No. 23-CV-832 & 24-CV-45

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETER FARINA,
APPELLANT,
V.
JANET KEENAN HOUSING CORPORATION, *et al*.,
APPELLEES.

PETER FARINA,
APPELLANT,
V.
JANET KEENAN HOUSING CORPORATION,
APPELLEE.

ON APPEAL FROM ORDERS OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

# BRIEF FOR APPELLEE THE DISTRICT OF COLUMBIA

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## STATEMENT OF THE ISSUES

The District of Columbia sued an affordable-housing nonprofit, Janet Keenan Housing Corporation ("JKHC"), to ensure that the sale of its sole asset—the property at 1304 Euclid Street, NW (the Euclid property)—supported JKHC's nonprofit purpose. After nearly a year of litigation and negotiations, the parties reached a settlement and drafted a consent order. That consent order, among other things, provides for the sale of the Euclid property; the distribution of the proceeds to Volunteers of America Chesapeake and Carolinas ("VOACC"), another affordable-housing nonprofit corporation; the dissolution of JKHC; and an option for the current residents of the property to relocate to a VOACC property at the same rent for at least one year. The Superior Court approved the consent order on September 29, 2023, finding that the parties' proposed resolution complied with the doctrine of cy pres and was in the public interest because JKHC's remaining assets will be used to support affordable housing in the District of Columbia.

On July 30, 2023, nearly a year after this litigation began and on the eve of the case's resolution, Peter Farina—a resident of the Euclid property—moved to intervene. The trial court denied that motion on August 24 for several reasons, including that it was untimely and because Farina failed to meet various substantive and procedural requirements in Super. Ct. Civ. R. 24. Specifically, the court found that Farina failed to include a pleading that set forth a claim; failed to establish

standing under the Nonprofit Corporation Act; and failed to show that Farina's interests were unrepresented by the original parties. The issue presented in case number 23-CV-832 (the only case to which the District is a party) is:

Whether the Superior Court abused its discretion when it denied Farina's motion to intervene.

## STATEMENT OF THE CASE

On September 30, 2022, the District filed a complaint against JKHC. Supplemental Appendix ("SA") 2, 23-35. On July 30, 2023, Farina moved to intervene, which the Superior Court denied on August 24. SA 10-11, 75-77. On September 18, Farina sought reconsideration. SA 11. On September 26, the District and JKHC sought approval of its settlement agreement. SA 12. On September 29, the court held a hearing to consider the settlement agreement, which it approved, and denied Farina's motion to reconsider. SA 12-13, 78-102, 104-11. On October 3, Farina timely appealed the denial of his motion to intervene. SA 13. On October 4, Farina sought in the trial court a stay pending appeal. SA 13. On October 16, Farina sought an emergency stay of the trial court's order in this Court. This Court denied the stay on November 21. SA 114. The trial court also denied the stay on January 11, 2024. SA 140.

Farina also filed a separate suit against JKHC on October 7, 2023. SA 177, 186-87. Along with the complaint, he also sought a temporary restraining order

("TRO"). SA 177. The trial court denied the TRO and dismissed the suit on January 11, 2024. SA 140. Farina timely appealed on January 13. SA 184. This Court consolidated the appeals on February 6.

## STATEMENT OF FACTS

### 1. The District Files A Lawsuit Against JKHC And The Parties Reach A Settlement.

JKHC is a nonprofit organization incorporated in August 2000 with a mission to preserve and promote affordable housing in the District of Columbia. SA 23-24 (Compl. ¶ 1); 141 (JKHC Articles of Incorporation). In December 2000, it purchased the residential property located at 1304 Euclid Street, NW. SA 24 (Compl. ¶ 2); 163 (Deed). JKHC operates the Euclid property as a group home for low-income District residents; it does not own or operate any other District real estate. SA 24 (Compl. ¶¶ 2-3).

In April 2022, JKHC notified Farina, a resident at the property and the designated head of the household, that JKHC could no longer maintain the property and that the property would be sold. SA 28 (Compl. ¶ 30). After learning that the Euclid property was under contract, the District sued JKHC in late September, alleging that it violated the Nonprofit Corporation Act ("NCA"), D.C. Code § 29-401.01 *et seq*., for attempting to sell the property without leave of court and without ensuring that the proceeds of the sale support JKHC's nonprofit purpose to promote affordable housing. SA 25 (Compl. ¶¶ 9-12); *District of Columbia v. Janet*

*Keenan Hous. Corp.*, No. 2022-CA-004492-B (D.C. Super. Ct. 2022) (hereinafter "2022 Case"). Along with its complaint, the District filed a motion for a TRO that resulted in a stay of the sale of the Euclid property. SA 36-46 (Motion); 70-71 (Order); *see also* SA 7 (11/7/2022 status hearing minutes). Notably, in support of the motion, the District attached a 23-page declaration from Farina. SA 47-69 (Declaration).

The parties exchanged discovery, including JKHC Board minutes that demonstrated the financial state of its operations and its financial inability to maintain the Euclid property. SA 165-75. By the summer of 2023, the parties had reached a settlement in principle that would allow the sale to go forward, with the proceeds supporting affordable housing in the District through another affordable-housing nonprofit. *See* Dist. Opp'n to Farina's Mot. to Intervene (8/14/2023).

**2. Farina Seeks To Intervene.**

On July 30, 2023, over nine months after the District filed suit, Farina moved to intervene in the 2022 Case. Farina Mot. to Intervene ("Intervention Mot."). Farina claimed that he had a "beneficial interest . . . in residing" at the Euclid property and referred to himself and other residents as "beneficiaries." Intervention Mot. 1, 9, 10. Farina sought to have the contract to sell the Euclid property considered "void, *ab initio*," claiming it was "unlawfully against JKHC purposes, its beneficiaries' interests as well as public interest and policy." Intervention Mot. 1.

Farina acknowledged that JKHC's nonprofit purpose was general: "to preserve and promote affordable housing in the District." Intervention Mot. 2 (quoting JKHC's Articles of Incorporation), 6 (similarly describing the purpose "in general, 'to preserve and promote affordable housing' throughout the District"). Nevertheless, he argued in his motion that JKHC's purpose was specific to the Euclid property and that the property must be transferred "to an entity that is committed to preserving *it* as affordable housing *and* that the transfer be for the least amount of money." Intervention Mot. 8 (first emphasis added).

Farina did not attach a pleading to his motion, nor did he ever file a pleading during the litigation before the Superior Court. He also never stated a claim or explained his right to pursue a claim under the NCA or the Uniform Trust Code ("UTC"), D.C. Code § 19-1301.01 *et seq*.—both of which he cited in the intervention motion to support applying the cy pres doctrine to the sale of the Euclid property. Intervention Mot. 7.

**3. The Court Denies Intervention And Farina Seeks Reconsideration.**

On August 24, the court denied Farina's motion, finding that it was both procedurally and substantively deficient. SA 75-77. First, Farina's motion was "patently untimely," and allowing him to intervene in a year-old case of which he was aware since its inception "would unnecessarily delay the parties' ability to timely resolve this legal action." SA 77. Farina's motion was also procedurally

deficient because it failed to include a pleading that expressly set forth the claim for which he sought intervention, plus he failed to seek the parties' consent before filing his motion. SA 76. Even if the court could overlook these procedural defects, Farina also failed to establish his standing to intervene. SA 76. Farina did "not provide context or clarity concerning whether he seeks to intervene as a Plaintiff, Defendant, or an individual with another interest," and his motion did "not set forth substantive legal grounds to permit his intervention." SA 76.

On September 18, Farina moved to reconsider. SA 11. For the first time, Farina recognized the obligation to file a pleading under Rule 24, and he asserted that his original motion contained the necessary elements of a pleading. Mot. to Reconsider 14-15. However, he still failed to identify the claim or legal ground that would permit intervention.

**4. The Court Approves The Parties' Consent Order And Denies Farina's Motion To Reconsider.**

On September 26, the District and JKHC filed a joint motion asking the court to approve a consent order which, among other things, provides for the sale of the Euclid property; the distribution of the proceeds to VOACC; the dissolution of JKHC; and an option for the current residents of the property to relocate to a VOACC property at the same rent for at least one year. SA 104-11.

At a hearing on September 29, the court considered the parties' motion. SA 78-102 (transcript). The court found that the consent order, which set forth the terms

for disposing of the Euclid property and accommodating its residents, was "consistent with the [d]octrine of [c]y[ ]pres in the disposal of nonprofit assets and dissolution of nonprofit organizations pursuant to D.C. Code Section 29-410[.03(a)]." SA 94.[1] In reaching this decision, the trial court focused on the purpose of the nonprofit: to "preserve and promote affordable housing in the District of Columbia." SA 81. The trial court verified that the articles of incorporation did not include a purpose specific to maintaining the Euclid property. SA 91-92. The court also found that JKHC is no longer financially able to continue operations and must dispose of the Euclid property, its primary asset. SA 93. And the court found that under the consent order, proceeds from the sale of the property will "provide for the relocation of the remaining residents" "into comparable affordable housing opportunities" and "promote affordable housing within the District of Columbia." SA 93-94. Based on these findings, the court approved the consent order. SA 94.

The court also denied Farina's motion to reconsider its August 24 order denying intervention. SA 94-102. The court observed that Farina's intent in seeking to intervene was "to stop the sale of the property at 1304 Euclid Street." SA 94. But

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[1] "The cy pres doctrine is a rule of construction used to preserve testamentary charitable gifts that otherwise would fail. When it becomes impossible to carry out the charitable gift as the testator intended, the doctrine allows the next best use of the funds to satisfy the testator's intent as near as possible." *Democratic Cent. Comm. of D.C. v. Wash. Metro. Area Transit Comm'n*, 84 F.3d 451, 455 n.1 (D.C. Cir. 1996) (internal quotation marks omitted).

the court found that stopping the sale was not a "feasible alternative, given that [JKHC] is financially and operationally otherwise unable to maintain the property." SA 94. The court also found that "intervention is not necessary in order to preserve Mr. [Farina]'s rights" and "interests" and that the "terms of the agreement" "accounted for the needs of the remaining residents in the [Euclid] property and will protect those residents during the sale of the property." SA 95. Stopping the sale of the Euclid property "one year into the litigation, to basically take us back to the starting block would be highly prejudicial to all of the parties" and "contrary to the mission of preserving and promoting affordable housing in [the District]." SA 96. Doing so would also divert additional resources from JKHC "into unnecessary litigation" and "diminish the remaining proceeds that are available" from the sale of the Euclid property "to promote affordable housing." SA 96. Finally, the court rejected Farina's assertion that the cy pres doctrine "require[s] that the [Euclid] property itself continue to be dedicated or restricted only for use and purposes of affordable housing." SA 101. Instead, the court found that what was required—and what the terms of the consent order provided—was "that the proceeds from the sale . . . be dedicated and invested in continuing to preserve and promote affordable housing in the District of Columbia, including but not limited to individuals" "who continue to reside at the" Euclid property. SA 101-02.

**5. Farina Appeals And Seeks A Stay Pending Appeal; Both The Superior Court And This Court Deny A Stay.**

On October 3, Farina filed a notice of appeal of the trial court's denial of his intervention motion. *See* SA 13; App. No. 23-CV-832. On October 4, Farina filed a motion in the trial court seeking a stay pending appeal. SA 13. On October 16, Farina filed in this Court an emergency motion to stay the trial court's order. This Court denied the motion on November 21 because, among other things, Farina had "not demonstrated that he is likely to succeed on appeal." SA 114. On January 11, 2024, the trial court also denied the stay. SA 140.[2]

**6. Farina Files A Separate Suit Against JKHC, The Trial Court Dismisses It, Farina Appeals, And This Court Consolidates The Cases.**

On October 7, 2023, Farina filed a separate lawsuit against JKHC that raised, for the first time, a claim under the Tenant Opportunity to Purchase Act ("TOPA"), D.C. Code §§ 42-3404.01 to 42-3404.14, as well as claims under the UTC. *See Farina v. Janet Keenan Hous. Corp.*, No. 2023 CAB 6168 (D.C. Super. Ct. 2023) ("2023 Case"); SA 176-87. Farina also filed a motion for a TRO. SA 177. The District was not a party to that case. Farina and JKHC presented evidence and argument during four days of hearings. SA 178-82. On January 9, 2024, the court consolidated the 2022 and 2023 Cases, SA 183, and on January 11, the trial court

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[2] The arguments in favor of a stay are contained in the October 20, 2023 transcript. The remaining days of evidence and argument related to the 2023 Case and mostly centered on the claims under the Tenant Opportunity to Purchase Act.

dismissed the claims under the UTC and TOPA in the 2023 Case, SA 140; *see also* SA 118-39 (transcript).

On January 13, Farina appealed the 2023 Case (No. 24-CV-45). SA 184. On February 6, this Court consolidated the two appeals (23-CV-835 and 24-CV-45). On June 4 and June 5, JKHC and the District respectively filed motions for summary affirmance, and JKHC filed a motion to expedite this appeal. On July 8, this Court granted the motion to expedite, denied the motions for summary affirmance, and issued an expedited briefing order.

## STANDARD OF REVIEW

A denial of "leave to intervene as of right" under Super. Ct. Civ. R. 24(a) "is appealable to this [C]ourt as a final order." *Vale Properties, Ltd. v. Canterbury Tales, Inc.*, 431 A.2d 11, 14 (D.C. 1981). "To the extent that the trial court's ruling" "is based on questions of law, it is reviewed de novo," and "to the extent that it is based on questions of fact, it is ordinarily reviewed for abuse of discretion." *Kayan, LLC v. Yunus*, 278 A.3d 1179, 1180 (D.C. 2022) (quoting *McPherson v. D.C. Hous. Auth.*, 833 A.2d 991, 994 (D.C. 2003)). "[W]here intervention of right is sought under Rule 24(a)(2) . . . the [trial] court must exercise its discretion in determining whether the application is timely made and whether the proposed intervenor's interest is adequately represented by existing parties." *McPherson*, 833 A.2d at 994 (quoting *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 125 n.36 (D.C. Cir.

1972)); *see also Vale Properties, Ltd.*, 431 A.2d at 15 ("The determination of the timeliness of the proposed intervenor's motion lies within the trial court's 'sound discretion,' and 'unless that discretion is abused, the court's ruling will not be disturbed on review.'" (quoting *NAACP v. New York*, 413 U.S. 345, 366 (1973))).

## SUMMARY OF ARGUMENT

The sole issue that concerns the District in this consolidated appeal is whether the trial court abused its discretion in denying Farina's motion to intervene in the District's action against JKHC. The court did not abuse its discretion. Instead, the record shows that the trial court exercised sound discretion in denying Farina's motion to intervene because the motion suffered from multiple, independently fatal deficiencies.

*First*, as the trial court found, the motion was "patently untimely." Farina has failed to address this deficiency in his opening brief, and he has therefore forfeited any response. But even if not forfeited, the trial court's decision was not an abuse of discretion. Courts consider several factors to assess timeliness, including the time that has passed since the movant knew of his interest in the suit, the movant's reason for the delay, the current litigation stage, and any prejudice to the original parties or the movant. Here, Farina knew about this litigation from the outset and even participated in it. Yet he waited almost a year before seeking to intervene. Nor did he explain the reason for that delay to the trial court in his motion. And his belated

motion presented real prejudice to the parties. After almost a year of litigation and negotiations, the District and JKHC had reached a settlement. Delaying this matter to allow Farina to intervene put at real risk the settlement agreement and its goal of providing affordable housing to the residents of the Euclid property and the District.

*Second*, the trial court cited Farina's failure to attach a pleading to his motion to intervene or otherwise set forth a claim. This deficiency too is unaddressed in Farina's opening brief, and any argument is thus forfeited. But even if not, the trial court acted well within its discretion to require adherence to the rules of civil procedure. And Farina's motion itself cannot replace a pleading because, as the trial court found, it did not provide clarity on the claims he wanted to pursue.

In any event, even if his motion and its focus on the cy pres doctrine could be construed as a claim under the NCA, Farina lacked standing to pursue such a claim. The NCA limits persons who can bring actions against a nonprofit to the Attorney General, as well as directors, officers, or the corporation itself, and Farina is not among that list. Moreover, Farina's reliance on trust principles in his subsequent litigation against JKHC (filed after his intervention motion was denied) came far too late to justify standing to intervene.

*Third*, the trial court did not abuse its discretion in finding that Farina's interests were already represented in the litigation. Once again, Farina has forfeited any argument to the contrary by not addressing (or even mentioning) this issue in

his opening brief. But even if not, the record supports the trial court's finding. In cases where the government is acting on behalf of its citizens, as the District is here under the NCA, Farina must make a compelling showing that the District is not adequately representing his interests. He cannot make such a showing because the interests are the same: Farina asked the court to apply the cy pres doctrine to the disposal of JKHC's asset, and so did the District. Indeed, the District explicitly ensured that the settlement agreement was reached consistent with the cy pres doctrine and embedded that doctrine into the agreement itself. Farina's disagreement with the District's (and the Superior Court's) cy pres analysis does not establish that he had a unique interest. Anyway, that disagreement is based on a misunderstanding of JKHC's nonprofit purpose—which is to ensure affordable housing in the District, not to maintain the Euclid property specifically.

## ARGUMENT

### I. The Trial Court's Denial Of Farina's Request To Intervene Was Not An Abuse Of Discretion.

Super. Ct. Civ. R. 24 lists several requirements for intervention. The motion to intervene (1) must be "timely" and (2) "must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Super. Ct. Civ. R. 24(a), (c). In addition, the movant must establish an interest that is not already adequately represented by an original party.

Super. Ct. Civ. R. 24(a)(2). The trial court determines whether there is such an interest by considering:

> (1) whether the person seeking to intervene "has an interest in the transaction which is the subject matter of the suit"; (2) whether "the disposition of the suit may as a practical matter impair his [or her] ability to protect that interest"; and (3) whether "his [or her] interest is adequately represented by existing parties."

*McPherson*, 833 A.2d at 994 (quoting *Calvin-Humphrey v. District of Columbia*, 340 A.2d 795, 798 (D.C. 1975)). Simply put, Farina did not meet those requirements. And each of his motion's deficiencies provides an independent reason to affirm the trial court's denial of his motion.

### A. Farina's motion was "patently untimely."

The trial court did not abuse its discretion when it rejected Farina's intervention motion as untimely. To begin, Farina has forfeited any challenge to the trial court's finding on timeliness. "[T]he 'judgment of any trial court is presumed to be valid [and thus a] losing party who notes an appeal from such a judgment bears the burden of convincing the appellate court that the trial court erred.'" *Lynch v. Ghaida*, No. 22-CV-0556, 2024 WL 3709712, at *2 (D.C. Aug. 8, 2024) (quoting *Cobb v. Standard Drug Co.*, 453 A.2d 110, 111 (D.C. 1982)); *see* D.C. App. R. 28(a)(10) (requiring parties to include all arguments in the opening brief). Farina did not meet his burden of showing error. His opening brief does not challenge the trial court's determination or otherwise argue that his motion was timely.

Instead, his sole attempt to address timeliness was to incorporate his motion to reconsider into his brief. *See* Farina Br. 13 (directing this Court to his reconsideration motion to address "questions about the procedural defects or timeliness of his Motion to Intervene"). Such incorporations by reference, however, impermissibly force this Court to search for and develop an argument on appeal, and they are not sufficient to preserve an issue. *See Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do [the party's] work."); *Brown v. United States*, 675 A.2d 953, 955 (D.C. 1996) (declining to consider arguments incorporated by reference). Indeed, federal appeals courts have "consistently and roundly condemned" such efforts to incorporate arguments by reference. *United States v. Orrego-Martinez*, 575 F.3d 1, 8 (1st Cir. 2009); *see, e.g.*, *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1167 n.4 (11th Cir. 2004); *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452-53 (6th Cir. 2003) (collecting cases).[3] Moreover, Farina's motion to reconsider does not adequately

[3] Farina also seeks to incorporate several documents into his brief as a substitute for developing facts, contrary to D.C. App. R. 28(a)(8)'s requirement to include a statement of facts in the opening brief. *See* Farina Br. 12 ("incorporat[ing] by reference" the District's complaint against JKHC, Farina's motions to intervene and to reconsider, and the court's order denying the motion to intervene); Farina Br. 24 ("incorporat[ing] by reference" the September 29, 2023 Consent Order and certain excerpts from transcripts). In addition to violating the Court's rules on the contents of a brief, the incorporation also violates this Court's page limitations. *See* D.C.

address timeliness. He offered a conclusory statement that he "believes [the trial c]ourt erred in failing to find his Motion timely" and asked "so what," if the motion causes delay. Mot. to Reconsider 13, 14.

Even assuming that Farina did not forfeit any argument concerning timeliness, however, the trial court acted well within its discretion. To determine timeliness, the court should consider (1) the time that has passed since the movant knew or should have known of his interest in the suit; (2) the movant's reason for the delay; (3) the current litigation stage; and (4) any prejudice that the original parties would suffer from granting intervention and that the movant would suffer from denial. *Mokhiber v. Davis*, 537 A.2d 1100, 1104 (D.C. 1988); *Anderson v. D.C. Hous. Auth.*, 923 A.2d 853, 865-66 (D.C. 2007) (similar). Each factor confirms that the trial court did not abuse its discretion.

*First*, Farina was well aware of this litigation since its inception. He signed a multi-page declaration in support of the District's motion for a TRO, filed along with its complaint in October 2022. SA 47-69. Yet he filed his motion to intervene almost a year later, in July 2023. SA 77.

*Second*, Farina did not explain the reason for this delay. The motion's silence on this factor was raised by the parties in opposition, *see, e.g.*, D.C. Opp'n 6, yet

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App. R. 32(a)(5) ("A principal brief may not exceed 50 pages."). For example, just the addition of the motion to reconsider adds 24 pages to Farina's opening brief, exceeding this Court's limit by 11 pages.

Farina did not address the delay in his reply. In short, he provided no justification to the trial court for waiting nine months before filing his motion.

*Third*, Farina's motion came as the parties to the litigation had completed discovery, conducted extensive settlement discussions, and were "on the eve of" announcing a settlement in principle. SA 77. "Intervention at that stage" would have "necessitate[d] an especially wasteful and duplicative expenditure of judicial resources." *Vale Properties, Ltd.*, 431 A.2d at 15. This is especially true, as discussed below, given Farina's failure to comply with Rule 24(c)'s pleading requirement. Pausing the resolution of this litigation to allow Farina time to clarify and develop a nebulous claim at such a late stage would have further delayed resolution of this matter.

*Fourth*, intervention on the eve of the parties' settlement "would unnecessarily delay the parties' ability to timely resolve this legal action," resulting in significant prejudice. SA 77. As Farina has never disputed, JKHC does not have the finances to continue operating as an affordable housing nonprofit. SA 94 (noting that JKHC cannot "maintain the property"). Thus, as the trial court explained, delaying these proceedings "would be highly prejudicial to all of the parties" and "contrary to the mission of preserving and promoting affordable housing in [the District]." SA 96. Delay would divert resources "into unnecessary litigation" and

"diminish the remaining proceeds that are available" from the sale of the Euclid property "to promote affordable housing." SA 96.

Delay also puts at risk the future housing of the residents of the Euclid property—including Farina. The parties' settlement agreement provided for their continued housing and support. Pausing implementation of the settlement agreement, as JKHC runs out of funds, puts at risk whether any such support would be available when this case is finally resolved. This factor weighs heavily in support of denying Farina's motion.

In short, Farina's untimeliness and the court's finding of prejudice to the original parties was reason enough to deny his motion to intervene. And the trial court's decision was certainly not an abuse of discretion. This Court can affirm for that reason alone.

**B. Farina's motion failed to set forth a claim.**

In addition to untimeliness, Farina's motion also suffered from several procedural and substantive deficiencies that independently warranted denial. Rule 24(c) is explicit: the motion to intervene "must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Super. Ct. Civ. R. 24(c). The "proposed pleading accompanying a motion to intervene must generally comply with Super. Ct. Civ. R. 7(a), 8, and 10 dealing with pleadings." *Rothberg v. Quadrangle Dev. Corp.*, 646

A.2d 309, 313-14 (D.C. 1994). And this requirement is not merely a formality; it serves an important purpose, ensuring that "all parties understand the position, claims and nature of relief sought by the prospective intervenors." *Id*. at 314 (quoting *Sanders v. John Nuveen & Co.*, 463 F.2d 1075, 1082 (7th Cir. 1972)). Relatedly, the movant must show he has an interest in the litigation. Super. Ct. Civ. R. 24(a)(2). "The pleading should set up the interest of the movant just as the original complaint." *Rothberg*, 646 A.2d at 314.

1. Farina failed to attach a pleading or otherwise state a claim.

Farina's motion failed to fulfill a basic requirement of intervention: attaching "a pleading that sets out the claim . . . for which intervention [was] sought." Super. Ct. Civ. R. 24(c); SA 76.[4] To begin, as with timeliness, this Court need not consider the pleading requirement because Farina has failed in his opening brief to address it. This failure is an independent reason to affirm because Farina has not carried his burden of establishing that the trial court erred in denying his motion for lack of compliance with Rule 24(c), and he has forfeited any argument to the contrary. *See supra* at 14-15.

[4] Farina also failed to certify that he had sought the parties' consent, as required by Super. Ct. Civ. R. 12-I. Along with being a mandatory requirement that aids the court in timely resolving motions, seeking consent also provides an opportunity for the parties to try to resolve disputes outside of litigation.

But even if not forfeited, Farina's failure to attach a pleading still supports affirmance. *First*, the rule is mandatory, and Farina undisputedly did not comply with it. *See* Super. Ct. Civ. R. 24(c) (the motion "*must* state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought" (emphasis added)).

To be sure, a trial court has "discretion to grant a procedurally inadequate motion *if no prejudice results*." *Rothberg*, 646 A.2d at 314 n.17 (emphasis added). But where there is prejudice to the parties, the trial court "clearly may require adherence to the rules." *Id*.; *see also Shevlin v. Schewe*, 809 F.2d 447, 450 (7th Cir. 1987) ("We do not advocate a strict interpretation of the rule in all circumstances . . . but that does not mean that intervenors may totally ignore the rule, particularly where the original parties in the meantime work out a settlement to their lawsuit."). Here, there is clear prejudice to the parties. At the time of Farina's motion, the District and JKHC had worked out a settlement after almost a year of discovery and negotiations. Farina's belated request to intervene without a pleading stating his claims left the parties with little sense of what he intended to argue and how they might respond—and therefore, with little ability to respond to his intervention motion. His failure, therefore, could have resulted in even more delay and wasted resources within the 2022 Case. The trial court was well within its

authority to "require adherence to the rules" that Farina "totally ignore[d]." *Rothberg*, 646 A.2d at 314 n.17; *Shevlin*, 809 F.2d at 450.

*Second*, even if the court excused the procedural inadequacies and treated Farina's motion as a substitute for a pleading, the requirement to set forth a claim remains unmet because the motion did not have a clear statement of the claims he intended to pursue. SA 76. In this regard, Farina is similar to the movant in *Rothberg*. There, the court affirmed denial of a motion to intervene where the movant did not include a pleading and his filing "did not resemble a complaint or answer" because it did not adequately put the parties on notice of the claim. *Rothberg*, 646 A.2d at 314. By contrast, this case differs from *Spring Construction Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980), where a court permitted intervention despite failing to attach a pleading. There, the movant was allowed to intervene despite the lack of pleading because there was no prejudice to the parties, the "petition and accompanying affidavit . . . set forth sufficient facts and allegations to apprise" the parties of the movant's claims and the "failure to file an accompanying pleading was rectified when [the movant] filed its amended complaint shortly thereafter." 614 F.2d at 377.

Here, as the trial court explained, Farina's motion did "not set forth substantive legal grounds to permit his intervention." SA 76. Indeed, his motion failed even to "provide context or clarity concerning whether he seeks to intervene

as a Plaintiff, Defendant, or an individual with another interest." SA 76. At best, his motion sought to apply the cy pres doctrine to the disposition of JKHC's asset—the Euclid property. While that doctrine is applicable through the NCA, D.C. Code § 29-410.03, as stated below, *infra* at 23-24, Farina did not establish that he could pursue an NCA claim or any other type of claim that would apply the cy pres doctrine. Seeking application of a doctrine untethered to a claim does not fulfill the mandate to set forth a claim that "generally compl[ies] with Super. Ct. Civ. R. 7(a), 8, and 10 dealing with pleadings." *Rothberg*, 646 A.2d at 313-14. Moreover, unlike in *Spring Construction*, Farina *never* filed a pleading in the 2022 Case despite being aware of the defect once the parties filed oppositions to his intervention motion. Instead, he wrongly asserted that Rule 24 did not require a pleading, *see* Reply in Support of Mot. to Intervene 3, an argument he understandably abandons on appeal.

In short, Farina's failure to comply with a basic litigation requirement of stating a claim justifying intervention was yet another sound basis for the trial court to exercise its discretion and deny the motion to intervene, and it provides yet another basis for this Court to affirm.

2. Assuming Farina's motion raised a claim under the NCA, the trial court correctly found that he lacked standing.

Relatedly, Farina's intervention motion also failed to provide a basis for standing to bring a claim, which was yet another reason why it was deficient. Standing requires a party to show that he "suffered an 'injury in fact'—an invasion

of a legally protected interest which is . . . concrete and particularized." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Standing "often turns on the nature and source of the claim asserted," and the "injury" required "may exist solely by virtue of statutes creating legal rights" "the invasion of which creates standing." *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (internal quotation marks omitted). The "standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in [Farina's] position a right to judicial relief." *Id*.

Farina appears to be challenging JKHC's power to sell its asset. Such a challenge is permitted under the NCA—but by only the Attorney General or a director, officer, or the corporation itself. *See* D.C. Code § 29-403.04(b); *see also* D.C. Code § 29-401.22 (officer, director, or member can challenge nonprofit corporate action in Superior Court, if the corporate action would affect that person's rights, duties, or status as a director, officer or member ). Indeed, while this Court has not addressed standing specifically under the NCA, in *Sibley v. St. Albans School*, 134 A.3d 789 (D.C. 2016), the Court has "question[ed] whether [a party] has standing" because D.C. Code § 29-403.04 "prohibit[s] challenges to validity of nonprofit corporation's actions as ultra vires except by certain specified individuals, e.g., the Attorney General, directors, members of the corporation." *Id.* at 802 n.8. Quite simply, Farina is not the Attorney General or a director, officer, or the

corporation itself, and thus he cannot challenge the validity of JKHC's corporate action to sell its asset. D.C. Code § 29-403.04(b). Thus, the trial court correctly found that Farina lacked standing. SA 76.

Farina suggests that he has standing as a *former* board member because he served as a board member more than twenty years ago. Farina Br. 19; SA 49 ¶ 12. But the NCA does not include former board members among the persons who can challenge the nonprofit's actions. And while Farina refers in passing to his ouster as a board member in 2002 or 2003, Farina Br. 19, he has not set forth any claim challenging *that* action. *See Bd. of Dirs. of the Wash. City Orphan Asylum v. Bd. of Trs. of the Wash. City Orphan Asylum*, 798 A.2d 1068, 1070 (D.C. 2002) (rejecting trial court's finding that "board of directors and managers [are] without standing to sue over its ouster"). The text of the statute simply does not provide Farina, as a resident of the nonprofit's property, with authority under the NCA to challenge JKHC's sale of that property. *See* D.C. Code §§ 29-401.01 to 29-414.04.

Farina also referenced charitable trusts and the UTC in his motion to intervene. Intervention Mot .7-9. But any claim he had under the UTC (or relying on trust principles to develop standing) was not developed until the 2023 Case, after the 2022 Case was resolved and an appeal had been noted to this Court. *See* 11/1 Tr. 3-4, 14, 19 (trial court referring to the October 20 hearing when Farina's theory on charitable trusts was first sufficiently clarified). As the trial court reasonably

explained, that was not grounds for it to consider the claim (and whether Farina had standing to bring it) as part of the motion to intervene. 11/1 Tr. 22 (trial court explaining Farina's charitable trust theory was not "a basis for [it] to go back and revisit [the] prior denial of [Farina's] motion to intervene"). It was hardly an abuse of discretion for the trial court not to address a claim that Farina failed to properly develop.

### C. Farina's motion failed to show that his interests were not represented by the original parties.

Lastly, the trial court did not abuse its discretion for yet another reason: Farina failed to show that his interests were not represented by the District. Intervention may be denied when the interest of the movant is similar to the interest of an original party. Super. Ct. Civ. R. 24(a)(2) (allowing intervention "unless existing parties adequately represent that interest"). "A presumption of adequate representation will arise . . . when an existing party seeks the same ultimate objective as the applicant." *Vale Properties, Ltd.*, 431 A.2d at 15. So too is there an "assumption of adequacy when the government is acting on behalf of a constituency that it represents." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).[5] Indeed, absent "a very

[5] There is a line of cases in which the assumption of adequacy of representation where the government is "representing the public interest of its citizens" may be overcome: where the District cannot represent the interests of private parties. *Dimond v. District of Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986). But those cases do not apply here, as Farina has never identified an interest that differed from

compelling showing to the contrary," it is assumed that the government "adequately represent[s] the interests of its citizens." 7C Charles Alan Wright, et al., *Federal Practice and Procedure* § 1909 (3d ed. 2024); *see Calvin-Humphrey*, 340 A.2d at 800 ("In most cases we will presume that representation by such authorities is adequate, especially when the issue in controversy is one of policy vested in the discretion of the city government."). "'[S]light difference[s] in interests between the applicant and the supposed representative' will not suffice to show inadequacy of representation." *Vale Properties, Ltd.*, 431 A.2d at 15 (quoting *Nuesse v. Camp*, 385 F.2d 694, 703 (D.C. Cir. 1967)).

Farina has not overcome the presumption that the District adequately represented his interest. To begin, like the other grounds for denying intervention, Farina has not challenged this ground on appeal. In fact, unlike some of the other issues above, his opening brief fails to even mention this issue or incorporate other documents to address it. Rather, his opening brief is entirely silent on whether his interest was adequately represented by the District, and any argument to the contrary is thus forfeited. *See supra* at 14-15.

But even if not forfeited, the trial court's finding that "intervention is not necessary in order to preserve Mr. Farina's rights" and "interests," and that the

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the District's interest or that would conflict with the District's interest in representing the public in enforcing the NCA.

"terms of the agreement" "accounted for the needs of the remaining residents in the [Euclid] property and will protect those residents during the sale of the property," was not an abuse of discretion. SA 95. *First*, Farina's interests and the District's interests were the same—applying the cy pres doctrine to the dissolution of JKHC and the disposition of its asset. Relying on the NCA, the District's claim from the outset was that as a nonprofit, JKHC could not dissolve without ensuring that its assets were disposed in a manner consistent with the cy pres doctrine. SA 25, 27, 31-32 (Compl. ¶¶ 9, 19, 48-55) (asserting a claim under the NCA, D.C. Code § 29-410.03(a), and its requirement to comply with the cy pres doctrine).

*Second*, the District brought this action under its statutory authority to represent the public interest. *See* D.C. Code § 29-403.04. Farina needed to have a "very compelling showing" to overcome the presumption that the District's representation of his interest was adequate. He did not provide such a showing: he did not identify in his filings before the trial court *any* interest that he would have advanced that was not already addressed by the District. His focus, like the District's focus, was on the cy pres doctrine to determine the disposition of the Euclid property. Intervention Mot. 7; Farina Br. 7, 14, 24.

While the merits of the settlement agreement are not before this Court in this appeal, the process of obtaining the trial court's approval of that agreement is further proof that the District adequately represented Farina's interests. The District

expressly considered the cy pres doctrine in reaching a settlement, as did the trial court in approving it.[6] SA 75 (court noting that the District considered the cy pres doctrine in its proposed settlement); SA 94 ("I am satisfied that the terms of the agreement are consistent with the Doctrine of Cy[]pres in the disposal of nonprofit assets and dissolution of nonprofit organizations pursuant to DC Code Section 29-410.[03]"). And the doctrine itself is embedded in the settlement agreement. SA 109 (¶ 15 (relating to the proceeds of the property the agreement provides that if the contract for sale is cancelled, any future disposition must be compliant with § 29-410.03 and the cy pres doctrine), ¶ 18 (noting that the Court finds "the terms of [the Consent] Order are consistent with the doctrine of cy pres in the disposal of nonprofit assets and dissolution of nonprofit organizations")). In short, the District ensured through its representation that the interests of Farina, the other residents, and the public were advanced.

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[6] The cy pres doctrine is applied under the NCA, and the 2022 Case was filed and resolved under the NCA. *See* SA 23-35 (complaint). But even if Farina's allegations under the UTC—that were not fully developed until the 2023 Case—were considered, the result would be the same. Under the UTC, the cy pres doctrine also applies: "if a particular charitable purpose is or becomes unlawful, impracticable, impossible to achieve, or wasteful . . . the court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes." D.C. Code § 19-1304.13(3). Farina has not argued otherwise.

To be sure, Farina apparently disagrees with the outcome of the 2022 Case. Farina Br. 24-29. But just because he disagrees does not mean he has a unique interest for purposes of intervention. Anyway, his disagreement is based on a misunderstanding of the application of the cy pres doctrine and the purpose of JKHC. The cy pres doctrine provides that when it becomes impossible to carry out a nonprofit entity's charitable purpose, its funds may be used to satisfy the intended purpose "as near as possible." *Democratic Cent. Comm. of D.C. v. Wash. Metro. Area Transit Comm'n*, 84 F.3d 451, 455 n.1 (D.C. Cir. 1996). Farina argues that the doctrine required that *the Euclid property* remain as affordable housing. *See* Intervention Mot. 8 (arguing the Euclid property must be transferred "to an entity that is committed to preserving it as affordable housing and that the transfer be for the least amount of money"); Farina Br. 27. But as reflected in his own filings, the nonprofit purpose of JKHC was "generally, as stated in JKHC's Articles of Incorporation . . . 'to preserve and promote affordable housing in the District of Columbia.'" Intervention Mot. 2. JKHC did not have a purpose tied to the Euclid property. Thus, the trial court correctly found that the Euclid property was an asset and that the proceeds of the sale of that asset (after covering the nonprofit's liabilities) would continue to serve the purpose of the nonprofit through VOACC—another nonprofit organization that provides affordable housing. SA 101-02.

In short, Farina has not shown that there was any abuse of discretion in the trial court's conclusion that "intervention is not necessary in order to preserve Mr. Farina's rights." SA 95. This is yet another reason for this Court to affirm.

* * *

For all these reasons, this Court should affirm the trial court's denial of Farina's motion to intervene. Notably, most of Farina's opening brief conflates the 2022 and 2023 Cases. For example, starting with his first two "issues for review," Farina suggests it was error for the trial court to deny intervention because he had an interest in the litigation based on his *TOPA* claim. Farina Br. 4-5, 28-35. But Farina never relied on TOPA in any of the filings in the 2022 Case. *See, e.g.*, Intervention Mot.; Reply in Support; Mot. to Reconsider. Rather, TOPA was raised as a separate claim in the 2023 Case, and the 2023 Case was filed against JKHC alone, and only after the 2022 Case was resolved. *Compare* SA 104 (final order in 2022 Case), *with* SA 186 (complaint in 2023 Case). Similarly, Farina did not fully set forth his charitable trust theory and reliance on the UTC until the 2023 Case. *See* 11/1 Tr. 3-4 (trial court referring to the October 20 hearing when his theory was first sufficiently clarified); *see also* Farina Br. 13, 17, 19, 21, 23 (relying on evidence and testimony from the 2023 Case). Because none of these arguments was before the trial court when it considered Farina's motion to intervene, they cannot form a basis for finding that the trial court abused its discretion in denying that motion.

## CONCLUSION

The Court should affirm the Superior Court's denial of Farina's request to intervene.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on August 30, 2024, this brief was served through this Court's electronic filing system to:

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