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Court of Appeals

STATE OF NEW YORK

Action No. 1

In the Matter of the Application of

REGINA METROPOLITAN CO., LLC,

Petitioner-Respondent,

against

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent-Appellant,

and

LESLIE E. CARR and HARRY A. LEVY,

Intervenors-Respondents.

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

(Additional Caption on the Reverse)

BRIEF OF *AMICI CURIAE*

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Date Completed: November 22, 2019

Action No. 2

In the Matter of the Application of

LESLIE E. CARR and HARRY A. LEVY,

Petitioners,

against

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent,

and

REGINA METROPOLITAN CO., LLC,

Intervenor-Respondent.

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

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Stephenie Futch, Jason Gallagher, Jacqueline Subramaniam, and Lawrence Chaifetz (collectively, the "*Amici*") respectfully submit this brief as *amici curiae*. For the reasons detailed below the Order of the Appellate Division, First Department[1] should be reversed.

PRELIMINARY STATEMENT

This action is one of the quintet of currently pending cases which address the intersection of the Housing Stability and Tenant Protection Act of 2019 ("HSTPA,"), various tax benefits programs (such as J-51), and the registration of regulated rent. Each of these cases presents questions that will affect thousands of tenants in pending actions before the lower courts.

In this action, the *Amici* submit their brief to resolve one such question: how to set the legal regulated rent for apartments that were deregulated, pre-*Roberts*[2] and re-registered at some point after that decision. More specifically, in setting the legal regulated rent, should a landlord be entitled to vacancy increases, Individual Apartment Improvement ("IAI") increases, and Major Capital Improvement ("MCI") increases, when the pre-*Roberts* tenants (in occupancy during the period

[1] Sachar Affirmation in Support of Motion to Appear as *Amici Curiae*, ("Sachar Aff.") Ex A.

[2] "*Roberts*" refers to *Roberts v Tishman Speyer Properties*, *L.P.*, (13 NY3d 270 [2009]). In that decision, this Court held that luxury deregulation was unavailable in buildings receiving J-51 benefits.

when such increases were sought), was not informed of their rent-stabilized rights? The answer is no.

Each of the three sides in this appeal (DHCR,[3] Landlord,[4] and Tenant[5]) proffer a different methodology for setting the legal regulated rent when an apartment was deregulated while in receipt of J-51 Benefits, pre-*Roberts*. We respectfully submit, each of them is wrong. For that reason, and because the question is of crucial importance to the thousands of tenants, class members, and putative class members represented by *Amici* and their counsel, oral argument is respectfully requested to address the re-registration issue.

HSTPA, and the Rent Stabilization Code ("RSC") establish how to set the rent for an apartment deregulated, pre-*Roberts*. It could not be easier.

1. Look to see if there is a reliable rent registration, served upon the tenant, at least six years prior to the complaint. If there is not one, keep going back in time until a reliable and registered rent, can be identified. If there is no reliable rent registration, served upon the tenant, proceed to step six;

2. If there is a reliable registration, served upon the tenant, the landlord may take Major Capital Improvement ("MCI") increases, provided the landlord properly informed the tenant of such increases, and DHCR approved the increases;

3. If there is a reliable registration, served upon the tenant, the landlord may take Individual Apartment Improvement ("IAI") increases,

[3] Respondent-Appellant, The New York State Division of Housing and Community Renewal ("DHCR")
[4] Petitioner-Respondent, Regina Metropolitan Co., LLC ("Landlord")
[5] Intervenors-Respondents, Leslie E. Carr and Harry A. Levy ("Tenants")

provided the landlord properly informed the tenant of such increases, and the landlord can provide the required documentation (such as invoices, and cancelled checks) to support such IAIs;

4. If there is a reliable registration, served upon the tenant, the landlord may take vacancy increases, provided the landlord informed the vacating tenant for whom it seeks such increase, of his or her rent-stabilized status;

5. If there is a reliable registration, served upon the tenant, the landlord may take Rent Guidelines Board ("RGB"), increases, provided the landlord properly informed the tenant for whom it seeks such increases, of their rent-stabilized status;[6]

6. If there is no reliable registration, or there is no evidence the registration was served upon the tenant, turn to the first three prongs of the DHCR default formula codified at RSC § 2522.6(b)(2) and (3). Choose the lowest rent resulting from those calculations.

7. If the RSC § 2522.6(b)(3) formula cannot be performed, or is inappropriate, turn to the DHCR Sampling Method at RSC § 2522.6(b)(3)(iv) to set the legal regulated rent.

Nothing more is required.

INTERESTS OF THE *AMICI*

The *Amici* are each plaintiffs in overcharge class actions currently pending in the New York City courts. Each *Amici* is either rent-stabilized or, at a minimum, asserts that their apartment would be rent-stabilized, but for their landlord's misconduct. As such, the quintet of currently pending HSTPA appeals could be crucially important to resolving their claims – especially with respect to establishing,

[6] This analysis skips the "second methodology" discussed below. That methodology would almost certainly never apply in any conceivable J-51 situation.

or re-establishing, their legal regulated rent. Each *Amici* resides in an apartment that was deregulated prior to *Roberts*, and re-regulated, after *Roberts.* Like Landlord here, when the landlord re-regulated each *Amici*'s apartment, it took advantage of increases available under the rent-regulations, including vacancy increases, IAI increases, and MCI increases.

Stephenie Futch and Jason Gallagher are each plaintiffs in *Mahmood, et al., v Riverside 1795 Associates L.L.C., et al.*, (Index No. 157260/2018 [Sup Ct, NY County]).[7] For each of their apartments, the landlord deregulated their units pre-*Roberts*.[8] Like Tenants, their landlord eventually re-registered their units (some five (5) years after directed to do so by the First Department, in *Gersten*[9]). When the landlord did so, it utilized some combination of vacancy increases, IAI increases, and MCI increases to re-establish the legal regulated rent, even though the landlord was not treating tenant in occupancy, at the time that the acts giving rise to such increases, as rent-stabilized, as the law required.[10]

Jacqueline Subramaniam is a plaintiff in *Yang, et al., v Creative Industries Inc., et ano.*, (Index No. 155681/2017 [Sup Ct, NY County]).[11] The landlord

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[7] Sachar Aff., ¶¶ 10-11.
[8] Sachar Aff., Exs. B-C.
[9] In *Gersten v 56 7th Ave, LLC*, (85 AD3d 189 [1st Dept. 2011]). In that decision, the First Department held that *Roberts* applied retroactively (as it was not a change in law), and landlords were directed to re-register deregulated apartments, promptly.
[10] *Id.*
[11] Sachar Aff., ¶ 13.

deregulated her unit, pre-*Roberts*.[12] Like Tenants, her landlord eventually re-registered her unit. When the landlord did so, it utilized some combination of vacancy increases, IAI increases, and MCI increases to re-establish the legal regulated rent, even though the landlord was not treating the tenant in occupancy, at the time that the acts giving rise to such increases, as rent-stabilized, as the law required.[13]

Lawrence Chaifetz is a plaintiff in *Chaifetz, et al. v Weinreb Management LLC, et al.*, (Index No. 20844/2018 [Sup Ct, Bronx County]).[14] His landlord deregulated his unit, post-*Roberts*, but pre-*Gersten*.[15] Like Tenants, the landlord eventually re-registered their units. When the landlord did so, it utilized some combination of vacancy increases and IAI increases to re-establish the legal regulated rent, even though the landlord was not treating tenant in occupancy, at the time that the acts giving rise to such increases, as rent-stabilized, as the law required.[16]

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[12] Sachar Aff., Ex. D.
[13] Sachar Aff., Ex. E.
[14] Sachar Aff., ¶ 13.
[15] Sachar Aff., Ex F.
[16] *Id.*

ARGUMENT

I. FACTUAL BACKGROUND

The landlord deregulated the apartment that is the subject of this appeal in 2003, because the last legal regulated rent, prior to the vacancy, exceeded the luxury deregulation threshold. A certain tenant occupied the apartment from 2003 to 2005, pursuant to a "free market" lease.[17] In 2005, that occupant vacated, and the Tenants occupied the apartment.[18]

In re-establishing the legal regulated rent, DHCR utilized the DHCR Formula, and took the last registered rent, allowed the landlord two (2) vacancy increase, an MCI increase and RGB increases.[19] It would have allowed the landlord an IAI increase as well, but the landlord did not present sufficient documentary evidence to justify such increase.[20]

Tenants back that formula, or in the alternative, request that the *Thornton* Default Formula, or the DHCR Sampling Formula, be utilized. Understandably (because such formula require discovery), the precise calculations are not provided.

Landlord contends that the instead of the DHCR Formula, the Four-Year Rule should have been utilized. Under the Four-Year Rule, as it existed at the time, the

[17] *Regina Metro. Co., LLC v New York State Div. of Hous. and Community Renewal*, (164 AD3d 420, 421 [1st Dept 2018])
[18] *Id.*
[19] *Regina* at 422.
[20] *Id.*

fact-finder goes back four years before the filing of the complaint, and takes all permissible increases.

Respectfully, DHCR, Tenant, and Landlord all have it wrong, especially after the enactment of HSTPA.

II. THE DHCR FORMULA IS ARBITRARY, CAPRICIOUS AND UNCONSTITUTIONAL. MOREOVER, IT REQUIRES TENANTS TO PAY FOR DHCR'S MISTAKES, AND THOSE OF THEIR LANDLORD

The DHCR Formula, as explained in DHCR's J-51 FAQ, works as follows:

> **1.** Identify[] the rent stated in the most recent stabilized lease prior to the improper deregulation; then
>
> **2.** Identify[] and add[] to the rent, all subsequent vacancy and renewal leases and apply the appropriate statutory vacancy/longevity increases and guidelines increases set by the New York City Rent Guidelines Board that were in effect at that time, as well as adding any other lawful and document rent increases for Individual Apartment Improvements (IAIs) and/or Major Capital Improvements (MCI rent increases[....][21]

Essentially then, for a landlord that deregulated an apartment pre-*Roberts*, DHCR allows that owner to take MCI increases, IAI increases, and vacancy increases. In other words, the DHCR Formula requires pretending the landlord had treated the subject apartment as regulated, even though the landlord did the opposite. As explained below, not only should the DHCR Formula rent increases not be allowed

[21] Sachar Aff., Ex. G.

under principles of fundamental fairness, allowing such increases violates the tenants' due process rights.

A. MCI Increases

A landlord may offset the cost of an MCI (a building-wide improvement, such as a new boiler), by seeking an increase of a rent-stabilized tenant's rent. As described in RSC § 2522.4, that process works as follows: a landlord performs the MCI, and seeks DHCR's permission to take the cost of that improvement as a rent increase. In turn, DHCR notifies each of the rent-stabilized tenants in the building, and the tenants are allowed to object to the cost of the MCI to DHCR. Eventually, DHCR either allows, or disallows, that MCI (in part based on the tenants' comments), and determines the amount of the resulting rent increase.

Here, however, Landlord was not treating Tenants, or their predecessors, as rent-stabilized. As a consequence, they were never informed of any MCIs, and never afforded the opportunity to object, as the RSC requires. Yet, when the apartment was re-registered, DHCR and Landlord saddled Tenants with MCI increases. It is simply unfair that, under the DHCR Formula, tenants (including the *Amici*), are forced to pay for MCIs upon which they did not have the opportunity to opine, and it is arbitrary and capricious for DHCR to simply ignore the RSC's MCI notification requirements. Moreover, it fundamentally violates due process to require a tenant to pay for an MCI, when such tenant was denied an opportunity to participate in the

MCI approval process, and was not even given notice of such proceeding, as the RSC requires.

B. IAI Increases

At the time period at issue here (the regulations have since changed to require even greater disclosure), the annual registration form advised tenants when the landlord performed IAIs[22] and sought increases.[23] The contemporaneous tenant thus has an opportunity to challenge those IAIs.[24] Although the landlord here sought to take advantage of such increases, that request was denied, because the proper documentation (in the form of cancelled checks, invoices, and the like) was lacking. DHCR is clear, however, that had the requisite documentation been provided, it would have allowed the IAI increase under the DHCR Formula.[25]

Such is impermissible. Landlord (like the *Amici*'s landlords) was not treating the apartments as rent-stabilized, the tenants did not receive the required registrations disclosing IAIs. How then, can DHCR allow a landlord to take credit for IAIs, when the tenant in occupancy was not informed such IAIs had been

[22] IAIs are, axiomatically, work that "improves" the apartment. According to the First Department, such IAIs can include "the installation of new thermal break windows; the demolition of walls and construction of a new closet in one bedroom; the removal and installation of new kitchen cabinets and countertops; the installation of new appliances, including a dishwasher and refrigerator; the installation of a new sink, faucet and floor in the kitchen; the refinishing of all doors; and the installation of new tiles around the plumbing work and new closet shelving." (*Taylor v 72A Realty Assocs., L.P.*, 151 AD3d 95, 98–99 [1st Dept 2017])

[23] Attached to the Sachar Affirmation as Exhibit H is a 2007 sample registration.

[24] It is important to challenge putatively performed IAIs promptly, because as time goes by wear and tear makes it difficult to tell when IAIs were performed)

[25] *Regina* at 423.

performed, and were subject to challenge, as the RSC required? By ignoring its own code, and allowing the landlord to take credit for IAI increases, DHCR not only behaved in an arbitrary and capricious manner, it violated due process.

C. Vacancy Increases and RGB Increases

Nor should vacancy increases be afforded to a landlord that was not following the law. Prior to HSTPA, when a rent-stabilized apartment became vacant, a landlord was allowed to take a percentage increase in the rent, usually around 20%. Here, DHCR allowed the landlord a vacancy increase for the tenant who vacated in 2005. But, that tenant was given a "free-market" lease, not a rent-stabilized one, and the rent for that apartment exceeded what was allowed under the rent regulations. A rent-stabilized lease is of significant value, and no landlord should be permitted to take credit when a tenant was not properly informed of their rent-stabilized status, regardless of the reason, and then reap the vacancy increase when that tenant departs.

We recognize the counter-argument that Landlord will make: they mistakenly relied on DHCR in deregulating the apartment, pre-*Roberts*.[26] And, of course, DHCR supports that argument; after all, the Landlord purportedly relied upon its errant guidance. It bears remembering, however, that *Roberts* was not a change in the law, this Court merely interpreted the J-51 Program's requirements. (*Gersten v 56 7th*

[26] There are many landlords who deregulated, or failed to re-register, post-*Roberts*. Claims related to those landlords are addressed in the *Taylor Amici* briefing.

Ave. LLC, 88 AD3d 189, 197-98 [1st Dept 2011] ["Although *Roberts*'s interpretation of the statute is inconsistent with regulations promulgated by DHCR, the Court has not enunciated a new principle of law. Instead, as in *Gurnee,* the decision in *Roberts* was based on a pure statutory analysis, 'dependent only on [an] accurate apprehension of legislative intent.'"].)

Because there was no new principle of law, the First Department held that *Roberts* applied retroactively. What the DHCR Formula does - - in allowing a vacancy increase based on a vacating, pre-*Roberts* tenant who was errantly given a "free-market" lease - - is to inoculate landlords from their mistakes or misdeeds as to the law's requirements. Then, it shifts the consequences of that error onto tenants (including Tenants, and the *Amici*), in the form of a vacancy increase, when the landlord never properly informed the vacating occupants of their rent-stabilized status (and that includes vacancy increase taking place after the First Department required retroactive registrations in *Gersten*, but where the landlord did not follow that requirement). The tenants never made the mistake of law, DHCR and the landlords did. Why should re-regulated tenants bear the brunt of DHCR's, and their landlord's, errors? They should not.

Nor are RGB increases allowed. As the First Department has held, a landlord who has not properly registered an apartment cannot take such increases. (*215 W 88th St. Holdings LLC v New York State Div. of Hous. and Community Renewal,*

(143 AD3d 652, 653 [1st Dept 2016] ["However, we disagree with the court that [DHCR] acted within its legitimate powers when, in calculating the overcharge, it afforded the owner the benefit of the percentage increases it would have received, at each renewal, in accordance with the RGB[], had it been charging a legal, rent-stabilized rent ... The statute makes no allowance for circumstances such as a successor owner's good faith or reliance on agency determinations in its favor that are later rescinded."].) And, it bears noting, that if RGB increases are not allowed (even if the landlord was relying, in good faith, on DHCR), other increases, such as the aforementioned vacancy increases, should similarly be barred.

In sum, the DHCR Formula seeks to shift the consequences for the mistake in law from DHCR and the landlords, and onto New York City's rent-regulated tenants, <u>the only innocent stakeholders</u>. What could be more arbitrary or capricious (not to mention unconstitutional) than for DHCR to engage in a game of make-believe, and subject tenants to rent increases, when the landlords seeking such increases were never in compliance with the very regulations DHCR purports to oversee, and, tenants were not provided the required notifications precedent to such increases? DHCR cannot waive the RSC's requirements to remedy the Agency's own legal errors, and those of New York's landlords, at the expense of New York's tenants.

Consequently, as the DHCR Formula is an arbitrary, invalid, and unconstitutional methodology to establish the legal regulated rent, it cannot be utilized.

III. THE FOUR-YEAR RULE IS NO LONGER APPLICABLE, AND HSTPA APPLIES TO ALL PENDING CLAIMS

The former version of the rent-regulations provided that "the legal regulated rent for purposes of determining an overcharge, shall be deemed to be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement, plus in each case subsequent lawful increases and adjustments" and (with the exception of fraud) if the rent-registration was not challenged within four years, than no challenge could be raised. (*Thornton v Baron*, 5 NY3d 175, 180 [2005], *citing* RSL § 26–516.) That was the Four-Year Rule.

HSTPA eliminated that rule. The legislature amended the pertinent section of the rent-regulations referring to it to read, "the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement (or, if more recently filed, the initial registration statement), plus in each case any subsequent lawful increases and adjustments." (RSL § 26-516)

The statute clearly indicates that the Four-Year Rule is no more. The First Department recently held likewise. (*Dugan v London Terrace Gardens, L.P.*, 177

AD3d 1, 9 [1st Dept 2019] ["Other panels of this Court, by split benches, reached a different conclusion, limiting review of the rental history to the four-year period preceding the filing of the overcharge complaint (*see Raden v. W 7879, LLC*, 164 A.D.3d 440, 84 N.Y.S.3d 30 [1st Dept. 2018], *lv granted* — N.Y.3d ——, — N.Y.S.3d ——, — N.E.3d ——, 2018 WL 6057059 [2018]; *Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 164 A.D.3d 420, 424, 84 N.Y.S.3d 91 [1st Dept. 2018], *appeal dismissed* 32 N.Y.3d 1085, 90 N.Y.S.3d 633, 114 N.E.3d 1086 [2018], *lv granted* 33 N.Y.3d 1062, 103 N.Y.S.3d 355, 127 N.E.3d 313 [2019]). The new statute resolves this conflict, and makes clear that courts must examine all available rent history necessary to determine the legal regulated rent."])

Tacitly recognizing that the Four-Year Rule is no longer available, Landlord contents itself with arguing that HSTPA should not be applied because, for example it was politically motivated, or that it does not specifically address post-*Roberts* registration.[27] Political motivation is irrelevant, and there is nothing in HSTPA that would give rise to the conclusion that the legislature intended to carve out J-51 rent-overcharge claims. Had the legislature so intended, they would have so provided.

[27] Respondent's correspondence, dated October 16, 2019 ("October 16 Corr.") at 2-7.

In any event, where Landlord really misses the mark is with its claim that the complaint was not filed "pursuant to or under the RSL as amended by [] HSTPA and therefore it must be determined pursuant to the pre-Amendment statute."[28]

HSTPA provide that the legislature intended the change in law to "take effect immediately, and shall apply to any claims pending or filed on or after such date[.]"(Laws 2019, ch 36 at Part A). It has long been understood that our state's legislature may, so long as it expresses such a desire clearly, (as it did here), modify the statute of limitations to revive claims that were previously barred. Section 59 of McKinney's Statutes states, "[w]hen reasonably exercised, the Legislature has the power to change laws relating to limitations of actions as by shortening limitations in pending cases or reviving an action previously barred." (*See also Commander-Larabee Mill Co v Manufacturers & Traders Tr. Co*, 61 F Supp 341, 342 [WD NY 1945] ["Under federal or state law the rule is that the lawmaking body may change laws relating to limitation of actions in pending cases."]).

Landlord points to *Mengoni v N.Y. State Div. of Hous. & Cmty Renewal*, (97 NY2d 630 [2001]), as supporting its assertion that the Court should ignore the legislature's intention that the statute of limitations amendment apply to "any claims pending" at the time of such amendment. Such a citation does not withstand even basic scrutiny.

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[28] October 16 Corr. at 9.

In *Mengoni*, two tenants filed overcharge complaints prior to April 1, 1984, the effective date of RSL § 26-516, which was established as part of the Omnibus Housing Act of 1983. (*Mengoni* at 632-633). In 1997 (before a final decision had been reached in both overcharge actions), the legislature amended RSL § 26-516 in the Rent Regulation Reform Act of 1997 (*Id.* at 633). Those amendments applied to "any action or proceeding pending in any court" or before an administrative agency (*Id*). The question before the Court of Appeals was whether the amendment applied to overcharge complaints filed prior to the pre-1984 statutory scheme.

This Court held that amendment was inapplicable. It first looked to Section 33 of the 1997 Reform Act, and noted that it "preclude[d] DHCR form calculating rent overcharges based upon a rent history prior to the four-year period preceding the filing of a complaint 'pursuant to this subdivision.'" (*Id.*, emphasis added). The Court then noted that Section 44 of the 1997 Reform Act provided that Section 33 applied "'to any action or proceeding pending in any Court or any application or proceeding before an administrative agency on [its] effective date.'" (*Id.*). Because the two overcharge claims had not been brought under the 1983 Omnibus Housing Act, the Court held "section 33 is therefore inapplicable." (*Id.* at 633-34).

In other words, *Mengoni* was focused on an exceedingly narrow issue: whether the 1997 Reform Act amendments to the Omnibus Housing Act of 1983 applied to claims that originated before the 1983 Act, and were not brought pursuant to that Act.

Nothing in *Mengoni* suggests that the Court should cavalierly ignore the Legislature's intention that the clear and unambiguous amended statute of limitations in HSTPA apply to "any claims pending," and the Court should reject the Landlord's invitation to do so.

It bears noting that the First Department has already rejected Landlord's argument. In *Dugan* (177 AD3d at 1), the court held:

> On June 14, 2019, New York State enacted the Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36) (HSTPA), landmark legislation making sweeping changes to the rent laws and adding greater protections for tenants throughout the state.[3] Of relevance to this appeal is part F of the HSTPA, which amended RSL § 26-516 and CPLR 213-a, which govern claims of rent overcharge and the statute of limitations for bringing such claims. The legislation directed that the statutory amendments contained in part F "shall take effect immediately and shall apply to any claims pending or filed on and after such date" (HSTPA, § 1, part F, § 7). Because plaintiffs' overcharge claims were pending on the effective date of part F of the HSTPA, the changes made therein are applicable here (*see Matter of Kandemir v New York State Div of Hous. & Community Renewal*, 4 AD3d 122 [1st Dept 2004]; *Matter of Pechock v New York State Div. of Hous. & Community Renewal*, 253 AD2d 655 [1st Dept 1998]; *Zafra v Pilkes*, 245 AD2d 218 [1st Dept 1997]).

Dugan at 8.

Similarly, Landlord's retroactivity argument was rejected in *Nájera-Ordóñez, et ano. v 260 Partners L.P, et ano.*, (2019 WL 5681030 [Sup Ct, NY County 2019]) by Justice Kotler, by Justice Cohen in *Stafford et al v A&E Real Estate Holdings, et al.*, (2019 NY Slip Op 33039[U], 8 [Sup Ct, NY County 2019]), and by Justice Edmead in *Alekna, et al. v 207-217 West 110 Portfolio Owner LLC*, (2019 NY Slip

Op. 33256[U], 4 [Sup Ct, NY County 2019]). (*Amici*'s counsel herein represents the tenants in all three actions, and Landlord's counsel represents the landlord in *Alekna*). Other justices hold likewise, including Justice Guthrie in *57 Elmhurst, LLC v Williams, et al.*, (2019 NY Slip Op 51778(U) [Civ Ct 2019]), and Justice Ibrahim in *3225 Holdings LLC v Imeraj*, (65 Misc 3d 1219(A) [Civ Ct 2019]).

IV. THE *THORNTON* DEFAULT FORMULA AND THE DHCR SAMPLING METHOD ARE UNAVAILABLE

Tenant asserts that the DHCR Formula should apply, and if that formula is unavailable because the Court seeks to utilize the Four-Year Rule, this Court should apply the *Thornton* Default Formula, or the DHCR Sampling Method.

As noted previously, the DHCR Formula is arbitrary and capricious, violates due process, punishes tenants for their landlord's mistakes, and requires pretending the landlord's mistake of law never occurred.

The Four-Year Rule was eliminated by HSTPA, so utilizing the *Thornton* Default Formula (a DHCR internal formula whereby one went back four years before the filing of the complaint, found the least expensive "comparable" apartment and utilized that apartment's rent to set the base date rent) is not possible. In any event, DHCR codified a modified default formula, after *Thornton,* at RSC § 2522.6(b)(2) and (3), with significant changes to the *Thornton* default formula. Even if there was a Four-Year Rule, the amended codification replaced the *Thornton* Default Formula.

As to the DHCR Sampling Method, that methodology is a last-ditch registration methodology when there is absolutely no other possible way to figure out the legal regulated rent under any acceptable methodology, or where all the other methodologies are inappropriate. Here, as described below, resort to that methodology is most likely not necessary, or at a minimum, is premature.

In sum, setting the legal regulated rent, is a simple process, especially now that the legislature passed HSTPA.

V. RENT OVERCHARGE CLAIMS SHOULD BE CALCULATED PURSUANT TO HSTPA

A. Methodology One: The Last Reliable Rent

Under HSTPA the legal regulated rent is established through three potential methods. First,

> ...[T]he legal regulated rent for purposes of determining an overcharge shall be the rent indicated in the most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement ... plus in each case any subsequent lawful increases or adjustments.

RSL § 26-516(a), emphasis added. So, the very first question to be resolved is "can we identify a reliable rent registration, served upon the tenant?" Now, technically, the analysis should stop here, because this question was never addressed, by either DHCR, Landlord, Tenant, or any of the courts below and this action should be remanded to conduct precisely that inquiry.

But thousands of tenants are waiting for guidance from this Court. So, for the purposes of this analysis, assume that the last "reliable" registration is the one preceding the impermissible, 2003 deregulation, and that Landlord can meet its burden of proof by demonstrating that such registration was served upon the tenant then in occupancy. Then, the question moves on to what is meant by "subsequent lawful increases or adjustments."

As discussed above, it would be impermissible for Landlord to take an MCI increase, if the tenant was not provided with the required MCI notice (because they were not being treated as rent stabilized), nor given the opportunity to object provided by the RSC. Thus, any MCI increase, taken when then apartment was unregistered, would not be a "lawful increase or adjustment."[29]

Again, for reasons outlined more fully above, IAI increases would also not be permitted, unless the tenant was informed of such improvements, and given the opportunity to verify them. But, at least at the time in question (greater notification requirements have since been established), IAI increases were disclosed on apartment registration forms, which are only provided to rent-stabilized tenants. Thus, unless the landlord demonstrates not only that it has the required IAI documentary evidence (in the form of invoices, cancelled checks, and the like), but

[29] MCI increases taken when the apartment was properly registered (even if registered at the proper amount), would be permissible, since the amount of the MCI increase is untethered to the legal regulated rent.

that the requisite disclosures were made to the contemporaneous tenant, such IAI increases would also not be a "lawful increase or adjustment."

Nor would vacancy increases (except for that allowed for the rent-stabilized tenant who vacated prior to the impermissible deregulation) be considered a "lawful increase or adjustment." The vacating tenant here was informed his apartment was "free-market" and was charged rent in excess of the legal regulated rent.[30] A rent-stabilized lease is of significant value, and no landlord should be allowed to take credit for a vacancy increase when the tenant was misinformed as to the rent-stabilized status of their apartment, regardless of the reason, and then reap the vacancy increase when that tenant departs. Not surprisingly, when registration failures occur, courts disallow vacancy increases. (*Gold Rivka 2 LLC v Rodriguez*, 64 Misc 3d 1228(A) [Civ Ct 2019] [vacancy and rent guidelines board increases barred because apartments were unregistered]; *EMA Realty v Leyva*, 64 Misc 3d 11 at 15 [App Term 2019] [lack of proper registrations barred vacancy increases].)

Finally, unless the apartment was registered, the landlord cannot take RGB increases. In *215 W 88th St. Holdings LLC*, the First Department reiterated that even when a landlord acts in purported "good faith" or relies on "agency determinations," it cannot take RGB increases if the apartment was not properly registered. (*Id.* at 653). While recognizing it was an "arguably harsh result," the First Department in

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[30] *Regina* at 422.

opinion disallowed RGB increases during the period when an apartment was not properly registered with DHCR. (*Id.*).

That is all then relatively straightforward. Go back to the last reliable registered rent, make sure it was served upon the tenant, and take any increases, subject to the condition that such increases must be proper, and cannot be had for a tenant who was not fully informed of their rent-stabilized rights.

But, what if methodology one is unavailable, either because the apartment was just registered for the first time, or because there is no reliable rent registration served upon a tenant? Methodologies two and three tell us.

B. Methodology Two: Initial Registrations

The second option provides:

> [a]s to complaints filed within ninety days of the initial registration of a housing accommodation, the legal regulated rent shall be deemed to be the rent charged on the date six years prior to the date of the initial registration of the housing accommodation (or, if the housing accommodation was subject to this chapter for less than six years, the initial legal regulated rent) plus in each case, any lawful increases and adjustments.

Id. This methodology applicable if the apartment was never registered, a complaint was never filed, and only goes into effect once that registration takes place. This methodology is inapplicable to Tenants' case, *Amici*'s cases, and frankly, is almost impossible to imagine coming up in a J-51 case.

C. Methodology Three: There is no Reliable Rent History

What if the landlord is unable to produce any reliable rent-registration, or demonstrate that any registrations were served upon the tenant? In that situation, one utilizes the third methodology, which provides:

> Where the prior rent charged for the housing accommodation cannot be established, such rent shall be established by [DHCR] provided that were a rent is established based on rentals determined under the provisions of the local emergency housing rent control act such rent must be adjusted to account for no less than the minimum increases which would be permitted if the housing accommodation were covered under the provisions of this chapter.

Id. That provision is fairly straightforward. If the rent cannot be established, a court should look to DHCR, and if DHCR looks towards a rent-controlled rental to determine the legal regulated rent, then those increases allowed by the RSL should be granted.

DHCR tells litigants and the courts precisely how to determine the legal regulated rent under the third methodology: the default formula. And, it bears noting, that although the statute says "DHCR" courts (including this Court) use that to mean that DHCR's methodology should be deployed, not that every claim with an unreliable rent history should be sent to DHCR for adjudication. (*Thornton* at 181 ["[W]e agree with Supreme Court and the Appellate Division majority that the default formula used by DHCR to set the rent where no reliable rent records are available was the appropriate vehicle for fixing the base date rent here."]; *Meyer v*

224 Lafayette St. Corp., 165 AD3d 598, 599 [1st Dept 2018] [illusory tenancy requires utilization of default formula]; *Kreisler v B-U Realty Corp.*, 164 AD3d 1117, 1118 [1st Dept 2018] [default formula appropriate to re-establish legal regulated rent]; *Altschuler v Jobman 478/480, LLC.*, 135 AD3d 439, 440 [1st Dept 2016] [default formula utilized because rent history was unreliable]; *Cooper v 85th Estates Co.*, 57 Misc 3d 1223(A) [Sup Ct NY County, 2017] [default formula appropriate in light of rent history's unreliability].)

i. Determining the Legal Regulated Rent under the Default Formula

The First Department recently explained, even after the passage of HSTPA:

> [T]he default formula is applied to calculate compensatory overcharge damages where no other method is available. Moreover, it is applied equally in cases in which the owner has engaged in fraud and in cases in which the base date rent simply cannot be determined or the rent history is unavailable.

(*Simpson v 16-26 E. 105, LLC*, 2019 NY Slip Op 07026 [1st Dept Oct. 1, 2019].)[31]

The default formula is codified by DHCR at RSC § 2522.6(b)(2) and (3). RSC § 2522.6(b)(2) provides:

(2) Where either:

(i) the rent charged on the base date cannot be determined; or

(ii) a full rental history from the base date is not provided; or

[31] *Amici*'s counsel is counsel for the tenants in *Simpson.*

(iii) the base date rent is the product of a fraudulent scheme to deregulate the apartment; or

(iii) a rental practice proscribed under section 2525.3(b), (c) and (d) of this Title has been committed, the rent shall be established at the lowest of the following amounts set forth in paragraph (3) of this subdivision.

Id. RSC § 2522.6(b)(3) describes how to calculate the rent once it is determined that the rent history is unreliable. It requires choosing the lowest resulting amount from three potential methodologies, and setting that as the legal regulated rent:

> (i) the lowest rent registered pursuant to section 2528.3 of this Title for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment; or
>
> (ii) the complaining tenant's initial rent reduced by the percentage adjustment authorized by section 2522.8 of this Title; or
>
> (iii) the last registered rent paid by the prior tenant (if within the four year period of review)[.]

RSC § 2522.6(b)(3). Once the legal regulated rent is set, the difference between the lowest of the RSC § 2522.6(b)(3) options, and the rent actually charged, is the amount of the tenant's overcharge.

ii. The Method of Last Resort: The DHCR Sample Method

RSC § 2522.6(b)(3) has one more potential formula: the DHCR Sample Method. Subsection iv of RSC § 2522.6(b)(3) provides that: "if the documentation set forth in subparagraphs (i) through (iii) of this paragraph is not available or is inappropriate, [the legal regulated rent shall be set at] an amount based on data compiled by the DHCR, using sampling methods determined by the DHCR, for

regulated housing accommodations." It is, of course, premature to turn to the DHCR Sample Method, until all other possible registration methodologies have been exhausted.

CONCLUSION

As demonstrated above, DHCR's preferred re-registration methodology violates due process, shifts the burden for the landlord's mistake (and DHCR's) to the tenants, and allows landlords to take advantage of rent-increases that were not properly taken in accordance with the RSC. The DHCR Formula should not be utilized to set the legal regulated rent for any apartment deregulated pre-*Roberts*, including those of Tenants, and the *Amici*.

Nor can Landlord's proffered formula, the Four-Year Rule, be utilized. That formula was overruled by HSTPA, which applies retroactively.

As to Tenants' desired methodology, the DHCR Formula is invalid, the *Thornton* Default Formula overridden, and the DHCR Sampling Method a formula of last resort, and one likely unnecessary here.

To set the legal regulated rent, the parties must first look to the last reliable registration, served upon the tenant, and proceed from there, with MCI, IAI, and vacancy increases allowed if the landlord is entitled to such increases, because it followed the rent-regulations, and provided proper notification. If there is no reliable registration, or there is no evidence the registration was served upon the tenant, turn

to the first three prongs of the DHCR default formula codified at RSC § 2522.6(b)(2) and (3). If those are not available, then, and only then, turn to the DHCR Sampling Method at RSC § 2522.6(b)(3)(iv). All it takes is some basic math, that can be performed in the space of a few minutes.

It could not be easier. To avoid years of continued briefing, in the many post-*Roberts* registration cases, some of which have stretched on for more than a decade, we respectfully submit that the Court should explain, as outlined above, how to re-register an apartment that was impermissibly deregulated, pre-*Roberts*.

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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