the issue of primary jurisdiction came before this Court in the context of a tenant's action for rent overcharge and a determination of regulatory status was in *Borden v. 400 East 55th Street Associates L.P.*, 24 N.Y.3d 382 (2014). *Borden* involved three consolidated appeals, and primarily dealt with the issue of class certification, which is not applicable

here because Plaintiffs here do not seek to maintain this case as a class action. However, in *Borden*, this Court also affirmed in all respects the holding in *Downing v. First Lenox Terrace*, 107 A.D.3d 86 (1st Dept. 2013). In *Downing*, the Appellate Division held that the Supreme Court should not have dismissed the individual tenants' overcharge claims because "Supreme Court has concurrent jurisdiction with DHCR to entertain an action to recover for rent overcharge." *Downing* at 91. This Court's affirmance of *Downing* was correct, and there is no reason for this Court to reverse itself here.

Plaintiffs elected to bring their individual claims as a multi-plaintiff action in Supreme Court, as was their right. In the Supreme Court all of Plaintiffs' claims can be heard together, whereas at the DHCR their claims would be filed individually and assigned to individual case examiners. Also, in Supreme Court, Plaintiffs would have full rights of pre-trial discovery pursuant to the CPLR, which are not available at the DHCR. Moreover, as the facts of Plaintiffs' cases are all very similar, and all Plaintiffs have elected to retain the same counsel, it is desirable that they be brought together in Court rather than individually at the DHCR.

The effect of the Appellate Division's ruling is that the dismissal of an action for overcharge and regulatory status by the Supreme Court for any

reason, or for no reason, will be upheld as a provident exercise of the Court's discretion. This ruling leaves Plaintiffs' claims in legal limbo, and it has a chilling effect on many other tenants who are currently pursuing similar claims, or are interested in pursuing claims, in Supreme Court. The Appellate Division's ruling also means that any defendant building owner may choose to file a motion to dismiss this type of case on the ground that the DHCR has primary jurisdiction, thereby conferring implicitly upon the owner the choice of forum.

The application of the doctrine of primary jurisdiction is not, and should not become, so discretionary that each individual Supreme Court Justice may grant a landlord's motion to dismiss simply because the particular Justice is not inclined to hear this type of case, or because the Court has too many cases on its docket. The Appellate Division's ruling herein is far out of the mainstream of Court decisions stretching over many years, which have held repeatedly that it is the tenant's choice whether to bring this type of claim in the Court or at the DHCR. It is respectfully requested that the Appellate Division's decision be reversed, that the complaint be reinstated, and that the action be remanded to Supreme Court for further proceedings.

With regard to Plaintiffs' claims of deceptive business practices pursuant to General Business Law §349, it is respectfully submitted that the Supreme Court improperly held, and the Appellate Division improperly affirmed, that these claims do not state a cause of action. The Supreme Court and the Appellate Division both cited to *Aguaiza v. Vantage Properties, LLC*, 69 A.D.3d 422, 423 (1st Dept. 2010), a case which was incorrectly decided and should not be followed. Contrary to the holding in *Aguaiza*, deceptive business practices by landlords regarding the rental of their apartments are consumer-oriented and aimed at the public at large, and therefore can form the basis for relief pursuant to GBL §349.

STATEMENT OF FACTS

Plaintiffs commenced this action by the filing of a Summons and Verified Complaint on September 7, 2016. Plaintiffs are, or were, tenants of eighteen separate apartments of the subject rental apartment building, located at 3300 Netherland Avenue, Bronx, New York. Record at 12 (hereafter "R.__"). Defendant 3300 NETHERLAND PROPERTY ASSETS LLC, a New York limited liability company, has been the owner of the building since July 24, 2013. R. 12. Defendant PARKOFF OPERATING CORP., a New York corporation, is the management company of the building. R. 12. The building was built prior to 1947; it is not owned as a

condominium or a cooperative; and it contains 67 apartments. R. 13. Despite the owner's receipt of J-51 tax benefits from 1990 to 2016, Plaintiffs' apartments were deemed deregulated pursuant to so-called "high-rent vacancy deregulation" and they were given "market" leases.[1] R. 13. 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 tendered to Plaintiffs illegal market-rate leases. R. 16.

In *Roberts, supra*, 13 N.Y.3d at n. 2, this Court left open the issue of retroactivity, a claim made by the defendants in that action for the first time when the case was on appeal to this Court. Thus, there was for a time at least some possible reason for landlords to question the applicability of *Roberts* as to tenants who were in occupancy as of the date of the *Roberts* decision. However, the issue of retroactivity has no applicability to all but one Plaintiff in this action, because all Plaintiffs except Rita Lombardi

[1] Pursuant to a provision of the Rent Stabilization Law, NYC Adm. Code §26-504.2(a), initially enacted in 1993, an apartment may become permanently exempt from regulation if, upon vacancy, the legal regulated rent exceeds a certain threshold amount. That threshold amount was initially $2,000.00 per month; in June 2011 that amount was increased to $2,500.00 per month; and in June 2015 that amount was increased to $2,700.00 per month, with additional increases in the threshold to be implemented on January 1 of each year in the amount of the guidelines increase for one-year renewal leases in effect at that time. Pursuant to the statute, this form of deregulation is not available to apartments which became or become subject to regulation by virtue of the owner's receipt of J-51 tax benefits. See discussion in *Taylor v. 72A Realty Assoc. LP*, 151 A.D.3d 95, 100-102 (1st Dept. 2017); see also *Altman v. 285 West Fourth LLC*, 31 N.Y.3d 178, 184-185 (2018), describing 1997 law.

moved in after the *Roberts* decision. Moreover, the Appellate Division held that *Roberts* applied retroactively in *Gersten v. 56 7th Avenue LLC*, 88 A.D.3d 189 (1st Dept. 2011), *appeal withdrawn*, 18 N.Y.3d 954 (2012), thereby resolving that issue.

The Verified Complaint alleges that Plaintiffs entered into possession of their respective apartments pursuant to "non-stabilized" leases during a time when the owner was receiving J-51 tax benefits, and that they were charged rents in excess of the last amounts registered with the DHCR. The Complaint also alleges that Defendants knew, or reasonably should have known that, based upon *Roberts*, all of Plaintiffs' units were covered by rent stabilization and were required to be registered with the DHCR. Further, the Complaint alleges that Defendants' actions were consumer-oriented and aimed at the public at large; they were misleading in a material way, and that Plaintiffs have suffered injury as a result of these deceptive practices and actions.

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 stabilization, 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. R. 33-35.

Defendants, through their attorneys, filed a pre-answer motion pursuant to CPLR 3211(a) 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 DHCR has primary jurisdiction. R. 61. Plaintiffs opposed the motion arguing that the Court must maintain jurisdiction over the first, second, third and fifth causes of action, and that to cede jurisdiction to the DHCR would constitute an error of law. Plaintiffs also argued that its fourth cause of action alleging consumer-oriented deceptive business practices in violation of General Business Law § 349, which have injured Plaintiffs, states a valid cause of action, and should not be dismissed. R. 84.

The Supreme Court dismissed the Complaint in its entirety, holding that while the Court has concurrent jurisdiction with DHCR, the doctrine of

primary jurisdiction applies. The Supreme Court distinguished certain Appellate Division cases cited in Plaintiffs' attorneys' papers on the basis that they were putative class actions. The Supreme Court also opined that dismissal for primary jurisdiction was appropriate because this case "does not contain any questions of first impression." R. 8-9. Otherwise, the Supreme Court articulated no reasons why the doctrine of primary jurisdiction should be applied to this action. The Court also dismissed Plaintiffs' GBL §349 claim.

The Appellate Division 1st Department affirmed the Supreme Court's Decision and Order in a short decision entered November 28, 2017 which held simply as follows:

> "The motion court providently exercised its discretion in ruling that plaintiffs' rent overcharge claims should be determined by the New York State Division of Housing and Community Renewal in the first instance. The Court also correctly ruled that plaintiffs had failed to state a cause of action for relief under General Business Law §349 (*Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 423, 893 N.Y.S.2d 19 [1st Dept 2010])."

ARGUMENT

I. IT WAS ERROR FOR THE APPELLATE DIVISION TO UPHOLD THE DISMISSAL OF PLAINTIFFS' CAUSES OF ACTION FOR RENT OVERCHARGE AND REGULATORY STATUS BASED UPON THE DOCTRINE OF PRIMARY JURISDICTION

A. The Court has jurisdiction to hear and decide this matter, and it should allow Plaintiffs their choice of forum in which their claims are to be heard

In cases involving rent overcharge and regulatory status, Courts have only rarely deferred to the DHCR by invoking the doctrine of primary jurisdiction, generally doing so only where the DHCR has already had involvement with the matter. The Appellate Division erred in upholding the dismissal of this case based on the doctrine of primary jurisdiction as a provident exercise of the Court's discretion, without articulating any legitimate reasons for doing so.

As a threshold matter, it is beyond dispute that the Supreme Court has the Constitutional authority to hear claims of rent overcharge and regulatory status, because its jurisdiction to hear these claims has not been specifically proscribed. NYS Constitution, Article VI, §7. *See e.g. Thrasher v United States Liab. Ins. Co*., 19 N.Y.2d 159, 166 (1967). Thus, there is no doubt that the claims asserted by Plaintiffs in this action may be brought initially in Supreme Court, without filing with the DHCR, and that tenants have the

choice of pursuing their claims either in Supreme Court initially, or in the DHCR initially with the possibility of Article 78 review by the Supreme Court.

Motions by landlords to dismiss Supreme Court actions for rent overcharge and a determination as to regulatory status on the ground of primary jurisdiction are generally denied unless one party or the other has previously submitted a complaint to the DHCR. *See e.g., Downing v. First Lenox Terrace, supra,* 107 A.D.3d at 91; *Wolfisch v. Mailman,* 196 A.D.2d 466 (1st Dept. 1993); *Nezry v. Haven Avenue Owner LLC*, 2010 NY Slip Op 51506(U) (Sup. Ct. NY Co. 2010).

Justice Carol Edmead explained in detail in *Nezry*, at 8-9, why the action should not be dismissed on the alleged ground that the DHCR has primary jurisdiction. This decision is worth citing at length because of its sound reasoning, and because the reasoning is entirely applicable to this case:

> "Contrary to defendants' contention, plaintiffs' first and second causes of action alleging a violation of the RSL, and seeking a declaration that plaintiffs are entitled to protections of the RSL, need not first be resolved by DHCR, where plaintiffs have not commenced any proceeding before the DHCR. The doctrine of primary jurisdiction does not preclude a plaintiff from seeking relief from the courts prior to instituting an overcharge complaint with the DHCR (*Dabalsa v Crino,* 143 Misc 2d

> 480, 541 NYS2d 144 [NY Civ. Ct. Queens County 1989] (denying motion to dismiss the complaint pursuant to CPLR 3211 …citing *State of New York v Winter*, 121 AD2d 287, 503 NYS2d 384]). Further, that plaintiffs' claims require the Court to determine, *inter alia*, whether each apartment at issue was subject to the RSL at any time during the landlord's receipt of J-51 benefits and, if so, the legal rent for each such apartment for each year at issue, and the amount of rent increases/adjustments available to defendants for each of the relevant years, such as increases permitted for capital improvements is no bar to this proceeding (see *Vazquez v Sichel*, 12 Misc 3d 604, 814 NYS2d 482 [NY City Civ. Ct. 2005] (denying defendant's motion to dismiss the complaint on subject matter jurisdiction grounds, and retaining jurisdiction over plaintiff's rent overcharge claim based on defendant's " Individual Apartment Improvement" increase, noting that ascertaining and applying the formula to calculate plaintiff's rent increase based on improvements to his apartment requires an evaluation of those improvements to it, and such formula is not complicated and does not require expertise or resources beyond the court's competence)). Also, issues as to the applicable statute of limitations and how such statute of limitations should be applied in light of *Roberts* and whether to apply *Roberts* retroactively may properly be decided by this Court as well."

See also Missionary Sisters of the Sacred Heart v. Meer, 131 A.D.2d 393, 396 (1st Dept. 1987) ("the Rent Stabilization Code …specifically permits grieved tenants the right to pursue, in addition to those remedies

provided by the Code, any other remedies granted by other provisions of law").

In contrast to the doctrine of primary jurisdiction, pursuant to the doctrine of exclusive jurisdiction, the Legislature, by enacting a statute establishing a highly technical regulatory scheme, is deemed to have entrusted certain specific adjudicatory functions requiring substantial technical or policy expertise to an administrative agency created and staffed for that purpose, thus divesting the courts of initial jurisdiction to consider a particular technical issue, and limiting the court's role to review pursuant to CPLR article 78. Thus, this Court in *Sohn v. Calderon* 78 N.Y.2d 755, 767 (1991) carefully examined the relevant provisions of the Rent Stabilization Law and determined that the Supreme Court did not have the power to adjudicate demolition cases in the first instance. However, unlike demolition cases, exclusive jurisdiction does not apply to cases of rent overcharge and regulatory status.

The doctrine of primary jurisdiction is intended to "co-ordinate the relationship between the courts and administrative agencies to the end that divergence of opinion between them does not render ineffective the statutes with which both are concerned, and to the extent that the matter before it is within the agency's specialized field, to make available to the court in

reaching its judgment the agency's views." *Capital Telephone Company v. Pattersonville Telephone Company*, 56 N.Y.2d 11, 22 (1982).

The lower Courts have repeatedly recognized that it is the tenant's choice whether to pursue an overcharge claim in Court or at the DHCR. It is not the tenant's burden to justify the choice of the Court as the forum for pursuing an overcharge claim. See e.g. *Nieborak v. W54-7 LLC*, 2016 NY Slip Op 31040(U) (Sup. Ct. NY Co. 2016) (Bannon, J.) (deferral to DHCR not warranted where tenant initiated action in Supreme Court and no DHCR proceeding was already pending); *Dodd v. 98 Riverside Drive, LLC*, 2011 N.Y. Misc. Lexis 4992 at 20 (Sup. Ct. NY Co. 2011) (Gische, J.) ("the DHCR does not have exclusive or primary jurisdiction over these claims for declaratory judgment and rent overcharge"); *Nezry v. Haven Ave. Owners*, *supra*; *Vazquez v. Sichel*, 12 Misc.3d 604, 608 (Civ. Ct. NY Co. 2005) (Billings, J.) ("Nor do the rent stabilization laws anywhere indicate that the State Legislature intended courts to 'opt out' of their jurisdiction over overcharge complaints and rely exclusively on DHCR determinations regarding overcharge.")

In the years since this Court issued its decision in *Roberts*, the Appellate Division has issued three rulings denying motions to dismiss by defendants-owners, rejecting the claim that the DHCR should hear these

cases based on the doctrine of primary jurisdiction. *Downing v. First Lenox Terrace Assoc., supra,* 107 A.D.3d at 91; *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.); and *Gerard v. Clermont York Assoc., LLC,* 81 A.D.3d 497 (1st Dept. 2011). While it is true that these cases were commenced as putative class actions, the motions to dismiss on the basis of primary jurisdiction were all denied before motions for class certification was filed. Therefore, the holdings in these cases are not limited to class actions, as the Supreme Court below opined.

Dismissal was denied in *Downing*, as in *Gerard* and *Dugan*, *supra*, not because the cases were putative class actions, but because the tenants had the right to pursue those actions in court, and because it was appropriate for the courts to address the issues in the first instance. Thus, 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." Again, at the time of the appeal in *Gerard*, the order on appeal was an order of the lower court dismissing the action on a CPLR

3211 pre-answer motion; no class had been certified; and the appeal was brought on behalf of the named plaintiffs only.

Similarly, in *Dugan v. London Terrace Gardens, L.P., supra,* the Appellate Division affirmed the ruling of the lower Court (Lucy Billings, J.) denying the landlord's motion to dismiss on the ground that the DHCR allegedly had primary jurisdiction. *Dugan*, 2011 NY Slip Op 52501(U) at 6 (Sup. Ct. NY Co. 2011). The lower Court accurately summed up the state of the law on this issue in a detailed and thoughtful decision, as follows:

> "No authority, however, supports the dismissal or stay of a court action until an administrative proceeding resolves the issues raised, except in the following circumstances. (1) The legislature specifically has conferred *exclusive*, rather than *primary*, jurisdiction on the administrative agency to resolve the issues in the first instance. *Sohn v. Calderon*, 78 NY2d at 766-67; *Wong v. Gouverneur Gardens Hous. Corp*. 308 A.D.2d at 304-305; *Vasquez v. Sichel*, 12 Misc. 3d 604, 607 (Civ. Ct. NY Co. 2005) *See Capers v. Giuliani* 253 AD 2d 630, 632-33 (1st Dept. 1998) *County Dollar Corp. v. Douglas*, 160 A.D. 2d 537, 538 (1st Dept. 1990) *Pocantico Home & Land Co. LLC v. Union Free School Dist. Of Tarrytown*, 20 A.D. 3d 458, 461-62 (2nd Dept. 2005); (2) Plaintiffs seek referral to the agency for resolution of their claims. *Crimmins v. Handler & Co*. 249 A.D.2d 89, 91 (1st Dept. 1998) *See Missry v. Ehlich*, 1 Misc. 3d 723, 731 (Civ. Ct. NY Co. 2003); (3) An administrative proceeding relating to the issues preceded the court action or still is pending. *Wong v. Gouverneur Hous. Corp*. 308 A.D.2d at 302, 305; *Davis v. Waterside Hous. Co*. 274 A.D.2d at 319; *Nasaw v. Jenrock Realty Co*. 225 A.D.2d at 386 *See Acosta v. Lowes Corp*. 276 A.D.2d at 218; *Missry v. Ehlich*, 1 Misc. 3d at 731.

> "Without such a proceeding previously or currently pending, none of the factors that militate in favor of DHCR's primary jurisdiction carries any force. No coordination between the court action and DHCR's proceeding is necessary. There is no risk of inconsistent dispositions, nor will any DHCR determinations be forthcoming to inform the court. *Wong v. Gouverneur Hous. Corp*. 308 A.D.2d at 303, *Davis v. Waterside Hous. Co*. 274 A.D.2d at 318-319; *Missionary Sisters of the Sacred Heart v. Meer*, 131 A.D.2d 393 (1st Dept. 1987); *Vasquez v. Sichel*, 12 Misc. 3d 604, 607 (Civ. Ct. NY Co. 2005) *Capital Telephone Company v. Pattersonville Telephone Company*, 56 N.Y.2d 11, 22 (1982); *Heller v. Coca-Cola Co*. 230 A.D. 2d 768, 770 (2nd Dept. 1996)."

Insofar as Defendants do not contend that any of these circumstances pertains here, the Appellate Division erred when, without explanation, it affirmed the lower court's decision and dismissed this action based on primary jurisdiction.

At stake in this appeal is whether owners can dictate where tenants' status and overcharge claims will be adjudicated. This is simply forum shopping. This Court should not allow Defendants, in status and overcharge claims, to decide whether they prefer to litigate at the DHCR or in court.

If the lower court's decision and the Appellate Division's affirmance are not reversed, some judges, those who want to adjudicate status and overcharge matters, will continue to exercise their discretion and decline to dismiss on the basis of primary jurisdiction, while other judges will defer matters to the DHCR. Either ruling will be seen as a provident exercise of

discretion since no reasons need to be articulated for ruling in favor of dismissal. There will be no standards for the applicability of the doctrine of primary jurisdiction to these types of cases, other than that it is completely with the Supreme Court's discretion.

Some landlords, those who believe that it is in their best interest to have the claims resolved by the DHCR, will move to dismiss these actions. This will deprive tenants of their right to choose the forum in which to assert these claims, a right which the Legislature chose not to deprive them of. The effect of the Appellate Division is that the choice of forum over claims of rent overcharge and regulatory status will be shifted from that of the tenant to that of the landlord. It is respectfully submitted that dismissal, based on primary jurisdiction, is inappropriate and an abuse of discretion when, as presented here, the sole basis for that determination is an agency's concurrent jurisdiction.

B. Issues of rent overcharge are not foreign to the courts and do not require the initial expertise of the DHCR

"A review of legal authority makes it clear that courts do not automatically apply the doctrine of primary jurisdiction simply because the controversy before them involves an administrative agency. Before a court decides to apply this doctrine it must consider whether the primary objectives of the doctrine -- the need for specialized expertise and for

uniformity of result -- will be helpful in the resolution of particular litigation" *People v. Port Distrib. Corp.*, 114 A.D.2d 259, 267 (1st Dept. 1986).

It has been held repeatedly that issues involving a tenant's regulatory status, the amount of the legal rent, or the amount of the overcharges, are not solely within the expertise of the DHCR; they are dealt with regularly and consistently by the courts; and the DHCR does not have any special competence to address these issues. *Matter of Rockaway One Co., LLC v. Wiggins*, 35 A.D.3d 36, 39 (2d Dept. 2006); *Missionary Sisters of the Sacred Heart v. Meer, supra*, 131 A.D.2d at 393; *Wolfisch v. Mailman, supra*, 196 A.D.2d at 466; *Crimmins v. Handler* & Co., 249 A.D. 2d 89 (1998).

Indeed, such issues are not at all foreign to this Court. For many years the courts have exercised their jurisdiction over these matters, and have refrained from dismissing overcharge/status claims brought by tenants on the ground of primary jurisdiction. Many of these cases have been heard by this Court. Indeed, in recent years, the Court of Appeals' jurisprudence in this area has been impressive. See e.g. *Altman v. 285 W. 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); *Borden v. 400 E. 55th Street, L.P.*, 24 N.Y.3d 382 (2014); *Scott v. Rockaway Pratt, LLC*, 17 N.Y.3d 739

(2011); *Roberts v. Tishman Speyer Properties 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).

The courts consider three factors in determining whether to apply the doctrine of primary jurisdiction. The first is whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise. *Good v. American Pioneer Title Insurance Company*, 12 A.D.3d 401 (2d Dept. 2004); *Wong v. Gouverneur Gardens Housing Corp*., 308 A.D.2d 301 (1st Dept. 2003). The second is whether the question requires the resolution of issues that, under a regulatory scheme, have been placed within the special competence of an administrative body. *Markow-Brown v. Board of Education, Port Jefferson Public Schools*, 301 A.D.2d 653 (2nd Dept. 2003); *Lauer v. New York Telephone Company*, 231 A.D.2d 126, 659 (3d Dept. 1997). The third factor is whether the action calls upon the court to interpret regulations and there exists a substantial danger of inconsistent ruling between the court and the agency, or whether the action simply calls upon the court to determine if there has been compliance with the regulations. *Davis v. Waterside Housing Co.,* 274 A.D.2d 318 (1st Dept. 2001); *Missionary Sisters of the Sacred Heart v. Meer, supra*, 131 A.D.2d at 396.

Applying these factors, there is no reason for the court to abdicate its jurisdiction over status and rent overcharge claims broadly, and more specifically, the type of claim presented in the complaint herein. Courts defer to an agency to assure that statutes are not rendered ineffective by divergent opinions (*Capital Telephone Company*, *supra*) and 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 meaning of the statute administered by the agency" (*Wong, supra* at 303). Here there is no such risk of divergent opinions, as the courts have dealt with these cases in the first instance for many years, and continue to do so.

Here, it is the courts, not DHCR, that have issued the vast majority of definitive rulings, if not all of the definitive rulings, in the aftermath of *Roberts*. *See e.g., Borden, supra; Leight v. W7879 LLC*, 27 N.Y.3d 929 (2016); *Taylor, v. 72A Realty Assoc.*, 151 A.D.3d 95 (1st Dept. 2017); *Altschuler v. Jobman 478/480, LLC*, 135 A.D.3d 439 (1st Dept. 2016), *leave to appeal dismissed*, 28 N.Y.3d 945 (2017); *72A Realty Assoc. v. Lucas*, 101 A.D.3d 401 (1st Dept. 2012); *Gordon v. 305 Riverside Corp.*, 93 A.D.3d 590 (1st Dept. 2012); *Gersten, supra*. Moreover, the DHCR has no particular "expertise" to deal with these issues. Defendants have not shown that the

issues in this case are "within the agency's specialized field" or that this dispute involves "issues beyond the conventional experience of judges".

The dismissal of this action would not accomplish any of the objectives of the doctrine of primary jurisdiction as were articulated by the Appellate Division in *Wong v. Gouverneur Gardens Housing Corp.*, 308 A.D.2d 301 (1st Dept. 2003). Dismissal of this action would not "coordinate the relationship between [this Court] and [the DHCR] to the end that divergence of opinion not render ineffective the statutes with which both are concerned" (Id. at 303); the courts regularly adjudicate issues of residential rent overcharge, and there has been no showing of potential divergence of opinions between the DHCR and the Court such that the statutes would be "rendered ineffective." Dismissal also would not "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 meaning of the statute administered by the agency" (Id. at 303).

Defendants have not shown that the issues in this case are "within the agency's specialized field". With regards to cases concerning an Owner's impermissible destabilization of apartments while receiving J-51 benefits, specifically, it is the Courts, rather than the DHCR, who have issued decisions. *See e.g. Taylor, supra.* Indeed, in seeking dismissal of this action

based upon the doctrine of primary jurisdiction, it would appear that Defendants' primary motive is to delay the resolution of Plaintiffs' claims. Delay would benefit Defendants; it would not benefit Plaintiffs. Delay is not a legitimate reason for seeking dismissal based upon primary jurisdiction.

C. Dismissal of an action for rent overcharge is not proper where no proceeding is pending before the DHCR, and no issue of interpretation of a DHCR order is involved

In *Sohn v. Calderon*, *supra*, the landlord, after a fire severely damaged its building, commenced an action in State Supreme Court, against the tenants who had lived in the building, seeking a declaration that it could demolish the building and was entitled to certificates of eviction. Supreme Court, in relevant part, determined that the landlord had established its right to demolish the building and issued certificates of eviction. Supreme Court also granted the landlord a permanent injunction against DHCR enjoining the agency from taking any action against him with regards to the tenants' pending complaints and charges filed with the agency. The Appellate Division affirmed.

This Court reversed, determining that "the constitutionally protected jurisdiction of the Supreme Court does not prohibit the Legislature from conferring exclusive original jurisdiction upon an agency in connection with the administration of a statutory regulatory program. In situations where the

Legislature has made that choice, the Supreme Court's power is limited to article 78 review." This Court opined that concurrent jurisdiction was not contemplated in this instance and therefore Supreme Court should not have entertained plaintiff's action for declaratory and related relief in connection with his efforts to demolish the building because the legislature had conferred DHCR exclusive jurisdiction over demolition applications. In *Sohn, supra,* this Court made clear the distinction between exclusive and primary jurisdiction, further confirming Supreme Courts' concurrent jurisdiction over all landlord/tenant matters not expressly mandated to be adjudicated by DHCR in the first instance. Significantly, *Sohn* does not stand for the proposition that DHCR's generalized expertise in rent regulation provides a basis for dismissal. *Sohn, supra*

Established precedent holds that it is an improper exercise of discretion to dismiss Plaintiffs' individual overcharge claims in Supreme Court on the basis of the doctrine of primary jurisdiction in the absence of a pending administrative proceeding, a need for an interpretation of an agency order, or an otherwise factually unique situation. *Downing v. First Lennox Terrace Assoc., supra,* 107 A.D.3d at 91; *Gerard v. Clermont York Assoc., LLC, supra,* 81 A.D.3d at 497-498; *Dugan v. London Terrace Gardens, L.P., supra,* 101 A.D.3d at 649; *Crimmins v. Handler & Co., supra,* 249 A.D.2d at

90 ("the tenant who has not filed an administrative complaint may raise a claim of rent overcharge affirmatively"); *Wolfisch v. Mailman, supra*, 196 A.D.3d at 466; *Olsen v. Stellar W. 110 LLC*, 96 A.D.3d 440 (1st Dept. 2012); see also *Wiggins*, *supra,* 35 A.D.3d at 39, holding that the Legislature had no intent to deprive the courts of jurisdiction over rent overcharge claims, and that a tenant could assert a claim of overcharge in the courts without being passed upon by the DHCR.

In *Missionary Sisters of the Sacred Heart v. Meer*, *supra*, 131 A.D.2d at 396, the Appellate Division held that the court should not defer to DHCR when the only issue is whether the owner has complied with applicable regulations. In that case the DHCR had previously ruled that the landlord was obligated to lease parking spaces to tenants before leasing them to non-occupants of the building. The landlord denied a space to a tenant. When the landlord sued the tenant for rent, the tenant interposed a counterclaim for damages due to the landlord's failure to give him a parking space. The trial court found that the landlord had violated the regulations and assessed damages. Appellate Term reversed, finding that DHCR had primary jurisdiction over this issue.

The Appellate Division reversed the Appellate Term order holding:

> "When the agency however has already determined which laws and regulations apply to a given matter,

> no possibility exists of a divergence of opinion, and all that remains is to determine whether there has been compliance with a rule or regulation and whether damages may be recovered, areas conveniently within the expertise of courts, the weight of legal authority holds that in such cases the doctrine of primary jurisdiction does not apply." 131 A.D.2d at 395, at 507

In *157 Broadway Assocs., LLC v. Edouard*, 2010 NY Slip Op 51545(U) (App. Term 1st Dept. 2010) the Court declined to dismiss a tenant's rent overcharge claim on the basis of primary jurisdiction even though the tenant, at the time of the decision was issued, had an overcharge complaint pending at the DHCR. Tenant's representation, at oral argument, that the DHCR complaint would be withdrawn was deemed sufficient to deny dismissal based on primary jurisdiction. *Id*.

In *Davis*, *supra*, the defendant, Waterside Housing Company, had filed an application with the DHCR, which application was still pending, for dissolution of its Mitchell-Lama status, when plaintiff Davis and other tenants brought their Supreme Court action to enjoin the agency from acting (*Davis, supra* at 318). Supreme Court originally granted the injunction, staying all proceedings pending before the DHCR. Appellate Division reversed, stating that judicial review should await the outcome of the dissolution application pending before the DHCR. Here there is no prior proceeding pending before the DHCR.

Here, it is undisputed that Plaintiffs have not filed claims with the DHCR and no interpretation of a DHCR order is involved. Rather, as discussed in more detail, *infra*, this case involves legal issues left unresolved in the wake of *Roberts*, namely, applicable limitations periods and the appropriate look back period which should be addressed by the courts in the first instance. *Taylor, supra; Gerard, supra; Dugan, supra* (applicable statute of limitations "should be addressed in the first instance by the courts, and should not be deferred to the DHCR.")

D. The Court is the preferred forum where, as here, tenants have brought a multi-plaintiff action, intend to engage in pre-trial discovery, and seek declaratory and injunctive relief as well as monetary damages

Plaintiffs have chosen to bring their claims in court rather than at the DHCR based on, amongst other factors, the availability of discovery. Through discovery, plaintiffs can obtain the necessary documents and information to prove damages. Pursuant to CPLR 3101(a) "[t]here shall be full disclosure of all matter material and necessary in the production or defense of an action…" Plaintiffs have the right to request that defendants, or any other party or person, for example a contractor who performed renovation work, produce such information and documents which plaintiffs believes are reasonably necessary for the development of the case. CPLR

3101(a)(1)(4). Plaintiffs may chose the discovery devices that they deem most appropriate, and leave of court is not required. CPLR 3102.

In contrast, proceedings before the DHCR are conducted based upon written submissions (RSC Part 2527). There is no right to discovery and thus an important due process right would be taken from plaintiffs if Justice Cohen's decision were affirmed.

Furthermore, unlike DHCR, the Court has the jurisdiction to grant Plaintiffs preliminary relief should it be needed. CPLR 6311. A preliminary injunction may be required in the event Defendants threaten to commence a non-payment or holdover proceeding in Housing Court. Thus, a preliminary injunction may be needed to protect Plaintiffs from becoming subject to proceedings in Housing Court. The Office of Court Administration sells Housing Court eviction data electronically to companies known as "tenant screening bureaus," who in turn sell the data to prospective landlords. Thus, regardless of whether a tenant wins in Housing Court, his or her name may be placed on a "blacklist," making it very difficult, if not impossible, to find a rental apartment. On the basis of these facts, the Courts have granted tenants preliminary injunctions prohibiting their landlords from commencing Housing Court proceedings. *Weisent v. Subaqua Corp.*, 16 Misc.3d 1115(A) at *3 (Sup. Ct. NY Co. 2007), citing *Pultz v. Economakis*, 8 Misc.3d

1022(A) at *10 (Sup. Ct. NY Co. 2005); see also *Denza v. Independence Plaza Assocs.*, 17 Misc.3d 1122(A) at *5 (Sup. Ct. NY Co. 2007).

In summary, Plaintiffs have the absolute legal right to commence this action in the court and to pursue all of their claims regarding overcharge and regulatory status to their conclusion.

E. This case involves legal issues in the wake of *Roberts v. Tishman Speyer Properties* regarding the interplay between J-51 tax benefits and high rent deregulation, which the court must resolve in the first instance

This collective action, involving thirty tenants residing in eighteen apartments, concerns an owner's improper renting of market rate apartments years after *Roberts*, and therefore seemingly presents a fact pattern not yet adjudicated in any forum

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 Appellate Division in *Gerard, supra,* correctly determined that legal issues left open after *Roberts* should be addressed by the Courts in the first instance. That determination is very much applicable to the present case, which deals with a myriad of legal issues left open from *Roberts*, such as the following: (i) the consequences to a landlord who represents to dozens of new tenants who

move in after *Roberts* that their apartment 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. Again, the Courts, not the DHCR, should address these issues in the first instance. *Gerard, supra.*

A recent J-51 decision issued by the Appellate Division, *Taylor, supra,* makes clear that the Courts continue to grapple with and clarify legal issues left open in the wake of *Roberts*. *Taylor, supra*, opens with: "There are interlocking *complex issues* framed by this appeal…" (emphasis supplied). The court further noted that the "collateral issues raised by this appeal concern the setting of the rent-stabilized rent for the apartment, which implicates the applicable statute of limitations and look back period." *Id.*

The Appellate Division Decision and Order appealed from cites only to *Olsen v. Stellar W. 110 LLC, supra*, a case with a very fact-specific situation concerning a single apartment where incoming tenants commenced occupancy 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.[2]

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). The Court in *Olsen* dismissed the action based on primary jurisdiction, despite any party raising primary jurisdiction below or at the Appellate Division and absent particularized reason for doing so.

Apart from *Olsen*, no authority exists to support a dismissal, based on primary jurisdiction, only because of an agency's generalized expertise, much less, DHCR's generalized expertise in rent regulation. Indeed, because DHCR is the administrative agency responsible for administration of the State's rent regulations, by definition, DHCR has a generalized "expertise in rent regulation" thus, potentially, subjecting any and all rent overcharge and status cases to dismissal. Highlighting, *Olsen's* departure

[2] 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).

from long established precedent the court relied on *Sohn v. Calderon, supra*, and *Davis v. Waterside Hous. Co., supra*, both of which involved cases in which DHCR had exclusive, rather than, primary jurisdiction.

The *Olsen* Court erred when they dismissed the action, based on primary jurisdiction for DHCR to investigate the tenant's claims of fraud. Indeed, issues related to fraud are not amongst the matters over which DHCR has exclusive jurisdiction, rather these issues are routinely dealt with by the Courts. *E.g. Thornton, supra; Conason, supra; Altschuler, supra.* As such, to the extent *Olsen* stands for the proposition that any rent overcharge and status case can be dismissed solely because DHCR has a generalized "expertise in rent regulation," it should be overruled.

Indeed, in the years since *Olsen,* Supreme Court Judges have issued inconsistent decisions when confronted with motions to dismiss status and overcharge complaints based on primary jurisdiction. Some Supreme Court Judges have granted these motions while others have denied them. *Compare Jeffrey and Brooke Ruskaup v. Contempo Acquisition LLC,* 45 Misc. 3d 1226(A) (Sup. Ct. NY Cty. 2014) (Jaffe, J.) (court dismisses status and overcharge complaint based on DHCR's primary jurisdiction); *Chester v Cleo Realty Assoc*., L.P., 2017 N.Y. Misc. LEXIS 2995 (court dismisses complaint because "this court will almost certainly be required to consider

issues that fall squarely within the purview and expertise of DHCR") and *Contempo Acquisition LLC v Dawson*, 2015 N.Y. Misc. LEXIS 4475 (Sup. Ct. NY Cty.) (Mills, J.) (court denies owner's motion to dismiss based on primary jurisdiction noting it "respectfully disagreed with her [Judge Jaffee's] ruling.")[3]; *Nieborak v. W. 54-7 LLC*, 2016 N.Y. Misc. LEXIS 2097 ("dismissal or stay of an action pending administrative resolution of a dispute is only available (1) when the legislature has expressly conferred exclusive, rather than primary, jurisdiction of an issue on the administrative agency (2) when the plaintiffs are the parties seeking referral to the administrative agency for adjudication or (3) when a related administrative proceeding has already taken place or is currently pending. The defendant does not argue that any such circumstances are present here." (internal cites omitted)).

The lack of any discernible standard as to whether or not a court retains jurisdiction has led to unpredictable results and has placed tenants at a disadvantage precisely because absent a discernible standard, beyond DHCR's always present generalized expertise in rent regulation, there is no way to know whether the courts will adjudicate overcharge and status cases or whether they will be dismissed. *Compare Pascaud v. B-U Realty Corp*.

[3] *Jeffrey and Brooke Ruskaup, supra,* and *Contempo Acquisition LLC, supra,* were both status and overcharge cases involving the same landlord.

2017 N.Y. Misc. LEXIS 2681 (Sup. Ct. NY Cty.) (court adjudicated issues including fraud, default formula and J-51 deregulation); *Casey v. Whitehouse Estates*, 2017 WL 1161744 (Sup. Ct. NY Cty.) (fraud, J-51 deregulation, default formula) and *Burton v 198 W. 10th St. LLC*, 2018 N.Y. Misc. LEXIS 3004 (court dismisses, *sua sponte*, status and overcharge complaint noting "that in *Olsen*, the First Department appears to have invoked primary jurisdiction *sua sponte*.")

Furthermore, *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. The facts in *Olsen* must be contrasted with the facts presented herein. The instant case presents readily identifiable legal issues left open in the wake of *Roberts*, amongst those the setting of the rent-stabilized rent for each apartment, which implicates the applicable statute of limitations and look back period. *Taylor, supra; Gerard, supra; Dugan, supra* (applicable statute of limitations "should be addressed in the first instance by the courts, and should not be deferred to the DHCR.")

While *Olsen, supra*, concerned an individual apartment and a limited factual inquiry regarding potential fraud by the landlord, the instant case presents readily identifiable legal issues that should be resolved by the courts

in the first instance. *Gerard*, *supra*. In September 2016, when this action was commenced, Plaintiffs' apartments remained unregistered and Plaintiffs had been provided with "market" leases.

Defendants, in their motion to dismiss, stated that they were justified in waiting until early 2016, when the DHCR started the so-called J-51 Initiative, to recognize that Plaintiffs' apartments are rent stabilized and were improperly deregulated. Under the J-51 Initiative, the DHCR began sending letters to owners who had not registered apartments that were rent stabilized by virtue of the owners' receipt of J-51 tax benefits. In March 2016, the DHCR issued a so-called FAQ regarding the J-51 Initiative, which explained that under the *Roberts* decision issued in 2009, high rent vacancy deregulation did not apply in buildings where the owner received J-51 tax benefits. [4]

At the outset, the very 2016 DHCR Initiative defendants rely on further demonstrates why, here, dismissal based on primary jurisdiction was an abuse of discretion. The DHCR Initiative, in relevant part, provides:

> "With respect to an apartment to be re-registered under the J-51 Rent Registration initiative, how does an owner calculate the legal rent to be registered for the subject apartment?"

[4] It must be noted that Plaintiffs' apartments remained unregulated at the time the Complaint was filed in September, 2016, nine months after the DHCR initiative was announced in January, 2016.

> A*: The law, in this area is continuing to evolve.* (emphasis supplied) At this time, for the purpose of this initiative, our guidance is that an owner may calculate and register rent on a stabilized apartment that was improperly deregulated while subject to J-51 by:…."

First, it is noteworthy that the aforementioned DHCR FAQ, issued in 2016, provides: "[t]he law in this area is continuing to evolve" and thus acknowledges the agency's uncertainty as to the proper manner in which to calculate the rent for apartments improperly destabilized while an Owner was receiving J-51 benefits. Under the J-51 Initiative, the DHCR did not issue regulations or otherwise prescribe any methodology for resolving the issues in this case; moreover, in writing letters to owners who had not registered their apartments, the DHCR did not purport to excuse those owners for their inaction for the previous several years. It was never intended that the J-51 Initiative be used by owners as an excuse for their past noncompliance with the law.

Defendants argued in its motion to dismiss that its concession that Plaintiffs occupy rent stabilized apartments leaves open simply the method for calculating the proper rent for each apartment. However, it has since become clear that the "applicable limitations periods" for the purpose of calculating the legal rent is in dispute, as are such issues as the effect of

Defendants' improper registration filings, or lack of registration filings, and Defendants' potential liability for treble damages.

Presumably, Defendants will claim that their inaction was justified at least until the 2016 DHCR Initiative; however, they will take the inconsistent position that they are entitled to a strict application of the four-year rule. It also noteworthy that this case presents facts more egregious than those presented in *Taylor*.

In *Taylor* this Court, in relevant part, held that even in the absence of fraud in the setting of the initial "improper" rent, after the apartment was improperly removed from rent stabilization, the four-year rule should not preclude an examination of the rental history. In addition, the *Taylor* Court found the proper formula to use to determine the legal regulated base date rent in this case is to consider the "permitted rent stabilization increases from the expiration of the 2000 lease [the last known/established legal rent] and February 21, 2010 [the base date]."

Here, despite the fact all but one Plaintiff commenced occupancy after *Roberts* was decided, they were offered market rate leases and charged illegal rents. As such, this case presents facts in which the Courts may find that owners, such as Defendants, who advertise and rent market rate apartments, while receiving J-51 benefits, long after their legal obligations

became clear, have engaged in fraud and as a result a methodology such as the default formula is warranted.

F. No issues of law or fact have been identified in this action which require the involvement of the DHCR

The doctrine of primary jurisdiction provides that "[where] the courts and an administrative agency have concurrent jurisdiction over a dispute involving issues 'beyond the conventional experience of judges,' the court will 'stay its hand until the agency has applied its expertise to the salient questions'." *Flacke v. Onondaga Landfill Systems, Inc*., 69 N.Y.2d 355 (1987).

Nothing in the state rent stabilization statutes indicates the State Legislature's intention that DHCR be the exclusive initial arbiter of challenges to deregulation and the legal rent. In *Abrams v. Winter*, 121 AD 2d 287 (1st Dept. 1986) the Attorney General initiated a lawsuit in New York Supreme Court for various violations of the rent stabilization law and seeking, amongst other relief, rent overcharge damages. The Court denied defendant's motion to dismiss based on primary jurisdiction finding "[i]f primary jurisdiction was applicable in this case, the court would be compelled to defer to the expertise of the DHCR for an adjudication….But because it is regularly in the province of the court to determine whether

violations of regulations have occurred, as is the case herein, the doctrine is inapplicable."

The doctrine of primary jurisdiction requires some basis or standard as to why the doctrine is being invoked. There is no precedent for dismissal, based on the doctrine of primary jurisdiction, in the absence of some particularized reason for doing so. Here, Defendants cannot identify a single issue of law or fact that requires the involvement of the DHCR. Indeed, Defendants' sole argument, which was adopted by the Supreme Court, for dismissal of this action is that DHCR has concurrent jurisdiction and is equally equipped to handle this matter. However, concurrent jurisdiction has never been and should not be the sole basis for dismissal based on primary jurisdiction. Rather, once a tenant, or tenants as is the case here, choses to proceed in Court as opposed to the DHCR, there must be some basis, other than concurrent jurisdiction, to justify dismissal.

In summary, there is absolutely no legitimate reason for this Court to cede its jurisdiction to the DHCR in this case. Plaintiffs have not filed rent overcharge complaints with the DHCR, nor does this case involve prior orders of the DHCR or matters which were previously decided by the DHCR. 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, the availability of treble damages, the consequences of the landlord's failure to register the units with the DHCR, and the methodology for calculating the amount of the overcharges. Accordingly, Defendants' motion for dismissal should have been denied and the Appellate Division's affirmance of the Supreme Court's Decision and Order should be reversed.

II. PLAINTIFFS' CAUSE OF ACTION FOR DECEPTIVE BUSINESS PRACTICES PURSUANT TO GENERAL BUSINESS LAW § 349 SHOULD BE REINSTATED

A. The complaint alleges that defendants engaged in deceptive business practices which were consumer-oriented

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."

Here, Plaintiff's GBL § 349 claim sets forth a viable cause of action. 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)[5]; *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."

[5] "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.

B. The complaint alleges that defendants' acts and practices were misleading in a material way

A GBL § 349 claim does not require repeated conduct or a pattern of deceptive behavior. Rather, "[a] claim brought under this statute must be predicated on an act or practice which is 'consumer-oriented,' that is, an act having the potential to affect the public at large, as distinguished from merely a private contractual dispute. . ." *Elacqua v. Physicians' Reciprocal Insurers*, 52 A.D.3d 886,888 (3rd Dept. 2008) *citing Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.* 86 NY 2d 20 (1995). Moreover, to avoid opening a floodgate of litigation against businesses, the courts adopted "an objective definition of deceptive acts and practices, whether representations or omissions, limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances . . ." *Oswego Laborers' Local 214 Pension Fund*, *supra* at 26.

Aguaiza v. Vantage Properties, LLC, 69 A.D.3d 422, 423 (1st Dept. 2010), should not be followed. The *Aguaiza* plaintiffs, rent stabilized tenants, alleged that their landlord had harassed them by commencing baseless non-payment proceedings, arbitrarily refusing to accept timely tendered rent payments, prosecuting bogus non-primary residency and/or illegal sublet holdover proceedings and making baseless refusals to offer lease renewals and arbitrarily demanding proof of identity from Plaintiffs,

without good cause, in order to maintain their rent stabilized tenancy rights. This Court found that 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." *Aguaiza, supra.*

Aguaiza was wrongly decided and should not be followed because the rental of apartments is a form of consumer-oriented conduct. Also, by offering apartments for rental, landlords are engaging in conduct aimed at the public at large, namely those consumers who are seeking rental housing accommodations. In the instant case, long after *Roberts*, defendants continued to market and advertise, to the public at large, apartments that they alleged were non-stabilized. Defendants, through the advertisement and rental of rent stabilized apartments by falsely claiming that they were market-rate apartments, certainly a material misrepresentation, engaged in activities that were directed to the public and were "consumer-oriented in the sense that it potentially affected similarly situated consumers." Plaintiff's GBL § 349 cause of action centers on defendants' material representations to the public with regards to the status and permissible rental rates for apartments they were contemplating renting.

C. The Complaint alleges that Plaintiffs were injured as a result of Defendants' actions and practices

Plaintiffs suffered injury, namely the payment of illegal rents, the purported lack of protection under rent stabilization, and the need to hire attorneys to enforce their rights under law, as a result of Defendant's deceptive acts. As such, Plaintiffs have set forth the elements of a claim under GBL § 349 and therefore this Court erred in dismissing this cause of action.

It is respectfully submitted that the Appellate Division should not have affirmed the Supreme Court's dismissal of Plaintiff's GBL § 349 claim. That claim should be reinstated, and the case should be remanded to Supreme Court for further proceedings.

CONCLUSION

For all the reasons set forth above, it is respectively requested that the Decision and Order of the Appellate Division, which affirmed the Decision and Order of the Supreme Court granting Defendants' motion to dismiss this action, should be reversed in its entirety; that Defendants' motion should be in all respects denied; that all causes of action in the Complaint should be reinstated; that this case should be remanded to Supreme Court for further proceedings; and that this Court should grant such other and further relief as it deems just and proper.

Dated: New York, NY
August 10, 2018

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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Dated: New York, NY
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