SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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STEPHEN TOWNSEND, AUSTIN SMITH,
TAMARA ROMERO, BRIAN MCFARLAND,
LETA MARGARET BARRY AND ANTHONY BAER,
GABRIEL AND ALEXIS LANDES, AND
BRUCE KOLB

Plaintiffs,

-against-

B-U REALTY CORP.

Defendant.

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Index No. 160291/2015

VERFIED ANSWER

Defendant, B-U REALTY CORP., hereby appears by its attorneys, Sidrane & Schwartz-Sidrane, LLP, 119 North Park Avenue, Suite 201, Rockville Centre, New York, 11570, (516) 569-9539, and answer Plaintiffs' Summons and Complaint, and alleges as follows:

1. Defendant denies the allegations contained in paragraph 1 of the complaint.
2. Defendant denies the allegations contained in paragraph 2 of the complaint.
3. Defendant denies the allegations contained in paragraph 3 of the complaint.
4. Defendant denies the allegations contained in paragraph 4 of the complaint.
5. Defendant denies the allegations contained in paragraph 5 of the complaint.
6. Defendant admits so much of the allegations contained in paragraph 6 of the complaint that asserts that Stephen Townsend is the tenant of Apt. 7G, and denies knowledge or information sufficient to form an opinion regarding the remainder of the allegations contained in paragraph 6 of the complaint.
7. Defendant admits so much of the allegations contained in paragraph 7 of the complaint that asserts that Austin Smith is the tenant of Apt. 7F, and denies knowledge or information sufficient to form an opinion regarding the remainder of

the allegations contained in paragraph 7 of the complaint.

8. Defendant admits so much of the allegations contained in paragraph 8 of the complaint that asserts that Tamara Romero is the tenant of Apt. 7B, and denies knowledge or information sufficient to form an opinion regarding the remainder of the allegations contained in paragraph 8 of the complaint.
9. Defendant admits so much of the allegations contained in paragraph 9 of the complaint that asserts that Brian McFarland is the tenant of Apt. 7A, and denies knowledge or information sufficient to form an opinion regarding the remainder of the allegations contained in paragraph 9 of the complaint.
10. Defendant admits so much of the allegations contained in paragraph 10 of the complaint that asserts that Leta Margaret Barry and Anthony Baer are the tenants of Apt. 10C, and denies knowledge or information sufficient to form an opinion regarding the remainder of the allegations contained in paragraph 10 of the complaint.
11. Defendant admits so much of the allegations contained in paragraph 11 of the complaint that asserts that Gabriel and Alexis Landes are the tenants of Apt. 4A, and denies knowledge or information sufficient to form an opinion regarding the remainder of the allegations contained in paragraph 11 of the complaint.
12. Defendant admits so much of the allegations contained in paragraph 12 of the complaint that asserts that Bruce Kolb is the tenant of Apt. 3A, and denies knowledge or information sufficient to form an opinion regarding the remainder of the allegations contained in paragraph 12 of the complaint.
13. Defendant admits the allegations contained in paragraph 13 of the complaint.
14. Defendant admits the allegations contained in paragraph 14 of the complaint.

15. Defendant admits the allegations contained in paragraph 15 of the complaint.
16. Defendant denies the allegations contained in paragraph 16 of the complaint.
17. Defendant denies the allegations contained in paragraph 17 of the complaint.
18. Defendant admits the allegations contained in paragraph 18 of the complaint.
19. Defendant refers the court to the statutes, laws and codes referenced for the true meaning thereof contained in paragraph 19 of the complaint.
20. Defendant admits the allegations contained in paragraph 20 of the complaint.
21. Defendant denies the allegations contained in paragraph 21 of the complaint.
22. Defendant denies the allegations contained in paragraph 22 of the complaint.
23. Defendant denies the allegations contained in paragraph 23 of the complaint.
24. Defendant denies the allegations contained in paragraph 24 of the complaint.
25. Defendant denies the allegations contained in paragraph 25 of the complaint.
26. Defendant denies the allegations contained in paragraph 26 of the complaint.
27. Defendant refers the court to the statutes, laws and codes referenced for the true meaning thereof contained in paragraph 27 of the complaint.
28. Defendant refers the court to the statutes, laws and codes referenced for the true meaning thereof contained in paragraph 28 of the complaint.
29. Defendant denies knowledge or information sufficient to form an opinion regarding the allegations contained in paragraph 29 of the complaint.
30. Defendant denies the allegations contained in paragraph 30 of the complaint.
31. Defendant denies the allegations contained in paragraph 31 of the complaint.
32. Defendant denies the allegations contained in paragraph 32 of the complaint.
33. Defendant denies the allegations contained in paragraph 33 of the complaint.

34. Defendant denies the allegations contained in paragraph 34 of the complaint.

35. Defendant denies the allegations contained in paragraph 35 of the complaint.

36. Defendant denies the allegations contained in paragraph 36 of the complaint.

37. Defendant denies the allegations contained in paragraph 37 of the complaint.

38. Defendant refers the court to the statutes, laws and codes referenced for the true meaning thereof contained in paragraph 38 of the complaint.

39. Defendant denies the allegations contained in paragraph 39 of the complaint.

40. Defendant denies the allegations contained in paragraph 40 of the complaint.

41. Defendant denies the allegations contained in paragraph 41 of the complaint.

42. Defendant denies the allegations contained in paragraph 42 of the complaint.

43. Defendant denies the allegations contained in paragraph 43 of the complaint.

44. Defendant denies the allegations contained in paragraph 44 of the complaint.

45. Defendant denies the allegations contained in paragraph 45 of the complaint.

46. Defendant denies the allegations contained in paragraph 46 of the complaint.

47. Defendant denies the allegations contained in paragraph 47 of the complaint.

48. Defendant denies the allegations contained in paragraph 48 of the complaint.

49. Defendant denies the allegations contained in paragraph 49 of the complaint.

50. Defendant refers the court to the statutes, laws and codes referenced for the true meaning thereof contained in paragraph 50 of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

51. Plaintiffs have failed to state a cause of action upon which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

52. Defendant B-U Realty Corp. treated Plaintiffs as free market tenants based on its

reasonable reliance on the policy and procedures of the New York State Division of Housing and Community Renewal's ("DHCR") policy allowing high rent deregulation despite the receipt of J-51 tax benefits. Defendant recognizes that DHCR's policy allowing high rent vacancy deregulation while receiving J-51 tax benefits, has been overruled by the Court of Appeals decision in Roberts v. Tishman-Speyer Props., L.P., 13 NY3d 270 (2009), and now considers the Plaintiffs' tenancies to have been rent regulated after 7/1/2005.

53. Plaintiffs' rents were set under varying circumstances. Some of the Plaintiff's rents commenced prior to the time Defendant was receiving tax benefits under the J-51 program. Some of the Plaintiffs' rents were set following a transition of their apartment from Rent Control to Free Market Status, or to Rent Stabilized status. Some of the Plaintiff's rents were treated as free market in error based on Defendant's reliance of DHCR's own policies and procedures which were clarified in the Roberts case.

54. Any overcharge found by the Court is not willful, but based on Defendant's reasonable reliance on DHCR's own policies and procedures relating to high rent deregulation.

55. Wherefore, based on the above, Plaintiffs are not entitled to treble damages based on the Defendant's alleged willful overcharge of rent.

Apt. 7G- STEPHEN TOWNSEND

56. The Defendant commenced receiving J-51 tax benefits on 7/1/2005.

57. Plaintiff Stephen Townsend moved into the subject premises on August 1, 2005, pursuant to a one year lease at a legal rent of $4,200.00, which was less than the rent

that could have been charged, based on Rent Guidelines Board ("RGB") Order #36, which allowed a 17% increase over the prior rent.[1]

58. This Plaintiff assumed occupancy on August 1, 2005, four (4) years prior to the Roberts decision, and prior to the base date in this action. The Defendant reasonably, but mistakenly relied on DHCR's own interpretation of the Rent Stabilization Code ("RSC") and treated Plaintiff's occupancy as free market up to the receipt of notification from the DHCR of its obligation to register the apartment. On February 3, 2015, Defendant registered the subject apartment as rent stabilized.[2]

59. The subject apartment was a free market apartment until 7/1/2005, as the prior legal rent exceeded the rent threshold for high-rent vacancy deregulation, prior to the Owner receiving the J-51 tax benefit. The subject apartment was mistakenly registered with DHCR as Permanently Exempt ("PE") in 1999, when its rent first exceeded the deregulation threshold. However, this was done in error (and again, in Defendant's reasonable, but mistaken belief that the receipt of J-51 tax benefits did not preclude high-rent deregulation of the apartment).

60. The prior J-51 tax benefits expired on June 30, 2000, and the apartment thereafter became Permanently Exempt on November 1, 2000 pursuant to RSC 2520.11(r)(4).

61. On the Plaintiff's third renewal lease, the legal rent increased to $4,633.88 for the lease dated 8/1/09 – 6/30/12. The Defendant charged this Plaintiff $5,096.00. This is the base date rent for calculation of rent overcharges, which is October, 2011.

62. On the fourth lease renewal the legal rent increased to $4,807.66 for the lease, dated

[1] The legal rent that could have been charged on Plaintiff Townsend's initial occupancy was $4,797.00.

[2] The apartment was registered as Rent Stabilized well prior to the commencement of this action.

7/1/12-6/30/13, but the Defendant charged this Plaintiff $5,248.88, for this lease period.

63. On the fifth lease renewal, the legal rent increased to $4,903.81 for the lease, dated 7/1/13-6/31/14, but the Defendant charged this Plaintiff $5,344.00 for this lease period.

64. On the last renewal the legal rent increased to $5,099.96 for the lease, dated 7/1/14-6/30/15, but, again, the Defendant charged this Plaintiff $5,557.76.

65. No Rent Stabilized renewal lease has been signed by the Plaintiff Townsend. As noted above, all of the maximum legal rents for this apartment for the Plaintiff were registered prior to the commencement of this action.

66. The rental history of the subject apartment is known and the maximum legal rent, based on leases and ledgers from the base date forward and prior to the receipt of the J-51 tax benefits is available. (See 72A Realty Assoc. v. Lucas, 101 A.D.3d 401 (N.Y. App. Div. 1st Dep't 2012)[Court to review all available rental history in determining the correct base date rent].

67. At the time the Defendant presented and entered into these leases with the Plaintiff, Defendant was reasonably, but mistakenly relying on its belief that once the legal rent reached the deregulation threshold, the apartment was deregulated and could be charged market rents.

68. Significantly, the Defendant recognizes the error in treating the apartment as unregulated and has refunded all overcharges from the first incorrect renewal, including 9% statutory interest, to Plaintiffs, in the sum of $19,540.49, plus a security refund of $457.80.

69. Any overcharge found by the Court is not willful, but occurred based on Defendant's reasonable reliance on DHCR's own policies and procedures relating to high rent deregulation well in advance of the Roberts decision, and not on any fraudulent scheme to deregulate the apartment. Thus, the legal base date rent should be found by the Court based on the available rental history, including the leases and current registrations, not on the default formulate where such rental information is unknown.

70. Wherefore, based on the above, Plaintiffs are not entitled to treble damages based on the Defendant's willful overcharge of rent.

71. The Plaintiff has not made any payment towards rent or use and occupancy since August 2014. The Owner has tendered to the Plaintiffs, a rent overcharge refund of $19,540.49 through November 2015, including 9% statutory interest from the base date (October 2011) calculated on the above noted legal rents. In addition to this overcharge refund, the Tenants have been tendered a return of their excess security of $457.80.

72. This apartment has been registered with the DHCR at the corrected legal rent, this overcharge with interest has been tendered to the Plaintiff, and the Plaintiff has been offered a Rent Stabilized Renewal Lease.

Apt. 7F- AUSTIN SMITH

73. This Plaintiff assumed occupancy on July 1, 2012, and paid a rent of $3,400.00 pursuant to a lease, dated 7/1/12 – 6/30/13.

74. The maximum legal rent for this apartment when the Plaintiff moved in, however, was only $3,374.11. This is the maximum legal rent calculated based on legal increases from the first Rent Stabilized Tenant (Matthiak & Diskin) after the Owner

started receiving J-51 benefits on July 1, 2005, who had a legal rent of $2,650.00. Pursuant to that lease which commenced on November 1, 2004, and ended on October 31, 2005, the apartment was legally, at the time, deregulated, pursuant to RSC 2520.11(r)(4).

75. The Plaintiff's initial maximum legal rent of $3,374.11, is based on a 16.5% vacancy increase as allowed by statute from the base date rent of the prior tenants of $2,896.23. Thereafter, although the Defendant correctly used a 2.0% increase for the renewal lease (dated 7/1/13 – 6/30/14), the rent on the initial lease was incorrect, which the Defendant mistakenly applied this 2% rent increase, so the renewal was incorrect as well. The RGB Order (Order #44) in effect at the time allowed an increase to $3,441.59. Thus, although the Defendant correctly utilized this 2% renewal allowance, the Plaintiff was incorrectly charged $3,468.00, rather than $3,441.59.

76. Then on the second renewal (7/1/14 – 6/30/15), the Defendant increase the rent by 4%, pursuant to RGB Order #45 to the current legal regulated rent of $3,579.25. Again, the Defendant used the correct 4% renewal allowance, however, since the initial lease was incorrect, this 4% rent increase was incorrect as well.

77. The rental history of the subject apartment is known and the maximum collectible legal rent, based on leases and ledgers from the base date forward and prior to the receipt of the J-51 tax benefits is available to set the correct base date rent for the calculation of rent overcharges. (See 72A Realty Assoc. v. Lucas, 101 A.D.3d 401 (N.Y. App. Div. 1st Dep't 2012)[Court to review all available rental history in determining the correct base date rent].

78. The Plaintiff has not made any payment towards rent or use and occupancy since September 2014. The Owner has tendered to the Plaintiffs, a rent overcharge refund of $858.47 through November 2015, including 9% statutory interest from the date the Plaintiff moved in on July 1, 2012 based on the maximum legal rent. In addition to this overcharge refund, the Plaintiff has been tendered a return of their excess security of $27.47.

79. This apartment has been registered with the DHCR at the corrected legal rent (except for the 2014 Registration which was mistakenly registered as Rent Stabilized with the current rent in effect, rather than the 2014 rent), this overcharge with interest has been tendered to the Plaintiff, and the Plaintiff has been offered a Rent Stabilized Renewal Lease.

Apt. 7B- TAMARA ROMERO

80. This Plaintiff assumed occupancy on April 1, 2012 and paid a rent of $4,900.00 pursuant to a lease, dated 4/1/12 – 4/1/13.

81. This was the legal rent for this apartment at that time, and is based on the base date rent of $4,375.56 plus a 16.5% vacancy increase, pursuant to RGB Order #43.[3]

82. Thereafter, this tenant renewed the lease and was mistakenly charged $5,000.00, rather than the maximum legal rent of $4,998.00 pursuant to RGB Order #44. The Defendant erred and charges this Plaintiff $2.00 more than the legal rent, for this renewal lease period (4/1/13 – 3/31/14).

83. On the second renewal (dated 4/1/14 – 3/31/15), the maximum legal rent increased to

[3] The Plaintiff could have been charges a legal rent as high as $5,097.53.

$5,197.92 for the lease dated 4/1/14 – 3/31/15. The Defendant, however, erred and charged this Plaintiff $5,200.00, $2.08 more than the maximum legal rent, for this lease renewal.

84. The Plaintiff has been offered a proper Rent Stabilized renewal lease, however, it has not been signed or returned.

85. The rental history of the subject apartment is known and the maximum legal rent, based on leases and ledgers from the base date forward and prior to the receipt of the J-51 tax benefits is available. (See 72A Realty Assoc. v. Lucas, 101 A.D.3d 401 (N.Y. App. Div. 1st Dep't 2012) [Court to review all available rental history in determining the correct base date rent].

86. At the time the Defendant presented and entered into these leases with the Plaintiff, Defendant was reasonably, but mistakenly relying on its belief that once the legal rent reached the deregulation threshold, the apartment was deregulated and could be charged market rents.

87. Significantly, the Defendant recognizes the error in treating the apartment as unregulated and has refunded all overcharges from the date this Plaintiff took occupancy (4/1/12), including 9% statutory interest, to Plaintiff, in the sum of $40.57, plus a security refund of $2.08. A chart detailing this refund calculation is annexed hereto.

88. Any overcharge found by the Court is not willful, but occurred based on Defendant's simple mistake and reasonable reliance on DHCR's own policies and procedures relating to high rent deregulation well in advance of the Roberts decision, and not on any "fraudulent scheme" to deregulate the apartment.

89. Wherefore, based on the above, Plaintiffs are not entitled to treble damages based on the Defendant's willful overcharge of rent.

90. The Plaintiff has not made any payment towards rent or use and occupancy since August 2014. The Owner has tendered to the Plaintiffs, a rent overcharge refund of $40.57 through November 2015, including 9% statutory interest from the base date (October 2011). In addition to this overcharge refund, the Tenants have been tendered a return of their excess security of $2.08.

91. This apartment has been registered with the DHCR at the corrected legal rent, this overcharge with interest has been tendered to the Plaintiff, and the Plaintiff has been offered a Rent Stabilized Renewal Lease.

Apt. 7A – BRIAN MCFARLAND

92. The initial rent for this apartment, was a legal rent, as contained in his lease, $4,395.00. This legal rent is based on legal rent increases, from the base date rent of $3,995.00.

93. This Plaintiff assumed occupancy on or about October 1, 2014, pursuant to a one (1) year lease for $4,395.00, and has only paid $2,197.50 in total, in September 2014, and has never paid any additional rent since he moved in over one (1) year ago. Therefore, since this Plaintiff has essentially never paid any rent, it is impossible that he has been overcharged.

94. In October 2014, once Defendant realized he was mistakenly treating the apartment as deregulated he immediately offered Plaintiff a replacement Rent Stabilized Vacancy Lease. Plaintiff, however, never returned it to the Landlord. Additionally, the Plaintiff has also been offered a proper Rent Stabilized renewal lease, however, it

too has not been signed or returned.

95. The rental history of the subject apartment is known and the maximum legal rent, based on leases and ledgers from the base date forward, and prior to the receipt of the J-51 tax benefits, is available. (See 72A Realty Assoc. v. Lucas, 101 A.D.3d 401 (N.Y. App. Div. 1st Dep't 2012) [Court to review all available rental history in determining the correct base date rent].

96. At the time the Defendant presented and entered into this lease with this Plaintiff, Defendant was reasonably, but mistakenly relying on its belief that once the legal rent reached the deregulation threshold, the apartment was deregulated and could be charged market rents. Nonetheless, the rent actually charged and agreed to in this Plaintiff's lease was the legal rent.

97. Significantly, the Defendant recognizes the error in treating the apartment as unregulated, has properly offered a replacement Rent Stabilized vacancy lease as well as a proper Rent Stabilized renewal lease.

98. Any overcharge found by the Court is not willful, but occurred based on Defendant's reasonable reliance on DHCR's own policies and procedures relating to high rent deregulation well in advance of the Roberts decision, and not on any fraudulent scheme to deregulate the apartment.

99. Wherefore, based on the above, Plaintiffs are not entitled to treble damages based on the Defendant's willful overcharge of rent.

100. The Plaintiff has never made any payment towards rent or use and occupancy since September 2014.

101. This apartment has been registered with the DHCR at the correct legal rent, and

the Plaintiff has been offered a Rent Stabilized Renewal Lease.

102. In March 2015, prior to the claims in this action, the Defendant commenced an Administrative Proceeding with the DHCR to determine the current Legal Regulated Rent. This Administrative Proceeding is currently pending under DHCR Dkt. No. DO-410040-AD, and was filed with the agency seven (7) months prior to the commencement of the instant case. Although the DHCR and Supreme Court have concurrent jurisdiction on Rent Overcharge claims, due to the fact that this Administrative Proceeding was commenced seven (7) months prior to the instant case, the Court should sever Plaintiff McFarland's claims, and dismiss them as against the Defendant and allow the DHCR to render a decision. Plaintiff McFarland will suffer no prejudice and can raise any defenses he may choose in that proceeding. In fact, in Olsen v. Stellar W. 100, LLC, 96 A.D.3d 440 (1st Dept. 2012), the Court held, pursuant to the Doctrine of Primary Jurisdiction, "***the matter [the setting of the legal rent], should be determined by the DHCR, given its expertise in rent regulation".

Apt. 4A – GABRIEL AND ALEXIS LANDES

103. These Plaintiffs assumed occupancy on March 1, 2014, pursuant to a two (2) year lease for $3,360.00.

104. The maximum legal rent for this apartment when the Plaintiffs moved in, was the rent that was in their lease, $3,360.00 and is based on legal rent increases, from the legal base date rent of $2,810.87. Therefore, as the Plaintiffs were only charged the legal rent, they have not been overcharged.

105. The rental history of the subject apartment is known and the maximum legal rent,

based on leases and ledgers from the base date forward, and prior to the receipt of the J-51 tax benefits, is available. (See 72A Realty Assoc. v. Lucas, 101 A.D.3d 401 (N.Y. App. Div. 1st Dep't 2012) [Court to review all available rental history in determining the correct base date rent].

106. At the time the Defendant presented and entered into this lease with the Plaintiff, Defendant was reasonably, but mistakenly relying on its belief that once the legal rent reached the deregulation threshold, the apartment was deregulated and could be charged market rents.

107. Significantly, the Defendant recognizes the error in treating the apartment as unregulated, has properly offered a proper and timely Rent Stabilized renewal lease to commence on March 1, 2016, after the Plaintiff's current lease expires on 2/29/16, and has registered the apartment with DHCR.

108. Any overcharge found by the Court is not willful, but occurred based on Defendant's reasonable reliance on DHCR's own policies and procedures relating to high rent deregulation well in advance of the Roberts decision, and not on any fraudulent scheme to deregulate the apartment.

109. Wherefore, based on the above, Plaintiffs are not entitled to treble damages based on the Defendant's willful overcharge of rent.

110. This apartment has been registered with the DHCR at the correct legal rent, and the Plaintiff has been offered a Rent Stabilized Renewal Lease.

Apt. 3A- BRUCE KOLB

111. This Plaintiff assumed occupancy on June 1, 2011, and paid a legal rent of $3,100.00. pursuant to a one (1) year lease that encompassed the base date of October

2011.

112. The Plaintiff's initial rent was $3,100.00 (which was a legal rent and not an overcharge) and based upon the RGB Orders on the Plaintiff first renewal, the maximum legal rent increased to $3,216.25 by lease dated 6/1/12 – 5/31/13. The Defendant, however, charged this Plaintiff $3,224.00, in error, an additional $7.75, incorrectly utilizing a 4% increase rather than the 3.5% in the RGB Order.

113. On the second renewal, the maximum legal rent increased to $3,280.58 for the lease dated 6/1/13 – 5/31/14. The Defendant, however, utilized a 2.5% increase rather than the correct 2% increase and charged this Plaintiff $3,304.60.

114. On the third and most recent renewal, the maximum legal rent increased to $3,411.80 by lease dated 6/1/14 – 5/31/15. The Defendant, however, charged this Plaintiff $3,436.78, and while using the correct 4% increase then in effect, applied it to the previous incorrect rent, compounding the prior error inadvertently.

115. The Plaintiff has been offered a proper Rent Stabilized renewal lease.

116. The rental history of the subject apartment is known and the maximum legal rent, based on leases and ledgers from the base date forward and prior to the receipt of the J-51 tax benefits is available. (See 72A Realty Assoc. v. Lucas, 101 A.D.3d 401 (N.Y. App. Div. 1st Dep't 2012) [Court to review all available rental history in determining the correct base date rent].

117. At the time the Defendant presented and entered into these leases with this Plaintiff, Defendant was reasonably, but mistakenly relying on its belief that once the legal rent reached the deregulation threshold, the apartment was deregulated and could be charged market rents.

118. Significantly, the Defendant recognizes the error in treating the apartment as unregulated and has refunded all overcharges from the base date (October 2011), including 9% statutory interest, to Plaintiff, in the sum of $941.34, plus a security refund of $24.98.

119. Any overcharge found by the Court is not willful, but occurred based on Defendant's mistaken clerical error and reasonable reliance on DHCR's own policies and procedures relating to high rent deregulation well in advance of the Roberts decision, and not on any fraudulent scheme to deregulate the apartment.

120. Wherefore, based on the above, Plaintiffs are not entitled to treble damages based on the Defendant's willful overcharge of rent.

121. This apartment has been registered with the DHCR at the corrected legal rent, this overcharge with interest has been tendered to the Plaintiff, and the Plaintiff has been offered a Rent Stabilized Renewal Lease.

Apt. 10C – LETA MARGARET BARRY AND ANTHONY BAER

122. This apartment was Rent Controlled[4] from prior to 1984 through September 1, 2005. At that time the prior Rent Controlled tenant left, and the apartment transitioned from Rent Control to Rent Stabilized status. These tenants, Neeta Sharma and Alfred Ogden, were the first Rent Stabilized tenants following this transition from Rent Control, pursuant to a one year lease that commenced on October 1, 2007, for a legal rent of $4,900.00. The Plaintiffs Leta Margaret Barry and Anthony Baer moved in pursuant to a two (2) year lease, commencing on October 25, 2009, and

[4] Was subject to the Rent Control Laws (the "RCL"), the Rent and Eviction Regulations (the "R&ER") and the Tenant Protection Regulations (the "TPR").

were charged a legal rent of $5,050.00. Their initial rent could have been as high as $5,880.00, based upon the allowable 20% vacancy increase over the prior rent of $4,900.00, however, the Defendant waived this higher rent and charged them, $5,050.00. Moreover, although when they first took occupancy in October of 2009, they were treated a free-market tenants, their apartment was subsequently properly registered, as Rent Stabilized with the DHCR, prior to the commencement of this action. These Plaintiffs have been offered Rent Stabilized Leases as well. The Defendants recognize these Plaintiffs are Rent Stabilized, along with all the other Plaintiffs as a result of Defendants' acceptance of J-51 tax benefits.

123. These Plaintiffs' challenge to initial Rent Stabilized rent charged for this apartment, is precluded by the Rent Stabilization Law and Code (RSC § 2522.3(a)). Their exclusive remedy would have been the filing of a Fair Market Rent Appeal with the DHCR, within four (4) years from the date the housing accommodation was no longer subject to Rent Control. See, RSC § 2522.3(a), which states:

> "* * * an appeal of the initial rent on the ground that it exceeds the fair market rent for the housing accommodation may be filed with the DHCR by the tenant of a housing accommodation which was subject to the city rental on December 31, 1973. This right is limited to the first tenant taking occupancy on or after April 1, 1984, except where such tenant had vacated the housing accommodation prior to the service by the owner of the notice of initial legal regulated rent as required by section 2523.1 of this title. In such event, any subsequent tenant in occupancy shall also have a right to file a fair market rent appeal until the owner males are required notice and 90 days shall have elapsed without the filing an appeal by a tenant's continuing and occupancy during said 90 – day period. Once a fair market rent appeal is filed, no subsequent tenant may file such appeal. Notwithstanding the above, where the first tenant taking occupancy after December 31, 1973, of a housing accommodation previously subject to the city rental, was served with the notice required by section 26 of the

former code of the rent stabilization Association of New York City, IMC., The time within which such tenant may file a fair market rent appeal is limited to 90 days after such notice was mailed to the tenant by the owner by certified mail. However no fair market rent appeal may be filed after four years from the date the housing accommodation is no longer subject to the city rent law".

124. In addition, the Fair Market Rent Appeal provisions of the RSC do not provide for treble damages or legal fees, and are thus distinct from the provisions of the RSC and RSL, parts 2526 – *Enforcement*, that are asserted in this action for rent overcharge.

125. The first tenant after rent control may not challenge their rent more than 90 days after having been served with the initial registration for their apartment, or in the case where no such registration was served, more than four years after their occupancy of the apartment[5]. (see, Powers Assocs. v. N.Y. State Div. of Hous. & Cmty. Renewal, 229 A.D.2d 349, 645 N.Y.S.2d 794 (App. Div. 1996).

126. Fair Market Rent Appeals ("FMRA") are under the exclusive jurisdiction of the DHCR.

127. Here, it has been ten (10) years since the Rent Controlled Tenant moved out of the subject apartment and eight (8) years after the first Rent Stabilized Tenant moved in, and therefore, the first Rent Stabilized Rent is not challengeable. (See, Gilman v. N.Y. State Div. of Hous. & Cmty. Renewal, 99 N.Y.2d 144, 753 N.Y.S.2d 1, 782

[5]In December 2000, the Rent Stabilization Code (9 NYCRR) § 2522.3 was amended. This amendment again revised the comparability standards for FMRAs, making them less restrictive than those created by the 1997 RRRA. It provided that in determining an FMRA, rents for comparable housing might be considered where such rents are:
(1) unchallenged rents in effect for housing accommodations subject to this [Rent Stabilization] Code on the date the tenant filing the appeal took occupancy; or
(2) at the owner's option, market rents in effect for other comparable housing accommodations on the date the tenant filing the appeal took occupancy, as submitted by the owner" (§ 2522.3 [e]).
The amended statute also provided that it applied to all pending cases "unless undue hardship or prejudice" would result (§ 2527.7).

In re IG Second Generation Ptnrs. L.P. v. N.Y. State Div. of Hous. & Cmty. Renewal, 2006 NY Slip Op 8885, ¶ 3, 34 A.D.3d 379, 381-82, 825 N.Y.S.2d 452, 455 (App. Div.)

N.E.2d 1137 [2002]; Powers Assocs. v. N.Y. State Div. of Hous. & Cmty. Renewal, 229 A.D.2d 349, 645 N.Y.S.2d 794 (1st Dept., 1996)[Court upheld DHCR conversion of overcharge claim to FMRA]).

128. However, although the first rent charged in October 2009 of $5,050.00 to these tenants was correct (except they were Rent Stabilized), the Defendant B-U Realty Corp., made an error in calculating these Plaintiffs' rent in their third lease, from November 1, 2012. In this lease they were charged a 3.0% increase, from the prior legal rent in their November 1, 2011 lease, rather than the 2.0% increase allowed by the RGB. This error caused an overcharge of $51.62, in this lease, and instead of being charged $5,194.17 as the legal rent, these plaintiffs were charged $5,245.79. Additionally, this error was compounded in their next lease, and while these Plaintiffs were charged less than the correct increase of 4.0%, the amount was wrong as it included the error from the prior year. The legal rent in the fourth lease should have been $5,401.94, but these Plaintiffs were charged $5,455.62 in error, an extra $53.68, since November 2013. These errors have been corrected both in the DHCR registrations, in the Rent Stabilized lease offered these Plaintiffs and a full refund has been tendered to these Plaintiffs in the sum of $2,238.63 for the overcharge, plus 9% statutory interest from October 2011, of $2,238.63 through November 2015. In addition, a refund has been tendered to these tenants in the sum of their excess security of $53.68.

129. Accordingly, as the Defendant B-U Realty Corp., has corrected its error, refunded the overcharge with interest, corrected the registration and offered a Rent Stabilized lease recognizing these Plaintiffs as Rent Stabilized, no further penalties are

appropriate under the circumstances as these Plaintiffs are whole, except for their legal fees.

130. The Defendant B-U Realty Corp., offers to pay these Plaintiffs (and all the Plaintiffs) their accrued legal fees to date and has filed an Offer to Compromise pursuant to CPLR 3221.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

131. Prior to the time within which the Defendant have to answer the instant complaint, the Defendant has calculated a refund of rent overcharge, based on the legal rents in effect on the base dates and has refunded all of the rent overcharged to Plaintiffs with 9% interest, according to DHCR's policies and procedures and have therefore demonstrated that any rent overcharge was not willful and should not be subject to treble damages.

132. DHCR Policy Statement 89-2, entitled "Application of Treble Damage Penalty" expands upon Section 26-516 (a) of the Rent Stabilization Law ("RSL") as follows:

> "The owner must prove by a preponderance of the evidence that the overcharge was not a willful act. This simply means that where an owner submits no evidence or where the evidence is equally balanced, the overcharge is deemed to be willful. The owner can submit such evidence after receiving notice of a tenant's filing of an overcharge complaint prior to the final order being issued. When an owner receives the second and final notice that an overcharge has been determined and treble damages are about to be imposed, he or she will be notified to submit evidence within twenty (20) days to prove that the overcharge was not willful."

133. The DHCR, in its Policy Statement, further states:

> "DHCR has determined that the burden of proof in establishing *lack of willfulness shall be deemed to have been met* and therefore, the *treble damage penalty is not applicable*, in some situations, where it is apparent or

where it is demonstrated that an overcharge occurred under certain specified circumstances. Examples of such circumstances are as follows:

1) Purchase of a building at a judicial or bankruptcy sale, where no records to establish the legal regulated rent were available.

2)Where an owner adjusts the rent on his or her own within the time afforded to interpose an answer to the proceeding and submits proof to the DHCR that he or she has tendered, in good faith, to the tenant a full refund of all excess rent collected, plus interest." (Emphasis added)

134. By making a refund herein with statutory interest, Defendant has complied with the Rent Stabilization Law and DHCR *Policy Statement* 89-2 paragraph 2 (*infra*) thus rendering Plaintiffs' claims of rent overcharge and treble damages moot.

135. Notwithstanding any claim by Plaintiffs, Defendant is entitled to establish that the apartment's rent exceeded the deregulation threshold prior to the acceptance of the J-51 tax benefits and to have the Court set the proper legal base date rent for the purposes of calculating a rent overcharge based on the available rental record and history for this apartment (See, 72A Realty Assoc. v. Lucas 101 A.D.3d 401 [1st Dept., 2012]).

136. Defendant has provided Plaintiffs with Offers to Compromise pursuant to CPLR 3221 and should the Plaintiffs fail to achieve a result in this litigation in excess of the amount offered, Defendant is entitled to relief pursuant to CPLR 3221.

137. As part of these Offers to Compromise the Defendant has refunded all the overcharges to Plaintiffs, with statutory interest of 9%, offered Rent Stabilized leases and returned any excess security deposit.

138. Based on this timely refund no treble damages should be imposed on Defendant

as any overcharge was not willful.

AS AND FOR A FIRST COUNTERCLAIM

139. Defendant repeats and realleges each and every allegation in paragraphs 1 - 138 as if set forth at length hereat.

140. Defendant is entitled to the payment of rent and fair use and occupancy, and accumulated arrears during the pendency of this action.

141. The Plaintiffs are in occupancy of the apartments in the subject building, and have entered into such occupancy under lease agreements where a rent obligation was assumed.

142. As the Plaintiffs remain in occupancy of apartments in the subject building, have not asserted any allegations which would warrant an offset, either partial or complete, in their rental obligations, the Defendant is entitled, and demands that rent and use and occupancy be paid herein, at the legal regulated rent, in an amount to be determined by the Court.

AS AND FOR A SECOND COUNTERCLAIM

143. Each of the Plaintiffs herein entered into possession of their respective apartments pursuant to a lease. Each lease contains a "legal fees" clause, which, if the Landlord is a prevailing party, would entitle Landlord to an award of legal fees.

144. In the event the Defendants are found to be prevailing parties, in whole or in part, an award of legal fees is requested.

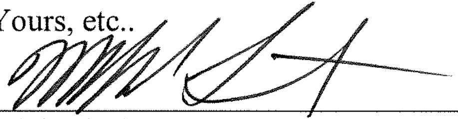
145. In addition, the Defendants have served and filed Offers to Compromise pursuant to CPLR § 3221 in this action on the Plaintiffs. In the event the Plaintiffs do not receive a judgment more favorable than that offered in the Offer to Compromise, it is

requested that this Court grant Defendants an award of fees and costs pursuant to CPLR §3221.

WHEREFORE, Defendant respectfully request that the Complaint be dismissed in its entirety with prejudice, that Defendant be awarded attorney's fees, that Defendant be awarded costs and disbursements from after the date of the Offer to Compromise, and such other further and different relief as the Court may deem just proper and equitable.

Dated: Rockville Centre, NY
November 20, 2015

Yours, etc..



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VERIFICATION

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

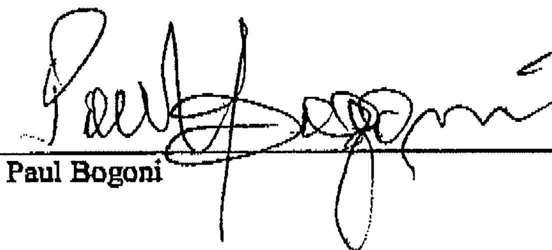
Paul Bogoni, being duly sworn, deposes and says:

1. I am an officer of Defendant, a corporation authorized to do business in the State of New York, named in the within proceeding.

2. I have read the Answer and know the contents thereof; to be true to my own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters, I believe them to be true.

3. The source of my information and belief is the books and records maintained by the corporate Defendant; conversations with Defendant's managing agents, independent contractors, and/or employees.

4. This verification is made by your deponent because the Defendant is a corporation and I am an officer thereof.



Paul Bogoni

Sworn to before me this
20h day of November, 2015