NEW HOPE IN ALTMAN’S AFTERMATH

By Matthew S. Brett

On the morning of Tuesday, April 28, 2015, the Appellate Division, First Department quietly released over 40 decisions. At the top of the alphabetical list released by the Appellate Division was Altman v 285 W. Fourth, LLC—a case that seemed to crater the landscape of high rent luxury deregulation as it existed prior to the Rent Act of 2015. Distilled down to its simplest form, Altman was a decision that eliminated post-vacancy deregulation (deregulating an apartment after it became vacant by lawfully raising the post-vacancy rent above the deregulation threshold). I will discuss the possible implications of Altman later in this article.

But first, I am cautiously optimistic to report some positive developments on the horizon that could stem the Altman tide. Specifically, the Appellate Term, First Department (a court below the Appellate Division) issued a decision on November 12, 2015 in the case of Aimco 322 East 61st Street, LLC v. Brosius in which the court refused to apply the holding of Altman. The case was notable in that the Appellate Term was explicitly rejecting the application of a higher court precedent. This is a rare, but not unprecedented event whereby a court indicates that a case decided by the higher court is simply wrong.

Aimco came on the heels of a decision from the DHCR in July 2015 (Matter of Terrance Trainer) that rejected Altman—at least by implication. I am hopeful that this trend will continue and will restore the means of high rent deregulation as it was applied prior to Altman.

Specifically, prior to Altman, it was well settled that in order to deregulate a rent stabilized...
apartment based upon high rent an owner could avail itself of two options:

**Option A:** Outgoing tenant’s rent is over $2,000.00 (or $2,500 pursuant to the Rent Act of 2011), apartment is deregulated upon vacancy.

**Option B:** Outgoing tenant’s rent is below $2,000.00 (or $2,500 pursuant to the Rent Act of 2011), but certain increases are taken during the vacancy and rent is lawfully raised above $2,000.

Option B has always been particularly attractive to owners. That is because even if an apartment has a legal rent that is below the deregulation threshold, after a vacancy is obtained, an owner could apply a number of lawful increases to the legal rent and bring it over the deregulation threshold. Then, the next tenant would be deregulated even if the actual market rent was below the increased legal rent.

Generally speaking there are three types of increases that could be taken after a vacancy:

1. A longevity increase of 0.6% per year if the prior tenant was in possession of the apartment for eight years or more;

2. Individual apartment increases whereby the owner was able to add 1/40th or 1/60th (depending on the time period and size of the building) of the cost of improvements to the legal rent; and

3. A vacancy increase of 20% if the next tenant signed a two year lease or a slightly smaller increase for a one year lease.

As such, Option B was a popular and widespread means of deregulation. Notably, the DHCR and the Courts routinely approve of this means of deregulation. In fact, there have been estimates that tens of thousands of apartments have been deregulated in this manner.

But everything seemed to have changed when the Appellate Division rendered its decision in *Altman*. The Appellate Division held:

The motion court erred in dismissing plaintiff’s complaint, and declaring that the apartment is not subject to the Rent Stabilization Law (see Administrative Code of City of NY § 26-504.2 [a]). Although defendant was entitled to a vacancy increase of 20% following the departure of the tenant of record, the increase could not effectuate a deregulation of the apartment since the rent at the time of the tenant’s vacatur did not exceed $2,000 (see Administrative Code §§ 26-504.2, 26-511[c] [5-a]; *Roberts v Tishman Speyer Props., L.P.*, 62 AD3d 71, 77 [1st Dept 2009], affd 13 NY3d 270, 280 [2009]).

The underlined language indicates that only Option A is a proper means of deregulation. This was particularly distressing to owners for a number of reasons. First, there is no explanation in *Altman* as to how the Appellate Division reached their decision. In one fell swoop it seemed to eliminate a commonly practiced and legally codified means of deregulation.

This is especially confounding since
the very citations used by the Appellate Division in the above excerpted paragraph explicitly state the contrary. For example, the Court cited *Roberts v Tishman Speyer Props., L.P.* However, in Roberts, the Appellate Division actually held:

The high-rent or luxury decontrol provisions of the RRRA, as amended in 1997, now exclude housing accommodations from the scope of the RSL when either: the legal regulated rent is $2,000 or more and the combined household income exceeds $175,000 for two consecutive years (RSL § 26-504.1) or the tenant vacates the apartment and the legal rent, plus vacancy increase allowances and increases permitted for landlord improvements, is $2,000 or more (RSL §§ 26-504.2, 26-511[c] [5-a]).

[Emphasis supplied]. The Appellate Division cited *Roberts* for the exact opposite of what *Roberts* actually held.

Second, the Appellate Division seemed to have ignored not only the legislative history of deregulation but also the explicit statutory language of the Rent Stabilization Law and the Rent Stabilization Code. Specifically, high rent deregulation was first enacted by the New York State Legislature in 1993.

At the time, an apartment could be deregulated when the legal rent exceeded $2,000 per month. There was a perceived ambiguity in the law and as it was up for renewal by the Legislature in the spring of 1997, the New York City Council decided to take matters into its own hands and amended the Rent Stabilization Law to provide that deregulation would only occur “where at the time the tenant vacated such housing accommodation the legal regulated was two thousand dollars or more per month ...” This was April 1, 1997.

However, on June 19, 1997, the State Legislature reenacted Rent Stabilization and ostensibly overruled the City Council’s amendments prospectively. Specifically, the 1997 law preserved the City Council’s deregulation method for the period between April 1, 1997 and June 19, 1997, but also stated that a deregulation could occur when an apartment became vacant after June 19, 1997 and had a legal regulated rent of over $2,000.00 per month. The new law used the phrase “with a legal regulated rent.” The Legislative history made it clear that post vacancy deregulation could occur when after a vacancy occurs the rent is raised over $2,000.00 (in 2011 the threshold was raised to $2,500.00 per month).

This was explicitly codified in the DHCR’s Rent Stabilization Code and applied by the agency in countless decisions. As indicated previously, it was also the most commonly understood (and practiced) method of deregulation. That is until Altman was issued.

Inasmuch as many believed that the Appellate Division may have overlooked the explicit text of the law, various real estate groups (including RSA, CHIP and REBNY), with the assistance of BBWG, submitted an affidavit in support of a motion to reargue and/or for leave to appeal to the Court of Appeals. The motion was denied on September 7, 2015. As of now, the matter will be tried to completion at the trial level and ultimately the matter will be appealed again. Hopefully, at the end of the day, the Court of Appeals will revisit this issue and restore the previously, almost
universally, accepted interpretation of the deregulation provisions.

However, in the interim there were two developments that seem to indicate a judicial and administrative departure from Altman. The first development emerged from the DHCR, when on July 28, 2015, Deputy Commissioner Woody Pascal issued an Order and Opinion Denying a Tenant’s Petition for Administrative Review in the Matter of Terrance Trainer, DHCR Adm. Rev. Docket No. BQ-410001-RK (7/28/15) that held:

The Rent Administrator’s order states that the base date for calculation purposes—being four years before the complaint was filed—is December 14, 200G; that the rent on that date (“base rent”) was $1,722.23 per month; that under the next lease to a former tenant, that rent rose to a figure higher than $2,000.00 per month; and that accordingly, under Section 2520.11(r)(4)(8)(i) of the Rent Stabilization Code, the subject accommodations were not subject to that Code when the complainant took occupancy.

This decision, which was rendered after Altman, simply ignores the Appellate Division’s holding in Altman when it rendered the decision. Thus, the DHCR appears continuing its reliance of high rent deregulation as it existed prior to Altman.

While the DHCR’s rejection of Altman seems to be by implication, the Appellate Term in Aimco did not mince words when they held:

In this regard, we note that Rent Stabilization Law (RSL) § 26-404.2[a]’s first statutory basis for high rent deregulation, that is, “at the time the tenant vacated... the legal regulated rent was two thousand dollars or more a month”.

In addition, increases in rent for post vacancy improvements count “to bring the legal rent above the luxury decontrol threshold” (Jemrock Realty Co., LLC v Krugman, 13 NY3d 924, 926 [2010]; see Roberts v Tishman Speyer Props., L.P., 62 AD3d 71, 78 [2009] [high rent deregulation when “the tenant vacates the apartment and the legal rent, plus vacancy increase allowances and increases permitted for landlord improvements, is $2,000 or more”], affd 13 NY3d 270, 281 [2009] [“post vacancy improvements count toward the $2,000 per month rent threshold [L 97, ch 116]” for high rent deregulation]; cf. Altman v 285 W. Fourth, LLC, 127 AD3d 654 [2015] [relying solely on RSL § 26-404.2[a]’s first statutory basis for high rent deregulation, that is, “at the time the tenant vacated... the legal regulated rent was two thousand dollars or more a month”]).

The Appellate Term recognized the two means of deregulation we referred to previously (Option A and Option B). The Court also recognized the Court of Appeals decision in Jemrock while contrasting Altman with disapproval (“relying solely on RSL § 26-404.2[a]’s first statutory basis for high rent deregulation, that is, ‘at the time the tenant vacated... the legal regulated rent was two thousand dollars or more a month’”).

Aimco is obviously not going to be the end of this controversy, as the Appellate Term is subordinate to the Appellate Division. Certainly, there will be tenant advocates that will cling to Altman. And Aimco may be reviewed by the same Appellate Division that decided Altman. But Aimco’s correct legal analysis and bold articulation of deregulation offers owners hope that high rent deregulation as it existed for decades, will be vindicated.

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It is important to emphasize that this article does not address deregulation under the Rent Act of 2015. The Rent Act of 2015 contains language that has been interpreted by some as changing how and when an apartment can be deregulated and we caution the reader that this article addresses deregulation of apartments that became vacant prior to June 15, 2015. If you have questions regarding deregulation pursuant to the Rent Act of 2015, please speak with an attorney at BBWG to discuss your particular issues and concerns.
ADMINISTRATIVE LAW UPDATE

DEREGULATE RENT REGULATED APARTMENTS THROUGH HIGH INCOME HIGH RENT DEREGULATION IN 2016

By Diana R. Strasburg

Each year we advise clients of the availability of High Income Rent Deregulation (“Luxury Deregulation”). Luxury Deregulation is an administrative proceeding commenced at the New York State Division of Housing and Community Renewal (“DHCR”) that results in the deregulation of a rent regulated apartment if (1) the monthly legal/maximum rent is at or above the rent threshold established by the State Legislature, and (2) the federal adjusted gross income, as reported on N.Y.S. income tax returns, of all persons occupying an apartment as a primary residence on other than a temporary basis, exceeded $200,000.00 for the two preceding years.

The Rent Act of 2015 increased the high income, high rent deregulation threshold from $2,500.00 to $2,700.00. The Act also changed the methodology for determining the threshold rent in high income rent deregulation proceedings in each filing year.

Beginning January 1, 2016, the rent threshold will be adjusted by the one year renewal lease guideline percentage increase issued the prior year by the Rent Guidelines Board. Therefore, because the New York City Rent Guidelines Board issued a 0% rent increase for one year renewal leases, the rent threshold will remain at $2,700.00 for the 2016 filing period. Rent regulated apartments with a legal or maximum monthly rent that reach or exceed $2,700.00 as of May 1, 2015 may be petitioned for Luxury Deregulation.

Current exceptions to Luxury Deregulation are (a) buildings currently receiving J-51 or 421-a tax benefits; (b) rent controlled units in buildings that had previously received J-51 tax benefits; and (c) former Interim Multiple Dwelling units.

BBW&G recommends that owners file for Luxury Deregulation against all rent regulated apartments (both rent stabilized and rent controlled) if the apartment’s legal or maximum rent is $2,700.00 or more as of May 1st, regardless of whether a tenant is paying a preferential rent of less than $2,700.00. An owner may also combine the legal rent of different apartments rented by the same family to reach the $2,700.00 threshold.

Timing is important when preparing Luxury Deregulation petitions.

- On or before May 1st, an owner must serve an Income Certification Form (“ICF”) upon an apartment with a legal or maximum rent of $2,700.00 or more (the ICF cannot be served until the apartment’s rent is $2,700.00 or more). The ICF requires tenants to answer whether their household’s annual income (defined by the Rent Stabilization Code as the Federal adjusted gross income as reported on a N.Y.S. income tax return), exceeded $200,000.00 in both years preceding the year that the owner’s petition is filed. If it is determined that the household income is $200,000.00 or more, DHCR will issue an Order of Deregulation, thereby removing the apartment from rent regulation. Orders of Deregulation may also be issued based upon a tenant’s failure to properly answer the ICF.

- On or before June 30th, owners must file a Petition by Owner for High Income Rent Deregulation with DHCR for each tenant the owner seeks to deregulate.

The owner’s High Income Rent Deregulation Petition requests that DHCR do one of the following:

- Issue an order deregulating an apartment based upon a tenant’s admission that the total annual household income exceeded $200,000.00; or
- Seek verification of the tenant’s answer in the ICF because the owner contests it; or
- Seek verification of a tenant’s household income because a tenant failed to properly answer the ICF.

If an owner seeks verification of a tenant’s answer in the ICF, DHCR will, with the cooperation of the New York State Department of Taxation and Finance, determine whether a tenant’s Federal Adjusted annual household income was above or below $200,000.00 in both years preceding the year that the owner’s petition is filed. If it is determined that the household income is $200,000.00 or more, DHCR will issue an Order of Deregulation, thereby removing the apartment from rent regulation. Orders of Deregulation may also be issued based upon a tenant’s failure to answer a Luxury Deregulation petition.

Generally, the verification process takes about eighteen (18) months from filing the petition to receiving an order from DHCR.

Diana R. Strasburg (dstrasburg@bbwg.com), is an associate in BBW&G’s Administrative Law Department. For more information regarding filing luxury deregulation petitions, please contact Ms. Strasburg.
By Aaron Shmulewitz

Aaron Shmulewitz heads the Firm's co-op/condo practice, consisting of more than 300 co-op and condo boards throughout the City, as well as sponsors of condominium conversions, and numerous purchasers and sellers of co-op and condo apartments, buildings, residences and other properties. If you would like to discuss any of the cases in this article or other related matter, you can reach Aaron at 212-867-4466 or ashmulewitz@bbwg.com.

CO-OP SHAREHOLDER NOT ENTITLED TO MAINTENANCE ABATEMENT FOR FLOOD CAUSED BY HER FAULTY REPAIRS

**In Re 12-14 East 64th Owners Corp. v. Hixon, Appellate Division, 1st Department**

COMMENT | The Court held that adverse possession applies to co-op apartments, and the suit was not barred by the statute of limitations.

CONDO BOARD ADOPTION OF HOUSE RULE IMPOSING 1-YEAR MINIMUM LEASE TERM INVALID; $500/DAY FINE INVALIDATED AS CONFOISCATORY

**Gabriel v. Board of Managers of The Gallery House Condominium, Appellate Division, 1st Department**

COMMENT | Leasing restrictions is an issue that condo Boards often grapple with; Boards must follow prescribed procedures in their governing documents to be able to enforce them.

CO-OP BOARD TURNDOWN OF BUYER PROTECTED BY BUSINESS JUDGMENT RULE

**Griffin v. Sherwood Village Co-op C., Inc., Appellate Division, 2nd Department**

COMMENT | The Court applied the business judgment rule factors, including the Board’s emphasis on the buyer’s excessive debt.

ELECTION OF CO-OP BOARD UPHELD, DESPITE

POST-MEETING DISCOVERY OF UNCOUNTED PROXY THAT WOULD HAVE CHANGED RESULT

**Mishaan v. 1035 Fifth Avenue Corporation, Supreme Court, New York County**

COMMENT | The Court analyzed various bylaw provisions, and held that the managing agent could not unilaterally correct his own error by certifying results different from what he announced at the annual meeting.

44-YEAR OLD RECONFIGURATION OF CO-OP APARTMENTS UPHELD DESPITE ABSENCE OF ANY DOCUMENTATION

**Green v. 880 Fifth Avenue Corporation, Supreme Court, New York County**

COMMENT | The Court held that adverse possession applies to co-op apartments, and the suit was not barred by the statute of limitations.

ATTORNEY GENERAL CAN SUE CO-OP AND ITS SPONSOR TO DISSOLVE CO-OP BASED ON SPONSOR’S REACQUISITION OF SOLD UNITS AND OPERATION OF THEM AS FREE-MARKET RENTALS

**People v. Ft. George Apt. Corp., Supreme Court, New York County**

COMMENT | The Attorney General contended that the sponsor was engaged in a scheme to permanently
control the co-op so as to circumvent rent-stabilization laws.

CONDO SELLER ENTITLED TO KEEP DOWNPAYMENT DUE TO BUYER’S REFUSAL TO CLOSE BECAUSE CONDO HAD NOT COMPLETED RETROACTIVE FIRESTOPPING INSTALLATION IN APARTMENT

Beinstein v. Navani, Appellate Division, 1st Department

COMMENT | There was no provision in the parties’ sale agreement making the buyer’s obligations contingent on any such remediation. Caveat emptor-this holding effectively compels buyers to close with unsafe, code-violative conditions in effect.

CITIBIKE STATION OUTSIDE PLAZA HOTEL CONDO UPHELD

Board of Managers of The Plaza Condominium v. New York City Department of Transportation, Appellate Division, 1st Department

COMMENT | The Court examined the standards underlying DOT’s decision, weighed all required factors, and held that DOT’s decision was not arbitrary and capricious. This decision continued Citibike’s winning streak against building owner challenges.

RENT-STABILIZED TENANT NOT ENTITLED TO ABATEMENT FOR SECOND-HAND SMOKE COMPLAINTS, BECAUSE HE FAILED TO ESTABLISH PROOF OF SOURCE

555-565 Associates, LLC v. Kearsley, Civil Court, New York County, Landlord & Tenant Part

COMMENT | The Court held that such conditions could constitute a breach of the warranty of habitability, but the tenant had failed to prove it here. While not involving a co-op or condo, this holding is instructive, nevertheless.

CONDO BOARD CAN SUE SPONSOR FOR FAILURE TO ESTABLISH RESERVE FUND, AND FOR CONSTRUCTION DEFECTS AS A BREACH OF CONTRACT

Board of Managers of 111 Hudson Street Condominium v. 111 Hudson Street, LLC, Supreme Court, New York County

COMMENT | But claims against the sponsor’s principals were dismissed, and a claim based on fraud was held barred by the Martin Act.

HOA MEMBER CANNOT SUE HOA IN SMALL CLAIMS COURT TO INVALIDATE UNPAID FINES, OR TO OVERTURN HOA BAR OF HER USE OF POOL DUE TO SUCH NON-PAYMENT

Esposito v. Barr, Civil Court, Small Claims Part, Richmond County

COMMENT | However, the Court indicated that, if it did have the jurisdiction, it likely would have invalidated the HOA’s decisions as being beyond the HOA’s authority based on its bylaws.

CO-OP AND ITS PRESIDENT CAN SUE DISSIDENT SHAREHOLDERS FOR DEFAMATION BASED ON STATEMENTS POSTED ON WEBSITE

Trump Village Section 4, Inc. v. Bezvoleva, Supreme Court, Kings County

COMMENT | The Court indicated that the statements might not be privileged, due to the posters’ apparent malice.
NEW YORK CITY PROMULGATES NEW LAWS AFFECTING TENANT BUYOUT PRACTICES

By Kara Rakowski

On September 3, 2015, Mayor de Blasio signed into law new legislation that affects how owners may approach regulated tenants regarding buy-outs of their tenancies. The law will be codified as an amendment to the Housing Maintenance Code, and will take effect 90 days from September 3, 2015.

The new law requires owners or their agents who are contacting regulated tenants regarding buy-outs to inform tenants, at the time of initial contact, of their right to (a) stay in their apartment, (b) seek an attorney’s advice, and (c) decline any future contact on a buyout offer for 180 days.

The law explicitly prohibits an owner or its agent from making buyout offers to a tenant or a relative of such tenant, within 180 days of the tenant explicitly informing the owner in writing that the tenant does not wish to receive such offers. In addition, the law requires anyone acting on behalf of an owner in connection with a buyout offer to inform the tenant that he or she is acting on behalf of the owner.

The penalty for violating the new law ranges from $1,000.00 to $10,000.00 for a first offense and $2,000.00 to $10,000.00 for subsequent offenses.

Belkin Burden Wenig & Goldman, LLP recommends that any buy-out communication to a regulated tenant include a statement informing the tenant that the tenant may (a) reject any offers and continue to reside in the apartment, (b) seek the advice of counsel, and (c) request in writing, not to be contacted for buyout purposes, which request would bar the owner or its representative from making any such contact for 180 days. During any verbal communication with a regulated tenant regarding a buyout, such information should be conveyed and then immediately followed up with a letter informing the tenant of the tenant’s rights under the new law. Owners should retain proof of mailing of the letter to the tenant.

Kara I. Rakowski is a partner in the Firm’s Administrative Law Department. For more information regarding this new law, please contact Ms. Rakowski at krakowski@bbwg.com

TRANSACTIONS OF NOTE

Partner Stephen M. Tretola and associate (awaiting admission) Cristina Riggio represented the owner of a mixed-use residential/retail development in Norwalk, Connecticut in a $35.5 million mortgage refinancing, which closed September 2.

Craig L. Price and Allison Lissner, Partners in the BBWG Transactional Department, represented a New York City-based investor in the acquisition of the downtown Westport, CT landmarked building that houses the local Patagonia store for $16.6 million, as well as, the acquisition and financing of a 24,602±-square-foot recently developed and expanded retail property situated in the heart of Route 1 in downtown Fairfield, Connecticut for $15 million.
NOTABLE ACHIEVEMENTS

Sherwin Belkin, a partner in the Firm’s Appeals and Administrative Law Departments, was quoted numerous times in connection with new City legislation restricting landlord buyouts of tenants, including in *The Greenfield Reporter* [http://m.greenfieldreporter.com/view/story/3b02ecd4b96f43e2b1c24e6d4943d173/NY--Tenant-Buyouts-Harassment] and *The Real Deal* [http://therealdeal.com/blog/2015/09/03/city-to-landlords-offering-buyouts-back-off/] on September 3; *The New York Law Journal* on September 4; *The Commercial Observer* on September 16; and *Real Estate Weekly* [http://rew-online.com/2015/09/30/city-slammed-for-creating-buyout-boogeymen/] on September 30. Mr. Belkin was also quoted in a feature article in the Real Estate Section of the *New York Times* on December 4, 2015, titled “New Apps and Services for Renters”. City Biz List also asked Mr. Belkin to comment on November 10, 2015, on proposed City Council legislation that would ban owners from checking the credit scores of would-be tenants prior to renting apartments. Law 360 on October 21, 2015, asked Mr. Belkin about his favorite law movie. Mr. Belkin said it was “The Verdict” with Paul Newman in the lead. On November 4, 2015, The Expert Network recognized Mr. Belkin as a Distinguished Lawyer, among the top in the real estate industry, based on peer reviews and ratings, dozens of recognitions, and accomplishments achieved throughout his career.

The Firm’s litigation department victory in *Richstone v. The Board of Managers of Leighton House Condominium*, and partners Jeffrey L. Goldman and Aaron Shmulewitz, and associate Scott F. Loffredo, were featured in the Realty Law Digest feature of *The New York Law Journal* on September 9, and in the October edition of Habitat magazine. Mr. Shmulewitz was also quoted by the Habitat on-line on September 16 and 25, concerning issues surrounding balcony enclosures and when they need to be removed.

Litigation partner, Steven Kirkpatrick, defeated a co-op unit owner’s attempt to prevent the upgrade of public hallway and lobby areas of a luxury Central Park West building. The unit owner’s request for a preliminary injunction halting the upgrade was rejected by the court. In the most recent decision, the unit owner’s claims against our client were formally dismissed.

Transactional and Appeals partner, Robert A. Jacobs, will co-chair a continuing legal education program at the New York City Bar Association on December 9, 2015, overviewing “The Do’s & Don’ts of Zoning Lot Mergers & Development Rights Transfers in NYC.” Mr. Jacobs was also quoted in an article in *The Real Deal* on November 23, 2015, concerning a pending Court of Appeals case, Ram I LLC v. DHCR, in which BBWG filed “friend of the court” brief on behalf of RSA, CHIP and SPONY. The article, “Aby Rosen’s RFR Challenges Muddled Rent Control Rule” featured the case.

Litigation partner, Martin Meltzer, head of BBWG’s non-payment practice group, recently competed in, and finished, the 30th anniversary event of the Marathon Des Sables (MDS). MDS is a self-sustained ultra-endurance event consisting of the equivalent of six marathons (155 miles) over the course of seven days in Morocco’s Sahara Desert. In conjunction with this event, Mr. Meltzer raised money for the Progeria Research Foundation and Team Zoey [https://www.crowdrise.com/team-zoey]. Mr. Meltzer is returning to Morocco in April 2016 to compete and raise money for the fights against Progeria.