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New York County Clerk's Index Nos. 111723/11 and 595472/17
Appellate Division–First Department Case No. 2020-03001

Court of Appeals

of the

State of New York

KATHRYN CASEY, LAURIE CAGNASSOLA, GERALD COHEN, BETTY FURR, FRANCESCA GAGLIANO, CAROLYN KLEIN, JOSEPH MORGAN, RICHARD ROSE, JESSICA SAKS and KIRK SWANSON, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

Index No. 111723/11

– and –

PAMELA RENNA and VITTINA DEGREZIA a/k/a Vittina Luppino,

Intervenor-Plaintiffs,

– against –

WHITEHOUSE ESTATES, INC., KOEPPEL & KOEPPEL, INC., DUELL 5 MANAGEMENT LLC d/b/a Duell Management Systems, WILLIAM W. KOEPPEL and EASTGATE WHITEHOUSE ESTATES, LLC,

Defendants-Appellants.

(For Continuation of Caption See Inside Cover)

BRIEF IN RESPONSE TO *AMICI CURIAE* RENT STABILIZATION ASSOCIATION OF NYC, INC. AND COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC. IN SUPPORT OF PLAINTIFFS-RESPONDENTS

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WHITEHOUSE ESTATES, INC., EASTGATE WHITEHOUSE LLC and WILLIAM W. KOEPPEL,

Third-Party Plaintiffs-Appellants,

– against –

ROBERTA L. KOEPPEL, ALEXANDER KOEPPEL as Executors and Trustees of the Trust created under Article Fourth of the Last Will of ROBERT A. KOEPPEL, KOEPPEL MANAGEMENT COMPANY LLC and ROBERTA L. KOEPPEL individually,

Third-Party Defendants-Respondents.

Third-Party Index No. 595472/17

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PRELIMINARY STATEMENT

This Brief is respectfully submitted on behalf of Plaintiffs-Respondents ("Respondents") in opposition to the *Amicus Curiae* Brief submitted on behalf of Rent Stabilization Association of NYC, Inc. and Community Housing Improvement Program, Inc. ("*Amici*") on this appeal.

Amici urge this Court, on this appeal, to address what they describe as the First Department's "fraudulent overcharge" jurisprudence,[1] i.e. cases where apartments were not unlawfully treated as deregulated but where the rental history is tainted by fraud. However, in this case, all of Respondents' apartment were unlawfully deregulated by Appellants.

In this case, the Supreme Court determined, and the Appellate Division affirmed, that Respondents' rents must be calculated pursuant to the default formula, based upon a combination of factual findings. Those findings included the unlawful deregulation of Respondents' apartments, Appellants' failure to document how the rents were lawfully increased to over $2,000.00 per month, Appellants' failure to document that the deregulation of Respondents' apartments was "consistent with agency guidance," Appellants' affirmative misrepresentations to Respondents and

[1] *See, e.g., 435 Central Park W. Tenant Assn. v. Park Front Apts., LLC,* 183 A.D.3d 509, 510-511 (1st Dep't 2020), wherein the Court denied defendants' motion for summary judgment and held, "In the event it is proven that defendant engaged in a fraudulent rent overcharge scheme to raise the pre-stabilization rent of each apartment, tainting the reliability of the rent on the base date, then the lawful rent on the base date for each apartment must be determined by using the default formula devised by DHCR."

the DHCR as to the amount of the legal regulated rents, Appellants' insistence that the legal regulated rents were larger than what was actually charged, Appellants' filing of fraudulent retroactive registrations with the DHCR listing false amounts as the legal rents, Appellants' refusal to provide backup documentation explaining how their so-called expert calculated these amounts, Appellants' presentation of leases renewals to many Respondents listing improper amounts as the legal rents, and Appellants failure to produce rental history records subsequent to the base date.

Amici continually characterize the application of the default formula as a type of "penalty," although the courts have held that the imposition of the default formula is not a form of a penalty, but rather a legal methodology for calculating the legal regulated rent where the base date rent is tainted by a fraudulent scheme, or where adequate records are not furnished to establish the amount of the base date rent, or to establish the rental history subsequent to the base date.

In making their arguments, *Amici* misconstrue the holding of this Court in *Matter of Regina Metro. LLC v. DHCR*, 35 N.Y.3d 332 (2020) to limit the Court's consideration to evidence of actions taken prior to the base date for the purpose of determining whether an owner engaged in a fraudulent scheme. In other words, *Amici* would have this Court find that it was improper for the Supreme Court and the Appellate Division to have considered actions taken by Appellants subsequent to the base date as part of their fraudulent scheme. However, nowhere in the *Regina*

Metro decision does it say that the courts are precluded from considering owner misconduct subsequent to the base date as evidence of a fraudulent scheme. And, importantly, the Supreme Court found, and the Appellate Division affirmed, that Appellants' post-base date conduct was part of an effort to avoid an official determination of Respondents' legal rents, and to impose their own outrageous rent calculations.

Regina Metro sanctioned the use of an unregistered market rent on the base date, for purposes of calculating the legal rent, only in cases where (i) the apartment was deregulated prior to the base date "consistent with agency guidance," and (ii) the tenants did not meet their burden of establishing that the owner engaged in a fraudulent scheme. *Regina Metro*, 35 N.Y.3d at 356-357. Such is not the case here.

In this case, the evidence presented to the Supreme Court, and reviewed by the Appellate Division, demonstrated that Appellants' deregulation of Respondents' apartments was not shown to be consistent with agency guidance, and that after this Court in *Roberts v. Tishman Speyer Properties LP*, 13 N.Y.3d 270 (2009), established that such deregulations were unlawful, Appellants engaged in a scheme designed to deceive the tenants, to inflate the rent roll, to exaggerate the amount of the legal rent they were entitled to collect, and to increase the base date rent to an amount higher than what was actually charged. Appellants did all this while refusing

to provide documentation to support these ludicrous claims, despite being given multiple opportunities to augment their discovery production.[2]

As was stated by the Court in *Montera v. KMR Amsterdam LLC*, 193 A.D.3d 102, 105 (2021), "…[A]n owner may not flout the teachings of *Roberts*." That is what Appellants did herein.

Amici also urge this Court – incorrectly – to find that the Appellate Division made a "legal error" to the extent that it found that the default formula should be applied because the actual base date rents for Respondents' apartments could not be established. *Amici* point to the charts prepared by Respondents and presented to Supreme Court whereby it allegedly was not claimed that leases purporting to show the actual base date rents charged were not produced for "at least 55" of Respondents' apartments (R. 1228-1242). This argument ignores the uncontroverted fact that, as per the chart submitted with Respondents' reply papers, the rental history documents produced had substantial gaps in the leasing history, both before and after the base date, and/or significant inconsistencies between the registered amounts and the lease amounts, thereby making it impossible to verify the

[2] The record shows that, after Respondents filed their motion for summary judgment in December 2015, Respondents consented to Appellants' request to supplement their discovery production, which they did in January and February 2016 (R. 455-458). Respondents demonstrated to the Supreme Court, and Appellate Division affirmed, that despite these supplements to the discovery, Appellants' production was entirely inadequate, a point which Appellants have never effectively refuted. Appellants' argument, raised on this appeal, that the documentation was sufficient based on *Regina*, is entirely lacking in merit.

accuracy of the base date amounts as well as the post-base date amounts. It further ignores the overwhelming evidence that Appellants engaged in actions in order to obfuscate the rental history record and deceive Respondents, the Court and the DHCR, by among other things, filing improper registrations and by presenting improper lease renewal forms to the tenants.

Amici predict harm to the real estate industry at large if this Court affirms the application of the default formula in this case. However, it is clear that Appellants made a deliberate choice to disregard the law, in contrast to law-abiding owners who, having followed agency regulations prior to *Roberts*, took appropriate corrective action when it was determined that those regulations were contrary to statute. Appellants also made a choice to refuse to turn over all of their rental history records, or offer an honest explanation for the missing data, or present alternative means of calculating the legal rents in the absence of a complete set of documentation. Appellants are in no way representative of the honest owners of rent regulated housing, which presumably make up the bulk of *Amici's* constituents.

ARGUMENT

I. THE APPELLATE DIVISION COMMITTED NO LEGAL ERROR IN AFFIRMING SUPREME COURT'S FINDING THAT THE BASE DATE RENTS COULD NOT BE ESTABLISHED.

Amici encourage this Court to reexamine the history of post-*Roberts* litigation as the basis of the Appellate Division's so-called error in finding that the base date

rents for Respondents' apartments could not be established. According to *Amici*, the Appellate Division failed to appreciate the impact of prior precedent such as *72A Realty Assocs. v. Lucas*, 101 A.D.3d 401, 402 (1st Dep't 2012) having been overturned by this Court in *Regina Metro.*[3] However, the Appellate Division in this case was fully cognizant of this Court's holding in *Regina Metro*, and the Court went to great lengths to distinguish this case from *Lucas*:

> "…[T]he facts of this case differ significantly from those in *Lucas* and other typical post-*Roberts* cases.
>
> Specifically, in *Regina,* the Court of Appeals rejected recourse to the default formula in cases like *Lucas*, in which the holding was based on the landlord's failure to maintain repair records from 2001, around seven years before the original holdover proceeding in which deregulation of the apartment was challenged, and more than a decade before this Court's decision (*Lucas*, 101 AD3d at 402). Here, however, after commencement of the action, defendants, without court approval, unilaterally registered rents from the base date forward that were not the rents actually paid, and instead registered rents far higher, without explanation. While these intentional misstatements of fact, which were intended to artificially increase the legal regulated rent, constitute fraud under *Grimm*, RSC 2522.6(b)(2) also calls for application of the default formula where '(i) the rent charged on the base date cannot be determined; or (ii) a full rental history from the base date is not provided.' Both of those scenarios apply here, and differ from situations in which the base date rent is known (*Regina, 35 N.Y.3d at 359* ["the alternative methods proposed by the tenants . . . reflected

[3] As described by this Court in *Regina Metro*, "In *Lucas*, the Appellate Division held that the four-year lookback rule should not be applied, even though the court did not find a colorable claim of fraud, in part because the rent charged four years prior to the complaint was a free market rent following improper deregulation" (35 N.Y.3d at 357).

> in the regulations . . . are available only '[w]here the rent charged on the base date cannot be established'"]). Here, the base date rent cannot be established because defendants failed to provide leases showing what the actual rent charged on the base date was, or whether the actual rent was known; rather, without explanation, they registered rents much higher than the actual rent. In such cases, under RSC 2522.6(b)(2), the default formula applies.
>
> We find that the motion court correctly determined that plaintiffs' legal regulated rent should be calculated according to the default formula set forth in RSC (9 NYCRR) § 2522.6(b). Although defendants may have been following the law in deregulating apartments during the period before *Roberts* was decided (*see Regina,* 35 N.Y.3d at 356), their 2012 retroactive registration of the improperly deregulated apartments was an attempt to avoid the court's adjudication of the issues and to impose their own rent calculations rather than face a determination of the legal regulated rent within the lookback period. *Casey v. Whitehouse Estates*, 197 A.D.3d 401, 403-404 (1st Dep't 2021)."

It is notable that the Appellate Division stated that Appellants "may" have been following the law in deregulating apartments prior to *Roberts*. It was in no way established by the record that Appellants actually did follow the law in deregulating Respondents' apartments prior to *Roberts*. The fact that the Appellate Division used the word "may" in this context demonstrates that reality. Indeed, Supreme Court "determined that [Appellants] failed to present documentary evidence to support their claim that the 78 subject apartments were legally and validly deregulated."

Amici advance an argument that Appellants did not make in Supreme Court, and did not make in their initial brief to the Appellate Division (Appellants mentioned the argument in their reply brief to the Appellate Division [see Compendium at C-153]), namely that Respondents' charts submitted to the Supreme Court did not reflect that leases in effect on the base date were missing from the document production with respect to a number of the affected apartments.[4] It has been claimed that Respondents "admitted" that they were provided actual leases showing the rents charged on the base date for at least 55 out of the 78 apartments at issue in this action.

In their initial brief to the Appellate Division, Appellants emphasized the so-called error made by Supreme Court of sanctioning the "reconstruction method" for determining the base date rent, without ever pointing out that the actual base date rents of some of the apartments could be determined based on the documentation they had belatedly produced in January-February 2016 (see Compendium at C50-C51).

Appellants briefly argued to the Appellate Division that "Supreme Court did not determine, as required by *Regina*, the actual rent charged on the Base Date"

[4] *Amici* characterize this point as an "admission" by Respondents, though *Amici's* characterization of the term "admission" is stretching the definition of that term. Nor did Appellants provide rental history records subsequent to the base date in dozens of cases. Appellants charted their course in this litigation by doubling down and insisting that the courts accept their own outrageous recalculations of the rents. In any event, as will be explained further below, Appellants could not have offered any alternative calculation based on the inadequate documentation they provided.

(C51), without ever explaining how the Supreme Court could have made that determination or affirmatively ever alleging that the documentary evidence existed that could have supported such finding.

Amici are also incorrect in arguing that Respondents had the burden of demonstrating that the base date rents could not be established for any of the apartments at issue. Under pre-HSTPA law, in any rent overcharge case, the owner had the burden of submitting satisfactory evidence of the rent charged on the base date, plus the full rent history subsequent to the base date. Rent Stabilization Code ("RSC") 9 NYCRR §§2526.1(a)(3)(i), 2526.1(g). Appellants also had the burden of establishing the base date rent, plus in each case any subsequent lawful increases and adjustments, by a preponderance of the evidence under RSC §2526.1(a)(3)(i).[5] *See also*, *Matter of Bondam Realty Assoc. LP v. DHCR*, 71 A.D.3d 477, 478 (1st Dep't 2010); *Matter of Mangano v. DHCR*, 30 A.D.3d 267 (1st Dep't 2006); *Matter of 4947 Assocs. v. DHCR*, 199 A.D.2d 179, 179-180 (1st Dep't 1993).

It has been held that the "default formula [was] designed to give the tenant the benefit of the doubt created by an owner's failure to provide complete records."

[5] The base date is defined as the date four years prior to the date the action was commenced, i.e. October 14, 2007 herein. RSC §2520.6(f)(1). It is also noted that Rent Stabilization Law ("RSL") NYC Admin. Code §26-516(a)(i) provided that the base date rent shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement, which in this case would be the inflated, illegal amounts contained in the retroactive registrations filed by Appellants in 2012. Based upon Appellants' fraudulent scheme and the absence of corroborating documents, the amounts in those illegal registrations could not be applied.

Matter of Round Hill Mgmt. Co. v. Higgins, 177 A.D.2d 256, 258 (1st Dep't 1991). *See also, Matter of Jane St. Assocs. v. Conciliation and Appeals Board*, 108 A.D.2d 636 (1st Dep't 1985), *affirmed* 65 N.Y.2d 898 (1985).

It has also been held that, where an owner relies upon questionable or unverified evidence in support of a particular base date rent amount, such as an apparent illusory tenancy, it is appropriate to apply the default formula to set the base date rent, since no reliable rent records were available. *Matter of Partnership 92 LP v. DHCR*, 11 N.Y.3d 859, 860 (2008).

The analysis of Appellants' January-February 2016 document production submitted to the Supreme Court with Respondents' reply papers on May 5, 2016 affirmatively demonstrated that the leasing history was incomplete from the October 14, 2007 base date, and going forward, as to at least 58 of the 78 apartments.[6] Thus, in at least 58 out of the 78 apartments, Respondents' analysis affirmatively stated that leasing records were missing for at least some substantial gap between October 2007 and February 2016. Appellants have never argued that they had adequate records such as leases, rent ledgers, etc., to calculate the rent for any of the 78 apartments from the October 14, 2007 base date through the present. As to the

[6] There is no basis for arguing, as *Amici* do, that the lack of an affirmative statement that documents showing the rents charged on the base date for certain apartments is tantamount to an admission that such documents do exist and were produced. The purpose of the chart presented to Supreme Court by Respondents on their reply papers was to list deficiencies in Appellants' document production, not to confirm receipt of documents showing the base date rents for some apartments.

remaining 20 out of the 78 apartments, Respondents affirmatively stated that there were missing records of individual apartment improvements and/or unexplained inconsistencies between the registration record and the leasing record. Thus, as to every one of the 78 apartments, Respondents' analysis of the records produced by Appellants in January-February 2016 showed that there were either large gaps in the leasing history records from the base date forward, or that there were significant discrepancies in the rental history records such that whatever lease record of the rent charged on the base date was unreliable and could not be supported based on the evidence. Appellants never refuted any of these affirmative statements.

In summary, *Amici's* claim that the Appellate Division committed a "legal error" by determining that the base date rents could not be established for the affected apartments is erroneous and should be rejected. The evidence shows that Appellants failed to put forward any legal regulated rent amounts other than the inflated calculations submitted by its so-called expert; failed to produce evidence as showing the base date rent plus any allowable increases or adjustments from the base date forward; failed to explain the blatant inconsistencies between the registered amounts and the amounts actually charged; and failed to produce documentation as to individual apartment improvements. As such, the Appellate Division committed no "legal error" and its determination should be in all respects affirmed.

II. THE APPELLATE DIVISION DID NOT COMMIT FURTHER ERROR IN AFFIRMING SUPREME COURT'S FINDING THAT APPELLANTS ENGAGED IN A FRAUDULENT SCHEME AND DETERMINING TO APPLY THE DEFAULT FORMULA.

Amici argue that the Appellate Division should not have applied the default formula based upon what *Amici* call the First Department's "fraudulent overcharge jurisprudence." However, *Amici's* argument does not fit well within the facts of this case. Appellants herein deregulated all of Respondents' apartments illegally. They then engaged in a series of actions, described below, which Supreme Court found to satisfy the "fraud" requirement of *Matter of Grimm v. DHCR*, 15 N.Y.3d 358 (2010), which finding was affirmed by the Appellate Division.

The Supreme Court, after reviewing the papers on Respondents' motion for summary judgment, including Respondents' reply papers and Appellants sur-reply papers, concurred with Respondents' position, finding that Appellants had engaged in a fraudulent scheme:

> "[I]t was on March 8, 2012, that defendants filed back-dated rent registration statements for all 78 apartments with the DHCR for 2007-2011. By back-dating the apartment registrations for five years (six, if one includes 2012, the year in which the amended registrations were filed), defendants were seeking to (1) obviate an official determination that the building's apartments were and are rent stabilized; and (2) impose their own rent calculations, as the presumptively legal rent, for the duration of the statutory four-year look-back period that would normally apply in the overcharge action that plaintiffs had recently commenced. The court finds this en masse filing a fraudulent attempt to (1) avoid the consequences of

> defendants' previous illicit deregulation of the 78 subject apartments herein; and (2) to use the RSL to prevent plaintiffs from challenging the rents that defendants had unilaterally calculated for those apartments. In other words, it satisfies the "fraud" showing specified in *Grimm*: i.e., a "combination of ... factors [that] should have led ... to investigat[ing] the legality of the base date rent, rather than blindly using the rent charged on the date four years prior to the filing of the rent overcharge claim." 15 NY3d at 366. Following *Grimm*, the court finds that, because the rent history in this action is unreliable, the default formula should be used to determine the base rent date and to calculate the rent for each of the 78 subject apartments herein."[7] (R. 27)

Appellants then moved the Supreme Court for leave to reargue this decision, again providing Appellants with an opportunity to refute Respondents' claims of fraud, which motion was denied (Respondents' Brief at 26).

On appeal to the Appellate Division, Appellants argued that the Supreme Court had made an error in finding that Appellants had engaged in a fraudulent scheme. However, the Appellate Division affirmed the Supreme Court's finding that Appellants had engaged in a fraudulent scheme, finding:

> "[Appellants'] 2012 retroactive registration of the improperly deregulated apartments was an attempt to

[7] See also the Appellate Division's discussion of the Supreme Court decision: "The [Supreme] court granted the motion for summary judgment. The court determined that under tests set forth in *Thornton v Baron* (5 NY3d 175, 833 N.E.2d 261, 800 N.Y.S.2d 118 [2005]) and *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.* (15 NY3d 358, 938 N.E.2d 924, 912 N.Y.S.2d 491 [2010]), plaintiffs had made a colorable claim of fraud because defendants' 2012 retroactive registration of the improperly deregulated apartments was an attempt to avoid the court's adjudication of the issues and to impose their own rent calculations rather than face a determination of the legal regulated rent within the lookback period." *Casey v. Whitehouse Estates*, 197 A.D.3d at 402

> avoid the court's adjudication of the issues and to impose their own rent calculations rather than face a determination of the legal regulated rent within the lookback period." *Casey v. Whitehouse Estates*, 197 A.D.3d at 404.

The Appellate Division went on to hold:

> "[T]he DHCR rent history for the apartments within the four-year lookback period shows that the rents beginning in 2007, four years before the complaint was filed, were registered in 2012, based on defendants' unilateral calculations and not the actual rent charged. Plaintiffs also assert that the Trynosky[8] letter demonstrates that in some cases, defendants converted plaintiffs' actual rents to 'preferential rents' in order to justify registering significantly higher rents with DHCR. That evidence, combined with defendants' failure to produce leases for the class within the lookback period, showing the actual rent paid, does not adequately establish the base date rent by a preponderance of the evidence under RSC 2526.1(3)(i).
> As properly found by the motion court, this conduct fulfilled the Court of Appeals test in *Grimm* that:
> 'What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization [in which case] the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date" (15 NY3d at 367).'" *Casey*, 197 A.D.3d at 404.

Amici (and Appellants) argue that the Appellate Division was precluded from considering conduct engaged in after the October 14, 2007 base date for the purpose of determining whether Appellants engaged in a fraudulent scheme. *Amici* urge this

[8] Mr. Trynosky was the so-called expert retained by Appellants to recalculate Respondents' rents and adjust them to a higher level (R. 155, 1196-1201). The backup documentation explaining his outrageous calculations was never provided.

Court to view the consideration of post-base-date conduct as the recognition of an additional common law exception to the four-year rule. *Amici's* arguments are based upon an incorrect reading of *Regina* and a misconstruing of the fraudulent exception to the four-year rule.

Regina does not hold that the only evidence of a fraudulent scheme that may be considered is evidence of conduct occurring prior to the base date. *Regina* upholds this Court's prior precedent in affirming that review of the rental history outside of the four-year lookback period was permitted where the tenant produced evidence of a fraudulent scheme (35 N.Y.3d at 355). *Regina* did not hold that evidence of conduct occurring subsequent to the base date could not be considered for the purpose of determining whether there was a fraudulent scheme.[9]

In *435 Central Park W. Tenant Assn. v. Park Front Apts., LLC, supra,* 183 A.D.3d at 510-511, the Appellate Division correctly held that "[i]n the event it is proven that defendant engaged in a fraudulent rent overcharge scheme to raise the pre-stabilization rent of each apartment, tainting the reliability of the rent on the base date, then the lawful rent on the base date for each apartment must be determined by using the default formula devised by DHCR."[10] That holding is consistent with the

[9] *Regina* reaffirmed this Court's prior precedent as to the existence of a fraudulent exception to the four-year rule; it did not place additional restrictions upon that exception.

[10] *See also, Davis v. Graham Ct. Owners Corp.*, 2021 N.Y. Misc. LEXIS 6229 *10 (Sup. Ct. NY Co.), noting that "[a]fter *Regina*, the Appellate Division, First Department ruled that the four-year lookback applies not only to deregulation, but also applies where a landlord was proven to have engaged in a fraudulent scheme to raise the 'pre-stabilization rent,' and the lawful rent on the base

prior precedents of this Court and is not contradicted by this Court's holding in *Regina*. There is simply no basis for precluding a tenant from producing evidence of a fraudulent scheme consisting of actions taken by the owner subsequent to the base date, and where that evidence shows that there is no reliable evidence of the base date rent, it is appropriate to apply the default formula, as the Supreme Court did in this case, and as the Appellate Division affirmed.

In any case, it bears reminding that the class of Respondents herein is defined as those tenants whose apartments were deregulated by Appellants during the period of time that Appellants were in receipt of J-51 tax benefits (R. 177-179, 183-197). The facts of this case are thus distinguishable from *435 Central Park*, where the issue was that the owners had tampered with the registration process, while not deregulating the apartments.

Amici's efforts to excuse Appellants' outrageous conduct are unavailing. *Amici* cite to the efforts made by their constituent members, in the wake of *Roberts*, to recalculate tenants' rents, register apartments retroactively, and provide rent stabilized lease renewals. Appellants filed hundreds of registrations in 2012 listing false rental amounts that were higher than what the tenants had been paying, and

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date 'must be determined by using the default formula devised by DHCR, and plaintiff's recovery would be limited to those overcharges occurring during the four-year period immediately preceding plaintiffs' rent challenge.' [*citing 435 Central Park W., supra* at 510]." *See also, Burrows v. 75-25 153rd St., LLC*, 2021 N.Y. Misc. LEXIS 5944 *9 (Sup. Ct. NY Co.) (same).

issued lease renewals at inflated rates. No amount of confusion in the law could have justified those actions. Appellants' conduct amounts to what has been described as "willful ignorance …since [Appellants] are sophisticated property managers and owners." *Montera v. KMR Amsterdam*, 193 A.D.3d at 107.

To the extent that it may be construed that *Amici* have argued that Respondents are precluded by CPLR 901(b) from having their rents calculated pursuant to the default formula, because it is a "penalty," that argument was not made by Appellants and is not properly before this Court. Furthermore, as is discussed at length in Point III below, the application of the default formula is not a penalty but a calculation methodology to be applied where adequate history records are not provided, or are found to be unreliable.

The Supreme Court correctly found, and the Appellate Division correctly affirmed, that Appellants engaged in deliberate and intentional conduct subsequent to the October 14, 2007 base date, and subsequent to the Courts' holdings in *Roberts* and *Gersten*,[11] that was designed to convince tenants and third parties that the legal base date rent was not the amount actually charged, but a higher amount. To that end, Appellants filed hundreds of registrations listing inflated rents (R. 864-1135)

[11] In *Gersten v. 56 7th Ave. LLC,* 88 A.D.3d 189, 196 (1st Dep't 2011), *appeal withdrawn* 18 N.Y.3d 954 (2012), the Court rejected an owner's argument that *Roberts* should only be applied prospectively, thereby placing owners throughout New York City on notice that apartments previously deregulated pursuant to agency regulations had to be brought back under rent stabilization and registered as such.

and presented dozens of tenants with lease renewals listing higher legal regulated rents, in many cases falsely describing a lower amount as a "preferential" rent (R. 486-863). Based upon Supreme Court's finding that Appellants engaged in these illegal actions, as well as the deficiencies of the rental history records, it was correct to find that the base date rent could not be determined and that the default formula had to be applied.

In summary, *Amici's* claim that any inquiry as to whether an owner engaged in a fraudulent scheme must be limited to evidence of action taken prior to the base date should be rejected by this Court. It was appropriate to find that Appellants herein, through their actions, engaged in a fraudulent scheme that resulted in the tainting of the base date rents of the affected apartments. These actions in combination with the inadequacy of the rental history records required the application of the default formula, consistent with this Court's precedent.

III. *AMICI'S* REQUEST FOR GUIDANCE FOR DETERMINING WHETHER AN OWNER'S CONDUCT IS MERELY WILLFUL OR IS IN FURTHERANCE OF A FRAUDULENT SCHEME IS BEYOND THE SCOPE OF THIS APPEAL, AND IN ANY EVENT SUCH DISTINCTION IS ALREADY CLEAR UNDER THE LAW.

Amici complain of confusion in the case law as to whether an owner's conduct may be found to be "willful," warranting treble damages, or whether an owner's conduct may be found to be "fraudulent" warranting application of the default formula. *Amici* requests that, in the event this Court adopts the First Department's

"fraudulent overcharging" jurisprudence, that it clarify the distinction between willful conduct and fraudulent conduct, so that other owners can know what they must do to avoid application of the default formula.

As a threshold matter, it is noted that Appellants are not pursuing a claim for treble damages because this case has been certified as a class action. Treble damages are not available in a class action. *See, Borden v. 400 E. 55th St. Assoc., LP*, 24 N.Y.3d 382, 393 (2014). Because Appellants have not pursued a claim for treble damages in this action, the parties have not asked this Court to clarify the distinction between "willful" and "fraudulent" conduct. As such, *Amici's* request is beyond the scope of this appeal and should not be considered by this Court.

Although the inquiry should end there, it is noted that in other cases the courts have been asked to consider the distinction under rent stabilization between treble damages, which are a punitive measure, and the application of the default formula, which is a non-punitive measure intended to set the base date rent pursuant to a certain calculation in an appropriate case.

The default formula is a time-honored calculation, first applied in the 1970's by the Conciliation and Appeals Board ("CAB"), the predecessor to the DHCR, and then approved by the Courts, in cases where owners failed to provide the complete rental history. *See, e.g. Matter of Jane St. Assocs. v. CAB, supra*. Beginning with *Thornton v. Baron*, 5 N.Y.3d 175, 180 (2005), and *Matter of Grimm v. DHCR*, 15

N.Y.3d at 366-367, the courts approved application of the default formula if it was found that an owner engaged in a fraudulent scheme, such that even if a particular rental amount charged on the base date was objectively known through production of documentation, that amount would not be accepted as lawful if it could be shown that it was the product of a fraud. Ultimately the default formula was formally adopted in 2014 as part of the Rent Stabilization Code. RSC §§2522.6(b)(2), 2522.6(b)(3), 2526.1(g). Then in 2015, this Court undertook a thorough review of its precedents in the area in the case of *Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 16-17 (2015), specifically holding that former CPLR 213-a was not a bar to applying the default formula to adjust the base date rent in a case involving a fraudulent scheme.[12]

Notably, the majority in *Conason* specifically rejected the claim that the Court equated "fraud" with a "willful overcharge" and the argument that allowing for a fraudulent exception to the four-year rule would create an untenable distinction between fraud and willfulness that could not be reconciled. That same claim had been made previously in *Grimm*, and had also been rejected by the Court in that case.

[12] Former CPLR 213-a, amended in 2019 pursuant to the HSTPA, used to provide as follows: "An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and 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, Conason v. Megan Holding, 15 N.Y.3d at 16; *Grimm v. DHCR*, 15 N.Y.3d at 368-369 (dissenting opinion). Notwithstanding this Court's repeated rejection of the claim that "fraud" and "willfulness" are indistinguishable and that there should not be separate remedies, *Amici* would have this Court revisit the issue once again. It is submitted that this Court has opined on this matter already a number of times, that it is beyond the scope of this appeal for this Court to do so again, and that it is unnecessary for this Court to do so again for any broader reason.

In recent years, some owners have argued that the application of the default formula is a form of a "penalty" although the default formula is not characterized as a penalty in the Rent Stabilization Code, and the courts have not viewed it as such. Owners have made this argument in the context of class actions, because CPLR 901(b) bars plaintiffs from recovering penalties in class actions. *See, e.g., Chernett v. Spruce 1209, LLC*, 200 A.D.3d 596, 598-599 (1st Dep't 2021); *Simpson v. 16-26 E. 105, LLC*, 176 A.D.3d 418, 419 (1st Dep't 2019) ("[T]he default formula is applied to calculate compensatory overcharge damages where no other method is available. Moreover, it is applied equally in cases in which the owner has engaged in fraud and in cases in which the base date rent simply cannot be determined or the rent history is unavailable. Considered in this light, we conclude that the default formula is not 'punishing conduct'").

An appellate court is "bound by principles of judicial restraint not to decide questions unnecessary to the disposition of the appeal." *People v. Carvajal*, 6 N.Y.3d 305, 316 (2005). *Amici* would have this Court violate this venerable rule of law.

In summary, *Amici* present no compelling reason why this Court should, once again, delve into the distinction between "willful" and "fraudulent" overcharging, a distinction which this Court has addressed in its prior cases, and which it need not and should not do on this appeal.

CONCLUSION

Appellants respectfully request that the Decision and Order of the Appellate Division dated August 5, 2021 be in all respects affirmed, along with costs and such other and further relief as this Court deems just and proper.

Dated: New York, New York
November 30, 2022

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NEW YORK STATE COURT OF APPEALS
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Dated: New York, New York
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