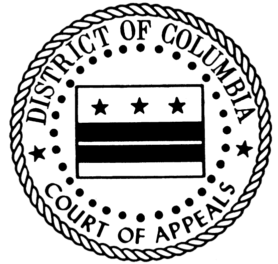

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DISTRICT OF COLUMBIA COURT OF APPEALS

APPEAL NO. 23-CV-422

MP PPH, LLC, Appellant,

v.

DISTRICT OF COLUMBIA, *et al.*, Appellees.

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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INTRODUCTION

The Superior Court's civil contempt powers are significant. They nevertheless are not unlimited. The Contempt Order in this case involves an unprecedented, overreaching, penal, and unjustifiable array of reversible errors comprising abuse of discretion and other reversible miscues. There is no single other case that exists, and none cited by Appellee the District of Columbia (the "District") in its effort to prop up the contested rulings, that comes anywhere close to the level of sanction imposed irrevocably, unconditionally, and retroactively by the Superior Court. Nor is this case one involving a mere "token effort to comply" or any evidence that could come close to justifying the appallingly overwhelming punishment leveled by Judge Neal E. Kravitz.

The District declines to admit otherwise, instead throwing out conclusory exaggerations that the behavior of Appellant MP PPH, LLC (the "Owner") was tantamount to having "brazenly flouted" the Consent Order, and couching this as a routine, run of the mill, every day exercise of the Superior Court's discretion permitted to vindicate its authority. Implicitly recognizing the tenuousness of the evidence and that suggestion, as a backstop, the District also suggests, wrongly, that the objections are "newfound arguments" never presented to Judge Kravitz and thus not preserved below, or they were otherwise somehow forfeited, waived, or lost, including by some claimed infirmity for being "insufficiently developed." The

Contempt Order cannot stand. Affirming it would validate actions going far beyond the appropriate parameters for civil contempt proceedings under our law. It must be reversed.

ARGUMENT

I. All Arguments on This Appeal Were Made and Preserved in the Superior Court, and are Viable.

The District claims, repeatedly and falsely, that the arguments the Owner presents were not preserved since – the District suggests – they were not made in the Superior Court or are "insufficiently developed." *See* Brief for Appellee ("App. Br.") at 3, 15, 33-34, 39-40, 49. Arguments not made in the Superior Court are typically not available on appeal, with exceptions reserved for "exceptional situations and when necessary to prevent a clear miscarriage of justice apparent from the record." *See District of Columbia v. Califano,* 647 A.2d 761, 765 (D.C. 1994) (quoting *Williams v. Gerstenfeld,* 514 A.2d 1172, 1177 (D.C. 1986)). Every single argument made on this appeal was presented to the Superior Court and preserved. The Owner objected repeatedly prior to and after the contested rulings and, right away after the Contempt Order was entered on April 26, 2023, filed comprehensive motions and related filings encompassing its various challenges: a motion for a stay of the Contempt Order (filed May 1, 2023); a motion for reconsideration, or to clarify, vacate, alter, and/or amend the Contempt Order (filed May 8, 2023); a reply

to the District's opposition to that motion (filed May 9, 2023); and a reply to the District's opposition to the motion for stay (also filed on May 9, 2023).[1]

Although the District intimates the Owner should have presciently predicted the exact scope of the crushing rent reductions the Superior Court enacted and leveled specific objections in advance, *see* App. Br. at 15, 33, the requirement is that the arguments be preserved – without a condition that they must precede the Superior Court's rulings. A primary rationale for the requirement that objections be made in the Superior Court is to apprise the parties and the Superior Court of the objections. *See Brown v. Collins,* 131 U.S. App. D.C. 68, 72, 402 F.2d 209, 213 (1968). This permits trial court consideration of such issues. *See Chase v. Gilbert,* 499 A.2d 1203, 1209 (D.C. 1985). In matters committed to the Superior Court's discretion, this requirement also allows this Court to evaluate the exercise of that discretion. *See Crockett v. Deutsche Bank Nat'l Trust,* 16 A.3d 949, 953 (D.C. 2011).

Not only were the arguments presented to Judge Kravitz, but his subsequent exercise of discretion, such as it was, in considering the arguments is patently obvious. Despite the plethora of well-stated and amply-grounded objections and concerns to the approach that Judge Kravitz charted for the case, the submissions

[1] It may be the case that the District's appellate counsel, who are different from the counsel that appeared for the District in the Superior Court, have not reviewed the record fully and are therefore unaware of all proceedings and filings below.

were cursorily and dismissively dispatched in the terse two-page Order dated May 22, 2023. (App. 153-54.)

It became pellucidly obvious later that the Superior Court gave only superficial review, at best, of the Owner's submissions, objections, and concerns. This was apparent during a June 8, 2023 Status Conference (a short time after the denial Order was issued), when the Owner reiterated the concern that the Contempt Order might be read as applying to future tenants (a concern raised explicitly in the earlier motions), and Judge Kravitz indicated that he had not thought about that question, and then off the cuff indicated that the Contempt Order did apply to future tenants, that further briefing was not being permitted because it would be "obviously problematic" to try to unravel the relief later, and that forcing rent reductions and controlling lease terms for future tenants "maybe [] will increase the number of occupied units." (H'g Trans. June 8, 2023 at pages/lines 7:17-8:25, 12:5-12:11.) Every argument on this appeal was made below, the Superior Court has had full opportunity to change course, Judge Kravitz rejected offhand every one of these arguments, and it is obvious that the improprieties stand uncorrected.

The District's effort to escape review on the premise that the Owner has made "skeletal" arguments not fully explained (*see* App. Br. at 39) is no more meritorious. All arguments are explained with clarity and detail. For some, no further explanation is needed or mandated. What the District complains is "skeletal," for instance, is the

multimillion dollar retroactive and prospective windfall that the Superior Court gifted to past, present, and future nonparty tenants. *See* App. Br. at 39. The Owner has explained cogently that this is impermissible because, among other things, those individuals are not parties (and in some instances have had other litigation with the Owner in which related issues were or are being adjudicated, which the Superior Court overrode).[2] This is not a case involving unique situations, such as wage and hour laws, that permit such relief. *Cf. McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949). Nor can this case be a vehicle for the District to short-circuit the litigation and obtain restitutionary relief sought on claims not even referred to in the Consent Order.[3]

Those arguments are plainly and cogently explicated and the District does not explain why they are incapable of being understood and adjudicated, along with all of the other grounds the Owner has presented for reversal of this untenable Contempt Order. Even if this were not so, this case plainly involves an exceptional situation and a clear miscarriage of justice apparent from the record. No property, much less

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[2] The District's effort to recouch the Superior Court's intrusion on separate pending or already-decided cases as a mere requirement that the Owner "make updated filings" (App. Br. at 42) ignores reality. Judge Kravitz expressly affected even cases in which judgments had already been entered. (App. 143.)

[3] No verbal gymnastics can change the March 2, 2022 date of entry of the Consent Order. Not even the speculation of a deliberately repetitive re-entry of an order never docketed or issued (*see* App. Br. 7 n. 1) changes reality. (*See also* App. 15.)

one with 674 residential units, could be expected to operate while having half of the rent taken away at the stroke of a pen, both retroactively and in the future.[4]

II. <u>The Contempt Order is Reversible for Abuse of Discretion, on a Wide Range of Grounds.</u>

As part of its effort to insinuate an artificially-restricted opportunity for appeal of the Contempt Order, the District suggests that only very limited grounds are available to find an abuse of discretion and order reversal, with a review constrained by overriding deference to the Superior Court. *See* App. Br. at 14, 17. This Court's ability to correct the indefensible result below is not so hampered.

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[4] The Owner will avoid repeating arguments from its Opening Brief, but on one critical point, the Superior Court's having targeted the Owner based on perceptions of the wealth and other subjective feelings about the Owner's principle plainly, and improperly, affected the Contempt Order. A property whose Owner is deprived of its right to earn income must necessarily seek alternative sources of funding; otherwise, the apartment complex could not function. The Superior Court undoubtedly knew that and felt operations could be placed at risk based on the expectation that the alternative funding sources would be forthcoming from the Owner's principals. The District suggests that it was fair to force parties not being held in contempt to contribute such funding, App. Br. at 50, based on the finding that the principals "have repeatedly moved more than $10 million in and out of MP PPH, seemingly whenever doing so advanced their investment purposes." (App. 141.) That finding was unfounded, as the related testimony was that another entity loaned funds to acquire the Property in 2015 and that loan was later repaid in 2021 from proceeds of a refinancing. (H'g Trans. Mar. 15, 2023 at pages/lines 140:11-140:23, 143:9-145:5, 149:12-150:2.) It is obvious that both the District and the Superior Court targeted the Owner in a way designed to force financial contributions from other parties and entities. *See also* App. Br. at 32. There was no evidence of impropriety or other such repeated conduct to justify the related impugnment from the Superior Court or the District, and nothing to justify the punitive treatment of the Owner (and indirectly its principals) based on subjective beliefs to the contrary and other sentiments about the Owner's principals.

By its very nature, a civil contempt proceeding itself is not intended to be a one-way path to destruction, even for a party found not to have complied with a consent order or other court order. As cited in the Owner's Opening Brief, this Court's jurisprudence has consistently spoken to the limitations on the extraordinary remedy of civil contempt when it is sought, assessed, and imposed. Significant substantive, procedural, and evidentiary limitations regulate the Superior Court's actions, and on any one of the grounds for this appeal, the Contempt Order could and should be reversed.

Any matter committed to the Superior Court's discretion, in fact, is subject to review by this Court and reversible for abuse of discretion, and where there is an abuse of discretion no deference to the Superior Court is appropriate. *See Coleman v. Carrington Mortg. Servs., LLC,* 312 A.3d 214, 218 (D.C. 2024) (citing *In re D.B.*, 879 A.2d 682, 691 (D.C. 2005) and quoting *Johnson v. United States,* 398 A.2d 354, 364 (D.C. 1979)). *See also Gill v. Van Nostrand*, 206 A.3d 869, 877 (D.C. 2019) ("But '[w]hether evidence meets the clear-and-convincing standard is a question of law that we review *de novo*.'") (quoting *Lewis v. Estate of Lewis*, 193 A.3d 139, 144 (D.C. 2018) and citing *Hipps v. Cabrera*, 170 A.3d 199, 205 n.7 (D.C. 2017)).

The District claims this Court's review of the Contempt Order for abuse of discretion "is supervisory in nature and deferential in attitude." App. Br. at 17. This is an inaccurate recitation of the standard of review. The case cited by the District

for this proposition is one involving the Superior Court's decision whether to permit "targeted discovery" in the context of a special motion to dismiss under D.C. Code § 16-5502, a provision of the District of Columbia's Anti-SLAPP ("Strategic Lawsuits Against Public Participation") Act. *See Fridman v. Orbis Bus. Intel. Ltd.*, 229 A.3d 494, 511-13 (D.C. 2020). Deciding on much less complex discovery matters such as that one is a far cry from the earthshattering decision that is the subject of this appeal.

Additionally, where *Fridman* cites to *Johnson v. United States,* the reference is to the exercise of discretion within its properly-defined parameters; the cited principles do not favor deference to abuses of discretion, which abuses may exist for a wide panoply of reasons including errors of law, the improper exercise of judgment, the assumption of a single answer to a question presented, a determination based on insufficient facts ("if the stated reasons do not rest upon a specific factual predicate"), failure to act within the range of permissible alternatives, failure to act in a rational and informed manner, arbitrary rulings, failure to consider a relevant factor or factors, stating reasons not reasonably supporting the conclusion, and for other recognized abuses of discretion. *See Johnson v. United States,* 398 A.2d at 365-68. Biased abuse of discretion is wrong, whether defended as irrelevant "*dictum*" or otherwise. *See* App. Br. at 41.

The District also cites to *Ford v. ChartOne, Inc.*, 908 A.2d 72 (D.C. 2006) to support the assertion that reversal for abuse of discretion is appropriate "only when" certain limited circumstances are met. *See* App. Br. at 17. While not offering as complete an exposition of the grounds for reversal as other cases from this Court provide, *Ford* in actuality states that reversal – rather than presenting a limited "only when" circumstance – is "likely called for" when the well-known standards for assessing the Superior Court's use of its discretion are exceeded. 908 A.2d at 84-85. Such is exactly the result that should obtain in this case.

III. The "Three-Step" Process Undeniably is Applicable.

The myriad issues with the Contempt Order include the Superior Court's undisputed failure to follow the required three-step process. The District pretends that there is no such procedure, *see* App. Br. at 44-46, ignoring even its own renewed motion, which did not seek the Draconian relief awarded, instead asking only that "the Court enter an order directing Defendant MP PPH LLC to show cause why they should not be held in contempt of the Consent Order and that the Court award attorneys' fees related to this Motion." (App. 108.)

The three-step process is particularly required when drastic sanctions like these are contemplated, and also is consistent with the main purpose of a civil contempt citation, to coerce and encourage compliance (rather than punish the contemnor). *See Hipps,* 170 A.3d at 212. Contrastingly, an immediate,

irremediable, retroactive sanction of millions of dollars is unquestionably punishment, not any "powerful incentive" as the District claims. *See* App. Br. at 15.

In addition to the authorities the Owner cited in its Opening Brief, this Court recently confirmed the three-step process in a *Per Curiam* Memorandum Opinion and Judgment dated December 11, 2023 in the case of *Sarah02, Inc. v. Estate of Elberry,* Nos. 22-CV-0710, 22-CV-0874, and 22-CV-0875. This Court therein held: "This court summarized the three-step process in *D.D. v. M.T.*, 550 A.2d 37 (D.C. 1988):

> First, the Court must issue an order . . . Secondly, following disobedience of that order, there is the issuance of a conditional order finding contempt and threatening to impose a specified penalty unless the recalcitrant party complies with purgation conditions. Finally, should the party fail to purge itself of contempt, exaction of the threatened penalty is the final stage.

Id. at 47 (quoting *Morgan v. Barry,* 596 F. Supp. 897, 899 (D.D.C. 1984))." Mem. Op. & J. at 5-6 (copy provided at A-1 through A-7).

In *Sarah02*, this Court held that the three-step process was properly followed by the Superior Court where a motion for an order to show cause was filed, followed by an August 31, 2022 order to comply with a separate order from a foreign court directing execution of documents to effect rescission of a deed, followed by an October 28, 2022 order finding contempt of Court and ordering daily fines starting on October 29, 2022. *See id.* at 2-6 (A-2 to A-6). The process thus serves the primary interest of the civil contempt power (coercion of compliance), and offers

the possibility of more drastic sanctions in the event of noncompliance. The District's suggestion that the "supposed 'three-step' process that would give MP PPH yet another chance to flout the consent order without consequences," App. Br. at 16, thus misunderstands the procedure and misstates the law. In any case, the Superior Court's declination to follow the three-step process in and of itself warrants reversal.[5]

IV. There is no Governing Authority Supporting the Drastic and Immediate Penalties Imposed by the Contempt Order.

A. The Evidence Received by the Superior Court.

As is appropriate given the seriousness of a claim for civil contempt, a clear and convincing evidence standard applies. The Superior Court acknowledged the standard (App. 117-18) but did not employ it. Given the conflicting facts and evidence, the proof did not rise to the required level. Applying the standards properly, and recognizing that the requirement is "far more demanding than a mere preponderance of the evidence," the District's proof was mandated to "require[] evidence that will 'produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.'" *See In re Wells,* 815 A.2d 771, 783 (D.C. 2003) (citing and quoting *In re T.J.*, 666 A.2d 1, 16 n.17 (D.C. 1995) and *District of*

[5] The District implies some sort of "plausibility" standard regarding the Contempt Order's Constitutional rights violations. *See* App. Br. at 50. No law supports such a standard, which seems to refer to the standard of review on motions to dismiss.

Columbia v. Hudson, 404 A.2d 175, 179 n.7 (D.C. 1979) (with internal citation omitted)). *See also Gill*, 206 A.3d at 877.

Seeking to avoid a scrutinizing review of the inconsistent and conflicting evidence below, the District claims "MP PPH does not dispute that it was in flagrant violation of more than a dozen provisions of the consent order and that no defense applies." *See* App. Br. at 24. This false assertion ignores the Owner's significant "diligent and energetic efforts" to comply and the evidence offered in the case. *See D.D. v. M.T.*, 550 A.2d 37, 44 (D.C. 1988). It was only by ignoring evidence (for example, arbitrarily excluding evidence of actions taken before the Consent Order was entered, or actions taken after the District's renewed contempt motion was filed, or issues with tenant access preventing repairs, vandalism, misuse, fire/casualty, and other causes outside of the Owner's reasonable control), considering improper evidence (such as the perceived wealth of the Owner's principals), construing the Consent Order as disallowing compliance already attempted, or giving undue weight to certain evidence such as the limited testimony of three residents, and discounting the many millions of dollars expended by the Owner, that the Superior Court could cabin the evidence to find the required evidentiary proof of contempt.

In October 2022, just a few months earlier, the prior Presiding Judge found "[t]he Court believes the parties are diligently working toward resolution of the issues within this litigation, but there is still work to do." *See* Order dated October 18, 2022

at 20. The Owner continued its diligent work and efforts at all relevant times, as it continues to do so (evidenced further, and recently, by the Owner's efforts to negotiate with the District and Judge Kravitz the very limited appointment of a receiver in the February 7, 2024 Consent Order the District mentions, App. Br. at 14). As common sense would indicate, managing the work at a massive Property like this is not easy, and this is not a case in which compliance could be immediately and simply fulfilled by execution of a document or a minimal filing. This was a complex matter and one that called for a careful, reasoned, and judicious exercise of discretion – not the "powerful incentive" and "heavy hand" the District now seeks to uphold. *See* App. Br. at 15, 32.

B. <u>The Governing Law Cited by the District.</u>

The District has had ample opportunity in the Superior Court and in this Court to cite any governing authorities that would support the paralyzing sanctions imposed in this case. Every District of Columbia case involving civil contempt sanctions cited by the District in its Brief, however, involves relief proportionate to the harm proven to the opposing party and a judicious exercise of the power to act on noncompliance. The contrast between the relief in the cited cases and the overreach present in this case is stark. *See Loewinger v. Stokes*, 977 A.2d 901, 923-27 (D.C. 2009) (for filing landlord/tenant case in violation of receivership order that placed Court-appointed receiver in control of the real estate, dismissing subject case

without prejudice, requiring dismissal of one other case contemnor had already promised to dismiss, and providing for a hearing to determine financial sanctions in favor of the tenant party (Clement Stokes) to the subject case for lost wages and attorneys' fees incurred as a result of that single specific case); *Fed. Mktg. Co. v. Va. Impression Prods. Co.*, 823 A.2d 513 (D.C. 2003) (for violation of consent decree prohibiting party from conducting business in the District under a certain name, awarding a total of $307,384.93 in profits shown by accounting to have arisen from the prohibited conduct and for attorneys' fees incurred in the contempt proceeding); *District of Columbia v. Jerry M.*, 571 A.2d 178 (D.C. 1990) (for violation of consent decree intended to correct conditions of youths held in juvenile facilities, imposing more specific requirements on the District, while reversing in part on a finding that some of the additional requirements were overbroad); *D.D.* (for violation of stipulation in which the Superior Court joined, requiring plaintiff's counsel to hold minor child's passport in escrow, Superior Court ordered passport to be deposited with Clerk of the Court, that no additional passport be obtained, and that Superior Court approval be granted for any travel outside of the United States for the minor child); *Bolden v. Bolden*, 376 A.2d 430 (D.C. 1977) (in divorce matter in which appellant wife refused to cooperate in agreed-on sale of marital home, Superior Court threatened but did not impose $75.00 per day fine and appointed trustee to carry out sale).

The District also cites at App. Br. at 38 a First Circuit Court of Appeals case involving the prohibited sale of shares in a Park Avenue New York City Cooperative Association Complex, and a civil contempt sanction of $6 million that took into account the $4.6 million sale price and 10.5% prejudgment interest of $1.4 million – plainly and directly proportionate, in actuality roughly equal to, to the effect of the noncompliance). *See Goya Foods, Inc. v. Wallack Mgmt. Co.*, 344 F.3d 16 (1st Cir. 2003).

C. **The Lack of Sufficient and Specific Evidence and Factual Predicate for the Devastating Relief Imposed.**

By no stretch of the imagination did the evidence rise to the level characterized by Judge Kravitz in finding Marbury Plaza an unbearable place to live (past, present, and future). Judge Kravitz himself admitted that the sweeping statements depicting conditions throughout the Property, in every Unit, for all tenants (past, present, and future) were just his estimate. (H'g Trans. Nov. 9, 2023 at page/lines 17:6-17:22.) The District, using what it has to work with, seeks to defend the result by obfuscation and misdirection.

The obfuscation involves the suggestion that there was evidence of mass damages and injury to nonparties that justified an award to compensate the nonparties for noncompliance with the Consent Order. In this vein, the District offers the conclusory assertions that the limited factual evidence offered to the Superior Court proved the overall "conditions" present "in the complex" and

supposed worsening of matters since entry of the Consent Order. *See* App. Br. at 9.[6] Another conclusory assertion is that the evidence proved "complex-wide problems that harmed the tenants *en masse*." *See id.* at 15, 31. Similarly, the District conflates references to various parts of the Property as showing "complex-wide" violations of the Consent Order and related damages. *See id.* at 28. The facts found by Judge Kravitz based on the misconstrued testimony of only three tenants is defended on the basis that their testimony provided "helpful context" on "personal [] experiences living at Marbury Plaza" that were "not unique." *See id.* at 34.[7] No citation is provided for that premise and none exists. Judge Kravitz himself never made any such assertion. It is instead plain that he extrapolated testimony of three residents to create by his interpretation to clear and convincing proof of "horrid conditions" forced on "more than 2,500 human beings." (App. 141.) Similarly unsupported is the

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[6] Judge Heidi M. Pasichow, the Presiding Judge until December 31, 2022, soundly refuted that notion. In her October 18, 2022 Order and at the October 31, 2022 Status Conference, she urged the parties to continue to work together and noted the Owner's ongoing efforts to address open issues. Although the District unfairly casts shade at Judge Pasichow's management of the case, *see* App. Br. at 8, the record reflects her active involvement in the issues and points to the unfairness in how Judge Kravitz recharacterized the factual background shortly after he took over the case and the District sought to capitalize on the reassignment by immediately filing a renewed show cause/contempt motion.

[7] The District's admission that Ms. Cooper did not draft her own declaration, App. Br. at 35, is revelatory; in the Superior Court the District's representatives have claimed, despite the obvious, that tenant declarations offered were authored by their signatories.

speculation that "[i]f MP PPH did nothing to fix the pervasive issues at its property, future residents would equally suffer from its egregious housing violations." *See* App. Br. at 35. It does not somehow undermine the Superior Court's authority to withhold relief to future tenants (also nonparties) whose circumstances were not proven at all.[8]

Refuge is also sought based on the tenuous claim that "the Superior Court did not need testimony from all 2,500 residents." *See id.* at 36-37. The Superior Court gave relief to all residents, and threw into the mix past and future residents as well. Even assuming that relief to nonparties was proper, evidence of injury and damage to those receiving relief was necessary. This is why *District of Columbia v. Bongam* is an apt reference. *See* 271 A.3d 1154, 1162-65 (D.C. 2022) (rejecting District's appeal based on assertion that testimony from a "representative group" of 49 individuals was sufficient to impose liability for an entire group of 136 alleged aggrieved persons). The District's irrelevant suggestion that the standard does not require "mathematical exactitude," App. Br. at 38, ignores completely the other evidentiary requirements. When the District refers to "compensation to those

[8] The District irresponsibly accuses the Owner of wanting license to mistreat future tenants with impunity. *See* App. Br. at 35. The Owner never asked for that and there is no reasonable characterization of the Owner's position that would support such an aspersion. Stating the obvious, the Owner should have the right to enter into leases with new tenants, those new tenants should have the right to choose whether to enter into such leases, and those new tenants would have the ability to independently enforce their rights as appropriate (regardless of any civil contempt ruling in the pending case).

aggrieved," it unwittingly makes the point that the claimed "compensation" is reserved for "aggrieved" parties (not nonparties) and based on specific proof for those persons. Judge Kravitz simply larded out relief to all categories of tenants without any factual predicate whatsoever. The District also cites to unproven allegations in its lawsuit to defend the Contempt Order. *See id.* at 5, 30. It goes as far as to cite a June 12, 2021 *Washington Post* article, id. at 30, that is not part of the record, involves hearsay, has no relevance or probative value at all, and predates the Consent Order and even the lawsuit itself (which the District filed on July 1, 2021). (The Owner objects to the offer and to consideration of the article.)

The District's misdirection involves the remarkable argument that it need not defend the Contempt Order and show that the debilitating relief bore any relation to the facts proven, insofar as "tenant compensation was only *part* of the purpose served by the rent abatement," and the Superior Court was empowered to use "a heavy hand" to coerce compliance. *See* App. Br. at 31-32 (emphasis in original). It would be a convenient means of extricating from the necessity of defending the Contempt Order if the District could use the claimed dual purposes of the Contempt Order to avoid any dissection of its elements and examination whether the remedies were proper. No law exists to provide that insulation from review and none is cited.

The District admits, as it must, that any sanction imposed must be "reasonably proportionate to the offending conduct." *See* App. Br. at 38. There is no evidence, argument, or basis cited to venture anywhere near such a showing in this case.

D. <u>The Lack of Clear and Convincing Proof of the Claimed "Token Effort to Comply" With the Consent Order.</u>

Given the required standards for clear and convincing evidence of noncompliance with a Court Order, the District seeks to malign the Owner's considerable expense and effort to comply with the Consent Order as merely "a token effort to comply." *See* App. Br. at 18, 32. Every civil contempt matter the District cites in which a party was held in civil contempt, or this Court indicated civil contempt was available under District of Columbia law, involved deliberate and total noncompliance or a "token effort to comply." *See J.J. v. B.A.*, 68 A.3d 721 (D.C. 2013) (husband pursued civil protection order in Superior Court despite having agreed to entry of consent order in Maryland State Court that included directive to "endeavor to dismiss" any such pending case); *Loewinger*, 977 A.2d at 917-18 (law firm "repeatedly filed and prosecuted nonpayment actions without any involvement of the receiver, in a manner directly inconsistent with one of the most, if not the most, essential provisions of the receivership order"); *Giles v. Crawford Edgewood Trenton Terrace*, 911 A.2d 1224 (D.C. 2006) (outright failure to make required repairs); *Fed. Mktg. Co.,* 823 A.2d at 520 ("despite VIP's efforts to comply with the consent decree, the court said, VIP had 'continued conducting business pretty much

the way [it] had been conducting business' before the decree was entered") (brackets in original); *District of Columbia v. Jerry M.*, 571 A.2d at 190 n. 28 (District had "taken steps" to comply belatedly, reflecting "a token effort to comply") (quoting *D.D.*); *D.D.*, 550 A.2d at 41 (wife took minor child out of country using passport that was supposed to be held in escrow); *Bolden*, 376 A.2d at 433 ("In face of clear and specific court orders requiring her to act and repeated explicit warnings that her disobedience would be punished, appellant voluntarily undertook a calculated risk not to act. She did so against the advice of her own counsel.").

As of October 2022, when the Superior Court ruled on a prior show cause motion and discussed the case with the parties, plainly there was not a belief, finding, or determination of a mere "token effort to comply." Judge Pasichow found precisely the opposite. *See* Order dated October 18, 2022 at 14-18, 20. After reassignment of the case and the District hastily sought another bite at the apple, not even Judge Kravitz found that this standard was met. Referring in particular to mold assessments, he found that "MP PPH's recent efforts are encouraging, to be sure." (App. 120.) (At the same time, Judge Kravitz complained that he perceived that the Owner had been motivated to do work by the filing of the District's renewed motion (*see id.*) – and apparently finding that the coercion of compliance by a renewed motion somehow warranted the overwhelming levy of punitive relief.)

Respectfully submitted this 8th day of July, 2024.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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