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October 16, 2019

Via FEDEX

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Chief Clerk and Legal Counsel to the Court
State of New York
Court of Appeals
Clerk's Office
20 Eagle Street
Albany, NY 12207-1095

Re: Matter of Regina Metropolitan v. NYS DHCR
No. APL-2018-00222

Dear Mr. Asiello:

Pursuant to your letter of September 17, 2019 the following sets forth Respondent Regina Metropolitan Co., LLC's supplemental argument addressing whether L 2019, ch 36 ("the Housing Stability and Tenant Protection Act of 2019" or "HSTPA") governs the issues presented on this appeal and, if so, the appropriate application thereof as well as the propriety and desirability of this Court determining such questions in the first instance on this appeal.

PRELIMINARY STATEMENT

This appeal pertains to the manner in which a rent overcharge complaint is to be determined in the wake of this Court's 2009 landmark ruling in *Roberts v. Tishman Speyer Properties, L.P.*, 13 N.Y.3d 270, 890 N.Y.S.2d 388.

In issuing the Order that is the subject of its appeal, DHCR recognized the absence of any wrongdoing on the part of Regina Metropolitan. DHCR had failed to address any statute or code section applicable to the situation other than its erroneous reliance upon Rent Stabilization Code ("RSC") §2526.1(a)(2)(ix). The Appellate Division's decision expressly found that section had no relevance to the situation since it applies only to apartments that were vacant or temporarily exempt from regulation, neither of which pertains to this matter. (R. 372). DHCR erroneously argued the RSC section it relied upon entitled it to construct a new rent by looking back beyond the four-year statutory look-back period to commence calculations from the last registered stabilized rent.

The RSC was amended in 2014. The Rent Stabilization Law ("RSL") was amended in 2015. Neither addressed calculating rent in a situation such as this. The 2019 HSTPA similarly fails to do so. In 2010 a Bill was introduced in the Legislature that specifically addressed calculating rent in a Roberts situation. That Bill did not pass. Yet DHCR's reply brief, in addressing Regina's position that the Agency engaged in impermissible legislation in utilizing a non-statutorily sanctioned methodology, claims Regina is incorrect, as the HSTPA validates the actions it took when it first decided this matter in 2014.

The HSTPA amendments to the RSL do not address the method of calculating a potential rent overcharge in the wake of Roberts. If it had done so, constitutional impediments to its retroactive application to this matter, which has been in litigation for almost ten years, require a finding no such recourse is permissible. Moreover, this Court has consistently held that, in situations involving the changing landscape of the rent stabilization laws, the law in effect at the time of the filing of a complaint should be utilized.

THE HSTPA SHOULD NOT BE APPLIED TO AN EXTENSIVELY LITIGATED COMPLAINT THAT WAS FILED ALMOST TEN YEARS PRIOR TO ITS ENACTMENT

On June 14, 2019 the HSTPA was enacted. Thus, as to this appeal, the question arises as to whether its draconian amendments to the RSL regarding criteria for the processing of rent overcharge complaints may be applied to a 2009 complaint that has been extensively litigated and, if so, whether the HSTPA would have any impact. Regina submits the answer to both of these questions is in the negative. In addition, it should not be left to DHCR to determine the issue of whether, in this instance, the HSTPA should be applied to a pending case. That issue should be determined by this Court in the first instance since, if the HSTPA is found to be inapplicable due to constitutional constraints, it will be unnecessary to determine whether, or to what extent, it impacts this matter.

On November 2, 2009, eleven days after the *Roberts* ruling, the Intervenor-Respondents, tenants Carr and Levy, filed their complaint of rent overcharge. On February 26, 2014, over four years after the complaint was filed, DHCR's Rent Administrator issued an order which, based upon *Roberts*, found an overcharge of $285,390.29, inclusive of $76,096.19 in statutory interest.

Both Regina and the tenants timely filed PARS appealing DHCR's ruling, Regina's having been filed March 25, 2014 and the Tenants on March 28, 2014. Regina claimed DHCR could not go beyond four years from the filing of the complaint to determine the legal regulated rent ("LRR"); the tenants claimed they should have been awarded treble damages and attorneys' fees. On May 13, 2015, almost a year later, DHCR denied the respective PARs. Thus, the administrative proceedings alone took over five years. Both parties then commenced Article 78 proceedings in Supreme Court that were denied on October 13, 2016. The Appellate Division's Order ("the Order") in favor of Regina that is the subject of this appeal by DHCR[1] issued August 16, 2018, almost nine years after the complaint was filed. The Order "remand[ed]to DHCR to

[1] The Intervenor-Respondents Carr and Levy do not have standing as appellants on this appeal based upon prior rulings by this Court.

recalculate the overcharge and proper rent using a base date rent of four years before the filing of the overcharge complaint." (R. 376). In *Raden v. W 7879*, 164 A.D.3d 440, 84 N.Y.S.3d 30 (1st Dept. 2018), a companion case now pending before this Court that was decided the same day as *Regina* (and which expressly relied upon it), the Appellate Division affirmed a special referee's finding that setting the free market base date rent in May 2006 (four years prior to the filing of the complaint) "was a reliable method of establishing the stabilized rent and that further look-back was inappropriate, because ...defendants could not have anticipated *Roberts*, which was contrary to industry practice at the time."

The above quoted language from *Raden*, supra, is as relevant now as it was prior to the enactment of the HSTPA. As will be addressed *infra*, there is no language in the HSTPA that expressly addresses calculating rent in the wake of *Roberts*. In addition, any attempt to apply it here violates due process.

It is well settled that a statute must be interpreted so as to avoid an unreasonable or absurd application of the law. *People v. Pabon*, 28 N.Y.3d 147, 156, 42 N.Y.S.3d 659 (2016).

The HSTPA eviscerates rights that have been in effect since the Omnibus Housing Act of 1983 became effective on April 1, 1984. That Act provided for a four-year statute of limitations which included limiting the look-back at an apartment's rent history to four years and calculating overcharges based upon the rent indicated in the registration statement filed four years prior to the filing of a complaint. *See* Rent Stabilization Law §26-516(a). The HSTPA provides that the base date rent is the rent indicated in the most recent reliable annual registration statement filed *and served six or more years* prior to the most recent registration statement. *See* RSL §26-516(a)(i). It also provides for a six-year recovery period for overcharge penalties and treble damages, replacing the prior four-year overcharge recovery period and two years of treble damages. It also provides for a record retention period of at least six years. In addition, DHCR no longer has discretion in declining to award a tenant attorney's fees.

The HSTPA expressly provides that it applies to pending overcharge proceedings. However, especially considering the circumstances and time frame of this action, any such mandate is unconstitutional.

There is a presumption against statutory retroactivity, which is founded upon elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994).

As the Supreme Court stated in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532, 533, 118 S. Ct. 2131 (1998):

> "Retroactivity is generally disfavored in the law ... in accordance with fundamental notions of justice that have been recognized throughout history ... It is a principle in the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect ... Retrospective laws are, as a rule, of questionable policy, and contrary to the

> general principle that legislation by which the conduct of mankind is to be regulated ought to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law ... Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact ... Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions ..." (internal quotation marks and citations omitted).

Generally, an amended statute is to be applied prospectively unless its language or the legislative intent indicates otherwise; an exception exists for remedial statutes that deal with procedural matters. In such circumstances, the amended statute is construed to be retroactive and, as such, is deemed to apply to pending matters. However, procedural statutes may not retroactively destroy rights already accrued and, accordingly, such application to pending matters is only to procedural steps taken subsequent to the effective date of the statute. *Auger v. State*, 236 A.D.2d 177, 666 N.Y.S.2d 760 (3d Dept. 1997). In *State ex rel Spitzer v. Daicel Chemical Industries, Ltd.*, 42 A.D.3d 301, 302, 840 N.Y.S.2d 8, 11 (1st Dept. 2007), the court stated the following:

> "... even remedial statutes are applied prospectively where they establish new rights, or retroactive application would impair a previously available defense ..."

Even where a statute is remedial, it should not be given retroactive effect where a defendant has a vested right in a defense which may not be impaired by retrospective application of an amendment. *Dorfman v. Leidner*, 150 A.D.2d 935, 541 N.Y.S.2d 278 (3d Dept. 1989) (further holding that procedural statutes may not retroactively destroy rights already accrued).

The retrospective application of new legislation may offend the due process clause if, upon balancing the considerations on both sides, it appears that retrospective application would be unreasonable. *Valladares v. Valladares*, 80 A.D.2d 244, 251, 438 N.Y.S.2d 810, 815 (2nd Dept. 1981), citing *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 655 S. Ct. 1137.

On the Federal level, in enunciating standards that are equally applicable to States, the Supreme Court, in *I.N.S. v. St. Cyr*, 121 S. Ct. 2271 (2001), in reliance upon *Landgraf, supra,* held that the first step in the impermissible-retroactive-effect determination is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively; the second step, which is pertinent to this matter, is to determine whether the law attaches new legal consequences to events completed before its enactment, a judgment informed and guided by considerations of fair notice, reasonable reliance, and settled expectations.

Although a statute is not invalid merely because it reaches back to establish the legal significance of events occurring before its enactment, a traditional principle applied in determining the constitutionality of such legislation is that the Legislature is not free to impair vested or property rights; this doctrine reflects the deeply rooted principles that persons should be able to rely on the laws that exist and plan their conduct accordingly and that the legal rights

and obligations that attach to completed transactions should not be disturbed [internal citations omitted]. *Alliance of American Insurers v. Chu*, 77 N.Y.2d 573, 678, 569 N.Y.S.2d 364 (1991). There, this Court stated the following:

> "Thus, where legislation has retroactive effects, judicial review does not end with the inquiry generally applicable to economic regulation, i.e., whether the legislation has a rational basis ... instead, the Courts must balance a number of factors, including fairness to the parties, reliance on pre-existing law, the extent of retroactivity and the nature of the public interest to be served by the law to determine whether the rights affected are subject to alteration by the Legislature." (internal quotation marks and citations omitted).

In *American Economy Ins. Co. v. State of New York,* 30 N.Y.3d 136, 158, 65 N.Y.S.3d 94 (2017) this Court stated the following in pertinent part regarding challenges to retroactive legislation:

> "In the context of a substantive due process challenge to retroactive legislation, we apply the same rational basis scrutiny as the Supreme Court. That test requires a legitimate legislative purpose furthered by a rational means....Although the justifications that suffice for the prospective nature of a legislative enactment may not suffice for its retroactive nature, the test of due process for retroactive legislation is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose..." (internal quotation marks and citations omitted).

The RSL has been amended by the Legislature numerous times in the past, most recently in 2015. Thus the question arises as to the urgency, necessity or rationale of applying the 2019 amendments to matters that were pending not only as of the date of the 2015 RSL amendments but for years prior. Applying this Court's "rational legislative purpose test" to this matter raises the question as to what occurred in the approximately four year period when the RSL was last amended and the present to support not only the need for the numerous amendments promulgated by the HSTPA but its retroactive application, especially to a case such as *Regina.*

There is nothing in the HSTPA or the memorandum in support thereof that specifically addresses *Roberts* or the need to protect tenants such as those involved in this matter who, like Regina, thought the apartment they were leasing was unregulated. As noted by the Appellate Division, First Department in *Ram I LLC v. New York State Div. of Housing and Community Renewal*, 123 A.D.3d 102, 106 (2014), the Court, in considering a *Roberts* issue, stated "we are not unmindful that the legislative history indicates a preference not to have people who can easily afford market value rental property inhabit rent-regulated housing." Considering the foregoing, this Court's language in *James Square Associates, LP v. Mullen*, 21 N.Y.3d 233, 249, 250, 970 N..YS.2d 888 (2013) is pertinent:

> "On the third factor dispositive in this case, the State fails to set forth a valid purpose for the retroactive application of the 2009 amendments. The legislature did not have an important public purpose to make the law retroactive. It was not

> attempting to correct an error in the tax code…The retroactive application of the 2009 Amendments simply punished the Program participants more harshly for behavior that already occurred and that they could not alter."

There is no indication the HSTPA, if it is somehow found to be applicable here, is attempting to correct an "error" with respect to calculating rent pursuant to an overcharge complaint. Equally true is that any such application would more harshly punish Regina for actions it cannot alter, that being relying upon the RSC and DHCR's interpretation of applicable law.

In *Matter of Chrysler Props. v. Morris*, 23 N.Y.2d 515, 522, 297 N.Y.S.2d 723 (1969) this Court stated the following:

> "We have all been raised in a legal tradition which finds retroactive legislation distasteful. After balancing the various factors, we conclude that, absent any showing of the public interest to be served by this retroactive legislation [citation omitted], it should not be sanctioned here. The City [defendant] should be required to make a strong case for retroactive effect. No persuasive case has been made."

The following language in that determination is also relevant:

> "If the Legislature should pass a law saying there should be an unlimited period in which to take appeals to the Court of Appeals or to make motions for reargument, this Court would surely refuse to apply the legislation to appeals taken on motions made years after the event where it would cause grave injustices." *Id.*

If the HSTPA had expressly set forth a fair methodology to apply in a *Roberts* situation, DHCR might have an argument in favor of retroactivity. Because no such formula is provided by the HSTPA, the burden is upon the Agency to make a "persuasive case" not only that the new law should be applied retroactively but that it is even relevant to this matter with respect to calculating the complaining tenants' rent. Instead, in its brief, DHCR briefly argued that Regina Metropolitan was wrong in accusing it of seeking to have the Court legislate a remedy since, years after the fact, in a manner that none of the parties could have contemplated, new legislation was enacted which DHCR, albeit erroneously, claims supports the previously non-statutorily sanctioned methodology it utilized in this matter.

The reality of this particular situation, i.e., the fact that the HSTPA was, in substantial part, politically motivated, cannot be overlooked or ignored In noting that politics and retroactive statutes raise particular concerns, the Supreme Court, in *Landgraf v. USI Film Products,* 114 S. Ct. 1483, 1497, 511 U.S. 244, 267 (1994) stated the following in pertinent part:

> "The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its 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."[2]

In *Roberts v. Tishman Speyer Properties, L.P.*, *supra*, this Court expressly stated there were issues yet to be decided, including retroactivity, the statute of limitations, and other defenses that may be applicable to particular tenants. The Court further acknowledged the uncertainty that arose as a consequence of its determination and the fact that the decision's impact would not be known until such time as the issue of "retroactivity" was decided.

Language in the dissenting opinion in *Roberts* is illustrative of the uncertainty that existed at the time of the filing of Plaintiff's complaint and which accurately predicted what would occur in the wake of the majority's ruling:

> "And you do not have to be gifted with her [Cassandara] power of prophecy to foresee significant, if not severe, dislocations in the New York City residential real estate industry as the result of today's decision. This is inevitable because the Court has upended an understanding of the law upon which numerous and substantial business transactions and dealings have been predicated for over a decade ...
>
> ... It will take years of litigation over many novel questions to deal with the fallout from today's decision. In the absence of meaningful legislative action, uncertainty will reign in an industry already rocked by the bursting of the great residential real estate bubble."

As set forth in the Appellate Division's decision in this matter, this Court had carved out a limited exception to the four-year limitation period pertaining to the calculation of rent and overcharges, that being whether the landlord engaged in a fraudulent scheme to evade rent regulation, citing *Grimm v. State of N.Y. Div. of Hous. & Community* Renewal *Off. Of Rent Admin.*, 15 N.Y.3d 358, 366 (2010). (R. 369). Thereafter the decision noted this was a "limited exception" and that to expand it to landlords who have not engaged in fraud "would create a much broader exception that would appear to negate the temporal limits contained in the Rent Stabilization Law and the CPLR." The Appellate Division also implicitly acknowledged the long appellate history pertaining to the calculation of rents in Roberts situations that had commenced in 2012 (R. 371). Its determination in this matter and the companion case of *Raden v. W7879, supra,* completed that evolutionary process.

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[2] In a joint statement by New York State Senate Majority leader Andrea Stewart-Cousins the following was set forth: "These reforms give New Yorkers the strongest tenant protections in history. For too long, power has been tilted in favor of landlords and these measures finally restore equity and extends [sic] protections to tenants across the State. These reforms will pass both legislative houses and we are hopeful that the Governor will sign then into law. It is the right thing to do. None of these historic new tenant protections would be possible without the fact that New York finally has a united Democratic legislature. Our appreciation also goes to the tenant advocacy groups and activists that fought so hard to make this possible." See, https://www.nysenate.gov/newsroom/press-releases/andrea-stewart-cousins/joint-statement.

THE HOUSING STABILITY AND TENANT PROTECTION ACT OF 2019, IF APPLICABLE, DOES NOT IMPACT THE CALCULATION OF PLAINTIFFS' RENT OR THEIR OVERCHARGE CLAIM

The HSTPA provides that, as to overcharges, it is to "take effect immediately and shall apply to any claims pending or filed on or after such date." While, as previously noted, constitutional limitations proscribe any such applicability, it is nevertheless clear that there is no language in the new law that expressly addresses *Roberts* issues or that would otherwise affect this Court's ruling in this matter.

It is a matter of public record that Bill 8050 that was introduced in the New York State Senate in 2010 provided several proposed formulas that expressly addressed calculating rents in the wake of *Roberts*. The significance of this Bill is that it did not pass. The question that thus arises is whether a court could then become a de facto legislative body and promulgate a rule that has been rejected by the New York State Legislature.

The HSTPA amended RSL §26-516(a)(i) in pertinent part as follows with respect to processing rent overcharge complaints:

> "Except as to complaints filed pursuant to clause (ii) of this paragraph [complaints filed within 90 days of the initial registration] 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." (language in bold is new).

RSL §26-516(g) has been amended in pertinent part as follows:

> "...any owner who has duly registered a housing accommodation pursuant to section 26-517 of this chapter shall not be required to maintain or produce any records relating to the rentals of such accommodation for more than [~~four~~] **six** years prior to the most recent registration or annual statement for such accommodation. **However, an owner's election not to maintain records shall not limit the authority of the division to of housing and community renewal and the courts to examine the rental history and determine legal regulated rents pursuant to this section.**" (language in bold is new).

The HSTPA amends RSL §26-516 to add a new subdivision "h". It provides, inter alia, that nothing contained in the subdivision shall limit the examination of rent history relevant to a determination as to (i) whether the legality of the rental amount charged or registered is reliable in light of all available evidence including but not limited to whether there is an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the unit, rendered such rent or registration unreliable; (ii) whether an apartment is subject to regulation; (iii) whether an order issued within six years of the filing of the complaint pursuant to the section affects or limits the amount of rent that may be charged or collected; (iv) whether an overcharge

was willful; (v) whether a rent adjustment that requires information regarding length of occupancy by a present or prior tenant was lawful; (vi) the existence or terms and conditions of a preferential rent; (vii) the legality of a rent charged or registered immediately prior to the registration of a preferential rent; or (viii) the amount of the legal regulated rent where the apartment was vacant or temporarily exempt on the date six years prior to a tenant's complaint.

There is only one subpart of the above referenced amendment that includes the term "reliable", that being "i", which addresses whether the legality of the rent is reliable in light of all available evidence including but not limited to whether there is an unexplained increase in rents, or a fraudulent scheme to destabilize the unit that rendered such rent unreliable. Neither is present here. No other guidance as to how to determine whether the rent is "reliable" is found.

DHCR and the Appellate Division clearly held there was an absence of any fraudulent scheme and that Regina's actions were based upon industry understanding and the RSC that was promulgated by the Agency. Nor was there an "unexplained increase" in the rent, since the rent charged on the base date was established in accordance with the RSC and both DHCR and the common understanding of the law until such time as this Court held to the contrary in *Roberts*.

There is nothing in subdivision "h" which even remotely addresses a *Roberts* situation.

Where a statute describes the particular situations in which it is to apply, "an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." *Patrolmen's Benev. Assoc'n of City of New York v. City of New York*, 41 N.Y.2d 205 (1976), citing McKinney's Cons. Laws of N.Y. Book 1, Statutes § 240. Equally clear is that a Court may not adopt a strained interpretation in order to fill a perceived gap in the statute. *Kennedy v. Kennedy*, 251 A.D.2d 407, 674 N.Y.S.2d 546 (2nd Dept. 1995).

THE TENANTS' COMPLAINT WAS NOT FILED PURSUANT TO OR UNDER THE RSL AS AMENDED BY THE HSTPA AND THEREFORE IT MUST BE DETERMINED PURSUANT TO THE PRE-AMENDMENT STATUTE

In 1983, the Omnibus Housing Act was enacted, effective April 1, 1984. That statute provided for a four-year limitation both on record keeping and review of a rental history. Numerous disputes arose subsequent to the Act, with landlords claiming they were entitled to rely on its provisions with respect to complaints filed prior to April 1, 1984 and tenants alleging they were entitled to rely upon the law in effect at the time they filed their complaint. The First Department consistently rejected the landlords' position, finding that the law in effect at the time of filing was to be utilized. See, e.g., *Lavanant v. State Div. of Housing and Community Renewal*, 148 A.D.2d 185, 544 N.Y.S.2d 331 (1989); *590 West End Associates v. State Division of Housing and Community Renewal*, 166 A.D.2d 184, 564 N.Y.S.2d 77 (1990).

Subsequently, the Rent Regulation Reform Act of 1997 was enacted. That Act provided for an amendment to Rent Stabilization Law §26-516 dealing with rent overcharge complaints, again including a proscription against examination of the rental history of the housing

accommodation prior to the four-year period preceding the filing of a complaint "pursuant to the subdivision."

In *Mengoni v. New York State Div. of Housing and Community Renewal*, 97 N.Y.2d 630, 633, 735 N.Y.S.2d 863 (2001) this Court, in rejecting the landlord's claim that the Rent Regulation Reform Act of 1997 precluded DHCR's examination of rent records beyond four years from the filing of the tenant's complaint, stated the following in pertinent part:

> "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 §26-516(a), and [§] 33 [of the RRRA-97] is by its terms inapplicable to them." (internal citation and ellipses omitted).

RSL §26-516(a)(2), as amended by the HSTPA, provides that "A complaint under this subdivision may be filed with the State Division of Housing and Community Renewal or in a court of competent jurisdiction at any time, however a recovery of overcharge penalties shall be limited to the six years preceding the complaint. A penalty of three times the overcharge shall be assessed upon all overcharges willfully collected by the owner starting six years before the complaint is filed."

Since the Tenants' complaint was filed in 2009, it cannot rationally be found to have been filed "under" the amended RSL section.

CONCLUSION

The HSTPA may not be applied retroactively to the unique facts of this case. Moreover, there is no language in the statute that is applicable to determining the complaining tenants' rent under the circumstances involving this Court's *Roberts* ruling.

Respectfully yours,

Niles C. Welikson

cc: Letitia James, Attorney General State of New York
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