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In the

District of Columbia Court of Appeals

DCA CAPITOL HILL LTAC, LLC
and DCA CAPITOL HILL SNF, LLC,

Appellants,

v.

CAPITOL HILL GROUP,

Appellee.

On Appeal from the Superior Court of the District of Columbia Civil Division in Case 2015 CA 008166 B (Honorable John Campbell and Honorable Juliet McKenna)

BRIEF FOR APPELLEE

*STEVEN M. SHEPARD
(*Pro Hac Vice Submitted*)
LEXIE G. WHITE
(*Pro Hac Vice Submitted*)
HALLEY W. JOSEPHS
(*Pro Hac Vice Submitted*)
SUSMAN GODFREY, L.L.P.
One Manhattan West
New York, New York 10001
(212) 336-8330
sshepard@susmangodfrey.com
lwhite@susmangodfrey.com
hjosephs@susmangodfrey.com

CHRISTOPHER A. GLASER
(Bar No. 463583)
JACKSON & CAMPBELL, P.C.
2300 Suite 300
Washington, DC 20037
(202) 457-1600
cglaser@jackscamp.com

Attorneys for Appellee

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RULE 28(a)(2) STATEMENT OF COUNSEL

The undersigned counsel for Appellee Capitol Hill Group certifies that the following listed parties appeared below:

Appellants: DCA Capitol Hill LTAC, LLC and DCA Capitol Hill SNF, LLC

Michael J. Edney
Hunton Andrews Kurth LLP
2200 Pennsylvania Avenue, NW
Washington, D.C. 20037

Filiberto Agusti
Steptoe & Johnson LLP
1330 Connecticut Ave., NW
Washington, D.C. 20036

Mark Oakes
Norton Rose Fulbright US LLP
98 San Jacinto Boulevard, Suite 1100
Austin, Texas 78701

Appellee: Capitol Hill Group

Christopher A. Glaser
Jackson & Campbell, P.C.
2300 N Street, NW, Suite 300
Washington, D.C. 20037

Lexie G. White
Susman Godfrey L.L.P.
1000 Louisiana St., Suite 5100
Houston, Texas 77002

Steven M. Shepard
Susman Godfrey L.L.P.
One Manhattan West, 50th Floor
New York, New York 10001

Halley W. Josephs
Susman Godfrey L.L.P.
1900 Avenue of the Stars, Suite 1400
Los Angeles, CA 90067

RULE 26.1(a) CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Rules of the District of Columbia Court of Appeals, Appellee Capitol Hill Group hereby states as follows: Capitol Hill Group does not have any parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

This appeal is the latest chapter in an eight-year campaign by Appellants (collectively, "**DCA**") to avoid paying rent owed to Appellee Capitol Hill Group ("**CHG**"), a local family-owned real-estate firm, for the use of the hospital building located at 700 Constitution Avenue NE. DCA is owned by Bridgepoint Healthcare LLC ("**Bridgepoint**"), which in turn is owned by Silver Point Capital, L.P., a multi-billion dollar hedge fund in Greenwich, Connecticut ("**Silver Point**"). App. 2561.

After DCA first withheld rent under the parties' Lease Agreement ("**Lease**"), CHG filed this lawsuit in Superior Court for breach of contract. DCA counterclaimed that it was CHG that had breached the Lease, and committed fraud, by failing to install the "new HVAC system" that DCA had just agreed, in the Lease, that CHG "ha[d] installed." App. 1788 (Lease Section 8.4). After years of litigation resulting from, in the Superior Court's words, DCA's "aggressive and time-consuming" approach to the case, the Superior Court held a five-day bench trial. App. 2683.

The Superior Court issued a detailed 36-page decision ruling in CHG's favor on every claim and counterclaim. App. 2559-94 (Findings of Fact and Conclusions of Law) (the "**Opinion**"). The Superior Court found that the evidence was "overwhelming" that DCA "had actual notice of the scope of the new HVAC project" and "ample opportunity" to conduct due diligence of its "scope and cost."

App. 2590-91. The Superior Court's comprehensive Opinion after the bench trial followed CHG's victory on virtually every other pre-trial issue. App. 2683.

This Court should affirm the judgment of the Superior Court. DCA cannot show that the Superior Court's extensive factual findings were clearly erroneous under the highly deferential standard for bench trials set forth in D.C. Code § 17-305(a). Nor can DCA show that the Superior Court improperly resolved the parties' contract claims and DCA's fraud counterclaim, based on those detailed findings.

The Superior Court correctly held that the phrase "new HVAC system" meant "three boilers and two water pumps in the basement, and two chillers on the roof"—all of which CHG did in fact install, and none of which was defective. App. 2583-84. In its Opinion, the Superior Court concluded that the meaning of "new HVAC system" was well understood by DCA:

- "As used and understood by the parties," this phrase "did *not* include the air distribution components that were on every floor of the hospital, in every patient room, and that were quite plainly not new." App. 2583 (emphasis added).
- The evidence showed "DCA was on-site and knew exactly what CHG had installed." *Id.*; *see also* App. 2585 ("DCA cannot credibly claim that it did not know and agree to this.").

- "There could have been no mistake about this." App. 2584. The context of the project was "perfectly clear." *Id.*
- "[I]t is inconceivable that it could have come as a surprise, to any reasonably diligent and well-informed party, that the distribution system at the hospital was not being replaced as part of the 'new HVAC system.'" App. 2571.

Moreover, the Superior Court correctly found that DCA also *waived* its breach-of-contract claims by failing to give notice of any HVAC problems within 90 days, as the Lease required. App. 2585.

The Superior Court also correctly held that CHG "fulfilled [its] obligation" to install a new generator in the hospital. App. 2585. When that generator experienced problems, CHG "arranged for [it] to be fixed," App. 2586, "at no cost to DCA," *id.* 2575. DCA's claim—first asserted at trial—that CHG was also responsible for the hospital's two *other* generators is waived and without any merit. App. 2576-77. "These two . . . were DCA's responsibility to repair", and DCA failed to give notice of any problems with those two generators within 90 days. App. 2586. Moreover, DCA only presented evidence of *indirect* damages (the cost of renting a backup generator), which are barred by the Lease. *Id.*; App. 2577.

With regard to DCA's fraud counterclaim, the Superior Court properly concluded that DCA's claim to have relied on CHG's oral statements about the "new

HVAC system" was "objectively unreasonable," since (as the Superior Court found) DCA had "actual notice" of the scope of the HVAC work and "ample opportunity" to investigate its "scope and cost." App. 2590. DCA's claimed reliance is also barred by the Lease's *two* integration clauses, one of which expressly states that any pre-Lease representations by CHG have no "force or effect." App. 1809; *see* App. 2590.

Finally, the Superior Court correctly determined that CHG was the prevailing party and awarded CHG all of its attorneys' fees under the Lease's fee-shifting provision. App. 2593, 2682-87. DCA now contends that the trial court was *required* to reduce CHG's fees because CHG lost one sub-issue: the method of calculating the late charges that DCA owed. This Court has repeatedly held that trial courts are not required to reduce attorneys' fees in this circumstance. The trial judge who presided over the bench trial was well within his very broad discretion to find that CHG was the prevailing party and entitled to the full amount of its fees.

CHG respectfully asks this Court to affirm the trial court on all issues, and to remand for the Superior Court to award CHG the additional attorneys' fees, expenses, and costs CHG has incurred in this entirely meritless appeal.

STATEMENT OF THE ISSUES

I. Did the Superior Court clearly err in determining that the Lease phrase "new HVAC system" referred only to the new equipment that CHG caused to be installed before the Lease was signed?

II. Did the Superior Court clearly err in finding that DCA waived its claims about the "new HVAC system" or "generator work" projects, by failing to give notice within the 90-day period prescribed by the Lease?

III. Did the Superior Court clearly err in finding that the two other generators were DCA's responsibility, and that DCA's claimed generator damages (the cost of renting a backup) were "indirect" damages for which CHG was not liable under the Lease's damages limitation provision?

IV. Did the Superior Court correctly deny DCA's fraud counterclaim in its final judgment?

V. Did the Superior Court abuse its discretion by finding CHG to be the prevailing party entitled to its reasonable attorneys' fees?

STATEMENT OF FACTS

I. The Property and the Prior Tenant, Specialty Hospital of Washington

CHG's property at 700 Constitution Avenue contains two parcels: the Hospital Parcel and the Apartment Parcel. App. 543-44. In 2004, CHG leased the property to the prior tenant, Specialty Hospital of Washington ("**SHW**"). App. 1882 (PX-6). But SHW did not use the Apartment Parcel, which was vacant and in poor condition. App. 544-46.

The two parcels Were linked by the "central plant" of the HVAC system, which was located in the vacant Apartment Parcel: three boilers in that parcel's

basement, and two chillers on that parcel's roof. App. 545-47. This central plant equipment was old and needed to be replaced. *Id.*

II. 2013: CHG Begins Work on the "New HVAC System"

In August 2013, CHG launched a plan to achieve two goals: first, to provide the Hospital Parcel with new boilers, pumps, and chillers, now to be located in the Hospital Parcel; and second, to develop the Apartment Parcel into apartment buildings. App. 482-83, 545-47. To carry out this plan, CHG leased the ground beneath the Apartment Parcel to 700 LLC, a local property developer. App. 748-49. CHG's Ground Lease with 700 LLC required that 700 LLC install this new equipment in the Hospital Parcel, and provide the Hospital Parcel with an additional generator. App. 848-49, 1197-98.

Also in August 2013, CHG and SHW executed the Sixth Amendment to the CHG-SHW Lease. App. 1923-48 (PX-14). In that Sixth Amendment, SHW agreed to pay "additional rent," in future years, in exchange for the "new HVAC system" that would be installed in the Hospital Parcel. App. 1925-26 ¶ 6. The Sixth Amendment explained the term "new HVAC system" in an attachment called Rider A. App. 1925 ¶ 5. Rider A described the "new HVAC system" as an installation of new central-plant components (three boilers, two pumps, and two chillers) in the Hospital Parcel. App. 1946. These new components would then be "connect[ed] to the existing distribution system" already located in the hospital building. *Id*.

For this plan to work, the developer would have to enter part of SHW's leased space (specifically, the hospital basement) to install the boilers, pumps, and generator there.[1] To facilitate the developer's entry, CHG and SHW granted the developer (700 LLC) a "temporary easement for the construction . . . necessary to install the New HVAC and Generator System (as hereinafter defined) in the existing auditorium currently located within . . . the Hospital Parcel." App. 1860. This easement was formalized in a publicly recorded document titled Declaration of Temporary Easements and Agreement ("**DTEA**"), which was signed by CHG, SHW, and 700 LLC in August 2013. App. 1859-81 (PX-5), 1881 (recorder's stamp).

The DTEA contained an Exhibit D describing the work that the developer would be doing in the Hospital Parcel. App. 1879-81. This document is very similar to Rider A to the Sixth Amendment to the CHG-SHW lease. Like Rider A, Exhibit D to the DTEA described the project as a "new HVAC system" that would consist of the new boilers, pumps, and chillers, and would then be "connect[ed] to" the "existing distribution system." App. 1879, 1860-61 ¶ 2 ("project scope set forth on Exhibit D"); App. 1212-13. The DTEA's Exhibit C was a blueprint of the hospital's basement illustrating precisely where, in the basement, this project would take place. App. 1878, 1860 ¶ 2 (the easement's scope is "generally depicted on Exhibit C").

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[1] No easement was required for 700 LLC to access the roof of the hospital building to install the new chillers, which was done via crane. App. 1192-93.

Before and during this project, the three parties involved—CHG, SHW, and 700 LLC—used the terms "new HVAC system" or "new system" when describing the project. App. 485, 558-59, 1205, 1714, 2122 (PX-113).

III. December 2013 – May 2014: DCA's Representatives Tour the Hospital and Conduct Due Diligence

By late 2013, SHW was in serious financial distress, App. 916, and began defaulting on rent, App. 830. Silver Point learned of SHW's financial distress and expressed an interest in taking over SHW's operations. App. 915-17. Silver Point is a multi-billion-dollar hedge fund in Greenwich, Connecticut that specializes in distressed assets. *Id.*; App. 2566 (Opinion).

Silver Point conducted extensive due diligence before ultimately signing a "term sheet" with CHG on May 22, 2014. In April 2014, Dr. Peter Shin—CHG's founder and CEO—told Silver Point during an in-person meeting that the HVAC project only involved replacing the central components located on the Apartment Parcel and would *not* replace the rest of the HVAC distribution components. App. 2568 (Opinion citing this testimony), 560-61 (testimony). Silver Point's representatives also toured the building and spoke with SHW's representatives about the building's condition. App. 486-87, 975, 1094-95, 2566-69 (Opinion).

The hospital's pre-existing HVAC distribution components primarily consist of air handler units ("**AHUs**") and fan coil units ("**FCUs**"). The AHUs are large distribution units that circulate air. One or more AHUs are located on each floor of

the hospital, typically in utility rooms. App. 488, 1396. The FCUs are individual air distribution components in each patient room. App. 874. At trial, CHG presented evidence that the poor state of this existing HVAC distribution equipment would have been obvious even to lay persons. App. 2484-2490 (photographs). CHG's engineering expert, Reardon Sullivan (the only witness qualified by the trial court as an expert, App. 1391), testified as much. App. 1406-16.

Before Silver Point signed the "term sheet" with CHG, Silver Point senior analyst Thomas Banks obtained and reviewed the CHG-SHW lease and "all amendments" to it. App. 976-77. Those amendments included the Sixth Amendment between CHG and SHW. *Id.* The Superior Court later found, based on Banks' testimony, that Banks was aware of the scope of the "new HVAC system" through his review of the CHG-SHW Sixth Amendment. App. 2568-69 (Opinion).

Contemporaneous documents confirm that Silver Point understood the scope of the "new HVAC system" project well before signing the "term sheet." An internal email, sent by one Silver Point employee to another on April 9, 2014, describes the project as an "HVAC system" "replacement" involving a "move" of equipment from the vacant east-west wing of the building (the Apartment Parcel) to the hospital building. App. 1966 (PX-24). On May 14, 2014, Silver Point's employees received photographs from SHW showing the boiler installation that was underway in the

hospital basement, and a description of the work indicating that it did not include repairs to the AHUs. App. 2027-33 (PX-46 & PX-51), 975-76, 2569 (Opinion).

IV. May 22, 2014: Silver Point and CHG Execute a "Term Sheet"

On May 22, 2014, CHG and a Silver Point subsidiary signed a "Landlord Sale Support Agreement Term Sheet" ("**Term Sheet**"). App. 1701-06 (DX-3). In this document, CHG pledged to support Silver Point's bid to become the "stalking horse" in SHW's bankruptcy. App. 1701-02 ¶¶ 5, 7. CHG also agreed to "fully fund the costs and expenditures required to complete the new HVAC system" and other construction projects. App. 1705 ¶ 18. For its part, Silver Point pledged to pay CHG $4.5 million, over the coming four years, to "cure" SHW's obligations to CHG. App. 1704 ¶ 13. That was significantly less than the $7 million that SHW owed CHG. App. 613.[2]

The parties' Term Sheet did not allocate any specific amount of the $4.5 million "cure" payment to the HVAC work or to any other liability owed by SHW. App. 1704 ¶ 13; App. 862. Nor did the Term Sheet contain any provision requiring CHG to spend any specific amount of money on the HVAC project. App. 1701-06

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[2] CHG's estimates of SHW's liabilities totaled more than $7 million, which included (1) $3,232,448 in unpaid rent and advances on property taxes, parking costs, and construction costs, and (2) a $4 million, round-number cost estimate for the HVAC system project then underway (including interest over 10 years). App. 1968-69 (PX-25), 609-13. The final cost of the HVAC project was unknown in April 2014; CHG only learned it in late 2014. App. 611, 1711 (DX-43), 2124 (PX-123).

(DX-3), 862-65, 991-92.[3] Silver Point never asked for any cost documentation for the HVAC project. App. 612, 985-86.

V. May – December 2014: DCA's Representatives Learn Even More about the "New HVAC System" and Negotiate the Lease with CHG

From May to December 2014, Silver Point and CHG negotiated the terms of the Lease with the assistance of what Mr. Ferrell called "boat loads" of counsel. App. 2583 (Opinion), 661-62, 1093-94.[4] On June 17, 2014, CHG's lawyer emailed an unsigned copy of the DTEA, with Exhibits C and D describing the "new HVAC system," to Silver Point's outside counsel. App. 1813-58 (PX-3). Later that day, CHG's lawyer also confirmed to Silver Point's counsel that the DTEA had been publicly recorded. App. 2106-07 (PX-69).

In July 2014, Silver Point consultant Marc Ferrell (who later became CEO of DCA's parent company) discussed issues with the hospital's HVAC distribution equipment with Dr. Shin (CHG's CEO) and with Susan Bailey (SHW's CEO). Mr. Ferrell was told that the new chiller equipment being installed as part of the "new HVAC system" would not work efficiently with the existing AHUs and FCUs,

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[3] In fact, CHG deleted, from an earlier draft, a proposed provision of the Term Sheet that would have required CHG to spend $4 million on the HVAC project, and Silver Point accepted this deletion. App. 2087, at 2098 (PX-60).

[4] Both CHG and Silver Point learned that the other party drove a tough bargain, and both went into the Term Sheet and Lease negotiations with "eyes open." App. 1014-15; *see* App. 607-08, 924-25.

which were not being replaced. App. 2108-09 (PX-74), 493-95 (Bailey testimony), 2478 (PX-305) (Ferrell email to Bailey noting he raised "the issue with the air handlers" with Dr. Shin). Mr. Ferrell and Silver Point employees then discussed adding a Lease provision that would shift responsibility for the "existing systems" including the "existing ductwork and air handlers in the hospital" from the tenant to CHG. App. 2112 (PX-83). No such language was ever proposed to CHG or included in the Lease. App. 2569-70 (Opinion).

During the summer and fall of 2014, Mr. Ferrell continued to receive updates about the "new HVAC system" project and took additional tours of the hospital. Ms. Bailey and another SHW employee, Henry Vaughn, testified at trial that they personally showed Mr. Ferrell the poor condition of the AHUs and FCUs before the Lease was signed, and told him that the ongoing work would not replace those components. App. 487-92 (Bailey testimony), 870-75 (Vaughn testimony). The Superior Court found their testimony "credible" and Ms. Bailey's testimony "unrebutted." App. 2567-68, 2570.

Two weeks before the Lease was signed, CHG informed Silver Point that the "transition" to the "new HVAC system" was complete. App. 1714 (PX-103), 955-

56.[5] DCA has never contended that the boilers, chillers, and pumps were defective, or that the new equipment was *not* state of the art. App. 1126 (Ferrell testimony about the equipment's "acceptable condition"), 1346 (DCA's engineering witness admitted the "boilers and chillers" had "clear[ly]" "recently been replaced"), 1185-86 (apartment developer who installed the equipment described it as "brand new"), 767-68 (Ted Shin testimony that the new equipment was "very modern").

VI. December 2014: The Parties Sign the Lease and DCA Takes Possession

The Lease was signed on December 16, 2014, and DCA took possession of the hospital property immediately thereafter. In the Lease, DCA agreed to accept the premises in their "AS-IS, WHERE-IS, WITH ALL FAULTS" condition "without representation or warranty of any kind." App. 1787 (Section 8.1). DCA also agreed to be "solely responsible for" the "maintenance and upkeep of" the "HVAC." App. 1787 (Section 7.1); *see also* App. 1793 (Section 13.1). Rent withholding was prohibited. App. 1776 (Section 3.1: rent "shall be payable . . . without set off, deduction or demand except as specifically set forth in this Lease").

The sole exception to these provisions was Section 8.4, which concerned the "new HVAC system" and the "generator work." App. 1788. Section 8.4 gave DCA

[5] Before that, CHG sent Silver Point updates about the HVAC project and asked Silver Point to attend training on the "new HVAC system." App. 2115 (PX-103). No one from Silver Point attended that training. App. 1116.

a 90-day period to "notify" CHG of "any matters to which Tenant objects in connection with such installation." *Id.* Section 8.4 also authorized DCA to withhold rent—but only if CHG failed "to use commercially reasonable efforts to correct an[y] matters identified by Tenant." *Id.* Silver Point's representatives drafted this Section just days before the Lease was signed. App. 2181 at App. 2199 (PX-152).

The Lease also "incorporated and attached" the DTEA. App. 2584 (Opinion citing Sections 1.3, 22.6, and 22.7 of the Lease, App. 1773, App. 1805-06). The DTEA is the document granting the developer access to the hospital basement to work on the "new HVAC system." *Supra*, at page 7 (describing the DTEA).

The Lease contained two integration clauses. In Section 24.10, DCA agreed that: "This Lease contains and embodies the entire agreement . . . . Any representation, inducement or agreement that is not contained in this Lease shall not be of any force or effect." App. 1809. In Section 24.1, DCA "acknowledge[d]" that CHG has not "made any representations or promises with respect to the Premises or the Building except as herein expressly set forth." App. 1807.

The Lease limits CHG's liability to direct damages only: "In no event shall Landlord have any liability to Tenant . . . for any indirect losses or consequential damages whatsoever." App. 1794 (Section 14.1).

VII. March 15, 2015: DCA Gives Notice of a *Generator* Problem But Does Not Give Notice of Any *HVAC* Problems

Section 8.4's 90-day deadline for DCA to "notify Landlord, in writing, of any matters to which Tenant objects" was March 15, 2015. App. 1788.

In the 90 days between taking possession and that March 15 deadline, DCA received even more notice of the poor state of the AHUs and FCUs, including through routine inspections, repair work, and its receipt of a $3.5 million bid to replace the AHUs.[6] DCA did not, during the 90-day notice period, hire any outside professional to inspect any of the HVAC components (new or old). App. 1325.

On the 90th day (March 15), Mr. Ferrell sent an email to Ted Shin, CHG's CFO. App. 1770 (DX-5). In this email, Mr. Ferrell identified problems with "the generator" that CHG had caused to be installed. *Id.* But he did not identify any HVAC problems. Instead, Mr. Ferrell stated that "[d]ue to the cold weather, we have

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[6] On December 30, 2014, SHW's former employee Mr. Vaughn emailed DCA's chief transition officer Kevin Chavez a "911 list" of critical maintenance tasks and estimated costs, including a $3.5 million replacement of 14 of the hospital's AHUs. App. 2285-86 (PX-161), 877-79 (Vaughn testimony). Beginning in January 2015, DCA's building engineer Gonzalo Guisbert inspected the hospital's HVAC distribution units (the AHUs and FCUs) and documented the poor condition of the AHUs. App. 2287-2304 (PX-163), 2473-77 (PX-300), 1238-42 (Guisbert testimony). In February 2015, DCA's Vice President of Plant Operations Tony Garcia sought and received a $3.5 million bid to replace certain AHUs. App. 2307-11 (PX-172 & PX-173). Later that month, DCA hired a repairman to fix "broken coils" in an AHU, at a cost of over $7,100. Supp. App. 293 (Mar. 4, 2015 invoice), 1131 (Ferrell testimony). At trial, DCA's CEO James Linhares admitted that he became aware of AHU problems before March 2015. App. 1319-24.

also been unable to determine the working condition of the new chillers and other components of the HVAC system." *Id.* The email said nothing about DCA's recent inspections of the AHUs and FCUs, its repair bills, or its multimillion dollar bid to replace the AHUs. The Superior Court found that this email did not raise the required "objection" to the "new HVAC system" and did not identify any HVAC "matters" for CHG to "correct." App. 2574, 2585 (Opinion) (DCA's email "ignor[ed] the 90-day clock" and "is not an objection; it is a stall.").

At trial, CHG conclusively rebutted Mr. Ferrell's claim that it was impossible to test the new HVAC components due to the "cold weather." CHG's engineering expert, Reardon Sullivan, explained that it is possible to test a chiller during the winter without damaging the rest of the system. App. 1413-16, 1424-26. The Superior Court credited this testimony. App. 2574 (Opinion). Mr. Sullivan also confirmed that a visual inspection of the AHUs and FCUs would have revealed their poor condition. App. 1415-17. In February 2016 (nearly one year after the 90-day period), DCA's engineering witness, Peter Forella, visually inspected the AHUs and FCUs and confirmed what DCA had already known: that they were in poor condition. App. 1357-59.

VIII. April – July 2015: CHG Causes the Generator to be Repaired

The hospital has three generators in its basement. Their purpose is to provide backup power if there is a power outage. One generator, known as Generator #5,

was installed in 2014 by the apartment developer 700 LLC. App. 728. The other two generators were already in the hospital and were not replaced in 2014. *Id.*

Mr. Ferrell's March 15 email reported "mechanical issues" with "the generator." App. 1770 (DX-5). This reference was understood by Mr. Ferrell and CHG to refer to Generator #5, which both parties understood to be CHG's responsibility to fix. App. 742-43, 1146, 2367 (PX-208). After receiving this email, CHG caused Generator #5 to be repaired at no cost to DCA. App. 744. The Superior Court found that CHG's efforts were commercially reasonable. App. 2590, 2575-76 (Opinion). Generator #5 was back in operation as of May 15, 2015. App. 2338-39 (PX-195), 1218-20.

In June 2015—more than a month *after* CHG had successfully caused Generator #5 to be repaired—DCA rented a backup generator at a cost of $131,000. App. 362. Mr. Ferrell acknowledged at the time that problems with the *other* two generators were the reason for the temporary generator. App. 1146 (Ferrell distinguishing between "our two generators and your No. 5"), 2586 (Opinion).

IX. September – October 2015: DCA Withholds Rent and Claims, for the First Time, that the Lease Required CHG to Replace the AHUs and FCUs

On September 2, 2015, DCA's litigation counsel sent a letter to CHG complaining about the AHUs and FCUs. App. 2388-92 (PX-241). The Superior Court found that this was the first time DCA told CHG that DCA believed that the

Lease phrase "new HVAC system" included these distribution components. App. 2574.

On October 1, 2015, DCA began withholding rent. It ultimately withheld $53,000 in rent for HVAC-related expenses. App. 362. DCA also withheld $131,000 in rent for the costs DCA incurred in renting the temporary backup generator. *Id.* DCA later withheld an additional $1 million rent payment in November 2016. Supp. App. 290-91 (DX-110).

PROCEDURAL HISTORY

CHG filed this lawsuit in D.C. Superior Court on October 22, 2015. App. 23-45. CHG alleged that DCA breached the Lease by withholding rent. DCA responded with three years of "aggressive and time-consuming" litigation conduct. App. 2683. Among other things, DCA caused a two-year delay by improperly removing these proceedings to federal bankruptcy court and "resist[ing] the order remanding" the case, created and lost "meritless" discovery disputes, and significantly raised the stakes of this rent-withholding dispute through its "$18 million counterclaims." *Id.*

The Superior Court (Hon. John Campbell) held a five-day bench trial in December 2018. The Court admitted 125 exhibits and heard testimony from five witnesses for CHG and seven witnesses for DCA. App. 2560. On June 16, 2022, the Superior Court issued an Opinion and Final Judgment that ruled in CHG's favor on every claim and counterclaim. App. 2559-94 (Opinion); App. 2556-58 (Final

Judgment). Beyond the HVAC and generator claims DCA raises in this appeal, CHG also prevailed on heavily litigated claims relating to the hospital's ramp and auditorium projects and DCA's claim that CHG breached the Term Sheet—rulings DCA does not challenge on appeal. *Id.* The Superior Court also found that "CHG is the prevailing party in this lawsuit and is entitled to reasonable attorneys' fees" pursuant to the Lease's fee-shifting provision. App. 2557, 2593.

On July 12, 2022, DCA filed a Rule 59 motion seeking reconsideration of the calculation of late charges that it owed for the withheld rent. App. 16. DCA did *not* seek reconsideration of the Superior Court's finding that CHG was the "prevailing party" entitled to attorneys' fees.

The Superior Court granted DCA's Rule 59 motion on May 18, 2023. App. 2674-81. The court adopted DCA's method of calculating late charges, and directed DCA to pay the $1,002,943 that it owed under that method. App. 2681. The court reaffirmed that CHG remained the "prevailing party" and that the "final amount" of CHG's fee award would be addressed in a "separate order." App. 2675 & n.1.

That "separate order" on attorneys' fees was issued on the same day. App. 2682-87. The Superior Court again found that CHG was "entitled to attorneys' fees" and that the amounts CHG requested were "reasonable and necessary." App. 2686.

Judge Campbell retired from the bench one day later. App. 2730. This case was then reassigned to the Honorable Juliet McKenna. *Id.*

In June 2023, DCA filed another Rule 59 motion seeking reconsideration of Judge Campbell's attorney-fee order. Supp. App. 242-62. DCA's motion contended that Judge Campbell should have reduced CHG's attorneys' fees to account for CHG's "loss" on the sub-issue of the proper method of calculating late charges. Supp. App. 251-58. On August 23, 2023, Judge McKenna denied this portion of DCA's motion for reconsideration, while she granted its request to remove prejudgment interest on the fee-award (a ruling CHG does not appeal). App. 2729-35. This appeal followed.

SUMMARY OF THE ARGUMENT

DCA's Opening Brief is notably silent on the clear error standard that governs this Court's review of factual findings rendered after a bench trial. D.C. Code § 17-305(a); *Lawlor v. District of Columbia*, 758 A.2d 964, 974 (D.C. 2000). Overwhelming evidence supports the Superior Court's conclusion that the key phrase "new HVAC system" was clearly understood by DCA to refer only to the *new* central HVAC components that had been recently installed, and *not* to refer to the obviously aged HVAC *distribution* components. The term "new HVAC system" was defined in the Lease itself and the circumstances surrounding the formation of the Lease confirmed its meaning was "perfectly clear." App. 2584. Moreover, DCA waived its HVAC claims (and any right to withhold rent) by failing to give notice within 90 days—another factual finding reviewed only for clear error. App. 2585.

DCA's generator claims—asserted for the first time at trial—fail because the Superior Court correctly found that the two other generators were DCA's responsibility. App. 2585-86, 2575-77. The Superior Court also correctly found that DCA waived any claims related to the two other generators because it failed to give notice of any problems with those generators within 90 days—again, a factual finding reviewed only for clear error. *Id.* Further, DCA's sole damages—the cost of renting a backup generator—are not recoverable in any event because the Lease states that CHG is not liable for "indirect or consequential" damages. *Id.*

DCA's fraud counterclaim was properly denied, in the Superior Court's final judgment, based on factual findings made after the bench trial. The evidence was "overwhelming" that DCA "had actual notice of the scope of the new HVAC project" and "ample opportunity" to conduct due diligence. App. 2590-91. Those findings are not clear error. The fraud claim is also barred because DCA agreed to two integration clauses, one of which stated that any earlier representations by CHG had no "force or effect." App. 1809 (Section 24.10).

The Superior Court did not abuse its broad discretion in finding that CHG is the prevailing party entitled to its attorneys' fees under the Lease's fee-shifting provision. CHG prevailed on every issue now before this Court, plus several others that DCA has now abandoned. Although CHG ultimately lost one sub-issue, the Superior Court was well within its discretion to find that this one loss, amid a sea of

victory, did not affect CHG's status as the prevailing party. App. 2675 & n.1, 2682-87, 2734.

ARGUMENT

I. Standards of Review

Section 17-305(a) of the D.C. Code governs this Court's review of a bench trial. It states: "the judgment may not be set aside except for errors of law unless it appears that the judgment is plainly wrong or without evidence to support it."

Under this standard, this Court "treats [the trial court's] factual findings as presumptively correct unless they are clearly erroneous or unsupported by the record." *Lawlor*, 758 A.2d at 974 (cleaned up). This Court "view[s] the evidence in the light most favorable to the prevailing party" and "defer[s] to the trial court's credibility determinations unless they are clearly erroneous." *Govan v. SunTrust Bank*, 289 A.3d 681, 690 (D.C. 2023) (cleaned up). This standard "means that if the trial court's determination is plausible in light of the record viewed in its entirety, we will not disturb it whether or not we might have viewed the evidence differently ourselves." *Reed v. Rowe*, 195 A.3d 1199, 1204 (D.C. 2018) (cleaned up).

DCA contends that this Court does not owe "any deference" to the Superior Court because of the delay between trial and judgment. Br. at 32; *id.* at 3, 25, 44, 48. That is not the law in D.C. DCA cites decisions of two *other* jurisdictions dealing with post-trial delays, but both cases are easily distinguished on their facts and did

not apply D.C. law.[7] And in any event, the Superior Court's thorough decisions on the merits of the parties' claims and CHG's attorney-fee request demonstrate its deep familiarity with the record from presiding over the case through trial.

II. The Superior Court Correctly Interpreted the Lease in Resolving the Parties' Contract Claims in CHG's Favor

A. Legal Standard and Standard of Review

In interpreting an unambiguous contract, the court must give "a reasonable, lawful, and effective meaning to all its terms," and "ascertain[ ] the meaning" of contractual terms "in light of all the circumstances surrounding the parties at the time the contract was made." *Debnam v. Crane*, 976 A.2d 193, 197 (D.C. 2009) (cleaned up). "Extrinsic evidence may be used to determine the circumstances surrounding the making of the contract." *Id.* Any "factual disputes" that a trial court resolves, about those circumstances, are reviewed only for clear error. *Spencer v. Spencer*, 494 A.2d 1279, 1286 (D.C. 1985).

Based on its factual findings about the contract's "circumstances," the court then determines what a "reasonable person," aware of those "circumstances," would have understood the disputed contract language to mean. *Akassy v. William Penn*

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[7] Both cases involved far longer delays (eight and twelve years); both applied a "clear error" standard; and both affirmed after finding no basis to suggest that the trial courts misapprehended any facts. *See Keller v. United States*, 38 F.3d 16, 21-22, 34 (1st Cir. 1994); *Hollis v. United States*, 323 F.3d 330, 334-39 (5th Cir. 2003).

Apts. Ltd. P'ship, 891 A.2d 291, 299 (D.C. 2006). This legal conclusion is reviewed *de novo*.

B. The Superior Court Correctly Interpreted the Term "New HVAC System" in the Term Sheet and the Lease

This Court should affirm the Superior Court's judgment on the "new HVAC system" breach-of-contract claims and counterclaims. The Opinion's detailed factual findings demonstrate that this phrase unambiguously referred solely to the new boilers, chillers, and pumps—which DCA has never contended were defective. This phrase did *not* promise a replacement of the older distribution components.

1. The Superior Court Did Not Clearly Err in Finding that the Lease Includes the DTEA, Which Defines the Term "New HVAC System"

The Superior Court found that the Lease contained the DTEA and all its exhibits. App. 2583-85, 2563 & n.3, 2565-66. This finding—about what documents comprise the parties' agreement—is reviewed only for clear error. *Spencer*, 494 A.2d at 1286.

The finding is amply supported by the evidence and by the Lease itself. *See Debnam*, 976 A.2d at 197. The Lease states that the DTEA is "attached hereto" as "Exhibit F" and "made a part hereof." App. 1773 (Lease Section 1.3); *see also* App. 1805-06 (in Lease Sections 22.6 and 22.7, DCA agrees to be bound by the DTEA). The DTEA (including all its exhibits) was recorded with the D.C. Recorder of Deeds. App. 1881 (recording stamp). Silver Point's counsel asked for—and received—

confirmation from CHG that the DTEA had been recorded. App. 2106-07 (PX-69), 1813-58 (PX-3), 2569 (Opinion). Silver Point's counsel also received an unsigned version of the DTEA containing Exhibits C and D. App. 1813-58 (PX-3).

The DTEA defines and explains the term "new HVAC system." App. 2583-85 (Opinion). Exhibit D to the DTEA described it as meaning an installation of new boilers, pumps, and chillers, which would then be "connect[ed] to" the "existing distribution system." App. 1879. Exhibit C shows where, in the basement, this would take place. App. 1878, 1860 ¶ 2.

To refute this evidence in the Lease itself, DCA raises two meritless attacks. *First*, DCA claims that it should not be bound by the DTEA because that easement was created for a "different purpose." Br. at 3, 33-34. But in the Lease, DCA acknowledged that purpose—the redevelopment of the Apartment Parcel—and agreed to be bound by the DTEA on the same terms as SHW. App. 1805-06 (Sections 22.6 & 22.7). *Second*, DCA suggests that an email sent four months before Lease signing—which inadvertently omitted the last three pages of the DTEA—somehow changed the scope of that publicly recorded easement. Br. at 34-35. The publicly recorded version, which Silver Point knew existed, controls. *See Drake v. McNair*, 993 A.2d 607, 616-18 (D.C. 2010) (trial court did not err in finding that a "reasonable inquiry" would have given plaintiff "actual knowledge" of publicly recorded deed's contents); App. 2566.

2. The Superior Court Did Not Clearly Err in Finding that DCA's Representatives Had "Actual Notice" of the Scope of the HVAC Project

Even if the Lease itself did not unambiguously define the term "new HVAC system" in the DTEA that was "attached" to and "made a part of" the Lease, this Court should still affirm because the meaning of this term is also unambiguously clear from the "circumstances surrounding" the Lease. *Debnam*, 976 A.2d at 197. The Superior Court made numerous factual findings regarding these "circumstances," which are reviewed only for clear error. *Spencer*, 494 A.2d at 1286.

Section 8.4 states that the parties "agreed and understood" that the landlord "has installed" (past tense) the "new HVAC system." App. 1788. The Superior Court found that the boilers, chillers, and pumps had in fact been recently installed weeks before the Lease was signed. App. 2567-70, 2584. The distribution components (the AHUs and FCUs) had *not* been recently installed. *Id*. DCA does not even try to dispute those factual findings.

The Superior Court also found that DCA, long before signing the Lease, had "actual notice" that the hospital's AHUs and FCUs were not being replaced. App. 2590, 2583-84. Silver Point toured the hospital and spoke with CHG's and SHW's leadership about the HVAC distribution components. *Supra*, at pages 8-10.

3. The Superior Court Correctly Held that "New HVAC System" Did Not Refer to the Hospital's Old Distribution Components

After making all these factual findings, the Superior Court then correctly determined what a "reasonable person," aware of these "circumstances," would have understood the term "new HVAC system" to mean. *Akassy*, 891 A.2d at 299 (reasonable person is "presumed to know all the circumstances surrounding the contract's making" and is "bound by usages of the terms which either party knows or has reason to know."). This legal conclusion is reviewed *de novo*. *Id.*

A reasonable person would have read Section 8.4's past tense—the landlord "has installed"—to mean that the term "new HVAC system" referred only to the chillers and boilers that "had" just been "installed," and did not include all the AHUs and FCUs, which quite obviously had not been newly "installed." App. 2571 (Opinion) (the lack of a "major" construction project on each floor of the hospital "would have been immediately apparent to anyone who set foot in the hospital"), 2583-84 ("There could have been no mistake about this."). A reasonable person would also have understood from the DTEA and its Exhibits C and D that the term "new HVAC system" was limited to the installation of new boilers, chillers, and pumps, and did *not* include replacement of the hundreds of AHUs and FCUs located throughout the hospital. *See* App. 2584-85 (Opinion) ("Here, [new HVAC system] was specifically defined in context of the specific work that is the focus of this

litigation. That context is perfectly clear: the term refers to the HVAC central plant that was in the basement (and partly on the roof) of the building.").

A reasonable person, with all this knowledge of the "circumstances surrounding" the Lease, would most certainly not interpret the term "new HVAC system" by recourse to a dictionary definition of the term "system" and a website article about the term "HVAC"—as DCA now contends. Br. at 36. App. 2584-85 (Opinion) (rejecting DCA's reliance on "a dictionary meaning, without reference to context").

Therefore, this Court should affirm the Superior Court's judgment denying DCA's counterclaim that CHG breached the Lease by failing to install a "new HVAC system." For the same reason, this Court should affirm the Superior Court's judgment that DCA breached the Lease by withholding rent based on its claim that CHG had breached Section 8.4 by failing to replace the AHUs and FCUs.

C. The Superior Court Did Not Clearly Err in Finding that DCA Waived Its Right to Bring a "New HVAC System" Claim Because DCA Failed to Give Notice Within 90 Days

Even if the Lease term "new HVAC system" included the HVAC distribution equipment (and it plainly did not), this Court should still affirm the judgment for a separate and independent reason. The Superior Court correctly determined that DCA waived any claim of breach by failing to timely object within Section 8.4's 90-day notice period. App. 2585; *see* App. 1788 (Lease Section 8.4 required DCA to either

"accept" the HVAC "installation" *or* give notice of "any matters" to which DCA "objects" within 90 days of Lease signing).

The Superior Court correctly found that Mr. Ferrell's March 15 email, sent on the last day of the 90-day notice period, does not "state any 'matters to which the Tenant objects in connection with' the HVAC system, so that CHG could 'use commercially reasonable efforts to correct' them, as required by Section 8.4. Rather, it announces that DCA has not even tested the equipment yet." App. 2574, 2585 (DCA's email "is not an objection; it is a stall."). The Superior Court's factual finding that DCA did not timely object to any HVAC matters is fully supported by the record. DCA identifies no error in this factual finding.

Instead, DCA wrongly contends that that this finding is a legal conclusion reviewed *de novo*. Br. at 38. Not so. This Court has held that "[w]hether or not an owner has accepted defective performance" "is generally a question of fact." *Phenix-Georgetown, Inc. v. Chas. H. Tompkins Co.*, 477 A.2d 215, 222 & n.21 (D.C. 1984).

DCA's failure to give timely notice means that DCA waived any counterclaim that CHG breached Section 8.4 and any right to withhold rent. *Id.*; *see also Williams v. Dudley Trust Foundation*, 675 A.2d 45, 47, 50, 55-56 (D.C. 1996) (affirming judgment entered following bench trial). In *Williams*, this Court held that a tenant's "[f]ailure to give the requisite notice [is] deemed a waiver which relieve[s] the [Lessor] of any further liability." *Id.* at 47, 56. This is especially true where, as here,

the tenant otherwise takes the property "as is" and fails to hire a "professional" to make "a reasonable inspection" within the contractual notice period. *Id.*; *see* App. 2573-74 (Opinion) (making these findings).

DCA contends that Mr. Ferrell's email shifted the burden to CHG to dispute the sufficiency of that email. Br. at 37-39. To support this argument, DCA relies solely on the final sentence of Section 8.4. *Id.* But that sentence says nothing of the sort. Section 8.4's final sentence gives CHG two options for responding to a proper notice: either use "commercially reasonable efforts to correct" the issue or else "dispute" it. App. 1788. For CHG to do either of those things, DCA first had to provide adequate notice of what it "object[ed]" to. DCA did not do that. App. 2574.

DCA also tries to excuse its failure to give timely notice by arguing that "cold weather" prevented it from "testing" the HVAC equipment. Br. at 39-40. This argument fails as a matter of law because the Lease does not contain any "cold weather" exception to Section 8.4's 90-day notice requirement. DCA contends that the Lease's *force majeure* clause excuses DCA's failure to give timely notice, App. 1810 (Section 24.18), but DCA identifies nothing unusual about D.C.'s winter weather in early 2015 that would rise to the level of *force majeure*.

DCA's excuse also fails on the facts. The Superior Court found that cold weather would *not* have prevented a professional engineer from testing the equipment. App. 2574 (crediting testimony of Plaintiff's expert Mr. Sullivan). The

trial court's credibility finding on this point is entitled to special deference. *Chatman v. Lawlor*, 831 A.2d 395, 401 n.10 (D.C. 2003). Nor was a professional inspection even required in order for DCA to give notice that the AHUs and FCUs were in need of repair. DCA had ample *actual notice* of this during the first three months of 2015 through routine inspections, repairs, and multi-million-dollar bids to replace AHUs. *Supra*, at page 15 & n.6 (summarizing evidence).

D. The Superior Court Correctly Found that DCA Breached the Lease by Withholding Rent for the Cost of Renting a Backup Generator

For three independent reasons, the Superior Court correctly determined that CHG did not breach Section 8.4's generator provision and that DCA did breach the Lease by withholding rent for backup generator rental costs: (1) CHG's obligation under Section 8.4 was limited to the one generator (Generator #5) that the parties understood was CHG's responsibility; (2) DCA's 90-day "notice" email only raised issues with Generator #5; and (3) DCA did not incur any direct damages. App. 2585-86.

Mr. Ferrell's March 15 email gave notice to CHG of issues with only one of the hospital's three generators—Generator #5. App. 1770 (notifying CHG that "the generator is still not functioning" and has "mechanical issues"). The Superior Court correctly found that CHG took commercially reasonable steps to repair Generator #5 and thus satisfied its obligation under Section 8.4. App. 2585-86, 2576. DCA

does not challenge that ruling on appeal. Instead, DCA contends that CHG was required to repair the two *other* generators (#3 and #4), which malfunctioned *later* in 2015. This untimely argument, regarding CHG's supposed responsibility for the *other* two generators, was raised for the first time during trial.[8]

The Superior Court correctly determined that these two other generators were DCA's responsibility. App. 2576. There is no clear error in this finding. DCA's Mr. Ferrell stated as much in an email in summer 2015. App. 2367, 1146.

Even if the other two generators *were* CHG's responsibility (and they weren't), this Court should still affirm because the Superior Court correctly found that Mr. Ferrell's March 15 email only gave notice to CHG regarding issues with Generator #5. App. 2585-86, 2575. DCA's failure to give timely notice within the Lease's 90-day period waived DCA's right to claim that these two other generators were defective. *See Williams*, 675 A.2d at 55-56.

In any event, DCA's only claimed damages—the cost of a backup generator—is neither compensable under the Lease nor a permissible basis for withholding rent. The Superior Court correctly held that CHG cannot be liable for this cost because Section 14.1 bars DCA from recovering "indirect or consequential" damages. App.

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[8] That claim appears nowhere in DCA's counterclaims (which reference "the generator" and "a generator"), App. 313-31, and CHG objected to trial on this undisclosed claim, App. 443. The Superior Court noted the untimeliness. App. 2576-77 & n.7.

2586. Consequential damages are those that "do not flow directly and immediately from the breach, but only from some of the consequences or results of the breach." 24 Williston on Contracts § 64:16 (4th ed.).

Section 8.4 contains no exception to Section 14.1 that would authorize rent withholding for the backup generator. Rather, Section 8.4 only authorizes DCA to withhold rent for costs that DCA "incur[red]" to "correct" the "matters" that DCA identifies in its 90-day notice. App. 1788 (Section 8.4). The Superior Court correctly found that DCA did not present any evidence that it "incurred" any costs to "correct" any of the three generators. App. 2577, 2586.

E. The Superior Court Appropriately Addressed the Context of the Prior Tenant's Bankruptcy Proceedings

DCA's final contract-based argument is that the Superior Court somehow erred by "failing appropriately to address the Lease's [bankruptcy] context." Br. at 41-44. This section of DCA's brief cites no relevant authority and identifies no legal error. DCA's failure to explain this argument amounts to waiver. *Wendemu v. Tesema*, 304 A.3d 953, 959 & n.3 (D.C. 2023) (party waived argument "by not articulating a clear legal basis for her challenge" and failing to "include any citations to the record or law"). Even if not waived, the argument is meritless. The Opinion is replete with findings about the SHW bankruptcy and the Lease's context. *See* App. 2561-62, 2566-68, 2585, 2591-92.

III. The Superior Court Correctly Entered Judgment in CHG's Favor on DCA's Fraud Counterclaim

A. Legal Standard and Standard of Review

To show that DCA was defrauded by CHG regarding the "new HVAC system," DCA bears the "very high" burden to prove fraud by "clear and convincing evidence." *Wash. Inv. Partners of Del., LLC v. Sec. House, K.S.C.C.*, 28 A.3d 566, 575-76 (D.C. 2011) (cleaned up). Because this is a "case[] involving [a] commercial contract negotiated at arm's length," DCA must satisfy the "further requirement" that its reliance on the alleged misrepresentations was "*reasonable*," in addition to proving the traditional common law elements of fraud. *Hercules & Co. v. Shama Rest. Corp.*, 613 A.2d 916, 923 (D.C. 1992) ("At common law, the requisite elements of fraud were (1) a false representation (2) made in reference to a material fact, (3) with knowledge of its falsity, (4) with the intent to deceive, and (5) an action that is taken in reliance upon the representation.").

This Court has "time and again imposed a very high standard on sophisticated business entities claiming fraudulent inducement in arms-length transactions," holding that "[i]t is fundamental that in a business transaction between two sophisticated entities involving substantial sums, as was this transaction, parties are bound by what they sign." *Wash. Inv. Partners*, 28 A.3d at 575-76 (affirming grant of summary judgment against fraud claim) (citing *Hercules*, 613 A.2d at 931-33) (cleaned up).

In reviewing the Superior Court's factual findings on this counterclaim, this Court "view[s] the evidence in the light most favorable to the prevailing party." *Govan*, 289 A.3d at 690 (cleaned up). The Superior Court's factual findings are treated as "presumptively correct," and can only be overturned for clear error. *Lawlor*, 758 A.2d at 974 (cleaned up). Legal conclusions are reviewed *de novo. Id.*

B. The Superior Court Correctly Determined that DCA Had "Actual Notice" of the New HVAC System and that DCA's Reliance On Any Alleged Misrepresentations Was "Objectively Unreasonable"

1. The Superior Court's Extensive Factual Findings Are Amply Supported by the Record

The Superior Court correctly denied DCA's fraud counterclaim in its final judgment. App. 2557 ¶ 6 (Final Judgment); App. 2590-91 (Opinion). The Superior Court found there was "overwhelming" evidence that DCA's "representatives had actual notice of the scope of the new HVAC project" and that DCA's due diligence opportunities made any reliance on CHG's alleged misrepresentations "objectively unreasonable." App. 2590-91.

The thrust of DCA's fraud argument is that Silver Point was defrauded into signing the Term Sheet on May 22, 2014. This point in time—May 2014—is what DCA now calls "the point of no return" because afterward, it claims, Silver Point was committed to funding SHW's hospital operations and serving as the "stalking horse" bidder in SHW's bankruptcy. Br. at 42. DCA contends that if not for CHG's alleged fraud in April and May, Silver Point would not have signed the Term Sheet

or committed the funding. *Id.* Key to this entire (meritless) argument is DCA's factual claim that it never had sufficient opportunity to discover the state of the hospital's HVAC distribution equipment until *after* it signed the Term Sheet. *Id.*

That factual contention—that DCA was unable to conduct due diligence into the scope and cost of the "new HVAC system" project before signing the Term Sheet—is conclusively refuted by the Superior Court's factual findings: "Silver Point had ample opportunity, and every incentive, to conduct an independent investigation into the scope and cost of the HVAC system project . . . for two months prior to signing the Term Sheet . . . . No one impeded [its] due diligence opportunities." App. 2590-91 (also finding that "CHG did not have exclusive access to this information"). Those findings are amply supported by the record.

Before signing the Term Sheet, Silver Point discussed the HVAC project with CHG's CEO Dr. Shin in April 2014 and learned that the existing distribution components would not be replaced; Mr. Banks reviewed the SHW lease and all amendments (including Rider A to the Sixth Amendment, describing the HVAC work); an internal Silver Point email on April 9, 2014 described the project as a "move" of certain components from the Apartment Parcel to the Hospital Parcel; and Silver Point toured the hospital and received photographs of and written updates on the project. *Supra*, at pages 8-10. Again, all of this happened *before* the Term Sheet was signed. App. 2567-69 (Opinion).

These factual findings thoroughly refute DCA's claim to have somehow been defrauded in connection with signing the Term Sheet. DCA's opportunity to conduct due diligence into the scope and cost of the HVAC project is, in and of itself, enough to show that reliance on CHG's statements wasn't objectively reasonable. *See Drake*, 993 A.2d at 620-21, 624-25 (affirming dismissal at pleading stage on this ground); *Wash. Inv. Partners*, 28 A.3d at 576 (affirming grant of summary judgment against fraud claim in part on this ground). And DCA didn't just have the *opportunity* to conduct due diligence, DCA actually *did* conduct it—again, even prior to signing the Term Sheet—and obtained a wealth of information that clearly showed the limited scope of the HVAC project that was well underway in April 2014. *Supra*, at pages 8-10. As for the alleged cost misrepresentations—which CHG denies and which are refuted by the contemporaneous written evidence—Mr. Banks admitted that Silver Point never asked for the basis for the HVAC estimate, or for any documentation of the "final cost of HVAC installation." App. 985-86 (Banks testimony), 610-12 (Ted Shin testimony that Silver Point never asked about CHG's "out-of-pocket" HVAC costs).

2. The Superior Court Correctly Ruled that the Lease's Integration Clauses Barred DCA's Fraud Counterclaim

Even if this Court were to disregard the Superior Court's numerous factual findings, this Court should still affirm based on the Lease's integration clauses and the sophistication of the parties. App. 373, 2590-91 (Opinion).

A "complete integration clause in [a] contract ma[kes] reliance on statement[s] outside of [the] contract legally irrelevant" in a fraud claim. *Sibley v. St. Albans Sch.*, 134 A.3d 789, 811 & n.17 (D.C. 2016) (describing *Hercules*, 613 A.2d at 927-29). Generally, this rule is strictly applied "at least in the context of commercial dealings at arm's length." *Hercules*, 613 A.2d at 929-35 (reliance on prior representation not included in fully integrated contract could not be "reasonable"); *see Wash. Inv. Partners*, 28 A.3d at 575-76 (same).

DCA relies on *Drake v. McNair* to argue that there is no "blanket exemption to claims of fraud in the inducement" for "prior representations that conceal fraudulent conduct." Br. at 26 (quoting *Drake*, 993 A.2d at 624). But *Drake* supports CHG, not DCA. *Drake* held that an integration clause *does* bar a fraudulent inducement claim that is based on "prior representations that a party will or will not do something *in the future*." *Drake*, 993 A.2d at 623-24 (emphasis added). That was precisely what DCA pleaded in its counterclaim and presented at trial. App. 325 (pleading), 986 (Banks testimony). DCA claimed that it was fraudulently induced by CHG's alleged pre-Lease statements about what CHG would do *in the future*, namely, install a "new HVAC system" costing $5 million. DCA's Opening Brief

also contends that it was misled about the *future* efficacy and cost of the "new HVAC system." Br. at 2, 25, 29-30, 42.[9]

The only exception *Drake* recognized, to the general rule that an integration clause will bar a later fraudulent inducement claim, was for a claim based on the defendant's fraudulent acts of "conceal[ing]" and "shielding information." *Drake*, 993 A.2d at 623-24. That is not this case—though DCA now tries to characterize it that way. Br. at 29-30. DCA cannot demonstrate that anything was "concealed" about the HVAC project's scope, since that was clearly *disclosed* in Rider A of the CHG-SHW Lease, which Mr. Banks read before signing the term sheet. *Supra*, at page 9. As for the alleged misrepresentation about CHG's out-of-pocket *cost* of the HVAC project,[10] DCA cannot demonstrate any "affirmative conduct" by CHG to "prevent discovery." *Drake*, 993 A.2d at 620-21. DCA has never alleged (or offered

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[9] DCA also takes issue with the description of the "new HVAC system" as "state of the art." Br. at 2, 9-11, 25, 30, 42; App. 1022-23 (Ferrell testimony that this reference was made in emails); *see* App. 1714 (DX-4) (email). But DCA offered no evidence that the "brand new," "modern" equipment that was actually installed was not "state of the art" and has never claimed that any of those components (boilers, chillers, pumps) are defective. *Supra*, at page 13. In any event, the term "state of the art" is "mere puffery" with respect to the *quality* of this new equipment. *See Pearson v. Chung*, 961 A.2d 1067, 1076 (D.C. 2008).

[10] DCA claims that CHG represented that it would ultimately pay $5 million out-of-pocket for the HVAC work, and that this was fraud because CHG's costs were fixed through an agreement with the apartment developer (who did the work). Br. at 10. CHG disputed (and refuted) this allegation at trial. App. 587 (Dr. Shin testimony), 612 (Ted Shin testimony).

any evidence) that CHG did *anything*, prior to signing the Term Sheet, to prevent DCA from investigating the scope or cost of the HVAC work. To the contrary, the evidence of Silver Point's due diligence and the parties' pre-Term Sheet conduct was fully aired at trial. In light of that evidence, the Superior Court made findings about DCA's unimpeded diligence opportunities—findings that, again, are subject only to clear error review. *Supra*, at pages 8-13.

DCA's attempt to invoke *Drake*'s "concealment" exception also fails for another reason: a defendant's alleged "failure to disclose information that has not even been requested" cannot constitute "fraudulent concealment" as a matter of law. *Id.* at 620-21 (affirming dismissal on this basis). That is yet another reason for this Court to affirm, since DCA's representatives never asked CHG about the scope of the HVAC work, or about the basis for CHG's $4 million, round-number cost estimate, or for documentation of CHG's out-of-pocket spend. *See* App. 1104 (Ferrell testimony), 985-86 (Banks testimony that Silver Point never asked for a "final cost of HVAC installation"), 610-13 (Ted Shin testimony that Silver Point never asked about CHG's "out-of-pocket" HVAC cost); *see also* App. 854-55.

Aside from *Drake*, DCA also relies on two federal district court pleading-stage decisions. Br. at 27-28. Neither of them supports DCA's arguments. *Jacobson v. Hofgard* is another *concealment* case regarding then-existing facts, and the pleadings raised questions about "the parties' relative bargaining power and

sophistication." 168 F. Supp. 3d 187, 204-05 (D.D.C. 2016). That is not this case. As for *Schwab v. MissionSide, LLC*, the contract at issue was nothing like the Lease here. The *Schwab* contract's integration clause was weakened by an express representation by the defendant that prior "representations . . . were true and complete." 2021 WL 5138445, at *8 (D.D.C. Nov. 4, 2021). The Lease, by contrast, rents the building in its "AS-IS, WHERE-IS, WITH ALL FAULTS" condition and "*without* representation or warranty of any kind" about the HVAC system. App. 1787 (Section 8.1) (emphasis added).

Finally, DCA relies on several non-D.C. cases that (it claims) give less deference to integration clauses. Br. at 28-29. But DCA offers no reason to depart from this Court's precedent. *See KS Condo, LLC v. Fairfax Village Condo. VII*, 302 A.3d 503, 507-08 (D.C. 2023).

C. This Court Should Review the Superior Court's *Final* Judgment, Not the Pre-Trial *Summary* Judgment

DCA's brief asserts—without citation to any authority—that this Court's review is limited to the Superior Court's pre-trial *summary* judgment ruling and not the Superior Court's *final* judgment. Br. at 31. The law is exactly the opposite. This Court's jurisdiction is limited to reviewing the Superior Court's "final order[] and judgment[]." D.C. Code § 11-721(a). That final order and judgment were based not only on the legal conclusion that the Lease's integration clauses and the sophistication of the parties barred DCA's fraud claim (the basis for the court's pre-

trial grant of summary judgment) but also on the numerous *factual* findings described above. App. 2590 (Opinion) (evidence was "overwhelming" that DCA had "actual notice" of the scope of the HVAC system project and that DCA's "reliance on alleged misrepresentations was objectively unreasonable"). It was entirely appropriate for the Superior Court to include those additional factual findings in its final order and judgment for review by this Court.

DCA also contends—again citing no authority—that the Superior Court's pre-trial summary judgment ruling somehow "*barred*" the Superior Court from later making additional factual findings or legal conclusions, in its final order and judgment, relating to its denial of DCA's fraud counterclaim. Br. at 31 & n.2. This argument is waived because DCA failed to make it below.[11] *Hollins v. Fed. Nat. Mortg. Ass'n*, 760 A.2d 563, 572 (D.C. 2000).

A finding of waiver is particularly appropriate here because DCA itself *asked* the Superior Court to hear DCA's evidence relating to the supposed fraud. *Id.* ("[A] litigant may not take one position at trial and a contradictory position on appeal." (cleaned up)). The Superior Court granted summary judgment against DCA's fraud

[11] CHG's post-trial submission asked the Superior Court to find that DCA's reliance was "objectively unreasonable" and that DCA's representatives had "notice" and "ample opportunity to conduct due diligence." Supp. App. 150-52. DCA did not object to CHG's request for these factual findings, even as the parties submitted a joint errata addressing a different dispute over their competing submissions. Supp. App. 218-20.

counterclaim on the first day of trial, just minutes before opening statements. App. 412. Moments later, DCA's counsel indicated that DCA intended to present its fraud case anyway, and the court agreed that DCA could do so:

> DCA's counsel: [T]he fraud issues, you know, are important and we certainly do believe the representations slash misrepresentations about the HVAC system are parol evidence that inform the meaning of the contracts, [and] we're prepared to present that evidence to Your Honor.
>
> THE COURT: Okay, all right.

App. 413. DCA was fully prepared to do so. The parties' joint pretrial statement contemplated a trial of DCA's fraud counterclaim. Supp. App. 33-35, 38. And over the next five days of trial, DCA did indeed "present" its "evidence" of fraud relating to the HVAC project's scope and cost.[12] All of the factual findings in the Superior Court's Opinion were thus tried with DCA's consent. *Flippo Constr. Co. v. Mike Parks Diving Corp.*, 531 A.2d 263, 269 (D.C. 1987) (concluding trial court did not err in considering misrepresentation defense because "a review of the trial transcript reveals that [plaintiff] impliedly, if not explicitly, agreed that these issues be tried").

[12] Mr. Ferrell testified that he relied on CHG's pre-Lease statements, about the "new HVAC system," as meaning "a new HVAC system, which would mean it would function." App. 1024 (Ferrell), 935-37 (Banks). DCA's witnesses also testified to alleged statements, by CHG, about the "$5 million" future cost of the "new HVAC system." App. 944-46 (Banks), 1016 (Ferrell). CHG's counsel cross-examined DCA's witnesses on these points. App. 1096-97, 1103-04, 1110, 1113 (Ferrell), 973-74, 986-92 (Banks). DCA's counsel also cross-examined CHG's witnesses on these points. App. 587-88, 596 (Dr. Shin), 747, 767-68, 817-18 (Ted Shin).

Even if not waived, DCA's contention that the Superior Court was *barred* from expanding upon its pre-trial summary judgment ruling is meritless. "Nothing prevents a trial court from" reconsidering a prior interlocutory order, so long as the reconsideration is "consonant with justice." *Marshall v. United States*, 145 A.3d 1014, 1018 (D.C. 2016). Even if the Superior Court's post-trial factual findings were to be considered as an "alternate ground" for affirming the pre-trial summary judgment, that too would be permissible—so long as no "procedural unfairness" would result. *Caesar v. Westchester Corp.*, 280 A.3d 176, 187-88 (D.C. 2022) (finding no "procedural unfairness with affirming" on an "alternate ground," because plaintiff "obviously had every incentive to demonstrate in the trial court that she had a viable housing-discrimination claim").

It was consonant with justice (and *not* procedurally unfair to DCA) for the Superior Court to include, in its final judgment, additional factual findings based on the evidence received at trial. DCA itself *asked* the Superior Court to hear this evidence. App. 413. Further, these factual findings were inextricably intertwined with DCA's claim, at trial, that CHG had breached the Term Sheet and the Lease. *See* App. 2583-85, 2588-89, 2591-92 (Opinion) (denying DCA's counterclaims that CHG "breached the Term Sheet as well as the lease itself"). These facts are part of the "circumstances surrounding" the formation of the Term Sheet (and the Lease) and therefore were properly tried to the Superior Court. *Debnam*, 976 A.2d at 197.

DCA, in its Opening Brief, does not point to any exhibit that it would have submitted, or any testimony that it would have elicited, to demonstrate its alleged lack of knowledge or the reasonableness of its alleged reliance, but for the Superior Court's summary judgment ruling on the first day of trial. Br. at 31 & n.2.

IV. The Superior Court Did Not Abuse Its Discretion by Awarding CHG Its Attorneys' Fees as the Prevailing Party

A. Standard of Review

Fee awards are "firmly committed" to the "informed discretion of the trial judge" and are subject to "limited" appellate review. *Lively v. Flexible Packaging Ass'n*, 930 A.2d 984, 988 (D.C. 2007) (cleaned up). This Court "requires a very strong showing of abuse of discretion to set aside the decision of the trial court." *Id.* This Court's deference is even more "substantial" where, as here, "the judge addressing the fee petition is the same judge who conducted the pre-trial conference and presided over the trial of the case." *Id.* at 993.

DCA's proposed *de novo* standard is wrong. Br. at 24. DCA cites a criminal case, *Mitchell v. United States*, 80 A.3d 962, 971 (D.C. 2013), that says nothing about fee awards. *De novo* review applies only when a party challenges the trial court's *authority* to award fees. *See Assidon v. Abboushi*, 16 A.3d 939, 942 (D.C. 2011). DCA makes no such challenge here.

An extra layer of deference is due in this case because DCA's challenge is to Judge McKenna's order denying DCA's Rule 59 motion to reconsider. The denial

of a motion for reconsideration is reviewed for abuse of discretion. *Onyeneho v. Allstate Ins. Co.*, 80 A.3d 641, 644 (D.C. 2013).

B. Judge Campbell Properly Exercised His Discretion to Award Fees

DCA's primary argument is that the Superior Court disregarded an alleged "requirement," in D.C. law, to reduce CHG's fee award because of CHG's post-trial loss on the sub-issue of how to calculate late charges. Br. at 45-48. No such "requirement" exists, and the Superior Court did, in fact, consider CHG's sub-issue loss. App. 2734; *see also* App. 2675 & n.1, 2682-87. But there is no need for this Court to even reach the merits because DCA never made this argument in its opposition brief to CHG's attorney-fee motion. Supp. App. 229-40.

Even if not waived, DCA cannot overcome the "substantial deference" due to the judge who presided over the trial. *Lively*, 930 A.2d at 993. As Judge Campbell correctly found, CHG prevailed at every stage of this case and on every major issue—and CHG "reasonably" incurred its attorneys' fees "to deal with" the many "obstacles" DCA created throughout this litigation. App. 2683-84; *see also* Supp. App. 269-70. DCA does not seriously dispute these findings.[13] Rather, DCA argues

[13] DCA does contend that the Superior Court "erroneously justified the fee award on grounds that the court had granted summary judgment that $1.2 million in rent was improperly withheld, and the Hospital should have paid this sum over to the Landlord before trial." Br. at 47 (citing App. 2674). The Attorney-Fee Order doesn't award fees on that ground. App. 2682-87. This sole claim of factual error lacks merit.

that Judge Campbell's findings deserve little deference because of the delay between trial and judgment. Br. at 47-48. Again, that is not the law in D.C. *Supra*, at page 23.

C. Judge McKenna Properly Exercised Her Discretion to Deny DCA's Motion for Reconsideration of the Fee Award

The very first reason Judge McKenna gave, for denying DCA's motion to reconsider, is that DCA failed to make this "partial success" argument in its opposition to CHG's attorney-fee motion. App. 2733. DCA now fails to even *mention* this ground for denial. Br. at 47-49. Judge McKenna was well within her discretion to find that DCA could have and should have made this argument earlier. App. 2733. *See Onyeneho*, 80 A.3d at 647 (no abuse of discretion where trial court declines to consider "an argument made for the first time" on reconsideration).

Even if this Court were to reject Judge McKenna's first ground for denying DCA's motion for reconsideration (untimeliness), this Court should still affirm on the other grounds set forth in Judge McKenna's order. Judge McKenna found that "the record in this case, as well as [] commonsense" demonstrated that Judge Campbell *had* considered CHG's loss on this sub-issue, and had found CHG to be the prevailing party anyway. App. 2733. *See supra*, at pages 19-20. Therefore, Judge McKenna correctly determined that Judge Campbell's assessment was entitled to "substantial deference." *Lively*, 930 A.2d at 993; *see* App. 2731-32.

Judge McKenna also correctly denied DCA's motion to reconsider on the merits. As she explained, DCA's argument—that CHG's failure to prevail on one

sub-issue necessarily requires a reduction in CHG's attorney fee award—"is simply not supported by the caselaw in this jurisdiction." App. 2734. In *Washington Nationals Stadium, LLC v. Arenas, Parks & Stadium Solutions*, this Court held that any reduction in attorneys' fees, based on a prevailing party's loss on some issues, is *discretionary*, not *required*. 192 A.3d 581, 587-88 (D.C. 2018) (the trial judge "*may* adjust the fee to reflect the level of success" (emphasis added)). A trial court should consider two factors: "(1) whether the plaintiff failed to prevail on claims that were unrelated to the claims on which he succeeded, and (2) whether the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." *Id.* (cleaned up); *see Lively*, 930 A.2d at 992.

Judge McKenna expressly considered both factors. She noted CHG's success on all claims and counterclaims, and found that the late-charge sub-issue did not justify reducing the fee award because it had consumed minimal attorney time in the case and was related to CHG's successful claims. App. 2734. That finding is correct: Less than five percent of the trial transcript pages concern late charges and only one witness (CHG's CFO Ted Shin) testified on this topic.[14]

DCA also contends that the late-charge sub-issue is more important because

[14] This issue is mentioned on just 56 pages of the 1,191-page trial transcript. App. 443-46, 450, 478-79, 616, 619-32, 654, 823-36, 845-48, 1499-1503, 1559-64, 1573-76. The parties' post-trial briefs discussed the issue on just 17 of 145 pages. Supp. App. 68-71, 154-62 (CHG), 197-98, 207-08 (DCA).

of the amount of money at stake. Br. at 5, 17-18, 45. Not so. In *Thanos v. D.C.*, this Court found no abuse of discretion where the trial court awarded the plaintiff's full request for attorneys' fees, even though the trial court did not award *any* damages. 109 A.3d 1084, 1092 (D.C. 2014). A "fee award should not be reduced simply because the [party] failed to prevail on every contention raised in the lawsuit." *Id.* Moreover, DCA is wrong to focus on the amount of late charges that CHG calculated in *June 2022*, several years *after* trial. Br. at 45. The relevant point in time is the December 2018 bench trial because by that point, the vast majority of CHG's attorneys' fees had been incurred and paid. At the time of trial, the amount of money at stake in the late-charge calculation sub-issue was less than 25% of the total amount in dispute between the parties.[15]

DCA also claims that CHG's late-fee calculation was the "principal impediment to settlement." *Id.* at 49. Not only is this assertion false, it is also irrelevant. In *Lively*, this Court reversed the trial court for doing exactly what DCA now urges. 930 A.2d at 994 ("a trial court should not . . . use the information provided in settlement letters for the purpose of determining" attorneys' fees).

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[15] At trial, CHG's calculation method yielded late charges and interest of $4.48 million. App. 2593. DCA's alternative calculation, at that time, yielded approximately $366,000. Supp. App. 271. The difference was $4.1 million, which was less than a quarter of the *$17.9 million* in damages that DCA sought for its fraud counterclaim. App. 2683, 1346-47.

V. CHG Is Entitled to Additional Attorneys' Fees for This Appeal

This Court should find that CHG is the prevailing party on appeal. CHG respectfully requests a remand to the Superior Court for the sole purpose of awarding CHG attorneys' fees, expenses, and costs for this appeal. *Jacobson v. Clack*, --- A.3d ---, 2024 WL 630207, at *10 (D.C. Feb. 15, 2024); *see also* D.C. App. R. 39.

CONCLUSION

For the foregoing reasons, CHG asks this Court to affirm the Superior Court's judgment and remand solely for the Superior Court to award appellate fees, expenses, and costs to CHG.

Dated: March 25, 2024

Respectfully submitted,

/s/ Christopher A. Glaser
Christopher A. Glaser (Bar No. 463583)
Jackson & Campbell, P.C.
2300 N Street, NW, Suite 300
Washington, D.C. 20037
P: (202) 457-1600
cglaser@jackscamp.com

Steven M. Shepard (*Pro Hac Vice Submitted*)
Lexie G. White (*Pro Hac Vice Submitted*)
Halley W. Josephs (*Pro Hac Vice Submitted*)
Susman Godfrey L.L.P.
One Manhattan West, 50th Floor
New York, New York 10001
P: (212) 336-8330
sshepard@susmangodfrey.com
lwhite@susmangodfrey.com
hjosephs@susmangodfrey.com

Attorneys for Appellee Capitol Hill Group

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of March, 2024, the following individuals were served by e-mail notification from the Court's filing system:

Michael J. Edney
(D.C. Bar No. 492024)
HUNTON ANDREWS KURTH LLP
medney@huntonak.com
2200 Pennsylvania Avenue, NW
Washington, DC 20037
Telephone: (202) 778-2204

Mark Oakes
(*Admitted Pro Hac Vice*)
NORTON ROSE FULBRIGHT US LLP
mark.oakes@nortonrosefulbright.com
98 San Jacinto Boulevard, Suite 1100
Austin, Texas 78701
Telephone: (512) 474-5201
Counsel for Appellants

/s/ Christopher A. Glaser
Christopher A. Glaser

District of Columbia
Court of Appeals

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

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
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     (1) the acronym "SS#" where the individual's social-security number would have been included;
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     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Christopher A. Glaser
Signature

Christopher A. Glaser
Name

cglaser@jackscamp.com
Email Address

23-cv-516, 23-cv-775
Case Number(s)

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Date