SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

KATHRYN CASEY, LAURIE CAGNASSOLA, GERALD COHEN, BETTY FURR, FRANCESCA GAGLIANO, CAROLYN KLEIN, JOSEPH MORGAN, JESSICA SAKS AND KIRK SWANSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs-Respondents, and PAMELA RENNA and VITTINA DEGREZIA a/k/a VITTINA LUPPINO, Plaintiffs-Intervenors, -against- WHITEHOUSE ESTATES, INC., KOEPPEL & KOEPPEL, INC., DUELL 5 MANAGEMENT LLC d/b/a DUELL MANAGEMENT SYSTEMS, WILLIAM W. KOEPPEL AND EASTGATE WHITEHOUSE LLC, Defendants-Appellants.	:	Index No. 111723/11 Appellate Case No. 2020-03001 **AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS AND FOR A STAY PENDING DETERMINATION OF <u>THE INSTANT MOTION</u>**
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.	:	Third-Party Index No. 595472/17

JEFFREY TURKEL, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms the following to be true under the penalties of perjury pursuant to CPLR 2106:

1. I am a member of Rosenberg & Estis, P.C., attorneys for defendants-appellants and third-party plaintiffs-appellants Whitehouse Estates, Inc. *et al.* (collectively, "Appellants"). As such, I am fully familiar with the facts and circumstances set forth below.

2. I submit this affirmation in support of Appellants' motion pursuant to CPLR 5602(b)(1) for leave to appeal from this Court's August 5, 2021 order herein ("Order"), annexed hereto as Exhibit "A". By its order, this Court affirmed an order of Supreme Court, New York County (Lebovits, J.) entered on March 28, 2017, a copy of which is annexed hereto as Exhibit "B."

3. I also submit this affidavit in support of Appellants' application for a stay of enforcement of the Order and all proceedings in Supreme Court, including, without limitation, the referee's hearing to determine the amount of rents for each of the subject apartments using DHCR's default formula and the amount of the rent overcharges for each apartment, pending determination of the instant motion for leave to appeal. Should leave be granted, Appellants request a stay of the Order pending determination of the appeal by the Court of Appeals.

4. Appellants respectfully submit that the Court of Appeals should review the following questions of law:

a. Can post-base date events ever constitute fraud for purposes of determining a rent overcharge claim under the pre-HSTPA version of the RSL?

b. Even if a landlord's post-base date failure to register apartments in a *Roberts*-type case can constitute fraud, can the post-base date registration of units as *rent stabilized* constitute fraud for determining a rent overcharge claim under the pre-HSTPA version of the RSL?

c. Can the four-year lookback period under RSL § 26-516(a)(1) be breached based on a claim of a fraudulent scheme to overcharge, where there was no fraudulent scheme to deregulate?

FACTS AND PROCEDURAL HISTORY

5. The facts and procedural history of this appeal are set forth at pages 11 through 22 of Appellants' December 31, 2020 brief herein, to which this Court is respectfully referred.

LEAVE TO APPEAL TO THE COURT OF APPEALS SHOULD BE GRANTED

6. Appellants respectfully submit that this Court should grant Appellants leave to appeal the Order so that the Court of Appeals can address the questions presented herein.

A. Post-Base Date Events do not Constitute Fraud for Purposes of Determining a Rent Overcharge Claim under the pre-HSTPA Version of the RSL

7. In its August 5, 2021 Order, this Court held that Appellants had committed fraud, such that the rents in question should be calculated pursuant to DHCR's default formula:

> "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 NY3d at 356), their 2012 retroactive registration of 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.
>
> Moreover, in *Montera v KMR Amsterdam LLC* (193 AD3d 102, 107 [1st Dept 2021]), this Court noted that '*Regina* does not grant an owner carte blanche in post-*Roberts/Gersten* cases to willfully disregard the law by failing to re-register illegally deregulated apartments, enjoying tax benefits while continuing to misrepresent the regulatory status of the apartments, and taking steps to comply with the law only after its scheme is uncovered.'"

See Exhibit "A," at p. 5.

8. In *Kreisler v B-U Realty Corp.*, 164 AD3d 1117, 1118 (1st Dept 2018), *lv dismissed* 32 NY3d 1090 (2018), this Court held that in a *Roberts*-type case, fraud will be found where the landlord unduly delays registering erroneously deregulated units. *See also Nolte v Bridgestone Assoc. LLC*, 167 AD3d 498 (1st Dept 2018).

9. In *Montera v KMR Amsterdam, LLC*, 193 AD3d 102, 105-06 (1st Dept 2021), Justice Singh, writing for the majority, explained the rationale for the Court's policy that a landlord's post-base date failure promptly to register

erroneously deregulated units constitutes fraud under *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 (2020):

> "In pre-*Roberts* cases where landlords relied on DHCR guidance there could be no fraudulent scheme to deregulate. This rule was explained by us in *Matter of Park v New York State Div. of Hous. & Community Renewal* (150 AD3d 105, 115 [1st Dept 2017], *lv dismissed* 30 NY3d 961 [2013]), where we found that DHCR rationally concluded that there was no basis to lookback beyond the four-year limitation period, as the owner did not engage in fraud when removing the apartment from rent regulation in 2005. We explained that the owner 'was relying on DHCR's own contemporaneous interpretation of the relevant laws and regulations' (*id.*). In fact, we gave the owner safe harbor, finding that fraud was not committed before 2012, when *Roberts* was applied retroactively.
>
> However, we have not extended this rule to cases decided after *Roberts* and *Gersten*. To the contrary, our jurisprudence holds that an owner may not flout the teachings of *Roberts*. In *Kreisler v B-U Realty Corp.* (164 AD3d 1117 [1st Dept 2018], *lv dismissed* 32 NY3d 1090 [2018]), we affirmed Supreme Court's declaration that the defendant owners engaged in a fraudulent scheme to remove the plaintiff tenants' apartment from rent regulation. The owner failed to notify the tenants that their apartments were subject to rent stabilization or to issue rent-stabilized leases. The owner finally addressed deregulation only after its conduct was revealed by an anonymous complaint. We affirmatively 'reject[ed] defendants' asserted reliance on a 'pre-*Roberts*' framework to justify their actions given that the wrongdoing here occurred in 2010, after *Roberts* was decided' (*id.* at 1118). Similarly, in *Nolte v Bridgestone Assoc. LLC* (167 AD3d 498, 498-499 [1st Dept 2018]), we did not give the owner safe harbor under the pre-*Roberts* line of cases because the 'defendant failed to promptly register the apartment and 30 other apartments in the

> building as rent-stabilized in March 2012, when the applicability of [*Roberts*] was clear.'
>
> We disagree with the dissent that the *Kreisler* and *Nolte* line of cases is no longer good law in light of *Regina*."

193 AD3d at 105-06.

10. Justice Gische, the dissenting Justice herein, also dissented in *Montera*:

> "The majority embraces plaintiffs' further argument that defendant's failure to register with DHCR after this Court's decisions in *Nolte* (167 AD3d 498), *Kreisler* (164 AD3d 1117) and *Matter of Park* (150 AD3d 105) is itself evidence of fraud and that we cannot allow defendant to avoid compliance with the law. I believe that *Regina*, with its robust requirements for finding fraud in *Roberts* overcharge cases has *sub silentio* overruled this authority."

193 AD3d at 116.

11. The dissent in *Montera* continued:

> "I fully recognize that an owner's failure to register the premises with DHCR is a violation of the rent stabilization laws and code, but there is an independent statutory remedy for such transgressions:
>
> > 'The failure to properly and timely comply, on or after the base date, with the rent registration requirements … shall, until such time as registration is completed, bar an owner from applying for or collecting any rent in excess of: the base date rent, plus any lawful adjustments allowable prior to the failure to register' (Rent Stabilization Code [RSC] [9 NYCCR] § 2528.4[a]).
>
> Once the late registration is filed this 'shall result in the elimination, prospectively, of such penalty' (*id.*) Where

> the increases in rent were lawful but for the failure to timely register, the rent collected in excess of the LRR at any time prior to the filing of the late registration is not an overcharge (*id.*) RSL § 26-517(e) specifies the remedy. It provides that '[t]he failure to file a proper and timely … registration statement' precludes an owner from collecting rent increases until the registration is filed.' Defendant's failure to register in itself does not permit a court's review of the rent history of this apartment prior to November 29, 2013 … Since there is already a statutory remedy for non-registration, there is no reason to devise an alternative method of relief."

Id. at 116-17.

12. The landlord in *Montera* thereafter sought leave to appeal from this Court. Leave was denied in an order dated May 20, 2021, from which Justice Gische dissented. *See*, Exhibit "C."

13. The same issue arose in the instant appeal. Citing *Montera*, the majority found that Appellants had committed fraud in that Appellants' "retroactive rent registrations…reflected rents significantly higher than those actually charged, and some purported to classify the actual rent as a 'preferential rent' to justify registration of the higher amount. Further, there was no basis submitted for their calculation. Defendants' actions give rise to a colorable claim of fraud." *See*, Exhibit "A," at p. 7.

14. Justice Gische again dissented, writing:

> "Here, defendants filed amended registrations for the years they treated the apartment as exempt from rent registration requirements. Defendants' filing of the amended registration evinces an effort to comply with the

> law once *Gersten* made it clear that *Roberts* had retroactive effect."

Id. at p. 14.

15. Appellants respectfully submit that post-base date conduct cannot constitute fraud for purposes of determining a rent overcharge complaint, and that leave to appeal should be granted so that the Court of Appeals can address this issue.

16. RSC § 2526.1(a)(2)(iv) provides that DHCR's default formula shall be used where "a fraudulent scheme to destabilize the housing accommodation … rendered unreliable the rent on the base date," a formulation derived from *Conason v Megan Holden, LLC*, 25 NY3d 1, 18 (2015). Here, the base date is October 14, 2007 (R. 75).

17. Appellants respectfully submit that nothing that occurs *after* the base date, including Appellants' 2012 registration of the units in question as rent-stabilized, can possibly render *earlier* base date rents unreliable. Accordingly, there was no fraud herein, such that DHCR's default rent formula does not apply.

18. In *Regina*, the Court of Appeals held that where there is no fraud, "the base date rent [is] the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges [are] to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period." 35 NY3d at 356. Accordingly, the base date rents herein should be the

rents charged and paid on the October 14, 2007 base date. To the extent that Appellants' registrations were incorrect, the applicable penalty, if any, is found in RSL § 26-517(e), as Justice Gische wrote in *Montera*. 193 AD3d at 116-17.

19. Appellants respectfully submit that differing views of the majority and the dissent, both here and in *Montera*, present a virtual template for the kind of appeal for which CPLR 5602(b)(1) relief is warranted. The issue of whether *Kreisler* and *Nolte* survived *Regina* is important to thousands of landlords and tenants who are, or will be, litigating overcharge claims in Civil Court, Supreme Court, and before DHCR. This question will arise again and again, as *Kreisler*, *Nolte*, *Montera*, and the instant appeal establish. Landlords, tenants, DHCR, and lower courts require guidance from the Court of Appeals on this fundamental issue.

B. Timely Registration of Erroneously Deregulated Units as Rent-Stabilized in a *Roberts*-Type Case does not Constitute Fraud

20. In *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 (2009), the Court of Appeals held that apartments cannot be luxury deregulated while a building is receiving J-51 benefits. In *Gersten v 56 7th Ave. LLC*, 18 AD3d 189 (1st Dept 2011), this Court held that *Roberts* was to be applied retroactively. On March 6, 2012, the appeal to the Court of Appeals in *Gersten* was withdrawn and discontinued. 18 NY3d 954. Thus, in *Roberts*-type cases, landlords were on notice as of March 6, 2012 that they must register as stabilized improperly deregulated

units. *See*, *e.g.*, *Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105, 110 (1st Dept 2017).

21. On September 28, 2011, one month after this Court's August 11, 2011 decision in *Gersten*, Appellants advised all of the tenants whose apartments had been erroneously deregulated during the J-51 as follows:

> "Upon review, your lease at 350 E. 52nd Street, NYC, needs to be redrawn with an adjusted monthly rent amount. This is due to a recent NY state Court of Appeals decision (the "Roberts Decision") returning many units into stabilization. Because your building…took advantage of the "J-51" tax abatement program, many units that were switched to market rates will now be converted back to stabilization rates.
>
> We are strictly adhering to the court decision, and we have hired an outside consultant to pour through the lease records to determine the exact rental amount that may be legally charged for each apartment.
>
> …Once finished, we will amend the registration statements with the City [sic] of New York and provide you with a new lease.
>
> If you have been overcharged, we will reimburse any overpayments and issue a new rent stabilized lease with a J-51 rider. If you signed a lease below the newly configured amount, we will honor the lower rent amounts now being paid…
>
> Thank you for your patience as we quickly and efficiently try to work through this process" (R. 132-33).

22. In connection therewith, Appellant retained Stephen K. Trynosky, an expert having more than 20 years of experience working with landlords in connection with J-51 abatement benefits and calculating legal regulated rents for

rent stabilized apartments (R. 1192-1193, 1196-1201). In 2011, however, the proper methodology for recalculating legal rents after *Roberts* and *Gersten* was not settled by the courts. Accordingly, Mr. Trynosky, and Appellants, made a good faith effort to recalculate "the legal regulated rents using DHCR guidelines for all of the apartments that were again subject to rent stabilization following the *Roberts v Tishman* decision and its progeny" (R. 1196).

23. On October 14, 2011, plaintiffs-respondents ("Tenants"), represented by experienced landlord-tenant counsel, commenced the instant action (R. 135).

24. On October 20, 2011, Mr. Trynosky sent a letter to affected tenants regarding his recalculation of the legal rents. The letter stated in relevant part:

> "The calculations establish a base rent and then use the authorized rent guidelines for the past several years to adjust it. If the amount actually paid is less than the 'Legal Regulated Rent', then it is considered to be a 'preferential rent.' In the future, all new leases containing this discrepancy will be so marked. All new leases will be considered Rent Stabilized leases and appropriate Rent Stabilization rules administered by DHCR will henceforth be in effect" (R. 156).

25. On January 12, 2012, counsel for both Appellants *and* Tenants sent a joint letter to the tenants of the subject building, which letter was described as "the product of discussions between counsel for the plaintiff-tenants and defendant-

landlord regarding the prior communications and any future communications" (R. 173). The joint letter went on to state:

> "The Trynosky letters described above are hereby withdrawn. They should be ignored.
>
> *The attorneys for both sides agree that the calculation of past, current and future legal regulated rents at the building are the subject of the pending litigation.*
>
> This letter is without prejudice to the claims of either the landlord or tenants that is not deemed a waiver of any rights to seek a higher or lower legal regulated rent, a higher or lower collectible rent, a preferential rent or a rent overcharge. All such claims are expressly reserved" (italics supplied) (*id*.).

26. By March 2012, Appellants had registered all of the affected apartments as rent-stabilized, including retroactively filing with DHCR amended rent registrations for the subject apartments for the years 2007 through 2011 to reflect their rent-stabilized status and the adjusted rents (R. 11, 27, 423-446, 864-995, 996-1135). Tenants of the affected apartments were sent a copy of the amended rent registrations for their apartment, and Appellants offered them rent stabilized leases in 2011/2012 with recalculated rents (R. 486-863, 864-995, 996-1135, 1197, 1199).

27. As the Court of Appeals held in *Regina*, fraud for purposes of determining rents in a *Roberts*-type case "consists of 'evidence [of] a representation of material fact, falsity, scienter, reliance and injury.'" 35 NY3d at 356, n. 7. Appellants' correspondence and registration efforts are a model of transparency.

Indeed, Appellants advised Tenants that irrespective of any correspondence or registrations, their rents would be set by the court. Absent reliance, there was no fraud. Certainly, registering erroneously deregulated apartments as *rent stabilized* cannot constitute a fraudulent scheme to *deregulate*.

28. Appellants did exactly what this Court in *Kreisler*, *Nolte*, and *Montera* said they should do: register the apartments as stabilized promptly after the 2012 termination of the *Gersten* litigation and recalculate rents. Of course, the precise method for calculating rents in *Roberts*-type cases would not be settled until 2020 in *Regina*. Prior thereto, "there was understandable confusion regarding how [*Roberts*] should be implemented, including whether *Roberts* should be given retroactive effect and, if so, how that should be accomplished." *Regina*, 35 NY3d at 356.

29. Appellant's consultant, without any administrative or judicial guidance, recalculated the rents and registered the apartments as best he could, all under the watchful eye of Tenants' counsel. Supreme Court, in its own good-faith attempt to calculate the rents herein, employed the "reconstruction" formula that the *Regina* Court ultimately held was unlawful. *Id*. at 358.

30. Appellants respectfully submit that the Court of Appeals should determine the issue of whether a good faith and prompt registration of improperly deregulated apartments in a *Roberts*-type case constitutes fraud.

31. Appellants are aware that this Court found there was a second basis for using the default rent formula, based on "the absence of evidence in the record as to the actual rent charged on the base date by which to calculate legal regulated rents under RSC 2526.1(a)(3)(i)." *See* Exhibit "A," at p. 7.

32. Appellants respectfully submit that Tenants' own documents establish that Appellants have produced on discovery copies of the actual leases in effect on the October 14, 2007 base date for the majority of the apartments in question. In 2015, Tenants' motion for summary judgment and related relief was primarily based upon Appellants' alleged failure to comply with their discovery obligations to produce all documents to establish the legal rent under the now discredited reconstruction method. In support of their motion, Tenants submitted a "Summary of Documents Provided by Defendants" (R. 256-78). Tenants own papers, however, admitted that Appellants did, in fact, produce base date leases for the following 44 apartments: 1D, 2B, 2H, 2J, 2K, 3C, 3G, 3K, 4A, 5B, 5C, 5G, 6F, 6G, 6H, 7C, 7D, 7G, 8E, 8J, 8K, 9A, 9C, 9G, 9H, 10A, 10C, 10D, 10G, 10H, 11B, 12H, 12K, 14C, 14F, 14G, 14H, 14J, 15B, 15E, 15G, PHB, PHC and PHD.

33. On or about May 4, 2016, in further support of their motion, Tenants submitted to this Court a schedule showing which documents had not yet been produced (R. 1228-41). A careful reading of the schedule establishes that base date leases for an additional 15 apartments were *not* listed on the schedule of missing

documents, such that they were necessarily in Tenants' possession: 3A, 3E, 3J, 4B, 4C, 4D, 5D, 8C, 11D, 12C, 12D, 12E, 12J, 14D, and 14E.

34. Accordingly, for 59 of the approximately 80 deregulated apartments at issue, the base date leases were in Tenants' possession. As such, there was no basis for using the default formula for 75% of the apartments premised on Appellants' alleged failure to establish the base date rent.

C. The Court of Appeals has Created only One-Fraud-Based Exception to the Four-Year Look-Back Period: a Fraudulent Scheme to Deregulate

35. Because registering apartments as *stabilized* cannot qualify as a fraudulent scheme to deregulate, this Court necessarily found that Appellants had engaged in a "fraudulent rent overcharge scheme," a common law exception to the four-year look-back rule first announced in *435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC*, 183 AD3d 509, 510 (1st Dept 2021). There, this Court wrote:

> "We reject defendant landlord's argument that the fraudulent exception to the four-year look-back period applies only to a fraudulent-scheme-to-deregulate case. In the event it is proven that the 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."

183 AD3d at 510-511.

36. As Appellants have already established, post-base date conduct cannot affect the reliability of prior base date rents. In *435 Cent. Park W.*, the alleged

fraudulent conduct occurred in 2001, some 10 years *before* the April 11, 2011 base date.

37. Appellants respectfully submit for the reasons set forth below that the only fraud-based exception to the four-year look-back period permitted by *Regina* is a fraudulent scheme to deregulate. *Regina*, and the Court of Appeals cases preceding it, quite simply, do not permit the lesser standard of a fraudulent rent overcharge scheme.

1. <u>The Origin of the Exception</u>

38. In *Thornton v Baron*, 5 NY3d 175 (2005), the landlord and various illusory prime tenants collusively entered into leases stating that the prime tenants would not use their apartments as their primary residences. The prime tenants then "sublet" the apartments at unregulated rents. The Court of Appeals aptly described this conduct as "a scheme to remove a number of … apartments from the protections of rent regulation by taking advantage of the statutory exemption for non-primary residences." *Id.* at 177-78.

39. In *Regina*, the Court of Appeals characterized its holding in *Thornton* as follows:

> "In *Thornton*, the owner *engaged in an egregious, fraudulent scheme to remove apartments from stabilization* by conspiring with tenants, who shared in the illegal profits, by falsely agreeing the apartment was not being used as a primary residence (and utilizing the courts as a tool to obtain false declarations to that effect) at market rates and then sublease at even higher rates. For

> overcharge calculation purposes, the Court acknowledged the preclusive effect of the four-year lookback rule, deeming the last regulated rent charged before that period to be of no relevance. We held that the legal rent should be based on a default formula, otherwise reserved for cases where there are no reliable rent records" (italics supplied, internal citations and quotation marks omitted).

35 NY3d at 354.

40. In *Matter of Grimm v New York State Div. of Hous. & Community Renewal*, 5 NY3d 358 (2009), the Court of Appeals expanded upon fraud exception it had created in *Thornton*. The *Regina* Court described *Grimm's* holding as follows:

> "We elaborated on this fraud exception to the lookback rule in *Matter of Grimm v. New York State Div. of Hous. & Community Renewal*, holding that where a tenant had made a 'colorable claim of fraud' by identifying 'substantial indicia,' i.e., '*evidence,' of 'a landlord's fraudulent scheme to remove an apartment from the protections of rent stabilization*,' that apartment's '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.' Consistent with *Thornton*, we directed that, if review of the rental history revealed such a fraudulent scheme, the default formula should be used to calculate any resulting overcharge" (italics supplied, internal citations omitted).

Id. at 355.

41. In *Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 99 (2014), the Court of Appeals, finding no fraudulent scheme to

deregulate, affirmed DHCR's refusal to examine the rent history beyond the four-year lookback period.

42. Lastly, in *Conason*, the landlord "'created an entirely fictitious tenant'" in "connection with a stratagem devised by Megan *to remove tenants' apartment from the protections of rent stabilization*" (italics supplied). 25 NY3d at 16. The Court of Appeals held that given the fraudulent scheme to deregulate, "the lawful rent on the base date must be determined by using the default formula devised by the New York State Division of Housing and Community Renewal." *Id*. at 6.

43. The Court of Appeals in *Regina*, after examining its holdings in *Thornton*, *Grimm*, *Boyd* and *Conason*, set forth and defined the sole judicially created fraud exception to the four-year look-back period:

> "The rule that emerges from our precedent is that, under the prior law, review of rental history outside the four-year lookback period *was permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate* and, even then, solely to ascertain whether fraud occurred - not to furnish evidence for calculation of the base rent or permit recovery for years of overcharges barred by the statute of limitations. In fraud cases, this Court sanctioned the use of the default formula to set the base date rent. Otherwise, for overcharge calculation purposes, the base date rent was the rent actually charged on the base date (four years prior to the initiation of the claim) and overcharges were to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period" (italics supplied).

35 NY3d at 355-56.

2. DHCR Codifies the Sole Fraud-Based Exception

44. In January of 2014, DHCR added § 2526.1(a)(2)(iv) to the RSC. That provision states in its entirety:

> "In a proceeding pursuant to this section the rental history of the housing accommodation pre-dating the base date may be examined *for the limited purpose of determining whether a fraudulent scheme to destabilize the housing accommodation* or a rental practice proscribed under section 2525.3(b), (c) or (d) rendered unreliable the rent on the base date" (italics supplied).

45. The regulation's reference to RSC §§ 2525.3(b) and (d) relates to the collusive scheme in *Thornton*. RSC § 2525.3(b) bars an owner from conditioning the rental of an apartment on a representation that "the housing accommodation shall not be used as the tenant's or prospective tenant's primary residence." RSC § 2525.3(d) prevents an owner from engaging in "illusory or collusive rental practices."

46. RSC § 2525.3(c) also relates to *Thornton*. That provision forbids a landlord from "requir[ing] a tenant or prospective tenant to sign a lease or other rental agreement in the name of a corporation or for professional or commercial use as a condition of renting a housing accommodation when the housing accommodation is to be used as the primary residence of the prospective tenant for residential purposes." This scheme is closely akin to the *Thornton* primary residence scheme.

47. Because none of the schemes enumerated in RSC § 2526.1(a)(2)(iv) is present herein, that provision would bar DHCR from breaching the four-year look-back period in the instant case.

48. In January of 2014, DHCR also amended the RSC to "provide a more comprehensive list of exceptions to the rule that when examining overcharges the look-back period to determine an overcharge is four years." *See* DHCR "RSC Amendment Summary," annexed hereto as Exhibit "D," p. 2. These exceptions -- none of which relates to fraud -- are found at RSC §§ 2526.1(a)(2)(iii) - (ix).

49. These exceptions to the four-year lookback period do not apply herein. Subdivision (iii) allows DHCR to breach the lookback period to determine "whether a housing accommodation is subject to the RSL," but that is not at issue herein. Subdivisions (v), (vii), (viii), and (ix) relate to, respectively, the existence of a rent reduction order more than four years old; longevity rent increases; the preservation of a preferential rent; and instances where an apartment is "vacant or temporarily exempt on the base date." Subdivision (vi) allows a *landlord* to introduce rent records prior to the base date to establish the lack of willful overcharge.

50. Accordingly, there is no RSC regulation authorizing DHCR to breach the four-year look-back period based on a "fraudulent scheme to overcharge."

51. Indeed, DHCR has consistently refused to breach the four-year lookback period, or employ its default methodology, where there is no fraudulent

scheme to deregulate. *See Matter of Ramos*, DHCR Adm. Rev. Dckt. No. FN-610035-RT, issued Nov. 21, 2017 ("the rent charged was far below the statutory threshold for high-rent, vacancy decontrol. As such, the Commissioner finds the claim that the owner was attempting to put the apartment outside rent stabilization fraudulently, [is] without merit") (Exhibit "E," at p. 2); *Matter of Harley*, DHCR Adm. Rev. Dckt. No. DV-610053-RT, issued May 24, 2016 ("significantly, the apartment has not been deregulated and there has been no attempt by the owner to deregulate the apartment") (Exhibit "F," at p. 4); *Matter of Ross*, DHCR Adm. Rev. Dckt. No. DT-110008-RT, issued Jan. 15, 2016 ("the base date rent was substantially lower than the luxury deregulation threshold of $2,000.00 per month, unlike in *Grimm*) (Exhibit "G," at p. 3); *Matter of Marca*, DHCR Adm. Rev. Dckt. No. CQ-210003-RT, issued Jan. 6, 2015 ("the courts have ruled that the owner's fraud must be done in connection with a fraudulent scheme to deregulate the apartment. In this case, the tenant's rent … is substantially below the rent necessary for high-rent luxury deregulation") (Exhibit "H," at p. 3).

52. Based on the foregoing, Appellants respectfully ask this Court to grant Appellants' leave to appeal so that the Court of Appeals can determine whether a fraudulent scheme to deregulate is the sole fraud-based exception to the four-year look-back period.

APPELLANTS RESPECTFULLY ASK THIS COURT TO STAY THE ORDER AND ALL SUPREME COURT PROCEEDINGS PENDING DETERMINATION OF THE INSTANT MOTION

53. Pursuant to CPLR 5519(c), Appellants request this Court to stay the Order and all Supreme Court proceedings pending determination of the instant motion. Appellants further request that should leave to appeal be granted, the stay be extended through the date the Court of Appeals determines the appeal.

54. The current status of the case, as reflected in the Order, was to remand the case for the purpose of a special referee determining the base rents and the amount of any overcharges, taking into account payments of interim use and occupancy ("U&O") payments made by tenants pursuant to Supreme Court's orders. *See* Ex. A, p. 9.

55. The primary issues on the appeal is whether there was fraud and whether the default formula should apply. If Appellants prevail on appeal, no such referee hearing should occur because the default formula would not be applicable. Thus, all proceedings should be stayed to avoid a waste of precious judicial resources and the substantial amount of time and expense to be expended by the parties by reconstructing rents going back more than 15 years.

56. Should the Court find that all proceedings should not be stayed, Appellants alternatively seek a stay of the Order, as well as Supreme Court's April 13, 2021 U&O reduction order, which was stayed when this Court granted Appellants an interim stay of Supreme Court's April 13, 2021 U&O order pending

determination of the instant appeal. *See* Exhibit "I." In its Order, this Court denied the stay application "without prejudice to the parties' respective positions at the hearing before the referee concerning the calculation of plaintiffs' legal rent under the default formula." *See* Exhibit "A," at p. 9.

57. The relevant facts are as follows. On May 21, 2014, Justice Singh (then sitting in Supreme Court) issued an order directing plaintiffs-respondents "to pay use and occupancy in whatever their last expired lease was when this action was commenced, and that shall be paid prospectively until the completion of the case. *See*, May 21, 2014 order, annexed hereto as Exhibit "J," at p. 20, lines 15-18.

58. In its March 28, 2017 order, Supreme Court modified Justice Singh's U&O order. While Supreme Court stated that it was not "relieve[d] from its obligation to enforce Justice Singh's 2014 [U&O Order], and to ensure plaintiffs' compliance with RPL § 220" (R. 31) by paying U&O to Landlord on a monthly basis "prospectively until the completion of this case" (R. 28, 483), Supreme Court nevertheless abrogated Justice Singh's prior U&O order by (a) "direct[ing] that the parties prepare [certain] documents and calculations and present them to the Special Referee, who shall compare them and incorporate the result into his/her proposed findings of fact" (R. 31) and (b) with respect to the non-paying tenants, "requir[ing] them to post a bond equal to the amount set forth in the Special Referee's findings, pending the final resolution of this action" (R. 31).

59. The significance of this modification is that it precluded Appellants from seeking to enforce the prior U&O order against tenants, who then owed more than $750,000, and were (and still are) being improperly permitted to continue living in their apartments rent free, until a Referee's hearing, which may not occur any time soon given the severe delays and backlog due to the COVID-19 pandemic.

60. In July 2020, Tenants moved Supreme Court, by Order to Show Cause, for an order modifying the previous U&O orders based upon DHCR's default rent formula even though those amounts were not determined by the Special Referee as previously directed, such that the amount of U&O due would be substantially reduced by approximately 60%.

61. Appellants argued that they would suffer extreme adverse financial hardship if the amount of U&O for the many apartments is reduced by the massive 60%. More specifically, Appellants argued that the substantial amount of arrears, as well as monies owed by other tenants in the building, continue to grow each and every month, and is posing a substantial hardship upon Landlord during this COVID-19 pandemic.

62. By an order dated April 13, 2021 (Exhibit "K"), Justice Lebovits granted Tenants' motion to the extent that:

> "… the Order of this Court dated May 14, 2014 (Singh, J.) is hereby modified only to the extent of reducing, prospectively, the amount of interim use and occupancy ('U&O') to be paid to Landlord by those individuals set forth in [the] list ('Tenants' for the purpose of

> this order) as annexed as Exhibit 'A' hereto, as amended by stipulation of the parties at NYSCEF, #441 …"

63. Such Ex. A showed the tremendous reduction in the monthly rent roll.

64. As noted, this Court granted Appellants an interim stay of the April 13, 2021 order, but ultimately denied the stay in the Order.

65. As established in the accompanying affidavit of William K. Koeppel, if a stay of the April 2021 U&O reduction order is not granted, there is a real risk that the subject building will be foreclosed.

66. It is well settled that, due to the unique character of real property, "[c]ourts will often perceive a party's loss of the possession and use of real property as an irreparable injury warranting injunctive relief" (13 Weinstein, Korn & Miller, Injunctions, ¶ 6301.15). The court explained this principle in *Workbench, Inc. v Syblin Realty Corp.*, 140 AD2d 693, 697 (2d Dept 1988) wherein, a preliminary injunction was sought to prevent the sale of real property. Granting the injunction, the court took note of the unique character of real property and the irreparable injury that would be sustained if the injunction was not granted. The court wrote:

> "We also conclude that the plaintiff will sustain irreparable injury if a preliminary injunction does not issue. The plaintiff has adduced sufficient evidence indicating that the subject premises is uniquely suited to its needs in terms of size and location."

67. To avoid this substantial prejudice and irreparable harm to Landlord absent a stay, the stay sought pending appeal should be issued.

68. When there is no prejudice to the other side in issuing a CPLR 5519 (c) stay, the request for a stay is usually granted (*see*, *e.g.*, *Jankoff Joint Venture II, LLC v Bayside Fuel Oil Corp.*, 74 AD3d 886 [2d Dept 2010]; *Slikas v Cyclone Realty, LLC*, 78 AD3d 144 [2d Dept 2009]).

69. Here, there will be no prejudice to Tenants if the stay sought is granted because they have not demonstrated any prejudice or hardship in having to pay the amount of U&O as directed by Supreme Court prior to the entry of the April 2021 U&O reduction order.

70. Pursuant 22 NYCRR § 1250.4(b)(2) Appellants advised opposing counsel when this application will be presented to the Court and we were advised that Tenants will oppose the application (Exhibit "L").

71. The relief sought herein has not previously been sought from this or any other court except as set forth above.

Dated: New York, New York
August 27, 2021

JEFFREY TURKEL