To be argued by: ROBERT E. SOKOLSKI, ESQ.
Time Requested: 15 minutes

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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 FOR PLAINTIFFS-RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

State Cases:

State Rules:

State Regulations:

QUESTION PRESENTED

Q: Did Supreme Court commit error by denying Defendant's motion for summary judgment dismissing the complaint to determine, *inter alia*, the proper legal rent for an apartment that Defendant now admits to wrongfully treating as exempt from rent stabilization while receiving J-51 tax benefits, where Defendant failed to support its motion with admissible evidence, failed to demonstrate the condition of the apartment prior to an alleged renovation, failed to submit any breakdown to exclude alleged renovation items that do not constitute Individual Apartment Improvements ("IAIs") and failed to submit an affidavit by anyone with personal knowledge of the purported renovations?

A: No, the Court below correctly denied Defendant-Appellant's motion for summary judgment.

Q: Did the Court below effectuate a retroactive application of the Roberts v. Tishman decision by rejecting the free market rent charged for an apartment wrongfully treated as exempt from rent stabilization as the base date maximum legal regulated rent upon restoring the apartment to its proper rent stabilization status?

A: Yes.

PRELIMINARY STATEMENT

This brief respectfully opposes the appeal by Defendant-Appellant 72A Realty Associates, L.P. ("Defendant" or "Appellant") from the Decision and Order of the Supreme Court, Appellate Division, First Department (Gische, J.) entered May 25, 2017 (R. 264-84), which affirmed Supreme Court's denial of Defendant's motion for summary judgment dismissing the complaint, affirmed partial summary judgment granted to Plaintiffs that the apartment involved in this proceeding is rent stabilized, dismissed Defendant's seventh and ninth affirmative defenses, and mandated the use of a method to set the base date rent to retroactively apply the binding precedent of *Roberts v. Tishman Speyer Properties, LP*, 13 N.Y.3d 279, 918 N.E.2d 900 (2009).

Defendant, in violation of the Rent Stabilization Law ("RSL") and Rent Stabilization Code ("RSC"), unlawfully treated the subject premises as a deregulated market rent unit despite the fact that the building in which the subject premises is located was in receipt of J-51 tax benefits at the time of the purported deregulation, and at the time Plaintiff Tamara Jenkins took possession. Defendant employed high-rent vacancy deregulation despite the plain language of the vacancy decontrol statute that excludes from this mechanism of deregulation any apartment in a building receiving J-51 benefits, an exclusion that was confirmed by this Court in the matter of *Roberts v. Tishman Speyer Properties, LP*, 13 N.Y.3d 279, 918 N.E.2d 900 (2009).

Although it is undisputed that the J-51 benefit was still in effect when Plaintiff Tamara Jenkins commenced occupancy of the subject premises and that her lease contained no notice of the J-51 benefits or their expiration, thereby rendering the subject premises rent stabilized for the duration of her tenancy, Defendant nonetheless continued to treat the subject premises as exempt from rent stabilization long after *Roberts* was determined in 2009.

Moreover, in response to the commencement of this proceeding, Defendant *still* denied that the subject premises were rent stabilized, raising at least two (2) affirmative defenses (seventh and ninth) in an improper attempt to further evade the requirements of rent stabilization mandated for the subject premises. Indeed, Defendants are still attempting to evade the requirements of rent stabilization applicable to the subject apartment, arguing that the courts below erred in granting and affirming partial summary judgment that the unit is rent stabilized.

Defendant's motion for summary judgment claimed that, as a result of purported renovations in the apartment, the legal rent rose above the threshold for rent stabilization (then $2,000.00 per month) after prior tenant Peter Zajonc vacated and Plaintiff Tamara Jenkins took possession of the subject premises.

However Defendant's motion was not supported by an affidavit of anyone with any actual knowledge of the renovations, evidence was not submitted in admissible

form, no evidence was presented as to the condition of the subject premises before the purported renovations and the purported documentation failed to breakdown the costs for a substantial amount of work that clearly would not qualify as IAIs because it was clearly cosmetic and/or normal repair and maintenance.

Supreme Court correctly granted Plaintiffs' cross-motion, finding that the subject premises are rent stabilized and dismissing Defendant's seventh and ninth affirmative defenses, and denying Defendant's motion for summary judgment (except for dismissal as against Defendant Janet Zinberg, which is not a subject of this appeal).

The issues in this case are actually quite simple—(i) Plaintiff Tamara Jenkins commenced occupancy of the subject premises at a time when it was undisputed that the subject building was in receipt of J-51 tax benefits, (ii) the purported vacancy decontrol claimed by the Defendant occurred just prior to Ms. Jenkins' commencing occupancy, at a time when it is also undisputed that the subject building was receiving J-51 tax benefits, (iii) it is undisputed that Ms. Jenkins lease (R. 141-44) contained no notice whatsoever regarding J-51 tax benefits or the date of their expiration, and (iv) Defendant is not claiming and never has claimed any basis for exemption from rent stabilization other than purported vacancy decontrol.

For the reasons set forth herein, Defendant's appeal should be denied.

ARGUMENT

I. THE APPELLATE DIVISION EMPLOYED A FAIR AND REASONABLE METHOD TO SET THE BASE DATE RENT AND APPLY THE *ROBERTS* CASE RETROACTIVELY.

The Appellate Division's decision to bridge the gap of Defendant's fourteen year-long violation of every provision of rent stabilization applicable to the subject apartment, by setting the legal rent in the same amount as it would have been had Defendant complied with those mandatory statutes, is fair and reasonable. While, for reasons explained in more detail below, Plaintiffs respectfully disagree with the Court's grant of any rent increases in the absence of annual rent registrations having been filed with DHCR, the determination to remedy the tainted base date rental history by computing the rent as if the Defendant complied with the law, was made to effectuate a retroactive and fair application of the *Roberts* case. The method selected avoids a potentially unfair punishment of the Defendant, who is paid precisely the amount Defendant would have been entitled to if Defendant followed the law. The method selected also avoids a windfall to the tenant, who would merely be reimbursed for any monies they paid over the legal regulated rent they would have been charged had their landlord not unlawfully treated the apartment as deregulated, starting with 4 years prior to the commencement of this action.

The Appellate Division's May 25, 2017 determination reasoned, correctly,

that "an Owner cannot use the lack of registration or misapprehension of the law as a sword to establish a rent that clearly bears no relation to the appropriate parameters of rent regulation." On that basis, the Court below rejected the market rent charged four years prior to the complaint as the base date legal regulated rent for the subject premises.

The Defendant complains that this method deprives them of the ability to keep some of the profit they made by charging an illegal market rate on the base date (Plaintiff's potential compensatory overcharge claim is limited to four of the fourteen years period of Defendant violation the law), and the windfall profits they would otherwise receive if they were allowed to continue to charge unlawfully inflated rents that have no relation to stabilized rents for the subject premises.

However, our law has long recognized the maxim that "cheaters never prosper" and our Courts have consistently refused to let a party profit from their own misconduct or illegality. *Carr v. Hoy*, 2 N.Y.2d 185, 187, 158 N.Y.S.2d 572, 575 (1957)("'No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.'")(*quoting, Riggs v. Palmer*, 115 N.Y.

506, 511-512 (1889)).

A judicial determination that affirmatively sets the base date rent at an unlawful market rate, permits the Defendant-landlord to keep the profits it made by collecting an unlawful market rent and to calculate all future rent increases based upon that unlawful market rent, violates ancient and well-settled universal maxims, by permitting the Defendant-landlord to profit from its own violation of law, regardless of whether those violations of law were intentional or inadvertent. This is particularly true in the area of rent stabilization, and the extremely important public policies that rent stabilization supports.

Where an apartment had previously been unlawfully deregulated (as is undisputed was the case here), the one way *not* to set the legal rent is by adopting a market rent that was charged on the base date.

In *72A Realty Assoc. v. Lucas*, 101 A.D.3d 401, 402, 955 N.Y.S.2d 19 (1st Dept. 2012), a case involving a pre-Roberts unlawful luxury deregulation of an apartment in a J-51 building, the Appellate Division held that the legal rent was not to be set by simply adopting the market rent charged as of the base date. Rather, the court must look to "any available record of rental history necessary to set the proper base date rent":

> The courts below, however, erred in setting the base date rent for the overcharge counterclaim at the $2,250 per month rate based on the

> market rate in the lease effective for [the base date]. While that date is correct under CPLR 213-a, in light of 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. *Lucas*, supra., 101 A.D.3d at 402.

If anything, *Lucas* provides very compelling precedent – this case involves the same Defendants, the same building and the same unlawful conduct.

In *Meyers v. Four Thirty Realty*, 127 A.D.3d 501, 8 N.Y.S.3d 50 (1st Dept. 2015), the Appellate Division affirmed the trial court's denial of the defendant-landlord's summary judgment motion and permitted discovery past the four-year lookback period. *Meyers* involved an investigation of fraud based upon unproven IAIs in the rental history, leases that did not explain the significant increase from the prior rent controlled rent to the first stabilized rent, and the landlord's failure to file rent registrations.[1]

[1] Notably, the *Meyers* Court affirmed the Supreme Court's determination that the subject unit was rent stabilized, an inescapable truth that the instant Defendant still stubbornly resists in this case. *See, Meyers v. Four Thirty Realty*, 127 A.D.3d 501, 8 N.Y.S.3d 50 (1st Dept. 2015)("As defendant concedes, plaintiff is entitled to a rent-stabilized lease because the building was receiving J–51 tax benefits at the time the apartment was deregulated (see Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d 270, 890 N.Y.S.2d 388, 918 N.E.2d 900 [2009]; *Gersten v. 56 7th Ave. LLC*, 88 A.D.3d 189, 198, 928 N.Y.S.2d 515 [1st Dept.2011] [giving retroactive effect to Roberts])."")

The instant Defendant-landlord purports to have served an RR-2A 'exit registration' upon Plaintiff. However, like the rest of Defendant's conduct, that purported document from 2000 violates the law. (R. 258). It did not state the prior legal regulated rent, it did not claim a single IAI and it did not explain how the rent increase from 1999 was computed. *Id.* Except for the name and address of Plaintiff and the term of the lease, *the purported RR-2A form is completely blank*. *Id.*

Meyers did not hold that there can be no look back to rental history beyond the four years absent a showing of fraud by the landlord. Thus, *Lucas* was not affected by *Meyers*. Rather, *Meyers* merely presented fraud as another circumstance under which courts are to look back beyond the four-year period to establish the legal rent.

After the *Meyers* decision was handed down by Appellate Division, DHCR addressed both *Meyers* and *Lucas* together, rejected the argument that *Meyers* ran contrary to *Lucas*, and expressly recognized that a showing of fraud is just one of several circumstances justifying looking back beyond the four-year period to set the legal rent. In the case of *In the Matter of the Administrative Appeal of Four Thirty Realty, LLC*, Administrative Review Docket No.: DO410011RO, DHCR recognized:

> …both the code and *Lucas* make clear that fraud is not the only reason for which this agency may examine a rental history more than four

> years old. *Meyers, supra*, is not to the contrary, the question of fraud having been very much alive therein, as it is not in the instant case.

DHCR's policy on this issue is to reject the market rent as the base date maximum legal regulated rent where the landlord wrongfully deregulated a rent stabilized unit, and to "bridge the gap" by adding lawful increases to the last lawful rent going forward, to the base date. *See id.*, at 2 ("The base-date rent was incorrect because treatment as deregulated was unwarranted; rather than using that unreliable rent as a base date, we therefore take the last lawful rent preceding it and 'bridge the gap' to the base date by adding lawful increases to arrive at the correct base date rent.")

Appellate Division's determination in this case tracks DHCR's method. *See*, May 25, 2017 Decision and Order (R. 264-84)("We cannot reconcile a mechanical application of CPLR 213–a and give effect to the retroactive application of *Roberts*, as we must (*Gersten*, 88 A.D.3d at 198, 928 N.Y.S.2d 515), without considering the permitted rent stabilization increases after the expiration of the 2000 lease and preceding February 21, 2010. Only in this manner can it be determined whether the rent the Owner charged plaintiffs on the base date bears any relation to a permissible, rent-stabilized rent.")

The method employed by the Appellate Division, to bridge the gap, is a fair and reasonable method to set the base date rent in cases like the one at bar, where an

apartment is unlawfully treated as exempt from rent stabilization more than four years prior to a tenant's complaint. It avoids a windfall on either side, it furthers the tremendous public policy underlying rent stabilization and it comports with the well-settled universal maxim that one must not profit from their own wrongdoing.

For the foregoing reasons, Defendant's appeal should be denied.

II. THE LAWFUL METHOD TO SET THE BASE DATE RENT IN THIS CASE IS THE DHCR DEFAULT FORMULA.

The Appellate Division should have mandated the use of the default formula to set the base date rent in this case, because the Defendant's unlawful conduct over a period of fourteen years and its use of a market rent during that time period resulted in an unreliable four year rental history that bears no relationship to rent stabilization applicable to the apartment.

The subject of how to set the base date legal rent when a housing accommodation was unlawfully treated as a free market unit is *not* new. It was the central subject in the case of *Thornton v. Baron*, 5 N.Y.3d 175, 181 (2005), where this Court specifically rejected strict application of the four year statute of limitations in setting the rent for a housing accommodation that was unlawfully treated as exempt from rent stabilization and brought back into compliance because of the Court's concern that:

> a landlord whose fraud remains undetected for four years—however willful or egregious the violation—would, simply by virtue of having filed a registration statement, transform an illegal rent into a lawful assessment that would form the basis for all future rent increases. Indeed, an unscrupulous landlord in collusion with a tenant could register a wholly fictitious, exorbitant rent and, as long as the fraud is not discovered for four years, render that rent unchallengeable. That surely was not the intention of the Legislature when it enacted the RRRA. Its purpose was to alleviate the burden on honest landlords to retain rent records indefinitely (see Gilman, 99 N.Y.2d at 149, 753 N.Y.S.2d 1, 782 N.E.2d 1137), not to immunize dishonest ones from compliance with the law. Id., at 181.

The *Thornton* Court directed the imposition of the DHCR default formula, rather than reward the landlord with a market rent as the base date rent.

In *Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 29 N.E.3d 215, 6 N.Y.S.3d 206 (2014), this Court also made clear that the imposition of the default formula mandated by *Thornton* was not limited to cases of illusory tenancies as was present in *Thornton*.

Like here, in both *Thornton* and *Conason*, the landlords' conduct included the failure to file annual rent registration statements with DHCR for more than four years prior to the filing of a complaint by the tenants. Like here, in both *Thornton* and *Conason*, the landlords' misconduct included false claims that the apartments were exempt from rent stabilization, which resulted in an unreliable base date rental history which bore no relationship to rent stabilization.

Here, the Defendants not only violated the law by unlawfully treating rent

stabilized housing accommodations as free market units while collecting J-51 tax benefits, but Defendant is also seeking to impose the free market rent changed four years prior to the filing of the complaint as the base date legal regulated rent. Here, Defendants attempted to establish a fraudulent rent by filing false annual rent registrations with DHCR that claim even higher legal rents than those charged to the tenant. Here, Defendants attempted to use the ruse of a preferential rent to explain an alleged higher legal rent, when it is undisputed that a preferential rent was never established in any lease between Defendant and Plaintiffs throughout their tenancy.

In *160 East 84th Street Associates LLC v. DHCR*, 160 A.D.3d 474, 75 N.Y.S.3d 141 (1st Dept. 2018), a J-51 unlawful deregulation case like the one at bar, Appellate Division affirmed the use of DHCR sampling to set a default formula base date rent, holding:

> DHCR's use of a sampling method to determine the legal regulated rent on intervenor tenant's apartment based on the average stabilized rents for studio apartments in the 2006 registration of the subject building is rationally based in the record and not arbitrary and capricious (see Matter of Tockwotten Assoc. v. New York State Div. of Hous. & Community Renewal, 7 A.D.3d 453, 454, 777 N.Y.S.2d 465 [1st Dept. 2004]).
>
> DHCR providently exercised its broad equity discretion to fashion an equitable solution to the question of the appropriate rent for an apartment that was improperly treated as deregulated for years (see Rent Stabilization Code [RSC] [9 NYCRR] § 2522.7; RSC former § 2522.6[b][2]; Matter of W 54–7 LLC v. New York State Div. of Hous. & Community Renewal, 39 A.D.3d 312, 313, 835 N.Y.S.2d 38 [1st

Dept. 2007]).

> The market rent of $2,200 per month, established by lease, in effect on the "base date" (RSC § 2520.6[f][1]) was the result of improper deregulation by petitioner and thus may not be adopted as the proper base date rent (see 72A Realty Assoc. v. Lucas, 101 A.D.3d 401, 955 N.Y.S.2d 19 [1st Dept. 2012]; Gordon v. 305 Riverside Corp., 93 A.D.3d 590, 592, 941 N.Y.S.2d 93 [1st Dept. 2012]). However, because petitioner's actions were based upon a mistaken pre-Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d 270, 890 N.Y.S.2d 388, 918 N.E.2d 900 (2009) belief that the apartment had been deregulated, and there is no evidence of fraud, resort to the punitive default formula set forth in Thornton v. Baron, 5 N.Y.3d 175, 800 N.Y.S.2d 118, 833 N.E.2d 261 (2005) is inappropriate (see Taylor v. 72A Realty Assoc., L.P., 151 A.D.3d 95, 105, 53 N.Y.S.3d 309 [1st Dept. 2017]; Matter of Park v. New York State Div. of Hous. & Community Renewal, 150 A.D.3d 105, 115, 50 N.Y.S.3d 377 [1st Dept. 2017], lv dismissed 30 N.Y.3d 961, 64 N.Y.S.3d 662, 86 N.E.3d 555 [2017]). *Id.*, at 474-75.

The instant case is analogous to *160 East 84th Street*, with one exception – Defendant presented no evidence that it believed or relied upon anything when it unlawfully treated the subject premises as exempt from rent stabilization. Indeed, the managing agent is deceased, and Defendant presented no other witness with any personal knowledge as to what they believed. Summary judgment relieving Defendant of the default formula to set the rent, as well as treble damages, would require sheer speculation as to what a deceased person believed. Defendant also presents no evidence to answer why that managing agent believed he could deregulate the subject premises pursuant to the Rent Stabilization Code, but ignored the requirements that all apartments remain stabilized contained in each and every

statute and regulation that actually govern J-51 benefits received for the subject building. *See*, *e.g.*, RPTL §489(7)(b)(2); Rent Stabilization Law §26-504(c); 28 RCNY §5-03(f).

In *Altschuler v. Jobman 478/480, LLC.*, 135 A.D.3d 439, 22 N.Y.S.3d 427 (1st Dept. 2016), another J-51 wrongful deregulation case, the Court mandated use of the DHCR default formula, holding:

> Further, the application of DHCR's default formula was warranted, given the unreliability of the rental history since 1995, due to defendant's failure to file a number of the annual rent registrations prior to the commencement of this action (see Levinson v. 390 W. End Assoc., L.L.C., 22 A.D.3d 397, 400–401, 802 N.Y.S.2d 659 [1st Dept.2005]).
>
> Supreme Court properly imposed a rent freeze on the apartment, since defendant collected the unlawful rent overcharges before filing late rent registrations (see Matter of Hargrove v. Division of Hous. & Community Renewal, 244 A.D.2d 241, 664 N.Y.S.2d 767 [1st Dept.1997]). Supreme Court also properly awarded treble damages, because defendant failed to establish, by a preponderance of the evidence, that the overcharge was not willful (id.). *Id.*, at 440-41.[2]

[2] While the Appellate Division, in *In re Regina Metropolitan Co., LLC v. DHCR,* 164 A.D.3d 420, 84 N.Y.S.3d 91 (1st Dept. 2018) rejected the rent-setting methodology of *Taylor, supra*, because that method required examination of the rental history of a housing accommodation for more than four (4) years prior to an overcharge complaint, the *Regina* Court made clear that it was not suggesting or limiting DHCR to the market rent as the four year base date rent. Notably, the dissents in both *Regina* and *Raden v. W 7879, LLC*, 164 A.D.3d 440, 84 N.Y.S.3d 30 (1st Dept. 2018) point out a split between different Justices in the Appellate Division, First Department on this issue. For the reasons set forth below, this Court must reject the Defendant's anticipated attempt to legalize the unlawful market rent charged on the base date, because such a holding violates, *inter alia*, Rent

Emphatically, this is not "an overcharge case". An overcharge case arises when a rent stabilized tenant, who has been given a rent stabilized lease rider with a rent stabilized vacancy lease – which informs them of the prior stabilized rent, provides computations of any increases from the prior tenant's legal rent and provides the tenant with notice of, *inter alia*, their right to challenge the rent and provides the name, address and telephone numbers for DHCR assistance – files a rent overcharge complaint with DHCR to challenge the rent they are charged.

That clearly did not happen here. Instead, the instant Defendant unlawfully issued Plaintiff a market lease with no explanation that the unit was previously rent stabilized, much less what the prior legal rent was and how any rent increases were calculated. Here, Defendant did not provide any of the required notices to Plaintiff. Defendant's 'exit registration' served upon the Plaintiff was blank. (R. 258).

This case was brought to remedy the landlord's complete violation of nearly every provision of rent stabilization applicable to the subject apartment, to establish Plaintiffs' right to rent stabilization as tenants of the subject premises, and to bring the unit back into compliance after the Defendant violated the Rent Stabilization Law by unlawfully treating the apartment as if it were exempt from stabilization for

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Stabilization Law §26-517(e), it would reward landlords' unlawful conduct and encourage even more violations of the Rent Stabilization Law and Code.

some fourteen years, until 2014, long after Roberts was decided (2009) and long after the Appellate Division, First Department settled the retroactivity issue in *Gersten v. 56 7th Avenue, LLC*, 88 A.D.3d 189, 928 N.Y.S.2d 515 (1st Dept. 2011). The setting of a proper base date stabilized rent and an award overcharge, if any, are claims that are merely incidental to a finding that the apartment is being unlawfully treated as exempt from rent stabilization.

Under the circumstances of the J-51 deregulation cases, some landlords might make a case for sympathy sufficient to avoid the imposition of treble damages. In the instant case, Defendant has the right to present evidence and/or witnesses at trial that may demonstrate Defendants' reliance on DHCR's 1996 advisory opinion and DHCR practice at the time, which erroneously permitted owners vacancy deregulation of units while they received J-51 tax benefits for the building. A proper showing may relieve Defendant of treble damages for a willful overcharge. However, no facts will permit Defendant to profit by its own unlawful conduct by rewarding Defendant, on a pre-discovery summary judgment, with a free market rent on the base date upon a finding that the subject premises was rent stabilized.

III. RENT STABILIZATION LAW §26-517(e) REQUIRES THAT THE RENT BE FROZEN DUE TO DEFENDANT'S FAILURE TO FILE ANNUAL RENT REGISTRATION STATEMENTS WITH DHCR.

It is well-settled that, where a landlord fails to file one or more annual rent

registrations with DHCR, the legal rent is frozen at the legal rent in effect when the last proper registration was filed and the landlord is prohibited from increasing the rent, a penalty that may only be eliminated prospectively. RSL §26-517(e); *Jazilek v. Abart Holdings, LLC*, 72 A.D.3d 531, 531, 899 N.Y.S.2d 198 (1st Dept. 2010); *425 3rd Ave. Realty Co. v. DHCR*, 29 A.D.3d 332, 816 N.Y.S.2d 411 (1st Dept. 2006); *Yorkroad Assoc. v. DHCR*, 19 A.D.3d 217, 797 N.Y.S.2d 60 (1st Dept. 2005); *Bradbury v. 342 West 30th Street Corp.*, 84 A.D.3d 681, 684-85, 924 N.Y.S.2d 349, 352-53 (1st Dept. 2011); *422 E. 14th St. Assoc. LLC v. Vlashos*, 21 Misc.3d 137(A), 875 N.Y.S.2d 820, 2008 NY Slip Op 52254(U) (App. Term 1st Dept. 2008).

Although the apartment at issue was subject to rent stabilization due to the Defendant's receipt of J-51 tax benefits, at least until the expiration of the tax benefits in the 2002-2003 tax period,[3] Defendant failed to file annual registration

[3] While there is no *per se* exclusion against luxury deregulation for apartments in J-51 buildings already subject to regulation once those J-51 benefits expire, the fact that none of the leases issued by Defendant to Plaintiff Tamara Jenkins ever informed her of the Defendant's receipt of J-51 benefits, when the J-51 tax period would expire, and the significance of such expiration, Plaintiff's tenancy is rent stabilized until Plaintiffs vacate the subject premises. *Schiffren v. Lawlor*, 101 A.D.3d 456, 955 N.Y.S.2d 44 (1st Dept. December 11, 2012) (recognizing issue of whether "tenant vacatur or [J-51] notice in the lease is necessary to trigger reversion of a dwelling unit to the original rent-regulation regime . . .."); *see also, 73 Warren Street, LLC v. DHCR*, 96 A.D.3d 524, 948 N.Y.S.2d 2 (1st Dept. June 14, 2012)(holding apartment in J-51 building was not subject to luxury deregulation

statements at all for the years 2001 through 2008. (R. 180) Furthermore, the 2000 registration is false and erroneous, as the 2000 filing claimed, and still claims, that the unit was exempt from rent stabilization, when it was not, and is otherwise blank. Moreover, as noted above, the registrations back-filed by Defendant for the years 2010 through 2013 (R. 134) are improper, as they report falsely alleged 'preferential rents' that simply do not exist.

RSL § 26-517(e) specifically provides, in pertinent part:

> The failure to file a proper and timely initial or annual rent registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement or if no such statements have been filed, the legal regulated rent in effect on the date that the housing accommodation became subject to the registration requirements of this section. The filing of a late registration shall result in the prospective elimination of such sanctions ... Id.

The language of RSL § 26-517(e) is mandatory. *See also*, RSC §2528.4(a). As such, Defendant's failure to file proper annual rent registration statements for the Subject Premises with the DHCR from 2000 onward barred Defendant from collecting any rent in excess of the legal regulated rent set forth in the last properly

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after the tax benefit period expired in the absence of vacatur or proper J-51 notices, reasoning: "here there was no vacatur or notice, so even if the building had been regulated before the receipt of tax benefits, that fact would be irrelevant.") Defendant's claim that the expiration of J-51 automatically ended rent stabilization for the subject premises, is contrary to binding First Department law.

filed registration statement, which was $1,464.00 in 1999. *See Jazilek, supra*. In *125 Court Street v. Sher*, 58 Misc.3d 150(A), 94 N.Y.S.3d 539 (Sup Ct. App. Term 2nd Dept. 2018), the Court held:

> Landlord failed to register the correct maximum legal regulated rent for the initial 2005 lease term until September 2013 and offered no explanation for its filing of improper registrations, and none of the leases it proffered to tenant during those years accurately represented the maximum legal regulated rents.
>
> In these circumstances, the rent was "frozen" at the initial legal regulated rent of $3,540 per month and landlord was entitled to no increases until September 2013 when the registrations were corrected (see Jazilek v. Abart Holdings, LLC, 72 AD3d 529, 531 [2010]; see also Thornton v. Baron, 5 NY3d 175, 181 [2005]; Bradbury v. 342 W. 30th St. Corp., 84 AD3d 681, 684–685 [2011]). Landlord's amended registrations have no retroactive effect (see Matter of Second 82nd SM LLC v. New York State Div. of Hous. & Community Renewal, 2012 NY Slip Op 30865[U], *8 [Sup Ct, NY County 2012]; Ernest & Maryanna Jeremias Family Partnership, LP v. Matas, 39 Misc 3d 1206[A], 2013 NY Slip Op 50505[U] [Civ Ct, Kings County 2013]). Consequently, the maximum legal regulated rent for the unit remained $3,540 until at least September 2013. *Id.*, at *1-2.

The rent freezing provisions of RSL § 26-517(e) impose a continuing duty on landlords not to collect a rent in excess of the last properly reported legal rent and a continuing bar to increases of rent over that last properly reported legal rent. Rather than adhere to RSL § 26-517(e)'s clear mandate, Defendant illegally increased the rent to $2,200.00 per month, clearly tainting the reliability of the base date rent.

Inasmuch as RSL §26-517(e) imposes a continuing duty upon landlords not to increase the rent on rent stabilized housing accommodations whenever the landlord fails to file a proper annual rent registration with DHCR, the Statute of Limitations for rent overcharge cannot defeat RSL §26-517(c). Where a duty imposed prior to a limitations period is a continuing one, the Statute of Limitations is not a defense to actions based upon breached of that duty occurring within the limitations period.

That is precisely why the courts have looked past the four years in rent overcharge proceedings where the rent is frozen by, *inter alia*, rent reductions orders. *Scott v. Rockaway Pratt, LLC*, 17 N.Y.3d 739, 929 N.Y.S.2d 204, 953 N.E.2d 277 (2011); *Matter of Cintron v. Calogero*, 15 N.Y.3d 347, 912 N.Y.S.2d 498, 938 N.E.2d 931 (2010).

In *Cintron v. Calogero*, 15 N.Y.3d 347, 912 N.Y.S.2d 498 (2010), this Court explained:

> Rent reduction orders thus place a "continuing obligation" upon an owner to reduce rent until the required services are restored or repairs are made (Thelma Realty Co. v. Harvey, 190 Misc.2d 303, 305–306, 737 N.Y.S.2d 500 [App.Term, 2d Dept. 2001]; see also Matter of Condo Units v. New York State Div. of Hous. & Community Renewal, 4 A.D.3d 424, 425, 771 N.Y.S.2d 380 [2d Dept.2004], lv. denied 5 N.Y.3d 705, 801 N.Y.S.2d 251, 834 N.E.2d 1261 [2005]; Crimmins v. Handler & Co., 249 A.D.2d 89, 91, 671 N.Y.S.2d 469 [1st Dept.1998])
>
> . . . [p]etitioner argues that DHCR rent reduction orders must be

considered by DHCR in establishing the legal stabilized rent for an apartment for the purposes of an overcharge complaint and that, because the rent reduction orders here remained in effect—and imposed a continuing duty on the landlord to reduce rent—during the relevant four-year period, the four-year look-back rule is no bar to considering those orders for the purposes of calculating the amount by which petitioner was overcharged [citations omitted]. DHCR, on the other hand, argues that its determination is supported by a rational basis and is consistent with the statute as the Legislature intended the four-year limitations/lookback period to be absolute, prohibiting the consideration of earlier rent records for the purpose of calculating a rent overcharge.

In this matter of statutory construction, where deference to an agency's interpretation is not required (see e.g. Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d 270, 285, 890 N.Y.S.2d 388, 918 N.E.2d 900 [2009]), we find petitioner's argument more persuasive as it best reconciles and harmonizes the legislative aims of both the four-year limitations/ look-back period as set forth in Rent Stabilization Law § 26–516(a)(2) and CPLR 213–a and the "continuing obligation" of a landlord to reduce rent and make repairs as per Rent Stabilization Law § 26–514 [citations omitted]. *Id.*, at 355.

In *Thelma Realty Co. v. Harvey*, 190 Misc.2d 303, 305-306, 737 N.Y.S.2d 500 (App. Term, 2nd Dept. 2001), the Court stated:

As the Housing Court correctly noted, in Hollis Realty Co. v. Glover (supra, at 526, 686 N.Y.S.2d 265), this court held that a DHCR rent reduction order imposes a continuing obligation upon an owner to reduce the rent and to refrain from collecting increases until he obtains an order restoring the rent. Where a duty imposed prior to a limitations period is a continuing one, the Statute of Limitations is not a defense to actions based on breaches of that duty occurring within the limitations period (see, e.g., Matter of Grossman v. Rankin, 43 N.Y.2d 493, 506, 402 N.Y.S.2d 373, 373 N.E.2d 267; Ballin v. Ballin, 204 A.D.2d 1078, 612 N.Y.S.2d 522; Matter of Kenny v. Loos, 286 App.Div. 97, 140 N.Y.S.2d 817).

See also, *Napa Partners, LLC v. DHCR*, 158 A.D.3d 632, 67 N.Y.S.3d 857 (2nd Dept. 2018)(affirming DHCR's consideration of rent reduction orders issued in 1996 and 1997 to determine overcharge proceeding in 2015); *508 Realty Associates, LLC v. DHCR*, 61 A.D.3d 753, 755-56, 877 N.Y.S.2d 392 (2nd Dept. 2009)(" The DHCR properly relied, in part, on a 1993 rent reduction order in determining the lawful rent for the subject apartment (see Jenkins v. Fieldbridge Assoc., LLC, 65 A.D.3d 169, 877 N.Y.S.2d 375, 2009 N.Y. Slip Op. 02751, 2009 WL 943901 [2d Dept. 2009]; Matter of Condo Units v. New York State Div. of Hous. & Community Renewal, 4 A.D.3d 424, 425, 771 N.Y.S.2d 380, leave denied, 5 N.Y.3d 705, 801 N.Y.S.2d 251, 834 N.E.2d 1261 (2005); Raffo v. McIntosh, 3 Misc.3d 127(A), 2004 WL 906582; see also Matter of Ador Realty, LLC v. Division of Hous. & Community Renewal, 25 A.D.3d at 136–138, 802 N.Y.S.2d 190)); *130 East 18th, L.L.C. v. Mitchel*, 50 Misc.3d 55, 57, 23 N.Y.S.3d 530 (Sup Ct. App. Term 2nd Dept., 2015)("Contrary to landlord's contention, it is clear that rent restoration is permitted only upon a determination by DHCR that a landlord is entitled to restoration . . . and the calculation in this proceeding of the rent due must take into account the rent reduction order still in effect from 1996 . . .")

Continuing duties imposed by rent reduction orders are not the only instance where the courts have correctly rejected landlords' defenses based upon the four (4)

year Statute of Limitations for rent overcharge.

In *446 Realty Co. v. Higbie*, 196 Misc.2d 109 (App. Term 1st Dept. 2003), the court determined that a harassment order by DHCR, which also imposes a rent freeze, was to be considered in setting the legal rent, even though it fell far outside the four year Statute of Limitations for rent overcharge. The Court explained:

> At issue is the calculation of tenant's recovery for rent overcharges. In this respect, Civil Court erred in failing to give effect to the provisions of Rent Stabilization Code § 2526.2(d), which provide that any owner found by the DHCR to have harassed a tenant shall "be barred thereafter from applying for or collecting any further rent increase for the affected housing accommodation". The Code further requires a "finding by the DHCR" that the conduct which resulted in the finding of harassment has ceased before "prospective elimination" of this sanction. Id., at 110.
>
> Since, as found by Civil Court, there has been to date "no vacatur of the DHCR findings concerning the subject apartment", the overcharge award must be calculated upon the last rent paid ($138.36) prior to the imposition of the harassment order.
>
> Landlord's reliance upon the four-year rule (CPLR§ 213–a) as precluding consideration of DHCR's 1988 harassment order is unavailing. Such an order does not "implicate the legislative concerns underlying the four-year statute of limitations" (see, Matter of 72A Realty Associates v. DHCR, 298 A.D.2d 276, 749 N.Y.S.2d 13) since, under the Code, a continuing duty was imposed upon the landlord to refrain from increasing the rent until the finding of harassment was removed (see, Thelma Realty Co. v. Harvey, 190 Misc.2d 303, 737 N.Y.S.2d 500 [App Term, 2d Dept]). Id., at 111.

For the same reason of a continuing duty imposed by law, the four year Statute of Limitations for rent overcharge does *not* bar the Courts or DHCR from

examining the entire rental history in order to ascertain whether a preferential rent was intended to last for the entire duration of a tenancy, or if the landlord was free to charge the full legal rent upon the next renewal. In *2115 Washington Realty, LLC v. Hall*, 55 Misc.3d 1213(A), 58 N.Y.S.3d 876, 2017 WL 1525965, 2017 N.Y. Slip Op. 50573(U) (Civ. Ct. Bronx Co, 2017)(Stoller, J.), the Court recognized:

> Consideration of the rental history prior to the four year statutory period is also permissible to determine the existence of a preferential rent and whether it was a "term and condition" of the original lease, RSC § 2522.5(g), that *continues* until the tenancy ends [emphasis added]. Matter of 218 East 85th St LLC v. Division of Hous & Community Renewal (23 Misc.3d 557, 872 N.Y.S.2d 640 (Sup Ct N.Y. Co 2009); Matter of Sugihara v. State of New York Div of Hous & Community Renewal Off of Rent Admin (13 Misc.3d 1239[A], 831 N.Y.S.2d 356 [Sup Ct N.Y. Co 2006]) (finding that the DHCR's consideration of the 1991 lease and lease rider would not violate the four-year rule); 560–568 Audubon Realty Inc v. Rodriguez (54 Misc.3d 1226[A], 2017 N.Y. Misc. LEXIS 879 [Civ Ct N.Y. Co 2017])(in granting tenant's motion to vacate a stipulation of settlement and the judgment and warrant contained therein, finding it appropriate to consider rent increases more than four years prior to the interposition of the rent overcharge defense where the use of unregistered preferential rents, along with other factors, supported an "arguably meritorious" rent overcharge cause of action).

Emphatically, the rent freezing provision of Rent Stabilization Law §26-517(e) are the same as the rent freezing provisions Rent Stabilization Code § 2526.2(d) – both freeze the rent based upon non-compliance with the law, a penalty that may only be removed prospectively once the landlord complies. That some rent freezes, like rent reductions and harassment, begin with an order from DHCR,

but others, like RSL §26-517(e) occur automatically, is immaterial. A statute that imposes a continuing duty to freeze the rent, like RSL §26-517(e), has the same power and effect upon a Statute of Limitations defense as a rent reduction order or harassment order – they all constitute laws of equal power, their sources are irrelevant.

It bears emphasis that any increases in the legal rent for a rent stabilized housing accommodation are dependent upon filing proper and timely annual registration statements with DHCR. Those annual registration statements are important – they document and explain all increases in the legal rent year after year, they are examined by any party seeking to enforce their rights and/or to enforce the provisions of the rent stabilization laws. They are a primary source of evidence of overcharge or compliant conduct by the landlord. They are so important that, even if only one (1) filing is missing for one (1) year, the landlord is prohibited from collecting any increase in rent from the rent stated in the last properly filed annual registration statement.

Inasmuch as Rent Stabilization Law §26-517 clearly imposes statutory obligations that mandate ongoing compliance, the Statute of Limitations can never stand as a defense in an "unlawful deregulation" situation, against the well-settled doctrine of continuing legal duty. See e.g., 78/79 York Assocs. v. Rand, 175

Misc.2d 960, 965-66, 672 N.Y.S.2d 619 (Civ.Ct. NY Co. 1998), aff'd, 180 Misc.2d 316, 691 N.Y.S.2d 875 (App. Term 1st Dept. 1999) (explaining CPLR 213-a four (4) year statute of limitation for rent overcharge and recognizing that "the holding that a cause of action accrues anew with each month's payment of rent is in conformance with New York law interpreting Statutes of Limitations holding that a continuous wrong will give rise to successive causes of action [citations omitted]."); *Matter of Condo Units LP v. DHCR*, 4 A.D.3d 424, 425, 771 N.Y.S.2d 380 (2nd Dept. 2004), leave denied, 5 N.Y.3d 705, 801 N.Y.S.2d 251(2005) ("…[w]here a duty imposed prior to a limitations period is a continuing one, the Statute of Limitations is not a defense to actions based on breach of that duty occurring within the limitations period.");

While the Appellate Division's rent-setting determination in this case represents a fair and reasonable approach in J-51 unlawful deregulation cases where the "deregulation" occurred more than four years prior to a complaint/defense of rent stabilization, it violates the Rent Stabilization Law and Code for three reasons.

First, as noted above, 'bridging the gap' violates the rent freezing provisions of RSL §26-517(e) where, as here, the landlord has failed to file annual registration statements.[4] Second, *all* rent increases under the Rent Stabilization Law and Code

[4] Defendant interjects information outside the record, claiming it attempted to file

require proper, rent stabilized vacancy leases or renewal leases in order for the landlord to increase the legal rent. In *Matter of 24 Fifth Ave. Assoc. v. DHCR*, 191 A.D.2d 331, 331-32, 595 N.Y.S.2d 50 (1st Dept. 1993), the Court recognized:

> Nor should that portion of respondent's order allowing rent stabilization increases only for renewal leases that were actually executed be disturbed. Under Rent Stabilization Code (9 NYCRR) § 2523.5 (a), an owner is required to offer a lease renewal at the legally regulated rent within the 150-to-120-day window period, prior to the expiration of lease, and a tenant is not obligated to execute a lease renewal at an unlawful rent. Where the landlord fails to comply, the courts have repeatedly upheld respondent's determination allowing the renewal lease increase to take effect only prospectively (Matter of Sommer v New York City Conciliation & Appeals Bd., 116 AD2d 457, 459; Matter of Wellington Estates v New York City Conciliation & Appeals Bd., 108 AD2d 685, affd 65 NY2d 918). Accordingly, because of its

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annual registration statements for 2000-2008 with DHCR. Defendant's attempt was refused by DHCR because the proposed registrations were false and/or fraudulent. It bears emphasis that this case involves a pre-discovery motion for summary judgment – it would be far more beneficial to the courts below, and far more faithful to Plaintiffs' due process rights, to affirm denial of summary judgment and permit discovery to proceed, so that this determination can be made on a full and competent record. Plaintiffs are the second set of tenants that our firm represents from the same building, whose apartments were unlawfully treated as exempt from rent stabilization during Defendant's receipt of J-51 benefits. Inasmuch as discovery has not been conducted, we do not know how widespread Defendant's unlawful conduct is. These issues are essential to a proper final determination of treble damages, and may very well impact upon the rent-setting method selected by the court. See, e.g. *160 East 84th Street Associates LLC v. DHCR*, 160 A.D.3d 474, 75 N.Y.S.3d 141 (1st Dept. 2018) (affirming the use of a sampling default formula, rather than the lowest rent, for an 'innocent' J-51 deregulation); *compare, Kreisler v. B–U Realty Corp.*, 164 A.D.3d 1117, 83 N.Y.S.3d 442 (1st Dept. 2018)("we find the evidence of other litigations by plaintiffs' co-tenants against defendants alleging the same or similar misconduct relevant and probative of a fraudulent scheme to deregulate [citation omitted].")

> noncompliance with the 1984 Conciliation and Appeals Board order fixing the rent, petitioner is not entitled to recover increases for those renewal leases never executed by the tenants.

See also, *Matter of Snowmass Realty Corp. v. DHCR*, 13 Misc.3d 1243(A), 831 N.Y.S.2d 362, 2006 WL 3490998 (N.Y.Sup.), 2006 N.Y. Slip Op. 52332(U) (Sup.Ct. NY Co. 2006)(Abdus-Salaam, J.)("Finally, respondent's determination that petitioner was not entitled to rent increases because petitioner had failed to provide the tenant with a lease was rational and consistent with the Rent Stabilization Law and Code (see 9 NYCRR 2522.5; 24 Fifth Avenue Associates v. State Div. of Housing & Community Renewal, 191 AD2d 331 [1993], lv denied 82 NY2d 652 [1993])."") Where, as here, the Defendant failed to issue Plaintiff proper rent stabilized vacancy lease and/or renewal lease(s), Defendant is not entitled to increases in the legal rent for the subject premises

Third, the Appellate Division's rent-fixing scheme, which attempts to 'bridge the gap' by permitting rent increases from the time Defendant began unlawfully treating the subject apartment as unregulated 2000, violates RSL §26-517(e)'s express and mandatory requirement that a rent freeze for failure to properly and timely file an annual registration statement *may only be eliminated prospectively*. *See* §26-517(e); RSC §2528.4(a). In *BN Realty Assocs. v. DHCR*, 254 A.D.2d 7, 677 N.Y.S.2d 791 (1st Dept. 1998), *leave denied*, 93 N.Y.2d 806 (1999), the Appellate

Division, First Department held:

> Also rationally rejected, as inconsistent with the plain language of section 26-517 (e) barring collection of rent increases "until such time as such registration [i.e., for the year in which the owner failed to register] is filed" (emphasis added), was petitioner's contention that its filing of timely registrations for the years immediately following 1990 *permitted it to increase the rent for those years before it finally made its late filing for 1990* [emphasis added]. *Id.*, at 7.

Notably, the Rent Stabilization Law only limits landlord record retention to four years for landlord whose units are properly registered with DHCR. See §26-516(g). ("Any owner *who has duly registered a housing accommodation pursuant to section 26-517 of this chapter* shall not be required to maintain or produce any records relating to rentals of such accommodation for more than four years prior to the most recent registration or annual statement for such accommodation. [emphasis added]")

Finally, Defendant's protestations that setting the rent and awarding overcharges, if any, exacts a "punishment" on Defendant, has already been rejected by this Court. *Borden v. 400 East 55th Street Associates, L.P.*, 24 N.Y.3d 382, 396, 998 N.Y.S.2d 729 (2014). Plaintiff's potential compensatory overcharge claim is limited to four years – Defendant still keeps some ten (10) years of overcharges.

If anyone is to blame for the lack of a reliable four year rent stabilized rent history for the subject apartment, it is the Defendant-landlord. Defendant-landlord,

like all the landlords in New York City faced, at best, conflicting laws, one of which permitted the landlord luxury deregulation while receiving J-51 benefits, and the balance of which required that the entire building remain rent stabilized while in receipt of J-51 tax benefits. At any time, the Defendant-landlord could have brought an action to clarify the discrepancy and avoid this litigation altogether. Instead, this Defendant, like many other landlords, disregarded the conflicting laws and took a risk, because that path brought them more money. Then they reached, argued and/or waited for more excuses and defenses, rather than complying with the law in 2009, when *Roberts* was decided. Mistake of law is not a proper defense, and Defendant should not be surprised that its risky venture failed.

IV. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED BY SUPREME COURT.

Supreme Court properly denied Defendant's pre-discovery motion for summary judgment dismissing the complaint in its entirety and adopting the market rent charged four years ago as the base date legal rent for the subject premises, and dismissing Plaintiff's claims for, *inter alia*, overcharge, treble damages and attorney's fees, as Defendant failed to demonstrate the absence of triable issues of fact and an entitlement to judgment as a matter of law.

Defendant claimed it was entitled to summary judgment dismissing the entire complaint due to the fact that Defendant purported to furnish evidence of IAI

rent increases which allegedly brought the rent from $1,464.00 to more than the then applicable regulatory threshold of $2,000.00 per month. Defendants base their arguments on their reading of *72A Realty Assocs. v. Lucas*, 101 A.D.3d 401, 955 N.Y.S.2d 19 (1st Dept. 2012).

In *Lucas*, the Appellate Division reversed the Appellate Term's acceptance of the base date market rent where an apartment was unlawfully treated as exempt from rent stabilization due to high-rent vacancy while the building was in receipt of J-51 tax benefits, due to "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 . . .."

However, the *Lucas* Court did not issue the holding argued by Defendant – in *Lucas* the Court found reason to reject, not to accept, the fair market base date rent. *Lucas* did not state that the "validity of the rent increase that brought the rent-stabilized amount above $2,000" would be enough to affirm acceptance of a fair market base date rent where an apartment was wrongfully treated as deregulated more than four years prior to an action like the one at bar, nor did the *Lucas* Court limit any other potential reasons to reject a fair market base date rent in other cases.

Nevertheless, even if Defendant's reading of *Lucas* is correct, Defendants failed to demonstrate their entitlement to judgment as a matter of law on this issue.

Defendant's pre-discovery submission of inadmissible documents purporting to support permissible IAIs, left far more questions than they answered.

Defendant's burden for pre-discovery summary judgment is well known. It is well settled that "[p]arties moving for summary judgment are obligated to prove through admissible evidence that they are entitled to judgment as a matter of law [emphasis added] " *Acosta v. Fuentes*, 183 A.D.2d 483, 585 N.Y.S.2d 1016 (1st Dept. 1992)(*citing Pastoriza v. State of New York*, 108 A.D.2d 605, 606, 484 N.Y.S.2d 832 [1st Dept. 1985]). Where "the movant, as here, fails to meet this burden, the motion should be denied, regardless of the adequacy of the opposing papers [emphasis added]." *Id*., (*citing Pastoriza, supra.*).

Moreover, the "'drastic remedy' of summary judgment should not be granted where there is any doubt as to the existence 'of (factual) issues." *Millerton Agway Cooperative, Inc. v. Briarcliff Farms, Inc.*, 17 N.Y.2d 57, 61, 268 N.Y.S.2d 18, 21 (1966)(*quoting Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 504 [1957]); *see also, Epstein v. Scally*, 99 A.D.2d 713, 472 N.Y.S.2d 318 (1st Dept. 1984)("summary judgment is a drastic remedy, the procedural equivalent of a trial . . . [i]ssue finding, not issue determination, is the appropriate function of the summary judgment [citations omitted].")

Finally, it is well settled that summary judgment "is not justified where

there are likely to be [claims] that depend upon knowledge in the possession of the party moving for summary judgment, which might well be disclosed by cross-examination or examination before trial." *Weinberg v. Johns-Manville Products Corp.*, 67 A.D.2d 640, 412 N.Y.S.2d 370 (1st Dept. 1979).

Here, Defendant failed step one – because Defendant's purported evidence was not in admissible form. Defendant presented no affidavit by a witness with actual knowledge of the facts to support the IAIs Defendant claims were performed in the subject premises. Affiant Janet Zinberg admitted that she was not assisting her father in managing the subject building in "1999-2000 when the rent stabilized tenant moved out and Plaintiff Jenkins moved into the subject apartment and the apartment was deregulated pursuant to high rent vacancy . . .." *See*, May 22, 2014 Affidavit of Janet Zinberg, (R. 79-84, 81) at ¶15. Ms. Zinberg clearly had no personal knowledge of any facts relevant to Defendant's motion. Instead, she admitted and claimed that "the facts contained in my affidavit are based on the records that we kept in the ordinary course of our business and my knowledge of our normal business practices."

Ms. Zinberg clearly had no personal knowledge as to business records kept in 1999-2000 – the earliest year she provides in her affidavit for her involvement in Defendant's business is 2008. *See*, Affirmation of Joel M. Zinberg, (R. 79-84, 80)

at ¶12 ("The managing agent who supervised the fourteen year old renovation is deceased. The current managing agent, Defendant Zinberg, has no personal knowledge of the renovations and can only rely on the landlord's business records as discussed below.")

More importantly, in addition to the fact that Ms. Zinberg cannot testify as to her personal knowledge of Defendant's business practices in 1999-2000, bills and invoices from third parties are not admissible as Defendant's own business records, because they were not made by Defendant, its principals, agents and/or employees, and Ms. Zinberg cannot testify as to her personal knowledge of the business practices of the entities that allegedly made them. *Insurance Co. of N. Am. v Gottlieb*, 186 A.D.2d 470, 588 N.Y.S.2d 571 (1st Dept. 1992)("The Special Referee correctly determined that the records of the prime rate of interest charged by the obligee of the promissory note were not admissible under the business records exception to the hearsay rule (CPLR 4518 [a]), since the testimony of plaintiff's agent, *who merely obtained the records from another entity that actually generated them*, was an insufficient foundation for their introduction into evidence (*see, Standard Textile Co. v National Equip. Rental*, 80 AD2d 911) [emphasis added]."). In *Standard Textile Co. v National Equip. Rental*, 80 A.D.2d 911, 437 N.Y.S.2d 398 (2nd Dept. 1981), the Appellate Division, Second Department

explained:

> Standard's employee, Fick, testified that the freight bills were kept in the ordinary course of Standard's business. *However, the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records* (see Burgess v Leon's Auto Collision, 87 Misc 2d 351, affd 91 Misc 2d 128) [emphasis added]. Instead, it must be established that the documents were made in the regular course of the *carrier's business*, since the information concerning delivery *was based on the personal knowledge of someone in the carrier's employ* [emphasis added]. *Fick was not a qualified witness to testify as to the record keeping of another entity* (see Matrix Computing v Davis, 554 SW2d 288 [Tex]) [emphasis added].

Similarly, Defendant's purported filing of purported invoices for services allegedly rendered by third parties, even if retained in the regular course of business, did not convert those documents into admissible business records of Defendant. Neither Defendant, nor anyone on behalf of Defendant, created any of the purported invoices, nor was it the business of Defendant to create such invoices.

Moreover, Defendant failed to produce a single witness with personal knowledge to demonstrate the nature of any of the improvements claimed in the purported documents. *See, Ernest and Maryanna Jeremias Family Partnership, LP v. Matas*, 39 Misc.3d 1206(A), 971 N.Y.S.2d 70, 2013 N.Y. Slip Op. 50505(U), at *3 (Civ. Ct. Kings Co.)("Conspicuously absent from the trial was an affidavit from the contractor and testimony from anyone with personal knowledge that the work listed on the invoice was actually completed.")

Rent increases are permitted for individual rent stabilized apartments pursuant to Rent Stabilization Law §26-511(13) and Rent Stabilization Code §2522.4(a)(1). RSL §26-511(13) permits adoption of a code that:

> provides that an owner is entitled to a rent increase where there has been a substantial modification or increase of dwelling space or an increase in the services, or installation of new equipment or improvements or new furniture or furnishings provided in or to a tenant's housing accommodation, on written tenant consent to the rent increase. In the case of a vacant housing accommodation, tenant consent shall not be required. The permanent increase in the legal regulated rent for the affected housing accommodation shall be one-fortieth, in the case of a building with thirty-five or fewer housing accommodations, or one-sixtieth, in the case of a building with more than thirty-five housing accommodations where such permanent increase takes effect on or after September twenty-fourth, two thousand eleven, of the total cost incurred by the landlord in providing such modification or increase in dwelling space, services, furniture, furnishings or equipment, including the cost of installation, but excluding finance charges. Provided further that an owner who is entitled to a rent increase pursuant to this paragraph shall not be entitled to a further rent increase based upon the installation of similar equipment, or new furniture or furnishings within the useful life of such new equipment, or new furniture or furnishings [emphasis added]. RSL §26-511(13).

The Rent Stabilization Code states that an owner is entitled to a rent increase where there has been a substantial increase "of dwelling space or an increase in services, or installation of new equipment or improvements, or new furniture or furnishings, provided in or to the tenant's housing accommodation." 9 NYCRR 2522.4(a)(1). As noted below, RSC §2522.4(a)(1) does not and has never

permitted a rent increase for cosmetic or decorative changes that landlords may make between tenants as part of maintaining or repairing the condition of apartments. To the contrary, both the RSL and RSC require a substantial modification of dwelling space, or increase in services, new equipment, furniture or furnishings.

Defendant bears the burden to "establish by credible evidence the existence of improvements justifying the rent increase sought under 9 NYCRR 2522.4(a)(1) (*see, Matter of Sohn v. DHCR*, 258 A.D.2d 384, 685 N.Y.S.2d 697 [1st Dept. 1999]; *Matter of Charles Birdoff & Co. v. DHCR*, 204 A.D.2d 630, 612 N.Y.S.2d 418)." *PWV Acquisition, LLC v. Toscano*, 2003 N.Y. Slip Op. 51048(U), 2003 WL 21499283 (App. Term 1st Dept. June 18, 2003); *see also, 1234 Broadway, LLC. v. DHCR*, 2011 N.Y. Slip Op. 30984(U), 2011 WL 1527191 (Sup.Ct. NY Co. 2011)("[t]he burden is on petitioner to establish that it is entitled to a rent increase based on renovations to the apartments (*985 Fifth Avenue v. DHCR*, 171 A.D.2d 572 [1st Dept. 1991]).").

Moreover, "[i]n order to claim an individual apartment improvement ("IAI") rent increase, [owner] must prove each specific item of improvement that was completed or installed. *Matter of Charles Birdoff & Co., v. DHCR*, 204 AD2d 630 (2nd Dept 1994). Documentation must be as specific as possible." *1097*

Holding LLC v. Ballesteros, 19 Misc.3d 1126(A), *2, 862 N.Y.S.2d 816 (Civ.Ct. Bronx Co. 2008). This proof includes, *inter alia*, evidence demonstrating the condition of an apartment prior to purported renovations, so that "the Court could assess the nature of the claimed improvements." Id., at *2 (*citing Toscano, supra.*); *see also, Merit Management Co. v. DHCR*, 266 A.D.2d 4, 4-5, 697 N.Y.S.2d 277 (1st Dept. 1999)("DHCR's determination to disallow costs attributed to plumbing work was rationally based since petitioner failed to submit sufficient documentation specifying the work performed and its cost [citations omitted]."); *Pechock v. DHCR*, 253 A.D.2d 655, 655, 677 N.Y.S.2d 554 (1st Dept. 1998)("DHCR's denial of a rent increase for alleged vacancy improvements was rationally based on the lack of detail in the bills and invoices purporting to support the increase [citation omitted].")

Defendant failed to produce a shred of competent, admissible evidence to demonstrate the condition of the subject premises prior to the purported renovation. Without this information, Supreme Court could only guess at the nature of the improvements. Even if the contractor's invoice and other invoices were in admissible form, which they are not, the work performed in the subject premises shows certain select replacements of kitchen cabinets and appliances and window replacement that may form the basis of IAIs, but the balance of the work is a very

limited floor replacement ($65.00 in materials), installation of moldings, painting, patching, floor repairs and other repair and maintenance work that would *not* result in approvable IAI rent increases.

The work purportedly performed in the subject premises is the complete *opposite* of a gut, or a substantial, renovation. Instead, Defendant appears to have installed a few appliances and kitchen cabinets, and repaired, patched, decorated and painted the apartment.

A major problem with Defendant's purported "evidence" is that there is no breakdown between IAI work and repair/maintenance/cosmetic work, leaving Plaintiffs and the Court clueless as to how much money was spent for approvable IAIs versus repair, maintenance and cosmetic work. Just as examples, the purported contractor's invoice (R. 96-97) includes work that may form approvable IAIs, but also lists many items that do not constitute approvable IAI work, such as stripping paint, refinishing, painting, plastering and sanding walls, repairing tiles and walls, and "miscellaneous repairs, renovations and installations . . .." The total price was, allegedly, $11,000.00, but there is no breakdown for any of the work purportedly performed.

The purported Atlantis Plumbing and Heating invoice notes the relatively simple installation of a new sink, dishwasher and faucet, but also allegedly included

the repair of the bathtub waste line ("broke bathroom floor installed new standing bathtub waste. Cemented back floor Replaced tiles. Replaced Defective [illegible].") (R. 103). Inasmuch as there is no claim of a bathtub purchase, it appears that the same bathtub was reinstalled after the repair to the waste line. These types of repairs are not IAIs. The un-itemized total of $2,175.00 (before taxes) left Supreme Court and Plaintiffs clueless as to whether, and in what amount, the work allegedly performed by Atlantis Plumbing and Heating constituted approval IAIs.

Even if the invoices were admissible, which they are not, the broken-down costs for the refrigerator, dishwasher, windows, building and installation of black and white Formica Kitchen cabinets and countertops, and closet doors only totals $2,589.21, or $64.73 in IAI increases. This would not have pushed the rent from $1,464.00, to over $2,000.00 when Plaintiff Tamara Jenkins took occupancy, even with a twenty percent (20%) vacancy increase.

It is well-settled that the Court's role in deciding a motion for summary is issue finding, not issue determination. *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498 (1957). As such, factual findings on IAI's are clearly inappropriate for summary judgment, particularly where, as here, the owner provides no breakdown at all to distinguish between repairs, maintenance

and decoration, for which IAIs cannot be given, and approvable IAIs.

It is also well-settled maintenance, repair and cosmetic or decorative work performed by a landlord in a rent stabilized apartment does not justify an IAI increase. *See e.g., Ansonia Associates v. DHCR, 160 A.D.2d 210, 553 N.Y.S.2d 341 (1st Dept. 1990)* ("the determination that the petitioner's improvements to the public hallways were not major capital improvements (MCI), but ordinary repairs and maintenance, or decorative or cosmetic renovations, was not arbitrary or capricious."); *PWV Acquisition, LLC v. Toscano*, 2003 N.Y. Slip Op. 51048(U), 2003 WL 21499283 (App. Term 1st Dept. June 18, 2003)(normal maintenance and repair, such as painting, does not authorize an IAI increase); *Matter of 201 East 81st Street Associates v. DHCR*, 288 A.D.2d 89, 89, 733 N.Y.S.2d 23 (1st Dept. 2001) (painting, plastering and demolition were "largely routine and not a permissible cost for purposes of 1/40th rent increases allowable under Rent Stabilization Code (9 NYCRR) § 2522.4 (a) (1) and (4) [*see, Matter of Mayfair York Co. v New York State Div. of Hous. & Community Renewal*, 240 AD2d 158]."); *Mayfair York Co. v DHCR*, 240 A.D.2d 158, 658 N.Y.S.2d 270 (1st Dept. 1997)(DHCR properly disallowed increases for painting, skim coating, partial floor replacement and partial rewiring.); *425 3rd Avenue Realty Co. v. DHCR*, 29 A.D.3d 332, 333, 816 N.Y.S.2d 411 (1st Dept. 2006)("Invoices for painting, plastering and floor polishing, among

other things, were correctly disallowed because they were for ordinary maintenance and repair, rather than for improvements [citation omitted]."); *Yorkroad Assocs. v. DHCR*, 19 A.D.3d 217, 797 N.Y.D.2d 60 (1st Dept. 2005)("Additionally, DHCR correctly held that invoices for plastering, replacing window glass, refinishing a floor and painting had been correctly disallowed because they were not for improvements, but rather for repairs or normal maintenance (*see Matter of Mayfair York Co. v New York State Div. of Hous. & Community Renewal*, 240 AD2d 158 [1997]).")

Furthermore, the information submitted by a contractor in support of IAI increases should break down the costs so that the Court (or DHCR) can determine to what extent, increases may be permitted for approvable IAI's versus normal maintenance and repair. In *7 West 87th Street, LLC v. DHCR*, 295 A.D.2d 103, 742 N.Y.S.2d 302 (1st Dept. 2002), the Court held:

> Judicial deference is due DHCR's finding that the contractor's affidavit submitted to the Rent Administrator, which did not purport to break down the cost of each improvement and can be read to describe at least some work in the nature of normal maintenance for which a rent increase might not be allowable, fell short of its purpose to show improvements justifying a rent increase (*see, Matter of Linden v New York State Div. of Hous. & Community Renewal*, 217 AD2d 407; *Matter of Birdoff & Co. v New York State Div. of Hous. & Community Renewal*, 204 AD2d 630; *Matter of Ista Mgt. v State Div. of Hous. & Community Renewal*, 161 AD2d 424, 425). *Id.*, at 103-104.

Moreover, while Defendant is not required to seek the lowest possible price

for IAI's, excessive or inflated costs do not justify IAI increases. *Matter of 201 East 81st Street Associates v. DHCR*, 288 A.D.2d 89, 89, 733 N.Y.S.2d 23 (1st Dept. 2001).

In *Jemrock Realty Co., LLC v. Krugman*, 13 N.Y.3d 924, 895 N.Y.S.2d 284 (2010), this Court recognized that while a landlord was not required, in all cases, to submit an item-by-item breakdown showing an allocation between improvements and repairs in an IAI determination, the "question is one to be resolved by the factfinder in the same manner as other issues, based on the persuasive force of the evidence submitted by the parties." Id., at 926. There this Court reversed and remanded, as "erroneous", this Court's determination of that issue 'as a matter of law'. Id.

Defendant was not entitled to summary judgment dismissing the Plaintiffs' complaint. Defendant did not submit evidence in admissible form that demonstrated entitlement to judgment as a matter of law. The invoices from third parties are not Defendants' 'business records' and are not admissible. Many of the invoices and checks do not even have the address and/or apartment number for the subject premises on them. Most of the work purportedly performed did not constitute approvable IAIs and the lack of any competent breakdown between approvable IAI work and maintenance/repair/cosmetic work makes arriving at a just

and proper conclusion without discovery and trial simply impossible. Summary judgment is an inappropriate vehicle for determination of these hotly disputed facts.

Moreover, Defendants' claim to MCI increase(s) for the subject premises must fail, because the Defendant's own documents of its MCI submission to DHCR (R. 90-95) prove that apartment #[redacted] was not listed as a rent stabilized apartment, and thus, no notice was ever sent to Plaintiffs of the MCI application. Defendant's cannot be heard to collect an MCI increase for an apartment that was never listed in the MCI application and therefore, not included in any Order granting the MCI, particularly where there was no due process or opportunity for Plaintiffs to contest the MCI, because they were not even listed or served with the MCI application).

Supreme Court's determination denying Defendant summary judgment must be affirmed.

V. DEFENDANT WAS NOT ENTITLED TO SUMMARY JUDGMENT DISMISSING PLAINTIFFS' CLAIM FOR TREBLE DAMAGES.

Defendant's motion contained conclusory claims that Defendant relied upon the Rent Stabilization Code and DHCR policy in improperly deregulating the apartment for high-rent vacancy during the J-51 benefit period. However, the managing agent at the time the apartment was unlawfully deregulated is deceased – it is anyone's guess just who Defendant, a business entity, is talking about.

More importantly, Defendant must answer why it "relied" upon the Rent Stabilization Code but ignored 28 RCNY §5-03(f), the very code pursuant to which Defendant received J-51 tax benefits, which unequivocally states that dwelling units in a building receiving J-51 tax benefits are to remain rent regulated for at least as long as the J-51 tax period.

It bears emphasis that *Roberts, supra*, was decided in 2009. This Court decided *Lucas, supra* in 2011. Still, Defendant, who was the same landlord and litigant in *Lucas*, did not issue Plaintiffs a rent stabilized lease renewal.

Moreover, while Defendant claims that it deregulated the unit based upon a high-rent vacancy in 2000, that is not what the past DHCR records show. Rather, an amended filing for 2000, made on August 13, 2001, falsely claims a personal exemption based upon "NYC COOP/CONDO", not a high rent vacancy. *See*, (R. 180).

Defendant knew it was receiving J-51 benefits for the subject premises, Defendant knew about *Roberts, supra* and Defendant knew about *Lucas, supra*, and yet, Defendant still continued to illegally treat the subject premises as exempt from rent stabilization. In the event an overcharge is found, Defendant should be held liable for treble damages. *See, Obiora v. DHCR*, 77 A.D.3d 755, 909 N.Y.S.2d 119 (2nd Dept. 2010) (affirming treble damages, holding: "Neither her asserted personal

ignorance of the law nor her attorney's incorrect advice justified her overcharging of the tenants' rent, since she admittedly knew of the existence of a J-51 tax abatement [see Administrative Code of City of N.Y. §11-243] for the subject building, which rendered the apartment at issue subject to rent stabilization.")

It bears emphasis that any overcharge is presumed to be willful and Defendant has broken the rent stabilization laws for many years. Plaintiffs' claim for treble damages should, at the very least, not be disposed of without discovery and trial.

VI. DEFENDANT WAS NOT ENTITLED TO SUMMARY JUDGMENT DISMISSING PLAINTIFFS' CLAIM FOR ATTORNEY'S FEES.

As earlier conceded by Defendant, RSL §26-516(a)(4) and RSC §2526.1(d) permit the Court to award attorney's fees in an overcharge case. While the fees are discretionary, Supreme Court could not properly exercise such discretion in the absence of facts, based upon a motion for summary judgment submitted with zero witnesses who have personal knowledge of the facts and inadmissible purported documentation. Rather, Supreme Court correctly denied Defendant's premature application. This Court should affirm that denial, and await discovery and trial, so that Supreme Court may exercise such discretion, or not, on a full record.

As to Plaintiffs' claim for attorney's fees pursuant to RPL §234, the lease

contains a clause triggering the statute. In a case involving the same exact attorney's fees lease provision as the Vacancy Lease (R. 141-44) the Appellate Division, First Department squarely held that the provision triggered Real Property Law §234, and the tenant's rights to claim their attorney's fees under that statute. *Marsh v. 300 West 106th St. Corp.*, 95 A.D.3d 560, 943 N.Y.S.2d 525 (1st Dept. 2012). Inasmuch as the Rent Stabilization Law and Code modify and constitute implied covenants in the lease, Real Property Law §234 clearly permits, in the event Plaintiffs are successful, for the recovery of Plaintiffs' reasonable attorney's fees.

Notably, in *Lucas*, the Appellate Division restored the tenant's claim for attorney's fees against the instant Defendant (who was also Sandra Lucas' landlord). Notably, in *NYC 107, LLC v. Clark*, 31 Misc.3d 129(A), 2001 N.Y. Slip Op. 50518(U) (App. Term 1st Dept. 2011), Appellate Term awarded the tenant her fees following her motion for summary judgment based upon *Roberts* and an improper J-51 deregulation, which the landlord did not oppose (the landlord did oppose that portion wherein the tenant sought her fees).

While Defendant posits that there were other issues left open by *Roberts, supra*, they have long since been resolved in this Department.

Indeed, in *Gersten v. 56 7th Avenue, LLC*, 88 A.D.3d 189, 928 N.Y.S.2d 515 (1st Dept. 2011), the Appellate Division that *Roberts v. Tishman Speyer*

Properties, LP, 13 N.Y.3d 279, 918 N.E.2d 900 (2009) was to be applied retroactively, primarily because *Roberts* did not pronounce a "new rule" or "new law" but merely construed a statute that had been in effect for a number of years. *Gersten, id.*, at 197-98.

Gersten also squarely rejected the landlord's claim that the tenant's attempt to challenge the regulatory status was barred by a statute of limitations, holding:

> pursuant to the RSL, the rent-regulated status of an apartment is a continuous circumstance that remains until different facts or events occur that change the status of the apartment. This Court considers such legislative mandate so sacrosanct as to be impervious to waiver. Accordingly, this Court has held that parties to a rent-stabilized lease may not "contract out of rent stabilization," even where their agreement bestows obvious advantages on the tenant (*Drucker v Mauro*, 30 AD3d 37, 42 [2006], appeal dismissed 7 NY3d 844 [2006]).
>
> Under the circumstances, a tenant should be able to challenge the deregulated status of an apartment at any time during the tenancy [emphasis added]. Indeed, courts have uniformly held that landlords must prove the change in an apartment's status from rent-stabilized to unregulated even beyond the four-year statute of limitations for rent overcharge claims. *East W. Renovating* (16 AD3d 166) illustrates the point. *Id.*, at 199.
>
> … [w]hile the statute of limitations defense rejected in *East W. Renovating* was the four-year statute applicable to rent overcharge claims, the reasoning for its inapplicability to a rent regulatory status claim extends with equal force to the six-year statute of limitations applicable to breach of contract actions. In our view, imposing such limitations on determining rent regulatory status subverts the protection afforded by the rent-stabilization scheme described above. Indeed, except as to limit rent overcharge claims, the Legislature has not imposed a limitations period for determining the rent regulatory

status of an apartment. *Id.*, at 200-201.

Defendant, who violated the rent stabilization laws for years, and continued to do so in this case long after *Roberts, supra* was decided by the Court of Appeals and *Lucas* was decided by this Court, should bear the costs of being caught breaking the law. Therefore, this Court should affirm Supreme Court's denial of Defendant's attempt to obtain summary judgment dismissing Plaintiffs' claims for attorney's fees.

VII. THE FOUR YEAR STATUTE OF LIMITATIONS FOR RENT OVERCHARGE DOES NOT SET THE LEGAL RENT.

The four year Statute of Limitations for rent overcharge is a limitation on a tenant's right to collect overcharges, but it does not, itself, set the legal rent for a rent stabilized housing accommodation. As noted above, to set or increase the legal rent, the landlord must issue proper rent stabilized leases and riders, proper rent stabilized renewal leases and file proper annual registration statements with DHCR. See, RSL §26-512(e)("*Notwithstanding any contrary provisions of this law*, on and after July first, nineteen hundred eighty-four, the legal regulated rent authorized for a housing accommodation subject to the provisions of this law *shall be the rent registered pursuant to section 26-517 of this chapter* subject to any modification imposed pursuant to this law [emphasis added].")

There is no mechanism under rent stabilization to perform what the landlord wishes to accomplish – setting the legal rent using a nine (9) year gap in DHCR registrations, followed by a market rent set forth in a back-filed registration in 2009, four years prior to commencement of this action. The whole point of the strict registration scheme prescribed by RSL §26-517 is to defeat what Defendant wishes to accomplish. In *Jacobson v. Jemrock Realty Co., LLC*, 2019 WL 1223240, 2019 N.Y. Slip Op. 30617(U) (Sup.Ct. NY Co. 2019), the Court recognized:

> However, the fact that this Court cannot examine the rent history beyond four years to determine whether there has been an overcharge does not mean that the rent charged on the base date is presumed to be correct (see Matter of 160 E. 84th St. Assocs. LLC v. New York State Div. of Hous. & Community Renewal, 160 AD3d 474, 474-75 [2018] citing 72A Realty Assoc. v Lucas, 101 AD3d 401 [2012]; Gordon v 305 Riverside Corp., 93 AD3d 590, 592 [2012]). There are other methods of calculating base date rent "that do not run afoul of the limitations period" (Matter of Regina Metro. Co., LLC, 164 AD3d at 428).

Assuming, *arguendo*, that the landlord was entitled to every dime of IAIs and other increases it claims, and that the rent of $2,200.00 charged to Plaintiff Tamara Jenkins in her initial 2000 lease (R. 141) was lawful and correct, her proper legal rent for 2009 (assuming she opted for two year renewals) would have been $2,856.36, not $3,500.00 per month, as claimed by the landlord. There is no basis for the landlord to claim a base date rent of $3,500.00 in 2009, other than the Defendant's own violations of every rent stabilization law that applied to the subject

premises during those years. The passage of time cannot cure a false and fraudulent market rent that Defendant charged on the base date – RSL §26-512(e) and RSL §26-517(e) both expressly forbid the result Defendant seeks. There is no question here that the rent sought by the landlord is illegal.

The failure of the courts below to strictly enforce the rent freeze provisions of RSL §26-517(e), and recognize the continuing duty RSL §26-517(e) creates in mandating a rent freeze and forbidding the landlord to charge or collect any increase in rent in the event that any single rent registration is missing, has created the conundrum of inconsistent determination we now face in the First Department. That landlords did not think they needed to file annual rent registration statements because they thought their units were exempt, is not an excuse – a mistake in law is no defense. However, even if the courts were properly employing their discretion to form an equitable remedy for landlords who relied upon DHCR's advice, policies or then unchallenged code permitting luxury deregulation in the course of receiving J-51 benefits in 2009, such innocent landlords would clearly have filed all of their missing registrations and brought their apartments back into compliance many years ago. For a landlord to not even provide tenant notice that they are stabilized five (5) years after *Roberts* was finally determined, is not a "mistake" of anything. Rather, it is the very compelling evidence of willful and unlawful conduct on the part of the

Defendant, and other landlords. The prospect of getting away with their unlawful deregulations and keeping the market rents they charged caused landlords to take the risk of waiting out the consequences, rather than promptly registering their units, notifying their tenants they were rent stabilized and resuming compliance with mandatory laws. The failure to strictly enforce the rent stabilization laws, to this day, has resulted in the loss of an untold number of units of affordable housing.

That Plaintiffs may have been able to afford market rents by Defendant is not the issue – the subject premises, and thousands of other apartments, would have been available to people who could not afford market rents, had Defendant complied with the law, rather than take a risk on conflicting laws. Permitting landlords to reap the benefits of their unlawful conduct does tremendous violence to the J-51 tax benefit system and the rent stabilization laws in a city that suffers from an eternal shortage of affordable housing.

CONCLUSION

For all of the foregoing reasons, this Court should deny Defendant's appeal from the Decision and Order of the Supreme Court, Appellate Division, First Department (Gische, J.) entered May 25, 2017 in all respects, and award Plaintiffs-Respondents such other and further relief that this Court deems just, equitable and proper.

Dated: May 21, 2019
New York, New York

Respectfully submitted,

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