ORAL ARGUMENT NOT SCHEDULED

No. 21-CV-0612

DISTRICT OF COLUMBIA COURT OF APPEALS

MAY, LADONNA, ET AL.

Appellants,

v.

STANTON VIEW DEV. LLC, ET AL.,

Appellees.

ON APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION
Case No. 2021 CA 000266 B
The Honorable Jose M. Lopez

BRIEF FOR APPELLANTS

Je Yon Jung
May Lightfoot, PLLC
3200 Martin Luther King Junior Avenue
Southeast 3rd Floor,
Washington, D.C. 20032
Tel: (202) 918-1824
jjung@maylightfootlaw.com
DC Bar No. 495154

LaRuby May
May Lightfoot, PLLC
3200 Martin Luther King Junior
Avenue Southeast 3rd Floor,
Washington, D.C. 20032
Tel: (202) 506-3591
lmay@maylightfootlaw.com
DC Bar No. 983484
Counsel for Appellants

RULE 28(a)(2)(A): STATEMENT OF PARTIES

The Plaintiff-Appellants in this case are LaDonna May, Ade Adenariwo, Britney Bennett, Theresa Brooks, Davina Callahan, Denine Edmonds, Ciera Johnson, and Robin McKinney, who are represented here and below by Je Yon Jung and LaRuby May of the office of May Lightfoot PLLC.

The Defendant-Appellees in this case are the District of Columbia which is represented below by Chad Copeland, and Patricia A. Oxedine of the Office of the Attorney General for the District of Columbia and on this appeal represented by Caroline Van Zile, Solicitor General for the District of Columbia and Karl A. Racine, Attorney General, 400 6th Street, N.W. Suite 8100, Washington, DC 20001.

Defendant-Appellee River East at Grandview Condominium Unit Owners' Association, Inc. which is represented here and below by Robert L. Ferguson, Jr. and Timothy J. Dygert, Jr. of Ferguson, Schetelich & Ballew, P.A.

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RULE 28(a)(5) STATEMENT OF JURISDICTION

This appeal is from the final orders entered by the Honorable Jose M. Lopez, Judge, Superior Court of the District of Columbia ("Superior Court"), on August 19, 2021, granting the Defendant-Appellee District of Columbia's ("District") Motion to Dismiss and August 26, 2021 granting the Defendant-Appellee River East at Grandview Condominium Unit Owners' Association, Inc.'s ("the Assoc.") Motion to Dismiss.

Plaintiff-Appellants LaDonna May, Ade Adenariwo, Britney Bennett, Theresa Brooks, Davina Callahan, Denine Edmonds, Ciera Johnson, and Robin McKinney ("Plaintiffs") filed a timely notice of appeal on September 1, 2021. D.C. App. R. 4(a)(1). This Court has jurisdiction over this appeal pursuant to D.C. Code § 11–721(a)-(1), which provides "[t]he District of Columbia Court of Appeals has jurisdiction of appeals from – all final orders and judgments of the Superior Court of the District of Columbia[.]"

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the Superior Court committed a reversible error in granting the District's Motion to Dismiss, as set forth in its August 19, 2021, Order.

II. Whether the Superior Court committed a reversible error in granting the Assoc.'s Motion to Dismiss, as set forth in its August 26, 2021, Order.

STATEMENT OF THE CASE

This appeal arises from a lawsuit filed by Plaintiffs against the District and the Assoc. (collectively, "Defendants") in connection with the funding, acquisition, development, construction, and management of a condominium property located at 1262 Talbert Street, SE, in Ward 8 of the District of Columbia (the "Property"). The Property was realized as part of a first-time home buyer effort to provide affordable housing and economic development and to revitalize underserved communities in the District of Columbia.

The District, through the Department of Housing and Community Development ("DHCD"),[1] controlled every substantive aspect of the Property's construction and development, including providing over $6,000,000.00 in funding for the "acquisition, construction, and development" of the Property; reserving and

[1] The District of Columbia is interchangeably identified throughout the Superior Court briefings as the Department of Housing and Community Development ("DHCD"), and the D.C. Department of Housing and Community Development ("DCHCD"), ("DCDHCD").

dictating 100% of the "Eligible Purchasers" for 100% of the Property units; and selecting and providing exclusive oversight over construction of the Property, through the District's selection of Stanton View Development, LLC ("Stanton View") as the developer and general contractor. RiverEast at Anacostia, LLC ("RiverEast") subsequently became Stanton View's assignee (collectively "Developer Defendants"). After meeting the District's first-time homebuyer program obligations and eligibility requirements, Plaintiffs, *inter alia*, were required to assume the repayment obligations of Developer Defendants to the District, in addition to their mortgage obligations for the Property units. The District, through its contractors, constructed a structurally unsound, unsafe, and hazardous Property.

Despite dozens of red flags, the Assoc. agreed to be burdened with the Property's construction defects without proper remedies, protection, and recourse against the Developer Defendants, who it conceded it did not trust—such burdens to only be passed through to unit owners, eight of whom are Plaintiffs in this case.

Defendants' failures individually and collectively saddled Plaintiffs—Black, female, low- to moderate-income first-time homebuyers—with uninhabitable units within weeks of occupancy, including dangerously insufficient structural stability and foundation integrity--causing backed-up sewage and broken plumbing; rampant mold and mildew; and gaping separations to the units' walls, ceilings, stairs, and floors. Because these Plaintiffs obtained and purchased their homes through the

District's first-time homebuyer programs, they were saddled with an uninhabitable and unsafe home, along with a 15 year-compliance and repayment period under the District's prorated Home Purchase Assistance Program ("HPAP"). A134.

After substantial failed efforts seeking the District's assistance and resolution, Plaintiffs filed a Complaint against the District, through the DHCD, for damages arising from violations of consumer protection and civil rights laws, breach of contract, and intentional infliction of emotional distress. The Complaint also sought damages against the Assoc. for negligence. Shortly thereafter, the Developer Defendants filed for bankruptcy.

The District filed a Motion to Dismiss, contending that DHCD is *non sui juris* and that the District of Columbia should not be substituted as the proper defendant because Plaintiffs have failed to state claims for which they are entitled to relief under any theory of liability. The Assoc. also filed a separate Motion to Dismiss contending Plaintiffs failed to state a claim for negligence because they could not allege a breach that occurred after the Assoc. undertook the management of the Property. Based on an improper application of both the pleading standard to the well pled facts of the Plaintiffs' Complaint and court precedent, the Superior Court granted both motions to dismiss without leave to amend. Plaintiffs timely filed their notice of appeal of both decisions and submitted this brief in accordance with this Court's scheduling order.

If this case is not reversed and remanded for further proceedings, the Plaintiffs will be left out in the cold, literally and figuratively. On August 17, 2021, the Assoc. issued notification to all residents to evacuate their units by August 30, 2021, due to the worsening of the stability of the foundation. The Property is still currently under evacuation orders due to the hazardous conditions and cannot be inhabited. The Plaintiffs' financial obligations to the District and to their mortgage lenders remain outstanding, saddling Plaintiffs with significant debt for zero benefit, and damages with long-lasting and substantial consequences. This outcome is antithetical to the District's mission to provide affordable housing, and Plaintiffs—Black women and mothers—should not be the ones left standing to shoulder the Defendants' failures.

STATEMENT OF FACTS

A. The Mission: To Create Affordable Housing Opportunities and Revitalize Underserved Communities in the District of Columbia.

DHCD is a District agency whose mission is "to create and preserve opportunities for affordable housing and economic development and to revitalize underserved communities in the District of Columbia." A6. On behalf of the District government, DHCD provides development loans from the DC Housing Production Trust Fund ("HPTF") and administers home buying assistance programs, including theHPAP. A7. HPAP provides interest-free loans and closing cost assistance to qualified first-time home buyers. A7.

B. The Reality: The District, through the DHCD, Provided More Than Six Million Dollars to Build Substandard and Hazardous Housing for Black Women in Ward 8.

After prevailing in a District bidding process, the Developer Defendants entered into a contractual Loan Agreement with the District on September 12, 2014, for the "purpose of funding acquisition, construction, and development financing costs for 46 affordable [housing units][2] to be constructed on [the Property]" for which they received over $6,000,000.00 of HPTF funds. A6; A91. The Property is in Ward 8, which has a 92% population of Black residents. A56.

The Loan Agreement provides that, "All Project Units shall, for the duration of the Affordability Period [be provided] to HPTF eligible occupants at approved prices, to and occupied exclusively by HPTF eligible households or individuals as prior approved by the Lender." A91, A97. Importantly, the Loan Agreement was later modified to require the Developer Defendants to only repay $1,890,626 of the outstanding loan of over $6 million dollars to the District in "proportionate shares from the proceeds of the sale of the 38th through the 46th unit, until all units have been sold and the sum of $1,890,626 has been repaid." Moreover, the remaining balance of $4,420,162 HPTF funds would be "assigned" "to the qualified

[2] The District initially intended the Property to contain affordable apartment rental units. However, the Property and the related Loan Agreement documents were later modified to reflect condominium units.

homebuyers who purchase homeownership units and assume a proportionate share of the debt." A131. The Loan Agreement was further modified to set forth the terms under which each "Eligible Purchaser" shall execute a Note in favor of the District evidencing the DHCD Homebuyer loan, among other things. A134. Importantly, each of the Plaintiffs, as Eligible Purchasers under the District's program requirements, executed Deeds of Trust and HPTF Covenants with the District. A155-92.

On or about March 24, 2017, the RiverEast at Grandview Condominium Bylaws were adopted, providing the Assoc. broad powers and duties. A322. In performing these duties, the Assoc. must "exercise the care required of a fiduciary of the unit owners." A322.

Between 2017 and 2019, Plaintiffs purchased units at the Property as first-time homebuyers with low- to moderate-income and with the assistance of the HPAP. A3-A6; A53; A56. All eight Plaintiffs are Black females, and most of whom have children and are heads of their households. A7-54. Within days or weeks of moving into their new homes, Plaintiffs realized there were substantial issues with the units. A6. However, they were repeatedly told by the Developer Defendants that the issues were the result of normal settling and to wait until the end of their one-year warranty period for the repairs to be completed. A6. These defects include large

openings and gaps in the walls, cracks in the floors, slanted floors, leaking pipes, water damage, mold, raw sewage odor, and defective windows and doors. A7-54.

Not only were these Plaintiffs denied safe and habitable dwellings that were fully and exclusively developed and funded by the District, they were denied the same level of construction and safety as other similarly situated occupants in predominantly white, male, and/or higher income level District projects throughout the District. A56-57.

C. The Search for Hope: Plaintiffs File Repeated Complaints with the District Agencies to No Avail.

As early as August 20, 2018, Plaintiffs provided notice to the District, through the DHCD, that the Property in the HPTF inventory was subject to serious structural issues and concerns. A201. On January 9, 2019, Plaintiff May, by and through LaRuby May, again followed up with the District, via email, about the issues in Plaintiff May's home and asked for assistance. A210. Specifically, the email reported (1) several dates explaining the progression of the various issues in Plaintiff May's home; (2) Plaintiff May's address; and (3) the details of the various issues in Plaintiff May's home. A210. On January 11, 2019, DHCD responded to LaRuby May's email that DHCD was looking into the issues and "consulting with DHCD counsel." A212. Upon recommendation of DHCD, Ms. LaDonna May, through

counsel, filed a formal structural defect warranty claim on March 3, 2019. On April 11, 2019, DHCD informed Plaintiff May that the "claim has been perfected." A207.

Despite Plaintiffs' ongoing correspondence, the District ignored its obligations to ensure the posting of a surety bond by Developer Defendants. Contrary to surety bond requirements, the District permitted Developer Defendants to avoid posting a surety bond, valued at $436,937.71, until August 22, 2019—two full years after construction was completed; after multiple units were already occupied; and only after the violation was identified as a result of Plaintiff May's complaint. A13.

As early as October 8, 2019, Plaintiffs also provided notice to the District of Columbia's counsel: the Attorney General's Office ("OAG"). Plaintiff Johnson shared an engineering report with both DHCD and OAG to give them notice of the issues with her home. A43; A216. Specifically, to the OAG, Plaintiff Johnson's notice included the location of her complaint, damages and injury, a description of the damage, and the probable cause of the damage from foundational defects. A217. Additionally, in the same email chain, Plaintiff Davina Callahan expressed that she was experiencing similar significant cracking in the walls of her home, and mold. A218-19. On October 9, 2019, OAG Investigator Timothy Shirley responded to the email exchange by explaining that Plaintiffs ". . . should take the necessary steps to

preserve their rights and consult their private attorney in case the remedies that state agencies aren't to their liking." A220.

On July 24, 2020, the Plaintiffs provided notice to the District of Columbia's counsel: Attorney General Karl Racine. A194. After the Plaintiffs learned that the OAG determined that it had completed an investigation and that no further enforcement action would be taken Plaintiff May, by and through LaRuby May, emailed Attorney General Karl Racine pleading with the OAG to act to assist the multiple Black women who are first-time homebuyers who are suffering because of the structural defects at a District HPTF Property. A194-95. Three days later, Mr. Downs further acknowledged the District's knowledge of its potential liability when he stated, ". . . we are not pursuing an enforcement action at this time because cooperation has proven productive and there are some legal barriers to filing a lawsuit" and ". . . we would also encourage you to consider a private lawsuit under the CPPA." A196-97. Potentially, the "legal barriers" to filing suit included the difficulty that the District would have in filing a lawsuit against itself.

D. The Litigation: Plaintiffs Are Forced to File a Complaint.

On January 29, 2021, Plaintiffs filed a Complaint against Defendants Stanton View and RiverEast, DHCD, and the Assoc. in which they brought the following causes of action: Count I: Violation of the Consumer Protections Procedure Act ("CPPA") (Defendants Stanton View, RiverEast, and DHCD); Count II: D.C.

Human Rights Act ("HRA") (Defendants Stanton View, RiverEast , DHCD); County III: Warranty Against Structural Defects (Defendants Stanton View and RiverEast); Count IV: Misleading Statement in a Public Offering Statement (Defendants Stanton View and RiverEast); Count V: Negligent Construction (Defendants Stanton View and RiverEast); Count VI: Breach of Contract (Defendants Stanton View, RiverEast and DHCD); Count VII: Breach of Implied Warranties (Defendants Stanton View and RiverEast ; Count VIII: Negligent Misrepresentation (Defendants Stanton View and RiverEast); Count IX: Negligence (Defendant Grandview); Count X: Negligence (Defendants Stanton View and RiverEast); Count XI: Fraud (Defendants Stanton View and RiverEast); Count XII: Strict Liability (Defendants Stanton View and RiverEast); and Count XIII: Intentional Infliction of Emotional Distress (Defendants Stanton View, RiverEast, and DHCD). A54-69. On March 23, 2021, Stanton View filed for Chapter 11 bankruptcy and RiverEast filed for Chapter 7 bankruptcy. A236.

On March 29, 2021, the District and the Assoc. filed separate Motions to Dismiss. A235-48; A229-34. The District made one procedural argument and five substantive arguments: 1) DHCD is *non sui juris*, and, therefore, cannot be sued as a separate agency of the D.C. government; 2) Plaintiffs cannot proceed against the District under the CPPA; 3) Plaintiffs cannot proceed against the District under the HRA; 4) Plaintiffs fail to state a claim for breach of contract; 5) Plaintiffs' claim for

intentional infliction of emotional distress is barred against the District because of failure to comply with D.C. Code § 12-309; and 6) Plaintiffs failed to state a claim for intentional infliction of emotional distress. A235-48. The Assoc. made one argument, contending that Plaintiffs failed to plead sufficient facts against the Assoc. to assert a plausible negligence claim because, as a matter of law, the Assoc. has no duty to identify structural defects while the Defendant-Developers are still in control of the condominium. A287.

On July 7, 2021, Plaintiffs also filed a Motion to Sever Bankrupt Defendants Stanton View and RiverEast, arguing the automatic stay imposed by 11 U.S.C. § 362 applies only to Stanton View and RiverEast Defendants. A235,48.

The Superior Court issued its omnibus order on August 19, 2021, granting the District's Motion to Dismiss, dismissing the District from this action, and granting the Plaintiffs' request to proceed against the Assoc. A235; A248.

The Superior Court issued a subsequent order on August 26, 2021, granting the Assoc.'s Motion to Dismiss, dismissing Count IX of the Complaint. A248.

E. The Appeal:

On September 1, 2021, Plaintiffs filed a notice of appeal of both orders and filed this Opening Brief in accordance with this Court's scheduling order. A249-52.

SUMMARY OF ARGUMENT

It has long been established that court litigation should be decided on the merits of a case. The Superior Court's imprimatur on Defendants' efforts to summarily prevail in this matter runs directly counter to that long-standing "judicial preference for the resolution of disputes on the merits rather than by the harsh sanction of dismissal," *Bond v. Wilson,* App. D.C., 398 A.2d 21 (1979). The finality achieved through the entry of dismissal should, but did not here, readily give way to the competing interests in reaching the merits of a lawsuit. Here, the Superior Court misapplied the *Iqbal/Twombly* standard to dismiss the Plaintiffs' Complaint against the District and the Assoc. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The Superior Court's decision was an abuse of discretion and should be reversed because Plaintiffs meet the applicable pleading standards. In the alternative, at a minimum, Plaintiffs should be provided an opportunity to amend their Complaint.

ARGUMENT

I. STANDARD OF REVIEW.

A motion to dismiss a complaint under Rule 12(b)(6) presents questions of law where the standard of review for this Court is *de novo*. *Fraser v. Gottfried*, 636 A.2d 430, 432 n. 5 (D.C. 1994). This Court applies the same standard as the Superior Court, meaning it must "accept the allegations of the complaint as true, and construe all facts and inferences in favor of the plaintiff." *In re: Estate of Curseen*, 890 A.2d

191, 193 (D.C. 2006) (quoting *Atkins v. Industrial Telecommunications Ass'n*, 660 A.2d 885, 887 (D.C. 1995)). Dismissal is warranted only if "it appears beyond doubt that the plaintiff can prove no set of facts supporting his claim which would entitle him to relief." *Owens v. Tiber Island Condominium Ass'n*, 373 A.2d 890, 893 (D.C. 1977) (quoting *Conley v. Gibson*, 355 U.S. 41, 45 (1957)). Any uncertainties or ambiguities involving the complaint must be resolved in favor of the pleader, and the complaint must not be dismissed because the court doubts that plaintiff will prevail. See *Atkins*, 660 A.2d at 887.

In the present case, Plaintiffs, filed a 69-page Complaint reciting allegations that the Defendants' unlawful activities caused injuries to Plaintiffs. The Plaintiffs alleged Defendants: 1) violated consumer protection laws; 2) violated Plaintiffs' civil rights; 3) breached a valid contract, and 4) intentionally inflicted severe emotional distress upon Plaintiffs. These allegations are recognized by applicable laws, and, construing these allegations as true, a rational, impartial trier of facts may find by a preponderance that Plaintiffs are entitled to relief. Therefore, in the interest of fairness and substantial justice, the judgment of the Superior Court should be reversed and the case remanded for further proceedings.

II. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT REFUSED TO SUBSTITUTE THE DISTRICT IN PLACE OF DHCD AS THE PROPER PARTY.

The Superior Court erred when it refused to substitute the District as the proper defendant or grant Plaintiffs leave to file an amended complaint to name the District as the proper defendant. *Eagle Wine & Liquor v. Silverberg Electric Co.*, 402 A.2d 31, 34 (D.C. 1979) ("the discretion accorded the trial court in deciding a motion for leave to amend is to be considered together with the prevailing spirit of liberalism in allowing such amendments when justice will be served."). The policy favoring resolution of disputes on the merits "creates a 'virtual presumption' that leave to amend should be granted unless there are sound reasons for denying it." *Pannell v. District of Columbia*, 829 A.2d 474, 477 (D.C. 2003). As set forth herein, Plaintiffs have pleaded claims for which they could recover from the District. Therefore, the Superior Court's refusal to allow for substitution of the District in place of DHCD constitutes an abuse of discretion.

III. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT ERRONEOUSLY HELD PLAINTIFFS' CPPA CLAIMS WOULD FAIL AGAINST THE DISTRICT.

A. The CPPA Must Be Broadly Construed to Effectuate Its Remedial Purpose to Adequately Protect Consumers from Unfair and Deceptive Trade Practices.

The CPPA is designed to provide consumers with a powerful remedy to right commercial wrongs and curtail merchants from foisting deceptive practices upon

D.C. citizens. *Modern Mgmt. Co. v. Wilson*, 997 A.2d 37, 62 (D.C. 2010) ("The purpose of the CPPA is to protect consumers from a broad spectrum of unscrupulous practices by merchants, therefore the statute should be read broadly to assure that the purposes are carried out."). The Act's stated purpose is to "assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices." D.C. Code § 28-3901(b)(1). In enacting the CPPA, the D.C. Council made clear that the law "shall be construed and applied liberally to promote its purpose," to effectuate the statute's remedial purpose to protect the public from deceptive and unconscionable acts. D.C. Code § 28-3901(c) ("This chapter shall be construed and applied liberally to promote its purpose."). To this end, the CPPA "defines its terms comprehensively so that it can provide a remedy for all improper trade practices." *Cooper v. First Gov't Mortg. & Investors Corp.*, 206 F. Supp. 2d 33, 35 (D.D.C. 2002); *see also Grayson v. AT&T Corp.*, 15 A.3d 219, 239 (D.C. 2011) ("The starting point for our understanding of the Council's intent is the essential purpose of the CPPA, which has remained unchanged throughout the CPPA's history . . . . to "assure that a just mechanism exists to remedy all improper trade practices."). Notably, there is no exception to this broad protection when the bad actor is the District, itself, and regardless of whether such unlawful conduct occurs through its agents or contractors.

The CPPA applies to "merchants," defined as "a person, whether organized or operating for profit or for a nonprofit purpose, who in the ordinary course of business does or would sell, lease (to), or transfer, either directly or indirectly, consumer goods or services, or a person who in the ordinary course of business does or would supply the goods or services which are or would be the subject matter of a trade practice." D.C. Code § 28-3901(a)(3). "Goods and services," in turn, are defined to mean "any and all parts of the economic output of society, **at any stage** or related or necessary point in the economic process, and includes consumer credit, franchises, business opportunities, **real estate transactions**, and consumer services of all types." D.C. Code § 28-3901(a)(7) (emphasis added).

Further, the legislative history defines "goods and services" as "the subject matter of any trade practice, including any action normally considered only incidental to the supply of goods and services to consumers." See Committee Report at 14. Finally, "trade practice" means "any act which does or would create, alter, repair, furnish, **make available,** provide information about, or, **directly or indirectly**, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services." D.C. Code § 28-3901(a)(6) (emphasis added).

The Property units were for the exclusive benefit and occupancy of individuals who qualified under the District's "DHCD Homebuyer Loan" program.

A 133. None of the Property units were available to other consumers outside of the DHCD Homebuyer Loan program. *Id.*

B. The Superior Court Misread This Court's Decision in *Snowder v. District of Columbia* to Improperly Narrow the Definition of "Merchant" and Wholesale Exclude the District from Liability Under the CPPA.

Instead of being guided by the language, legislative history, and purpose of the CPPA and this Court's precedent, Superior Court Judge Lopez issued a blanket pronouncement, based on a misapplication of the law, that "the District of Columbia law is clear that the District is not a merchant under the CPPA." (A242-43) (citing *Snowder v. District of Columbia*, 949 A.2d 590 (D.C. 2008)). On this erroneous basis alone, the Superior Court held that Plaintiffs failed to state a CPPA claim.[3]

Contrary to the Superior Court's interpretation, *Snowder* did not stand for the proposition that the District can never be a "merchant." Indeed, in reaching its decision in *Snowder*, this Court noted the appellants' specific, narrow basis for liability in that case: "the District indirectly sold or supplied towing services in this

[3] DHCD also argued in its Motion to Dismiss that Plaintiffs (1) failed to allege a trade practice in which it engaged that violates the CPPA, (2) failed to allege "goods and services" it supplied that are covered under the CPPA, and (3) failed to allege conduct falling within the statute of limitations. These contentions lack a proper basis in fact or law and Plaintiffs maintain their opposition to the arguments. However, as none of these contentions are the basis of the Superior Court's decision, Plaintiffs will not repeat their arguments presented below and respectfully refer this Court to their Opposition to DHCD's Motion to Dismiss to the extent the issues are reviewed in this appeal.

case because the towing companies acted pursuant to MPD authority; thus, because the towing companies could not act without the city's involvement, the city participated in the trade practice." *Snowder*, 949 A.2d at 599. This Court characterized this basis of liability as one arising from an "arm of the state" relationship and acknowledged appellants' contentions are "not without some force," but ultimately rejected the application of "merchant" to the District. *Id.* at 600. In so holding, this Court reasoned that, "Although the MPD participates in the towing of automobiles in the District, in that it contacts towing companies to retrieve vehicles on its streets, it did not supply the towing and storage services *in this case*." *Id.* (emphasis added). In other words, this Court rejected the delegation of authority as a basis for liability "in this case" because mere "contacting" was insufficient to amount to "supplying." *Id.*

The *Snowder* decision suggests, and the statutory language makes clear, that the District can be a merchant under the CPPA if it supplies directly or indirectly consumer goods or services, receives remuneration from companies providing consumer goods or services, and/or enters a consumer-merchant relationship. *Id; see also McMullen v. Synchrony Bank*, 164 F. Supp. 3d 77, 91 (D.D.C. 2016) ("merchant need not be the 'actual seller of the goods or services' complained of but must be 'connected with the 'supply' side of the consumer transaction'"); *District of Columbia v. Student Aid Ctr., Inc.*, No. 2016 CA 003768 B, 2016 D.C. Super. LEXIS

11, at *7 (D.C. Super. Ct. August 17, 2016) (defining "connected with the supply side" to mean "a person who is the seller or provider of services [,] one who controls the sale or provision of services to the consumer or who is further along the supply chain.") *Calvetti v. Antcliff*, 346 F. Supp. 2d 92, 104 (D.D.C. 2004) (holding that offer to obtain supplies and shepherd vendor contracts and promise to oversee and monitor work amounts to connection with supply side); *Synchrony Bank*, 164 F. Supp. 3d at 92 (holding bank was "merchant" because it participated in providing health care financing); *Hall v. S. River Restoration, Inc.*, 270 F. Supp. 3d 117, 123 (D.D.C. 2017) (holding bank was merchant because it "inserted itself into the 'supply side' of the transaction" when it conditioned payment under the insurance policy on using certain home repair company and made representations about repair company's warranty and because bank had ability to effectuate changes in repair company's personnel).

The Superior Court misconstrued *Snowder* and ignored the breadth of facts alleged here, which are more consistent with the cases finding "merchant" status and extend far beyond mere contact or delegation of authority to Defendant Developers. The Superior Court erroneously concluded that the District "did not create a consumer-merchant relationship with Plaintiffs; it simply loaned them money and funded the construction." A242. The facts Plaintiffs allege establish that the District was a direct merchant, at best, or an indirect supplier, at worst. As to the former, the

Deed of Trust and Covenants attached to the Complaint compels the conclusion that the District "engaged in the business of selling residential properties in the District." A94; *District of Columbia v. Hogfard*, No. 2015 CA 003354 B, 2015 D.C. Super. LEXIS 15, at *6 (D.C. Super. Ct. August 8, 2015). As to the latter, the District controlled every aspect of the real estate transaction through the (1) funding, acquisition, construction, and development of the Property; (2) specified reservation of 100% of the Property units to the District-approved Eligible Purchasers; (3) allowance of the agent to forego legal requirements regarding special or surety warranty bonds for the Property; and (4) subsequent replacement and assumption of the District's Loan Agreement with the Developer Defendants by the Eligible Purchasers (i.e., Plaintiffs). A7; A13; A16; A19; A23; A28; A31; A37; A44; A47; A61; A156. In short, not only did the District bankroll the entire construction with $6,000,000.00 of taxpayer money, the only homeowners who were eligible to occupy the units had to qualify under the District's homebuyer programs. A133. Plaintiffs sufficiently alleged that the District supplied consumer goods and services when it funded, promoted, and facilitated the substandard construction of the Property, thereby making it a "merchant" under the CPPA. A55. Even assuming Arguendo that the District merely loaned the money for the construction, as the Superior Court held below, the District would still be a merchant under the CPPA. *See e.g., Synchrony Bank*, 164 F. Supp. 3d at 92; and *Hall*, 270 F.Supp. 3d at 123).

By summarily granting DHCD's Motion to Dismiss, the Superior Court granted the District sanctuary status for activity that would make any other entity a "merchant" subject to CPPA liability and without legislative authorization. The decision is, in effect, a grant of sovereign immunity to the District by judicial fiat. Moreover, the Superior Court's decision eviscerates the CPPA's broad purpose; a purpose especially crucial in the high-stakes circumstances of homeownership. For these reasons, the Superior Court's dismissal of the CPPA claim constitutes an abuse of discretion.

IV. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT ERRONEOUSLY HELD PLAINTIFFS' HRA CLAIMS FAIL AGAINST THE DISTRICT.

A. The HRA Must be Broadly Construed to Effectuate Its Remedial Purpose to Adequately Protect Human Rights.

Like the CPPA, the Act is "a broad remedial statute, and it is to be generously construed." *George Washington Univ. v. D.C. Bd. Of Zoning Adjustment*, 831 A.2d 921, 939 (D.C. 2003). That means that courts "must read the words of the DCHRA liberally consistent with the Act's sweeping statement of intent." *Estenos v. PAHO/WHO Federal Credit Union*, 952 A.2d 878, 887 (D.C. 2008)

B. The Superior Court Improperly Applied the *Iqbal/Twombly* Pleading Standard.

The *Iqbal/Twombly* pleading requirement is not the equivalent of a summary judgment or trial proof burden, and the Superior Court's application otherwise

constitutes an abuse of discretion. *See Grayson*, 15 A.3d at 246-47 ("a motion to dismiss "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." It is not until a "lawsuit reaches the summary judgment stage, the 'mere allegations' of the pleadings become insufficient.") A complaint need only "contain 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."' *Hylton v. Watt*, No. 17-2023, 2018 WL 4374923, at *4 (D.D.C. Sept. 13, 2018) (quoting *Wu v. Special Counsel*, No. 14-7159, 2015 WL 10761295, at *1 (D.C. Cir. Dec. 22, 2015) (citation omitted) (holding that disparate treatment claim must "simply give the defendant fair notice of what [plaintiff's] . . . claim is and the grounds upon which it rests"); *Boykin v. Fenty*, 650 F. App'x 42, 44 (D.C. Cir. 2016 (To survive a motion to dismiss a claim of disparate impact Plaintiffs "must allege that a facially neutral practice or policy had a disproportionate impact on persons [in the protected class]."). An allegation on information and belief that a practice denied opportunities to members of a protected class compared to similarly situated non-members suffices. *Hedgeye Risk Mgmt., LLC v. Heldman*, 271 F. Supp. 3d 181, 189 (D.D.C. 2017) (quotation omitted).

Here, Plaintiffs' factual allegations allow the Superior Court to draw the reasonable inference that the identified District practices inflict harm on low- to moderate-income Black women, the majority of whom are single mothers, different

from white, male, and/or high-income individuals. Plaintiffs' non-conclusory facts show a plausible claim of discriminatory intent and treatment based on race and color, sex, familial status, and source of income. *United States v. City of Beaumont*, No. 1-15-CV-201, 2015 WL 13730887, at *2 (E.D. Tex. 2015) (difference in treatment sufficient to deny Rule 12(b)(6) motion).

First, Plaintiffs have identified the specific practice at issue; namely, the District financed, acquired, constructed, and developed the Property, specified reservation of 100% of the property units to the District-approved Eligible Purchasers, allowed its agent to forego legal requirements regarding special or surety warranty bonds for the Property, paved the way for the subsequent replacement and assumption of the District's Loan Agreement with the Eligible Purchasers (i.e., Plaintiffs) in lieu of the Developer Defendants, failed to provide assistance to residents through the OAG, and--to add insult to injury--issued violations and fines regarding the structural problems against the residents of the Property. A7; A13; A16; A19; A23; A28; A31; A37; A44; A47; A61.

Second, Plaintiffs identify harm inflicted on a focused group of individuals because of the District's practice. Plaintiffs allege that all eight (8) Plaintiffs are Black female first- time home buyers (A56); the Property is located in Ward 8, which has a 92% population of Black residents (A56); upon information and belief, all the units are predominately, if not exclusively, owned by Black residents (A56); and

that the District allowed its contractor and agent to forego legal requirements regarding special or surety warranty bonds for a Property located in the 92% Black Ward 8 (A13; A61); that 100% of the reserved unit owners of the Property were low- to moderate-income residents of the District and Eligible Purchasers, as required by the District (A7; A15; A19; A23; A28; A3; A37; A44; A46); and that the District, through its OAG, failed to assist these Black female residents of Ward 8 on a property that it funded, acquired, constructed and developed. A14. In fact, the District's OAG acknowledged in an email to attorney LaRuby May that the "outstanding issues are serious" and based on our review, your sister's unit raises serious health and safety concerns beyond what any other resident is facing. A196-97. However, the District stated in the same email, "[n]evertheless, we are not pursuing an enforcement action at this time because cooperation has proven productive, and there are some legal barriers to filing a lawsuit." *Id*.

Third, Plaintiffs allege the District "denied Plaintiffs property, services, products, and treatment on an equal basis to white, male, and/or higher-income individuals." A56. Plaintiffs further allege upon information and belief that the District "provides safer and more structurally sound construction, as well as substantively better and timelier responses and repairs to individuals in other areas of the District that are or (sic) substantively more white, higher income, with male heads of household." A57. At a minimum, Plaintiffs should be entitled to discovery

from the District to ascertain the types of other similarly-situated District-funded projects across the District, including wards with less Black residents, with similar evacuation orders and/or structural hazards.

Reading these allegations in the light most favorable to Plaintiffs and taking them as true, as the Superior Court must do at the motion to dismiss stage, prevents dismissal of these claims. Therefore, the Superior Court erred when it granted the motion to dismiss based on *Iqbal/Twombly*.

C. The Superior Court Improperly Narrowed and Ignored Allegations Regarding the District's Discriminatory Conduct.

Despite delineating many of the alleged practices in its Order (A244), the Superior Court held that the District failed to state a claim because "funding construction of allegedly faulty condominium units is simply not contemplated under the statute" and "each Plaintiff received funding for their property through HPAP and no Plaintiff was denied any services by [the District]." (A244). As set forth above, the Complaint's allegations are not so limited.

Through its practices, the District reconstituted the units from rental apartments to condominiums and saddled the Plaintiffs with responsibility for apportioned repayment of the District's $6 million dollar funding costs, among other financial obligations for uninhabitable and structurally unsound Property. In "exchange" for the HPAP funding, Plaintiffs are effectively imprisoned in contractual and financial obligations for uninhabitable homes that have backed up

sewage and broken plumbing; rampant mold and mildew; and gaping wall, ceiling, and floor separation. A7-54. Plaintiffs were recently forced to evacuate these horrible living conditions for themselves or their children, but they remain obligated to their financial and contractual obligations with their lenders and the District—or suffer further harm to their credit and ability to find alternative living arrangements. Instead of providing "opportunities for affordable housing and economic development," to this "underserved" community, the District's Hobbesian choice has decimated these Ward 8 Plaintiffs. These Plaintiffs must either reside in unsafe housing (after the mandatory evacuation order is lifted) for a 15-year compliance period, or otherwise repay the prorated HPAP funding in full. A134. Indeed, the District's "Affordability Covenants" require this substandard housing to be exclusively available to low-income households. A172.

In sum, the Plaintiffs' Complaint more than sufficiently alleges the District's conduct extends far beyond construction and HPAP funding to include providing substandard and structurally unsound properties exclusively to its low-income households. The Superior Court's conclusion that no Plaintiff was denied services by the District because they received HPAP funding ignores the allegations and contradicts the clear result of the District's conduct—in short, no habitability, no house. The denial of housing in Ward 8 is nothing other than a denial of housing to a focused population. The District's conduct and results therefrom is the epitome of

conduct prohibited under the HRA. The Superior Court's adoption of the District's narrowed description of Plaintiffs' allegations constitutes an abuse of discretion.

V. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT HELD PLAINTIFFS FAILED TO PLEAD A CLAIM FOR BREACH OF CONTRACT AGAINST THE DISTRICT.

A. The Superior Court Improperly Disregarded the Complaint's Allegations to Conclude Plaintiffs Could Not Enforce the Contracts.

A contract may be enforced either by a party to the contract or an intended third-party beneficiary. Restatement (Second) of Contracts §§ 302, 304 (Oct. 2021 Update); *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 n.3 (2006); *Fort Lincoln Civic Ass'n, Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1064 (D.C. 2008). A party's status as an intended (as opposed to incidental) beneficiary depends on the contracting parties' intent. Restatement (Second) Contracts § 302 (explaining that the contract need not specifically reference the individual; rather, the individual must only fall within a group clearly intended to be benefitted by the contract). "One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him." *Fort Lincoln*, 944 A.2d at 1068. Intent is a case-specific "question of fact" that must be gleaned from reading the contract as a whole in light of the circumstances under which it was entered. 13 Williston on Contracts § 37:10 (4th

ed. May 2022 Update); *A.S. Johnson Co. v. Atlantic Masonry Co.*, 693 A.2d 1117, 1122 (D.C. 1997).

The Complaint alleges Plaintiffs are direct parties to a contract with the District and intended third-party beneficiaries to a contract between the District and Developer Defendants. A62. Where, as here, the status is unambiguously alleged, the Superior Court should have accepted the allegations as true, presumed the general allegations embrace those specific facts necessary to support the claim, and construed all facts and inference in favor of Plaintiffs. *See In re: Estate of Curseen*, 890 A.2d at 193; *See Grayson*, 15 A.3d at 246-47. Instead, the Superior Court engaged in what should be a fact-intensive inquiry without the benefit of the facts fleshed out through discovery. Such a fact-finding mission, to the exclusion of the actual allegations, at the motion to dismiss stage constitutes an abuse of discretion.

B. The Superior Court Improperly Misconstrued the Contracts to Conclude Plaintiffs Could Not Enforce the Contracts.

Even if the Superior Court properly considered Plaintiffs' status under the contracts at this early stage of the proceedings, the Superior Court's conclusion was erroneous. It construed the third-party beneficiary language in the contract between the District and Developer Defendants unduly restrictive in light of the other contract recitals and provisions. The Complaint alleges the contracts expressly directed the reservation of units to a focused and exclusive population of District-approved Eligible Purchasers, which precisely encompasses this group of Plaintiffs. A91, A97.

For the intended beneficiary to the contract, one need look no further than the specific assumption of the Developer Defendants' obligations to the District by the Eligible Purchasers, i.e., Plaintiffs. A124-25. Plaintiffs were clearly intended parties to the contractual agreements between the District and Developer Defendants because each Plaintiff was in fact substituted and assumed the obligations and provisions that the Developer Defendants had previously entered with the District. A90-152; A155-92. Accordingly, Plaintiffs have a right to sue or enforce the contract between the District of Columbia and themselves or as third-party beneficiaries to the contract between the District and the Developer Defendants. The Superior Court's finding otherwise is error.

C. The Superior Court Improperly Disregarded the Complaint's Allegations to Conclude Plaintiffs Did Not Allege a Breach.

The Superior Court also erred when it *sua sponte* concluded, without any analysis, that Plaintiffs failed to plead facts showing the District breached any terms of the contract. Plaintiffs alleged the District failed to enforce or implement the contractual provisions between it and the Developers, including, but not limited to, enforcement of the warranty against structural defects security bond, property inspections, and/or certificates of occupancy. A61.

VI. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT HELD PLAINTIFFS FAILED TO PLEAD A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST THE DISTRICT.

A. The Superior Court Improperly Held Plaintiffs Failed to Provide Proper Notice of their Claims to the District.

Devoid of any explanation, the Superior concluded, "Plaintiffs have not provided notice to the Mayor as required under the statute." Regardless of whether this conclusion was based on the timing, the recipient, and/or the contents of the notice, this matter should be remanded for further consideration as to the sufficiency of notice in light of this Court's decision in *Farris v. District of Columbia*, 257 A.3d 509 (D.C. 2021). *Farris* was issued on the same day as the Superior Court's decision and directly reached the issue of timely notice in a case of property damage resulting from continuing inaction on the part of the District.

1. In accordance with § 12-309, Plaintiffs submitted timely notice.

This Court began its analysis in *Farris* with a discussion of the "guiding principles." Specifically, a claimant must know the injury was sustained before triggering the notice requirement and "any doubt as to the proper timing for the giving of the notice should be resolved in favor of earlier notice." *Id.* at 516 (quoting *District of Columbia v. Ross* 697 A.2d 14, 19 (D.C. 1997). Additionally, "[t]he rationale for insisting on such early notice—to enable the District not only to investigate the claim, but also to take steps to prevent or mitigate future damage—

applies with full force if, and perhaps especially if, the infliction of the damage is on-going (as in this case)." *Id.*

This Court acknowledged that it is "difficult" to determine when an injury from a continuing cause, as opposed to a discrete cause and effect, is sustained. *Id.* at 515. In analyzing the date of injury, this Court expressly hesitated to accept the Superior Court's conclusion that notice should have been given as early as 1980 "because it appears any injury inflicted at that early point in time was, or may have been, relatively trivial – mere water seepage with no immediate structural consequences." *Id.* at 516. Instead, the Superior Court reasoned that the property owner sustained and knew he had sustained the kind of damage requiring § 12-309 notice no later than 2008 when a structural engineer inspected the foundation and informed him the foundation wall had collapsed due to the water that had continued to seep in from the alley that was to be maintained by the District and therefore notice provided in 2016 was not timely. *Id.* at 516.

Even before *Farris*, this Court noted that where it is difficult to disentangle the ultimate injury from circumstances that worsened over time, an injury occurs when such circumstances evolve "into a more serious condition which poses greater danger" to a claimant. *Brown v. District of Columbia*, 853 A.2d 733, 739 (D.C. 2004) (citing *DeBoer v. Brown*, 673 P.2d 912 (Ariz. 1983)). It is clear then that the six-month clock regarding § 12-309's notice to the District begins for a claim not when

a condition is noted to exist, but when the injury is sustained, an event that may happen over time based on a worsening of conditions. *Id*.

Here, like *Farris*, the District's inaction "over a period of years–and continuing, worsening effects–" culminated in Plaintiffs' procurement of a structural engineering report in the summer of 2019. A43, A215-19. Unlike *Farris*, notice was submitted to the District within six months after receipt of this report which cited the following issues: "(1) cracks large enough for a pencil to enter appeared in the concrete slab close to the front wall and in the bedroom close to rear side as cracks, (2) the kitchen floor slopes, (3) cracks in the rear foundation wall, and (4) cracks on the concrete slab close to the front wall where it was repaired previously." *Id.*; A-215-19. As the District received notice that Plaintiffs had sustained injuries within six months of the structural engineering report, Plaintiffs provided timely notice in accordance with § 12-309.

2. In accordance with § 12-309, Plaintiffs submitted notice to the OAG which constitutes notice to the Mayor.

Plaintiffs provided notice, including the structural engineering report, to the OAG by way of email. A8; A217-18. Plaintiffs subsequently engaged with the OAG on July 24, 2020. A219-227. Nevertheless, the Superior Court determined that Plaintiffs failed to provide notice to the Mayor. A246. This conclusion is contrary to this Court's long-standing precedent that notice to authorized District counsel, the OAG in this case, satisfies the requirement to provide notice to the Mayor. *Shehyn v*

District of Columbia, 392 A.2d 1008 (1978) (holding that plaintiff's counsel's letter to counsel authorized to defend District, subsequent oral notice to the district office, and the district's sole possession of the premises where the injury occurred afforded officials sufficient time to investigate the matter and did not prejudice the District); *Hirshfeld v. District of Columbia*, 254 F.2d 774 (1958) (holding that plaintiff's claim letter erroneously sent to district engineer who forwarded letter to counsel authorized to defend the District was sufficient to satisfy notice requirements in D.C. Code § 12-208); *Stone v. District of Columbia*, 237 F.2d 28 (1956) (cert den. 352 U.S. 934) (holding that as the purpose of the notice statute was to give the district timely notice of claims in support of preparing to defend the forthcoming lawsuit, notice on counsel authorized to defend the District fully achieved the purpose).

3. In accordance with § 12-309, Plaintiffs submitted sufficiently detailed notice.

Notice to the OAG included the approximate time of damage, the place, the suspected cause, and the circumstances of the damage. The notice provides a basis for potential liability; namely, the District holds the Deed of Trust Note on the Property. This notice was sufficiently detailed because it could be "reasonably anticipated that a claim against the District might arise." *Pitts v. District of Columbia*, 391 A.2d 803, 809 (D.C. 1978) (holding that notice of cause in a police report was sufficient where it stated that a child "slipped and fell through a guard rail . . . after attempting to climb . . . a flight of stairs (4 stairs)" at a public housing

project that the investigator plans to find and photograph the exact location of the fall). Moreover, it was sufficiently detailed to satisfy "the rationale for insisting on such early notice—to enable the District not only to investigate the claim, but also to take steps to prevent or mitigate future damage." *See Farris*, 257 A.2d at 516.

The Superior Court did not expressly find otherwise, nor could it given that the District did investigate in relation to the concerns in the notice. In particular, the District asked Plaintiffs to further detail their complaints in writing to be sent to the Developer and the OAG, (A223), and allegedly took steps to mitigate future damage through mediation with the Developer and coordination with DHCD. A219. At worst, any doubt as to the sufficiency of the content—of which Plaintiffs contend there should be none—must be resolved "in favor of finding compliance with the statue." *Wharton v. District of Columbia*, 666 A.2d 1227, 1230 (D.C. 1995); *Maldonado v. District of Columbia*, 924 F. Supp. 2d 323, 333 (D.D.C. 2013) (citing *Enders v. District of Columbia*, 4 A.3d 457, 468 (D.C. 2010)).

4. Long before notice to the Mayor, the District was aware of its misconduct and the resulting harm, and its actions/inactions are inexcusable.

To the extent an injury can be construed to have been sustained earlier than the date of the structural engineering report, the District knew of its own misconduct and its inaction should not be rubber-stamped on § 12-309 grounds. Any such early injury is unlike the category of cases involving "tortious conduct of employees of

the District, to which the District, as the superior, must respond," or the category of cases where the "District itself is in breach of a duty but where, although necessarily aware of the breach, the District is not necessarily aware of the injury produced by the breach"—both of which require the notice contemplated by § 12-309. *See Shehyn*, 392 A.2d at 1013-14 (1978).

Here, the District was directing the conduct and understood its duties and obligations, and the extent of the damage it was causing. First, Plaintiffs provided notice to the District through DHCD as early as August 20, 2018, and again on January 9, 2019, that the property in HPTF inventory was subject to serious structural issues and concerns. A201; A210. Second, the District through DHCD responded to Plaintiffs that it was looking into these issues and are "consulting with DHCD counsel," (A212), and further confirmed on April 11, 2019, that the structural defect warranty claim filed on March 3, 2019, had been perfected. A207. In short, the District had actual notice of the Property's condition and injury therefrom and its misconduct should not be excused on the grounds that it did not have notice.

B. Even if Notice Was Insufficiently Pleaded, the Superior Court Improperly Denied Plaintiffs an Opportunity to Amend.

At minimum, the Superior Court should not have short-circuited the entirety of Plaintiffs' tort claim based on a motion to dismiss. Indeed, had the Superior Court allowed the matter to proceed to discovery, Plaintiffs would have submitted evidence not only of the injuries sustained in 2018 and 2019 but also in 2020 and 2021 when,

as a result of continuing violations and increasingly structural instability, Plaintiffs were notified that evacuation of the Property was determined to be necessary based on the results of an engineering examination undertaken by the Board of Directors, Property Management company, Legal Counsel, and Falcon Engineering. A 260-268; A269-280. Plaintiffs also would have submitted evidence of their additional notice filed with the District on April 7, 2021, and, to the extent necessary filed a motion for leave to amend in the event these injuries constituted "qualitatively different" types of injuries.[4] *See Farris*, 257 A.3d at 516, n. 19 (citing *Ross*, 697 A.2d at 19 n.5 (noting that *Ross* "may be read to imply that a failure to give timely notice of one type of injury does not necessarily foreclose a suit against the District for unliquidated damages attributable to a 'qualitatively different' type of injury that only manifests at a later date, even if the two types of injury derive from the same cause.").

[4] On August 19, 2021, the Assoc. held a Town hall meeting with all Property owners to discuss the forthcoming results of a comprehensive structural engineering report. The meeting was attended by representatives of the Mayor and the District, after the Mayor established a "task force" related to the Property. After this meeting, and based on the additional information from the report and the severity and escalation to an evacuation order, Plaintiffs provided the District with another §12-309 notice on November 20, 2021. Although these facts occurred after the facts subject to this appeal, they are important for purposes of context of the continuing and escalating violations, resulting new injuries, and the extreme prejudice to Plaintiffs regarding the erroneous summary dismissal by the court below.

C. The Superior Court Improperly Narrowed Plaintiffs' Intentional Infliction of Emotional Distress Allegations.

The Superior Court failed to consider Plaintiffs' allegations contextually, holding that the issuance of fines did not rise to the level of outrageous and atrocious conduct. Deciding the issue in a vacuum to the exclusion of the surrounding circumstances is error. Plaintiffs did not merely plead that the District issued citations; rather, the allegations are, in part, that the District was making citation violations against the Property that it funded and effectively constructed through HPTF funds and approved to be sold to each of the Plaintiffs. A6; A13; A14. In short, it was citing construction violations for property defects wholly caused by the District and its agents and then issuing citations to the homebuyer program participants. In addition to improperly diminishing the import of the citation allegations, the Superior Court failed to consider allegations that subjecting Plaintiffs to delayed remediation at a Property that was funded, acquired, constructed, and developed at the behest and specific parameters that the District imposed is outrageous conduct.

The District intentionally or recklessly disregarded its own obligations to rectify and/or enforce the habitability of the Property it "reserved" as affordable housing units. The District touts the provision of affordable housing units to deserving residents of the District. In reality, these eight Plaintiffs reside (or did reside before the evacuation) in homes that have overflowing and backed up sewage

due to failed plumbing; gaping separation of their ceilings, walls, and floors; rampant mold and mildew throughout their homes and property; and constant fear that their homes will collapse and injure them or their children. The District has full authority to remediate all these conditions but fails to do so. This conduct is outrageous and intentional and continues to cause Plaintiffs severe emotional distress. The Superior Court's finding otherwise is an abuse of discretion.

VII. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT HELD PLAINTIFFS FAILED TO PLEAD A CLAIM FOR NEGLIGENCE AGAINST GRANDVIEW.

In *District of Columbia v. Harris*, 770 A.2d 82, 87 (D.C. 2001), this Court recited the "familiar proposition that to establish negligence a plaintiff must prove a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, and damage to the interests of the plaintiff, proximately caused by the breach." (Citations omitted.) The Superior Court correctly articulated these well-settled elements but improperly narrowed the allegations in Plaintiffs' Complaint.

The Superior Court acknowledged Plaintiffs alleged an ongoing duty and obligation which includes "proper evaluation of the construction of the condominium elements and structural integrity of the condominiums." A63. Even Grandview conceded it had this duty in its Motion to Dismiss stating, it must exercise the care required of a fiduciary of the unit owners. A292. Implicit in this duty is the

obligation to promptly exercise its rights, including submitting a warranty claim in the event an evaluation makes the need to file a warranty claim.

Yet, the Superior Court narrowly construed and improperly limited the allegations as to breach of this duty. Though the Superior Court recognized that Plaintiffs pleaded allegations as to Grandview's failures in relation to the warranty claims (A258), it reasoned that "Plaintiffs do not cite Grandview's submission of its warranty claims under Count IX, do not state that it was a breach of any duty, and do not explain how this damages Plaintiffs." As an initial matter, Count IX expressly incorporates by reference paragraphs 17-354 of the Complaint, thereby including the allegations regarding submission of warranty claims in Count IX. Further, having incorporated the preceding paragraphs, Plaintiffs' allegation that "[a]ll Plaintiffs suffered damages as a result of [Grandview's] breach and negligence" is sufficient to give notice to Grandview of liability and damages arising from its conduct concerning its evaluation of the condominiums and submission of warranty claims. This notice pleading is all that is required of Plaintiffs' claim. *Kangethe v. District of Columbia*, 953 F. Supp. 2d 194, 199 (D.D.C. 2013) (holding a plaintiff's "claim must simply give the defendant fair notice of what [their] . . . claim is and the grounds upon which it rests.") (citations omitted).

The Superior Court also refused to consider any allegations as to Grandview's failure to conduct a transition deficiency study or otherwise identify structural

defects prior to taking over management. In so holding, the Superior Court relied on D.C. Code § 42-1903 et seq., which generally provides for a declarant control period, during which all Association powers and responsibilities belong to the declarant, i.e., developer. As Grandview has not provided a date certain by which it officially took over control of the Property from the declarant, any determination as to its liability based on a before/after declarant-control period requires additional information outside the pleadings. Therefore, § 42-1903 et seq. is an improper basis for decision upon a motion to dismiss.

Refusing to consider the allegations, failing to construe all facts and inferences in favor of Plaintiffs, and applying a standard higher than the applicable notice pleading standard is reversible error. *See In re Estate of Curseen*, 890 A.2d at 193 (quoting *Atkins*, 660 A.2d at 887).

VIII. THE SUPERIOR COURT ERRED IN FAILING TO GIVE PLAINTIFFS THE OPPORTUNITY TO REPLEAD.

"The policy favoring resolution of cases on their merits creates a 'virtual presumption' that a court should grant leave to amend where no good reason appears to the contrary." *Bennett v. Fun & Fitness of Silver Hill, Inc.*, 434 A.2d 476, 478 (D.C. 1981) (quoting *Randolph v. Franklin Investment Co.*, 398 A.2d 340, 350 (D.C. 1979) (en banc)). "[I]t is merely abuse of discretion" rather than an exercise of discretion to refuse "to grant leave without any justifying reason appearing for the denial." *Id*. at 483, n.2 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). When

a court dismisses a complaint for failure to state a claim, "the cases make it clear that leave to amend the complaint should be refused only if it appears to a certainty that the plaintiff cannot state a claim." Wright & Miller, 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed. April 2022 Update). Courts commonly "allow at least one amendment regardless of how unpromising the initial pleading appears because except in unusual circumstances it is unlikely that the district court will be able to determine conclusively on the face of a defective pleading whether the plaintiff actually can state a claim for relief." *Id*.

If this Court were to find that dismissal of any of Plaintiffs' claims is warranted, remand as to such claims is appropriate to permit Plaintiffs to file an amended Complaint. Plaintiffs requested leave to file Motion to file their First Amended Complaint in their Opposition to the DHCD's Motion and given the breadth, scope and seriousness of the allegations, Plaintiffs should be granted an opportunity to replead.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court (1) reverse the District Court's grant of Defendants' motions to dismiss and (2) remand the case to the Superior Court for further proceedings to include at a minimum an opportunity to amend.

Respectfully submitted,

/s/__Je Yon Jung_____

Je Yon Jung
DC Bar No. 495154
May Lightfoot, PLLC
3200 Martin Luther King Junior Avenue Southeast 3rd Floor,
Washington, D.C. 20032
Tel: (202) 918-1824
jjung@maylightfootlaw.com

/s/_LaRuby May_____

LaRuby May
[BAR NUMBER]
May Lightfoot, PLLC
3200 Martin Luther King Junior Avenue Southeast 3rd Floor,
Washington, D.C. 20032
Tel: (202) 918-1006
lmay@maylightfootlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2022, a copy of the Appellant's Redacted Brief was served on the following through the Court's electronic filing system and will send notice of filing to any of the following registered users:

Caroline Van Zile, Esquire
Solicitor General for the
District of Columbia
Karl Racine, Esquire
Attorney General 400 6th
Street NW Suite 8100
Washington, DC 20001

Robert L. Ferguson
Timothy Dygert
Ferguson, Schetelich &
Ballew, P.A. 100 S. Charles
Street, Suite 1401
Baltimore, MD 21201-2725
Attorneys for Appellees

/s/__Je Yon Jung_____

Je Yon Jung

Attorney for the Appellants

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

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.

_/s/ Je Yon Jung_____	2021-CV-0612_____
Signature	Case Number(s)
__Je Yon Jung_____	05/31/2022_____
Name	Date

___
_jjung@maylightfootlaw.com_____
Email Address