ORAL ARGUMENT NOT SCHEDULED FOR
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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

For **ALL** intents and purposes, the subject Property—1262 Talbert Street SE—was built, owned, and later sold to Plaintiffs by and through the District of Columbia. The District's use of a third-party as a general contractor vendor does nothing to change its liability. Because of Judge Lopez's erroneous dismissal of Plaintiffs' Complaint prior to discovery, Plaintiffs were unable to discover the specific documents between the District and its general contractor and developer vendors that would establish the District's *exclusive* financing of the Property's land acquisition and construction. Those same documents would show that the District required exclusive control of the qualifications and approval for each resident of all 46 units. In short, this Property would have never been built (and later uninhabitable by Plaintiffs) but for the District's funding, direction, approval, and exclusive rights and covenants regarding all 46 units' occupants.

The District's misleading statements to the Court that it was "[m]erely lending money" (District's Opposition Brief ("DC Opp.") p. 35) to the Developers should be squarely rejected. Not only did the District utilize taxpayer money to bankroll the development and construction of the Property that was originally intended to be rental units exclusively for the District's low-income residents, it subsequently set the exclusive conditions for the sale of these units as condominiums, and then prolonged and delayed remediation of the Property under the auspices that the condominiums were no longer the

responsibility of the District once they were sold to owners who satisfied the District's exclusive qualifications for ownership.

In providing consumer real estate goods and services that are uninhabitable and structurally unsound, the District engaged in an unfair trade practice as a merchant in violation of the Consumer Protections Procedure Act ("CPPA"). Despite the District's creative arguments to the contrary, the District is not now and has never been immunized or exempted from the CPPA. Moreover, at a minimum, the CPPA's statutory claims for liquidated damages, are not subject to D.C. Code § 12-309. Even if it were, the District waived this affirmative defense by failing to raise it before the Superior Court.

The District's practices also amount to discrimination based on race—Black, sex—female, and source of income—affordable housing programs. At the motion to dismiss stage, the significant disparate impact allegations should be accepted as true and construed in the light most favorable to Plaintiffs. More is not required, and the District is neither exempted nor immunized from the District of Columbia's Human Rights Act ("HRA"). Moreover, the District's intent and foreseeability of its conduct are irrelevant. Sovereign immunity does not shield against claims of discrimination. Plaintiffs need not allege specific comparators in support of their claim.

In addition to the statutory violations, the District breached the contract to which Plaintiffs are intended third-party beneficiaries. Plaintiffs, who were "eligible"

occupants/owners, are clearly intended beneficiaries throughout the District's contracts. Even if the inference could not have been made, Plaintiffs should have been permitted to replead, in which case they could have, though not required, identified specific contractual provisions supporting their claim including the publicly available documents subject to judicial notice cited herein.

Finally, the District intentionally inflicted emotional distress on Plaintiffs. The District cannot hide behind § 12-309's statutory notice requirements. The claim is not based on a *respondeat superior* theory typical of tort claims against government agencies, requiring notice. Rather, the District directed the conduct and was aware of the harm it could and did cause. Even then, Plaintiffs alleged notice on multiple occasions, which was sufficient to provide the District with a potential basis of liability and to afford the District an opportunity to investigate. The District's conduct was and continues to be outrageous. The District subjected Plaintiffs to substandard housing, lengthy battles over citations in the thousands of dollars because of the substandard housing, and ultimately constructive eviction!

ARGUMENT

I. The District is the Responsible Party for this Uninhabitable Subject-Property.

Had Judge Lopez followed the applicable standards for a motion to dismiss, Plaintiffs would have had the opportunity to present loan documents, trust documents,

and other documents between the District and its general contractors, Defendants Stanton View and RiverEast. In fact, although unnecessary at the motion to dismiss stage, Plaintiffs' recent search of the District of Columbia's Office of Tax Revenue and Recorder of Deeds' public website identified the following additional evidence of the District's ownership and exclusive control of the Property through a publicly accessed recorded document—number 2014086809:[1]

- The District of Columbia entered into a Trust Subordination agreement ("Trust Document") with Defendant RiverEast at Anacostia, LLC in 2014.

- Recital B of the Trust Document states the Project is being funded by 6.3 million dollars of the District's HPTF funds.

- In addition to an "HPTF Loan," the Trust Document also references a number of documents that the Plaintiffs have not had the benefit of discovery to review: "HPTF Note," "HPTF Loan Agreement," "HPTF Deed of Trust," "HPTF Financing Statement," "HPTF Loan Documents," "HPTF Indebtedness," and "HPTF Declaration of Covenants."

- Further, Recital C of the Trust Document states that the HPTF Declaration of Covenants states that RiverEast or the borrower must "rent each Unit [in the Project] to an eligible tenant whose income is limited, as more fully described in [the HPTF Declaration of Covenants.]."

- This Trust Document represents the District's agreement to subordinate its HPTF Loan Agreement of 6.3 million dollars to the commercial lender's subsequent mortgage loan of 5.2 million for the Property.

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[1] This Court can take judicial notice of this public information, including recorded documents. *Drake v. McNair*, 993 A.2d 607, 616 (D.C. 2010). https://countyfusion4.kofiletech.us/countyweb/disclaimer.do and Document Search No.: 2014086809

- As outlined on page 15 of the Trust Document, 9 million was dedicated to the "acquisition" and "construction" of the property.

- Further on page 15 of the Trust Document, RiverEast received a "Developer Fee" of nearly 1.4 million.

Notably, this Trust Document was entered into when the Property was intended to be part of the District's low-income and/or public housing rental unit inventory. The fact that the Property was later converted to condominiums, but still subject to the District's exclusive requirements that the buyers qualify under the District's required first-time homebuyer programs, does not substantively change the District's original and exclusive role; in fact, it evidences the District's duplicitous assertions that it was "merely a lender."

Also notable and subject to the court's judicial notice is the District's website for the District's DHCD properties wherein it identifies this subject Property as a "non-RFP" "Acquisition" utilizing 2.2 million dollars of HPTF taxpayer monies;[2] and the same property as a "non-RFP" "New Construction" utilizing 4.1 million dollars of HPTF taxpayer monies;[3] and then finally,[4] the Property was converted to condominiums in December 2016.

II. Plaintiffs Sufficiently Allege a CPPA Claim.

A. D.C. Code § 12-309 does not bar Plaintiffs' CPPA claim.

[2] https://octo.quickbase.com/db/bit4krbdh?a=dr&r=ev&rl=j66
[3] https://octo.quickbase.com/db/bit4krbdh?a=dr&r=2&rl=j75
[4] https://octo.quickbase.com/db/bit4krbdh?a=dr&r=bg3&rl=j8g

The District's contention that D.C. Code § 12-309 bars Plaintiffs' CPPA claim is baseless. As a threshold matter, having raised this affirmative defense as a bar to the CPPA claim for the first time, it is waived.[5] DC Opp, pp. 8-9; *see Jaiyeola v. District of Columbia*, 40 A.3d 356, 361-62 (D.C. 2012). Even if not waived, § 12-309 applies to actions sounding in tort and thus cannot bar a statutory CPPA claim. *See District of Columbia v. Campbell*, 580 A.2d 1295, 1302 (D.C. 1990). Finally, the relief authorized under the CPPA does not constitute unliquidated damages, a prerequisite for dismissal under § 12-309. *Id.* at 1300. "A debt is liquidated if 'at the time it arose, it was an easily ascertainable sum certain.'" *Id.* quoting *Hartford Accident & Indem. Co. v. District of Columbia*, 441 A.2d 969, 974 (D.C. 1982). Equitable relief, injunctive relief, attorneys' fees, and costs are liquidated damages. *Lindsey v. District of Columbia*, 810 F. Supp. 2d 189, 202-03 (D.D.C. 2011). Statutory penalties are also a liquidated sum of damages. *Washington Gas Light Co. v. Public Service Com'n of District of Columbia*, 982 A.2d 691, 713 (D.C. 2009). Thus, § 12-309 is inapplicable to Plaintiffs' CPPA claim.

B. The District is Subject to the CPPA in This Case Because the Alleged Conduct Makes It a "Merchant" engaged in an unfair "Trade Practice."

The District's statutory argument fares no better. The CPPA is entirely silent as to the types of persons and entities included or excluded in the definition of "merchant,"

[5] To the extent the District incorporates its § 12-309 arguments into Section IV of its Brief addressing the Plaintiffs' tort claim, Plaintiffs respond thereto in Section V of this Reply.

instead defining coverage based on conduct. *See* D.C. Code § 28-3901(a)(3). It is of no moment that the Council added a separate, entirely unrelated subsection to its "Definitions and purposes" to clarify and make, by legislative emphasis, more definite what had always been its intention to include the D.C. Housing Authority among landlords required to comply with Section 28-3091(e) of the CPPA. It is not without significance that, in addition to its content, the title of the amendatory act declares its application, i.e., "Housing Authority Accountability Emergency Amendment Act" ("Emergency Amendment"). That the Emergency Amendment includes self-contained limiting language regarding its construction does not open avenues of escape from liability under independent and unrelated statutory sections. The Council enacted the Emergency Act to apply to a *sui juris* entity outside the District and entirely distinct from the District. The sole concern of the Council was the Housing Authority as a landlord. The "Definition" of "merchant" remains unchanged, and the "Emergency" Act does not improve the District's position vis a vis the DHCD as it pertains to "merchant" status.

The District's precedence regarding the definition of "merchant" is likewise unavailing. The District's cases, *Snowder v. District of Columbia*, 949 A.2d 590 (D.C. 2008) and *Bd. of Regents of Univ. of Wis. Sys. v. Mussallem*, 289 N.W. 2d 807 (Wis. 1980), are easily distinguishable. The basis of liability in both cases was the arm-of-the-state relationship between the government entity and the non-government entity. *Id.* While compelling, the courts held this basis insufficient. *Id.*

In contrast, the basis of liability here is the District's direct and exclusive conduct, not its relationship with the Developers. Specifically, Plaintiffs allege the District engaged in the real estate business, controlling every aspect of the real estate transaction. Far more than "acting as a conduit of government funds," as the District would have this Court believe, or delegating its authority as was the case in *Snowder* and *Mussallem*, here, the District controlled and promoted the funding, acquisition, development, construction, and use of the Property. The Superior Court's failure to consider these allegations, instead applying a categorical rule that does not exist, is error. *See, e.g.*, *Ali v. Tolbert*, 636 F.3d 622, 628-629 (D.C. Cir. 2011) (engaging in detailed analysis of whether conduct falls within definition of "merchant"); *Levick v. Kiser*, 206 F. Supp. 3d 337, 346 (D.D.C. 2016) (same). As outlined in Plaintiffs' opening brief on pages 28-29, a merchant can be connected with the supply side of a transaction and even a lender, as the District minimally concedes it was.

As to its final argument that the conduct alleged does not plausibly amount to an "unfair or deceptive trade practice," the District fails to cite even one case in support. To be clear, Plaintiffs allege the District's unfair trade practice is the provision of substandard consumer real estate goods and services, and not the provision of affordable housing and economic development to revitalize underserved communities. A.12-13, A.54. The District's unfair trade practice falls within § 28-3904, which makes it a violation, *inter alia*, to:

> (a) represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have;
> (d) represent that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another;
> (r) make or enforce unconscionable terms or provisions of sales or leases; and
> (dd) violate any provision of title 16 of the District of Columbia Municipal Regulations.

The District's argument it did not "directly or indirectly" engage in an unfair trade practice when it effectuated, sold, leased, or transferred substandard consumer real estate goods or services to the Plaintiff consumers contradicts reality, Plaintiffs' exhibits, the District's exhibits, publicly available documents, and the overwhelming facts plausibly alleged in Plaintiffs' Complaint.

III. Plaintiffs Sufficiently Allege an HRA Claim.

The HRA prohibits intentional and unintentional discrimination, including "limit[ing] or refus[ing] to provide any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived: race, . . . sex . . . source of income . . . ." D.C. Code § 2-1402.73. The District challenges Plaintiffs' HRA pleadings based on the alleged protected class and practice. Both grounds fail.

A. The District's affordable housing program is the basis of Plaintiffs' "source of income" discrimination allegation.

As to the protected class, the District contends that Plaintiffs have failed to allege a claim based on "familial status" and "source of income." Though Plaintiffs did not expressly plead "familial status," they did plead a "source of income"—specifically,

affordable housing programs. *See, e.g.*, A.6, A.56. "Source of income" encompasses housing programs. *See Feemster v. BSA Ltd. Partnership*, 548 F.3d 1063, 1071 (D.C. Cir. 2008). Not only is the District substantively mistaken, but also the District's argument fails procedurally because the District raises it here for the first time. DC Opp, pp. 10-11, Thus, it is waived. *See Jaiyeola*, 40 A.3d at 361-362.

B. Foreseeability, intent, and sovereign immunity are not dispositive of Plaintiffs' disparate impact claim.

As to the practice, the District contends that Plaintiffs do not allege the District knew or had reason to know the Developers would build structurally unsound housing or that it adopted or tailored its practices to discriminate. The District's argument erroneously imports into the HRA—without any citation or basis in the law—a prerequisite foreseeability and intent element for all claims. Foreseeability is not an element of any HRA claim and intent is irrelevant to the disparate impact claims at issue here. See D.C. Code § 2-1402.68; *Gay Rights Coalition of Georgetown Univ. Law Ctr. V. Georgetown Univ.*, 536 A.2d 1, 29 (D.C. 1987).

The District also contends its enforcement failures amount to nothing more than an exercise of prosecutorial discretion akin to that upheld in *Tucci v. District of Columbia*, 956 A.2d 684, 692 (D.C. 2008) (holding that, for purposes of sovereign immunity, the exercise of prosecutorial discretion is a core executive function precluding judicial review). But, sovereign immunity cannot be invoked as a defense to claims of

discrimination as alleged here. *Torres v. Tex. Dep't of Pub. Safety,*142 S.Ct. 2455, 2461 (2022).

In sum, Plaintiffs' allegation that due to the District's funding, acquisition, development, and provision of the substandard Property to Plaintiffs, the District denied Plaintiffs "affordable quality housing that was safe and structurally sound as was provided to similarly situated white residents of Defendants' properties and residents in predominantly white-populated wards" A.56. fits squarely within the "effects clause." The District's defenses do not save it from a discrimination claim.

C. Plaintiffs need not identify specific comparators to state a plausible claim of discrimination.

The District also attacks the pleadings as implausible because Plaintiffs do not identify specific comparators. Such specificity is unnecessary at the pleading stage. *See, e.g.*, *Clay v. Howard University*, 128 F. Supp. 3d 22, 31 (D.D.C. 2015) (holding allegation on information and belief that "other similarly situated males" received more pay was sufficient to withstand a motion to dismiss); *Finefrock v. Five Guys Ops., LLC*, No. 1:16-cv-1221, 2017 U.S. Dist. LEXIS 48335, at *3 (M.D. Pa. Mar. 31, 2017) (comparator is premature at motion to dismiss stage). Indeed, many courts do not even require a specific comparator after the development of a factual record. See *Lavin-McEleney v. Marist Coll.*, 239 F.3d 476, 480 (2d Cir. 2001) (declining to adopt a rule that a plaintiff must name a comparator at trial); *Raines v. Seattle Sch. Dist. No. 1*, No. C09-203Z, 2012 U.S. Dist.

LEXIS 19414, *5 n.4 (W.D. Wash. Feb. 16, 2012) (noting the Ninth Circuit does not require a comparator at summary judgment).

As Plaintiffs stated on p. 32 of its opening brief, at the motion to dismiss stage, Plaintiffs need only allege that the District's actions had a disproportionate impact on the basis of a protected class. *See e.g., Boykin v. Fenty*, 650 F. App'x 42, 44 (D.C. Cir. 2016). Plaintiffs' well-pled Complaint stated that the Property is located in Ward 8, which has 92% population of Black residents. A.56. Furthermore, these units were only available to eligible to low-income households that qualified under the District's low-income homeownership program, which clearly relates to source of income. Again, although such additional evidence should not be necessary at the motion to dismiss stage, the Court can take judicial notice of the following publicly available data: of all the eight (8) Wards in the District, Ward 8 where the Property sits, contains the highest number of Black residents in the District; the 46 unit owners were almost exclusively Black (upwards of 90%); and all Plaintiffs are Black female low-income owners. Furthermore, upon information and belief, there has never been any other District-funded residential construction in any other Ward that has been deemed unsafe or structurally unsound shortly upon completion of construction. In short, there is no comparison because the District-funded new construction properties in other Wards, white-majority wards in particular, have not been uninhabitable. Nevertheless, Plaintiffs plead the housing the District provided them was different from the housing provided to similarly situated

individuals who are white and/or male and/or not required to seek housing through affordable housing programs. A.56-57. At this stage, this level of pleading is sufficient.

IV. Plaintiffs Sufficiently Allege a Breach of Contract Claim as Third-Party Beneficiaries.

The District relies on *Fort Lincoln Civic. Ass'n v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1064 (D.C. 2008), to argue that the disclaimer of third-party beneficiary language in the loan agreement between the District and the Developers is dispositive. However, the *Fort Lincoln* contract "manifest[ed] an intent to benefit the District of Columbia *and all its residents*, including minorities and minority business enterprises." *Id.* at 1065 (emphasis added). This Court further noted the *Fort Lincoln* contract:

> contemplate[d] a range of facilities for the Fort Lincoln community, estimated to consist of 16,000 persons at the time the Agreement was executed. These facilities included community facilities, a commercial Town Center, educational institutions, and housing for low, moderate, and middle-income families, and the elderly. The [agreement] does not single out any particular civic association, nor condominium owners as intended beneficiaries.

In contrast, where a contract contains language that provides a "clear intended benefit" to certain parties, that language prevails over third-party disclaimer language. *See Martin Marietta Materials, Inc. v. Redland Genstar, Inc.*, No. JFM-99-42, 1999 U.S. Dist. LEXIS 23431, *11-12 (D. Md. Aug. 8, 1999). Indeed, courts have routinely held that

third-parties that are more than incidentally benefitted from a contract can enforce a contract.[6]

Here, the contract provides a clear intended benefit—housing—to a single sub-group of DC residents—individuals who were to reside at the Property in Ward 8 by way of participation in the DC affordable housing programs (i.e., HOME or HPTF)—of which Plaintiffs are members. *See e.g.*, A.91-94, 110, 133. Further, Recital C in the Trust Document *infra* provides that the units would go to eligible limited-income tenants. The District's contracts were unequivocal that the intended beneficiaries to these units were eligible low-income or DC-program recipients.

Finally, contrary to the District's contention, Plaintiffs are not obligated to identify specific contractual provisions to survive a motion to dismiss. Plaintiffs' Complaint alleges that the District failed to enforce *and* implement the contractual provisions between it and its Developers, thus breaching the contract. A.61. The District is on notice, and that is all that is required at the pleading stage. *See Grayson v. AT&T*, 15 A.3d 291, 250 (D.C. 2011).

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[6] *See, e.g., Bhatia v. 3M Co.,* 323 F. Supp. 3d 1082, 1099 (D. Minn. 2018) (ultimate consumers of a product sufficiently pled a third-party claim against manufacturer); *Cartwright v. Viking Industries, Inc.*, 249 F.R.D. 351, 356 (E.D. Cal. 2008) (noting that the only requirement for third-party beneficiary status is that "the party is more than incidentally benefitted by the contract"); *see also Sanchez-Knutson v. Ford Motor Co.*, 52 F. Supp. 3d 1223, 1233-34 (S.D. Fla. 2014) (holding that the purchaser of a vehicle could pursue a breach-of-implied-warranty claim as a third-party beneficiary).

V. Plaintiffs Sufficiently Allege an Intentional Infliction of Emotional Distress Claim.

The District, erroneously assuming compliance with § 12-309 is necessary, contends the Superior Court correctly dismissed Plaintiffs' intentional infliction of emotional distress claim because the notice Plaintiffs allege was provided was deficient as to recipient, contents, and timeliness, and alternatively because Plaintiffs failed to state a claim of intentional infliction of emotional distress. Procedurally and substantively, the District is mistaken.

A. Section 12-309 does not apply under the *Shehyn* doctrine.

This Court held in *Shehyn v. District of Columbia*, 392 A.2d 1008, 1013-14 (D.C. 1978), that § 12-309 applies to only two types of torts: (1) a tortious act of a District employee for which the District must answer in *respondeat superior*, such as false arrest, automobile collisions, or medical negligence, and (2) an act of the District itself if the District is unaware of the injury resulting from its breach, such as the failure to maintain public property. If the District is aware of the injury resulting from its own tortious act, then the claim is exempt under *Shehyn*, and "§ 12-309 compliance will be unnecessary." *Campbell*, 580 A.2d at 1299.

Here, Plaintiffs' negligence claim arises from an act of the District, itself. The resulting injury is the natural consequence of the District's tortious act. Under *Shehyn*, notice was unnecessary. The District's attempt in a footnote to avoid the controlling effect

of *Shehyn* because it involved a breach of contract claim lacks merit. In *Campbell*, this Court interpreted *Shehyn* exactly as Plaintiffs offer here:

> In *Shehyn* we stated that § 12-309 applies to two types of claims: (1) claims arising out of the tortious conduct of employees of the District, 392 A.2d at 1013-14, and (2) claims "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.". . . . Accordingly, as to *Shehyn's* second category, § 12-309 compliance will be unnecessary only if the District is aware both of the breach and the injury.

Id. (internal citation omitted). Plaintiffs' intentional infliction of emotional distress claim falls into neither category. Thus, any purported deficiencies of Plaintiffs' notice are not dispositive.

B. Even if notice was required, Plaintiffs provided notice sufficient to afford the District an opportunity to investigate and adjust the claim.

Notwithstanding *Shehyn/Campbell*, Plaintiffs sufficiently alleged notice to the District sufficient to satisfy § 12-309. The Complaint and its exhibits identify notice to the Mayor by way of its counsel in 2018, 2019, and 2020. The District cites no decisional law overruling this Court's precedence holding notice to the Mayor's Counsel sufficient and the police report cases cited by the District are inapposite as Plaintiffs do not allege the statutory exception for police reports as a basis for notice.

Any determination as to the timeliness of any one or all notices at this stage was premature. The deteriorating nature of the damage and the escalating impact on Plaintiffs, to the point where they were effectively evicted from their homes due to unsafe

conditions, required the Superior Court to disentangle the ultimate injury from the circumstances that worsened over time to determine when the injury was sustained. This much, *Farris* makes clear. The District's attempt to dismiss the relevance of *Farris* because this Court ultimately held notice was required once the plaintiff became aware of the structural damage does not control the outcome here. It is the deteriorating nature of the damage, not the type of damage that is of consequence, and it is for the Superior Court to disentangle based on a factually developed record--a record the Plaintiffs were denied an opportunity to create.

The content of the notice was also adequate irrespective of the fact that it requested the District's assistance. A notice need not state any claim, so long as it describes the "injuring event" in sufficient detail to reveal "a basis for the District's potential liability." *Washington v. District of Columbia*, 429 A.2d 1362, 1366 (D.C. 1981); *see also Spiller v. District of Columbia*, 302 F. Supp. 3d 240, 253 (D.D.C. 2018) (stating an adequate description of "injuring event" is determinative). In this regard, the holding in *Pitts v. District of Columbia*, 391 A.2d 803, 809 (D.C. 1978), that notice is sufficient where the District can "*reasonably* anticipate" a claim against it is directly on point. *Id.* (concluding allegation that the place of injury in *Pitts* was owned and operated by the District to be sufficient notice of the District's potential liability) (emphasis added). *See also Reiser v. District of Columbia*, 563 F.2d 462, 476 (D.C. Cir. 1977), *vacated en banc*, 563 F.2d 482 (D.C. Cir. 1977) *reinstated in part*, 580 F.2d 647 (D.C. Cir. 1978) (*en banc*) (holding the

allegation that the victim's assailant was a District of Columbia parolee was sufficient for the District to reasonably anticipate that a claim might arise for failure to fully disclose the assailant's criminal history and failure to provide adequate parole supervision).

Here, the communications with the District provided notice that property in HPTF inventory—property the District knew it funded, developed, and provided—was structurally unsound and causing harm. The District's connection to the Property at issue was abundantly clear and the District's apparent argument that it could not decipher its potential liability from the Plaintiffs' innumerable communications is disingenuous. The notice more than adequately provided the District with facts from which it could *reasonably* anticipate its potential liability for funding and developing structurally unsound housing.

C. Plaintiffs allege conduct sufficient to state a claim of intentional infliction of emotional distress.

The District's conduct alleged in the Complaint is outrageous. "Conduct" can be understood either as an act or a failure to act. *See, e.g.*, *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 934-36 (D.C. 1995) (holding failure to act "sufficient for the jury to find that management intentionally inflicted emotional distress upon the tenants."); *McCord v. Green*, 362 A.2d 720, 724-25 (D.C. 1976). Whether the alleged conduct is "outrageous" is heavily fact-driven and must account for the context of the conduct at issue, including the nature of the activity, the relationship between the parties, and the particular

environment in which the conduct took place. *See King v. Kidd*, 640 A.2d 656, 668 (D.C. 1993).

The District's funding, acquiring, and developing the structurally unsound Property; subjecting Plaintiffs, low-income, Black, females, to the Property by way of its affordable housing program; prolonging and delaying remediation of the defects leaving Plaintiffs no choice but to foot the bill for a structural report and to find replacement housing despite their low-income status; and dragging at least one Plaintiff through a nine-month battle, including an appeal, to defeat a six-thousand dollar citation *is* outrageous.

The Property and Plaintiffs' distress arising therefrom could not have occurred absent the District's involvement, an inference readily made from the allegations in the Complaint. That the OAG eventually "worked with residents and the developers" does not change the conclusion that the conduct is outrageous.

Plaintiffs also adequately pled that the District's conduct was reckless or intentional, at least in part, because "[i]t is possible to infer the existence of . . . recklessness [] from the very outrageousness of a defendant's conduct." *Kotsch v. District of Columbia*, 924 A.2d 1040, 1046 (D.C. 2007).

VI. Plaintiffs Should Have an Opportunity to Amend.

The District cannot combat the '"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*). As an initial matter, Plaintiffs do not seek leave to amend on appeal for the first time but instead contend that the Superior Court erred in denying leave to amend. Therefore, the District's citation does not control. *See City of Harper Woods Employees' Retirement System v. Olver*, 589 F.3d 1292, 1304 (D.C. Cir. 2009). Moreover, *Olver* only "applies where . . . the court of appeals affirms dismissal of the complaint," and here, there is ample reason for a reversal of dismissal. Plaintiffs did notify the Superior Court that if it found the pleading insufficient Plaintiffs sought leave to amend, and the authority upon which Defendants rely for the technicality is distinguishable. *See id.* (plaintiff "forfeited" challenge to dismissal with prejudice since instead of a request for leave, it put in two vague allusions to a possible future amendment).

CONCLUSION

For these and the reasons outlined in its opening Brief, Plaintiffs respectfully request this Court (1) reverse the District Court's grant of the District's motion to dismiss and (2) remand the case to the Superior Court for further proceedings and, if necessary, an opportunity to amend.

Respectfully submitted,

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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_____	01/27/2023_____
Name	Date

___

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2023, a copy of the Appellant's Reply 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:

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