To be Argued by:
JILLIAN N. BITTNER
(Time Requested: 30 Minutes)

Court of Appeals

of the

State of New York

In the Matter of the Application of

160 EAST 84TH STREET ASSOCIATES LLC,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

– against –

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Respondent.

APL-2023-00147

AD, 1st Dep't Case No. 2021-00718

New York Cty. Clerk's Ind. No. 157576/20

(For Continuation of Caption See Inside Cover)

BRIEF FOR PETITIONERS-APPELLANTS

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APL-2023-00148

AD, 1st Dep't Case Nos. 2021-02603 2021-02604 2021-02605 2021-02606

New York Cty. Clerk's Ind. Nos. 157558/20 157560/20 157579/20 157582/20

In the Matter of the Application of

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NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Respondent.

APL-2023-00149

AD, 1st Dep't Case Nos. 2021-02556 2021-03885 2021-03891

New York Cty. Clerk's Ind. No. 157557/20

In the Matter of the Application of

1700 YORK AVENUE ASSOCIATES, LLC,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

– against –

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Respondent.

APL-2023-00150

AD, 1st Dep't Case No. 2021-03068

New York Cty. Clerk's Ind. No. 157893/20

In the Matter of the Application of

87TH STREET SHERRY ASSOCIATES, LLC,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

– against –

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Respondent.

APL-2023-00151

AD, 1st Dep't Case Nos. 2021-02679 2021-02680 2021-02681

New York Cty. Clerk's Ind. Nos. 153992/20 153997/20 154002/20

In the Matter of the Application of

87TH STREET SHERRY ASSOCIATES LLC,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

– against –

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Respondent.

APL-2023-00152

AD, 1st Dep't Case No. 2021-00655

New York Cty. Clerk's Ind. No. 153995/20

In the Matter of the Application of

87TH STREET SHERRY ASSOCIATES LLC,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

– against –

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Respondent.

APL-2023-00153

AD, 1st Dep't Case No. 2021-00644

New York Cty. Clerk's Ind. No. 153999/20

In the Matter of the Application of

CLERMONT YORK ASSOCIATES, LLC,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

– against –

NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL,

Respondent-Respondent.

APL-2023-00154

AD, 1st Dep't Case No. 2021-03069

New York Cty. Clerk's Ind. No. 157776/20

In the Matter of the Application of

160 EAST 84TH STREET ASSOCIATES LLC,

Petitioner-Appellant,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

– against –

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent-Respondent.

APL-2024-00003

AD, 1st Dep't Case Nos. 2021-02599 2021-02600 2021-02601

New York Cty. Clerk's Ind. Nos. 157563/20 157573/20 157580/20

STATEMENT OF RELATED LITIGATION

Petitioners-Appellants have five CPLR Article 78 proceedings pending before the Supreme Court, New York County, all of which share the same legal issues to those raised herein, namely, the impact, if any, of Part D of the Housing Stability and Tenant Protection Act of 2019, on high rent/high income luxury deregulation petitions that were timely filed, processed and adjudicated to finality, prior to the Act's enactment on June 14, 2019.

Those actions, which are pending before Justice Debra A. James, include,

1. *Matter of the Application of 160 East 84th Street Associates LLC v New York State Div. of Hous. & Cmty Renewal*, (Sup Ct, NY County, Index No. 157566/20), fully submitted as of November 15, 2020;

2. *Matter of the Application of 160 East 84th Street Associates LLC v New York State Div. of Hous. & Cmty Renewal* (Sup Ct, NY County, Index No. 157569/20), fully submitted as of November 15, 2020;

3. *Matter of the Application of 1700 York Avenue Associates, LLC v New York State Div. of Hous. & Cmty Renewal*, (Sup Ct, NY County, Index No. 157580/20), fully submitted as of February 5, 2021;

4. *Matter of the Application of 87th Street Sherry Associates, LLC v New York State Div. of Hous. & Cmty Renewal*, (Sup Ct, NY County, Index No. 154006/20), fully submitted as of October 3, 2020; and,

5. *Matter of the Application of 1700 York Avenue Associates, LLC v New York State Div. of Hous. & Cmty Renewal*, (Sup Ct, NY County, Index No. 154004/20), fully submitted as of October 3, 2020.

A similar legal issue, although not identical, to that on appeal prompted the commencement of the Article 78, *Matter of the Application of Clermont York Associates LLC v New York State Div. of Hous. & Cmty Renewal*, (Sup Ct, NY County, Index No. 157267/23), assigned to Justice Arlene P. Bluth, and which has been adjourned by Stipulation to June 30, 2024, pending this Court's decision on appeal.

Related legal issues to those presented before the Court herein have arisen in the context of the following Supreme Court and Appellate Division proceedings, albeit these actions involve separate and distinct entities from Petitioners-Appellants.

Counsel for Petitioners-Appellants herein represent Petitioner-Respondent in *Matter of the Application of 305 Riverside Corp. v New York State Div. of Hous. & Cmty. Renewal*, (Sup Ct, NY County, Index No. 150659/23, Bluth, J.), which involves a related legal question. Respondent-Appellant DHCR perfected its appeal from this Decision/Order to the Appellate Division, First Department under Case No. 2023-01984; oral argument occurred on November 14, 2023, and upon

information and belief, the First Department is holding its decision in abeyance pending the outcome of this appeal.

Counsel for Petitioners-Appellants herein represent Petitioner-Respondent in *Matter of the Application of 225 Central Park North LLC v New York State Div. of Hous. & Cmty. Renewal*, (Sup Ct, NY County, Index No. 155440/23, Bluth, J.). Respondent DHCR filed a Notice of Appeal from this Decision/Order on January 12, 2024. The Appellate Division, First Department has assigned this appeal Case No. 2024-01370, and the time to perfect has not yet come due.

Counsel for Petitioners-Appellants herein represent Petitioner-Appellant in *Matter of the Application of Riverside Syndicate Inc. v New York State Div. of Hous. & Cmty. Renewal*, (Sup Ct, NY County, Index No. 160089/22, Kraus, J.). Petitioner-Appellant filed a Notice of Appeal from this Decision/Order dated May 5, 2023, and thereafter filed a motion to enlarge its time to perfect the appeal to the Appellate Division, First Department under Case No. 2023-00187 by the September Term, which was granted by the Appellate Division under Mot. No. 2024-00187.

Counsel for Petitioners-Appellants herein represent Petitioner-Appellant in *Matter of the Application of Georgia Properties Inc. v New York State Div. of Hous. & Cmty. Renewal*, (Sup Ct, NY County, Index No. 150620/23, Ally, J.). Petitioner-Appellant filed a Notice of Appeal from this Decision/Order dated

October 6, 2023, and intends to file a motion to enlarge its time to perfect the appeal to the Appellate Division, First Department assigned Case No. 2023-05066.

Counsel for Petitioners-Appellants herein represent Petitioner in *Matter of the Application of Hitchcock Plaza Inc. v New York State Div. of Hous. & Cmty. Renewal*, (Sup Ct, NY County, Index No. 160010/22) assigned to Justice Lori L. Sattler, fully submitted as of February 15, 2023; and *Matter of the Application of Hitchcock Plaza Inc. v New York State Div. of Hous. & Cmty. Renewal*, (Sup Ct, NY County, Index No. 159986/22) assigned to Justice Nancy M. Bannon, fully submitted as of February 15, 2023. Oral argument in both proceedings has been held in abeyance as the Court has expressed interest in this Court's ruling in the context of this appeal.

CORPORATE DISCLOSURE STATEMENT

Pursuant to § 500.1(f) and 500.13(a) of the Rules of the New York State Court of Appeals, Petitioners-Appellants 160 East 84th Street Associates LLC, 87th Street Sherry Associates LLC, 1700 York Avenue Associates, LLC, and, Clermont York Associates, LLC, certify that:

1. 160 East 84th Street Associates LLC is a limited liability company, with no parents, subsidiaries and/or affiliates, except its affiliation with Broadwall Management Corp., which manages it.

2. 87th Street Sherry Associates LLC is a limited liability company, with no parents, subsidiaries and/or affiliates, except its affiliation with Broadwall Management Corp., which manages it.

3. 1700 York Avenue Associates, LLC is a limited liability company, with no parents, subsidiaries and/or affiliates, except its affiliation with Broadwall Management Corp., which manages it.

4. Clermont York Associates, LLC is a limited liability company, with no parents, subsidiaries and/or affiliates, except its affiliation with Broadwall Management Corp., which manages it.

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PRELIMINARY STATEMENT

Petitioners-Appellants 160 East 84th Street Associates LLC, 87th Street Sherry Associates LLC, 1700 York Avenue Associates LLC and Clermont York Associates LLC (collectively, "Appellants") appeal from the Orders of the Appellate Division, First Department that held New York State Division of Housing and Community Renewal's ("DHCR") purported Explanatory Addenda, which effectively nullified 16 final and binding orders of luxury deregulation, was rational and proper. (R. 7-9; 12-13; 16-18; 22-23; 26-27; 30-31).[1]

Appellants are landlords of residential apartment buildings that received high rent/high income deregulation orders ("Deregulation Orders"), all of which were final, binding and no longer challengeable prior to the enactment of the Housing Stability and Tenant Protection Act of 2019 (the "HSTPA") (L 2019, Ch 36) on June 14, 2019.

Pursuant to Part D of the HSTPA, the Legislature repealed the luxury deregulation provisions of the Rent Stabilization Law, effective immediately. (L 2019, Ch 36, Part D). As a purported consequence of this repeal, albeit not sanctioned by the Rent Stabilization Law, the Rent Stabilization Code or the HSTPA as written, DHCR *sua sponte* issued "Explanatory Addenda to Order" (the "Addenda") to the then unchallengeable Deregulation Orders.

[1] Citations to the Record on Appeal in Appellants' Brief appear in the form "(R. ___)."

The Addenda erroneously retroactively applied Part D of the HSTPA to vitiate the Deregulation Orders, months, and in some instances over a year, after they had become final and binding, and were no longer subject to appeal.

The Addenda provided in pertinent part,

> If the lease in effect on the day the Rent Administrator's deregulation order was issued expired before June 14, 2019 the housing accommodation is deregulated.
>
> If the rent stabilized lease in effect on the day the Rent Administrator's deregulation order was issued expires on or after June 14, 2019, the housing accommodation remains regulated to the Rent Stabilization Law or ETPA and pursuant to HSTPA is not deregulated.

(R. 96).

As a consequence of the foregoing, and merely because Tenants' leases in effect on the date that each of the luxury deregulation orders issued expired after June 14, 2019, the Addenda nullified the Deregulation Orders. Therefore, the 16 apartments for which there existed final and binding Deregulation Orders, will remain permanently rent stabilized, not only for the present tenants, but for those in the future as well.

In affirming DHCR's "interpretation" of Part D of the HSTPA through the Addenda, the Appellate Division erroneously sanctioned its retroactive application. Employment of the HSTPA's enactment date of June 14, 2019 as the "cut-off" date

by which a tenant's lease must expire for luxury deregulation to be valid, permitted DHCR to claw back deregulation orders that were final and binding long before June 14, 2019, thereby unlawfully retroactively applying the HSTPA.

There is no language in the repeal of Rent Stabilization Law (Administrative Code of the City of NY) §§ 26-504.1 or 26-504.3 ("RSL") to remotely suggest the Legislature intended Part D to impact, let alone vitiate, a previously issued final and binding order of deregulation that was lawfully issued under that statute and was no longer subject to challenge. Rather, what is clear from the repeal of those sections of the RSL is that deregulation may no longer be applied for based upon high rent/high income. The effect of that repeal was limited by Part Q § 10 of Ch. 39 of the Laws of 2019 (colloquially referred to as the "Clean Up Bill"), which amended Part D § 8 of HSTPA to read as follows: "This act shall take effect immediately; provided however, that (i) any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated; * * *." The units herein were lawfully deregulated pursuant to unequivocal Deregulation Orders issued by DHCR, that were issued and became final prior to June 14, 2019.

RSL § 26-504.3, in effect at the time of the issuance of the Deregulation Orders provided that an apartment qualified for deregulation when the rent exceeded the deregulation threshold and the household income in the two preceding calendar years exceeded the income threshold. *See also* RSL former

§ 26-504.1. It is undisputed that the two statutory criteria were satisfied in the context of each Deregulation Order herein. There is no question that the plain language of RSL § 26-504.3 did not condition the finality or validity of an order of luxury deregulation on the expiration of the lease in effect at the time the order issued. Once a luxury deregulation order issued, and became final, the apartment was exempt as a matter of law and the tenant(s) therein no longer possessed any right to a rent stabilized renewal. That the lease in effect did not immediately end pursuant to DHCR's issuance of a deregulation order did not alter the apartment's deregulated status.

Even more egregious was the Appellate Division's affirmance of DHCR's unjustifiable decision to not process the 2016 luxury deregulations petitions in adherence with former RSL § 26-504.3. DHCR not only elected to ignore the mandatory processing timelines, which were non-discretionary, but applied the wrong statutory provisions to process the petitions, resulting in issuance of 2016 Deregulation Orders more than two years after they were statutorily mandated to issue. Had DHCR adhered to the statute, the Deregulation Orders would have been completely unaffected by the enactment of the HSTPA and the Addenda would have been inapplicable (assuming there is any validity to it otherwise).

DHCR does not have (and never did have) any jurisdictional or statutory authority to issue the Addenda or to change the effective terms of a previously issued order after it became final and thus, was no longer subject to review. Yet, the Appellate Division erroneously adopted DHCR's position that the Addenda "explained" the effect of Part D of the HSTPA.

Implicit in DHCR's adoption of amendments to the Rent Stabilization Code on November 8, 2023, which included an amendment explicitly sanctioning the actions achieved by the Addenda four years after the fact, is an acknowledgment by DHCR that no such support was in effect at the time the Addenda issued. Even if the amended Rent Stabilization Code had been in effect when the Addenda was issued, any such provisions would have been subject to legal challenge since a code section or amendment may not deprive either an owner or a tenant of rights granted by the Rent Stabilization Law. *See* Rent Stabilization Code (9 NYCRR) § 2520.3 ("RSC").

For the reasons set forth herein, the Orders of the Appellate Division, First Department should be reversed, the Addenda ruled a nullity and the final 16 Deregulation Orders reinstated pursuant to a ruling that they are to be given full force and effect as written.

STATEMENT OF QUESTIONS PRESENTED

1. Whether DHCR possessed the statutory authority to vitiate a previously issued, final and binding order of luxury deregulation through a device the Agency labeled an "Explanatory Addenda," and which had the effect of an Agency order.

The Appellate Division answered this question in the affirmative.

2. Whether the HSTPA's repeal of the luxury deregulation provisions, effective June 14, 2019, could be applied to previously issued luxury deregulation orders that had become final, and were no longer subject to any challenge before the enactment of the HSTPA.

The Appellate Division answered this question in the affirmative

3. Whether an order deregulating an apartment may be nullified by DHCR *sua sponte* due to the lease expiring after the law eliminating luxury deregulation became effective.

The Appellate Division answered this question in the affirmative

4. Whether DHCR's subsequent, 2023 enactment of a Rent Stabilization Code Amendment sanctioning the Addenda is an implicit admission that no such authority existed at the time the Addenda initially issued.

The First Department did not address this question, which first arose on November 8, 2023, the date that the Amendments to the Rent Stabilization Code were published in the New York State Register and adopted.

STATEMENT OF FACTS

A. The Parties

Appellants are owners of residential apartment buildings for which 16 high rent/high income (luxury) deregulation orders lawfully issued. The Deregulation Orders were final and binding prior to the enactment of the HSTPA.

Appellant 160 East 84th Street Associates LLC ("160 East 84th Street"), is the owner and landlord of the residential apartment building located at 160 East 84th Street, New York, NY.

Appellant 87th Street Sherry Associates LLC ("87th Street Sherry"), is the owner and landlord of the residential apartment building located at 125 East 87th Street, New York, NY.

Appellant 1700 York Avenue Associates LLC ("1700 York"), is the owner and landlord of the residential apartment building located at 1700 York Avenue, New York, NY.

Appellant Clermont York Associates LLC ("Clermont York"), is the owner and landlord of the residential apartment building located at 444 East 82nd Street, New York, NY.

Respondent DHCR is the administrative agency charged by law with the duty and obligation of administering the Rent Stabilization Law of 1969, as amended.

B. Luxury Deregulation Procedure Inclusive of Statutorily Mandated Time Constraints

The procedures for high income deregulation, including the mandatory processing timeline, were set forth in RSL § 26-504.3 (now repealed).

Under former RSL § 26-504.3(b), an owner of an apartment whose rent equaled or exceeded the deregulation threshold was permitted to send the tenant an income certification form ("ICF") on or before May 1st of each year and the tenant was required to respond within 30 days of such service.

If the income as certified was in excess of the deregulation income threshold in each of the two preceding calendar years, the owner was permitted to file the certification with DHCR on or before June 30th of such year, and the Agency was required, within 30 days of the filing, to issue an order deregulating the apartment upon the expiration of the existing lease. *See* former RSL § 26-504.3(b).

If the tenant(s) failed to return the certification within 30 days or the owner disputed the certification, the owner had the right to petition DHCR. DHCR was required to notify the tenant(s) within 20 days of the filing of the petition of their obligation to provide information necessary to verify whether the income exceeded the deregulation income threshold, and that the failure to respond within 60 days would result in an order of deregulation. *See* former RSL § 26-504.3(c)(1).

If the Department of Taxation and Finance ("DTF") determined the income exceeded the statutory threshold, DHCR was required to notify the parties by November 15th and the parties had 30 days within which to comment on the verification results. *See* former RSL § 26-504.3(c)(2).

Within 45 days after the expiration of the comment period, DHCR was required to issue an order, where appropriate, providing that the apartment shall be deregulated upon the expiration of the existing lease. *See* former RSL § 26-504.3(c)(2).

In the event the tenant(s) failed to provide the information required, DHCR was mandated to issue, on or before December 1st of such year, an order providing the apartment will not be subject to the RSL upon the expiration of the then existing lease. *See* former RSL § 26-504.3(c)(3).

C. <u>The 2016 Luxury Deregulation Orders</u>

Appellants possessed final and binding deregulation orders for the 2016 filing period with respect to two apartments, prior to the enactment date of the HSTPA.

160 East 84th Street obtained a Deregulation Order for the 2016 Filing Period with respect to Apartment [redacted]. On April 15, 2016, Appellant served Douglas Ryker, the tenant of Apt. [redacted], with an ICF for the 2016 filing period. (R. 803-808). Tenant certified a total household income in excess of $200,000 in each

of the two preceding calendar years (2014 and 2015). (R. 809-812). DHCR misprocessed this petition by adjudicating it under the incorrect provision of law. DHCR adjudicated the 2016 petition pursuant to former RSL § 26-504.3(c), instead of RSL § 26-504.3(b), resulting in the Deregulation Order first issuing on May 23, 2018 under Docket No. EQ410104LD, instead of by the statutorily mandated deadline of June 5, 2016, at which time the lease would have expired on August 31, 2017. (R. 797-799; 824).

Notwithstanding this misprocessing, the 2016 Deregulation Order stemmed from a petition that was filed, granted and became final when high rent/high income deregulation was in full force and effect pursuant to former RSL § 26-504.3 – that is, prior to June 14, 2019. *See also* former RSL § 26-504.1.

Clermont York obtained a Deregulation Order for the 2016 Filing Period with respect to Apartment [redacted]. On April 15, 2016, Appellant served Ryan and James Cunningham with an ICF for the 2016 filing period. (R. 2164-2169). Tenants failed to return the ICF. On June 22, 2016, Appellant filed the 2016 luxury deregulation petition with DHCR requesting verification of Tenants' income. (R. 2170). DHCR served the petition on Tenants, with a notice requesting information necessary for verification of the household income. In response, Tenants admitted an income in excess of $200,000 in each of the two preceding calendar years (which was also verified by DTF), resulting in the Rent

Administrator's issuance of the Deregulation Order for the 2016 Filing Period under Docket No. ER410437LD on April 5, 2019, despite the statute mandating this order issue more than two years earlier on January 29, 2017, when Tenants' lease would have expired on July 31, 2017. (R. 2150; 2158-2160; 2171; 2239).

Thirty-five (35) days after the issuance of the respective 2016 Deregulation Orders, when the time to file a Petition for Administrative Review ("PAR") challenging the orders had expired (which the Tenants did not file), the Deregulation Orders became final and were no longer subject to challenge. *See* RSC § 2529.2. The Deregulation Orders became final prior to the enactment of the HSTPA.

Had DHCR adhered to the statutory processing timelines memorialized in former RSL § 26-504.3, which were not discretionary, and properly adjudicated the 2016 petitions, the Deregulation Orders would have been completely unaffected by the enactment of the HSTPA. However, due to DHCR's negligent, if not willful, misprocessing of these petitions and delay, the leases in effect at the time the 2016 Deregulation Orders issued, expired post-June 14, 2019.

At the crux of this appeal is whether the lease expiration date can have any bearing on the validity or enforceability of the final and binding Deregulation Orders, which Appellants have demonstrated, pursuant to the governing statute and laws regarding retroactivity, it may not.

D. The 2018 Luxury Deregulation Orders

Appellants possessed Deregulation Orders for the 2018 filing period with respect to 14 apartments, all of which became final and binding prior to the enactment date of the HSTPA.

(i) 160 East 84th Street

Appellant 160 East 84th Street obtained eight Deregulation Orders for the 2018 filing period with respect to Apartments [redacted] and [redacted] when high rent/high income deregulation was still authorized by former RSL § 26-504.3. *See also* former RSL § 26-504.1.

On April 11, 2018, Appellant served ICF's for the 2018 filing period on the following tenants: Ali R. Latifi and Corey M. Baker, the tenants of Apt. [redacted]; Matthew Dunn of Apt. [redacted]; Anthony Karydakis of Apt. [redacted]; Gila and David Cohen of Apt. [redacted]; Scott and Kathy Griffin of Apt. [redacted]; Jennifer Ottinger of Apt. [redacted]; Afsaneh Latifi and Keyvan Kazemi of Apt. [redacted]; and, Steve Gottschalk of Apt. [redacted]. (R. 265-272; 392-397; 2356-2363; 2491-2498; 99-106; 523-529; 2635-2642; 654-660).

The Tenants of Apt. [redacted] completed the ICF, therein admitting a total household income in excess of $200,000 in each of the two preceding calendar years. On June 13, 2018, Appellant filed the 2018 luxury deregulation petition with DHCR. (R. 273-277). On October 19, 2018, the Rent Administrator issued

the Deregulation Order for the 2018 Filing Period under Docket No. GR410222LD, based on Tenants' admission of the household income in excess of the deregulation threshold. (R. 259-261). *See* former RSL § 26-504.3(b).

The Tenant of Apt. [redacted] failed to return the ICF. On June 13, 2018, Appellant filed the 2018 luxury deregulation petition with DHCR, requesting DHCR verify Tenant's income. (R. 398). DHCR served the petition on Tenant, together with a notice requesting Tenant provide information necessary for the verification of the household income. (R. 436-450). On March 22, 2019, the Rent Administrator issued the Deregulation Order for the 2018 Filing Period under Docket No. GR410225LD, based on Tenant's failure to respond to DHCR's notice. (R. 386-388). *See* former RSL § 26-504.3(c)(3).

The Tenant of Apt. [redacted] completed the ICF, therein admitting a total household income in excess of the deregulation threshold in the two preceding calendar years. On June 6, 2018, Appellant filed the 2018 luxury deregulation petition with DHCR. (R. 2364-2368). On October 19, 2018, the Rent Administrator issued the Deregulation Order for the 2018 Filing Period under Docket No. GR410106LD, based on Tenant's admission of the household income in excess of the deregulation threshold. (R. 2350-2352). *See* former RSL § 26-504.3(b).

The Tenants of Apt. [redacted] failed to return the ICF. On June 29, 2018, Appellant filed the 2018 luxury deregulation petition with DHCR, requesting DHCR verify Tenants' income. (R. 2499). DHCR served the petition on Tenants, together with a notice requesting Tenants provide information necessary for the verification of the household income. (R. 2544-2553). On April 5, 2019, the Rent Administrator issued the Deregulation Order for the 2018 Filing Period under Docket No. GR410643LD, based on Tenants' failure to respond to DHCR's notice. (R. 2485-2487). *See* former RSL § 26-504.3(c)(3).

The Tenants of Apt. [redacted] failed to return the ICF. On June 29, 2018, Appellant filed the 2018 luxury deregulation petition with DHCR, requesting DHCR verify Tenants' income. (R. 107). DHCR served the petition on Tenants, with a notice requesting Tenants provide information necessary for the verification of the household income. (R. 145-157). In response, Tenants admitted a household income in excess of $200,000 in each of the two preceding calendar years, resulting in the Rent Administrator's issuance of the Deregulation Order for the 2018 Filing Period under Docket No. GR410651LD on January 7, 2019. (R. 93-95).

The Tenant of Apt. [redacted] failed to return the ICF. On June 14, 2018, Appellant filed the 2018 luxury deregulation petition with DHCR, requesting DHCR verify Tenant's income. (R. 530). DHCR served the petition on Tenant,

with a notice requesting Tenant provide information necessary for the verification of the household income. (R. 568-581). On March 22, 2019, the Rent Administrator issued the Deregulation Order for the 2018 Filing Period under Docket No. GR410237LD, based on Tenant's failure to respond to DHCR's notice. (R. 517-519). *See* former RSL § 26-504.3(c)(3).

The Tenants of Apt. [redacted] completed the ICF, therein admitting a total household income in excess of the deregulation threshold in the two preceding calendar years. On June 14, 2018, Appellant filed the 2018 luxury deregulation petition with DHCR. (R. 2643-2648). On October 17, 2018, the Rent Administrator issued the Deregulation Order for the 2018 Filing Period under Docket No. GR410233LD, based on Tenants' admission of household income in excess of the deregulation threshold. (R. 2629-2631). *See* former RSL § 26-504.3(b).

The Tenant of Apt. [redacted] failed to return the ICF. On June 11, 2018, Appellant filed the 2018 luxury deregulation petition with DHCR, requesting DHCR verify Tenant's income. (R. 661). DHCR served the petition on Tenant, along with a notice requesting information necessary for verification of the household income. (R. 699-716). In response, Tenant admitted an income in excess of $200,000 in each of the two preceding calendar years, which resulted in

the Rent Administrator's issuance of the Deregulation Order for the 2018 Filing Period under Docket No. GR410160LD on November 14, 2018. (R. 648-650).

(ii) <u>87th Street Sherry</u>

Appellant 87th Street Sherry obtained five Deregulation Orders for the 2018 filing period with respect to Apartments [redacted] and [redacted].

On April 11, 2018, Appellant served ICF's for the 2018 filing period on the following tenants: Francesca Coloni, the tenant of Apt. [redacted]; Matthew and Mindy Gillis of Apt. [redacted]; Todd Hill of Apt. [redacted] Diane and Jane Davidowitz of Apt. [redacted]; and, Peter Calatozzo of Apt. [redacted]. (R. 1739-1744; 1605-1610; 1471-1476; 1885-1890; 2045-2050).

The Tenant of Apt. [redacted] failed to return the ICF. On June 29, 2018, Appellant filed the 2018 luxury deregulation petition with DHCR, requesting DHCR verify Tenant's income. (R. 1736). DHCR served the petition on Tenant, along with a notice requesting information necessary for verification of the household income. (R. 1736-1755). On April 5, 2019, the Rent Administrator issued the Deregulation Order for the 2018 Filing Period under Docket No. GR410654LD, based on Tenant's failure to respond to DHCR's notice. (R. 1713-1715). *See* former RSL § 26-504.3(c)(3).

The Tenants of Apt. [redacted] failed to return the ICF. On June 29, 2018, Appellant filed the 2018 luxury deregulation petition with DHCR, requesting DHCR verify Tenants' income. (R. 1602). DHCR served the petition on Tenants, with a notice requesting information necessary for verification of the household income. (R. 1602-1621). In response, Tenants admitted a household income in excess of $200,000 in each of the two preceding calendar years, which resulted in the Rent Administrator's issuance of the Deregulation Order for the 2018 Filing Period under Docket No. GR410644LD on January 7, 2019. (R. 1579-1581).

The Tenant of Apt. [redacted] failed to return the ICF. On June 14, 2018, Appellant filed the 2018 luxury deregulation petition with DHCR, requesting DHCR verify Tenant's income. (R. 1468). DHCR served the petition on Tenant, together with a notice requesting information necessary for verification of the household income. (R. 1468-1487). On May 3, 2019, the Rent Administrator issued the Deregulation Order for the 2018 Filing Period under Docket No. GR410250LD, based on Tenant's failure to respond to DHCR's notice. (R. 1445-1447). *See* former RSL § 26-504.3(c)(3).

The Tenants of Apt. [redacted] failed to return the ICF. On June 14, 2018, Appellant filed the 2018 luxury deregulation petition with DHCR, requesting DHCR verify Tenants' income. (R. 1882). DHCR served the petition on Tenants, with a notice requesting information necessary for verification of the household

income. (R. 1882-1904). In response, Tenants admitted a household income in excess of the deregulation threshold in each of the two preceding calendar years, resulting in issuance of the Rent Administrator's Deregulation Order for the 2018 Filing Period on February 27, 2019, under Docket No. GR410254LD. (R. 1851-1853).

The Tenant of Apt. [redacted] failed to return the ICF. On June 29, 2018, Appellant filed the 2018 luxury deregulation petition with DHCR, requesting DHCR verify Tenant's income. (R. 2042). DHCR served the petition on Tenant, with a notice requesting information necessary for verification of the household income. (R. 2042-2070). On April 5, 2019, the Rent Administrator issued the Deregulation Order for the 2018 Filing Period under Docket No. GR410647LD, based on Tenant's failure to respond to DHCR's notice. (R. 2009-2011). *See* former RSL § 26-504.3(c)(3).

(iii) <u>1700 York</u>

On April 11, 2018, Appellant 1700 York served Eugenie Piszcatowska of Apt. [redacted] with an ICF for the 2018 filing period. (R. 1141-1146). Tenant failed to return the ICF. On May 11, 2018, Appellant filed the 2018 luxury deregulation petition with DHCR, requesting DHCR verify Tenant's income. (R. 1147). On April 12, 2019, the Rent Administrator's Deregulation Order for the 2018 Filing

Period issued under Docket No. GQ410308LD, based on Tenant's failure to respond to DHCR's notice. (R. 1135-1137). *See* former RSL § 26-504.3(c)(3).

Thirty-five (35) days after the issuance of the above 14 Deregulation Orders for the 2018 Filing Period, when Tenants' time to file PARs challenging the respective deregulation orders expired (which none of the Tenants filed), the Deregulation Orders became final and were no longer subject to challenge. *See* RSC § 2529.2. The Deregulation Orders were therefore issued, and final and binding prior to the enactment of the HSTPA on June 14, 2019.

Each of the Tenants' leases in effect at the time the 2016 and 2018 Deregulation Orders issued expired after June 14, 2019.

E. <u>The Explanatory Addenda</u>

On September 6, 2019[2], months after the Deregulation Orders issued, and after each was final and binding, and no longer subject to challenge by any party, DHCR issued the Addenda that was purportedly based upon the HSTPA's repeal of RSL §§ 26-504.1 and 26-504.3.

The Addenda stated the following in pertinent part,

> The language, which makes the deregulation contingent upon the expiration of the lease in effect on the day the Rent Administrator's deregulation order was issued, was taken from the applicable ETPA and RSL provisions authorizing such orders. Effective June 14, 2019, the

[2] The Addenda issued with respect to 87th Street Sherry, Apartments [redacted] and [redacted], issued on September 20, 2019.

> Housing Stability and Tenant Protection Act of 2019 (HSTPA) and its subsequent amendments were enacted. HSTPA repealed the high rent/high income deregulation provisions under which the above order was issued and stated that the law is to 'take effect immediately.' Additionally, HSTPA provides that 'any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated.'
>
> If the lease in effect on the day the Rent Administrator's deregulation order was issued expired before June 14, 2019 the housing accommodation is deregulated.
>
> If the rent stabilized lease in effect on the day the Rent Administrator's deregulation order was issued expires on or after June 14, 2019, the housing accommodation remains regulated to the Rent Stabilization Law or ETPA and pursuant to HSTPA is not deregulated.

(R. 96)[3].

Because of the Addenda, every Deregulation Order issued pursuant to both the 2016 and 2018 filing periods was nullified.

The Addenda erroneously retroactively applied the HSTPA, despite the mandate of Part Q § 10 of the Clean Up Bill, which provided, *inter alia*, "(i) any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated." The 16 apartments were lawfully deregulated prior to June 14, 2019 pursuant to final Deregulation Orders issued by DHCR, and were entitled to remain that way.

[3] *See also* R. 262; 389; 520; 651; 800; 1138; 1448; 1582; 1716; 1855; 2012; 2161; 2353; 2488; 2632.

F. Appellants' PARs Challenging the Addenda

Appellants filed PARs challenging the Addenda issued with respect to each of the apartments. The Deputy Commissioner erroneously affirmed the propriety of the Addenda, which nullified the final and binding orders of luxury deregulation. (R. 85-92).

The PAR Orders state, albeit disingenuously, the Addenda's "purpose" was,

> …to explain the impact of the new law upon an order previously issued by the Division of Housing and Community Renewal (DHCR) Rent Administrator (RA). While that order may have appeared to grant the deregulation of the above subject apartment, it may not do so if there was a Rent Stabilized or ETPA lease between the parties at the time the order was issued that remained in effect on or after June 14, 2019.

(R. 86).[4]

The Deregulation Orders did not "appear" to deregulate the apartments at the expiration of the leases then in effect; rather, the orders unambiguously did so, and those orders could not be vitiated by an ex post facto "Addenda" months after they issued, predicated solely on the fact that the rent stabilized leases in effect on the date the Orders issued "expire[d] on or after June 14, 2019." DHCR's statement to the contrary is implausible considering, (i) the Deregulation Orders unequivocally deregulated the apartments and could not be vitiated by an "Addenda" issued

[4] *See also* R. 96, the Addenda.

months, if not years, after the orders became final; (ii) the Addenda modifies the actual orders issued by the Rent Administrator, even though it is neither characterized nor described as an order, but rather, as "explanatory"; and, (iii) the Addenda is accompanied by an attachment that notifies the parties of the right to challenge it by a PAR, the significance of which is that only an order (not an "explanation") is subject to such review. Thus, at a time when DHCR could no longer issue a further order or amend the Deregulation Orders, it attempted to circumvent that fact by implicitly admitting the Addenda was an order subject to review.

ORDERS OF SUPREME COURT

Appellants commenced CPLR Article 78 proceedings before Supreme Court, New York County seeking orders setting aside the PAR Orders that upheld the Addenda, and reinstating the final and binding 16 Deregulation Orders.

The Article 78 petitions objected to the Addenda, and the PAR Orders that upheld it based upon five points of law, (i) DHCR erroneously retroactively applied the HSTPA to the Deregulation Orders; (ii) DHCR improperly revived time-barred claims; (iii) retroactive application of the HSTPA is an unconstitutional denial of due process; (iv) DHCR lacked jurisdiction to issue the Addenda; and (v) the PAR Orders were arbitrary, capricious and contrary to law. (R. 59-84)[5].

The Article 78 petitions filed with respect to the two 2016 Deregulation Orders included the argument that the statutory timeline governing the 2016 luxury deregulation petitions clearly proscribes application of the HSTPA. (R. 765; 2127).

Justice Carol R. Edmead, Justice Arthur F. Engoron and Justice Eileen A. Rakower issued respective Decisions and Orders, all of which erroneously permitted DHCR's Addenda to vitiate the final, non-challengeable Deregulation

[5] *See also* R. 225-250; 352-377; 484-509; 614-639; 756-787; 1099-1125; 1409-1435; 1543-1570; 1678-1704; 1817-1843; 1973-1999; 2118-2149; 2315-2341; 2451-2476; 2595-2620.

Orders that had issued well in advance of the HSTPA's enactment, on the singular ground that the leases in question did not expire until after the statute's prospective repeal of luxury deregulation.

The Supreme Court espoused DHCR's misapplication of Part D of the HSTPA to hold, "…[DHCR] could not authorize the deregulation of rent stabilized apartments after June 14, 2019, even pursuant to previously issued deregulation orders, if such orders provided for the subject apartments to remain subject to stabilization until their pending lease terms expired, and the expiration dates fell after June 14, 2019." (R. 48; 1805; 2263). This statement overlooked the fact that there was nothing for DHCR to "authorize" since the Agency had already ordered the deregulation; the expiration of the lease, and transition in status, was a condition subsequent that would occur without any action by any party, and by a date certain known to both Appellants and Tenants.

The Supreme Court disregarded the fact that at the time the Addenda issued, Appellants' rights stemming from the orders had vested. All time limitations applicable to challenging the orders had expired. *See* RSC § 2529.2. DHCR no longer had jurisdiction to address the orders, either via modification or otherwise. Yet in an unprecedented act, the Addenda it issued did in fact do just that by stating that if the lease expired subsequent to the effective date of the HSTPA the orders were no longer effective.

ORDERS OF APPELLATE DIVISION, FIRST DEPARTMENT

On February 24, 2022, the First Department issued the first of its unanimous Decisions and Orders denying Appellants' appeals and affirming the Orders of the Supreme Court. (R. 7-9; 12-13; 16-18; 22-23; 26-27; 30-31).

The First Department affirmed the Judgments of Justice Edmead, holding,

> DHCR's explanatory addenda and orders denying the petitions for administrative review challenging the addenda are not arbitrary and capricious or affected by an error of law (internal citations omitted). The article 78 court correctly rejected petitioners' argument that DHCR's September 2019 addenda explaining the effect of HSPA part D on the deregulation orders improperly gave retroactive effect to the statute. Part D repealed certain rent deregulation provisions of the Rent Stabilization Law (L 2019, ch 36, pt D, § 5), effective June 14, 2019, the date of enactment (L 2019, ch 36, pt. D, § 8). Later in June 2019, part D was amended to state, in pertinent part: 'This act shall take effect immediately; provided however, that (i) any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated' (L 2019, ch 39, pt Q, § 10). Thet exception did not apply to the instant cases, in which the three subject leases expired on June 30, 2019. DHCR's deregulation orders, issued in January, February and April 2019, stated prospectively that the subject apartment units would become deregulated "[u]pon the expiration of the existing lease[s]."
>
> DHCR's addenda explained that the effect of HSTPA part D was to prohibit deregulation of units with leases expiring after June 14, 2019. That is, they simply noted the prospective effect of the June 14, 2019 statute on subsequently expiring leases. Thus, in this case, the statute 'affect[ed] only the propriety of prospective relief…[and] ha[d] no potentially problematic retroactive

> effect' (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 365[2020] [internal quotation marks omitted]).
>
> We reject petitioners' argument that the addenda improperly revived time-barred challenges to the deregulation orders (*see id.* at 371).

(R. 8-9).

The First Department's recitation of the facts in this first Order, specifically the dates the Deregulation Orders issued of January 7, 2019, February 27, 2019, and April 5, 2019 – months before the enactment of the HSTPA, demonstrate an acknowledgement that these orders were final and binding before the Addenda even came into existence in September 2019. (R. 9). Yet, the First Department affirmed the Addenda as "explanatory."

The conclusion of the Appellate Division is not supported by law, namely, former RSL § 26-504.3, in effect at the time Appellants filed and obtained the luxury deregulation orders. The Appellate Division incorrectly adopted the false premise advanced exclusively by DHCR that lease expiration was a condition precedent for the luxury deregulation of an apartment, despite there never being any such requirement in the law. *See* former RSL § 26-504.3; *see also* former RSL § 26-504.1; former RSC § 2520.11(s).

There is no precedent for DHCR to issue any explanatory Addenda, especially considering this document is an order that the Agency had no authority

to issue. If the Addenda had merely been "explanatory" it would not have had any legally binding effect. However, DHCR accompanied its issuance of the Addenda with a notice that the parties could challenge it by filing a PAR. (R. 96-98). Thus, at a time when DHCR no longer had authority over these orders, by virtue of the fact that the time limit for any challenge had expired, it effectively modified them by inserting a provision *nunc pro tunc*, that if the leases in effect at the time the orders issued expired after the enactment of the HSTPA, the orders were no longer enforceable.

The Orders of the Appellate Division sanction DHCR's egregious abuse of authority and blatant retroactive misapplication of Part D of the HSTPA that repealed luxury deregulation effective June 14, 2019. For that reason, the Orders of the Appellate Division warrant reversal.

ORDERS GRANTING LEAVE TO APPEAL TO THE COURT OF APPEALS

By Orders entered September 21, 2023 and January 11, 2024, respectively, this Court granted Appellants motions for leave to appeal. (R. 4; 5; 6; 11; 15; 20; 21; 25; 29).

POINT I

DHCR HAD NEITHER JURISDICTIONAL NOR STATUTORY AUTHORITY TO ISSUE THE ADDENDA; NOR WAS ANY SUCH AUTHORITY CONVEYED UPON DHCR BY THE HSTPA

Appellants filed 16 petitions for luxury deregulation when high rent/high income deregulation was permitted pursuant to former RSL § 26-504.3. *See also* former RSL § 26-504.1; former RSC § 2520.11(s).

Former RSL § 26-504.3, which was in effect from the date the Deregulation Orders issued through the date that they were no longer subject to challenge, required two conditions be satisfied, those being, (i) the apartment was occupied by persons with a total annual income in excess of the deregulation income threshold for the two preceding calendar years, and (ii) the legal regulated monthly rent exceeded the deregulation threshold. *See also* former RSL § 26-504.1. Once DHCR determined these conditions were met (neither of which involve the expiration of a tenant's lease), DHCR was statutorily mandated to issue an order of deregulation.

DHCR has never had the authority to deny the enforcement of a luxury deregulation order if the conditions for high income deregulation were satisfied. *See e.g. Classic Realty LLC v New York State Div. of Hous. & Cmty. Renewal*, 2 N.Y.3d 142, 146 (2005) (DHCR erroneously considered amended tax returns submitted by the tenant during the comment period, after DTF verified the tenant's

income exceeded $175,000. This Court held, "DHCR's ruling cannot stand as it invites abuse of the luxury decontrol procedures which contemplate a single verification, the result of which is binding on all parties unless it can be shown that DTF made an error. No such showing is present here, and deregulation is therefore required.")

The companion regulation, former RSC § 2520.11(s), which was in effect from the date the Deregulation Orders issued and for 35-days thereafter, similarly provided that this Code shall apply to all or any class of housing accommodations, except,

> (s) Upon the issuance of an order by the DHCR pursuant to the procedures set forth in Part 2531 of this Title, including orders resulting from default, housing accommodations which:…
> (2) have a legal regulated rent of $2,500 or more per month as of July 1, 2011 or after, and which are occupied by persons who had a total annual income in excess of $200,000 per annum for each of the two preceding calendar years, where the first of such two preceding calendar years is 2010 or later, with total annual income being defined in and subject to the limitations and process set forth in Part 2531 of this Title;…

There is no dispute that the statutory criteria were satisfied in the context of each deregulation petition, resulting in 16 Deregulation Orders pursuant to former RSL § 26-504.3. There is also no dispute that at the time of the enactment of the HSTPA on June 14, 2019, all 16 Deregulation Orders were already final and binding. The regulatory status of the apartments was legally determined. The fact

that the leases were not immediately terminated by the Deregulation Orders did not change the regulatory status of the apartments from exempt to stabilized, nor did it make the exempt status contingent on the expiration of the lease. Tenants' right to occupy would end by a date certain (*i.e.*, expiration of the lease then in effect), which was known by both Tenants and Appellants. An order of deregulation is final once the time to challenge it has expired. *See Dowling v Holland*, 245 A.D.2d 167 (1st Dept 1997) (Tenant's failure to file a timely PAR from a deregulation order resulted in the order being final and no longer subject to challenge and was grounds for dismissal of the tenant's Article 78 proceeding); *see also* RSC § 2529.2.

Yet, on September 6, 2019, and premised exclusively upon the enactment of the HSTPA, DHCR took it upon itself to issue the Addenda to "explain" the effect of Part D, which it contends nullified the previously issued orders if the leases in effect at the time they issued expired after the effective date of the Act, that being June 14, 2019. (R. 96-98).

Any interpretation of the Addenda as constituting an explanation of Part D requires this Court to insert language into the HSTPA that the Legislature did not include, which is prohibited. *Cf. Majewski v Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583 (1998) (The statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect

to its plain meaning); *see also People v Brown*, 25 N.Y.3d 247, 250 (2015) ("[T]he governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the Legislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used."). Luxury deregulation of the apartments at issue was authorized and final by virtue of the Deregulation Orders that went unchallenged by the parties and became final before the HSTPA was enacted.

The Deregulation Orders correctly recognized the criteria for luxury deregulation were satisfied. There is nothing in the Deregulation Orders, former RSL § 26-504.3 or Part D of the HSTPA that conditions luxury deregulation upon lease expiration, or for that matter, upon anything else. Rather, once the conditions for the issuance of a deregulation order were satisfied, the apartment became exempt from rent regulation and no further rent stabilized renewal lease was required past the expiration of the existing lease.

The expiration of the lease in effect was never a condition precedent for the issuance of an order granting luxury deregulation or the finality of any such order. *See e.g.* former RSL §§ 26-504.3(b) and (c). RSL §§ 26-504.3(b) and (c) refer to an "order" of deregulation; not a "conditional order" of deregulation.[6]

[6] Under former RSL § 26-504.3(e), the requirement that the landlord offer the tenant a fair market lease was the sole remaining obligation.

The expiration of a tenant's lease in effect at the time a deregulation order issued was not a triggering event, as it had zero impact on the finality or validity of the order or the deregulated status of the apartment. Part D does not provide, suggest or contain any language that addresses or prohibits the deregulation of units with leases expiring on or after June 14, 2019, where an order of luxury deregulation was final and binding prior to its enactment.

Former RSL § 26-504.3(e) confirms that luxury deregulation was not conditioned upon lease expiration, having provided,

> Upon receipt of such order of deregulation pursuant to this section, an owner shall offer the housing accommodation subject to such order to the tenant at a rent not in excess of the market rent, which for the purposes of this section means a rent obtainable in an arm's length transaction. Such rental offer shall be made by the owner in writing to the tenant by certified and regular mail and shall inform the tenant that such offer must be accepted in writing within ten days of receipt. The tenant shall respond within ten days after receipt of such offer. If the tenant declines the offer or fails to respond within such period, the owner may commence an action or proceeding for the eviction of such tenant.

Pursuant to former RSL § 26-504.3(e), an owner "shall" offer a fair market lease to the tenant "upon receipt" of the deregulation order. Where the tenant declined the owner's offer or did not respond within 10-days after receipt, the RSL authorized the owner to commence eviction proceedings.

The purpose of this provision is to further establish a transitional period whereby once the lease for the deregulated apartment expires, the tenant has the right to remain in occupancy (right of first refusal), provided they are willing to pay the market rent.[7] (R. 95). The lease expiration was a condition subsequent that would occur without any action by DHCR or any party, and by a date certain known to both tenant and owner.

Part D of the HSTPA repealed RSL §§ 26-504.1 and 26-504.3, the high rent/high income deregulation provisions. There is no language in the repeal that remotely suggests any intention to affect previously issued orders or regulatory status. This is clear from the Clean Up Bill, which amended Part D § 8 to read: "This act shall take effect immediately; provided however, that (i) any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated; * * *." The Deregulation Orders were final and binding; the 16 apartments were lawfully deregulated pursuant to statute, with no possible remaining challenge, prior to June 14, 2019.

There is no language in the repeal of RSL §§ 26-504.1 or 26-504.3 to suggest it could impact, let alone vitiate, a previously issued deregulation order. Rather, what is clear from the repeal of those sections is that deregulation may no

[7] By the time the Addenda issued, which was after the Deregulation Orders were final and binding, the tenants had already been lawfully tendered fair market leases.

longer be applied for based upon high rent/high income. No language in the repeal of either section addresses prior orders, especially those that are final, and thus, there was no right for DHCR to insert language into the HSTPA that simply is not there. As illustrated by the Clean Up Bill, the intention of the Legislature was to avoid any retrospective application of the repeal of luxury deregulation.

Markedly, there is no language in the HSTPA that indicates that an apartment that was luxury deregulated prior to the statute's enactment must remain stabilized if the lease expires after June 14, 2019. DHCR alone created this "rule." Lease end was not a condition precedent. Lease end was a contractual term that allowed the tenant to remain in occupancy as a regulated tenant and to maintain the status quo until the lease then in effect expired. DHCR is creating a legal fiction, elevating form over substance to reach an illogical result. There is no rational reason that a tenant whose lease expired June 13, 2019 would be deregulated by a final order of luxury deregulation, but another tenant whose lease expired the following day, June 14, 2019, would be regulated simply because of the fortuitous timing of the HSTPA.

The Appellate Division incorrectly overlooked the retroactive consequence of employing the HSTPA enactment date, which is not articulated by the Legislature, as the "cut-off" for deregulation. Even if lease expiration was a condition precedent, which it was not, the fact that the leases herein expired after

June 14, 2019 does not make such application of the HSTPA prospective, because DHCR's application reaches back to retroactively vitiate final and binding orders, which at the time the HSTPA was enacted, were no longer subject to challenge.

The Court must "interpret a statute so as to avoid an unreasonable or absurd application of the law." *Lubonty v U.S. Bank Nat'l Ass'n*, 34 N.Y.3d 250, 255 (2019), quoting *People v Garson*, 6 N.Y.3d 604, 614 (2006). Applying this principle, DHCR's and thereafter, the Court's "reading" of Part D as establishing a June 14, 2019 "cut off" date prior to which a lease must expire for a deregulation order, which was final and binding prior to June 14, 2019, to be valid, produces an inequitable and absurd result, and must be rejected.

Interpretation of Part D to annul the deregulation of the 16 apartments herein, which deregulation was known to the parties, was uncontested and occurred prior to the enactment of Part D, results in an outcome antagonistic to the purpose and design of the HSTPA as written by the Legislature, especially when the "Clean Up" Bill is taken into consideration. *See Lubonty*, 34 N.Y.3d 250; *see also People v Pabon*, 28 N.Y.3d 147 (2016).

A. Implicit in the adoption of an Amendment sanctioning DHCR's conduct, four-years after the fact, is an admission that DHCR did not possess the authority to issue the Addenda

There was no language in the RSL, the RSC or the HSTPA prior to the adoption of the Code amendments on November 8, 2023, that supports DHCR's issuance of the Addenda.

DHCR was keenly aware that it had no legal basis for claiming the HSTPA impacted previously issued orders of deregulation. That is evident by the fact that on November 8, 2023, DHCR enacted amendments to the RSC that were consistent with the actions it previously took, thus putting the proverbial cart before the horse. Even if the RSC amendments had been in effect when the Addenda was issued (which clearly was not the case) any such provisions would have been of dubious enforceability since a code section or amendment may not deprive either an owner or tenant of rights granted by the RSL.

Where an agency's actions or orders contravene existing law, those acts of the agency must be invalidated or nullified. *See e.g. Samson Mgmt. Co. LLC v Hubert*, 92 A.D.3d 932 (2d Dept 2012) ("Here, the Appellate Term properly determined that RSC § 2523.5(c)(2) is invalid to the extent it impairs a right granted to tenants by Real Property Law § 232-c.").

On August 31, 2022, DHCR proposed an amendment to the Code that would sanction the actions it took three years prior in issuing the Addenda. On November

8, 2023, the NYS Register published the amendments to the RSC, which first took effect as of that date. Included in the amendments is entirely new language that is now RSC § 2520.11(s)(1) and (2).

Implicit in DHCR's adoption of an amendment to the RSC that supports its right to issue the Addenda is that prior to November 8, 2023, no such right existed. Applying an amendment, that took effect November 8, 2023, to authorize the Agency's prior actions would clearly be improper, erroneous and unconstitutionally retroactive.

Subdivision (s) of 9 NYCRR § 2520.11 was amended as follows,

> (s)(1) Effective June 14, 2019, high rent high income deregulation is no longer applicable. Any apartment that was lawfully deregulated pursuant to Rent Stabilization Law sections 26-504.1 and 26-504.3 shall remain deregulated, notwithstanding that such sections were repealed pursuant to Chapters 36 and 39 of the Laws of 2019. For the purposes of this subdivision, lawful deregulation shall be defined as the issuance of an order by the DHCR pursuant to Rent Stabilization Law sections 26-504.1 and 26-504.3, repealed by Chapters 36 and 39 of the Laws of 2019, and the expiration of the lease in effect upon issuance of such order expiring prior to June 14, 2019.
>
> (2) Effective June 14, 2019, no further high rent high income deregulation proceedings pursuant to this Title may be commenced, and all pending applications shall be dismissed as not subject to deregulation. For the purposes of this paragraph, an application shall not be considered pending if the subject housing accommodation was lawfully deregulated pursuant to such application prior to June 14, 2019, and such lawful deregulation is subject to

> review as of June 14, 2019 in a Court of competent jurisdiction, before the commissioner pursuant to a petition for administrative review, or before the rent administrator subsequent to a remand for further consideration by the either the commissioner or a court.

The amendments to the Code (which are themselves erroneous) reveal three fatal flaws with the Addenda; (i) by adopting an amendment to the Code sanctioning its actions, DHCR implicitly acknowledges that no such support was in effect at the time the Addenda were issued in September 2019; (ii) the amendment, having been adopted and effective as of November 8, 2023, cannot be applied retroactively as any retroactive application is unconstitutional (*see Matter of Regina Metropolitan Co., LLC v New York State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332 (2020) ("*Regina*")); and (iii) it is impermissible for an RSC amendment to deprive a party of rights granted by the RSL which, in this instance, was the right to obtain an order of deregulation and to utilize it. Nor was there any basis for the amendments to re-define and expand the meaning of "lawful deregulation" to include that "the expiration of the lease in effect upon issuance of such order expir[e] prior to June 14, 2019." *See* RSC § 2520.11(s)(1). The Legislature did not include any language in Part D to suggest June 14, 2019 as an intended "cut-off" date for the effectiveness of prior, final orders.

(i) An Amendment to the RSC requires rigorous compliance with SAPA

DHCR cannot deny it is required to comply with the RSL and Code as written and that it has no right to exceed the boundaries of either. In this instance, it certainly did exceed those boundaries. DHCR now attempts to garner support for its actions pursuant to the enactment of an amendment to RSC § 2520.11(s). For the amendment to become law, DHCR was required to comply with the New York State Administrative Procedure Act ("SAPA"), which mandates, *inter alia*, procedures for the creation of rules and regulations. The creation of rules and regulations must be promulgated in "substantial compliance" with SAPA's provisions, and include hearings and public commentary to ensure the propriety of any proposed change. *See* SAPA § 202[8]; *Owner Operator Independent Drivers Ass'n., Inc. v New York State Dept. of Transportation*, 205 A.D.3d 53 (3d Dept 2022).

At the time the Addenda was issued, obviously none of SAPA's requirements were satisfied. The amendment was not even proposed by means of publication in the State Register until August 31, 2022, some three years after the Addenda issued. *See* SAPA § 202[1][a] (Prior to the adoption of a rule, an agency must submit a notice of proposed rulemaking to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on

the proposed rule). Yet, DHCR acted as if the amendments that were first adopted on November 8, 2023, were in fact, law. That is completely impermissible.

SAPA sets forth numerous safeguards that must be complied with before a Code amendment becomes effective. *See* SAPA § 202. DHCR improperly circumvented those safeguards by taking legally unsanctioned actions prior to even promulgating the amendment, that arguably, could have permitted the issuance of the Addenda after adoption.

B. DHCR lacked any jurisdiction or other authority to issue the Addenda, which effectively nullified previously issued, final orders of deregulation.

The RSC sets forth limited, specific circumstances in which DHCR has the power to modify or even annul prior orders, none of which are in any way applicable to the Addenda.

RSC § 2527.8, entitled "Modification or revocation of orders" provides,

> The DHCR, on application of either party, or on its own initiative, and upon notice to all parties affected, may issue a superseding order modifying or revoking any order issued by it under this or any previous Code where the DHCR finds that such order was the result of illegality, irregularity in vital matters or fraud.

There has never been a claim, nor can there be, that any of the final orders of deregulation were the result of illegality, irregularity in vital matters or fraud. Thus, the Addenda is not sanctioned by RSC § 2527.8.

RSC § 2529.9, "Modification or revocation of orders by the Commissioner," similarly empowers DHCR to alter its orders in limited circumstances, none of which is applicable to the Addenda. It provides in pertinent part,

> The commissioner, on application of either party or on his own initiative, and upon notice to all parties affected, may, prior to the date that a proceeding for judicial review has been commenced in the supreme court pursuant to Article 78 of the Civil Practice Law and Rules, issue a superseding order modifying or revoking any order issued by him under this or any other previous Code where he finds that such order was the result of illegality, irregularity in vital matters or fraud.

Once again, the lack of any finding of illegality, irregularity in vital matters or fraud proscribes any reliance by DHCR on this section.

DHCR is permitted by RSC § 2527.11 to issue advisory opinions and operational bulletins. That section equally fails to provide jurisdictional support for the Addenda as it is neither an opinion nor a bulletin. That section provides,

> (a) The DHCR may render advisory opinions as to the DHCR's interpretation of the RSL, this Code or procedures, on the DHCR's own initiative or at the request of a party.
> (b) In addition to the advisory opinion issued under subdivision (a), the DHCR may take such other required and appropriate action as it deems necessary for the timely implementation of the RSL and this Code, and for the preservation of regulated housing in accordance with section 2510.3 of this Title (Construction and Implementation). Such other action may include the issuance and updating of schedules, forms, instructions, and the official interpretative opinions and explanatory statements of general policy

> of the Commissioner, including Operational Bulletins, with respect to the RSL and this Code.

The Addenda fails to fall within the purview of DHCR's authority under RSC § 2527.11, as it does any other section of the RSL and Code. In fact, nowhere is the word "Addenda" mentioned in either the RSL or Code; nor is there any precedent for DHCR issuing any such nullification of a previously issued final order.

To the extent that Supreme Court, Justice Edmead, found the Addenda was merely guidance, it was in error as attached to the Addenda was a "Notice of Right to Administrative Review" that provided the parties the right to appeal therefrom. (R. 42 *but see* R. 98).

Even if DHCR had argued it was relying on RSC §§ 2527.8 or 2529.9, its *sua sponte* issuance of the Addenda, without notice to the parties, would be fatal to the Addenda's effectiveness. *See Laub v New York State Div. of Hous. and Cmty. Renewal,* 176 A.D.2d 560 (1st Dept 1991) (DHCR's revocation of order was improper in that tenant was not provided with prompt notice that it was reconsidering its prior order and the irregularity cited by DHCR, that being failure to mail a notice that included information that had previously been provided in earlier notices, is not an irregularity in a vital matter).

As this Court recognized in *Matter of Peckham v Calogero,* 54 A.D.3d 27, 28 (1st Dept 2008), *aff'd.* 12 N.Y.3d 424 (2009), when an "irregularity in a vital

matter" is presented and the agency is not merely attempting to reach a different determination, a remand is appropriate despite the otherwise final nature of the questioned order. While the absence of any such irregularity is clear, what DHCR nevertheless did through the Addenda was to impermissibly reach a different determination, that being nullifying the orders by conditioning their effectiveness upon when the lease expired. In *Peckham*, 12 N.Y.3d at 432, this Court noted, "…the question here is not whether DHCR can change its regulations, standards or even orders (it certainly can), but when. Here, DHCR may not get what amounts to a second chance to rule on Owner's application *after* setting and applying a new standard …".

"Absent ambiguity the courts may not resort to rules of construction to [alter] the scope and application of a statute because no such rule gives the court discretion to declare the intent of the law when the words are unequivocal." *Kuzmich v 50 Murray Street Acquisition LLC*, 34 N.Y.S.3d 84 (2019).

The Addenda is nothing more than an impermissible attempt by DHCR to expand its authority over its orders beyond that which is granted by law. In so doing, the Agency has wrongfully reached a different determination that is contrary to the original order, but which is premised on the identical facts. As such, the Addenda must be ruled a nullity.

POINT II

THE ADDENDA CONSTITUTES AN IMPERMISSIBLE RETROACTIVE APPLICATION OF PART D OF THE HSTPA THAT IS NOT AUTHORIZED BY THE LEGISLATURE

The Appellate Division's affirmance of June 14, 2019 as a "cut-off" date, prior to which a tenant's lease must expire for a final order of luxury deregulation to be valid, has improper retroactive consequences. That the leases in question expired after June 14, 2019, does not make application of the HSTPA prospective, since the Deregulation Orders were final and binding pre-HSTPA.

The Addenda constitutes a retroactive application of the HSTPA, as the Addenda operates to supersede, modify and ultimately revoke the terms of the Deregulation Orders in which Appellants unmistakably had significant and substantial interests that vested prior to the enactment of Part D.

This Court previously ruled against retroactive application of Part F of the HSTPA in *Regina* and, by extension, should similarly rule as such in this matter. The Orders of the Appellate Division violate the principles enunciated in *Regina*, and recently confirmed in *Casey v Whitehouse Estates, Inc.*, 39 N.Y.3d 1104 (2023).

Applying the HSTPA to luxury deregulation orders that were final prior to its enactment, is retroactive. *See e.g. Matter of County of St. Lawrence v Daines*, 81 A.D.3d 212, 216 (3d Dept 2011) ("However, where, as here, application of a

statute serves to 'impair vested rights or alter past transactions or considerations,' it is retroactive in the true sense (citations omitted)."); *see also Matter of Harris v Israel*, 191 A.D.3d 468 (1st Dept 2021) ("*Harris*"). Since the Addenda was used to nullify the Deregulation Orders after they were final, application of Part D of the HSTPA in this manner, constitutes an impermissible retroactive application of that statute in the truest sense, regardless of the nomenclature used by the DHCR or the Courts, to justify its unlawful application. *See, e.g. Matter of County of St. Lawrence*, 81 A.D.3d at 216 (Where the transactions were complete and reimbursement was owed prior to the effective date of the Medicaid Cap statute, "application of that statute to petitioner's claims would render it 'retroactive'…".); *see also Harris*; *Regina*.

This Court in *Regina*, 35 N.Y.3d at 378-379, refused to apply Part F of the HSTPA retroactively to rent overcharge claims that accrued prior to the enactment of the HSTPA, holding,

> Likewise, in *James Square*, we invalidated the retroactive application of amendments to the Empire Zones Program Act that changed the criteria for receipt of tax benefits, noting businesses had no forewarning of the change, and that a 16-month period of retroactivity was excessive because businesses had 'gained a reasonable expectation that they would secure repose in the existing tax scheme' (21 N.Y.3d at 248–250, 970 N.Y.S.2d 888, 993 N.E.2d 374 [internal quotation marks omitted]). We emphasized that retroactively denying tax credits did not further any aim of the statute – by spurring investment or preventing abuses of the program - but 'simply punished participants

> more harshly for behavior that already occurred and that they could not alter' (*id.* at 250, 970 N.Y.S.2d 888, 993 N.E.2d 374). Unlike the statutes at issue in *R. A. Gray & Co.*, *Turner Elkhorn* or *American Economy*, where the retroactive scope was directly related or integral to furtherance of the legislative goals, in *Chrysler Props.* and *James Square* we concluded retroactive application would be irrational given the extent of settled interests, degree of repose and lack of a permissible basis for unsettling those interests.

Where a statute directs that it is to take effect immediately, it does not have retroactive operation or effect. *See Murphy v Board of Education, North Bellmore Union Free School District*, 104 A.D.2d 796 (2d Dept 1984); *see also Regina*, 35 N.Y.3d at 370; *Shielcrawt v Moffett*, 294 N.Y. 180, 190-191 (1945).

Language in a statute that it shall "take effect immediately" does not support retroactive application. *See, e.g., Regina*, 35 N.Y.3d at 365 ("A statute has retroactive effect if 'it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed,' thus impacting 'substantive' rights (citation omitted)"); *see also State ex rel. Spitzer v Daicel Chemical Industries, Ltd.*, 42 A.D.3d 301 (1st Dept 2007). This maxim of statutory interpretation was erroneously overlooked by the Appellate Division.

The holding in *Regina* is not limited to Part F of the HSTPA. *See Harris*.

The applicable precedent that this Court should apply, and which should have been applied, in resolving the issues raised herein is *Matter of Shafer v Gabel*,

16 N.Y.2d 513, *decision clarified*, 16 N.Y.2d 1078 (1965). In *Shafer*, this Court addressed whether a subsequent change in the law could be applied retroactively to annul a prior final order of the state local rent administrator to defeat the reasonable expectations of a property owner who purchased property expecting a 6% rate of return based upon the purchase price under the law in effect at time of purchase. *Shafer*, 16 N.Y.2d at 515-516. This Court held that such retroactive application was improper. *Id*.

A. The Addenda impairs an existing right possessed by Appellants

The Addenda is a nullity because it runs afoul of the retroactivity prohibition in *Landgraf v USI Film Products*, 511 U.S. 244 (1994) ("*Landgraf*"), relied upon by this Court in *Regina*. *Landgraf* held that provisions of Civil Rights Act of 1991 which created a right to recover compensatory and punitive damages and a right to a trial by jury for damages claims did not apply to cases pending on appeal when the statute was enacted.

The Addenda necessarily impairs existing legal and property rights that Appellants possessed, namely the Deregulation Orders. The Deregulation Orders conferred upon Appellants the right to 16 deregulated apartments and the economic benefits flowing from the apartments' deregulated status.

Regardless of DHCR's and the Court's deliberate avoidance of the use of the phrase "retroactive," its application of the HSTPA retroactively impacted the 2016

and 2018 Deregulation Orders. *See also American Economy Ins. Co. v State of New York*, 30 N.Y.3d 136, 149 (2017), *cert denied*, 584 US —, 138 S Ct 2601 (2018).

Appellants had settled interests; they possessed deregulated apartments under the RSL in effect in 2016 and 2018. DHCR's Addenda destroyed those settled interests, which, under *Regina*, is an unconstitutional impairment of a vested right. By eliminating the constitutionally protected economic benefits that Appellants would have realized by virtue of the deregulations, the Addenda also violated *Landgraf.*

The retroactive effect of the HSTPA in the form of the Addenda and the Appellate Division's upholding of the Addenda is a violation of Appellants' right to due process. *See e.g*. *Regina*; *Landgraf*; and *Harris*. High rent/high income deregulation was proper when the Deregulation Orders issued. The HSTPA does not contain language authorizing DHCR to vitiate these final orders, let alone through the subterfuge of an Addenda. Because the Addenda, as applied to the Deregulation Orders, impacts a substantive right possessed by Appellants and has a retroactive effect, the prohibition against retroactivity is triggered.

As this Court held in *Shielcrawt*, 294 N.Y. at 190-91,

> Nonetheless the statute creates a remedy for a wrong for which previously there was no remedy, and it interferes with the antecedent right of small stockholders to maintain derivative actions in [*sic*] behalf of the

> corporation and gives to corporations rights which they had not previously enjoyed. If the statute had been in effect when the plaintiffs instituted this action they might not have been able or willing to give the required security; if applied to pending actions it might prevent these plaintiffs from trying the action after they had spent time and money in preparing it for trial. Though the Legislature has found that the statute is a just and reasonable solution of a serious problem, it does not follow that it would decide that it would be just and reasonable to apply the statute to actions then pending. Under well established principles the statute may not be so applied unless the Legislature has disclosed an intention that it should be so applied.

There is a "deep rooted" presumption in the law against a statute being retroactive, a fact ignored by the First Department.

As noted by this Court in *Regina*, 35 N.Y.3d at 370,

> As opposed to a decisional change in the common law – which typically but not invariably applies 'to all cases still in the normal litigating process' (citation omitted) – generally, a statute is presumed to apply only prospectively (*Majewski*, 91 N.Y.2d at 584, 673 N.Y.S.2d 966, 696 N.E.2d 978). Retroactive legislation is viewed with 'great suspicion' (*Matter of Chrysler Props. v. Morris*, 23 N.Y.2d 515, 521, 297 N.Y.S.2d 723, 245 N.E.2d 395 [1969]). This 'deeply rooted' presumption against retroactivity is based on '[e]lementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly' (*Landgraf*, 511 U.S. at 265, 114 S.Ct. 1483). As the Supreme Court has cautioned, careful consideration of retroactive statutes is warranted because '[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration' and '[i]ts responsivity to political pressures poses a risk that it may

> be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals' (*id.* at 266, 114 S.Ct. 1483).

The Deregulation Orders were not in the "normal litigating process;" each of the orders were final, no longer active, pending or subject to review at the time the law changed.

Unlike cases where retroactive application rationally furthered a legislative goal, or instances intended to prevent legislation from being undermined by those seeking to escape its impact before enactment, there is no indication here that the Legislature considered the disruptive effect on Appellants' settled expectations, much less had a rational justification for that result. Tenants with both a rent and an income that exceeded the then applicable deregulation thresholds are not the class of tenants which the RSL, or the repeal of luxury deregulation, was intended to protect. *See, for example, Gersten v 56 7th Ave LLC*, 88 A.D.3d 189, 192 (1st Dept 2011) (plaintiffs were "not the typical tenants intended to be protected by rent regulation***.") (Upholding a final prior deregulation order in the face of a *Roberts v Tishman Speyer Props., L.P.*, 13 N.Y.3d 738 [2009] claim).

POINT III

THE LAW IN EFFECT AT THE TIME APPELLANTS FILED THE PETITIONS, AND OBTAINED THE DEREGULATION ORDERS, GOVERNS

The issuance of the Addenda stands in direct contravention of the principle that the law in effect at the time Appellant filed the deregulation petitions controls. *See e.g*. *Regina*; *Chatsworth Realty Corp. v New York State Div. of Hous. & Cmty. Renewal*, 2007 WL 6881705 (Sup Ct NY County 2007), fn 1 ("In 1997, the Rent Stabilization Law and Code were amended to lower the income threshold to $175,000. The instant dispute arose before the effective date of that amendment (see RSL § 26-504.1; RSC § 2511.2)").

The applicable precedent is *Shafer*, 16 N.Y.2d 513, discussed *supra*. Likewise, in *Mengoni v New York State Div. of Hous. & Cmty. Renewal*, 97 N.Y.2d 630 (2001), this Court held the four-year statute of limitations set forth in former RSL § 26-516, as amended by the Rent Regulation Reform Act of 1997 (RRRA-97, L 1997, Ch 116) §§ 33, 46, does not apply to rent overcharge complaints filed prior to April 1, 1984, the effective date of RSL § 26-516. The Court explicitly held the law in effect at the time the complaint was filed applies; in the context of *Mengoni*, that meant the law in effect prior to April 1, 1984 governed. *See also Century Tower Assocs. v State Div. of Hous. & Cmty. Renewal*, 83 N.Y.2d 819 (1994).

The Court of Appeals, in interpreting the Legislature's actions in 1997, held,

> In 1997 the Legislature passed the Rent Regulation Reform Act of 1997. Section 33 of the RRRA–97 amended RSL § 26–516 to preclude DHCR from calculating rent overcharges based upon a rent history prior to the four-year period preceding the filing of a complaint "pursuant to this subdivision." Section 46 of RRRA–97 provides that section 33 "shall apply to any action or proceeding pending in any court or any application, complaint, or proceeding before an administrative agency on [its] effective date." We reject the contention that this language applies to cases brought before April 1, 1984. Because RSL § 26–516 became effective April 1, 1984, complaints filed prior to that date "are not complaints pursuant to section 26–516(a), and * * * [§] 33 [of the RRRA–97] is by its terms inapplicable to them" (*Matter of Greenberg Real Estate v. Division of Hous. & Community Renewal,* 258 A.D.2d 313, 685 N.Y.S.2d 188).
>
> In both cases now before us, the rent overcharge complaints were filed before April 1, 1984, and section 33 is therefore inapplicable. The overcharge complaints are thus not limited to a four-year limitations period, and in both cases, it was appropriate to review the entire rental history.

Mengoni, 97 N.Y.2d at 633-34.

In *Matter of Amsterdam-Manhattan Assoc. v Joy*, 42 N.Y.2d 941 (1977), this Court determined that landlords who timely filed for electrical exclusion orders were entitled to have their applications determined in accordance with the law in existence at the time of the filing.

DHCR's application of a change in law or regulation to pending proceedings has previously been rejected on due process grounds. In *AEJ 534 East 88th LLC v New York State Div. of Hous. & Cmty. Renewal*, Index No. 157908/18 (Sup Ct NY County 2018)[8], the court revoked DHCR's retroactive application of amended RSC § 2526.1(a)(3)(iii), which concerns setting a rent after extended vacancy or temporary exemption from rent stabilization.

A. Had DHCR complied with RSL § 26-504.3's mandatory deadlines, the tenancies that were the subject of the 2016 Deregulation Orders would have expired prior to the enactment of the HSTPA and thus, for this reason alone, the Addenda should not impact those tenancies.

The two 2016 Deregulation Orders must be reinstated since had DHCR complied with statutorily mandated time limitations, the leases for these apartments would have expired prior to the HSTPA's enactment on June 14, 2019 and been wholly unaffected by any change in the law. DHCR lacked the authority to divest itself of its obligations under the RSL as they existed through June 13, 2019. Respondent further could not divest itself of its duty to adjudicate a

[8] On appeal, the First Department held, "We do find, however, that DHCR's determination was affected by an error of law to the extent that it applied its own policy of 'bridging the gap' to determine the base date rent of the apartment using the last filed registration statement, which was in 1990 when the legal regulated rent was $398.15. This methodology is wholly inconsistent with how a rent overcharge should be calculated, leading us to modify Supreme Court and vacate the Deputy Commissioner's determination of what the legal rent was on the base date." *Matter of AEJ 534 E. 88th, LLC v New York State Div. of Hous. & Cmty. Renewal*, 194 A.D.3d 464, 471 (1st Dept 2021).

deregulation petition in adherence with the governing provision of law three years prior to the enactment of the HSTPA.

DHCR was statutorily mandated to issue the 2016 Deregulation Order with respect to Apt. [redacted] at 160 East 84th Street by June 5, 2016. Appellant filed the petition for deregulation on May 5, 2016. (R. 809). Based on Tenant's admission of income in excess of the deregulation threshold (R. 812), an order of deregulation was required to issue pursuant to statute by June 5, 2016. *See* former RSL § 26-504.3(b). Tenant's lease in effect when the deregulation order was statutorily mandated to issue was for the term of September 1, 2015 through August 31, 2017, and thus, would have been unaffected by the HSTPA or any Addenda. (R. 824).

The fact that it took DHCR until May 23, 2018 to issue an order statutorily required to issue June 5, 2016, is *prima facie* evidence that DHCR was at a minimum, negligent, in processing this 2016 petition. DHCR's failure to comply with former RSL § 26-504.3(b) was not limited to its disregard of the statutory deadlines for processing, but involved misprocessing the petition under the incorrect provision of law.

For reasons never articulated by DHCR, the Agency disregarded Tenant's admission of income and elected to process the petition under former RSL § 26-504.3(c), although it was subsection (b) that governed. Had DHCR timely processed the petition under the correct provision of law, the Addenda would have

been inapplicable to this matter, since Tenant's lease would have expired prior to the enactment of the HSTPA. Instead, because of DHCR's inexcusable delay and misprocessing, Appellant was required to renew Tenant's lease, which renewal expired after the effective date of the HSTPA.

DHCR was statutorily mandated to issue the 2016 Deregulation Order with respect to Apt. [redacted] at 444 East 82nd Street by January 29, 2017. Although Tenants did not respond to service of the ICF for the 2016 filing period, in response to DHCR's service of the petition together with a request for information necessary for DTF to verify the household income, Tenants admitted a total household income in excess of $200,000 for the two preceding calendar years (2014 and 2015). (R. 2150).

DHCR unjustifiably elected not to process this 2016 petition in adherence with former RSL § 26-504.3(c), ignoring not only the mandatory timelines, but Tenants' admission; instead, DHCR waited more than two years to issue the order of deregulation on April 5, 2019. Proper adjudication of the petition required DHCR issue the Deregulation Order at a time when Tenants' lease in effect would have expired on July 31, 2017. (R. 2171).

The procedures for the adjudication of a high-income deregulation petitions were set forth in former RSL § 26-504.3 and were unequivocal. DHCR ignored

every statutory timeline set forth in the RSL and Code. DHCR was both negligent and deliberately dilatory.

Had DHCR complied with the statute (former RSL § 26-504.3(c)), a determination of the deregulation petitions for the 2016 filing period, would have issued on the merits, two years prior to the enactment of the HSTPA.

This Court in deciding *Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. & Cmty. Renewal*, 10 N.Y.3d 474 (2008), could never have intended that DHCR would use its utter disregard for statutory processing periods as a sword, not a shield, to absolve itself of all responsibility (and liability) for its complete failure to comply with statutory obligations for three years prior to the enactment of the HSTPA. Unlike the tenant in *IG Second Generation Partners L.P.*, who did not present any evidence that the delay in the resolution of their fair market rent appeal was the result of DHCR's negligent or deliberate conduct, Appellants have categorically demonstrated that the Agency singlehandedly disregarded RSL § 26-504.3. *See IG Second Generation Partners L.P.*, 10 N.Y.3d at 483.

Any interruption in Appellants' rights, specifically with respect to the 2016 Deregulation Orders, cannot be attributed to the enactment of the HSTPA.

Supreme Court Justice Arlene P. Bluth rejected DHCR's attempt to justify its wholesale abdication of its responsibility for complying with the statutorily

mandated time limits contained in former RSL § 26-504.3 in a Decision and Order, entered April 17, 2023, in *Matter of the Application of 305 Riverside Corp. v New York State Div. of Hous. & Cmty. Renewal*, (Sup Ct, NY County, Index No. 150659/23)[9], which granted owner's Article 78 challenging, *inter alia*, DHCR's failure to process timely filed luxury deregulation petitions for the 2017 and 2018 filing periods. (*See* C-1 – C-6). Justice Bluth was unpersuaded by DHCR's claim that the Agency was not obligated to adhere to the statutorily mandated time periods, holding that the purported cut-off date of June 14, 2019 only passed due to DHCR's failure to process the luxury deregulation petitions in accordance with the statutorily imposed time limits. (*See* C-4).[10]

Justice Bluth held,

> Respondent's decision in the petition for administrative review fails to adequately address or explain its rationale on this issue. It concludes that 'The fact that these 2017 and 2018 petitions would have been determined based on the tenant's incomes in 2015, 2016 and 2017, events that occurred before the passage of HSTPA, is of no matter given that this apartment could not have been deregulated after June 14, 2019, which is a prospective determination' (NYSCEF Doc. No. 18 at 3). That circular reasoning does not compel the Court to deny the petition. The only reason, at least on these papers, that a decision on the merits was not rendered was because of respondent's failure to issue a timely decision. (C-5).

[9] DHCR perfected its appeal to the Appellate Division, First Department under Case No. 2023-01984; oral argument occurred on November 14, 2023, and upon information and belief, the First Department is holding its decision in abeyance pending the outcome of this appeal.
[10] Citations to Appellants' Compendium appear in the form "(C-___)."

Justice Bluth's rebuke of DHCR's blatant disregard of its obligations is equally, if not more strongly, applicable to the 2016 luxury deregulation proceedings at issue herein.

Justice Bluth echoed this sentiment in *Matter of the Application of 225 Central Park North LLC v New York State Div. of Hous. & Cmty. Renewal,* (Sup Ct, NY County, Index No. 155440/23)[11], finding,

> Clearly, respondent's decision to ignore statutory deadlines is the only reason why the deregulation petition was not decided prior to the effective date of Part D of the HSTPA. For petitioner to have a claim but lose only because the government agency charged with administering the law egregiously ignored its responsibilities defies logic and fairness. (C-11).

DHCR's role was to facilitate a prompt determination on the merits and in accordance with the statutorily prescribed timelines. DHCR abdicated its responsibilities under the law then in effect and absent any explanation.

Where the evidence shows even a negligent delay, the agency must apply the law in effect when the complaint was filed. *Reichman v New York City Conciliation & Appeals Bd*., 117 A.D.2d 517 (1st Dept 1986) ("The law clearly provides that administrative delay in processing an application, whether negligent or willful, is a sufficient reason for applying the law as it existed at the time the

[11] DHCR filed a Notice of Appeal from this Decision/Order on January 12, 2024. The Appellate Division, First Department has assigned this appeal Case No. 2024-01370.

application was filed (citations omitted)."); *see also Matter of Amsterdam-Manhattan Assoc.*, 42 N.Y.2d 941.

Even if the Court were to accept that DHCR did not unreasonably delay in processing the 2016 petitions, despite DHCR's blatant disregard of the mandatory processing timelines, the law in effect as of the date of Appellants' 2016 filings, must govern these orders. As the Agency's misconduct alone caused the delay in issuance of the 2016 Deregulation Orders, it cannot now retroactively divest Appellants of their property interest.

POINT IV

THE ADDENDA IMPERMISSIBLY REVIVED TIME-BARRED CLAIMS

The Deregulation Orders became final and binding 35-days after their issuance, which is when Tenants' time to challenge the luxury deregulation of their respective apartments expired. *See* RSC § 2529.2. None of the Tenants challenged the Deregulation Orders.

"Once an administrative agency has decided a matter, based upon a proper factual showing and the application of its own regulations and precedent, the parties to that matter are entitled to have the determination treated as final." *Peckham*, 12 N.Y.3d 424.

The Addenda improperly revived time barred claims because it vitiated the finality of the Deregulation Orders, which was barred by the passage of the time limit for filing a PAR challenging those orders. *See* RSC § 2529.2.

DHCR's prohibited (and erroneous) application of the repeal of RSL § 26-504.3 is evidenced by the fact that the Addenda reopened closed cases and revived claims that were previously time-barred having been determined to finality in Appellants' favor. Tenants of Apts. [redacted] and [redacted] filed PARs from the Addenda requesting it be applied, so as to nullify the Deregulation Orders, even though these Tenants admitted an income in excess of the threshold and did not challenge the Deregulation Orders. (R. 1571; 2250). There is no question the Deregulation Orders were final orders, no longer subject to challenge by any tenant or DHCR.

This Court held in *Regina*, 35 N.Y.3d at 371,

> If retroactive application would not only impose new liability on past conduct but also revive claims that were time-barred at the time of the new legislation, we require an even clearer expression of legislative intent than that needed to effect other retroactive statutes—the statute's text must unequivocally convey the aim of reviving claims. For nearly a century, this Court has recognized that '[r]evival is an extreme exercise of legislative power. The will to work it is not deduced from words of doubtful meaning. Uncertainties are resolved against consequences so drastic' (*Hopkins v Lincoln Trust Co.*, 233 NY 213, 215 [1922, Cardozo, J.]). Indeed, it is a bedrock rule of law that, absent an unambiguous statement of legislative intent, statutes that revive time-barred claims if applied retroactively will not be construed to have that effect (*see e.g. Matter of Thomas v*

> *Bethlehem Steel Corp.*, 63 NY2d 150, 155 [1984]; *Beary*, 44 NY2d at 412-413).

DHCR erroneously revived a time barred claim, namely the right to challenge the validity of the Deregulation Orders by improperly issuing the Addenda and applying Part D of the HSTPA to the orders, which were no longer susceptible to challenge after the time to file a PAR had expired.

Statutes that revive time-barred claims if applied retroactively will not be construed to have that effect without an express and unambiguous statement of legislative intent. *See Regina,* 35 N.Y.3d at 371; *see also Thomas v Bethlehem Steel Corp*., 63 N.Y.2d 150, 155 (1984); *Matter of Beary v City of Rye*, 44 N.Y.2d 398, 412- 413 (1978).

As this Court articulated in *35 Park Ave. Corp. v Campagna*, 48 N.Y.2d 813, 814-815 (1979),

> The cause of action to rescind the lease between plaintiff corporation as landlord and defendants as tenants, interposed more than six years after the execution of the lease, is time barred (see CPLR 213). Plaintiff's reliance on section 235-c of the Real Property Law, enacted in July, 1976 after this action was commenced, is misplaced. That section, which provides that a court may grant relief from an unconscionable lease or clause, does not revive a claim already time barred. An intent on the part of the Legislature to effect so drastic a consequence must be expressed clearly and unequivocally *(Hopkins v Lincoln Trust Co.*, 233 NY 213, 215). The proviso in the amendment (L 1976, ch 828, § 2), making section 235-c effective immediately and 'applicable to all leases, regardless of when executed', at best is ambiguous and

> does not indicate an intention to resurrect a cause of action predicated on unconscionability (see *Beary v City of Rye*, 44 NY2d 398, 413).

Neither DHCR nor the parties had the right to challenge the finality and validity of the Deregulation Orders by means of the Addenda. Not only is DHCR's interpretation of the HSTPA as applied to these orders improperly retroactive in nature, but it has simultaneously and impermissibly allowed for the revival of time-barred claims.

POINT V

THE ADDENDA, WHICH PURPORTS TO INTERPRET PART D OF THE HSTPA, IS NOT ENTITLED TO DEFERENCE

The Appellate Division erred in holding, "DHCR's explanatory addenda and the orders denying the petitions for administrative review challenging the addenda were not arbitrary and capricious, nor were they affected by an error of law (citations omitted)." (R. 8; 12; 17; 23; 26; 30-31).

As a matter of statutory interpretation and constitutional law, the repeal of RSL § 26-504.3 effectuated by Part D of the HSTPA cannot be applied to the Deregulation Orders, regardless of whether such application is denoted as a supervening change in the law or otherwise; nor does the repeal of RSL § 26-504.3 provide a lawful basis for the issuance of the Addenda.

DHCR's interpretation of Part D of the HSTPA is not entitled to any deference, since the issue is one of pure statutory construction. *See Matter of West*

58th St. Coalition, Inc. v City of New York, 188 A.D.3d 1, 8 (1st Dept 2020), *quoting Kurcsics v Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980) ("Where, however, the question is one of purely statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight…"); *see also Dworman v New York State Div. of Hous. & Cmty. Renewal*, 94 N.Y.2d 359, 371 (1999).

DHCR's interpretation of Part D through issuance of the Addenda was anything but reasonable or rational. The Addenda completely changed the terms of the final and binding Deregulations Orders premised in the legal fallacy that luxury deregulation was conditioned on the expiration of the lease in effect at the time the order issued.

Former RSL § 26-504.3 did not condition luxury deregulation on the expiration of the lease in effect at the time the Deregulation Orders issued; that is apparent from the plain language of the statute. Part D of the HSTPA did not condition the effectiveness or finality of a previously issued, final deregulation order on the lease expiration in effect at the time the order issued. That is evident from the fact that the Legislature unambiguously drafted the Part D, § 5, to read, "Sections 26-504.1, 26-504.2 and 26-504.3 of the administrative code of the city of

New York are REPEALED". The regulatory status of the apartments were determined to finality once the time to challenge the Deregulation Orders expired, which occurred prior to June 14, 2019.

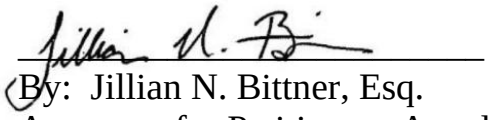
The Appellate Division, in affirming the decisions of Supreme Court, misapprehended its role in reviewing DHCR's interpretation of a statute, and overlooked the plain wording of Part D of the HSTPA and the Clean Up Bill. The Appellate Division failed to acknowledge that the Deregulation Orders were final, non-reviewable orders and thus, no longer subject to any modification by any action or by any party. The Addenda memorializes DHCR's own improper application of the HSTPA; it is not premised upon the language set forth by the Legislature in the statute nor can any such interpretation be extrapolated therefrom.

CONCLUSION

The Orders of the Appellate Division, First Department should be reversed insofar as they affirmed the propriety of DHCR's Addenda that retroactively nullified 16 final and binding Deregulation Orders, thereby indefinitely precluding the apartments with both high rents and high incomes from exiting rent stabilization absent any basis in law.

Dated: Williston Park, New York
March 20, 2024

HORING WELIKSON ROSEN &
DIGRUGILLIERS PC



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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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) ss.:
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

On March 21, 2024

deponent served the within: **Brief for Petitioners-Appellants**

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at the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on
March 21, 2024

Mariana Braylovskiy

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No. 01BR6004935
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