To be argued by: Joel M. Zinberg
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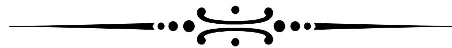
Court of Appeals
of the
State of New York



JAMES TAYLOR and TAMARA JENKINS,

Plaintiffs-Respondents,

— against —

72A REALTY ASSOCIATES, LP and JANET ZINBERG,,

Defendants-Appellants.

BRIEF OF APPELLANTS

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DISCLOSURE OF PARENTS, SUBSIDIARIES AND AFFILIATES

None

STATUS OF ANY RELATED LITIGATION AS OF THE DATE THE BRIEF IS COMPLETED

PETITION FOR ADMINISTRATIVE REVIEW (PAR) UNDER DOCKET NO. FV410031RO FILED OCTOBER 2017 WITH DIVISION OF HOUSING AND COMMUNITY RENEWAL (DHCR) IS PENDING. ORIGINAL PETITION FOR HIGH INCOME DEREGULATION OF SUBJECT APARTMENT FILED MAY 2014 AND DENIED SEPTEMBER 2017

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QUESTIONS PRESENTED

1. Did the Court below violate CPLR §213-a and err in ordering that the rental history prior to the 4 year period immediately preceding the commencement of this residential rent overcharge action be used to calculate the base date rent and overcharges where there was an explicit finding of no fraud?

Answer: Yes

2. Did the Court below err in in failing to grant Defendant partial summary judgment dismissing Plaintiffs' claims for treble damages and attorneys' fees where the Defendant-owner did nothing more than rely on then valid DHCR regulations to luxury deregulate an apartment while a J-51 was in effect?

Answer: Yes

3. Did the Court below err in granting Plaintiffs' Declaratory Judgment that the apartment remains rent stabilized more than fourteen years after the J-51 expired?

Answer: Yes

JURISDICTIONAL STATEMENT AND PRESERVATION OF ISSUES

This Court has jurisdiction to entertain this appeal pursuant to CPLR §5602(b)(l), which empowers the Court to hear an appeal, by permission of the Appellate Division, from an order of that court that does not finally determine an action and is not appealable as of right.

The Appellate Division granted leave to appeal in an order dated December 13, 2019 (R.263).

The Court has jurisdiction to review the questions raised by Appellants, because Appellants preserved each such question for review in the Supreme Court proceedings (R.4, R.49), and the orders of the Supreme Court and the Appellate Division specifically addressed the issues raised by Appellants in the appeal (R.7, R.263, R.264).

The questions presented on this appeal are questions of law, reviewable by this Court pursuant to CPLR §5501(b).

PRELIMINARY STATEMENT

Defendant-Appellant-Owner appeals from *Taylor v. 72A Realty Associates, L.P.*, 151 AD3d 95 (1st Dept 2017) (R.264) because it utilized rental history prior to the period four years before the action commenced to calculate rental overcharges and impose treble damages and attorneys' fees. The decision is contrary to the relevant statutes, decisions of this Court, and multiple other Appellate Division First Department decisions including, but not limited to, *Stulz v. 305 Riverside Corp.*, 150 AD3d 558 (1st Dept. 2017), *lv denied* 30 NY3d 909, decided two days before the case on appeal here, and two other cases that are also on appeal to this Court, *Matter of Regina Metro. Co., LLC v. New York State Div.*

of Hous. & Community Renewal, 164 AD3d 420 (1st Dept. 2018) and *Raden v. W 7879,* LLC, 164 AD3d 440 (1st Dept. 2018).

This case involves a 2014 complaint seeking recovery for overcharges, treble damages and attorneys' fees, and a declaratory judgment that the subject apartment is rent stabilized. The apartment was luxury deregulated in 2000 due to high rent vacancy while a J-51 tax abatement was in effect. Plaintiff-Respondent Jenkins was given a free market lease that was repeatedly renewed. Defendant offered Plaintiffs a rent stabilized renewal lease in 2013 which Plaintiffs signed. The J-51 expired in tax year 2002-2003, eleven years before this action was commenced. At the time of the deregulation DHCR policy allowed luxury deregulation of rent stabilized apartments while a J-51 was in effect if the J-51 was not the sole reason for the apartment's rent stabilized status. Nine years after Plaintiff Jenkins moved into the subject apartment, this Court invalidated the New York State Div. of Housing & Community Renewal's (DHCR) interpretation of the RSL and found that apartments in buildings receiving J-51 benefits could not be luxury deregulated while a J-51 was in effect. *Roberts v. Tishman Speyer Props., L.P.*, 13 NY3d 270 (2009). The decision expressly left open questions of retroactivity and the statute of limitations and did not address the status of apartments after the J-51 expired.

In 2017 the Appellate Division First Department found that the Plaintiff-tenants remain rent stabilized tenants, fourteen years after the J-51 benefit expired, and, despite finding "no evidence of fraud by the Owner" and that deregulating the apartment in 2000 "was consistent with DHCR's interpretation of the relevant laws and regulations at that time," ordered that a novel method utilizing the rental history prior to the four-year base date (2010) be used to calculate the legal base date rent and overcharges. (*Taylor supra* at 99, 105). The Court below ordered that the four-year base date rent and overcharges be calculated by applying legally permissible rent guidelines increases to the legal rent that had resulted from a valid rent increase in the year 2000, solely because the owner, using that rent increase, deregulated the apartment while a J-51 was in effect (*Taylor supra* at 106). The panel in this case is the only appellate court to order this method utilizing history before the four-year base date to compute overcharges in a J-51 case in the absence of fraud.

Rent stabilization is a regulatory scheme that, inter alia, limits the annual rent increases on covered apartments. If an owner charges in excess of the legal rent the tenant may recover overcharges made in the four years prior to the complaint by filing an overcharge complaint with the relevant agency, the DHCR, or with the Supreme Court. To calculate overcharges, legal increases are applied to

the rent in effect on the base date, the date four years prior to the commencement of the overcharge action, and compared to the rents charged. DHCR or the Court has the discretion to award attorneys' fees and treble damages if the overcharges were "willful." The "four-year rule" makes this process easy to administer.

The four-year rule is both a statute of limitations applicable to rent overcharge claims and an evidentiary rule that prohibits consideration of an apartment's rental history more than four years prior to the commencement of a residential overcharge proceeding. CPLR §213-a provides that,

> '…no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action."

See also RSL §26-516(a)(2) and RSC §2526.1(a)(2)(ii)

The Rent Regulation and Reform Act of 1997 (RRRA) amended the statute to counter mistaken court decisions that permitted the examination of rental history before the four-year period in overcharge cases and to simplify the administration of overcharge cases. New York State Senator Leibell's sponsor's memorandum stated,

> "Recent court decisions have erroneously interpreted the language of the statute … to permit examination of the rental history of an apartment prior to the four-year period authorized by law. …Notwithstanding the judicial opinions to the contrary, it was and is the intention of the Legislature to

> preclude the examination of the prior rental history." (Bill Jacket, L 1997, ch 116)

Governor Pataki noted, "[a] number of regulatory reforms are included … to simplify the administration of rent laws while protecting the rights of tenants and owners" (*See* Governor's Mem approving L 1997, ch 116, 1997 McKinney's Session Laws of NY, at 1923). The RRRA, "clarified and reinforced the four-year statute of limitations applicable to rent overcharge claims by limiting examination of the rental history of housing accommodations prior to the four-year period preceding the filing of an overcharge complaint." [citations omitted] *Thornton v. Baron*, 5 NY3d 175, 180 (2005).

In *Matter of Grimm v. State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358 (2010), this Court carved out an exception to the limitation on considering rental history prior to four-year base date if the tenant provided evidence of a "colorable" claim of fraud. This Court affirmed that the four-year rule and narrow fraud exception apply in J-51 cases in *Matter of Boyd v. New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 (2014). In *Boyd*, a case that like the instant one involved renovations and a rent increase while the building was receiving J-51 benefits more than 4 years before the tenant's overcharge complaint and a legal rent that reached the $2,000 deregulation threshold, this Court held the four-year base date rent should be adopted without an

examination of earlier records because "the tenant failed to set forth sufficient indicia of fraud" meeting the standards set forth in *Grimm* and reversed the Appellate Division's order "to investigate the legality of the base date rent." (*Matter of Boyd v. New York State Div. of Hous. & Community Renewal*, 110AD3d 594,595). *Boyd* rejected a separate exception to the four-year rule in J-51 cases.

The Court below ignored the statutes and regulations setting out the four-year rule, this Court's decision in *Boyd,* and multiple other First Department decisions applying the four-year rule in J-51 cases to create a new J-51 exception to the four-year rule (See Sec I.A infra). The Court below relied in part on *72A Realty Assoc. v. Lucas*, 101 AD3d 401 (1st Dept 2012), a case that, while it did not decide how to calculate the base date rent or overcharges, disregarded the four-year rule and required the owner to provide eleven year old renovation records to prove the validity of a rent increase, regardless of fraud, solely because of a deregulation while a J-51 was in effect. *Lucas* did not mention the word fraud or cite *Grimm* and ignored findings by the lower courts of no wrongful behavior by the owner. But neither the Court below nor *Lucas* cited any statute or precedent to justify creating a special exception to the four-year rule in J-51 cases. The policy arguments advanced by the Court below in this case and by the dissent in *Regina supra* for creating a special exception to the four-year rule in J-51 cases are without merit

(See Sec. I.B infra). This new exception is contrary to the legislature's intent in enacting the four-year rule and creating luxury deregulation, creates a windfall for wealthy tenants who willingly negotiated free market leases they can easily afford, and will turn every J-51 overcharge case, regardless of fraud, into a lengthy and unnecessary fact-finding mission (See Sec. I.C). The Supreme Court has already been deluged with litigation that would be more appropriately decided by the DHCR or on summary judgment utilizing the unambiguous four-year rule and fraud exception.

If the four-year base date rent had been properly utilized in this case there were no overcharges – a fact that Plaintiffs-Respondents have not disputed during five years of litigation. If there was no overcharge there can be no damages, no treble damages and no award of attorneys' fees. But the Court below compounded its erroneous abandonment of the four-year rule by remanding to determine if the Defendant acted willfully and consider whether treble damages and attorneys' fees are due. In so doing the Court below ignored this Court's finding in *Borden v. 400 E.55th St. Assoc., L.P.,* 24 NY3d 382, 398 (2014) that, "…a finding of willfulness is generally not applicable to cases arising in the aftermath of *Roberts.*" Multiple other Appellate Division First Department panels, have held that even if there were overcharges, attorneys' fees and treble damages are not available in J-51 cases like

this one where the owner did nothing more than rely on the DHCR's mistaken statutory interpretation. The Court below did not mention *Borden* (See Sec. II.A infra). Contrary to DHCR guidance on registration in J-51 cases and without citing a single precedent the Court below focused on when Defendant registered the apartment as stabilized (See Sec. II.B infra). Its remand to determine willfulness was predicated on a misapprehension of facts in the record. Unlike like other cases, the J-51 in this case expired years before *Roberts* was decided. Defendant could not know if Plaintiffs were stabilized tenants. Once that status was determined by the final decision in *Lucas* in 2013, Defendant-Appellant gave the tenants a rent stabilized lease renewal *prior* to the commencement of this overcharge action and registered the apartment as stabilized during the next annual registration period (See Sec. II.C infra). The ruling below also ignored another Appellate Division decision holding that attorneys' fees were not available under RPL §234 or the lease because the lease clause (identical to the lease clause in this case) only allowed for fees in actions to recover possession or for nonpayment of rent (*Rossman v. Windermere Owners LLC*, 111 AD3d 429 (1st Dept 2013)). Like *Rossman*, this case is not an action to recover possession or for non-payment but is a tenant's action seeking a declaratory judgment and overcharges. (See Sec. II.D infra)

The Court below also relied on *Lucas* in granting Plaintiffs' declaratory judgment that they remain stabilized fourteen years after the J-51 expired. However, *Lucas* did not cite a single statute or precedent in deciding that apartments that had been mistakenly deregulated pursuant to DHCR guidance while a J-51was in effect would not only be reregulated while a J-51 was in effect, but would remain stabilized after the J-51 expired. This Court has never ruled on the issue. The sole justification offered in *Lucas* and in this case for this finding was that the apartment had been "improperly" deregulated.

While the Defendant acknowledged that the Supreme Court in this case was bound by the *Lucas* decision, Defendant opposed Plaintiffs' declaratory judgment motion as moot (Plaintiffs had stabilized lease) and opposed perpetual stabilized status because it is contrary to the legislature's intention, outlined in RSL §26-504(c) and RPTL §489 7(b)(2), that stabilization would end upon J-51 expiration in older buildings like the subject building that were already subject to regulation and where J-51 abatements were obtained after 1985. The legislature's intent in enacting the J-51 exception to luxury decontrol contained in RSL §§26-504.1 & 26-504.2 was to ensure that buildings would not simultaneously receive J-51 benefits and luxury decontrol benefits. *Roberts supra*, 13 NY3d at 286-87. That concern ends when the J-51 expires (See Sec. III infra). Defendant appealed the

Supreme Court's Order declaring Plaintiffs rent stabilized tenants and the Appellate Division's affirmance thus preserving the issue for review by this Court.

FACTS

Appellant-Defendant-Owner, 72A Realty Associates, L.P., is a small family partnership owning a single building that was subject to rent regulation because it was built in 1938 (5/22/14 ZinbergAffd ¶8, R.80). In more than fifty years of ownership Defendant has never been found guilty of or paid any rent overcharge complaints. (5/22/14 ZinbergAffd ¶9 at R.80)[1]

Plaintiff Jenkins entered into possession of the subject two-bedroom apartment ███ at ███ East 4th Street, New York, N.Y. 10009, pursuant to a two-year free market, vacancy lease in February 2000 at a rent of $2,200. This lease was repeatedly renewed (*Taylor supra* at 97-100). Plaintiff Taylor was added as a tenant on a lease renewal dated March 1, 2004. (5/22/14 ZinbergAffd ¶25 at R.82; Complaint ¶16 at R.18). Both Plaintiffs Taylor and Jenkins are successful screenwriters, producers and directors. They have been nominated for numerous Academy Awards. Taylor won an Oscar in 2004. (R.55, ¶22)

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[1]Defendant did have a dispute with the DHCR regarding retroactive temporary reduction of MCI amounts while receiving J-51 benefits. See Matter of 72A Realty Assoc. v. State of New York Div. of Hous. & Community Renewal, 298 AD2d 276 (1st Dept. 2002).

The Court below made the following findings of fact that have not been appealed by the Plaintiffs: Prior to Jenkin's tenancy starting February 15, 2000, the apartment was renovated at a cost $18,343.07. The renovation records provided by the Defendant-owner were valid and justified an increase in the legal rent to "…$2,215.38, a sum that is more than what Jenkins was actually charged for the rent in the initial vacancy lease made as of February 2000" and well above the $2,000 deregulation threshold. There was "no evidence of fraud by the owner." (*Taylor supra* at 105); Defendant-owner, relying on then valid DHCR regulations, opinions and practices deregulated the subject apartment under a high rent vacancy while receiving a J-51 abatement. (*Taylor* supra at 99) The J-51 expired in tax year 2002-2003, fourteen years before the decision below. (Complaint ¶21 at R.19)

The Court below also found that Plaintiff Jenkins had been informed in 2000 that the apartment was being removed from rent stabilization pursuant to luxury decontrol and of her right to challenge the rent and her regulatory status. She was aware of conditions in the apartment and was told she could challenge the cost of the improvements that formed the basis for the rent increase over the deregulation threshold. Yet in the fourteen years between moving in and commencing this overcharge action in 2014, Jenkins never challenged the rent, the improvements or the regulatory status of the apartment. The Plaintiffs' complaint (¶41, at R.21),

unsupported by any affidavits or other proofs, falsely claimed, “that the owner had not made any improvements at all….” (*Taylor supra* at 103)

Nine years after Plaintiff Jenkins moved into the subject apartment, this Court, invalidated DHCR’s interpretation of the RSL and found that apartments in buildings receiving J-51 benefits could not be luxury deregulated. *Roberts v. Tishman Speyer Props.*, 13 NY3d 270 (2009). The decision explicitly left open several important issues relevant to Defendants’ building including, “retroactivity, class certification, the statute of limitations, and other defenses that may be applicable to particular tenants.” *Roberts*, supra 13 NY3d at 287. Importantly for this case, “The Court of Appeals did not address what effect expiration of J-51 benefits would have on the rent-regulated status of affected apartments or how to calculate the rent-stabilized rents for apartments that were improperly removed from rent regulation.” (*Taylor supra* at 101)

Defendant-Owner 72A was involved in another case, *72A Realty Assoc. v. Lucas*, 101 AD3d 401 (1st Dept.2012), that dealt with the then previously undecided question of whether after *Roberts* a tenant, luxury deregulated ten years earlier while a J-51 was in effect, would remain stabilized many years after the J-51 expired. The defendant-owner did not know if it would have to treat the *Lucas* tenant and similarly situated tenants in the building as stabilized until the case was

resolved. The answer was not obvious. The Appellate Division held Ms. Lucas should be treated as stabilized but found the legal reason justifying continued stabilized status offered by the Housing Court and Appellate Term below – that the owner failed to provide a J-51 lease notice – was incorrect. The sole reason offered by the Appellate Division was that the apartment had been “improperly” deregulated while a J-51 was in effect. (*Lucas supra* at 402).

Lucas was finally decided in 2013 when both parties’ applications for leave to appeal to the Court of Appeals were denied by the Appellate Division (*72A Realty Assoc. v. Lucas,* 2013 NYSlipOp 68006(U)). A few months later, Defendant took the next opportunity to offer Plaintiffs in this case a rent stabilized lease renewal within the statutorily mandated window period. This offer was several months *before* Plaintiffs started this overcharge action (R.130 date of lease renewal & R.15 date action was filed). In this case, the Owner-Defendant calculated no refund was due because all rent increases within the previous four years were within the statutory guidelines. In fact, the undisputed facts stated in the Supreme Court (R.10) show the Tenants were undercharged (See table below).

Lease Date	Guideline Increases	Legal Rent	Rent Charged	**Undercharge**
Mar 1, 2009	base date rent	3,500.00	3,500.00	**0.00**
Mar 1, 2010	6.000%	*3,739.12	3,575.00	**164.12**
Mar 1, 2012	3.750%	3,879.34	3,709.00	**170.34**
Mar 1, 2013	2.000%	3,956.93	3,783.00	**173.93**

*figure includes guideline increase plus MCI increase; with guideline increase alone rent was $3,710

The Renewal Lease offer (R.130-131), at page 1, gave notice to Plaintiffs that their status changed to Rent Stabilized and at page 2 gave Plaintiffs notice of their rights to challenge the rent. The Plaintiffs could therefore not have been prejudiced by any alleged delay in registrations. Both Plaintiffs-Tenants signed a rent stabilized two-year lease renewal.

The apartment was registered as rent stabilized for the years 2009-2013. DHCR instructed the Owner that an application for an Administrative Determination was necessary to register the apartment for 2000 – 2008 and such an application asking for stabilized registration was filed for the years 2000 - 2008 (See certified DHCR registration – at R.132-135, and letter requesting administrative determination attached at R.136 and 5/22/14 ZinbergAffd ¶28 R.83).[2] Subsequently, DHCR, citing Plaintiffs' objection, rejected Defendant's

[2] The apartment was subsequently registered as stabilized for 2014 at the appropriate filing time (after 4/1/2014) See Certified Printout of 2014 Annual Registration for Plaintiffs' apartments at R.255-257.

request for an Administrative Determination and declined to register the apartment 2000 - 2008.

On February 21, 2014, Plaintiffs commenced this action asking for 1) a declaratory judgment declaring the premises to be rent stabilized; 2) an order directing Defendant to provide Plaintiffs with a rent stabilized lease and rent stabilized renewal leases for the duration of the tenancy, and to register the premises as rent stabilized with the DHCR; 3) a judgment for overcharges and treble damages; and 4) attorneys' fees pursuant to RSL §26-516(a)(4), RSC §2526.1(d), RPL §234 and the terms of the lease (R.15-28).

Defendants' Verified Answer (R.31-44) asked for dismissal and asserted several affirmative defenses including: adequate improvements were performed in 2000 to bring the rent over the deregulation threshold and Defendant reasonably relied on the then valid DHCR rules that allowed Defendant to deregulate the apartment while J-51 was in effect; Defendant did not act fraudulently at any time; Defendant did not overcharge Plaintiffs because the base date rent of $3,500 charged and collected on the base date of February 21, 2010 was the legal regulated rent and subsequent increases were at or less than the guideline amounts; Plaintiffs were not entitled to collect attorneys' fees under their lease or applicable law; and the declaratory judgment was moot since the tenants had been given a

stabilized lease but continued stabilized status would be contrary to law. Defendant provided detailed business records documenting $18,343.07 in improvements - double the amount of improvements needed to bring the legal rent above the $2,000 decontrol threshold.

On January 29, 2016, the Honorable Jennifer Schecter granted Defendant's motion to the extent of dismissing the complaint against managing agent Janet Zinberg but denied the Defendants' motion in all other respects and granted Plaintiffs' cross-motion for declaratory relief that Plaintiffs are entitled to rent stabilization protection (R.6-14). Defendant 72A appealed. Plaintiffs did not appeal.

On May 25, 2017, in a decision by the Honorable Judith Gische, the Appellate Division found that Defendant-Owner proved the validity of the rent increase that brought the rent above the deregulation threshold in 2000 (*Taylor v. 72A Realty Associates, L.P.*, 151 AD3d 95,105 (1st Dept 2017)). Nevertheless, despite finding "…there is no evidence of fraud by the Owner… ." (*Id*), the Court failed to set the base date rent at the rent in effect four years prior to the overcharge complaint and ordered a calculation of overcharges based upon overcharges occurring more than four years before the action was commenced. The Court ordered a novel method to calculate the base date rent based on the first lease rent

from 2000 and subsequent legal, rent-stabilized increases. Despite finding that Defendant-Owner had relied on DHCR guidance to deregulate the apartment (*Taylor* at 99), the Court remanded to determine if the Owner acted willfully and whether attorneys' fees and treble damages would be due.

Two days before the decision in this case, a different Appellate Division panel in a J-51 deregulation/overcharge case found that, in the absence of fraud, the rent in effect on the four-year base date should be adopted as the four-year base date rent and used to calculate overcharges (*Stulz v. 305 Riverside Corp.*, 150 AD3d 558 (1st Dept 2017)). The fact patterns are practically identical between *Stulz* and this case with the major difference being that the owner in this case offered the tenants a stabilized lease and calculated if any overcharges were due (none were) *before* the tenant initiated an overcharge complaint. In *Stulz,* the owner did not offer a lease or calculate overcharges until *after* the tenant started an overcharge action. Applying the four-year base date rent, the *Stulz* owner owed an overcharge, but the Court found that no attorney's fees or treble damages were due.

Relying on *Stulz*, Defendant moved for re-argument or for permission to appeal to the Court of Appeals The Court below denied this motion (*James Taylor et al. v 72A Realty Associates L.P. et al.*, 2017 NYSlipOp 88644(U) Oct 12, 2017).

Less than a year later, two separate Appellate Division First Department panels – *Matter of Regina Metro. Co., v. New York State Div. of Hous. & Community* Renewal, 164 AD3d 420 (1st Dept 2018) and *Raden v. W 7879, LLC,* 164 AD3d 440 (1st Dept 2018) - explicitly rejected *Taylor* and its method of overcharge calculation. Both were J-51 overcharge cases with fact patterns similar to this case; both found no evidence of fraud; both utilized the rent in effect on the four-year base date to calculate overcharges; both found overcharges were due yet did not impose treble damages or attorneys' fees. The Appellate Division granted permission to appeal to the Court of Appeals in both of these cases.

Based on these new cases and multiple other concordant First Department cases, Appellant-Defendant filed a motion to renew or in the alternative permission to appeal to the Court of Appeals. The Court below denied Defendant's motion to renew but granted it permission to appeal to this Court. 2018 NY Slip Op 90758(U) 12/18/2018 (R.263).

ARGUMENT

I. THE COURT BELOW ERRED IN EMPLOYING A NOVEL METHOD OF CALCULATING THE BASE DATE RENT AND OVERCHARGES THAT UTILIZES RENTAL HISTORY PRIOR TO THE FOUR-YEAR BASE DATE

A. The Method of Calculating the Base Date Rent and Overcharges Used by the Court below Is Inconsistent with Unambiguous Controlling Law, Decisions of this Court and Multiple Other First Department Cases

RSL §26-516(a)(2), RSC §2526.1(a)(2)(ii), and CPLR §213-a establish a four-year statute of limitations for rent overcharge complaints and preclude consideration of rental history outside of the four-year period prior to the complaint to set the base date rent and determine an overcharge. CPLR §213-a provides that,

> "…**no determination of an overcharge and no award or calculation of an award of the amount of any overcharge** may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action." (emphasis added)

RSL 26-516(a)(2) along with RSC 2526.1(a) & (a)(2)(ii) use nearly identical language.

RSC §2526.1(a)(3)(i) categorically states, "The 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."

RSC §2526.1(a) was amended in 2014 to reflect J-51 issues and exceptions to the four-year rule but §2526.1(a)(3)(i) was not changed. See also RSC §2520.6(e) defining legal regulated rent as, "The rent charged on the base date set forth in subdivision (f) of this section, plus any subsequent lawful increases and adjustments."; and RSC§2520.6(f)(1) defining the base date as four years before the complaint.

The Court below ignored this unambiguous guidance and remanded for "a determination of the legally permissible rent-stabilized rent that plaintiffs should have been charged on the base date [through] a mathematical calculation of the applicable rent guidelines (and any other) legally permissible increases since February 2002, the expiration date of the first lease." (*Taylor supra* at 106)

The Court below's method of overcharge computation also conflicts with the decisions of this Court. This Court has instructed,

> "To effectuate the purpose of the four-year limitations period, in rent overcharge cases...set the 'legal regulated rent' as the rent charged on the 'base date,' which is the 'date four years prior to the date of the filing of [the overcharge] complaint' plus any subsequent lawful increases." (citations omitted) *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 365 (2010).

The *Grimm* court found a limited exception to the four-year limitations period when there is evidence of fraud (*Grimm supra* at 366). Other decisions of this

Court have restricted lookbacks beyond four years to this limited exception in J-51 cases. As the *Regina* court observed in J-51 cases,

> "The Court of Appeals has continued to require a showing of fraud or intentional wrongdoing before courts may allow any look back at a unit's rental history beyond the four-year limitations period. In *Matter of Boyd v New York State Div. of Hous. & Community Renewal* (23 NY3d 999 [2014], rev'g 110 AD3d 594 [1st Dept 2013]), a J-51 case, the Court of Appeals reversed this Court's remand to DHCR for a fact-finding hearing regarding potential fraud and the legality of the base date rent. The Court, citing *Grimm*, held that the tenant 'failed to set forth sufficient indicia of fraud to warrant consideration of the rental history beyond the four-year statutory period' (id. at 1000-1001). In *Conason v Megan Holding, Inc*. (25 NY3d 1 [2015], supra), the Court of Appeals found evidence that the landlord engaged in a 'stratagem' to remove the tenants from the aegis of rent stabilization, and allowed a look back of more than four years at the unit's rental history (*id.* at *16*)." *Regina supra* 425-426.

Boyd, affirmed that actual indicia of fraud, not simply deregulation while a J-51 was in effect, are necessary to breach the four-year rule. *Boyd* also affirmed DHCR's utilization of the four-year base date rent to calculate overcharges. "[U]sing the base date of April 7, 2005, which was four years prior to the filing date of petitioner's rent overcharge complaint…DHCR determined that there had been no rent overcharge." *Matter of Boyd v New York State Div. of Hous. & Community Renewal* 110 AD3d at 597 (Gische dissenting).

Justice Gische's dissent in *Regina* claimed that "…*Boyd* is not a *Roberts* overcharge case." (*Regina supra* at 436). But as the majority in *Regina* noted, *Boyd* was "a J-51 case." (*Regina supra* at 425). The dissent acknowledged there

was a J-51 in *Boyd* but claimed, "the apartment had never been luxury deregulated." (*Regina supra* at 436) This claim is belied by Justice Gische's dissent at the Appellate Division in *Boyd* in which she noted that Ms. Boyd moved in with a vacancy lease at $2,000 monthly rent while a J-51 was in effect and that the DHCR initially dismissed her overcharge claim because they believed the apartment was free market. The apartment was luxury deregulated after a vacancy when the rent reached the threshold. DHCR held, "The apartment/ building is no longer subject to the Rent Stabilization Code because the legal rent exceeded two thousand dollars at the time the complainant took occupancy." (R.226-Brief of Robert E. Sokolski in *Boyd*). DHCR subsequently realized that *Roberts* applied and reopened the case. *Boyd,* 110 AD3d 594, 596 (Gische dissenting)

Multiple First Department cases, following *Boyd*, have declined to look back beyond four years of the filing of an overcharge to set the base date in J-51 cases in the absence of fraud: *Regina supra; Raden supra*; *Stulz supra*; *Matter of Park v. New York State Div. of Hous. & Community Renewal,* 150 AD3d 105 (1st Dept. 2017), lv denied 30 NY3d 961(2017); *Todres v. W7879, LLC.*, 137 AD3d 597 (1st Dept 2016), lv denied 28 NY3d 910 (2016).

Stulz v. 305 Riverside Corp. supra, decided two days before *Taylor,* adopted, "the rent on the base date of four years prior to the filing of the complaint to

compute the overcharges" when there was no evidence of fraud in the deregulation of an apartment while a J-51 was in effect. As in this case, the base date in *Stulz* was many years (7) after the date of the mistaken deregulation.

Todres, like the instant case, involved a declaratory judgment action alleging an overcharge and luxury deregulation while a J-51 was in effect where the deregulation and J-51 expiration occurred many years before the action was initiated. The Court cited *Boyd* and held that since,

> "...defendants did not engage in a 'fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization' (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d 358, 367 [2010]; see *Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014]). ...the court should not have looked at 'the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action' (CPLR 213-a)." *Todres*, at 598

The post *Boyd* cases listed above follow the approach that has long been used in the First Department. In *East W. Renovating Co. v. New York State Div. of Hous. & Community Renewa*l, 16 AD3d 166, 167 (1st Dept 2005), a case dealing with an improper deregulation while receiving a J-51 and overcharges, the Court wrote, "consideration of events beyond the four-year period is permissible if done not for the purpose of calculating an overcharge but rather to determine whether an apartment is regulated (citations omitted)." The Court set the base date,

"...four years prior to the filing of the overcharge complaint, and calculated the lawful increases forward from that date based on the free market rent that the tenants were paying immediately prior to the base date." *East W., supra* at 167

See also, *Matter of Hatanaka v. Lynch*, 304 A.D.2d 325, 326 (1st Dept 2003),

> "This legislative scheme "specifically 'preclude[s] examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of the complaint'" (*Zafra v Pilkes*, 245 A.D.2d 218, 219 [1997]) **even where the prior rental history clearly indicates that an unauthorized rent increase had been imposed**." (emphasis added; citations omitted)

The sole J-51 case that contravenes these multiple other cases is the instant case.

> "*Taylor* runs athwart the Court of Appeals' decisions in *Grimm* and *Boyd* and the bulk of the authority of this Department, discussed above. These decisions do not rest on the factors the dissent uses to distinguish them from the instant appeal. Rather, the relevant body of authority rests upon the presence, or absence, of fraudulent behavior by the landlord. Where, as here, there are insufficient indicia of a fraudulent scheme to evade rent regulation, there can be no consideration of the rental history beyond four years for the purpose of calculating a rent overcharge." *Regina, supra* at 427.

The *Taylor* Court below did not cite a single statute or precedent supporting its novel method of calculating the base date rent and overcharges. The dissent in *Regina*, belatedly cites *Lucas* for the proposition that the Court should not "blindly use" the rent in effect on the four-year base date in an overcharge case "without further investigation." (*Regina supra* at 437 (Gische dissenting)). Even assuming *Lucas* was correctly decided – and its blatant disregard of the four-year rule and the

narrow fraud exception suggests it was not – it does not support abandoning the four-year base date rent in this case.

Lucas did not say that the rent in effect on base date should never be adopted as the base date rent in a J-51 overcharge case or direct how to calculate overcharges. The Housing Court and the Appellate Term had both found no wrongdoing by the Owner and set the base date rent at the market rate in effect on the base date (*72A Realty Assoc. v. Lucas*, 32 Misc.3d 47, 49-50 (App. Term 1st 2011) and 28 Misc.3d 585, 590 (Civ. Ct. NY Cty 2010)). The Appellate Division held,

> "While that date is correct under CPLR 213-a, in light of the fact the improper deregulation of the apartment **and** given that the record does not clearly establish the validity of the rent increase that brought the rent-stabilized amount above $2,000, the free market lease amount should not be adopted, and the matter must be remanded for further review of any available record of rental history necessary to set the proper base date rate." (emphasis added) *Lucas supra*, 101 A.D.3D at 402

The Court did not cite *Grimm* or mention the word fraud. It did not alter the finding that the Owner had done anything other than rely on the DHCR. *Lucas* created a rebuttable presumption of fraud in J-51 cases out of thin air.

But *Lucas* did not direct abandoning the rent in effect on the base date rent once it was proven, as in the instant case, that the rent increase over the $2,000 deregulation threshold was valid. By using "and" *Lucas* found that two conditions

must both apply before discarding the base date rent that "is correct under CPLR 213-a." Here the Court below found, and Plaintiffs have not appealed, that the record does clearly establish the validity of the rent increase that brought the apartment above $2,000. The two conditions cited in *Lucas* do not both apply. Hence, the "correct" approach is to adopt the four-year base date rent. There is no basis under *Lucas* for utilizing rental history prior to the four-year base date for setting the base date rent and overcharges in this case.

The *Regina* dissent also cited *Matter of 160 E. 84th St. Assoc. LLC. v. New York State Div. of Hous. & Community Renewal*, 160 AD3d 474 (1st Dept. 2018) as a case that did not adopt the rent charged on the base date as the base date rent in the absence of fraud (*Regina dissent* at 432). But in the *Matter of 160* that Court misinterpreted the holding in *Lucas* as saying the market rent may not be adopted as the base date rent in any circumstance, regardless of the validity of the rent increase over the deregulation threshold or the presence of fraud. Nevertheless, the Court in *Matter of 160* adhered to the four-year limitation period and did not, as the Court did in this case, utilize any information prior to the four-base date to calculate the base date rent.

The exceptions this Court has created to adopting the rent in effect on the four-year base date have all involved intentional wrongdoing by the owner (fraud –

Grimm; illusory tenancy – *Thornton v. Baron*, 5 NY3d 175 (2005); ignoring rent freeze orders – *Matter of Cintron v. Calogero*, 15 NY3d 347 (2010)). Here, the Defendant-owner, who followed DHCR's pre-*Roberts* guidance and offered the tenant a stabilized lease within months of the final decision in *Lucas*, did nothing wrongful. The rent in effect on the base date should be adopted as the base date rent to calculate overcharges in this case, which would result in there being no overcharges.

B. There Is No Legal, Factual or Practical Rationale for Adopting the Novel Method of Calculating Overcharges Used in this Case for J-51 Cases

The Appellate Division in this case, in opposition to this Court and every other First Department panel that has considered the issue, has created an exception to the four-year rule for calculating overcharges in J-51 cases. The *Regina* dissent claimed that, "[t]he [*Taylor*] methodology applies only to those cases in which a landlord overcharged the tenant, albeit mistakenly, by removing the apartment from rent stabilization at a time when the building was receiving J-51 tax benefits from the City of New York." (*Regina supra* at 428, Gische dissenting) The rationale for this violation of CPLR §213-a is that, "Given the unique circumstances of *Roberts* overcharges and their complicating factors, this methodology rectifies the erroneously deregulated rent and ensures that subsequent

legal regulated rents are based upon a reliable rent." (*Regina supra* at 433, Gische dissenting).

But this rationale cannot be confined to *Roberts* cases. Questions about the reliability of rents are not unique to *Roberts* cases. There are multiple reasons other than deregulation while a J-51 was in effect why a four-year base date rent could be questioned. The absence of rent registrations following deregulations is not, as claimed in the *Regina* dissent *(Regina supra* 434, 436), a unique factor distinguishing *Roberts* cases that undermines tenants' ability to file an overcharge complaint. Nor does the presence of registrations guarantee accuracy. Rent registrations can be unintentionally or deliberately inaccurate (See *Conason v. Megan Holding, LLC,* 25 NY3d 1 (2015) where the owner filed registrations with a fictitious tenant and rent). Contrast that with the instant case where the Plaintiff-tenants were in continuous residence from deregulation in 2000 to the present, knew the previous tenant was stabilized and that deregulation was based on renovations, and had first-hand knowledge of the rental history because they had been paying it – nothing impaired their ability file or prosecute an overcharge. The *Roberts*/J-51 exception will become the exception that swallows the rule. The quest for a reliable rent could be rationalized to allow inquiries into pre four-year rent increases that occurred in nearly every overcharge complaint. The rationale ignores the unique factor that truly distinguishes *Roberts*/J-51 cases from other

overcharges cases – the finding by the Court below that the Defendant-owner did nothing wrong other than following DHCR guidance.

This Court rejected the notion that J-51 cases are exceptional in *Boyd*. Plaintiffs-Respondents' counsel in this case, Sokolski & Zekaria, wrote the tenant's Brief before the Appellate Division for Ms. Boyd which this Court considered "On review of submissions pursuant to section 500.11 of the Rules." *Boyd,* 23 NY3d at 1000. Defendant obtained that brief from the Court of Appeals website for the *Boyd* case (R.217-244, hereinafter "Sokolski Boyd Brief"). The brief claimed two independent bases for going beyond the four-year statutory limit: *Lucas* and, citing *Grimm*, possible fraud.

> "This case...demonstrates a failure of DHCR to...abide by the precedent of this Court and the Court of Appeals in fraud cases [*Grimm*] and in cases where owners received J-51 tax benefits for their properties and attempted to deregulate their units unlawfully [*Lucas*]." Sokolski Boyd Brief, p.2 at R.221

(See also, Sokolski Boyd Brief, p. 9, footnote 5, at R.228 and Sokolski Boyd Brief, p.17, at R.236, arguing that "Clearly this case is analogous to *Lucas* and this Court should...[direct] DHCR to investigate, inter alia, proof of the alleged IAI increases.") But this Court rejected the brief's argument that *Roberts*/J-51 cases are an exception to the four-year rule that requires examining earlier rent increases and re-calculating the four-year base date rent in the absence of fraud. Justice Gische's

dissent at the Appellate Division in *Boyd* reached the same conclusion.[3] *Boyd* did not adopt the formula advanced in this case that would utilize pre four-year rent history to calculate the base date rent and overcharges – it affirmed the DHCR's use of the rent in effect on the four year base date. *Boyd* also rejected the *Lucas* rule that regardless of fraud, an owner must produce records to justify a rent increase that occurred more than four years prior to an overcharge complaint while a J-51 was in effect.

The instant case, *Taylor*, in effect, wants to place the tenants in the position they would have been in had they exercised their rights to initiate an overcharge in a timely manner – as Amy Roberts did in *Roberts*. This Court's decision in *Boyd* and Justice Gische's dissenting opinion in *Boyd* at the Appellate Division rejected that approach. In *Boyd* the apartment was renovated leading to a large rent increase when a new tenant took occupancy while a J-51 was in effect (October 2004). Approximately two and a half years later (March 2007), after another vacancy, the plaintiff-tenant took occupancy with a $2,000 per month free market lease (110

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[3] "In general, no determination of an overcharge and no calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years preceding the filing of an overcharge complaint (Rent Stabilization Law of 1969 [Administrative Code of the City of NY] 26-516[a]). In order to effectuate the purpose of the four-year limitation period the legal regulated rent is set at the base date, which is four years prior to the flling of the overcharge complaint, plus any subsequent lawful increases (Rent Stabilization Code [9 NYCRR] 2520.6[e], [f], [l]; 2526.1[a][3][i]}….Only where there is a "colorable" claim of fraud may the rental history outside the four-year period be examined (citations omitted)." *Boyd,* 110 AD3d 594, 597 (Gische dissenting)

AD3d 594, 596, Gische dissenting). But Ms. Boyd waited another 2 years (April 2007) to initiate an overcharge complaint in which she alleged that the rent increase more than 4 years before was not valid. *Id.*

> "Accordingly, the information on which petitioner's overcharge claim is based was known to her when she moved into the apartment in 2007, at which time she was within the four-year period permitting a challenge to the rent without having to show a fraudulent predicate." *Boyd* 110 AD3d 594, 597 (Gische dissenting)

The presence of a J-51 did not relieve Ms. Boyd of her obligation to file a timely overcharge if there was no fraud. There is no reason to change the rule in this case where the Court below found there was no fraud and that in 2000 the Defendant had informed the Plaintiffs,

> "…that the apartment had been removed from rent stabilization pursuant to luxury decontrol. …Clearly, Jenkins knew the condition of the apartment when she first moved in 2000, and that year she had the right to contest the basis for the claimed increases in rent that brought it beyond the $2,000 per month threshold. Plaintiffs were aware of the facts that would have permitted them to mount a challenge to the rent [and regulatory status] at that time.... she was given sufficient notice of the increases to the rent at or about the time she accepted the lease and moved in so as to trigger any rights she had at the time to contest the improvements." *Taylor supra* at 103-104

Yet plaintiffs waited 14 years to falsely claim, "upon information and belief" in their complaint without any supporting affidavits or other proof, "…that the owner had not made any improvements at all...." *Taylor supra* at 103.

Both the *Taylor* Court below and the dissent in *Regina* claim that applying the four-year rule is inconsistent with *Gersten v. 56 7th Ave., LLC*, 88 AD3d 189 (1st Dept 2011) *appeal withdrawn* 18 NY3d 954 (2012) which held that *Roberts* should be applied retroactively. ("We cannot reconcile a mechanical application of CPLR 213-a and give effect to the retroactive application of *Roberts*, as we must (*Gersten*, 88 AD3d at 198)...." *Taylor* at 106; "...the result in *Taylor* was warranted, if not mandated, by...*Gersten*...giving *Roberts* retroactive effect." *Regina* dissent at 429; "If *Gersten* is to have any effect... limiting the look back period for establishing the base rent in *Roberts* overcharge cases must be rejected." *Regina* dissent at 432) But applying *Roberts* retroactively simply means that previous deregulation while a J-51 was in effect was mistaken and the apartment remained stabilized. Retroactivity deals with the apartment's regulatory status. It says nothing about how to calculate the base date rent and overcharges.

An apartment's regulatory status and the calculation of rents and overcharges are not, as claimed in the *Regina* dissent, "inseparable issues" (*Regina supra* at 435 & 437). Once it is established that deregulation occurred while a J-51 was in effect the regulatory status issue is resolved without additional examination of the rental history. CPLR §213-a and RSL §26-516(a)(2) are clear, the rental history may not be used in the "award or calculation of an award of the amount of

an overcharge." They do not limit the use of the rental history for other purposes like determining regulatory status. Courts have had no trouble utilizing the pre four-year history to determine status while declining to use that history to calculate overcharges (See *East W. supra* at 167, a J-51 case affirming the use of the four-year base date rent while allowing, "consideration of events beyond the four-year period is permissible if done not for the purpose of calculating an overcharge but rather to determine whether an apartment is regulated.").

The Court in this case and the dissent in *Regina* both worried that applying the four-year rule could, "allow the owner to collect rent that might be in excess of what it could have otherwise charged plaintiffs" (*Taylor supra* at 106; See also *Regina* dissent at 426). The four-year rule represents a long-standing legislative determination, as in any statute of limitations, that while some older "overcharges" may go un-remedied, other objectives, like relieving the record-keeping burden on owners and creating an easy to apply standard for overcharge cases, are more important. In the ten years since *Roberts*, the legislature has not altered the four-year rule. Any change in this long-standing standard should be by the legislature, not judicial fiat.

C. Failing to Reverse the Novel Overcharge Formula Applied by the Court below Will Subvert the Legislature's Intent and Provide Plaintiffs with a Windfall

The purpose of the rent stabilization laws is to preserve affordable housing for those who really need it. It isn't to reward wealthy tenants like the Plaintiffs who are seeking a windfall. The legislature determined that wealthy tenants who can afford to pay rents above the deregulation threshold ($2,000 in the year 2000, currently $2,774.76) do not need the protection of rent stabilization. ("…the system in place disproportionately benefitted 'high income tenants' whose rent should not be subsidized, and that no housing emergency existed with respect to apartments renting for more than $ 2,000 (*See* Memorandum of Senator Kemp Hannon, L 1993, ch 253 at 175-176)…" *Roberts v. Tishman Speyer Props., L.P.*, 62 AD3d 71,77 (1st Dept 2009))

Both Plaintiffs are successful, Oscar winning, screenwriters and film directors who willingly sought and negotiated free market leases. They do not need rent stabilization protection.

The legislative intent in enacting the four-year rule was "to alleviate the burden on honest landlords to retain rent records indefinitely" (*Thornton supra* 5 NY3d at 181). Hence, the rent history the statutes and regulations setting out the four-year rule refer to cannot be, as the *Regina* dissent suggests, limited to an

owner's annual filings with the DHCR (*Regina dissent* at 434) Once records are filed with the DHCR it is not a "burden" on landlords to retain them – the DHCR retains them. As the *Regina* majority observed, "A far more reasonable interpretation of "rental history" would embrace not just agency records but also the records of the landlord and the tenant, as embodied in ledger books, cancelled checks, rent receipts, expired leases and the like." (*Regina supra* at 427).

Using that rental history to recalculate rents beyond the four-year base date in J-51 cases puts honest owners like Defendant 72A who relied on the DHCR J-51 policy in a worse position than owners in non-J-51 cases who, despite overcharging, get the benefit of the CPLR §213-a four-year statute of limitations and adoption of the market base-date rent.

The Defendant did not intentionally do anything wrong. It relied on then valid DHCR regulations, opinions and practices and an understanding of the law that, "the responsible administrative agency and the entire real estate industry reasonably shared at the time." *Latipac Corp. v. BMH Realty*, 93 AD3d 115, 124 (1st Dept 2012). The Defendant did not rent gouge – the rent only rose from $2,200 to $3,500 (R.9-10) over the ten years between the first lease and the base date. The Defendant actually charged the Plaintiffs less than it was entitled to under stabilization increases (See tables on page 15 & 44). The Defendant offered

the Plaintiffs a stabilized lease renewal *before* the Plaintiffs commenced an overcharge action.

In contrast, the Plaintiffs, who the Court below acknowledged were completely informed that renovations were being performed, that the apartment was exiting stabilization and of their rights to challenge their rent and regulatory status in 2000, and who could have checked public records to find that a J-51 was in effect, waited fourteen years to commence an overcharge with a knowingly dishonest, verified complaint claiming no renovations had been done. (*Taylor supra* at 103,104) Plaintiffs should not be allowed to pick the parts of the legislatively determined stabilization regime that benefit them - stabilized status and the right to collect overcharges – and discard those that inconvenience them – the four-year rule.

Rather than adopting a novel calculation of the base date rent that provides a windfall to the wealthy Plaintiffs, this Court should follow the unambiguous language of CPLR §213-a and utilize the rent in effect on the base date. As then Supreme Court Justice Gische previously wrote in a similar case, "...[adopting the rent in effect on the base date] makes the most sense. It neither unduly punishes either party nor does it create any windfall, because the parties followed what was widely believed to be the correct law at the time the lease was made." *Rosenzweig*

v. 305 Riverside Dr. Corp., 2012 NY Slip Op 51103(U) (S.Ct NY Co. - Gische J.)

II. THE COURT BELOW ERRED IN DENYING DEFENDANT PARTIAL SUMMARY JUDGMENT AND REMANDING TO CONSIDER THE IMPOSITION OF TREBLE DAMAGES AND ATTORNEYS' FEES IN THIS CASE

If the rent in effect on the four base date is properly applied there is no overpayment – Plaintiffs were significantly undercharged – and therefore, no need to consider treble damages and attorneys' fees. But even if there was an overcharge, neither treble damages nor attorneys' fees should be imposed.

A. The Court below Misapplied Precedents of this Court and Multiple Other First Department Cases Dealing with Wilfulness, Treble Damages and Attorney's Fees in J-51 Cases

Regina, *Raden*, *Stulz* and *Todres* were all cases where, even after utilizing the rent in effect on the base date, there were overcharges due. All of these Courts declined to impose treble damages or attorneys' fees.

In *Borden v. 400 E. 55th St. Assoc.* L.P., 24 NY3d 382 (2014) this Court found that in post *Roberts* cases,

> "...treble damages would be unavailable to the tenant because **a finding of willfulness is generally not applicable to cases arising in the aftermath of *Roberts***. For *Roberts* cases, defendants followed the Division of Housing and Community Renewal's own guidance when deregulating the units, so there is little possibility of a finding of willfulness (citation omitted)." (emphasis added) *Borden* at 398.

Defendant-appellant's brief to the Appellate Division in this case highlighted *Borden* and the case was discussed at the oral argument. Remarkably, *Taylor* did not mention *Borden*.

The Court below did not provide any legitimate reason or cite any case to rebut the *Borden* presumption of lack of willfulness in this case or any reason to deviate from the majority position in the First Department that follows *Borden*. The Court below explicitly found that the Defendant-owner was relying on the DHCR guidance when it deregulated the apartment and there was no fraud. Therefore, *Borden* applies and a finding of willfulness "is not applicable."

B. The Court Below's Reasoning in Ordering a Remand to Determine Willfulness Was Arbitrary, Unsupported by Precedent, and Contrary to Guidelines by the Relevant Administrative Agency

The sole rationale offered by the Court below to question the Defendant-owner's willfulness was the timing of the registration of the apartment as stabilized and the fact that the apartment was not registered for the years 2000-2008 and "[t]hus, they are subject to dispute." (*Taylor supra* 106-107). The decision does not specify why the registrations are important for adjudging the issue of willfulness or what standard for determining willfulness the court is supposed to apply on remand. The 2000-2008 registrations would only be important if they were needed

to calculate the base date rent and overcharges, which would violate the four-year rule and the multiple decisions described above. The Court below did not cite a single decision holding that timing of registration alone was dispositive of willfulness in an overcharge case.

The Court's emphasis on registrations is contrary to DHCR guidance in its "J-51 Rent Registration Initiative - FAQs" (available at http://www.nyshcr.org/Rent/J-51-FAQ.pdf) that specifically instructs in point 6 that owners are not being directed to file amended registrations to correct deregulation events or to file late registrations for missing years after the deregulation.

C. The Court below Misapprehended Important Facts in this Case When it Ordered a Remand to Determine Wilfulness

The Court below claimed the Defendant-owner should have known after the appeal to the Court of Appeals in *Gersten supra* (deciding that *Roberts* should be applied retroactively) was withdrawn in 2012 (18 NY3d 954) and after *Lucas,* in which it was one of the litigants, was decided, "…that an improperly deregulated apartment was required to be returned to rent stabilization and that the base date rent should not have been set to the market rate. The owner here failed to register apartment ██ and readjust the rent until 2014 when faced with this litigation."

(*Taylor supra* at 106- 107) The Court remanded because, "…the owner should be allowed the opportunity to explain the reasons for such delay and the steps, if any, it undertook to bring itself in compliance." (*id* at 107)

But the Court overlooked that the Defendant could not know if the Plaintiffs in this case should be considered rent stabilized until *Lucas* was finally decided in 2013 and that Defendant offered the Plaintiffs a rent stabilized lease within months of that final decision. The apartment was registered as stabilized at the next available date after the stabilized lease was signed. The Court seems to have focused on the reported date of 2012 for *Lucas* (the decision date was December 4, 2012) and overlooked information in the record that both sides sought permission to appeal.

Lucas dealt with the then undecided question of whether after *Roberts* a tenant, luxury deregulated ten years earlier while a J-51 was in effect, would remain stabilized many years after the J-51 expired. Even after *Gersten*, the owner-defendant did not know if it would have to treat the *Lucas* tenant and similarly situated tenants like Taylor and Jenkins in the same building as stabilized until the case was resolved. The answer was not obvious. The Appellate Division held Ms. Lucas should be treated as stabilized but found the legal reason justifying

continued stabilized status offered by the Housing Court and Appellate Term below – that the owner failed to provide a J-51 lease notice – was incorrect.

Lucas was not finally decided until well into 2013 when the Appellate Division denied both parties' applications for leave to appeal to the Court of Appeals (2013 NYSlipOp 68006(U)). Defendant offered, and Plaintiffs signed, a rent stabilized lease renewal in 2013 within a few months of that final denial of appeals in *Lucas* during the window period of 90 - 150 days before the expiration of their then current lease. (*See* the Supreme Court finding of fact at R.10). This is the timing that the DHCR instructs (J-51 Rent Registration Initiative *supra*, point 11). That stabilized lease (R.130-131) gave the tenants notice that their status had changed from free market to stabilized and of their right to challenge the rent. The Plaintiffs could not have been prejudiced by any alleged delay in registrations. There was no need "to readjust" the rent since applying the four-year base date rent, the tenant had been undercharged, not overcharged.

The "clear notice" that the Court below suggests Defendant received when the appeal in *Gersten* was withdrawn on March 6, 2012 (*Taylor* supra at 101 & 107) would have only been immediately clear to the litigants in that case. The reporting of withdrawal of an appeal is a relatively obscure event, that would be less apparent to owners or their attorneys compared to the reporting of an actual

decision. Regardless, the *Gersten* decision would not affect the Defendant's situation because *Lucas* had not yet been decided.

The DHCR did not issue any guidelines or directions to owners to register or offer stabilized renewal leases after the appeal in *Gersten* was withdrawn or *Lucas* was finally decided. In fact, DHCR did not offer any guidance until 2016. Nor did *Gersten* offer guidance to owners about registering apartments since it found the apartment at issue remained free market subject to an earlier, unchallenged DHCR deregulation order.

Even if the Defendant had offered Plaintiff a stabilized lease and registered the apartment when ". . . the [*Gersten*] appeal was withdrawn in March 2012 ..." and the Plaintiffs had immediately commenced an overcharge action there would be no overcharge in the instant case, and therefore no treble damage issue. Using the base date of March 6, 2008 (four years before the *Gersten* withdrawal on March 6, 2012) the table below shows that there was still no overcharge, in fact, there was an undercharge. The rents charged between March 1, 2008 through March 2013 in the table below came from the undisputed findings of fact in the Supreme Court below (R.10). The rent charged commencing March 1, 2014 is indicated in the renewal lease signed by Plaintiffs (R.130-131).

Begin	Guideline Increase	Legal Rent	Rent Charged	**Under charge**
03/01/08	Gersten base rent	3,400.00	3,400.00	0.00
03/01/09	4.500%	3,553.00	3,500.00	**(53.00)**
03/01/10	6.000%	3,766.18	3,575.00	**(191.18)**
03/01/12	3.750%	3,937.62	3,709.00	**(228.62)**
03/01/13	2.000%	4,016.37	3,783.00	**(233.37)**
03/01/14	7.750%	4,327.64	4,076.18	**(251.46)**

The Court below also overlooked the fact in the record that Defendant-Appellant tried to register the apartment for the years 2000-2008 but was thwarted by the Plaintiffs. When the Defendant tried to register for those years DHCR instructed it that an application for an Administrative Determination was necessary. An application asking for stabilized registration was filed for the years 2000 - 2008 (See certified DHCR registration – at R.132-135, and letter requesting administrative determination attached at R.136 and 5/22/14 ZinbergAffd ¶28 R.83). Subsequently, DHCR, citing Plaintiffs' objection, rejected Defendant's request for an Administrative Determination and declined to register the apartment 2000 - 2008.

D. Attorneys' Fees Are Not Available under the Lease or RPL §234 in this Case

Plaintiffs' complaint asked for attorneys' fees under RPL §234 and the terms of the lease. Attorneys' fees should not be available because the instant case did not involve an action to recover possession or breach of the lease. In *Rossman v.*

Windermere Owner LLC, 111 AD3d 429 (1st Dept 2013) the Court found that attorneys' fees were not available under the lease or RPL §234 because the case did not involve an action to recover possession or a breach of the lease. The fact pattern and the lease clause regarding attorneys' fees in this case are identical (*Rossman* lease at R.146 ¶27; *Taylor* lease at R.142, ¶27). As in *Rossman*, this case is a declaratory judgment and overcharge action.

E. Finding Willfulness and Imposing Treble Damages and Attorneys' Fees in this Case Would Be Unfair

> "A finding of willfulness... and liability for treble damages...should depend on a finding as to whether the owner had reason to know that the amount it was charging was in excess of the lawful rent. Here, [Defendant] showed, by a preponderance of the evidence, that it did not have reason to know that [the rent charged] was in excess of the lawful rent." *Matter of Round Hill Mgt. Co. v. Higgins*, 177 AD2d 256, 258 (1st Dept. 1991)

Like every other owner at the time the Defendant-owner in this case reasonably believed it could treat the apartment as free market. The Defendant offered the Plaintiffs a rent stabilized leased when it became clear it was legally required to do so without waiting for the tenants to start an action.

Defendant has never been found guilty of or collected an overcharge in fifty years of ownership (Affidavit of managing agent R.79, ¶9).

> "... an owner who has never been found to have violated these regulations should have the full benefit of that history to support its claim that the instant overcharge was not willful, but rather, an aberration and a good-faith mistake." *Matter of H.O. Realty Corp. v*

State of N.Y. Div. of Hous. & Community Renewal, 46 AD3d 103, 108 (1st Dept 2007)

The Court below found Defendant acted in good faith reliance on the DHCR and documented that the increase bringing the rent above the threshold was valid. Awarding fees in this case would be unfair and inconsistent with the holdings in *Regina*, *Raden*, *Stulz*, *Todres* and *Rossman*.

III. THE COURT BELOW ERRED IN GRANTING PLAINTIFFS-TENANTS' DECLARATORY JUDGMENT TO CONTINUE THEIR STABILIZED STATUS MORE THAN ELEVEN YEARS AFTER J-51 EXPIRATION

This declaratory judgment action commenced eleven years after the J-51 expired which distinguishes this case from most other J-51 overcharge cases where the J-51 was still in effect when the case started – in *Regina*, for example, the action commenced in 2009, four years before the J-51 expired (*Regina supra* at 429-430, Gische dissenting). This Court has never addressed whether apartments deregulated while a J-51 was in effect would remain stabilized past J-51 expiration.

In granting Plaintiff's Declaratory Judgment that the apartment remains rent stabilized despite J-51 expiration, the Court below relied exclusively on *Lucas supra*.

> "The Court of Appeals [Roberts] did not address what effect the expiration of J-51 benefits would have on the rent-regulated status of affected apartments…. *Lucas* compels the further result that even

> though the J-51 benefits have since expired, the apartment was improperly deregulated and remains rent-stabilized. Jenkins was the legal tenant of apartment ██ while the J-51 tax benefits were in effect and after they expired, plaintiffs continued to occupy the apartment. Because plaintiffs have continuously occupied the same apartment since the inception of Jenkins's tenancy in 2000, apartment ██ remains subject to rent stabilization." *Taylor* 151 AD3d 95, 102

Lucas involved a luxury deregulation in 2001 following a rent-controlled vacancy while a J-51 was in effect in the same building as this case. Ms. Lucas took occupancy nearly two years later, only nine months before the J-51 expired. The Housing Court and the Appellate Term found no fraud by the owner but held the apartment remained stabilized years after J-51 expiration solely because the Owner had failed to include a notice under RSL §26-504(c) informing the tenant (Lucas) that she was, "...**temporarily** protected by rent stabilization because landlord was receiving the tax abatement, but that such protection would terminate upon expiration of landlord's tax abatement...." (emphasis added) (*Lucas*, 28 Misc3d at 591); (See also *Lucas* , 32 Misc3d at 49).

On appeal the Appellate Division in *Lucas*, found that, "…the notice requirement plainly does not apply to dwellings such as the one here, that were subject to rent regulation for a reason other than the receipt of J-51 benefits (citation omitted)." *Lucas,* 101 A.D.3d at 402. Nevertheless, the Court held,

> "…tenant is entitled to rent-stabilized status for the duration of her tenancy…. That the J-51 benefits subsequently expired does not support

> landlord's claim that the apartment must be denied ongoing regulated status. Our determination that the tenancy is rent stabilized is not, as found by the lower courts, based on the failure of the owners to have provided a notice as set forth in Rent Stabilization Law of 1969 (Administrative Code of the City of New York) 26-504, but is premised on the apartment having been improperly deregulated as of the time that the tenant took occupancy." *Lucas supra,* at 401-402.

Lucas gave no reason other than "improper deregulation" for extending stabilized status indefinitely past the J-51 expiration. The Court did not cite any precedent or statute.

The only thing "improper" about the deregulation in *Lucas* and in this case was that Defendant-Appellant relied on DHCR regulations that were invalidated eight years later. No fraud or other untoward behavior was proven in either case.

The legislature intended stabilization to expire when the J-51 expired in buildings like Defendant's. The J-51 abatement program was established by RPTL §489 and provided that regulation would cease when the abatement ended. In 1985 RPTL §489 (7)(b)(2) was added and RSL §26-504(c) was amended. Both provided that for a limited class of buildings (those receiving a J-51 prior to 1985 and those that were not subject to regulation under the RSL of 1969 or the ETPA of 1974) regulation would continue after J-51 expiration unless there was J-51 lease notice or until the first vacancy after the expiration of benefits (*Matter of Bleecker St. Mgt. Co. v New York State Div. of Hous. & Community Renewal*, 284 AD2d 174,

176 (1st Dept. 2001)). Defendant's building in this case (and *Lucas*) does not fall into that limited category. The requirement that the apartment remain stabilized for the duration of Plaintiffs-Respondents' tenancy (until the first post J-51vacancy) is in the same RPTL §489(7)(b)(2) and RSL §26-504(c) notice sections that the *Lucas* Court found "plainly does not apply to dwellings such as the one here." Keeping Plaintiffs stabilized until they vacate would create two classes of buildings, those that can exit stabilization when the J-51 ends by including a notice and those with no route to exit stabilization when the J-51 ends. This cannot be what the legislature intended. It would destroy the incentive for most buildings to enter the J-51 program. It might also encourage owners already receiving J-51 benefits to leave apartments vacant until the J-51 expires, thereby reducing the stock of available and affordable housing.

Nothing in the amended statutes changed the fact that under RPTL §489 regulation for the building in this case would end when the J-51 ended. The last clause of RSL §26-504(c) specifies that when the J-51 expires in buildings like Defendant's that were previously subject to regulation before receipt of a J-51 the building is subject to the RSL, "...to the same extent and in the same manner as if this subdivision had never applied thereto." (RSL §26-504(c)) If the subdivision had "never applied thereto" the subject apartment would be deregulated.

Defendant-Appellant's position is consistent with the legislature's intent in establishing luxury deregulation and providing exceptions for buildings receiving J-51s. The legislative history of the RRRA reflects the legislature's determination that tenants like the Plaintiffs who could afford rents over $2,000 (now $2,774.76) were not in need of rent regulation. 1993 N.Y. State Legis. Ann. at 176 ("there is clearly no 'housing emergency' for apartments renting for more than $2,000."). "...the Rent Regulation Reform Act ...recognizes that '[t]here is no reason why public and private resources should be expended to subsidize rents for these households.'" *Noto v. Bedford Apts. Co.*, 21 AD3d 762, 765 (1st Dept. 2005) (citing Memo of Sen. Kemp Hannon 1993 N.Y. Legis. Ann at 175)

The legislature's intent in enacting the exception to luxury decontrol contained in RSL §§26-504.1 & 26-504.2 was to ensure that buildings would not simultaneously receive J-51 benefits and luxury decontrol (*Roberts supra*, 13 NY3d at 286-87). In the instant case, where the apartment would normally have been deregulated when the legal regulated vacancy rent exceeded the threshold of $2,000, it was temporarily kept stabilized because of J-51 receipt. When J-51 benefits expired two years later, so too did the concern over simultaneous receipt of benefits and the apartment should have become deregulated.

CONCLUSION

For all the reasons set forth above, it is respectfully requested that this Court reverse the portions of the Decision and Order of the Appellate Division, which 1) denied Defendants' motion for summary judgment dismissing all claims for overcharges and attorneys fees; and 2) granted Plaintiffs' cross-motion declaring that Plaintiffs' apartment remains subject to rent stabilization and declaring that the Plaintiffs are the rent stabilized tenants thereof; and that this Court should grant such other and further relief as it deems just and proper.

Dated: New York, NY
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NEW YORK STATE COURT OF APPEALS
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Dated: February 6, 2019

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Murray Shactman