SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES D'AUGUSTE** **PART** **55**

Justice

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LEISA ARAS, CATHERINE SCHWARTZ, ALBERT PANOZZO, GEORGIA MARANTOS, YU PING TANG, JAMES GLADSTONE, KATHLEEN CAMPANA, PETER KANE, PAULINA PERERA-RIVEROLL, KATHARINE LASELL, JOHN MENAPACE, KAREN MENAPACE,

Plaintiffs,

- v -

B-U REALTY CORP., PAUL BUGONI,

Defendants.

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INDEX NO. 161448/2014

MOTION DATE 01/09/2021

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 322

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, the motion is decided as follows:

In this residential landlord-tenant action, plaintiffs move for "summary judgment or partial summary judgment" on the complaint (motion sequence number 009). The motion is granted in part and denied in part to the extent set forth below.

BACKGROUND

All plaintiffs are tenants of a residential apartment building located at 945 West End Avenue in the County, City and State of New York (the building). *See* amended verified complaint, ¶¶ 2-15. Defendant B-U Realty Corp. (B-U) is the building's corporate owner, and co-defendants Paul and Irene Bogoni (the Bogonis) are officers and principals of B-U. *Id.*, ¶¶ 16-18.

From 2005 through 2019, B-U enrolled the building in the "J-51" real estate tax abatement program overseen by the New York City Department of Housing Preservation and Development (HPD).[1] *See* notice of motion, Howard affirmation, ¶ 2; exhibit G. One of the conditions of the "J-51" program (set forth in Real Property Tax Law [RPTL] § 489 and 28 RCNY § 5-03) is that enrolled buildings must remain subject to the Rent Stabilization Law (RSL) and Code (RSC) for the duration of their enrollment. *See Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 (2009). Despite this, plaintiffs assert that B-U failed to register any of their apartments with the New York State Division of Housing and Community Renewal (DHCR) as rent stabilized units, and instead issued all of them unregulated, market-rate leases which charged them monthly rents far in excess of the legal rent stabilized maximum. *See* amended verified petition, ¶¶ 1, 20-25.

Plaintiffs initially commenced this action on November 24, 2014. *See* original verified complaint, affs of service. Defendants filed a timely answer, but plaintiffs later moved for leave to amend their pleadings (motion sequence number 003). *See* notice of motion, Howard affirmation, ¶¶ 16-18. Plaintiffs subsequently filed an amended verified complaint on June 12, 2015 which sets forth causes of action for: 1) rent overcharge; 2) a preliminary injunction; 3) a stay; 4) harassment; and 5) attorney's fees. *See* amended verified complaint, ¶¶ 20-45.

Plaintiffs' counsel avers that, prior to the commencement of this action, several of his clients contacted Assemblyman Daniel O'Donnell (Assemblyman O'Donnell) about B-U's non-compliance with the "J-51" program, and notes that Assemblyman O'Donnell thereafter wrote to the DHCR's Tenant Protection Unit (TPU) on July 14, 2014 to urge the agency to look into the tenants' allegations. *See* notice of motion, Howard affirmation, ¶ 10; exhibits A, C. Counsel

[1] Plaintiffs presented tax records that established that that the building was actually enrolled in the "J-51" program during the periods of 1974-1984, 1989-2000 and 2005-2019. *See* notice of motion, Howard affirmation, ¶ 2; exhibit G. However, as will be discussed, plaintiffs' claims only accrued during the final enrollment period.

further avers that on August 14, 2014, the TPU's Bureau Chief wrote to Bogoni to direct him to take steps to ensure that B-U take the all necessary action to comply with the "J-51" program. *Id.*, ¶ 11; exhibit B. Finally, counsel avers that, after this action was commenced, Bogoni submitted a number of amended rent registration statements to the DHCR in 2015 and 2017 which retroactively re-registered many the building's apartments as rent stabilized units (some as far back as 2000), and listed "legal regulated rents" for many units that either matched or exceeded the rents set forth on their actual leases. *Id.*, ¶¶ 13-16; exhibit H. Counsel alleges that Bogoni's filings were an attempt to obscure the building's rent registration history, and to retroactively claim incorrect legal regulated rents for its apartments, and that his actions were all in furtherance of B-U's "fraudulent scheme to deregulate the building" while it was enrolled in the "J-51" program. *Id.*, ¶¶ 14-21. To document this alleged fraud, plaintiffs have presented copies of their leases, of their units' original DHCR rent registration histories, and of Bogoni's improper amended DHCR filings. *Id.*; exhibits H, K-ZZ. Plaintiffs have also presented copies of earlier decisions by Justices of this Court who found that B-U has engaged in a "fraudulent scheme to deregulate the building" for years. *Id.*, exhibits D, E, F.[2] One of those decisions was affirmed by the Appellate Division, First Department, which unequivocally found that:

> "The record reflects evidence of a fraudulent scheme to deregulate plaintiffs' apartment, as well as other apartments in the building, including evidence of defendants' failure, while in receipt of J-51 tax benefits, to notify plaintiffs their apartment was protected by rent stabilization laws or to issue them a rent-stabilized lease, and further reflects that defendants only addressed the issue when their conduct, which violated *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]), came to light in connection with an anonymous complaint, which in turn triggered the involvement of an Assemblyman in 2014."

Kreisler v B-U Realty Corp., 164 AD3d 1117, 1117 (1st Dept 2018).

[2] Those decisions are *Townsend v B-U Realty Corp.*, 67 Misc 3d 1228(A), 2020 NY Slip Op 50662(U) (Sup Ct, NY County 2020); *Kreisler v B-U Realty Corp.*, 2017 NY Slip Op 32742(U) (Sup Ct, NY County 2017); and *Pascaud v B-U Realty Corp.*, 2017 NY Slip Op 41328(U) (Sup Ct NY County 2017).

On January 8, 2021, plaintiffs submitted the instant motion for partial summary judgment on their first and fifth amended causes of action, which respectively seek money judgments for rent overcharges and attorney's fees. *See* notice of motion, Howard affirmation, ¶ 1. The plaintiff/tenants who join in the motion are: 1) Leisa Aras (apartment 11B); 2) Robert Arnot & Ellen Hirsch (formerly apartment 11C); 3) Sarah Barish-Straus (currently apartment 9D, formerly apartment 2C); 4) James Gladstone & Kathleen Campana (formerly apartment 10B); 5) Patricia Lederer (apartment 8D); 6) Albert Panozzo & Georgia Marantos (apartment 1B); 7) John & Karen Menapace (apartment 8A); and 8) Peter Kane & Paulina Perera-Riveroll (apartment 10D). *Id.*, ¶¶ 1, 4. Co-plaintiffs Yu Ping Tang, Katherine Lasell, Carly Roberts and Adam Bellow did not join in the motion. Defendants submitted opposition but did not cross-move. *See* Alterac affirmation in opposition. This motion is now ready for disposition (motion sequence number 009).

DISCUSSION

I. Governing Law

Plaintiffs' motion seeks "summary judgment or partial summary judgment" on their first and fifth causes of action. The party who moves for summary judgment 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 the moving party does so, 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).

Plaintiffs' first cause of action alleges "rent overcharge," and demands that "[p]laintiffs have the opportunity to determine the legal rent for their apartments and also that the [p]laintiffs

are awarded individual money judgments against [landlord] for the amount their rent payments exceeded the legal rent for their units and that the [p]laintiffs be awarded treble damages for the ament of the overcharges due to the willful nature of [landlord's] behavior, along with such other and further relief as this Court deems just and proper." *See* amended verified complaint, ¶¶ 20-25. "Rent overcharge" is an entirely statutory cause of action whose elements (and damages) are set forth in RSL § 26-516. That statute was amended effective June 14, 2019 by the New York State Legislature's enactment of the "Housing Stability and Tenant Protection Act of 2019" (HSTPA). However, in 2020, the Court of Appeals held that the amended version of RSL § 26-516 could not be applied retroactively to overcharge claims filed before the HSTPA's effective date. *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 (2020]). Instead, the *Regina Metropolitan* holding dictates that plaintiffs' rent overcharge claims must be assessed pursuant to the pre-HSTPA version of RSL § 26-516, since those claims were filed in 2014, i.e., well before the HSTPA's 2019 effective date. The old version of the statute provided, in pertinent part, as follows:

> "§ 26-516. Enforcement and procedures
> "a. Subject to the conditions and limitations of this subdivision, any owner of housing accommodations who, upon complaint of a tenant, or of the [DHCR], is found by the [DHCR], after a reasonable opportunity to be heard, to have collected an overcharge above the rent authorized for a housing accommodation subject to this chapter shall be liable to the tenant for a penalty equal to three times the amount of such overcharge. In no event shall such treble damage penalty be assessed against an owner based solely on said owner's failure to file a timely or proper initial or annual rent registration statement. If the owner establishes by a preponderance of the evidence that the overcharge was not willful, the [DHCR] shall establish the penalty as the amount of the overcharge plus interest. (i) Except as to complaints filed pursuant to clause (ii) of this paragraph, the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement, (or, if more recently filed, the initial registration statement) plus in each case any subsequent lawful increases and adjustments. Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter. (ii)

As to complaints filed within ninety days of the initial registration of a housing accommodation, the legal regulated rent shall be deemed to be the rent charged on the date four years prior to the date of the initial registration of the housing accommodation (or, if the housing accommodation was subject to this chapter for less than four years, the initial legal regulated rent) plus in each case, any lawful increases and adjustments. Where the rent charged on the date four years prior to the date of the initial registration of the accommodation cannot be established, such rent shall be established by the [DHCR].

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

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

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

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

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

"(5) The order of the [DHCR] awarding penalties may, upon the expiration of the period in which the owner may institute a proceeding pursuant to article seventy-eight of the civil practice law and rules, be filed and enforced by a tenant in the same manner as a judgment or not in excess of twenty percent thereof per month may be offset against any rent thereafter due the owner.

> "b. In addition to issuing the specific orders provided for by other provisions of this law, the [DHCR] shall be empowered to enforce this law and the code by issuing, upon notice and a reasonable opportunity for the affected party to be heard, such other orders as it may deem appropriate."

RSL § 26-516 (a), (b) (emphasis added).

RSL § 26-516 (a) defines a "rent overcharge" as a rental charge which is "above the rent authorized for a housing accommodation," which is, in turn, defined as "the rent indicated in the annual [DHCR] registration statement filed four years prior to the most recent registration statement, . . . plus in each case any subsequent lawful increases and adjustments." As a result, in order to establish whether a landlord collected rent overcharges from a tenant, it is first necessary to calculate three figures: 1) an apartment's "legal regulated rent" (i.e., the rental amount listed on the appropriate DHCR registration statement plus lawful increases and adjustments); 2) the amounts that the landlord actually charged to the tenant; and 3) the amounts that the tenant actually paid to the landlord. In *Regina Metropolitan*, the Court of Appeals stated that "under pre-HSTPA law, the four-year lookback rule and standard method of calculating legal regulated rent govern in *Roberts* overcharge cases, *absent fraud*." *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 361 (emphasis added). Here, as noted earlier, the First Department recently upheld a finding that B-U *has* engaged in "a fraudulent scheme to deregulate" the building. *Kreisler v B-U Realty Corp.*, 164 AD3d at 1117. As a result, the First Department found inapplicable the "four-year lookback rule" set forth in the old version of RSL § 26-516 (a) when it assessed the rent overcharge claims in that case. *Id.*, at 1117.

First Department jurisprudence has evolved further since then. This year, in *Montera v KMR Amsterdam LLC* (193 AD3d 102 [1st Dept 2021]), the First Department clarified that, in cases where a landlord has engaged in a "fraudulent scheme to deregulate" a building, "the apartment history beyond the four-year lookback period may be reviewed to determine whether

fraud occurred" in setting individual apartment rents. 193 AD3d at 109. In *Montera*, the "fraudulent scheme" that the First Department ruled was a sufficient prerequisite to allowing the court to check for fraud in rent setting consisted of the landlord ignoring for years the holdings of *Roberts v Tishman Speyer Props. L.P.* and *Gersten v 56 7th Ave. LLC* (88 AD3d 189 [1st Dept 2011]), which required all owners of buildings enrolled in the "J-51" program to reregister improperly deregulated apartments as rent stabilized with the DHCR. 193 AD3d at 105-108. In this case, landlord perpetrated the same prerequisite "fraudulent scheme to deregulate" as in *Montera* by neglecting to reregister the building's apartments as rent stabilized until 2015-2017, well after *Roberts* was decided in 2009, or *Gersten* was decided in 2011. *See* notice of motion, Howard affirmation, ¶¶ 13-16; exhibit H. The First Department unequivocally stated that:

> "*Regina* does not grant an owner carte blanche in post-*Roberts/Gersten* cases to willfully disregard the law, by failing to re-register illegally deregulated apartments, enjoying tax benefits while continuing to misrepresent the regulatory status of the apartments, and taking steps to comply with the law only after its scheme is uncovered. Owners should not be incentivized to remove regulated housing from the statutory scheme by simply ignoring the law. It is axiomatic that ignorance of the law is not a defense for the failure to comply with unambiguous legal obligations."

Montera v KMR Amsterdam LLC, 193 AD3d at 107 (internal citation omitted). Here, in addition to the fraud noted in *Kreisler v B-U Realty Corp.*, B-U also acted fraudulently by failing to reregister the building's apartments as rent stabilized until the period of 2015-2017, after this action was commenced. Accordingly, the Court is plainly authorized to examine the rent histories of the moving plaintiffs' apartments beyond the statutory four-year "lookback" period to determine whether B-U engaged in fraud in setting each unit's rent.

Regarding plaintiffs' fifth cause of action, First Department case law recognizes that "[u]nder the general rule, attorney's fees are incidents of litigation, and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 (1989); *see also Sykes v RFD*

Third Ave. I Assoc., LLC, 39 AD3d 279 (1st Dept 2007). Here, RSL § 26-516 (a) plainly provides that court costs, attorney's fees, money damages, treble damages, interest and related declaratory and/or injunctive relief are all items of damages to which plaintiffs are entitled if they can establish a landlord's liability for "rent overcharge." Although there was technically no need for plaintiffs to plead a separate cause of action for "attorneys fees," this decision will nevertheless treat it as a separate cause of action for the sake of clarity.

II. Facts

The moving plaintiffs have presented a quantity of documentary evidence to support their rent overcharge claims, and Bogoni has presented an equally large amount of documentation to attempt to disprove those claims. As was previously observed, RSL § 26-516 requires a court to determine (a) the amount of rent charged, (b) the amount of rent actually paid and (c) the "legal regulated" rent for each moving plaintiff's apartment in order to assess those rent overcharge claims. Consistent with this mandate, the moving plaintiffs' rent overcharge claims are limited to the statutory four-year recovery period; i.e., from November 10, 2010 through and until the date this action was filed four years later on November 24, 2014 (the overcharge claims period). RSL § 26-516 (a) (2).

A. Apartment 11B (Leisa Aras)

Plaintiff/tenant Leisa Aras (Aras) states that she took possession of apartment 11B on February 7, 2012 pursuant to the terms of a one-year, free-market lease with a monthly rent of $4,950.00. *See* notice of motion, Aras aff, ¶ 2. Aras has presented copies of leases that establish that B-U charged the following monthly rental amounts during the portion of the overcharge claims period applicable to her (i.e., February 7, 2012 through November 24, 2014): 1) $4,950.00 per month from February 1, 2012 through January 31, 2013; 2) $5,050.00 per month from February 1, 2013 through January 31, 2014; and 3) $5,252.00 per month from February 1, 2014 through

January 31, 2015. *Id.*, ¶ 2; exhibit PP. Aras also avers that the actual monthly rent payments she made between February 7, 2012 and November 24, 2014 were as follows: 1) $4,950.00 from February 2012 through January 2013 (12 months x $4,950.00 = $59,400.00 total paid); 2) $5,050.00 from February 2014 through January 2015 (12 months x $5,050.00 = $60,600.00 total paid); 3) $5,252.00 from February 2014 through March 2014 (2 months x $5,252.00 = $10,500.00 total paid); and 4) $2,200.00 from April 2014 through November 2014 (8 months x $2,200.00 = $17,600.00 total paid). *Id.*, ¶ 13. Thus, Aras's grand total rent payments during the overcharge claims period totaled $148,100.00. Aras avers that she began making monthly rent payments of $2,200.00 in April 2014 pursuant to the terms of a stipulation that she entered with B-U to settle a proceeding that B-U had commenced against her in the Civil Court of the City of New York, Housing Part, a/k/a Housing Court. *Id.*, ¶ 13, n1. Bogoni does not dispute the amounts set forth on Aras's three leases in effect between February 1, 2012 through January 31, 2015, nor does he dispute the amounts that she claims to have paid during that period. *See* Bogoni aff in opposition, ¶¶ 87-93; exhibits EE, FF, GG, HH. Therefore, the Court accepts those figures as accurate.

Regarding apartment 11B's legal regulated rent during the overcharge period, the original DHCR registration statement in effect on February 7, 2012 recited that the unit was an "Exempt Apartment - Reg. Not Required." *See* notice of motion, exhibit QQ. It also designated the unit as "exempt" on November 10, 2010. *Id*. The original statement further indicated that apartment 11B became exempt from registration when B-U removed it from rent stabilization on September 28, 1998 by reason of "High Rent Vacancy." *Id*. However, because the building was enrolled in the "J-51 program" between 1989 and 2000, B-U was not entitled to utilize the RSC's "high income deregulation" procedure in 1998. *See* notice of motion, Howard affirmation, ¶ 2; exhibit G. The Court of Appeals would consider this to be a non-fraudulent "pre-*Roberts*" deregulation which was inadvertently based on the DHCR's incorrect guidance regarding the "J-51" program. *Matter*

of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal, 35 NY3d at 361. As a result, the Court finds that the original DHCR registration history indicates shows that landlord's deregulation of apartment 11B was improper, but not fraudulent. There are other facts to consider in Aras's case, however.

Aras has also presented a copy of the amended DHCR registration statement, which Bogoni filed for apartment 11B on January 26, 2015. *See* notice of motion, exhibit QQ. The Court notes that Bogoni filed that statement after this action was commenced, and after he had been contacted about B-U's registration obligations by the TPU at Assemblyman O'Donnell's behest about constituent complaints of "serious allegations concerning abuse of the rent stabilization code and harassment of tenants" in the building. *Id.*, Aras aff, ¶ 5; exhibits A, B, C. The 2015 amended registration statement recited that the unit's 2012 legal regulated rent (when Aras took possession) was $4,950.50 per month, the same rent specified on Aras's initial market rate lease. *Id.*, exhibits QQ, PP. The amended registration further listed apartment 11B as "permanently exempt" from rent stabilization in 2005, as "vacant in 2006," and as "rent stabilized" in 2007 with a legal regulated rent of $4,795.00 per month. *Id.* Thereafter, the unit's legal regulated rent increased to $5,095.00 per month in 2008, decreased to $4,450.00 in 2010, and increased again to $4,950.50 per month when Aras took possession in 2012. *Id.* The unit's status designations are inconsistent with the fact that apartment 11B was rent stabilized in 2005 by virtue of the building's re-enrollment in the "J-51" program, and the subsequent pattern of rent increases and decreases on its leases does not follow the normal method for rent increase calculations permitted by the RSC. These amendments evince B-U's disregard for the RSC's regulations. Bogoni attempts to explain that B-U "mistakenly treated [Aras] as a free market tenant," and that it "erred" several times by charging her several dollars "more than the maximum allowable legal rent . . . based on the [Rent Guidelines Board Order] then in effect." *See* Bogoni aff in opposition, ¶¶ 87-93. Bogoni asserts

that all of those overcharges were minimal, and that B-U credited them against Aras's account and offered her a rent stabilized lease. *Id*. Plaintiffs' counsel responds that Bogoni "is collaterally estopped from denying [B-U's] building-wide fraudulent scheme of deregulation" by virtue of this court's findings in *Townsend v B-U Realty Corp.*, *Kreisler v B-U Realty Corp.*, and *Pascaud v B-U Realty Corp.*,[3] and the First Department's affirmance in *Kreisler v B-U Realty Corp*. (164 AD3d 1117). *See* notice of motion, Howard affirmation, ¶¶ 22-30; exhibits D, E, F. For her part, Aras avers that Bogoni presented her with four back-dated "substitute" rent stabilized leases covering the duration of her tenancy from 2012 through 2015 which contained the monthly rents listed on the amended 2015 DHCR registration statement, but that she refused to sign them. *Id.*, Aras aff, ¶ 12; exhibit RR. Aras also avers that, between 2012 and 2014, Bogoni improperly and without explanation required her to remit her monthly rent payments in two checks - one check for half the rent made out to B-U and a second check for the other half of the rent made out to him personally. *Id*., Aras aff, ¶ 13; exhibit SS.

Consonant with several decisions rendered in this forum,[4] the Court finds that B-U has been continuously engaged in a building-wide fraudulent deregulation scheme. Bogoni ignored B-U's obligation to re-register the building's apartments as rent stabilized from 2005 forward until 2015, even though *Roberts* had been decided in 2009 and *Gersten* in 2011. *See* notice of motion, exhibit QQ. Bogoni only acted in 2015, after this action was commenced in 2014 and after the TPU had contacted him at Assemblyman O'Donnell's request that same year. *Id*., exhibits A, B, C, I. The 2015 amended DHCR registration statement was incomplete and inconsistent with RSC regulations. Bogoni should have re-designated apartment 11B as rent stabilized in 2005 when the building was re-enrolled in the "J-51" program, but he instead listed the unit as exempt from rent

[3] *See* citations in footnote 2.
[4] *See* n 2.

stabilization in 2005 and 2006. Further, while it was proper for Bogoni to have registered apartment 11B as rent stabilized in 2012, it was not proper for him to coerce Aras to sign back-dated rent stabilized leases to replace her original market-rate leases. In doing so, Bogoni sought to create the appearance, after the fact, that B-U had complied with the RSC (28 RCNY § 5-03) while the building was enrolled in the "J-51" program, while it had not done so. This would have frustrated the TPU's ability to enforce B-U's tax obligations under RPTL § 489, which authorized the "J-51" program. Bogoni's back-dated leases also sought to legitimize the rents that B-U had charged Aras on her original market-rate leases and thereby immunize it against a possible rent overcharge claim from her. *Id*., exhibit RR. Further, the back-dated leases all contained both rent stabilization riders and "J-51" riders, which Aras's original leases did not, in violation of RSL § 26-511 (d) and NYC Admin Code § 11-243. *See e.g., Matter of 73 Warren St., LLC v State of N.Y. Div. of Hous. & Community Renewal,* 96 AD3d 524 (1st Dept 2012). In offering the replacement leases, Bogoni sought to evade B-U's responsibility for those violations as well. In addition to this plain evidence of deceptive behavior, the Court is struck by Bogoni's admission in one of the other cases against B-U that he signed a tenant's name on a rent stabilized rider which the tenant herself had not signed.[5] *Id*., exhibit E. As a result of the foregoing, the Court cannot credit any of Bogoni's assertions, and instead concludes that B-U acted fraudulently in setting apartment 11B's rent. The Court consequently also finds that this fraud precludes it from making a clear determination of the unit's "legal regulated rent" either on the November 10, 2010 base date or on February 1, 2012, when Aras's tenancy began.

[5] *Pascaud v B-U Realty Corp.*, Index No 161824/14, 2017 NY Slip Op 41328(U), *4 (Sup Ct, NY County 2017).

B. Apartment 11C (Robert Arnot & Ellen Hirsch)

Plaintiffs/tenants Robert Arnot (Arnot) and Ellen Hirsch (Hirsch) first took possession of apartment 11C pursuant to the terms of a one-year, free-market lease that ran from August 1, 2013 to July 31, 2014 with a monthly rent of $6,000.00. *See* notice of motion, Arnot aff, ¶ 2; exhibit TT. Arnot has presented copies of two leases that establish that B-U charged the following monthly rental amounts during the portion of the overcharge claims period that applies to him and Hirsch (i.e., August 1, 2013 through November 24, 2014): 1) $6,000.00 per month from August 1, 2013 to July 31, 2014; and 2) $6,240.00 per month from August 1, 2014 through November 24, 2014. *Id*., ¶ 2; exhibit TT. Arnot also avers that his and Hirsch's actual monthly rent payments during the overcharge claims period matched the lease amounts; i.e.: 1) $6,000.00 from August 1, 2013 to July 31, 2014 (12 months x $6,000.00 = $72,000.00 total paid); and 2) $6,240.00 from August 1, 2014 through November 24, 2014 (4 months x $6,240.00 = $24,960.00 total paid). *Id*., ¶ 8. Thus, Arnot's and Hirsch's grand total rent payments during the overcharge claims period were $96,960.00. Bogoni acknowledges the two leases and does not dispute Arnot's and Hirsch's alleged payments; stating instead that "this Plaintiff is not in arrears and is not in occupancy of the subject apartment." *See* Bogoni aff in opposition, ¶ 106; exhibits II, JJ, LL. As a result, the Court accepts the foregoing figures.

With respect to apartment 11C's legal regulated rent, the Court notes that Bogoni did *not* submit an amended DHCR registration statement, but instead relied on the unit's original DHCR registration history. *See* Bogoni aff in opposition, exhibit KK. That history recites that apartment 11C was rent controlled in 1984 with a monthly rent of $612.40, and that it was thereafter listed as "Rent Control – Reg. Not Required" between 1985 to 2013. *Id*. In 2014, apartment 11C was designated as rent stabilized with a monthly legal regulated rent of $6,000.00, and Hirsch named as the tenant of record. *Id*. Bogoni contends that landlord's deregulation of apartment 11C was

proper since the RCS permitted it to charge the first rent stabilized tenant of a formerly rent controlled apartment a monthly rent in excess of the statutory $2,000.00 deregulation threshold (subject to the tenants' right to file a Free Market Rent Appeal with the DHCR). *Id.*, Bogoni aff in opposition, ¶¶ 94-106. Bogoni's interpretation of RSC § 2522.3 is correct. *See e.g., Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d 105 (1st Dept 2017). The DHCR registration history indicates that B-U's deregulation of apartment 11C comported with the RSC.

This is not to say that Bogoni acted entirely properly. The first lease that B-U issued to Arnot and Hirsch should have been on a rent stabilized lease form and should have included both a "deregulation rider" and a "J-51" notice. 9 NYCRR §§ 2521.1, 2522.3, RSL § 26-511 (d), NYC Admin Code § 11-243. It did not, and the Court deems this to be additional evidence of Bogoni's disregard for the RSC's regulations. However, pursuant to RSC § 2522.3 (9 NYCRR § 2522.3), Arnot's and Hirsch's only remedy was to have filed a Fair Market Rent Appeal with the DHCR within four years of the commencement of their initial lease term, and they did not do so – choosing instead to vacate the building in 2020. *See* notice of motion, Arnot aff, ¶ 7. As a result, the Court finds that Bogoni's improprieties did not establish that B-U committed fraud in setting apartment 11C's legal regulated rent. Accordingly, the Court accepts the monthly rent amounts specified on Arnot's and Hirsch's two leases ($6,000.00 and $6,240.00, respectively) and in the DHCR rent registration history as the unit's "legal regulated rents."

C. Apartments 2C and 9D (Sarah Barish-Straus)

Plaintiff/tenant Sarah Barish-Straus (Barish-Straus) occupied apartment 2C during part of the rent overcharge claims period, and later moved into apartment 9D (where she still lives). *See* notice of motion, Barish-Straus aff, ¶ 1. Specifically, Barish-Straus resided in apartment 2C from November 10, 2010 through April 30, 2012, and thereafter moved into apartment 9D from May 1,

2012 until November 10, 2014. *Id*., ¶ 2. Neither Barish-Straus nor B-U has presented any documents regarding her tenancy in apartment 2C. As a result of that lack of evidence, this decision only considers Barish-Straus's overcharge claim with respect to her tenancy in apartment 9D.

Barish-Straus does not present copies of any of the leases that she executed for apartment 9D either. However, Bogoni presents a copy of one free market lease that he executed with Barish-Straus for apartment 9D which ran from May 1, 2014 until April 30, 2015 with a monthly rent of $3,717.00. *See* Bogoni aff in opposition, exhibit T. Bogoni also presents a copy of apartment 9D's rent history which indicates that B-U charged Barish-Straus the following monthly rents during the overcharge period: 1) $3,500.00 per month from May 1, 2012 through April 30, 2013; 2) $3,570.00 per month from May 1, 2013 through April 30, 2014; and 3) $3,717.00 per month from May 1, 2014 through November 24, 2014. *Id*., exhibit S. Bogoni and Barish-Straus both agree that her actual rent payments matched the amounts specified on her leases, which were as follows: 1) $42,000.00 between May 1, 2012 through and April 30, 2013 (12 months x $3,500.00 = $42,000.00); 2) $42,888.00 between May 1, 2013 through and April 30, 2014 (12 months x $3,570.00 - $42,888.00); and 3) $26.019.00 between May 1, 2014 through and November 30, 2014 (7 months x $3,717.00 = $26.019.00). *See* notice of motion, Barish-Straus aff, ¶ 16; Bogoni aff in opposition, ¶¶ 56-57; exhibit S. Thus, Barish-Straus's total rent payments during the overcharge claims period amounted to $110,907.00.

Regarding apartment 9D's legal regulated rent, both Barish-Straus and Bogoni have presented identical copies of the unit's DHCR rent registration history. *See* notice of motion, exhibit HH; Bogoni aff in opposition, exhibit U. It appears that, unlike a number of other plaintiffs/tenants' units, Bogoni did not file an after-the-fact amended DHCR registration statement to retroactively obscure apartment 9D's rental history, but instead made

contemporaneous DHCR filings each year. *Id.* Nevertheless, the Court finds that the rents set forth on apartment 9D's DHCR registration history are unreliable. In 2012, when Barish-Straus first took possession of apartment 9D, the registration history records that the unit was "permanently exempt" from rent stabilization by reason of "high rent vacancy." *Id.* In 2013, the registration history likewise designated the unit as an "Exempt Apartment - Reg. Not Required." *Id.* In 2014, the registration history records Barish-Straus's 2012 monthly rent of $3,500.00 as the unit's legal regulated rent. *Id.* In 2015, the registration history records Barish-Straus's 2014 monthly rent of $3,317.00 as the unit's legal regulated rent. *Id.* It records the same $3,717.00 figure at the unit's legal regulated rent in 2016 and 2017 as well. *Id.* There is plainly a three-year variance between the years that the parties agreed that Barish-Straus actually paid the designated rents (i.e., $3,500.00 per month between May 2012 and April 2013, $3,570.00 per month between May 2013 and April 2014, and $3,717.00 per month between May and November 2014) and the years that landlord registered those rents as apartment 9D's legal regulated rents (i.e., 2014, 2015 and 2016). Further, in 2012 and 2013, Bogoni improperly registered apartment 9D as exempt from rent registration despite the facts that the building was enrolled in the "J-51" program at the time, *and* both *Roberts* and *Gersten* had already been decided. Given B-U's demonstrated history of fraud, the Court is unwilling to ascribe the foregoing variance to Bogoni's clerical error. Instead, the Court concludes that it constitutes evidence of fraud in B-U's setting of apartment 9D's legal regulated rent. Bogoni submitted DHCR registrations which misrepresented the unit's status and legal regulated rent over a period of years, and never corrected the information. This permitted B-U to collect market-rate rents from Barish-Straus while also reaping the tax abatement benefits of the "J-51" program. The Court finds that by persisting to file incorrect registration information post-*Roberts*, Bogoni acted fraudulently, and *not* inadvertently. As a result, the Court also

concludes that the unit's "legal regulated rents" as specified on the DHCR registration history are unreliable and may not be used to calculate Barish-Straus's rent overcharge claim.

D. Apartment 10B (James Gladstone & Kathleen Campana)

Plaintiffs/tenants James Gladstone (Gladstone) and Kathleen Campana (Campana) resided in apartment 10B between April 1, 2003 until March 31, 2014. *See* notice of motion, Gladstone aff, ¶ 2, Bogoni aff in opposition, ¶ 64. As a result, their occupancy of apartment 10B during the rent overcharge claims period ran from November 10, 2010 until March 31, 2014. Gladstone and Campana assert that all of their leases were free market rather than rent stabilized, although they do not present copies of any of them.[6] *Id*., Gladstone aff, ¶ 3. However, they and Bogoni both agree that their actual rent payments during the overcharge period matched the amounts that were set forth on their leases, specifically: 1) $4,963.04 per month from November 1, 2010 through March 31, 2011; 2) $5,074.71 per month from April 1, 2011 through March 31, 2012; 3) $5,226.95 per month from April 1, 2012 through March 31, 2013; and 4) $5,331.49 per month from April 1, 2013 through March 31, 2014. *Id*., Gladstone aff ¶ 11; Bogoni aff in opposition ¶ 69. The Court therefore accepts that Gladstone and Campana paid the following amounts during the rent overcharge claims period: 1) $23,465.20 (5 months x $4,963.04 = $23,465.20); 2) $60,896.52 (12 months x $5,074.71 = $60,896.52); 3) $62,723.40 (12 months x $5,226.95 = $62,723.40); and 4) $63,977.88 (12 months x $5,331.49 = $63,977.88). Their total rent payments amounted to $211,063.00. Bogoni avers that "[t]hese tenants are not in arrears and are not in occupancy." *Id*., Bogoni aff in opposition, ¶ 71.

[6] For his part, Bogoni has only produced a copy of one free market lease for apartment 10B that ran from May 1, 2014 until April 30, 2015 with a monthly rent of $5,800.00; i.e., after Gladstone and Campana had vacated the unit. *See* Bogoni aff in opposition, exhibit X.

Regarding apartment 10B's legal regulated rent, Gladstone and Campana present a copy of the unit's original DHCR registration history as well as a copy of the amended registration statement that Bogoni filed on January 26, 2015, after they had vacated the building. *See* notice of motion, exhibit MM. The original DHCR registration history listed apartment 10B as "permanently exempt" from rent stabilization in 1998 as a result of "high rent vacancy," and thereafter designated it as an "Exempt Apartment – Reg. Not Required" from 1999 through 2013. *Id*. The 1998 deregulation was clearly improper, since the building was enrolled in the "J-51" program until 2000. *See* notice of motion, Howard affirmation, ¶ 2; exhibit G. However, it appears that this was an inadvertent, and therefore non-fraudulent, pre-*Roberts* deregulation based on landlord's reliance on the improper guidance that the DHCR had promulgated at the time. The 2015 amended DHCR rent registration indicates that apartment 10B was an "Exempt Apartment – Reg. Not Required" in 1999, 2000, 2001 and 2002, that it was "permanently exempt" from rent stabilization as a result of "high rent vacancy" in 2003, 2004 and 2005, and that it was thereafter a rent stabilized unit at of 2006 with a legal regulated rent of $4,445.27 (and Gladstone named as the tenant of record). *Id*., notice of motion, exhibit MM. The amended registration statement also contains inaccurate information. The building's "J-51" history indicates that it was enrolled in the program in the 1999/2000 tax year, and re-enrolled in the 2005/2006 tax year, during all of which years Bogoni should have registered 10B as rent stabilized. *Id*., Howard affirmation, ¶ 2; exhibit G. At the least, this supplies further evidence of Bogoni's disregard for its obligation to file timely, accurate rent registrations. However, because Bogoni filed the amended registration in 2014, years after *Roberts* and *Gersten* had been decided (and he was therefore aware that B-U was obligated to re-register apartment 10B as rent stabilized), the Court finds that Bogoni's inclusion of improper status designations for 1999, 2000 and 2005 was a fraudulent act. This fraud does not appear to have affected apartment 10B's legal regulated rent during the overcharge claims period, however.

Gladstone and Campana assert that "landlord had flouted the rent stabilization laws by denying us . . . the benefits and protections of rent stabilization, but we did not learn that we were rent stabilized and of our right to remain in our home, until after we had moved out of our home." *Id*., Gladstone aff, ¶ 4. Bogoni responds that "[p]laintiffs' initial legal rent exceeded the deregulation threshold of $2,000.00, at the time of their initial occupancy and the apartment became legally deregulated as a result, notwithstanding the registration status of the apartment." *See* Bogoni aff in opposition, ¶ 67. Bogoni's point is well taken. Gladstone and Campana took possession of apartment 10B on April 1, 2003 during a five-year gap in which the building was *not* registered in the "J-51" program. In *Matter of 73 Warren St., LLC v State of N.Y. Div. of Hous. & Community Renewal* (96 AD3d 524), the First Department held that:

> "Pursuant to [NYC Admin. Code § 26–504 (c)], an apartment that becomes rent stabilized upon the building owner's receipt of J–51 benefits remains stabilized upon the expiration of those benefits, *except in two distinct instances: where the stabilized tenant vacates*, or where the stabilized tenant had been consistently and properly notified in his leases that the apartment would become deregulated upon expiration of the tax benefits."

96 AD3d at 527 (emphasis added); *see also Matter of Tribeca Equity Partners, L.P. v New York State Div. of Hous. & Community Renewal*, 144 AD3d 554 (1st Dept 2016). In this case, apartment 10B was subject to rent stabilization in the 1999/2000 tax year by virtue of the building's enrollment in the "J-51" program through then, the benefits expired in 2000, a previous tenant vacated the unit, Gladstone and Campana took possession of it in 2003, and apartment 10B became subject to rent stabilization again in the 2005/2006 tax year, when the building's re-enrollment in the "J-51" program took effect. *See* notice of motion, exhibit G. However, when Gladstone and Campana moved in on April 1, 2003, apartment 10B was subject to luxury decontrol by virtue of the previous tenants vacatur, and B-U was entitled to charge a market-rate rent for the unit. *Matter of 73 Warren St., LLC v State of N.Y. Div. of Hous. & Community Renewal*, 96 AD3d at 527.

Although the amended registration statement does not report the unit's legal regulated rent for 2003, 2004 or 2005, it does list legal regulated rents for 2006 through the end of Gladstone's and Campana's tenancy in 2014, and the figures recorded during the rent overcharge claim period coincide with those which the parties agreed were contained in the 2010-2014 leases. *Id.*, exhibit MM; Gladstone aff ¶ 11; Bogoni aff in opposition ¶ 69. Thus, even though Bogoni's 2015 amended DHCR registration statement retroactively (and deceptively) changed apartment 10B's status designation from "exempt" to "rent stabilized" for the bulk of Gladstone's and Campana's tenancy, and improperly failed to include the "rent stabilized" designation for one year of that tenancy (2005), the amended statement did *not* include legal regulated rents that differed from the monthly rents on Gladstone's and Campana's leases. Thus, there is no evidence of fraud in Bogoni's setting of apartment 10B's rent.

This is not to say that all of Bogoni's actions were proper. When the building was re-enrolled in the "J-51" program in 2005, Bogoni should have offered Gladstone and Campana a rent stabilized lease with a "J-51" rider. There is no evidence that he did so. Likewise, the mere fact that the parties agree on the rental amounts set forth on Gladstone's and Campana's 2003-2014 leases does not constitute evidence that that the rental increases which B-U collected between 2005 and 2014 (when the building was again subject to rent stabilization) accurately reflected the "subsequent lawful increases and adjustments" that it was entitled to collect at that time. However, the Court of Appeals disfavors using the "reconstruction method" to determine whether the rents on Gladstone's and Campana's renewal leases were calculated correctly. *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 358. As a result, the Court declines to do so, and simply concludes that there was no evidence of fraud in B-U's setting of the apartment 10B's "legal regulated rents," all of which were accurately recorded on Gladstone's and Campana's leases.

E. Apartment 8D (Patricia Lederer)

Plaintiff/tenant Patricia Lederer (Lederer) first took possession of apartment 8D on July 16, 2010 pursuant to a one-year, free-market lease that ran from August 1, 2010 until July 31, 2011 with a monthly rent of $3,095.00. *See* notice of motion, Lederer aff, ¶ 2; exhibit BB. Lederer, who still resides in apartment 8D, has presented copies of all of her subsequent one-year free-market leases for the unit, including the following ones that were in effect during the rent overcharge claims period which specified the following rents: 1) $3,095.00 per month from August 2010 through July 2011; 2) $3,195.00 per month from August 2011 through July 2012; 3) $3,295.00 per month from August 2012 through July 2013; 4) $3,375.00 per month from August 2013 through July 2014; and 5) $3,510.00 per month from August 2014 through January 2015. *Id*., exhibit BB. Lederer also avers that she actually made the following rent payments during the overcharge claims period: 1) $27,855.00 from November 2010 through July 2011 (9 months x $3,095.00 per month = $27,855.00); 2) $38,340.00 from August 2011 through July 2012 (12 months x $3,195.00 per month = $38,340.00); 3) $39,540.00 from August 2012 through July 2013 (12 months x $3,295.00 per month = $39,540.00); 4) $40,500.00 from August 2013 through July 2014 (12 months x $3,375.00 per month = $40,500.00); and 5) $14,040.00 from August 2014 through November 2014 (4 months x $3,510.00 per month = $14,040.00). *Id*., Lederer aff, ¶ 10. Thus, Lederer's total rent payments during the overcharge claims period amounted to $160,275.00. Bogoni confirms both the monthly rental amounts specified in Lederer's leases and the monthly payments that she actually made and acknowledges that her payments equaled the amounts that B-U billed her. *See* Bogoni aff in opposition, ¶¶ 40-43; exhibits O, P, R. As a result, the Court accepts these figures as accurate.

With respect to apartment 8D's legal regulated rent, Lederer has presented copies of the unit's original DHCR rent registration history and of an amended registration statement that

Bogoni filed on October 27, 2014. *See* notice of motion, Lederer aff, exhibit CC. The original registration history did not list a legal regulated rent for apartment 8D on the November 10, 2010 base date, but instead designated the unit as an "Exempt Apartment - Reg. Not Required." *Id*., exhibit CC. An examination of apartment 8D's pre-base date registration history shows that Bogoni listed the unit as "permanently exempt" from rent stabilization as of May 5, 2004 by reason of "high rent vacancy" and "improvement," and thereafter designated it as an "Exempt Apartment - Reg. Not Required" each year from 2005 until 2013. *Id*., exhibit CC. Although the building was not enrolled in the "J-51" program in 2004, B-U re-enrolled in in the program in the 2005/2006 tax year. *Id*., Howard affirmation, ¶ 2; exhibit G. Thus, although the building was not subject to rent stabilization in 2004, it became subject to rent stabilization in the 2005/2006 tax year as a result of its reentry into the "J-51" program. Accordingly, it was improper for B-U to have mis-designated apartment 8D as an exempt unit from 2005 through 2013, and to have given Lederer a market rate lease when her tenancy began in 2010, and market rate renewal leases thereafter. Indeed, B-U was required to give apartment 8D's tenant in 2005 a rent stabilized lease with both rent stabilization and "J-51" riders, and to have done the same for Lederer in 2010. Nevertheless, because the unit's deregulation purportedly took place in 2004, as a result of a prior tenant's vacatur while the building was not enrolled in the "J-51" program, the Court might have disregarded B-U's registration errors, as it did with respect to Gladstone and Campana. *See Matter of 73 Warren St., LLC v State of N.Y. Div. of Hous. & Community Renewal*, 96 AD3d at 527. However, there are other factors to consider in Lederer's case.

The amended rent registration that Bogoni filed in 2014 did not re-designate apartment 8D as a rent stabilized unit as of 2005. Instead, it retained the unit's designation as an "Exempt Apartment - Reg. Not Required" from 2005 through 2013, and only changed it to "rent stabilized" in 2014 with a legal regulated rent of $3,375.00 per month (and Lederer named as the tenant of

record). *See* notice of motion, exhibit CC. The Court observes that Bogoni submitted the 2014 amended registration statement after this action was commenced, and after he had been contacted by the TPU as Assemblyman O'Donnell's request, with full knowledge of B-U's registration obligations under the 2009 *Roberts* and the 2011 *Gersten* holdings. As a result, the Court finds that Bogoni's intentional filing of an incomplete amended registration statement which failed to re-designate apartment 8D as a rent stabilized unit from 2005 forward was not an inadvertent act, as is the case with most pre-*Roberts* deregulations. Instead, the Court finds that it was the same sort of fraudulent act as was described in *Montera v KMR Amsterdam LLC*; i.e., "willful ignorance, which constitutes willful conduct." 193 AD3d at 107, quoting *Grady v Hessert Realty L.P.*, 178 AD3d at 405. By filing the incomplete 2014 amendment, Bogoni obscured apartment 8D's rental history, and made it impossible to determine whether Lederer's initial 2010 rent had been calculated correctly. The fact that the building was not enrolled in the "J-51" program in 2004 when the unit's purported deregulation took place is of no moment, since its free-market rent in that year is not known, and neither are the rent stabilized rents which B-U imposed on its subsequent leases. There is no justification for Bogoni's assumption that a luxury deregulation in 2004 justified whatever rent B-U chose to charge on Lederer's 2010 lease. Further, B-U improperly began to reap the tax abatement benefit of the building's enrollment in the "J-51" program in 2005 but failed to properly register apartment 8D until 2014. By filing the incomplete amended registration statement, Bogoni sought to retain that tax benefit and frustrate the TPU's ability to ensure that B-U's compliance with its registration obligation under RPTL § 489. This was also fraudulent. The Court discount's Bogoni's assertions that B-U acknowledged having imposed a small rent overcharge on Lederer between August 2013 and the end of the overcharge claims period as a result of an "error" in calculating the applicable RGBO increases. *See* Bogoni

aff in opposition, ¶¶ 41-44. Instead, the Court concludes that Bogoni's fraud makes it impossible to determine apartment 8D's correct "legal regulated rent" as of the November 10, 2010 base date.

F. Apartment 1B (Albert Panozzo & Georgia Marantos)

Plaintiffs/tenants Albert Panozzo (Panozzo) and Georgia Marantos (Marantos) first took possession of apartment 1B on May 12, 2011 pursuant to the terms of a one-year, market rate lease that ran from May 28, 2011 until May 27, 2012 with a monthly rent of $4,695.00. *See* notice of motion, Marantos aff ¶ 2; exhibit M. Marantos asserts that they also executed three subsequent market rate renewal leases for the unit, but she only presents copies of the first and last of those leases. *Id*., ¶ 3. She claims that the leases during the rent overcharge claims period specified the following monthly rents: 1) $4,695.00 from May 28, 2011 until through May 27, 2012; 2) $4,871.06 from June 1, 2012 through May 31, 2013; 3) $4,992.84 from June 1, 2013 through May 31, 2014; and 4) $5,192.55 from June 1, 2015 through May 31, 2015. *Id*., ¶ 2. Marantos also claims that she and Panozzo actually made the following rent payments during the overcharge claims period: 1) $61,035.00 from May 2011 until May 2012 (13 months x $4,695.00 = $61,035.00); 2) $58,452.72 from June 2012 until May 2013 (12 months x $4,871.06 = $58,452.72); 3) $59,914.08 from June 2013 until May 2014 (12 months x $4,992.84 = $59,914.08); and 4) $15,577.65 from June 2014 until August 2014 (3 months x $5,192.55 = $15,577.65). *Id*., ¶ 8. Marantos acknowledges that she and Panozzo stopped paying rent between September 2014 and July 2017. *Id.* Marantos indicates that they paid a total of $194,979.45 during the overcharge claims period. *Id*. Bogoni acknowledges both the lease amounts, and the payment amounts that Marantos claimed, and presents copies of B-U's payment history for apartment 1B. *See* Bogoni aff in opposition, ¶¶ 24-25; exhibits G, H, J. Therefore, the Court accepts those figures as accurate.

With respect to apartment 1B's legal regulated rent, Marantos presents copies of both the unit's original DHCR registration history and of amended registration statements that Bogoni filed

on October 27, 2014 and January 26, 2015. *See* notice of motion. Marantos aff, ¶ 7; exhibit N. In its original filings, B-U designated apartment 1B as rent controlled in 1984 with a legal regulated rent of $553.59, and as "Rent Control - Reg. Not Required" for the years 1985 through 2013, inclusive. *Id*., exhibit N. Bogoni's October 27, 2014 amended registration changed apartment 1B's designation to "rent stabilized" with a legal regulated rent of $5,167.22 reflected on a lease that ran from June 1, 2013 until May 31, 2014 (with Panozzo as the tenant of record). *Id*. Three months later, on January 26, 2015, Bogoni filed another amended registration that re-designated apartment 1B as a rent stabilized unit during 2012 and 2013, with legal regulated rents of $4,695.00 (from May 28, 2011 until May 27, 2012) and $4,871.06 (from June 1, 2012 until May 31, 2013), respectively (again, with Panozzo listed as the tenant of record). *Id*. Apartment 1B's original rent registration history contains inaccurate information. Although the unit may have initially been rent controlled, it became rent stabilized by operation of law during the periods of 1989-2000 and 2005-2019 when the building was enrolled in the "J-51" program. *See e.g.*, *Matter of Park v New York State Div. of Hous. & Community Renewal*, 150 AD3d at 112. As a result, B-U should have designated apartment 1B as a rent stabilized unit in 2011 when Panozzo and Marantos first took possession of it and should have included "J-51" riders on their leases. The fact that it did not do so might be ascribed to inadvertence resulting from B-U's mistaken reliance on the DHCR's pre-*Roberts* deregulation guidance, as was the case with Arnot and Hirsch in apartment 11C. However additional facts make it clear that B-U's purported deregulation of apartment 1B was fraudulent.

As previously noted, B-U was required to register all of the building's apartments as rent stabilized beginning in 2005, when the building re-entered the "J-51" program. *See* notice of motion, Howard affirmation, ¶ 2; exhibit G. B-U's obligation to do so was made clear in 2009 by the Court of Appeals' *Roberts* decision, and reinforced in the First Department's 2011 *Gersten* decision. However, despite being fully aware of B-U's legal obligations, Bogoni only acted in

2014, after both decisions had been issued, after this case had been commenced, and after he had been contacted by the TPU at Assemblyman O-Donnell's request. When Bogoni did act with respect to apartment 1B, he filed two consecutive amended registration statements, three months apart, both of which were intentionally incomplete and retroactively designated the unit as rent stabilized for only three of the ten years in which it had enjoyed that status (i.e., since 2005). *Id*., exhibit N. In only those three years did Bogoni specify legal regulated rents for apartment 1B, (and those figures exactly matched the monthly rents contained on Panozzo's and Marantos's market-rate leases). *Id*., exhibits M, N. The Court finds that Bogoni's selective compliance with *Roberts* constituted the type of "fraud" that the First Department discussed in *Montera v KMR Amsterdam LLC*; i.e., "willful ignorance, which constitutes willful conduct." 193 AD3d at 107 (internal citation omitted). By only partially amending apartment 1B's DHCR registration, Bogoni obscured the unit's rental history between 2005 and 2011, and thereby made it impossible to determine whether Panozzo's and Marantos's initial rent had been accurately calculating by adding six years worth of "subsequent lawful increases and adjustments" to the unit's initial rent stabilized rent. Bogoni's incomplete amendments both also obscured the fact that the building was not in compliance with the "J-51" program after 2005, which hindered the TPU's ability to hold B-U accountable for the tax consequences of its noncompliance. As a result of this fraud, the Court concludes that the DHCR registrations are unreliable, and that apartment 1B's legal regulated rent on the November 10, 2010 base date is indeterminable.

G. Apartment 8A (John & Karen Menapace)

Plaintiffs/tenants John and Karen Menapace (Menapace) first took possession of apartment 8A in October 2013 pursuant to a one-year, market-rate lease that ran from October 1, 2013 until September 30, 2014 with a monthly rent of $4,200.00. *See* notice of motion, Menapace aff, ¶ 2; exhibit Z. Thereafter, they executed one-year, market-rate renewal lease that ran from October 1,

2014 until September 30, 2015 with a monthly rent of $4,242.00. *Id.*, ¶ 2; exhibit Z. They still reside in the unit. *Id.*, ¶ 1. Karen Menapace avers that she and her husband made the following rent payments during the portion of the rent overcharge claims period that overlapped with their tenancy: 1) $50,400.00 (12 months x $4,200.00 = $50,400.00); and 2) $8484.00 (2 months x $4,242.00 = $8484.00). *Id.*, ¶ 12. Thus, their grand total rent payments during the overcharge period amounted to $58,884.00. Bogoni acknowledges both leases and also acknowledges the Menapace's rent payments. *See* Bogoni aff in opposition, ¶¶ 32-33; exhibits K, L, N. However, Bogoni also acknowledges that B-U overcharged the Menapaces during that time period. *Id.*, ¶¶ 34-35. Bogoni details the calculations that he performed to arrive at what he asserts were apartment 8A's actual correct rents between 2013 and 2015, and notes that B-U voluntarily issued the Menapaces a refund to compensate them. *Id*. The Court nevertheless finds that Bogoni's explanation is insufficient.

Regarding apartment 8A's legal regulated rent, Karen Menapace presents copies of the unit's original DHCR rent registration history, and of two amended registration statements that Bogoni filed for the unit on February 3, 2015 and January 30, 2017, respectively. *See* notice of motion, Menapace aff, ¶¶ 8-11; exhibit AA. The original DHCR registration listed apartment 8A as a rent stabilized unit in 2013 with a legal regulated rent of $1,545.80 per month, and stated that the tenant of record was one "M. Madera" whose lease ran from February 1, 2012 until January 31, 2014. Id., exhibit AA. Bogoni's February 3, 2015 amended registration statement designated apartment 8A as continuously rent stabilized from 1984 through 2013, in which year Madera was listed as the unit's tenant of record with a legal regulated rent of $1470.08 per month and a two-year lease that ran from February 1, 2012 until January 31, 2014. *Id*., exhibit AA. Bogoni's January 30, 2017 amended registration statement further designated apartment 8A as a rent stabilized unit in 2014, 2015, 2016 and 2017, in which years it also listed the Menapaces as the

tenants of record. *Id*., exhibit AA. Bogoni's January 30, 2017 amended registration statement also listed the unit's legal regulated rents as follows: 1) $2,906.64 per month in 2014; 2) $2,935.71 per month in 2015; 3) $2935.71 per month in 2016; and 4) $2,935.60 per month in 2017. *Id*., exhibit AA. Menapace asserts that Bogoni's "blatant fabrication of a history of compliance with the requirements of rent stabilization, including registering rents that contradict our leases, and the wholesale revision of prior tenants' rent histories, clearly demonstrate his knowledge of his own misconduct." *Id*., Menapace aff, ¶ 11. Bogoni responds that "[t]his apartment has been registered with the DHCR at the corrected legal rent, the overcharge with interest has been refunded to the Plaintiffs and they have been offered a Rent Stabilized lease." *See* Bogoni aff in opposition, ¶ 38. After reviewing the DHCR filings, however, the Court finds that they are unreliable.

Apartment 8A's registration history plainly contains incorrect information. Both the original DHCR registration and Bogoni's 2015 amended registration list the unit as rent stabilized between 2000 and 2005 even though it was established that the building was *not* enrolled in the "J-51" program during that period. *See* notice of motion, Howard affirmation, ¶ 2; exhibits G, AA. The 2015 amended registration also designated apartment 8A as rent stabilized from 2013 to 2015 despite the fact that Bogoni had executed non-rent-stabilized leases with the Menapaces during those years. *Id*., exhibit Z. Bogoni's 2017 registration amendment recorded legal regulated rents for apartment 8A in 2013 ($1,470.08) and 2014 ($2,906.64), but did not enter the "actual rent paid" by the Menapaces in either year. *Id*., exhibit AA. In addition, legal regulated rents asserted on the 2017 amendment vary greatly from those specified on the Menapaces' non-rent stabilized leases for 2013 ($4,200.00) and 2014 ($4,242.00). *Id*., exhibit Z. In short, Bogoni appears to have filed the 2015 and 2017 amended registration statements with false information that conceals apartment 8A's true rent history during the Menapace's tenancy. In view of this deception, there is no reason to trust the veracity of any of the other entries on the unit's DHCR registration history.

In this regard, the Court is struck by the facts that Bogoni omitted apartment 8A's original registration history from the DHCR documents that he submitted, and that he also failed to present copies of any of apartment 8A leases from before the Menapace's tenancy which might have confirmed the entries he made on the unit's amended registrations. *See* Bogoni aff in opposition, exhibit M. Therefore, the Court concludes that apartment 8A's correct legal regulated rent on the November 10, 2010 base date is indeterminable.

H. Apartment 10D (Peter Kane & Paulina Perera-Riveroll)

Plaintiffs/tenants Peter Kane (Kane) and Paulina Perera-Riveroll (Perera-Riveroll) first took possession of apartment 10D in November 2009 pursuant to a two-year, market-rate lease that ran from November 1, 2009 to October 31, 2011 with monthly rents of $2,800.00 during the first year and $2,900.00 during the second year. *See* notice of motion, Perera-Riveroll aff, ¶ 1; exhibit NN. Perera-Riveroll states that she and her husband thereafter executed three more one-year, market-rate renewal leases for the unit during the rent overcharge claims period and presents copies of all of those leases. *Id*., ¶ 1; exhibit NN. They still reside in the building. The leases establish that B-U charged Kane and Perera-Riveroll the following monthly rents during the overcharge claims period: 1) $2,900.00 from November 1, 2010 through October 31, 2011; 2) $2,987.00 from November 1, 2011 through October 31, 2012; 3) $3,076.61 from November 1, 2012 through October 31, 2013; and 4) $3,199.67 from November 1, 2013 through October 31, 2014. *Id*., exhibit NN. Perera-Riveroll further avers that she and Kane actually paid the following amounts to B-U during the overcharge period: 1) $34,800.00 from November 2010 through October 2011 (12 months x $2,900.00 per month = $34,800.00); 2) $35,844.00 from November 2011 through October 2012 (12 months x $2,987.00 per month = $35,844.00); 3) $36,919.68 from November 2012 through October 2013 (12 months x $3,076.61 per month = $36,919.68); and 4) $41,595.71 from November 2013 through November 2014 (13 months x $3,199.67 per month =

$41,595.71). *Id*., Perera-Riveroll aff, ¶ 14. This indicates that their total payments to B-U during the rent overcharge claims period amounted to $149,159.39. Bogoni acknowledges both the monthly rental amounts set forth on apartment 10D's 2010-2014 leases, and that Kane and Perera-Riveroll paid those amounts in full during the overcharge claims period. *See* Bogoni aff in opposition, ¶¶ 78-81; exhibits AA, BB, DD. As a result, the Court accepts the foregoing figures as accurate.

Bogoni nevertheless admits that B-U overcharged Kane and Perera-Riveroll, although he asserts that it did so "mistakenly." *See* Bogoni aff in opposition, ¶¶ 77-83. Bogoni specifically asserts that "Jonathan Rosen, the tenant prior to [Kane and Perera-Riveroll], paid a legal regulated rent of $2,321.11, which was over the deregulation threshold at that time, and that B-U "mistakenly treated apartment 10D as deregulated" because it "reasonably, but mistakenly relied on DHCR's own interpretation of the RSC and treated [apartment 10D] as free market up to the receipt of notification from the DHCR of its obligation to register the apartment." *Id.*, ¶ 76. Bogoni concludes that B-U's inadvertent deregulation of apartment 10D in 2009 was a non-fraudulent, pre-*Roberts* deregulation, and notes that B-U tendered a refund to Kane and Perera-Riveroll for the overcharge amount that it calculated was due to them (without treble damages for willfulness). *Id*., ¶¶ 84-86. Perera-Riveroll nevertheless asserts that Bogoni committed fraud "by retroactively amending the DHCR rent registrations for apartment 10D for 2010 through 2014" when he submitted two false amended DHCR registrations on January 26, 2015 and February 3, 2015. *See* notice of motion, Perera-Riveroll aff, ¶ 11; exhibit OO. After reviewing both apartment 10D's original and amended rent registration history, the Court agrees.

Despite Bogoni's contention, apartment 10D's original DHCR registration history does not indicate a typical, inadvertent pre-*Roberts* deregulation of the unit. Instead, B-U's July 7, 2010 DHCR registration filing listed apartment 10D as "permanently exempt" from rent stabilization by

reason on "high rent vacancy" and "improvement" a full year after *Roberts* was decided in 2009. *See* notice of motion, exhibit OO. That filing also listed apartment 10D as rent stabilized from 2000 until 2005, even though the building was not enrolled in the "J-51" program during those years. *Id.*, Howard affirmation, ¶ 2; exhibits G, AA. In addition, the original registration statement recorded the unit's tenant of record prior to Kane and Perera-Riveroll as an individual named "Knight" (rather than "Jonathan Rosen," as Bogoni claimed), and asserted that "Knight's" last lease expired on January 31, 2010, even though Bogoni acknowledged that Kane's and Perera-Riveroll's tenancy had commenced before that on November 1, 2009. *Id.*, exhibits NN, OO. The two amended registration statements that which Bogoni subsequently filed in 2015 contain similar inaccuracies. Neither of those amended registrations corrected the 2000-2005 gap in apartment 10D's rent stabilized status resulting from the building's non-enrollment in the "J-51" program. *Id.*, exhibit OO. The January 2015 amended registration retained the entry that "Knight" was the unit's tenant of record until January 31, 2010, but inexplicably also recorded Kane's and Perera-Riveroll's tenancy as having commenced on November 1, 2009. *Id.* The January 2015 amended registration also listed Knight's legal regulated rent as $1,828.55 per month from February 1, 2008 through January 31, 2010 rather than the $2,321.11 figure that Bogoni had ascribed to the non-existent (and possibly fictitious) "Jonathan Rosen." *Id.*, exhibit OO; Bogoni aff in opposition, ¶ 76. The January 2015 amended registration thereafter listed Kane's and Perera-Riveroll's monthly legal regulated rents as: 1) $2,800.00 from November 1, 2009 through October 31, 2010; 2) $2,863.00 from November 1, 2010 through October 31, 2011; 3) $2,970.36 from November 1, 2011 through October 31, 2012; and 5) $3,029.77 from November 1, 2012 through October 31, 2013. *Id.*, exhibit OO. Bogoni's February 3, 2015 amended registration statement further recorded Kane's and Perera-Riveroll's legal regulated rent from November 1, 2013 through October 31, 2014 as $3,150.96 per month. *Id.* None of B-U's DHCR registrations for apartment 10D contains

an entry in the "actual rent paid" column. *Id.* However, the amounts recorded on Kane's and Perera-Riveroll's payment history differ slightly from the "legal regulated rents" that Bogoni's claimed in the amended DHCR registrations. Specifically, Kane and Perera-Riveroll actually paid monthly rents of: 1) $2,900.00 from November 1, 2010 through October 31, 2011 (rather than $2,863.00); 2) $2,987.00 from November 1, 2011 through October 31, 2012 (rather than $2,970.36); 3) $3,076.61 from November 1, 2012 through October 31, 2013 (rather than $3,029.77); and 4) $3,199.67 from November 1, 2013 through October 31, 2014 (rather than $3,150.96). *Id.*, exhibit NN. Even assuming that the monthly rents of those leases were equal to apartment 10D's "legal regulated rents" - which defendants have *not* established – the foregoing discrepancies indicate that B-U collected a small rent overcharge from Kane and Perera-Riveroll during the 2010-2014 claims period.

For his part, Bogoni has admitted that B-U collected a small overcharge, subsequently offered Kane and Perera-Riveroll a reimbursement of $335.06 in compensation. *See* Bogoni aff in opposition, ¶¶ 84-86; exhibit DD. However, the Court does not accept Bogoni's figures. He states that, in the amended registration statements, he recalculated Kane's and Perera-Riveroll's initial rent stabilized rent based on the previous tenant's $2,321.11 monthly rent. *Id.*, ¶ 76. However, apartment 10D's original DHCR registration history included a May 27, 2009 filing contemporaneous with the previous tenant's last lease term that stated that the unit's "legal regulated rent" then was $1828.55 per month rather than $2,321.11. *Id.*, exhibit OO. Bogoni also claims that Kane's and Perera-Riveroll's initial rent stabilized rent included "a vacancy increase of 17%" to which B-U was "entitled . . . under the Rent Stabilization Code and Law." *Id.*, Bogoni aff in opposition, ¶ 77. However, he does not explain how he arrived at that conclusion or provide a dollar amount that represents that purported 17% increase. Similarly, although the February 2015 amended registration statement asserted that Kane's and Perera-Riveroll's initial rent

stabilized rent included increases for "vacancy lease" and "improvements," Bogoni did not state what those amounts were. As a result, it is impossible to determine whether the $2,800.00 "legal regulated rent" on the amended registration statement was calculated correctly to include the "subsequent lawful increases and adjustments" with which B-U was entitled to augment the previous rent stabilized rent of $1,828.55 per month. The Court concludes that Bogoni's two 2015 amended DHCR registration statements were fraudulent because they contained unverifiable and/or inaccurate information intended to obscure apartment 10D's true "legal regulated rent" in 2009, even though those amended registration statements did correctly re-designate the unit as rent stabilized. Because the Court of Appeals disfavors use of the "reconstruction method" to determine what an apartment's correct "legal regulated rent" was,[7] the Court simply finds that apartment 10D's "legal regulated rent" as of the November 10, 2010 "base date" is unknown.

III. Plaintiffs' First Cause of Action (Rent Overcharge)

A. Liability

As was previously observed, the pre-HSTPA version of RSL § 26-516 (a) requires a reviewing court to determine (a) the amount of rent charged, (b) the amount of rent actually paid, and (c) the "legal regulated" rent for an apartment occupied by a tenant who raises a rent overcharge claim against a landlord. Here, having made certain factual findings regarding those amounts with respect to each moving plaintiff's apartment, the Court now renders the following legal analysis of each moving plaintiff's rent overcharge claim.

[7] *See Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 358.

1. Leisa Aras (Apartment 11B)

The Court found that the market-rate lease which Aras's signed on February 7, 2012 required her to pay a monthly rent of $4,950.00, and that the two subsequent renewal leases that she signed during the rent overcharge claims period required her to pay monthly rents of $5,050.00 and $5,252.00, respectively. The Court also found that Aras actually paid the rent amounts set forth on her leases, for a grand total of $148,100.00 in payments to B-U during the overcharge claims period. It noted that Bogoni did not dispute either the lease amounts or Aras's payments. However, the Court further found that apartment 11B's "legal regulated rent" was indeterminable because the amounts listed on the amended DHCR registration statement which were allegedly in effect on the November 10, 2010 "base date" ($4,450.00) and on February 1, 2012, when Aras's tenancy commenced ($4,950.00), were both unreliable as a result of defendants' fraud. As a result, it is necessary to supply an alternate "legal regulated rent" for apartment 11B in order for the Court to complete its assessment of Aras's rent overcharge claim.

Plaintiffs' counsel argues that "plaintiffs' rents should be set using the 'default formula' under RSC § 2522.6 (b)." *See* plaintiffs' mem of law at 11-14. Defendants respond that this request should be denied. *See* Altarac affirmation in opposition, ¶¶ 163-185. The "default formula" is one of four rent-setting methods authorized in the RSC by the regulation that governs "[o]rders where the legal regulated rent or other facts are in dispute, in doubt, or not known, or where the legal regulated rent must be fixed." RSC § 2522.6. The relevant portions of this regulation are set forth in subparagraphs (b) (2) and (b) (3), which provide as follows:

> "(2) Where either:
> "(i) *the rent charged on the base date cannot be determined*; or
> "(ii) a full rental history from the base date is not provided; or
> "(iii) *the base date rent is the product of a fraudulent scheme to deregulate the apartment*; or

> "(iv) a rental practice proscribed under section 2525.3(b), (c) and (d) of this Title has been committed, the rent shall be established at the lowest of the following amounts set forth in paragraph (3) of this subdivision.
>
> "(3) These amounts are:
>
> "(i) *the lowest rent registered pursuant to section 2528.3 of this Title for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment*; or
>
> "(ii) the complaining tenant's initial rent reduced by the percentage adjustment authorized by section 2522.8 of this Title; or
>
> "(iii) the last registered rent paid by the prior tenant (if within the four year period of review); or
>
> "(iv) if the documentation set forth in subparagraphs (i) through (iii) of this paragraph is not available or is inappropriate, an amount based on data compiled by the DHCR, using sampling methods determined by the DHCR, for regulated housing accommodations."

RSC §§ 2522.6 (b) (emphasis added). The most recent appellate guidance on the use of the "default formula" was provided by the Court of Appeals in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, wherein the Court confirmed its earlier jurisprudence holding that:

> "In fraud cases, this Court sanctioned use of the default formula to set the base date rent. Otherwise, for overcharge calculation purposes, the base date rent was the rent actually charged on the base date (four years prior to initiation of the claim) and overcharges were to be calculated by adding the rent increases legally available to the owner under the RSL during the four-year recovery period."

35 NY3d at 355-356. The Court specifically found that the inadvertent, non-fraudulent nature of most pre-*Roberts* deregulations renders use of the "default formula" improper when setting the rents of apartments which have been so deregulated. 35 NY2d at 358-359. With respect to Aras's claim, however, the Court has determined that Bogoni did act fraudulently in deregulating apartment 11B. As a result, the Court finds that the *Regina Metro.* holding sanctions the use of the "default formula" to supply a "legal regulated rent" figure for the unit. Defendants failed to raise any legal argument as to why such use might be improper. The Court rejects defendants' assertion that there is "no factual support for [the] allegation" that they "engaged in a fraudulent

scheme to deregulate the subject apartment" for the reasons discussed earlier. *See* Altarac affirmation in opposition, ¶ 172.

The Court of Appeals holds that employing the "default formula" involves "setting the base date rent as 'the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date.'" *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 354-355, quoting *Thornton v Baron*, 5 NY3d 175, 179-181 and n12 (2005); *Conason v Megan Holding, LLC*, 25 NY3d 1, 9-10 (2015), citing *Thornton v Baron*, 5 NY3d at 179-180 and n1; *see also Casey v Whitehouse Estates, Inc.*, _ AD3d_, 2021 NY Slip Op 04646 (1st Dept 2021). Here, plaintiffs' counsel notes that all of the moving plaintiffs' apartments are either four-room or five-room units, and that apartment 11B in particular is a five-room unit that Aras took occupancy of on February 7, 2012. *See* notice of motion, Howard affirmation, ¶ 88. Counsel has identified apartment 2B as a similar five-room unit in the building which B-U rented on March 1, 2012 for $1,345.16 per month. *Id.*, ¶ 87; exhibit ZZ. The Court finds that unit 2B is a "comparable apartment" to unit 11B within the meaning of the term set forth in RSC § 2522.6 (b) (3) (i) as discussed in the foregoing Court of Appeals decisions. The Court believes that the $1,345.16 rental figure is accurate and free from fraud because B-U evidently registered it a contemporaneous DHCR registration statement dated June 19, 2012, and did not alter it in any of Bogoni's subsequent amended registration statements. The Court also believes that the $1,345.16 monthly rental figure is appropriate in Aras's case; although the "base date" for all of the instant rent overcharge claims is November 10, 2010, Aras did not take possession of apartment 11B until February 7, 2012. As a result, the Court finds that $1,345.16 per month is the appropriate "legal regulated rent" amount to use in assessing Aras's rent overcharge claim. The Court finally notes that defendants' opposition papers did not raise any argument on the issue of whether unit 2B is a "comparable apartment."

At this point, the Court reiterates its findings that apartment 11B's "legal regulated rent" at the start of Aras's tenancy was $1,345.16 per month, that the rental amount B-U charged her on her initial lease was $4,950.00 per month, and that the payment records show establish that Aras actually paid B-U $4,950.00 per month when her tenancy began. As a result, it is clear that B-U imposed a "rent overcharge" on Aras, as that term is defined in the pre-HSTPA version of RSL § 26-516 (a), since the evidence shows that it collected a rental charge "above the rent authorized for [the] housing accommodation" from her (i.e., $4,950.00 rather than $1,345.16). The Court therefore grants so much of plaintiffs' motion as seeks partial summary judgment against defendants on the first cause of action, with respect to Aras, on the issue of liability only. The Court will discuss the issue of the calculation of damages relating to this cause of action in the next portion of this decision.

2. Robert Arnot & Ellen Hirsch (Apartment 11C)

The Court found earlier that apartment 11C's "legal regulated rent" on the base date was $6,000.00 per month, that the rent specified on Arnot's and Hirsch's August 1, 2013 lease was $6,000.00, and that Arnot and Hirsch actually paid $6,000.00 per month at the start of their tenancy. As a result of the uniformity of these three figures, there is no basis to find that B-U collected a rent overcharge from Arnot and Hirsch when they first took possession of apartment 11C. It also does not appear that the $6,240.00 monthly rent specified on Arnot's and Hirsch's August 1, 2014 renewal lease exceeded the unit's "legal regulated rent" since that increase figure reflected the 4% rent increase authorized by RGBO #45, which was in effect in 2014. *See* Bogoni aff in opposition, ¶ 103. Plaintiffs have offered no evidence that that increase was improper. Therefore, the Court denies so much of plaintiffs' motion as seeks partial summary judgment against defendants on the first cause of action, with respect to Arnot and Hirsch.

3. Sarah Barish-Straus (Apartment 9D)

Despite a lack of documentary proof, the Court earlier accepted Barish-Straus's and Bogoni's assertions that the initial lease Barish-Straus executed for apartment 9D on May 1, 2012 required her to pay $3,500.00 per month in rent, and that she actually paid that amount during her lease term. The Court also found that Bogoni had acted fraudulently by intentionally misrepresenting the unit's registration status and legal regulated rents in B-U's DHCR filings. As a result, it is necessary to employ the default method to establish a legal regulated rent for apartment 9D at the beginning of Barish-Straus's tenancy.

Plaintiffs' counsel notes that apartment 9D is a four-room unit, and has identified apartment 2D, another four-room unit which B-U rented for $1,331.13 per month on July 1, 2012, as a "comparable apartment." *See* notice of motion, Howard affirmation, ¶¶ 87-88; exhibit YY. The Court finds that unit 2D is a "comparable apartment" to unit 9D as the term is defined in RSC § 2522.6 (b) (3) (i). *See Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 354-355. Defendants' opposition papers did not raise any argument on the issue of whether unit 2D is a "comparable apartment." The Court finds that the $1,331.13 rental figure is accurate and free from fraud because B-U evidently registered that rent in a DHCR filing dated April 24, 2013, and Bogoni did not alter it in any subsequent amended registration statements. The Court also concludes that the $1,331.13 monthly rental figure is appropriate as regards Barish-Straus. Although the overcharge claims in this action all have a "base date" of November 10, 2010, Barish-Straus did not take possession of apartment 11B until May 1, 2012. As a result, the Court finds that $1,331.13 per month is the appropriate "legal regulated rent" amount to use in assessing Aras's rent overcharge claim.

Having so found, the Court further finds that B-U imposed a "rent overcharge" on Barish-Straus, since the evidence shows that it collected a monthly rental charge from her ($3,500.00)

which was "above the rent authorized for [the] housing accommodation" ($1,331.13). The Court therefore grants so much of plaintiffs' motion as seeks partial summary judgment on the first cause of action on the issue of liability only, with respect to Barish-Straus.

4. James Gladstone & Kathleen Campana (Apartment 10B)

Gladstone and Campana initially took possession of apartment 10B in 2003 and resided there during the entire rent overcharge claims period. As was the case with Barich-Straus, the documentary evidence regarding Gladstone's and Campana's tenancy is wanting because they did not produce copies of all of their leases. Nevertheless, the Court accepted their and Bogoni's representations that the market-rate lease for apartment 10B that was in effect from November 1, 2010 through March 31, 2011 specified a monthly rent of $4,963.04, and that Gladstone and Campana paid that amount each month during that lease term. The Court also found that defendants had not acted fraudulently in setting apartment 10B's "legal regulated rent," since Gladstone and Campana took possession of it in 2003, when building's "J-51"benefits had expired and the unit was subject to luxury decontrol by virtue of the previous tenant's vacatur, and B-U was entitled to charge a market-rate rent. *Matter of 73 Warren St., LLC v State of N.Y. Div. of Hous. & Community Renewal*, 96 AD3d at 527. As a result, the Court concludes that apartment 10B's "legal regulated rent" was the same as the unit's leased rent on the base date (i.e., $4,963.04 per month). Because Gladstone's and Campana's actual rent payments also matched the leased rent and "legal regulated rent" amounts, there is no evidence to support their rent overcharge claim against defendants at the inception of their tenancy. However, the Court noted that precedent disfavors employing the 'reconstruction method' to determine whether the renewal rent increases that B-U collected from Gladstone and Campana during the ensuing rent overcharge claims period comported with the "subsequent lawful increases and adjustments" that it was entitled to collect under the pre-HSTPA version of RSL § 26-516. Therefore, the Court holds Gladstone's and

Campana's request for partial summary judgment on their rent overcharge claim in abeyance pending their submission of further calculations (if any) regarding said "subsequent lawful increases and adjustments."

5. Patricia Lederer (Apartment 8D)

Lederer's tenancy in apartment 8D encompassed the entire 2010-2014 rent overcharge claims period, and specifically commenced on July 16, 2010 pursuant to a one-year lease with a monthly rent of $3,095.00. The Court found that the evidence showed that Lederer's actual rent payments matched the amounts on her initial lease and on her subsequent renewal leases and noted that Bogoni did not dispute the veracity of either the leases or the payments. The Court also found that Bogoni's fraudulent filing of deceptive and inaccurate amended DHCR registration statements made it impossible to determine apartment 8D's correct "legal regulated rent" as of the November 10, 2010 base date. As a result, it is necessary to employ the "default method" to supply an alternate "legal regulated rent" for the unit.

Plaintiffs' counsel notes that apartment 8D is a four-room unit, and has identified apartment 2D, another four-room unit which was rented for $1,241.15 per month on July 1, 2010, as a "comparable apartment." *See* notice of motion, Howard affirmation, ¶¶ 87-88; exhibit YY. The Court finds that unit 2D is a "comparable apartment" to unit 8D as the term is defined in RSC § 2522.6 (b) (3) (i). *See Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 354-355. Defendants' opposition papers did not raise any argument on the issue of whether unit 2D is a "comparable apartment." The Court finds that the $1,241.15 rental figure is accurate and free from fraud because B-U evidently registered that rent in a DHCR filing on May 13, 2011, and Bogoni did not alter it in any subsequent amended registration statements. The Court also concludes that the $1,241.15 monthly rental figure is appropriate as regards Lederer since it was in effect both during the initial term of her tenancy and

on the November 10, 2010 "base date." As a result, the Court finds that $1,241.15 per month is the appropriate "legal regulated rent" amount to use in assessing Lederer's rent overcharge claim. Having so found, the Court further finds that B-U imposed a "rent overcharge" on Lederer, since the evidence shows that it collected a monthly rental charge from her ($3,095.00) which was "above the rent authorized for [the] housing accommodation" ($1,241.15). The Court therefore grants so much of plaintiffs' motion as seeks partial summary judgment against defendants on the first cause of action, with respect to Lederer, on the issue of liability only.

6. Albert Panozzo & Georgia Marantos (Apartment 1B)

Panozzo's and Marantos's tenancy in apartment 1B commenced on May 12, 2011 and continued for the duration of the rent overcharge claims period. Their initial lease specified a monthly rent of $4,695.00 and their payment history established that they actually paid that monthly amount during the lease term. The Court noted that Bogoni did not dispute either the amounts set forth on Panozzo's and Marantos's initial and renewal leases, or the amounts that they actually paid. The Court also noted, however, that Bogoni's fraudulent filing of intentionally incomplete amended DHCR registration statements rendered apartment 1B's registration history are unreliable and made it impossible to determine the unit's correct "legal regulated rent" on the November 10, 2010 "base date." As a result, it is necessary to employ the "default method" to supply an alternate "legal regulated rent" for apartment 1B.

Plaintiffs' counsel notes that apartment 1B is a five-room unit and has identified apartment 2B as a similar five-room unit in the building which B-U had leased out from February 1, 2011 until January 31, 2012 at a monthly rent of $1,254.73. *Id.*, ¶ 87; exhibit ZZ. The Court finds that unit 2B is a "comparable apartment" to unit 1B as the term is defined in RSC § 2522.6 (b) (3) (i). *See Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 354-355. The Court finally notes that defendants' opposition papers did not raise any

argument on the issue of whether unit 2B is a "comparable apartment." The Court also finds that the $1,254.73 rental figure is accurate and free from fraud because B-U recorded it on a contemporaneous DHCR registration statement dated May 13, 2011, and Bogoni his subsequent fraudulent amended registration statements. The Court also further concludes that $1,254.73 is an appropriate "base date rent" because it was in effect in apartment 2B when Panozzo's and Marantos's tenancy in apartment 1B commenced on May 12, 2011. As a result, the Court determines that a "legal regulated rent" of $1,254.73 per month should be used to assess Panozzo's and Marantos's rent overcharge claim. The Court therefore consequently determines that B-U did impose a "rent overcharge" on Panozzo and Marantos, since the evidence shows that it collected a monthly rental charge from them ($4,695.00) which greatly exceeded "the rent authorized for [the] housing accommodation" ($1,254.73). Accordingly, the Court grants so much of plaintiffs' motion as seeks partial summary judgment against defendants on the issue of liability only on the first cause of action, with respect to Panozzo and Marantos.

7. John and Karen Menapace (Apartment 8A)

The Menapaces first took possession of apartment 8A on October 1, 2013, resided there for the duration of the rent overcharge claims period and still reside there today. Their initial market rate lease specified a monthly rent of $4,200.00 and the unit's payment history shows that they actually paid that amount for the duration of the initial lease term. The Court noted that Bogoni did not dispute the monthly rental amounts set forth on any of the Bogoni's leases, and agreed that their actual rent payments during the overcharge claims period matched the amounts of those leases. Therefore, the Court also found that Bogoni had fraudulently listed inaccurately low "legal regulated rents" for apartment 8A on a 2017 amended DHCR registration statement which obscured the unit's rental history and made it impossible to determine its correct "legal regulated

rent" on Menapace's move-in date. As a result, it is necessary to employ the "default method" to supply an alternate "legal regulated rent" for apartment 8A.

Plaintiffs' counsel notes that apartment 8A is a four-room unit, and has identified apartment 2D, another four-room unit which B-U rented had leased for $1,331.13 between July 1, 2012 and June 30, 2014, as a "comparable apartment." *See* notice of motion, Howard affirmation, ¶¶ 87-88; exhibit YY. The Court finds that unit 2D is a "comparable apartment" to unit 8A as the term is defined in RSC § 2522.6 (b) (3) (i). *See Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 354-355. Defendants' opposition papers did not raise any argument on the issue of whether unit 2D is a "comparable apartment." The Court concludes that the $1,331.13 rental figure is accurate and free from fraud because B-U registered it on a contemporaneous DHCR filing dated April 24, 2013, and Bogoni did not alter it on the subsequent fraudulent amended registration statements. The Court also finds that $1,331.13 is an appropriate "base date rent," because it was in effect in apartment 2D on October 1, 2013 when the Menapaces took possession of apartment 8A. As a result, the Court finds that $1,331.13 per month is the appropriate "legal regulated rent" amount to use in assessing the Menapaces' rent overcharge claim. Having so found, the Court further finds that B-U imposed a "rent overcharge" on the Menapaces, since the evidence shows that it collected a monthly rental charge from them ($4,200.00) which was far "above the rent authorized for [the] housing accommodation" ($1,331.13). The Court therefore grants so much of plaintiffs' motion as seeks partial summary judgment against defendants on the first cause of action, on the issue of liability only with respect to the Menapaces.

8. Peter Kane & Paulina Perera-Riveroll (Apartment 10D)

Kane's and Perera-Riveroll's tenancy in apartment 10D commenced in November 2009 and spanned the 2010-2014 entire rent overcharge claims period. The Court noted that the two-year,

market-rate lease for apartment 10D that was in effect on the November 10, 2010 "base date" specified a monthly rent of $2,900.00 for November 1, 2010 through October 31, 2011, and also noted that the unit's payment history established that Kane and Perera-Riveroll had made monthly rent payments in that amount during that portion of the initial lease term. The Court further found that Bogoni did not contest the rent amounts set forth on either that lease of any of Kane's and Perera-Riveroll's subsequent renewal leases for apartment 10D, and that Bogoni admitted that they had actually made monthly rent payments that matched their lease amounts during the entire 2010-2014 rent overcharge claims period. The Court finally found that the unit's "legal regulated rent" on the base date was unknown as a result of the uncertainty created by Bogoni's intentionally inaccurate and/or incomplete 2015 amended DHCR registration statements. As a result, it is necessary to employ the "default method" to supply an alternate "legal regulated rent" for apartment 10D.

Plaintiffs' counsel notes that apartment 10D is a four-room unit, and has identified apartment 2D, another four-room unit which B-U rented had leased for $1241.15 between July 1, 2010 and June 30, 2012, as a "comparable apartment." See notice of motion, Howard affirmation, ¶¶ 87-88; exhibit YY. The Court finds that unit 2D is a "comparable apartment" to unit 10D as the term is defined in RSC § 2522.6 (b) (3) (i). *See Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal,* 35 NY3d at 354-355. Defendants' opposition papers did not raise any argument on the issue of whether unit 2D is a "comparable apartment." The Court concludes that the $1241.15 rental figure is accurate and free from fraud because B-U registered it on a contemporaneous DHCR filing dated June 19, 2012, and Bogoni did not alter it on either of the 2015 amended registration statements. The Court also finds that $1241.15 is an appropriate "base date rent," because it was in effect in apartment 2D on November 1, 2010 when the second year of Kane's and Perera-Riveroll's initial two-year lease term commenced. As a

result, the Court finds that $1241.15 per month is the appropriate "legal regulated rent" amount to use in assessing Kane's and Perera-Riveroll's rent overcharge claim. Having so found, the Court further finds that B-U imposed a "rent overcharge" on Kane and Perera-Riveroll, since the evidence shows that it collected a monthly rental charge from them in 2010 ($2,900.00) which exceeded "the rent authorized for [the] housing accommodation" ($1241.15). The Court therefore grants so much of plaintiffs' motion as seeks partial summary judgment on the issue of liability only against defendants on the first cause of action, with respect to Kane and Perera-Riveroll.

In summary, the Court grants plaintiffs' motion for partial summary judgment, on the issue of liability only, on plaintiffs' first cause of action for rent overcharge with respect to the individual claims of moving plaintiffs Aras, Barish-Straus, Lederer, Panozzo and Marantos, Menapace and Menapace and Kane and Riveroll. The Court holds its decision in abeyance with respect to the individual rent overcharge claim of moving plaintiffs Gladstone and Campana pending further submissions from those parties. The Court denies the motion with respect to individual rent overcharge claims of moving plaintiffs Arnot and Hirsch.

B. Damages

Having made the foregoing determining determinations regarding defendants' liability to certain of the moving plaintiffs on their causes of action for rent overcharge, the Court now makes the following determinations regarding the measure of damages to be imposed on defendants for their liability.

The pre-HSTPA version of RSL § 26-516 provided that a landlord found to have collected a rent overcharge from a tenant "shall be liable to the tenant for a penalty equal to three times the amount of such overcharge." As a result, the statute required a reviewing court to determine two figures when assessing a tenant's damages for a rent overcharge claim: 1) the actual amount of rent overcharged; and 2) treble damages for that amount. The statute contained two limitations on

the latter figure. First, it provided that "If the [landlord] establishes by a preponderance of the evidence that the overcharge was not willful, the [Court] shall establish the penalty as the amount of the overcharge plus interest." RSL § 26-516 (a). Next, the statute also provided that "[n]o penalty of three times the overcharge may be based upon an overcharge having occurred more than two years before the complaint is filed." RSL § 26-516 (a) (2).

In the previous section of this decision, the Court made factual determinations as to the "legal regulated rent" for each moving plaintiff's apartment, and to the "actual rent paid" by each of those moving plaintiffs, on the November 10, 2010 "base date" and/or whichever the date on which a moving plaintiff commenced residency in his/her apartment. In order to determine the amount of rent overcharge defendants imposed on each moving plaintiff, it is necessary to compare their respective units' "legal regulated rents" with their individual payment histories over the enitre 2010-2014 rent overcharge claims period (or the portion of that period during which a moving plaintiff resided in his/her apartment). Pursuant to RSL § 26-516, an apartment's "legal regulated rent" is its' "base date rent," or the rent on the date that the tenant entered his/her apartment, "plus in each case any subsequent lawful increases and adjustments." The moving plaintiffs have not yet calculated their respective units' "legal regulated rents" during the entire rent overcharge claims period utilizing the amounts that the Court determined were appropriate as a starting point. Neither have they factored in the "lawful increases and adjustments" which defendants would have been entitled to make on their renewal leases.[8] The Court now directs the moving plaintiffs to make those calculations, and to compare them with the rent payments that they actually made during the overcharge claims period, in order to determine what amount of rent overcharge each

[8] This calculation is particularly important in the case of moving plaintiffs Gladstone and Campana, since defendants' liability to them for rent overcharge depends almost entirely on whether defendants included "increases and adjustments" on Gladstone's and Campana's renewal leases that were not "lawful."

of them individually paid to defendants. The Court further directs the moving plaintiffs to submit those calculations within 30 days after receipt of a copy of this decision with notice of entry. The Court directs defendants to submit a response to the moving plaintiffs' submission within 20 days thereafter.

The Court also directs the moving plaintiffs to include on their submission a separate calculation of the amount of treble damages to be applied to each of their individual rent overcharge claims. As noted, that amount is subject to the two-year limitation set forth in the pre-HSTPA version of RSL § 26-516 (a) (2). The Court further directs defendants to include in their response any evidence which that they wish the Court to consider regarding the statutory presumption of willfulness which is set forth in the pre-HSTPA version of RSL § 26-516 (a).

In summary, the Court holds in abeyance so much of this motion as seeks summary judgment on the issue of damages, and the entry of individual money judgments on the moving plaintiffs' respective individual claims for rent overcharges, pending further submissions by the parties.

IV. Plaintiffs' Fifth Cause of Action (Attorney's Fees)

As was previously noted, appellate case law considers attorney's fees to be an "incident of litigation" and that a prevailing party may only collect where an award is authorized by statute. *See Hooper Assoc. v AGS Computers*, 74 NY2d at 487; *Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d at 279. Here, the pre-HSTPA version of RSL § 26-516 (a) (4) plainly authorizes such an award. However, at this juncture, the Court has only issued a determination as to defendants' liability for rent overcharges to certain of the moving plaintiffs and has not yet made any determination as to the damages they suffered. Because the litigation of this issue (and others) is ongoing, it would be premature for the Court to consider plaintiffs' request for an award of

attorney's fees and/or court costs at this point. Accordingly, the Court holds in abeyance so much of this motion as seeks summary judgment on the plaintiffs' fifth cause of action.

CONCLUSION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiffs Leisa Aras, Albert Panozzo, Georgia Marantos, James Gladstone, Kathleen Campana, Peter Kane, Paulina Perera-Riveroll, John and Karen Menapace, Robert Arnot, Ellen Hirsch, Sarah Barish-Straus and Patricia Lederer (motion sequence number 009) for partial summary judgment on their first cause of action is granted, solely with respect to the issue of liability, as regards the claims of plaintiffs Leisa Aras, Albert Panozzo, Georgia Marantos, Peter Kane, Paulina Perera-Riveroll, John and Karen Menapace, Sarah Barish-Straus and Patricia Lederer, but is held in abeyance with respect to the claims of plaintiffs James Gladstone and Kathleen Campana, and is denied with respect to the claims of plaintiffs Robert Arnot and Ellen Hirsch; and it is further

ORDERED that balance of the motion, pursuant to CPLR 3212, of plaintiffs Leisa Aras, Albert Panozzo, Georgia Marantos, James Gladstone, Kathleen Campana, Peter Kane, Paulina Perera-Riveroll, John and Karen Menapace, Robert Arnot, Ellen Hirsch, Sarah Barish-Straus and Patricia Lederer (motion sequence number 009) for summary judgment on their first cause of action is held in abeyance pending the Court's receipt of additional submissions by the respective parties' counsel as described in this decision; and it is further

ORDERED that plaintiffs' counsel is directed to make the submission described in this decision within 30 days after receipt of a copy of this decision with notice of entry, and defendant' counsel is directed to make the responsive submission described in this decision within 30 days after receiving plaintiffs' counsel's submission; and it is further

ORDERED that balance the portion of the motion, pursuant to CPLR 3212, of plaintiffs Leisa Aras, Albert Panozzo, Georgia Marantos, James Gladstone, Kathleen Campana, Peter Kane, Paulina Perera-Riveroll, John and Karen Menapace, Robert Arnot, Ellen Hirsch, Sarah Barish-Straus and Patricia Lederer (motion sequence number 009) which seeks summary judgment on their fifth cause of action is held in abeyance pending the Court's review and determination of counsel's above-described submissions; and it is further

ORDERED that the balance of this action shall continue.

8/24/2021
DATE

JAMES D'AUGUSTE, J.S.C.

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