Casey v Whitehouse Estates, Inc.
2017 NY Slip Op 33319(U)
March 23, 2017
Supreme Court, New York County
Docket Number: 111723/11
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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

Plaintiffs,

-and-

PAMELA RENNA, VITINA DEGREZIA a/k/a VITINA LUPPINO,

Proposed Intervenor-Plaintiffs,

-against-

WHITEHOUSE ESTATES, INC., KOEPPEL & KOEPPEL, INC., DUELL 5 MANAGEMENT LLC d/b/a DUELL MANAGEMENT SYSTEMS, and WILLIAM W. KOEPPEL,

Defendants.

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Index No.: 111723/11
DECISION/ORDER

Hon. Gerald Lebovits, J.S.C.:

In this residential landlord/tenant class action for rent overcharge, the named class-member plaintiffs move for leave to serve an amended complaint as well as for partial summary judgment, while defendants cross-move for an order to deny summary judgment and to establish and enforce use and occupancy payments (motion sequence number 006). Several potential class-member plaintiffs also move separately, by order to show cause, for leave to intervene in this action and for an order to stay or enjoin the special proceeding that defendants have commenced against them in the Civil Court of the City of New York, Housing Part (motion sequence number 008).[1] The motion, cross motion, and order to show cause are all disposed of in accordance with the following decision.

BACKGROUND

Plaintiffs Kathryn Casey, Laurie Cagnassola, Gerald Cohen, Betty Furr, Francesca Gagliano, Carolyn Klein, Joseph Morgan, Richard Rose, Jessica Saks, and Kirk Swanson (plaintiffs) are all tenants of a building (the building) located at 350 East 52nd Street in the County, City, and State of New York. *See* notice of motion (motion sequence number 006), exhibit G (complaint), ¶ 1. Plaintiffs have been certified as a class pursuant to an order of this court (Singh, J.) dated August 6, 2012. *Id.*, exhibit M. Defendants Whitehouse Estates, Inc. (Whitehouse), is alleged to be the building's former owner; co-defendants Koeppel & Koeppel,

[1] Motion sequence number 007 was withdrawn on consent on October 13, 2016.

Inc. (K&K), Duell 5 Management LLC d/b/a Duell Management Systems (Duell), and William W. Koeppel (Koeppel, and collectively, defendants) are alleged to be the building's managing agents, and also to hold ownership interests in the building. *Id.*, exhibit G (complaint) ¶¶ 16-19. As will be discussed, the building's current owner is alleged to be an entity called Eastgate Whitehouse LLC (Eastgate). *See* plaintiffs' memorandum of law (motion sequence number 006) at 9. The dispute in this action concerns plaintiffs' assertion that defendants illegally deregulated 78 of their rent-stabilized and/or rent-controlled apartment units and overcharged them market rent rates, while at the same time receiving tax abatements for the building pursuant to the J-51 program, which forbids that deregulation. *See* notice of motion (motion sequence number 006), exhibit G (complaint), ¶¶ 30-40.

Plaintiffs assert that defendants first registered 139 of the building's apartment units as rent stabilized in 1984 and that defendants thereafter participated in the J-51 tax abatement program from 1991 through 2014. *See* plaintiffs' mem of law at 3-4. Plaintiffs present copies of registration records from the New York State Division of Housing and Community Renewal (DHCR) and the New York City Department of Taxation and Finance (DTF) to support these claims. *See* notice of motion (motion sequence number 006), exhibits D, E. The class-member plaintiffs' individual tenancies commenced between 2002 and 2011. *Id.*, exhibit M. Plaintiffs next present a copy of a letter, dated September 28, 2011, that defendants sent to all the building's tenants stating that they (i.e., defendants) had removed a number of the building's apartment units from rent regulation in contravention of the Court of Appeals decision in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]), and that those units would "need to be converted back to stabilization rates," with new leases provided, as necessary. *Id.*, exhibit F. Plaintiffs disputed defendants' recalculation of their rents and commenced this action on October 14, 2011. *Id.*, exhibit G. Defendants then sent plaintiffs two letters: the first, dated October 20, 2011, from defendants' consultant Stephen Trynosky (Trynosky), annexed copies of DHCR registration records for each individual apartment unit and set forth a purported calculation of each apartment's "maximum legal regulated rent" (the Trynosky letter); and the second, dated January 12, 2012, from defendants' counsel, stated that, in view of plaintiffs' decision to commence this action, the building's tenants should ignore the Trynosky letter (the counsel letter). *Id*,, exhibits H, J. Thereafter, on March 8, 2012, defendants filed "revised rent registration statements" for the building with the DHCR for the years 2007-2011. *See* notice of cross motion (motion sequence number 006), exhibit C.

Plaintiffs moved to be certified as a class (motion sequence number 002). They present a copy of this court's August 6, 2012 decision (Singh, J.), which found, in pertinent part, as follows:

> "It is clear that common questions of law and fact predominate in the instant case. The litigation involves a single building and a single landlord. To determine damages, this Court must answer two questions common to each class member: 1) how to determine the tenant's base rent; and 2) how to devise a formula for calculating damages." *Id.*, exhibit M at 11.

Plaintiffs allege that, despite a lengthy discovery period, defendants have failed to produce complete rent registration records for all the building's apartment units, with the result that "the

rental history records are filled with large gaps, or in many cases . . . are completely nonexistent" or make claims for vacancy increases in various units' rents without including documentation to evince that any repair work was done to justify the increases. *Id.*, exhibits N-X; plaintiffs' mem of law at 9. Plaintiffs conclude that, as a result, "the legal regulated rents for all . . . apartments must be calculated by applying the DHCR's default formula." Plaintiffs' mem of law at 9.

For their part, defendants cite to a portion of the transcript of a hearing held before Justice Singh on May 21, 2014, in which the court ruled on defendants' earlier motion to preclude (motion sequence number 004); and on plaintiffs' cross motion for a preliminary injunction (motion sequence number 005). The transcript included the following order:

> "I am directing the landlord to bring a motion for use and occupancy if he so chooses. In the event the landlord decides it's too onerous, then I am going to direct the tenants to pay use and occupancy. In the event the landlord chooses not to bring a motion for this court to set use and occupancy in these cases, the tenants are directed to pay use and occupancy in whatever their last expired lease was when this action was commenced, and that shall be paid prospectively until the completion of this case.
>
> "Further, within 45 days, any prior rents that have not been paid shall be paid to the landlord.
>
> "In the event these amounts aren't paid, then the landlord has the right to go into Housing Court to commence a nonpayment proceeding against those tenants who are in arrears based on the rents in their last lease when this action was commenced." Notice of cross motion (motion sequence number 006), exhibit A at 20.

Defendants assert that a number of plaintiffs are either in default of their obligation to pay use and occupancy, or have refused to pay rent increases; and that, as a result, defendants have had to commence proceedings in Housing Court to collect these amounts. *See* defendants' mem of law at 2. Defendants also assert that "Housing Court has refused to enforce the obligation to pay use and occupancy," allegedly owing to a lack of "clarity" regarding Justice Singh's May 21, 2014 order, and has dismissed several of the aforementioned proceedings without prejudice. *Id.* Consequently, defendants have cross-moved for an order to fix plaintiffs' current use and occupancy and to require them to pay it pendente lite (motion sequence number 006). The court notes that defendants' moving papers do not delineate the class-member plaintiffs against whom they commenced non-payment proceedings Housing Court or which of those proceedings was actually dismissed. The court further notes that defendants also commenced at least one holdover proceeding in Housing Court (L&T Index Number 78632/15) against the tenants of the building's penthouse apartment, Pamela Renna and Vitina DeGrezia a/k/a Vitina Luppino (the proposed intervenors). These tenants have moved separately by order to show cause for leave to intervene in this action (motion sequence number 008).

As was previously mentioned, plaintiffs commenced this action on October 14, 2011 by filing a summons and complaint that sets forth causes of action for (1) a declaratory judgment

and injunctive relief; (2) money damages for rent overcharge; and (3) attorney's fees. *See* notice of motion (motion sequence number 006), exhibit G. On December 13, 2011, defendants filed an answer that asserted numerous affirmative defenses, including (1) failure to state a claim for relief; (2) Duell is an agent of a disclosed principal; (3) K&K is an agent of a disclosed principal; (4) lack of subject matter jurisdiction; (5) failure to exhaust administrative remedies; (6) plaintiffs' claims are barred by statute; (7) plaintiffs' claims are barred by the doctrine of laches; (8) plaintiffs are barred from proceeding as a class; (9) plaintiffs' claims for treble damages are barred by the Rent Stabilization Law (RSL); (10) the RSL does not permit class action claims; (11) some plaintiffs' rents are less than the amount allowed by the RSL; (12) some plaintiffs' apartment units are no longer receiving J-51 tax benefits; (13) some plaintiffs' apartment units were exempt from rent regulation before the building began receiving J-51 benefits; (14) defendants acted in accordance with the law; (15) defendants acted in good faith; 16) defendants' participation in the J-51 program was the result of a mutual mistake; (17) defendants justifiably relied on the DHCR's interpretation of its own regulations; (18) plaintiffs' claims are barred by the Takings Clause of the United States Constitution; (19) plaintiffs' claims are barred because the RSL is void for vagueness; (20) plaintiffs' claims are barred by the Due Process Clause of the United States Constitution; (21) plaintiffs' claims are barred by the doctrine of waiver; (22) plaintiffs' claims are barred by the doctrine of estoppel; (23) plaintiffs' claims are barred by the doctrines of res judicata and collateral estoppel; and (24) some of plaintiffs' claims are void as speculative. *Id.*, exhibit I. Now before the court are plaintiffs' motion for leave to serve an amended complaint and for partial summary judgment, defendants' cross motion for use and occupancy (together, motion sequence number 006), and the proposed intervenors' order to show cause (motion sequence number 008).

DISCUSSION

In the interests of judicial economy and logic, the court addresses the current motions out of sequence.

The first matter to be addressed is the branch of plaintiffs' motion (motion sequence number 006) that seeks leave to file and serve an amended complaint naming Eastgate as a defendant. "It is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay," unless "the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law." *Davis & Davis v Morson*, 286 AD2d 584, 585 (1st Dept 2001) (internal citations omitted). In support of their motion, plaintiffs note that defendants have submitted an affidavit from Koeppel, in which he states that he is a principal of Eastgate and that Eastgate is the successor in interest to Whitehouse's ownership interest in the building. *See* notice of cross motion (motion sequence number 006), exhibit G, ¶ 1. Further, defendants themselves consent to plaintiffs' request for relief. *See* defendants' reply memo of law at 14. In light of the admission regarding Eastgate's ownership interest and defendants' consent to plaintiffs' proposed amendment, the court finds that the first branch of plaintiffs' motion should be granted. The form of that grant will be discussed at the end of this decision.

The second matter to be reviewed is the proposed intervenors' order to show cause, which seeks both an order to stay and/or enjoin defendants' holdover proceedings against them

in Housing Court as well as leave to intervene in this action (motion sequence number 008). The evidence discloses that the proposed intervenors took possession of the building's penthouse apartment pursuant to a two-year lease which ran from July 15, 2013 to July 31, 2015 (the penthouse lease). *See* notice of motion (motion sequence number 008), exhibit B. The penthouse lease, which was not rent stabilized, provided that the apartment's legal regulated rent was $7,451.95 per month but that the proposed intervenors would receive a temporary preferential rent of $5,000.00 per month for the duration of the lease term. *Id.* The penthouse lease also contained a rider that provided as follows:

"Tax benefits Rider for J-51

> "Expiration of Rent Stabilization Coverage. The Apartment is made subject to the Rent Stabilization Law (RSL) and Rent Stabilization Code (RSC) solely because of the building's participation in the tax benefits program under Real Property Tax Law (RPTL) § 489 and New York City Administrative Code § 11-243 (formerly known as 'J-51'). The apartment shall remain subject to the RSL and RSC until the expiration of the building's tax benefits on or about April 2014, or the expiration of the applicable provisions of the RSL, whichever occurs first. When the tax benefits under RPTL § 489 and New York City Administrative Code § 11-243 expire, and the lease then in effect subsequently expires, the Landlord may charge an unregulated rent for the Apartment. At that time, the Landlord will not be legally required to provide a renewal lease. Any leases that the Landlord gives at that time will be at a rent not regulated by law."

Id.

The proposed intervenors state that after the penthouse lease expired, defendants offered them a market-rent renewal lease, which they rejected. DeGrezia aff, ¶¶ 5-6. The proposed intervenors further state that defendants then offered them a rent stabilized lease; however, before they could execute it, defendants commenced the holdover proceeding in Housing Court on September 16, 2015. *Id.*, ¶¶ 7-8; exhibit J. The petition in the Housing Court proceeding alleges, as its basis, that the proposed intervenors continued occupancy of their apartment after the expiration of the penthouse lease is improper, because the apartment is not rent stabilized. *Id.*, exhibit J. During the litigation of that proceeding, the proposed intervenors moved for a stay pending the outcome of this class action. The Housing Court (Schreiber, J.) denied the stay on August 25, 2016, with leave to renew the application in this court. *Id.*, exhibit L. The proposed intervenors have now done so (motion sequence number 008).

In the first branch of their order to show cause, the proposed intervenors request that this court issue an order under CPLR 2201 to stay the Housing Court proceeding. That rule provides that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." CPLR 2201. The Appellate Division, First Department, has held that issuing such a stay is a provident act of judicial discretion "only when the other proceeding shares complete identity of parties, claims and relief sought." *Asher v Abbott Labs.*, 307 AD2d 211, 211 (1st Dept 2003). Here, those factors are all met. Therefore, it appears that the proposed intervenors are entitled to the stay they

request. Defendants, nevertheless, argue that granting a stay would not be "just" within the meaning of CPLR 2201 because the proposed intervenors "seem to have the habit of bringing a motion every time this action is ready to proceed" and because they have paid no use and occupancy since October 2015. *See* Alvarado affirmation in opposition (motion sequence number 008), ¶¶ 35-38. The court discounts the former statement as self-serving and irrelevant. Regarding the latter, the proposed intervenors reply that, to date, they have tendered $10,000.00 in arrears payments to defendants. *See* Livits reply affirmation, ¶ 34. It has been held that the grant of a stay in circumstances similar to these would be appropriate if it were conditioned upon the payment of an undertaking. *See e.g. Union Theol. Seminary v Harris*, 1 Misc 3d 909(A), 2003 NY Slip Op 51636 (U) (Civ Ct, NY County 2003). The court now finds that the proposed intervenors must do the same, for the reasons discussed below.[2] That does not end the inquiry into the matter of a stay, however.

In addition to requesting a stay, the proposed intervenors' order to show cause also asks this court to grant a preliminary injunction, pursuant to CPLR 6301, to stop defendants from continuing to prosecute the Housing Court holdover proceeding. That rule provides that:

> "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had."

CPLR 6301. The Court of Appeals has held that "[t]he party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Hous. Inc.*, 4 NY3d 839, 840 (2005), citing *Doe v Axelrod*, 73 NY2d 748, 750 (1988). A moving party must establish these elements. In contrast, the granting of a stay under CPLR 2201 is a matter addressed to the court's discretion. *See e.g. High v Reuters Am., Inc.*, 7 Misc 3d 1006(A), 2005 NY Slip Op 50476 (U) * 3 (Sup Ct, Bronx County 2005), citing *Pierre Assoc. v Citizens Cas. Co. of N.Y.*, 32 AD2d 495, 496 (1st Dept 1969). Here, as will be discussed below, the proposed intervenors argue that they have demonstrated all the elements required to secure a preliminary injunction; therefore, there the court need not use its discretionary powers to grant the proposed intervenors' request for a stay. Accordingly, even though they appear to be entitled to a stay, the court declines to grant so much of the proposed intervenors' order to show cause as seeks such a stay, and turns its attention to that branch of their order to show cause that seeks

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[2] Later in this decision, the court will discuss the issue of certain of the class-member plaintiffs being required to post a bond for outstanding use and occupancy payments during the pendency of this action.

injunctive relief.

Regarding the first element of a preliminary injunction, the court notes that Justice Singh's May 21, 2014 decision and order plainly stated that "I am going to grant the preliminary injunction [against defendants commencing any holdover proceedings against plaintiffs in Housing Court during the pendency of this action] because I do find that the plaintiffs have established a likelihood of success on the merits." *See* notice of cross motion (motion sequence number 006), exhibit A at 19-20. Those "merits" were a finding that plaintiffs' apartments were protected by the RSL and RSC. As was previously noted, defendants made the exact opposite allegation in their holdover petition against the proposed intervenors, which alleged that the penthouse apartment was not subject to those protections. *See* notice of motion (motion sequence number 008), exhibit J. This allegation cannot stand, either in light of Justice Singh's finding or in light of this own court's findings, discussed *infra*. Therefore, the court concludes that the proposed intervenors have adequately demonstrated the likelihood of their success on the merits of their claim that the allegations defendants made in the Housing Court proceeding are erroneous.

Regarding the third element of a preliminary injunction, the court notes that Justice Singh's May 21, 2014 decision and order also plainly stated "that the equities balance in favor of the tenants." Notice of cross motion (motion sequence number 006), exhibit A at 19-20. Defendants do not contest this point in their opposition papers, whereas the proposed intervenors indicate that they are willing to pay ongoing use and occupancy during the pendency of this action. *See* notice of motion (motion sequence number 008), Livits affirmation, ¶ 57. From this, it is reasonable to conclude that the proposed intervenors are more likely to be harmed in the event that the Housing Court proceeding results in their groundless eviction than defendants would be by being required to proceed instead in this action (especially since the proposed intervenors have already made some use and occupancy payments and have expressed willingness to continue making them, pendente lite). Therefore, the court concludes that the proposed intervenors have adequately demonstrated that the equities balance in their favor.

Regarding the second element of a preliminary injunction, the proposed intervenors argue that they will suffer the irreparable harm of a "de facto eviction" if Housing Court should determine that the penthouse apartment is not rent stabilized. *Id.*, ¶¶ 45-47. They specifically argue that they would not be able to afford the rent that defendants are likely to charge in the event defendants obtain the authorization to offer them a market-rate lease. *Id.* Defendants' response, that "landlord has offered to give the tenants a new lease but they would have to pay some type of increase," does not address that argument. *See* Alvarado affirmation in opposition, ¶ 40. The court agrees that it would cause significant harm to the proposed intervenors if Housing Court were to issue a potentially erroneous finding regarding the rent regulatory status of the penthouse apartment, since that could result in the imposition of an illegal rent and/or the proposed intervenors' eviction. Therefore, the court finds that they have established this element, too. Accordingly, the court concludes that the proposed intervenors have established they are entitled to a preliminary injunction to prevent defendants from continuing the Housing Court holdover proceeding against them.[3] As the court indicated earlier, however, defendants'

[3] The court notes in passing that this finding also renders the proposed intervenors' request for a

argument, that the proposed intervenors should be required to post some form of bond or undertaking, is compelling, and this issue will be addressed at the end of this decision.

The final portion of the proposed intervenors' order to show cause seeks leave to intervene in this action under CPLR 1013. This rule provides that

> "Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party."

CPLR 1013. The appellate courts have held that a two-part analysis must be made when reviewing a CPLR 1013 motion. First, "[c]onsideration of any motion to intervene begins with the question of whether the motion is timely," and "[i]n examining the timeliness of the motion, courts . . . consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party." *Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 (1st Dept 2010), citing *Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 522 (1996). Here, the proposed intervenors argue that their motion is timely because they made it "soon after [they] realized that the issues in the Housing Court action are identical to those in this class action," and "less than six months after [they] learned of the . . . class action." Notice of motion (motion sequence number 008), Livits affirmation, ¶ 65.

Defendants do not address the timeliness issue. Rather, they raise two other arguments against the proposed intervenors' order to show cause. First, they argue that it is "procedurally defective," because they did not receive service of the order to show cause in the manner indicated on its signature page. *See* Alvarado affirmation in opposition (motion sequence number 008), ¶¶ 19-20. The proposed intervenors respond that this argument is unavailing, because the parties both consented to service via e-filing. *See* Livits reply affirmation, ¶¶ 4-8. The proposed intervenors are correct that Uniform Trial Rule 202.5-b (f) (2) (ii) obviates defendants' argument. Therefore, the court rejects it.

Defendants also argue that the proposed intervenors' order to show cause "is precluded by their execution of a J-51 rider to their original and only lease." Alvarado affirmation in opposition (motion sequence number 008), ¶¶ 21-31. The proposed intervenors reply that this argument, too, has been obviated by appellate authority, which provides that the penthouse apartment was subject to the protection of the RSL for the entire time that the building was participating in the J-51 tax abatement program. *See* Livits reply affirmation, ¶¶ 20-24. Since it is clear that the proposed intervenors' tenancy overlapped with the period of time in which the building was participating in the J-51 program, their overcharge claim against defendants is not precluded by the J-51 rider, because that rider was a legal nullity, with no force and effect. Therefore, the court rejects this argument also. Returning to the issue of timeliness, the court

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stay of that proceeding moot.

finds that the proposed intervenors have sufficiently established this element, since their overcharge claim is within the applicable statute of limitations and since the court has already determined that defendants should be enjoined from proceeding against the proposed intervenors in Housing Court. As a result, there is no need to consider whether the proposed intervention would "cause a delay in resolution of [that] action."

The second issue to consider is whether the proposed intervenors "have a bona fide interest in an issue involved in that action." *Yuppie Puppy Pet Prods.*, 77 AD3d at 201. Here, the proposed intervenors assert that they do have such an interest, since a finding that the building was rent stabilized at the onset of their tenancy would both validate their overcharge claim against defendants, and potentially ensure their continued, rent-stabilized occupancy. *See* notice of motion (motion sequence number 008), Livits affirmation, ¶ 67. As previously was indicated, defendants did not address this issue. In any case, the court finds that the existence of the proposed intervenors' "bona fide interest" in the issues being litigated in this class action is self-evident.

The last issue to be considered is whether defendants possess a similar "bona fide interest in an issue involved in [this] action" that might be prejudiced by the proposed intervention under consideration. It is clear to the court that they do not. Although defendants might argue that they would be prejudiced by the proposed intervenors' failing to pay monthly use and occupancy, the proposed intervenors already have made partial payment thereof and have indicated their agreement to continue making such payments, pendente lite. *See* Livits reply affirmation, ¶ 34. Further, as will be discussed, the court will make provision for the proposed intervenors to post a bond pending the outcome of this action. Thus, defendants will be protected against any potential financial prejudice. Therefore, it appearing that the proposed intervenors have satisfied all the requirements of CPLR 1013, the court finds that the portion of their order to show cause that seeks leave to intervene in this class action should be granted. As has been indicated, ancillary matters related to that grant will be discussed later in this decision.

The court now turns to plaintiffs' motion (motion sequence number 006), specifically, to that branch of the motion that seeks partial summary judgment on plaintiffs' first cause of action. At the outset, the court again notes that this first cause of action contains requests for two proposed declarations and one request for injunctive relief. *See* notice of motion (motion sequence number 006), exhibit G, ¶¶ 50-55. However, plaintiffs make an incomplete request for summary judgment regarding this cause of action. While the motion correctly identifies the first proposed declaration, it misidentifies the second proposed declaration and omits any reference to the request for injunctive relief. Consequently, plaintiffs' request for partial summary judgment is difficult to parse, and will result in an even more partial grant than it otherwise might.

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City*

Tr. Auth., 304 AD2d 340, 342 (1st Dept 2003). With respect to plaintiffs' claim, declaratory judgment is a discretionary remedy that may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *accord Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 681, 682 (1st Dept 1999). It also has long been recognized that, in an action for a declaratory judgment, the court may properly determine respective rights of all the affected parties under a lease. *See Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 (1926).

Here, plaintiffs' first proposed declaration requests a finding:

> "that their apartments are subject to Rent Stabilization or Rent Control and that defendants are required to offer renewal leases on forms approved by the DHCR at legal regulated rents, or to continue their existing [tenancies] pursuant to the RCL [i.e., Rent Control Law] with legal maximum rents as established by the RCL."

Notice of motion (motion sequence number 006), exhibit G (complaint), ¶ 54. Plaintiffs argue that the class they represent is entitled to a declaration that their apartments are rent regulated (i.e., either rent controlled or rent stabilized) under any of three circumstances: (1) where a tenant took possession of an apartment unit that defendants incorrectly deemed to be "high rent or vacancy deregulated" during the time that defendants were participating in the J-51 tax abatement program (i.e., between 1991 and 2014); (2) where a tenant took possession of an apartment unit that defendants deemed to be "high rent or vacancy deregulated" pursuant to a DHCR "deregulation" order that was issued after defendants had served an erroneous income certification form either upon a unit's previous tenant, or upon a unit's current tenant, during the time that defendants were participating in the J-51 tax abatement program (i.e., between 1991 and 2014); or (3) where a tenant took possession of an apartment unit during the time that defendants were participating in the J-51 tax abatement program (i.e., between 1991 and 2014) "solely by virtue of the receipt of J-51 tax benefits." *See* plaintiffs' mem of law at 17-18. Defendants respond that plaintiffs are not entitled to the requested declaration because the issue is academic. *See* defendants' mem of law at 7-9. Defendants specifically assert that the fact that they took steps to re-register some 72 of the building's apartment units, as rent regulated, in the wake of the *Roberts* decision renders the question of their status academic and makes it improper for the court to rule on the issue. *Id.* Plaintiffs reply that the question is not academic and cite the decision of the Appellate Division, First Department, in *546 W. 156th St. HDFC v Smalls* (43 AD3d 7 [1st Dept 2007]), which held that:

> "In determining whether a dwelling unit is subject to rent regulation, what the parties think might be its status or even what they agree to be its status is not dispositive; what is controlling is whether the premises meet the statutory criteria for protection under the applicable regulatory statute.
>
> . . . .
>
> Where . . . the Legislature has subjected premises to a particular form of

> organization and regulation, the courts are obligated to apply the pertinent statute so as to promote its purpose. Alternatively stated, the courts may not permit parties to a regulated tenancy to evade the provisions governing that tenancy, thereby subverting legislative intent."

Id. at 12-14 [internal citations omitted]. Plaintiffs then argue that defendants' unilateral decision to re-regulate some, but not all, of the building's apartment units was of no force or effect and that the questions of the status of those units, and of the legal rent that may be charged for them, are still open and not moot. *See* plaintiffs' reply mem of law at 10. The court finds for plaintiffs.

In the first place, there is no question that, in *Roberts,* the Court of Appeals held that both luxury and vacancy decontrol are unavailable to owners of apartment buildings who participate in the J-51 tax abatement program. *Roberts*, 13 NY3d at 280. Second, there also is no question that the *Roberts* holding has been accorded retroactive effect and that it applies to the entire time period that any building was enrolled in the J-51 program. *See Gersten v 56 7th Ave. LLC*, 88 AD3d 189 (1st Dept 2011). It is true that the Appellate Division, First Department, has held that tenants may be collaterally estopped from seeking to apply the *Roberts* holding to declare their decontrolled apartment units to be rent regulated, where such deregulation resulted after a DHCR deregulation proceeding in which the tenant "had a full and fair opportunity to participate." *Leight v W7879 LLC*, 128 AD3d 417, 418 (1st Dept 2015), *affd* 27 NY3d 929 (2016). However, in *Extell Belnord LLC v Uppman* (113 AD3d 1 [1st Dept 2013]), the First Department also held that the collateral estoppel exception is unavailable to a landlord, where the DHCR's deregulation order was not issued after a hearing where matters were actively litigated, but merely in response to an agreement that a landlord had presented to the agency for "rubber stamping." 113 AD3d at 6.

Here, defendants claim only that they unilaterally recalculated the rent of those apartment units that they deemed to be subject to rent regulation, and thereafter presented new leases and income certifications to the DHCR for registration. Defendants do not claim that any deregulation proceedings were held before the DHCR, and neither party has presented any DHCR orders that purport to have been issued after such evidentiary hearings. Therefore, it is clear that a collateral estoppel argument cannot stand, and that the *Roberts* holding applies to the entire building. Thus, the three distinct circumstances that plaintiffs refer to in their argument (two of which appear to be identical) are unnecessary. Because it is undisputed that defendants participated in the J-51 tax abatement program from 1991 to 2014, the court finds that plaintiffs are entitled to a declaration that their apartment units were rent regulated (i.e., governed either by the RSL or RCL) during that period. Because both the RSL and the RCL require that landlords issue leases to tenants of rent regulated apartments, the court also finds that plaintiffs are entitled to a declaration that defendants are obligated to issue them leases that comply with those statutes. Accordingly, the court finds that plaintiffs should be awarded summary judgment on their first proposed declaration.

The next section of plaintiffs' motion, which incorrectly requests summary judgment on their *second* cause of action, seeks a declaration that "the legal regulated rents for plaintiffs' apartments should be determined based upon the DHCR's default formula." Plaintiffs' mem of law at 19-27. As the complaint plainly discloses, plaintiffs' second cause of action seeks money

damages for rent overcharge, *not* declaratory relief. The proposed declaration clearly refers to the *second* proposed declaration contained in plaintiffs' *first* cause of action and not the second cause of action itself. *See* notice of motion (motion sequence number 006), exhibit G (complaint), ¶¶ 56-63. The court reiterates that plaintiffs' first cause of action seeks declarations

> "that their apartments are subject to Rent Stabilization or Rent Control *and* that defendants are required to offer renewal leases on forms approved by the DHCR at legal regulated rents, *or* to continue their existing [tenancies] pursuant to the RCL [i.e., Rent Control Law] *with* legal maximum rents as established by the RCL."

Notice of motion (motion sequence number 006), exhibit G (complaint), ¶ 54 [emphasis added]. The court finds that this request is clearly disjunctive; i.e., the first half seeks a declaration as to the controlling law, while the second half seeks the issuance of leases for which the monthly rental charges are calculated pursuant to that controlling law. By contrast, plaintiffs' second cause of action simply states that

> "[a]s a result of defendants' rent overcharges, plaintiffs and the other members of the class have been damaged, and are entitled to an award of money damages against defendants in an amount to be determined at trial."

Id., ¶ 61. This is clearly a request for monetary, rather than declaratory, relief. However, because plaintiffs have denominated their motion as one for summary judgment and because plaintiffs' first cause of action clearly requests two separate declarations, the court elects to treat this section of plaintiffs' motion as pertaining to their first cause of action and not to the second (especially since plaintiffs' arguments are clearly inapposite to a claim for money damages). CPLR 3212 (b). As regards plaintiffs' second cause of action for money damages, and also their third for legal fees, the court notes that plaintiffs' motion is devoid of any argument pertaining to either, despite that motion's having been denominated as a motion for summary judgment on the entire complaint. It clearly is not. Therefore, at this juncture, the court denies so much of plaintiffs' motion as pertains to plaintiffs' second and third causes of action, although it will issue instructions pertaining to those claims later in this decision.

For now, the court returns its attention to the second proposed declaration in plaintiffs' first cause of action, which requests a finding that defendants be "required to offer renewal leases on forms approved by the DHCR at legal regulated rents, or to continue their existing [tenancies] pursuant to the RCL with legal maximum rents as established by the RCL." Notice of motion (motion sequence number 006), exhibit G (complaint), ¶ 54. Plaintiffs specifically argue that "the RSC requires that the default formula be applied to this case" to determine the legal rents that their leases should contain. *See* plaintiffs' memo of law (motion sequence number 006) at 24-27. Plaintiffs first cite the Court of Appeals' decision in *Matter of Partnership 92 LP v State of N.Y. Div. of Hous. & Community Renewal* (11 NY3d 859, 860 [2008]) for the rule that "[i]t was . . . appropriate for the agency to apply the default formula to set the base rent since no reliable rent records were available." That case cited the Court's earlier decision in *Thornton v Baron* (5 NY3d 175 [2005]), which reasoned that

> "Reflecting an attempt to circumvent the Rent Stabilization Law in violation of the public policy of New York, the [respondent's] lease was void at its inception. Further, because the rent it purported to establish was therefore illegal, the 1996 rent registration statement listing this illegal rent was also a nullity. Under those circumstances, we agree with Supreme Court and the Appellate Division majority that the default formula used by DHCR to set the rent where no reliable rent records are available was the appropriate vehicle for fixing the base date rent here."

Id. at 181. Plaintiffs argue that, here, "because defendants have failed to produce adequate and credible rental records sufficient to determine the legal base rent for plaintiffs' apartments, the rents must be calculated pursuant to the default formula." Plaintiffs' memo of law (motion sequence number 006) at 27. Defendants make two responses.

First, defendants assert that they have presented sufficient records with which to calculate accurately the legal base rent for plaintiffs' various apartments because "defendants have cured any alleged default or deficiency in their discovery production." Defendants' memo of law (motion sequence number 006) at 9-10. Plaintiffs acknowledge that plaintiffs did indeed provide a large volume of discovery material in January and February 2016; however, they assert that this material is nonetheless insufficient evidence from which to calculate the legal base rent of the building's 78 improperly deregulated apartments. *See* plaintiffs' reply memo at 2-8. After reviewing all the relevant discovery material, the court agrees with plaintiffs' assessment. The submissions that defendants annexed to their cross motion include, in their words, the following four types of documents: (1) "leases of tenants last expired and last proffered but unsigned"; (2) "amended rent registrations"; (3) "Rent Guidelines Board orders 38-47"; and (4) "chart of tenant status." Notice of cross motion (motion sequence number 006), Alvarado affirmation, ¶ 4; exhibits B, C, D, E. However, a review of these submissions discloses that the evidence is not as defendants characterize it.

The first category, "leases," does not include all the leases for each of the subject apartments in this action. *Id.*, exhibit B. For some apartments, no leases appear to have been provided at all. *Id.* For others, there are either gaps between years of occupancy or no leases earlier than 2011, when this action was commenced. *Id.* Regarding the latter, some of those leases are not the actual leases in effect in 2011, but appear to be the leases the defendants offered to plaintiffs after inserting their own chosen rental amounts. *Id.* None of the leases indicates how those monthly rental amounts were calculated. *Id.* Further, defendants delivered the leases in the form of a "document dump" rather than clearly matching them to each individual apartment and class member/tenant. *Id.* Therefore, the court finds that the "leases" defendants submitted in support of their argument that it is now possible to calculate the apartments base rents are both incomplete and unreliable.

The second collection of documents, "amended rent registrations," are the same ones plaintiffs submitted in 2012 with the rental amounts that they themselves had calculated. *Id.*; exhibit C. These documents set forth the DHCR's properly calculated legal rent for each apartment. *Id.*, exhibit C.

The third class of documents, denominated "rent guidelines board orders," are nothing of the sort. *Id.*; exhibit D. Rather, they are the original, erroneous, rent-registration statements that defendants sought to amend in 2012. *Id.* Additionally, the rent calculations contained therein are also of the defendants own devise — no*t* the properly calculated legal rent for each apartment. *Id.* The court further notes that neither of these two piles of rent-registration statements is accompanied by any evidence (i.e., receipts or work orders) of any repair or renovation work purportedly done to any of the registered apartments. Nor are there any DHCR orders authorizing major capital improvement (MCI) increases for the rents for said apartments. Thus, any rental increases contained in the yearly leases that defendants issued and which might have been based on such purported MCI increases would be disallowed as a matter of law, because these increases are authorized only after a landlord has submitted an MCI application to the DHCR is supported by adequate documentation. 9 NYCRR § 2522.4. Here, there are no such documents or DHCR orders.

The final class of documents, the "chart of tenant status," is also misidentified. It is rather merely the building's 2015 rent roll and sets forth the same apartment rents that defendants calculated themselves. *Id.*, exhibit E. Neither it nor any of the older leases that defendants submitted offers any proof that defendants had grounds to collect the periodic vacancy increases to the various apartment rents that they claim they were entitled to take. Absent any such proof (i.e., dated surrender agreements and/or lease applications evincing when any given apartment was and was not tenanted), defendants are foreclosed from collecting increases, as a matter of law, since they, too, are authorized only after a duly supported application is made to the DHCR. 9 NYCRR § 2522.8; *see also Matter of Ador Realty, LLC v Division of Hous. & Community Renewal*, 25 AD3d 128 (2d Dept 2005). Here, again, defendants' submissions are devoid of either DHCR orders or the type of proof necessary to justify such orders. In short, defendants' evidence is too incomplete to permit an accurate calculation of either the base rent, or the current legal rent, for any of the 78 apartments that plaintiffs assert were improperly deregulated. Therefore, the court rejects defendants' first opposition argument.

Second, defendants argue that "this court should seek to use the four-year rule in calculating the legal rents of the tenant class-members." Defendants memo of law (motion sequence number 006) at 10-11. They specifically argue that

> "there is not sufficient evidence in this matter to support that the fraud exceptions to the four-year rule ... and the RSC [be used, because] this court has already ruled in its decision and order of August 6, 2012 that the landlord was acting in good faith reliance upon the DHCR's own interpretation of the law, [and] there has been no finding or allegations that the rent increases are invalid."

Id. Plaintiffs dispute this assertion in their reply memorandum, and cite the Appellate Division, First Department's recent decision in *Altschuler v Jobman 478/480, LLC.* (135 AD3d 439 [1st Dept 2016]) to support their assertion that the default formula should be used because the evidence of fraud herein is sufficient. As can be seen, both these arguments use the term "fraud," although not in its usual context. That is because in cases of rent overcharge, the "fraud" to which the parties refer is essentially a term of art that has arisen in Court of Appeals case law on the subject. It would now be well to review that case law.

The first case was *Thornton* (5 NY3d 175), which involved a landlord and several tenants who had conspired to remove their apartments from the protections of the RSL by agreeing to declaratory judgments that the apartments were exempt from the law, since they were being used as nonprimary residences. The Court held as follows:

> "Reflecting an attempt to circumvent the Rent Stabilization Law in violation of the public policy of New York, the [tenant's] lease was void at its inception. Further, because the rent it purported to establish was therefore illegal, the 1996 rent registration statement listing this illegal rent was also a nullity. Under those circumstances, we agree with Supreme Court and the Appellate Division majority that the default formula used by DHCR to set the rent where no reliable rent records are available was the appropriate vehicle for fixing the base date rent here."

5 NY3d at 181.

Subsequently, in *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.* (15 NY3d 358 [2010]), a case that involved a landlord who filed inaccurate rent-registration statements with the DHCR, as part of a scheme to remove its building's apartments from rent stabilization protection, the Court found as follows:

> "In particular, here it is alleged that the tenants immediately preceding petitioner paid significantly more than the previously registered rent, and were not given a rent-stabilized lease rider. Moreover those tenants were informed that their rent would be higher but for their performance of upgrades and improvements at their own expense. Almost simultaneously with the substantial increase in the rent for the affected unit, the owner ceased filing annual registration statements (*see* Rent Stabilization Code [9 NYCRR] § 2528.3 [a] [requiring annual registration statements be filed with DHCR]) and later filed several years' registration statements retroactively after receiving petitioner's overcharge complaint. Finally, petitioner's initial lease did not contain a rent-stabilized rider. The combination of these factors should have led DHCR to investigate the legality of the base date rent, rather than blindly using the rent charged on the date four years prior to the filing of the rent overcharge claim.
>
> Our holding should not be construed as concluding that fraud exists, or that the default formula should be used in this case. Rather, we merely conclude that DHCR acted arbitrarily in disregarding the nature of petitioner's allegations and in using a base date without, at a minimum, examining its own records to ascertain the reliability and the legality of the rent charged on that date.
>
> DHCR also argues that, under the Appellate Division's holding, any 'bump' in an apartment's rent—even those authorized without prior DHCR approval, such as rent increases upon installation of improvements to an apartment (*see* Rent Stabilization Law § 26-511 [c] [13])—will establish a colorable claim of fraud

> requiring DHCR investigation. Again, we disagree. Generally, an increase in the rent alone will not be sufficient to establish a 'colorable claim of fraud,' and a mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further. What is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization. As in *Thornton*, the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date."

15 NY3d at 366-367.

Most recently, in *Conason v Megan Holding, LLC* (25 NY3d 1 [2015]), a case that also involved a landlord who removed its building's apartments from rent stabilization protection by filing statements that it was entitled to unjustified vacancy increases, the Court held that:

> "Here, tenants do not just make a generalized claim of fraud. They instead advance a colorable claim of fraud within the meaning of *Grimm*—i.e., tenants alleged substantial evidence pointing to the setting of an illegal rent in connection with a stratagem devised by [landlord] to remove tenants' apartment from the protections of rent stabilization (*compare Matter of Partnership 92 LP v State of N.Y. Div. of Hous. & Community Renewal*, 11 NY3d 859, 860 [2008] [where there was 'ample basis' in the record for DHCR to 'conclude that, in arguing for a higher base rent, the owner had relied on an illusory tenancy,' the agency properly set the base rent using its default formula], with *Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999 [2014] [DHCR properly declined to examine the apartment's rental history for fraud where a tenant merely alleged that the registered monthly rent increased from $572 in July 2004 to $1,750 in October 2004]). In light of *Thornton* and *Grimm*, Supreme Court in this case properly considered tenants' counterclaim alleging rent overcharges notwithstanding expiration of the four-year statute of limitations to which such claims are generally subject (*see Mozes v Shanaman*, 21 AD3d 854 [1st Dept 2005], *lv denied* 6 NY3d 715 [2006] [CPLR 213-a barred the plaintiff sublessees' overcharge complaints brought more than four years after each of their separate tenancies commenced])."

25 NY3d at 16-17. Thus, "fraud," in the context of rent-overcharge claims, refers to the test in *Grimm* for determining whether a party has made a showing sufficient to warrant examination of an apartment's rental history further back than the four-year look-back period specified in the RSL. The foregoing cases also indicate that, where the issue has been raised before the DHCR in the first instance, the agency has the authority to determine whether such a showing has been made and, if not, to employ its default formula, whereas when the issue is raised before the court, it is up to the court to make those determinations. The court now returns to the parties' respective arguments.

As was previously mentioned, defendants base their argument that there is insufficient evidence of "fraud" herein on the decision that this court (Singh, J.) entered on August 6, 2012

that found that there was no legal basis for plaintiffs' claim for treble damages. Justice Singh's decision relied heavily on the decisions of the Civil Court of the City of New York (28 Misc 3d 585 [Civ Ct, NY County 2010]) and the Appellate Term, First Department (32 Misc 3d 47 [App Term, 1st Dept 2011]), in a case captioned *72A Realty Assoc. v Lucas*. In *72A Realty Assoc.*, the lower courts found that a landlord would not be found to have committed fraud, and thereby subjected itself to liability for treble damages, where that landlord relied "in good faith . . . on DHCR's long-standing and unambiguous interpretation of the luxury decontrol statute." 32 Misc 3d at 49.

However, four months after Justice Singh issued his decision, the Appellate Division, First Department, rendered its own decision in *72A Realty Assoc.* (101 AD3d 401 [1st Dept 2012]), which modified the Civil Court and Appellate Term decisions. The First Department specifically found that:

> "The courts below . . . erred in setting the base date rent for the overcharge counterclaim at the $2,250 per month rate based on the market rate in the lease effective for October 2004. While that date is correct under CPLR 213-a, in light of the improper deregulation of the apartment and given that the record does not clearly establish the validity of the rent increase that brought the rent-stabilized amount above $2,000, the free market lease amount should not be adopted, and the matter must be remanded for further review of any available record of rental history necessary to set the proper base date rate.
>
> The courts also erred to the extent they dismissed, as a matter of law, tenant's counterclaim seeking treble damages. Landlord, in its affidavit, states that in 2001, $30,000 worth of renovations to the apartment were completed, bringing the monthly rent above the $2,000 threshold. However, the record does not contain anything to support landlord's renovation claim, including for example, bills from a contractor, an agreement or contract for work in the apartment, or records of payments for the renovations. A $1,491 monthly increase in rent is a substantial amount, and landlord did not provide sufficient information to validate the increase. Further inquiry upon remand is required to determine whether the overcharge was not willful, but rather the result of reasonable reliance on a DHCR regulation."

Id. at 402-403. From this, it is clear that Justice Singh's decision can no longer be regarded as good law or serve as the basis for defendants' opposition argument. Instead, the law requires this court to determine whether plaintiffs have demonstrated "a colorable claim of fraud within the meaning of *Grimm*—i.e., tenants alleged substantial evidence pointing to the setting of an illegal rent in connection with a stratagem devised by [landlord] to remove tenants' apartment from the protections of rent stabilization." *Conason*, 25 NY3d at 16. Plaintiffs assert that they have. They cite *Altschuler* to support their argument that "the default formula and freezing of the rent should be applied." Plaintiffs' reply memo at 8-10.

After reviewing the evidence, the court agrees that plaintiffs have demonstrated the necessary quantum of "fraud." In the previous section of this decision, the court already

determined that defendants failed to present documentary evidence to support their claim that the 78 subject apartments were legally and validly deregulated. As a result, defendants also have failed to establish that the rents set forth in the various apartments' leases are legal, as well. The court notes that, while the 78 alleged acts of improper apartment deregulation took place over time between 1995 and 2011, it was on March 8, 2012, that defendants filed back-dated rent registration statements for all 78 apartments with the DHCR for 2007-2011. By back-dating the apartment registrations for five years (six, if one includes 2012, the year in which the amended registrations were filed), defendants were seeking to (1) obviate an official determination that the building's apartments were and are rent stabilized; and (2) impose their own rent calculations, as the presumptively legal rent, for the duration of the statutory four-year look-back period that would normally apply in the overcharge action that plaintiffs had recently commenced. The court finds this en masse filing a fraudulent attempt to (1) avoid the consequences of defendants' previous illicit deregulation of the 78 subject apartments herein; and (2) to use the RSL to prevent plaintiffs from challenging the rents that defendants had unilaterally calculated for those apartments. In other words, it satisfies the "fraud" showing specified in *Grimm*: i.e., a "combination of . . . factors [that] should have led . . . to investigat[ing] the legality of the base date rent, rather than blindly using the rent charged on the date four years prior to the filing of the rent overcharge claim." 15 NY3d at 366. Following *Grimm*, the court finds that, because the rent history in this action is unreliable, the default formula should be used to determine the base rent date and to calculate the rent for each of the 78 subject apartments herein. The court directs a Special Referee to hear and report on such calculations.

As previously was noted, plaintiffs' first cause of action also contains a request for an injunction that defendants be required to issue them rent stabilized leases with the rents correctly calculated thereon. *See* notice of motion (motion sequence number 006), exhibit G (complaint), ¶ 54. However, plaintiffs have not presented any argument with regard to this request for injunctive relief. Therefore, the court does not address this issue at this time. The court will return to it at the end of this decision, however.

The next branch of plaintiffs' motion requests that the rent for the 78 subject apartments herein be "frozen" pending the outcome of this action. Plaintiffs cite the decision of the Appellate Division, First Department, in *Bradbury v 342 W. 30th St. Corp.* (84 AD3d 681, 683-684 [1st Dept 2011]), which held that, where a landlord fails to file "proper" annual rent registrations that comport with the governing provisions of the RSL (Administrative Code § 26-517 [a], [f] and 9 NYCRR § 2528.3), the landlord is barred from collecting any rent increases in excess of the last "properly" registered rent. *See* plaintiffs' mem of law at 28-30. In their cross motion, defendants argue instead that the court should set the "fair and reasonable use and occupancy for the tenant class members." Defendants' mem of law at 2-6. Defendants cite the portion of the order that Justice Singh entered on the record on May 21, 2014, that stated as follows:

> "The landlord here is not without remedy. He has had a remedy since 2011. To the extent he believes that the rents the tenants are paying - and in some instances, as it has been brought to the court's attention off the record, that some of the tenants are not paying rent, the remedy is to have this court fix use and occupancy in each of the cases. That issue, obviously, is going to be litigated because it's

going to be the landlord's position that rent goes to the base date with increases. The tenants' position is going to be something different.

I will adjudicate that position and fix appropriate use and occupancy in each of the cases.

And further, once I fix use and occupancy, I am going to direct the tenants to pay that use and occupancy. If they fail to pay that use and occupancy, the landlord will have a right to go into Housing Court to commence nonpayment proceedings against those tenants for failing to pay use and occupancy.

I am directing the landlord to bring a motion for use and occupancy if he so chooses. In the event the landlord decides it's too onerous, then I am going to direct the tenants to pay use and occupancy. In the event the landlord chooses not to bring a motion for this Court to set use and occupancy in these cases, the tenants are directed to pay use and occupancy in whatever their last expired lease was when this action was commenced, and that shall be paid prospectively until the completion of this case.

Further, within 45 days, any prior rents that have not been paid shall be paid to the landlord.

In the event these amounts aren't paid, then the landlord has the right to go into Housing Court to commence a nonpayment proceeding against those tenants who are in arrears based on the rents in their last lease when this action was commenced.

This decision constitutes the order of the court."

See notice of cross motion, exhibit A at 19-21.

Defendants then assert that they commenced several special proceedings in the Civil Court of the City of New York, Housing Part, which were ultimately dismissed. *See* defendants' mem of law (motion sequence number 006) at 6. They have presented a copy of one decision in a case entitled *Whitehouse Estates, Inc. v Gerald Cohen et al.* (Civ Ct NY County, November 25, 2015; Stoller, J., Index No. L&T 84212/13), which found as follows:

"In opposition to [r]espondent's motion, [p]etitioner does not submit any evidence rebutting [r]espondent's showing that [p]etitioner increased the rent to an amount greater than that allowed by the vacancy provisions of the Rent Stabilization Code, 9 NYCRR § 2522.8 (a) (1), and [p]etitioner therefore does not rebut a showing of rent overcharge.

In order to be entitled to relief in a summary proceeding, it is not only necessary that a landlord plead the rent regulatory status and compliance with the appropriate statutes and codes, but that a landlord actually be in compliance

> therewith. As [p]etitioner has failed to rebut [r]espondent's showing that [p]etitioner has not fulfilled an element of its prima facie case for nonpayment of rent, the Court grants [r]espondent's motion and awards respondent summary judgment dismissing this proceeding [internal citations omitted]."

See Languedoc reply aff (motion sequence number 006), exhibit C. Defendants then argue that this decision "unless overturned by the Appellate Term, effectively prevent[s] the landlord from collecting U&O as directed by this court in the May 21, 2014 order." Defendants' mem of law (motion sequence number 006) at 5. Plaintiffs reply that defendants' characterization of Justice Singh's order is "incomplete and misleading." *See* plaintiffs' reply mem at 12. After reviewing Justice Singh's order in its entirety, the court agrees. Defendants quoted only the second half of Justice Singh's decision. In the first half, Justice Singh granted plaintiffs' request for an injunction to prevent defendants from commencing any holdover proceedings against plaintiffs in Housing Court, based on plaintiffs' failure to sign the renewal leases that defendants had presented to them. That portion of the decision found as follows:

> "I am going to grant the preliminary injunction because I do find that the plaintiffs have established a likelihood of success on the merits.
>
> The issue in this case is what the rent should be. How far - what the date is that the rent should be calculated from and, further, what increases, if any, the landlord is entitled to. Those are all issues to be determined by this Court and not by the landlord in whatever mechanisms that he wishes to operate in.
>
> And the irreparable injury is to compel the tenants to sign leases with rents that have been unilaterally determined by the landlord, although there is a class action suit pending before this Court where this Court is going to determine the rent.
>
> So for those reasons, I am going to grant injunctive relief and, further, I find that the equities balance in favor of the tenants."

See notice of cross motion, exhibit A at 18-20.

Defendants' argument that Housing Court's dismissal of their nonpayment proceedings leaves defendants without any remedy in this action is disingenuous. Justice Singh plainly gave defendants the option of either attempting to collect use and occupancy through a special proceeding in Housing Court or submitting a motion to request this court to fix use and occupancy for each of the subject apartments. Justice Singh also found that the balance of the equities in this action favor plaintiffs and further that defendants' proposed renewal leases contained unreliable, made-up rents. As circumstances have transpired, after reviewing those leases, Housing Court decided to dismiss defendants' nonpayment proceedings. Subsequently, defendants filed their cross motion, which requests an order to set plaintiffs' use and occupancy. This is defendants' remedy, per Justice Singh's order. The court has already determined that the rent calculations shall be carried out by a Special Referee using the DHCR's default formula. But that does not completely dispose of the issue.

Defendants' cross-motion raises the valid point that "a dispute concerning the amount of rent owed is no reason to allow a tenant to occupy the landlord's property gratis." Defendants' mem of law (motion sequence number 006) at 4; *see e.g. Levinson v 390 W. End Assoc., L.L.C.*, 22 AD3d 397 (1st Dept 2005). Defendants assert that "some tenant class members [have failed] to pay their use and occupancy" and that "in the case of Cohen and Casagnola [they] have not paid U&O in over two (2) years and one (1) year respectively." Defendants' me of law (motion sequence number 006) at 5-6. Defendants moving papers do not identify the other tenants who are alleged not to have paid their ongoing use and occupancy, however. For their part, plaintiffs argue that the court should deny defendants' cross motion because it was "made late, just as this court is about to resolve this case on the merits." *See* plaintiffs reply mem at 11. Plaintiffs cite the holding of the Appellate Division, First Department, in *MMB Assoc. v Dayan* (169 AD2d 422, 422 [1st Dept 1991]) that:

> "At the time the order appealed from was issued, not only had issue been joined but a reply served in response to defendant's counterclaims. The award of use and occupancy during the pendency of an action or proceeding 'accommodates the competing interests of the parties in affording necessary and fair protection to both' and preserves the status quo until a final judgment is rendered. It is manifestly unfair that defendant herein should be permitted to remain in possession of the subject premises without paying for their use."

Id. [internal citations omitted]. Plaintiffs then argue that the purpose of maintaining the status quo would not be served by imposing interim use and occupancy payments herein, "because the delay in prosecuting this action is the result of defendants' acknowledged tardiness in producing discovery documents that were initially requested in January 2013." Plaintiffs' reply mem at 11. Plaintiffs conclude that defendants' cross motion should be denied because "it is only appropriate to make an application for interim use and occupancy payments at the beginning of the litigation," and that "when plaintiffs' motion for summary judgment is granted, the court will render a final determination." *Id.* Plaintiffs argument misconceives the operative facts of this case. While it appears that defendants did substantially delay in fulfilling their discovery obligations, it is more important to note that Justice Singh entered an interim use and occupancy order in 2014 and that it is now 2017. Simply put, a tenant's obligation to pay use and occupancy, set forth in Real Property Law (RPL) § 220, is accorded greater weight than a litigant's obligation to abide by discovery rules. Therefore, the court rejects plaintiffs' argument.

Defendants urge that "the court should sanction those plaintiff class members who have violated the court's order requiring payment for use and occupancy while this action is pending." Defendants' reply mem at 7-9. Strangely, defendants' papers are devoid of any argument about what specific sanctions to apply or how to apply them. Instead, defendants state that "although [they] are not currently seeking to hold plaintiffs in contempt, the court should take note of the egregious conduct of plaintiffs Casagnola and Cohen" and enter an order that "requires these plaintiffs to immediately pay use and occupancy pendente and all arrears due and owing." *Id.* It would thus appear that defendants have abandoned their motion for sanctions, apart from requesting that the court enforce Justice Singh's U&O order against only two plaintiffs. It is impossible to tell which plaintiffs, apart from these two, have failed to comply, in whole or in part, with that U&O order. It would be arbitrary and capricious selectively to enforce that order

against only two plaintiffs, if other plaintiffs are also in violation of it. Defendants further assert that they "have produced every document necessary to calculate use and occupancy." *Id.* at 7. However, the court previously found that defendants' submissions are inadequate. *See* notice of cross motion, exhibit B. Justice Singh's order required plaintiffs to pay use and occupancy, pendente lite, as calculated from "whatever their last expired lease was when this action was commenced." *See* notice of cross motion, exhibit A at 20-21. However, the "leases of tenants last expired and proffered but unsigned," which defendants presented, do not contain every "last expired lease when this action was commenced." *See* notice of cross motion, exhibit B. Rather, it appears that defendants have omitted a number of the earlier leases, and, for 2011 when this action was commenced, have attempted to insert the unsigned renewal leases that contain their own proposed, and disputed rent calculations. Further, neither of the parties' moving papers delineate exactly which apartments are affected (i.e., are occupied by class members), state what the rent for such apartments was pursuant to "the last expired lease . . . when this action was commenced," or calculate either the amount of rent that has come due since, or the amount that has been paid to date. Without these documents and calculations, despite defendants' assertion to the contrary, there is currently no way for the court to make a complete calculation of the U&O that is due for each apartment from the inception of this action. This does not relieve the court from its obligation to enforce Justice Singh's 2014 order, and to ensure plaintiffs' compliance with RPL § 220, although it certainly complicates that task. As a result, the court directs that the parties prepare these documents and calculations and present them to the Special Referee, who shall compare them and incorporate the result into his/her proposed findings of fact.

With respect to those plaintiffs who have abided by Justice Singh's order to pay ongoing U&O, the court shall take no special action. With respect to those plaintiffs, if any, who have chosen to disregard Justice Singh's order, the court will require them to post a bond equal to the amount set forth in the Special Referee's findings, pending the final resolution of this action. *See Levinson*, 22 AD3d 397. The failure to post such a bond shall not preclude said plaintiffs from participating in this action to the extent they seek a money judgment for rent overcharges, but it shall subject them, at defendants' option, to an action for ejectment, pursuant to RPL Article 6. Defendants may commence these proceedings, at their discretion, in this court, and may move to have them consolidated with this action. With respect to those plaintiffs who have paid U&O pendente lite, the court directs that the Special Referee take note of the amounts of such payments, and incorporate them into his/her calculation of the amounts of U&O that were actually due for each of the affected apartments herein, pursuant to the DHCR's default formula, as discussed in the earlier portion of this decision. Therefore, the court concludes that the second branch of plaintiffs' motion should be granted in accordance with the foregoing and that defendants' cross motion should be granted only to the extent indicated above, but otherwise denied.

The final branch of plaintiffs' motion seeks summary judgment dismissing each of defendants' 24 affirmative defenses. The court notes that defendants' moving papers do not set forth any specific arguments to support their affirmative defenses individually, but rather assert that "plaintiffs failed to carry their . . . burden [of proof], [but,] to the extent that some defenses are no longer applicable due to law of this case, they should be deemed abandoned." Defendants' mem of law at 7. Defendants' memorandum does not say which defenses should be deemed abandoned, however. *Id.* As a result, the court must examine each of defendants' 24 affirmative

defenses in order.

Defendants' first affirmative defense is that plaintiffs have failed to state a claim for relief. *See* notice of motion (motion sequence number 006), exhibit I (answer), ¶ 66. Plaintiffs argue that their allegations satisfy the pleading requirements for a rent overcharge claim that are set forth in NYC Admin Code § 26-516 (a) and 9 NYCRR § 2526.1 (a) (1). *See* plaintiffs' mem of law at 10. The latter provides that:

> "Any owner who is found by the DHCR, after a reasonable opportunity to be heard, to have collected any rent or other consideration in excess of the legal regulated rent shall be ordered to pay to the tenant a penalty equal to three times the amount of such excess, except as provided under subdivision (f) of this section. In no event shall such treble damage penalty be assessed against an owner based solely upon the owner's failure to file any timely or proper 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, which interest shall accrue from the date of the first overcharge on or after the base date, at the rate of interest payable on a judgment pursuant to section 5004 of the Civil Practice Law and Rules, and the order shall direct such a payment to be made to the tenant."

9 NYCRR § 2526.1 (a) (1). Here, plaintiffs have not only pleaded the elements of an overcharge claim, they also have presented enough evidence to justify an inquiry into how much, if any, they have actually been overcharged. In any case, plaintiffs do not state how plaintiffs' pleadings are insufficient. Therefore, the court rejects defendants' first affirmative defense.

Defendants' second and third affirmative defenses allege that plaintiffs' claims must fail as against the building's managing agents, Duell and K&K, respectively, because they are agents of a disclosed principal (i.e., the building's owner, Whitehouse, now Eastgate). *See* notice of motion (motion sequence number 006), exhibit I (answer), ¶¶ 67, 68. Plaintiffs argue that 9 NYCRR § 2520.6 (i) defines the term "owner" broadly enough to include managing agents. *See* plaintiffs' mem of law at 11. Plaintiffs are correct. The statute plainly states as follows:

> "(i) Owner. A fee owner, lessor, sublessor, assignee, net lessee, or a proprietary lessee of a housing accommodation in a structure or premises owned by a cooperative corporation or association, . . . or any other person or entity receiving or entitled to receive rent for the use or occupation of any housing accommodation, *or an agent of any of the foregoing* . . . shall only commence a proceeding pursuant to section 2524.5 of this Title, in the name of such foregoing principals."

9 NYCRR § 2520.6 (i) [emphasis added]; *see also Matter of Howard v New York State Div. of Hous. & Community Renewal*, 2010 NY Slip Op 30241 (U) (Sup Ct, NY County 2009). Therefore, Duell and K&K are proper parties to this action, as are Whitehouse and Eastgate. Accordingly, the court rejects defendants' second and third affirmative defenses.

Defendants' fourth affirmative defense alleges lack of subject matter jurisdiction. Plaintiffs correctly point out that the DHCR does not have primary jurisdiction over all rent overcharge claims and that this court is an appropriate forum in which to litigate such matters. *See e.g. Gerard v Clermont York Assoc., LLC*, 81 AD3d 497 (1st Dept 2011). Therefore, the court rejects defendants' fourth affirmative defense.

Defendants' fifth affirmative defense alleges that plaintiffs failed to exhaust administrative remedies before commencing this action; i.e., that they failed to commence this action before the DHCR. *See* notice of motion (motion sequence number 006), exhibit I (answer), ¶ 70. This affirmative defense is rejected for the same reason stated in the preceding paragraph.

Defendants' sixth affirmative defense alleges that "some" plaintiffs' claims are barred by the RSL because their apartments were not deregulated improperly. *See* notice of motion (motion sequence number 006), exhibit I (answer), ¶ 71. They assert that "some" of the building's apartments were deregulated on grounds other than high rent or vacancy. *Id.* However, defendants have failed to identify the apartments that they are referring to, or to provide any documentary evidence to support their contention. As a result, the court deems that defendants have abandoned this affirmative defense, and, therefore, rejects it.

Defendants' seventh affirmative defense alleges that plaintiffs' claims are barred by the doctrine of laches. *See* notice of motion (motion sequence number 006), exhibit I (answer), ¶ 72. Plaintiffs correctly point out that laches is an equitable defense that is unavailable in contract based actions that are commenced within the applicable statute of limitations. *See e.g. Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 118 AD3d 581 (1st Dept 2014). Here, plaintiffs commenced this action within the four-year statute of limitations applicable to rent overcharge claims. Therefore, the court rejects defendants' seventh affirmative defense.

Defendants' eighth, ninth, and tenth affirmative defenses allege, respectively, that (8) plaintiffs are barred from proceeding as a class; (9) plaintiffs' claims for treble damages are barred by the RSL; and (10) the RSL does not permit class action claims. *See* notice of motion (motion sequence number 006), exhibit I (answer), ¶¶ 73-75. Plaintiffs respond that the Court of Appeals has specifically held that rent overcharge claims may be brought in class action form, as long as the plaintiff class members do not seek treble damages in violation of CPLR 901 (b). *See Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382 (2014). Plaintiffs also state that they have "waived their right to recovery of treble damages" in this action. *See* plaintiffs' mem of law at 12. As defendants' eighth, ninth, and tenth affirmative defenses fail as a matter of law, the court rejects them.

Defendants' eleventh affirmative defense alleges that some plaintiffs' rent is less than what the RSL allows. *See* notice of motion (motion sequence number 006), exhibit I (answer), ¶ 76. However, as was previously discussed, defendants have failed either to identify the plaintiffs' apartments to which they are referring or to support their contention with any documentary evidence. In fact, the documentary evidence presented indicates that defendants' contention is incorrect. Therefore, the court deems that defendants have no affirmative defense and therefore rejects it.

Defendants' twelfth and thirteenth affirmative defenses allege, respectively, that (12) some plaintiffs' apartment units are no longer receiving J-51 tax benefits; and (13) some plaintiffs' apartment units were exempt from rent regulation before the building began receiving J-51 benefits. *See* notice of motion (motion sequence number 006), exhibit I (answer), ¶¶ 77-78. Plaintiffs correctly note that, in *Roberts*, the Appellate Division, First Department, found 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." 62 AD3d at 81, *affd* 13 NY3d 270 (2009). Therefore, defendants' arguments are irrelevant, as a matter of law, and the court rejects defendants' twelfth and thirteenth affirmative defenses on that ground.

Defendants' fourteenth, fifteenth, and seventeenth affirmative defenses allege, respectively, that (14) defendants acted in accordance with the law; (15) defendants acted in good faith; and (17) defendants justifiably relied on the DHCR's interpretation of its own regulations. *See* notice of motion (motion sequence number 006), exhibit I (answer), ¶¶ 78, 80, 82. However, as was previously indicated, these affirmative defenses track the language of that portion of Justice Singh's August 6, 2012 order that relied on the Appellate Term's decision in *72A Realty Assoc.*, which the Appellate Division, First Department, modified four months later. *72A Realty Assoc.*, 101 AD3d at 402-403. Because that Appellate Term decision is no longer good law, defendants' affirmative defenses can no longer stand as a matter of law, either. Therefore, the court rejects defendants' fourteenth, fifteenth, and seventeenth affirmative defenses.

Defendants' sixteenth affirmative defense alleges that defendants' participation in the J-51 program was the result of a mutual mistake. *See* notice of motion (motion sequence number 006), exhibit I (answer), ¶ 81. However, as plaintiffs correctly point out, the Appellate Division, First Department, has squarely held that the mutual mistake defense, which applies to actions for rescission of a contract, is unavailable in cases like the one at bar, because "[t]he J-51 program is a tax benefit program—there is no contract or agreement to rescind." *Matter of London Terrace Gardens, L.P. v City of New York*, 101 AD3d 27, 30 (1st Dept 2012). Therefore, the court rejects defendants' sixteenth affirmative defense.

Defendants' eighteenth, nineteenth, and twentieth affirmative defenses allege, respectively, that plaintiffs' claims are barred (18) by the Takings Clause of the United States Constitution; (19) because the RSL is void for vagueness; and (20) by the Due Process Clause of the United States Constitution. *See* notice of motion (motion sequence number 006), exhibit I (answer), ¶¶ 83-85. However, the First Department also has rejected each of these arguments in *Matter of London Terrace Gardens, L.P.*, 101 AD3d at 31-32. Therefore, the court rejects defendants' eighteenth, nineteenth, and twentieth affirmative defenses.

Defendants' twenty-first and twenty-second affirmative defenses allege, respectively, that plaintiffs' claims are barred by the doctrines of waiver and estoppel. *See* notice of motion (motion sequence number 006), exhibit I (answer), ¶¶ 86-87. However, plaintiffs again correctly point out that our appellate courts previously have held that these equitable defenses are not available in rent overcharge actions. *See e.g. Matter of 85 E. Parkway Corp. v New York State Div. of Hous. & Community Renewal*, 297 AD2d 675 (2d Dept 2002) (an agreement to waive the protections of the RSL is invalid as against public policy); *Matter of Benaresh v City of New*

York Dept. of Hous. Preserv. & Dev., 273 AD2d 86 (1st Dept 2000) (estoppel is ordinarily unavailable against a governmental agency). Therefore, the court rejects defendants' twenty-first and twenty-second affirmative defenses.

Defendants' twenty-third affirmative defense alleges that plaintiffs' claims are barred by the doctrines of res judicata and collateral estoppel. *See* notice of motion (motion sequence number 006), exhibit I (answer), ¶ 88. However, the decisions rendered by Justice Singh, on which defendants base their res judicata argument, are no longer good law. Further, the court also already has held that the collateral estoppel defense is unavailable, because plaintiffs have made the requisite showing of "fraud" as defined in *Grimm*. Therefore, the court rejects defendants' twenty-third affirmative defense.

Defendants' twenty-fourth affirmative defense alleges that some of plaintiffs' claims are void as speculative. *See* notice of motion (motion sequence number 006), exhibit I (answer), ¶ 89. Plaintiffs deny this claim, and assert that their damages will be easily calculated once the correct evidence has been presented and the base dates and legal regulated rents for all the affected apartments herein have been established. See plaintiffs' mem of law at 17. The court agrees that this is a factual matter easily susceptible of calculation and resolution. Further, defendants have made no attempt to argue why plaintiffs' damages should be considered "speculative." Therefore, the court considers that defendants have abandoned this argument, and rejects their twenty-fourth affirmative defense. As a result of the foregoing, the court finds that the branch of plaintiffs' motion that seeks dismissal of defendants' affirmative defenses should be granted.

In conclusion, the court has determined that (1) plaintiffs are entitled to partial summary judgment on their first cause of action, to the extent of awarding them the two proposed declarations set forth in their complaint; (2) this matter shall be submitted to a Special Referee on the issues of (a) calculating both the base rent dates and legally regulated (rent-stabilized) rents for each plaintiffs' apartments, utilizing the DHCR's default formula; and (b) identifying how much use and occupancy, if any, each plaintiff has paid to date and how much was actually due; (3) that defendants' cross motion shall be denied; and (4) that the proposed intervenors' order to show cause shall be granted to the extent of (a) enjoining defendants from proceeding any further against them in the Housing Court holdover proceeding that bears L&T Index Number 78632/15; and (b) granting the proposed intervenors leave to intervene in this action.

The court now also directs that the Special Referee shall make base date, legal rent, and U&O payment calculations regarding the proposed intervenor plaintiffs, along with the other class-member plaintiffs. The court additionally directs that when plaintiffs submit their motion to confirm the Special Referee's report, they shall annex an amended complaint that names Eastgate as a defendant; that the caption shall name the proposed intervenors, along with the other class member plaintiffs; and that plaintiffs shall include with that motion a request for summary judgment on the balance of their first cause of action — i.e., an order enjoining defendants immediately to issue rent-stabilized leases to all plaintiffs that reflect the maximum legal rents, as determined by the Special Referee's calculations. The court further directs that when defendants submit their motion to confirm or deny the Special Referee's report, it shall include a request that the court issue an order requiring those plaintiffs who have not paid any

use and occupancy to post a bond, equal to the amount of use and occupancy specified in Justice Singh's May 21, 2014 order, within 20 days after service of a copy of the court's decision on that motion with notice of entry. As previously was indicated, defendants may thereafter commence an action for ejectment against any plaintiff who fails to post such a bond and request that that action be referred to this court. After the forthcoming motion to confirm is decided, plaintiffs shall then be free to seek summary judgment on the balance of their complaint — i.e., the entry of money judgments for rent overcharges and legal fees, if any. The court is mindful that, to fix those amounts, another round of calculations by a Special Referee may be required. This is regrettable, but necessary, to afford the parties full and complete relief in this action.

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the branch of the motion, pursuant to CPLR 3025 (b), of plaintiffs Kathryn Casey, Laurie Cagnassola, Gerald Cohen, Betty Furr, Francesca Gagliano, Carolyn Klein, Joseph Morgan, Richard Rose, Jessica Saks and Kirk Swanson for leave to amend the complaint to include Eastgate Whitehouse LLC as a defendant (motion sequence number 006) is granted, and said plaintiffs shall serve an amended complaint naming said defendant, along with a copy of this order with notice of entry thereof on all parties, as well as on the County Clerk's Office and the General Clerk's Office, which are directed to add Eastgate Whitehouse LLC as a defendant; and it is further

ORDERED that said defendant shall serve an amended answer to the amended complaint, or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that the branch of plaintiffs' motion (motion sequence number 006) which seeks a declaratory judgment with respect to the subject matter of the complaint's first cause of action is granted, with costs and disbursements to plaintiffs as taxed by the Clerk; and it is further

ADJUDGED and DECLARED:

1) that plaintiffs' apartments in the building located at 350 East 52nd Street in the County, City and State of New York are subject to either Rent Stabilization or Rent Control; and

2) that defendants are required to offer plaintiffs renewal leases on forms approved by the DHCR at legal regulated rents as established by the Rent Stabilization Law, or to continue their existing tenancies pursuant to the Rent Control Law with legal maximum rents as established by the Rent Control Law; and it is further

ORDERED that the issues of:

(1) calculating the base rent date for each plaintiff's apartment

(including each proposed intervenor plaintiff) utilizing the DHCR's "default formula;" and

(2) calculating the maximum legal regulated rent for each plaintiff's apartment (including each proposed intervenor plaintiff); and

(3) calculating the amount of use and occupancy that was to be paid for each plaintiff's apartment (including each proposed intervenor plaintiff) pursuant to the order issued in this action by the Hon. Singh, J., on May 21, 2014; and

(4) calculating the amount of use and occupancy that was actually paid, if any, by each plaintiff in this action to date (including each proposed intervenor plaintiff)

are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on the Office of the Special Referee in the General Clerk's Office (Room 119M) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendants Whitehouse Estates, Inc., Koeppel & Koeppel, Inc, Duell 5 Management LLC d/b/a Duell Management Systems and William W. Koeppel (motion sequence number 006) is denied; and it is further

ORDERED that the branch of the order to show cause of proposed intervenor-plaintiffs Pamela Renna and Vitina Degrezia a/k/a Vitina Luppino, which seeks leave to intervene in this action, pursuant to CPLR 1013 (motion sequence number 008), is granted to the extent that said parties are permitted to intervene in the above-entitled action as party plaintiffs; and it is further

ORDERED that the summons and complaint in the above-entitled action be amended by adding Pamela Renna and Vitina Degrezia a/k/a Vitina Luppino thereto as party plaintiffs, and listing said parties as the last plaintiffs in the caption; and it is further

ORDERED that the attorney for the intervenors shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B), and upon the General Clerk's Office (Room 119), which are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that the branch of the order to show cause of proposed intervenor-plaintiffs Pamela Renna and Vitina Degrezia a/k/a Vitina Luppino, which seeks injunctive relief, pursuant to CPLR 6301 (motion sequence number 008), is granted to the extent that: defendants, their

agents, servants, employees and all other persons acting under their jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of defendant, or otherwise, any of the following acts:

(1) to continue prosecuting the holdover proceeding currently pending against the intervenor plaintiffs in the Civil Court of the City of New York, Housing Part 18-D, that bears L&T Index Number 78632/15; and it is further

ORDERED that the branch of the order to show cause of proposed intervenor-plaintiffs Pamela Renna and Vitina Degrezia a/k/a Vitina Luppino, which seeks a stay, pursuant to CPLR 2201 (motion sequence number 008), is denied as academic; and it is further

ORDERED that the balance of this action shall continue with the additional directives that were specified by the court at the conclusion of this decision.

Dated: New York, New York
March 23, 2017

J.S.C.
HON. GERALD LEBOVITS
J.S.C.