SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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JOHN STAFFORD, TIMOTHY HICKERNELL, JEFFREY NATT, DANIEL FEYKA, JULIAN JONES, DONALD HALL, THOMAS HUNTER, SEUN OH, JANE KIM, DENISE STARAKIEWICZ, WOJTEK STARAKIEWICZ, RYAN KORELL, EMAN ASIRI, MOHAMMAD HAQUE, RYAN HALEY, MARISOL MARTINEZ, WINFIELD COOPER, MATTHEW SULLIVAN, ELISE CZAJKOWSKI, JOHN PETRALITO, ROYA BASSAM, MOLLY CROOG, SAM TANABE, JASON BAILEY, ALEXANDER RICHARDS, HAJERA DEHQANZADA, ALI ABIDI, DERIC MIZOKAMI, JOHN RIVERA, ALVIN REALUYO, FABIENNE FERREIRA, K.M.O. VERA, KRISTIN MYERS, JESSE NEIL, CRAIG NADEAU, ANNMARIE COLUCCI, ROSHEN CARMAN, ALVIN FERNANDEZ, MARGARET PLESS, JOSE CALVILLO, EMMANUELLA PAUL, JESUS RIOS, NINA CHIDICHIMO, NATALIE HIRSH, CRAIG CONNOLE, ALEXANDRIA KIRCHER, EARL BARRETT-HOLLAWAY, SANTA PENA, DONNA DEMPSEY, SERENA FORBES, SOPHIA GREER, RUXANDRA STANCU, LEAH MCKUNE, RASUEL MCKUNE, DAVID WARTH, MOHAMMAD UDDIN, ELI JAMES, RICHARD DURO, NICHOLAS NAVIGLIA, MONICA THORNE, VINCENT WALLGREN, EILEEN WALLGREN, JEANNINE FRUMESS, EVAN JACOBS, WILLIAM RIVERS, GRACE RIVERS, DANIEL REYES, OSCAR VALENCIA

Plaintiffs,

- v -

A&E REAL ESTATE HOLDINGS, LLC, A&E REAL ESTATE MANAGEMENT, LLC, JOHN ARRILLAGA, DOUGLAS EISENBERG,

Defendants.

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INDEX NO. 655500/2016

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 63, 64, 65, 67, 68, 70, 71, 72, 73, 74, 75, 76, 78, 79, 82, 140, 141, 142, 143, 144, 145, 146, 147, 148, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165

were read on this motion to DISMISS.

This is a putative class action alleging that Defendants – owners and operators of numerous apartment buildings in New York City – systematically inflated rents over and above the amounts which the Rent Stabilization Law ("RSL") and Rent Stabilization Code ("RSC") allow. Defendants move to dismiss Plaintiffs' claims on multiple grounds, including the timeliness of the claims, the jurisdiction of a state agency to adjudicate the claims, and the sufficiency of the class action allegations underlying the claims.

For the reasons set forth below, Defendants' motion is granted in part and denied in part.

FACTUAL BACKGROUND

The Alleged Scheme

Plaintiffs – 68 individuals residing in 55 apartment units in 22 different apartment buildings throughout New York City – allege that "Defendants have pursued (and continue to pursue) a scheme designed to inflate rents over and above the amounts which they are legally permitted to charge" under New York law. (Class Action Complaint ("CAC") ¶¶1, 13-67).

Defendants own and operate a portfolio of over 100 New York City apartment buildings, which Plaintiffs term "the A&E Portfolio." (*Id.* ¶1). Defendant A&E Real Estate Holdings LLC ("A&E Real Estate Holdings") serves as the holding company for the multiple corporate entities in the A&E Portfolio, while Defendant A&E Real Estate Management, LLC ("A&E Real Estate Management") acts as the property management company for the buildings which comprise the Portfolio. (*Id.* ¶¶68-69). The two individual Defendants – John Arrillaga Jr. and Douglas Eisenberg (the "Individual Defendants") – are each referred to as "a principal" of A&E Real Estate Holdings. (*Id.* ¶¶70-71).

In recent years, Plaintiffs allege, the A&E Portfolio has "grown rapidly" in assets and value in conjunction with Defendants' "improper and illegal rental increases." (*Id.* ¶10).

Specifically, Defendants allegedly engaged in "a pattern and practice of: (a) altering and misrepresenting the legal regulated rent records provided to tenants to justify charging higher initial rents; (b) inflating and/or misrepresenting the amount of [Individual Apartment Improvements ('IAIs')] that were completed; and (c) using such false information to increase rents and/or deregulate apartments that should remain rent stabilized." (*Id.* ¶95).

The Alleged Class

To vindicate their rights as well as those of other similarly-situated tenants, Plaintiffs propose to represent a class "consist[ing] of current and former tenants of A&E Portfolio buildings who, between October 18, 2012, and the present date, resided in rent-stabilized or unlawfully-deregulated apartments, and who paid rent in excess of the legal limit based on misrepresentations by Defendants, or any predecessor in interest, concerning legal regulated rents and improvements (the 'Class')." (CAC ¶97). In addition, Plaintiffs propose a sub-class "[c]onsisting of all current tenants of A&E Portfolio building, who currently reside in a rent-stabilized apartment or unlawfully deregulated apartment (the 'Sub-Class')." (*Id.* ¶99).

Procedural History

Plaintiffs filed the Class Action Complaint on October 18, 2016, alleging six causes of action: (1 and 2) violations of RSL §26-512 on behalf of the Class and the Sub-Class, respectively; (3) declaratory relief, on behalf of the Sub-Class, adjudging and determining, *inter alia*, that "Plaintiffs and members of the Sub-Class are each entitled to a rent-stabilized lease in a lease form promulgated by DHCR"; (4) violation of General Business Law ("GBL") §349, on behalf of the Class; and (5 and 6) illegality and mistake of contract, on behalf of the Class and the Sub-Class, respectively.

In deciding the instant motion, the Court takes note of two intervening developments that have recently reshaped this area of the law: (1) the First Department's decision in *Maddicks v. Big City Properties, LLC*, 163 A.D.3d 501 (1st Dep't 2018) (appeal pending) concerning class-action claims in rent overcharge cases, and (2) the New York State Legislature's overhaul of the rent control laws. Because these developments will steer the analysis that follows, both are summarized here.[1]

1. The Maddicks *Case*

On July 26, 2018, the First Department decided *Maddicks,* which prescribed the appropriate scope of a court's inquiry on a pre-answer motion to dismiss class allegations concerning rent overcharges. The allegations in *Maddicks* will sound familiar. "Plaintiffs allege[d] in substance that Defendants or their predecessors illegally and fraudulently engaged in a scheme and pattern to inflate rents in apartments located in over 20 buildings owned or operated by Defendants ('Big City Portfolio') in violation of the rent stabilization laws," using various methods to illegally overcharge the tenants. *Maddicks v Big City Properties, LLC*, No. 656345/2016, 2017 WL 5499213, at *1 (Sup. Ct. N.Y. Cty. Nov. 16, 2017). The trial court dismissed the plaintiffs' class action complaint, holding that "[p]laintiffs' [sic] failed to properly assert a class action." *Id.* at *3. According to the trial court, the putative class allegations improperly "attempt[ed] to join former and current tenants of several different properties, owned by separate and distinct companies, which are based on different theories of recovery, involving separate and distinct law and facts." *Id.*

[1] The Court granted the parties leave to submit supplemental briefing addressing the impact of these recent developments on the motion. (*See* NYSCEF Doc. Nos. 140, 160, 161).

The First Department, by a 3-2 margin, reversed the dismissal of the class allegations. In the majority's view, "it was premature, in this case, for the [trial] court to engage in a detailed analysis of whether the requirements of class certification were met" prior to the class certification phase. *Id.* at 502. Moreover, "[i]t did not appear conclusively from the complaint that, as a matter of law, there [was] no basis for class action relief." 163 A.D.3d at 502. Despite the disparate properties, entities, and tenant classes at issue, the court emphasized the class claims' common bonds. All the owners of the subject buildings were allegedly part of one holding company, and the rent overcharges in the various buildings were allegedly all "part of a systematic effort by Big City Acquisitions to avoid compliance with the rent stabilization laws." *Id.* at 503. Ultimately, "[a]lthough there may be some differences in the documents to be examined for each apartment, whether individual issues will predominate over class concerns can be fleshed out once plaintiffs make a motion for class certification and defendants oppose it." *Id.*

The Court of Appeals granted the *Maddicks* defendants leave to appeal the First Department's decision, and that appeal is currently pending.

2. Housing Stability and Tenant Protection Act of 2019

On June 14, 2019, the State of New York enacted the Housing Stability and Tenant Protection Act of 2019 ("HSTPA"), "landmark legislation making sweeping changes to the rent laws and adding greater protections for tenants throughout the State." *Dugan v. London Terrace Gardens, L.P.*, No. 603468/09, 2019 WL 4439346, at *2-3 (1st Dep't Sept. 17, 2019). Part F of the HSTPA amended the statutory framework "which govern claims of rent overcharge and the statute of limitations for bringing such claims." *Id.* at *3. "The legislation directed that the

statutory amendments contained in Part F 'shall take effect immediately and shall apply to all claims pending or filed on or after such date." *Id.* (quoting HSTPA, Part F, §7).

Two effects of the statutory amendments are particularly salient. First, the Legislature expanded the statute of limitations on residential rent overcharge actions. Before the HSTPA, CPLR 213-a required that "[a]n action on a residential rent overcharge shall be commenced 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 any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced." But the HSTPA changed CPLR 213-a to read as follows:

> No overcharge penalties or damages may be awarded for a period more than six years before the action is commenced or complaint is filed, however, an overcharge claim may be filed at any time, and the calculation and determination of the legal rent and the amount of the overcharge shall be made in accordance with the provisions of law governing the determination and calculation of overcharges.

HSTPA, Part F, §6. "Likewise, the amended version of RSL §26-516(a)(2) provides that an overcharge complaint 'may be filed with [DHCR] or in a court of competent jurisdiction at any time, however any recovery of overcharge penalties shall be limited to the six years preceding the complaint.'" *Dugan*, 2019 WL 4439346, at *3 (quoting RSL §26-516).

Second, Part F expressly permitted tenants to bring certain rent-overcharge actions "in a court of competent jurisdiction" – not just the DHCR – and announced that "[t]he courts and the [DHCR] shall have concurrent jurisdiction, subject to the tenant's choice of forum." HSTPA, Part F, §1.

Against that doctrinal and statutory backdrop, the Court now turns to the substance of Defendants' motion to dismiss Plaintiffs' Class Action Complaint.

LEGAL ANALYSIS

I. Statute of Limitations (Counts 1, 2, and 3)

A. Retroactive Application of the HSTPA Amendments is Not Unconstitutional

As a threshold matter, Defendants argue that "[a]lthough the [HSTPA] provides that this section 'shall take effect immediately and shall apply to any claims pending or filed on and after such date,' retroactive application of the Act's new statute of limitations to Plaintiffs' claims here would be unconstitutional." (Defs.' Supp. Mem. of Law at 2) (quoting Act, Part F §7). Defendants contend, specifically, that applying the current statute of limitations regime to this case would result in a due process violation and run afoul of the Contracts Clause and the Takings Clause in the U.S. Constitution. *See id*. Notably, however, Defendants do not cite a single case which has found such retroactive application to be unconstitutional. This case is no exception. For the reasons that follow, the Court concludes that Defendants' constitutional arguments are unavailing.

1. Due Process

The First Department recently dispensed with the precise due process concerns raised by Defendants. In *Dugan v. London Terrace Gardens, L.P.*, No. 603468/09, 2019 WL 4439346 (1st Dep't Sept. 17, 2019), the court "f[ound] no merit to defendant's claim that applying the amendments to RSL §26-516 and CPLR 213-a to [the] pending litigation violates due process." *Id.* at *4. The court's analysis began by noting that "the legislature expressly made the amendments applicable to pending claims, and legislative enactments carry 'an exceedingly strong presumption of constitutionality.'" *Id.* (quoting *Barklee Realty Co. v Pataki*, 309 A.D.2d

310, 311 (1st Dep't 2003)).[2] "Further," the court reasoned, "it is well settled that absent deliberate or negligent delay, '[w]here a statute has been amended during the pendency of a proceeding, the application of that amended statute to the pending proceeding is appropriate and poses no constitutional problem.'" *Id.* (quoting *Matter of St. Vincent's Hosp. & Med. Ctr. Of N.Y. v New York State Div. of Hous. & Community Renewal*, 109 AD2d 711, 712 (1st Dep't 1985), *aff'd* 66 N.Y.2d 959 (1985)).

In support of that principle, the court cited past examples of changes to statutes of limitations being applied to pending litigation:

> In *Matter of Schutt v New York State Div. of Hous. & Community Renewal* (278 AD2d 58 [1st Dept 2000], *lv denied* 96 NY2d 715 [2001]), this Court found the petitioners' fair market rent appeal untimely based on the four-year statute of limitations in the newly-enacted Rent Regulation Reform Act of 1997 (RRRA). The petitioners argued that applying the RRRA's limitations period to pending cases violated due process because it "depriv[ed] them of the benefit of pre-RRRA rent regulation provisions law more favorable to their claims" (*id.* at 58). The Court found no due process infirmity because "rent regulation does not confer vested rights" (*id., citing I.L.F.Y. Co. v City Rent & Rehabilitation Admin.*, 11 NY2d 480 [1962]).
>
> Likewise, in *Matter of Brinckerhoff v New York State Div. of Hous. & Community Renewal* (275 AD2d 622 [1st Dept 2000], *lv dismissed* 96 NY2d 729 [2001], *lv denied* 96 NY2d 712 [2001]), this Court applied the newly-enacted four-year limitations period to the petitioners' pending rent overcharge complaints, rejecting their claim that the retroactive application of the amendments denied them due process.

Id. at *4-5. Summing up its analysis, the court "f[ound] that defendant's due process rights are not impaired by applying the new amendments to plaintiffs' pending overcharge claims." *Id.* at *5. The same result holds here.

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[2] In *Barklee*, the First Department observed: "It is fundamental that a legislative enactment . . . 'carr[ies] an exceedingly strong presumption of constitutionality.' Although such presumption is rebuttable, any challenge to a statute's constitutionality carries the 'heavy burden of demonstrating unconstitutionality beyond a reasonable doubt.'" 309 A.D.3d at 310 (quoting *Elmwood-Utica Houses v Buffalo Sewer Auth.*, 65 N.Y.2d 489, 495 (1985)).

2. Contracts Clause

"The Contract Clause of the U.S. Constitution 'prohibits states from enacting '[l]aw[s] impairing the Obligation of Contracts.'" *Am. Economy Ins. Co. v. State,* 30 N.Y.3d 136, 149 (2017) (quoting U.S. Const, art I, §10).

The statutory amendments at issue do not implicate the Contracts Clause. That is in part because the statute of limitations on rent overcharge claims is not for the subject of any contract. It is a creature of statute, governing the remedies available to tenants under rights secured by the rent control laws. Tellingly, Defendants cannot identify any express contractual obligation impaired, or even altered, by the new statute of limitations.[3] By contrast, cases implicating the Contracts Clause typically pit a government enactment directly against some identified contractual provision. *See, e.g., Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 240 (1978) (legislation "substantially altered . . . [contractual] . . . relationships by superimposing pension obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake"); *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006) (city wage freeze affected "[c]ontract provisions that set forth the levels at which union employees are to be compensated").

Even if the Contracts Clause analysis were found to be applicable here, Defendants' argument still falls short. It is well-settled that the language of the Contracts Clause "should not be read literally and that the States retain the power to safeguard the vital interests of [their] people." *Am. Econ. Ins. Co.,* 30 N.Y.3d at 149; *Buffalo Teachers Fed'n,* 464 F.3d at 367 ("Although facially absolute, the Contracts Clause's prohibition is not the Draconian provision

[3] Indeed, since the Complaint proposes a Class and Sub-Class which would include former tenants, Defendants are not even in contractual privity with all putative Plaintiffs. (*See, e.g.*, CAC ¶¶97, 101).

that its words might seem to imply . . . [i]t does not trump the police power of a state to protect the general welfare of its citizens, a power which is paramount to any rights under contracts between individuals."). "The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Am. Econ. Ins. Co.*, 30 N.Y.3d at 150. "In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past." *Id.*; *see Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 (1983) ("[s]ignificant" to threshold inquiry "is the fact that the parties are operating in a heavily regulated industry"). On that score, the context surrounding the statutory amendments clearly preclude Defendants' constitutional argument.

Defendants are sophisticated participants in an extensively regulated industry, and the HSTPA marks only the latest legislative change to an area under tight legislative control. Indeed, the rent control apparatus is entirely a legislative invention, perpetuated by an array of interlacing statutes, regulations, and agencies. *See Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 389 (1994) (recounting the legislative origins of "[t]he rent stabilization system" in New York City). In that light, Defendants' constitutional concerns are unmoving. It may be true that Defendants purchased their contractual rights in the subject apartment buildings "based on the expectation that overcharge claims were governed by a four-year statute of limitations." (Defs.' Supp. Mem. of Law at 7). The enlarged statute of limitations on rent overcharge claims may expose Defendants *post-hoc* to a wider aperture of liability; and they may have, by operation of the law, assumed more risk than they bargained for. But "[w]hen [Defendants] purchased into an enterprise already regulated in the particular to which [they] now object[ ], [they] purchased subject to further legislation upon the same topic." *Veix v. Sixth Ward Bldg. & Loan Ass'n of*

Newark, 310 U.S. 32, 38 (1940). Put differently, "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter." *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 357 (1908). By entering themselves into an arena subject to government regulation, Defendants submitted to the possibility that future regulations would dislodge their settled commercial expectations. Applying the HSTPA to this case does not confound any objectively *reasonable* expectations, *see Energy Reserves Grp., Inc.*, 459 U.S. at 413, and therefore is not a substantial impairment under the Contracts Clause.[4]

3. Takings Clause

"The Takings Clause of the Fifth Amendment of the US Constitution, 'made applicable to the States through the Fourteenth Amendment, . . . provides that 'private property' shall not 'be taken for public use, without just compensation.' The New York Constitution similarly provides that '[p]rivate property shall not be taken for public use without just compensation.' (NY Const, art I, § 7(a))." *Am. Econ. Ins. Co.*, 30 N.Y.3d at 155.

The Court of Appeals' decision in *Am. Econ. Ins. Co.* dictates the analysis as well as the result here. As the Court noted, "[t]he threshold step in any Takings Clause analysis is to determine whether a vested property interest has been identified." *Id.* Because Defendants "cannot identify any vested property interest impaired by the legislative amendment . . . their takings claim must fail." *Id.* While Defendants may lament the damage inflicted on their economic interests by the HSTPA, "the mere obligation to pay money, without identification of a

[4] Because the Court finds that retroactive application of the HSTPA does not work an impairment – substantial or otherwise – on any contractual relationship, "[w]e need not consider whether . . . any substantial impairment is justified by a significant and legitimate public purpose." *Am. Econ. Ins. Co.*, 30 N.Y.3d at 153.

vested property interest, cannot constitute a taking." *Id.* Notwithstanding Defendants' position that "[t]he economic impact of such a retroactive change in the law is enormous and not necessary to address any wrongs which the Legislature identified," (Defs.' Supp. Mem. of Law at 6), this Court will not "dictate to the legislative body the choice of remedy to be selected; questions as to wisdom, need or appropriateness are for the Legislature." *I.L.F.Y. Co. v. City Rent & Rehab. Admin.*, 11 N.Y.2d 480, 490 (1962).

B. Plaintiffs' Claims are Timely

Under the applicable statutes of limitations – as amended by the HSTPA – Plaintiffs' claims are timely. Once again, *Dugan* squarely addresses the issue:

> We reject defendant's contention that the complaint should be dismissed as time-barred. The newly-enacted CPLR 213-a provides that "an overcharge claim may be filed at any time," however "[n]o overcharge penalties or damages may be awarded for a period more than six years before the action is commenced." Likewise, the amended version of RSL §26-516(a)(2) provides that an overcharge complaint "may be filed with [DHCR] or in a court of competent jurisdiction at any time, however any recovery of overcharge penalties shall be limited to the six years preceding the complaint." Because both of these statutes provide that an overcharge complaint can be brought "at any time," plaintiffs' claims are timely. However, they may recover for overcharges only as far back as November 13, 2003, six years before the commencement date.

2019 WL 4439346, at *3.

Plaintiffs' claims are thus timely, with the caveat that they may recover for overcharges only as far back as October 18, 2010, six years before the Class Action Complaint was filed. (*See* NYSCEF Doc. No. 2).

II. DHCR Jurisdiction

Next, Defendants argue that Plaintiffs' rent overcharge claims are subject to the primary jurisdiction of the state's Division of Housing and Community Renewal (DHCR), and "nothing

in the [HSTPA] precludes the Court from finding that DHCR is better equipped to determine Plaintiffs' overcharge claims." (Defs.' Supp. Mem. of Law at 10).

This argument fails for at least two reasons. First, it is well-established that this Court may "properly decline[ ] to cede primary jurisdiction of these actions to DHCR, since the actions raise legal issues, including class certification and applicable limitations periods, that should be addressed in the first instance by the courts." *Dugan v. London Terrace Gardens, L.P.*, 101 A.D.3d 648, 648 (1st Dep't 2012); *Hess v. EDR Assets LLC*, 171 A.D.3d 498, 498 (1st Dep't 2019) ("reject[ing] respondent's request for dismissal of this action on the ground that DHCR has primary jurisdiction since the action raises legal issues, including class certification, that must be addressed in the first instance by the court"). The Class Action Complaint raises exactly the kind of legal issues that must be addressed by the courts, not the DHCR, such as class certification. Second, the HSTPA amendments strongly reinforce the principle that, when tenants choose to pursue rent overcharge claims in the courts, the courts should hear them. Part F of the HSTPA now explicitly directs "[t]he courts and the [DHCR] shall have concurrent jurisdiction, *subject to the tenant's choice of forum*." HSTPA, Part F, §1 (emphasis added).

Therefore, the Court declines to dismiss Plaintiffs' Complaint on the basis of DHCR's jurisdiction.

III. Sufficiency of the Class Allegations

In light of the controlling authority in *Maddicks*, the Court declines to dismiss Plaintiffs' class allegations at this stage. Like in *Maddicks*, "[i]t does not appear conclusively from the complaint that, as a matter of law, there is no basis for class action relief." 163 A.D.3d at 502.

Plaintiffs allege a "systematic and pervasive pattern of misconduct" stretching across the A&E Portfolio, designed to "circumvent New York City's rent regulation process." (CAC ¶¶ 9,

103); *see* 163 A.D.3d at 503 ("The dissent fails to consider plaintiffs' allegation that the setting of the improper rents in these apartments was part of a systematic effort by Big City Acquisitions to avoid compliance with the rent stabilization laws."). All the buildings are owned and operated by Defendants. *See id.* ("Although the instant action involves 11 buildings and 8 owners, all the buildings are allegedly managed by Big City Realty Management, and all the owners are allegedly part of one holding company[.]"). As a result, discovery could show, for example, that Defendants "charged all the tenants the same fraudulent and inflated amounts for claimed improvements," which "would support a class action and make one tenant's proof relevant to that of other tenant." *Id.* In a nutshell, "[i]t simply is premature, before discovery and before a class certification motion has been made, to rule out the class claims in their entirety." *Id.*

Defendants argue that *Maddicks* "is dispositively different from this case in three important respects." (Defs.' Supp. Mem. of Law at 11). First, although all of the buildings at issue are now under common ownership (*i.e.*, the "A&E Portfolio"), they were owned by multiple different entities at the time the relevant IAIs were performed. (*Id.*) Second, unlike in *Maddicks*, Plaintiffs do not assert any so-called "J-51 claims." (*Id.*) And third, individualized issues concerning the applicable statute of limitations will predominate over common class issues. (*Id.* at 12).

None of these differences, however, compel a different result. To begin with, nothing in the *Maddicks* opinion suggests that common ownership of the apartment buildings in the past, when the IAIs were performed, "was an important factor" in the court's reasoning. The court emphasized only the *current* structure of common ownership, which weighed against dismissal of the class allegations. *Id.* at 503. That same factor weighs against Defendants' argument here. The other two differences that Defendants raise are similarly insubstantial. The *Maddicks* court

saw "no reason, at this pre-answer stage, to distinguish between [J-51] claims and the other aspects of the purported scheme asserted by plaintiffs." *Id.* at 504. And the recent HSTPA amendments create a clear-cut statute of limitations, minimizing the "individualized issues" that Defendants forewarn. *See Dugan*, 2019 WL 4439346, at *3 (noting "these provisions resolve a split in this Department as to what rent records can be reviewed to determine rents and overcharges . . . mak[ing] clear that courts must examine all available rent history necessary to determine the legal regulated rent"). More broadly, Defendants' attempt to distinguish *Maddicks* on these particular facts loses sight of the case's core tenet – that "[a]lthough there may be some differences in the documents to be examined for each apartment, whether individual issues will predominate over class concerns can be fleshed out once plaintiffs make a motion for class certification and defendants oppose it." 163 A.D.3d at 503.

Therefore, the branch of Defendants' motion to dismiss Plaintiffs' class allegations is Denied.

IV. GBL §349 Claim (Count 4)

Plaintiffs also allege that Defendants' conduct violates New York General Business Law ("GBL") §349, which provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." §349(a). The GBL claim fails on two grounds: (1) the claim does not allege "consumer-oriented" conduct and, alternatively, (2) the claim does not allege an independently deceptive act.

"[A]s a threshold matter, plaintiffs claiming the benefit of section 349 . . . must charge conduct of the defendant that is consumer-oriented." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995). Under First Department

precedent, Defendants' alleged violations of the rent control laws do not constitute "consumer-oriented" conduct under GBL §349. In *Aguaiza v. Vantage Properties, LLC*, 69 A.D.3d 422 (1st Dep't 2010), the court held that allegations of "unlawfully deceptive acts and practices" brought by rent-stabilized tenants against their landlords "presented only private disputes between landlords and tenants, and not consumer-oriented conduct aimed at the public at large, as required by [GBL §349]." *Id.* at 423, *affirming Aguaiza*, No. 105197/08, 2009 WL 1511791, at *6 (Sup. Ct. N.Y. Cty. May 21, 2009) ("[A] residential lease together with the statutory protections cloaking a rent stabilized tenant at the inception of that tenant's leasehold interest which protects that tenant and his or her successor in perpetuity ostensibly cannot be deemed a consumer transaction contract implicating GBL § 349."). And in *Collazo v. Netherland Prop. Assets LLC*, 155 A.D.3d 538 (1st Dep't 2017), the First Department affirmed the dismissal of tenants' claims – including rent overcharge claims – for "fail[ing] to state a cause of action for relief under [GBL] §349." *Id., affirming Collazo*, No. 157486/2016, 2017 WL 947618, at *1 (Sup. Ct. N.Y. Cty. Mar. 07, 2017) ("[P]laintiffs' facts do not support a consumer-related transaction within the ambit of GBL 349."). Trial courts have followed suit, dismissing GBL §349 claims brought by tenants against their landlords. *See, e.g.*, *Sheffield v. Pucci*, 63 Misc. 3d 1216(A), at *14 (Sup. Ct. N.Y. Cty. April 15, 2019) (dismissing GBL §349 claim because "plaintiff's allegations are asserted only as a private dispute between tenant and landlord and not consumer-oriented conduct aimed at the public at large as required by the statute").

The cases on which Plaintiffs rely do not justify a departure from the First Department's holdings in *Aguaiza* and *Collazo*. Plaintiffs cite a single New York state court case, *Meyerson v. Prime Realty Servs., LLC*, 7 Misc. 3d 911 (Sup. Ct. N.Y. Cty. 2005), decided prior to *Aguaiza* and *Collazo*. In *Meyerson*, the argument "that plaintiff lacks a proper claim under General

Business Law §349 because the defendants' activity was not directed to the 'public at large' [was] not properly before the court because it was raised only in reply papers." *Id.* at 920-21. Nevertheless, the court, in dicta, opined that the plaintiff's claim was "recognized under the statute." *Id.* To the extent *Meyerson* conflicts with the subsequent rulings in *Aguaiza* and *Collazo*, however, those First Department rulings control.[5]

Even if GBL §349 did encompass rent overcharge claims against landlords as a general matter, in this case Plaintiffs' claim still fails because the Complaint fails to allege "[d]eceptive acts or practices" distinct from Defendants' purported violations of the rent control laws. Essentially, Plaintiffs' GBL claim mirrors their rent overcharge claims. By allegedly charging rents in excess of what the law permits, Plaintiffs theorize, Defendants deceived the tenants on their leases as to what the proper rent should be. *See* CAC ¶130 ("Defendants have engaged and continue to engage in deceptive consumer orientated acts and practices by subjecting rent-stabilized tenants, including Plaintiffs and members of the Class, to demands for rent above that permitted under law[.]"). But GBL §349 does not prescribe appropriate rents; the RSL and RSC do. And a violation of another statute is not "perforce a violation of section 349(a)" just by "inserting an unlawful provision in [a] contract." *Schlessinger v. Valspar Corp.*, 21 N.Y.3d 166, 172 (2013). As the Court of Appeals instructed in *Schlessinger*, such "reasoning [is] too attenuated to be plausible":

[5] At most, *Meyerson* supports the idea, raised by several federal courts in applying New York law, that this issue may be ripe for a ruling from the Court of Appeals. *See Dzganiya v. Cohen Ehrenfeld Pomerantz & Tenenbaum, LLP*, No. 1:17-CV-04525-GHW, 2018 WL 2247206, at *8 (S.D.N.Y. May 16, 2018) (noting "[t]he New York Court of Appeals has yet to comment on this issue"); *Lautman v. 2800 Coyle St. Owners Corp.*, No. 13-CV-967 ARR VVP, 2014 WL 2200909, at *8 (E.D.N.Y. May 23, 2014) ("[P]laintiff's section 349 claim raises novel issues in an undeveloped area of law regarding whether New York's consumer protection statute would apply in this sort of landlord-tenant rent dispute.").

> It cannot fairly be understood to mean that everyone who acts unlawfully, and does not admit the transgression, is being "deceptive." Such an interpretation would stretch the statute beyond its natural bounds to cover virtually all misconduct by businesses that deal with consumers. If the legislature had intended this result, it would not have enacted a statute limited to "[d]eceptive acts or practices" in the first place.

Id. at 172-73. *See also Broder v Cablevision Sys. Corp.*, 418 F.3d 187, 200 (2d Cir. 2005) (dismissing GBL §349 claim where plaintiff did not "make a free-standing claim of deceptiveness" but rather alleged that a violation of the other statute was, in itself, a section 349 violation) (cited approvingly by *Schlessinger*). Plaintiffs' GBL claim suffers a similar infirmity and is dismissed on that additional ground.

Therefore, the branch of Defendants' motion to dismiss Plaintiffs' GBL §349 claim is Granted.

V. Contract Claims (Counts 5 and 6)

Plaintiffs' contract claims – labeled as "Illegality and Mistake of Contract," on behalf of the Class (Count 5) and Sub-Class (Count 6), respectively – are also dismissed.

Counts 5 and 6 seek contract remedies – monetary damages and reformation – without alleging a breach of any express or implied contractual obligation. Instead, these claims piggyback onto the rent overcharge claims. First, they are premised entirely on finding that Defendants' rents violated the rent-control laws. (CAC ¶¶136, 139 ("Defendants . . . entered into leases which incorrectly, falsely, and illegally misrepresented the amount of rent Defendants and/or the entities controlled by Defendants were legally entitled to collect.")). Second, the relief sought under the contract claims restate the relief sought under the rent overcharge claims. Count 2, for instance, alleges that "Plaintiffs and members of the Sub-Class are entitled to reformation of their leases to represent accurately the amount of rent Defendants are legally entitled to charge[.]" (CAC ¶122). Count 6 makes the same assertion. (CAC ¶141 ("Plaintiffs

and members of the Sub-Class are entitled to reformation of their leases to represent accurately the amount of rent Defendants are legally entitled to charge[.]")).

While Plaintiffs cite to case law which distinguishes between rent overcharge and contract claims, the contract claims in those cases alleged breaches that were independent of any RSL or RSC violation. *See Paganuzzi v. Primrose Mgmt. Co.*, 181 Misc. 2d 34, 37 (Sup. Ct. N.Y. Cty. 1999) ("Here, plaintiff's FMRA award is based upon Primrose's breach of an implied covenant of the lease contract not to charge in excess of the legal regulated rent."). By contrast, Counts 5 and 6 of Plaintiffs' Class Action Complaint are little more than rent overcharge claims in contract guise.

Therefore, the branch of Defendants' motion to dismiss Counts 5 and 6 is Granted.

VI. Claims As Against the Individual Defendants (All Counts)

All claims as against individual Defendants Arrillaga and Eisenberg are dismissed on the ground that the Class Action Complaint fails to state any specific allegations against them.

"[I]t is elementary that the primary function of a pleading is to apprise an adverse party of the pleader's claim and to prevent surprise." *Cole v. Mandell Food Stores, Inc.*, 93 N.Y.2d 34, 40 (1999) (cited by *Giacobbe v 115 Mulberry, LLC*, No. 155436/2016, 2018 WL 1305340, at *4 (Sup. Ct. N.Y. Cty. March 13, 2018) (dismissing rent liability claim against individual defendant where plaintiff pled only "generalized allegations)). Plaintiffs' allegations as to Arrillaga and Eisenberg fail to perform this basic function. The entirety of the Complaint's allegations as to Arrillaga and Eisenberg can be found in Paragraphs 70 and 71, which assert that each of them is "a principal of A&E Real Estate Holdings, LLC." (CAC ¶¶70-71). But that conclusory statement sheds no light on how these Defendants participated in – or knew about – the conduct underlying Plaintiffs' claims. Plaintiffs do not describe the Individual Defendants' actual job

titles or day-to-day responsibilities within the A&E Portfolio. It is unclear, for example, what role the Individual Defendants allegedly played in "failing to register properly the apartments with DHCR," (*id.* ¶94), "inflating and/or misrepresenting the amount of IAIs that were completed," (*id.* ¶95), and "using such false information to increase and/or deregulate apartments that should remain rent stabilized," (*id.*). *See Haygood v. Prince Holdings 2012, LLC*, 60 Misc. 3d 1220(A) (Sup. Ct. N.Y. Cty. 2018) (dismissing rent overcharge claims against individual defendant because "[t]he complaint contains no specific allegations of actions by [him]"); *see also Northern Valley Partners, LLC v. Jenkins*, 23 Misc. 3d 1112(A), at *7-8 (Sup. Ct. N.Y. Cty. 2009) (dismissing fraud claims against individual defendants where "there [was] no claim, at least by anyone with personal knowledge, that the [individuals] were involved in the day-to-day management" of company).

The Court of Appeals' holding in *Pludeman v. Northern Leasing Systems, Inc.*, 10 N.Y.3d 486 (2008), on which Plaintiffs rely, does not rescue Plaintiffs' claims. In *Pludeman*, "[t]he sole issue" was whether "plaintiffs sufficiently pleaded a cause of action for fraud against individually-named corporate defendants pursuant to CPLR 3016(b)," which requires that "[w]here a cause of action is based upon misrepresentation, [or] fraud . . . the circumstances constituting the wrong shall be stated in detail." *Id.* at 489. The Court noted that 3016(b)'s requirement "should not be confused with unassailable proof of fraud" – since, "[s]imply put, sometimes such facts are unavailable prior to discovery." *Id.* at 492, 493. "Necessarily, then, section 3016(b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct." *Id.* at 492 (citing *Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 55 (2001) (alleged facts sufficient to permit a jury to "infer [defendant's] knowledge of or participation in the fraudulent scheme")). Here, Plaintiffs do not allege "a cause of action for fraud," nor do they

cite case law extending *Pludeman* to deny a motion to dismiss rent overcharge claims against individual corporate defendants. In any event, the undeveloped allegations against Arrillaga and Eisenberg are not "sufficient to permit a reasonable inference of the alleged conduct." Courts – sensitive to the concerns spelled out in *Pludeman* – still demand *some* specificity about how individual defendants fit into a larger alleged scheme. *See Tribbs v 326-338 E 100th LLC*, No. 150179/2018, 2019 WL 3206139, at *7 (Sup. Ct. N.Y. Cty. July 16, 2019) (finding "no basis for dismissal" where the complaint alleged that individual defendant "directed all aspects of leasing" and held "position as a managing member of defendant [entity]"). That baseline level of specificity is simply lacking here.

Therefore, the branch of Defendants' motion to dismiss seeking the dismissal of all claims as against the Individual Defendants is Granted.

* * * *

Accordingly, it is:

ORDERED that Defendants' motion to dismiss is **GRANTED** with respect to: (i) Plaintiffs' fourth, fifth, and sixth causes of action; and (ii) all claims as against the Individual Defendants. The motion is **DENIED** with respect to Plaintiffs' first, second, and third causes of action as to Defendants A&E Real Estate Holdings and A&E Real Estate Management; and it is further

ORDERED that the parties are to appear for a Preliminary Conference on December 3, 2019 at 10 a.m.

This constitutes the Decision and Order of the Court.

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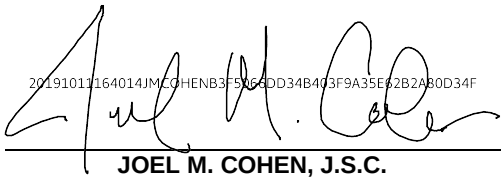

10/11/2019
DATE

JOEL M. COHEN, 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**