DISTRICT OF COLUMBIA
COURT OF APPEALS

District of Columbia Court of Appeals
Case Nos. 24-CV-439, 24-CV-444, 24-CV-480

District of Columbia Superior Court Case No. 2019-CA-008177-B

2135 NE, LLC,

Appellant,

v.

DLY GEORGE'S WAREHOUSE, LLC, *et al.*,

Appellee.

BRIEF OF 2135 NE LLC AND EKHO EVENTS LLC[1]

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Cross-Appellant Ekho Events LLC

[1] Ekho Events LLC is technically a Cross-Appellant/Appellee. It joins in this brief because the order that is the subject of 2125 NE, LLC's appeal is the same order that is the subject of Ekho Events LLC's Cross-Appeal. The parties expect to file an unopposed procedural motion concerning briefing.

2135 NE LLC'S CORPORATE DISCLOSURE

Appellant 2135 NE LLC states and discloses that it has no parent corporation and that no parent corporation or public corporation owns any stock, shares, or interest of or in Appellant.

These representations are made for purposes of recusal.

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September 9, 2024

EKHO EVENTS LLC'S CORPORATE DISCLOSURE

Ekho Events LLC states and discloses that its parent corporation is GLOW DC LLC. GLOW DC LLC is owned by Insomniac Holdings, LLC and In The Dark, Inc. Live Nation Worldwide, Inc. owns an interest in Insomniac Holdings, LLC. Live Nation Entertainment, Inc. (publicly traded) owns 100% of Live Nation Worldwide, Inc.

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I. STATEMENT OF JURISDICTION, ISSUES PRESENTED FOR REVIEW, STATEMENT OF THE CASE, STATEMENT OF THE FACTS, SUMMARY OF ARGUMENT, STANDARDS OF REVIEW

A. Statement Of Jurisdiction:

This matter was initially brought in the Superior Court of the District of Columbia, pursuant to D.C. Code § 11-921. This Court has jurisdiction pursuant to D.C. Code § 11-721(a)(1).

B. Statement Of Issues Presented For Review:

(1) Whether the trial court erred as a matter of law by failing to conclude that the motion was neither ripe nor justiciable;

(2) Whether the trial court erred as a matter of law by failing to construe the easement to provide for unimpeded access; and

(3) Whether the trial court erred as a matter of law by failing to consider the intent of the parties to the easement and surrounding circumstances.

C. Statement Of The Case:

This matter is here on appeal from an "Omnibus Order" entered on February 20, 2024 by the Honorable Robert R. Rigsby granting in part Defendant's Motion for Summary Judgment. Disposition of the remaining claims was made by stipulation on April 8, 2024, and following trial on the merits on April 8, 2024, and a final order on April 11, 2024. This appeal followed.

This case commenced on December 13, 2019, when Plaintiff DLY George's Warehouse, LLC ("DLY" and/or "Plaintiff") filed a two (2) count Complaint, which asserted relief which asserted relief as follows: Declaratory Judgment (Count I); and Permanent Injunctive Relief (Count II).

On January 21, 2020, Defendant/Counter-Plaintiff 2135 NE, LLC ("2135") filed its Answer and a two count Counterclaim against Plaintiff as follows: Declaratory Judgment (Count I); and Private Nuisance (Count II).

On February 6, 2020, Defendant Ekho Events, Inc., now known as Ekho Events LLC, ("Ekho" or "Echostage") filed their Answer to the Complaint and Crossclaim against 2135. Ekho's Crossclaim asserted relief as follows: Breach of Lease (Count I); and Indemnification (Count II).

On February 21, 2020, Ekho dismissed their Crossclaim against 2135.

On February 27, 2020, Plaintiff/Counter-Defendant filed their Answer to Defendant/Counter-Plaintiff's Counterclaim.

On August 17, 2021, Defendant/Counter-Plaintiff filed a Motion for Preliminary Injunction. On August 31, 2021, Plaintiff/Counter-Defendant filed its Opposition to Defendant/Counter-Plaintiff's Motion for Preliminary Injunction.

On September 28, 2021, the Court commenced an evidentiary hearing on Defendant/Counter-Plaintiff's Motion for Preliminary Injunction. Further evidence

was taken On December 6, December 8, 2021, January 18, 2022 and January 19, 2022.

On February 11, 2022, the parties timely filed Proposed Findings of Fact, Conclusions of Law, and Proposed Orders.

On March 9, 2022, the Court issued an Order denying Defendant/Counter-Plaintiff's Motion for Preliminary Injunction (the "2022 Order"). Appendix, at ("Appx.") D.

On March 11, 2022, Defendant/Counter-Plaintiff noted its appeal of the 2022 Order.

On June 21, 2023, this Court issued a Memorandum Opinion and Judgment affirming the Superior Court's denial of Defendant/Counter-Plaintiff's Motion for Preliminary Injunction. As this Court explained:

> The trial court evaluated the motion under all four preliminary injunction factors and we are satisfied that it considered "all the issues which necessarily underlie the issuance of an injunction." *Wieck*, 350 A.2d at 387.[2] However, we will not examine its reasoning as to the remaining three factors, especially because the most contested factor—likelihood of success on interpreting the language of the easement—hews so closely to "the overall merits of the dispute between the parties," which "it is not our task to resolve." *Id.* The failure of 2135 to demonstrate a threat of irreparable harm is sufficient to determine the outcome of this appeal. *See id.* ("A preliminary injunction is an extraordinary remedy, and the trial court's power to issue it should be exercised only after careful deliberation has persuaded it of the necessity for the relief."). At 3.

[2] *Wieck v. Sterenbuch*, 350 A.2d 384, 387 (D.C. 1976).

On November 17, 2023, Plaintiff/Counter-Defendant and Defendant/Counter-Plaintiff 2135 filed their motions for summary judgment on the complaint.

On November 20, 2023, Defendant/Counter-Plaintiff Ekho filed their Joinder In Support Of Defendant/Counter-Plaintiff 2135's Motion For Summary Judgment.

On December 1, 2023, all parties filed their respective oppositions.

On December 8, 2023, Plaintiff/Counter-Defendant and Defendant/Counter-Plaintiff 2135 filed their respective replies.

On January 17, 2024, the Honorable Yvonne M. Williams held and continued the Pretrial Conference pending the ruling on the Plaintiff/Counter-Defendant and Defendant/Counter-Plaintiff 2135 motions for summary judgment.

On February 20, 2024, Judge Rigsby issued an Omnibus Order. The order stated in pertinent as follows:

> **I. <u>Count I – Declaratory Judgment:</u>**
>
> The parties move for summary judgment as to Count I of Plaintiff's Complaint in their respective motions….
>
> Here, the intent of the creators of the easement are irrelevant when the documents themselves are unambiguous such as the case here. Accordingly, summary judgment in favor of Plaintiff as to Count I is appropriate and Plaintiff's Motion is **GRANTED** as to Count I.
>
> As the Court found that Plaintiff has proven its burden in the above analysis, Defendant 2135's competing motion for summary judgment as to Count I is summarily **DENIED.**
>
> There is no basis for the Plaintiff to unreasonably interfere with Ekho's rights to the easement nor should the Court's ruling be construed as such.

II. Count II – Permanent Injunction:

…Plaintiff's injuries do not appear immediate or concrete for purposes of summary judgment as to Defendant 2135….

In drawing all reasonable inferences in the non-movant's favor, there does not appear to be a violation of the ROW for purposes of the *Motions*….

As to Count I of the Complaint:

…[T]he language of that certain Deed (the "WFJ Deed") dated April 14, 2010 and recorded April 19, 2010 as Document No. 201003307 among the land records of the District of Columbia, pursuant to which Defendant 2135 NE, LLC ("2135 NE") acquired (and presently owns) fee simple title to the real property located at 2135 Queens Chapel Road, NE, Washington, DC (the "2135 Property"), is unambiguous, including, but not limited to, the "Right of Way" described therein over a portion of the real property located at 2145 Queens Chapel Road, NE, Washington, DC (the "2145 Property") presently owned by Plaintiff DLY George's Warehouse, LLC "DLY").

1. The WFJ Deed restricts use of the Right of Way only by 2135 NE and its permitted users of the Right of Way (including, but not limited to, Defendant Ekho Events Inc. ("Ekho")), and no such restrictions apply to DLY or its permitted users of the Right of Way.[3]

2. The WFJ Deed does not provide 2135 NE or its permitted users of the Right of Way with unfettered, exclusive or unconditional use of the Right of Way and loading dock on a 24/7 basis.

3. The WFJ Deed prohibits 2135 NE and its permitted users of the Right of Way from parking (temporarily or otherwise) on the Right of Way, interfering with DLY or any other of DLY's permitted

[3] "This Order applies to 2135 NE, LLC as the owner of record of the 2135 Property and, as such, the extant "Grantee" under the WFJ Deed, and to DLY George's Warehouse, LLC as the owner of record of the 2145 Property and, as such, the extant "Grantor" under the WFJ Deed." February 20, 2024, Omnibus Order, Appx. E, at n.4.

> user's use of the Right of Way, or using the Right of Way for any purpose whatsoever (other than ingress and egress for accessing and using the loading dock and rear of the 2135 Property).

February 20, 2024 Omnibus Order, (the "Omnibus Order") Appx. E, at (unnumbered) 3-8.

On April 8, 2024, a bench trial was conducted and concluded.[4] At the commencement of the trial, Plaintiff/Counter Defendant and Defendant/Counter Plaintiff 2135 LLC submitted a Notice of Voluntary Dismissal and Related Relief which stated as follows:

1. Plaintiff/Counter Defendant DLY George's Warehouse LLC dismisses with prejudice Count II (Permanent Injunctive Relief) of its Complaint as to Defendant/Counter Plaintiff 2135 NE LLC.

2. On March 9, 2022, Judge Rigsby denied 2135 NE LLC's Motion for Preliminary Injunction (the "2022 Order"). On February 20, 2024, Judge Rigsby entered Declaratory Judgment and denied Plaintiff's Motion for Summary Judgment on Permanent Injunction (the "2024 Order") (collectively the "Orders").

3. Defendant/Counter Plaintiff 2135 NE LLC dismisses with prejudice Count II (Private Nuisance) of its Counterclaim as to Plaintiff/Counter Defendant DLY George's Warehouse LLC.

4. These dismissals resolve all remaining claims and counterclaims asserted in this case between Plaintiff/Counter Defendant DLY George's Warehouse LLC and Defendant/Counter Plaintiff 2135 NE LLC.

[4] No party had sought consolidation under SCR-C-v 65(a)(2), which provides:

> Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial.

5. These dismissals do not resolve any claims between Plaintiff/Counter Defendant DLY George's Warehouse LLC and Defendant Ekho Events LLC.

6. These dismissals do not affect, dissolve, vacate, alter, or amend any orders or judgments previously entered in this case, including the Orders.

7. No orders, judgments, notices, or rulings entered in this case after the filing of this notice shall be applicable to, binding on, used as evidence or precedent against or effective against 2135 NE LLC or 2135 NE, Washington, DC and shall not constitute or be used by any party to support *res judicata*, collateral estoppel, issue preclusion, fact preclusion or liens or title claims against 2135 NE LLC or 2135 NE, Washington, DC. Neither this notice nor any proceedings in this case after the filing of this notice shall be used against 2135 NE LLC or DLY George's Warehouse LLC in any of the following cases: 2020-CA-004062-R(RP); 2020-CA-001875-B; 2021-CA-002390-B; and 2021-CA-001300-B. This Paragraph 7 does not affect, dissolve, vacate, alter, or amend any orders or judgments entered in this case prior to the filing of this notice, including the Orders.

8. No orders, judgments, notices or rulings entered in this case after the filing of this notice shall constitute or be used by 2135 NE LLC to support *res judicata*, collateral estoppel, issue preclusion, fact preclusion as to any claims or causes of action of DLY George's Warehouse LLC against 2135 NE LLC or shall be used as evidence or precedent by 2135 NE LLC against DLY George's Warehouse LLC or 2145 NE, Washington, DC. This Paragraph 8 does not affect, dissolve, vacate, alter, or amend any orders or judgments entered in this case prior to the filing of this notice, including the Orders.

9. Any and all claims between Defendant Ekho Events LLC and 2135 NE LLC are reserved and the foregoing dismissals shall not constitute *res judicata*, collateral estoppel, issue preclusion, or fact preclusion with respect to any such claims.

April 8, 2024 Notice of Voluntary Dismissal and Related Relief, Appx. F.

On April 11, 2024, Judge Williams issued in open court the following pertinent findings and conclusions:

> A bench trial was held on Monday, May [*sic*] 8th, 2024, to resolve plaintiff DLY's claim for permanent injunction against defendant Ekho Events LLC to prohibit vehicles from parking in or otherwise interfering with the use of the right-of-way granted by the 2010 WFJ deed, allowing use of the loading dock behind plaintiff's property at 2145 Queens Chapel Road NE….
>
> Judge Rigsby already decided declarant has --issued a declaratory judgement holding in part that the…WFJ deed does not provide 2135 NE or permitted users of the right-of-way with unfettered, exclusive, or unconditional use of the right-of-way and loading dock on a 24/7 basis.
>
> Judge Rigsby also declared the WFG -- FJ [*sic*] deed prohibits 2135 NE and its permitted usage of the right-of-way from parking, temporarily or otherwise, on the right-of-way, interfering with DLY or any other of DLY's permitted user's rights of the right-of-way or using the right-of-way for any purpose whatsoever, other than ingress and egress for accessing and using the loading dock and rear of the 2135 property.
>
> Because 2135 leases its property to defendant Ekho Events LLC, Ekho Events is bound by the terms of the WFJ deed. Ekho Events LLC is a concert venue owned by Insomniac, which is owned by Live Nation. Concerts are generally held on Friday and Saturday evenings of every week and host approximately 2,800 people.
>
> To host the concerts, Ekho Events uses the loading dock to load and unload concert equipment, including lighting, lasers, scaffolding, cryogenics, video equipment, sound systems, custom set pieces, and that's just to name a few of the things that get delivered on a weekly basis to Ekho Events….
>
> At issue before the Court is whether Ekho Events LLC's use of the loading dock violates the WFJ deed, thus warranting a permanent injunction to enjoin it from continuing to do so.
>
> Upon consideration of the facts presented at Monday's trial, the Court finds that a permanent injunction is not warranted in this case, and orders judgement for defendant Ekho Events….

> …[T]he Court cannot find that there is even an injury, let alone an irreparable injury.
>
> Moreover, even if there was an injury or some sort of act that violated the WFJ deed, and the Court does not find that any of those acts occurred, DLY has not shown that any injury is imminent.
>
> Regarding adequate remedy at law…Plaintiff admits that they have an adequate remedy at law whether or not a permanent injunction is granted.
>
> Balance of hardships: …for defendant to require each of its delivery vendors to move their delivery truck every time they are in the defendant venue preparing to load or unload the truck is a significant burden on the defendant; particularly, where the plaintiff has not demonstrated that it is burdened at all by the presence of defendant's delivery trucks.

("2024 Trial Order") April 11, 2024 Transcript of Proceedings, Appx. G, at 3:19-25; 4:24-25; 5:3-25; 6:1, 12-19; 10:17-22; 11:12, 17-18; 12:4; and 13:1-6.

D. Statement Of The Facts:[5]

i. <u>The Properties, Deeds, and Leases:</u>

2135 Queen's Chapel Road, N.E., Washington, D.C. 20018 (the "2135 Property") and 2145 Queen's Chapel Road, N.E., Washington D.C. 20018 (the "2145 Property") are adjoining commercial properties. The 2135 Property is owned by Defendant 2135 NE, LLC, and the 2145 Property is owned by Plaintiff DLY George's Warehouse, LLC ("DLY").

Prior to 2010, both properties were part of a single lot, along with a third lot, and were owned by WFJ, LLC which was managed by Mr. Cornell Jones. The

[5] Derived from the statement of material facts not in genuine issue or dispute in the opposition to Plaintiff's Motion for Summary Judgment.

parcel which later became the 2135 Property was operated by the predecessor of 2135 NE LLC as a one-story mezzanine nightclub and concert venue with a liquor license. The parcel which later became the 2145 Property was improved by a three-story vacant parking garage.

A predecessor to 2135 LLC entered a contract of sale and leasehold arrangement with WFJ, LLC in 2008, pending subdivision of the consolidated parcel. From 2008 to 2010, Mr. Sonny Preet, a 50% member of 2135 LLC with Mr. Raj Dua, managed its day-to-day operations. 2135 LLC renovated the 2135 property, spending over a million dollars. Following the subdivision in 2010, 2135 LLC, by Deed dated April 14, 2010, and recorded April 19, 2010 ("The Deed"), acquired fee simple title to the "2135 Property"). Pursuant to the Deed, an easement (the "Easement", or "Right of Way") was conveyed to provide the grantee with the same rights and access as were used prior to the subdivision.

On July 20, 2012, 2135 LLC executed a retail lease for the 2135 Property with Ekho Events, Inc., (the "Tenant").

On or about 2015-2016, Jemal George's Wasserman, LLC ("Jemal") acquired the 2145 Property.

On September 27, 2019, DLY acquired title to the 2145 Property from Jemal.

ii. <u>The Creation of the Easement:</u>

In order to operate the nightclub and concert venue at the 2135 Property,

round-the-clock access to the rear of that property, including the loading dock and the sidewalk, is necessary, and was necessary prior to the subdivision in 2010. No access through the front of the 2135 Property for equipment, supplies, and deliveries for performers, during or prior to performances, is available and was available before the subdivision.

Plaintiff reviewed the Easement before it acquired the 2145 Property. Plaintiff had inspected the 2145 Property, and the Easement, on several occasions going back to 2015.

Before and during the operation of the nightclub and concert venue from 2008 to 2010, Mr. Sanjeev Preet ("Mr. Preet"), now a managing member of 2135 LLC, recognized that continuous access to the loading dock and the rear of the 2135 Property was the "lifeline" for commercial operation of the 2135 Property. 2135 LLC would not have sought acquisition of the 2135 Property without that access.

2135 LLC negotiated for acquisition of an Easement which, following subdivision, would provide 2135 LLC with continuous access to the rear of the 2135 Property, including the alley, loading dock and the sidewalk. 2135 paid an additional $400,000.00 for the Easement.

The Easement provides:

> For the sole purpose of accessing and using the loading dock and rear of 2135 Queens Chapel Road, N.E., Washington, D.C., situate on Lot 144, in Square 4258, for the benefit of the Grantee, its successors and or assigns. Grantee, or

> any permitted users of Grantees, shall not park on the Right of Way, interfere with Grantor's or any other permitted user's use of the Right of Way, or use of Right of Way for any other purpose whatsoever. Grantee may install a gate to control access to the right-of-way. Grantee, its successors and/or assigns, shall provide gate keys to Grantor, and/or its successors and assigns, and/or Grantor's tenants. Costs for maintenance and repairs of the right-of-way shall be borne equally by Grantor and Grantee, their respective successors and/or assigns.

April 14, 2010 Easement, Appx. H.

iii. Use of the Easement from 2010 – 2012:

From 2008 to 2012, before the Echostage lease was signed, 2135 LLC used the rear of the 2135 Property, including the alley, sidewalk, and loading dock, without interruption, 24 hours a day, seven days a week.

iv. The Echostage Use of the Easement from 2012 – 2019:

Echostage is indirectly owned by Live Nation Entertainment, Inc., a public company. It provides venues for world-class artists, and it operated at the 2135 Property solely as a concert venue, and not as a nightclub.

Approximately 70% of artists travel with their own stage and sound equipment.

Echostage handles two (2) types of shows: (1) fly-ins, when artists fly in with their crew to perform; and (2) full tours, when artists bring their own production equipment. Fly-ins require Echostage to provide equipment for concert production, *i.e.,* audio and lighting consoles, lighting packages, video wall packages, and other requested equipment. Full tours require Echostage to be readily available from

5:00am to 9:00am for unloading production trucks. At any given concert, artists can bring five (5) to six (6) semi-trucks. Unloading production trucks requires 10 to 20 stagehands over the course of two (2) to seven (7) hours of work. After the concert, anywhere from 12:00am to 4:00am depending on the pendency of the concert, the production trucks return, and the equipment is loaded. Production trucks depart Echostage by roughly 5:00 AM and the process is repeated with the next concert. Truck drivers are union workers, meaning that the unloading and loading schedule is both very stringent and uncertain.

Delivery trucks typically make "Northeast Runs" meaning they either come from or go to New York City or Philadelphia. Truck drivers inform Echostage when they will be making their deliveries not *vice versa*. Often ten (10) to 15 stagehands are waiting hours for trucks to make their deliveries.

During the delivery process, two (2) to three (3) trucks may need access to the loading dock. Navigating the Easement with three (3) trucks is "very tricky," like a "wild dance". If a vehicle is placed on the corner of the Easement, it interferes with Echostage's ability to maneuver on the Easement and timely unload trucks. Echostage relies on forklifts and pallet jacks to unload and transport large pallets of personalized equipment and structures.

Echostage is unable to determine when they specifically require access to the Easement and subsequently the rear of the 2135 Property. Echostage is on standby

with deliveries and is also responsible for ensuring equipment is ready for the concert. Interference with the loading dock would be potentially catastrophic. Echostage's inability to access the loading dock prevents optimal delivery capacity and affects artists' willingness to play future concerts. Interference of the loading dock would amount to "…an incredible amount of [lost] income that would be crippling."

The access to the loading dock, by delivery vehicles including four box trucks, some as long as 20 feet, multiple semis, and trailer trucks was a large part of the reason Echostage chose to lease the 2135 Property. Those trucks need every inch of space on the Easement to maneuver in and out.

Echostage always requires access to the rear of the building and the loading dock, but spared no expense to keep the Easement open. Echostage has never stored construction equipment, supplies or materials on the Easement, never permitted long-term parking on the Easement, has a full-time employee managing the Easement, and pays security guards to oversee the Easement.

From 2012 to DLY's acquisition of the 2145 Property, Echostage's relationship with the owner of the 2145 Property was amicable, and they got along "wonderfully." During that period, Echostage used the alley, loading dock, sidewalk, and rear of the 2135 Property the same way it had been used from 2008-

2012, without any complaints, objections, or interference from the owners of the 2145 Property.

v. DLY's Interference with the Easement Since 2019:

After DLY acquired the 2145 Property in 2019, Mr. Peter Marx ("Mr. Marx") of DLY met with Mr. Raj Dua ("Mr. Dua"), a member of 2135 LLC, and asked 2135 LLC for $15,000.00 a month to use the Easement. Mr. Dua refused the initial offer. At a second meeting with both Mr. Preet and Mr. Dua in attendance, Mr. Marx presented the offer again with the stipulation that only 2135 LLC's tenants would pay for the monthly fee.

Since DLY acquired the 2145 Property, it has been used by plaintiff's parking vendor. No building permits are pending. The interior of the garage can be accessed without entering onto or blocking the Easement.

When DLY first acquired the 2145 Property, it sought to acquire fees or rental payments from 2135 LLC or from Echostage for the use of the Easement area. During these discussions, Plaintiff made no complaints to 2135 LLC about Echostage's use of the Easement.

Following the rejection of those proposals, 2135 LLC and Echostage have been inundated with frivolous complaints from Plaintiff about the use of the Easement by Echostage, and Plaintiff has repeatedly interfered with and delayed deliveries to the loading dock and to the rear of the 2135 Property. Fifty or more

groundless demands were made by Plaintiff at all hours after its demands were rejected. The demands continued into September and October 2021.

While Plaintiff has modified its conduct since the filing of the motion for a preliminary injunction, there is no evidence that Plaintiff has made a permanent concession about the right of Echostage or 2135 LLC to use the Easement without interference or interruption.

E. Summary Of Argument:

The trial court erred in three respects when it granted in part Plaintiff's Motion for Summary Judgment: (1) Plaintiff's Motion for Summary Judgment was not justiciable, because, as the Court determined when it denied at the same time Plaintiff's motion for an injunction, the injury or threatened injury was neither immediate nor concrete; (2) the conveyance of an easement interest in real estate by deed includes unimpeded access; and (3) the intent of the parties to the deed and evidence of surrounding circumstances should have been considered by the court.

F. Standard Of Appellate Review:

The standard of review is *de novo*. *Chastleton Coop. Ass'n, Inc. v. Kawamoto Notes, LLC,* 2024 WL 3893258, at *3 (D.C. Aug. 22, 2024) ("We review grants of summary judgment *de novo*, viewing the evidence in the light most favorable to the non-moving party and drawing all inferences in that party's favor.")

Neither the prior ruling of this Court nor the trial court's denial of the motion for preliminary injunction constitutes the law of the case. "Rulings—predictions—as to the likely outcome on the merits made for preliminary injunction purposes do not ordinarily establish the law of the case, whether the ruling is made by a trial court or by an appellate court." § 4478.5 Law of Case—Nature of the Ruling or Issues, 18B Fed. Prac. & Proc. Juris. § 4478.5 (3d ed.).

II. ARGUMENT

A. The Trial Court Erred As A Matter Of Law By Failing To Conclude That The Motion Was Neither Ripe Nor Justiciable:

The denial by Judge Rigsby of Plaintiff's request for injunctive relief because "…Plaintiff's injuries do not appear immediate or concrete for purposes of summary judgment as to Defendant 2135 [6]…. In drawing all reasonable inferences in the non-movant's favor, there does not appear to be a violation of the ROW for purposes of the *Motions*." Omnibus Order, Appx. E[7], at (unnumbered) 6, cannot be reconciled with grant of declaratory relief.

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[6] Aside from Plaintiff's failure to identify any immediate threat of injury, neither Plaintiff nor 2135 used their respective properties at the time. Plaintiff leased its property to a parking vendor, and 2135 leased its property to Echo Events. *See* Section I.D above.

[7] As Judge Williams determined at trial: "…the Court cannot find that there is even an injury, let alone an irreparable injury. Moreover, even if there were an injury or some sort that violated the WFJ deed, and the Court does not find that any of those acts occurred, DLY has not shown that any injury is imminent." 2024 Trial Order, at 10, Appx. G.

> Ripeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. …Declaratory judgment authority does not supersede the rules of justiciability,…; (R)ipeness concerns therefore still apply in cases where, as here, the plaintiff seeks declaratory relief….. (internal citations, quotation marks, brackets omitted.)

Loc. 36 Int'l Ass'n of Firefighters v. Rubin, 999 A.2d 891, 895–96 (D.C. 2010). "For the purpose of applying the ripeness doctrine, there is no distinction between complainants seeking a declaratory judgment and those seeking an injunction." *Richardson v. D.C. Redevelopment Land Agency*, 453 A.2d 118, 124, n.5 (D.C. 1982), citing *Eccles v. Peoples Bank of Lakewood,* 333 U.S. 426, 68 S.Ct. 641, 92 L.Ed. 784 (1948).

Similarly, in *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, (9th Cir. 1999), the Ninth Circuit wrote:

> Plaintiffs, who each were stopped once by Border Patrol agents …seek equitable relief, asking in their complaint for a declaratory judgment that "the roving patrol operations [of the Border Patrol] involve systemic violations of the Fourth Amendment to the United States Constitution," and for an injunction "prohibiting Defendants from further ordering, directing, sanctioning or knowingly permitting such unconstitutional practices" and requiring defendants "to prescribe and implement measures sufficient to prevent resumption of those practices

Hodgers-Durgin v. de la Vina, 199 F.3d at 1039 (9th Cir. 1999). The Ninth Circuit affirmed summary judgment in favor of defendants, because "…plaintiffs have

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In this respect, it is worth noting that Plaintiff's claim languished for over one and half years until defendant 2135 filed its motion for preliminary injunction.

shown insufficient likelihood of future injury to warrant equitable relief." As the *Hodgers* Court explained:

> We hold that Mr. Lopez and Ms. Hodgers–Durgin have not demonstrated a sufficient likelihood of injury to warrant equitable relief.… Mr. Lopez and Ms. Hodgers–Durgin were each stopped only once in 10 years…. In the absence of a likelihood of injury to the named plaintiffs, there is no basis for granting injunctive relief ….
>
> The named plaintiffs' failure to establish a likelihood of future injury similarly renders their claim for declaratory relief unripe…. In suits seeking both declaratory and injunctive relief against a defendant's continuing practices, the ripeness requirement serves the same function in limiting declaratory relief as the imminent-harm requirement serves in limiting injunctive relief. We need not consider whether plaintiffs' declaratory relief claim is ripe in the Article III sense because the claim fails the prudential ripeness inquiry, which "requir[es] us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149, 87 S.Ct. 1507….Whether the named plaintiffs are likely to be stopped again by the Border Patrol is simply too speculative to warrant an equitable judicial remedy, including declaratory relief …. At 1044.

And *see Hisp. Leadership Fund, Inc. v. Fed. Election Comm'n*, 897 F. Supp. 2d 407, 424 (E.D. Va. 2012) (for declaratory judgment claims, hardship "is measured by the immediacy of the threat and the burden imposed on the [plaintiffs] (brackets in original).")

Both Judge Rigsby, when he denied Plaintiff's Motion for Summary Judgment on its claim for injunctive relief, and Judge Williams, when she dismissed at trial Plaintiff's claim for injunctive relief, found and concluded that any injury or threatened injury was neither concrete nor imminent. Because "…there is no

distinction between complainants seeking a declaratory judgment and those seeking an injunction…," *Richardson v. D.C. Redevelopment Land Agency*, *supra*, 453 A.2d at 124, n.5, and because there was no hardship to plaintiff, the declaratory judgment claim was not ripe, nor justiciable, and plaintiff's motion for summary declaratory judgment should have been denied on that basis.

B. The Trial Court Erred As A Matter Of Law By Failing To Construe The Easement To Provide For Unimpeded Access:

The declaratory judgment provided in pertinent part that:

1. The WFJ Deed restricts use of the Right of Way only by 2135 NE and its permitted users of the Right of Way (including, but not limited to, Defendant Ekho Events Inc. ("Ekho")), and no such restrictions apply to DLY or its permitted users of the Right of Way.[8]

2. The WFJ Deed does not provide 2135 NE or its permitted users of the Right of Way with unfettered, exclusive or unconditional use of the Right of Way and loading dock on a 24/7 basis.

3. The WFJ Deed prohibits 2135 NE and its permitted users of the Right of Way from parking (temporarily or otherwise) on the Right of Way, interfering with DLY or any other of DLY's permitted user's use of the Right of Way, or using the Right of Way for any purpose whatsoever (other than ingress and egress for accessing and using the loading dock and rear of the 2135 Property).

Omnibus Order, Appx. E., at (unnumbered) 7-8.

[8] "This Order applies to 2135 NE, LLC as the owner of record of the 2135 Property and, as such, the extant "Grantee" under the WFJ Deed, and to DLY George's Warehouse, LLC as the owner of record of the 2145 Property and, as such, the extant "Grantor" under the WFJ Deed." February 20, 2024, Omnibus Order, Appx. E, at n.4.

The Omnibus Order also included the following: "There is no basis for the Plaintiff to unreasonably interfere with Ekho's rights to the Easement nor should the Court's ruling be construed as such." *Id*., at Appx. E.

> An easement is an interest in land owned by another person, consisting in the right to *use or control the land for a specific limited purpose*. …This interest "runs with the land," which is to say that, subject to notice concerns, it is binding on the servient property where the easement is located notwithstanding a change in ownership or occupancy. …
>
> An express easement, acknowledged in a deed conveying ownership of property, is always preferred under the law… because of the potential long-term effects that these interests have on land use and value (internal citations, quotation marks omitted, emphasis added).

Bd. of Trustees Grand Lodge of Indep. Ord. of Odd Fellows of D.C. v. Carmine's DC, LLC, 225 A.3d 737, 743 (D.C. 2020). The "dominant estate" is the estate that benefits from the easement, and the "servient estate" is the estate that is burdened by the easement. *Martin v. Bicknell*, 99 A.3d 705, 708, at nn. 7, 8 (D.C. 2014).

As in this case, an easement can provide for unimpeded access. *Daniel G. Kamin Houghton LLC v. Flewelling Properties, LLC*, 2023 WL 6938145, at *7 (Mich. Ct. App. Oct. 19, 2023), *Downing as Tr. of James Downing Irrevocable Tr. v. Somers*, 2023 IL App (4th) 220900, ¶ 1, *Lake Anne Homeowners Ass'n v. Lake Anne Realty Corp*., 225 A.D.2d 736, 736, 640 N.Y.S.2d 200, 201 (1996), *Consol. Rail Corp. v. MASP Equip. Corp*., 67 N.Y.2d 35, 39, 490 N.E.2d 514, 516 (1986). Thus,

> In dismissing plaintiffs' claim against Loch Arbour, the court concluded that any interference by Loch Arbour with plaintiffs' easement along Euclid Avenue was minimal, especially in view of the availability of other access a short distance to the north of Euclid Avenue. However, in the absence of any showing by Loch Arbour of a compelling justification for interfering with plaintiffs' easement, the deeds to the Loch Arbour property owners gave plaintiffs a right to unimpeded access to the beach and ocean along Euclid Avenue. Therefore, the trial court erred in dismissing the claim against Loch Arbour at the close of plaintiffs' case.

Bubis v. Kassin, 353 N.J. Super. 415, 429–30, 803 A.2d 146, 154 (App. Div. 2002).

Consistent with that framework, because the deed conveying the easement was specially warranted, the conveyance is presumed to be unconditional.

> A warranty deed, absolute upon its face, is presumed to be an unconditional conveyance. The burden to overthrow this presumption is upon him who asserts the contrary, and the rule is that the proof, to be sufficient, must be clear, satisfactory, and specific, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt (internal citations, quotation marks omitted).

State v. Crum, 70 N.D. 177, 292 N.W. 392, 395 (1940).

There is nothing in the language of the Easement which reserves to the servient estate the right to interfere – reasonably or otherwise – with the dominant estate's "…accessing and using the loading dock and rear of 2135 Queens Chapel Road, N.E.,…." Though the Easement was expressly limited to access, the Easement's grantor secured no further limitations.

Quite to the contrary, the Easement can only be read to expressly provide that, so long as the use was for access to the loading dock of the rear of the 2135 property,

resultant interference with use by the 2145 property was authorized. Thus, the Easement expressly provides that "…Grantee, or any permitted users of Grantees, shall not park on the Right of Way, interfere with Grantor's or any other permitted user's use of the Right of Way, or use of Right of Way for any *other* purpose whatsoever (emphasis added)." That language clearly contemplates that the dominant estate may "…interfere with Grantor's …use of the Right of Way" so long as the interference is for the purpose of "accessing and using the loading dock and rear of 2135 Queens Chapel Road, N.E.,…."

The successive decisions in *Preston v. Siebert,* 21 App. D.C. 405 (1903) and *Fields v. District of Columbia,* 143 U.S. App. D.C. 325, 443 F.2d 740 (1971), and along with *Everdell v. Carroll,* 25 Md. App. 458, 465, 336 A.2d 145, 150 (1975) all of which were cited by *Tanaka v. Sheehan*, 589 A.2d 391, 393 (D.C. 1991), underscored that the "…terms of the grant itself" and the "…manner in which (the property) had been used and occupied," can establish an intent contrary to any reservation of reasonable interference with the easement. *Tanaka*, at 395.[9]

Here, the failure to give meaning to the word "…other …" serves to "…render this language surplusage—an interpretation we must avoid." *D.C. v. D.C. Pub. Serv. Comm'n,* 963 A.2d 1144, 1157 (D.C. 2009). Stated otherwise, the trial court's failure to consider the dispositive effect of the word "other" impermissibly reads out of the

[9] Discussed in Section II.C below.

controlling language a critical limitation on a limitation, and thus violates the proscription against treating language as surplusage. *See, e.g., Pappas v. City of New York*, 2024 WL 2093472, at *9 (S.D.N.Y. May 9, 2024) (thus would read out of the agreement the language that limits the mandatory arbitration provision to those claims that "aris[e] from the application of the matters described in paragraphs II(b) and III," in violation of the cardinal rule that contracts must be read so as to avoid rendering any language surplusage.").

The Easement on its face unambiguously subordinated the servient estate's interest in use of and access to the right of way to the right of the dominant estate to access to the loading dock and the rear of the 2135 Property. Where a contract is unambiguous, summary judgment is appropriate. *Unit Owners Ass'n of 2337 Champlain St. Condo. v. 2337 Champlain St., LLC,* 314 A.3d 1198, 1211, n.20 (D.C. 2024), quoting *Byrd v. Allstate Ins. Co.*, 622 A.2d 691, 693-94 (D.C. 1993).

Further, in construing an easement "we should enforce such agreements just as we would any other valid contract (internal citations, quotation marks, ellipses omitted)." *Bd. of Trustees Grand Lodge of Indep. Ord. of Odd Fellows of D.C. v. Carmine's DC, LLC,* 225 A.3d 737, 739 (D.C. 2020). Well-recognized contract rules of construction apply, and each conflict with the trial court's decree. First,

> Course of performance refers to actions with respect to the contract taken after the contract has formed…. It, in other words, relates to the way the parties have acted in performance of the particular contract in

> question…. [S]uch evidence when it does exist is considered the best indication of what the parties intended the writing to mean…. As the Court of Appeals recently put it: "[T]he parties' conduct in carrying out the agreement, can aid in discerning what the parties meant by the words they used." *Ramsey v. United States Parole Comm'n,* 840 F.3d 853, 860 (D.C. Cir. 2016) (citing *Restatement* (*Second*) *of Contracts* § 203(b)) (internal citations, quotation marks, brackets omitted).

Cemex Inc. v. Dep't of the Interior, 2021 WL 4191959, at *7 (D.D.C. 2021).

It was undisputed that 2135 LLC purchased at considerable cost from Plaintiff's predecessor an interest in Plaintiff's property which necessarily reduced Plaintiff's use of that property. That is, after all, the nature of a conveyance of any interest. The grantor's previous right to exclusive use and control is sold for an agreed-upon price.

After all, it is undisputed that unimpeded and ready access to the rear and the loading dock was critical to the operation of the concert venue.[10] It is undisputed that:

1. From 2008 to 2012, before the Echostage lease was signed, 2135 LLC used the rear of the 2135 property, including the alley, sidewalk and loading dock, without interruption, 24 hours a day, seven days a week.

2. Echostage is a subsidiary of Insomniac Holdings which is indirectly owned by Live Nation Entertainment, Inc. It provides venues for world-class artists, and it operated at the 2135 property solely as a concert venue, and not as a nightclub.

[10] As is set forth in the following section, the court may consider the circumstances that existed at the time of the contract, including the apparent purpose of the parties in entering the contract, and the history of negotiations leading up to the contract.

3. Approximately 70% of artists travel with their own stage and sound equipment. Echostage caters two (2) types of shows: (1) fly-ins, when artists fly in with their crew to perform; and (2) full tours, when artists bring their own production equipment. Fly-ins require Echostage to provide equipment for concert production, *i.e.,* audio and lighting consoles, lighting packages, video wall packages, and other requested equipment. Full tours require Echostage to be readily available from 5:00am to 9:00am for unloading production trucks. At any given concert, artists can bring five (5) to six (6) semi-trucks. Unloading production trucks requires 10 to 20 stagehands over the course of two (2) to seven (7) hours of work. After the concert, anywhere from 12:00am to 4:00am depending on the pendency of the concert, the production trucks return, and the equipment is loaded. Production trucks depart Echostage by roughly 5:00 AM and the process is repeated with the next concert. (12/06/21 Tr. 100:20-25; 101:1-25; 102:1-15) (Cronin Test.)

4. Truck drivers are union workers, meaning that the unloading and loading schedule is both very stringent and uncertain. Delivery trucks typically make "Northeast Runs" meaning they either come from or go to New York City or Philadelphia. Truck drivers inform Echostage when they will be making their deliveries not *vice versa*. Often ten (10) to 15 stagehands are waiting hours for trucks to make their deliveries.

5. During the delivery process, two (2) to three (3) trucks may need access to the loading dock. Navigating the Easement with three (3) trucks is "very tricky," like a "wild dance". If a vehicle is placed on the corner of the Easement, it interferes with Echostage's ability to maneuver on the Easement and timely unload trucks. Echostage relies on forklifts and pallet jacks to unload and transport large pallets of personalized equipment and structures.

6. Echostage is unable to determine when they specifically require access to the Easement and subsequently the rear of the 2135 Property. Echostage is on standby with deliveries and is also responsible for ensuring equipment is ready for the concert. Interference with the loading dock would be potentially catastrophic. Echostage's inability to access the loading dock prevents optimal delivery capacity and affects artists' willingness to play future concerts. Interference of the loading dock would amount to "…an incredible amount of [lost] income that would be crippling."

7. The access to the loading dock, by delivery vehicles including four box trucks, some as long as 20 feet, multiple semis, and trailer trucks was a large part of

the reason Echostage chose to lease the 2135 Property. Those trucks need every inch of space on the Easement to maneuver in and out.

8. Echostage always requires access to the rear of the building and the loading dock, but spared no expense to keep the Easement open. Echostage has never stored construction equipment, supplies or materials on the easement, never permitted long-term parking on the easement, has a full-time employee managing the easement, and pays security guards to oversee the easement.

9. From 2012 to DLY's acquisition of the 2145 Property, Echostage's relationship with the owner of the 2145 Property was amicable, and they got along "wonderfully." During that period, Echostage used the alley, loading dock, sidewalk, and rear of the 2135 property the same way it had been used from 2008-2012, without any complaints, objection, or interference from the owners of the 2145 Property.

It was that unimpeded and ready access to the rear and the loading dock, which was worth $400,000 to Defendant in 2010, and it was easy profit for a grantor with an occasional parking garage. Course of performance for years after the delivery of the easement by Plaintiff's predecessor supports Defendants' construction of the Easement and is inconsistent with the trial court's declaratory judgment.

Both primary and secondary rules of contract construction, as well as the nature of express easements, therefore, precluded the grant of Plaintiff's motion for summary judgment, and warranted grant of Defendants' motions for summary judgment.

C. The Trial Court Erred As A Matter Of Law By Failing To Consider The Intent Of The Parties To The Easement And Surrounding Circumstances:

The trial court in its Omnibus Order stated "…the intent of the creators of the easement are irrelevant when the documents themselves are unambiguous such as the case here." February 20, 2024 Omnibus Order, Appx. E, at (unnumbered) 4.

In interpreting an easement, the Court first considers:

> …[T]he language of the deed and the circumstances of the creation of the easement to determine whether the intent of the creators of the easement was to prohibit the construction of a gate and fence (with gates). In so doing the judge misapplied *Fields.*

Tanaka v. Sheehan, 589 A.2d at 395–96.

> "Its [parol evidence] purpose is, as Farnsworth puts it, to give "legal effect to whatever intention the parties may have had to make their writing a complete expression of their agreement." Farnsworth, Contracts § 7.2, at 451. Corbin too saw the rule as aimed at implementing the parties' intent. In the supplement to his treatise, he offered a number of general principles as an introduction to the study of the rule, including:
>
> > (1) The primary and ultimate purpose of interpretation is to determine and make effective the Intention of the Contracting Parties.
> >
> > (2) No contract should ever be interpreted and enforced with a meaning that neither party gave it.
> >
> > …
> >
> > (4) No party to a contract should ever be bound by an interpretation that is determined exclusively by the linguistic education and experience of the judge.
> >
> > …
> >
> > (6) When a court enforces a contract in accordance with an interpretation that seems "plain and clear" to the court and excludes relevant convincing evidence that the parties intended a different

> interpretation, it is "making a contract for the parties", one that they did not make.
>
> 3 Corbin on Contracts § 572B (Supp.1971) (emphasis and capitalization in original). The rule asks judges to find intent, not to blind themselves to it."

Hershon v. Gibraltar Bldg. & Loan Ass'n, Inc., 864 F.2d 848, 858 (D.C. Cir. 1989). And *see Stevens, RW, Standardized Jury Instructions for the District of Columbia* §11:13.[11]

The evidence of the circumstances surrounding the creation of the Easement, as well as performance pursuant to that Easement until 2019, precluded grant of partial summary judgment and instead mandated the conclusion that the easement subordinated – in the limited circumstances described by the easement – the interest of 2145 property to the easement interests of the 2135 property.

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[11] In determining the terms of a contract, you should first consider what as reasonable person in the position of the parties would have believed was the meaning of the words. Next, you may consider the circumstances that existed at the time the contract was made, including the apparent purpose of the parties in entering into the contract, the history of negotiations leading up to the contract and the statements of the parties about their understanding of the contract. In addition, you may consider the statement of any agent for a party about [his] [her] actions in negotiating or drafting the contract, or about [his] [her] understanding of the language of the contract.

Stevens, RW, Standardized Jury Instructions for the District of Columbia §11:13

CONCLUSION AND PRAYER FOR RELIEF

This case should be remanded to the trial court with instructions to vacate its grant of the summary judgment motion, grant Defendants' motions for summary judgment, and to conduct further proceedings consistent with the reversal.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September 2024, I caused a true and correct copy of the foregoing to be served to all counsel of record via the Court's electronic filing system.

/s/ Philip M. Musolino
Philip M. Musolino