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SCANNED ON 9/10/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46
Justice

Index Number : 603468/2009
DUGAN, WILLIAM
vs.
LONDON TERRACE GARDENS
SEQUENCE NUMBER : 003
ORDER MAINTAIN CLASS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 6, were read on this motion to/for consolidation and class certification

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-3
Answering Affidavits — Exhibits _____ | No(s). 4-5
Replying Affidavits _____ | No(s). 6

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

The court grants plaintiffs' motion for consolidation and for class certification pursuant to the accompanying decision. C.P.L.R. §§ 602(a), 902.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
SEP 10 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/16/13

Lucy Billings, J.S.C.
LUCY BILLINGS
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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WILLIAM DUGAN, MARSHA D'YANS, GEORGETTE GAGNON, LOWELL D. KERN, MICHAEL MCCURDY, JOSE PELAEZ, TRACY SNYDER, MICHAEL J. WALSH, LESLIE M. MACK, and ANITA ZITIS, on Behalf of Themselves and All Other Persons Similarly Situated,

Index No. 603468/2009

Plaintiffs

- against -

LONDON TERRACE GARDENS, L.P.,

Defendant

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JAMES DOERR, on Behalf of Himself and All Other Persons Similarly Situated,

Index No. 603696/2009

Plaintiffs

- against -

LONDON TERRACE GARDENS, L.P.,

Defendant

----------x

DECISION AND ORDER

APPEARANCES:

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs in these two actions, on behalf of themselves and similarly defined classes of tenants at defendant's building complex London Terrace Gardens, claim that defendant charged them excessive rents under applicable rent stabilization laws and equivalent rent control laws. Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d 270 (2009). London Terrace Gardens consists of almost 1,000 apartments. Plaintiffs claim defendant unlawfully removed over 50% of these units from rent stabilization or control and charged their tenants excessive rent.

The court's prior decision, affirmed by the First Department, denied defendant's motion to dismiss or stay each action to permit the New York State Division of Housing and Community Renewal (DHCR) to resolve plaintiffs' claims. Dugan v. London Terrace Gardens, L.P., 34 Misc. 3d 1240, 2011 WL 7553528 (Sup. Ct. N.Y. Co. 2011), aff'd, 101 A.D.3d 648 (1st Dep't 2012). Pursuant to that decision, the court retains jurisdiction to

decide whether plaintiffs' apartments are subject to the rent stabilization and control laws at issue, whether the tenants have been charged excessive rent, and what rent was to have been charged for what past period and is to be charged currently. This decision addresses plaintiffs' motions to consolidate the two actions and certify a plaintiff class and third party defendant DHCR's motion to dismiss defendant's third party complaints in each action. Plaintiffs have resolved by a stipulation their motions insofar as they sought to appoint lead counsel for the class.

II. THE APPLICABLE RENT STABILIZATION AND CONTROL LAWS AND THEIR INTERPRETATION

The "luxury decontrol" provisions of the New York City Rent Control Law and Rent Stabilization Law allow a landlord to remove apartments from rent control or stabilization and charge market rent when tenants' incomes exceed specified thresholds. N.Y.C. Admin. Code §§ 26-403.1, 26-504.3. Once a landlord removes apartments from rent regulation and charges market rent, the landlord is no longer subject to the various other requirements attendant to rent regulation. These companion obligations include renewal the tenants' leases for a prescribed period, adherence to the original lease terms with limited rent increases, provision of the same services, and liability for harassment of tenants.

Where landlords receive a New York City "J-51" tax exemption or abatement for their apartments under New York Real Property Tax Law § 489(1)(a) and New York City Administrative Code §§ 11-

243 and 11-244 (formerly §§ J51-2.5 and J51-5), the apartments are subject to rent regulation, N.Y.C. Admin. Code §§ 11-243(i)(1), 26-504(c), and the luxury decontrol provisions do not apply. N.Y.C. Admin. Code §§ 26-403(e)(2)(j) and (e)(2)(k), 26-504.1, 26-504.2(a). DHCR's Rent Stabilization Code and its Rent and Eviction Regulations for rent controlled units, interpreting the luxury decontrol statutes, however, allowed a landlord to avail itself of luxury decontrol of apartments that already were rent stabilized or controlled when the landlord began receiving a J-51 tax exemption or abatement for those apartments. DHCR's regulations also allowed a landlord to continue charging market rent for apartments already deregulated under luxury decontrol when the landlord began receiving J-51 tax benefits for the building, but the New York City Department of Housing Preservation and Development (HPD) had reduced them in proportion to the percentage of deregulated apartments in the building.

Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d at 285-86, determined that this regulatory interpretation, 9 N.Y.C.R.R. § 2520.11(r)(5)(i) and (s)(2)(i), of the Rent Stabilization Law, N.Y.C. Admin. Code §§ 26-504.1 and 26-504.2(a), was contrary to the statutes' terms that a landlord may not avail itself of luxury decontrol where the apartment "became subject to" rent stabilization "by virtue of receiving" a J-51 tax exemption or abatement. The statutory terms prohibiting luxury decontrol of rent controlled apartments receiving J-51 tax benefits, N.Y.C. Admin. Code § 26-403(e)(2)(j) and (e)(2)(k), are identical to §§

26-504.1 and 26-504.2(a), just as DHCR's regulations misinterpreting each statute are comparable. 9 N.Y.C.R.R. §§ 2200.2(f)(19)(v) and (20)(ii), 2520.11(r)(5)(i) and (s)(2)(i).

The Roberts ruling, however, in turn raises further issues. The extent to which these issues now have been resolved or will require resolution in this litigation and their suitability for classwide resolution bear on the pending motions.

A. RETROACTIVITY

First is the extent to which defendant's unlawful decontrol of apartments when tenants' incomes exceeded the thresholds for luxury decontrol, despite defendant's receipt of a J-51 tax exemption or abatement, must be remedied retroactively, requiring the landlord to repay past overcharges to tenants. Related to retroactivity is when plaintiffs' claims accrued and whether they survive under the applicable statute of limitations.

The Appellate Division subsequently has resolved that the Court of Appeals' interpretation in Roberts of the Rent Stabilization Law, N.Y.C. Admin. Code §§ 26-504.1 and 26-504.2(a), and the analogous provisions of the Rent Control Law, N.Y.C. Admin. Code § 26-403(e)(2)(j) and (e)(2)(k), is to be applied retroactively. Roberts v. Tishman Speyer Props., L.P., 89 A.D.3d 444, 445-46 (1st Dep't 2011); Gersten v. 56 7th Ave. LLC, 88 A.D.3d 189, 198 (1st Dep't 2011). Retroactive application is warranted primarily because the Court of Appeals' decision did not establish a new principle of law, either by abruptly overruling past precedent on which litigants may have

relied, or by resolving an issue for the first time in a way not foreshadowed. Gurnee v. Aetna Life & Cas. Co., 55 N.Y.2d 184, 191-92 (1982); London Terrace Gardens, L.P. v. City of New York, 101 A.D.3d 27, 31 (1st Dep't 2012); Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 197-98; Hilton Hotels Corp. v. Commissioner of Fin. of City of N.Y., 219 A.D.2d 470, 477 (1st Dep't 1995). See People v. Hill, 85 N.Y.2d 256, 262-63 (1995); People v. Favor, 82 N.Y.2d 254, 262-63 (1993); Americorp Sec. v. Sager, 239 A.D.2d 115, 117-18 (1st Dep't 1997); Matter of Taihem F., 222 A.D.2d 322, 323-24 (1st Dep't 1995). Rather than creating a new principle of law, the decision simply construed a statute not judicially construed previously, hence mandating retroactive application. Roberts v. Tishman Speyer Props., L.P., 89 A.D.3d at 445-46; Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 197-98.

Consequently, since no other judicial principle of law or judicial interpretation governed previously, and only an administrative interpretation was adopted, no caution is necessary in the displacement of a previously relied upon judicial principle or interpretation by a newly announced principle or interpretation. Instead, retroactive operation of the original judicial construction in Roberts is necessary to promote its effect. Gurnee v. Aetna Life & Cas. Co., 55 N.Y.2d at 192-93; Hilton Hotels Corp. v. Commissioner of Fin. of City of N.Y., 219 A.D.2d at 477-78. See People v. Hill, 85 N.Y.2d at 262-63; People v. Favor, 82 N.Y.2d at 262, 265-66; Americorp Sec. v. Sager, 239 A.D.2d at 117-18.

Finally, retroactive application will not impose inequitable results. Gurnee v. Aetna Life & Cas. Co., 55 N.Y.2d at 192-93; Hilton Hotels Corp. v. Commissioner of Fin. of City of N.Y., 219 A.D.2d at 477-78. See People v. Hill, 85 N.Y.2d at 262-63; People v. Favor, 82 N.Y.2d at 262, 266; Americorp Sec. v. Sager, 239 A.D.2d at 117-18. Retroactive application of Roberts will protect tenants pursuant to the Rent Stabilization and Rent Control Laws, rather than allowing landlords to profit from a faulty administrative interpretation of the statutes. Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 198.

B. APPLICABLE STATUTES OF LIMITATIONS

To this end, the Appellate Division also refused to impose a statute of limitations, either the four years for rent overcharges, C.P.L.R. § 213-a; N.Y.C. Admin. Code § 26-516(a); Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 200-201, or the six years for breach of a lease, C.P.L.R. § 213(2); 72A Realty Assoc. v. Lucas, 101 A.D.3d 401, 402 (1st Dep't 2012); Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 199-200, for the purpose of determining the rent regulatory status of apartments claimed to have been illegally deregulated while the landlord received J-51 tax benefits. While no statute of limitations bars plaintiffs' challenge to the regulatory status of their apartments, the court still must determine the operative statute of limitations on the periods of rent overcharges that plaintiffs are entitled to recover should they prevail. In calculating damages for rent overcharges, the limitations period of four years applies to the

recovery of overcharges for rent stabilized apartments. C.P.L.R. § 213-a; N.Y.C. Admin. Code § 26-516(a); 9 N.Y.C.R.R. § 2526.1(a); Cintron v. Calogero, 15 N.Y.3d 347, 355-56 (2010); Crimmins v. Handler & Co, 249 A.D.2d 89, 91 (1st Dep't 1998). See H.O. Realty Corp. v. State of N.Y. Div. of Hous. & Community Renewal, 46 A.D.3d 103, 109 (1st Dep't 2007). A limitations period of two years applies to the recovery of rent overcharges for rent controlled apartments. N.Y.C. Admin. Code § 26-413(d)(2); 9 N.Y.C.R.R § 2206.8(a)(1). As plaintiff Dugan and his co-plaintiffs also claim breach of contract, the limitations period of six years may govern the calculation of overcharges for which defendant is liable, should plaintiffs prevail on that claim. C.P.L.R. § 213(2).

C. DECONTROL IN PROPORTION TO A REDUCTION IN TAX BENEFITS

Another issue the Roberts ruling left unresolved is whether defendant legally may avail itself of luxury decontrol for apartments to which it attributes no J-51 tax benefits, while receiving them for other apartments in its building, because HPD reduced them in proportion to the percentage of decontrolled apartments in the building. The Appellate Division in Roberts held that "all apartments in buildings receiving J-51 tax benefits are subject to the RSL during the entire period in which the owner receives such benefits." Roberts v. Tishman Speyer Props., L.P., 62 A.D.3d 71, 80 (1st Dep't 2009), aff'd, 13 N.Y.3d at 284 (emphasis added). In affirming, the Court of Appeals did not repeat that holding, but, when referring to the legislative

history of Administrative Code §§ 26-504.1 and 26-504.2(a), emphasized that it "plainly indicates that 'at no point' would the luxury decontrol provisions apply to buildings which 'received' tax exemptions." Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d at 287 (emphasis added). In fact the Rent Stabilization Law itself requires that it apply to: "Dwelling units in a building . . . receiving the benefits of section 11-243 or section 11-244." N.Y.C. Admin. Code § 26-504(c) (emphases added). See Denza v. Independence Plaza Assoc., LLC, 95 A.D.3d 153, 160-61 (1st Dep't 2012).

D. PRECLUSION

Related to all the above issues is the extent to which any prior judicial or DHCR adjudicatory decisions specifically regarding plaintiffs' rent levels affect the determination of retroactivity, limitations of plaintiffs' claims, and the lawfulness of decontrol in proportion to a reduction in the tax benefits. A prior DHCR luxury decontrol order may preclude plaintiffs from challenging the removal of apartments from rent regulation, if that issue was litigated fully and decided in a DHCR proceeding, where plaintiffs were provided an opportunity to challenge whether their apartments were to be subject to luxury decontrol. Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 201-202. See ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 226 (2011); Staatsburg Water Co. v. Staatsburg Fire Dist., 72 N.Y.2d 147, 153 (1988); Ryan v. New York Tel. Co., 62 N.Y.2d 494, 499 (1984); Metro-North Commuter R.R. Co. v. New York State Exec. Dept. Div.

of Human Rights, 271 A.D.2d 256, 257 (1st Dep't 2000).

III. PLAINTIFFS' CLAIMS

Plaintiffs bring their actions on behalf of a class of former and current tenants at London Terrace Gardens residing in apartments that were subject to rent stabilization or rent control, but were treated as unregulated under luxury decontrol since 2003, when defendant began receiving almost $2,000,000 in J-51 tax benefits. Plaintiffs seek a declaratory judgment that these apartments be returned to their prior regulated status, that any pending petitions before DHCR to deregulate apartments are void, and that any prior deregulation orders by DHCR are void. To return the apartments to regulated status, plaintiffs seek injunctive relief ordering defendant to register the unregulated apartments with DHCR and to offer the tenants renewal leases approved by DHCR. Plaintiffs seek damages equal to the excessive rents charged, plus interest, when plaintiffs' apartments were treated as unregulated during defendant's receipt of J-51 tax benefits.

Plaintiffs in both these two actions claim rent overcharges and the related relief outlined above under the Rent Stabilization Law or Rent Control Law. Plaintiff Dugan and his co-plaintiffs also claim deceptive business practices, promissory estoppel, breach of the parties' rental contracts, and reformation of those contracts. Plaintiff Doerr also claims defendant's unjust enrichment.

IV. CONSOLIDATION

In the interest of judicial economy, consolidation of the two actions is warranted because they raise common questions of fact and law, and consolidation would cause no discernible prejudice of any party's rights or delay in their adjudication. C.P.L.R. § 602(a); Kally v. Mount Sinai Hosp., 44 A.D.3d 1010 (1st Dep't 2007); Amcan Holdings, Inc. v. Torys LLP, 32 A.D.3d 337, 339 (1st Dep't 2006); Geneva Temps, Inc v. New World Communities, Inc., 24 A.D.3d 332, 334-35 (1st Dep't 2005). See Cason v. Deutsche Bank Group, 106 A.D.3d 533 (1st Dep't 2013). The two actions share common issues because both actions are against the same defendant for illegal deregulation of apartments in London Terrace Gardens. Maintaining the actions separately would pose a risk of inconsistent dispositions. Murphy v. 317-319 Second Realty LLC, 95 A.D.3d 443, 445 (1st Dep't 2012); Badillo v. 400 E. 51st St. Realty LLC, 74 A.D.3d 619, 620 (1st Dep't 2010). For these undisputed reasons, and based on defendant's consent to plaintiffs' motion insofar as it seeks to consolidate the two actions, the court grants consolidation under Index Number 603468/2009, the first filed action. C.P.L.R. § 602(a); Badillo v. 400 E. 51st St. Realty LLC, 74 A.D.3d at 620.

V. CLASS CERTIFICATION

A. WAIVER OF THE STATUTORY PENALTY

Absent specific statutory authorization, a class action may not be maintained to recover a penalty created or imposed by a statute, because such punitive or aggregated damages provide the

same incentive as the rationale for class actions: to encourage individuals to sue where they may be entitled to only a minimal recovery. C.P.L.R. § 901(b); Sperry v. Crompton Corp., 8 N.Y.3d 204, 211, 214 (2007). The Rent Stabilization Law and Rent Control Law and their implementing regulations provide for treble damages as a penalty for a willful rent overcharge. N.Y.C. Admin. Code §§ 26-413(d)(2), 26-516(a); 9 N.Y.C.R.R. §§ 2206.8(b)(1), 2526.1(a). Plaintiffs elect to waive the penalty on behalf of the class, however, seeking only compensatory relief for the actual amounts of overcharges plus interest. Class members may opt out of the class to pursue the statutory penalty against defendant.

Contrary to defendant's insistence that a class representative may not forgo the class' claim for a statutory penalty to circumvent C.P.L.R. § 901(b), a waiver is permitted as long as (1) the penalty is neither mandatory nor the sole measure of recovery, and (2) class members retain the right to opt out of the class to pursue the punitive relief. Downing v. First Lenox Terrace Assoc., 107 A.D.3d 86, 89 (1st Dep't 2013); Borden v. 400 E. 55th St. Assoc., L.P., 105 A.D.3d 630 (1st Dep't 2013); Gudz v. Jemrock Realty Co., LLC, 105 A.D.3d 625 (1st Dep't 2013); Cox v. Microsoft Corp., 8 A.D.3d 39, 40 (1st Dep't 2004). Unlike mandatory treble damages provisions that bar class certification, e.g., Asher v. Abbott Labs., 290 A.D.2d 208 (1st Dep't 2002) (N.Y. Gen. Bus. Law § 340(5)), the treble damages provisions in Administrative Code §§ 26-413(d)(2) and 26-516(a) and 9

N.Y.C.C.R.R. §§ 2206.8(b)(1) and 2526.1(a) supplement the recovery of overcharges and may be awarded only upon finding of willfulness or bad faith. Therefore the treble damages are neither a sole means of recovery for rent overcharge claims nor mandatory and may be waived on behalf of a class. Downing v. First Lenox Terrace Assoc., 107 A.D.3d at 89.

Consequently, plaintiffs' waiver of treble damages and allowance for class members to opt out of the class permit plaintiffs to proceed as a class action despite C.P.L.R. § 901(b)'s prohibition against a class action that seeks a statutory penalty. Downing v. First Lenox Terrace Assoc., 107 A.D.3d at 89; Borden v. 400 E. 55th St. Assoc., L.P., 105 A.D.3d 630; Gudz v. Jemrock Realty Co., LLC, 105 A.D.3d 625. Although Administrative Code § 26-516(a) and 9 N.Y.C.C.R.R. § 2526.1(a) denominate plaintiffs' classwide claims for rent overcharges plus interest and attorneys' fees a "penalty," such a term alone is not dispositive. Interest and attorneys' fees, as well as reimbursement of overcharges, are in fact compensatory forms of relief and thus do not bar class certification under C.P.L.R. § 901(b). Downing v. First Lenox Terrace Assoc., 107 A.D.3d at 90-91; Gudz v. Jemrock Realty Co., LLC, 105 A.D.3d at 627.

B. FORFEITURE OF LAWFUL RENT INCREASES

Plaintiffs claim that, in calculating their damages, due to defendant's noncompliance with rent stabilization and control registration requirements, N.Y.C. Admin. Code § 26-517(e); 9 N.Y.C.R.R. §§ 2203.7, 2528.4(a), defendant is not entitled to any

lawful annual or bi-annual rent increases adopted by the New York City Rent Guidelines Board, N.Y.C. Admin. Code § 26-510(a) and (b), beyond the base date rent. The base date rent is the legal regulated rent on the last rent registration filed for an apartment or when it became subject to rent regulation. See Grimm v. State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin., 15 N.Y.3d 358, 365-66 (2010); Thornton v. Baron, 5 N.Y.3d 175, 180-81 & n.1 (2005).

Even though defendant maintains that plaintiffs' claim for forfeiture of rent increases is inapplicable here, defendant nonetheless contends that this forfeiture claim under Administrative Code § 26-517(e) seeks a statutory penalty that bars plaintiffs from proceeding as a class action. Defendant provides no authority for its proposition that plaintiffs' mere invocation of the forfeiture provision, N.Y.C. Admin. Code § 26-517(e), that in fact is inapplicable, even if it is a penalty for purposes of C.P.L.R. § 901(b), bars class certification. Nevertheless, because the forfeiture provision does not amount to a penalty, even if it applies, it does not bar class certification.

1. The Forfeiture Provision's Context

Plaintiffs present defendant's forfeiture of its entitlement to Rent Guidelines Board increases as a component of damages for rent overcharges and contend that the forfeiture is not a penalty because the forfeiture provision itself does not dictate that defendant pay a monetary award to plaintiffs. Whether a

provision amounts to a penalty depends on the context. Sperry v. Crompton Corp., 8 N.Y.3d at 213. Even if Administrative Code § 26-517(e) and 9 N.Y.C.R.R. § 2528.4(a) denominate the forfeiture a "penalty" for a landlord's failure to file rent registrations, again such a denomination is not dispositive. Downing v. First Lenox Terrace Assoc., 107 A.D.3d at 90-91; Gudz v. Jemrock Realty Co., LLC, 105 A.D.3d at 626. Where the recovery sought is compensatory, lacking a punitive or deterrent purpose or litigation incentive, the claim is not for imposition of a penalty as contemplated by C.P.L.R. § 901(b). Gudz v. Jemrock Realty Co., LLC, 105 A.D.3d at 626.

Defendant's forfeiture of rent increases equates to its nonentitlement to a statutory benefit. The forfeiture statute thus "penalizes those who violate it but does not provide for the recovery of a penalty" as redress, as necessary to fall under C.P.L.R. § 901(b)'s penalty exclusion. Pruitt v. Rockefeller Ctr. Props., 167 A.D.2d 14, 27 (1st Dep't 1991).

2. Extrapolation from Administrative Code § 26-516(a) and 9 N.Y.C.R.R. § 2526.1(a)(1)

Notably, Administrative Code § 26-516(a) and 9 N.Y.C.R.R. § 2526.1(a)(1) specify that the treble damages provision may not be imposed to punish defendant based solely on its failure to file rent registrations. Since treble damages still are imposed in many instances where landlords failed to file rent registrations, this prohibition is not against imposing the punitive measure when such a failure has occurred, but only against imposing the measure as a penalty for that failure.

Unlike the treble damages recovery available to plaintiffs for rent overcharges, forfeiture of annual or bi-annual regulated rent increases due to defendant's failure to file rent registrations enhances any overcharge award to plaintiffs by comparatively little. Plaintiffs' only recovery would be the rent increases set by the Rent Guidelines Board, which for the last 15 years average 3.43% for the annual rent adjustment and 6.30% for the bi-annual rent adjustment. See Rent Guidelines Board Apartment Orders #1 through #45 (1969 to 2014) (June 26, 2013), http://www.housingnyc.com/downloads/guidelines/aptorders2014.pdf. If treble damages may not be considered a punitive measure for failure to file rent registrations, a far lesser enhancement of a tenant's overcharge award may not be considered punitive either.

3. The Forfeiture Provision's Effects

Regardless of any extrapolation from Administrative Code § 26-516(a) and 9 N.Y.C.R.R. § 2526.1(a)(1), such a small recovery would not enhance plaintiff's damages enough to amount to a punitive measure or provide the litigation incentive that the treble damages for willful rent overcharges provide. See Sperry v. Crompton Corp., 8 N.Y.3d at 214; H.O. Realty Corp. v. State of N.Y. Div. of Hous. & Community Renewal, 46 A.D.3d at 108. Defendant's very defense to the forfeiture claim reveals its lack of deterrent effect. Defendant maintains, and plaintiffs do not dispute, that it failed to file rent registrations on its assumption that it was exempted from the registration

requirements, in reliance on DHCR's longstanding but erroneous interpretation of the law. See State of N.Y. ex rel. Grupp v. DHL Express (USA), Inc., 19 N.Y.3d 278, 286-87 (2012); 164 Mulberry St. Corp. v. Columbia Univ., 4 A.D.3d 49, 60 (1st Dep't 2004). While defendant's reliance on DHCR's statutory interpretation may have been deliberate, plaintiffs have not contended that defendant deliberately flouted the statute or fraudulently overcharged them. Whether that reliance on an administrative interpretation in the absence of a governing judicial interpretation was in good faith or foolhardy, in the absence of purposefully illegal deregulation or fraud, the forfeiture provision does not impose the punitive and deterrent effects on defendant that are intended to constitute a penalty.

D. Governing Appellate Authority

This analysis follows the same reasoning revealed in 72A Realty Assoc. v. Lucas, 101 A.D.3d at 402-403. Simply claiming reliance on DHCR's faulty interpretation, without more, may be insufficient to escape liability for treble damages. Id. at 402. If, however, defendant demonstrates the absence of fraud or of willful conduct designed to deregulate illegally, plaintiffs still will be entitled to compensation for the overcharges, but this punitive damages measure may not be imposed. Id. at 403. Similarly, if defendant failed to file rent registrations for apartments on the assumption that they were deregulated legally and exempted from registration requirements, in the absence of any fraudulent conduct, plaintiffs may be entitled to

compensation, but defendant will not incur a penalty.

Whether landlords that deregulated apartments while receiving J-51 tax benefits in reliance on DHCR's faulty interpretation are barred from collecting statutory rent increases and whether that forfeiture is a penalty have not been directly addressed. Given the forfeiture provision's relevance in calculating damages for overcharges in post-Roberts litigation, however, its applicability and effects are issues that must recur. Yet it has never impeded class certification in similar actions against landlords for luxury deregulation during their participation in the J-51 program. Downing v. First Lenox Terrace Assoc., 107 A.D.3d 90-91; Borden v. 400 E. 55th St. Assoc., L.P., 105 A.D.3d 630; Gudz v. Jemrock Realty Co., LLC, 105 A.D.3d 625. It has not been found to be a penalty and therefore has not been found to require waiver. For claims against landlords' luxury deregulation during their participation in the J-51 program to proceed as a class action, only the treble damages provision has been found to be a penalty requiring waiver. Downing v. First Lenox Terrace Assoc., 107 A.D.3d at 90-91; Borden v. 400 E. 55th St. Assoc., L.P., 105 A.D.3d 630; Gudz v. Jemrock Realty Co., LLC, 105 A.D.3d 625.

In this light, denying class certification would contravene the recent and consistent appellate authority approving class actions for claims of illegal deregulation of apartments under the J-51 program and the flexibility afforded under C.P.L.R. Article 9, "to favor the maintenance of class actions." Pruitt

v. Rockefeller Ctr. Props., 167 A.D.2d at 20. Absent any currently articulated error in the forfeiture provision's effect as construed above, the court must resolve the issue "in favor of allowing the class action." Pruitt v. Rockefeller Ctr. Props., 167 A.D.2d at 21; Liechtung v. Tower Air, 269 A.D.3d 363, 364 (2d Dep't 2000); Brown v. State, 250 A.D.2d 314, 320 (3d Dep't 1998). See Englade v. Harpercollins Publs., 289 A.D.2d 159 (1st Dep't 2001). At this stage of the litigation, certification of a plaintiff class is not to be denied solely on the possibility that the forfeiture is both a penalty in this context and applicable to landlords that relied on DHCR's mistaken interpretation of the law.

C. STANDARDS FOR CLASS CERTIFICATION

One or more members of a class may sue as representative parties on behalf of all class members if plaintiffs meet the following prerequisites. C.P.L.R. § 901(a). (1) The class is so numerous that joinder of all members is impracticable. (2) Questions of law or fact common to the class predominate over any questions affecting only individual members. (3) The representative parties' claims are typical of the class' claims. (4) The class representatives will protect the class' interests fairly and adequately. (5) A class action is superior to other methods for the fair and efficient adjudication of this controversy.

Plaintiffs, as the parties seeking class certification, bear the burden to present evidence establishing these criteria.

Kudinov v. Kel-Tech Constr. Inc., 65 A.D.3d 481, 481 (1st Dep't 2009). The criteria are to be construed liberally in favor of class certification. Id.; Pruitt v. Rockefeller Ctr. Props., 167 A.D.2d at 21. The court may consider the merits of plaintiffs' claims only to the extent of ensuring those claims are not a sham. Pludeman v. Northern Leasing Sys., Inc., 74 A.D.3d 420, 422 (1st Dep't 2010); Kudinov v. Kel-Tech Constr. Inc., 65 A.D.3d at 482; Jim & Phil's Family Pharm. v. Aetna U.S. Healthcare, 271 A.D.2d 281, 282 (1st Dep't 2000).

1. Numerosity

Plaintiffs' proposed class consists of all past and current tenants of London Terrace Gardens who have been charged or continue to be charged deregulated rents during defendant's receipt of tax benefits under New York City's J-51 program. The proposed class includes all tenants formerly and currently residing in the 558 deregulated apartments. Aff. of Tania Taveras ¶ 7. As it indisputably would be impracticable to join even 558 potential plaintiffs individually, the proposed class surely satisfies the numerosity requirement for class certification. Dabrowski v. Abax Inc., 84 A.D.3d 633, 634 (1st Dep't 2011); Pesantez v. Boyle Envtl. Servs., 251 A.D.2d 11, 12 (1st Dep't 1998).

2. Commonality

Common questions of fact and law predominate over individual questions. All class members are current and former tenants residing in deregulated apartments at London Terrace Gardens

since defendant began receiving J-51 tax benefits in 2003. The predominant legal claim for all class members is defendant's unlawful deregulation of their apartments while defendant was receiving J-51 tax benefits. The common inquiry for the entire class in determining defendant's liability is whether class members paid deregulated rent during defendant's participation in the J-51 program. If so, then the common predominant questions for the class members include the precise period of defendant's liability and the formula for calculating rent overcharges, questions which will require minimal individualized disputed evidence and to which no conceivable individualized defenses pertain. Because defendant's retroactive liability for its unlawfully excessive rents is resolved, neither is that question subject to individualized defenses or dependent on individualized evidence as to whether the parties' conduct or other circumstances warrant a retroactive remedy. Once a common formula is developed and applied, determining the extent of defendant's liability will be primarily a methodological exercise. Pludeman v. Northern Leasing Sys., Inc., 74 A.D.3d at 422-23; Yeger v. E*Trade Sec. LLC, 65 A.D.3d 410, 413 (1st Dep't 2009); CLC/CFI Liquidating Trust v. Bloomingdale's, Inc., 50 A.D.3d 446, 447 (1st Dep't 2008).

Factual questions peculiar to class representatives do not defeat commonality in any event. City of New York v. Maul, 14 N.Y.3d 499, 514 (2010); Pludeman v. Northern Leasing Sys., Inc., 74 A.D.3d at 423; Kudinov v. Kel-Tech Constr. Inc., 65 A.D.3d at

482. Although calculating damages for individual class members may involve applying specific criteria in the rent control and rent stabilization statutes and regulations, any consideration of class members' factual circumstances is confined solely to the calculation of damages and does not predominate over the class' common claims to bar class certification. Borden v. 400 E. 55th St. Assoc., L.P., 105 A.D.3d at 631; Kudinov v. Kel-Tech Constr. Inc., 65 A.D.3d at 482; Englade v. Harpercollins Publs., 289 A.D.2d at 160; Globe Surgical Supply v. GEICO Ins. Co., 59 A.D.3d 129, 139-40 (2d Dep't 2008). To accommodate individual considerations in damage calculations further, the court may define subclasses or appoint a special master. Godwin Realty Assoc. v. CATV Enters, 275 A.D.2d 269, 270 (1st Dep't 2000); Globe Surgical Supply v. GEICO Ins. Co., 59 A.D.3d at 142.

Finally, certification of the class remains subject to modification until disposition of the action. C.P.L.R. § 902. E.g., DeFilippo v. Mutual Life Ins. Co. of N.Y., 13 A.D.3d 178, 180 (1st Dep't 2004). See Matter of Colt Indus. Shareholder Litig., 77 N.Y.2d 185, 198 (1991); Louisiana Mun. Employees' Retirement Sys. v. Cablevision Sys. Corp., 74 A.D.3d 1291, 1293 (2d Dep't 2010). Should the determination of damages require modification of the class definition or decertification, the court may make such accommodations without them deterring class certification at this stage.

3. Typicality

Typicality is satisfied when the named plaintiffs' and the class' claims derive from the same course of conduct and are based on the same legal theory. Pludeman v. Northern Leasing Sys., Inc., 74 A.D.3d at 423; Ackerman v. Price Waterhouse, 252 A.D.2d 179, 201 (1st Dep't 1998). The named plaintiffs' claims in this consolidated action are typical of the classwide claims, as the named plaintiffs seek the same declaratory and injunctive relief sought by the class based on defendant's illegal deregulation of the apartments at London Terrace Gardens while receiving J-51 tax benefits. Borden v. 400 E. 55th St. Assoc., L.P., 105 A.D.3d at 631. The class representatives claim, for themselves and for the class, damages equal to the excessive rents charged, plus interest, when the tenants' apartments were treated as unregulated during defendant's receipt of J-51 tax benefits, all according to the same formula.

4. Adequacy of Representation

William Dugan and his co-plaintiffs each verified the complaint and attested to their understanding of the action and their ability and willingness to pursue the class' claims. Plaintiff Doerr's affidavit details his ability and willingness to serve as a class representative. As his affidavit simply supplements his complaint, and defendant does not object to the affidavit, despite its untimeliness, the court considers the affidavit a demonstration of Doerr's willingness to take whatever action is necessary to represent the class and relies on the

affidavit in determining his suitability as a class representative. C.P.L.R. § 2001.

Nor does defendant object to the named plaintiffs' financial ability to pursue a class action. In any event, the attorney for at least one plaintiff has agreed to advance all litigation expenses. The named plaintiffs' waiver of treble damages on behalf of the class accompanied by a provision for class members to opt out of the class does not implicate the named plaintiffs' capability of serving as class representatives. Borden v. 400 E. 55th St. Assoc., L.P., 105 A.D.3d at 631. The court discerns no question as to the competency of the attorneys for the class or conflict of interest that would affect the named plaintiffs' ability or willingness to act in the class' best interest. Id.; Ackerman v. Price Waterhouse, 252 A.D.2d at 202.

Except for plaintiff Zitis against whom defendant raises no specific objections, defendant insists that proposed class representatives either lack a viable claim or otherwise are not typical of the class. Defendant specifically objects to plaintiffs Doerr, Pelaez, and Snyder as lacking any claim because their apartments were removed from rent control and set at market rates before their tenancies, and they failed to challenge the decontrol timely. Because a DHCR order deregulated plaintiff McCurdy's apartment, he similarly may not maintain a claim after failing to challenge his apartment's regulatory status timely. The proposed class definition includes class members whose apartments were deregulated through various means, including the

means employed against these named plaintiffs. Nonetheless, the common claim and legal question for all class members in determining defendant's liability remains whether they paid deregulated rent during the period defendant participated in the J-51 program.

Insofar as defendant claims it deregulated apartments legally, pursuant to a decontrol order by DHCR or otherwise, notwithstanding defendant's receipt of J-51 tax benefits, such a claim is a legal question to determined. Class members in circumstances similar to the four plaintiffs listed above are part of the class for whom the court must determine whether defendant's deregulation of their apartments was allowable under applicable statutes. Regarding defendant's defense that the statutes of limitations bar these named plaintiffs' claims, not only is this defense also a legal question to be determined, but, for plaintiffs' purpose of challenging the regulatory status of apartments deregulated while defendant was receiving J-51 tax benefits, no applicable limitations period bars that fundamental claim. 72A Realty Assoc. v. Lucas, 101 A.D.3d at 402; Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 199-200.

Regarding defendant's claim that named plaintiffs Doerr, Dugan, Gagnon, and Kern are former tenants and therefore maintain no interest in pursuing injunctive and declaratory relief regarding the apartments' future regulatory status and rent, these plaintiffs, too, fall within the class definition that includes former tenants of defendant's building. These

plaintiffs' tenancy status is typical of the class members who are former tenants and still hold a stake in the overcharge claims against defendant. The remaining class representatives who are current tenants adequately represent the class' interest in pursuing prospective relief.

Negotiated agreements regarding renovations in the apartments of named plaintiffs Walsh and Mack are individual considerations that affect only the calculation of damages for the overcharges, but do not render these plaintiffs atypical. See Borden v. 400 E. 55th St. Assoc., L.P., 105 A.D.3d at 631; Kudinov v. Kel-Tech Constr. Inc., 65 A.D.3d at 482; Englade v. Harpercollins Publs., 289 A.D.2d at 160; Globe Surgical Supply v. GEICO Ins. Co., 59 A.D.3d at 139-40. Defendant's insistence that, based on its own calculations, defendant owes plaintiffs Dugan, D'Yans, Gagnon, Walsh, and Mack no damages for rent overcharges similarly affects only the calculation of damages and is premature. Defendant has premised this contention, moreover, on the rent plaintiffs were charged four years before they commenced these actions, as the base date rent, even though that rent has not been determined the legal regulated rent that was to have been charged. See Grimm v. State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin., 15 N.Y.3d at 365-66; Thornton v. Baron, 5 N.Y.3d at 180-81 & n.1; 72A Realty Assoc. v. Lucas, 101 A.D.3d at 402; Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 200.

5. Superiority

Class members' numerosity and the expenses entailed in bringing separate, individual actions outweigh any anticipated difficulties in managing a class action. Judicial resources would be taxed much more heavily in managing such numerous individual actions. C.P.L.R. § 902. Development and application of a formula for calculating overcharges and determination of the limitations on claims, the preclusive effect of any prior DHCR adjudications involving the parties, and the legality of decontrol in proportion to a reduction in tax benefits are more efficiently and aptly undertaken on a classwide rather than an individual basis. Because these questions relating to liability are common and predominate for the entire class, a class action on liability conserves judicial resources even if determining damages requires the use of subclasses or a special master to assess individualized facts. C.P.L.R. § 906.

In individual instances the amount of overcharges also may result in damages so prohibitively low as to discourage class members from pursuing their claims. A class action provides a means of compensation for those individuals. Nawrocki v. Proto Constr. & Dev. Corp., 82 A.D.3d 534, 536 (1st Dep't 2011); Drizin v. Sprint Corp., 12 A.D.3d 245, 246 (1st Dep't 2004).

In sum, the factors enumerated in C.P.L.R. § 902 weigh in favor of proceeding as a class action against defendant on behalf of:

all past and current tenants of London Terrace Gardens who

have been charged or continue to be charged deregulated rents during defendant's receipt of J-51 tax benefits under New York Real Property Tax Law § 489(1)(a) and New York City Administrative Code §§ 11-243 and 11-244.

Therefore the court grants certification of a plaintiff class defined above. C.P.L.R. §§ 902, 903.

VI. DHCR'S MOTION TO DISMISS DEFENDANT'S THIRD PARTY ACTION

DHCR's province is to administer the Rent Stabilization and Rent Control Laws through implementing regulations and adjudicating claims under those statutes and regulations. Defendant's third party action against DHCR seeks declaratory and related injunctive relief binding on DHCR to the following effect. (1) The Court of Appeals' interpretation in Roberts of the Rent Stabilization Law may not be applied retroactively, such that the rents defendant charged and continues to charged are permitted under the rent stabilization statutes and regulations. (2) Retroactive application of Roberts is an unconstitutional regulatory taking without fair notice under the Takings Clause and the Due Process Clause of the Fifth Amendment to the United States Constitution. (3) Defendant is entitled to rescind its participation in the J-51 program. (4) Alternatively to (1)-(3), upon the expiration of defendant's J-51 tax benefits, defendant no longer will be subject to any rent stabilization laws triggered by the J-51 program. DHCR moves to dismiss defendant's third party actions on the grounds that there is no viable controversy between defendant and DHCR for which relief may be

granted and that defendant seeks to prohibit DHCR from lawfully pursuing its statutory duties.

A. DEFENDANT SEEKS DECLARATORY AND INJUNCTIVE RELIEF REGARDING ISSUES ALREADY DECIDED.

As discussed above, the Court of Appeals' ruling in Roberts, as an original judicial construction of a statute, applies retroactively. Roberts v. Tishman Speyer Props, L.P., 89 A.D.3d at 445-46; Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 197-98. The Roberts ruling created neither a new principle of law, nor an arbitrary change in the law, for which retroactive application implicates the Takings or Due Process Clause. London Terrace Gardens, L.P. v. City of New York, 101 A.D.3d at 31; Roberts v. Tishman Speyer Props., L.P., 89 A.D.3d at 445-46. Defendant was not deprived of fair notice because it relied on DHCR's faulty interpretation of a current statute, the plain text of which was readily available for defendant to read and interpret for itself, and which was foreseeably susceptible of the courts' different interpretation according to that text. London Terrace Gardens, L.P. v. City of New York, 101 A.D.3d at 31; Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 198.

Because the Roberts ruling's retroactive application already has been decided, the constitutionality of such retroactivity is not in controversy, it is constitutional, and defendant's claim that it is not is untenable. Because the Appellate Division already has decided, in this instance directly as to defendant itself, that it may not rescind its participation in the J-51 program, London Terrace Gardens, L.P. v. City of New York, 101

A.D.3d at 30, that decision not only is binding precedent, but collaterally estops defendant from obtaining any contrary relief here. Tydings v. Greenfield, Stein & Senior, LLP, 11 N.Y.3d 195, 199 (2008); City of New York v. Welsbach Elec. Corp., 9 N.Y.3d 124, 128 (2007); Buechel v. Bain, 97 N.Y.2d 295, 303-304 (2001); Martin v. Safeco Ins. Co. of Am., 19 A.D.3d 221 (1st Dep't 2005).

B. THERE IS NO VIABLE CONTROVERSY BETWEEN DEFENDANT AND DHCR.

Defendant insists that DHCR is a necessary party for the conclusive determination of London Terrace Gardens apartments' regulatory status under the rent stabilization statutes. Given the resolution of whether the Roberts ruling applies retroactively and whether defendant may rescind its participation in the J-51 program, all defendant's remaining claims regarding the permissibility of its deregulation of apartments and whether defendant has overcharged rent constitute a controversy between defendant and the plaintiff class only.

As an administrative agency with quasi-adjudicative authority, DHCR shares concurrent jurisdiction with the court over issues relating to rent regulation, including the determination of regulated rent and the compensation and penalties for rent overcharges. 9 N.Y.C.R.R. § 2506.1(g); Downing v. First Lenox Terrace Assoc., 107 A.D.3d at 88; Dugan v. London Terrace Gardens, L.P., 34 Misc. 3d 1240, 2011 WL 7553528, at *5, aff'd, 101 A.D.3d 648. The court's prior decision nonetheless refused to cede primary jurisdiction to DHCR to determine the issues raised in this action, as many of them are

within the court's exclusive jurisdiction and beyond DHCR's authority to adjudicate. Dugan v. London Terrace Gardens, L.P., 34 Misc. 3d 1240, 2011 WL 7553528, at *7-8, aff'd, 101 A.D.3d 648.

Nor has DHCR taken any position on the regulatory status of defendant's apartments or made any determination regarding the parties or issues in this action in the wake of Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d 270. Aff. of Sheldon Melnitsky ¶¶ 31-33. DHCR will have no jurisdiction or authority to make any determination regarding the parties or issues in this action unless and until either a plaintiff class member or defendant institutes a proceeding before the agency. N.Y.C. Admin. Code § 26-516(b); 9 N.Y.C.R.R. § 2506.1(a) and (g). Once DHCR makes a determination affecting defendant's rights or interests, defendant may seek judicial review of DHCR's determination after exhausting available administrative remedies or upon demonstrating that pursuit of such remedies would be futile. C.P.L.R. § 7801; Contest Promotions-NY LLC v. New York City Dept. of Bldgs., 90 A.D.3d 436, 437 (1st Dep't 2012); People Care Inc. v. City of N.Y. Human Resources Admin., 89 A.D.3d 515, 516 (1st Dep't 2011); Amazon.com, LLC v. New York State Dept. of Taxation & Fin., 81 A.D.3d 183, 203 (1st Dep't 2010); Wong v. Gouveneur Gardens Hous. Corp., 308 A.D.2d 301, 305 (1st Dep't 2003).

Res judicata and collateral estoppel will apply to a final determination of the rights and obligations of the plaintiff

class and defendant raised by their claims in this action. Tydings v. Greenfield, Stein & Senior, LLP, 11 N.Y.3d at 199; Landau v. LaRossa, Mitchell & Ross, 11 N.Y.3d 8, 12 (2008); Josey v. Goord, 9 N.Y.3d 386, 389-90 (2007); City of New York v. Welsbach Elec. Corp., 9 N.Y.3d at 128. This court's adjudication of this action therefore will preclude plaintiff class members and defendant from relitigating these claims before DHCR and will bind DHCR to the extent of that preclusion, as long as the parties had a full and fair opportunity to litigate the claims here, and the court rendered a final determination on the merits. Finkel v. New York City Hous. Auth., 89 A.D.3d 492, 493 (1st Dep't 2011); Zito v Fischbein Badillo Wagner Harding, 80 A.D.3d 520, 521 (1st Dep't 2011); Ginezra Assoc. LLC v. Ifantopoulos, 70 A.D.3d 427, 429 (1st Dep't 2010).

An action seeking a declaratory judgment regarding the parties' legal rights and relationship requires a controversy capable of resolution by the judiciary, C.P.L.R. § 3001; Megibow v. Condominium Bd. of Kips Bay Towners Condominium, 38 A.D.3d 265, 266 (1st Dep't 2007); Sokoloff v. Town Sports Intern. Inc., 6 A.D.3d 185, 186 (1st Dep't 2004); New York County Lawyers' Assn. v. State of New York, 294 A.D.2d 69, 72 (1st Dep't 2002), involving an actual, genuine dispute of law or facts between adverse parties, each with a stake in the outcome. Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 99-100 (1st Dep't 2009); Long Is. Light. Co. v. Allianz Underwriters Ins. Co., 35 A.D.3d 253 (1st Dep't 2006); Mt. McKinley Ins. Co. v. Corning

Inc., 33 A.D.3d 51, 57 (1st Dep't 2006). Defendant does not challenge any regulations promulgated by DHCR or conduct by DHCR against defendant. Defendant does not allege that DHCR has taken any actions at all or that its inaction has harmed defendant.

The regulatory status of defendant's apartments and its liability for deregulating them while receiving J-51 tax benefits are disputed issues in which only defendant and the plaintiff class hold a genuine stake. Even though defendant claims that any liability of defendant for the deregulation of plaintiffs' apartments derives from defendant's reliance on a DHCR regulation, defendant does not seek contribution or indemnification from DHCR.

Nor does DHCR hold any stake in the outcome of this action or indicate any interests adverse to defendant regarding its rent regulatory status or liability to plaintiffs. As there is no genuine dispute between DHCR and defendant, DHCR's inclusion in this action as a third party defendant will not affect the determination of the rights and obligations between defendant and the plaintiff class. See New York Times Co. v. City of N. Y. Police Dept., 103 A.D.3d 405, 407 (1st Dep't 2013); Mt. McKinley Ins. Co. v. Corning Inc., 33 A.D.3d at 57; Walker v. Pataki, 266 A.D.2d 40, 41 (1st Dep't 1999).

C. DEFENDANT'S ALTERNATIVE CLAIM FOR RELIEF IS NOT YET RIPE.

A fundamental requirement for declaratory relief is a controversy that is ripe for adjudication. C.P.L.R. § 3001; Cuomo v. Long Is. Light. Co., 71 N.Y.2d 349, 354 (1988). See

City of New York v. State of New York, 76 N.Y.2d 479, 485 (1990). Defendant's claim for declaratory relief regarding its regulatory status upon the expiration of its participation in the J-51 tax benefits program is premature for judicial adjudication because the effect of any such declaration by the court would be contingent on future events that may not occur. Cuomo v. Long Is. Light. Co., 71 N.Y.2d at 354; Empire 33rd LLC v. Forward Assn. Inc., 87 A.D.3d 447, 448 (1st Dep't 2011).

Whether defendant's apartments will be subject to rent stabilization is contingent first on the determination in this litigation regarding the apartments' past and current regulatory status and defendant's liability while defendant received J-51 tax benefits, which are viable claims between defendant and the plaintiff class. See N.Y.C. Admin. Code § 26-405(c); 72A Realty Assoc. v. Lucas, 101 A.D.3d at 402 & n.; 73 Warren St. LLC v. State of N.Y. Div. of Hous. & Community Renewal, 96 A.D.3d 524, 527, 529 (1st Dep't 2012); Gersten v. 56 7th Ave. LLC, 88 A.D.3d at 194. At this stage, there is no controversy between defendant and DHCR. See 73 Warren St. LLC v. State of N.Y. Div. of Hous. & Community Renewal, 96 A.D.3d at 529. When defendant's J-51 tax benefits expire, and defendant no longer participates in the program, defendant may petition DHCR to deregulate defendant's apartments. If and when defendant's claims are ripe for adjudication, defendant then may seek judicial review of DHCR's determinations regarding these apartments' regulatory status. Id. at 529-30.

D. CONCLUSION

In sum, the requisite controversy between defendant and DHCR is absent. Defendant's third party action against DHCR presents no factual or legal basis to grant defendant any of the relief sought against DHCR. C.P.L.R. § 3001; Sokoloff v. Town Sports Intern. Inc., 6 A.D.3d at 186. Absent any genuine factual or legal dispute between defendant and DHCR, the court grants DHCR's motion to dismiss defendant's third party complaint in each action. C.P.L.R. § 3211(a)(7).

VII. DISPOSITION

For the foregoing reasons, the court grants plaintiffs' motions for consolidation and for class certification. C.P.L.R. §§ 602(a), 902. The court certifies a plaintiff class of all past and current tenants of London Terrace Gardens who have been charged or continue to be charged deregulated rents during defendant's receipt of J-51 tax benefits under New York Real Property Tax Law § 489(1)(a) and New York City Administrative Code §§ 11-243 and 11-244. C.P.L.R. §§ 902, 903. The caption of this action shall be:

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WILLIAM DUGAN, MARSHA D'YANS, GEORGETTE GAGNON, LOWELL D. KERN, MICHAEL MCCURDY, JOSE PELAEZ, TRACY SNYDER, MICHAEL J. WALSH, LESLIE M. MACK, ANITA ZITIS, and JAMES DOERR, on Behalf of Themselves and All Other Persons Similarly Situated,

Index No. 603468/2009

Plaintiffs

- against -

LONDON TERRACE GARDENS, L.P.,

Defendant

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DATED: August 16, 2013

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED

SEP 10 2013

COUNTY CLERK'S OFFICE
NEW YORK