SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER TISCH **PART** 18

Justice

----------X

HEATH WOODSON, DANIEL LARKIN,

Plaintiffs,

- v -

CONVENT 1 LLC, CHESTNUT HOLDINGS OF NEW YORK, INC.,

Defendants.

----------X

INDEX NO. 160547/2017

MOTION DATE 10/07/2021, 10/07/2021

MOTION SEQ. NO. 007 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 281, 282, 283, 284, 285, 286, 287, 288, 289, 311, 312, 313, 314, 315, 319, 320, 321, 322, 323, 324, 325, 327, 330, 332, 333, 334, 335

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 316, 317, 318, 329, 331

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

In this residential landlord/tenant class action, plaintiff-tenants Heath W. Woodson, Daniel Larkin et al. (plaintiffs) move for summary judgment on their amended complaint and to dismiss defendants' counterclaim (motion sequence number 007), and co-defendants Convent 1 LLC (Convent) and Chestnut Holdings of New York, Inc. (Chestnut; together, defendants) move separately for summary judgment to dismiss the amended complaint (motion sequence number 008). This decision resolves both motions to the extent set forth below.

PROCEDURAL HISTORY

Convent is the owner of a residential apartment building located at 310 Convent Avenue in the City, County and State of New York (the building), and Chestnut is the building's registered managing agent. *See* amended complaint, ¶¶ 1-2.

Plaintiffs commenced this class action regarding defendants' alleged violations of the Rent Stabilization Law and Code (RSL and RSC) on December 13, 2017. *See* class action complaint, affs of

service, NYSCEF documents 4-7. On October 17, 2018, the Court (Cohen, J.) issued a decision denying defendants' motion to dismiss plaintiffs' original complaint (motion sequence number 001) after having so-ordered a stipulation on June 22, 2018 which granted the parties certain interim relief (motion sequence number 002). *See* NYSCEF documents 90, 102. On April 30, 2019, this Court (i.e., Tisch, J.) granted the parties' separate applications to stay this matter pending the resolution of certain relevant litigation by the Court of Appeals, and also granted plaintiffs' motion for class certification (motion sequence number 003). *See* NYSCEF document 178. The Court later lifted the stay in an order dated July 1, 2019 (motion sequence number 004). *See* NYSCEF document 231. The Court subsequently issued orders (a) dated February 18, 2020 granting plaintiff's motion for leave to amend their complaint (motion sequence number 005), and (b) dated September 23, 2020 granting plaintiffs leave to further amend the complaint and to approve class notices (motion sequence number 006). *See* NYSCEF documents 245, 281.

Plaintiffs' amended class action complaint sets forth causes of action for: 1) various forms of relief for alleged violations of RSL § 26-512 (on behalf of a "class"); 2) various forms of relief for alleged violations of RSL § 26-512 (on behalf of a "subclass"); and 3) a declaratory judgment with ancillary equitable relief (on behalf of the "subclass"). *See* amended complaint, ¶¶ 75-95; NYSCEF document 256. Defendants' amended answer, dated March 10, 2020, includes 11 affirmative defenses and a counterclaim for court costs and attorney's fees. *See* answer, ¶¶ 96-112; NYSCEF document 277. Plaintiffs filed the instant motion seeking summary judgment on their amended complaint and dismissal of defendants' affirmative defenses and counterclaim on May 3, 2021. *See* notice of motion (motion sequence number 007). Defendants filed their motion seeking summary judgment to dismiss the amended complaint and for summary judgment on their counterclaim on May 4, 2021. *See* notice of motion (motion sequence number 008). The Court thereafter acceded to several requests from the parties to submit supplemental briefs in support of their respective motions. All submissions have now been received.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See 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). Here, plaintiffs seek summary judgment on their two causes of action alleging violations of RSL § 26-512 and their one cause of action for declaratory relief, as well a summary judgment dismissing defendants' lone counterclaim.

Plaintiffs assert their first cause of action on behalf of a "class" composed of:

> ". . . all tenants at 310 Convent Avenue living, or who had lived, in apartments that were deregulated during the period when J-51 tax benefits were being received by the owner of 310 Convent Avenue, except that the class shall not include (i) any tenants who vacated before November 29, 2013."

See amended class action complaint, ¶ 49. They assert their second and third causes of action on behalf of a "subclass" composed of "all current tenants at 310 Convent Avenue, who currently reside in an unlawfully deregulated apartment." *Id.*, ¶ 61. The definitions of the terms "class" and "subclass" differ from the ones set forth in plaintiffs' original complaint, which the court certified in its order dated April 30, 2019 (motion sequence number 003). *See* NYSCEF document 178. However, the Court's subsequent order of September 23, 2020 permitted plaintiffs to amend both the complaint and the class certification order to incorporate the updated definitions (motion sequence number 006). *See* NYSCEF document 281. This decision will review each cause of action in turn using the updated definitions. Before doing so, however, the Court must address certain preliminary matters that pertain to all three claims.

First, as noted, plaintiffs commenced this action on December 13, 2017. *See* class action complaint, affs of service, NYSCEF documents 4-7. As a result, so much of plaintiffs' claims as seek monetary compensation for alleged rent overcharges are governed by the provisions of the RSL that were in effect before June 14, 2019 (i.e., the effective date of the Housing Stability and Tenant Protection Act of 2019 [HSTPA]). *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 (2020). The relevant statute is the pre-HSTPA version of RSL § 26-516 (a) (2), which stated that:

> "(2) Except as provided . . ., 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. . . . 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."

RSL § 26-516 (a) (2). Pursuant to this statute, the "base date" for all of plaintiffs' rent overcharge claims against defendants is December 13, 2013; i.e., the date that fell four years prior to the date on which they commenced this action. *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 348. That four-year interval is also the plaintiffs' "overcharge claims period;" i.e., the window of time in which the statute permitted a tenant to pursue a rent overcharge claim against a landlord. *Id.* The statute plainly states that a court may not consider rent overcharges that occurred outside of a permissible claims period. RSL § 26-516 (a) (2). As a result, this decision will not consider any claims that fall outside of the 2013-2017 claims period.

Second, as was also noted, plaintiffs first two causes of action allege violations of RSL § 26-512. *See* amended complaint, ¶¶ 75-89; NYSCEF document 256. However, this was improper for several reasons. The pre-HSTPA version of RSL § 26-512 was entitled "stabilization provisions," and governed the manner in which a rent-stabilized apartment's initial "legal regulated rent" should be calculated. Plaintiffs' first cause of action instead seeks "monetary damages from Defendants based on . . . unlawful

[rent] overcharges, as well as an award of interest thereon." *Id.*, ¶ 80. Their second cause of action seeks:

> "a declaratory judgment adjudging and determining:
> "a. the apartments of Plaintiffs and members of the Sub-Class are each subject to the RSL and RSC;
> "b. Plaintiffs and members of the Sub-Class are each entitled to a rent-stabilized lease in a form promulgated by DHCR [i.e., the New York State Division of Housing and Community Renewal];
> "c. the amount of the legal regulated rent for the apartments of Plaintiffs and members of the Sub-Class;
> "d. any leases offered by Defendants to Plaintiffs and members of the Sub-Class are invalid and unlawful unless they are offered on lease forms and terms prescribed by DHCR; and
> "e. Plaintiffs and members of the Sub-Class are not required to pay any rent increases unless and until legally permissible rent-stabilized lease offers are made to, and accepted by, Plaintiffs and members of the Sub-Class."

Id., ¶ 87. These claims are *not* governed by RSL § 26-512 ("stabilization provisions"), but by RSL § 26-516 ("enforcement and procedures"). Specifically, rent overcharge claims are assessed pursuant to RSL § 26-516 (a), and the injunctive relief ancillary to the declarations that plaintiffs seek is provided for in RSL § 26-516 (e). Those are the forms of relief that the statute permits the court to consider in connection with plaintiffs' first and second causes of action. As a result, this decision will apply the pre-HSTPA version of RSL § 26-516 to those claims.

Finally, plaintiffs have chosen to litigate their claims against defendants in the form of a class action suit. *See* amended complaint, NYSCEF document 256. As a result, they have waived the right to seek treble damages from defendants in connection with their rent overcharge claims. *See e.g., Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382 (2014); *Casey v Whitehouse Estates, Inc.*, 197 AD3d 401 (1st Dept 2021). Accordingly, this decision will not discuss the issues of treble damages or "willfulness" since they are inapposite.

Having made these initial determinations, the Court turns its consideration to plaintiffs' three causes of action.

Plaintiffs' First Cause of Action

Plaintiffs' first cause of action seeks summary judgment on the claim that defendants collected rent overcharges from a defined "class" of plaintiff/tenants who resided in the building between December 13, 2013 and December 13, 2017. *See* amended complaint, ¶¶ 75-80; NYSCEF document 256. Plaintiffs allege that defendants collected rent overcharges from tenants in 13 of the building's 37 apartments; specifically, units 1B, 1C, 1E, 2C, 2D, 2F, 3A, 4B, 4F, 5C, 5E, 6B and 6C.[1] *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶¶ 14-202. However, it appears that eight of those plaintiff/tenants still reside in the building, and are therefore more correctly classified as members of the "subclass" on whose behalf plaintiffs asserted the second cause of action.[2] *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶¶ 14-202. Thus, to avoid unnecessary duplication, this portion of the decision will only review the rent overcharge claims of the "class" composed of plaintiff/tenants who are "living, or who had lived, in apartments that were deregulated during the period

---

[1] Plaintiffs further specifically assert that defendants collected the overcharges during the following tenants' leaseholds: 1) 1B - Miho Urisaka (May 1, 2014 through April 30, 2015), Connor Hayward, Geoffrey Kelly and Anthony Nasello (July 1, 2016 through June 30, 2018) and Delphin Ndayemeye and Charlotte Ndayishimaye (September 1, 2018 through present); 2) 1C - Heath Woodson and Richard Streeter (November 1, 2010 through present); 3) 1E - Frederick and Mary Bigger (August 1, 2010 through present); 4) 2C - Olivia Bailey, Robert Liota and Christopher Thomas (April 1, 2012 through December 31, 2012), Robert Liota, Christopher Thomas and David Bailey (January 1, 2013 through March 31, 2018) and Christopher Thomas, Ngoc An Nguyen and Shashana Packus (April 1, 2018 through present); 5) 2D - Ozgur Tarhan (April 1, 2010 through present); 6) 2F - Edmee Ervin (April 1, 2003 through present); 7) 3A - Syvonne Richardson and Dametri Moore (June 1, 2017 through May 31, 2018); 8) 4B - Vikas Thakur and Eldad Shurion (February 1, 2016 through February 28, 2017); 9) 4F - Mahmudul Hassan, Geraldine Sultana and Gus Weinstein (December 1, 2016 through December 31, 2017); 10) 5C - Brent Ginsberg, Thomas E. Weaver Jr., Gary Ginsberg and/or Thomas Weaver Sr. (August 1, 2013 through July 31, 2017), Chandan Singh, Fernando Veliz and Selam Sahle (September 1, 2016 through August 31, 2017), and Kyra Sturken (November 1, 2017 through October 31, 2018); 11) 5E - Jillian Wipfler, Emma Roos, Kelsey Roberts and Jacqueline Gold (January 1, 2017 through January 31, 2018); 12) 6B - Virginia Pike, Stephanie Kirkman, Donald Pike and/or Nadine Serfas (July 1, 2010 through present); and 13) 6C - Daniel Larkin, Joseph W. Davidson and/or Alisa Selman (April 1, 2008 through present). *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶¶ 14-202; exhibits 8, 10, 14, 16-19, 20-24, 25-28, 31-37, 39-45, 46, 47, 48, 49-54, 55, 56-60, 61-66.

[2] The plaintiff/tenants who currently reside in the building include the occupants of units 1B (Delphin Ndayemeye and Charlotte Ndayishimaye), 1C (Heath Woodson and Richard Streeter), 1E (Frederick and Mary Bigger), 2C (Christopher Thomas, Ngoc An Nguyen and Shashana Packus), 2D (Ozgur Tarhan), 2F (Edmee Ervin), 6B (Virginia Pike, Stephanie Kirkman, Donald Pike and/or Nadine Serfas) and 6C (Daniel Larkin, Joseph W. Davidson and/or Alisa Selman). *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶¶ 14-202; exhibits 8, 10, 14, 16-19, 20-24, 25-28, 31-37, 39-45, 46, 47, 48, 49-54, 55, 56-60, 61-66.

when J-51 tax benefits were being received by the [defendants[3]]" during the 2013-2017 claims period. *See* amended complaint, ¶ 59; NYSCEF document 256.

The pre-HSTPA version of RSL § 26-516 (a) reproduced above defines the term "rent overcharge" as a rental charge which is "above the rent authorized for a housing accommodation," which is, in turn, defined as "the rent indicated in the annual DHCR registration statement filed four years prior to the most recent registration statement, . . . plus in each case any subsequent lawful increases and adjustments." As a result, in order to establish whether a landlord has imposed a rent overcharge on 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. The Court of Appeals has held 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). However, the Appellate Division, First Department has more recently held that where a landlord was 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. *Montera v KMR Amsterdam LLC*, 193 AD3d 102, 109 (1st Dept 2021). In *Montera*, the "fraudulent scheme to deregulate" which the First Department identified was the landlord's persistent failure to comply with the holdings of *Roberts v Tishman Speyer Props. L.P.* (13 NY3d 270 [2009]) and *Gersten v 56 7th Ave. LLC* (88 AD3d 189 [1st Dept 2011]) that owners of buildings enrolled in the "J-51" real estate tax abatement program are

---

[3] Those individuals specifically include the former tenants of units: 1) 1B (Miho Urisaka and Connor Hayward, Geoffrey Kelly & Anthony Nasello); 2) 2C (Olivia Bailey, Robert Liota, Christopher Thomas and/or David Bailey); 3) 3A (Syvonne Richardson and Dametri Moore); 4) 4B (Vikas Thakur and Eldad Shurion); 5) 4F (Mahmudul Hassan, Geraldine Sultana and Gus Weinstein); 6) 5C (various); and 7) 5E - Jillian Wipfler, Emma Roos, Kelsey Roberts and Jacqueline Gold. *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶¶ 14-202; exhibits 8, 10, 14, 16-19, 20-24, 25-28, 31-37, 39-45, 46, 47, 48, 49-54, 55, 56-60, 61-66.

required to reregister improperly deregulated apartments as rent stabilized with the DHCR. 193 AD3d at 105-108. 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, the evidence demonstrates that defendants perpetrated the same "fraudulent scheme to deregulate" many of the building's apartments as did the landlord in *Montera*.

Plaintiffs have presented a copy of a "Final Certificate of Eligibility" approved by the New York City Department of Housing Preservation and Development (HPD) on December 21, 2007 which authorized defendants' enrollment of the building in the "J-51" real estate tax abatement program for a 14-year period commencing in 2005. *See* notice of motion (motion sequence number 007), exhibit 5. They have also presented copies of the building's June 2018 and June 2019 quarterly Property Tax Bills from the New York City Department of Finance (DOF). *Id.*, exhibits 3, 4. The former reflects that the building was still receiving the benefit of the "J-51" real estate tax abatement in June 2018, while the latter indicates that the building was no longer receiving that benefit in June 2019. *Id.* Together, this documentary evidence establishes that the building was enrolled in the "J-51" program between 2005 and 2019. Defendants admit that the building was enrolled in the "J-51" program, although they failed to specify the dates of its period of enrollment. *See* notice of motion (motion sequence number 008), Reider aff, ¶¶ 13-15, 23-24, 27. Regardless, pursuant to the Court of Appeals' 2009 holding in *Roberts v Tishman Speyer Props. L.P.*,[4] defendants were precluded from removing any of the building's

[4] *Roberts v Tishman Speyer Props. L.P.*, 13 NY3d 270. The First Department determined the *Roberts* holding to be retroactive in its 2011 decision in *Gersten v 56 7th Ave. LLC* (88 AD3d at 198).

apartments from rent stabilized status via the RSC's "high rent" or "luxury deregulation" procedures for the duration of its enrollment in the "J-51" program.

The Court notes that the building's DHCR rent roll indicates that defendants had removed five of the apartments involved in this case from rent stabilization before they enrolled the building in the "J-51" program.[5] *See* notice of motion (motion sequence number 007), exhibit 7. Because those deregulations occurred in either 2002 or 2003, and *Roberts v Tishman Speyer Props. L.P.* was not decided until 2009, it is tempting, but inaccurate, to classify the removal of units 1B, 1C, 2C, 2F and 5C from rent stabilization as a series of "pre-*Roberts*" deregulations. They are technically not. The term "pre-*Roberts*" deregulation actually describes the removal of an apartment from rent stabilization *while its building is enrolled* in the "J-51" program. *Montera v KMR Amsterdam LLC*, 193 AD3d at 103. The Court of Appeals deems most such "pre-*Roberts*" deregulations to be non-fraudulent because landlords inadvertently relied on the DHCR's incorrect application of the Real Property Tax Law (RPTL) to the RSC. *Id.* at 103, citing *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal,* 35 NY3d 332. Here, however, units 1B, 1C, 2C, 2F and 5C were deregulated *before* the building was enrolled in the "J-51" program. There was no evident fraud in defendants' deregulation of those units in 2002 and 2003 since the RSC permitted "luxury/high rent deregulation" at that time. However, the five deregulated units subsequently regained rent stabilized status "for at least as long as the building continue[d] to enjoy J–51 benefits" along with the rest of the building's apartments (i.e., from 2005 to 2019). *Montera v KMR Amsterdam LLC*, 193 AD3d at 103. As a result, the fact that units 1B, 1C, 2C, 2F and 5C had been properly deregulated prior to the building's enrollment in the "J-51" program is of no moment. Instead, the issue before the Court is whether or not

[5] The DHCR rent roll specifically records units 1B, 1C and 2C as being "permanently exempt" (PE) from rent stabilized status as of 2002, and units 2F and 5C as becoming "PE" in 2003. *See* notice of motion (motion sequence number 007), exhibit 7. The reason recorded for each unit's removal from rent stabilization was "high rent vacancy;" i.e., the then-effective RSC rules permitting "high rent" or "luxury" apartment deregulation. *Id.*

there was fraud associated with defendants' rental practices while the building was enrolled in the program. The court finds that plaintiffs have established the existence of such fraud.

In *Montera v KMR Amsterdam LLC*, the First Department found that:

> "The hallmarks of a fraudulent scheme to deregulate are present here. Defendant deregulated the apartment after *Roberts* was decided and did not re-register with DHCR, despite receiving J-51 tax benefits after *Gersten* applied *Roberts* retroactively. During the four-year period preceding commencement of the lawsuit, plaintiff was still not given a rent-stabilized lease. Unlike in *Park*, where the owner promptly registered the apartment, defendant waited until 2018 to re-register the apartment, one year after the complaint in this case was filed alleging that defendant unlawfully deregulated the building's apartments - more than a decade after *Roberts* was decided and eight years after our decision in *Gersten*. Defendant's actions cannot be deemed to be prompt compliance. Rather, at this stage, plaintiff has sufficiently alleged a six-year scheme to illegally deregulate 27 units or approximately 32% of the building."

193 AD3d at 108-109. Here, the tenancies of all of the plaintiffs in the "class"[6] commenced while the building was enrolled in the "J-51" program, and after *Roberts* and *Gersten* had both been decided (in 2009 and 2011, respectively). *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶¶ 16, 23, 39, 82-82, 127, 136, 145, 154-161, 163, 169, 172. Nevertheless, defendants gave many of those "class" plaintiffs free market, non-rent-stabilized leases. *Id.*, exhibits 8, 10, 14, 25-28, 46, 47, 48, 49-52, 53, 54, 55. The building's DHCR rent roll indicates that defendants waited until 2016 to re-register the building's apartments as rent stabilized en masse - seven years after *Roberts* was decided and five years after *Gersten*. *Id.*, exhibit 7. Thus, during the majority of the 2013-2017 rent overcharge claims period, defendants continued to collect unregulated rents from plaintiffs' *Roberts*-regulated apartments,[7] and also enjoyed the benefit of a "J-51" tax abatement. The Court finds that the above documentary evidence establishes the same "hallmarks of a fraudulent scheme to deregulate" as were

---

[6] The plaintiffs who are members of the "class" include the former residents of units 1B (Urisaka; Hayward Kelly, Nasello and/or Kelly), 2C (Bailey, Thomas, Liota and/or Bailey), 3A (Richardson and Moore), 4B (Thakur and Shurion), 4F (Hassan, Sultana and Weinstein), 5C (Ginsburg, Weaver, Ginsburg and/or Weaver; Singh, Veliz and Sahle; Sturken) and 5E (Wipfler, Roos, Roberts and Gold). *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶¶ 16, 23, 39, 82-82, 127, 136, 145, 154-161, 163, 169, 172.

[7] With one exception, which will be discussed *infra*.

present in *Montera*.[8] As a result, the Court concludes that it is permissible to examine the rental history of certain apartments beyond the four-year "lookback" period proscribed by the pre-HSTPA version of RSL § 26-516.[9] However, it also appears that defendants gave some of the plaintiff/tenants in the "class" rent stabilized leases. While there are issues as to whether the rents set forth on those leases constituted the correct rent stabilized monthly "legal regulated rent," there is no question that defendants tendered those plaintiffs rent stabilized leases while the building was subject to rent stabilization by virtue of its enrollment in the "J-51" program. This cannot be said to constitute the sort of "willful disregard" that the First Department discussed in *Montera v KMR Amsterdam LLC*. 193 AD3d at 107. As a result, there is no basis to conclude that defendants engaged in a "fraudulent scheme to deregulate" with respect to those tenancies, and it is therefore clear that the four-year "lookback" rule governs the Court's review of the subject apartments' rent histories. *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal,* 35 NY3d at 361. In light of the foregoing findings, the

---

[8] Defendants assert that they "re-registered [all of the building's apartments] with the DHCR as rent stabilized" "[p]romptly after [receiving] the DHCR January 6, 2016 letter." *See* notice of motion (motion sequence number 008), Rieder aff, ¶ 15. However, the *Montera* holding made it clear that a five to seven year delay in re-registration cannot be deemed "prompt compliance." *Montera v KMR Amsterdam LLC*, 193 AD3d at 108-109. Therefore, the court rejects defendants' assertion.

[9] The Court accepted a late submission from defendants in which they argued that *Montera v KMR Amsterdam LLC* is both factually distinguishable and legally inapposite to this action. Defendants arguments were unpersuasive, however. As explained above, it is unimportant that the apartments at issue in *Montera* were "pre-*Roberts*" deregulations, while the instant apartments are not. The First Department explained that it has given landlords "safe harbor [upon a] finding that fraud was not committed before 2012, when *Roberts* was applied retroactively," but that it has "not extended this rule to cases decided after *Roberts* and *Gersten*" because landlords "may not flout the teachings of *Roberts*." *Montera v KMR Amsterdam LLC*, 193 AD3d at 105. Here, defendants' "fraudulent scheme to deregulate" was established by their persistent failure to re-register any of the building's apartments as rent stabilized until 2016. Although apartments 1B, 1C, 2C, 2F and 5C were lawfully deregulated between 2001 and 2002, they were re-regulated in 2005, but went unregistered until 2016. Therefore, defendants are not entitled to claim "safe harbor" as a result of those units' previous unregulated status. Defendants' argument that *Montera* is legally inapposite is also misplaced. It is true that *Montera* only held that "willful noncompliance" fraud was a basis for disregarding the four-year "lookback" rule in pre-HSTPA rent overcharge cases, and left open the question of whether such fraud could also justify the use of the "default formula" to set an improperly deregulated apartment's "legal regulated rent." 193 AD3d at 109. However, the First Department answered that question affirmatively in its subsequent decision in *Casey v Whitehouse Estates, Inc.* (197 AD3d at 405). Therefore, the Court rejects all of defendants' supplemental arguments.

Court makes the following factual determinations regarding the rent overcharge claims of each plaintiff in the "class."

Apartment 1B - Urisaka

Miho Urisaka executed a lease for apartment 1B that ran from May 1, 2014 through April 30, 2015 with a monthly rent of $2,500.00. *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶ 16; exhibit 8. The building's DHCR rent roll indicates that Urisaka also signed a one-year renewal lease that ran from May 1, 2015 through April 30, 2016 with a monthly rent of $2,575.00, although the parties have not presented a copy of it. *Id.*, exhibit 7. The foregoing establishes that Urisaka's tenancy fell within the December 2013-December 2017 overcharge claims period, and that her "actual rent charges" during that time totaled $60,900.00. Unfortunately, the parties have not presented copies of any receipts or a payment history to establish Urisaka's "actual rent payments" during the overcharge claims period.

With respect to apartment 1B's "legal regulated rent," Urisaka was one of the plaintiffs in the "class" who was given a rent stabilized lease in 2014.[10] *See* notice of motion (motion sequence number 007), exhibit 8. Because defendants chose to treat Urisaka's tenancy as rent stabilized while the building actually was rent stabilized (as a result of its enrollment in the "J-51" program during 2014 and 2016), there is no fraud indicated and the four-year "lookback" rule in the pre-HSTPA version of RSL § 26-516 governs the Court's review of apartment 1B's rental history. Under that rule, "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," and "[t]his paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding

[10] Although the parties did not produce a copy of Urisaka's renewal lease, the DHCR rent roll indicates that apartment 1B was rent stabilized in 2016 with a legal regulated rent of $2,575.00 per month. *See* notice of motion, (motion sequence number 007), exhibit 7. It is not clear how defendants justified this $75.00 monthly increase in apartment 1B's rent, since it appears that the Rent Guidelines Board Order (RGBO) in effect between October 1, 2015 and September 30, 2016 specified a 0% rent increase for one-year renewal leases executed for rent stabilized units during that period.

the filing of a complaint pursuant to this subdivision." RSL § 26-516 (a) (2). Here, "the four-year period preceding the filing of [the] complaint" began in December 2013; i.e., six months before Urisaka's tenancy commenced on May 1, 2014. Accordingly, the Court may not examine apartment 1B's rental history prior to December 2013. However, the rental history during the six-month period between that date and the date Urisaka took possession of the unit is still troublesome.

The building's DHCR rent roll records that apartment 1B was permanently exempt from rent regulation in 2013, 2014 and 2015 with no DHCR registration statements on file in those years, and no legal regulated rent amounts recorded. *See* notice of motion (motion sequence number 007), exhibit 7. This contradicts Urisaka's 2014-2015 lease, which stated that the unit was rent stabilized with a legal regulated rent of $2,500.00. *Id.*, exhibit 8. Since it cannot compare 1B's December 2013 rent with Urisaka's subsequent April 2014 rent, the Court cannot determine whether the latter figure ($2,500.00 per month) was the unit's actual "legal regulated rent" *even though* defendants treated Urisaka's tenancy there as rent stabilized.[11] Instead, the Court concludes that the evidence is insufficient to establish either (a) what the unit's actual "legal regulated rent" on the December 2013 "base date" was, or (b) whether the rents set forth on Urisaka's two later leases reflected accurate rent stabilized "legal regulated rents." The pre-HSTPA versions of RSL § 26-516 do not provide a method for ascertaining an apartment's "legal regulated rent" where there was no DHCR registration statement on file four years prior to the commencement of a rent overcharge claim. Instead, they simply forbade any such claims if they were based on challenges to registration statements more than four years old. However, where apartments had been subject to rent stabilization for less than four years at the time that an overcharge complaint was filed, the pre-HSTPA statutes instructed that "[w]here 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].*" RSL § 26-516 (a) (ii), eff. October 9, 2009; eff. June 15, 2015 (emphasis

[11] The Court has already noted that the $2,575.00 monthly rent charge on Urisaka's ensuing 2015-2016 lease appears to have been unjustified. *See* fn 9, *supra*.

added). Here, after removing apartment 1B from rent stabilization in 2002, defendants re-registered it as rent stabilized in 2016. *See* notice of motion (motion sequence number 007), exhibit 7. In the absence of any other guidance, the Court finds that the pre-HSTPA versions of RSL § 26-516 mandate that (a) defendants' 2016 re-registration of apartment 1B as rent stabilized should be treated as the unit's "initial registration," and (b) it is incumbent on the DHCR to establish the unit's previous legal regulated rent for the purposes of Urisaka's overcharge claim. It is clear that this Court and the DHCR have concurrent jurisdiction over rent overcharge claims, subject to a tenant's choice of forum. *See e.g.*, *Matter of Hefti v New York State Div. of Hous. & Community Renewal*, 203 AD3d 605, 605 (1st Dept 2022), citing *Collazo v Netherland Prop. Assets LLC*, 35 NY3d 987, 990 (2020). However, the Court of Appeals has explicitly held that a court may *not* use the "reconstruction method" to determine an apartment's legal regulated rent in connection with a pre-HSTPA rent overcharge claim, and that it may only use the "default method" when there has been a showing of fraud. *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 357-360. Here, the Court has determined that there is insufficient evidence of fraud with respect to Urisaka's tenancy, which the defendants appear to have treated as rent stabilized. Accordingly, plaintiffs' only option is to seek a determination from the DHCR regarding apartment 1B's legal regulated rent on the December 1, 2013 base date. After it has done so, and once plaintiffs have supplied a copy of Urisaka's payment history during her tenancy, then the Court will be able to complete the calculations to determine whether defendants collected a rent overcharge from her during the claims period. For now, the Court must hold in abeyance so much of plaintiffs' motion as seeks summary judgment on their first cause of action as pertains to Urisaka.

Apartment 1B - Hayward, Kelly, Nasello and/or Kelly

Connor Hayward, Geoffrey Kelly, and Anthony Nasello executed a non-rent-stabilized lease for apartment 1B that ran from July 1, 2016 through June 30, 2017 with a monthly rent of $3,175.00. *See* notice of motion (motion sequence number 007) Sachar affirmation, ¶ 23; exhibit 10. Thereafter, those

three along with co-tenant Kristen Kelly also signed a non-rent-stabilized renewal lease for the unit that ran from July 1, 2017 through June 30, 2018 with a monthly rent of $3,200.00. *Id.*, Sachar affirmation, ¶ 39; exhibits 7, 14. These documents establish that the "actual rent charges" which defendants sent to plaintiffs Hayward, Kelly, Nasello and/or Kelly during their portion of the overcharge claims period (i.e., July 2016 through December 2017) totaled $57,300.00 (i.e., 12 months x $3,175.00 and six months x $3,200.00). However, because the parties failed to submit a payment history for this tenancy, the Court cannot determine the amount of "actual rent payments" that Hayward, Kelly, Nasello and/or Kelly made during their portion of the overcharge claims period.

With respect to apartment 1B's "legal regulated rent" during Hayward's, Kelly's, Nasello's and/or Kelly's tenancy, the Court has already determined that defendants' fraudulent scheme to deregulate the building permits it to disregard the four-year lookback rule in the pre-HSTPA versions of RSL § 26-516. The Court further finds that defendants' fraudulent scheme clearly continued during the pendency of this tenancy *even though* defendants re-registered apartment 1B as rent stabilized in 2016 at roughly the time that the tenancy commenced. Despite registering the unit as rent stabilized, defendants still tendered the plaintiff tenants a market rate lease and a market rate renewal lease and still continued to enjoy the tax benefit of the building's enrollment in the "J-51" program through 2019. Accordingly, the Court rejects defendants' contention that "the uncontroverted record is devoid of intent to defraud." *See* defendants' mem of law (motion sequence number 008) at 23- 25. An examination of apartment 1B's rental history from before the December 2013 base date discloses that defendants never registered a legal regulated rent for the unit at any point after it became rent stabilized by operation of law in 2005 when the building's "J-51" enrollment began. In *Casey v Whitehouse Estates, Inc.* (197 AD3d 401), the First Department held that the same type of fraud which it had discussed in *Montera v KMR Amsterdam LLC* (193 AD3d 102) was also sufficient to justify calculating an apartment's legal regulated rent via the "default formula" set forth in RSC (9 NYCRR) § 2522.6 (b). *Casey v Whitehouse Estates, Inc.*, 197 AD3d at 404. The First Department observed that:

> "Although defendants may have been following the law in deregulating apartments during the period before *Roberts* was decided, their . . . retroactive registration of the improperly deregulated apartments was an attempt to avoid the court's adjudication of the issues and to impose their own rent calculations rather than face a determination of the legal regulated rent within the lookback period."

Id., 197 AD3d at 404 (internal citations omitted). Here, defendants perpetrated the same type of evasion by attempting, without explanation, to legitimize the $2,575.00 monthly rent set forth on Urisaka's 2016 renewal lease by simply including it among the re-registrations on the 2016 DHCR rent roll. Accordingly, the same remedy as the First Department proscribed in *Casey* applies here, and the Court finds that it would be appropriate to determine apartment 1B's legal regulated rent via the "default formula" for the purpose of reviewing Hayward's, Kelly's, Nasello's and/or Kelly's rent overcharge claim. Unfortunately, the Court cannot do so at this juncture. Under the "default formula," an apartment's legal regulated rent is fixed at "the lowest rent registered . . . for a *comparable apartment in the building in effect on the date the complaining tenant first occupied the apartme*nt." RSC (9 NYCRR) § 2522.6 (b) (3) (i) (emphasis added). The parties have not identified a "comparable apartment" to unit 1B whose 2016 rent could be used as unit 1B's legal regulated rent. As a result of this failure of proof, coupled with plaintiffs' failure to document Hayward's, Kelly's, Nasello's and/or Kelly's "actual rent payments" during the overcharge claims period, the Court cannot complete the calculations specified in the pre-HSTPA versions of RSL § 26-516 that are necessary to establish whether or not defendants collected a rent overcharge from said plaintiffs between 2016 and 2017. Accordingly, the Court must hold in abeyance so much of plaintiffs' motion as seeks summary judgment on their first cause of action as pertains to Hayward, Kelly, Nasello and/or Kelly.

Apartment 2C - Bailey, Thomas, Liota and/or Bailey

Olivia Bailey, Christopher Thomas and Robert Liota executed a non-rent-stabilized lease for apartment 2C that ran from April 1, 2012 through March 31, 2013 with a monthly rent of $2,500.00. *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶ 82; exhibit 25. Olivia Bailey then left the apartment, and David Bailey, Christopher Thomas and Robert Liota executed non-rent-

stabilized leases that ran from: 1) April 1, 2013 through March 31, 2014 with a monthly rent of $2,600.00; 2) April 1, 2014 through March 31, 2015 with a monthly rent of $2,650.00; and 3) April 1, 2015 through March 31, 2016 with a monthly rent of $2,676.50. *Id.*, ¶ 83; exhibits 26, 27, 28. The original lease with Olivia Bailey as a tenant predated the December 1, 2013 base date and therefore fell outside of the overcharge claims period litigated in this action. Therefore, the Court will not consider it. The subsequent renewal leases establish that defendants tendered David Bailey, Christopher Thomas and Robert Liota a total of $74,318 in "actual rent charges" during the overcharge claims period (4 months x $2,600.00, 12 months x $2,650.00 and 12 months x $2,676.50). *Id.*, exhibits 26-28. However, the parties have presented no evidence of the total "actual rent payments" that the plaintiff/tenants made during the claims period.

Apartment 2C was apparently lawfully deregulated in 2002, but returned to rent stabilized status in 2005 when the building's enrollment in the "J-51" program began. Thereafter, defendants did not re-register the building as rent stabilized until 2016, but only issued market rate leases to David Bailey, Christopher Thomas and Robert Liota despite receiving the benefits of the "J-51" real estate tax abatement. Defendants willful disregard of their obligations under the *Roberts* and *Gersten* holdings is sufficient evidence of a fraudulent scheme to deregulate apartment 2C as to justify setting the unit's "legal regulated rent" via the "default formula." *Casey v Whitehouse Estates, Inc.*, 197 AD3d at 404. However, the Court cannot do so at this juncture since plaintiffs have not identified a "comparable apartment" whose December 2013 rent may be referred to to establish apartment 2C's "legal regulated rent" using that formula. RSC (9 NYCRR) § 2522.6 (b) (3) (1). Accordingly, the Court holds in abeyance so much of plaintiffs' motion as seeks summary judgment on their first cause of action as pertains to David Bailey, Christopher Thomas and Robert Liota.

Apartment 3A - Richardson and Moore

Similar to Miho Urisaka, Syvonne Richardson and Dametri Moore were given a rent-stabilized lease for apartment 3A that ran from June 1, 2017 through May 31, 2018 with a monthly rent of

$2,750.00. *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶ 127; exhibit 46. The building's DHCR rent roll indicates that Richardson and Moore thereafter executed a two-year renewal lease for the unit that ran from June 1, 2018 through May 31, 2020 with a monthly rent of $2,805.00. *Id.*, exhibit 7. The parties have not produced a copy of the renewal lease, and it cannot be determined whether that lease was rent stabilized too. Nevertheless, because only seven months of Richardson's and Moore's tenancy fell within the overcharge claims period, it can be determined that Richardson and Moore were assessed a total of $19,250.00 in "actual rent charges" during the overcharge claims period (7 months x $2,750.00). *Id.*, exhibits 26-28. The parties present no evidence of the total "actual rent payments" that Richardson and Moore made during the claims period. Neither do plaintiffs state whether Richardson and Moore still occupy apartment 3A. This is of no moment, however. If they do, then Richardson and Moore may, like the plaintiffs in the "subclass" who are the subject of the second cause of action, commence new proceedings over any rent overcharges they may allege to have suffered since the claims period litigated in this action closed on December 31, 2017. Because this action is governed by the pre-HSTPA versions of RSL § 26-516, the rent overcharge claims asserted herein are subject to the four-year claims period that began on the December 1, 2013 "base date" and closed upon the filing of the complaint.

Also because this action is governed by the pre-HSTPA versions of RSL § 26-516, the Court's review of apartment 3A's rent history is constrained by the four-year "lookback" rule, absent evidence of fraud. *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 357-360. Here, as was the case with Urisaka, there is insufficient evidence that defendants acted fraudulently with respect to Richardson's and Moore's tenancy since they gave them a rent stabilized lease while the building was rent stabilized by operation of law. As a result, the Court may not examine apartment 3A's rent history before the December 1, 2013 "base date." Even so, the building's DHCR rent roll shows that apartment 3A was registered as rent stabilized in 2013 with a "legal regulated rent" of $786.05 per month, of which the previous tenant of record, one Diane Sorzano,

actually paid $486.70 per month. *See* notice of motion (motion sequence number 007), exhibit 7. Sorzano's tenancy evidently continued until Richardson and Moore took possession of apartment 3A in 2018, when the unit's "legal regulated rent" was recorded at $863.91 per month, and Sorzano is recorded as having paid $862.96 per month. *Id.* There is no explanation for defendants' subsequent increase of the "legal regulated rent" to $2,750.00 per month when Richardson and Moore executed their first lease. However, because the building was enrolled in the "J-51" program at the time and "luxury deregulation" was unavailable, the evidence indicates that that increase was improper. As a result, and in reliance on the pre-HSTPA versions of RSL § 26-516, the Court finds that apartment 3A's "legal regulated rent" for the purpose of Richardson's and Moore's overcharge claim is "the rent indicated in the annual registration statement filed four years prior to the most recent registration statement," or the $786.05 per month reflected on the building's DHCR 2013 rent roll. Unfortunately, however, without evidence of Richardson's and Moore's "actual rent payments" during the overcharge claims period, the Court is unable to complete the calculations mandated by the pre-HSTPA versions of RSL § 26-516 regarding their overcharge claim. Accordingly, the Court holds in abeyance so much of plaintiffs' motion as seeks summary judgment on their first cause of action as pertains to Syvonne Richardson and Dametri Moore.

Apartment 4B - Thakur and Shurion

Like Richardson and Moore, Vikas Thakur and Eldad Shurion were also given a rent stabilized lease that ran from February 1, 2017 through February 28, 2018 with a monthly rent of $2,950.00. *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶ 136; exhibit 47. The building's DHCR rent roll indicates that Thakur and Shurion subsequently executed a two-year renewal lease for apartment 4B that ran from March 1, 2018 through February 29, 2020. *Id.*; exhibit 7. However, the parties have not presented a copy of that renewal lease, and defendants did not record the renewal lease's monthly rent on the DHCR rent roll. *Id.* As a result, the Court cannot ascertain whether the renewal lease was rent stabilized, or what amount of monthly rent Thakur and Shurion were charged

after February 28, 2017. All that can be determined is that the "actual rent charges" to Thakur and Shurion between February 1, 2017 through February 28, 2017 totaled $35,400.00. The parties' additional failure to provide a copy of Apartment 4B's payment records during that time prevents the Court from ascertaining what Thakur's and Shurion's "actual rent payments" were.

Because there was no fraud associated with Thakur's and Shurion's tenancy, the Court's review of apartment 4B's governed by the four-year "lookback" rule contained in the pre-HSTPA versions of RSL § 26-516. Under that rule, the unit's "legal regulated rent" is the amount set forth on its DHCR registration in effect on the December 1, 2013 "base date." The DHCR rent roll records that apartment 4B's monthly "legal regulated rents" were 1) $1,040.90 in 2013; 2) $1,040.90 in 2014; 3) $1,121.57 in 2015; 4) $1,121.57 in 2016; and 5) $2,950.00 in 2017. *See* notice of motion (motion sequence number 007), exhibit 7. Defendants offer no explanation for more than doubling apartment 4B's rent between 2016 and 2017. They admit that "there were no major capital improvements during the past ten years" (*Id.*, exhibit 13 at p. 15), and the Court has already noted that "luxury/high rent deregulation" was unavailable for the duration of the building's enrollment in the "J-51" program between 2005 and 2019. *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal,* 35 NY3d at 361. As a result, the Court concludes that the $2,950.00 amount set forth on Thakur's and Shurion's 2017 rent stabilized lease was not the unit's correct rent stabilized "legal regulated rent," and determines that that figure should instead be calculated by reference to the $1,040.90 amount set forth on the unit's 2013 DHCR registration. Because Thakur's and Shurion's "actual rent charges" plainly exceeded apartment 4B's "legal regulated rent," it certainly appears that their rent overcharge claim is meritorious. However, without knowing Thakur's and Shurion's "actual rent payments," the Court cannot determine the exact amount of the overcharge that they sustained between February and December 2017. Accordingly, the Court holds in abeyance so much of plaintiffs' motion as seeks summary judgment on their first cause of action as pertains to Vikas Thakur and Eldad Shurion.

Apartment 4F - Hassan, Sultana and Weinstein

Mahmudal Hassan, Geraldine Sultana, and Gus Weinstein were given a rent stabilized lease that ran from December 1, 2016 through December 31, 2017 with a monthly rent of $2,850.00. *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶ 145; exhibit 48. The building's DHCR rent roll shows that Hassan, Sultana and Weinstein subsequently signed a renewal lease for the unit that ran from January 1, 2018 through December 31, 2018. *Id.*, exhibit 7. However, the parties have not presented a copy of that renewal lease, so the Court cannot ascertain either whether it too was rent stabilized, or what new monthly rent it specified for the renewal term. This is nevertheless of no moment since the renewal lease's term fell outside of the December 2013-December 2017 overcharge claims period, and the Court cannot consider that portion of Hassan's, Sultana's and Weinstein's tenancy in connection with the first cause of action. The Court notes that their 2016-2017 lease establishes that the trio incurred a total of $37,050.00 in "actual rent charges" during that lease's term (13 months x $2,850.00). *Id.*, exhibit 48. However, the parties failure to provide a payment history for apartment 4F prevents the Court from ascertaining Hassan's, Sultana's and Weinstein's "actual rent payments" during that period.

The building's DHCR rent roll shows that defendants registered apartment 4F as rent stabilized between 2013 and 2017, and recorded its monthly "legal regulated rents" at: 1) $1,338.08 in 2013; 2) $1,391.60 in 2014; 3) $1,391.60 in 2015; 4) $1,429.87 in 2016; and 5) $2,850.00 in 2017. *See* notice of motion (motion sequence number 007), exhibit 7. As was the case with Thakur and Shurion, defendants offer no explanation for nearly doubling apartment 4F's rent between 2016 and 2017. As noted, defendants admit that "there were no major capital improvements during the past ten years" (*Id.*, exhibit 13 at p. 15), and the law provides that "luxury/high rent deregulation" was unavailable for the duration of the building's enrollment in 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 concludes that the $2,850.00 amount set forth on Hassan's, Sultana's and Weinstein's 2016-2017 rent stabilized lease was

not the unit's correct rent stabilized "legal regulated rent," and determines that that figure should instead be calculated by reference to the $1,338.08 amount set forth on the unit's 2013 DHCR registration. Because Hassan's, Sultana's and Weinstein's "actual rent charges" plainly exceeded apartment 4F's "legal regulated rent," it certainly appears that their rent overcharge claim is meritorious. However, without knowing the trio's "actual rent payments," the Court cannot determine the exact amount of the overcharge that they sustained between December 2016 and December 2017. Accordingly, the Court holds in abeyance so much of plaintiffs' motion as seeks summary judgment on their first cause of action as pertains to Mahmudal Hassan, Geraldine Sultana, and Gus Weinstein.

Apartment 5C - Ginsburg, Weaver Jr., Ginsburg and/or Weaver Sr.

Brent Ginsberg and Thomas Weaver Jr. executed a non-rent-stabilized lease for apartment 5C that ran from August 1, 2013 through July 31, 2014 with a monthly rent of $2,500.00. *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶ 154; exhibit 49. They and co-tenants Gary Ginsberg and Thomas Weaver Sr. thereafter executed a non-rent-stabilized renewal lease for the unit that ran from August 1, 2014 through July 31, 2015 with a monthly rent of $2,515.00. *Id.*, ¶ 156; exhibit 50. The next non-rent-stabilized renewal lease named only Thomas Weaver Jr. as the tenant of record and ran from August 1, 2015 through July 31, 2016 with a monthly rent of $2,540.15. *Id.*, ¶ 158; exhibit 51. The final non-rent stabilized renewal lease was executed by Thomas Weaver Jr. and Thomas Weaver Sr. as co-tenants, and ran from August 1, 2016 through July 31, 2017 with the same monthly rent of $2,540.15. *Id.*, ¶ 160; exhibit 52. However, it appears that the Weavers vacated the unit abruptly, since defendants executed a lease for apartment 5C with a new group of tenants which commenced on September 1, 2016 (discussed below). *Id.*, ¶ 162. The "actual rent charges" to Ginsburg, Weaver Jr., Ginsburg and/or Weaver Sr. during the overcharge claims period totaled $83,201.95 (8 months x $2,500.00, 12 months x $2,515.00 and 13 months x $2,540.15). The parties have not presented documentation establishing these tenants' "actual rent payments" during that claims period.

The building's DHCR rent roll shows that, after listing apartment 5C as "permanently exempt" from rent regulation in 2002 by reason of "high rent vacancy," defendants did not re-register the unit as rent stabilized until 2016, at which time they recorded its monthly "legal regulated rent" as $2,450.15, and stated that tenant of record Brent Ginsberg actually paid $2,345.00 per month. *See* notice of motion (motion sequence number 007), exhibit 7. In 2017, the DHCR rent roll records apartment 5C's legal regulated rent as $2,500.00. *Id.* Defendants' protracted disregard of their obligation to re-register the unit as rent stabilized in the wake of the *Roberts* and *Gersten* holdings was a fraudulent act that justifies the examination of its rent history beyond the four-year "lookback" period. *Montera v KMR Amsterdam LLC*, 193 AD3d at 108-109. Review of apartment 5C's rent history shows that defendants did not record any "legal regulated rent" for the unit until 2016, at which time they listed the $2,540.14 monthly charge set forth in Weaver's second renewal lease. *See* notice of motion (motion sequence number 007), exhibit 7. Because this constituted an improper attempt to retroactively legitimize an incorrect market rent, the Court may use the "default formula" to set apartment 5C's "legal regulated rent" for the purpose of reviewing this overcharge claim. *Casey v Whitehouse Estates, Inc.*, 197 AD3d at 404. Unfortunately, the Court cannot complete its calculations regarding that claim since plaintiffs (a) have not identified a "comparable apartment" whose 2103 rent can be used in the "default formula" (RSC [9 NYCRR] § 2522.6 [b]), and (b) have not provided a copy of apartment 5C's rent payment history. Accordingly, the Court holds in abeyance so much of plaintiffs' motion as seeks summary judgment on their first cause of action as pertains to Brent Ginsberg, Thomas Weaver Jr., Gary Ginsberg and/or Thomas Weaver Sr.

Apartment 5C - Singh, Veliz and Sahle

As indicated above, defendants executed a non-rent-stabilized lease for apartment 5C with Chandan Singh, Fernando Veliz, and Selam Sahle which ran from September 1, 2016 through August 31, 2017 with a monthly rent of $2,500.00. *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶ 163; exhibit 53. Their "actual rent charges" during the overcharge claims period thus

totaled $30,000.00 (12 months x $2,500.00). *Id.*, exhibit 53. Their "actual rent payments" during the overcharge claim period cannot be ascertained at this juncture because plaintiffs have not presented a copy of the trio's rent payment history.

Plaintiffs note that defendants failed to re-register apartment 5C as rent stabilized until two months after Singh's, Veliz's and Sahle's tenancy had commenced, despite many years having passed since the *Roberts* and *Gersten* decisions had been rendered. *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶ 165. For the same reasons as discussed in connection with the Ginsberg/Weaver tenancy *supra.*, the Court finds that defendants' persistent disregard of their obligations warrants both disregarding the four-year "lookback" rule and utilizing the "default formula" in the case of Singh, Veliz and Sahle. However, plaintiffs' failure to identify a "comparable apartment" to 5C also similarly prevents the Court from completing the statutory calculations pertaining to Singh's, Veliz's and Sahle's rent overcharge claim. Accordingly, the Court holds in abeyance so much of plaintiffs' motion as seeks summary judgment on their first cause of action as pertains to Chandan Singh, Fernando Veliz, and Selam Sahle.

Apartment 5C - Sturken

Kyra Sturken executed a non-rent-stabilized lease for Apartment 5C with defendants that ran from November 1, 2017 through October 31, 2018 with a monthly rent of $2625.00. *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶ 169; exhibit 54. Because only two months of her tenancy fell within the December 1, 2013-December 31, 2017 overcharge claims period, Sturkes's total "actual rent charges" during that period only amounted to $5,250.00 (2 months x $2625.00). Plaintiffs have not presented any evidence of Sturken's "actual rent payments." Apartment 5C's "legal regulated rent" is to be set via the "default formula," as discussed above. However, plaintiffs' failures to identify a "comparable apartment" to use in that formula or to establish Sturken's "actual rent payments" during the overcharge claims period prevents the Court from completing the statutory calculations necessary to evaluate her rent overcharge claim. Accordingly, the Court holds in abeyance

so much of plaintiffs' motion as seeks summary judgment on their first cause of action as pertains to Kyra Sturken.

Apartment 5E - Wipfler, Roos, Roberts and Gold

Jillian Wipfler, Emma Roos, Kelsey Roberts, and Jacqueline Gold executed a rent stabilized lease for apartment 5E that ran from January 1, 2017 through January 31, 2018 with a monthly rent of $2,995.00. *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶ 172; exhibit 55. For the 12 monthly of that lease term which fell within the overcharge claims period, Wipfler, Roos, Roberts and Gold were billed a total of $35,940.00 in "actual rent charges" (12 months x $2,995.00). Plaintiffs have not presented documentation of the quartet's "actual rent payments" during the overcharge claims period.

Because Wipfler, Roos, Roberts and Gold were given a rent stabilized lease at a time when the building was rent stabilized by operation of law, the four-year "lookback" rule in the pre-HSTPA versions of RSL § 26-516 applies, and the Court's review of apartment 5E's rent history cannot extend beyond the December 1, 2013 "base date." *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 357-360. The building's DHCR rent roll states that apartment 5E's "legal regulated rent" on that date was $1,512.98 per month. *See* notice of motion (motion sequence number 007), exhibit 7. It certainly appears that defendants charged Wipfler, Roos, Roberts and Gold a monthly rent that exceeded apartment 5E's "legal regulated rent" during the overcharge claims period. However, without establishing the tenants' "actual rent payments" during that time, the Court cannot complete the statutory calculations required to determine their overcharge claim. Accordingly, the Court holds in abeyance so much of plaintiffs' motion as seeks summary judgment on their first cause of action as pertains to Jillian Wipfler, Emma Roos, Kelsey Roberts, and Jacqueline Gold.

In conclusion, the Court holds plaintiffs' request for summary judgment on their first cause of action in abeyance pending plaintiffs' submission of the additional evidence described above. The

Court concomitantly also holds in abeyance so much of defendants' motion as seeks summary judgment dismissing that cause of aciton. The Court directs plaintiffs to make the above-described submission within 45 days from entry of this decision and order.

Plaintiffs' Second and Third Causes of Action

Plaintiffs' second cause of action seeks summary judgment on behalf of a defined "subclass" composed of "all current tenants at [the building] who currently reside in an unlawfully deregulated apartment." *See* amended complaint, ¶¶ 61, 81-89; NYSCEF document 256. The eight members of the "subclass" on whose behalf plaintiffs assert the second cause of action are: 1) Delphin Ndayemeye and Charlotte Ndayishimaye (1B) 2) Heath Woodson and Richard Streeter (1C); 3) Frederick and Mary Bigger (1E); 4) Christopher Thomas, Ngoc An Nguyen and Shashana Packus (2C); 5) Ozgur Tarhan (2D); 6) Edmee Ervin (2F); 7) Virginia Pike, Stephanie Kirkman, Donald Pike and/or Nadine Serfas (6B); and 8) Daniel Larkin, Joseph W. Davidson and/or Alisa Selman (6C). *See* notice of motion (motion sequence number 007), Sachar affirmation, ¶¶ 14-202; exhibits 8, 10, 14, 16-19, 20-24, 25-28, 31-37, 39-45, 46, 47, 48, 49-54, 55, 56-60, 61-66. Plaintiffs' second cause of action does not seek money damages for rent overcharges collected by defendants in violation of (pre-HSPTA) RSL § 26-516 (a), but rather seeks certain equitable relief that was authorized by (pre-HSTPA) RSL § 26-516 (e). Plaintiffs specifically seek declarations:

> "a. [that] the apartments of Plaintiffs and members of the Sub-Class are each subject to the RSL and RSC;
> "b. [that] Plaintiffs and members of the Sub-Class are each entitled to a rent-stabilized lease in a form promulgated by DHCR;
> "c. [calculating] the amount of the legal regulated rent for the apartments of Plaintiffs and members of the Sub-Class;
> "d. [that] any leases offered by Defendants to Plaintiffs and members of the Sub-Class are invalid and unlawful unless they are offered on lease forms and terms prescribed by DHCR; and
> "e. [that] Plaintiffs and members of the Sub-Class are not required to pay any rent increases unless and until legally permissible rent-stabilized lease offers are made to, and accepted by, Plaintiffs and members of the Sub-Class."

See amended complaint, ¶¶ 61, 81-89; NYSCEF document 256. The Court notes that plaintiffs' third cause of action seeks the same five-part declaratory judgment (with slightly different wording). *Id.*, ¶¶

90-95. Because both causes of action seek identical relief, the Court will consider them together as one claim.[12]

> The pre-HSTPA versions of RSL § 26-516 (e) provided that:
>
> "Violations of this law, or of the code [i.e., the RSL or RSC; specifically, the regulations set forth in 9 NYCRR Part 2520 et seq. of the latter] and orders issued pursuant thereto may be enjoined by the supreme court upon proceedings commenced by the [DHCR] which shall not be required to post bond."

RSL § 26-516 (e), eff. Oct. 9, 2009; L.2009; eff. June 26, 2015. Plaintiffs do not seek injunctive relief in this action. Instead, they request several declaratory judgments which they presumably intend to serve on the DHCR (if successful), and/or to enforce via injunction afterwards (if necessary). Declaratory judgment is a discretionary remedy which may be granted "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR 3001; *see e.g.*, *Jenkins v State of N.Y., Div. of Hous. & Community Renewal*, 264 AD2d 681 (1st Dept 1999). It has long been the rule that, in an action for declaratory judgment, the Court may properly determine respective rights of all of the affected parties under a lease. *See Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 (1926).

The first declaration that plaintiffs seek is that "the apartments of Plaintiffs and members of the Sub-Class are each subject to the RSL and RSC." *See* amended complaint, ¶ 87-a; NYSCEF document 256. The building's DHCR rent roll indicates that all of its units were either rent stabilized or rent controlled in 1984. *See* notice of motion (motion sequence number 007), exhibit 7. As the Court noted

---

[12] The only deviation between the pleading of the second and third causes of action is that the latter requests a declaration that "the apartments of Plaintiffs and members of the Sub-Class members are subject to the RSL and RSC *and any purported deregulation by Defendants was invalid as a matter of law*." *See* amended complaint, ¶ 95-a; NYSCEF document 256 (emphasis added). The court has addressed the question of deregulation earlier in this decision. To the extent that the "purported deregulation" mentioned in the third cause of action refers to plaintiff's deregulation of apartments 1B, 1C, 2C, 2F and 5C in 2001 and 2002, the court has already determined that those deregulations were proper. To the extent that the claim refers to alleged "deregulations" after the building's 2005 enrollment in the "J-51" program, the court has already determined that such deregulations were improper pursuant to the *Roberts* and *Gersten* holdings. Because the language in the third cause of action is unclear about which "deregulations" plaintiffs are referring to, and because the court has made determinations concerning each type of "deregulation," the Court considers the language in the pleading to be mere surplusage and disregards it.

supra, defendants had lawfully deregulated five of the apartments involved in this action between 2002 and 2003. Further review of the rent roll indicates that defendants had deregulated five other units before that. Nevertheless, as the Court also noted *supra*, all of the building's apartments became rent stabilized again by operation of law upon the building's enrollment in the "J-51" real estate tax abatement program in 2005. *Gersten v 56 7th Ave. LLC*, 88 AD3d at 197-198, citing *Roberts v Tishman Speyer Props., L.P.*, 13 NY3d at 285. That status persisted until the building exited the "J-51" program 19 years later in June 2019. *Montera v KMR Amsterdam LLC*, 193 AD3d at 103. The building's rent stabilized status became permanent on the HSTPA's June 14, 2019 effective date via the statute's repeal of the RSC's "high rent" and "luxury" deregulation procedures. Defendants concede that the previously deregulated units are now rent stabilized along with the rest of the building's apartments. *See* notice of motion (motion sequence number 008), Rieder aff, ¶ 38; defendants' mem of law (motion sequence number 008) at 25. As a result, the Court finds that plaintiffs are entitled to the declaration they request regarding the rent stabilized status of their apartments.

That finding is dispositive with respect to several of the plaintiffs' other declaratory judgment requests. They seek a declaration that "Plaintiffs and members of the Sub-Class are each entitled to a rent-stabilized lease in a form promulgated by DHCR." *See* amended complaint, ¶ 87-b; NYSCEF document 256. RSC (9 NYCRR) §§ 2522.5 (a) and (c) require that landlords offer tenants rent stabilized leases that conform to the RSL and "plain language" requirements of General Obligations Law § 5-702, and riders "in a form promulgated or approved by the DHCR." Defendants do not argue against the applicability of this regulation. Therefore, plaintiffs are entitled to the declaration they request.

Plaintiffs seek a declaration that "any leases offered by Defendants to Plaintiffs and members of the Sub-Class are invalid and unlawful unless they are offered on lease forms and terms prescribed by DHCR." *See* amended complaint, ¶ 87-d; NYSCEF document 256. This request restates the one just

discussed, and is supported by the regulations just cited. Defendants do not oppose it. Therefore, plaintiffs are entitled to the declaration they request.

Plaintiffs seek a declaration that "Plaintiffs and members of the Sub-Class are not required to pay any rent increases unless and until legally permissible rent-stabilized lease offers are made to, and accepted by, Plaintiffs and members of the Sub-Class." *See* amended complaint, ¶ 87-e; NYSCEF document 256. 256. RSC (9 NYCRR) §§ 2522.5 (c) (3) provides that:

> "Where a tenant, [or] permanent tenant . . . is not furnished, as required by the above provision, with a copy of the lease rider pursuant to paragraph (1), the notice pursuant to paragraph (2), or the documentation required on demand by paragraph (1) (ii) of this subdivision, *the owner shall not be entitled to collect any adjustments in excess of the rent set forth in the prior lease unless the owner can establish that the rent collected was otherwise legal.* In addition to issuing an order with respect to applicable overcharges, DHCR shall order the owner to furnish the missing rider, notice, or documentation. The furnishing of the rider, notice, or documentation by the owner to the tenant or hotel occupant shall result in the elimination, prospectively, of such penalty. . .."

RSC (9 NYCRR) §§ 2522.5 (c) (3) (emphasis added). Defendants do not contest the applicability of this regulation either. Therefore, plaintiffs are entitled to the declaration they request.

Although defendants did not challenge the applicability of any of the foregoing regulations, they did argue that plaintiffs' requests for declarations derived from those regulations were moot because they have already provided leases in the proscribed formats. *See* plaintiffs' mem of law (motion sequence number 008), at 25-26. Plaintiffs respond that "[d]efendants did not provide rent-stabilized leases until after the initiation of this litigation," that they did not provide such leases to all of the building's tenants, and note that several of the leases omitted provisions required by the RCS, included improper rent increases and/or "utilized preferential rents, in direct contravention of DHCR's express directives." *See* plaintiffs' reply mem (motion sequence number 008), at 10-13. The court notes that the documentary evidence annexed to defendants' motion is incomplete and does not support their blanket assertions. See notice of motion (motion sequence number 008), exhibits 1-70. Therefore, the court rejects defendants' "mootness" argument as unsupported.

Plaintiffs' final request for declaratory relief seeks a ruling calculating "the amount of the legal regulated rent for the apartments of Plaintiffs and members of the Sub-Class." *See* amended complaint, ¶ 87-d; NYSCEF document 256. Plaintiffs argue that "post-*Regina* case law requires imposition of the default formula," and asserts that "[s]hould the Court be so inclined, the matter may be referred to the Special Referees Part, or . . . [to a JHO] to conduct the appropriate comparisons, determine the legal regulated rents, and calculate damages (and interest thereon)." *See* plaintiffs' mem of law (motion sequence number 007) at 19-22. Defendants do not directly discuss plaintiffs' requests for declaratory relief, but they rely on their counterarguments that "absent fraud plaintiffs cannot go beyond the four-year lookback period," and "the uncontroverted record is devoid of intent to defraud as a matter of law." *See* defendants' mem of law (motion sequence number 008), at 18-25. The parties' opposition and reply papers merely restate these arguments.[13] *See* plaintiffs' mem of law in opposition (motion sequence number 008), at 21-24; defendants' omnibus mem of law in opposition and reply (motion sequence numbers 007 & 008), at 4-13; plaintiffs' mem of law in further support (motion sequence number 007), at 4-9. The Court has already rejected defendants' arguments for the reasons discussed earlier in this decision. However, the Court cannot grant plaintiffs' application for reasons that were also discussed earlier in this decision. In order to utilize the "default formula" to establish an apartment's "legal regulated rent" on a "base date," RSC (9 NYCRR) § 2522.6 (b) requires that a "comparable apartment" be identified whose contemporaneous "base date rent" may be referred to in order to establish the "legal regulated rent" of the apartment in question. Here, however, the Court has repeatedly noted that plaintiffs have failed to identify any "comparable apartments" in connection with their overcharge claims. That lack of evidence precludes the Court from issuing final rulings on those claims at this juncture. It likewise preludes the Court from issuing declaratory judgments as to "the amount of the legal regulated rent for the apartments of Plaintiffs and members of the Sub-Class" at this juncture.

[13] With the exception of defendants' supplemental submission concerning the First Department's holding of *Montera v KMR Amsterdam LLC*, discussed *supra*. in n 9.

Only after the parties have submitted the necessary evidence can the Court complete its review of plaintiffs' claims. Accordingly, the Court holds in abeyance so much of plaintiffs' motion as seeks summary judgment on the proposed declaration set forth in subparagraph 87-d of their second (and/or third) cause(s) of action.[14]

In conclusion, the Court grants plaintiffs' motion for summary judgment on their second and third causes of action to the extent set forth above, and holds the balance of their requests in abeyance pending their submission of the evidence described in the first part of this decision. The Court concomitantly also holds in abeyance so much of defendants' motion as seeks dismissal of those claims.

Defendants' Affirmative Defenses and Counterclaim

The balance of plaintiffs' motion seeks summary judgment to strike defendants' affirmative defenses and counterclaim, while defendants' motion seeks summary judgment on their counterclaim. Defendants' amended answer raises the affirmative defenses that: 1) the HSTPA is unconstitutional; 2) failure to state a claim; 3) co-defendant Chestnut is not an owner of the building; 4) defendants "did nothing wrong"; 5) statute of limitations; 6) the "class" and "subclass" mentioned in the complaint do not met the statutory requirements for class certification; 7) the "class" and the "subclass" do not meet the "numerosity" requirement; 8) the "class" and the "subclass" do not meet the "common question of fact or law" requirement; 9) the "class" and the "subclass" do not meet the "typicality" requirement; 10) a class action is not the best available procedural vehicle for plaintiffs to pursue their claims; and 11) the DHCR has jurisdiction over rent overcharge claims. *See* amended answer, ¶¶ 96-111; NYSCEF document 277. Defendants also assert a counterclaim for court costs and attorney's fees. *Id.*, ¶¶ 112-113. Plaintiffs correctly note that defendants' moving, opposition and reply papers did not set forth any legal arguments whatsoever concerning their affirmative defenses and counterclaim, and assert that the

[14] To the extent that plaintiffs intend to use this declaratory judgment as a basis for asserting claims for money damages against defendants as compensation for rent overcharges collected from members of the "subclass" after December 2017, the court notes that that issue is not before it, since their second and third causes of action seek only equitable relief (i.e., declaratory judgments, injunctions and lease reformation) rather than money damages.

Court should consider defendants to have abandoned them. *See* plaintiffs' mem of law in further support (motion sequence number 007), at 4. The Court finds that the majority of defendants' affirmative defenses should be stricken, but not for that reason.

Defendants' first affirmative defense asserts that the HSTPA is unconstitutional. *See* amended answer, ¶¶ 96-101; NYSCEF document 277. This statement is incorrect as a matter of law. The Court of Appeals has determined that the HSTPA *is* constitutional, although its amended rent overcharge provisions cannot be applied retroactively. *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 386. Therefore, the Court finds that defendants' first affirmative defense should be dismissed as meritless.

Defendants' second affirmative defense asserts that the complaint "fails to state a claim" pursuant to CPLR 3211 (a) (7). *See* amended answer, ¶ 102; NYSCEF document 277. The court cannot make a determination regarding this affirmative defense at this juncture since it has held plaintiffs' request for summary judgment on its claims in abeyance pending the submission of further evidence. Therefore, the Court denies so much of plaintiffs' motion as seeks summary judgment striking second affirmative defense with leave to renew their application after the submission of said evidence.

Defendants' third affirmative defense asserts that co-defendant Chestnut is not an owner of the building. *See* amended answer, ¶ 103; NYSCEF document 277. This is irrelevant. A managing agent that participates with a building owner in a "fraudulent scheme to deregulate" rent stabilized apartments is a proper party to any subsequent rent overcharge litigation. *See e.g.*, *Haygood v Prince Holdings 2012 LLC*, 186 AD3d 1157, 1158-1159 (1st Dept 2020). Therefore, the Court finds that defendants' third affirmative defense should be dismissed as meritless.

Defendants' fourth affirmative defense asserts that they "did nothing wrong." *See* amended answer, ¶ 104; NYSCEF document 277. This is a vague and meaningless statement. To the extent that defendants contend that there is insufficient proof that they violated the provisions of the RSL and/or RSC, the concerns that they raise in the fourth affirmative defense will be adequately addressed by their

second affirmative defense. Therefore, the Court finds that defendants' fourth affirmative defense should be dismissed as duplicative and meritless.

Defendants' fifth affirmative defense raises the statute of limitations. *See* amended answer, ¶ 105; NYSCEF document 277. However, defendants have presented no evidence (or argument) that any of plaintiffs' claims are untimely. The Court has already determined that plaintiffs' overcharge claims are governed by the four-year limitations period set forth in the pre-HSTPA versions of RSL § 26-516, and has limited its review of those claims to that claims period. Therefore, the Court finds that defendants' fifth affirmative defense should be dismissed as meritless.

Defendants' sixth through tenth affirmative defenses challenge the legal sufficiency of plaintiffs' "class" and "subclass" definitions and the propriety of proceeding on their claims via class action suit. *See* amended answer, ¶¶ 106-110; NYSCEF document 277. However, the Court has already issued rulings granting plaintiffs' requests for class certification and for leave to interpose amended definitions of "class" and "subclass" in their complaint (motion sequence numbers 003 & 006). *See* NYSCEF documents 233, 274. Therefore, the Court finds that the challenges raised in defendants' sixth through tenth affirmative defenses should be dismissed as moot.

Defendants' eleventh affirmative defense asserts that the DHCR has jurisdiction over rent overcharge claims. *See* amended answer, ¶ 111; NYSCEF document 277. This is irrelevant. As noted previously, appellate case law recognizes that "the court and DHCR have concurrent jurisdiction over rent overcharge claims, subject to the tenant's choice of forum." *Matter of Hefti v New York State Div. of Hous. & Community Renewal*, 203 AD3d at 605-606, citing *Collazo v Netherland Prop. Assets LLC*, 35 NY3d at 990. Therefore, the Court finds that defendants' eleventh affirmative defense should be dismissed as meritless.

Defendants motion also seeks summary judgment on their counterclaim for court costs and attorney's fees. *See* amended answer, ¶¶ 112-113; NYSCEF document 277. The Court notes that plaintiffs included an identical request in their amended complaint, although they did not designate it as

a separate cause of action. *See* amended complaint at 16, subparagraph F, NYSCEF document 256. CPLR 8101 provides that "[t]he party in whose favor a judgment is entered is entitled to costs in the action, unless otherwise provided by statute or unless the court determines that to so allow costs would not be equitable, under all of the circumstances." New York law recognized 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, the outcome of the litigation has not yet been determined, since the parties must submit further evidence before the court can adequately assess the claims and counterclaims before it. As a result, it would be premature to rule on defendants' counterclaim for court costs and attorney's fees at this juncture. Therefore, the Court denies so much of plaintiffs motion as seeks summary judgment dismissing defendants' counterclaim, and so much of defendants' motion as seeks summary judgment on that counterclaim, as premature. These denials are without prejudice to the parties' rights to renew their respective applications at the close of the litigation of this matter.

In conclusion, the Court grants, in part, and denies, in part, so much of plaintiffs' motion as seeks summary judgment dismissing defendants' affirmative defenses and counterclaims, and also denies, without prejudice, so much of defendants' motion as seeks summary judgment on their counterclaim.

CONCLUSION

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the branch of the plaintiffs' motion (motion sequence number 007) seeking summary judgment dismissing defendants' affirmative defenses is granted in part to the extent that defendants' first, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh affirmative defenses are dismissed; it is further

ORDERED that the branch of the plaintiffs' motion seeking summary judgment on defendants' counterclaim for court costs and attorneys' fees is denied without prejudice and with leave to renew; and it is further

ORDERED that the branches of the plaintiffs' motion for summary judgment on their second and third causes of action for declaratory judgment is granted as to subdivisions (a), (b), (d), and (e) as set forth herein; and it is further

ORDERED, ADJUDGED, and DECLARED that the apartments of plaintiffs and members of the subclass are each subject to the RSL and RSC; and it is further

ORDERED, ADJUDGED, and DECLARED that plaintiffs and members of the subclass are each entitled to a rent-stabilized lease in a form promulgated by DHCR; and it is further

ORDERED, ADJUDGED, and DECLARED that any leases offered by defendants to plaintiffs and members of the subclass are invalid and unlawful unless they are offered on lease forms and terms prescribed by DHCR; and it is further

ORDERED, ADJUDGED, and DECLARED that plaintiffs and members of the subclass are not required to pay any rent increases unless and until legally permissible rent-stabilized lease offers are made to, and accepted by, plaintiffs and members of the subclass; and it is further

ORDERED that the remaining claims are severed and shall proceed, namely: (1) plaintiffs' first cause of action for monetary damages; (2) subdivision (c) of plaintiffs' second and third causes of action for declaratory judgment; (3) defendants' second affirmative defense; and it is further

ORDERED that those branches of plaintiffs' motion for summary judgment related to the remaining claims listed in the preceding paragraph are held in abeyance pending submission of additional evidence as set forth herein; and it is further

ORDERED that the branch of defendants' motion for summary judgment (motion sequence no. 008) on their counterclaim for court costs and attorneys' fees is denied without prejudice and with leave to renew; and it is further

ORDERED that the remainder of the defendants' motion for summary judgment, to dismiss the amended complaint, is held in abeyance pending submission of additional evidence as set forth herein; and it is further

ORDERED that plaintiffs shall submit the aforementioned evidence described in this decision above via NYSCEF within 45 days of entry of this decision and order; and it is further

ORDERED that defendants Convent 1 LLC and Chestnut Holdings of New York, Inc. may e-file a response to plaintiffs' submission within 30 days after plaintiffs' submission; or may alternatively e-file a letter or stipulation declining to make such a submission; and it is further

ORDERED that motion sequence nos. 007 and 008 are restored to the IAS Part 18 motion calendar on **October 3, 2022** for the submission of the additional papers only and at which time no appearance will be necessary.[15]

This constitutes the decision and order of the Court.

7/7/2022
DATE

ALEXANDER TISCH, 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

[15] Requests for extensions of time to e-file additional submissions and/or to adjourn this return date shall be directed to the Part 18 Clerk (SFC-Part18-Clerk@nycourts.gov).