To be Submitted by:
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APL-2019-00116
New York County Clerk's Index No. 159841/16

Court of Appeals
of the
State of New York

ELIZABETH REICH and STANLEE BRIMBERG,

Plaintiffs-Appellants,

– against –

BELNORD PARTNERS, LLC and EXTELL BELNORD, LLC,

Defendants-Respondents.

RESPONSE TO BRIEF FOR *AMICI CURIAE* PETER GUNTHER, JOHN FUNK, AGNES BERECZ, JOHANNA KARLIN, SEMI PAK, BRUCE HACKNEY and TIMOTHY SMITH

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 500.1(f) and 500.13(a) of the New York Court of Appeals Rules of Practice, the Plaintiff-Appellant, Belnord Partners, LLC, is a Foreign Limited Liability Company authorized to do business in the State of New York. Belnord Partners, LLC has no subsidiaries. Belnord Partners, LLC's parent is P9 Mezz, LLC. Belnord Partners, LLC's controlling affiliate is P9 Holdings, LLC.

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Defendants-Respondents Belnord Partners LLC and Extell Belnord LLC ("Respondents") respectfully submit this brief in response and opposition to the brief for the *amici curiae* Peter Gunther, John Funk, Agnes Berecz, Johanna Karlin, Semi Pak, Bruce Hackney and Timothy Smith (collectively, the "*Amici*").

PRELIMINARY STATEMENT

The *Amici* do not set forth *any* arguments in their brief pertaining to why the First Department Order[1] should be reversed (or affirmed) by this Court. Instead, the *Amici* improperly ask this Court to resolve a hypothetical question that is beyond the scope of the instant appeal -- namely: "how should the legal regulated rent be calculated [under the HSTPA] when there is no reliable rent history filed and served upon the tenant" (*Amici* Brief, pp. 1, 5). In turn, the *Amici* request that, *if* this Court revives and reinstates Appellants' dismissed rent overcharge claim pursuant to the HSTPA, this Court should go further and hold, on this appeal, that: (a) the "DHCR default formula should be used when no reliable rent history exists…or, alternatively (b) specifically indicate that the Court is taking no position on the issue of whether the default formula should be utilized in circumstances where no reliable rent history exists…" (*Amici* Brief, pp. 5, 12). It is respectfully submitted that, for several reasons, the *Amici*'s relief requested is improper and should be denied.

[1] Unless otherwise indicated, all capitalized terms herein shall have the meaning ascribed to them in Respondents' "Brief for Defendants-Respondents," dated October 8, 2019.

The *Amici*'s requested relief is based on a number of false and misleading assumptions, including that (i) the provisions of the HSTPA apply to revive Appellants' rent overcharge claim[2] and (ii) that, if revived, "no reliable rent history exists" to establish Appellants' legal rent. Without a complete record on the issue, it cannot be said that there is *no* reliable rent history in this case or that the "DHCR default formula" should be applied to calculate the legal rent. In fact, the record made by Appellants establishes just the opposite. Appellants' own cross-motion for summary judgment adopts all of the allegations of their Complaint and thereby concedes that "the tenant before plaintiffs' occupancy was…an owner of the subject building…and the apartment was registered as exempt" (R. 37, ¶ 17) -- a reliable, undisputed fact. Given Appellants' admission, there can be no dispute that, upon Appellants taking occupancy in 2005, the owners were entitled to a "first rent" at the market rate subject only to a Fair Market Rent Appeal, which they did not take. Therefore, Appellants' initial rent, and each rent thereafter, *was* a reliable legal rent, and it cannot be said that no reliable rent history exists.

In the least, it would be premature and outside of the scope of this appeal for this Court hold that there is "no reliable rent history" in this case and that, therefore, the "DHCR default formula" should be applied to determine the legal rent (which application would be incorrect in any event). As set forth in Respondents' Brief (*see*

[2] The Court is respectfully directed to Respondent's Brief for its arguments in this regard.

Point IV, pp. 58-59), Respondents never interposed an answer to Appellants' rent overcharge claim because it was (correctly) dismissed as time-barred on Respondents' pre-answer motion to dismiss. If this Court revives Appellants' rent overcharge claim pursuant to the HSTPA (which, respectfully, it should not do), Respondents must be allowed to answer and assert any and all appropriate defenses to the claim, perform necessary discovery, establish the existence of a reliable rent history and/or reliable rent registration statement(s), and/or prove that the rent charged to Appellants was a proper legal rent. Based on the limited record before it, this Court cannot and should not determine that the "default formula" applies here.

In any event, even if this Court reaches the issue posited by the *Amici* regarding the applicability of the "default formula" in hypothetical circumstances where there "is no reliable rent history," the *Amici* are wrong that, under the HSTPA, the "DHCR default formula" should be applied in such circumstances. To the contrary, the default formula on which the *Amici* rely (*see* RSC §§ 2522.6[b][2] and [3]; *accord* RSC § 2526.1[g]) is inconsistent on its face with the HSTPA, and *cannot* be applicable under the HSTPA. Rather, it is a regulation that was codified by DHCR to implement the standards of the *old* rent laws, and not the vast changes made to the rent laws by the HSTPA. The "default formula" has no application under the HSTPA. Rather, the HSTPA itself expressly provides guidance and factors that are to be considered in determining the legal regulated rent for a premises

subject to an overcharge claim, including the consideration of "whether the legality of a rental amount charged or registered is reliable in light of *all available evidence*…" (NYC Administrative Code § 26-516 [h] [i], as amended by L 2019, ch 36, part F, § 5 [HSTPA, Part F, §§ 1, 5]). It is therefore respectfully submitted that the improper relief inappropriately requested by *Amici* in this case should be denied.

ARGUMENT

POINT I

THE *AMICI*'S REQUESTED RELIEF IS BASED ON THE FALSE PREMISE THAT THERE IS "NO RELIABLE RENT HISTORY" HERE

The *Amici*'s requested relief is based entirely on the false premise that no reliable rent history exists in this case to properly establish the legal regulated rent under the HSTPA (*Amici*'s Brief, p. 2). In fact, however, because Appellants' rent overcharge claim was properly dismissed as time-barred, it cannot be presupposed that no reliable rent history exists here. To the contrary, the limited record reveals that the first rent charged to Appellants in 2005, and registered with DHCR every year since 2010, for more than six years prior to this action, is a reliable legal rent.

Namely, in opposition to Respondents' motion to dismiss Appellants' rent overcharge claim, Appellants' moved for summary judgment based solely on the allegations asserted in their Complaint (R. 135-136). In doing so, Appellants conceded the allegation in their Complaint that "the tenant before plaintiffs' occupancy was…an owner of the subject building" (R. 37, ¶ 17). Therefore, Appellants cannot dispute that the rent that was initially charged to Appellants in 2005 was the "first rent" charged after a prior owner vacated a temporarily-exempt, owner-occupied unit. As the "first rent," pursuant to RSC § 2526.1(a)(3)(iii) as it existed in 2005, Respondents were entitled to charge a free-market rent pursuant to an agreement with Appellants, subject only to a Fair Market Rent Appeal

("FMRA"). Here, the parties agreed to the first rent, Appellants entered into a lease and paid that agreed-upon rent ($18,000 per month) without filing a FMRA. Thus, the first rent charged to Appellants, and each rent thereafter, was a reliable legal rent. In turn, the subsequent registrations of the legal rent, beginning in 2010 in the immediate aftermath of the *Roberts* decision, and continuing each year thereafter for more than six years prior to the commencement of this action, are reliable rent registrations based on a legal rent amount.

Accordingly, the entire premise on which the *Amici* base their request for relief is false and inapplicable here, and their requested relief should be denied.

POINT II

IT WOULD BE PREMATURE FOR THIS COURT TO FIND THAT NO RELIABLE RENT HISTORY EXISTS AND, THEREFORE, THAT THE DEFAULT FORMULA SHOULD BE APPLIED TO THIS CASE

Notwithstanding the forgoing, it would be premature and outside of the scope of this appeal for this Court hold that there is "no reliable rent history" in this case and that, therefore, the "DHCR default formula" should be applied to determine the legal rent. As set forth in Respondents' Brief (*see* Point IV, pp. 58-59), Respondents never interposed an answer to Appellants' rent overcharge claim because such claim was (correctly) dismissed as time-barred on Respondents' pre-answer motion to dismiss. If this Court revives and reinstates Appellants' rent overcharge claim pursuant to the HSTPA (which, respectfully, it should not), Respondents must be

permitted an opportunity to answer and assert additional defenses to the rent overcharge claim, and to perform necessary discovery. In turn, Respondent must be permitted, under the HSTPA, to establish the existence of a reliable rent history and/or reliable rent registration statement(s) six or more years prior to the commencement of the action, and/or prove that the rent amount charged to Appellants was, and always has been, a reliable legal rent.

This Court simply cannot and should not determine, on this appeal, whether a reliable rent registration statement or history exists, or if there was any overcharge in the first place (even under the HSTPA if the Court applies the new law). Instead, it is submitted that, if Appellants' rent overcharge claim is revived (which, respectfully, it should not be), then such claim must be remanded for proper adjudication in Supreme Court, and it would be premature for this Court to hold that "no reliable rent history exists" and that the "DHCR default formula" should be applied to calculate the legal rent.

POINT III

THE "DHCR DEFAULT FORMULA" IS INCONSISTENT WITH AND INAPPLICABLE UNDER AND THE HSTPA

The "DHCR default formula" is an administrative regulation that was written to implement the rent laws as previously enacted, which restricted the review of rent history to only four years. On its face, the "default formula" is now inconsistent and incompatible with the new rent laws, as amended by the HSTPA. It relies on

concepts such as a "base date," "four year period of review," and vacancy allowance, which are no longer existent under the new rent laws. Accordingly, in applying the new rent laws, the "default formula" cannot be used by courts to calculate the legal rent. It simply does not apply under the HSTPA. Instead, the HSTPA amended the law to expressly describe everything that DHCR and the courts must consider in determining legal regulated rents (HSTPA, Part F, § 5). An entirely new subsection (h) was added to RSL § 26-516, providing that:

> h. The division of housing and community renewal, and the courts, in investigating complaints of overcharge and in determining legal regulated rents, shall consider all available rent history which is reasonably necessary to make such determinations, including but not limited to (i) 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; (ii) any order issued by any state, municipal or federal agency; (iii) any records maintained by the owner or tenants; and (iv) any public record kept in the regular course of business by any state, municipal or federal agency. Nothing 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;

> (ii) whether an accommodation is subject to the emergency tenant protection act or the rent stabilization law;
>
> (iii) whether an order issued by the division of housing and community renewal or by a court, including, but not limited to an order issued pursuant to section 26-514 of this chapter, or any regulatory agreement or other contract with any governmental agency, and remaining in effect within six years of the filing of a complaint pursuant to this section, affects or limits the amount of rent that may be charged or collected;
>
> (iv) whether an overcharge was or was not willful;
>
> (v) whether a rent adjustment that requires information regarding the length of occupancy by a present or prior tenant was lawful;
>
> (vi) the existence or terms and conditions of a preferential rent, or the propriety of a legal registered rent during a period when the tenants were charged 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.

The *Amici* entirely omit any mention of this relevant section of the new law from their brief, arguing incorrectly that, rather than resort to the above factors to determine the legal rent, the "DHCR default formula" should be applied.

The "DHCR default formula" on which the *Amici* rely is set forth in RSC § 2522.6(b)(2) and (3), and also at RSC § 2526.1(g) (*Amici*'s Brief, pp 10). The "DHCR default formula" provides that:

[2522.6(b)(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;
>
> (iii) or the base date rent is the product of a fraudulent scheme to deregulate the apartment; or
>
> (iv) a rental practice proscribed under section 2525.3(c) and (d) of this Title has been committed, the rent shall be established at the lowest of the following amounts:

[2522.6(b)(3)]:

> (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 [a vacancy allowance]; or
>
> (iii) the last registered rent paid by the prior tenant (if within the four year period of review); or
>
> (iv) if the documentation set forth in paragraphs (i) through (iii) of this subdivision is not available or is inappropriate, data compiled by the DHCR, using sampling methods determined by the DHCR, for regulated housing accommodations.

(RSC §§ 2522.6[b][2] and [3] [emphasis supplied]; *accord* RSC § 2526.1[g]).

On its face, the default formula is inconsistent with the RSL as amended by the HSTPA. The default formula *cannot* be applicable under the HSTPA, as it

repeatedly references and relies upon factors, such as the "base date," "four year period of review," or reduction of a "vacancy allowance," that are no longer applicable *or existent* under the HSTPA. That is because the RSC was promulgated by DHCR to implement the rent laws as previously written. Now that the HSTPA has made sweeping changes to the rent laws, including the elimination of the four year "base date" and "four year look back," and instead directs DHCR or the court to review all evidence necessary to determine the legal rent, much of the RSC (including the default formula) is inapplicable on its face, pending its amendment by DHCR (pursuant to RSL § 26-511[b]) to conform to the new rent laws.

Many of the RSC's sections are now inconsistent on their face with the RSL after the changes implemented by HSTPA. For example, RSC § 2520.6(e) still defines the "legal regulated rent" as "[t]he rent charged on the base date…plus any subsequent lawful increases and adjustments." RSC § 2520.6(f)(1) still defines the "base date" as the "date four years prior to the date of the filing of [an overcharge] complaint." RSC § 2526.1(a)(2) still provides that: "[a] complaint pursuant to this section must be filed with the DHCR within four years of the first overcharge alleged." RSC § 2526.1(a)(2) further provides that "no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed." Likewise, RSC § 2526.1(a)(2)(ii) provides:

> the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section…shall not be examined. This subparagraph shall preclude examination of a rent registration for any year commencing prior to the base date, as defined in section 2520.6(f) of this Title, whether filed before or after such base date.

RSC § 2526.1(a)(3)(i) still provides that "[t]he legal regulated rent for purposes of determining an overcharge shall be deemed to be the rent charged on the base date, plus in each case any subsequent lawful increases and adjustments."

After the enactment of the HSTPA and the sweeping changes to the RSL, much of the RSC, including the default formula, is out of harmony with the law and has no application to a rent overcharge claim (*see e.g.*, *Kew Gardens Dev. Corp v Wambua* 103 AD3d 576 [1st Dept 2013] ["If an agency regulation is 'out of harmony' with an applicable statute, the statute must prevail"], *quoting Weiss v City of New York*, 95 NY2d 1, 4-5 [2000]; *see also Ling Ling Yung v County of Nassau*, 77 NY2d 568, 570-571 [1991] ["It is well established that a general statute will repeal special or local acts without expressly naming them, where they are inconsistent with it, and whether it can be seen from the whole enactment that it was the intention to sweep away all local peculiarities…and to establish one uniform system."]).

Indeed, the *Amici* argue incorrectly that, "[u]nder the HSTPA the legal regulated rent is established through three potential methods" (Amici's Brief, pp. 8-

9). In fact, the HSTPA, Part F, § 1 and § 4, provide *two* scenarios pursuant to which the legal rent is calculated, not three. The first provides that:

> (i) Except as to complaints filed pursuant to clause (ii) of this paragraph, the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the 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. The division of housing and community renewal or a court of competent jurisdiction, in investigating complaints of overcharge and in determining legal regulated rent, shall consider all available rent history which is reasonably necessary to make such determinations.

The second provides that:

> (ii) As 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. Where the rent charged on the date six years prior to the date of the initial registration of the accommodation cannot be established, such rent shall be established by the division. Where the prior rent charged for the housing accommodation cannot be established, such rent shall be established by the division provided that where 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, less any appropriate penalties.

(HSTPA, Part F, § 1 and § 4).

In fact, the HSTPA amended the law further, to expressly provide guidance and specify factors that are to be considered in determining the legal regulated rent for a premises subject to an overcharge claim, including the consideration of "any records maintained by the owner or tenants" and "whether the legality of a rental amount charged or registered is reliable in light of all available evidence…" (NYC Administrative Code § 26-516 [h] [i], as amended by L 2019, ch 36, part F, § 5 [HSTPA, Part F, § 5] [emphasis supplied]). The *Amici*, glaringly, entirely ignore and omit this directly relevant section(s) the HSTPA, which specifically enumerates the factors that DHCR and/or the courts are to consider when determining the legal rent in an overcharge claim (and in no way refers to the default formula).

The *Amici*'s argument that, because the HSTPA provides that: "Where the prior rent charged for the housing accommodation cannot be established, such rent shall be established by the division…," the courts should resort to application of the "DHCR default formula" to calculate legal rents if there is "no reliable rent history" is unreasoned. Notwithstanding that the *Amici* have taken the applicable sentence entirely out of context, even if it were applicable here, it provides that the "rent shall be established by the division." Therefore, in circumstances where such clause is applicable (not here), the HSTPA directs that the legal rent *shall be established by*

DHCR, not that the courts should look to an old formula that DHCR used to apply to cases under the old law and somehow adapt it to the new rent law.

Under the HSTPA, calculation of the legal regulated rent is consistently based on all available evidence from the owner and the tenant and the entire rent history. Use of the "default formula," which includes a myriad of factors and elements that are no longer existent under the new law, is unnecessary, inconsistent, and impossible to apply on its face. There is simply no way to determine which parts of the regulation to apply, and which parts to disregard as inconsistent with the new law. Rather, the rent laws as amended by the HSTPA provide for an entirely new universal means by which the legal regulated rent is to be determined.

CONCLUSION

It is respectfully submitted that the First Department Order should be affirmed, with costs.

Dated: New York, New York
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CERTIFICATE OF COMPLIANCE

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