Nos. 21-CV-358, 21-CV-359, 21-CV-390,
21-CV-391, 21-CV-579, 21-CV-580

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,
APPELLANT/CROSS-APPELLEE,

v.

BET ACQUISITION CORP.; BLACK ENTERTAINMENT TELEVISION LLC,
APPELLEES/CROSS-APPELLANTS.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF THE ISSUES

Plaintiff BET Acquisition Corp. held the ground leases for two adjacent properties owned by the District of Columbia. In 2017, it contracted to assign the leases to a real-estate developer. As part of the same contract, plaintiff Black Entertainment Television LLC ("BET LLC") agreed to sell the developer a third adjacent property that BET LLC owned in fee simple. The ground leases required Acquisition Corp. to obtain the District's written consent for such an assignment, which the District could not "unreasonably" withhold. One of the leases, Ground Lease Two, also gave the District discretion to decide whether, in the District's "sole judgment," a tenant's use of the property would adequately promote the job-creation and economic-development goals of the District-created industrial park where the properties were located. Unconvinced that the developer's use of the property would meet those goals, the Mayor denied Acquisition Corp.'s assignment request. Plaintiffs sued, arguing that the denial was unreasonable and that the District had thus breached the leases and tortiously interfered with their deal with the developer. After a bench trial, the court (Puig-Lugo, J.) ruled in plaintiffs' favor and awarded them over $16 million in damages. The issues presented are:

1. Whether the trial court's liability ruling must be reversed because (a) the Mayor's denial of consent under Ground Lease Two was reasonable given her extraordinary discretion under the lease terms to decide whether a tenant's use would

adequately promote the economic-development aims of the industrial park, and (b) the reasonable denial as to Ground Lease Two rendered the denial as to Ground Lease One reasonable also, since plaintiffs' deal with the developer was contingent on the assignment of *both* leases.

2. Whether the damages award must be vacated because BET LLC failed to file timely pre-suit notice of its tort claim as required by D.C. Code § 12-309.

3. Whether the damages award must be vacated or reduced because (a) the trial court's determination of the properties' current worth was based in part on a purported expert opinion that the expert never offered at trial; (b) the prompt post-judgment sale of the properties for far more than the trial court's estimate means that plaintiffs will reap a windfall profit of more than $2 million in taxpayer funds; and (c) the judgment failed to account for $400,000 in deposits that plaintiffs received from the developer, which reduced their damages.

STATEMENT OF THE CASE

Plaintiffs filed their initial suit, Superior Court No. 2018 CA 002023 B ("No. 2023"), on March 23, 2018. Joint Appendix ("JA") 32. They filed a second suit, Superior Court No. 2018 CA 006351 B ("No. 6351"), on September 5, 2018, JA 696, and the cases were soon consolidated, JA 169-70. On October 21, 2020, following a bench trial, the court found the District liable and awarded injunctive relief, but reserved the question of damages. JA 523. After hearing further

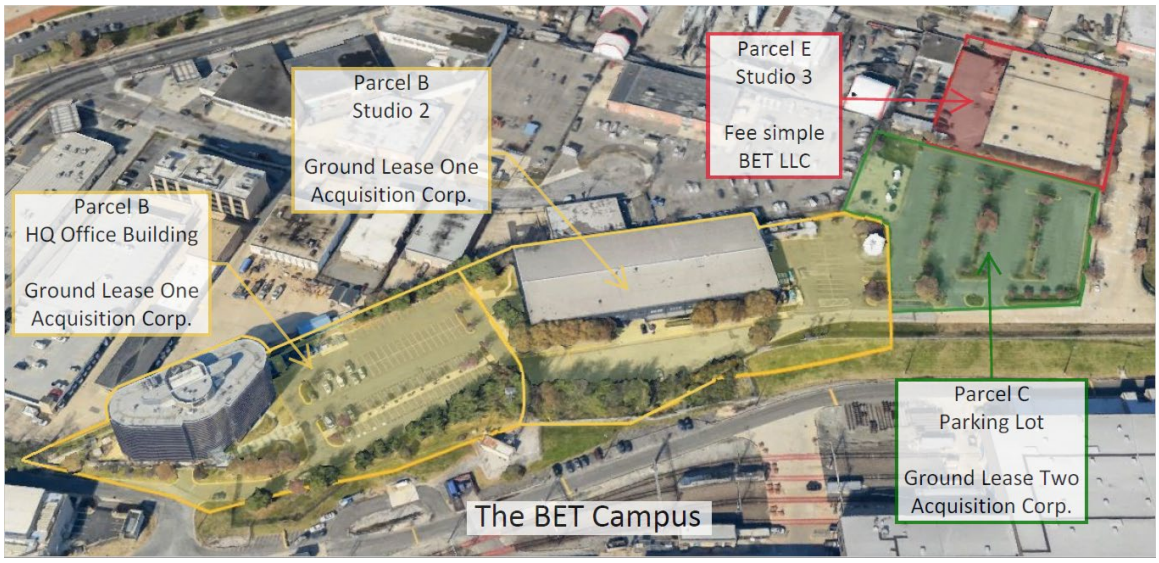
testimony, the court issued a damages decision on February 25, 2021, JA 570, and entered final judgment on March 10, 2021, JA 587. The District timely moved to alter the judgment, and the court denied the motion on May 19, 2021. JA 621. The District timely appealed that order and the final judgment (Nos. 21-CV-358 & -359). JA 627. Plaintiffs in turn timely cross-appealed (Nos. 21-CV-390 & -391). JA 629. In July 2021, the District moved for relief from the final judgment, and the court denied that motion on August 13, 2021. JA 677. The District timely appealed that order as well (Nos. 21-CV-579 & -580). JA 683.

STATEMENT OF FACTS

1. The BET Campus And The Ground Leases.

A subsidiary of media conglomerate Viacom, BET LLC is a leading provider of entertainment, music, news, and public affairs programming to African-American audiences. Acquisition Corp., in turn, is a wholly owned subsidiary of BET LLC. 10/6/20 PM Tr. 71:18-20. Where the distinction between these two entities is immaterial, this brief will refer to them collectively as "BET" or "plaintiffs."

From the mid-1990s until 2017, BET's national headquarters was located in the District's Brentwood neighborhood, with its entrance at 1235 W Street, NE. By the 2000s, the "BET Campus" comprised three parcels, known as Parcels B, C, and E. The diagram on the next page illustrates the rough boundaries of these parcels, which are described in turn.



Parcel B is owned by the District. JA 523. It lies within an economic-development area known as the Capital City Business and Industrial Park, which the District created "to foster the industrial and commercial development of the New York Avenue, N.E., corridor of the District." JA 523 (¶ 1), 952. The District originally leased Parcel B to the Washington Beef Limited Partnership, which built a refrigerated warehouse on the northeast portion of the parcel. JA 523 (¶ 1). In 1992, Washington Beef assigned the lease to Acquisition Corp. as part of a foreclosure sale. JA 523 (¶ 2). BET renovated the warehouse, turning it into a film and television studio known as Studio 2. JA 524 (¶ 6). On the southwest half of Parcel B, BET constructed a six-story office building that served as its headquarters. JA 524 (¶ 6).[1]

[1] Parcel B encompasses two assessment-and-taxation lots: number 0142 0134 to the northeast (Studio 2), and number 0142 0133 to the southwest (the office building). *See* JA 1065.

The lease for Parcel B is known as Ground Lease One. JA 523 (¶ 1). The District and Acquisition Corp. amended this lease several times between 1992 and 2015. JA 876-909. Among other terms, Ground Lease One (as amended) states that the tenant "may assign the Ground Lease, or any portion thereof, to [an entity unrelated to BET] upon notice to the District and the prior written approval of the District, which approval shall not be unreasonably withheld." JA 880.

Parcel C lies just northeast of Parcel B. It too is owned by the District and located within the Capital City Business and Industrial Park. JA 523. The District leased Parcel C to Acquisition Corp. in 1999, and BET thereafter used the parcel as a parking lot to support the rest of the Campus. JA 525-26 (¶¶ 8, 13). The lease for Parcel C is known as Ground Lease Two. JA 525 (¶ 8). Like Ground Lease One, it permitted assignment of the lease with the District's prior written approval, which "shall not be unreasonabl[y] withheld." JA 944.

Unlike Ground Lease One, however, Ground Lease Two incorporates important use restrictions contained in a "Declaration of Protective Covenants for the Capital City Business and Industrial Park." JA 914 ("Parcel C shall be used only as permitted by the Declaration of Protective Covenants . . . ."); *see* JA 949 (Declaration of Protective Covenants). The Protective Covenants provide that

> no use or operation shall be permitted that, *in the sole judgment of the Declarant* [i.e., the District]: (A) is not compatible with the then-existing or contemplated uses in the Park and the surrounding neighborhood (including adjacent residential areas); (B) does not offer

> sufficient employment opportunities for residents of the District of Columbia; or (C) does not comply with the purposes for the development of the Park as set forth in Article II.

JA 966-67 (emphasis added); *see* JA 525 (¶ 10). The "purposes for the development of the Park" include, among other things, "foster[ing] the industrial and commercial development of the New York Avenue, N.E., corridor . . . by attracting new businesses and industries that might otherwise relocate outside the District," and "expand[ing] the availability to full-time, permanent employment opportunities, particularly in the blue-collar and technical fields." JA 952; *see* JA 525 (¶ 11).

Parcel E is the third and final component of the Campus. Unlike the first two parcels, Parcel E is not owned by the District. Instead, during the relevant period, BET LLC owned Parcel E in fee simple. 10/6/20 PM Tr. 72:16-18 (stipulation).[2] Parcel E contains a building, Studio 3, used partly as a studio and partly as a warehouse. JA 524 (¶ 7); 10/5/20 AM Tr. 100:14-20 (Stevenson).

2. BET's Agreement To Sell The Campus To Jemal's TEB.

In 2016, BET decided to wind down its operations on the Campus and sell its interests in the properties. *See* JA 527 (¶ 19). Among the potential buyers was the District itself. The District's Department of General Services ("DGS"), which is responsible for acquiring and managing the District's real property holdings,

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[2] The trial court's liability decision states several times that Acquisition Corp. owned Parcel E, *see, e.g.*, JA 524 (¶ 7), but that is clearly wrong.

partnered with a developer, Boundary Companies, to submit a joint bid for the Campus. JA 526-27 (¶¶ 17, 20). Under their proposal, the District would have acquired Parcels C and E for the operation of the Circulator Bus program run by the District's Department of Transportation ("DDOT"). JA 527 (¶ 20), 1066-67. Although BET initially accepted this offer, DGS and Boundary were ultimately unable to complete the transaction. 10/14/20 AM Tr. 27:5-18 (Fuller); JA 1202.

Instead, in April 2017, BET signed a deal to sell the Campus to Jemal's TEB LLC. JA 527 (¶ 24). Jemal's TEB was a special-purpose entity created by Douglas Jemal, the president of Douglas Development Corporation. JA 527-28 (¶¶ 24, 26). Jemal's TEB agreed to pay $26.75 million for the Campus. JA 571 (¶¶ 6, 8). The parties expected to close in mid-September 2017, contingent on BET obtaining the District's consent to assign both ground leases to Jemal's TEB. JA 571 (¶¶ 6, 8). Jemal's TEB paid BET a deposit of $1.5 million and agreed to pay an additional $50,000 deposit per month until closing (though the parties later agreed to stop these additional payments). JA 571, 573 (¶¶ 7, 13); *see* JA 1186.

3. The District's Denial Of Consent To The Proposed Lease Assignments.

Between April and October 2017, BET made, and the District denied, three requests to assign the leases to Jemal's TEB. DGS denied the first two. BET's third request, however, went to the Mayor. Disagreeing with DGS's recommendation to grant the third request, Mayor Bowser herself made the decision to deny it.

A. DGS's first and second denials.

BET first asked the District to consent to the lease assignments in April 2017. JA 528 (¶ 25); *see* JA 1194-96. This request "provided no information about the ability of the proposed assignee to satisfy financial obligations under the leases or whether the assignee's intended uses for the premises were consistent with the terms of each lease." JA 528 (¶ 27). The next month, DGS Director Greer Gillis sent BET a letter denying the request. JA 529 (¶ 34). She explained that BET's request did not contain information that the District needed to assess the proposed assignment, "including the intended uses of the leased premises." JA 1225.

Later in May, Yohance Fuller, the head of DGS's Portfolio Management Division, conferred with BET representatives about the assignment request. JA 530-31 (¶ 41). He explained that DGS sought "(1) a more detailed description of the proposed assignee's proposed uses, (2) financial information about the proposed assignee or a guaranty from a parent entity to comply with tenant obligations and (3) a proposed form of consent for DGS review." JA 530-31 (¶ 41).

BET soon submitted a second assignment request. JA 531 (¶ 42); *see* JA 1499-1501. The request did not include information about Jemal's TEB's finances other than the fact that, if the sale closed, Jemal's TEB's balance sheet would include Parcel E and the improvements on Parcels C and B. JA 1499-1500. Nor did the request contain a lease guaranty. *See* JA 1499-1501.

Regarding the assignee's proposed uses of Parcels B and C, BET forwarded a one-page memo from Douglas Jemal dated May 12, 2017. JA 1502. The memo stated that Jemal's TEB intended "to continue to use the office building [on Parcel B] as commercial office, including leasing to 3rd parties." JA 1502. As for Studio 2 (also on Parcel B), it would continue to be used "as a television/production studio," but "[a]lternate or additional uses may include charter schools, retail, or industrial-type uses." JA 1502. Last, the memo said that Jemal's TEB would "continue to use Parcel C as supplemental parking to support the rest of the property." JA 1502. But the memo closed with a broad caveat: "Notwithstanding the foregoing, Purchaser reserves all rights to operate the property for any or all of the uses that are permitted by the ground leases, the PDR-4 zoning and any future zoning." JA 1502.

DGS denied BET's second assignment request in July 2017. JA 532 (¶ 48); *see* JA 1336-37. DGS explained that the information BET had provided was "insufficient for a landlord to assess the ability of a proposed assignee to make rental payments and otherwise perform under a lease." JA 1336. DGS noted that "a lease guaranty from Douglas Development Corp." would address DGS's financial concern. JA 1336.

B. The leaseback proposal.

During the same period that it was fielding BET's assignment requests, DGS was also negotiating with Jemal about a potential deal involving the Campus. In

April, Jemal proposed that, after acquiring the Campus from BET, he would lease Parcel C (the parking lot) and Parcel E (Studio 3) back to the District for DDOT to use as a Circulator Bus facility. JA 528 (¶ 29), 1198, 1381. DGS rejected this initial offer but expressed interest in a leaseback deal that would also include the Studio 2 portion of Parcel B. JA 1381.

After trading several proposals and counter-proposals, *see* JA 1382-83, Jemal and DGS "reach[ed] an agreement in principle as to the terms" of a leaseback deal on June 15. 10/6/20 AM Tr. 57:18-24; *see* JA 531 (¶ 43), 1256-61. Jemal would lease Parcel C, Parcel E, and the Studio 2 portion of Parcel B to the District for a base rent of $2.7 million per year. JA 1383. The space would primarily be used by DDOT as a Circulator Bus facility, though the District's Office of Cable Television, Film, Music and Entertainment would also use part of Studio 2. JA 1383. DGS restated the essential terms of the leaseback deal in final (though unexecuted) letters of intent that were drafted by mid-July. JA 1385; *see* JA 1307-34 (unexecuted letters of intent).[3]

In an important respect, the leaseback deal conflicted with Jemal's earlier May memo describing Jemal TEB's intended uses of the Campus. That memo had said

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[3] The trial court described Jemal's June 15 proposal as entailing the "lease [of] the entirety of the BET Campus to the District." JA 531 (¶ 43). That is incorrect. As the letters of intent confirm, the proposal did not include the office building portion of Parcel B. JA 1307 (defining "Parcel B" to mean only lot 0142 0134); *see* 10/14/20 AM Tr. 34:1-9 (Fuller).

that Parcel C, containing approximately 156 parking spaces, would continue to be used "as supplemental parking to support the rest of the property," JA 1502, including the six-story office building. The office building portion of Parcel B contained only 127 parking spaces of its own, less than half the number a building of that size would likely need. JA 1052; 10/15/20 PM Tr. 56:6-10 (Sherwood); *see* JA 576 (¶ 32) ("Parcel C provides parking space that is needed to support activities on Parcels B and E."). Under the leaseback deal, however, Parcel C would become part of the Circulator Bus facility and thus would no longer provide supplemental parking for the office building (or Studio 2).

C. BET's third assignment request and the Mayor's denial.

In August, after DGS and Jemal had reached their "agreement in principle" on the leaseback deal's terms, BET submitted a third request to assign the leases to Jemal's TEB. JA 533 (¶ 52); *see* JA 1338-39. BET explained that Douglas Development had "now agreed to provide a lease guaranty as per [DGS's] request." JA 1339. Given this lease guaranty, Gillis and Fuller now believed that the assignment request should be granted. 10/6/20 AM Tr. 90:1-11 (Gillis); 10/14/20 AM Tr. 18:3-9 (Fuller). DGS recommended approving the assignment and moving forward with the leaseback proposal. JA 534-35 (¶ 58); *see* JA 1386.

But the third decision was not left to DGS. By August, BET had brought the assignment issue to the attention of high-ranking members of Mayor Bowser's

administration, including Senior Adviser Beverly Perry and City Administrator Rashad Young. JA 533 (¶ 53); *see* JA 1387. Given the importance of the issue, the administration decided that Mayor Bowser would make the final decision. 10/6/20 AM Tr. 98:24-99:11 (Gillis); 10/6/20 PM Tr. 74:24-25 (stipulation).

In its decision-point memo to Mayor Bowser, DGS described the Campus, DDOT's interest in using it as a Circulator Bus facility, the leaseback proposal, and BET's assignment request. JA 1443-45. DGS recommended that Mayor Bowser consent to the assignment. JA 1443, 1447. It explained that, after consenting, the District could secure the site for DDOT through the leaseback deal or eminent domain. JA 1445-47. In contrast, Perry recommended that the Mayor deny consent based on her view that the leases contained an "an economic development thread" that the assignment would not satisfy. JA 534 (¶ 55), 541 n.1.

In October 2017, Mayor Bowser denied BET's assignment request. *See* JA 535 (¶¶ 59-61). She understood that if the leases were assigned, Jemal intended to lease the Campus back to the District for bus storage and maintenance. JA 535 (¶ 60); *see* 10/15/20 PM Tr. 30:8-11. She further understood "the intent of those leases [to be] to produce jobs and economic development at that business and industrial park." 10/15/20 PM Tr. 12:2-4. "[I]n [her] view," moving a Circulator Bus facility to the Campus would not "constitute economic development" but instead would simply "support[] existing District government operations." 10/15/20

PM Tr. 17:3-14. The Mayor therefore "decided to deny consent for the assignments because the assignments would not create jobs or promote economic development." JA 535 (¶ 60); *see* 10/15/20 PM Tr. 13:22-24, 30:10-13.

The Mayor's denial of the third request was conveyed to BET in an October 13 letter drafted by Perry and other staff and signed by Gillis. JA 535 (¶ 61); *see* JA 1482-83. In addition to noting the District's denial of consent to the assignment, the letter also asserted that BET had "default[ed] under the Ground Leases based upon BET's cessation of operations on the Ground Lease properties." JA 1482.

4. Plaintiffs' Suit And Disputed Compliance With D.C. Code § 12-309.

Plaintiffs filed their first action in Superior Court (No. 2023) in March 2018. JA 32. The complaint contained four counts. The first two alleged that the District had breached the leases with Acquisition Corp. by unreasonably withholding consent to the proposed assignment. JA 42-43 (¶¶ 56-71). The third count alleged, on behalf of both Acquisition Corp. and BET LLC, that the District's unreasonable withholding of consent constituted tortious interference with their prospective transaction with Jemal's TEB. JA 43-44 (¶¶ 72-76). The fourth count sought a declaratory judgment that, contra the District's October 13 letter, Acquisition Corp. was not in default under the leases. JA 44-45 (¶¶ 77-83).

The District moved to dismiss the tortious interference claim on the ground that plaintiffs had not complied with D.C. Code § 12-309. JA 75-76. Section 12-

309 requires a party to submit a written notice of a claim to the Mayor within six months of an injury before the party can sue the District for unliquidated tort damages. *See* D.C. Code § 12-309(a). Plaintiffs had not presented a written notice to the Mayor before suing, the District argued, and their tort claim was therefore barred. JA 75-76.

Plaintiffs responded with a procedural three-step. On July 18, they amended their complaint as a matter of right to remove the tort claim. *See* JA 79, 90 (omitting Count III). The next day, they filed a formal claim notice. JA 1496-97. And the day after that, they sought to amend their complaint to re-add the tort claim, arguing that they had now indisputably complied with Section 12-309. JA 93-97. But the trial court denied leave to amend. A Section 12-309 notice must be received *before* a plaintiff sues, the court explained, and because plaintiffs' second amended complaint would relate back to the date of the original complaint (March 23), the July 19 notice was ineffective. JA 136-39.

Plaintiffs then tried a different tack. They filed a new, separate action (No. 6531) alleging only the tort claim. JA 696, 708. They then moved to consolidate the two cases. JA 140-48. The trial court agreed to consolidate them, but in the same order it dismissed the new case (No. 6531). JA 168-72. It concluded that, even if the July 19 notice could now be said to have predated plaintiffs' lawsuit, it was still untimely by several months. Section 12-309's six-month clock had "started

on October 13, 2017, the date on which Plaintiff[s] received the District's final letter denying their request for consent to assign the leases," and so had run out in April 2018. JA 171.

Several weeks later, however, plaintiffs successfully moved to reinstate the tort claim. They argued that a demand letter that their counsel, Venable LLP, had sent to DGS on October 23, 2017 satisfied Section 12-309 because discovery showed that the letter was forwarded to the Mayor the next day. JA 196-99 (letter); JA 194-95 (email chain forwarding letter to Mayor). The trial court agreed that the Mayor's indirect receipt of the demand letter was enough to satisfy Section 12-309, and it therefore vacated the dismissal of the later case (No. 6531). JA 238-45.

5. The Summary Judgment Ruling.

In spring 2019, the parties cross-moved for summary judgment. Among other issues, the District again raised Section 12-309, but now limited its argument to BET LLC. JA 353-55. The District explained that the October 2017 demand letter, by its own terms, was sent solely on behalf of Acquisition Corp. and made no mention at all of BET LLC or its alleged injuries. JA 353-55. Thus, even if Acquisition Corp. had satisfied Section 12-309, BET LLC had not.

The trial court rejected this argument in its summary judgment decision, stating only that the District had "not provided any sufficient reason for the Court to reconsider its previous ruling[] regarding the alleged lack of notice." JA 520. The decision largely rejected both parties' requests for summary judgment, concluding

that factual disputes required a trial on the breach of contract and tortious interference claims. JA 517-20. The court did, however, grant summary judgment to Acquisition Corp. on its declaratory claim that it was not in default under the leases. JA 520-22.

6. The Bench Trial And The Court's Liability Decision.

The court held a remote bench trial from October 5 to 19, 2020. *See* JA 24-26. Several current or former District officials testified, including Gillis, Fuller, Perry, and Mayor Bowser.[4] BET/Viacom witnesses included Debra Lee, BET's former CEO, and Timothy Stevenson, Viacom's head of real estate. Both sides also offered expert witness testimony from appraisers about the value of the Campus.

Two days after closing arguments, the trial court issued an order finding the District liable for both counts of breach of contract and for tortious interference, all based on its third denial of consent. JA 523-43. (The court held that the first two denials were reasonable. JA 540-41.) After the court set out its findings of fact, JA 523-36, its conclusions of law offered essentially three reasons that the District's third denial was unreasonable, *see* JA 536-43.[5]

First, the court said that the District had imposed "conditions precedent to

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[4] Plaintiffs also introduced portions of Mayor Bowser's earlier deposition. 10/7/20 AM Tr. 46:6-49:17; *see* JA 1543 (transcript of deposition excerpts).

[5] The court issued an amended version of the order the next day that made only trivial, non-substantive changes. *See* JA 544-64.

granting consent" that were "simply not part of the contractual terms" of the leases: namely, that BET continue "operating on the premises" and that it "negotiate with the District a plan for use of the premises." JA 537; *see* JA 540. Notably, however, the court's findings of fact never stated that Mayor Bowser believed these to be conditions precedent, let alone that any such belief was the reason she denied consent. Instead, the court's factual finding was that the Mayor "decided to deny consent for the assignments because the assignments would not create jobs or promote economic development." JA 535 (¶ 60).

Second, the court said that the suitability of the proposed assignment to Jemal's TEB was to be judged by an "objective standard" and that this standard was met. JA 538. The lease guaranty sufficed to ensure that the proposed assignee would pay the rent. JA 538. And Jemal had "proposed uses for the premises in his May 12, 2017 memorandum that were legal, consistent with the terms of the lease and aligned with how the campus had been used." JA 538. In the court's view, the fact that DGS spent months negotiating the leaseback deal with Jemal "underscored" that the District must have considered him a suitable assignee. JA 538.

Third, and related, the court believed that the District had unreasonably withheld consent "based on objections to the agreement negotiated between DGS and Douglas Development," i.e., the leaseback proposal, "not based on objections to the terms that BET proposed for reassignment." JA 539; *see* JA 535 (¶ 59). The "intended uses" that "BET proffered," and thus that the Mayor should have

considered, were those in Jemal's May 2017 memo. JA 539. By not doing so, she had "not fully and accurately consider[ed]" the proposed assignment. JA 539.

The court also held that, because the District's unreasonable third denial prevented plaintiffs from closing their deal with Jemal's TEB, the District was liable for tortious interference. JA 540-42.

As for remedies, the court ordered the District to provide Acquisition Corp. with written consent to assign Parcels B and C to Jemal's TEB. JA 542. The court postponed the determination of damages until it became clear whether plaintiffs' sale to Jemal would close. JA 542-43. The District promptly moved for a stay pending appeal, but the trial court denied the motion. JA 565-67. The District then immediately sought a stay from this Court. After granting a temporary administrative stay, the Court denied the District's motion "because it fail[ed] to demonstrate irreparable harm." 11/13/20 Order, No. 20-CV-612.

Complying with the trial court's order, the District provided written consent to Acquisition Corp. on November 16, 2020. JA 573 (¶ 14). In January 2021, however, Jemal refused to close the sale. JA 573 (¶¶ 14-17). Plaintiffs therefore terminated the sales agreement and retained Jemal TEB's deposit. JA 573 (¶ 17).

7. The Damages Proceedings.

In February, the trial court heard further evidence and argument on damages. Among other issues, both sides' experts offered additional testimony on the current

value of the Campus. Plaintiffs' expert, Stuart Smith, opined that the leasehold interests in Parcels B and C were now worth just $10,569,000, millions less than they had been worth in 2016 or 2018. 2/8/21 Tr. 9:21-10:12. Smith did not, however, testify about the value of Parcel E. *See* 2/8/21 Tr. 41:19-20. Plaintiffs argued that the current value of Parcel E was irrelevant because they were not asking for diminution-in-value damages for that parcel, only for Parcels B and C. 2/8/21 Tr. 41:13-25. To determine those damages, plaintiffs urged the court take the 2017 contract price for the entire Campus ($26.75 million), multiply it by 82.08%, which they claimed was the percentage of value attributable to the Parcel B and C leases, and subtract the current value of the leases. *See* JA 569 ("Diminution in Value" calculation).

In contrast, the District asked the court to make a simpler, apples-to-apples comparison: take the 2017 contract price for the entire Campus and subtract the current value of the entire Campus, including Parcel E. 2/11/21 Tr. 74:13-19. To that end, the District's expert, Samuel Sherwood, offered an opinion on the values of all three parcels: the Parcel B and C leases were currently worth $20.2 million, and Parcel E was worth $8.1 million. JA 577-78 (¶ 39).

On February 25, the trial court issued its damages opinion. JA 570-86. The court held that plaintiffs were entitled to several categories of damages running from October 13, 2017 (the date of the third denial letter), including taxes paid, rent paid

under the leases, and the costs of maintaining the properties. JA 579-83. The court also awarded expected future damages (to cover costs until the Campus was sold) and a fixed sum for the cost of remarketing the Campus. JA 583-84.

In addition, the court awarded diminution-in-value damages. As the District had proposed, the court took the 2017 contract price for the entire Campus and subtracted the entire Campus's current value, which the court put at $18 million. JA 578 (¶ 43), 582. The court characterized this $18 million figure as a middle ground between Sherwood's total-Campus valuation of $28.3 million and a purported total-Campus valuation by Smith of $14.609 million. *See* JA 577-78 (¶¶ 35-43). Subtracting this $18 million from the contract price of $26.75 million, and then subtracting an additional $1.5 million to account for Jemal's initial deposit (which plaintiffs had retained), the court reached an ultimate diminution-in-value award of $7.25 million. JA 582-83.

Roughly two weeks later, in accordance with Super. Ct. Civ. R. 58, the court entered final judgment in a separate document. JA 587-88. In all, the court awarded plaintiffs approximately $15.7 million, plus an additional $198,170 per month of future damages until the property resold. JA 587-88. (The court later stayed the judgment pending appeal. *See* JA 30 (6/21/21 order).)

8. The Post-Judgment Proceedings.

The District filed a timely motion to alter or amend the judgment. JA 589;

see Super. Ct. Civ. R. 59. As relevant here, it argued that the court had erred in determining the diminution-in-value damages because Smith had not in fact offered an opinion that the full Campus was worth $14.609 million. JA 594-96. Although Smith had once written a report stating that Parcel E was worth $4.04 million *in 2016*, he did not offer that opinion at trial, let alone an opinion on what Parcel E was *currently* worth. JA 594-96.

In May 2021, while its Rule 59 motion was pending, the District learned that plaintiffs had signed a new agreement to sell the Campus—to none other than Jemal's TEB. JA 617. The District promptly asked the trial court to refrain from deciding the Rule 59 motion for 30 days to let the District assess the effect of this new development and file an updated brief if necessary. JA 617.

The court instead denied the Rule 59 motion the next week. JA 621-25. It gave no reason for refusing to wait for more information about the new sale. And it adhered to its diminution award, asserting—without citation—that Smith "offered testimony as to the 2016 value of the fee simple property" and that "it was not error to consider the 2016 value of the fee simple property . . . to assist [the court] in making its current value determination of the BET campus." JA 622.

After the District filed its notice of appeal, it learned the details of the new sale. Using the District's court-ordered consents, BET had agreed on April 30 to sell the Campus to Jemal's TEB for $20,175,000—$2,175,000 more than the $18

million figure the court had used to calculate damages. JA 646, 656. The District therefore moved for relief from the judgment under Super. Ct. Civ. R. 60(b). JA 631. The new sale, the District argued, was an extraordinary circumstance justifying relief because it meant that BET would receive an extra $2,175,000 in taxpayer funds for damages that it did not suffer—in effect, a double recovery. JA 636-37.

The court denied the Rule 60(b) motion. JA 677. It did not dispute that BET would wind up with $2,175,000 more than it had suffered in actual damages. But this was not technically a double-recovery, the court said, because Jemal's payment for the Campus "was not a satisfaction of BET's judgment against the District." JA 681. Moreover, granting the District's motion "would allow every money judgment based on a subject property's fair market value [to] be amended after the sale of the subject property," which would stretch Rule 60(b) too far. JA 681.

STANDARD OF REVIEW

"On appeal from a bench trial, [this Court] reviews the trial court's legal conclusions de novo and its factual findings for clear error." *FDS Rest., Inc. v. All Plumbing Inc.*, 241 A.3d 222, 227 (D.C. 2020). The proper interpretation of the leases is a legal question reviewed de novo. *Abdelrhman v. Ackerman*, 76 A.3d 883, 887 (D.C. 2013). Whether the District breached the leases is a mixed question: the trial court's relevant findings of historical fact are reviewed only for clear error, but its ultimate conclusion that the District breached the leases is reviewed de novo. *See Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1176 (2d Cir. 1995) ("The legal

conclusions to be drawn from factual findings, including the conclusion that the contract has been breached, are subject to *de novo* review."); *cf. Trice v. United States*, 849 A.2d 1002, 1005 (D.C. 2004). Whether BET LLC complied with D.C. Code § 12-309 is a question of law that the Court reviews de novo. *District of Columbia v. Arnold & Porter*, 756 A.2d 427, 436 (D.C. 2000). As to the District's post-judgment motions, "Rule 59 motions that claim an error of law are reviewed *de novo*, whereas Rule 60 motions are reviewed for abuse of discretion." *Callahan v. 4200 Cathedral Condo.*, 934 A.2d 348, 353 (D.C. 2007) (alterations and internal quotation marks omitted).

SUMMARY OF ARGUMENT

1. A landlord can reasonably deny consent to a lease assignment if the proposed assignee will not use the property consistently with the lease terms. Ground Lease Two's terms were far removed from those of a typical commercial lease. They prohibited any use of Parcel C that did not, in the District's "sole judgment," satisfy certain economic-development goals—a condition of *subjective* satisfaction. Mayor Bowser concluded in good faith that Jemal's most recent and specific proposal for the property, to lease it back to the District for use as a bus facility, would not satisfy those goals. Because that was her honest, good faith judgment, it was conclusive under the terms of the lease, and her decision to deny consent was therefore reasonable.

The trial court's contrary reasoning lacks merit. It believed that the Mayor

should have considered only the proposed use of Parcel C that Jemal had set forth in the May 2017 memo attached to BET's second assignment request: supplemental parking for the rest of the Campus. But *after* sending that memo, Jemal spent months negotiating with DGS over a different and incompatible use of Parcel C: the bus-facility leaseback. There is no reason that the Mayor should have ignored that more recent and concrete information about how Jemal intended to use the property. Also without merit was the court's conclusion that the District had wrongly invented "conditions precedent" to granting consent. The relevant decisionmaker was the Mayor, and the court did not find (and the evidence does not support) that she had imposed such conditions or denied consent on that basis.

The conclusion that the Mayor reasonably denied consent as to Ground Lease Two (Parcel C) means that she also reasonably denied consent as to Ground Lease One (Parcel B). BET's consent request was for *both* leases because its deal with Jemal was contingent on the assignment of both. Given this arrangement, consenting to just one of the assignments would have been pointless. And even if the Parcel B denial was unreasonable, it was not the proximate cause of plaintiffs' injuries, because the lawful Parcel C denial was enough on its own to prevent their deal with Jemal from closing.

2. Alternatively, BET LLC cannot recover damages because it did not provide the District with written notice of its tort claim within six months of the third

denial, as required by D.C. Code § 12-309. The trial court held that a demand letter from plaintiffs' counsel satisfied Section 12-309, but that letter stated specifically that it was sent on behalf of *Acquisition Corp.* and never mentioned BET LLC, let alone described BET LLC's injuries. That is not enough to satisfy the statute, which must be construed narrowly against claimants. This Court should reject plaintiffs' proposal of an atextual exemption from Section 12-309 based on an unjustified extension of *Shehyn v. District of Columbia*, 392 A.2d 1008 (D.C. 1978).

3. The diminution-in-value award is flawed in three respects. *First*, it was based in key part on a purported expert opinion on Parcel E's worth that BET's expert never offered. *Second*, given BET's speedy new sale of the Campus to Jemal for far more than the trial court's (flawed) estimate of the Campus's worth, the judgment will give BET a multimillion-dollar windfall at taxpayer expense—an extraordinary circumstance that demands post-judgment relief. *Third*, the award failed to account for $400,000 in deposits that BET undisputedly received from Jemal and retained, a sum that should therefore be subtracted from BET's damages.

ARGUMENT

I. The Liability Decision Should Be Reversed Because The Trial Court Ignored That Ground Lease Two Granted The Mayor Extraordinary Discretion To Determine If A Proposed Use Would Satisfy The Lease's Economic-Development Purposes.

Both leases stated that the District could not "unreasonably" withhold its consent to a proposed assignment. JA 880, 944. But it is always reasonable to deny

consent if a proposed assignee will not use the property consistently with the lease terms. By its express terms, Ground Lease Two gave the District wide discretion to determine whether a proposed use of Parcel C would adequately advance important economic-development aims—and so, by extension, whether to reject a proposed assignment of the parcel. Mayor Bowser concluded in good faith that Jemal's most recent and specific proposed use of the property, to lease it back to the District for use as a bus facility, was not acceptable under the lease terms. Her decision to deny consent was therefore reasonable, and the trial court's contrary reasoning is unpersuasive.

A. Mayor Bowser's denial of consent to assign the Parcel C lease was reasonable.

Leases of real property are construed as contracts, *Abdelrhman*, 76 A.3d at 887, and "[t]he interpretation of any contract necessarily involves analysis of the particular contract language at issue, and application of case-specific facts," *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 514 F.3d 651, 660 (7th Cir. 2008). This means that the grounds that constitute a "reasonable" basis for rejecting a proposed lease assignment depend on the specific terms of the particular lease. If a lease has no unusual terms or restrictions, an objective standard of commercial reasonableness is appropriate. But if a lease restricts how the property may be used, the landlord has a right to enforce those restrictions. It can thus reasonably deny consent unless the assignee "will use the premises lawfully *and otherwise consistently with the lease*

terms." *1010 Potomac Assocs. v. Grocery Mfrs. of Am., Inc.*, 485 A.2d 199, 209 n.14 (D.C. 1984) (emphasis added); *see Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 737 (D.C. 2000); *Pay 'N Pak Stores, Inc. v. Superior Court*, 258 Cal. Rptr. 816, 819-20 (Cal. Ct. App. 1989).

Here, Ground Lease Two (covering Parcel C) contained an unusual, highly restrictive use clause. It prohibited any use that, "in the sole judgment of the [District]," did not "offer sufficient employment opportunities for residents of the District" or comply with the economic-development purposes of the industrial park. JA 966-67; *see* JA 914. When a contract lets one party exercise "sole judgment" or "sole discretion" to decide whether a condition is met, the only question is whether that party has made the decision in subjective good faith—not whether the decision is right or even reasonable. If the party has expressed its honest view, its judgment is conclusive. *See, e.g.*, *Kohler v. Leslie Hindman, Inc.*, 80 F.3d 1181, 1185-87 (7th Cir. 1996) (contract giving auctioneer "sole discretion" to rescind sale was limited only by auctioneer's subjective good faith); *Greenwood v. Koven*, 880 F. Supp. 186, 198-99 (S.D.N.Y. 1995) (same under contract referring to party's "sole judgment"); *Dorsey Bros. v. Anderson*, 287 A.2d 270, 272 (Md. 1972) (where contract leaves matter to party's "sole judgment," "the judgment of a court is not to be substituted for the honest, even though misguided, judgment of the party"). That such a subjective standard applies to Ground Lease Two is further confirmed by the fact

that the conditions at issue, such as the creation of "sufficient employment opportunities," cannot be measured objectively. *See Fursmidt v. Hotel Abbey Holding Corp.*, 200 N.Y.S.2d 256, 259-60 (N.Y. App. Div. 1960) (lack of "objective standards" to measure performance indicated subjective standard); *Mattei v. Hopper*, 330 P.2d 625, 627 (Cal. 1958) (same).

In exercising this extraordinary discretion over Parcel C, the Mayor understood that Jemal's intention was to lease the parcel back to the District for use as a bus facility. JA 535 (¶ 60); *see* 10/15/20 PM Tr. 30:8-11. This was a reasonable understanding of Jemal's intended use. Although Jemal's one-page May 2017 memo said that he "intend[ed] to continue to use Parcel C as supplemental parking to support the rest of the property," the memo's very next sentence rendered this intention hollow: "Notwithstanding the foregoing, Purchaser reserves all rights to operate the property for any or all of the uses that are permitted by the ground leases, the PDR-4 zoning and any future zoning." JA 1502. Moreover, even if the May 2017 memo *had* stated unequivocally that Jemal would use Parcel C as supplemental parking, Jemal's later actions would have superseded and contradicted that premise. In the months *after* sending the memo, Jemal negotiated the leaseback proposal with DGS officials. Jemal and those officials "reach[ed] an agreement in principle" to terms that he offered on June 15. 10/6/20 AM Tr. 57:18-24; *see* JA 1256-61 (Jemal's written proposal). Under this arrangement, Parcel C would not be available as

supplemental parking for the rest of the Campus; it would instead become part of a Circulator Bus facility. JA 1256, 1444. Indeed, Jemal himself proposed that Parcel C "be used solely as storage and repair facility for DC Circulator." JA 1256. Thus, when Mayor Bowser was deciding in fall 2017 whether to consent to the assignments, she reasonably considered Jemal's proposed use for Parcel C to be a bus-facility sublease.

As explained, Ground Lease Two made the Mayor the "sole judg[e]" of whether this proposed use of Parcel C would create enough jobs and adequately promote the economic-development goals of the industrial park. She concluded that it would not. JA 535 (¶ 60). There is no evidence that this was not her honest, good-faith judgment. To the contrary, during closing arguments, the trial court specifically noted that "bad faith [was] not an issue" here. 10/19/20 AM Tr. 120:11-12. As a result, Mayor Bowser's determination that the proposed use of the parcel would not satisfy the lease terms was conclusive.[6] Her denial of consent to the assignment was therefore reasonable.

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[6] If it were relevant, her determination was also objectively reasonable. As the Mayor explained, placing a Circulator Bus facility on the Campus would largely transfer *existing* jobs, not create new ones. JA 1551 (p. 59). And by eliminating a large percentage of the Campus's overall parking, the proposal would cause the value of the other parcels to "go down considerably." 10/15/20 PM Tr. 57:3-6 (Sherwood). Indeed, a private broker working with DGS believed that putting a bus facility there would "make[] the balance of the site worthless." JA 1484; *see* JA 576

To be clear, in reasonably denying consent in October 2017, the Mayor was not conclusively forbidding an assignment to Jemal. BET and Jemal remained free going forward to propose a different use for Parcel C and to seek assignment approval on that basis. *See* 10/15/20 PM Tr. 17:15-18:1 (Bowser). The Mayor would have then had a renewed obligation to judge that intended use, and thus the reasonableness of the assignment request, in good faith. The Mayor did not, however, have any obligation to consider possible uses that BET and Jemal failed to propose with reasonably clarity. *D'Oca v. Delfakis*, 636 P.2d 1252, 1253-54 (Ariz. Ct. App. 1981) ("The burden to furnish sufficient information for a lessor to determine whether a consent to assignment of a lease will be given is the lessee's. The lessor is under no duty to seek out such information." (citations omitted)).

B. The trial court's contrary reasoning is unpersuasive.

The trial court's contrary reasoning was flawed in several respects. The central error was the court's view that the Mayor should have looked only at Jemal's May 2017 memo in deciding whether to consent to the assignment. *See* JA 539. The court apparently believed that because BET forwarded that memo with its second assignment request, the District was compelled to treat the memo as the official, exclusive statement of the assignee's proposed uses. In contrast, the court viewed the Mayor's consideration of the leaseback proposal to be illegitimate because

(¶ 32) ("The economic potential of each unit [of the Campus] depends on its proximity to and interaction with the other parcels.").

"[t]hose were not the uses that BET proffered in its request for consent. Those were the uses that DGS negotiated with Douglas Development in conversations that did not include BET." JA 539; *see* JA 535 (¶ 59) (emphasizing that BET "had absolutely nothing to do with that proposal").

This reasoning is illogical. A landlord deciding whether to consent to an assignment needs to know how the assignee intends to use the property. It is entirely reasonable for a landlord to consider the most specific and up-to-date information about those intended uses, *whether or not that information comes from or passes through the current tenant*. Suppose, for instance, that a tenant seeking consent for an assignment tells the landlord that the proposed assignee intends to use the property as a coffee shop; two weeks later, however, before the landlord has decided whether to consent, the proposed assignee himself tells the landlord directly that he now intends to open a liquor store (and indeed has begun negotiating with distributors). No principle of law or logic requires the landlord to ignore that information and make its decision on the assumption that the property will become a coffee shop. Indeed, that would be patently *un*reasonable.

Yet that is what the trial court demanded here. In its view, the Mayor was required to assume that Jemal intended to use Parcel C as supplementary parking even though he had more recently proposed a different, incompatible use. That makes no sense. Nor is it relevant that BET was not part of the leaseback proposal

discussions. What matters is the *landlord's* (here, the Mayor's) reasonable understanding of how the assignee intends to use the property, not the tenant's. If the assignee tells the landlord about a new plan for the property without informing the tenant, the tenant might be justifiably upset with the assignee; but that is no reason for the *landlord* to ignore the new plan when deciding whether to consent. It was thus reasonable for the Mayor to consider the bus-facility sublease to be Jemal's proposed use, and to deny consent—at least for the time being—on that basis.

A second flaw in the trial court's reasoning was its view that the District must have considered Jemal a suitable assignee because DGS spent months negotiating the leaseback proposal with him. JA 538-39. This view ignores both (1) that under Ground Lease Two, the question was not whether Jemal was an *objectively* reasonable assignee, but whether the District was *subjectively* satisfied with his intended use of the property, and (2) that the ultimate decisionmaker was the Mayor. Asking whether the District considered the assignment to Jemal suitable means asking whether Mayor Bowser considered it suitable. 10/15/20 AM Tr. 83:10-11 (stipulation that "[t]he executive power of the District is vested in the Mayor"). On that issue (like others), she was free to disagree with and overrule her subordinates—and she did, explaining that DGS had not given adequate attention to the "job creation and economic development component" of the leases. 10/15/20 PM Tr. 14:3-10. Thus, the time that DGS spent working toward a leaseback arrangement

and its recommendation to consent to the assignment do not show that the assignment was necessarily reasonable.

The trial court's final error was its contention that the District had unreasonably imposed "conditions precedent to granting consent" that were "simply not part of the contractual terms" of the leases: namely, that BET continue "operating the premises" and "negotiate with the District a plan for use of the premises." JA 537; *see* JA 540. The problem is that the court never found as factual matter that Mayor Bowser believed that these were conditions precedent to assignment, let alone that they were the reason she denied consent. The absence of such a finding is understandable, for there would have been no evidence to support it. Instead, as the trial court found, the Mayor "decided to deny consent for the assignments because the assignments would not create jobs or promote economic development." JA 535 (¶ 60).[7] For the reasons explained, that honest belief was a sufficient basis under the lease for denying consent.

C. Because the denial of consent as to Parcel C was reasonable, so was the denial as to Parcel B.

Because the Mayor's decision to deny consent as to Parcel C was reasonable, her denial as to Parcel B was as well. Reaching this conclusion does not require a

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[7] The trial court found that *Perry* believed that these were conditions precedent to an assignment. JA 533-34 (¶ 54). But even if that finding is correct, Perry's beliefs are irrelevant without further findings that (1) the Mayor shared those beliefs and (2) denied consent on that basis.

separate analysis of Ground Lease One's terms. Instead, it follows from the nature of BET's request and the structure of its deal with Jemal. BET's request was a *joint* request for the assignment of *both* leases. *See* JA 1399. Under the terms of its deal with Jemal, BET needed to convey both leases; if it was unable to convey either one, the deal would not close. JA 1090, 1126; 10/5/20 PM Tr. 75:6-12 (Stevenson). Given this arrangement, consenting to the assignment of just one of the leases would not have made sense. Thus, the very fact of the Parcel C denial made the Parcel B denial reasonable too.

This conclusion of course defeats Acquisition Corp.'s two breach of contract claims. *See* JA 89-90. It also defeats plaintiffs' tortious interference claim. *See* JA 708. When a tortious interference claim is based on a landlord's refusal to consent to a lease assignment, liability turns on the same reasonableness inquiry that governs the contract question. *See CASCO Marina Dev., L.L.C. v. D.C. Redev. Land Agency*, 834 A.2d 77, 84 (D.C. 2003). If, as here, the landlord's refusal was reasonable under the lease terms, any resulting interference is privileged and not tortious. *See Pakwood Indus., Inc. v. John Galt Assocs.*, 466 S.E.2d 226, 229 (Ga. Ct. App. 1995); *Jones v. O'Connell*, 458 A.2d 355, 361 (Conn. 1983); *D'Oca*, 636 P.2d at 1254.

Because liability should be reversed on all counts, plaintiffs are entitled to no damages. The Court should further hold that the November 2020 consent forms are null and void. The District executed those forms under court order and only after

seeking emergency relief in both the trial court and this Court, so their validity remains a live question. *See* 13B Edward H. Cooper, *Federal Practice & Procedure* § 3533.2.2 (3d ed. 2021) ("[A] transfer of title obedient to a court order does not moot an appeal seeking retransfer."). If the Court agrees that the Mayor acted reasonably, there was no basis for compelling the District to consent, and the assignments should be rescinded.

D. Even if only the Parcel C denial was reasonable, plaintiffs are not entitled to any damages.

Even if the Mayor's denial of consent was reasonable as to Parcel C only, that is enough to foreclose the award of any damages. The reason is lack of causation. To recover under either its contract or tort claims, plaintiffs must prove that the District's wrongdoing proximately caused their damages. *See Exec. Sandwich Shoppe*, 749 A.2d at 736-37; *Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 849 (D.C. 1998). If the District's *lawful* conduct was an independent cause of those damages, then the claims fail, as *Executive Sandwich Shoppe* illustrates. In that case, a landlord initially refused to consent to an assignment unless the proposed assignee paid a higher rent. *Id.* at 736. The Court held that this was a breach of the lease but was not the proximate cause of the damages that the current tenant suffered when the assignment fell through. *Id.* at 737. It was not the proximate cause because the landlord *also* had reasonable concerns about the assignee's financial position, and this legitimate basis for refusing to consent would have independently prevented the

assignment and thereby caused the tenant's damages. *Id.* at 737 & n.19.

Similarly, here, the Mayor's lawful refusal to consent to the assignment of either one of the leases would have independently caused plaintiffs' damages. Those damages all flow from BET's inability to execute the sale agreement with Jemal. As noted, that deal would have failed unless BET could convey *both* leases. 10/5/20 PM Tr. 75:6-12 (Stevenson). Thus, because the Mayor was justified in refusing to consent as to Parcel C, her refusal as to Parcel B, even if wrongful, did not proximately cause the failure of BET's deal with Jemal and any resulting damages.

II. Alternatively, BET LLC Did Not Comply With D.C. Code § 12-309.

A. BET LLC's notice of claim under Section 12-309 was untimely because the six-month clock had expired in April 2018.

Because BET LLC (unlike Acquisition Corp.) was not a party to the leases, its sole claim was for tortious interference with prospective business advantage. *See* JA 708. A "condition precedent" to suing the District for tortious interference (or any other tort) is compliance with D.C. Code § 12-309. *Campbell v. District of Columbia*, 568 A.2d 1076, 1078 (D.C. 1990); *see DeKine v. District of Columbia*, 422 A.2d 981, 987-88 (D.C. 1980) (applying Section 12-309 to tortious interference claim). In relevant part, that statute provides:

> [A]n action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Mayor of the District of

> Columbia of the approximate time, place, cause, and circumstances of the injury or damage.

D.C. Code § 12-309(a). BET LLC's damages were not "an easily ascertainable sum certain but, rather, [were] the subject of controversy and proof at trial," and so were unliquidated. *District of Columbia v. Campbell*, 580 A.2d 1295, 1301 (D.C. 1990) (internal quotation marks omitted). BET LLC was therefore required to give the Mayor written notice within the statute's six-month window.

The written notice that BET LLC submitted in July 2018, *see* JA 1496-97, was too late. As the trial court correctly held, the six-month clock began running on October 13, 2017, the date of the District's third denial. JA 171. "The duty to provide notice under § 12-309 attaches as soon as [the] plaintiff suffers actionable injury." *DeKine*, 422 A.2d at 987 (alterations and internal quotation marks omitted). The trial court found that BET LLC's damages began accruing on October 13, 2017, and it thus had actionable injury on that date. JA 573 (¶ 12); *see DeKine*, 422 A.2d at 988. The fact that BET LLC's damages continued to accumulate after that date is not relevant. Section 12-309's clock is triggered as soon as the tortious acts have occurred and the plaintiff has suffered *any* damages. *See Farris v. District of Columbia*, 257 A.3d 509, 516 (D.C. 2021); *DeKine*, 422 A.2d at 988. Because the six-month clock began running on October 13, 2017, it ran out on April 13, 2018, several months before BET LLC's written notice.

B. The October 2017 demand letter did not satisfy Section 12-309 because it never even mentioned BET LLC.

The trial court held that Section 12-309 was satisfied by an October 23, 2017 demand letter that BET's counsel sent to DGS and that was then forwarded to the Mayor. JA 242; *see* JA 194-99. But as the District explained at summary judgment, even if this letter were adequate notice of a claim by Acquisition Corp., it was not notice of a claim by BET LLC. To comply with Section 12-309, a written notice must "set[] forth the claimant's identity." *Smith v. District of Columbia*, 463 F.2d 962, 965 (D.C. Cir. 1972). Consistent with "the principle that § 12-309 is to be construed narrowly, against claimants," a written notice from one party does not satisfy another party's obligation to comply with the statute, even if both of their claims stem from the same incident. *Arnold & Porter*, 756 A.2d at 437 (holding that, where a water-main rupture damaged multiple businesses, plaintiffs could not rely on other parties' written notices).[8]

Given these principles, the October 2017 demand letter was not adequate written notice of a claim by BET LLC. The letter never so much as mentions BET LLC, let alone describes its injury or damage. *See* JA 196-99. Instead, the letter refers only to Acquisition Corp., even defining "BET" in the very first sentence to

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[8] The one exception this Court has recognized is that a claimant's spouse need not file a separate notice to bring a loss of consortium claim. *Romer v. District of Columbia*, 449 A.2d 1097, 1100-02 (D.C. 1982). But the Court has rightly "see[n] no reason to extend *Romer* beyond the context of loss of consortium." *Chidel v. Hubbard*, 840 A.2d 689, 696 (D.C. 2004).

mean Acquisition Corp. specifically. JA 196. The cover email from BET's counsel, which was also forwarded to the Mayor, reinforces the point: "Please see the attached letter, sent on behalf of BET Acquisition Corp." JA 195. The subject line of the cover email was equally specific: "BET Acquisition Corp." JA 195. It is impossible to read the letter as notice of a forthcoming tort claim by BET LLC, a corporate entity distinct from Acquisition Corp. and not a party to the leases discussed in the letter. *See Off. of People's Couns. v. Pub. Serv. Comm'n of D.C.*, 520 A.2d 677, 682 (D.C. 1987) (noting that "a [corporate] parent and subsidiary comprise two wholly separate entities with individual property rights" (internal quotation marks omitted)).

Below, plaintiffs argued that the demand letter was good enough because "the District knew that counsel represented both sellers of the campus property," i.e., both Acquisition Corp. and BET LLC. JA 429. This argument lacks merit for several reasons. To begin, the record contains no evidence that the Mayor—the relevant actor here—knew that Venable LLP represented both Acquisition Corp. and BET LLC. Even if she did, the letter and cover email stated precisely that they were sent "on behalf of BET Acquisition Corp." A reader who knew that Venable represented both entities would thus rationally conclude that the letter was *not* a communication from BET LLC. In any event, the Mayor's purported background knowledge about Venable's other clients would mean, at most, that the District had *actual* notice of

BET LLC's potential tort claim. But "[w]hether the District had actual notice of [a plaintiff's] potential claim is not an appropriate consideration under section 12-309." *Doe by Fein v. District of Columbia*, 697 A.2d 23, 29 (D.C. 1997). Only proper *written* notice satisfies the statute. *Id.* (citing *District of Columbia v. World Fire & Marine Ins. Co.*, 68 A.2d 222, 224 (D.C. 1949)).

World Fire illustrates the point. There, an attorney who represented both a driver and the driver's insurer filed a written notice under Section 12-309 describing damage that the District had allegedly done to the driver's car. 68 A.2d at 223-24. But the written notice mentioned only the driver, not the insurance company. *Id.* at 224. The Court held that an action by the insurance company was therefore barred by Section 12-309. *Id.* at 225. That was so even though other statements by the attorney gave the District actual notice that the insurer also had a claim. *See id.* at 224-25. "[A]ctual notice," the Court explained, "is without effect to dispense with a written notice, when a statute requires notice in writing." *Id.* at 225 (footnote omitted). Like the notice in *World Fire*, the demand letter in this case did not satisfy BET LLC's obligation to comply with Section 12-309.

C. The *Shehyn* decision does not excuse BET LLC's noncompliance with Section 12-309.

Plaintiffs also argued below that Section 12-309 did not apply here under the logic of *Shehyn*, 392 A.2d 1008. In *Shehyn*, a plaintiff landlord alleged that the District, its former tenant, had failed to return the leased premises to their original

condition, and so it sued the District for breach of the lease (Count I) and conversion (Count II). *Id.* at 1010-11. The Court stated that although Section 12-309 applies to actions against the District based on *respondeat superior*, it should not apply where "the District itself is in breach of a duty" and also is "necessarily aware of the injury produced by the breach." *Id.* at 1013-14. The Court found the first condition satisfied because the District itself was alleged to have breached the lease. *Id.* at 1014. It found the second condition satisfied because "the District took possession of the premises in the condition to which they were to have been restored," and thus "[c]omparison of that [original] condition to the condition of the premises upon expiration of the lease was, in itself, full notice of the injury produced by the District's breach." *Id.*

Shehyn does not control here for several reasons. To begin, the two claims at issue in *Shehyn* were both *contract* claims. *See id.* (noting that Count I alleged "breach of [a] contractual duty," and that under Count II "the District would be liable upon its contract of bailment (or in the case of a fixture removed, upon the lease)"). *Shehyn* thus did not (nor could) establish binding precedent on how Section 12-309 applies to tort claims. Sure enough, this Court has never applied *Shehyn* to excuse a tort plaintiff's noncompliance with the statute. Furthermore, because the Court later clarified that Section 12-309 is *categorically* inapplicable to contract claims,

Campbell, 580 A.2d at 1302, none of *Shehyn*'s reasoning was necessary to its result, and so was dicta even as to contract claims.

Shehyn's reasoning should not be extended to tort claims because it is triply flawed. *First*, it is utterly atextual. Nothing in Section 12-309's text draws a distinction between (1) a claim that "arises out of the tortious conduct of employees of the District" and (2) a claim "where the District itself is in breach of a duty." 392 A.2d at 1013-14. Instead, the statute applies uniformly to any "action . . . against the District of Columbia for unliquidated damages to person or property." D.C. Code § 12-309(a). *Second*, *Shehyn* implicitly rests on the premise that, for some claims, *actual* notice is good enough. But binding decisions both pre- and post-dating *Shehyn* explicitly reject the sufficiency of actual notice and, consistent with the statutory text, demand proper *written* notice. *E.g.*, *Chidel*, 840 A.2d at 695; *Doe by Fein*, 697 A.2d at 29; *World Fire*, 68 A.2d at 224-25. *Third*, *Shehyn* ignored, and its reasoning contradicts, the longstanding principle that Section 12-309 "is to be construed narrowly, against claimants." *Arnold & Porter*, 756 A.2d at 437.

Even if the Court felt compelled to apply *Shehyn*'s atextual exception to tort claims, it does not reach this case. A key fact in *Shehyn* was that the District had "full notice of the injury" caused by its contractual breach because it had direct knowledge of the premises' condition at both the start and end of the lease. 392 A.2d at 1014. Here, in contrast, the District had no comparable "full notice" of BET

LLC's injury. The District could not directly know whether, how, and to what extent BET LLC was injured by the District's refusal to consent to the assignment of *Acquisition Corp.'s* leases. Because BET LLC owned Parcel E in fee simple, it remained free to use or dispose of it however it wished. Given this fundamental uncertainty about how the District's conduct had impacted BET LLC, applying Section 12-309's notice requirement as written makes perfect sense.[9]

III. Even If Liability Were Upheld, The Damages Award Should Be Vacated Or At Least Reduced.

A. The trial court's valuation of the Campus was erroneously based on a purported expert opinion that was never offered.

To calculate the diminution-in-value damages, the trial court correctly reasoned that it should start by determining the difference between the 2017 contract price for the entire Campus ($26.75 million) and the current value of the entire Campus. In deciding the latter value, the trial court chose to steer a middle course between two expert opinions: Sherwood's that the Campus was worth $28.3 million, and Smith's that it was worth only $14.609 million. JA 577-78 (¶¶ 35-43). Moving inward from these two poles, but hewing much more closely to Smith's purported

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[9] Given its Section 12-309 argument, the District asked that the final judgment "specify which plaintiff is entitled to which damages based on which claims," but the trial court largely declined to do so, stating that if this Court reversed "then it's fine, I'll go back and recalculate." 2/11/2021 Tr. 96:16-24. The Court should therefore vacate the damages award and remand for further proceedings to determine the proper allocations.

estimate, the court decided that the current value was $18 million. JA 578 (¶ 43).

This analysis was fundamentally flawed because Smith never testified as to an opinion on the value of Parcel E. In his October 2020 testimony, he stated clearly that he was not offering such an opinion. 10/8/20 AM Tr. 107:9-11. In his February 2021 testimony, he again offered no opinion on Parcel E, an omission that BET's counsel conceded outright: "There's been no testimony elicited from Mr. Smith about the value of the fee simple." 2/8/21 Tr. 41:19-20. Instead, Smith opined on the value only of the leases for Parcels B and C, which he said currently totaled $10,569,000. 10/8/20 AM Tr. 92:17-21; 2/8/21 Tr. 10:9-15, 18:16-19. The trial court's assertion that "Smith estimated [the entire Campus's 'as-is'] value at $14.609 million," JA 577 (¶ 38), was simply wrong.

Though never explained, the trial court apparently arrived at this "$14.609 million" figure by taking Smith's opinion of the leases' current worth ($10,569,000) and adding an estimate of Parcel E's value *in 2016* ($4,040,000) that Smith had written in a report. But that report was not offered into evidence, and Smith never testified to its accuracy on this point, whether as a measure of Parcel E's value in 2016 or, as would actually be relevant, in 2021. The court learned of the $4,040,000 estimate when the court itself asked *Sherwood* to relay the contents of Smith's report. 10/8/20 AM Tr. 62:20-63:23. The District's counsel promptly interjected that "Smith did not offer an opinion in this trial regarding the fee simple interest and its

value," but the court nevertheless asked Sherwood to look up and relay the number in Smith's report. 10/8/20 AM Tr. 63:4-15.

It was error for the trial court to treat this $4,040,000 estimate as substantive evidence, and indeed integral to its diminution-in-value award. The estimate might have been Smith's opinion at some point in time, but it was not an opinion *that he offered at trial*. *Contra* JA 622 (erroneously asserting that Smith "offered testimony as to the 2016 value of the fee simple property"). Because Smith did not offer this opinion, the District had neither a reason nor an opportunity to cross-examine him about it. *See District of Columbia v. Bethel*, 567 A.2d 1331, 1333 (D.C. 1990) (noting that an expert's opinion should be "measure[d]" "with the assistance of vigorous cross-examination").

The trial court's reliance on this unoffered, untested expert opinion was prejudicial error. To be sure, the court did not adopt the unsupported total estimate of $14.609 million without adjustment, instead moving its finding upward to $18 million. But the erroneous $14.609 million figure plainly exerted an "anchoring effect" on the court's analysis, pulling it lower than it would have been if the court had considered only Sherwood's opinion of Parcel E's value. *See* Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. Pa. L. Rev. 1251, 1286-93 (2005) (showing the effect of anchoring on judges' damages awards). The damages award should

therefore be vacated.

On remand, the trial court will no longer need to *estimate* the Campus's 2021 value, because the new sale to Jemal provides a conclusive answer: $20,175,000. JA 656.[10] With the judgment reopened, there will be no rational basis for ignoring that actual, undisputed sales price. It should be the starting point for a corrected determination of diminution-in-value damages. If the Court agrees, then it need not decide whether, as argued next, the denial of the District's Rule 60(b) motion was erroneous and independently requires vacatur and remand.

B. The new sale to Jemal for millions more than the trial court's estimate of the Campus's worth justifies relief from the judgment.

Less than two months after the trial court entered final judgment, BET and Jemal "reinstated and amended" their sale agreement. JA 646 (capitalization altered). The new sales price was $20,175,000—$2,175,000 more than the trial court's (flawed) estimate of the Campus's worth. JA 656. This means that, unless the judgment is modified, BET will keep $2,175,000 more in damages than it in fact suffered in losses. Because this unjustified windfall was—and is—an extraordinary circumstance, the trial court abused its discretion in denying the District's Rule 60(b) motion.

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[10] That real-world price is further (though not necessary) proof that relying on Smith's non-opinion about Parcel E was error. If Smith's appraisal of the leases' value ($10,569,000) was even roughly accurate, then the total sales price indicates that Parcel E's value was much closer to *$10 million* than to $4 million.

"A cardinal principle of law is that, in the absence of punitive damages, a plaintiff can recover no more than the actual loss suffered. . . . He or she has no right to make a profit from the injury." *Reid v. District of Columbia*, 391 A.2d 776, 777 (D.C.), *amended*, 399 A.2d 1293 (D.C. 1978). Given this fundamental principle, courts have "consistently" awarded Rule 60(b) relief "when some subsequent event occurs that would render the original judgment unjust, such as when enforcement of the judgment as written would result in a double recovery or otherwise result in an unwarranted windfall for the plaintiff." *Gould v. Salem*, 59 V.I. 813, 818 (2013).[11]

In *FDIC v. United Pacific Insurance Co.*, 152 F.3d 1266 (10th Cir. 1998), for instance, the FDIC, acting as receiver for a bank, sued the bank's insurers for a bond payment to help cover the bank's losses on a bad loan. 152 F.3d at 1268-69. The FDIC won at trial and the court entered judgment against the insurers for the maximum bond payment. *Id.* at 1269. After trial, however, the FDIC allegedly managed to liquidate more of the loan collateral, thereby reducing its underlying loss. *Id.* at 1270-71. The Tenth Circuit held that, if this was true, the trial court had

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[11] *See, e.g.*, *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 579 F.3d 1268, 1273 (11th Cir. 2009); *FDIC v. United Pac. Ins. Co.*, 152 F.3d 1266, 1275 (10th Cir. 1998); *Stokors S.A. v. Morrison*, 147 F.3d 759, 763 (8th Cir. 1998); *Warner Bros. Int'l Television Distrib. v. Golden Channels & Co.*, No. 02-CV-209326, 2005 WL 8162979, at *2-*4 (C.D. Cal. Feb. 10, 2005). Some of these "windfall" decisions award relief under Rule 60(b)(6) and others under Rule 60(b)(5). What matters is not the label but the substance of the basis for relief. *See United Pac.*, 152 F.3d at 1271 n.3.

abused its discretion in denying the insurers' Rule 60(b) motion:

> [I]f the FDIC has recovered its loss on the loan from the loan collateral, [it] is not entitled to a double recovery from both the collateral and the fidelity insurers merely because all the collateral was not liquidated at the time of trial. Such a double recovery constitutes extraordinary circumstances which justify relief from judgment.

Id. at 1275.

Similarly, the trial court here entered judgment on the premise that BET had suffered diminution-in-value damages of $8,750,000 ($26.75M - $18M). But within weeks it was clear that BET's actual loss in this respect was only $6,575,000 ($26.75M - $20.175M). Like the FDIC's post-trial liquidation of collateral, BET's post-trial sale of the Campus reduced its underlying loss. If the District is nonetheless compelled to pay the full judgment, BET will obtain a windfall double recovery. BET will not merely be made whole for "the actual loss suffered," it will "make a profit from the injury"—a profit of more than $2 million in taxpayer funds. *Contra Reid*, 391 A.2d at 777. That is an extraordinary circumstance that compels relief from the judgment.

The trial court did not dispute that its judgment would, at public expense, give BET millions more than its actual loss. *See* JA 678-81. It instead gave two other reasons for denying relief, but neither is persuasive. *First*, it said that there was no double recovery because Jemal's payment to BET "for the post-judgment sale of the Property was not a satisfaction of BET's judgment against the District." JA 681. In

other words, the court believed that only a double payment *on the judgment* would count as an improper windfall to BET. That does not make sense. What matters is whether the judgment compels the defendant to pay more than plaintiff's actual loss. That problem can exist without a double payment on the judgment, as various cases illustrate. In *United Pacific*, for instance, the income from the FDIC's post-trial liquidation of loan collateral "was not a satisfaction of [the FDIC's] judgment against [the insurers]," and yet the Tenth Circuit recognized that it would still create an impermissible double recovery. *See* 152 F.3d at 1275; *see also Gould*, 59 V.I. at 816-19 (improper windfall caused by post-judgment elimination of plaintiff's anticipated tax obligation).

Second, the trial court feared that granting relief here would open the Rule 60(b) floodgates and "allow every money judgment based on a subject property's fair market value [to] be amended after the sale" based on the actual sales price. JA 681. That is incorrect. Because property values can change over time, Rule 60(b) relief is warranted in this type of case only if there is a substantial price deviation soon after the judgment. Here the price deviation was millions of dollars, and the sale occurred less than two months after the entry of judgment, while the District's Rule 59 motion was still pending. That is a rare scenario. Indeed, the District is unaware of any other case (in any jurisdiction) where Rule 60(b) relief has even been *sought* for a comparable post-judgment property sale. Granting relief under the

unusual circumstances of this case will not open any floodgates.

C. The diminution-in-value damages should be reduced by $400,000 to account for the full size of the deposit BET retained.

The trial court correctly reduced BET's damages by $1,500,000 to account for the initial deposit that Jemal paid to BET and BET retained. JA 582-83. But it is undisputed that Jemal *also* paid eight more monthly deposits of $50,000, which BET retained as well. *See* JA 571 (¶ 7); JA 1186 (ending deposits after December 2017 payment); 10/19/20 AM Tr. 69:23-24 (BET's counsel acknowledging that "the deposit already being held by BET . . . is 1.9 million dollars"); 2/11/21 Tr. 35:8-10 (same). BET's damages should therefore be reduced by a further $400,000.

The District admits that it did not raise this argument below. But this Court can overlook such a forfeiture "in the interests of justice," *District of Columbia v. Helen Dwight Reid Educ. Found.*, 766 A.2d 28, 33 n.3 (D.C. 2001), and it should do so here. The relevant facts are undisputed. "All that is left is the legal significance of those facts, an issue which [BET can] brief[] fully in this appeal," leaving "no risk of unfair prejudice." *Id.* Because it would be manifestly unjust to let BET keep an extra $400,000 of taxpayer money to which it is plainly not entitled, the Court should reduce the damages award accordingly.

CONCLUSION

The judgment should be reversed, or at minimum vacated and remanded for a redetermination of damages.

Respectfully submitted,

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November 2021

CERTIFICATE OF COMPLIANCE

I certify that I have reviewed Super. Ct. Civ. R. 5.2 and this Court's June 17, 2021 order and that this brief complies with the applicable requirements of those provisions.

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CERTIFICATE OF SERVICE

I certify that on November 2, 2021 this brief was served through this Court's electronic filing system to:

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