Alekna v 207-217 W. 110 Portfolio Owner LLC
2021 NY Slip Op 32757(U)
December 23, 2021
Supreme Court, New York County
Docket Number: Index No. 156847/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD** **PART** **35**

Justice

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MARIANA DIMITROVA ALEKNA, BEATRIZ DA COSTA, SAMUEL GILCHRIST, RACHEL OLSON, JOSE SANTAMARIA, LAURA MAHLER, KELLY HOLLAND, MAX HOLLAND, MICHAEL TIVE, JOHN COLE, MARY ELLEN COLE, KRISTIN MANNONI, JOSEPH DEBART, WILLIAM DEBART, ALEX BERRICK, ASHAN SINGH, LAMAR SMALL, RACHEL PERKINS, SARA MUSE, KYUNG CHAN ZOH, JIHOE KOO

Plaintiff,

- v -

207-217 WEST 110 PORTFOLIO OWNER LLC,207 REALTY ASSOCIATES L.L.C., MANN REALTY ASSOCIATES, GFB MANAGEMENT LLC,

Defendant.

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INDEX NO. 156847/2016

MOTION DATE 03/23/2021, 04/01/2021

MOTION SEQ. NO. 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 218, 219, 222, 223, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 270, 271, 272

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 212, 213, 214, 215, 216, 217, 220, 224

were read on this motion to/for REARGUMENT/RECONSIDERATION.

It is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiffs Mariana Dimitrova Alekna, Beatriz Da Costa, Samuel I. Gilchrist, Rachel Olson, Jose Santamaria, Laura Mahler, Kelly C. Holland, Max A. Holland, Michael G. Tive, John C. Cole, Mary Ellen Cole, Kristin Mannoni, Joseph Richard Debart, III, William Blair Debart, Alex Berrick, Ashan Singh, Lamar Small, Rachel L. Perkins, Sara Muse, Kyung Chan Zoh and Jihoe Koo (motion sequence number 006) is held in abeyance with respect to a finding on the issue of liability on the plaintiffs' first

cause of action pending the parties' respective submissions of the additional material described in this decision; and it is further

ORDERED that the parties shall submit the additional material described in this decision within sixty (60) days; and it is further

ORDERED that the balance of said plaintiffs' motion (motion sequence number 006) is held in abeyance pending the aforementioned submissions and the court's issuance of a ruling based thereon; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendants 207-217 West 110 Portfolio Owner LLC and GFB Management LLC (motion sequence number 006) is held in abeyance pending the aforementioned submissions and the court's issuance of a ruling based thereon; and it is further

ORDERED that the motion, pursuant to CPLR 2221 (motion sequence number 007), of defendants 207 Realty Associates LLC and Mann Realty associates for leave to reargue a portion of the court's March 2, 2021 decision (motion sequence number 005) is granted; and it is further

ORDERED that, upon reargument, the application of defendants 207 Realty Associates LLC and Mann Realty Associates to dismiss the second cross-claim in the amended answer of defendants 207-217 West 110 Portfolio Owner LLC and GFB Management LLC, and so much of the third cross-claim in that answer that seeks liability against defendant 207 Realty Associates LLC on a theory of common-law indemnity is granted; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days; and it is further

ORDERED that the Clerk of the Court, upon service upon him (60 Centre Street, Room 141B) of a copy of this order with notice of entry, is directed to enter judgment dismissing the

cross claims of defendants 207-217 West 110 Portfolio Owner LLC and GFB Management LLC against defendants 207 Realty Associates LLC and Mann Realty Associates, with prejudice, and with costs and disbursements to the latter defendants as taxed by the Clerk; and it is further

ORDERED that the balance of this action shall continue.

MEMORANDUM DECISION

In this residential landlord/tenant action, the plaintiff-tenants move for summary judgment on the complaint and the current building owner and managing agent cross-move for summary judgment to dismiss the complaint (together, motion sequence number 006), while the prior building owner and managing agent move separately for leave to reargue a portion of one of the court's earlier decisions (motion sequence number 007). This decision resolves both sets of motions.

BACKGROUND

Defendant-landlord 207-217 West 110 Portfolio Owner LLC (207 W 110) is the current owner of a residential apartment building located at 207 Central Park North in the City, County and State of New York (the building). *See* notice of cross motion (motion sequence number 006), exhibit A (amended complaint), ¶ 1. Co-defendant GFB Management LLC (GFB) is the building's current managing agent (together, the "buyer defendants"). *Id.*, ¶ 2. Co-defendant 207 Realty Associates LLC (207 Realty) was the building's prior record owner, and co-defendant Mann Realty associates (Mann) was the building's prior managing agent (together, the "seller defendants"). *Id.*, ¶¶ 4-5. The buyer defendants acquired the building from the seller defendants on April 20, 2016 via a "Purchase and Sale Agreement" (the "PSA"), which was recorded in the Office of the City Register of the City of New York on May 4, 2016 along with the deed of sale. *Id.*, ¶ 4. The plaintiff-tenants (tenants) are all current or former tenants of the

building who assert that they paid rent overcharges in violation of their rights under the Rent Stabilization Law (RSL) and Code (RSC). *Id.*, ¶¶ 6-8. Both sets of landlord/defendants deny imposing overcharges and assert that none of the tenants' apartments were rent regulated.

Tenants initially commenced this action on August 16, 2016 via a summons and verified complaint, to which the buyer and seller defendants each filed timely verified answers. On September 6, 2019, tenants filed a motion for leave to serve and file an amended complaint, which the court granted in a decision dated October 31, 2019 (motion sequence number 003). Tenants' amended complaint sets forth causes of action for: 1) violation of RSL § 26-512; 2) a declaratory judgment (that the buyer and seller defendants both violated RSL § 26-512); 3) a declaratory judgment (that all of the tenants' apartments are rent stabilized, and that the buyer defendants are required to issue them rent stabilized leases that reflect each apartment's "legal regulated rent"); 4) a permanent injunction (preventing the buyer defendants from commencing eviction proceedings against any of the tenants, and ordering the buyer defendants to issue each tenant a rent stabilized lease that reflects his/her/their apartment's correct "legal regulated rent"); 5) breach of the covenant of good faith and fair dealing (by the buyer defendants); and 6) attorney's fees. *See* notice of cross motion (motion sequence number 006), exhibit A (first amended verified complaint). The buyer defendants initially filed an amended answer on November 20, 2019, but later filed a second amended answer on January 23, 2020 that includes 29 affirmative defenses, a counterclaim against tenants for attorney's fees, and cross-claims against the seller defendants for: 1) breach of contract; 2) fraud and fraudulent inducement; 3) indemnity and contribution; and 4) rescission. *See* second amended answer (buyer defendants). On January 27, 2020, tenants filed a reply to the buyer defendants' counterclaim which raised six affirmative defenses. *See* plaintiffs' verified reply. For their part, the seller defendants filed a

motion to dismiss the buyer defendants' cross-claims against them, which the court granted in part and denied in part in a decision dated March 2, 2021 (motion sequence number 005). Thereafter, on March 22, 2021, the seller defendants filed an amended answer to the tenants' second amended complaint that includes 24 affirmative defenses and cross-claims against the buyer defendants for: 1) breach of contract; 2) contractual indemnity; 3) the "implied contractual right of indemnity"; 4) common-law indemnity; and 5) contribution. *See* amended answer (seller defendants).

Tenants filed the instant motion for summary judgment on the amended complaint as against the buyer defendants (only) on March 24, 2021.[1] *See* notice of motion (motion sequence number 006). The buyer defendants filed a cross motion for summary judgment to dismiss that complaint on June 1, 2021. *See* notice of cross motion (motion sequence number 006).

On April 1, 2021, the seller defendants moved separately for leave to reargue so much of the court's March 2, 2021 decision as denied their motion to dismiss two of the buyer defendants' cross-claims. *See* notice of motion (motion sequence number 007). The buyer defendants filed timely opposition to that motion.

This matter is now fully submitted (motion sequence numbers 006 & 007).

DISCUSSION

For the sake of clarity, this decision reviews the two motions before the court in reverse order.

I. Seller defendants' motion for leave to reargue (motion sequence number 007)

[1] The tenants had previously discontinued their claims as against the seller defendants in a stipulation dated August 29, 2019. *See* notice of cross motion (motion sequence number 006), exhibit F.

As was noted, the court's March 2, 2021 decision disposing of the seller defendants' motion to dismiss the buyer defendants cross-claims (motion sequence number 005) granted that relief in part and denied it in part. The buyer defendants had originally asserted cross-claims for: 1) breach of contract; 2) fraud and fraudulent inducement; 3) indemnification and contribution; and 4) rescission. *See* second amended answer (buyer defendants). The court's March 2, 2021 decision dismissed the first, third and fourth cross claims as against Mann, and the first and fourth cross claims as against 207 Realty. In the current motion (motion sequence number 007), the seller defendants request seek leave to renew/reargue the portion of their motion that sought dismissal of the second cross claim (fraud and fraudulent inducement) against both of them, and so much of the third cross claim (indemnity and contribution) as remained against 207 Realty.

Although the seller defendants style their motion as seeking "leave to renew or reargue," CPLR 2221 requires different showings to be made in support of each sort of motion. Pursuant to CPLR 2221 (d) (2), "[a] motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." Such a motion may be granted only upon a showing "'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.'" *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992), quoting *Schneider v Solowey*, 141 AD2d 813 (2d Dept 1988). As the Appellate Division, First Department, has observed, "a motion for leave to reargue 'is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented.'" *Matter of Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 (2d Dept

2011); quoting *McGill v Goldman*, 261 AD2d 593, 594 (2d Dept 1999). Here, the seller defendants object to two sections of the court's March 2, 2021 decision.

First, the seller defendants assert that the portion of the court's order which declined to dismiss the cross-claim for fraud and fraud in the inducement "overlooked or misapprehended key facts and law that buyer defendants failed to contest." *See* defendants' mem of law in support of motion (motion sequence number 007) at 9-14. The entire relevant section of the March 2, 2021 decision is too long to reproduce verbatim. However, it contained the finding that the seller defendants failed to establish any of the four arguments that they raised against the cross-claim; i.e.:

> ". . . that (1) the Buyer Defendants failed to plead the cross-claim with particularity; (2) the fraud cross-claim is duplicative of the contract cross-claim; (3) the Buyer Defendants' due diligence belies any claim of justifiable reliance; and, (4) the Buyer Defendants' unreasonable delay in bringing this cross claim constitutes a waiver."
> (Motion sequence number 005).

In their current motion, the seller defendants argue that the court's finding was mistaken, for three reasons; specifically that: 1) "there [was] no need for the Court to consider 'the accuracy of the information' and records provided by Seller Defendants on summary judgment . . . when the Buyer Defendants had an independent legal obligation to obtain and review sufficient rental records on their own to ensure the apartments were properly regulated and registered"; 2) "the only information the Buyer Defendants needed to ascertain whether the apartments were properly de-regulated . . . was the Building's receipt of J-51 benefits, which . . . was publicly available information"; and 3) "the Buyer Defendants directly contemplated the possibility of rent overcharges in the PSA - which is alone sufficient documentary evidence to show the Buyer Defendants knew or had reason to know of the potential overcharge liability. . . yet only required 207 Realty to represent that it had not received any overcharge complaints in writing 'within the

24-month period immediately preceding the date of this Agreement.'" *See* defendants' mem of law in support of motion (motion sequence number 007) at 9-14. The seller defendants assert that "[c]ollectively, these uncontested points . . . wholly refute the essential fraud allegations that a misrepresentation was made with the intent to deceive or that there was justifiable reliance." *Id*., at 13. The seller defendants' motion thus asks to reargue the court's finding that they had failed to establish their third defense to the "fraud and fraudulent misrepresentation" cross-claim; i.e., that "the Buyer Defendants' due diligence belies any claim of justifiable reliance."

The portion of the court's March 2, 2021 decision that specifically addressed the seller defendants' "justifiable reliance" argument found as follows:

> "The Seller Defendants maintain that there can be no detrimental reliance since the Buyer Defendants, who are 'sophisticated, well-represented parties entering into a $45 million deal,' performed their own due diligence investigation (NYSCEF Doc 171, Seller Defendants' mem of law at 17). The Seller Defendants further contend that the necessary information to ascertain the true rent regulated statuses, including tax information for the Building, was available either publicly, or had been furnished to the Buyer Defendants in accordance with Section 3.2 (i) of the PSA. However, '"the fact that one party is sophisticated does not end the fact-intensive question of what constitutes reasonable reliance, because [courts] consider the entire context of the transaction'" (*High Value Trading, LLC v Shaoul*, 168 AD3d 641, 642 [1st Dept 2019], lv denied 33 NY3d 910 [2019] [citation omitted]). Where sophisticated investors are involved, they 'must show they used due diligence and took affirmative steps to protect themselves from misrepresentations by employing what means of verification were available at the time.' (*VisionChina Media Inc.*, 109 AD3d at 57). A fraud claim will not be dismissed where the investor 'has taken reasonable steps to protect itself against deception' (*DDJ Mgt., LLV v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]).
>
> "Here, the Buyer Defendants allege that they took several steps to protect themselves from the alleged deception. First, the PSA contains an express warranty from Realty that the rent roll was accurate, and a provision requiring Realty to update this warranty as of the closing. The Buyer Defendants allege that the Seller Defendants failed to correct the rent regulated designations in the rent roll prior to the closing. Second, whether the Buyer Defendants could have discovered that the representations were false depends, in part, upon the accuracy of the information available to them. For example, the Buyer Defendants sought to review the rent registration records maintained by DHCR using an authorization Novoa furnished to their attorneys (NYSCEF Doc No. 175, ¶ 17). The accuracy of DHCR's records partially depends upon the registration statements furnished to it by the Seller Defendants. The Buyer Defendants, though, allege that even after the Seller Defendants received the DHCR notice in January 2016, they did not re-

> register the exempt apartments as rent stabilized. In addition, 'landlords [must] keep and preserve sufficient records to determine the legal rent at all times … [so that] a successor landlord would always be able to ascertain whether the previous owners had been guilty of overcharges and protect itself accordingly' (*see Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 549 [1997]). Although the Seller Defendants maintain that this information had been furnished to the Buyer Defendants, it is unclear, at this juncture, whether those records would have disclosed any potential rent overcharge claims or whether the apartments were improperly deregulated. While the better practice may have been for West to protect itself from possible overcharge claims by inserting a protective indemnification provision into the PSA (*see Matter of 500 West End Ave. Owners. v New York State Div. of Hous. & Community Renewal*, 185 Misc 2d 179, 184 [Sup Ct, NY County 2000]), the issue of whether the Buyer Defendants' reasonably relied on the alleged misrepresentations on the rent roll cannot be resolved on this motion."
> *(See* motion sequence number 005.)

In sum, the court found that the buyer defendants' allegation of the "justifiable reliance" element of their "fraud and fraudulent misrepresentation" cross-claim was sufficient to withstand a pre-answer motion to dismiss, pursuant to CPLR 3211. There is case law denying motions to dismiss fraud claims in connection with real property transactions which has recognized that a final determination regarding "justifiable reliance" necessarily requires a factual inquiry, so that a plaintiff's allegation of that element is sufficient in the pre-answer phase of litigation. *See e.g.*, *Garendean Realty Owner, LLC v 14 Lincoln Place, LLC*, 175 AD3d 651, 652 (2d Dept 2019), citing *Rodin Props-Shore Mall v Ullman*, 253 AD2d 403, 404 (1st Dept 1998); *see also Costantino v Lynch*, 163 Misc 2d 924 (Sup Ct, NY County 1995). As a result, the court was correct to conclude that "the issue of whether the Buyer Defendants' reasonably relied on the alleged misrepresentations on the rent roll cannot be resolved on this motion." However, this matter is no longer at the pre-answer stage.

On March 22, 2021, the day after the court rendered the decision disposing of the buyer defendants' motion to dismiss (motion sequence number 005), the seller defendants filed an answer to the buyer defendants' cross claims. *See* amended answer (seller defendants). On

March 24, 2021, the tenants filed a motion for summary judgment on the current complaint, and on June 1, 2021, the buyer defendants filed a cross motion for summary judgment to dismiss that complaint (together, motion sequence number 006, discussed *infra*). Although the buyer defendants' cross motion does not include a request for summary judgment on their cross-claims against the seller defendants, their memorandum of law includes lengthy arguments on the issue of the seller defendants' alleged fraud in connection with the sale of the building. *See* defendants' mem of law in support of cross motion (motion sequence number 006) at 3-8. As noted above, the seller defendants' "justifiable reliance" argument in this motion is essentially an assertion that the buyer defendants' reliance on their allegedly fraudulent statements was not justifiable as a matter of law. Both parties' arguments are drawn entirely from the warranty provisions of the PSA (a copy of which the seller defendants had annexed to their previous dismissal motion). *See* notice of motion (motion sequence number 005), exhibit A. As a result, the court concludes that the parties have "laid bare their proof" by submitting a copy of the governing contract, and that they have "charted a summary judgment course" with respect to the justifiable reliance issue, since they have "presented only issues of law and not issues of fact" on this reargument motion. *See e.g., Few Spirits v UB Distribs., LLC,* 192 AD3d 418, 418 (1st Dept 2021), citing *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 320 (1st Dept 1987); *Hernandez v 2075-2081 Wallace Ave. Owners Corp.*, 176 AD3d 467, 467 (1st Dept 2019). Accordingly, the court elects to treat this motion as a request for summary judgment to dismiss the buyer defendants' "fraud and fraudulent misrepresentation" cross-claim, pursuant to CPLR 3211 (c).

The court concludes that that request should be granted. In *114 W. 14 Realty LLC v Brandman* (147 AD3d 703 [1st Dept 2017]), the Appellate Division, First Department, held that:

> "Plaintiff's cause of action alleging fraud against all defendants is barred by the contract's specific disclaimer language and by the related 'as is' and merger language contained in

> the contract (*see e.g. Mountain Cr. Acquisition LLC v. Intrawest U.S. Holdings, Inc.*, 96 AD3d 633 [1st Dept 2012]). The rent-regulated status of an apartment in the building was not a matter peculiarly within the seller's knowledge, so as to permit a claim of justifiable reliance on defendants' alleged misrepresentations concerning that status despite the disclaimer language (*see Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014]). Even assuming that defendants' alleged misrepresentations about the rent-regulated status of an apartment were not discoverable by plaintiff, plaintiff's reliance upon those misrepresentations would not have been reasonable in light of the contract's language specifically warning plaintiff that defendants made no representations about the rent-regulated status of the building's units or defendants' compliance with the Loft Law (*see Rodas v Manitaras*, 159 AD2d 341 [1st Dept 1990])."
>
> 147 AD3d at 703-704; *see also International Plaza Assoc., L.P. v Lacher*, 63 AD3d 527 (1st Dept 2009).

Here, the PSA contains the same "as is" merger and disclaimer provisions as the contract at issue in *114 W. 14 Realty LLC v Brandman*. *See* notice of motion (motion sequence number 005), exhibit A. As a result, the court concludes that the buyer defendants' allegation of "justifiable reliance" is untenable in light of the PSA's clear provisions, even if that allegation was sufficient to withstand scrutiny under the more lenient standard applicable to a CPLR 3211 motion to dismiss. Accordingly, the court finds that the portion of the seller defendants' motion for leave to reargue the decision not to dismiss the buyer defendants' cross-claim for "fraud and fraudulent misrepresentation" should be granted, and that, upon reargument, that the seller defendants' prior motion to dismiss that cross-claim should also be granted.

The next branch of the seller defendants' motion asserts that the portion of the court's March 2, 2021 decision that addressed the buyer defendants' cross-claim for indemnity and contribution "misapprehended the facts and law by concluding that buyer defendants can be both liable and entitled to common-law indemnification." *See* defendants' mem of law in support of motion (motion sequence number 007) at 5-9. This section of the court's prior decision is also too lengthy to reproduce verbatim. However, in sum, it found that 207 Realty could pursue a

common-law indemnity claim against the seller defendants for two reasons: 1) case law permits a building's purchaser to assert an indemnification claim against the building's seller for the proportionate share of any rent overcharges that the seller collected and for which the purchaser is liable to the building's tenants; and 2) the PSA's waiver provision did not apply to rent overcharge claims.[2] Motion sequence number 005. The seller defendants now argue that the cross-claim actually seeks contribution rather than common-law indemnity, and that New York law does not permit contribution claims in the context of rent overcharges. *See* defendants' mem of law in support of motion (motion sequence number 007) at 5-9. The buyer defendants respond that the court's original findings were correct, and that the case law that the seller defendants cited was either inapposite or misquoted. *See* defendants' mem of law in opposition (motion sequence number 007) at 5-9. The seller defendants' reply papers assert further legal arguments on the concept of "vicarious liability." *See* defendants' reply mem (motion sequence number 007) at 6-10. After careful review, it finds for the seller defendants.

The March 2, 2021 decision found that "[207] Realty has not demonstrated that indemnification is unavailable," and reviewed the scant case law on the issue of indemnity claims by building purchasers for rent overcharges that were collected by the building's sellers. Motion sequence number 005. The court distinguished most of those cases as factually inapposite, apart from *Helfand v Sessler* (194 Misc 2d 38 [Civ Ct, NY County 2002]), a Civil Court decision (Billings, J.) which opined that such indemnity claims are legally viable, but found that it would be improper to rule on the claim at bar in that case on a pre-answer motion to dismiss. That case constituted at least some authority to support the buyer defendants' common-

[2] The portion of the court's March 2, 2021 decision that discussed "carryover liability" is irrelevant, since it did so only in the context of the buyer defendants' cross-claim for breach of contract, which was dismissed. Motion sequence number 005.

law indemnity claim against 207 Realty, and 207 Realty failed to cite any contrary authority. However, the court's research has disclosed that the Appellate Term, First Department, later heard the appeal of a summary judgment motion in *Helfand v Sessler* and issued a decision holding that:

> "'Implied indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other' (*Mas v Two Bridges Assocs.*, 75 NY2d 680, 690 [1990]). On the undisputed facts here presented, *where plaintiff had the opportunity to investigate the building's rent history prior to her acquisition of the premises*, to negotiate a purchase price reflective of any pending overcharge claim(s), *and to contractually require defendant to answer to her for any potential carryover overcharge liability*, the plaintiff's cause of action seeking equitable relief in the form of implied indemnification must fail."
> *Helfand v Sessler*, 8 Misc 3d 96, 98 (App Term, 1st Dept 2005) (emphasis added).

As this case, too, has reached the summary judgment phase of litigation (*see* discussion *supra*), the court finds that the later *Helfand v Sessler* decision is on point. The Appellate Term specifically found that the existence of "the opportunity to investigate the building's rent history" and "to contractually require defendant to answer to her for any potential carryover overcharge liability" was fatal to a claim for common-law ("implied") indemnity for prior rent overcharges. Although Judge Billings' 2002 decision declined to dismiss that claim during the pre-answer phase of the proceedings, the Appellate Term's 2005 decision granted a motion for summary judgment to dismiss that claim due to the presence of the two highlighted factors. Those same factors are present in this case. The buyer defendants admit that they had "the opportunity to investigate the building's rent history" prior to purchasing the building, although they assert that 207 Realty's records were inaccurate. *See* notice of cross motion (motion sequence number 006), Katz aff, ¶¶ 4-9. The terms of the PSA also make it clear that the buyer defendants also had the opportunity "to contractually require [207 Realty] to answer to her for any potential carryover overcharge liability." The court's March 2, 2021 decision found that the PSA's waiver

provision was silent as to issues regarding rent overcharge. Although that finding was fatal to the seller defendants' waiver argument, it also does not support the buyer-defendants' indemnity argument. The fact that the waiver clause was silent as to carryover rent overcharge liability simply indicates that the buyer defendants failed to take advantage of the opportunity to preserve their right to seek recourse against 207 Realty. However, per the Appellate Term's decision, the fact that the buyer defendants *had* such an *opportunity*, and *failed* to use it, precludes them from raising a common-law indemnity claim as a matter of law. *Helfand*, 8 Misc 3d at 98; *see also Nartov v 137 Rivington*, LLC, 2021 WL 4950327 (Sup Ct, NY County 2021). As a result, the court concludes that 207 Realty's request for leave to reargue the portion of the March 2, 2021 decision that sustained the buyer defendants' common-law indemnity claim against it should be granted, and upon reargument, grants 207 Realty's motion to dismiss that claim.

The seller defendants also raise the final argument that "new facts arose post-briefing which further warrant dismissal of the surviving cross-claims." *See* defendants' mem of law in support of motion (motion sequence number 007) at 14-16. However, these "new facts" are plainly inapposite to the buyer defendants' common-law liability cross-claim, since they relate solely to a separate motion to compel discovery. *See* notice of motion (motion sequence number 007), exhibit 2. Therefore, the court will not consider them.

In conclusion, the court grants the seller defendants' motion for leave to reargue the findings in the March 2, 2021 decision which declined to dismiss the buyer defendants' second cross-claim against both seller defendants ("fraud and fraudulent inducement") or to dismiss part of the third cross-claim against 207 Realty ("indemnity and contribution"), and upon reargument, dismisses both of those cross-claims in their entirety.

I. Tenants' motion and buyer defendants' cross motion for summary judgment (motion sequence number 006)

As was previously mentioned, the tenants' motion seeks summary judgment on the second amended complaint (and to dismiss the buyer defendants' counterclaim and affirmative defenses), and the buyer defendants' cross motion seeks summary judgment to dismiss that complaint (together, motion sequence number 006).

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 (2016) (internal quotation marks and citation omitted). If the moving party does not satisfy this initial burden, the court must deny the motion "regardless of the sufficiency of the opposing papers." *Pullman v Silverman*, 28 NY3d 1060, 1062 (2016), quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). If the movant submits the evidence required to make this showing, "the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action." *Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 74 (2020) (internal quotation marks and citations omitted). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); accord *Justinian Capital SPC v WestLB AG, N.Y. Branch*, 28 NY3d 160, 168 (2016).

Here, tenants' second amended complaint sets forth five causes of action, and the buyer defendants' answer sets forth one counterclaim along with 29 affirmative defenses. Each will be reviewed in turn.

A). Tenants' first cause of action ("Violation of RSL § 26-512")

Tenants' first cause of action alleges "violation of RSL § 26-512" ("Stabilization provisions"). *See* notice of cross motion (motion sequence number 006), exhibit A (amended verified complaint), ¶¶ 268-273. However, their amended complaint asserts that "Defendants overcharged Plaintiffs an amount equal to the difference between their monthly rents and the appropriate legal regulated rent-stabilized rents." *Id*. This states a claim of rent overcharge under RSL § 26-516 ("Enforcement and procedures"), which is what the court will review.

As tenants commenced this action on August 16, 2016, their rent overcharge claims are governed by the provisions of the RSL that were in effect before June 14, 2019 - the effective date of the Housing Stability & Tenant Protection Act of 2019 (HSTPA). *See Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 (2020). The pre-HSTPA version of RSL § 26-516[3] provided, in pertinent part, as follows:

> "§ 26-516. Enforcement and procedures
> "a. Subject to the conditions and limitations of this subdivision, *any owner of housing accommodations who*, upon complaint of a tenant, or of the [DHCR], *is found* by the [DHCR], after a reasonable opportunity to be heard, *to have collected an overcharge above the rent authorized for a housing accommodation subject to this chapter shall be liable to the tenant for a penalty equal to three times the amount of such overcharge*. In no event shall such treble damage penalty be assessed against an owner based solely on said owner's failure to file a timely or proper initial or annual rent registration statement. If the owner establishes by a preponderance of the evidence that the overcharge was not willful, the [DHCR] shall establish the penalty as the amount of the overcharge plus interest. (i) Except as to complaints filed pursuant to clause (ii) of this paragraph, *the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement, (or, if more recently filed, the initial registration statement) plus*

[3] Tenants incorrectly referred to RSL § 26-512 in their first and second causes of action for declaratory relief. However, those claims respectively seek declarations: 1) of liability for money damages for rent overcharge; and 2) that the buyer defendants should be ordered to issue the tenants rent-stabilized leases containing their apartments' correct legal regulated rents. *See* amended verified complaint, ¶¶ 268-283. Those declarations necessarily involve the application of RSL § 26-516 ("Enforcement and procedures") rather than RSL § 26-512 ("Stabilization provisions").

in each case any subsequent lawful increases and adjustments. Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter. (ii) As to complaints filed within ninety days of the initial registration of a housing accommodation, the legal regulated rent shall be deemed to be the rent charged on the date four years prior to the date of the initial registration of the housing accommodation (or, if the housing accommodation was subject to this chapter for less than four years, the initial legal regulated rent) plus in each case, any lawful increases and adjustments. Where the rent charged on the date four years prior to the date of the initial registration of the accommodation cannot be established, such rent shall be established by the [DHCR].

"Where the rent charged on the date four years prior to the date of initial registration of the housing accommodation cannot be established, such rent shall be established by the [DHCR] provided that where a rent is established based on rentals determined under the provisions of the local emergency housing rent control act such rent must be adjusted to account for no less than the minimum increases which would be permitted if the housing accommodation were covered under the provisions of this chapter. Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter.

"(1) The order of the [DHCR] shall apportion the owner's liability between or among two or more tenants found to have been overcharged by such owner during their particular tenancy of a unit.

"(2) Except as provided under clauses (i) and (ii) of this paragraph, a complaint under this subdivision shall be filed with the [DHCR] 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 an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed*. (i) *No penalty of three times the overcharge may be based upon an overcharge having occurred more than two years before the complaint is filed* or upon an overcharge which occurred prior to April first, nineteen hundred eighty-four. (ii) Any complaint based upon overcharges occurring prior to the date of filing of the initial rent registration as provided in section 26-517 of this chapter shall be filed within ninety days of the mailing of notice to the tenant of such registration. *This paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this subdivision*.

"(3) Any affected tenant shall be notified of and given an opportunity to join in any complaint filed by an officer or employee of the [DHCR].

"(4) *An owner found to have overcharged may be assessed the reasonable costs and attorney's fees of the proceeding and interest from the date of the overcharge* at the rate of interest payable on a judgment pursuant to section five thousand four of the civil practice law and rules.

"(5) The order of the [DHCR] awarding penalties may, upon the expiration of the period in which the owner may institute a proceeding pursuant to article seventy-

> eight of the civil practice law and rules, be filed and enforced by a tenant in the same manner as a judgment or not in excess of twenty percent thereof per month may be offset against any rent thereafter due the owner.
> "b. In addition to issuing the specific orders provided for by other provisions of this law, the [DHCR] shall be empowered to enforce this law and the code by issuing, upon notice and a reasonable opportunity for the affected party to be heard, such other orders as it may deem appropriate."
> RSL § 26-516 (a), (b) (emphasis added).

A cause of action for "rent overcharge" is a statutorily-created claim, not one derived from the common-law. RSL § 26-516 (a) plainly provides that court costs, attorney's fees, judgments for money damages, treble damages and related declaratory and/or injunctive relief (i.e., "other orders as may be deemed appropriate") are all items of *damages* to be assessed only after a landlord's *liability* for "rent overcharge" has been established. As a result, it was improper for tenants to have pled those items as separate causes of action in their amended complaint. This decision will only pass on the buyer defendants' liability for rent overcharges and will not discuss issues of damages.

RSL § 26-516 (a) defines a "rent overcharge" as a rental charge which is "above the rent authorized for a housing accommodation," which is, in turn, defined as "the rent indicated in the annual [DHCR] registration statement filed four years prior to the most recent registration statement, . . . plus in each case any subsequent lawful increases and adjustments." As a result, in order to establish whether a landlord has collected a rent overcharge, it is necessary to calculate three figures: 1) an apartment's "legal regulated rent"; 2) the amount(s) that landlords actually charged to the tenant/s; and 3) the amounts that the tenant/s actually paid to landlords. This decision will set forth those calculations with respect to each of the tenants' apartments insofar as they may be discerned from the evidence at hand.

The first figure to be calculated is each apartment's "legal regulated rent" which is normally determined by reference to the amount indicated in the annual DHCR registration

statement filed four years prior to the most recent registration statement. In *Regina Metropolitan*, the Court of Appeals confirmed the rule that "under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in *Roberts* overcharge cases, absent fraud." *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal,* 35 NY3d at 361, citing *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 (2009). In this case, the buyer defendants aver that the seller defendants improperly deregulated all of the subject apartments prior to the Court of Appeals 2009 *Roberts* decision in the mistaken belief that they were permitted to employ the RSC's "luxury deregulation" procedures to remove apartments from rent stabilization while the building was enrolled in the "J-51" tax abatement program. *See* notice of cross motion (motion sequence number 006), Katz aff, ¶¶ 1-11. The buyer defendants admit that the building was enrolled in the "J-51" real estate tax abatement program between 1998 and June 2015. *See* notice of cross motion (motion sequence number 006), Katz aff, ¶ 5. Therefore, the tenants' first cause of action constitutes a "*Roberts* overcharge" claim, and is governed by the four-year lookback rule (absent fraud).

However, earlier this year in *Montera v KMR Amsterdam LLC* (193 AD3d 102 [1st Dept 2021]), the Appellate Division, First Department, held that a landlord's incorrect "[a]ssumptions regarding the regulatory status of an apartment may amount to 'willful ignorance, which constitutes willful conduct, particularly since defendants are sophisticated property managers and owners.'" 193 AD3d at 107, quoting *Grady v Hessert Realty L.P.*, 178 AD3d 401, 405 (1st Dept 2019). The Court further observed 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. Owners should not be incentivized to remove regulated housing from the statutory scheme by simply

> ignoring the law. It is axiomatic that ignorance of the law is not a defense for the failure to comply with unambiguous legal obligations."
> 193 AD3d at 107, citing *Stauber v Antelo*, 163 AD2d 246, 249 (1st Dept 1990).

As a result, the First Department held that "the apartment history beyond the four-year lookback period may be reviewed to determine whether fraud occurred" in setting the legal regulated rent of "*Roberts* deregulated" apartments that were not subsequently re-registered as rent-stabilized units. *Montera v KMR Amsterdam LLC*, 193 AD3d at 109; *see also Casey v Whitehouse Estates, Inc.*, 197 AD3d 401 (1st Dept 2021). Here, none of the subject apartments were re-registered with the DHCR until August 2016, after the buyer defendants purchased the building, and seven years after *Roberts* was decided in 2009. *See* notice of cross motion (Katz aff), ¶ 9. This brings them within the ambit of the *Montera* holding and permits the court to consider evidence from before the four-year lookback date specified in RSL § 26-516 to determine whether fraud was involved in setting any unit's "legal regulated rent." In cases where such fraud exists, the *Matter of Regina Metro. Co., LLC* holding confirmed the rule (enunciated in prior Court of Appeals decisions) that a trial court reviewing a rent overcharge claim may set an apartment's "legal regulated rent" via the "default formula" described in RSC § 2522.6 (b) (3) (i). *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal,* 35 NY3d at 355. Tenants have requested that the court do so in this case.

The other two figures to calculate - the rental amounts that were actually charged and the amounts that the tenants actually paid - will be determined from the tenants' leases and from the parties' billing and payment records.

As the tenants' claims are governed by the pre-HSTPA version of RSL § 26-516, the amounts of rent overcharges are limited to the period of four years prior to the date their claims were filed. *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community*

Renewal, 35 NY3d at 374. Since this action was commenced on August 16, 2016, the "base date" for the tenants' overcharge claims recovery period was August 16, 2012. RSL § 26-516 (a) (2); RSC (9 NYCRR) § 2520.6 (f) (1).

This decision will review the overcharge allegations concerning: 1) apt. 22 (Mariana Dimitrova Alekna); 2) apt. 17 (Beatriz Da Costa); 3) apts. 16 & 28 (Samuel I. Gilchrist); 4) apt. 10 (Rachel Olson); 5) apt. 11 (Jose Santamaria); 6) apt. 27 (Laura Mahler); 7) apt. 30 (Kelly C. Holland and Max A. Holland); 8) apt. 20 (Michael G. Tive); 9) apt. 31 (John C. Cole and Mary Ellen Cole); 10) apt. 4 (Kristin Mannoni); 11) apt. 7 (Joseph Richard Debart, III, William Blair Debart, Alex Berrick and Ashan Singh); 12) apt. 23 (Rachel L. Perkins and Sara Muse); and 13) apt. 14 (Kyung Chan Zoh and Jihoe Koo). Another tenant, Lamar Small, is listed as a plaintiff on this caption of this action; however, tenants have not presented any information regarding him. As a result, the court deems that tenants have abandoned their causes of action as regards to Lamar Small.

1) Apt. 22 (Mariana Dimitrova Alekna)

Records that show that plaintiff Mariana Dimitrova Alekna (Alekna) first took possession of apartment 22 pursuant to a one-year, non-rent-stabilized lease that ran from July 1, 2012 through June 30, 2013 with a monthly rent of $3,300.00. *See* notice of motion (motion sequence number 006), exhibits 7-8 (NYSCEF Doc No 201). Alekna thereafter also signed one-year non-rent-stabilized renewal leases that ran from: 1) July 1, 2013 through June 30, 2014 with a monthly rent of $3,400.00; and 2) July 1, 2014 through June 30, 2015 with a monthly rent of $3,475.00; and 3) a two-year, non-rent-stabilized renewal lease that ran from July 1, 2015 through June 30, 2017 with monthly rents of $3,525.00 during the first year and $3,550.00 during the second year. *Id.* Her total actual rent charges during the August 2012 - August 2016

overcharge claims period were therefore $168,200.00, calculated as follows: 1) August 2012-June 2013 (11 mos.) x $3,300.00 ($36,300.00); 2) July 2013-June 2014 (12 mos.) x $3,400.00 ($40,800.00); 3) July 2014-June 2015 (12 mos.) x $3,475.00 ($41,700.00); 4) July 2015-June 2016 (12 mos.) x $3,525.00 ($42,300.00); and 5) July 2016-August 2016 (2 mos.) x $3,550.00 ($7,100.00).

The parties have not presented records or receipts of Alekna's rent payments during the August 2012 - August 2016 overcharge claims period. As a result, the court cannot now calculate Alekna's total actual rent payments during the claims period.

As was previously mentioned, the seller defendants' failure to promptly re-register apartment 22 with the DHCR as rent stabilized in compliance with the *Roberts* and *Gersten* holdings mandates "that the apartment history beyond the four-year lookback period may be reviewed to determine whether fraud occurred" in setting the unit's legal regulated rent. *Montera v KMR Amsterdam LLC*, 193 AD3d at 109. Apartment 22's individual DHCR registration history states that it was registered as rent stabilized in 1984 when the tenant of record (one Herbert Reid) paid a legal regulated rent of $650.00 per month. *See* notice of motion (motion sequence number 006), exhibit 9 (NYSCEF Doc No 201). The unit's DHCR history then indicates that the agency found no registrations between 1985 and 1991. *Id.* Apartment 22 was listed as "vacant" between 1992 and 1994 and was thereafter registered as rent stabilized again between 1995 and 1998. *Id.* The last tenant of record (one Robert Williams) was listed as paying a legal regulated rent of $774.00 per month through August 1999. *Id.* Apartment 22 was then listed as "permanently exempt" as of August 2, 1999 by reason of "high rent vacancy," and thereafter designated as an "exempt apartment - reg. not required" from 2000 until 2015. *Id.*

The buyer defendants have also produced a copy of a building-wide DHCR rent roll that indicates that apartment 22 was: 1) rent stabilized in April 1984 with a legal regulated rent of $650.00 per month; 2) unregistered from 1985 to 1991; 3) vacant from July 1992 through July 1994; 4) rent stabilized from 1995 through 1997 with a legal regulated rent of $600.00 per month; 5) rent stabilized in 1998 with a legal regulated rent of $774.00; 5) "permanently exempt" from rent regulation as of August 1999 by reason of "high rent vacancy"; 6) unregistered in 2000; 7) "permanently exempt" from rent regulation as of July 2001 by reason of "high rent vacancy"; 7) unregistered from 2002 through 2011. *See* notice of cross motion (motion sequence number 006), exhibit H. The rent roll also indicates that, on August 16, 2016, the buyer defendants filed an incomplete set of amended DHCR registration statements that retroactively re-registered apartment 22 as rent stabilized from 2012 forward, and recorded its monthly legal regulated rents as: 1) $3,500.00 in 2012; 2) $3,300.00 in 2013; 3) $3,366.00 in 2014 (although $3,400.00 per month was the amount the buyer defendants actually charged); 4) $3,475.00 in 2015; and 5) $3,509.75 in 2016 (although $3,525.00 per month was the amount the buyer defendants actually charged).[4] *Id.* The court notes that the buyer defendants' amended DHCR registrations did *not* cover the entire 1998 - 2015 period of the building's enrollment in the J-51 program. *See* notice of cross motion (motion sequence number 006), Katz aff, ¶ 5. The court also notes that the amended registrations for apartment 22 recorded the monthly rents contained in Alekna's four leases as being the unit's actual legal regulated rents (with an unexplained $50.00 discrepancy spread over two years).

[4] The DHCR rent roll also records the 2017 legal regulated rents for apartment 22 and the building's other units, which the buyers recorded on a DHCR registration filing dated August 10, 2017. *See* notice of cross motion (motion sequence number 006), exhibit H. However, as 2017 fell after the August 2012-August 2016 overcharge claims period at issue in this action, there is generally no need for the court to discuss 2017 rents in this decision.

Tenants argue that the seller defendants' act of neglecting to promptly re-register apartment 22 as rent stabilized with the DHCR (in compliance with *Roberts* and *Gersten*) was itself evidence of a "fraudulent scheme to deregulate" the unit. *See* plaintiffs' mem of law (motion sequence number 006) at 35-36. Tenants cite a number of older decisions to support this argument. However, the court finds that case law must be read in light of the First Department's more recent *Montera* holding, which primarily found that a landlord's failure to promptly reregister an improperly deregulated unit to comply with *Roberts* and *Gersten* is an act of "willful ignorance" that justifies examining an apartment's rent history beyond the statutory "look-back period" to determine whether there was fraud in setting the legal regulated rent. *Montera v KMR Amsterdam LLC*, 193 AD3d at 109.[5] Nevertheless, this does not end the inquiry.

Apartment 22's extended rent history, recounted above, contains ample evidence of fraud by both sets of defendants in the setting of the unit's legal regulated rent. The seller landlords registered the unit as rent stabilized in 1984; however, they left an unexplained seven-year gap in its registration history followed by a further three-year gap during which it was listed as vacant rather than rent stabilized. *See* notice of motion (motion sequence number 006), exhibit 9 (NYCSEF document number 201). The seller defendants then registered apartment 22 as rent stabilized again from 1995 through 1998, during which year it's legal regulated rent was recorded as $774.00 per month. *Id*. However, in 1999, the seller defendants simply raised that

[5] *Montera* also acknowledged that a landlord's failure to promptly reregister an improperly deregulated apartment as rent stabilized may constitute evidence of a "fraudulent scheme to deregulate;" however, that case involved a summary judgment motion made "on a pre-discovery record," and the court's decision did not involve an evidentiary ruling. *Montera v KMR Amsterdam LLC*, 193 AD3d at 109.

amount above the then-applicable $2,000.00 per month "deregulation threshold"[6] without explanation. *Id.* This minimum $1,226.00 disparity[7] cannot be ascribed to the 2% and 4% increases permitted by the Rent Guidelines Board Order (RGBO) that was in effect in 1999, or to the "vacancy" or "longevity" percentage increases then permitted by the RSC (NYC Admin. Code § 26-511 [c] [5a], repealed June 14, 2019). Nor does the registration history reflect that any individual apartment improvement (IAI) work was performed in apartment 22, or that any major capital improvement (MCI) work was performed in the building, at that time.[8] Instead, the foregoing demonstrates that the seller defendants simply ignored their obligation to register apartment 22 with the DHCR for a decade, and then, after three years of compliance, also ignored the agency's deregulation procedures and simply began collecting a market rate rent. The seller defendants also later ignored the governor's post-*Roberts* directive that landlords of buildings enrolled in the J-51 real estate tax abatement program must re-register all improperly

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[6] The provisions for "high income rent" deregulation, now repealed by the HSTPA, were set forth in New York City Administrative Code (NYC Admin Code) § 26-504.2. The version of the statute in effect on the August 16, 2012 base date provided that an apartment could be removed from the protection of the Rent Stabilization Law (RSL) once its legal regulated rent was had been lawfully raised above $2,500.00 per month, and the versions of the statute in effect before that set the deregulation threshold at $2,000.00 per month.

[7] The actual amount of the disparity cannot be determined since the parties have not produced a copy of the lease that was in effect for apartment 22 in 1999.

[8] The court notes that neither the buyer nor the seller defendants have raised any allegations about IAI or MCI work in their current papers. The court also notes that there is no credible evidence of such work in the record. Although Mann's former leasing agent, Henry Novoa (Novoa), claimed that Mann had performed substantial IAI work in a number of the building's apartments, he did not identify any particular units or specify how much Mann had spent on the alleged work. Instead, Novoa averred that the seller defendants engaged in an improbable practice whereby Mann's principal would personally loan money for IAI work to 207 Realty (in which he was also a principal), and 207 Realty would later repay the loans. *See* notice of cross motion (motion sequence number 006), exhibit D (Novoa deposition) at 39-40, 53-54. However, he did not produce records of either the purported loans or of the purported work expenditures. *Id.* In the absence of any such supporting evidence, the court disregards Novoa's allegations regarding IAI work as self-serving and not credible.

deregulated apartments. Novoa testified that Mann refused to reregister any of the building's apartments either: 1) after *Roberts* was decided in 2009 or *Gersten* was decided in 2011; 2) in 2013, when Mann became aware of the reregistration requirement as a result of its involvement in the litigation of *Altschuler v Jobman 478/480 LLC* (135 AD3d 439 [1st Dept 2016]), a case which involved *Roberts* deregulations in another Mann-managed property; or 3) in 2016, after Mann received notice of the DHCR's "J-51 reregistration initiative." *Id*., exhibit D (Novoa deposition), at 92-102.[9] This plainly demonstrates willful non-compliance by the seller defendants. The fact that the buyer defendants partially reregistered apartment 22 as after they acquired the building in 2016 did not convert the unit's improper market rate rent into a legal regulated rent. Instead, the court concludes that the rents contained on Alekna's leases are unreliable in that they never reflected the unit's actual legal regulated rent. As a result, other means must be used to determine apartment 22's correct legal regulated rent for the purposes of evaluating this overcharge claim.

Tenants argue that the court should employ the "default formula" set forth in RSC (9 NYCRR) § 2522.6 (b) (3) to establish that figure. *See* tenants' mem of law (motion sequence number 006) at 35-37. That formula fixes an apartment's legal regulated rent at "the lowest rent registered . . . for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment." As noted, the Court of Appeals has reiterated the rule that "[i]n fraud cases, this Court sanctioned use of the default formula to set the base date rent."

[9] In making these statements, Novoa recanted the statement that he had made in an earlier affidavit which alleged that Mann had deregulated the building's apartments in reliance on "the guidance offered in the 17 DHCR 1996 advisory opinion." *See* notice of cross motion (motion sequence number 006), exhibit D (Novoa deposition) at 66-68. He instead stated that the seller defendants were unaware of the building's continued enrollment in the J-51 program. *Id*. 105-107, 117-122.

Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal, 35 NY3d at 355. The buyer defendants nevertheless argue that "the default formula does not apply to apartments that were deregulated prior to *Roberts*." *See* buyer defendants' mem of law (motion sequence number 006) at 13-16. They specifically assert that "the four-year rule is applicable even if the base date rent was free-market and inflated, provided the deregulation: (i) predated *Roberts*; (ii) was not fraudulent; and (iii) was justifiably based on then-existing [DHCR] guidance." *Id*. at 15. However, although the buyer defendants' argument accurately states the *Regina Metropolitan* holding, it is inapplicable to the facts of this case. As was discussed, the court's review of apartment 22's extended rental history (permitted by the *Montera* holding) disclosed that it *was* fraudulently deregulated via an unexplained and inexplicable rent increase of at least $1,226.00 in 1999. There is no evidence to support the buyer defendants' self-serving assumption that the seller defendants deregulated the unit "justifiably based on then-existing DHCR guidance." Instead, as noted, the evidence indicates that the seller defendants simply ignored the high rent/vacancy deregulation procedures set forth in NYC Admin Code 26-504 (2)[10] and began collecting a market rate rent. As a result, apartment 22 was deregulated fraudulently rather than inadvertently, as is the case with most *Roberts* deregulations. Therefore, the rule that the buyer defendants cited from *Regina Metropolitan* is inapplicable, and the court rejects their argument.

[10] The RSC's now repealed "high rent/vacancy" deregulation procedures allowed landlords to impose incremental rent increases for, e.g., RGB Orders, IAIs, MCIs and apartment vacancy and/or "longevity," and to remove apartments from rent stabilization once their legal regulated rents had been properly increased past the $2,000.00 per month "deregulation threshold." NYC Admin Code 26-502 (2). Here, however, there is no evidence that the seller defendants abided by the RSC's deregulation procedures, and apartment 22's rent history indicates that they simply imposed a unilateral increase and thereafter leased the unit out at market rate rents.

The buyer defendants also argue that "failure to re-register does not warrant imposition of the default formula." *See* buyer defendants' mem of law (motion sequence number 006) at 16-22. This argument is predicated on the same fallacious claim that the seller defendants "simply failed to re-register after *Roberts,*" and that their failure to do so was inadvertent rather than fraudulent. *Id*. at 17. Accordingly, the court rejects it for the same reason. The seller defendants' failure to re-register apartment 22 before they sold the building in 2016 was an act of "willful ignorance" which permits examination of the unit's rental history beyond the four-year lookback period. *Montera v KMR Amsterdam*, 193 AD3d at 109; *see also Hess v EDR Assets LLC*, 2021 NY Slip Op 06920 (1st Dept, December 9, 2021). That examination disclosed the seller defendants' "fraudulent scheme to deregulate" apartment 22 by: 1) concealing the unit's true status and legal regulated rent by failing to register it for a decade; 2) the sudden, unexplained increase of the unit's 1998 rent stabilized rent of $774.00 per month by over $1,226.00 in 1999[11] in apparent violation of the RSC's deregulation procedures; and 3) their subsequent failure to promptly comply with the post-*Roberts* re-registration requirement and continued imposition of a market-rate rent.[12] They plainly did so in *defiance* of the regulations set forth in the RSC and not in *reliance* on the DHCR's interpretation of those regulations. For their part, the buyer defendants also willfully defied the *Roberts* holding by filing apartment re-

[11] As noted, the exact amount of the 1999 rent increase is unknown since the parties have not presented a copy of the lease in effect for apartment 22 during that year. However, it would clearly have to have exceeded the $2,000.00 per month deregulation threshold for the seller defendants to have registered the unit as "permanently exempt" from rent stabilization by reason of "high rent/vacancy" deregulation.

[12] As noted in n. 11, the exact amount of the 1999 rent increase is unknown, since the parties have not presented a copy of the lease in effect for apartment 22 during that year. However, it would clearly have to have exceeded the $2,000.00 per month deregulation threshold for the seller defendants to have registered the unit as "permanently exempt" from rent stabilization by reason of "high rent/vacancy" deregulation.

registrations that were (a) incomplete, and (b) contained inaccurate legal regulated rents which the buyer defendants simply transcribed from recent leases. They ignored the fact that apartment 22's purported 1999 deregulation was clearly improper, and that, consequently, it was extremely unlikely that the unit's legal regulated rent could have been lawfully increased above the deregulation threshold at the time Alekna took possession of it. Nor did the buyer defendants seek guidance from the DHCR regarding the unit's status or correct legal regulated rent. Instead, in 2016, they simply registered the amounts set forth on Alekna's leases, and thereby sought to legitimize them after the fact. This was a willful blindness to their duty, as landlord, to abide by the *Roberts* holding and the provisions of the RSL and RSC. Therefore, the court rejects the buyer defendants' contention that this case involved a "simple failure to re-register" as unfounded. Instead, the court concludes that using the "default formula" to set apartment 22's legal regulated rent is appropriate in light of defendants' fraud. However, it may not do so at this juncture.

Although tenants have established that using the default formula to set apartment 22's legal regulated rent is warranted by the facts of this case, they have not identified a rent for a "comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment." RSC 2522.6 (b) (3). Until they do so, the court in unable to set the unit's legal regulated rent for the purposes of resolving Alekna's overcharge claim. This omission, coupled with tenants' failure to produce records of Alekna's actual rent payments during the overcharge claims period, means that the court is currently unable to complete the calculations mandated by RSL 26-516 (a). Accordingly, although it appears that the seller defendants imposed a rent overcharge on Alekna between August 16, 2012 and August 16, 2016, and it is certain that the buyer defendants are liable for whatever overcharge amount that was collected, the court must

withhold its decision on so much of tenants' first cause of action as applies to Alekna, pending further submissions from the parties. Therefore, the court holds in abeyance its decision on so much of tenants' motion as pertains to that claim, and directs the parties to produce copies of Alekna's payment history during the overcharge claims period, and directs tenants to identify a "comparable" six-room apartment whose 2012 rent may be used in the "default formula" to establish apartment 22's legal regulated rent during the overcharge claims period.

2) Apt. 17 (Beatriz Da Costa)

Records show that plaintiff Beatriz Da Costa (Da Costa) took possession of apartment 17 pursuant to a 20-month, non-rent-stabilized lease that ran from October 15, 2014 through February 29, 2016 with a monthly rent of $4,100.00. *See* notice of motion (motion sequence number 006), exhibit 10 (NYSCEF document number 202). There are no records of her remaining in the unit after that date. As a result, Da Costa's total rent charges during the portion of the overcharge claims period during which she occupied apartment 17 amounted to $82,000.00 (20 mos. x $4,100.00).

The parties have not presented records of Da Costa's rent payments during the August 2012 - August 2016 overcharge claims period. As a result, the court cannot now calculate her total actual rent payments during the claims period.

Apartment 17's legal regulated rent during the overcharge claims period is likewise indeterminable. The unit's individual DHCR registration history states that the unit was rent controlled in 1984 with a legal regulated rent of $163.34 per month, and that it was thereafter registered as rent stabilized from 1986 through 2007, with the notation that the agency found no registration on file for the year 2003. *See* notice of motion (motion sequence number 006), exhibit 11 (NYSCEF document number 202). In 2008, apartment 17 was listed as "vacant" with

a legal regulated rent of $936.71 per month, and in 2009, it was listed as "exempt" from rent stabilization by reason of "high rent vacancy." *Id.* From 2010 to 2015, it was listed as an "exempt apartment – reg not required." *Id.* The DHCR registration history does not indicate that the seller defendants utilized any of the RSC's authorized rent increase methods[13] to justify doubling apartment 17's 1998 legal regulated rent of $936.71 per month to exceed the $2,000.00 deregulation threshold in 2009. *Id.*[14] As a result, the court concludes that they did so unilaterally.

The building-wide DHCR rent roll records that the seller defendants listed apartment 17 as: 1) rent controlled in 1984 with a monthly legal regulated rent of $163.34; 2) rent stabilized from 1985-1987 with a monthly legal regulated rent of $500.000; 3) rent stabilized from 1988-1989 with a monthly legal regulated rent of $545.00; 4) rent stabilized from 1990-1991with a monthly legal regulated rent of $594.02; 5) rent stabilized from 1992-1993 with a monthly legal regulated rent of $ 635.63; 6) rent stabilized in 1994 with a monthly legal regulated rent of $667.41; 7) rent stabilized from 1995-1999 with a monthly legal regulated rent of $714.13; 8) rent stabilized from 2000-2001 with a monthly legal regulated rent of $761.51; 9) rent stabilized in 2002 with a monthly legal regulated rent of $835.24; 10) unregistered in 2003; 11) rent stabilized from 2004-2005 with a monthly legal regulated rent of $879.54; 12) rent stabilized from 2006-2007 with a monthly legal regulated rent of $936.71; 13) vacant in 2008 with a monthly legal regulated rent of $936.71; 14) "permanently exempt" from rent regulation in 2009

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[13] I.e., RGBO percentage increases, IAI, MCI, vacancy or longevity increases. NYC Admin Code §§ 26-511 (c) (5-a), 511.1.

[14] The court further notes that *Roberts* made clear in 2009 that the RSC's high rent vacancy deregulation were not available while the building was enrolled in the J-51 real estate tax abatement program, and that the building was still enrolled in the program when Da Costa took possession of apartment 17 in 2014. *See* notice of cross motion (motion sequence number 006), Katz aff, ¶ 5.

by reason of "high rent vacancy"; and 15) unregistered in 2010 or 2011. *See* notice of cross motion (motion sequence number 006), exhibit H. This document also offers no evidence of how the seller defendants were able to legally increase apartment 17's legal regulated rent by over $1,000.00 in 2009. The rent roll records that the buyer defendants filed amended DHCR registrations for apartment 17 on August 16, 2016 which retroactively registered the unit as rent stabilized from 2012-2016 with monthly legal regulated rents of: 1) $3,500.00 in 2012; 2) $3,600.00 in 2013; 3) $3,744.00 in 2014 (although $3,750.00 per month was the amount actually charged); 4) $4,100.00 in 2015; and 5) vacant in 2016 (with the same legal regulated rent of $4,100.00 per month). *Id*. The document thus shows that the buyer defendants' amended DHCR re-registrations for apartment 17 were incomplete, and that they sought no guidance from the agency as to the unit's correct legal regulated rent, but simply recorded the amounts set forth on Da Costa's lease (and those of the tenants who occupied the unit immediately prior to her) as being the legal regulated rents.

The foregoing demonstrates that both sets of defendants engaged in "fraudulent schemes to deregulate" apartment 17. With no evidence that the unit's 1999 rent increase comported with the RSC, the court finds that the seller defendants imposed it unilaterally and willfully, as they did with apartment 22. As a result, the court also finds that the 1999 rent did not represent apartment 17's correct legal regulated rent. Further, since deregulation was unavailable in 1999 as a result of the building's enrollment in the J-51 program, and it was therefore unlikely that apartment 17's monthly legal regulated rent could have been lawfully increased by over $1,000.00 to exceed the deregulation threshold, the buyer defendants were not justified to presume that a market rate rent was proper for the unit. The buyer defendants were also unjustified in submitting an incomplete apartment re-registration to the DHCR that sought to

retroactively legitimize five years worth of market rate rents as the unit's legal regulated rents. The court deems this to be a willful and self-serving attempt by the buyer defendants to avoid their obligation to comply with the RSL and RSC.

Accordingly, for the same reasons discussed earlier, the court concludes that the tenants' request to use the "default formula" to set apartment 17's rent during the rent overcharge claims period is proper and should be granted. However, since the tenants have not identified a "comparable" six-room apartment whose 2014 rent may be used in the "default formula" to set apartment 17's legal regulated rent, the court cannot complete its calculations of Da Costa's rent overcharge claim at this juncture. Therefore, the court directs the parties to make the same evidentiary submissions with respect to apartment 17 as it did with respect to apartment 22.

3) Apts. 16 & 28 (Samuel I. Gilchrist)

Records show that plaintiff Samuel I. Gilchrist (Gilchrist) first took possession of apartment 16 pursuant to a one-year, non-rent-stabilized lease that ran from August 20, 2010 through August 31, 2011 with a monthly rent of $2,850.00. *See* notice of motion (motion sequence number 006), exhibits 12-13 (NYSCEF document number 202). He thereafter executed two one-year, non-rent-stabilized renewal leases for the unit with respective monthly rents of $3,200.00 (September 1, 2011-August 31, 2012) and $3,350.00 (September 1, 2012-August 31, 2013), and a final six-month, non-rent-stabilized renewal lease running (September 1, 2013 through February 28, 2014) with a monthly rent of $3,450.00. *Id.* There is then a gap in time during which Gilchrist evidently moved apartments, and he later executed a one-year, non-rent-stabilized lease for apartment 28 that ran from September 1, 2015 through August 31, 2016 with a monthly rent of $4,400.00. *See* notice of cross motion (motion sequence number 006), exhibit I. During the overcharge claims period of August 16, 2012 - August 16, 2016, Gilchrist

thus appears to have been charged a total of $64,100.00 in rent for apartment 16, calculated as follows: 1) August 2012 (1 mo.) x $3,200.00 ($3,200.00); 2) September 2012-August 2013 (12 mos.) x $3,350.00 ($40,200.00); 3) September 2013-February 2014 (6 mos.) x $3,450.00 ($20,700.00). He also appears to have been charged a total of $52,800.00 in rent for apartment 28 during the overcharge claims period (12 mos. x $4,400.00). Thus, Gilchrist's total rent charges during the overcharge claims period amount to $116,900.00.

The parties have not presented records, receipts etc. of Gilchrist's actual rent payments for either apartment during the overcharge claims period. Therefore, the court cannot now calculate those amounts.

Apartment 16's individual DHCR registration history shows that the unit was registered as rent controlled from 1984 until 1991, as rent stabilized from 1992 until 2001, as "exempt" in 2002 by reason of "high rent vacancy," and as an "exempt apartment – reg not required" from 2003 through 2011. *See* notice of motion (motion sequence number 006), exhibit 14 (NYSCEF document number 202). Apartment 16's last rent-stabilized legal regulated rent was registered as $745.56 per month in 2001. *Id.* The registration history does not indicate that the seller defendants then used any of the RSC's proscribed rent increase mechanisms to bring apartment 16's rent above the $2,000.00 per month deregulation threshold in 2002. *Id.*

The DHCR rent roll records that the seller defendants listed apartment 16 as: 1) rent controlled in 1984 with a monthly legal regulated rent of $180.00; 2) unregistered from 1985-1991; 3) rent stabilized from 1992-1998 with a monthly legal regulated rent of $700.00; 4) rent stabilized in 1999 with a monthly legal regulated rent of $728.00; 5) rent stabilized from 2000-2001 with a monthly legal regulated rent of $745.56; 6) "permanently exempt" from rent regulation in 2002 by reason of "high rent vacancy" with a monthly legal regulated rent of

$2,600.00; and 7) unregistered from 2003-2011. *See* notice of cross motion (motion sequence number 006), exhibit H. The rent roll also indicates that the buyer defendants filed amended DHCR registration statements for apartment 16 on August 16, 2016 which retroactively registered the unit as rent stabilized from 2012 forward, and records the unit's monthly legal regulated rents as: 1) $3,350.00 in 2012-2013; 2) $3,450.00 in 2014; 3) $3,700.00 in 2015; and 4) unregistered in 2016 as the unit was "permanently exempt" from rent regulation by reason of "high rent vacancy" (although the buyer defendants again registered the unit as rent stabilized in 2017). *Id*. The court notes that the 2012-2014 amended registrations list the monthly rent amounts on Gilchrist's four leases as apartment 16's legal regulated rents.

The foregoing records contain no evidence to justify the $1,254.44 discrepancy between apartment 16's 2001 and 2002 rents. They do not indicate that the seller defendants employed any of the available RSC rent increase mechanisms to effect such a large increase. As a result, the court concludes that the seller defendants imposed it unilaterally and in violation of the RSC. Given that luxury deregulation was unavailable in 2002 due to the building's enrollment in the J-51 program, there were no reasonable grounds for the buyer defendants to presume that apartment 16 was a market rate unit when Gilchrist took possession of it in 2010. Accordingly, the court also concludes that none of apartment 16's leased rents after 2001 reflect the unit's correct legal regulated rent.[15]

Apartment 28's DHCR individual registration history shows that: 1) the unit was registered as rent stabilized in 1984 with a legal regulated rent of $625.00 per month; 2) no registrations were found from 1985 through 1993; 3) the unit was again registered as rent

[15] The court again notes that the RSC's deregulation procedures were unavailable to the seller defendants in 2002 due to the building's enrollment in the J-51 real estate tax abatement program then and in 2010, when Gilchrist took possession of apartment 16. *See* n 11.

stabilized from 1994 through 1999 (with a legal regulated rent of $750.00 per month); 4) it was listed as "permanently exempt" in 2000 by reason of "substantial rehabilitation"; and 5) it was thereafter listed as an "exempt apartment – reg not required" from 2001 through 2015. *See* notice of motion (motion sequence number 006), exhibit 16 (NYSCEF document number 202). There is a $1,250.00 difference between apartment 28's 1999 legal regulated rent of $750.00 per month and the then-applicable $2,000.00 per month deregulation threshold. In order for the seller defendants to have raised the unit's rent above the deregulation threshold via the 1/40th permanent rent increase permitted in (the then-applicable version of) RSC § 2522.4, they would have had to perform a minimum of $50,000.00 worth of qualifying IAI work in the unit. Tenants assert that there is insufficient evidence that they did so. *See* plaintiffs' mem of law (motion sequence number 006) at 38. Based on the record before it, the court agrees. Without any documentary proof, the court cannot credit Navoa's vague, non-specific and unsupported claims regarding the seller defendants' alleged MCI and/or IAI work in the building. This absence of proof makes it possible that no qualifying IAI work was performed in apartment 28, which would result in the unit's legal regulated rent remaining below the deregulation threshold in 2000, and for some time thereafter. It is conceivable that apartment 28 retained its rent stabilized status when the building exited the J-51 program in 2015. The evidence now before the court does not permit a finding either way.

The DHCR rent roll is no more helpful. It indicates that the seller defendants listed apartment 28 as: 1) rent stabilized in 1984 with a monthly legal regulated rent of $625.00; 2) unregistered from 1985-1993; 3) rent stabilized again from 1994-1998 with a monthly legal regulated rent of $625.00; 4) rent stabilized in 1999 with a monthly legal regulated rent of $750.00; 5) "permanently exempt" from rent regulation in 2000 by reason of "substantial

rehabilitation"; and 6) unregistered from 2001-2012. *See* notice of cross motion (motion sequence number 006), exhibit H. The DHCR rent roll also indicates that the buyer defendants filed amended registration statements for apartment 28 on August 16, 2016 which retroactively re-registered the unit as rent stabilized from 2013 forward, and recorded its monthly legal regulated rents as: 1) $3,460.72 in 2013 (although $3,520.10 per month was the amount actually charged); 2) $4,200.00 in 2014; 3) $4,250.00 in 2015; and 4) "permanently exempt" from rent regulation in 2016 by reason of "high rent vacancy" (although the buyer defendants registered apartment 28 as rent stabilized again in 2017 with a legal regulated rent of $4,475.00 per month). *Id*. As noted, "substantial rehabilitation" via IAI work is certainly a permissible method of raising a rent stabilized apartment's legal regulated rent. NYC Admin Code §§ 26-511 (c) (5-a), 511.1. As was also noted, there is no evidence that the seller defendants ever performed such work in apartment 28, and it is possible that the unit retained rent stabilized status when the building exited the J-51 program in 2015. It is, however, clear that the buyer defendants did not investigate that matter, but instead simply submitted an incomplete amended apartment registration to the DHCR in 2016 that sought to retroactively legitimize all of the rents contained on apartment 28's post-2013 leases. Without a further factual inquiry, the court cannot determine whether they were warranted to do so. At this juncture, the court certainly cannot ascertain the unit's legal regulated rent when Gilchrist took possession of it in September 2015. As a result, it must employ other means to set that figure.

The buyer defendants nevertheless argue that Gilchrist[16] is not entitled to a rent-stabilized lease, "[b]ecause the [2015-2016] lease was executed after the J-51 benefits expired and the

[16] The buyer defendants make the same arguments regarding the apartments of plaintiff tenants Kelly and Max Holland (30), Rachel Olson (10) and roommates William deBart, Joseph deBart, Ashan Singh and Alex Berrick (7), all of which will be discussed *infra*.

[$4,400.00] rent was above the deregulation threshold, [and] the apartment was no longer subject to rent stabilization." *See* buyer defendants' mem of law (motion sequence number 006) at 29-30. As just noted, that argument hinges on facts that have not yet been established. Should the evidence indicate that the seller defendants did not perform at least $50,000.00 worth of IAI work in apartment 28 between 1999 and 2000, then the unit's legal regulated rent would have remained somewhere beneath the deregulation threshold in 2000 and afterwards.[17] Consequently, when the building exited the J-51 program in 2016, it is possible that apartment 28 reverted to its previous rent stabilized status. Therefore, the court rejects the buyer defendants' argument with leave to renew it after all the relevant evidence is presented.

At this juncture, the court finds that the tenants' request to use the "default formula" to set the rents for apartments 16 and 28 during the overcharge claims period is proper, and that it should be granted. However, since the tenants have not identified comparable six- and five-room apartments whose 2012 and 2015 rents could be used to set the units' respective legal regulated rents via the "default formula," the court cannot yet complete its calculations of Gilchrist's rent overcharge claim. Therefore, the court directs the parties to make the same evidentiary submissions with respect to apartments 16 and 28 as were discussed above.

4) Apt. 10 (Rachel Olson)

Records show that plaintiff Rachel Olson (Olson) first took possession of apartment 10 with two non-plaintiff roommates pursuant to a one-year, non-rent-stabilized lease that ran from August 1, 2011 through July 31, 2012 with a monthly rent of $3,300.00. *See* notice of motion

[17] The court repeats the earlier observation that deregulation was unavailable to the seller defendants in 2000, since the building was enrolled in the J-51-real estate tax abatement program from 1998 through 2015. *See* notice of cross motion (motion sequence number 006), Katz aff, ¶ 5.

(motion sequence number 006), exhibit 19 (NYSCEF document numbers 202, 203). Olson and successive different roommates thereafter also signed one-year, non-rent-stabilized renewal leases for the unit that ran from: 1) August 1, 2012 through July 31, 2013 with a monthly rent of $3,350.00; 2) August 1, 2013 through July 31, 2014 with a monthly rent of $3,500.00; 3) August 1, 2014 through July 31, 2015 with a monthly rent of $3,650.00; and 4) August 1, 2015 through July 31, 2016 with a monthly rent of $3,700.00. *Id.*, exhibits 20-23. It appears that Olson and her roommates were charged a total of at least $170,400.00 in rent during the August 16, 2012 - August 16, 2016 overcharge claims period, calculated as follows: 1) August 2012-July 2013 (12 mos.) x $3,350.00 ($40,200.00); 2) August 2013-July 2014 (12 mos.) x $3,500.00 ($42,000.00); 3) August 2014-July 2015 (12 mos.) x $3,650.00 ($43,800.00); 4) August 2015-July 2016 (12 mos.) x $3,700.00 ($44,400.00); and 5) August 2016 (1 mo.) at an indeterminate rent. *Id.*

The parties have not presented records of the actual rent payments that Olson and her roommates made during the overcharge claims period. As a result, the court cannot now calculate those amounts.

The parties have not presented a copy of apartment 10's individual DHCR registration history either. However, the DHCR rent roll that shows records that the unit was: 1) rent controlled in April 1984 with a legal regulated rent of $126.27 per month; 2) rent stabilized in July 1994 with a legal regulated rent of $126.27 per month; 3) rent stabilized in May 1997 with a legal regulated rent of $126.27; 4) rent stabilized but "vacancy decontrolled" in February 1998 with a legal regulated rent of $2,100.00 per month; 5) "permanently exempt" from rent regulation in August 1998 with the same legal regulated rent of $2,100.00 per month; and 6) again "permanently exempt" from rent regulation in July 2001 with a legal regulated rent of $2,675.00. *See* notice of cross motion (motion sequence number 006), exhibit H. The rent roll

also indicates that, on August 16, 2016, the buyer defendants filed amended DHCR registration statements that retroactively re-registered apartment 10 as rent stabilized from 2011 onward, and recorded the unit's legal regulated rents as: 1) $3,300.00 per month in 2011; 2) $3,350.00 per month in 2012; 3) $3,417.00 per month in 2013 (although $3,500.00 per month was actually paid); 4) $3,553.68 per month in 2014 (although $3,650.00 per month was actually paid); 5) "permanently exempt" again in August 2016 as "J-51 expired"; and 6) rent stabilized again in 2017 with a legal regulated rent of $3,553.68 per month. *Id.* The foregoing registration history makes two things clear. The first is that the seller defendants effected the 1998 "vacancy decontrol" of apartment 10 via an unexplained rent increase of $2,000.00 over the unit's 1997 rent of $126.27 per month. The second is that the buyer defendants' 2016 reregistration of apartment 10 recorded the unit's legal regulated rents from 2011 forward as being equal to the amounts of Olson's leases (with miniscule variations). The court further observes that the seller defendants' purported 1998 "vacancy decontrol" was impermissible given the building's enrollment in the J-51 program between 1998 and 2015, and that the buyer defendants' 2016 re-registration was improper, since *Roberts* mandated that such re-registrations should cover the entire period of a building's J-51 enrollment. The court finds that both sets of defendants acted with the intent to conceal apartment 10's true rent regulation status and correct legal regulated rent. As their actions plainly constituted a "fraudulent scheme to deregulate" the unit, the court further finds that none of the rents indicated on the amended DHCR rent roll reflect the unit's accurate legal regulated rent. As a result, the court concludes that the "default formula" should be used to set that figure and grants so much of the tenants' motion as seeks that relief. However, as is unfortunately the case throughout this motion, the tenants have not identified a comparable apartment whose 2012 rent could be used to set apartment 10's legal regulated rent

via the "default formula." Accordingly, the court cannot complete its calculations of Olson's rent overcharge claim at this juncture.

The buyer defendants also assert that Olson is not entitled to a rent-stabilized lease given that (a) her 2015-2016 renewal lease is deemed to be a "vacancy lease" since it added a new roommate as tenant of record, and (b) that "vacancy" occurred after the building had exited the J-51 program, and therefore had the effect of removing apartment 10's rent stabilized status. *See* defendants' mem of law (motion sequence number 006) at 30-31. This is a plausible argument; however, it presumes the existence of facts that have yet to be proven. It is possible that apartment 10's actual legal regulated rent was sufficiently low that, after the building exited the J-51 program, a vacancy increase would not have been enough to raise that legal regulated rent above the deregulation threshold. The court cannot determine the matter from the facts at hand. Further, the buyer defendants' argument is clearly directed at the tenants' third cause of action for a declaratory judgment regarding the apartments' rent regulated status, rather than toward their first cause of action for rent overcharge. As a result, the court will not consider the buyer defendants' argument in this decision.

Instead, for the foregoing reasons, the court directs the parties to make the same evidentiary submissions regarding apartment 10 as were discussed earlier in this decision (i.e., records of Olson's payment history and identification of a comparable apartment)[18].

5) Apts. 11 & 18 (Jose Santamaria)

Records show that plaintiff Jose Santamaria (Santamaria) first took possession of apartment 11 pursuant to a one-year, non-rent-stabilized lease that ran from August 15, 2009

[18] As the parties did not submit a copy of apartment 10's individual DHCR registration history, which indicates the number of rooms in a given unit, it is incumbent on them to locate this information when they identify a "comparable" unit to apartment 10.

through August 31, 2010 with a monthly rent of $3,450.00. *See* notice of motion (motion sequence number 006), exhibit 26 (NYSCEF document number 203). The parties have not presented copies of any renewal leases that Santamaria may have signed for apartment 11. Tenants argue that apartment 11's DHCR registration history shows that the seller defendants improperly deregulated the unit in 2006-2007 when the building was enrolled in the J-51 program, and that, as a result, the unit was actually rent stabilized, and the seller defendants should have given Santamaria a rent stabilized lease. *Id*., Sachar affirmation, ¶¶ 60-66; exhibit 27. However, as Santamaria's tenancy in apartment 11 fell outside of the August 16, 2012 - August 16, 2016 overcharge claims period, the court declines to consider this argument.

Records also show that Santamaria took possession of apartment 18 pursuant to a one-year, non-rent-stabilized lease that ran from September 1, 2014 through August 31, 2015 with a monthly rent of $4,600.00. *See* notice of motion (motion sequence number 006), exhibit 28 (NYSCEF document number 203). Santamaria thereafter signed a one-year non-rent-stabilized renewal lease for the unit that ran from September 1, 2015 through August 31, 2016 with the same $4,600.00 monthly rent. *Id*, exhibit 29. Thus, it appears that Santamaria was charged a total of $110,400.00 in rent during the overcharge claims period, calculated as follows: 1) September 2014 - August 2015 (12 mos.) x $4,600.00 ($55,200.00); and 2) September 2015 - August 2016 (12 mos.) x $4,600.00 ($55,200.00).

The parties have not presented records of Santamaria's actual rent payments for apartment 18 during the overcharge claims period. As a result, the court cannot now calculate those amounts or compare them to the charged amounts.

Apartment 18's individual DHCR registration history shows that the unit was listed as: 1) rent controlled from 1984 through 1993; 2) rent stabilized from 1994 through 1996, during

which year its legal regulated rent was recorded as $339.78 per month; 3) not registered from 1997 through 2000; 4) rent stabilized in 2001 with a legal regulated rent of $3,075.00 per month (with the notation "deregulated", but no reason given for the purported deregulation); 5) not registered from 2002 through 2015. *See* notice of motion (motion sequence number 006), exhibit 30 (NYSCEF document number 203). The DHCR rent roll states that apartment 18 was: 1) rent controlled in 1984 with a legal regulated rent of $650.00 per month (and an evidently commercial tenant called "Apex Beauty School"); 2) unregistered from 1985-1993; 3) rent stabilized from 1994-1996 with a legal regulated rent of $339.78 per month; and 4) unregistered from 1997-2011 (although the rent roll's "initial registration" page also states that apartment was "vacancy decontrolled" from rent stabilized status in April 2001, with a legal regulated rent of $3,075.00 per month). *See* notice of cross motion (motion sequence number 006), exhibit H. The DHCR rent roll also states that the buyer defendants filed amended DHCR registration statements for apartment 18 on August 16, 2016 that retroactively re-registered the unit as rent stabilized from 2012 forward, and recorded its monthly legal regulated rents as: 1) $3,800.00 in 2011-2012; 2) $3,942.50 in 2012-2013; 3) $4,021.35 in 2013-2014; 4) $4,600.00 in 2014-2015; and 5) $4,600.00 in 2015-2016. *Id.* The amended DHCR registrations did not cover the entire period of the building's 1998 and 2015 enrollment in the J-51 program.

The court finds that these documents demonstrate "fraudulent schemes to deregulate" apartment 18 by both the seller and buyer defendants. The former registered apartment 18 as rent controlled in 1984, as rent stabilized from 1994-1997, and as "vacancy decontrolled" from rent stabilized status in 2001. However, in most years, the seller defendants simply neglected to register the unit. They also neglected to justify the alleged "vacancy decontrol" in 2001 which purportedly raised the unit's last rent-stabilized legal regulated rent of $339.78 per month (1997)

to $3,075.00. The DHCR history indicates that apartment 18 was already rent stabilized at the time, rather than rent controlled. Thus, the provision of the RSC that allows a landlord and tenant to negotiate the monthly rent for an apartment's first rent stabilized lease was inapplicable. RSC § 2521.1 (a) (1). It is evident that the seller defendants willfully attempted to conceal apartment 18's true rent regulated status and correct legal regulated rent - they appear to have chosen whichever status and rent suited them in any given year (and to have abandoned their registration obligations entirely in other years). Similarly, the buyer defendants willfully filed an incomplete amended re-registration statement in 2016 which (a) ignored the clear impropriety of apartment 18's purported 2001 "vacancy decontrol,"[19] and (b) simply recorded whichever rents were set forth on the unit's 2011-2016 leases as its correct legal regulated rents. The court concludes that none of the foregoing documents may be used to establish apartment 18's correct legal regulated rent as they are all clearly tainted by fraud. Instead, the court finds that the "default formula" should be used to set that figure, and grants so much of the tenants' motion as seeks that relief. However, the tenants have not identified a comparable apartment whose 2014 rent could be used to set apartment 18's legal regulated rent via the "default formula." Accordingly, the court cannot complete its calculations of Santamaria's rent overcharge claim at this juncture.

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[19] The court notes, again, that the building was enrolled in the J-51 program between 1998 and 2015. *See* notice of cross motion (motion sequence number 006), Katz aff, ¶ 5.
The fact that apartment 18 was rent controlled at the time the building entered the program also establishes that "vacancy decontrol" was unavailable for both the duration of the building's J-51 enrollment *and* after its exit from the program. *See Matter of RAM I LLC v New York State Div. of Hous. & Community Renewal*, 123 AD3d 102 (1st Dept 2014), *see also Matter of Tribeca Equity Partners, L.P. v New York State Div. of Hous. & Community Renewal*, 49 Misc 3d 502 (Sup Ct, NY County 2015), *affd* 144 AD3d 554 (1st Dept 2016). Thus, the purported "vacancy deregulation" was clearly improper.

As a result, the court directs the parties to make the same evidentiary submissions regarding apartment 10 as were discussed earlier in this decision (i.e., records of Santamaria's payment history and identification of a comparable eight-room apartment to unit 18).

6) Apt. 27 (Laura Mahler)

Records show that plaintiff Laura Mahler (Mahler) took possession of apartment 27 pursuant to a one-year, non-rent-stabilized lease that ran from October 15, 2014 through February 29, 2016 with a monthly rent of $4,525.00. *See* notice of motion (motion sequence number 006), exhibit 31 (NYSCEF document number 204). They also show that Mahler requested a renewal lease for the unit in 2016, but that the seller defendants declined her request. *Id*., exhibit 32. As a result, it appears that Mahler was charged a total of $74,662.50 in rent during the overcharge claims period calculated as follows: October 2014-February 2016 (16 ½ mos.) x $4,525.00 ($74,662.50).

The parties have not presented a copy of Mahler's payment history in the building. As a result, the court cannot determine the amount of rent she actually paid during the overcharge claims period or compare that figure to the amount she was charged.

Apartment 27's individual DHCR registration history records the unit as: 1) rent controlled from 1984 through 1991; 2) rent stabilized in 1992 with a legal regulated rent of $650.00 per month; 3) not registered in 1993; 4) rent stabilized again from 1994 through 1998 with a legal regulated rent of $165.00 per month; and 5) not registered from 1999 through 2015. *See* notice of motion (motion sequence number 006), exhibit 33 (NYSCEF document number 204). The DHCR rent roll states that the unit was: 1) rent controlled in 1984 with a monthly legal regulated rent of $165.00; 2) unregistered from 1985-1991; 3) rent stabilized in 1992 with a monthly legal regulated rent of $650.00; 4) unregistered in 1993; 5) rent stabilized from 1994-

1998 with a monthly legal regulated rent of $165.00; and 4) unregistered from 1999-2011. *See* notice of cross motion (motion sequence number 006), exhibit H. The rent roll also states that the buyer defendants filed amended DHCR registration statements for apartment 27 on August 16, 2016 that re-registered the unit as rent stabilized from 2011 onward, and listed its monthly legal regulated rents as: 1) $3,400.00 in 2011-2012; 2) $3,490.00 in 2012-2013; 3) $3,559.60 in 2013-2014; and 4) $4209.46 in 2014-2016 (but $4,450.00 being the monthly amount that was actually charged). *Id*. The court finds that the registration history shows that both sets of defendants engaged in "fraudulent schemes to deregulate" apartment 27.

The seller defendants registered the unit's legal regulated rents inconsistently or not at all, and raised and lowered its legal regulated rent without explanation or justification. The buyer defendants filed an incomplete re-registration that ignored the obvious improprieties in the unit's registration record and simply listed the rent amounts set forth on the unit's leases from 2011 forward as being its correct legal regulated rents. They had no justification for doing so. Accordingly, the court finds that the "default formula" should be used to set apartment 27's legal regulated rent, and grants so much of the tenants' motion as seeks that relief. However, the tenants have not identified a comparable six-room apartment whose 2014 rent could be used to set apartment 27's legal regulated rent via the "default formula." As a result, the court cannot complete its calculations of Mahler's rent overcharge claim at this juncture.

The court thus directs the parties to make the same evidentiary submissions regarding apartment 27 as were discussed earlier in this decision (i.e., records of Mahler's payment history and identification of a comparable six-room apartment).

7) Apt. 30 (Kelly C. Holland and Max A. Holland)

Records show that plaintiffs Kelly C. Holland and Max A. Holland (the Hollands) took possession of apartment 30 pursuant to the terms of a one-year, non-rent-stabilized lease that ran from August 15, 2015 to August 31, 2016 with a monthly rent of $4,900.00. *See* notice of motion (motion sequence number 006), exhibit 48 (NYSCEF document number 205). They evidently did not sign a renewal lease for the unit. As a result, it appears that the Hollands were charged a total of $61,250.00 in rent during the overcharge claims period (12 ½ mos. x $4,900.00). The parties have not presented a copy of the Hollands' payment history, however. Thus, the court cannot calculate that figure.

Apartment 30's individual DHCR registration history states that the unit was: 1) rent controlled from 1984-1993 with a monthly legal regulated rent of $301.60; 2) rent stabilized in 1994-1995 with a monthly legal regulated rent of $301.60; 3) rent stabilized in 1996 with a monthly legal regulated rent of $302.00; and 4) unregistered from 1997-2015. *See* notice of motion (motion sequence number 006), exhibit 49 (NYSCEF document number 205). The building-wide DHCR rent roll states that the unit was: 1) rent controlled in 1984 with a monthly legal regulated rent of $301.60; 2) unregistered from 1985-1993; 3) rent stabilized in 1994-1995 with a monthly legal regulated rent of $301.60; 4) rent stabilized in 1996 with a monthly legal regulated rent of $302.00; and 5) unregistered from 1997-2014. *See* notice of cross motion (motion sequence number 006), exhibit H. The DHCR rent roll also states that the buyer defendants filed amended registration statements for apartment 30 on August 16, 2016 that retroactively designated the unit as rent stabilized from 2015 forward, and recorded its monthly legal regulated rents as: 1) $4,900.00 in 2015; and 2) "permanently exempt" from rent regulation in 2016 by reason of "high rent vacancy" (although the buyer defendants registered the unit as rent stabilized again in 2017 with a monthly legal regulated rent of $4,900.00). *Id.*

In addition to the DHCR documents, the buyer defendants present a copy of a "confidential surrender agreement" that was purportedly executed by Mann with apartment 30's previous long-term tenant, one Eugenia Mitchell (Mitchell). *Id.*, exhibit P. The document bears Mitchell's signature (dated December 6, 2012) but was not signed by Mann. *Id.* It recites that Mitchell was the "sole rent controlled tenant" of apartment 30, and purports to memorialize an agreement to surrender the unit by February 28, 2013 for a "vacate payment" of $126,500.00. *Id.* The buyer defendants also present a copy of the lease executed by 207 Realty with apartment 30's next tenant, one Brandon H. Berkis (Berkis) and his roommates, which ran from August 1, 2013 through July 31, 2014 with a monthly rent of $4,800.00. *Id.*, exhibit Q.

The buyer defendants argue that the Hollands are not entitled to a rent stabilized lease[20] as their tenancy in apartment 30 commenced after the building had exited the J-51 program, and the "confidential surrender agreement" had allowed the seller defendants to previously execute a lease with Berkis with a "first rent" that was above the deregulation threshold. *See* defendants' mem of law (motion sequence number 006) at 27-29. However, the documents before the court do not support these allegations. The statement in the "confidential surrender agreement" that Mitchell was the unit's "sole rent controlled tenant" is at odds with the DHCR filings which both indicate that apartment 30 was actually rent stabilized from 1994 forward. Therefore, the court cannot find that the document is proof that apartment 30 was rent controlled. Further, if the unit was, in fact, rent controlled when the building entered the J-51 real estate tax abatement program

[20] The court notes that this argument also appears to be directed to the tenants' second cause of action, since that cause of action requests an order directing the buyer defendants to issue rent stabilized leases. *See* notice of cross motion (motion sequence number 006), exhibit A (first amended verified complaint) ¶¶ 274-283. To the extent that it is directed at that cause of action, the court does not consider it in this decision.

in 1998, the Rent Control Law (RCL)[21] provided that it would be exempt from "luxury deregulation" when the building exited the program in 2015. *See Matter of RAM I LLC v New York State Div. of Hous. & Community Renewal*, 123 AD3d at 106-107. Thus, the seller defendants would not have been entitled to raise the unit's rent above the deregulation threshold solely as a result of Michell's vacating it. Finally, the documents before the court do not indicate that Berkis's subsequent lease should be deemed to be a "first lease" marking the beginning of a rent stabilized tenancy after the unit's exit from rent control. RSL § 26-512 (b) (2). That lease specifically stated that it was *not* rent stabilized, and it contained none of the required decontrol and stabilization notices. RSC § 2531.8. As a result, the court rejects the buyer defendants' argument that that lease was a "first lease," and that the failure to challenge it in a fair market rent appeal within four-years precludes any subsequent challenge to the legitimacy of its $4,800.00 rent. *See* defendants' mem of law (motion sequence number 006) at 27-29. Instead, the court concludes that the seller defendants fraudulently used their buyout of Mitchell's tenancy as a pretext to improperly deregulate apartment 30 at a time and under circumstances when that was not permitted.

The court also finds that both the seller and the buyer defendants engaged in other "fraudulent schemes to deregulate" apartment 30. The seller defendants willfully concealed the unit's regulated status and its legal regulated rent by only registering that information with the DCHR in four out of 31 years. The unit appears to have exited rent control and become rent stabilized in 1994, but there is no indication as to how or why this occurred. Similarly, the only legal regulated rent that the seller defendants ever recorded for apartment 20 was $301.60 (or $302.00) per month, which evidently applied whether the unit was rent controlled or rent

[21] Specifically, NYC Admin. Code § 26-403 (e) (2) (j).

stabilized. Finally, the DHCR history indicates that the seller defendants had still not filed any further DHCR registrations for apartment 30 when they sold the building in 2016 - more than seven years after the *Roberts* decision was rendered. The buyer defendants acted fraudulently by filing an incomplete amended apartment re-registration in 2016 in an attempt to retroactively legitimize the rent(s) resulting from apartment 30's improper deregulation. Therefore, the court concludes that apartment 30's correct legal regulated rent cannot be determined by reference to reliable documents and find that other means must be used to set that figure.

As above, the court finds that the "default formula" should be used to set apartment 30's legal regulated rent, and grants so much of the tenants' motion as seeks that relief. However, the tenants have not identified a comparable eight-room apartment whose 2015 rent could be used to set that rent pursuant to that default formula. As the court therefore cannot complete its calculations of the Hollands' rent overcharge claim at this juncture, it directs the parties to make the same evidentiary submissions regarding apartment 30 as were discussed earlier in this decision (i.e., records of the Hollands' payment history and identification of a comparable eight-room apartment).

8) Apt. 20 (Michael G. Tive)

Records show that plaintiff Michael G. Tive (Tive) first took possession of apartment 20 pursuant to the terms of a 15-month non-rent-stabilized lease that ran from December 1, 2008 through February 28, 2010 with a monthly rent of $3,800.00. *See* notice of motion (motion sequence number 006), exhibit 34 (NYSCEF document number 204). Tive thereafter also signed seven consecutive one-year, non-rent-stabilized renewal leases that ran from: 1) March 1, 2010 to February 28, 2011 with a monthly rent of $3,800.00; 2) March 1, 2011 to February 28, 2012 with a monthly rent of $4,000.00; 3) March 1, 2012 to February 28, 2013 with a monthly rent of

$4,200.00; 4) March 1, 2013 to February 28, 2014 with a monthly rent of $4,300.00; 5) March 1, 2014 to February 28, 2015 with a monthly rent of $4,500.00; 6) March 1, 2015 to February 28, 2016 with a monthly rent of $4,575.00; and 7) March 1, 2016 to February 28, 2017 with a monthly rent of $4,575.00. *Id.*, exhibits 35-37. It thus appears that, during the August 2012 - August 2016 overcharge claims period, Tive was charged a total of $217,350.00 in rent, calculated as follows: 1) August 2013-February 2013 (7 mos.) x $4,200.00 ($29,400.00); 2) March 2013- February 2014 (12 mos.) x $4,300.00 ($51,600.00); 3) March 2014-February 2015 (12 mos.) x $4,500.00 ($54,000.00); 4) March 2015-February 2016 (12 mos.) x $4,575.00 ($54,900.00); and 5) March 2016-August 2016 (6 mos.) x $4,575.00 ($27,450.00).

The parties have not presented records/receipts of Tives's rent payments during the overcharge claims period. As a result, the court cannot now calculate his total actual rent payments.

Apartment 20's individual DHCR rent history states that the unit was: 1) rent controlled in 1984 with a legal regulated rent of $301.00; 2) rent controlled but not registered from 1985-1993; 3) rent stabilized from 1994-1996 with a legal regulated rent of $301.00; and 4) unregistered from 1997-2015. *See* notice of motion (motion sequence number 006), exhibit 37 (NYSCEF document number 204). The building-wide DHCR rent roll similarly states that apartment 20 was: 1) rent controlled in 1984 with a legal regulated rent of $301.00; 2) not registered from 1985-1993; 3) rent stabilized from 1994-1996 with a legal regulated rent of $301.00; and 4) not registered from 1997-2011. *See* notice of cross motion (motion sequence number 006), exhibit H. The rent roll also indicates that the buyer defendants filed amended registration statements for apartment 20 on August 16, 2016 that retroactively registered the unit as rent stabilized from 2012 forward, and retroactively recorded its monthly legal regulated rents

as: 1) $4,200.00 in 2012; 2) $4,300.00 in 2013; 3) $4,386.00 in 2014 (with $4,500.00 being the monthly amount that was actually charged); 4) $4,429.86 in 2015 (with $4,575.00 being the monthly amount that was actually charged); and 5) $4,429.86 in 2016 (with $4,575.00 being the monthly amount that was actually charged). *Id.*

The court finds that the foregoing documentary evidence establishes that both sets of defendants engaged in "fraudulent schemes to deregulate" apartment 20. The seller defendants willfully concealed the unit's regulated status and its legal regulated rent by only registering that information with the DCHR in four out of 31 years. The unit appears to have exited rent control and become rent stabilized in 1994, but there is no indication as to how or why this occurred. Similarly, the only legal regulated rent that the seller defendants ever recorded for apartment 20 was $301.00 per month, which evidently applied whether the unit was rent controlled or rent stabilized. Finally, the DHCR history indicates that the seller defendants had still not filed any further DHCR registrations for apartment 20 when they sold the building in 2016 - more than seven years after the *Roberts* decision was rendered. For their part, the buyer defendants repeated their self-serving practice of ignoring apartment 20's obviously suspicious registration history (which contains no record of a deregulation event) and submitting incomplete amended DHCR re-registration statements that sought to retroactively legitimize the unit's market rate rents as its legal regulated rents. As a result, the court concludes that apartment 20's correct legal regulated rent cannot be determined by reference to reliable documents and find that other means must be used to set that figure.

As above, the court finds that the "default formula" should be used to set apartment 20's legal regulated rent, and grants so much of the tenants' motion as seeks that relief. However, the tenants have not identified a comparable eight-room apartment whose 2008 rent could be used to

set that rent pursuant to that default formula. As the court therefore cannot complete its calculations of Tive's rent overcharge claim at this juncture, it directs the parties to make the same evidentiary submissions regarding apartment 20 as were discussed earlier in this decision (i.e., records of the Hollands' payment history and identification of a comparable eight-room apartment.

9) Apt. 31 (John C. Cole and Mary Ellen Cole)

Records show that plaintiffs John C. Cole and Mary Ellen Cole (the Coles) first took possession of apartment 31 pursuant to the terms of a one-year, non-rent-stabilized lease that ran from September 1, 2009 to August 31, 2010 with a monthly rent of $3,400.00. *See* notice of motion (motion sequence number 006), exhibit 38 (NYSCEF document number 204). They thereafter signed six consecutive one-year, non-rent-stabilized renewal leases that ran from: 1) September 1, 2010 to August 31, 2011 with a monthly rent of $3,000.00; 2) September 1, 2011 to August 31, 2012 with a monthly rent of $3,350.00; 3) September 1, 2012 to August 31, 2013 with a monthly rent of $3,400.00; 4) September 1, 2013 to August 31, 2014 with a monthly rent of $3,675.00; 5) September 1, 2014 to August 31, 2015 with a monthly rent of $3,675.00; and 6) September 1, 2015 to August 31, 2016 with a monthly rent of $3,675.00. *Id.*, exhibit 39. It thus appears that the Coles incurred total rent charges of $176,450.00 during the August 2012 - August 2016 overcharge claims period, calculated as follows: 1) August 2012 (1 mo.) x $3,350.00 ($3,350.00); 2) September 2012 - August 2013 (12 mos.) x $3,400.00 ($40,800.00); 3) September 2013 - August 2014 (12 mos.) x $3,675.00 ($44,100.00); 4) September 2014 - August 2015 (12 mos.) x $3,675.00 ($44,100.00); and 5) September 2015 - August 2016 (12 mos.) x $3,675.00 ($44,100.00).

The parties have not presented records/receipts of the Coles' actual rent payments during the overcharge claims period. As a result, the court cannot now calculate their total actual rent payments.

Apartment 31's individual DHCR registration history states that the unit was: 1) rent controlled in 1984 with a legal regulated rent of $153.00; 2) rent controlled but unregistered from 1985 until 1993; 3) rent stabilized from 1994-1995 with a legal regulated rent of $153.00; and 4) unregistered from 1996-2015. *See* notice of motion (motion sequence number 006), exhibit 40 (NYSCEF document number 204). The building-wide DHCR rent roll similarly states that the unit was: 1) rent controlled in 1984 with a legal regulated rent of $153.00; 2) unregistered from 1985 to 1993; 3) rent stabilized in both 1994 and 1995 with a legal regulated rent of $153.00; and 4) unregistered from 1996 to 2011. *See* notice of cross motion (motion sequence number 006), exhibit H. The rent roll also states that, on August 16, 2016, the buyer defendants filed an incomplete set of amended DHCR rent registrations for apartment 31 that retroactively designated the unit as rent stabilized from 2012 onward, and retroactively listed its monthly legal regulated rents as: 1) $3,350.00 in 2012; 2) $3,400.00 in 2013; 3) $3,568.00 in 2014 (with $3,475.00 being the monthly amount actually charged); 4) $3,606.72 in 2015 (with $3,675.00 being the monthly amount actually charged); and 5) $3,642.79 in 2016 (with $3,675.00 being the monthly amount actually charged). *Id.*

As was the case with apartment 20, the court finds that the documentary evidence establishes that both sets of defendants engaged in "fraudulent schemes to deregulate" apartment 31. The seller defendants willfully concealed the unit's regulated status and its legal regulated rent by only registering that information with the DCHR in three out of 31 years. The unit appears to have exited rent control and become rent stabilized in 1994, but there is no indication

as to how or why this occurred. Similarly, the only legal regulated rent that the seller defendants ever recorded for apartment 31 was $153.00 per month, which evidently applied whether the unit was rent controlled or rent stabilized. Finally, the DHCR history indicates that the seller defendants had still not filed any further DHCR registrations for apartment 31 when they sold the building in 2016 - more than seven years after the *Roberts* decision was rendered. For their part, the buyer defendants continued their self-serving practice of ignoring apartment 31's obviously suspicious registration history (which contains no record of a deregulation event) and submitting incomplete amended DHCR re-registration statements that sought to retroactively legitimize the unit's market rate rents as its legal regulated rents. As a result, the court concludes that apartment 31's correct legal regulated rent cannot be determined by reference to reliable documents, and find that other means must be used to set that figure.

As above, the court finds that the "default formula" should be used to set apartment 31's legal regulated rent, and grants so much of the tenants' motion as seeks that relief. However, the tenants have not identified a comparable six-room apartment whose 2009 rent could be used to set that rent using the default formula. As the court cannot complete its calculations of the Coles's rent overcharge claim at this juncture, it directs the parties to make the same evidentiary submissions regarding apartment 31 as were discussed earlier in this decision (i.e., records of the Coles's payment history and identification of a comparable six-room apartment).

10) Apt. 4 (Kristin Mannoni)

Records show that plaintiff Kristin Mannoni (Mannoni) first took possession of apartment 4 pursuant to the terms of a 15-month, non-rent-stabilized lease that ran from December 1, 2008 through February 28, 2010 with a monthly rent of $3,400.00. *See* notice of motion (motion sequence number 006), exhibit 41 (NYSCEF document number 205). She then

signed seven subsequent one-year, non-rent-stabilized renewal leases that ran from: 1) March 1, 2010 - February 28, 2011 with a monthly rent of $3,400.00; 2) March 1, 2011 - February 28, 2012 with a monthly rent of $3,500.00; 3) March 1, 2012 - February 28, 2013 with a monthly rent of $3,550.00; 4) March 1, 2013 - February 28, 2014 with a monthly rent of $3,850.00; 5) March 1, 2014 - February 28, 2015 with a monthly rent of $4,000.00; 6) March 1, 2015 - February 28, 2016 with a monthly rent of $4,100.00; and 7) March 1, 2016 - February 28, 2017 with a monthly rent of $4,100.00. *Id.*, exhibit 42. It thus appears that the Mannoni incurred total rent charges of $192,850.00 during the August 2012 - August 2016 overcharge claims period, calculated as follows: 1) August 2012-February 2013 (7 mos.) x $3,550.00 ($24,850.00); 2) March 2013-February 2014 (12 mos.) x $3,850.00 ($46,200.00); 3) March 2014-February 2015 (12 mos.) x $4,000.00 ($48,000.00); 4) March 2015-February 2016 (12 mos.) x $4,100.00 ($49,200.00); and 6) March 2016-August 2016 (6 mos.) x $4,100.00 ($24,600.00).

The parties have not presented records of Mannoni's actual rent payments during the overcharge claims period. As a result, the court cannot now calculate her total actual rent payments during that period.

The DHCR individual apartment registration history for unit 4 shows that it was: 1) rent controlled in 1984 with a legal regulated rent of $385.00 per month; 2) rent controlled but not registered from 1985 through 1993; 3) rent stabilized from 1994 through 1996 with a legal regulated rent of $385.00 per month; and 4) unregistered from 1997 through 2015. *See* notice of motion (motion sequence number 006), exhibit 43 (NYSCEF document number 205). The building-wide DHCR rent roll similarly shows that apartment 4 was: 1) rent controlled in 1984 with a legal regulated rent of $385.00 per month; 2) unregistered from 1985 through 1993; 3) rent stabilized from 1994 through 1996 with a legal regulated rent of $385.00 per month; and 4)

unregistered from 1997 through 2011. See notice of cross motion (motion sequence number 006), exhibit H. The rent roll also shows that, on August 16, 2016, the buyer defendants filed incomplete amended apartment registration statements for apartment 4 which retroactively re-registered the unit as rent stabilized from 2012 forward, and retroactively recorded its monthly legal regulated rents as: 1) $3,550.00 in 2012; 2) $3,621.00 in 2013 (with $3,850.00 being the monthly rental amount actually charged); 3) $3,765.84 in 2014 (with $4,000.00 being the monthly rental amount actually charged); 4) $3,803.50 in 2015 (with $4,100.00 being the monthly rental amount actually charged); and 5) $3,803.50 in 2016 (with $4,100.00 being the monthly rental amount actually charged). *Id.*

As was the case with the two previously discussed units, the court finds that the documentary evidence establishes that both sets of defendants engaged in "fraudulent schemes to deregulate" apartment 4. The seller defendants willfully concealed the unit's regulated status and its legal regulated rent by only registering that information with the DCHR in three out of 31 years. The unit appears to have exited rent control and become rent stabilized in 1994, but there is no indication as to how or why this occurred. Similarly, the only legal regulated rent that the seller defendants ever recorded for apartment 4 was $385.00 per month, which evidently applied whether the unit was rent controlled or rent stabilized. Finally, the DHCR history shows that the seller defendants had still failed to file any further DHCR registrations for apartment 4 when when they sold the building in 2016 - more than seven years after the *Roberts* decision was rendered. For their part, the buyer defendants continued their self-serving practice of ignoring apartment 4's obviously suspicious registration history (which contains no record of a deregulation event) and submitting incomplete amended DHCR re-registration statements that sought to retroactively legitimize the unit's market rate rents as its legal regulated rents. As a

result, the court concludes that apartment 4's correct legal regulated rent cannot be determined by reference to reliable documents, and find that other means must be used to set that figure.

As above, the court finds that the "default formula" should be used to set apartment 4's legal regulated rent and grants so much of the tenants' motion as seeks that relief. However, the tenants have not identified a comparable eight-room apartment whose 2008 rent could be used to set that rent using the default formula. As the court cannot complete its calculations of Mannoni's rent overcharge claim at this juncture, it directs the parties to make the same evidentiary submissions regarding apartment 4 as were discussed earlier in this decision (i.e., records of Mannoni's payment history and identification of a comparable eight-room apartment).

11) Apt. 7 (Joseph Richard Debart, III, William Blair Debart, Alex Berrick and Ashan Singh)

Records show that plaintiff roommates Joseph Richard Debart, III, William Blair Debart, Alex Berrick and Ashan Singh (Debart et al.) took possession of apartment 7 pursuant to the terms of a one-year, non-rent-stabilized lease that ran from October 1, 2015 through September 30, 2016 with a monthly rent of $4,600.00. *See* notice of motion (motion sequence number 006), exhibit 44 (NYSCEF document number 205). It is unclear whether Debart et al. signed renewal leases for the unit; however, the term of any such renewal lease would fall outside of the August 2012 - August 2016 overcharge claims period. It appears that Debart et al. were charged a total of $50,600.00 in rent during that period, calculated as follows: October 2015 - August 2016 (11 mos.) x $4,600.00 ($50,600.00).

The parties have not presented records of the rent payments Debart et al. made during the overcharge claims period. As a result, the court cannot calculate their total actual rent payments.

Apartment 7's individual DHCR registration history shows that the unit was: 1) rent controlled in 1984 with a monthly legal regulated rent of $184.51; 2) rent controlled but unregistered between 1985 and 1993; 3) rent stabilized from 1994 through 1995 with a monthly legal regulated rent of $184.51; and 4) unregistered from 1996 through 2015. *See* notice of motion (motion sequence number 006), exhibit 45 (NYSCEF document number 205). The building-wide DHCR rent roll similarly shows that apartment 7 was: 1) rent controlled in 1984 with a monthly legal regulated rent of $184.51; 2) unregistered from 1985-1993; 3) rent stabilized in 1994 and 1995 with a monthly legal regulated rent of $184.51; and 4) unregistered from 1996 until 2011. *See* notice of cross motion (motion sequence number 006), exhibit H. The rent roll also shows that, on August 16, 2016, the buyer defendants submitted an incomplete set of amended DHCR registration statements for apartment 7 that retroactively designated the unit as rent stabilized from 2012 forward, and retroactively listed its monthly legal regulated rents as: 1) $3,850.00 in 2012; 2) $3,850.00 in 2013, although the unit is listed as "vacant" that year; 3) $4,250.00 in 2014; 4) $4,250.00 in 2015, although the unit is again listed as "vacant" that year; and 5) $4,600.00 in 2016. *Id.* In addition to the DHCR documents, the tenants also present copies of: (a) a petition in a 1997 non-payment proceeding (Index No. L&T 068919/97) that the seller defendants filed against one of apartment 7's previous tenants (one "Jocelyn Hame"), and (b) a 1997 possessory judgment issued by the Housing Court (Padilla, J.) which terminated that tenant's tenancy. *See* notice of motion (motion sequence number 006), exhibit 45 (NYSCEF document number 205). The tenants note that the DHCR registrations discussed above name one "Jocelyn Hamel" as apartment 7's original rent-controlled tenant, but that the 1997 Housing Court filings allege that apartment 7 is rent stabilized. *Id.*, Sachar aff, ¶¶ 88-95. The tenants argue that, regardless of the seller defendants' incomplete and inconsistent DHCR

registrations, the tenant's original apparent 1997 eviction (while the building was enrolled in the J-51 program) would certainly have resulted in apartment 7 becoming a rent stabilized unit. *Id.* They also note that there is no documentation that the unit was ever subsequently deregulated. *Id.*

As with a number of the previously discussed apartment units, the court finds that the foregoing evidence establishes that both sets of defendants engaged in "fraudulent schemes to deregulate" apartment 7. The seller defendants willfully concealed the unit's regulated status and its legal regulated rent by refusing to register either piece of information with the DCHR for 28 out of 31 years. The unit appears to have exited rent control and become rent stabilized in 1994, but there is no indication as to how or why this occurred. As was discussed, the 1997 eviction filings afford some proof that apartment 7 was rent stabilized, but not that it was legally deregulated. Indeed, although apartment 7's 1997 DHCR registration alleges that the unit's monthly legal regulated rent was $184.51 that year, the 1997 Housing Court petition alleges that its rent was $1,250.00 per month. *See* notice of motion (motion sequence number 006), exhibits 45-47 (NYSCEF document number 205). There is no explanation for this discrepancy, or for the fact that the seller defendants still had not filed any further DHCR registrations for apartment 7 when they sold the building in 2016 – seven years after the *Roberts* decision was rendered. For their part, the buyer defendants continued their self-serving practice of ignoring apartment 7's obviously suspicious registration history (which contains no record of a deregulation event) and submitting incomplete amended DHCR re-registration statements that sought to retroactively legitimize the unit's market rate rents as its legal regulated rents. As a result, the court concludes that apartment 7's correct legal regulated rent cannot be determined by reference to reliable documents, and find that other means must be used to set that figure.

The buyer defendants also argue that Debart et al. are not entitled to a rent stabilized lease as their tenancy in apartment 7 commenced after the building had exited the J-51 program and the unit's "rent was already above the deregulation threshold, which cannot be challenged" as the time to file a fair market rent appeal has expired. *See* defendants' mem of law (motion sequence number 006) at 31-32. However, as was previously noted, the DHCR filings regarding apartment 7 are incomplete and inconsistent, and they contain no evidence of how, when or if the unit was ever deregulated. The court repeats that deregulation was unavailable for the duration of the building's enrollment in the J-51 program. The court also notes that the near complete absence of DHCR registration statements for apartment 7 makes it impossible to discern whether its legal regulated rent ever exceeded the deregulation threshold so as to justify the unit's deregulation after the building exited the J-51 program. The buyer defendants' self-serving retroactive re-registrations are not reliable evidence of the unit's actual legal regulated rent. Therefore, the court rejects the buyer defendants' argument.[22]

The court again finds that the "default formula" should be used to set apartment 7's legal regulated rent, and grants so much of the tenants' motion as seeks that relief. However, the tenants have not identified a comparable eight-room apartment whose 2015 rent could be used to set that figure via the default formula. As the court cannot complete its calculations with respect to the overcharge claim of Debart et al. at this juncture, it directs the parties to make the same evidentiary submissions regarding apartment 7 as were discussed earlier in this decision (i.e., a rent payment history and identification of a comparable eight-room apartment).

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[22] The court also notes that this argument also appears to be directed to the tenants' second cause of action, since that cause of action requests an order directing the buyer defendants to issue rent stabilized leases. *See* notice of cross motion (motion sequence number 006), exhibit A (first amended verified complaint) ¶¶ 274-283. To the extent that it is directed at that cause of action, the court does not consider it in this decision.

12) Apt. 23 (Rachel L. Perkins and Sara Muse)

Records show that plaintiffs Rachel L. Perkins (Perkins) and several non-plaintiff roommates first took possession of apartment 23 pursuant to the terms of an 18-month, non-rent-stabilized lease that ran from December 1, 2013 to May 31 2015 with a monthly rent of $4,400.00. *See* notice of motion (motion sequence number 006), exhibit 51 (NYSCEF document number 206). Rather than sign a renewal lease, Perkins and several other roommates – including co-plaintiff Sara Muse (Muse) - subsequently signed a new, one-year, non-rent-stabilized lease for apartment 23 that ran from June 1, 2015 through May 31, 2016 with a monthly rent of $4,600.00. *Id*., exhibit 52. It thus appears that Perkins incurred a total of $134,400.00 in rent charges during the August 2012-August 2016 overcharge claims period, calculated as follows: 1) December 2013 - May 2015 (18 mos.) x $4,400.00 ($79,200.00); and 2) June 2015 - May 2016 (12 mos.) x $4,600.00 ($55,200.00).

The parties have not presented records of the rent payments Perkins made during the overcharge claims period. As a result, the court cannot now calculate her total actual rent payments or ascribe a portion of those payments to Muse (as is required by the pre-HSTPA version of RSL § 26-516 [a] [1]).

The parties have not presented a copy of apartment 23's individual DHCR registration history either. However, the building-wide DHCR rent roll states that the unit was: 1) rent controlled in 1984 with a monthly legal regulated rent of $186.27; 2) unregistered from 1985 through 1993; 3) rent stabilized in 1994 and 1995 with a monthly legal regulated rent of $186.27; 4) rent stabilized in 1996 with a monthly legal regulated rent of $600.00; 5) unregistered from 1997 through 1990; 6) "permanently exempt" from rent regulation in 2000 by reason of "substantial rehabilitation"; 7) and unregistered from 2001 through 2011. *See* notice of cross

motion (motion sequence number 006), exhibit H. The rent roll also indicates that, on August 16, 2016, the buyer defendants submitted an incomplete set of amended DHCR registration statements for apartment 23 that retroactively designated the unit as rent stabilized from 2012 forward, and retroactively listed its monthly legal regulated rents as: 1) $4,000.00 in 2012; 2) $4,200.00 in 2013; 3) $4,400.00 in 2014; 4) $4,400.00 in 2015; and 5) $4,600.00 in 2016. *Id.* The court further notes that the rent roll's "initial registration" page states that apartment 23 became rent stabilized in 1999 by "vacancy decontrol" with a monthly legal regulated rent of $3,050.00. *Id.* That 1999 "vacancy decontrol" allegation is plainly inconsistent with the 1999 "substantial rehabilitation" allegation. Further, it does not appear that the seller defendants ever registered apartment 23's alleged 1999 monthly legal regulated rent of $3,050.00 with the DHCR. *Id.*

The court finds that the foregoing establishes that both sets of defendants engaged in "fraudulent schemes to deregulate" apartment 23. The seller defendants willfully concealed the unit's regulated status and its legal regulated rent by only registering that information with the DCHR in four out of 31 years. Their filings first state that the unit exited rent control and become rent stabilized in 1994, but also state that it did not become rent stabilized until 1999, and there are inconsistent explanations as to how it allegedly achieved that status. *See* notice of cross motion (motion sequence number 006), exhibit H. The filings also show a purported 1999 legal regulated rent of $3,050.00 per month, which is inexplicably much higher than its registered 1996 legal regulated rent of $600.00 per month. *Id.* There are no explanations for these discrepancies. It also appears that the seller defendants failed to file any further DHCR registrations for apartment 23 before they sold the building in 2016 - seven years after the *Roberts* decision was rendered. For their part, the buyer defendants also continued their self-

serving practice of ignoring apartment 23's contradictory registration history and simply submitting incomplete amended DHCR re-registration statements that sought to retroactively legitimize the unit's market rate rents as its legal regulated rents. As a result, the court concludes that apartment 23's correct legal regulated rent cannot be determined by reference to reliable documents, and find that other means must be used to set that figure.

The court again finds that the "default formula" should be used to set apartment 23's legal regulated rent, and grants so much of the tenants' motion as seeks that relief. However, the tenants have not identified a comparable apartment[23] whose 2013 rent could be used to set that figure via the default formula. As the court cannot complete its calculations regarding Perkins's overcharge claim at this juncture, it directs the parties to make the same evidentiary submissions regarding apartment 23 as were discussed earlier in this decision (i.e., a rent payment history and identification of a comparable apartment).

13) Apt. 14 (Kyung Chan Zoh and Jihoe Koo).

Records show that plaintiffs Kyung Chan Zoh (Zoh) and Jihoe Koo (Koo) first took possession of apartment 14 pursuant to the terms of a 13-month, non-rent stabilized lease that ran from April 1, 2014 through April 30, 2015 with a monthly rent of $2,200.00. *See* notice of motion (motion sequence number 006), exhibit 53 (NYSCEF document number 206). Zoh and Koo subsequently signed a one-year, non-rent-stabilized renewal lease for the unit that ran from May 1, 2015 through April 30, 2016 with a monthly rent of $2,225.00. *Id.*, exhibit 54. The tenants note that the renewal lease contained a rider which Zoh and Koo refused to sign that provided that apartment 14 was not rent stabilized the unit was "rented following a vacancy with

[23] Without an individual DHCR apartment registration history, the court cannot discern how many rooms apartment 23 has.

a legal regulated rent that is in excess of $2,500.00 per month" (i.e., the then-applicable deregulation threshold). *Id.*, Sachar affirmation, ¶ 109; exhibit 55. Tenants aver that the buyer defendants thereafter refused to tender Zoh and Koo another renewal lease for apartment 14. *Id.*, Sachar affirmation, ¶ 110; exhibit 56. Correspondence from the seller defendants indicates that Zoh and Koo thereafter became "month to month tenants." *Id.*, exhibit 56. As a result, it appears that Zoh and Koo incurred a total of $64,460.00 in rental charges during the August 2012-August 2016 overcharge claims period, calculated as follows: 1) April 2014-April 2015 (13 mos.) x $2,200.00 ($28,860.00); and 2) May 2015-August 2016 (16 mos.) x $2,225.00 ($35,600.00).

The parties have not presented records of the rent payments that Zoh and Koo made during the overcharge claims period. As a result, the court cannot now calculate their total actual rent payments.

The parties have not presented a copy of apartment 14's individual DHCR registration history either. However, the building-wide DHCR rent roll states that the unit was: 1) rent controlled in 1984 with a monthly legal regulated rent of $70.03; 2) unregistered from 1985 through 1993; 3) rent stabilized in 1994 and 1995 with a monthly legal regulated rent of $70.03; 4) unregistered from 1996 through 1998; 5) rent stabilized in 1999 with a monthly legal regulated rent of $1,550.00; 6) rent stabilized in 2000 with a monthly legal regulated rent of $1,596.34; 7) rent stabilized in 2001 with a monthly legal regulated rent of $1,660.19; 8) rent stabilized in 2002 with a monthly legal regulated rent of $1,976.87 (although $1,768.01 was the monthly amount actually charged); and 9) unregistered from 2003 through 2011. *See* notice of cross motion (motion sequence number 006), exhibit H. The rent roll also states that, on August 16, 2016, the buyer defendants submitted an incomplete set of amended DHCR registration

statements for apartment 14 that retroactively designated the unit as rent stabilized from 2012 forward, and retroactively listed its monthly legal regulated rents as: 1) $1,800.00 in 2012; 2) $1,800.00 again in 2013; 3) $2,200.00 in 2014; 4) $2,200.00 again in 2015; and 5) $2,200.00 again in 2016 (although $2,225.00 was the monthly rent actually charged). *Id.* The court further notes that the rent roll's "initial registration" page states that apartment 14 became rent stabilized in 1999 by "vacancy decontrol" with a monthly legal regulated rent of $1,550.00. *Id.* There is no explanation as to how the seller defendants raised the unit's legal regulated rent to that figure from its previous registered legal regulated rent of $70.83 in 1995.

The court finds that the foregoing establishes that both sets of defendants engaged in "fraudulent schemes to deregulate" apartment 14. The seller defendants willfully concealed the unit's regulated status and its legal regulated rent by only registering that information with the DCHR in seven out of 31 years. The rent roll states that the unit exited rent control and become rent stabilized in 1994, but there is no explanation as to how it allegedly achieved that status. *See* notice of cross motion (motion sequence number 006), exhibit H. Indeed, the rent roll also states that alleged "vacancy decontrol" purportedly took place five years later in 1999. *Id.* This is an unexplained inconsistency. Also unexplained is the previously mentioned $1,500.00 increase to the unit's legal regulated rent which the seller defendants appear to have imposed unilaterally in 1999. *Id.* The seller defendants also appear not to have filed any further DHCR registrations for apartment 14 before they sold the building in 2016 - seven years after the *Roberts* decision was rendered. For their part, the buyer defendants also continued their self-serving practice of ignoring apartment 14's contradictory registration history and simply submitting incomplete amended DHCR re-registration statements that sought to retroactively legitimize the unit's 2012-2016 market rate rents as its legal regulated rents. As a result, the

court concludes that apartment 14's correct legal regulated rent cannot be determined by reference to reliable documents, and find that other means must be used to set that figure.

The court again finds that the "default formula" should be used to set apartment 14's legal regulated rent, and grants so much of the tenants' motion as seeks that relief. However, the tenants have not identified a comparable apartment[24] whose 2013 rent could be used to set that figure via the default formula. As the court cannot complete its calculations regarding Zoh's and Koo's overcharge claim at this juncture, it directs the parties to make the same evidentiary submissions regarding apartment 14 as were discussed earlier in this decision (i.e., a rent payment history and identification of a comparable apartment)[25].

In conclusion, the evidence now before the court does not permit it to calculate all three of the figures necessary to determine whether a landlord has imposed a "rent overcharge" on a tenant (i.e., a rental charge which is "above the rent authorized for a housing accommodation" RSL § 26-516 [a]). Although the tenants' leases allowed the court to calculate each tenant's total rent charges during the period when they occupied their respective apartments during the August 2012 – August 2016 overcharge claims period, the parties' failure to produce the tenants' payment records prevented the court from calculating each tenant's actual rent payments during the claims period. Further, although the DHCR records disclosed substantial fraud by both the seller and the buyer defendants in the setting of each apartment's legal regulated rent, and that fraud warrants the use of the "default formula" to establish each apartment's legal regulated rent by reference to the rent of a "comparable" apartment instead, the parties' failure to identify such

[24] Without an individual DHCR apartment registration history, the court cannot discern how many rooms apartment 14 has.
[25] Without an individual DHCR apartment registration history, the court cannot discern how many rooms apartment 14 has.

comparable apartments herein prevented the court from using the default formula to set the units' legal regulated rents. As a result, it is now necessary for the parties to submit the missing information so that the court can complete its calculations and determine whether, and to what extent, the buyer defendants are now liable for overcharges that occurred during the claims period.

As a result, the court directs the parties to supplement their respective motions by submitting the following information within 60 days of receipt of a copy of this decision: 1) records of each plaintiff tenant's actual total rent payments during the August 2012-August 2016 overcharge claims period; and 2) the identity of "comparable apartments" with the same number of rooms as each plaintiff tenant's apartment that were leased out on or near the base date of each plaintiff-tenant's overcharge claim, and whose rent may therefore be used in the "default formula." Should the parties be unable to submit the required information with respect to any given tenant or apartment, they must certify to the court that they are unable to do so. In such a case, the court will sever the rent overcharge claim applying to that tenant or apartment and hold it an abeyance without prejudice to said tenant's right to submit an application to the DHCR to determine the subject apartment's correct rent regulated status and/or correct legal regulated rent. For now, the court withholds its decision on the issue of liability on the tenants' first cause of action pending submission of the requested material. As was previously stated, the court cannot rule on issues of damages at all until the issue of liability for rent overcharge is first resolved.

B). Tenants' second cause of action ("Violation of RSL § 26-512")

Like their first cause of action, tenants' second cause of action alleges that both sets of landlords committed a "violation of RSL § 26-512." *See* amended verified complaint, ¶¶ 274-283. However, the second cause of action specifically requests declaratory judgments that:

"a. the apartments of Plaintiffs are or were each subject to the RSL and RSC;
"b. those Plaintiffs who are current tenants are each entitled to a rent-stabilized lease in a form promulgated by DHCR;
"c. the amount of the legal regulated rent for the apartments of Plaintiffs; and
"d. any leases offered to Plaintiffs were and are invalid and unlawful unless they are offered on lease forms and terms prescribed by DHCR"

along with an injunction ordering the buyer defendants to issue reformed leases that comply with the requested declarations. *Id.* In the previous section of this decision, the court determined that tenants' first cause of action claiming a violation of RSL § 26-512 ("Stabilization provisions") actually set forth a claim for rent overcharges pursuant to RSL § 26-516 ("Enforcement and procedures"). That determination applies with equal force to tenants' second cause of action. The court notes that subparagraphs (b)[26] and (e)[27] of the pre-HSTPA version of RSL § 26-516 respectively authorized awards of declaratory and injunctive relief to enforce DHCR findings that a landlord had violated by collecting a rent overcharge. Of course, CPLR Articles 3001 and 6301 respectively empower this court to issue those forms of relief. However, whether an overcharge claim is submitted to the DHCR or to a court in the first instance, there must be a finding of liability for the charge before the reviewing forum can consider issues relating to damages, including the granting of declarations or injunctions. Here, as was explained above, the evidence presented in support of the instant motions is insufficient for the court to grant or deny an application for summary judgment on the issue of the buyer defendants' liability (if any) to the tenants for rent overcharges imposed in violation of RSL § 26-516. Only after the issue of

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[26] RSL § 26-516 (b) specifically provides that "[i]n addition to issuing the specific orders provided for by other provisions of this law, the [DHCR] shall be empowered to enforce this law and the code *by issuing*, upon notice and a reasonable opportunity for the affected party to be heard, *such other orders as it may deem appropriate*" which necessarily includes declaratory judgments (emphasis added).

[27] RSL § 26-516 (e) specifically provides that "[v]iolations of this law, or of the code and orders issued pursuant thereto *may be enjoined* by the supreme court upon proceedings commenced by the [DHCR] which shall not be required to post bond" (emphasis added).

liability has been determined can the court proceed to consider issues of damages, including the propriety (or not) of granting the declaratory and injunctive relief that the tenants' second cause of action requests. Accordingly, the court holds so much of the parties' respective summary judgment motions as regards that cause of action in abeyance pending its receipt of the additional submissions described above, and the issuance of a decision based thereon.

C). Tenants' third cause of action ("Declaratory Relief")

Tenants' third cause of action seeks "declaratory relief" against all defendants in the form of a judgment that:

> "a. the apartments of Plaintiffs are or were each subject to the RSL and RSC;
> "b. those Plaintiffs who are current tenants are each entitled to a rent-stabilized lease in a form promulgated by DHCR;
> "c. the amount of the legal regulated rent for the apartments of Plaintiffs; and
> "d. any leases offered to Plaintiffs were and are invalid and unlawful unless they are offered on lease forms and terms prescribed by DHCR."

See amended verified complaint, ¶¶ 284-290. This cause of action simply repeats the request for declaratory relief that the tenants asserted in their second cause of action. Accordingly, for the same reasons stated above, the court holds so much of the parties' respective summary judgment motions as regards tenants' third cause of action in abeyance pending its receipt of the additional submissions described above, and the issuance of a decision based thereon.

D). Tenants' fourth cause of action ("Mandatory Injunctive Relief")

Tenants' fourth cause of action requests "mandatory injunctive relief" against the buyer defendants in the form of an order:

> ". . . enjoining Defendants or their agents and/or attorneys from instituting any actions or proceedings to dispossess, terminate or otherwise interfere with Plaintiffs' tenancies based on the purported expiration of their respective leases; and directing Defendants to provide Plaintiffs each with rent stabilized leases for their respective apartments in a form promulgated by the DHCR, at the legal regulated rent as determined by the Court."

See amended verified complaint, ¶¶ 291-296. This cause of action simply repeats the request for injunctive relief that the tenants asserted in their second cause of action. Accordingly, for the

same reasons stated above, the court holds so much of the parties' respective summary judgment motions as regards tenants' fourth cause of action in abeyance pending its receipt of the additional submissions described above, and the issuance of a decision based thereon.

E). Tenants' fifth cause of action ("breach of the covenant of good faith and fair dealing")

Tenants' fifth cause of action seeks an award of money damages against the buyer defendants for their alleged "breach of the covenant of good faith and fair dealing" that New York state law implies in each of the tenants' leases. *See* amended verified complaint, ¶¶ 297-302. This cause of action essentially states a claim for breach of contract, and appears to be either duplicative of, or offered as an alternative theory of relief for, the tenants' claim in their first cause of action that the buyer defendants allegedly breached RSL § 26-516. However, without addressing either of those matters, the court repeats its finding that the evidence currently before it is insufficient to support either a grant or a denial of summary judgment with respect to the buyer defendants' liability for rent overcharges. The court also notes that the parties' respective memoranda are devoid of any discussion of the tenants' fifth cause of action. Accordingly, for the same reasons stated above, the court holds so much of the parties' respective summary judgment motions as regards tenants' fifth cause of action in abeyance pending its receipt of the additional submissions described above, and the issuance of a decision based thereon.

F). Tenants' sixth cause of action ("attorney's fees")

Tenants' sixth cause of action requests an award of attorneys' fees against all defendants. *See* amended verified complaint, ¶¶ 303-307. Subparagraph (a) (4) of the pre-HSTPA version of RSL § 26-516 specifically provided that "[a]n owner found to have overcharged may be assessed

the reasonable costs and attorney's fees of the proceeding and interest from the date of the overcharge at the rate of interest payable on a judgment pursuant to section five thousand four of the civil practice law and rules." This provision clearly requires a finding of liability for rent overcharge as a prerequisite to an award of costs and attorney's fees. However, as explained, the court cannot yet make a determination regarding the extent (if any) of the buyer defendants' liability for rent overcharges to the tenants. Accordingly, for the same reasons stated above, the court holds so much of the parties' respective summary judgment motions as regards tenants' sixth cause of action in abeyance pending its receipt of the additional submissions described above, and the issuance of a decision based thereon. To the extent that the sixth cause of action appears to seek relief against the seller defendants, the court notes that the tenants previously discontinued their causes of action as against those defendants in the August 29, 2019 stipulation. *See* notice of cross motion (motion sequence number 006), exhibit F.

G). Buyer defendants' counterclaim

The buyer defendants' second amended answer set forth a counterclaim against the tenants for "reasonable attorney's fees." *See* notice of cross motion (motion sequence number 006), exhibit B (second amended answer), ¶¶ 201-203. The tenants argue that the buyer defendants abandoned that counterclaim by leaving it "unmentioned in their papers." *See* plaintiffs' reply mem (motion sequence number 006) at 22. It is true that the buyer defendants moving and reply papers do not include any argument regarding their counterclaim. However, "[u]nder the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 (1989); *see also Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279 (1st Dept 2007). Here, the court cannot yet

determine who is the "prevailing party" with respect to the tenants' rent overcharge claim, and any consideration of whether or not a party is entitled to attorney's fees at this juncture would be inappropriate. Accordingly, for the same reasons stated above, the court holds so much of the parties' respective summary judgment motions as regards the buyer defendants' counterclaim for attorney's fees in abeyance pending its receipt of the additional submissions described above, and the issuance of a decision based thereon.

H). Buyer defendants' affirmative defenses

The balance of the tenants' motion seeks summary judgment to dismiss the buyer defendants' 29 affirmative defenses, while the buyer defendants' cross motion counters that those affirmative defenses afford grounds for summary judgment to dismiss the complaint. *See* plaintiffs' mem of law (motion sequence number 006), at 7-29; defendants' mem of law (motion sequence number 006) at 32-34. The court notes that the buyer defendants' affirmative defenses include assertions that the tenants' claims must be dismissed as: 1) the complaint fails to state a cause of action; 2) the buyer defendants complied with all applicable laws; 3) equitable relief is unavailable; 4) the doctrines of res judicata and collateral estoppel; 5) the subject apartments were deregulated pursuant to DHCR guidance; 6) failure to exhaust administrative remedies; 7) the doctrine of primary jurisdiction; 8) unspecified provisions of the U.S. and New York State Constitutions; 9) the doctrine of non-primary residence; 10) the statute of limitations; 11) the equitable defense of unjust enrichment; 12) unspecified provisions of the RSL and RSC; 13) any overcharges were refunded; 14) the overcharge claims exceed the six-year recovery period; 15) the equitable doctrines of waiver, release and/or estoppel; 16) the voluntary payment doctrine; 17) the equitable defense of unclean hands; 18) plaintiffs' own inequitable conduct (including illegal profiteering); 19) the equitable doctrine of laches; 20) documentary evidence; 21) RSC §

2528.4 (a); 22) attorney's fees are unavailable; 23) plaintiffs' fraud claims are not pled with sufficient particularity; 24) the buyer defendants are permitted to collect lawful rent increases; 25) the buyer defendants are not liable for the seller defendants' rent overcharges; 26) the buyer defendants are not liable for treble damages for the seller defendants' rent overcharges; 27) the buyer defendants are not liable for treble damages for their own rent overcharges as they did not act "willfully"; 28) GFB is an agent for disclosed principal 207 W 110; and 29) the buyer defendants reserve the right to assert any other affirmative defenses to which this litigation may give rise. *See* second amended answer, ¶¶ 171-200. The buyer defendants further group their affirmative defenses into four categories, i.e.: 1) "defenses supported by *Regina* and the four-year rule" (5, 10, 14, 16, 21,22, 23 and 24); 2) "defenses supported by lack of willfulness and the 'safe harbor' rule" (2, 13, 20, 25, 26 and 27); 3) "defenses supported by plaintiffs' prior agreement with [the] Mann defendants," i.e., the August 29, 2019 stipulation of discontinuance[28] (4, 11, 15); and 4) the "agent for a disclosed principal" defense. *See* defendants' mem of law (motion sequence number 006) at 32-34. While it is possible to grant or deny summary judgment with respect to some of these affirmative defenses as a matter of law, the court finds that doing so at this juncture would be improvident as it would result in multiple, confusing rulings on the parties' respective motions. Accordingly, for the same reasons stated above, the court holds so much of the parties' respective summary judgment motions as regards the buyer defendants' affirmative defenses in abeyance pending its receipt of the additional submissions described above, and the issuance of a decision based thereon.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

[28] *See* notice of cross motion (motion sequence number 006), exhibit F.

ORDERED that the motion, pursuant to CPLR 3212, of plaintiffs Mariana Dimitrova Alekna, Beatriz Da Costa, Samuel I. Gilchrist, Rachel Olson, Jose Santamaria, Laura Mahler, Kelly C. Holland, Max A. Holland, Michael G. Tive, John C. Cole, Mary Ellen Cole, Kristin Mannoni, Joseph Richard Debart, III, William Blair Debart, Alex Berrick, Ashan Singh, Lamar Small, Rachel L. Perkins, Sara Muse, Kyung Chan Zoh and Jihoe Koo (motion sequence number 006) is held in abeyance with respect to a finding on the issue of liability on the plaintiffs' first cause of action pending the parties' respective submissions of the additional material described in this decision; and it is further

ORDERED that the parties shall submit the additional material described in this decision within sixty (60) days; and it is further

ORDERED that the balance of said plaintiffs' motion (motion sequence number 006) is held in abeyance pending the aforementioned submissions and the court's issuance of a ruling based thereon; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendants 207-217 West 110 Portfolio Owner LLC and GFB Management LLC (motion sequence number 006) is held in abeyance pending the aforementioned submissions and the court's issuance of a ruling based thereon; and it is further

ORDERED that the motion, pursuant to CPLR 2221 (motion sequence number 007), of defendants 207 Realty Associates LLC and Mann Realty associates for leave to reargue a portion of the court's March 2, 2021 decision (motion sequence number 005) is granted; and it is further

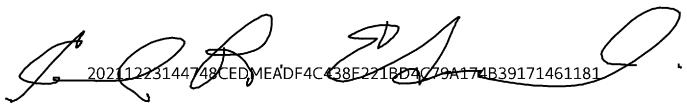
ORDERED that, upon reargument, the application of defendants 207 Realty Associates LLC and Mann Realty Associates to dismiss the second cross-claim in the amended answer of defendants 207-217 West 110 Portfolio Owner LLC and GFB Management LLC, and so much

of the third cross-claim in that answer that seeks liability against defendant 207 Realty Associates LLC on a theory of common-law indemnity is granted; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days; and it is further

ORDERED that the Clerk of the Court, upon service upon him (60 Centre Street, Room 141B) of a copy of this order with notice of entry, is directed to enter judgment dismissing the cross claims of defendants 207-217 West 110 Portfolio Owner LLC and GFB Management LLC against defendants 207 Realty Associates LLC and Mann Realty Associates, with prejudice, and with costs and disbursements to the latter defendants as taxed by the Clerk; and it is further

ORDERED that the balance of this action shall continue.



12/23/2021
DATE

CAROL EDMEAD, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE