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.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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This reply brief is respectfully submitted on behalf of Plaintiffs-Appellants ("Plaintiffs") in reply to Defendants-Respondents' ("Defendants") brief and in further 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 (Cohen, J.) entered March 6, 2017 which granted Defendants' pre-answer motion to dismiss the complaint.

PRELIMINARY STATEMENT

New York State Supreme Court has always been a viable forum for tenants seeking to assert claims with regards to rent regulatory status and rent overcharge. Whether or not that continues is at the heart of this appeal. Contrary to Defendants' assertions, Plaintiffs' arguments do not "run afoul of decades of State-wide jurisprudence" or present a "wish list of limits [we] would like this Court to place on the doctrine of primary jurisdiction." (*See* Def. brief at 3). Rather, Plaintiffs solely seek to prosecute their claims in Supreme Court, a forum where tenants have consistently brought these types of cases and where the courts have routinely declined to cede jurisdiction. Indeed, unless the appealed from decision is reversed, how and where rent regulatory status and overcharge matters are adjudicated will be fundamentally altered.

Defendants' argument, that courts can properly dismiss these types of cases based on DHCR's generalized expertise in rent regulation, absent anything more, finds no support in this Court's most recent holdings regarding primary jurisdiction. In *Capital Telephone Company v. Pattersonville Telephone Company*, 56 N.Y.2d 11, 22 (1982) this Court made clear that judicial deferral to an agency is appropriate when it accomplishes specific policy goals. Similarly, in *Sohn v. Calderon* 78 N.Y.2d 755, 767 (1991), this Court confirmed Supreme Courts' concurrent jurisdiction over all landlord/tenant matters not expressly mandated to be adjudicated by DHCR in the first instance, and reaffirmed that primary jurisdiction should be invoked only when it effectuates a specific purpose, i.e. to "…co-ordinate the relationship between courts and administrative agencies" particularly where "…the agency's specialized experience and technical expertise is involved." *Id.*

Significantly, *Sohn* does not, as Defendants claim, stand for the proposition that DHCR's generalized expertise in rent regulation, alone, provides a basis for dismissal and or that any particular case should be dismissed based on a court's disinclination to adjudicate matters it has routinely handled. *Sohn, supra.* Deferral to DHCR, here, would not accomplish any specific policy goals or effectuate a specific purpose, *Sohn, supra; Capital Telephone Company, supra,* and Defendants do not attempt to make this claim. Rather, Defendants argue that unless a tenant can articulate a specific reason why a particular case should be adjudicated in Supreme

Court, that case should be dismissed based on primary jurisdiction. This argument, as adopted by the Appellate Division, would deprive tenants of their preferred choice of forum and would, *de facto,* confer exclusive jurisdiction, whenever desired by a landlord, to DHCR with regards to claims of regulatory status and rent overcharge, something the legislature specifically declined to do.

In addition, this case does not concern purely factual determinations as repeatedly asserted in Defendants' brief. Rather, this is a collective action on behalf of thirty plaintiffs, residing in eighteen apartments, which seeks both declaratory and equitable relief, based, specifically, on Defendants' improper de-regulation of the subject apartments while receiving J-51 tax benefits. As detailed in Plaintiffs' brief, all but one Plaintiff moved into the subject building after this Court issued its decision in *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270 (2009) (hereinafter "*Roberts*").

Defendants' specious claim, that no legal issues remain unresolved in the wake of *Roberts*, is simply wrong. Certainly, both trial level and appellate courts continue to grapple with complex legal issues, specifically, the methodology for calculating the legal regulated rent, the applicability of the four-year rule, and whether tenants are entitled to treble damages, indeed, the precise issues presented in this case.

Indeed, illustrative of how unsettled this area of law is, just days after Plaintiffs perfected their appeal, a closely divided panel of the Appellate Division First Department decided *Matter of Regina Metro Co., LLC v. New York State Div. of Hous. & Community Renewal*, 164 A.D.3d 420 (1st Dept. 2018). As discussed more fully below, in *Regina Metro*, also a J-51 case, the most contentious issue presented on appeal was a question of law, namely, how to calculate the base date rent. The court's majority reversed the DHCR's decision, and held that in the absence of fraud the "four-year" rule applies, seemingly overruling that court's own 2017 decision *Taylor v. 72A Realty Assoc.*, 151 A.D.3d 95 (1st Dept. 2017).[1]

Finally, contrary to its affirmance of dismissal in this case, the Appellate Division First Department in *Kreisler v B-U Realty Corp*., ___ A.D.3d ___, 2018 N.Y. App. Div. LEXIS 6016 (1st Dept. 2018), when presented with facts analogous to those presented here, reached the opposite result. Citing to *Dugan v. London Terrace Gardens, L.P.*, 101 A.D.3d 648 (1st Dept. 2012) the Appellate Division held, in relevant part, "the court also properly retained jurisdiction over the rent overcharge issues rather than referring these to DHCR, given that legal issues remain open, including the willfulness of defendants' rent overcharges."

[1] In a strong dissent, Justice Gische reasoned that the methodology adopted in *Taylor* was correct based upon the obligation to give retroactive application to *Roberts*. On the same date, the Appellate Division issued a 4-1 decision in *Raden v. W7879, LLC*, 164 A.D.3d 440, LEXIS (1st Dept. 2018), also rejecting that Court's prior ruling in *Taylor*. Justice Richter dissented for the reasons stated in *Taylor* and in the dissent in *Regina*.

ARGUMENT

I. THIS CASE PRESENTS LEGAL ISSUES LEFT UNRESOLVED IN THE WAKE OF *ROBERTS* WHICH THE COURT MUST RESOLVE IN THE FIRST INSTANCE

The Appellate Division First Department has ruled repeatedly that the courts should not defer to the DHCR in overcharge cases where the apartment was incorrectly classified as unregulated where an owner was in receipt of J-51 tax benefits. Rather, the courts have repeatedly held that the legal issues raised in these cases should be decided in the first instance by the courts. *Gerard v. Clermont York Assoc., LLC*, 81 A.D.3d 497 (1st Dept. 2011); *Dugan, supra* (both holding that legal issues left open after *Roberts* should be addressed by the courts in the first instance); *see also Downing v. First Lenox Terrace*, 107 A.D.3d 86 (1st Dept. 2013); *Kreisler v B-U Realty Corp., supra.*

Indeed, contrary to its affirmance of dismissal in this case, the Appellate Division First Department in *Kreisler v B-U Realty Corp., supra*,[2], when presented with facts analogous to those presented here, reached the opposite result. Citing to *Dugan, supra* the Appellate Division held, in relevant part, "the court also properly retained jurisdiction over the rent overcharge issues rather than referring these to

[2] *Kreisler v B-U Realty Corp.* was decided and entered on September 13, 2018, two full weeks prior to Defendants' filing of their brief in this matter. Defendants' brief, however, fails to mention, much less discuss, the Appellate Division's contrary holding with regards to primary jurisdiction.

DHCR, given that legal issues remain open, including the willfulness of defendants' rent overcharges."

The plaintiffs in *Kreisler v B-U Realty Corp***.** asserted the exact same claims made by Plaintiffs herein. The plaintiffs in *Kreisler v B-U Realty Corp***.** alleged that their apartment was subject to the Rent Stabilization Law (RSL), that defendants/landlord had improperly removed their apartment from rent stabilized status at a time when the landlord was receiving J-51 benefits and, as a result, plaintiffs claimed they had been overcharged since their tenancy began in 2010.

Plaintiffs herein presented to the Appellate Division the legal issues in this case as follows: (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.[3] Inasmuch as Plaintiffs herein presented to the Appellate Division, one year earlier,

[3] As a correction to the Statement of Facts in Plaintiffs' main brief, it is noted that Plaintiffs in three of the eighteen apartments were given rent stabilized leases; Plaintiffs in the other fifteen apartments were given non-stabilized leases. The irregularities in the rental histories of the eighteen apartment are otherwise similar.

the same facts and issues presented in *Kreisler v B-U Realty Corp*., *supra*, there is no logical reason why the Appellate Division affirmed dismissal of the Complaint herein.

With regards to the merits of plaintiffs' claims in *Kreisler v B-U Realty Corp*., *supra*, The Appellate Division held:

> "The record reflects evidence of a fraudulent scheme to deregulate plaintiffs' apartment, as well as other apartments in the building, including evidence of defendants' failure, while in receipt of J-51 tax benefits, to notify plaintiffs their apartment was protected by rent stabilization laws or to issue them a rent-stabilized lease, and further reflects that defendants only addressed the issue when their conduct, which violated *Roberts v. Tishman Speyer Props. L.P.* (13 NY 3d 270, 918 N.E.2d 900, 890 N.Y.S.2d 388 [2009]) came to light in connection with an anonymous complaint, which in turn triggered the involvement of an Assemblyman in 2014.
>
> "We reject defendants' asserted reliance on a "pre-*Roberts*" framework to justify their actions, given that the wrongdoing here occurred in 2010, after *Roberts* was decided. Moreover, and notwithstanding defendants' arguments to the contrary, we find the evidence of other litigations by plaintiffs' co-tenants against defendants alleging the same or similar misconduct relevant and probative of a fraudulent scheme to deregulate (*see e.g. Pascaud v. B-U Realty Corp.*, 2017 NY Slip Op 31482[U] [Sup Ct, NY County 2017])
>
> "In turn, we find defendants have not shown that Supreme Court erred in directing the Special Referee to use the default formula of 9 NYCRR § 2522.6(b)(2) to determine plaintiffs' base rent, on the theory that such rent was the product of a fraudulent scheme to deregulate the apartment."

Defendants do not explicitly reject or attack those precedents[4] in which the Appellate Division has repeatedly held that legal issues left unresolved in the wake of *Roberts* should be determined by the courts in the first instance. Rather, incredibly and disingenuously, Defendants claim that "for all of these [legal] 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." (*See* Def. brief at 27).

Defendants claim that "items "i", "ii" and "iv" [of Plaintiffs' above list of legal issues presented in this case] "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." (See Def. brief at 29). In *Kreisler v B-U Realty Corp***.,** *supra,* the court held dismissal based on primary jurisdiction improper "…given that legal issues remain open, *including the willfulness* of defendants' rent overcharges." (emphasis supplied). Whether or not defendants' overcharge (in *Kreisler v B-U Realty Corp***.)** was willful was an issue that was <u>not</u> decided by the lower court or addressed by the Appellate Division's affirmance. Rather, the lower court referred the matter to a Special Referee for a hearing with regards to both the amount of the

[4] S*ee Dugan, supra, Gerard, supra*

overcharge and whether the overcharge was willful. *Kreisler v B-U Realty Corp***.,** 2017 N.Y. Misc. LEXIS 5113 (Sup. Ct. NY Cty) (Deborah James, J.). As such, as it pertains to willfulness, recognized by the Appellate Division as a discreet legal issue left unresolved in the wake of *Roberts*, that issue certainly remains unsettled today.

Further demonstrating just how unsettled this area of the law remains, just days after Plaintiffs perfected their appeal, a closely divided panel of the Appellate Division First Department decided *Matter of Regina Metro Co., LLC v. New York State Div. of Hous. & Community Renewal*, *supra.*. In *Regina Metro*, also a J-51 case, the most contentious issue presented was a question of law, namely, how to calculate the base date rent. The court held that in the absence of fraud the "four-year" rule applies seemingly overruling that court's own 2017 decision *Taylor v. 72A Realty Assoc.*, 151 A.D.3d 95 (1st Dept. 2017). *See Regina*, 164 A.D.3d at 427

In *Taylor* the Appellate Division, 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]."

Significantly, the methodology the court held proper in *Taylor*, was the precise methodology DHCR had outlined in its 2016 J-51 initiative upon which defendants rely as justification for waiting until early 2016 to register Plaintiffs' apartments. It also bears noting that the 2016 J-51 initiative provides "the law, in this area is continuing to evolve" proven prophetic by the holding in *Matter of Regina Metro Co., LLC, supra.*

In *Matter of Regina Metro Co., LLC, supra,* the Appellate Division, in a 3-2 decision, rejected the methodology adopted by the *Taylor* court and held that in the absence of fraud, the applicable statute of limitations bars any review of the rental history more than four years preceding the filing of a complaint. The majority, seemingly uncomfortable with the prospect of relying on the rent provided in an improper market rate lease responded to the dissent and explained that "DHCR is not limited to calculating the base date rent according to the market rate obtained pursuant to the parties' lease, and that the agency has the discretion to implement other methods of base date rent calculation that do not run afoul of the limitations period (*see Matter of 160 E. 84th St. Assoc. v. New York State Div. of Hous. & Community Renewal,* 160 AD3d 474 (1st Dept. 2018)". [5] *Id.*

[5] In *Matter of 160 E. 84th St. Assoc., supra,* DHCR's use of a sampling method to determine the legal regulated rent on the base date was upheld.

Justice Gische's lengthy and well-reasoned dissent demonstrates the complexity and evolving nature of this area of the law. Judge Gische argues:

> "If *Gersten*[6] is to have any effect, the majority's adoption of the landlord's arguments limiting the look back period for establishing the base rent in *Roberts* overcharge cases must be rejected. Otherwise the tenants before us now, and others similarly situated, will have a right without a remedy. They will be entitled to the protections of the rent regulations, including a rent-stabilized lease and rent-regulated rents, but be unable to recover the full extent of their overcharges. Moreover, the landlords will be able to continue to charge fair market rents, in complete contravention of a retroactive treatment of *Roberts*."

In sum, it appears that this Court may ultimately determine the appropriate methodology with regards to *Roberts* overcharge cases. And, it is significant to note that there likely will be more than one methodology in these cases, as it is much harder, if not impossible, for a landlord to justify giving a non-stabilized vacancy lease after the *Roberts* decision, where the landlord was receiving J-51 tax benefits.

It is disingenuous for Defendants to argue "we are past the first instance" (*See* Def. brief at 27) and there is "nothing left to determine with respect to methodology" (*See* Def. brief at 29) when, in the past month, the Appellate Division First Department issued two decisions which, potentially, have fundamentally altered the landscape with regards to both the application of the four year rule and the proper

[6] *Gersten v. 56 7th Avenue LLC*, 88 A.D.3d 189 (1st Dept. 2011), *appeal withdrawn*, 18 N.Y.3d 954 (2012),

methodology for calculating the base date rent in J-51 cases. *Matter of Regina Metro Co., LLC, supra; Kreisler v B-U Realty Corp., supra.*

Significant to this appeal, the court in, *Matter of Regina Metro Co., LLC*, a CPLR Article 78 proceeding, did not defer to DHCR with regards to the methodology the agency employed, indeed, the precise methodology the Appellate Division held to be appropriate in *Taylor, supra*. Rather, the Appellate Division seemingly overruled *Taylor, supra*, a decision it issued a mere year earlier. Justice Gische's dissent accurately sums up the state of the law with regards to J-51 litigation as follows: "As we have previously recognized, in deciding *Roberts*, the Court of Appeals left open many important issues resulting from its decision, some expressly, such as retroactivity and statute of limitations, and some *sub silentio*, such as how to calculate rents for apartments improperly deregulated. The courts and DHCR have since been working to resolve these issues in a consistent and just manner." (internal cite omitted). Both *Matter of Regina Metro Co., LLC, supra* and *Kreisler v B-U Realty Corp., supra* make certain that the courts continue to address the legal issues at the heart of this case therefore rendering dismissal improper.

II. DISMISSAL BASED ON PRIMARY JURISDICTION MUST EFFECTUATE A SPECIFIC PURPOSE

A. Dismissal Must Be Based on An Ascertainable Standard

The doctrine of primary jurisdiction requires some basis, some 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. Defendants' claim "that the doctrine's *only* requirement is that the claim involves a question within the specialized knowledge and expertise of the agency." (*See* Def. brief at 14) (emphasis in original). If that were true, every case in which Supreme Court had concurrent jurisdiction would be subject to dismissal unless, as Defendants argue, the party who brought the action can articulate "some reason *not* to do so." *Id*.

Defendants argue that this case was not, as Plaintiffs claim, dismissed merely because of DHCR's concurrent jurisdiction and cite to the lower court's decision which provides "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." (*See* Def. brief at 22) (R. 8). However, inasmuch as every rent regulatory status and rent overcharge complaint raises "questions about the applicability of the rent stabilization law and the proper amount of rent" and because

DHCR is the administrative agency established to enforce rent regulation, any complaint asserting claims with regards to status and the proper rent, arguably fall within the agency's expertise. Therefore, rendering every claim subject to dismissal. As such, as it applies to claims under the Rent Stabilization Law, there is no distinction between the standard articulated by the lower court and simply stating that dismissal is appropriate based on DHCR's concurrent jurisdiction.

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, chose to proceed in court as opposed to the DHCR, there must be some basis, other than concurrent jurisdiction, to justify dismissal. "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 (1st Dept. 1986).

Courts have relied on a three-factor test to determine whether the doctrine of primary jurisdiction applies. Defendants' claim "that each of the factors is a different way of saying the thing: the doctrine applies whenever a claim calls for a

determination of matters that are within an agency's particular competence" is incorrect. (*See* Def. brief at 12)

The three factors are not a different way of saying the same thing. Rather, each factor is distinct and taken together provide a reasonable and ascertainable standard as to when dismissal (or deferral) based on primary jurisdiction is appropriate.

The first factor 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). This case does not involves technical or policy considerations within DHCR's particular field of expertise. Status and overcharge cases are routinely adjudicated in court. Indeed it is the courts, rather than DHCR, who have issued most, if not all, of the definitive rulings in the aftermath of *Roberts*. *See e.g Borden v. 400 East 55th Street Associates L.P.*, 24 N.Y.3d 382 (2014); *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*.

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)[7]; *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 Hous. Co*. 274 A.D.2d at 318-319, *supra*; *Missionary Sisters of the Sacred Heart v. Meer*, 131 A.D.2d 393 (1st Dept. 1987). The instant case centers on the resolution of legal issues, specifically the appropriate methodology for calculating the base date rent. The holding in *Matter of Regina Metro Co., LLC, supra*, in which the court declined to defer to DHCR's methodology, demonstrates that these legal issues have not been placed within the special competence of DHCR.

While Defendants argue that "courts throughout the State regularly exercise their discretion to dismiss or stay claims in favor of initial determinations by various agencies", many of the cases Defendants cite to articulate a basis, beyond an

[7] The doctrine is intended to coordinate the relationship between courts and administrative agencies so that the agency's views on *factual and technical issues* are made available where the matter before the court is within the agency's specialized field) *Id*. (emphasis supplied)

agency's generalized expertise, as to why deferral or dismissal is appropriate. (See Def. brief at 13) For example, Defendants cite to *Township of Thompson v. New York State Elec. & Gas Corp.*, 25 A.D. 850 (3rd Dept.) *lv denied*, 6 N.Y.S. 3d 713 (2006) a case filed as a putative class action by nonresidential seasonal customers of defendant, challenging electrical service overcharges. The Complaint therein was filed after the Public Service Commission had resolved similar complaints filed by two other entities, KLCR Land Corporation and Har-Nof, Inc. in which the agency determined defendant had misapplied the applicable tariff resulting in overcharges. In affirming dismissal, based on primary jurisdiction, the court cited to PSC's own directive and determined "PSC is in the best position to determine whether defendant has complied with its 2004 directive to recalculate the bills of those similarly situated" and noted that "plaintiffs' common-law and statutory causes of action were also properly dismissed, as they amount to little more than….a collateral attempt to obtain relief beyond that granted by the PSC to the KLCR complainants." *See also Brownsville Baptist Church v. Consol. Edison of New York Inc*., 272 A.D. 2d 358 (2nd Dept. 2000)("Reasonableness of a utility's rates, rules, or practices is properly submitted first to the agency which has been vested by the Legislature with the authority to regulate and review such matters.")

As we stated in our main brief, there are a number of Supreme Court decisions where the requirements for dismissal or deferral in this context were discussed based

upon those courts' analyzes of the case law. These decisions do not set forth a "wish list" as claimed by Defendants, but rather are based upon a careful analysis of the cases. Thus, in *Dugan v. London Terrace Gardens, L.P*, 2011 NY Slip Op 52501(U) at 6 (Sup. Ct. NY Co. 2011) (Lucy Billings, J.), *aff'd* 101 A.D.3d 648, and again in *Nieborak v. W. 54-7 LLC*, 2016 N.Y. Misc. LEXIS 2097 (Sup. Ct. NY Co. 2016), courts accurately summed up the state of the law on this issue 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; (2) Plaintiffs seek referral to the agency for resolution of their claims. (3) An administrative proceeding relating to the issues preceded the court action or still is pending." (internal cites omitted)

Without such a proceeding previously or currently pending, none of the factors that militate in favor of DHCR's primary jurisdiction carries any force. This is particularly true here, where 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. Indeed, as discussed, *infra*, it is the courts who continue to grapple with the methodology and related legal issues left unresolved in the wake of *Roberts*. *Matter of Regina Metro Co., LLC, supra; Kreisler v B-U Realty Corp., supra*, *Wong v. Gouverneur Hous. Corp*. 308 A.D.2d at 303, *Davis v. Waterside Hous. Co*. 274 A.D.2d at 318-319; *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*, 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).

B. Plaintiffs Should Not Be Denied Their Choice of Forum

With regards to regulatory status and rent overcharge claims, courts have refused to apply the doctrine of primary jurisdiction as a sword to deprive tenants of their preferred choice of forum. 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. *Dugan, supra, Borden v. 400 East 55th Street Associates L.P.,* 24 N.Y.3d 382 (2014); *Matter of Rockaway One Co., LLC v. Wiggins*, 35 A.D.3d 36, 39 (2d Dept. 2006); *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).[8]

[8] In *Greenway Terrace LLC v. Gole*, 37 A.D.3d 792 (1st Dept. 2007), the Appellate Division's affirmance of dismissal, based on primary jurisdiction, was premised on the plaintiff's pending DHCR complaint. *Id*. ("Under such circumstances, judicial review over the matter should await the exhaustion of administrative remedies.")(internal cites omitted); *see also Friscia v. Lem Lee 13th Ltd. Partnership*, 37 A.D.3d 168 (1st Dept. 2007)("judicial review of these matters, if necessary, should await plaintiff's exhaustion of her administrative remedies")

Defendants' statutory argument, citing to a distinction between the language provided in the Emergency Tenant Protection Act of 1974, as amended (the "ETPA"), codified at McKinney's Unconsol. Laws §§ 8621, *et seq*.) for cities having a population of less than one million as opposed to New York City (population over one million) was squarely addressed in *Matter of Rockaway One Co., LLC v. Wiggins*, 35 A.D.3d 36, 39 (2d Dept. 2006).[9]

In *Rockaway One Co., LLC v. Wiggins* the landlord argued the legislature's inclusion of language providing tenants, outside of New York City, the "…absolute right to commence an action…so long as the tenant has not commenced a DHCR proceeding", coupled with the absence of said language providing an "absolute right" for tenants in New York City, should be interpreted to deprive tenants the right to commence actions or interpose counterclaims, in the first instance, in court. The Court rejected the landlord's argument and, in relevant part, held:

> The owner's argument that the Civil Court is without such jurisdiction rests on its reading of the Emergency Tenant Protection Act of 1974 (hereinafter ETPA) (L 1974, ch 576, § 4, as amended by L 2003, ch 70-73, 82; McKinney's Uncons Laws of NY § 8621, *et seq.*) as permitting only courts outside

[9] Defendants cite to §8632(a)(1)(a)-(e) and note that in cities with a population of less than one million DHCR has the authority to adjudicate claims but (b) so long as the tenant has not commenced a DHCR proceeding, the tenant has the absolute right to "commence an action or interpose a counterclaim in a court of competent jurisdiction". *Id.* However, in cities with a population of over one million (New York City) "no specification that a tenant retains the absolute right to sue in court" is provided. (See Def. Brief at 16)

> the City of New York to entertain rent overcharge complaints. It is true, as the owner contends, that ETPA explicitly provides that a tenant outside the City of New York who is subject to its provisions may, except where the tenant has already presented the issue to the DHCR, raise a rent overcharge claim in court, either as the tenant's principal claim or as a counterclaim (*see* ETPA 12 [a] [McKinney's Uncons Laws of NY § 8632 (a); L 1974, ch 576, § 4, as amended]). It is also true that the corresponding provision with respect to courts within the City of New York does not contain such language (*see* ETPA 12 [b] [McKinney's Uncons Laws of NY § 8632 (b)]). Nevertheless, it reads too much into the express grant of authority in the former provision to infer that the Legislature intended by the omission of such language from the latter to deprive the Civil Court of the authority to hear counterclaims over which it would otherwise have jurisdiction.

The court in *Rockaway One Co., LLC v. Wiggins* concluded "had the Legislature intended to deprive the Civil Court of [that] jurisdiction, it could have done so explicitly. Since it did not do so, we conclude that it had no such intent." *Id.* Similarly, here, the legislature has not deprived Supreme Court of its concurrent jurisdiction and authority to hear status and overcharge cases.

Plaintiffs do not argue that the doctrine of primary jurisdiction is inapplicable, under any circumstance, to rent stabilization law claims. (*see* Def. brief at 15) Rather, as discussed, *infra*, Plaintiffs argue that once a tenant initiates a regulatory status and or overcharge case in Supreme Court, and no related administrative proceeding is pending at DHCR, dismissal, based on primary jurisdiction, is improper unless the moving party can articulate a specific policy goal or purpose justifying dismissal. *Sohn, supra; Capital Telephone Company, supra.*

It is also significant that Supreme Court has, until the appealed from order was issued, consistently refused to cede jurisdiction over these types of cases[10] and that courts, including this Court, have routinely adjudicated, absent DHCR involvement, cases concerning rent regulatory status and rent overcharge.[11]

Plaintiffs, relying on the above cited precedent, filed this action in Supreme Court, in part, because Supreme Court is the superior forum to litigate these types of claims. First and foremost, Plaintiffs in this action decided to organize, pool resources and file an affirmative action in Supreme Court. There is no ability for tenants to file, collectively, at DHCR.

In Supreme Court Plaintiffs are automatically entitled to discovery, including the production of a landlord's rental history documents and the ability to depose the

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[10] See *Nezry v. Haven Avenue Owner LLC*, 2010 NY Slip Op 51506(U) (Sup. Ct. NY Co. 2010); *Nieborak v. W54-7 LLC*, 2016 N.Y. Misc. Lexis 2097 (Sup. Ct. NY Co.); *Dodd v. 98 Riverside Drive, LLC*, 2011 N.Y. Misc. Lexis 4992 (Sup. Ct. NY Co.); *Contempo Acquisition LLC v Dawson*, 2015 N.Y. Misc. LEXIS 4475 (Sup. Ct. NY Co.); *Vazquez v. Sichel* 2005 N.Y. Misc. LEXIS 3125 (Sup. 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.") See also *Dabalsa v. Crino*, 143 Misc.2d 480, 481 (Civ. Ct. Queens Co. 1989) ("The Civil Court, being a court of record and of competent jurisdiction, has concurrent jurisdiction with the DHCR to determine the issues herein presented. It is regularly within the province of the court to determine whether violations of regulations have occurred. 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.").

[11] 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).

landlord and the contractors who allegedly performed Individual Apartment Improvements. At the DHCR, subpoenas are issued at the DHCR's discretion. *See* RSC §2527.5(e). In the event a trial or hearing is required, a proper foundation would need to be laid before any particular document is admitted into evidence and witnesses could be cross-examined. In contrast, proceedings before the DHCR are conducted primarily upon written submissions (RSC Part 2527) and hearings are only granted at the discretion of the agency. RSC §2527.5(h). Furthermore, unlike DHCR, the Court has the jurisdiction to grant plaintiffs preliminary relief should it be needed.

Finally, Defendants claim DHCR's efficiency and "…streamlined procedures for making the factual determinations at issue" support dismissal. (*See* Def. brief at 33). Plaintiffs dispute whether DHCR can more effectively and efficiently handle these claims.[12] Notwithstanding Defendants' allegations that the DHCR could offer the parties streamlined procedures, this Court in *Sohn, supra* cast doubt as to whether consideration of delays is appropriate under the doctrine of primary jurisdiction. The *Sohn* court noted that "Supreme Court's consideration of the delays that purportedly

[12] There are numerous cases in which the courts have considered the DHCR's "inordinate delay" in processing and rendering a decision in a proceeding. See e.g. *Matter of IG Second Generation Partners v. New York State Division of Housing and Community Renewal*, 10 N.Y.3d 474, 482 (2008) citing to "DHCR's inordinate delay in resolving the owner's petition for administrative review [four years]"; *Matter of Weinreb Management v. New York State Division of Housing and Community Renewal*, 297 A.D.2d 221, 223 (1st Dept. 2002), citing to DHCR's "inordinate delay" regarding an 18-year-old matter.

typify the administrative adjudicative process was inappropriate, since that factor, to the extent it might ever be relevant at all, would apply only in the application of the doctrine of primary jurisdiction." *Sohn, supra.* Furthermore, courts can and do refer factual determinations, once legal issues have been determined, in status and overcharge case, to judicial referees. *See e.g*. *Cooper v. 85th Estates Co.*, 2017 N.Y. Misc. LEXIS 4549 (Sup. Ct. NY Cty.); *Casey v. Whitehouse Estates*, 2017 WL 1161744 (Sup. Ct. NY Cty.); *Kreisler v B-U Realty Corp, supra.*

Make no mistake, Defendants true objective is not efficient or swift adjudication of Plaintiffs' claims. Rather, Defendants, as Plaintiffs have emphasized, seek dismissal of this action because it benefits them. Defendants have determined that it is to their advantage to litigate these claims at DHCR; if they thought otherwise they would not have moved for dismissal. Defendants should not be able to invoke the doctrine of primary jurisdiction to dictate the forum where these claims are adjudicated.

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

Plaintiffs' claims under General Business Law § 349 ("GBL § 349") do not involve their initial improper market rate leases and or the impermissible rental amounts they paid. Rather, it is Defendants' false advertising, their material

misrepresentation to the public at large, namely that apartments in the subject building were not rent-stabilized, that violates the statute.

In a recent decision, *Cooper v. 85th Estates Co.*, 2017 N.Y. Misc. LEXIS 4549, the court concluded "…landlord-tenant claims may fall within GBL § 349...". Indeed, in *Cooper v. 85th Estates Co, supra*, the court distinguished between allegations regarding how each plaintiff's initial rent was established and "the Landlord's policy of treating each of their apartments as a market rate apartment, despite the Landlord's receipt of J-51 tax abatements for the building…". How each plaintiff's rent was established "would appear to be a private dispute between landlord and tenant, rather than a matter aimed at the general public". *Id.* However, with regards to the landlord's conduct, post *Gersten,* namely the marketing and advertisement of apartments as market-rate long after the landlord knew or should have known the apartments were rent stabilized, the court recognized a cognizable claim under GBL § 349. *Id.*

Similarly, here, it is Defendants' affirmative act, the advertisement and rental of market-rate apartments, long after Defendants knew or should have known said apartments were rent stabilized which constitutes a material misrepresentation. Defendants' misrepresentation was certainly directed to the public and was "consumer-oriented in the sense that it potentially affected similarly situated consumers." GBL § 349.

In *Schlessinger v. Valspar Corp.*, 21 N.Y.3d 166 (2013), a case relied on by Defendants, this Court considered whether the inclusion of an unlawful provision in a contract violates GBL § 349. This Court characterized plaintiffs' theory as "in essence that Valspar's [Defendant's] violation of section 395-a [of the GBL] is perforce a violation of section 349 because, by inserting an unlawful provision in the contract, Valspar impliedly represented that this provision was valid and thereby engaged in a deceptive act or practice. This Court determined that "Section 349 does not grant a private remedy for every improper or illegal business practice, but only for conduct that tends to deceive consumers." *Id.*

Plaintiffs are not alleging that it was Defendants' violation of the rent stabilization law and or any particular unlawful provision in their leases violates GBL § 349. Indeed, Plaintiffs' do not rely on their initial illegal leases or provisions therein in support of their GBL § 349 claims. Rather, Plaintiffs' GBL § 349 cause of action centers on defendants' material representations to the public with regards to the status and permissible rental rates for apartments in the subject building prior to the inception of each Plaintiffs' tenancy.

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).

Plaintiffs have sufficiently pled the elements of a GBL § 349 and therefore this Court erred in dismissing this cause of action.

CONCLUSION

For all the reasons set forth in its initial brief and above, Plaintiffs' appeal must be granted; the Order dismissing the complaint should be reversed in its entirety, and this action should be remitted to the lower court for further proceedings

Dated: New York, New York
October 25, 2018

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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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