To be Argued by:
SETH A. MILLER
(Time Requested: 30 Minutes)

APL-2018-00214
New York County Clerk's Index No. 111725/10

Court of Appeals

of the

State of New York

JOEL RADEN and ODETTE RADEN,

Plaintiffs-Appellants,

– against –

W7879, LLC., W79TH LLC., N, K AND S LLC., MN BROADWAY, LLC., LISA W. NAGEL IRREVOCABLE T LLC, DESCENDANT'S SINGLE TRUST U/W MICHAEL NAGEL, Evelyn Nagel and Alan Nagel Trustees, DESCENDANT'S SINGLE TRUST U/W MICHAEL NAGEL f/b/o Steven Nagel, *et al.*, Evelyn Nagel and Alan Nagel Trustees, DESCENDANT'S SINGLE TRUST U/W MICHAEL NAGEL f/b/o Evelyn Nagel, *et al.*, Evelyn Nagel and Alan Nagel Trustees, DESCENDANT'S SINGLE TRUST U/W MICHAEL NAGEL f/b/o Clair Nagel, *et al.*, Clair Nagel Jernick and Alan Nagel Trustees, and DESCENDANT'S SINGLE TRUST U/W MICHAEL NAGEL f/b/o Alan Nagel, *et al.*, Alan Nagel and Steven Nagle Trustees,

Defendants-Respondents.

BRIEF FOR PLAINTIFFS-APPELLANTS

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Date Completed: February 25, 2019

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PRELIMINARY STATEMENT

This is an appeal by Plaintiffs-Appellants JOEL RADEN ("Raden") and ODETTE RADEN ("Appellants") from the Decision of the Appellate Division, First Department, entered August 16, 2018 (the "Order Under Review"), affirming a Judgment of the Supreme Court, New York County entered on January 25, 2018 (the "Trial Court Judgment") in the amount of $600.52, and affirming an Order of the same Court, entered March 7, 2016, (Kenney, J., hereinafter referred to as the "Trial Court Order") (A. 7)[1] denying Appellants' motion to reject the July 10, 2015 Report and Recommendation of Special Referee Jeffrey A. Helewitz (the "Referee's Report", A. 8-35), and confirming that Report in its entirety, in this rent overcharge action.

This action arises from the unlawful deregulation of Apartment [redacted] (the "Apartment") at [redacted] (the "Building") in January, 1995, at a time when the Building received J-51 benefits.

This appeal involves the questions of (a) whether Dr. Michael Nagel ("Dr. Nagel"), Respondents' predecessor, committed fraud when he deregulated Appellants' apartment in 1995, when it was plainly illegal to do so: (b) whether an unregistered "free market base date rent" (as the Order Under Review describes it) that is plainly the product of illegal deregulation, may be used to set a rent stabilized rent; and (c) whether

[1] References to the Appendix are denominated as "A." followed by the applicable page number.

Dr. Nagel's fraudulent concealment of the regulatory status of the Apartment, coupled with the policy of the New York State Division of Housing and Community Renewal ("DHCR"), beginning in January, 1996, of permitting the deregulation of apartments in buildings receiving J-51 benefits, had any impact on the statute of limitations for overcharge claims in those apartments.

In this case, the Order Under Review held that Appellants' rent stabilized rent can legally be the free market rent they paid four years before, plus rent stabilized increases. That base rent was the product of the illegal deregulation of the Apartment, and was never a registered rent, which is the only kind of rent that is permitted by statute to be used as a base rent. In a companion case, decided the same day, *Matter of Regina Metro. Co., LLC v DHCR*, 164 A.D.3d 420 (1st Dept, 2018) ("*Regina Metro*"), the same court approved the use by the New York State Division of Housing and Community Renewal of a "sampling" method for determining the base rent, so long as the method does "not run afoul of the [four year] limitations period."

In this case, however, the Apartment was deregulated by fraud. Unlike most (if not all) other cases arising in the wake of *Roberts v. Tishman Speyer Properties, L.P.*, 15 N.Y.3d 270 (2009)) ("*Roberts*"), the Apartment was not deregulated in "reliance" on a 1996 opinion letter from the New York State Division of Housing and Community Renewal ("DHCR"). It was deregulated in 1995, when deregulation was unambiguously illegal. *See, e.g.*, DHCR Operational Bulletin 95-3 (A. 906, 909) (high-

rent "deregulation provisions shall not apply to housing accommodations which are subject to rent regulation by virtue of receiving tax benefits"); Rent Stabilization Law §26-504(c) (regulating all of the "[d]welling units in a building or structure receiving" J-51 benefits); Rent Stabilization Law §26-504.2 (imposing high-rent vacancy deregulation, except for apartments that "became or become subject to this law . . . by virtue of receiving [J-51] tax benefits"); DHCR's September 28, 1995 Opinion Letter (A. 951) ("decontrolled" apartments in buildings receiving J-51 would, on re-rental, "become subject to stabilization"); 28 RCNY §5-03(f)(1) (the regulations of the New York City Department of Housing, Preservation and Development ("HPD"), stating that, "for at least so long as a building is receiving the benefits of the Act . . . all dwelling units in buildings or structures converted, altered or improved shall be subject to rent regulation pursuant to: . . . the Rent Stabilization Law of 1969"); *see also*, RPTL §489 (7)(b)(1); NYC Admin. Code §11-243 (i)(1).

In 1995, Dr. Nagel, the predecessor of Defendants-Respondents W7879 LLC, et. al.[2] ("Respondents" or "Owners") was under an affirmative statutory duty to register

[2] The other Defendants-Respondents, all of whom jointly own the Building, are: N, K AND S LLC, WEST 79TH LLC, MN BROADWAY LLC, EVELYN NAGEL as co-executor of the Estate of Michael Nagel, and as co-trustee of the Descendants Single Trust u/w Michael Nagel, the Descendants Separate Trust u/w Michael Nagel fbo Steven Nagel, et al., and the Descendants Separate Trust u/w Michael Nagel fbo Evelyn Nagel, et al., ALAN NAGEL as co-trustee of the Descendants Separate Trust u/w Michael Nagel fbo Clair Nagel Jernick, et al., and the Descendants Separate Trust u/w Michael Nagel fbo Alan Nagel, et al., and LISA W. NAGEL IRREVOCABLE T, LLC.

the Apartment as rent stabilized, and to mail a copy of the registration to the Appellants. *See*, Rent Stabilization Law ("RSL") §26-517(d). He was under a separate duty under Rent Stabilization Code ("RSC") §2522.5(c) to provide a lease rider specifically notifying Appellants of their rights as rent stabilized tenants, including the right to file an overcharge complaint, and including the statute of limitations for doing so.

Rather than comply with its affirmative statutory duty to disclose the status of the apartment and the prior rent, each lease offered to the Appellants specified, in capital letters, that the Apartment was not subject to rent stabilization. (A. 1049 through 1094).

At trial, Appellant Joel Raden testified without contradiction that he relied on his landlord's misrepresentation, and failure to disclose the status of his apartment, in deciding not to challenge his rent. (A. 152, 180).

These misrepresentations, in violation of a clear statutory duty to disclose the status of the apartment and the prior rent, were fraudulent. The legal effect of the fraud is twofold. First, it triggers the use of the default formula in calculating the rent in this case, under *Grimm v. DHCR*, 15 N.Y.3d 358; 912 N.Y.S.2d 491 (2010) (where there are indicia of fraud, DHCR was held to be required to "investigate the legality of the base date rent, rather than blindly using the rent charged on the date four years prior to the filing of the rent overcharge claim.") Second, it equitably estops the Respondents

from relying upon the statute of limitations in setting the rent. *Simcuski v Saeli*, 44 N.Y.2d 442, 448-449 (1978).

Even without a finding of fraud, as argued below, this Court has never approved of the use of an unregistered and illegal market rent as a base rent in setting the rent for a rent stabilized apartment. Rather, the approved method, not only in cases of fraud, but also in cases of illegality, is to use the default formula outlined by this Court in *Thornton v. Baron*, 5 N.Y.3d 175 (2005) ("*Thornton*").

Moreover, as argued below, during the period from January, 1996, when DHCR reversed two earlier opinion letters and began to advise landlords that it was lawful to deregulate apartments receiving J-51 benefits, to October, 2009, when this Court definitively ruled that such policy was illegal in *Roberts*, any statute of limitations that would have obligated tenants to file overcharge complaints, should be tolled. Just as this Court has found that landlords were entitled to rely on that policy, and therefore that overcharges collected in reliance on that policy cannot have been willful (*Borden v. 400 East 55th Street Assoc. L.P.*, 24 N.Y.3d 382, 398 (2014)), tenants were equally entitled to rely on that policy, and those who did not file overcharge complaints during that time should not be penalized.

Appellants are entitled to treble damages. The Order Under Review erroneously found that Respondents did nothing illegal when they rented the Apartment to Appellants as deregulated in 1995, because "defendants could not have anticipated

Roberts, which was contrary to industry practice at the time." Because this finding is in error, Appellants are entitled to treble damages.

Leaving aside the fact that "industry practice" is not law, as of 1995 Respondents need not have "anticipated *Roberts*" to follow the law requiring that the Radens' apartment be rented as stabilized. High-rent deregulation was clearly *not* allowed at the time of the Radens' initial lease. The Owners failed to prove any facts at all with respect to the then-Owner's basis for deregulating the Radens' apartment in 1995, and it was their burden to overcome the presumption of willfulness. *See*, RSC §2526.1. The only evidence they attempted to introduce was the opinion of their attorney, James Marino, to the effect that, as of 1995 "just about everybody in the real estate industry" believed that high-rent apartments in buildings receiving J-51 benefits could nevertheless be deregulated (A. 600). Mr. Marino was not familiar with HPD's regulations, requiring "all" apartments to remain regulated (A. 525), or with DHCR's September 1995 opinion letter (A. 625) prohibiting the deregulation of apartments in buildings receiving J-51 benefits. As this Court held in *Roberts*, the plain meaning of the statute requires that every apartment in a building receiving J-51 benefits be registered as rent stabilized: in 1995, there was no contrary authority.

These points are set forth in greater detail, below.

QUESTIONS PRESENTED

Can a free-market rent be used as the "base rent" for purposes of calculating the legal rent and overcharges for an apartment, in a building receiving J-51 benefits, that was illegally deregulated in 1995?

The Court below erroneously answered in the affirmative.

If the rent charged on the "base date" was the product of the illegal deregulation of a rent stabilized apartment, must any rent overcharge be calculated on the basis of the default formula articulated by this Court in *Thornton*?

The Court below did not reach the question.

Absent any proof of the actual reason for deregulating, in 1995, an apartment located in a building that was receiving J-51 benefits, should treble damages be imposed.

The Court below did not reach the question.

STATEMENT OF FACTS

On March 8, 1990 Dr. Michael Nagel, then the Owner of the Building, swore, in an affidavit submitted in connection with his application for J-51 benefits, that "for each of the dwelling units in the premises, a filing for rent registration with [DHCR] has been made." (A. 994). On the basis of that affidavit, in 1992 the Building began receiving J-51 benefits. (A. 496). They were scheduled to last twelve years. *See*, 28 RCNY §5-06(c) (term of tax abatement).

From March, 1992 to sometime at the end of 1994 the Apartment had been occupied by Laurence and Joanne Gordon, who had been registered as the first rent stabilized tenants of the Apartment. (A. 1035, the DHCR registration statements). Prior to the Gordons' tenancy, the apartment had been registered as exempt from registration requirements on the basis of its rent controlled status. *Id.* In 1984, the rent had been $610.03 per month.[3] The Gordons' initial rent was $1,966.28, and their last legal rent was $2072.52.[4]

Joel Raden saw the Apartment while the Gordons still lived there. It had been "fixed up for" the Gordons. (A. 142). No further improvements were made prior to the Radens' occupancy, as the Apartment had already recently been renovated. This case,

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[3] For the sake of convenience, the phrase "per month" is omitted from all other references to rent in this brief. All rents are "per month" unless stated otherwise.

[4] Oddly, their last registration statement says they paid $2,105.33, a higher rent than the "legal regulated rent."

therefore, does *not* involve the issue of whether a tenant may challenge a rent increase for improvements. *Compare*, *Matter of Boyd v. DHCR*, 23 N.Y.3d 999 (2014).

The Radens signed an initial lease for the Apartment on December 19, 1994, for a term of one year and two weeks, commencing January 15, 1995, at a rent of $2,350.00. (A. 1049 to 1055). Their initial lease stated, falsely, in bold capital letters, "THIS APARTMENT IS NOT SUBJECT TO RENT STABILIZATION." (A. 1054).

At the time, Dr. Nagel had no basis for deregulating the apartment. It was illegal.

The initial lease did not contain the "rights rider" required by RSC §2522.5(c). Neither Dr. Nagel, at the time of initial rental, nor his successors, the Respondents, registered the apartment as rent stabilized. Therefore, they did not serve a copy of any registration statement upon the Radens, as required by RSL §26-517(d). The Radens received *none* of the mandatory disclosures that would have put them on notice that their time to challenge their rent had begun to run.

Instead, Joel Raden believed the statement in his first lease, to the effect that the Apartment was not regulated, and on the basis of it refrained from filing any papers with DHCR to challenge his rent. (A. 152, 180).

At the hearing before the Referee, no evidence was introduced concerning the basis for Dr. Nagel's belief that the Apartment could be deregulated in 1995, notwithstanding the receipt of J-51 benefits. At the time DHCR's policy clearly prohibited deregulation. For example, in September, 1995 DHCR issued an opinion

letter (A. 951) stating clearly that deregulation was unavailable in buildings receiving J-51 benefits.

Respondents could not call Dr. Nagel as a witness, because he passed away in 2010. On the issue of how the Radens' apartment came to be deregulated, Respondents' sole witnesses were the current managing agent and their lawyer, Mr. Marino, who represented Dr. Nagel in 1995 but could not recall any discussions with him about the basis for deregulating units at the Building. (A. 500, 502, 583, and 619). Mr. Marino testified instead that as of 1995 "just about everybody in the real estate industry" believed that high-rent apartments in buildings receiving J-51 benefits could nevertheless be deregulated (A. 600). Mr. Marino was not familiar with HPD's regulations (28 RCNY §5-03(f)(1)), requiring "all" apartments in buildings receiving J-51 benefits to remain regulated (A. 525), or with DHCR's September 1995 opinion letter (A. 625) prohibiting the deregulation of apartments in buildings receiving J-51 benefits.

Dr. Nagel deregulated the Apartment in disregard of the law, either willfully or negligently.

The Radens then received a series of "free market" lease extensions and lease renewals, running through January 31, 2011. (A. 1056 to 1077). Each one contained the same false statement in bold capital letters: "THIS APARTMENT IS NOT SUBJECT TO RENT STABILIZATION."

Needless to say, with each renewal, Dr. Nagel, and then the Respondents, failed once again to provide a "rights rider" and to serve the Radens with a copy of any rent registration.

With the offer of nearly every renewal lease, Joel Raden would request that the amount requested be lowered. (A. 182 to 185). He did not like having to do this: "I had no leverage." In fact, he said, "I was at the landlord's mercy."[5] (A. 185).

The lease terms and the rents for the Radens' tenancy, up until 2010, are as follows.[6]

Lease Term	Rent Charged
1/15/95 to 1/31/97	$2,350.00
2/1/97 to 1/31/99	$2,444.00
2/1/99 to 1/31/01	$2,750.00
2/1/01 to 1/31/03	$3,250.00
2/1/03 to 1/31/05	$3,400.00

The base date is May, 2010, for the reasons set forth below. Therefore, the portion of the chart appearing below is subject to an overcharge calculation, beginning with the rent paid in May, 2006.

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[5] This statement was objected to, and the objection was sustained, erroneously. There is no rule of evidence that would warrant excluding it.

[6] The leases and rents are found at A. 1049 through 1094.

2/1/05 to 1/31/07	$3,500.00
2/1/07 to 1/31/09	$3,700.00
2/1/09 to 1/31/10	$3,850.00
2/1/10 to 1/31/11	$4,000.00
2/1/11 to 1/31/12	$4,054.72.
2/1/12 to 1/31/13	$4,206.77
2/1/13 to 1/31/14	$4,290.91
2/1/14 to 1/31/15	$4,462.55
2/1/15 to 1/31/16 [7]	$4,507.18

On May 19, 2010, Mr. Marino wrote to the Radens (A. 1045 to 1047) to inform them that the Apartment was, in fact, rent stabilized, and that their rent had been recalculated, to reduce the rent they were then paying, $4,000.00 per month, down to $3,965.00 per month. He used, as a base date, May 1, 2006.[8] He enclosed a check for $140.59.

Self-evidently, the calculation was based on the free-market rent that had been in effect in May, 2006. The Owners made no effort to reconstruct the rent that would

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[7] The Radens continued to pay rent and sign leases, but this entry is the last one documented in the Appendix.

[8] Although this action was commenced in September, 2010, it is uncontested that the Owner's May 19, 2010 letter (A. 1046), acknowledging the overcharge, tolled the statute of limitations for the period from May 2010 to September 2010. *See,* General Obligations Law §17-101; *City of New York v. North River Housing Dev. Fund Corp*., 12 A.D.3d 294 (1st Dept., 2004) (letter held unconditional acknowledgment of debt, tolling statute of limitations).

have been in effect had they not illegally deregulated the apartment, or offer any other means of calculating the base rent. Instead, they wished to keep the high rent level that had resulted from their violation of the law.

The Owners filed late registrations, in June, 2010, for the years 2006, 2007, 2008 and 2009, reflecting Mr. Marino's calculations. (A. 1037).

In October, 2011, however, the Owners registered the 2010 rent for the Apartment as $4,000.00 per month, an amount that they admitted in Mr. Marino's letter (A. 1048) was an overcharge. Mr. Marino admitted on the witness stand that this registration was mistaken. (A. 559).

Appellants commenced this action on September 2, 2010. They filed a Verified Amended Complaint on or around June 28, 2011. (A. 83). The Complaint sought a declaration that the Apartment is rent stabilized, rent overcharges, treble damages and attorneys' fees, plus interest.

Respondents unsuccessfully moved to dismiss the Complaint. Their motion was denied by Decision and Order (Kenney, JSC) entered November 22, 2011. (A. 37).

Respondents then filed an Answer (A. 95-99) and, separately, a Counterclaim (A. 100-101) seeking attorneys' fees.

Respondents unsuccessfully moved for summary judgment. Their motion was denied by Decision and Order (Kenney, JSC) entered September 13, 2013 (A. 69-82),

who referred the matter to the Special Referee for a trial, jointly with three other related matters.

This action, together with *Stone v. W7879 LLC,* Sup. Ct., NY Co. Index No. 109621/10 (the "Stone" case); *Roberts v. W7879 LLC,* Sup. Ct., NY Co. Index No. 110213/10 (the "Roberts" case); and *Clyne v. W7879 LLC,* Sup. Ct., NY Co. Index No. 111313/10 (the "Clyne" case), were jointly tried before Special Referee Jeffrey A. Helewitz, over the course of eighteen days in late 2014 through the middle of 2015.

The Referee's Report and Recommendation (A. 8-35) adopted the Owner's calculation method in its entirety, finding that the Radens' free market May, 2006 base date rent was a reliable means to establish the rent stabilized rent for the apartment. The Special Referee found that, in the absence of fraud, the free market rent was permitted to be used as a basis for calculating rents, and found, contrary to Mr. Marino's statements, that he "advised [the defendants] that the units could be deregulated, based on his firm belief." (A. 30). Actually, as noted above, Mr. Marino did not recall giving such advice. (*See, .e.g.,* A. 502, testifying that he did not recall speaking to Dr. Nagel about deregulation in 1995). According to the Special Referee, the illegal deregulation of the Radens' apartment could not be fraudulent, because Dr. Nagel may not have known it was illegal, notwithstanding that there was a statutory duty to disclose the status of the apartment as rent regulated.

The Special Referee refused to award treble damages, finding erroneously that "all of the leases in question were entered into after luxury deregulation was allowed." According to the Special Referee, the fact that the Owners voluntarily re-registered the Radens' apartment was sufficient to avoid treble damages. (A. 31). In this way, the Referee sidestepped the issue of whether illegally deregulating the apartment, in 1995, at a time when it was clearly illegal, established that any overcharges were willful.

By Order entered March 7, 2016 (Kenney, JSC) the Court below denied Appellants' motion to reject the Report and Recommendation, and ordered instead that it be confirmed. (A. 7). Judgment was entered in the case on January 25, 2018 (A. 1188).

Appellants then appealed to the Appellate Division, First Department.

The Appellate Division, First Department affirmed (A. 1197), in a decision entered August 16, 2018.

Before the Appellate Division, First Department, Appellants argued that their rent should be calculated in accordance with *Taylor v. 72A Realty Assoc., LP,* 151 A.D.3d 95 (1st Dept., 2017), which had mandated, in overcharge cases involving illegally deregulated apartments in buildings receiving J-51 subsidies, that the rent be calculated by taking the last rent registered prior to deregulation, and adding applicable rent guidelines board increases. Alternatively, Appellants had argued that the rent should be determined in accordance with the *Thornton* default formula.

The Order Under Review found, effectively overruling *Taylor,* that the "free market base date rent" was an appropriate base rent for calculating Appellants' rent under rent stabilization. The court cited two grounds. It cited CPLR 213-a and RSC §2526.1(a)(2)(ii), implementing the statute of limitations for overcharge cases, which state what records may *not* be employed in calculating an overcharge, but do not say what formula *should* be used. In addition, it cited RSC §2626.1(a), which fixes the legal rent as the "rent charged on the base date," without giving effect to the cases (*e.g. Thornton*), the statutory language (RSL §§ 26-512(e) and 26-516(a)(i), mandating that only a registered rent be treated as the legal rent), and DHCR practice (e.g., *Regina Metro,* discussed below, and *160 E. 84th St. Assoc. LLC v. DHCR,* 160 A.D.3d 474 (1st Dept., 2018)), that holds consistently that a rent known to be the product of illegality cannot be made legal by virtue of the statute of limitations.

The Order Under Review found that the base date rent was not the product of fraud, citing no facts from the record, instead reasoning that Appellants cannot have been defrauded because another tenant in the Building had been found, in *Todres v. W7879, LLC* (137 A.D.3d 597 (1st Dept., 2016)) not to have been defrauded. Appellants, however, were not parties to the *Todres* case, which was litigated on different issues by different counsel. Appellants are entitled to their own day in court.

By order entered November 20, 2018, the Appellate Division, First Department granted leave for Appellants to appeal to this Court. It certified the following question of law:

> Was the order of this Court, which affirmed the order of the Supreme Court, properly made?

This appeal followed.

ARGUMENT

POINT I: APPELLANTS' RENT IS THE PRODUCT OF FRAUD, AND MUST BE RECALCULATED UNDER THE DEFAULT FORMULA

When the Radens rented the Apartment in January, 1995, consistent and unambiguous authority prohibited the deregulation of any apartment in a building receiving J-51 benefits. DHCR later reversed its position, in 1996, but Appellants' apartment was illegally deregulated in 1995. That deregulation was illegal, as Dr. Nagel should have known.

The J-51 program is authorized by state law, Real Property Tax Law §489(7)(b)(1), which states (and stated as of 1995) that "any local law or ordinance may also provide" that J-51 benefits "shall not apply to any multiple dwelling, building or structure . . . which is not subject to the provisions of the emergency housing rent

control law or to local law enacted pursuant to the local emergency rent control act." The reference in the statute is to entire buildings, not individual apartments.

Rent Stabilization Law §26-504(c) imposes rent stabilization upon all "[d]welling units located in a building or structure receiving the benefits of section 11-243 or section 11-244 of the [NYC Admin.] code . . . " Every dwelling unit is required to remain regulated, under the plain provisions of this statute, which was in effect in 1995 and has not been changed since.

Rent Stabilization Law §26-504.2 was enacted in 1993 to provide initially for the deregulation, upon vacancy, of apartments that rented for more than $2,000.00 as of October, 1993. It was expanded by Local Law 4 of 1994 to provide for the deregulation of vacant apartments with a legal regulated rent of $2,000.00, without specifying a particular time when the rent must reach that level. As of 1995 it contained an exception: "exclusion pursuant to this subdivision shall not apply to housing accommodations which became or become subject to this law (a) by virtue of receiving [J-51] tax benefits." This Court has held that the *plain meaning* of this language is to prohibit deregulation of vacant units in buildings receiving J-51 benefits. *Roberts,* 13 N.Y.3d at 286, 287.

The J-51 Ordinance, NYC Admin. Code §11-243 (i) (1), required in 1995 and still requires that "the benefits of this section shall not apply . . . to any existing dwelling which is not subject to the provisions of the . . . city rent stabilization law."

28 RCNY §5-03(f)(1), part of the municipal regulations governing the J-51 program, which had been promulgated in 1989 (*see*, the City Record, December 20, 1989, p. 3454, col. 2), required (as of 1995) and still require that "for at least so long as a building is receiving the benefits of the Act . . . all dwelling units in buildings or structures converted, altered or improved shall be subject to rent regulation pursuant to: . . . the Rent Stabilization Law of 1969." These regulations state, in unmistakable language, that "all dwelling units" in a building receiving J-51 benefits must remain rent regulated "for at least so long as a building is receiving the benefits." (A. 893-905 contains the full text of the regulation).

As of 1995 the Rent Stabilization Code had not been amended to provide for high rent vacancy deregulation. It was not amended until 2000.

Instead, DHCR issued a series of opinion letters and Operational Bulletins, implementing the new deregulation statute. As of 1995, they uniformly provided that deregulation was *not* available in buildings receiving J-51 benefits.

DHCR Operational Bulletin 95-3 (A. 906-917) as well as DHCR Operational Bulletin 94-1 (A. 918-927) both state that deregulation "shall not apply to housing accommodations which are subject to rent regulation by virtue of receiving tax benefits pursuant to sections 421-a or 489 of the Real Property Tax Law . . . " (A. 909 contains the quoted language). These Operational Bulletins were intended to provide clear and concise guidance as to the scope of the new deregulation regime. DHCR

believed, for good reason, that the public well understood what apartments it meant to exclude by excluding apartments "subject to rent regulation by virtue of receiving tax benefits." The reference was to the scope of HPD's regulation and RSL §26-504(c), which plainly required that all such apartments be subject to stabilization.

On September 28, 1995 DHCR's legal staff issued an opinion letter stating that "decontrolled" apartments in buildings receiving J-51 would, on re-rental, "become subject to stabilization," and that any unit that "became or become subject to" rent stabilization because of J-51 is excluded from decontrol,[9] including apartments in buildings that received J-51 benefits prior to the enactment of the Rent Regulation Reform Act of 1993, and regardless of "whether or not the J-51 benefits constitute the sole ground for rent regulatory jurisdiction."

DHCR abruptly changed positions when, in in a private January 16, 1996 letter to Sherwin Belkin, Esq. (A. 953-954), it decided to permit the deregulation of apartments in buildings receiving J-51 benefits. It states: "we have reconsidered our earlier opinion." The 1996 letter cited, as authority, only two sources: that it did not find any mention of the J-51 exemption in the legislative history of the 1993 statute, and the dictionary. DHCR did not purport to have examined HPD's regulations, RPTL § 489, the J-51 Ordinance, or any material concerning the history, purpose or function

[9] It is clear from the context that the letter concerns rent stabilized apartments, despite using the antique phrase "decontrol."

of the J-51 Program. Unlike its prior opinion letter, which had been issued by DHCR's legal staff, the January, 1996 reversal of position was signed by an assistant commissioner, a political appointee.

As of 1995, applicants for J-51 benefits were given a handbook (A. 928-950) that specifically states that every unit in a building receiving J-51 benefits "must be registered with the [DHCR] and subjected to rent stabilization." The affidavit sworn by Dr. Nagel is in accord with this administrative practice. (A. 994).

At trial, Defendants introduced no contrary evidence. There is simply no authority for the proposition that, as of 1995, a landlord could lawfully deregulate an apartment in a building receiving J-51 benefits.

The Appellate Division, First Department has obliquely recognized that DHCR's 1996 position represented a change in the law. It has twice held that *Roberts* must be applied retroactively: in *Roberts v. Tishman Speyer Properties, L.P.*, 89 A.D.3d 444 (1st Dept., 2011) (opinion following remand), and in *Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189, (1st Dept., 2011). Included within the analysis of whether a decision is to be applied retroactively is an inquiry as to whether the "new" rule was foreshadowed. *Gersten* held that it was.

In *Roberts*, the Appellate Division, First Department upheld a trial court decision that detailed the many ways in which the *Roberts* decision had been foreshadowed, and therefore the many ways in which an owner should have known that it would be held

liable for illegally deregulating apartments in buildings receiving J-51 benefits. As the trial court held (*Roberts v. Tishman Speyer Properties, L.P.*, Sup. Ct., NY Co. Index No. 100956/07 (Lowe, J.S.C., Order entered August 5, 2010) (A 964-972):

> MetLife argues that 'DHCR's first interpretation' of luxury decontrol 'was issued in January 1996, over 13 years before the [Decision] in this case' (MetLife Opening Brief, at 16), and that 'DHCR's consistent and unchallenged interpretation" of the luxury decontrol statute was that "the exclusion applied only to buildings that voluntarily opted in to rent regulation by accepting J-51 benefits on an unregulated building" (id. at 17). However, the January 1996 correspondence referred to by MetLife, and submitted by MetLife in support of its motion, was an advisory opinion from DHCR, which DHCR issued after issuing Operational Bulletin 95-3 on December 18, 1995. Significantly, the Operational Bulletin stated that the deregulation of high-rent housing accommodations 'shall not apply to housing accommodations which are subject to rent regulation by virtue of receiving tax benefits pursuant to sections 421-a or 489 of the Real Property Tax Law, until the expiration of the tax abatement period.' (Emphasis added.) This too foreshadowed the Decision. [FN 1]
>
> [FN 1] The court notes MetLife's arguments that "landlords ... relied in good faith . . . " However, the above-referenced advisory opinion was requested by the landlord law firm Belkin Burden Wenig & Goldman, LLP (Belkin Burden), now defendant Tishman's attorneys, concerning the interpretation of the 'by virtue of' language of the luxury decontrol statutes. DHCR responded on October 19, 2005, presumably unfavorably, based upon Belkin Burden's follow-up letter dated December 14,2005 and DHCR's January 16, 1996 response to Belkin Burden's December 14th letter. DHCR's January 16th letter states that DHCR 'reconsidered [its] earlier opinion in view of the arguments set forth in [Belkin Burden's] submission.' . .

> . Implicit in the January 16, 1996 letter is that landlords were aware of DHCR's initial interpretation in Operation Bulletin 95-3 and correspondence leading up to and including DHCR's January 1996 opinion letter, thereby further foreshadowing the Decision.
>
> Furthermore, MetLife's argument that HPD never objected to DHCR's position is undermined by HPD's September 27, 2000 letter to DHCR. Specifically, HPD wrote to 'express [its] concern' and to request that DHCR 'reconsider' its proposed 2000 amendment (RSC §2520.11[s]) to the extent that it 'does not apply to rent stabilized units that became regulated solely due to receipt of tax incentives,' because DHCR's proposal 'appears to permit the deregulation ofunits that were not intended to be deregulated.' . . . Moreover, the New York State Register reveals that the passage of RSC §§2520.11(r) and (s) was raised as a 'major substantive issue[]' during public commentary, with the specific issue raised that 'RRRA-97 never intended deregulation of premises subject to regulation solely because of 421-a or J-51 benefits.' NY Reg, Dec. 20,2000, at 18.

As of 1995, therefore, Dr. Nagel knew or should have known that it was illegal to deregulate the Radens' apartment.

As noted above, at trial the Respondents could not explain how Dr. Nagel came to the decision to deregulate the Apartment. They did not call any witness with personal knowledge. Instead, they called the most recent managing agent, who had never been employed by Dr. Nagel and only became involved with the Building after his death, and they called their lawyer, Mr. Marino, who represented Dr. Nagel in 1995.

Mr. Marino could not recall any discussions with Dr. Nagel about the basis for deregulating units at the Building. (A. 500, 502, 583, and 619).

Because the Apartment was regulated, Dr. Nagel was under an affirmative legal duty to disclose to the Radens that they were rent stabilized. Specifically, he was required to make two disclosures. First, he was required to register the Apartment and mail them a copy of the rent registration statement. *See,* RSL §26-517(d); *Cooper Realty Corp. v. DHCR*, 240 A.D.2d 665 (2d Dept., 1997) (DHCR order imposing rent freeze for owner's failure to mail copies of registration statements, upheld on Article 78). Second, he was required to provide a "rights rider" as a part of the Radens' initial lease (*see,* RSC §2522.5(c)), which was required to include "a notice of the prior legal regulated rent" and an explanation of how the Radens' initial rent was computed.

Rather than make these disclosures, Dr. Nagel tendered a lease that said, falsely, in bold capital letters, "THIS APARTMENT IS NOT SUBJECT TO RENT STABILIZATION." (A. 1054).

Joel Raden testified, without contradiction that he refrained from filing papers to challenge his rent, in reliance on this statement. Had he received the required disclosures, he would not have refrained from any rent challenge. (A. 152, 180).

In *Grimm v. DHCR,* 15 N.Y.3d 358; 912 N.Y.S.2d 491 (2010) this Court held that where a landlord charges a base rent that is shown to be the product of "a landlord's fraudulent deregulation scheme to remove an apartment from the protections

of rent stabilization" the rent will be recalculated using the *Thornton* default formula. *See also, Conason v. Megan Holding LLC*, 25 N.Y.3d 1, 21 (2015) (a fraudulent "stratagem" remove an apartment from rent stabilization, held to trigger recalculation of the rent using the *Thornton* default formula).

This case involves just such a deregulation scheme. Dr. Nagel had a duty to know the apartment could not be deregulated. He failed to disclose the regulatory status of the Apartment, something he had an affirmative statutory duty to disclose. Instead, he falsely claimed that the Apartment was deregulated, and conveyed the message that the issue of the status of the Apartment is sufficiently important to warrant a notice in capital letters. Joel Raden relied upon that false message, to his detriment. His reliance was justified as a matter of law: because there is a statute requiring disclosure of his stabilized status, he was entitled to rely on the lack of disclosure in treating the apartment as deregulated. *Compare, Sicignano v Dixey*, 124 AD3d 1301 (4th Dept, 2015) (purchaser of real property held entitled to rely on statutory disclosure statement); *Westbury Small Business Corp v. Ballarine,* 125 A.D.2d 462 (2d Dept., 1986) (failure to disclose information required in a sale of a gas station held to be fraudulent).

Exactly this kind of conduct has been found to constitute fraud, in *Kreisler v. B-U Realty Corp.*, 164 A.D.3d 1117 (1st Dept., 2018). In *Kreisler*, the Appellate Division, First Department found that it is fraud to rent apartments in J-51 subsidized buildings

as deregulated, "after *Roberts* was decided." *Roberts* invalidated DHCR's policy of permitting deregulation in J-51 assisted buildings, a policy that did not come into effect until 1996. At the time of Dr. Nagel's fraud, the law was exactly the same as it was at the time of the fraud found in *Kreisler*. There is no rational reason why the same conduct that constitutes fraud now, after the *Roberts* decision, would not have constituted fraud in 1995, when the law was the same as was ultimately found in *Roberts.*

Dr. Nagel was under an absolute duty to know that the Radens' apartment was exempt from deregulation. *Obiora v. DHCR*, 77 A.D.3d 755 (2nd Dept., 2010) (rejecting a landlord's claim of "good faith" reliance on counsel's advice in deregulating an apartment in a building receiving J-51 subsidies); *Hargrove v. DHCR*, 244 A.D.2d 241 (1st Dept, 1998) (rejecting landlord's claim of "good faith" misinterpretation of J-51 statute). Because the landlord was under a duty to know that the apartment was exempt from deregulation, and under a duty to disclose that fact to the Radens, the Radens' base date rent was tainted by fraud, as that term has been used in *Grimm* and *Conason.*

The fact that DHCR changed its position in 1996 does not change the consequence of Respondents' fraudulent deregulation of the Apartment. Respondents have never proven that they relied upon DHCR's change of position to justify the fraud that took place at the inception of the Radens' tenancy. Rather than prove reliance, the

testimony shows nothing more than that Dr. Nagel initially deregulated the Apartment when it was clearly illegal to do so, and that neither he nor the Respondents had occasion to reconsider that initial illegal decision. Having obtained overcharges that do not belong to them, Respondents should not be heard to profess their innocence by theorizing that, after they willfully received overcharges, DHCR later said it would be legal to keep them.

DHCR's complete reversal of position, in an opinion letter issued January 16, 1996, cannot be interpreted as retroactively absolving Respondents from the consequences of their fraud. DHCR's abrupt reversal of position adopted an implausible and unreasonable interpretation of the statute, at variance with its plain meaning. *Roberts, supra.*

Under these circumstances, DHCR's reversal of position cannot be found to be retroactive. *Compare, Roberts v. Tishman Speyer Props., L.P.,* 89 A.D.3d 444, 932 N.Y.S.2d 45 (1st Dept., 2011) (*Roberts* is retroactive); *Gersten v. 56 7th Ave. LLC,* 88 AD3d 189 (1st Dept., 2011), *app. withdrawn,* 18 N.Y.3d 954, 2012 NY Slip Op 69029 (2012) (same). DHCR's reversal of position was not foreshadowed by any prior development in the law, was not supported by the plain meaning or practical operation of the statutes at issue, and was directly contradicted an HPD regulation that had been on the books since 1989. To find it retroactive would ratify the gross denial, to tenants generally, and the Radens specifically, over the course of more than a decade, of the

intended legislative benefits of the J-51 program: the enjoyment of rent stabilized leases and a rent stabilized rent that is disclosed to the tenant to be rooted in prior rents and in the law. It would be inequitable to apply DHCR's illegal change of policy retroactively, so as to absolve the Respondents of the consequences of Dr. Nagel's fraud.

Joel Raden testified that he relied on the Owner's statements to the effect that the Apartment was unregulated, and that he would have investigated the lawful rent had it not been for those statements. If the Owner had initially treated the Apartment as regulated, as required by law, and then waited until 1996, when DHCR changed positions, before asserting that the Apartment could be deregulated, Mr. Raden would have challenged any such deregulation, thirteen years before the *Roberts* case.

In the proceedings below, Respondents' chief argument, accepted in the Order Under Review, was that in another case brought by another tenant in the Building, represented by different counsel, based on different facts and different arguments, the Appellate Division, First Department had found that Respondents had not committed fraud. *Todres v. W7879, LLC,* 137 A.D.3d 597 (1st Dept., 2016).

Todres is not a basis for overlooking the ample proof of fraud in this case. Appellants were not parties to *Todres,* and its result is not binding on them. *Gilberg v. Barbieri,* 53 N.Y.2d 285, 291 (1981) ("Due process, of course, would not permit a litigant to be bound by an adverse determination made in a prior proceeding to which

he was not a party [citation omitted]."), *Todres* did not involve any claim that could fairly be described as a J-51 overcharge claim. *Todres* involved two apartments. In the first one, the complaining tenant was the first tenant to take occupancy after the departure of a rent controlled tenant, raising the issue of setting the initial stabilized rent, an issue not present here. The tenant moved to the second apartment after the Building no longer received J-51 benefits, raising only the issue of the value of improvements, an issue not present here.

Appellants are entitled to their own day in court, on the issue of whether they, and not any other tenants in the Building, were the victims of a fraudulent scheme to deregulate their apartment. Because Respondents have no defense on the merits, the rent must be recalculated in accordance with the default formula.

POINT II: EVEN IF FRAUD IS NOT FOUND, APPELLANTS' RENT IS THE PRODUCT OF ILLEGALITY, AND MUST BE RECALCULATED UNDER THE DEFAULT FORMULA

The Rent Stabilization Law provides, in two places, that only a registered rent can be used as a legal rent for purposes of determining the existence or amount of an overcharge. RSL §26-512(e) provides:

> Notwithstanding any contrary provisions of this law, on and after July first, nineteen hundred eighty-four, the legal regulated rent authorized for a housing accommodation subject to the provisions of this law shall be the rent

> registered pursuant to section 26-517 of this chapter subject to any modification imposed pursuant to this law.

As of the base date of May 1, 2006, the Radens' apartment was not registered. Undisputedly, as the Order Under Review found, they were paying a "free market" rent. Since that rent had never been "registered pursuant to [RSL] section 26-517," it could not be "the legal regulated rent."

RSL §26-516(a)(i) provides:

> a. (i) Except as to complaints filed pursuant to clause (ii) of this paragraph, *the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement*, (or, if more recently filed, the initial registration statement) plus in each case any subsequent lawful increases and adjustments. *Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter.*

(Emphasis supplied).

In this case, when the Respondents' attorney sent his May 19, 2010 letter, the Apartment had not been registered since 1995. (A. 1035-1036). The Radens' base date rent was not registered.

CPLR 213-a prohibits the "examination of the rental history" of an apartment prior to the base date. Broadly speaking, it says what records may *not* be considered,

when determining the rent. It has nothing to say about what records *should* be considered, or what formula should be used.

These statutes, which state what evidence shall be used and what evidence cannot be used in determining the legal regulated rent for a rent stabilized apartment, must be read *in pari materia* with one another. *Plato's Cave Corp. v State Liq. Auth.*, 68 N.Y.2d 791 (1986) ("statutes which relate to the same or to cognate subjects are in pari materia and to be construed together unless a contrary intent is clearly expressed by the Legislature [citation omitted]"); *Lower Manhattan Loft Tenants v. New York City Loft Board*, 66 N.Y.2d 298 (1985) (same).

In cases involving the illegal deregulation of apartments receiving J-51 benefits, reconciling these two statutes necessarily requires that the court determine whether it is appropriate to require rent stabilized tenants to pay what are essentially market rents, because the only rent records that are permitted to be examined in performing a rent calculation are records of the payment of *unregistered* market rents, registrations for other apartments, and registrations far more than four years old. Because DHCR's illegal policy of permitting deregulation in buildings receiving J-51 benefits was in effect for over thirteen years, between January, 1996 until this Court rendered its opinion in *Roberts,* in October, 2009, that policy has resulted in a large number of cases in which the records of registered rents, intended by law to be used to calculate rents, are not available.

These apartments were held to be *retroactively* rent stabilized, in *Roberts v. Tishman Speyer Properties, L.P.*, 89 A.D.3d 444 (1st Dept., 2011) (opinion following remand), and *Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189, (1st Dept., 2011). That determination of retroactivity cannot be meaningful, if the end result is that the tenants wind up paying the same market rent as was in effect prior to *Roberts.*

Where the base date rent is the product of illegality, this Court has required, in *Thornton*, the use of a default formula, examining registered rents for comparable apartments as of the base date, to determine the rent. Historically, this was a middle path between early cases that required the continued use of old registration statements for the complaining tenant's apartment (reasoning, among other things, that a registration statement is not the sort of "rental history" that is precluded), and cases that, adopting the reasoning exemplified in the Order Under Review, turn a blind eye to blatantly illegal unregistered base rents.

In *Thornton*, a landlord and tenant entered into an illegal agreement to deregulate a rent stabilized apartment, on the pretext that it would not be the tenant's primary residence and would thus be exempt from regulation, and agreed to leases that fixed the rent at a free market level. *Thornton* was an overcharge suit by subtenants, who were also charged a market based rent, who sued the tenant within four years, but did not sue the landlord until seven years after taking occupancy. This Court found that the lease was an attempt to circumvent the RSL, and was "void at its inception." 5 N.Y.3d at

181. The rent under that lease "was therefore illegal" and the registration of that rent "was also a nullity." *Id.* The Court therefore required that the rent be recalculated, using the "default formula," defined as "the lowest rent charged for a rent stabilized apartment with the same number of rooms in the same building on the relevant base date." The default formula ensures that the stabilized rent for an apartment with an unreliable rent history is set in accordance with registered rents, thereby satisfying the requirements of RSL §§ 26-512(e) and 26-516(a)(i).

The rationale of *Thornton* is not limited to cases where there is a scheme to evade the rent stabilization law through the use of an illusory prime tenant. It applies when the rent paid four years prior to an overcharge complaint can be shown to be illegal, without using proof that is itself barred from consideration by the four year rule. When the base rent is illegal, then no "reliable rent records are available," and the default formula must be used. *Id.* Here, we know the Radens' apartment was illegally deregulated, without having to examine any records from before the base date.

Here, the base rent was clearly an unregistered free market rent that was the product of the illegal deregulation of the Radens' apartment, not a registered rent stabilized rent, and in that sense it was illegal. The lease in effect on the base date stated falsely that the Apartment was not rent stabilized. In fact, the Apartment was and is a stabilized apartment.

Thornton specifically rejected the use of a falsely-registered free market rent as a base rent, on the grounds that it was "illegal." *Thornton* also rejected use of the last valid registration in effect as the basis for calculating the rent, as had been suggested by the dissenting opinion in the Appellate Division. *Compare, Thornton v. Baron,* 4 A.D.3d 258, 260-264 (1st Dept., 2004), *aff'd,* 5 N.Y.3d at 175; *see also, Myers v. Frankel,* 184 Misc. 2d 608 (App. Term, 2d Dept., 2000) (explaining the long ago rejected theory that the four year statute of limitations permits rents to be set in accordance with the last valid registration), *rev'd,* 292 A.D.2d 575 (2d Dept., 2002); *Cecilia v. Irizarry,* 189 Misc. 2d 430 (App. Term, 2d Dept., 2001) (same), *rev'd,* 292 A.D.2d 557 (2d Dept., 2002). In *Thornton,* this Court charted a middle path between a system that would have required the use of registration statements that may be more than four years old at the time of an overcharge complaint, and a system in which even the most obviously illegal unregistered rent charged on the base date will always be deemed to be legal. To that extent, the Order Under Review conflicts with *Thornton.*

Since that time, this Court has never approved the use of a free market rent as a means of establishing the legal rent for a rent stabilized apartment. Rather, it has adhered to the principle that, although "rent history" before the base date cannot be used to calculate the rent, unless there is reliable rent history, registered in accordance with the RSL, to show a rent stabilized rent was charged on the base date, the rent is required to be set in accordance with the default formula.

In *Grimm*, 15 N.Y.3d at 358, 366, this Court required DHCR to "ascertain whether the rent on the base date is a lawful rent" where circumstantial evidence of the landlord's fraud indicated that the rent charged on the base date should not be regarded as legal. These circumstances included the landlord's inexplicably ceasing to file registration statements, an inexplicably large rent increase, and the fact that "petitioner's initial lease did not contain a rent stabilized rider." Under the circumstances, the Court found that rent history from before the base date could be examined for the limited purpose "of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date." *Id* at 367. The lack of registration was found to render the base date rent suspect, and to support a finding of fraud.

The rationale of *Grimm* is that base date rents must be reliable, and if they appear to be the product of fraud they cannot be reliable. *Grimm* did *not* hold that an unreliable and unregistered free market rent can be charged, so long as there has been no fraud. It held that a "fraudulent scheme to destabilize" an apartment is one of the things that can make a rent unreliable, so as to trigger use of the default formula.

The rent in this case is not "reliable" within the meaning of *Grimm.* It was set unilaterally by the landlord, in a purportedly "free market" negotiation in which Appellants were not given the mandatory disclosure of their rights as rent stabilized tenants. The rent was not based upon any prior rents. It was not registered, and was

not connected, as the statute requires, to prior and subsequent registrations. It should go without saying that a free market rent is not a registered rent stabilized rent.

In *Conason v. Megan Holding LLC*, 25 N.Y.3d 1; 6 N.Y.S.3d 206 (2015) this Court upheld the use of the default formula to determine a tenant's overcharge complaint, where the base date rent was "tainted by fraudulent conduct," *quoting, Grimm,* 15 N.Y.3d at 362. The Court found that the landlord had engaged in "the setting of an illegal rent" as part of a "stratagem" to deregulate the apartment. As in *Grimm*, the rationale was the illegality of the base rent, a conclusion the Court found to be justified by its finding of fraudulent deregulation.

In J-51 illegal deregulation cases, DHCR has rejected use of an unregistered free market rent to calculate any overcharges. Rather, in *Regina Metro,* now on appeal to this Court, the agency set the rent according to its rule for calculating rents for apartments that were temporarily exempt from regulation on the base date (*see,* RSC 2526.1(a)(3)(iii)), and the Appellate Division, First Department found that DHCR had impermissibly examined rent history before the base date. The Court did *not*, however, mandate use of a free market rent as a base rent. Rather, the Court remanded to DHCR for purposes of implementing a method that does not involve the use of rental history antedating the base date.

In *160 E. 84th St. Assoc. LLC v. DHCR,* 160 A.D.3d 474 (1st Dept., 2018), the Appellate Division, First Department upheld DHCR's use of a "sampling method" to

set the rent for an apartment that was "improperly treated as deregulated for years." The court and DHCR rejected use of the free market rent that had been charged on the base date, since it was the result of improper deregulation. Pointedly, neither DHCR nor the Court agreed with the landlord's position, that a free market rent could be used as an appropriate base rent.[10]

Although not all of its opinions are consistent with one another, there is a significant line of Appellate Division, First Department caselaw that prohibits the use of an unregistered free market rent as a base rent in overcharge cases. *See, 160 E. 84th St. Assoc*, 160 A.D.3d at 474; *Taylor*, 151 A.D.3d at 95 (free market rent is not one that "bears any relation to a permissible, rent-stabilized rent"); *72A Realty Assoc. v Lucas*, 101 A.D.3d 401 (1st Dept., 2012) (finding error "in setting the base date rent for the

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[10] The "sampling method" is prescribed in RSC §2522.6(b)(2). That regulation is a codification of DHCR's default formula, although it differs from the formula mandated in *Thornton* in the crucial respect that it does not apply a default calculation as of the base date, but, instead, applies the calculation "on the date the complaining tenant first occupied the apartment." The regulation applies a "sampling method" where the documentation to perform a default calculation is 'not available or inappropriate." The regulation states that the default calculation can be triggered where the "rent charged on the base date cannot be determined," where the landlord defaults in providing "a full rental history from the base date", where the base rent is the product of a "fraudulent scheme to deregulate the apartment," or where the landlord has committed a rental practice prohibited by RSC §2525.3 (b), (c) or (d). Those rental practices include illusory tenancy, leases that are conditioned upon an exemption from rent stabilization, or "any practice . . . which deprive[s] a tenant in possession of his or her rights under this Code."

The illegal deregulation of J-51 subsidized apartments is certainly a rental practice that deprives tenants of their rent stabilized rights, triggering the default formula. To the extent that the regulation prescribes a different calculation from the one required by *Thornton*, however, the *Thornton* formula must be applied.

overcharge at the $2,250.00 per month rate based on the market rate", in light of doubts that the rent ever exceeded $2,000.00 *and* "in light of the improper deregulation of the apartment"); *Gordon v. 305 Riverside Corp.*, 93 A.D.3d 590 (1st Dept., 2012) (rejecting use of free-market rent to set rent for illegally deregulated apartment receiving J-51 subsidies, which was vacant on the base date), *Levinson v. 390 W. End Assoc. LLC*, 22 A.D.3d 397 (1st Dept., 2005) (in a case involving a collusive and illegal lease purporting to deregulate apartment on primary residence grounds, broadly and correctly holding that the *Thornton* default formula "should be used to determine the base rent in an overcharge case where, as here, no valid registration statement was on file as of the base date," language that goes well beyond cases of collusive leases)[11] ; *but see, Todres*, 137 A.D.3d at 597; *Stulz v. 305 Riverside Corp.*, 150 A.D.3d 558 (1st Dept., 2017).

Under the statute, the practice of DHCR, and the majority of reported cases on the issue, therefore, an unregistered free market lease that is plainly the product of illegal deregulation cannot be used to determine the rent to be charged for an apartment. On that basis alone, the Order Under Review must be reversed.

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[11] In *Regina Metro*, decided the same day as the Order Under Review, the court found that use of the "sampling method" approved in *160 E. 84th Assoc.* would satisfy its concerns about the four year statute of limitations, and remanded a post-*Roberts* illegal deregulation overcharge case to DHCR for recalculation accordingly. The Order Under Review, however, gave Appellants no opportunity to have their rent calculated in accordance with that method.

Under this Court's precedents, because the illegal rent that the Radens paid for their illegally deregulated apartment cannot be used as a basis for calculating their legal rent, the *Thornton* default formula must be used.

The "sampling method" used by DHCR in *160 E. 84th St. Assoc,* and the calculation method adopted by the First Department in *Taylor,* of taking a pre-base date registered rent and adding lawful increases to that rent, appear to be based on the concern that application of the default method would be unjustifiably harsh, particularly as applied to those landlords who, unlike the Respondents, deregulated J-51 subsidized apartments at a time when DHCR's policy of permitting such deregulation was thought to be lawful.

Use of the default formula under these circumstances is not unduly harsh. It is consistent with how the default formula has been used under the Rent Stabilization Law since it was first adopted, in the mid-1980s, with the advent of the Omnibus Housing

Act of 1983 (L. 1983, Ch. 403).[12] It has long been the law that it is the landlord's burden to prove that the rent charged was lawful, and that the failure to produce the evidence needed to set a lawful base rent is a default that triggers the use of the default formula to establish the rent. Because it is the landlord's burden to establish the legal rent to be charged for an illegally deregulated apartment, and because the use of a free market rent does not satisfy that burden, use of the default formula is a straightforward application of longstanding rules for setting rents.

It is not unusual to apply the default formula where the landlord cannot submit anything but the records of illegally deregulated rents. The default formula continues to be used in cases where the landlord defaults in supplying any reliable rent history. *E.g., Bondam Realty Assoc. v. DHCR,* 71 A.D.3d 477 (1st Dept., 2010). The situations

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[12] A complete account of the history of the default formula is beyond the scope of these papers. The thumbnail version is that the original penalty for landlords who did not furnish the rent records that are needed to establish the rent was that the apartment was expelled from rent stabilization, and re-regulated under rent control. At that time, a landlord was required to produce, in any overcharge proceeding, every lease from the time when the apartment first became rent stabilized. *Endeavor Property Holdings N.V. v. CAB,* 116 Misc.2d 541 (Sup. Ct, NY Co., 1982). That rule was abandoned in the mid-1980s in favor of the current default formula. "The new procedure was adopted in order to provide an alternative method for establishing a base rent so that automatic default and expulsion from rent stabilization could be avoided in cases where the owner does not submit rent records." *Charles H. Greenthal Co., Inc. v. DHCR,* 126 Misc.2d 795, 800 (Sup. Ct., NY Co., 1984). Since the mid-1980s the penalty for failing to submit records needed to prove the legal rent has been to find the landlord in default, and set the rent at the lowest of either (a) the lowest rent for an apartment in the same line; (b) the tenant's initial rent minus one guidelines percentage; or (c) the previous tenant's last rent. A partial set of cases in which this formula was applied is as follows: *61 Jane Street Associates v. CAB,* 65 N.Y.2d 898 (1985); *Serencha v. DHCR,* 260 A.D.2d 244 (1st Dept., 1999); *60 Gramercy Park Co. v. DHCR,* 188 A.D.2d 371 (1st Dept., 1992); *Vinsue Corp. v. DHCR,* 169 A.D.2d 592 (1st Dept., 1991); *Cohen v. Mirabel,* 138 A.D.2d 665, (2nd Dept., 1988); *Charles H. Greenthal Co., Inc. v. DHCR, supra.*

where this could occur include more than cases of fraud (such as *Grimm*), or cases of illusory tenancy (such as *Thornton*). They include cases of long-term illegal deregulation, like this case. They include cases where there has never been a registration of a newly stabilized apartment, after it has left rent control. *Wasserman v. Gordon*, 24 A.D.3d 201 (1st Dept., 2005). They could potentially include many other categories of cases where the legal rent would be difficult to establish, such as where a sixth unit is added to a building that was previously treated as exempt from rent stabilization. *See, e.g. Gandler v. Halperin*, 232 A.D.2d 637 (2d Dept. 1996). They could include cases where a landlord claims to have substantially rehabilitated a vacant building, so as to deregulate it, and the claim is rejected. *See, e.g., Woodcrest Mgmt. Corp. v. DHCR*, 2 A.D.3d 172 (1st Dept.. 2003) (rejecting deregulation claim twenty years after the work had been performed).

In *Taylor*, the First Department opened the door a tiny bit to the use of records from before the base date in establishing the rent to be charged for an apartment that had been illegally deregulated for more than four years, but the court reversed course soon thereafter, in *Regina Metro* and in the Order Under Review. In *Regina Metro*.,

DHCR had adopted a similar formula to the one in *Taylor*, only to be reversed.[13] As of now, the only method approved by this Court for calculating the rent for an illegally deregulated apartment is the default method approved in *Thornton.*

Although there are numerous exceptions to the four year rule[14], this Court has yet to approve an alternative method for rent setting, other than the *Thornton* default

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[13] In the companion cases now before this Court, *Taylor* and *Regina Metro*, Appellants fully support the argument that an exception to the four-year look-back period is warranted for post-*Roberts* overcharge cases involving the deregulation of J-51 assisted apartments. Appellants do not, however, believe that it is necessary for this Court to make such an exception in order for them to prevail.

The unique circumstances arising from the application of a four-year statute of limitations to limit the readjustment of rents that had been illegally collected during a period of more than thirteen years, when the agency charged with administering the rent laws implemented an illegal policy, amply justifies such an exception. Arguably, the accepted application of the four year rule, which deprives registration statements of any force whatsoever if they relate to rents collected more than four years prior to a complaint, no matter when filed, (*see, e.g., McCarthy v. DHCR*, 290 A.D.2d 313 (1st Dept., 2002)), goes beyond what is required in order to reconcile CPLR 213-a with RSL §§ 26-512(e) and 26-516(a)(i), and goes beyond what is meant by the term "rental history" to be excluded from examination by CPLR 213-a, so as to exclude the very registration statements that the legislature intended for use in establishing rents. As this Court remarked in *Matter of Cintron v Calogero*, 15 NY3d 347, 354 (2010), "[n]otably, the term 'rental history' is not defined in the relevant statutes or in DHCR regulations and we need not attempt to define it here."

Appellants do not agree, however, that the *Thornton* default formula is too harsh to be applied in these circumstances. They do not believe that a new rule is necessary in order for them to prevail. For that reason, Appellants will leave the task of fully arguing for any new rule, to others.

[14] *See, e.g., Matter of Cintron v Calogero*, 15 NY3d 347 (2010) (the impact of rent reduction orders in effect prior to the base date); *H.O. Realty Corporation v. DHCR*, 46 A.D.3d 103 (1st Dep't, 2007) (the issue of whether an overcharge is willful); *Ador Realty, LLC v DHCR*, 25 AD3d 128 (2nd Dept, 2005) (the issue of whether a landlord may collect a "longevity" rent increase); *Pastreich v. DHCR*, 50 A.D.3d 384 (1st Dept., 2008) (the issue of the duration of an agreement to charge less than the maximum legal regulated rent (a "preferential" rent)); *East West Renovating Co. v. DHCR*, 16 A.D.3d 166 (1st Dept. 2005) (the issue of regulatory status, considered separately from rent setting).

formula, where the base date rent is the product of illegal deregulation. As of now the *Thornton* default formula is the only approved method to perform that calculation. Equally, this court has never permitted the use of an unregistered and illegally deregulated free market rent in calculating the rent for a rent stabilized apartment. To the extent that the choice is between imposing the *Thornton* default formula and allowing landlords to keep the overcharges that tenants paid throughout the period prior to the *Roberts* decision, the default formula should be applied. The tenants are innocent parties who should not be unfairly penalized. Tenants were just as entitled to rely on DHCR's illegal policy, in refraining from filing overcharge complaints, as their landlords were, in charging market rents. Respondents should not be able to retain all of the proceeds of the illegal deregulation of Appellants' apartment, and in addition retain the very generous subsidies they received under the J-51 program, and continue to charge market rents, with stabilized increases added, in perpetuity. Therefore, the default method in *Thornton* should apply.

POINT III: THE STATUTE OF LIMITATIONS SHOULD BE EQUITABLY TOLLED

In *Thornton,* both the majority opinion (5 NY3d at 180, fn. 3)[15] and the dissent (5 NY3d at 183)[16] were careful to note that the tenant had not been fraudulently induced into refraining from filing a complaint within the statute of limitations. This Court, therefore, has recognized, albeit in *dicta*, that the principles of equitable estoppel and equitable tolling of statutes of limitations apply to overcharge proceedings. *See, Simcuski v Saeli*, 44 NY2d 442 (1978).

In *Simcuski* this Court held:

> It is the rule that a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action. (*General Stencils v Chiappa*, 18 NY2d 125; *Erbe v Lincoln Rochester Trust Co.*, 13 AD2d 211, *mot for rearg and mot for lv to app den* 14 AD2d 509, *app dsmd* 11 NY2d 754, *supra; see* Fraud, Misrepresentation, or Deception as Estopping Reliance on Statute of Limitations, Ann., 43 ALR3d 429.)

Moreover, misrepresentations made in violation of a duty to disclose the truth, can be the basis of an equitable estoppel against pleading the Statute of Limitations.

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[15] Footnote 3 reads: "Because defendants' fraudulent scheme to evade the Rent Stabilization Law did not induce plaintiffs to refrain from filing a timely action, the owner is not equitably estopped from invoking the statute of limitations (*see, Simcuski v Saeli*, 44 N.Y.2d 442, 448-449, 377 N.E.2d 713, 406 N.Y.S.2d 259 [1978])."

[16] The dissent put it this way: "If the landlord had somehow tricked them into delaying their lawsuit, the landlord might be equitably estopped from relying on the lapse of time, but nothing of that sort happened."

Juman v Louise Wise Servs., 254 A.D.2d 72 (1st Dept 1998) (finding an issue of fact, in a "wrongful adoption" case, as to whether adoption agency had duty to disclose the natural mother's history of schizophrenia, so as to raise an equitable estoppel against the Statute of Limitations).

In this case, Respondents are the successors of Dr. Nagel, who had the duty to disclose to the Radens when they rented the Apartment in 1995 that it was rent stabilized, by mailing a current registration form and attaching a "rights rider" to their initial lease. As discussed extensively above, the Radens were deceived, by virtue of Dr. Nagel's (a) breach of his duty to disclose, and (b) affirmative misrepresentation of the regulatory status of the Apartment, into refraining from filing any challenge to their rent.

Respondents are therefore equitably estopped from relying upon the Statute of Limitations. Appellants filed this lawsuit well within four years after Mr. Marino disclosed, in his May 19, 2010 letter, that the apartment had indeed been rent stabilized. This lawsuit is therefore timely.

Because Respondents are estopped from relying upon the Statue of Limitations, Appellants are entitled to recover damages for all of the overcharges they paid since the inception of their tenancy, in 1995, calculated in accordance with their complete rent history.

Moreover, the Statute of Limitations was tolled by the adoption, by DHCR, of a policy that permitted the deregulation of apartments in buildings receiving J-51 benefits. That policy was in effect from January, 1996 through October, 2009, when this Court issued the *Roberts* decision.

Statutes of Limitations may be suspended or tolled when a party is prevented from exercising his or her legal remedy:

> 'The broad rule is laid down that whenever some paramount authority prevents a person from exercising his legal remedy, the time during which he is thus prevented is not to be counted against him in determining whether the statute of limitations has barred his right even though the statute makes no specific exception in his favor in such cases' (51 Am Jur 2d, Limitation of Actions, § 140, at 711; see also, 54 CJS, Limitations of Actions, § 86, at 121-123)

Roldan v Allstate Ins. Co., 149 A.D.2d 20, 34 (2nd Dept 1989); *Brown v State*, 250 A.D.2d 314 (3rd Dept 1998) ("the Statute of Limitations is tolled where a cause of action has accrued, but was 'temporarily extinguished as a result of an erroneous court order, which was later reversed'"); *accord, Billiard Balls Mgt., LLC v Mintzer Sarowitz Zeris Ledva & Meyers, LLP*, 54 Misc 3d 936, 944-946 (Sup Ct, NY County 2016), *aff'd*, 157 A.D.3d 419 (1st Dept., 2018) (cataloging the cases in which a party's obligation to file a complaint was tolled by superceding legal authority.)

This Court has held in *Borden v. 400 East 55th Street Assoc. L.P.*, 24 N.Y.3d 382, 398 (2014) that, during the period when DHCR had a policy of permitting the

deregulation of apartments in buildings receiving J-51 benefits, owners who acted in reliance on that policy would not be liable for treble damages:

> As the lower courts noted, treble damages would be unavailable to the tenants because a finding of willfulness is generally not applicable to cases arising in the aftermath of *Roberts*. For *Roberts* cases, defendants followed the Division of Housing and Community Renewal's own guidance when deregulating the units, so there is little possibility of a finding of willfulness [citation omitted]. Only after the *Roberts* decision did the DHCR's guidance become invalid.

This holding must be taken as a recognition that prior to *Roberts* tenants were also justified in "following the Division of Housing and Community Renewal's own guidance" in refraining from filing overcharge complaints. Normally, an owner cannot rely upon a good faith misinterpretation of the law as a way to avoid treble damages. *Obiora v. DHCR*, 77 A.D.3d 755, 909 N.Y.S.2d 119 (2nd Dept., 2010) (imposing treble damages on an owner who deregulated an Apartment while receiving J-51 assistance, rejecting a claim of reliance on the advice of counsel); *Matter of S.E. & K. Corp. v. DHCR*, 239 A.D.2d 123, 657 N.Y.S.2d 601 (1st Dept.,1997) (upholding a treble damages award and rejecting "Petitioner's excuse that its inexperience as a landlord caused it to be misled by the advice of the prior owner that a fair market rent could be charged"); *Hargrove v. DHCR*, 244 A.D.2d 241, 664 N.Y.S.2d 767 (1st Dept, 1998) (imposing treble damages on landlord who claimed that its "misinterpretation of the J-51 law was in good faith"). The holding in *Borden*, therefore, treats DHCR's guidance

as more than a mere misinterpretation of the law: it treats DHCR's guidance as paramount authority as that term is used in *Roldan v. Allstate.*

As a practical matter, during the time when DHCR's erroneous policy was in effect, tenants affected by that policy should not have been expected to file overcharge complaints. Although in *Roberts* a well-funded class of tenants ultimately successfully challenged the policy, after it was in effect for more than thirteen years, the intent and design of the RSC is for an unrepresented tenant to be able to ascertain, based on required disclosures, whether to file a complaint. Rent regulation is supposed to discourage litigation, not require tenants to hire counsel every time they rent a vacant apartment. Absent any disclosures from their landlord, and in light of DHCR's support, beginning in 1996, for the position taken by Dr. Nagel in 1995, the Radens cannot be expected to have filed a challenge to their rent within four years after the Gordons vacated.

Therefore, the Statute of Limitations was tolled, and Appellants are entitled to challenge their initial rent and all subsequent rent increases.

POINT IV: TREBLE DAMAGES SHOULD HAVE BEEN AWARDED

As argued above, as of 1995, Dr. Nagel knew or should have known that it was illegal to deregulate the Radens' apartment. His neglect or disregard of the law warrants the imposition of treble damages.

In an overcharge case, the burden is on the landlord to plead and prove that any overcharges were not willful. *Hargrove v. DHCR*, 244 A.D.2d 241, 664 N.Y.S.2d 767 (1st Dept, 1998) (imposing treble damages on landlord who claimed that its "misinterpretation of the J-51 law was in good faith"). Defendants have not met that burden.

To avoid treble damages, the landlord must "establish the lack of both willfulness and negligence." *Tockwotten Assoc. v. DHCR*, 7 A.D.3d 453 (1st Dept., 2004). Here, Dr. Nagel deregulated the Apartment in disregard of the clear, uniform command of the law. That is either willful or negligent.

Defendants profess to have deregulated Plaintiffs' Apartment innocently, but the only evidence in the record shows that it was illegal to deregulate Plaintiff's apartment in 1995. Defendants introduced nothing at all to the contrary. Mr. Marino's testimony was that he did not know what, if anything, led Dr. Nagel to deregulate the Radens' apartment.

The issue of treble damages is required to be determined in accordance with all relevant evidence, and is not limited to the last four years' worth of evidence. *H.O. Realty Corporation v. DHCR*, 46 A.D.3d 103, 844 N.Y.S.2d 204 (1st Dep't, 2007) ("No one would seriously argue that any valid interest would be served by allowing a landlord who is a chronic offender of these regulations to bar from consideration any part of its history of charging tenants illegal rents just because the overcharges occurred four years before the most recent complaint.") Under *H.O. Realty Corp.*, the continuation of the Defendants' longstanding illegal practices, is relevant to determining whether treble damages must be awarded.

Respondents' unproven claim of reliance on industry standards does not state a defense to the Radens' claim for treble damages. Neither a mistake of law nor reliance upon erroneous legal advice is any shield against treble damages. *Obiora v. DHCR*, 77 A.D.3d 755, 909 N.Y.S.2d 119 (2nd Dept., 2010); *Matter of S.E. & K. Corp. v. DHCR*, 239 A.D.2d 123, 657 N.Y.S.2d 601 (1st Dept.,1997); *Hargrove v. DHCR*, 244 A.D.2d 241, 664 N.Y.S.2d 767 (1st Dept, 1998).

Respondents' tender of a refund, based on calculations that began with an illegal base rent, and that included only four years' worth of overcharges, was not sufficient to avoid treble damages penalties. The Appellate Division, First Department has stated clearly that a landlord must give back *all* overcharges, including the money illegally collected *more than* four years prior to the complaint, before it can dispel the

presumption that keeping someone else's money is ordinarily willful. *Hargrove v. DHCR*, 244 A.D.2d 241, 664 N.Y.S.2d 767 (1st Dept, 1998) ("the landlord's refund of the overcharge amount with interest did not rebut the presumption of willfulness, where, as here, the refund was not tendered until after the landlord interposed an answer to the complaint, *and did not cover the period from 1988–1989, which, while outside of the four-year Statute of Limitations, was nonetheless part of the entire overcharge*." (Emphasis supplied).)

Defendants claim not to have been willful in overcharging the Radens, but they offer no excuse for intentionally holding onto the money they illegally obtained from them during the period before the Base Date. While it is true that the Radens may not be able to sue to recover that money, if it is found to be beyond the statute of limitations, it is equally true that the landlord cannot keep that money and still argue that the overcharges were not willful. *Hargrove, supra.*

The fact that DHCR changed its position in 1996 does not turn Respondents' willful overcharges into innocent overcharges. Respondents were required to prove "reasonable reliance" on DHCR's policy, which they have not done. *Lucas*, 101 A.D.3d at 403. As noted above, the testimony shows nothing more than that Dr. Nagel initially deregulated the Apartment when it was clearly illegal to do so, and that neither he nor the Respondents had occasion to reconsider that initial illegal decision.

The Court therefore erred in failing to award treble damages.

POINT V: APPELLANTS SHOULD BE AWARDED ATTORNEYS' FEES

Appellants' initial lease contains a provision (Article 20(A)) that requires them to reimburse the Owners for attorneys fees arising from a default under the lease. (A. 1049, 1051). Real Property Law §234 makes this provision reciprocal. Therefore, if Appellants prevail on this post-trial appeal, they should be awarded attorneys' fees.

Moreover, Rent Stabilization Code §2526.1(d) permits an award of attorneys' fees in overcharge cases. On that basis as well, Appellants should be awarded attorneys' fees.

CONCLUSION

For the foregoing reasons, the Order Under Review should be reversed.

Dated: New York, New York
February 22, 2019

Respectfully submitted,

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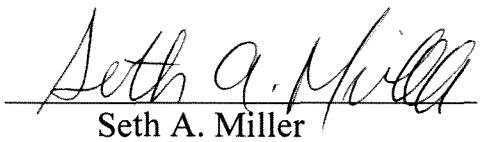
NEW YORK COURT OF APPEALS CERTIFICATE OF COMPLIANCE WITH PRINTING SPECIFICATIONS

SETH A. MILLER, an attorney duly admitted to practice law before the Courts of the State of New York, affirms the truth of the following pursuant to CPLR 2106:

1. I am a member of Collins, Dobkin & Miller, LLP, attorneys for Appellants JOEL RADEN and ODETTE RADEN.

2. This brief is in compliance with 22 N.Y.C.R.R. Part 500.1(j). It is 52 pages long and contains 13,100 words, counting all printed text on each page of the body of the brief. It was prepared on several computers using several versions of Corel WordPerfect. The typeface is Times New Roman, set in 14 point type, double spaced, throughout the body of the brief and in the headings. Footnotes are set in 12 point type, single-spaced.

Dated: New York, New York
February 22, 2019



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