Appeal Nos. 22-CV-805 and 22-CV-0971

DISTRICT OF COLUMBIA
COURT OF APPEALS

C.A. HARRISON COMPANIES, LLC *et al.*,

Appellants,

v.

2021-CA-003423 B
Consolidated with
2021-CA-003423 B

TRUST AGREEMENT OF STEVEN SUSHNER

Appellee.

Appeal from the Superior Court of the District of Columbia
(The Honorable Hiram E. Puig-Lugo)

APPELLANTS' BRIEF

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Rule 28(a)(2) Listing

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Appellee/Plaintiff:	Trust Agreement of Steven Sushner
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[1] Mr. Doumar will argue the appeal.

Appellants' counsel certifies to the best of their knowledge and belief:

1. Plant 64 DCMC, LLC and C.A. Harrison Companies, LLC are limited liability companies under the laws of the District of Columbia; and
2. No publicly held company owns more than 10% of either Plant 64 DC MC, LLC or C.A. Harrison Companies, LLC.

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ISSUES PRESENTED

1. The trial court erred in granting Appellee/Plaintiff The Trust Agreement of Steven Sushner's ("Sushner") motion to compel discovery of Appellant Plant 64 DCMC's ("Plant 64 DCMC") corporate books and records in a corporate book and records case under D.C. Code 29-804.10. The trial court's ruling effectively granted Sushner final judgment on the merits, even though Sushner did not meet the standards for prevailing in a books and records case under D.C. Code 29-804.10.

   See Exhibit A, Appendix at p. A1-21, Orders dated June 8, 2022 and August 15, 2022 ("Discovery Orders").

2. In its December 8, 2022, Order, the trial court erred by ordering Plant 64 DCMC to replace its managing member because the Court had no authority to interfere in Plant 64 DCMC's management and effectively rewrite its operating agreement. Sushner brought a single-count complaint pursuant to D.C. Code 29-804.10, and Sushner is not entitled to documents or other relief outside the scope of D.C. Code 29-804.10.

   See Exhibit B, Appendix at p. A-22-28, Order, dated December 8, 2022 (the "Sanctions Order" or "Contempt Order").

3. The trial court erred by ordering a default judgment, attorneys' fees for Sushner, and a civil fine of $5,000 per day against Appellants C.A. Harrison Companies, LLC ("CAH Companies") and Plant 64 DCMC as a sanction for opposing the trial court's unauthorized Discovery Orders.

   See Exhibit B, Appendix at p. A-22-28 (the "Sanctions Order"); Exhibit C, Appendix at p. A-29-35, Order dated October 13, 2022 (the "Default Order"); Exhibit D, Appendix at p. A-36-42, Order dated October 13, 2022 (the "Attorneys' Fees Order").

4. The trial court did not have jurisdiction over non-party Chris Harrison and erred by (i) enjoining Mr. Harrison from voting on behalf of CAH Companies for the election of a new managing member of Plant 64 DCMC, (ii) ordering Mr. Harrison to assist a new managing member to locate *all* records covered

by the trial court's orders, and (iii) imposing a $5,000 per day fine on Mr. Harrison, apparently through requiring Appellants to require Mr. Harrison to pay such amount, pending his assisting a new managing member to locate records. The trial court incorrectly found that Mr. Harrison was a party to the lawsuit and a Member of Plant 64 DCMC; he is neither.

See Exhibit B, Appendix at p. A-22-28 ("Sanctions Order"); Exhibit E, Appendix at p. A-43-53, Orders dated January 13, 2023, January 30, 2023, and March 14, 2023 ("Post Judgment Orders").

5. The trial court erred by ordering a civil fine of $5,000 per day based on the ambiguous and unauthorized Default Order.

See Exhibit B, Appendix at p. A-22-28 ("Sanctions Order"); Exhibit C, Appendix at p. A-29-35 ("Default Order").

6. The trial court does not have jurisdiction over the case and cannot continue to issue orders, expanding the scope of Appellants' production obligations, after granting final relief to Sushner and after Appellants noted their appeal.

See Exhibit E, Appendix at p. A-43-53 ("Post-Judgment Orders").

7. The trial court abused its discretion by (i) ordering a default judgment against Appellants, (ii) ordering Plant 64 DCDC to replace its managing members, and (iii) ordering a civil fine of $5,000 per day against Appellants and Mr. Harrison, a non-party.

See Exhibit B, Appendix at p. A-22-28 ("Sanctions Order"); Exhibit C, Appendix at p. A-29-35 ("Default Order").

STATEMENT OF THE CASE

A. Summary of Facts and Proceedings

Sushner and the trial court circumvented D.C. Code 29-804.10 by compelling Plant 64 DCMC to produce its corporate books and records in discovery.

Sushner is a passive 2.5% owner of Plant 64 DCMC, an entity that is managed by CAH Companies. Compl. at ¶¶ 4-5. Plant 64 DCMC holds a 20% membership interest in Innovation Lofts Associates, LLC, a North Carolina entity that purchased a historic tobacco factory in Winston-Salem and redeveloped it into a modern apartment complex with amenities (the "Winston-Salem Project"). Id. at ¶ 11.

Sushner filed a narrow one-count complaint for the corporate books and records of Plant 64 DCMC under D.C. Code 29-804.10. The statute requires Sushner to show a "proper purpose" for the books and records demanded. See id. Instead, Sushner simply issued discovery for Plant 64 DCMC's books and records (and other documents) and moved to compel production of these documents as part of discovery. The trial court granted Sushner's motion to compel the production of Plant 64 DCMC (and Winston-Salem Project) documents including Plant 64 DCMC's books and records. See Exhibit A, Appendix at p. A-15, A-20 ("Discovery Orders"). In doing so, Sushner and the trial court short-circuited D.C. Code 29-804.10 improperly.

In addition, the case metastasized into an expansive quest for documents relating not just to Plant 64 DCMC's corporate books and records, but also the Winston-Salem Project generally and its development over a ten-year period. Sushner's request for records was untethered to any statutory requirements because they were not connected to Sushner's purpose as a passive, minority member of Plant 64 DCMC. See D.C. Code 29-804.10.

The trial court also issued orders upending the management of Plant 64 DCMC without authority and contrary to the Plant 64 DCMC operating agreement. And without any legal basis, the trial court sanctioned Mr. Harrison individually. Mr. Harrison was not party, not a member of Plant 64 DCMC, not subject to any third-party subpoena, and not subject to any court orders. He did not and could not have violated any court orders resulting in contempt sanctions.

B. Legal Overreach

Sushner cannot gain access to Plant 64 DCMC's corporate books and records (as well as documents related to the Winston-Salem Project) under D.C. Code 29-804.10 via discovery requests. In this case, Sushner filed a one-count complaint for access to Plant 64 DCMC's corporate books and records pursuant to D.C. Code 29-804.10. Access to Plant 64 DCMC's books and records was the only issue in the case. Sushner, Plant 64 DCMC, and CAH Companies, were the only parties before the trial court.

Rather than address the issue of corporate books and records on the merits, Sushner served discovery requests for Plant 64 DCMC's documents and records. These requests led to extensive follow-up requests for a multitude of information relating to Plant 64 DCMC's operations and the operations of non-party Innovation Lofts Associates, LLC, including extensive records of the ten-year history of the Winston-Salem Project. The requests were issued under the rubric of D.C. Sup. Ct. R. 26, which allows for liberal discovery.

Complying with the statutory prerequisites of D.C. Code 29-804.10 on the merits is the only mechanism by which a member such as Sushner could obtain documents in this case. However, the trial court granted a Motion to Compel for Plant 64 DCMC's books and records and other documents. See Exhibit A, Appendix at p. A-7-8, A-10, A-15-16, A-18, A-20 ("Discovery Orders") (finding that requests for records relating to, for example, revenues and expenses, capital expenditures, loans, compensation to any persons from company funds, tax records were appropriate and reasonable). Most such records related to the Winston-Salem Project, as Plant 64 DCMC did not have capital improvements, loans, and other property-related issues. If a 2.5% owner of a limited liability company could file a lawsuit for access to corporate books and records under D.C. Code 29-804.10 and bypass statutory guardrails by issuing discovery, then the statute is meaningless and would never be adjudicated as a member could file some suit to gain access to

records through discovery to which he is otherwise not entitled to review under the records statute.

Wholly ignoring the stringent requirements of D.C. Code 29-804.10, the trial court improperly granted Sushner's Motion to Compel ignoring that Sushner had not proven a proper purpose for requesting the information. The trial court treated this case like an ordinary civil case subject to the liberal discovery process under Rule 26. This approach was incorrect because, among other reasons, it allowed Sushner to circumvent the requirements under D.C. Code 29-804.10 for a minority member to prove a "proper purpose" before gaining access to a company's books and records. Here, Sushner's claimed "proper purpose" was to confirm the finances of another entity, Innovation Lofts Associates, LLC, which developed the Winston-Salem Project. See Compl at ¶ 16. Plant 64 DCMC's records are not the Winston-Salem Project's records. Thus, Sushner did not have a proper purpose for the statutory records request.

On August 15, 2022, the trial court confirmed Appellants' improper production obligations. See Exhibit A, Appendix at p. A-10, A-20 ("Discovery Orders"). On October 13, 2022, citing Appellants' purportedly deficient production, the trial court improperly granted default judgment against Appellants and awarded Appellee Sushner its attorneys' fees. See Exhibit C, Appendix at p. A-30-35 ("Default Order"); Exhibit D, Appendix at p. A-41 ("Attorneys' Fees Order").

On December 8, 2022, the trial court improperly ordered Plant 64 DCMC to replace its managing member and held Appellants Plant 64 DCMC, CAH Companies, and non-party, Mr. Harrison, in contempt for not following its improper Discovery Orders and Default Order, even though Mr. Harrison was not subject to those prior orders. See Exhibit B, Appendix at p. A-27 ("Contempt Order").

The trial court continues improperly to exercise jurisdiction over this case and has issued orders on January 13, 2023, January 30, 2023, and March 14, 2023, overseeing the replacement of Plant 64 DCMC's managing member and accommodating Sushner's growing demands for records related to not just Plant 64 DCMC but the Winston-Salem Project generally (collectively, the "Post-Judgment Orders").

Sushner's initial discovery request of 8 pages and 27 items encompassed capital expenditures, loans, and other documents related to the Winston-Salem Project, far beyond the books and records of Plant 64 DCMC. See Exhibit F1, Appendix p. A-56-63, Sushner's Discovery Requests. Not surprisingly, Defendants, focused on records of Plant 64 DCMC, responded that they had no records responsive to various categories. See Exhibit F2, Appendix at p. A-65-71, Appellants Objections and Responses. Sushner's motion to compel emphasized the Winston-Salem Project records, not the books and records of Plant 64 DCMC. Exhibit F3, Appendix at A-73-89, Sushner's Motion to Compel. Sushner's follow-up list of

missing documents submitted to the trial court expanded to 37 pages and 100 items, including small details and large swaths of Winston-Salem Project records. See Exhibit F5, Appendix at A-91-128, Follow-up Chart of Missing Documents Sushner Provided to the Trial Court.

The trial court should not have allowed Sushner to win its case simply by propounding discovery for Plant 64 DCMC's books and records when the ultimate issue of the case was Appellee Sushner's entitlement to such records under D.C. Code 29-804.10. Corporate books and records for one investment entity should have been limited, and the case simple. Case law confirms that discovery, if any, should have been permitted only on the narrow issue of Sushner's proper purpose behind its statutory records request. To that end, the Discovery Orders were a clear violation of law as they imposed obligations on the defendants beyond the scope of D.C. Code 29-804.10. The Default Order, Attorneys' Fees Order, and the Contempt Order were all issued to enforce the erroneous Discovery Orders. Therefore, these orders should be reversed as well.[2]

STATEMENT OF FACTS

In 2012, Appellee Sushner invested $50,000 for a 2.5% membership interest in Plant 64 DCMC, a Manager-Managed limited liability company. Compl. at ¶¶ 4-

[2] The Default Order on its own, depriving Defendants of any right to contest on the merits, without a hearing, was improper in its own right.

5. Plant 64 DCMC was formed solely to invest in the Winston-Salem Project. Id. at ¶ 11. In 2013, Plant 64 DCMC became a minority member of Innovation Lofts, which entity owned the Winston-Salem Project.

In 2023, Innovation Lofts sold the Winston-Salem Project for approximately $83.5 million. Plant 64 DCMC received 20% of the net proceeds from the sale, and Sushner received a $228,045 distribution for its 2.5% membership interest in Plant 64. This is nearly a 400% return for Sushner.

Over the last 10 years, Sushner did not contribute additional funds to Plant 64 DCMC or the Winston-Salem Project, and was nothing more than a passive minority member. During that same time frame, Mr. Harrison worked hard with Innovation Lofts to make the Winston-Salem Project a success. Mr. Harrison found, designed, raised capital, and guaranteed over $40 million in loans for the Winston Salem Project. Winston-Salem Project's success was a product of Mr. Harrison's hard work and tens of millions of dollars of investment. This success benefitted all of Plant 64's members, including Susher with its 2.5% stake. Only after the Winston-Salem Project was completed and became successful did Sushner start to complain that Mr. Harrison had made too much money from his work with Innovation Lofts and otherwise on the Winston-Salem Project.

Sushner filed this lawsuit for corporate records against Plant 64 DCMC in 2021. Sushner filed another lawsuit before the U.S. District Court for the District of

Columbia in 2022 relating to the Winston-Salem Project, Trust Agreement of Steven Sushner v. C.A. Harrison Companies, LLC, et al, Case 1:22-cv-02837-CRC, filed September 20, 2022, which remains pending, apparently to interfere with the prospective sale of the Winston-Salem Project and coerce Mr. Harrison and others into increasing Sushner's proceeds from the Winston-Salem Project. Sushner filed yet another lawsuit against C.A. Harrison Companies, LLC relating to another $50,000 investment in District of Columbia Superior Court, Steven Sushner et al v. Christopher Harrison et al, Case No. 2021 CA 00340, filed September 23, 2021, which remains pending.

Sushner's efforts to interfere with the Winston-Salem Project sale were wasted, as the Winston-Salem Project was sold and all members benefitted. At this time, the trial court's improper orders, including the Discovery Orders, Default Order and Sanctions Order are artificially delaying the process of Plant 64 DCMC winding-up for all members. The trial court did not have the authority to grant Sushner's Motion to Compel, to replace Plant 64 DCMC's managing member, or to impose a civil fine on appellants and non-party Mr. Harrison.

The trial court's Discovery Orders, Default Order, Attorneys' Fees Order, and Sanctions Order should all be reversed. The Winston-Salem Project is sold, all members profited, and Plant 64 DCMC should be permitted to wind-up in peace. Sushner's tantrum should not be allowed to continue because the trial court erred in

ordering the production of Plant 64 DCMC's corporate records via a discovery motion, interfered with Plant 64 DCMC internal management, and imposed a drastic civil fine of $5,000 per day to enforce its erroneous prior orders.

STANDARD OF REVIEW

In matters of statutory interpretation, appellate courts review the trial court's decision de novo. Reese v. Newman, 131 A.3d 880, 884 (D.C. 2016). This case involves statutory interpretation of D.C. Code 29-804.10, and whether a minority member is allowed to propound discovery for a limited liability company's books and records in a case brought solely under D.C. Code 29-804.10.

If Sushner was not entitled to discover Plant 64 DCMC's documents and information in discovery in an action brought pursuant to D.C. Code 29-804.10, then the Discovery Orders, and all subsequent sanctions orders, including the grant of default against Appellants, were improper and a clear error of law. See Exhibit A, Appendix at p. A-10, A-20 ("Discovery Orders"); Exhibit B, Appendix at p. A-27 ("Sanctions Order"); Exhibit C, Appendix at p. A-34 ("Default Order"); Exhibit D, Appendix at p. A-41 ("Attorneys' Fees Order"); and Exhibit E, Appendix at p. A-47, A-50, A-52 ("Post-Judgment Orders").

Appellants' right to a hearing is a matter of due process and *de novo* review is again appropriate. See J.C. v. D.C., 199 A.3d 192 (D.C. 2018). No evidence was

taken, or hearings held in connection with the orders on appeal, either the Discovery Orders, Default Order, or Sanctions Order.

If this Court determines Sushner is allowed to serve discovery for Plant DCMC's corporate books and records in a case brought under D.C. Code 29-804.10 for corporate books and records, the standard of review is de novo for purposes of determining as a matter of law whether such document requests can exceed the parameters of the statute and request records of other entities, but then the determination of whether the trial court's sanctions are appropriate is likely subject to an abuse of discretion standard. See Shimer v. Edwards, 482 A.2d 399, 401 (D.C. 1984). Here, the trial court replaced Plant DCMC's managing member without any authority and fined Appellants and purportedly Mr. Harrison (a non-party) $5,000 per day. The trial court's Post-Judgment Orders confirm that the trial court mistakenly believed Mr. Harrison was a party to the case. These issues usually depend on witness credibility and factual issues, but again in this case, no hearing was held.

SUMMARY OF ARGUMENT

The trial court's rulings should be reversed on multiple, independent grounds.

The trial court improperly decided a case for corporate books and records under D.C. Code 29-804.10 on a discovery motion. See Exhibit A, Appendix at p. A-10, A-15, A-20 ("Discovery Orders"). A case under D.C. Code 29-804.10 is not

an ordinary civil case subject to the liberal discovery standard of D.C. Sup. Ct. R. 26. Sushner is statutorily obligated to prove the proper purpose behind its demand for Plant 64 DCMC's corporate records.

The documents at issue in discovery also have improperly extended far beyond the corporate books and records of Plant 64 DCMC.

The trial court then improperly sanctioned Appellants for contempt based on its improper Discovery Orders without any hearing on disputed issues. See Exhibit B, Appendix at p. A-27 ("Sanctions Order"); Exhibit C, Appendix at p. A-34 ("Default Order"); Exhibit D, Appendix at p. A-41 ("Attorneys' Fees Order").

As sanctions, the trial court entered default judgment against Appellants, ordered Plant 64 DCMC to replace its managing member, awarded Sushner its attorneys' fees, and imposed a civil fine of $5,000 per day against Appellants and non-party Mr. Harrison.

These drastic sanctions stemmed from the trial court's erroneous Discovery Orders and were legally improper, or at least an abuse of discretion. The trial court had no authority, under statute or otherwise, to replace Plant 64 DCMC's managing member. And egregiously, the trial court's monetary sanctions were tied to Mr. Harrison assisting a new managing member who had not yet been appointed. Mr. Harrison was not a party, not a member of Plant 64 DCMC, and not subject to any of the trial court's prior orders. The Sanctions Order was also improper because it

was vague and relied on the previously vague Default Order. A Sanctions Order must also be clear and definite, not only itself but in respect of the order the sanctioned party has violated.

This Court should reverse the trial court's orders and remand this matter to the trial court to assess this books and records case according to the standards of D.C. Code 29-804.10.

ARGUMENT

I. Sushner Cannot Circumvent Proving His Case For Books and Records Under D.C. Code 29-804.10 By Issuing Discovery for Such Documents and Other Categories of Related Records.

Susher is not entitled to "win the case" under D.C. Code 29-804.10 by issuing discovery for Plant 64 DCMC's corporate books and records. To receive Plant 64 DCMC's corporate books and records Sushner must prove that he "seeks the information for a purpose material to his [Sushner's] interest as a member." D.C. Code 29-804.10. The records sought must also be books and records of Plant 64 DCMC, not records of Innovation Lofts or the Winston-Salem Project.

A. Sushner Never Showed Any "Proper Purpose" for Its Statutory Records Request.

Sushner's "proper purpose" is a necessary element of the case, but the trial court never addressed this issue. Sushner cannot end-run his burden to show a proper purpose by issuing discovery for Plant 64 DCMC's documents including corporate

books and records, and in many cases documents "relating to" or "referring to" such documents.

The "proper purpose" requirement was intentionally adopted by the Council in the statute. The Revised Uniform Limited Liability Company Act (RULLCA), upon which the District's Limited Liability Company Act is based, distinguishes between member-managed and manager-managed limited liability companies compared to its predecessor. Given that minority members, such as Sushner, had no fiduciary duties to manager-managed companies such as Plant 64 DCMC, the RULLCA imposed restrictions on minority members' access to corporate books and records. The "proper purpose" requirement in particular protects companies from minority members with a grudge, who seek to use corporate information for personal reasons, for embarrassment, to use against other members or even to the detriment of the company. In this case, the trial court's orders completely ignore the issue of "proper purpose."

Here, Sushner alleges that the "proper purpose" for which documents were sought was to confirm the revenue and distributions from the Winston-Salem Project because Plant 64 DCMC's tax returns did not show rental income, as well as obtaining a K-1 form. Compl at ¶ 16. As Plant 64 DCMC does not own or manage the Winston-Salem Project, Plant 64 DMC does not have rental income records and Sushner's request is improper. Plant 64 DCMC has no rental income because it does

not own a rental complex. It is an investor entity only. A request for a K-1 Form would not have merited extensive discovery in any case.

Based on the lack of any "proper purpose" shown, Sushner was not entitled to Plant 64 DCMC's books and records.

B. Case Law Precludes Discovery of Plant 64 DCMC's Books and Records, as Production of Books and Records is the Ultimate Issue in This Case.

Although District of Columbia courts have not interpreted this statutory provision as to the availability of discovery for a corporate records case, "District of Columbia courts have often looked to Delaware for guidance on matters of corporate law." Jones & Assocs. v. District of Columbia, 797 F. Supp. 2d 129, 135 (D.D.C. 2011). Delaware courts are clear – "Books and records actions are not supposed to be sprawling, oxymoronic lawsuits with extensive discovery." KT4 Partners LLC v. Palantir Techs., Inc., 203 A.3d 738, 754 (Del. 2019). "Because the issues in a books and records case are narrow, discovery is necessarily narrow as well…[and] a plaintiff may not bypass the merits of her demand by requesting in discovery the very documents she seeks as final relief." Handler v. Centerview Partners Holdings L.P., No. 2022-0672-SG, 2023 Del. Ch. LEXIS 40 *12-13 (Ch. Feb. 13, 2023).

In Maitland v. Int'l Registries, LLC, 2008 Del. Ch. LEXIS 70 *6 (Del. Ch. June 6, 2008), for example, Maitland filed an action for the inspection of books and records and sought discovery from the defendant-companies' outside auditor. The

court ruled that Maitland could not obtain documents from the outside auditor because the action was, at its core, an action for the inspection of the books and records of defendants. Id. "Maitland [could not] use the discovery process in a books and records case to gain access to the books and records ultimately at issue." Id. To grant such discovery would have been effectively to grant Maitland final relief in the case. Id.

Likewise, in U.S. Die Casting & Dev. v. Sec. First Corp., C.A. No. 14019, 1995 Del. Ch. LEXIS 49 *7 (Ch. Apr. 28, 1995), the court reconfirmed that discovery in cases on statutory records requests are limited and ruled "to grant [plaintiff-member] its complete requested discovery would obviate the need for the § 220 action because the [plaintiff member] would obtain through discovery all of the documents requested before a determination of the scope of its rights under § 220." Id. The court ruled that as the sole issue was whether plaintiff-member had a proper purpose for its statutory records request, discovery was limited to that issue only. Id.

The holdings in Handler, Maitland, and U.S. Die Casting mandate that the Discovery Orders be reversed. The trial court repeatedly cited the broad discovery standards under Rule 26, which should not have been at issue in a corporate books and records case.

The Delaware decisions make sense and define a workable standard, otherwise the corporate records statute and its limiting provisions would be effectively superfluous. No court would ever make a decision on the issue in dispute, because discovery, generally permitted on a liberal basis, would obviate the need for any decision.

Sushner's tactic of issuing discovery to Plant 64 DCMC, which included documents of the Winston-Salem Project owned by Innovation Lofts, renders D.C. Code 29-804.10's guardrails meaningless. Sushner did not have to make any showing about his purpose as directed by the statute. Instead, Sushner merely served document requests, which should not have been allowed, and then asked the court to compel production of the following:

Request No.	Details of Request[3]
1	All Plant 64 corporate records (including any amendments to the Operating Agreement, minutes and resolutions)
2	All Plant 64 records of revenues and expenses.
3	All Plant 64 records relating to capital improvements.
4	All Plant 64 records of compensation to any persons from company funds.
5	All Plant 64 records of distributions to any persons from company funds.
6	All Plant 64 records of any loans, purchases or leases made from company funds.
7	All Plant 64 records of any debts taken on behalf of the company.
8	All Plant 64 records of any secured transactions involving company property.
9	All Plant 64 records of any litigation involving the company.
10.	All Plant 64 audited and unaudited profit and loss statements.

[3] Ex. A, Discovery Orders at Appendix p. 1-21.; Ex. C, Default Order at Appendix p. 29-35.

12.	All Plant 64 audited and unaudited balance sheets.
13.	All Plant 64 bank records.
14.	All Plant 64 state, local, and federal tax records, including company tax returns, 1099 forms and all K-1s.
15.	All records that identify the members of Plant 64.
16.	All records that identify and explain any change in the membership of Plant 64.
18	All records that identify and explain and change in the managing member(s) of Plant 64.
21	All communications by any Defendants referring or relating to Plant 64.
22	All communications that have been made by Defendants to any member of Plant 64 relating to the company since its inception.
23	All communications by or to any managing member of Plant 64 regarding the finances or operations of the company.
24	All communications between Defendants and Plaintiffs relating to Plant 64.
25	All communications between Defendants and any tax authority.
26	All communications between Defendants and banks or financial institutions.
27	All communications between Defendants and law enforcement agencies.

In granting Sushner's Motion to Compel for document requests against Plant 64 DCMC, on June 8, 2022, under the broad standards of D.C. Sup. Ct. R. 26, the trial court erred by rendering final judgment against Appellants without any evidence on the record. This was effectively an end-run around the records request statute. Even if Sushner were able to prove his case on the merits, which he cannot, Request No. 1, and tax returns under Requests 13 and 14, would typically be sufficient. The remaining, overreaching requests are unrelated to D.C. Code 29-804.10 and

apparently intended to obtain records of Innovation Lofts and the Winston-Salem Project generally.

C. The Trial Court Incorrectly Applied the Liberal Discovery Standards of Rule 26, and Combined with the Broad and Ambiguous Nature of Sushner's Discovery Requests, the Trial Court Ordered Production Far Beyond the Scope of D.C. Code 29-804.10.

The responses to the foregoing requests are not just Plant 64 DCMC's corporate books and records, such as corporate records, tax returns and bank statements, but include documents relating to "capital improvements," all documents referring to or relating to "Plant 64," meaning the Winston-Salem Project, and related or even unrelated e-mails. The trial court erred by ordering this extraneous production on a discovery motion for a books and records case under D.C. Code 29-804.10.

As stated in Sec. First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 565 (Del. 1997), to demand corporate books and records "…the burden on the plaintiff is not insubstantial. The statutory remedy is not an invitation to an indiscriminate fishing expedition. The plaintiff must not only show a credible basis to find probable wrongdoing but must justify each category of the requested production." A member cannot use discovery to fish for documents and retroactively define a "proper purpose."

Here, the trial court did not inquire into Sushner's purpose whatsoever but approached the discovery dispute through the liberal lens of Rule 26. None of these

documents demanded relate to Susher's alleged "proper purpose" as a passive, minority member. Instead, they were a fishing expedition beyond the scope of D.C. Code 29-804.10 for documents about the Winston-Salem Project generally.

II. As the Trial Court's Default Order, Attorneys' Fees Order, and Contempt Order Rely on its Error of Allowing Improper Discovery in a Books and Records Case, The Court Should Also Reverse These Orders.

The trial court compounded its error of granting Sushner's motion to compel discovery requests against Plant 64 DCMC including records of the Winston-Salem Project by ordering four corresponding sanctions: (1) appointing a new managing member of Plant 64 DCMC, (2) entering default judgment against Appellants Plant 64 DCMC and C.A. Harrison Companies, LLC, (3) imposing a civil fine of $5,000 per day against Appellants and non-party Mr. Harrison pending assistance to a new managing member that had not been appointed, and (4) awarding Sushner's attorneys' fees. Since Sushner's discovery requests were improper in a corporate records case and beyond the scope of D.C. Code 29-804.10, orders stemming from Sushner's motion to compel discovery should be reversed. Appellants address each of these improper sanctions in turn.

A. Appellants Were Entitled to a Hearing Before Being Held in Civil Contempt.

As a preliminary issue, the trial court erred by replacing Plant 64 DCMC's manager and imposing a civil fine of $5,000 for civil contempt without any hearing.

A full, impartial hearing is required for a civil contempt sanction if there is any material fact in dispute about the contempt. WMATA v. Amalgamated Transit Union, 531 F.2d 617, 620 (D.C. Cir. 1976). "For the trial court to issue a civil contempt order, the movant must make a clear and convincing showing that (1) the alleged contemnor is subject to a court order, and that (2) he or she has failed to comply with that order." Woodroof v. Cunningham, 146 A.3d 777, 791 (D.C. 2016).

Here, given the extensive nature of Sushner's unauthorized discovery requests, Appellants (and especially, Mr. Harrison individually) did not have access to the documents. At minimum, the trial court should have held a hearing to determine whether a sanction was appropriate, whether Chris Harrison as a non-party was individually subject to the trial court's orders, whether discovery was appropriate in a books and records case, and whether Appellants had access to and could be compelled to produce the requested documents, among other issues. The trial court failed to do so. Just as Sushner did not have to show a proper purpose before getting final relief through the Discovery Orders, Sushner did not have to meet any factors of civil contempt before getting that relief.

As the trial court did not hold a hearing for civil contempt, its Contempt Order, replacing Plant 64 DCMC's manager and awarding a civil fine of $5,000 per day, should be reversed.

B. The Trial Court Did Not Have the Authority to Remove CAH Companies as the Managing Member of Plant 64 DCMC; The Operating Agreement and D.C. Limited Liability Company Act Confirm that Sushner's 2.5% Voting Interest Does Not Allow Him To Replace the Managing Member.

The trial court had no authority to remove CAH Companies as Plant 64 DCMC's manager and order the appointment of a new manager. Sushner is entitled to a limited set of documents, namely corporate books and records, under the statute, if he can show a "proper purpose," nothing more.

Plant 64 DCMC's operating agreement sets forth the procedure to remove its managing member. See Exhibit G, Appendix at p. A-145, § 6.01(D), Plant 64 DCMC, LLC Operating Agreement ("Operating Agreement"). Removal requires "the unanimous consent of the Members." Id. No statute allows the trial court to ignore the operating agreement and impose a fictional procedure to remove CAH Companies LLC as managing member just because Sushner requests it.

By doing so, the trial court violated the rights of CAH Companies, Kumiva Development Holdings LLC, James Farrior, Martin Tomasz, and Michael D. Worch. These members own 97.5% of Plant 64 DCMC. Exhibit G, Appendix at p. A-133 ("Operating Agreement"). The trial court cannot elevate Sushner's 2.5% membership interest above these other members. Sushner's minority voting interest means that he has no power to remove CAH Companies' managing member without the support of other members. That is the operating agreement Sushner entered.

Sushner's limited, 2.5% interest in Plant 64 DCMC highlights the issue of whether it had a proper purpose for requesting records. The multiple lawsuits filed by Appellee Sushner have been destructive to and at the least been an impediment to the operation of Plant 64 DCMC and confirm that Sushner may have a conflict with the other members. Ultimately paying Sushner more would decrease the capital accounts of other members, putting Sushner in direct conflict with other members. In an analogous context, in corporate litigation, courts have held that a derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of members "who are similarly situated in enforcing the right of the corporation or association." Petersen v. Federated Dev. Co., 416 F. Supp. 466 at n.6 (S.D.N.Y. 1976). This limited interest does not negate Sushner's right to request corporate records but does make it especially important that a court discern a proper business purpose.

As Sushner's initial discovery requests under D.C. Code 29-804.10 were improper, the trial court's decision to grant Sushner's motion to compel responses to these requests and the corresponding sanction of replacing Plant 64 DCMC's manager was improper. Neither D.C. Code 29-804.10 nor any authority authorizes the trial court to create a procedure to replace Plant 64 DCMC's manager.

C. The Trial Court Did Not Have the Authority to Enter Default Judgment Against Appellants For Purportedly Not Responding to Unauthorized Discovery.

Entering default judgment against a party in connection with a discovery motion is "a sanction of last resort." Webb v. District of Columbia, 146 F. 3d 964, 971 (D.C. Cir 1998). "Disposition of cases on the merits is generally favored." Id.; see also Shimer, 482 A.2d at 400-401 (ruling that dismissal is the "most draconian sanction" and "runs counter to valid societal preference for a decision on the merits").

In its October 13, 2022, order, the trial court concluded that Appellants purported nonproduction of Plant 64 DCMC's corporate books and records "has severely hampered Plaintiff's ability to present its case." Exhibit C, Appendix at p. A-34 ("Default Order"). The trial court was incorrect. Sushner's ability to present his case relates to Sushner's ability to show a "proper purpose" for his statutory request for documents, not the documents themselves.

The trial court further stated: "a hearing is not necessary when the requested discovery relates to information that a limited liability company should have…such as revenues of revenues and expenses." Exhibit C, Appendix at p. A-33 ("Default Order"). In fact, as the Discovery Orders and Default Order confirms, Sushner in fact sought records as to capital improvements, loans, and expenditures actually related to the Winston-Salem Project, not to Plant 64 DCMC. See Exhibit A,

Appendix at p. A-8, A-15 ("Discovery Orders") and Exhibit C, Appendix at p. A-32 ("Default Order"). To the extent Sushner requested documents not in the possession, custody, or control of Appellants, such as documents related to Innovation Lofts Associates, LLC and the Winston-Salem Project generally, Appellants should have been given the opportunity to explain to the trial court why such discovery was improper and also how and why they do not have these documents.

The trial court approached this matter as a discovery dispute in general civil litigation, not as a matter brought under D.C. Code 29-804.10. Appellants had no obligation to produce Plant 64's corporate books and records in discovery. At minimum, a hearing was necessary for Sushner to prove that Sushner had a proper purpose behind his statutory records request.

As Sushner's initial discovery requests under D.C. Code 29-804.10 were improper, the trial court's decision to grant Sushner's motion to compel responses to these requests and the corresponding sanction of default judgment was improper.

D. The Trial Court Did Not Have the Authority to Impose a Civil Fine or Award Attorney's Fees in Connection with Sushner's Unauthorized Discovery.

Monetary sanctions against Appellants in connection with Sushner's unauthorized discovery are unjustified. The attorneys' fees awards and civil fine of $5,000 per day are directly tied to the trial court's improper Discovery Orders and should be reversed.

The Attorneys' Fees Order provides fees for all of Sushner's counsel's work on discovery, Susher's motion to compel, and Sushner's motion for sanctions in connection with discovery. See Exhibit D, Appendix at p. A40-41 ("Attorneys' Fees Order"). None of this work merits fees, because none of this work related to the specific issues under Section D.C. Code 29-804.10, but all related instead to discovery that was improperly served.

Sushner not entitled to request Plant 64 DCMC's documents and information in the discovery process and cannot recover fees in connection with their efforts for the same. Appellees apparent lack of inquiry into the narrow scope of discovery permissible, and the trial court's consequently incorrect rulings cannot be the basis for an attorneys' fees award.

In addition, a sanction should be no greater than necessary given the circumstances. See Shimer at 401. In this case, $5,000 a day pending an effort to assist a new managing member who was not yet appointed, especially when Chris Harrison was individually not subject to any prior court order, is excessive and unwarranted.

The trial court had no authority to bypass Plant 64 DCMC's operating agreement to replace Plant 64 DCMC's manager nor compel production of various Plant 64 DCMC documents and information.

For all the foregoing reasons, any civil sanction should be reversed.

III. As a Non-Party to the Lawsuit and Non-Member of Plant 64 DCMC, Mr. Harrison Cannot Be Fined for CAH Companies LLC and Plant 64 DCMC's Obligation to Produce Documents.

In addition to improperly granting sanctions against CAH Companies LLC and Plant 64 DCMC based on the Discovery Orders, the trial court made the extraordinary factual assumption and error of finding that Mr. Harrison was a party to the lawsuit and also a member of Plant 64 DCMC, and thereby holding him jointly responsible for the sanctions on Appellants.

A. Christopher Harrison Was Not a Party to the Lawsuit.

Sushner was the Plaintiff. CAH Companies and Plant 64 DCMC were the Defendants. Neither did Sushner amend the Complaint to add Mr. Harrison nor did the trial court enter any order joining Mr. Harrison as a party to this case.

The trial court's finding that "Christopher Harrison… is a party to this case," in its January 30, 2023, order is incorrect, but appears to be a predicate for the Court's rulings. See Exhibit E, Appendix at A-50 ("Post Judgment Orders").

B. Christopher Harrison Was Not a Member of Plant 64 DCMC.

CAH Companies, Sushner, Kumiva Development Holdings LLC, James Farrior, Martin Tomasz, and Michael D. Worch are the members of Plant 64 DCMC. See Exhibit G, Appendix at p. A-133 ("Operating Agreement"). No arguments made by either party nor any evidence presented to the trial court indicated that Mr. Harrison was a member of Plant 64.

The trial court's March 14, 2023, order states: "Ordered that all members of [Plant 64 DCMC], except Mr. Harrison, will vote… to select an independent manager unaffiliated with Mr. Harrison…" The trial court's finding that Mr. Harrison was a member of Plant 64 DCMC is incorrect. CA Harrison Companies was such a member, not Mr. Harrison. The Court improperly blurred the distinction between various persons and entities, and consequently, imposed a $5,000 civil fine on Mr. Harrison without justification.

C. As a Non-Party, Mr. Harrison Has No Obligations Under D.C. Code 29-804.10.

This case is driven by D.C. Code 29-804.10(b), which creates a duty for Plant 64 DCMC's "manager" to provide Sushner access to company records under certain conditions. The duty does not extend to other members, and certainly not non-members, for a manager-managed limited liability company.

Here, Sushner and the trial court can order Plant 64 DCMC, as the company, to give Appellee access to company records after Sushner proves his "proper purpose." But, the statute does not extend this duty to Mr. Harrison.

In addition to having no statutory obligations, Mr. Harrison had no discovery obligations in this case. Sushner did not sue Mr. Harrison, and Sushner did not serve a third-party document subpoena on Mr. Harrison. As an individual, Mr. Harrison was never before the Court and never subject to any discovery obligations.

Mr. Harrison was not before the trial court as a party nor a third-party with any discovery obligations. Therefore, there was no authority for the trial court to order a $5,000 per day sanction against Mr. Harrison to the extent Appellants did not produce documents under the trial court's improper orders.

All sanctions against Mr. Harrison, mistakenly treated as a party and member of Plant 64 DCMC, should be reversed.

IV. The Contempt Order is Not Enforceable Because It Relies on the Ambiguous Default Order, and Is Ambiguous Itself.

Under District law, "as a general proposition, civil contempt of a court order, including a consent decree, may be established only if the order allegedly violated is specific and definite, or clear and unambiguous." Fed. Mktg. Co. v. Va. Impression Prods. Co., 823 A.2d 513, 525 (D.C. 2003); See also In re Jones, 898 A2d. 916 (D.C. 2006).

Here, the Default Order, dated October 13, 2022, which Appellants allegedly violated, was ambiguous. Firstly, the Default Order did not impose any obligations on Mr. Harrison, a non-party, but is directed to Appellants only. Thus, the Contempt Order is inappropriate against Mr. Harrison.

Secondly, given Appellants on-going supplementation of discovery responses for months, the trial court's reference in its Contempt Order to compliance with its June 8, 2022 "Discovery Order" was unclear. By October 2022, the rulings in the

improper Discovery Order were superseded. Voluminous responsive documents had been produced in response to Sushner's expanding discovery and follow-up requests, and the Appellants had no meaningful way to determine what was left.

Most importantly, the Default Order was unauthorized in the first place. As detailed above, since Sushner's initial discovery requests under D.C. Code 29-804.10 were improper, the trial court's decision to grant Sushner's motion to compel responses to these requests and the corresponding sanction of default judgment was improper.

And even the December 8, 2022, Order is ambiguous in itself. Mr. Harrison is ordered to "assist" the new manager locate "all documents" covered by the trial court's prior unauthorized and vague orders. No manager was yet appointed, nor had Mr. Harrison been subject to any prior order. The literal wording of the Contempt order states that the trial court is ordering the Appellants to assist the new manager in locating records and also ordering Appellants to require Mr. Harrison to pay a $5,000 a day fine.

Under the literal wording, it is not clear if the Court is actually sanctioning Mr. Harrison, or just ordering Appellants to require Chris Harrison to pay a fine, in which case the Court may not be exercising jurisdiction over Chris Harrison directly. In such case, the Court's order to a Defendant to order somebody else to pay a fine would be unenforceable.

The ambiguous December 8, 2022, Contempt Order is also based on an improper and ambiguous October 13, 2022, Default Order and should be reversed.

V. The Trial Court Cannot Continue to Exercise Jurisdiction Over This Matter and Enforce its Improper Discovery Order, Default Order, and Contempt Order.

The trial court does not have the authority to charge forward with enforcing its improper Discovery Order, Default Order, and Contempt Order after Appellants had noted their appeal to these matters.

"Discovery orders may be considered final and appealable where the discovery request is the only proceeding pending before the court." Crane v. Crane, 657 A.2d 312, 315 (D.C. 1995). And in general, a trial court loses jurisdiction to proceed with a case when a notice of appeal is filed. See Abrams v. Abrams, 245 A.2d 843, 844 (D.C. 1968).

Here, Appellants appealed the Default Judgment Order and Contempt Order, on October 18, 2022, and December 21, 2022. These orders, based on the Discovery Order from June 2022, were effectively final as they ordered the production of Plant 64 DCMC's documents in response to a discovery request, which included Plant 64 DCMC's corporate records, which is the only issue in this case.

On January 12, 2023, January 30, 2023, and March 14, 2023 (collectively, the "Post-Judgement Orders"), the trial court continued to attempt to issues orders to direct the management of Plant 64 DCMC and enforce its improper Discovery Order.

Through these Post-Judgment Orders, the trial court continues to pass judgment on the candidates for Plant 64 DCMC's manager and continues to force Plant 64 DCMC to produce various documents, while subjecting Appellants to daily sanctions pending assistance to a new managing member not yet appointed.

The trial court was wrong to permit Sushner to issue discovery in connection with the Plant 64 DCMC's corporate records case and should not be permitted to continue proceedings with respect to its previous, improper orders.

VI. The Trial Court Abused its Discretion by Interfering in Plant 64 DCMC's Management and Requiring Appellants and Mr. Harrison to Assist a New Managing Member Under the Threat of a $5,000 Per Day Fine.

The confusing wording of the trial court's Contempt Order, its excessive sanction, its trial court's resolving the merits on a discovery motion, its presumptions that Chris Harrison was a party and a member of Plant 64 DCMC, all confirm that the trial court went out of its way to punish the Defendants and Mr. Harrison. In doing so, the trial court misstated facts and misinterpreted the law. At the very least, in making such findings and issuing such orders, the Court abused its discretion.

CONCLUSION

This case is governed by D.C. Code 29-804.10. Sushner cannot circumvent the statute's requirements by filing a lawsuit and serving discovery for Plant 64 DCMC's books and records.

The trial court erred by granting Sushner's motion to compel Plant 64 DCMC's books and records, and then sanctioning Appellants and non-party Mr. Harrison based on its previous, improper orders.

Sushner is a 2.5% minority owner, but this lawsuit has elevated his interests above all other members. The trial court has improperly given Sushner access to documents without any showing of a proper purpose, replaced Plant 64 DCMC's managing member in contravention of its operating agreement, and levied a $5,000 per day fine on the company (and non-party Mr. Harrison) in conjunction with its previous improper Discovery Orders.

The trial court also erred by apparently ordering Mr. Harrison to provide company documents (which appears to be the intent) and imposing a $5,000 per day civil fine on him individually. The trial court mistakenly concluded that Mr. Harrison was a party to the case and a member of Plant 64 DCMC. These findings are incorrect. Mr. Harrison was not a party to the case, not a member of Plant 64 DCMC, and not subject to any third-party discovery. The trial court had not authority to impose a civil fine on him for the obligations of Appellants.

At this time, the Winson-Salem Project has been sold. All members, including Sushner have benefitted. The trial court's improper orders should be reversed and Plant 64 DCMC permitted to wind-up in peace.

Dated: May 31, 2023.

Respectfully Submitted,

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REDACTION CERTIFICATE DISCLOSURE FORM

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing

violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

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