PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of Respondent-Respondent-Cross-Appellant Raffaello Locatelli ("Tenant"): a) in opposition to the appeal of Petitioner-Appellant-Respondent Aurora Associates LLC ("Landlord") from the Decision and Order of the Appellate Term First Department, entered December 6, 2017 (the "Order"), which Order: (i) affirmed that portion of the Decision and Order of the Civil Court, New York County (Hon. Jack Stoller, J.H.C.), dated November 28, 2016, dismissing the underlying holdover petition inasmuch as Tenant is entitled to the protections of Rent Stabilization, and (ii) reversed the Housing Court's denial of attorneys' fees to Tenant; and b) in support of Tenant's cross-appeal from that portion of the Appellate Term's Order, which failed to award Tenant a judgment for rent overcharge.[1]

Landlord commenced the underlying holdover summary proceeding based upon the unfounded claim that Tenant was a free market tenant whose month-to-month tenancy of the subject loft apartment (the "Apartment") had allegedly been properly terminated.

The Appellate Term First Department properly affirmed the Housing Court's dismissal of the underlying holdover petition inasmuch as the Tenant's

[1] References to the Record on Appeal shall be in the form of R. followed by relevant page number(s). The Order being cross-appealed from appears at R. 4-5.

Apartment is subject to the protections of Rent Stabilization. The Appellate Term First Department also properly reversed the Housing Court's failure to grant Tenant an award of attorneys' fees inasmuch as Tenant is the prevailing party. The Appellate Term First Department, however, did not grant Tenant an award of rent overcharge and treble damages, and Tenant respectfully cross-appeals from that portion of the Order. As a matter of law, since Tenant's Apartment has been found to be rent stabilized, then Landlord must also be found to have engaged in rent overcharge. Notably, Landlord has failed to ever register the Apartment with DHCR and all the rents it has charged and collected have been illegal.

QUESTIONS PRESENTED

1. Whether Tenant's Apartment is subject to Rent Stabilization?

   The court below properly answered in the affirmative.

2. Whether the Tenant's Apartment is subject to Rent Stabilization independent of the Loft Law?

   The court below properly answered in the affirmative.

3. Whether an apartment covered by the Loft Law is considered temporarily exempt from Rent Stabilization?

   The court below properly answered in the negative.

5. Whether Tenant is entitled to an award of rent overcharge and treble damages?

The court below improperly answered in the negative.

6. Whether Tenant is entitled to an award of attorneys' fees as the prevailing party?

The court below improperly answered in the affirmative.

COUNTER-STATEMENT OF FACTS

Landlord argues that Tenant is a fair market tenant whose month-to-month tenancy was properly terminated. R. 44. Landlord further claims (without viable proof) that: a) Tenant's Apartment was subject to an alleged sale of fixtures in 1998 that resulted in permanent exemption from all forms of rent regulation (R. 87-89); and b) the previous owner's charging of $4,250 in monthly rent to a previous tenant in 1999 somehow serves as proof that the Apartment was permanently exempt from Rent Stabilization. R. 90-98.

In support of its claim that a sale of fixtures occurred, Landlord has proffered a photocopy of a handwritten document purporting to be a Sales Record Form, dated March 26, 1998. R. 87-89. Landlord relies on this copy as proof positive that a sale of fixtures took place.

The purported Sales Record Form shows a signature of a Mr. Lombardi but contains no reference to Helena Lombardi who was also a tenant-of-record who signed the appurtenant lease. R. 85-86. Tenant is unaware of any authority that would permit one tenant-of-record to surrender the Loft rights of a separately named tenant-of-record.

Notably, while the alleged sale of fixtures took place in 1998, each page of the document shows a Loft Board "Received" stamp of October 12, 2004. R. 87-89. For some inexplicable reason, Landlord elected not to submit a copy of an attorney's affidavit sworn to on October 11, 2004, also filed with the Loft Board on October 12, 2004, wherein Landlord's then counsel in 2004 acknowledged that the Loft Board had no record of the original Sales Record Form ever having been filed. R. 122.

Thus, Landlord sought summary judgment utilizing a photocopy of a document that cannot be authenticated nor can it be properly introduced as a business record inasmuch as it is a document that originally (if it ever existed as an original at all) was never under Landlord's control. Landlord's attorney in 2004 merely claimed in his affidavit "upon information and belief" that the original Sales Record Form was filed with the Loft Board. R. 121. Landlord, however, does not even have proof that a sale of fixtures ever took place. Landlord has not submitted any proof that the Loft Board has recognized that a sale of fixtures

occurred. To the contrary, Landlord itself has admitted that the Loft Board has no record of the original purported 1998 sale of fixtures on file. R. 121.

The basis for Landlord's claim to possession is the mistaken belief that a sale of fixtures somehow forever precludes the applicability of rent regulation.

The Housing Court properly dismissed the petition, holding that:

> Petitioner argues that even if the subject premises would otherwise be subject to the Rent Stabilization Law, the first rent in 1998 being above $2,000.00 effectuated a deregulation of the subject premises by the provisions of the very Rent Stabilization Law Respondent claims coverage under. However, the apartment in Acevedo, supra, had a vacancy lease of $2,781.00 in June 1999, after the vacancy lease for the subject premises. Acevedo, supra, 70 A.D.3d at 126. If the rule that Petitioner urges the Court to apply here were applied to Acevedo, supra, the result would be the same, because the rent-stabilized apartments which become vacant on or after June 19, 1997 but before June 24, 2011 with a legal regulated rent of $2,000.00 or more per month are subject to deregulation. 9 N.Y.C.R.R. §2520.11(r)(4). The ruling in Acevedo, supra, that is contrary to Petitioner's argument compels the conclusion that the provisions of the Loft Law and the ETPA preclude such an application of the law as Petitioner urges. . . .
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> Petitioner cites other authority that stands for a different proposition than Acevedo, supra, and also argues that Acevedo, supra, is not good law. However, the authority that Petitioner cites is not binding on this Court in the same manner that the First Department of the Appellate Division is on this Court. It is axiomatic that a lower Court, like this one, is bound to apply the law as

> promulgated by the Appellate Division within its particular Judicial Department.

R. 8-9.

ARGUMENT

POINT I

ACEVEDO CONTROLS

Landlord's counsel insists that Acevedo v. Piano Bldg, LLC, 70 A.D.3d 124, 891 N.Y.S.2d 41 (1st Dep't 2009) is somehow not applicable to this matter. The crux of Landlord's appeal is that Appellate Division First Department should rule in a manner that ignores and/or disavows its own prior ruling in Acevedo. The reality, whether Landlord likes it or not, is that Acevedo is controlling precedent that must be respected and adhered to by this Court. Indeed, Landlord cannot escape the directly on point applicability of this Court's ruling in Acevedo. See also, VVV Partnership v. Moran, 10 Misc. 3d 130(A), 809 N.Y.S.2d 484 (A.T. 1st Dep't 2005).

The Appellate Term properly affirmed the Housing Court's dismissal of the holdover petition citing Acevedo. The pertinent facts in Acevedo v. Piano Bldg, LLC, 70 A.D.3d 124, 891 N.Y.S.2d 41 (1st Dep't 2009) are practically identical to the facts in this dispute. Thus, in Acevedo:

- the building was constructed prior to 1974 and contained more than six residential units;

- the Loft Board ruled that the subject building was an IMD in 1985;

- the landlord purchased the subject loft apartment's prior occupant's rights under MDL §286(12) in 1995;

- after the landlord's purchase of prior occupant's rights under MDL §286(12), the subject apartment continued being used for residential purposes;

- in 1999 (which was two years after the enactment of the 1997 Rent Stabilization Code amendment, which codified what is commonly referred to as the four year temporary exemption rule under NYCRR §2526.1(a)(3)(iii)[1997]), the landlord rented the apartment to a tenant at an "unregulated market rent" with a monthly rent of $2,781, which rent was above the luxury rent threshold at that time;

- in 2005, six years after commencement of the subject tenancy, the tenant sought a declaration that his apartment was subject to Rent Stabilization;

- the landlord asserted that the prior owner's purchase of fixtures resulted in the permanent inapplicability of rent regulation;

- the tenant argued that the continued residential use of the apartment in a pre 1974 building with six or more units triggered Rent Stabilization protection;

- the court rejected the landlord's "assertion that the sale of the Loft Law rights here ended the unit's eligibility for rent stabilization;" and

- the Appellate Division First Department affirmed the lower court's granting of summary judgment in the tenant's favor declaring that Rent Stabilization applied to the subject apartment.

The facts of the instant litigation mirror Acevedo as follows:

- The subject building was constructed prior to 1974 and contains six or more residential units;
- The building was declared an IMD in 1983;
- Landlord claims that the prior owner purchased the fixtures in 1998;
- After the purported purchase of fixtures, the subject apartment has continuously been rented for residential purposes;
- In 1999 Landlord started renting the unit for a monthly rent over the luxury rent threshold;
- Tenant entered into possession in 2009; and
- Landlord has done nothing to legally deregulate the Apartment.

Simply stated, Landlord cannot distinguish or somehow escape the squarely on point applicability of Acevedo.

Another pending case that has properly applied Acevedo is Costanzo v. Joseph Rosen Found., Inc., 61 Misc. 3d 730, 83 N.Y.S.3d 830 (N.Y. Sup . Ct. 2018), where the trial court held:

> The court finds that Acevedo is squarely on point. In that case, the plaintiff-tenant was treated by the defendant-owner as an unregulated market rent tenant after the defendant-owner's predecessor-in-interest purchased the Loft Law rights from the tenant's predecessor. The First Department rejected the owner's assertion "that the sale of the Loft Law rights ended the unit's eligibility for rent stabilization", because "zoning expressly allows residential use as of right, and [the subject] apartment can

be legalized by the owner filing a certificate of occupancy." In so doing, the First Department declined to follow the Second Department's rulings in Caldwell v American Package Co., Inc., 57 AD3d 15, 866 N.Y.S.2d 275 [2008] and Gloveman Realty; Corp. v Jefferys, 18 AD3d 812, 795 N.Y.S.2d 462 [2005]: "[w]e decline to join the Second Department in reading Wolinsky as providing a blanket prohibition barring ETPA coverage of all loft units not subject to the Loft Law, even where the Zoning Resolution permits residential use as of right."

The Acevedo Court reasoned that the owner's position was in contravention to the legislative intent of the Loft Law. The Loft Law was a stopgap protection to occupants of illegal residential units designed to make those units legal for residential occupancy and bring them within the ambit of rent regulation. Indeed, after a sale of Loft Law rights, an owner can either return the unit to commercial use or legalize it for residential use (MDL §286[12]). There is no dispute that since the unit became deregulated under the Loft Law, the unit has been used for residential purposes. Nor does defendant represent that it will bring the unit into commercial use.

*** *** ***

The Acevedo Court noted that the "sole basis for such rent regulation" contained in MDL § 286 [12] necessarily implies that a former Loft Law unit may be covered by rent stabilization because "[t]he only other 'such rent regulation' is ETPA" (Acevedo at 128). This interpretation is in harmony with the broad scope of the ETPA, which offers protection to any housing accommodation not expressly excluded therein (Salvati v Eimicke, 72 NY2d 784, 787, 533 N.E.2d 1045, 537 N.Y.S.2d 16 [1988] [the ETPA is "inclusive, rather than exclusive" and, as such, sweeps within rent stabilization "all housing accommodations which it does not expressly

> exempt"]; see also Ruskin v. Miller, 172 AD2d 164, 567 N.Y.S.2d 702 [1st Dept 1991]).
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> *** *** ***
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> The Acevedo Court distinguished Wolinsky v. Kee Yip Realty Corp. (2 NY3d 487, 812 N.E.2d 302, 779 N.Y.S.2d 812 [2004]) from the case before it, expressly stating that "**Wolinsky stands for nothing more than the proposition that illegal loft units are not entitled to rent stabilization treatment when the unit is incapable of being legalized**."

(emphasis added). See also, 315 Berry St. Corp. v. Hanson Fine Arts, 39 A.D.3d 656, 835 N.Y.S.2d 261 (2d Dep't 2007), where the Second Department held:

> It is undisputed that the subject premises contain six or more units being used for residential purposes. The petitioner landlord previously procured the deregulation of the premises under the New York City Loft Law (*see* Multiple Dwelling Law art 7-C) by, inter alia, purchasing the improvements and rights to the unit at issue from the former tenants and representing to the New York City Loft Board that the unit would be used for nonresidential purposes and would not be reconverted to residential use without first complying with all legal requirements therefor. It is further undisputed that the petitioner nevertheless knew of and acquiesced in the unlawful conversion, at the expense of the occupants, of the unit from commercial to residential use, that the applicable zoning generally permits residential use, and that the petitioner sought legal authorization to convert the premises to such use during the pendency of this proceeding. Under these circumstances, the unit at issue was properly determined to be subject to the rent regulations of the Emergency Tenant Protection Act of 1974 (L 1974, ch 576, § 4; McKinney's Uncons Laws of NY § 8621 *et seq.*) and the New York City Rent Stabilization Law and Code.

In our case, it is undisputed that Tenant's Apartment is capable of being legalized into residential housing unit with a valid Certificate of Occupancy. To date, Landlord has simply failed to do what is necessary to obtain a Certificate of Occupancy.

POINT II

THE FOUR YEAR TEMPORARILY EXEMPT RULE DOES NOT APPLY

Notably, while the Acevedo holding makes no mention whatsoever of loft units being "temporarily exempt" from Rent Stabilization under the ETPA, Landlord has fabricated the "temporarily exempt" theory and misapplied it in a Loft setting in order to advance its claim that the subject apartment is exempt from rent regulation because the rent collected after the purported purchase of fixtures was above the luxury rent threshold. At page 21 of its counsel's appellate brief, Landlord erroneously states that "[t]his temporary exemption from Rent Stabilization due to regulation under the Loft Law is discussed by the Appellate Court in *Acevedo."* Contrary to Landlord's misleading argument, however, the "temporarily exempt" theory was not raised in Acevedo because it has no application whatsoever to the issues that were at the heart of that (and the instant) dispute. Notwithstanding that the Acevedo holding makes no mention of loft units

being "temporarily exempt" from Rent Stabilization under the ETPA, Landlord insists in trying to force a round peg into a square hole.

The reason that the "temporarily exempt" theory was not raised in Acevedo is because it has no viability. The tenant who fought for and won a declaration of applicability of Rent Stabilization in Acevedo also paid a rent higher than the luxury rent threshold (namely $2,781) from the inception of his tenancy in 1999.

The New York City Rent Guidelines Board defines temporarily exempt housing accommodations as:

> A temporarily exempt accommodation is one which is not presently occupied by a rent stabilized tenant, but may be covered by rent stabilization if the tenancy changes. For example, the accommodation:
>
> 1. Is occupied by the owner or members of the owner's immediate family.
> 2. Is occupied by an employee who is not paying rent.
> 3. Is rented solely for business or professional use.
> 4. Is in a hotel or SRO and houses a transient occupant.
> 5. Is occupied by a tenant not using the unit as his or her primary residence, as determined by a court of competent jurisdiction.
> 6. Is owned by a non-profit institution and is occupied by a tenant who is affiliated with that institution, in a building which also contains non-affiliated tenants.
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> **The owner is required to register these apartments on an annual basis.**

See http://www.nycrgb.org/html/glossary_defs.html#tu (emphasis added).

Had a Loft unit ever been intended to be "temporarily exempt" then surely it would have been specifically included in the definition of "temporarily exempt." Simply stated, there is no precedent that defines a unit under the Loft Law protections to be a "temporarily exempt" unit under Rent Stabilization. It bears noting that all of the above definitions of "temporarily exempt" involve situations where no rent for a long term residential tenancy is being paid to the landlord in connection with the exempt usage.

Landlord goes on to proffer an argument that certain apartments no longer covered by the Loft Law may "revert" to coverage under Rent Stabilization. Landlord's use of the word "revert" meaning go back to ties into Landlord's flawed theory that units covered by the Loft Law are "temporarily exempt" from Rent Stabilization.

Moreover, Landlord improperly argues that, but for the ruling in Acevedo, the purchase of fixtures results in automatic and permanent deregulation. That conclusion is a fallacy. The Acevedo case itself was not new law but rather the application of previous rulings rendered by this Court. Thus, in Acevedo this Court held:

> We reject the owner's assertion that the sale of the Loft Law rights here ended the unit's eligibility for rent stabilization. In 182 Fifth Ave., this Court confronted a circumstance identical to this one: the owner of a loft covered by the Loft Law purchased the protected

> occupant's rights under Multiple Dwelling Law § 286 (12) and then leased the unit for residential purposes. We held that HN3 where, as here, the building contains six or more residential units, it is subject to rent stabilization by virtue of ETPA "notwithstanding the sale of Loft Law rights by a prior tenant" (300 AD2d at 199; see also Matter of 315 Berry St. Corp. v Hanson Fine Arts, 39 AD3d 656, 835 NYS2d 261 [2007], lv dismissed 10 NY3d 742, 882 NE2d 898, 853 NYS2d 285 [2008]).
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> The result in 182 Fifth Ave. and its progeny is amply supported by the plain language of Multiple Dwelling Law § 286 (12), which reads as follows:
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> > "No waiver of rights pursuant to this article by a residential occupant qualified for protection pursuant to this article made prior to the effective date of the act which added this article shall be accorded any force or effect; however, subsequent to the effective date an owner and a residential occupant may agree to the purchase by the owner of such person's rights in a unit" (emphasis added).
>
> By its own terms, Multiple Dwelling Law § 286 (12) applies only to the purchase of an occupant's Loft Law rights. The statute says nothing about rent stabilization or ETPA; it says nothing about any subsequent tenant's rights; indeed, it says nothing about deregulating units in any way whatsoever. The purchase of rights permitted in this section is thus necessarily limited to an occupant's rights under the Loft Law.

Acevedo v. Piano Bldg, LLC, 70 A.D.3d 124, 127, 891 N.Y.S.2d 41, 42-43 (1st Dep't 2009), citing 182 Fifth Ave v. Design Dev. Concepts, Inc., 300 A.D.2d 198, 751 N.Y.S.2d 739 (1st Dep't 2002).

POINT III

LANDLORD COULD NOT CHARGE A "FIRST RENT"

Contrary to Landlord's flawed theory, RSC §2526.1(a)(3)(iii) does not serve to divest Tenant of the protections afforded by Rent Stabilization. Indeed, this is not the first time that a landlord has tried to rely upon RSC §2526.1(a)(3)(iii) to effectuate deregulation albeit to no avail. In this regard, in the case Arnold v. 4-6 Bleecker LLC, 2017 N.Y. Misc. LEXIS 2139 (N.Y. Sup. Ct., Index No.: 158541/13), the New York Supreme Court held as follows:

> [Landlords-Defendants] simply rehash their prior argument that the legal rent for apartments 2E and 3E should be determined in accordance with *RSC §2526.1(a)(3)(iii)*. Relying on that provision, defendants assert that those apartments were temporarily exempt from regulation, and upon the expiration of those temporary exemptions, the legal rent is the rent agreed upon by the landlord and the ***first tenant***. The Court rejected that identical argument as without merit in both the original decision and upon reargument. . . .
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> *** *** ***
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> The Court rejected [Landlord's] reliance on the language in *RSC §2526.1(a)(3)(iii)* which states that "the legal regulated rent shall be the rent agreed to by the owner and the ***first*** rent stabilized ***tenant*** taking occupancy after such vacancy or temporary exemption expires." Significantly, the 2014 amendments to the Rent Stabilization Code substantially changed *section 2526.1(a)(3)(iii)* and eliminated that language. *Section 2526.1(a)(3)(iii)* now provides as follows:

> Where a housing accommodation is vacant or temporarily exempt from regulation pursuant to *section 2520.11* of this Title on the base date, the legal regulated rent shall be the prior legal regulated rent for the housing accommodation, the appropriate increase under *section 2522.8* of this Title, and if vacated or temporarily exempt for more than one year, as further increased by successive two year guideline increases that could have otherwise been offered during the period of such vacancy or exemption and such other rental adjustments that would have been allowed under this code.

2017 Misc. LEXIS 2139; aff'd, 165 A.D.3d 493, 86 N.Y.S.3d 22 (1st Dep't 2018).

Thus, by amending RSC §2526.1(a)(3)(iii), the legislature made it unmistakably clear that the "temporary exemption" rule was never meant to result in deregulation of any housing unit (let alone a premises that was previously subject to Loft Law protections until a sale of rights and fixtures occurred) via the use of a so called first rent. The courts should therefor apply RSC §2526.1(a)(3)(iii) as amended. See Arnold v. 4-6 Bleecker LLC, supra, holding that:

> Rent Stabilization Code *§2527.7* which expressly provides in relevant part that "[e]xcept as otherwise provided herein, unless undue hardship or prejudice results therefrom . . . where a provision of this Code is amended or an applicable statute is enacted or amended during the pendency of a proceeding, the determination shall be made in accordance with the changed provision."

Accordingly, the Appellate Term First Department, citing the exemption language codified in RSC §2520.11(r)(7)(ii), properly held that the above threshold rent that was charged to the tenant immediately following the purported purchase of fixtures in 1998 could not constitute a basis for high rent deregulation. R. 5.

Moreover, the longstanding tradition has always been to zealously protect rent regulation and the Court of Appeals has expressly stated that the central purpose of Rent Stabilization is to combat the widespread lack of affordable housing. Manocherian v. Lennox, 84 N.Y.2d 385 (1994).

Not only should the older and now amended version of RSC §2526.1(a)(3)(iii) not be relied upon to deregulate the Apartment, but even the previous incarnation of §2526.1(a)(3)(iii) did not define units covered by the Loft Law as "temporarily exempt" from Rent Stabilization.

Notably, the cases cited by Landlord in so called support of charging a non regulated "first" rent without even securing a valid Certificate of Occupancy ("C of O") are inapposite. In this regard, Landlord cites 73 Tribeca LLC v. Greenbaum, 36 Misc. 3d 1217(A), 959 N.Y.S.2d 92 (N.Y. Hous. Ct. 2012), claiming that "[t]he sale of improvements or rights is considered a deregulating event." The facts in 73 Tribeca LLC are distinguishable from our case in that the building in 73 Tribeca LLC contained "fewer than six (6) residential units."

Accordingly, outside of the Loft Law, the building in 73 Tribeca LLC could not have any other independent basis for the applicability of Rent Stabilization. Moreover, the lower court's ruling in 73 Tribeca LLC was reversed by 73 Tribeca LLC v. Greenbaum, 44 Misc. 3d 16, 988 N.Y.S.2d 837 (A.T. 1st Dep't 2012), wherein the Appellate Term First Department ruled that the landlord failed to establish that a sale of fixtures had even occurred.

Landlord also cites Hatanaka v. Lynch, 304 A.D.2d 325, 756 N.Y.S.2d 578 (1st Dep't 2003), where a first rent was permitted inasmuch as the subject apartment had been rented by an educational institution to students for more than four years. Thus, the apartment in Hatanaka v. Lynch clearly was temporarily exempt from rent stabilization.

Likewise, Landlord's reliance upon Walsh v. Salva Realty Corp., 2009 WL 2207516, 2009 Slip. Op. 31573(U) (N.Y. Sup. Ct. 2009) is also misguided. In Walsh, the landlord obtained a C of O in 2004 and presumably renovated the subject unit in such a manner as to create a free market unit. In our case, Landlord simply continued renting for residential purposes without renovating or obtaining a C of O.

Finally, Landlord's reliance upon Rubin v. Decker, 52 Misc. 3d 1208(A) (N.Y. Sup. Ct. 2016) is also misguided. The facts in Rubin involved the creation of a residential apartment from the combination of a total of 5 separate

units (only one of which may have previously been subject to Loft Law protection). The Supreme Court properly ruled that a newly created luxury apartment, which initially rented for $6,995 a month after issuance of a final C of O should not be subject to rent regulation. In our dispute, Tenant's Apartment was not substantially rehabilitated into a new unit five times the size of a previous housing accommodation covered by the Loft Law. Indeed, Tenant's Apartment remains the simple humble residential loft unit that it has always been and Landlord has yet to obtain a C of O.

POINT IV

THE SUBJECT BUILDING IS SUBJECT TO RENT STABILIZATION INDEPENDENT OF THE LOFT LAW

Landlord has failed to refute that independent of the Loft Law, the creation of six or more residential housing units in a building that was built prior to 1974 subjects the created housing units to Rent Stabilization. Indeed, it does not even matter if the housing units were created illegally. It is the mere creation of 6 or more units, which can be legalized, that establishes the applicability of Rent Stabilization. Shubert v. DHCR, 162 A.D.2d 261 (1st Dep't 1990); Wilson v. One Ten Duane Street Realty Co., 123 A.D.2d 198 (1st Dep't 1987); Rosenberg v. Gettes, 187 Misc. 2d 790 (A.T. 1st Dep't); Duane Thomas Loft Tenants Association v. Sylvan Lawrence Co., Inc., 117 Misc. 2d 360 (Sup. Ct. N.Y. Co.

1982); Rashid v. Cancel, N.Y.L.J., p. 28, col. 3, 33 H.C.R. 893 (A.T. 2d Dep't 2005); Commercial Hotel, Inc. v. White, 194 Misc. 2d 26, 752 N.Y.S.2d 779 (A.T. 2d Dep't 2002); and Lucimar Properties, Inc. v. Owens, Decision/Order dated July 7, 2006, Halprin, J.H.C, LT Index No. 98221/03, N.Y. Co. Hous. Ct. (2003).

Thus, controlling law dictates that an illegal housing unit that can be legalized remains subject to the protections of Rent Stabilization. However, there is no precedent for finding that an apartment without a valid C of O can be legally deregulated. It is axiomatic that in order to legally and permanently deregulate an apartment, the apartment would first have to be legalized with a valid C of O. While a unit without a C of O can be subject to Rent Stabilization, there is no way that a landlord can escape Rent Stabilization without a valid C of O in place together with a host of other factors. It is impossible to deregulate an apartment without a C of O. In a setting outside of the Loft Law, without a valid C of O in place, a landlord cannot legally collect any rent let alone a deregulated free market rent. To hold otherwise, would allow landlords to charge free market rents for allegedly deregulated and illegal housing units without valid C of Os in place.

Thus, Landlord has done nothing to legally deregulate the Apartment. Again, Landlord has cited no authority for a housing unit without a valid C of O being considered exempt from Rent Stabilization. Indeed, if a landlord claims that a housing unit is no longer covered by the Loft Law, then that unit must be

legalized and a C of O obtained if the landlord wants to continue renting the unit for residential purposes. The pertinent and controlling laws mandate that when a landlord does buy fixtures then such landlord's options are to either discontinue residential use and return to commercial use or legalize the apartment for residential use by obtaining a valid C of O. No landlord has the option of remaining in limbo by claiming that the Loft law no longer applies yet renting the unit as a residential apartment without a valid C of O. Indeed, without a valid C of O, the landlord has no basis to collect any rent let alone a free market rent.

Aside from other arguments, Landlord could not maintain the summary holdover proceeding because the underlying petition is fatally defective inasmuch as it fails to assert the rent regulated status of the Apartment let alone trying to proffer an explanation as to how the Apartment is exempt from rent regulation. Indeed, the Housing Courts have refused to recognize deregulation when a housing unit has never even been registered at DHCR, holding that:

> In 111 on 11 Realty Corp. v. Norton, the court refused to find that an apartment had become ***deregulated***, even though the tenant had been paying more than $2000 a month. *(189 Misc 2d 389, 398 [Civ Ct, Kings County 2001]*.) The apartment was not automatically ***deregulated*** because, as in this proceeding, the landlord had never registered the apartment with the DHCR and because that agency never set a legally regulated rent. (Id.) The court expressly found that only regulated apartments can have legally regulated rent. (Id.) Petitioner has not filed any registration with the DHCR and has not notified

> respondents of the status of their accommodations. Without complying with the proper regulation procedures, petitioner cannot prove that the apartments have been properly ***deregulated*** by respondents paying a legally regulated rent over $2000. (See id.) No case or statute says otherwise, and the 111 on 11 Realty court's reasoning is persuasive. This court therefore rejects petitioner's claim of ***deregulation***.

Tribeca M. Corp. v. Haller, 2003 NYLJ LEXIS 1560, N.Y.L.J., 9/17/03, p. 20, col. 1 (N.Y. Hous. Ct., 2003, Lebovits, J.H.C.), aff'd, 11 Misc. 3d 133 (A), 816 N.Y.S.2d 702 (A.T. 1st Dep't 2006).

POINT V

TENANT IS ENTITLED TO AN AWARD OF RENT OVERCHARGE AND TREBLE DAMAGES

Landlord's sole basis for disputing an award of rent overcharge seems to be its reliance on the position that the Apartment is deregulated and that since it is allegedly deregulated that rent overcharges cannot accrue. Contrary to Landlord's position, as a matter of law, inasmuch as the subject Apartment is rent stabilized then Landlord must be found to be engaging in rent overcharge since Landlord has failed to ever register the Apartment with DHCR and Landlord has charged and collected illegal rents. Thus, in Costanzo v. Joseph Rosen Found., Inc., 61 Misc. 3d 730, 83 N.Y.S.3d 830 (N.Y. Sup . Ct. 2018), involving a loft unit where fixtures were purchased, the trial court held:

> Since the unit is subject to rent stabilization, the balance of the cross-motion must also be granted. The owner of a rent stabilized unit must register the rents with the NYS Division of Housing and Community Renewal (see *NYC Admin.Code § 26-517*; *NYCRR §2528.1*) and it is undisputed that defendant did not. The legal regulated rent and permitted rent increases remain to be determined. Therefore, plaintiffs have established entitlement to summary judgment on defendant's liability for rent overcharge.

Landlord's belated allegation that Tenant did not raise a claim in the Answer filed in response to the underlying petition that the Apartment is subject to Rent Stabilization is nonsensical. Tenant expressly stated in the Answer (in the first and second affirmative defenses and the first counterclaim) that the Apartment needed to be registered with DHCR and that Landlord was liable for rent overcharge and treble damages. R. 54. Moreover, all the documentary evidence needed to calculate a rent overcharge and treble damages, as supported by law, was submitted to the Housing Court in the context of the summary judgment motion and cross-motion, namely the relevant leases and controlling statutes.

In this regard, the evidence demonstrates the following: a) in 1997 a prior owner rented the Apartment to William and Helena Lombardi at a monthly rental rate of $440.16 (R. 85-86); and b) the next monthly rent collected by Landlord for the Apartment was $4,250 in December 1998 (R. 90-98). Landlord has not proffered any explanation for why it raised the rent from $440.16 to

$4,250. Clearly, the tenant in December 1998 was overcharged. Since Landlord never registered the Apartment with DHCR no baseline for legal rents was ever established. Indeed, allowing Landlord to somehow establish a clearly illegal base rent that was never even registered with DHCR would "render largely meaningless a registration system that requires landlords to substantiate the lawfulness of their rents." Lyndonville Props. Mgmt. v. DHCR, 291 A.D.2d 311, 737 N.Y.S.2d 617 (1st Dep't 2002).

Notably, RSL 26-517 (e) provides that:

> The failure to file a proper and timely initial or annual rent registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement or if no such statements have been filed, the legal regulated rent in effect on the date that the housing accommodation became subject to the registration requirements of this section. The filing of a late registration shall result in the prospective elimination of such sanctions and provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration, the owner, upon the service and filing of a late registration, shall not be found to have collected an overcharge at any time prior to the filing of the late registration. If such late registration is filed subsequent to the filing of an overcharge complaint, the owner shall be assessed a late filing surcharge for each late registration in an amount equal to fifty percent of the timely rent registration fee.

The Housing Stability and Tenant Protection Act of 2019 enacted on June 14, 2019 (“HSTPA”), authorizes courts to examine "all available rent history which is reasonably necessary" to determine the legal regulated rent and investigate overcharges. NYC Administrative Code 26-516[h]. The new regulations also authorize courts to consider "any rent registration or other records filed with the state division of housing and community renewal, or any other state, municipal or federal agency, regardless of the date to which the information on such registration refers." Id. The regulations further provides, in pertinent part, as follows:

> [n]othing contained in this subdivision shall limit the examination of rent history relevant to a determination as to: (i) whether the legality of a rental amount charged or registered is reliable in light of all available evidence including but not limited to whether an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the housing accommodation, rendered such rent or registration unreliable.

NYC Administrative Code 26-516(h)

The legislation specifically provides that such amendment to the law "shall take effect immediately and **shall apply to any claims pending** or filed on or after such date." 2019 Bill Text NY S.B. 6458 (emphasis added).

Thus, relying upon Orders issued by the NYC Rent Guidelines Board (see http://www.nycrgb.org/html/guidelines/apt.html), the Apartment’s rent should

have increased as follows: from $440.16 monthly rent to $549.31 in December 1998 (applying 20% vacancy increase and 4% increase as per Order #30); then from $549.31 to $582.28 in January 2002 (applying 6% increase as per Order #33); then from $582.28 to $623.04 in January 2004 (applying 7% increase as per Order #35); then from $623.04 to $807.46 in August 2009 when Tenant commenced his tenancy (applying 20% vacancy increase and 8% increase as per Order #40); then from $807.46 to $843.80 in August 2011 (applying 4.5% increase as per Order #42); then from $843.80 to $877.55 in August 2013 (applying 4% increase as per Order #44); and then from $877.55 to $901.68 in August 2015 (applying 2.75% increase as per Order #46).

For the period of August 1, 2009 until July 31, 2011, Tenant was overcharged $76,620.96 inasmuch as Tenant paid $4,000 in monthly rent instead of what should have been the Rent Stabilized rent of $807.46 per month. For the period of August 1, 2011 until July 31, 2013, Tenant was overcharged $75,748.80 inasmuch as Tenant paid $4,000 in monthly rent instead of what should have been the Rent Stabilized rent of $843.80 per month. For the period of August 1, 2013 until November 30, 2014, Tenant was overcharged $49,959.20 inasmuch as Tenant paid $4,000 in monthly rent instead of what should have been the Rent Stabilized rent of $877.55 per month. For the period of December 1, 2014 until July 31, 2015, Tenant was overcharged $26,386.56 inasmuch as Tenant paid $4,200 in

monthly rent instead of what should have been the Rent Stabilized rent of $901.68 per month. For the period of August 1, 2015 to the commencement of this proceeding, Tenant was overcharged $32,983.20 inasmuch as Tenant was charged $4,200 in monthly rent instead of what should have been the Rent Stabilized rent of $901.68 per month. Thus, Tenant has been overcharged by $261,698.72, which when trebled results in Tenant being entitled to a judgment of $785,096.16 against Landlord on his rent overcharge counterclaim.

With the passage HSTPA, the amounts due to Tenant must be amended. As required by CPLR 4511(a), courts must take judicial notice of the public statutes of New York. See Chanler v Manocherian, 151 AD2d 432, 433, 543 N.Y.S.2d 671 (1st Dep't 1989) ("refusal to take judicial notice of pertinent laws and regulations constitutes reversible error"). The HSTPA amended Section 26-516(a) of the Administrative Code of the City of New York to expand the overcharge period from four (4) to six (6) years before the filing of an overcharge complaint, and the treble damages period to also six (6) years (HSTPA, Part F, Sec. 4). As the HSTPA was passed during the pendency of this matter, Tenant may recalculate the amounts owed on the overcharge and treble damages amounts. Accordingly, upon reversal, this matter should be remanded to the Housing Court for a proper and final calculation of the overcharge and treble damages.

In response to Tenant's overcharge claim, Landlord has merely repeated its argument that the Apartment is free market and thus insulated from any rent overcharge claim. While Landlord theorizes that if Rent Stabilization applies, then the Apartment's rent might be subject to increases, Landlord does not proffer any calculations. Landlord is in sole control of any and all leases pertinent to the Apartment and Landlord could have made an alleged calculation based on the documentation in its possession but Landlord elected not to do so. Thus, Landlord should not have evaded a summary judgment finding of rent overcharge and liability for treble damages.

Tenant is unaware of what tenancies, if any, were in place from 2004 to 2009 and Landlord failed to proffer any evidence of other tenancies during that time period in opposition to Tenant's summary judgment cross-motion. Accordingly, the Record is bereft of any information appurtenant to tenancies, if any, from 2004 to 2009 and Landlord is now forever precluded from arguing that it is entitled to a rent computation that includes any tenancy from 2004 to 2009. Landlord was obligated to lay bare its proof in the motion practice before the Housing Court.

Based on all of the foregoing, the Appellate Term erred in stating that "no basis was shown to examine the rental history beyond the statutory four-year look-back period" and that portion of the Order should be reversed and the issue of

rent overcharge and treble damages should be summarily decided in Tenant's favor and remanded to the Housing Court for a calculation.

POINT VI

TENANT IS ENTITLED TO AN AWARD OF HIS ATTORNEYS' FEES

Tenant is entitled to collect attorney's fees pursuant to RPL § 234, which states, in pertinent part:

> Where a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease. . . there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant in . . . the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law . . . by way of a counterclaim in any action or summary proceeding commenced by the landlord against the tenant.

Paragraph 19 of Tenant's initial Lease, is a unilateral attorneys' fees provision in favor of Landlord. R. 70.

Since Landlord's eviction proceeding was dismissed and the dismissal was upheld because Tenant is a Rent Stabilized tenant, the reciprocity provision of RPL § 234 applies in this case, and Tenant is entitled to an award of attorneys fees.

Once again, on appeal, Landlord merely repeats its argument that the Apartment is free market. It should be noted that the crux of this litigation involves legal possession of the Apartment, and thus the Appellate Term properly reversed the Housing Court and awarded Tenant attorneys' fees as the prevailing party.[2]

CONCLUSION

For all of the foregoing reasons, the dismissal of the underlying petition and the award of attorneys' fees to Tenant should be affirmed and that portion of the Order which denied Tenant award of rent overcharge and treble damages thereon should be reversed.

Dated: New York, NY
September 21, 2019

Respectfully submitted,

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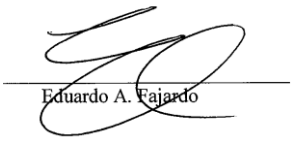
Attorneys for Tenant



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[2] Once a final non-appealable Order is entered in this litigation, Tenant will restore this matter to the Housing Court for a determination on the amount of the judgment for attorneys' fees that Tenant is entitled to against Landlord.