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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA **Plaintiff,** **v.** **EQUITY RESIDENTIAL MANAGEMENT, L.L.C., *et al.*,** **Defendants.**	**2017 CA 008334 B** **Judge Yvonne Williams**

ORDER ON REMEDIES

Before the Court is Plaintiff District of Columbia's (the "District") Third Amended Complaint against Defendants Equity Residential Management, L.L.C. and Smith Properties Holdings Van Ness, L.P. (collectively, "Equity"[1]), filed February 24, 2020. This bifurcated matter appeared before the Court for a Non-Jury Trial on liability from December 7, 2020 through December 16, 2020. On April 23, 2021, the Court issued an Order wherein it entered judgment in favor of the District with respect to claims under D.C. Code §§ 28-3904(e) & (f); the Court entered judgment in favor of Equity for all other claims in the Third Amended Complaint.

As to the current remedies phase, before the Court is the District's Brief on Remedies, filed June 25, 2021. Equity filed its Opposition to District of Columbia's Brief on Remedies ("Opposition") on August 18, 2021. On September 10, 2021, the District's Reply Brief on Remedies ("Reply") followed. On September 23, 2021, this matter appeared before the Court for a Remedies Hearing. Counsel James Graham Lake, Benjamin Wiseman, and Laura C. Beckerman appeared for the District. John Letchinger and Carey S. Busen appeared for Equity. Consideration of remedies in this matter is now fully ripe and the Court awards relief as follows

[1] The Parties have stipulated that "for the limited purposes of this trial," Smith Properties Holdings Van Ness, L.P. and Equity Residential Management, L.L.C. may be referred to jointly or singularly as "Equity," and distinguishing between the affiliates is not necessary in this instance. PTX385 ¶ 1.

in this Order.

I. RELEVANT BACKGROUND

This case concerns findings that Equity's advertising and leasing practices regarding a 625-unit rental apartment property located at 3003 Van Ness Street, NW, Washington, DC 20008 ("Property") are in violation of the Consumer Protection Procedures Act ("CPPA"). *See generally* Order (Apr. 23, 2021). The below established facts are relevant to the Court's consideration of the requested relief in this matter.

A. EQUITY'S BUSINESS PRACTICES

From February 2013 to February 2019, Equity leased apartments using a pricing structure that included monthly concessions, or recurring discounts, subtracted from the total monthly rent on the lease.[2] *See, e.g.*, DTX264 at 1. Equity misrepresented or omitted material facts about its pricing structure with prospective and current tenants throughout various stages of communication—including initial online engagement, in-person apartment tours, the tenant application process, the first lease signing, and lease renewals.

Many prospective tenants' initial engagement with the Property was through online advertisements located on Equity's website, Craigslist, and third-party websites such as apartments.com and hotpads.com. *See* PTX390 ¶¶ 13, 55, 56; PTX372 at 2; 12/9/20 AM Tr. at 89:6–19 (Makinde discussing online apartment search). Equity's website advertised monthly apartment rents with a concession applied, if any, but did not indicate which quoted rents had a concession applied or the concession amount. *See* PTX390 ¶ 15; *see also* PTX001; PTX054; PTX060.A. From February 28, 2013 to May 16, 2015, no disclosure existed regarding a concession. *See* DTX005 ¶ 2(a); PTX350. A disclosure first appeared on Equity's website on

[2] Equity discontinued the use of rent concessions in February 2019. DTX005 at 2.

May 20, 2015; it read: "Quoted rent may include a concession. Contact the community for more information." DTX005 ¶ 2(a); PTX327 at 30. This disclosure was located near the end of the website and below the listed apartment results. *See* PTX327 at 19–32. This disclosure was also in "one of the lower [font sizes] within legibility for a human." *See* 12/9/20 PM Tr. at 73:8–12. In July 2017, the disclosure was updated to read, "Actual rental rates may be higher than the amounts quoted. Quoted amounts may reflect your rental payment after a concession, if one has been applied." PTX390 ¶ 24. The updated disclosure was moved higher on the website to the beginning of the section listing available apartments. PTX327 at 49–57.

On Craigslist, Equity posted approximately seven apartment advertisements per day. PTX390 ¶ 56. The Craigslist advertisements quoted the post-concession price as the "rent," but did not disclose the existence or amount of any concession at least until July 2017. *Id.* ¶¶ 57–59; *compare* PTX003 (Craigslist advertisement from May 23, 2017 with no disclosure), *with* PTX004 (Craigslist advertisement from November 19, 2018 with a concession disclosure). Equity posted similar apartment advertisements on third-party websites such as apartments.com and hotpads.com with post-concession rent prices, but tenants testified there was no concession disclosure. *See, e.g.*, 12/9/20 AM Tr. at 89:6–19.

After seeing online advertisements, some prospective tenants chose to visit the Property for in-person tours. During the tours, Equity's employees explained that the Property was rent controlled. 12/7/20 AM Tr. at 77:1–4; 12/8/20 PM Tr. at 8:9–13. Employees also quoted the post-concession apartment prices to tenants, but did not always indicate that the building used or that the quoted price included a rent concession. *See, e.g.*, 12/7/20 AM Tr. at 76:13–25; 12/7/20 PM 90:2–10; 12/8/20 AM Tr. at 20:22–21:14. Thus, at the time prospective tenants chose to apply for an apartment, they were aware that the quoted rent "may reflect your rental payment

after a concession, if one has been applied," based on online advertisements, but regularly did not receive any further information about the concession. *See* PTX327 at 49–57 (Equity's website).

If prospective tenants chose to take the next steps in leasing at the Property, they submitted online or paper rental applications. PTX064 (online application); PTX060.F (online application); PTX372 (paper application). The application listed a "Monthly Apartment Rent." *Id.* Neither the online or paper applications included information about rental concessions, nor did they indicate whether a concession was included in the monthly rent of the apartment for which a tenant was applying. *See id.* Prospective tenants were required to pay a non-refundable application fee of $75.00 and a holding fee of $200.00 when submitting the application. PTX064. The $200 holding fee was generally credited towards a tenant's first month rent upon move-in. 12/15/20 AM Tr. 55:21–56:3.

Once Equity approved an application, it provided tenants with the lease, comprised of a Term Sheet and Additional Lease Addenda. *See, e.g.*, DTX264. The Term Sheet detailed the "Total Monthly Rent" and any monthly recurring concession. *Id.* at 1. Upon receiving the lease, or through contemporaneous emails, some tenants learned for the first time the pre-concession rent, listed as "Total Monthly Rent," and the concession amount. *See id.*; PTX370 at 1; 12/9/20 AM Tr. at 94:4–7. Attached to the lease was a Concession Addendum which stated: "You have been granted a monthly recurring concession as reflected on the Term Sheet. The monthly recurring concession will expire and be of no further force and effect as of the Expiration Date Shown on the Term Sheet." DTX264 at 19.

Sixty to ninety days before the end of a tenant's lease term, Equity sent a RAD Form 8 entitled "Housing Provider's Notice to Tenants of Adjustments in Rent Charged," and a cover

letter. *E.g.*, PTX106. The cover letter explained that the amount listed on the RAD Form 8 reflects the Monthly Apartment Rent and excludes any concessions offered during the previous lease term. *Id.* at 1. The cover letter also stated, "Separate from this formal notice, you will receive another communication that further details any concession that may be available for your continued residence with us, and that also confirms your Monthly Apartment Rent." *Id.* The RAD Form 8 notified the tenant of the increase in rent for the following year if they decided to renew. *Id.* at 2. The form explained, "the increase in rent charged is based on the increase in the Consumer Price Index (CPI-W)," and that for most tenants, the maximum percentage increase in rent charged is the CPI-W plus 2%. *Id.* Equity applied this calculation to the pre-concession Monthly Apartment Rent, and not the post-concession amount actually paid by the tenant during the previous year. *Id.*; *see* PTX104; PTX105. Thereafter, tenants could contact Equity's leasing office and engage in a negotiation process to receive a new concession for their renewal lease. *See, e.g.*, 12/7/20 PM Tr. at 53:17–54:25.

B. PRIOR PROCEEDINGS AGAINST EQUITY REGARDING "RENT CHARGED"

In six different proceedings between 2013 and 2017 against Equity[3] as the housing provider, the Office of Administrative Hearings ("OAH") addressed allegations that Equity impermissibly increased rent above the amount allowed under the Rental Housing Act ("RHA"). *See generally* DTX074 (*Spiegel v. Equity Residential Mgmt., L.L.C.*, No. 2016 DHCD-TP 30,780 (D.C. OAH Aug. 9, 2017)); DTX070 (*Fineman v. Smith Prop. Holdings Van Ness L.P.*, No. 2016 DHCD-TP 30,842 (D.C. OAH Mar. 16, 2017)) (hereinafter "*Fineman I*"); DTX001 (*Gural v. Equity Residential Mgmt.*, No. 2016 DHCD-TP 30,855 (D.C. OAH Apr. 12, 2017)); DTX069 (*Maxwell v. Equity Residential Mgmt., L.L.C.*, No. 2015 DHCD-TP 30,704 (D.C. OAH Apr. 22,

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[3] These proceedings were either against Equity Residential Management, L.L.C. only, Smith Properties Holdings Van Ness, L.P. only, or Defendants collectively.

2016)); DTX068 (*Pope v. Equity Residential Mgmt.*, No. 2014 DHCD-TP 30,612 (D.C. OAH Mar. 25, 2016)); DTX073 (*Jenkins v. Equity Residential Mgmt., L.L.C.*, No. 2012 DHCD-TP 30,191 (D.C. OAH May 15, 2013)). At all times during this period, Equity used the Total Monthly Rent, i.e. the pre-concession rent, as the "rent charged" basis for calculating increases, instead of using the amount the tenant paid, i.e. the post-concession rent. *See generally id.* These OAH decisions all found in favor of the housing provider, and determined that Equity's use of the pre-concession rent for "rent charged" was appropriate as long as it did not exceed the maximum allowable rent. *See generally id.* In *Fineman I*, the OAH stated that the housing provider could interpret the term "current rent charged" to mean the maximum legally authorized rent, but could also interpret the term to mean the amount a tenant is actually paying each month. DTX070 at 15.

On appeal from *Fineman I*, the Rental Housing Commission ("RHC") reversed the OAH's decision on how "rent charged" was to be interpreted. *See* PTX056 (*Fineman v. Smith*, No. 2016 DHCD-TP 30,842 (D.C. RHC Jan. 18, 2018)) (hereinafter "*Fineman II*"). In *Fineman II*, the RHC concluded that "rent charged" was the "entire amount of money . . . that is *actually* demanded, received, or charged by a housing provider as a condition of occupancy or use of a rental unit." *Id.* at 31 (emphasis in original).

On March 13, 2019, the District of Columbia passed the Rent Charged Definition Clarification Amendment Act of 2018 (hereinafter "2019 Act") to add an express definition for "rent charged" in the RHA. The 2019 Act defined "rent charged" as "the entire amount of money, money's worth, benefit, bonus, or gratuity a tenant must actually pay to a housing provider as a condition of occupancy or use of a rental unit, its related services, and its related facilities, pursuant to the Rent Stabilization Program." D.C. Code § 42-3501.03(29A). At the

September 23, 2021 Remedies Hearing, the District stated it is not aware that Equity has engaged in any unlawful trade practices since *Fineman II* and the 2019 Act.

II. PROCEDURAL HISTORY

The District initiated this lawsuit on December 13, 2017; filed its Second Amended Complaint on October 5, 2018; and filed its Third Amended Complaint ("TAC") on February 24, 2020. In the TAC, the District alleges that Equity's advertising and leasing practices deprive consumers of "the right to stable and predictable rent increases in both future renewal leases and month-to-month tenancies," in violation of the CPPA. *See* D.C. Code §§ 28-3901, *et seq.*; *see generally* TAC. Claims 1 through 5 allege that Equity has made misrepresentations or failed to disclose material facts about rental prices, the permanence and source concessions, and how Equity calculates future rent increases. *Id.* ¶¶ 27–36. Claim 6 of the TAC alleges that Defendants engaged in unlawful trade practices under the CPPA by raising rent prices above the maximum permitted under the RHA. *Id.* ¶¶ 38–49. The District requests that the Court permanently enjoin and restrain Defendants from engaging in unlawful trade practices; order restitution for amounts collected from District of Columbia consumers; order the payment of statutory civil penalties; and award the District the costs of this action and reasonable attorney's fees. *Id.*, Prayer for Relief.[4]

The Court bifurcated this matter into two phases: Liability and Remedies. With respect to liability, the Court held a Non-Jury Trial from December 7, 2020 to December 16, 2020. Both the District and Equity filed respective Post-Trial Briefs on January 29, 2021. On April 23, 2021, the Court issued an Order finding Equity liable for violations of the CPPA, D.C. Code

[4] The District did not include economic damages in its Prayer for Relief. Equity raises in its Opposition that Equity failed to receive proper notice for economic damages. This point is not defended in the District's Reply.

§§ 28-3904(e) & (f)[5]: Equity misrepresented as to a material fact which has a tendency to mislead and Equity failed to state a material fact where such failure tends to mislead in regard to its leasing and renewal practices. More pointedly, the Court found that Equity made several misrepresentations and failures to disclose on Equity's website, on third-party websites, during leasing tours, in online and paper applications to lease an apartment, and in conversations between prospective tenants and leasing agents. Order at 8–18 (Apr. 23, 2021). The Court stated:

> The result of these misrepresentations and omissions is that they create a net impression in prospective tenants' minds of what their monthly rent payment will be, and that any increases will be within the applicable rent control limits. Based on this impression, a reasonable consumer would apply for an apartment at the Property and incur a non-refundable application fee, but have no idea what the actual rent is for the applied for apartment. At this stage, reasonable consumers who have applied to become tenants do not know that future rent increases will be based on a higher pre-concession rent of which they are not aware and not based on the post-concession rent told to them at the time they submitted an application to lease the apartment.

Id. at 12 (Apr. 23, 2021). The Court denied all other claims in the TAC.

With respect to remedies, the Parties submitted the instant briefing: the District's Brief on Remedies, filed June 25, 2021; Equity's Opposition, filed August 18, 2021; and the District's Reply, filed September 10, 2021. On September 23, 2021, the Parties appeared for a Remedies Hearing and the Court raised questions from and heard argument about the Parties' briefing. In response, the Court issues this Order.

[5] The CPPA makes it unlawful to engage in an unfair or deceptive trade practice, including to: "(e) misrepresent as to a material fact which has a tendency to mislead;" or "(f) fail to state a material fact if such a failure tends to mislead." §§ 28-3904(e), (f). The plaintiff need not establish that a material misrepresentation or failure to disclose is intentional. *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013).

III. DISCUSSION

The District seeks five modes of relief in its Brief on Remedies: (1) permanent injunctive relief; (2) restitution; (3) civil penalties; (4) economic damages; and (5) attorneys' fees and costs. The Court discusses each in turn. In its consideration, the Court bears in mind the stated purpose of the CPPA: to "assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices." D.C. Code § 28-3901(b)(1). The CPPA is fundamentally a remedial statute, and it must be construed and applied liberally to promote its purpose. D.C. Code § 28-3901(c); *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013).

A. PERMANENT INJUNCTIVE RELIEF

The Court shall deny the District's request for permanent injunctive relief. "A permanent injunction [] requires the trial court to find that there is no adequate remedy at law, the balance of equities favors the moving party, and success on the merits has been demonstrated." *Ifill v. District of Columbia*, 665 A.2d 185, 188 (D.C. 1995) (quotation marks and ellipses omitted). More specifically, the Attorney General plaintiff must show that the injunction is (1) in the public interest; and (2) "there exists some cognizable danger of recurrent violation" of the CPPA. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). "[O]nce the plaintiff makes out a *prima facie* case of 'some cognizable danger of recurrent violation,' a defendant arguing that an injunction should not be issued because of voluntary cessation of the challenged activity carries the heavy burden of []demonstrating that 'there is no reasonable expectation that the wrong will be repeated.'" *Mbakpuo v. Ekeanyanwu*, 738 A.2d 776, 782–83 (D.C. 1999) (quoting *W.T. Grant*, 345 U.S. at 633).

The Court does not find the District's burden for permanent injunctive relief satisfied

because there is no reasonable expectation that Equity's wrongs will be repeated. It is undisputed that Equity abolished concession pricing after the 2019 Act, more than 2.5 years ago. At the September 23, 2021 hearing, the District could not identify a single unlawful trade practice since that time. Without a cognizable danger of recurrent violation, no sufficient basis exists to impose permanent injunctive relief.

B. RESTITUTION

The Court shall award restitution for rent overcharges and application charges as well as apply 2 percent prejudgment interest. The CPPA expressly provides that the Attorney General may bring an action in Superior Court to "take affirmative action, including the restitution of money." D.C. Code § 28-3909(a). The goal of the CPPA is "to provide oversight and enforcement of consumer protection laws; restitution supports this goal by acting as a deterrent." *In re Suter*, 2005 WL 2989336, at *7 (D.M.D. Nov. 7, 2005) (analyzing the District's CPPA). "Restitution is 'an equitable remedy under which a person is restored to his or her original position prior to loss or injury, or placed in the position he or she would have been, had the breach not occurred.'" *Remsen Partners, Ltd. v. Stephen A. Goldberg Co.*, 755 A.2d 412, 413 n.2 (D.C. 2000) (quoting BLACK'S LAW DICTIONARY 1313 (6th ed. 1990)). Restitution is aimed at forcing the defendant to disgorge benefits it would be unjust for him to keep and should be limited to preventing unjust enrichment. *See Consumer Prot. Div. v. Consumer Pub. Co.*, 501 A.2d 48, 71 (Md. 1985); *Luskin's, Inc. v. Consumer Prot. Div.*, 726 A.2d 702, 726 (Md. 1999).

With respect to calculating the amount of restitution, the plaintiff need only show that its calculations "reasonably approximate[]" the appropriate amounts, at which point the burden shifts to the defendant to establish that the figures are inaccurate. *FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997) (citing cases from the Second, Third, and Fourth Circuits). "[T]he risk of

uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty." *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989). As to the Court's role, restitution is an equitable remedy and the Court's "equitable powers . . . to effect remedies are wide." *Owen v. Bd. of Directors of Wash. City Orphan Asylum*, 888 A.2d 255, 270 (D.C. 2005).

1. Application Fees

The Court shall order disgorgement of application fees collected. The evidence at trial established that neither the online nor the paper applications included information about rental concessions; applications merely stated the "Monthly Apartment Rent." Prospective tenants were required to pay a non-refundable application fee of $75.00 and a holding fee of $200.00 when submitting the application. The Parties do not dispute that these application fees should be made part of any restitution award. Indeed, at the September 23, 2021 hearing, Equity admitted that application fees are temporally and causally connected to Equity's misrepresentations or omissions about its leasing terms as determined by the Court.

The District submits, via the Declaration of Rory Pulvino, a Senior Data Analyst at the Office of the Attorney General for the Government of the District of Columbia, that applicants who did not become tenants at the Property paid in total at least $29,239.67 in application fees during the relevant time period of the liabilities found in this suit; the application fees paid by residents who moved into an apartment with a concessionized rent is at least $120,975.00[6] Decl. of Rory Pulvino ¶¶ 6–10, Ex. A, Ex. B (June 22, 2021) ("Pulvino Declaration") (relying on PTX150). Although Equity's Opposition raises some objection to the use of Mr. Pulvino's calculations because Mr. Pulvino's testimony at trial was materially impeached, Equity did not raise further objection to these figures at the September 23, 2021 hearing. What is more, Equity

[6] Mr. Pulvino's Declaration does not include the $200 holding fee in his calculations. According to testimony at trial, the fee would have been applied to the tenant's first month's rent upon move-in. 12/15/20 AM Tr. 55:21–56:3.

has not provided any countervailing methodology or figures, did not hire a damages expert, and has not otherwise satisfied its burden to show that the District's figures are inaccurate. As such, the Court shall require that Equity pay $150,214.67 in restitution related to application fees.

2. Rent Overcharges

The Court finds that disgorgement of rent increased above the amounts that would have been permissible had Equity's representations about rent been accurate to be an appropriate basis of restitution. In nearly every communication with consumers, and beginning with persistent advertisements, Equity omitted, obfuscated, or otherwise misled prospective residents into thinking that the concession pricing was the price from which a renewal increase would be determined. Equity misrepresented or omitted the accurate base price for renewals while touting that its apartments were rent-controlled as a key feature of living in the building. *Every* application failed to state pricing that would accurately or fully inform residents of future rent increases. Equity undoubtedly lured some number of residents into an initial year at concession pricing with the false belief that the rent would not skyrocket upon a lease renewal. Though the final lease disclosed the actual rent, future rent was negotiable and every earlier representation about the price was artificially deflated. As the Court's Order on liability stated, the result is a "net impression in prospective tenants' minds of what their monthly rent payment will be, and that any increases will be within the applicable rent control limits." Order at 12. Rent overcharges are a direct result of Equity's core deceptions. And, much like the concept that "fraud vitiates everything" so too does Equity's misrepresentations and omissions; therefore, restitution based on rent overcharges is not limited to an initial lease renewal.

The Court will not require an individualized showing of reliance via a claims procedure for a resident to collect restitution, as Equity advocates. The text of the CPPA does not

command it; by the plainest terms, it states that the Attorney General may seek restitution of money. The statute elsewhere provides that it is to "be construed and applied liberally to promote its purpose" of "assur[ing] that just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices." D.C. Code §§ 3901(b)–(c). "[A]ll improper trade practices" includes those misrepresentations which have a "tendency to mislead" and omissions that "tend[] to mislead." D.C. Code § 28-3904(e)–(f). In consideration of the CPPA's structure, this low bar for a finding of liability is not consonant with the high bar of requiring individualized reliance for restitution. Moreover, consumer protection cases initiated by the Attorney General are not mass class actions and the Court declines to turn this action into one.

The Court will limit restitution to the evidence provided by the District. According to Mr. Pulvino's Declaration, and based on exhibits submitted into evidence at trial, rent overcharges total at least $719,129.52. Pulvino Decl. ¶ 3; PTX150; PTX347. The District seeks this amount as a restitution floor because rent overcharges were calculated from "incomplete data from Defendants and in a manner significantly undercounting harm to elderly and disabled residents." Br. on Remedies at 10. However, the District should have sought complete data about affected consumers during discovery, including enforcing ongoing obligations for updated records. The Court is not inclined to impose an onerous claims process for individualized claims when the Court rejects doing so for a reliance requirement or economic damages, *see infra* Part III.D. A one-time restitution award of $719,129.52, based on proven overcharges, ensures that Equity is not unjustly enriched and will expedite restitution payments to consumers without the added complications and costs of a third-party claims process. For these reasons, the Court shall award $719,129.52 in restitution for rent overcharges.

3. Prejudgment Interest

The Court shall apply a 2 percent simple prejudgment interest. "[N]o explicit statutory authorization is required for an award of pre-judgment interest." *Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229, 1254 (D.C. 1990). Restitution is an equitable remedy and the "equitable powers of the trial court to effect remedies are wide." *Owen*, 888 A.2d at 270. "The obligation to pay interest is intertwined with the obligation to make restitution." *In re Huber*, 708 A.2d 259, 260 (D.C. 1998); *see also In re Newsday Litigt.*, 2008 WL 2884784 at *14 n.13 (E.D.N.Y. July 23, 2008) (stating "[r]estitution orders frequently provide for interest" and collecting cases). As one court has reasoned: "Money has a 'time value,' and unless [the defendant] is required to include the time value of money in the amount of its liability, there will not have been full disgorgement of ill-gotten gains." *Crude Co. v. FERC*, 923 F. Supp. 222, 241 (D.D.C. 1996), *aff'd*, 135 F.3d 1445 (Fed. Cir. 1998); *see also Riggs Nat'l Bank*, 581 A.2d at 1253 ("[I]n equity, interest is allowed as a means of compensating a creditor for the loss of the use of his [or her] money.").

Here, restitution means restoring consumers to the financial position they would have been in had Equity honestly conveyed leasing price information—and that includes the time value of the money that Equity unlawfully obtained. As to the appropriate rate, the Court declines to award the 9 percent prejudgment interest advocated by the District. Although the District avers that 9 percent is fair as half the rate that Equity imposes on its own tenants in its leases, the Court finds 9 percent exceedingly high when considering remedial principles. Rather, the Court looks to D.C. Code § 28–3302 which provides the rate of interest on judgments in the District of Columbia:

> The rate of interest on judgments and decrees, where the judgment or decree is not against the District of Columbia, or its officers, or

> its employees acting within the scope of their employment or where the rate of interest is not fixed by contract, shall be 70% of the rate of interest set by the Secretary of the Treasury . . . for underpayments of tax to the Internal Revenue Service, rounded to the nearest full percent, or if exactly 1/2 of 1%, increased to the next highest full percent; provided, that a court of competent jurisdiction may lower the rate of interest under this subsection for good cause shown or upon a showing that the judgment debtor in good faith is unable to pay the judgment.

The interest rate for underpayments of tax to the IRS is 3 percent. 26 CFR 301.6621-1; Rev. Rul. 2021-17, https://www.irs.gov/pub/irs-drop/rr-21-17.pdf (accessed Oct. 4, 2021). Therefore, the appropriate interest rate to apply is 2 percent. The Court will require the Parties to calculate a 2 percent rate of simple interest by following the prejudgment interest methodology used by Mr. Pulvino in his Declaration, paragraphs 11 to 14. As in Mr. Pulvino's Declaration, prejudgment interest will apply to both restitution awarded for application fees and rent overcharges.

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In total, Equity shall pay a restitution award of **$869,344.19 plus 2 percent simple prejudgment interest** within sixty (60) days of the date of this Order. The District shall use all amounts collected as restitution to pay restitution to consumers who have been harmed by Equity's unlawful practices. The District shall distribute this restitution in an amount equal to the application fees and/or overcharges each consumer paid Equity, less any amount that Equity has already refunded to the consumer, with an applied 2 percent interest. Restitution may be distributed *pro rata* to consumers if Defendants fail to pay all restitution due. The District shall hold any unpaid restitution amounts either as an unclaimed fund for the consumer or it shall use the funds for any other lawful purpose designated by the Attorney General.[7]

[7] *See F.T.C. v. Febre*, 128 F.3d 530 (7th Cir. 1997) (affirming trial court's order that a defendant disgorge illegally obtained funds, and, to the extent that repayment to specifically wronged consumers was not feasible, pay the

C. Civil Penalties

The Court declines to impose civil penalties against Equity. Under the CPPA's Attorney General enforcement provision, "the Attorney General for the District of Columbia may recover (1) From a merchant who engaged in a first violation of section . . . 28-3904, a civil penalty of not more than $5,000 for each violation" and (2) "a civil penalty of not more than $10,000 for each subsequent violation." D.C. Code §§ 28-3909(b)(1)–(2).[8] The use of the word "may" is permissive and endows the Court with discretion. The statute is silent as to a scienter requirement, what standard of proof applies, and any factors the Court must consider in determining civil penalties. However, the D.C. Court of Appeals has held that "a claim for *intentional* misrepresentation under the Act requires the same burden of proof as does a common law claim for such misrepresentation—the clear and convincing standard. *Osbourne v. Capital City Mortg. Corp.*, 727 A.2d 322, 325 (D.C. 1999) (emphasis added) (citing Standardized Civil Jury Instructions for the District of Columbia, No. 20-3 (1998 rev. ed.); *cf. Twyman v. Johnson*, 655 A.2d 850, 857–58 (D.C. 1995)).

This case has always presented as a case about *unintentional* conduct and review of any civil penalties is so limited. The District never alleged intent or willfulness, and, moreover, submitted that "the clear and convincing requirement does not apply to the District's claims, . . . Where a party brings a CPPA claim based on unintentional conduct, as is the case here, the preponderance of the evidence standard applies." Joint Pretrial Statement, Attach. S. at 1 (Jan. 22, 2020); *see also* Opp. at 18–20 (collecting the District's representations that the standard is

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remainder to the U.S. Treasury); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469–70 (11th Cir. 1996) (stating "because it is not always possible to distribute the money to the victims of defendant's wrongdoing, a court may order the funds paid to the United States Treasury").

[8] D.C. Law 22-140 amended the penalty amount, effective July 17, 2018. Because the Court would look to the date of the violation to apply a penalty, the District may recover up to $1,000 for each violation before July 17, 2018 and up to $5,000 per violation on or after that date, for each violation of the statute. D.C. Code § 28-3909(b)(1); D.C. Law 22-140.

preponderance of evidence). The Court chooses not to award civil penalties for unintentional conduct. Further, the Court is ambivalent that the record reflects Equity's bad faith when the Court previously found that Equity reasonably relied on contemporaneous OAH interpretations of "rent charged" when calculating lease adjustments and has completely complied with the 2019 Act upon its passage. *See* Order at 26–27. Equity never violated rental housing laws and it is not a recidivist. Accordingly, the Court exercises its discretion to reserve civil penalties for proven bad actors, and not merely negligent actors. *Cf. BMW of N. Am. v. Gore*, 517 U.S. 559, 580 (1996) (stating "the omission of a material fact may be less reprehensible than a deliberate false statement, particularly when there is a good-faith basis for believing that no duty to disclose exists" and "That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award"); *State v. Action TV Rentals, Inc.*, 467 A.2d 1000, 1015 (Md. 1983) (finding against imposition of a civil penalty for consumer protection violations and observing that "[r]eserving to the trial court a discretion not to impose any fine is particularly apt . . . [because] the State is not required to prove, in order to establish a [Consumer Protection Act] violation, that 'any consumer in fact has been misled, deceived, or damages as a result of [a prohibited] practice.'") (citation omitted).

D. ECONOMIC DAMAGES VIA A CLAIMS PROCEDURE

The Court shall deny economic damages. Section 3909(b)(3) of the CPPA permits the Attorney General to recover "[e]conomic damages." D.C. Code § 28-3909(b)(3) (2018). An earlier version of Section 3909 provided for "damages suffered by consumers." D.C. Code § 28-3909(b)(3) (2013). The Court finds that economic damages are not merited because such damages are redundant of the restitution awarded. *See supra*, Part III.B. Further, the District's

proposed claims procedure for individualized additional alleged damages raises serious concerns about traditional proof requirements like causation. Therefore, no economic damages will be awarded.

E. ATTORNEYS' FEES AND COSTS

The Court shall award attorneys' fees and costs, but reduce the District's proposed fees and costs award by half. The CPPA provides for the "costs of the action and reasonable attorneys' fees." D.C. Code § 28-3909(b)(4). The court "compute[s] the number of hours reasonably expended on the litigation, excluding any claimed hours that are excessive, redundant, or unnecessary." *District of Columbia v. Jerry M.*, 580 A.2d 1270, 1281 (D.C. 1990) (citations omitted). As the Supreme Court has recognized, "[c]ases may be overstaffed, and the skill and experience of lawyers vary widely," however the prevailing party must employ the same "billing judgment" in fee setting as private sector counsel. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983) (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc)). "The determination of reasonableness of attorneys['] fee[s] lies within the trial court's sound discretion." *Sagalyn v. Foundation for Preservation of Historic Georgetown*, 691 A.2d 107, 115 (D.C. 1997) (citing *Hampton Courts v. District of Columbia Rental Hous. Comm'n*, 599 A.2d 1113, 1115 (D.C. 1991)).

The District seeks $2,020,986.00 for 4,370 hours of legal work from the beginning of the litigation through September 10, 2021. Reply at 27; Ex. G. The District utilized the 2015-2021 USAO Attorney's Fees Matrix to establish reasonable rates for the District's core legal team. Br. on Remedies, Ex. 3, Declaration of Benjamin Wiseman in Support of Attorneys Fees and Costs at ¶¶ 8–9 (June 25, 2021) ("Wiseman Decl."). The Court accepts the hourly rates but reduces the award by half to compensate for (1) hours that are excessive, redundant, and unnecessary; and

(2) the District's lack of contemporaneous timekeeping for Gary Tan prior to December 3, 2019 and all hours submitted by Sondra Mills.

Examples abound of excessive, redundant, or unnecessary hours. One such category of hours is when highly experienced, and therefore highly compensated, attorneys spent excessive hours on tasks that ordinarily would be assigned to a more junior attorney or paralegal. For example, Mr. Tan, an attorney with 25 years of experience, spent 23 hours from January 25, 2021 to January 28, 2021 "cite checking draft trial brief." *Id.*, Ex. 4, Declaration of Gary Tan, Attach. 1 at 14 (June 21, 2021) ("Tan Declaration"). On December 5, 2019, Mr. Tan searched for "URLS for the Equity website from the Wayback Machine." *Id.* at 4. Other entries from senior attorneys reflected administrative work. *See, e.g.*, *id.* at 6 (on January 31, 2020, Mr. Tan "[a]ssembl[ed] and sen[t] Graham [w]ord copies of all [] attachments from the Pretrial Conference Statement"); *id.*, Ex. 3, Wiseman Decl., Attach 1. at 9 (on December 5, 2020 Mr. Wiseman spent 4.75 hours to in part "refresh documents to onedrive"). Passive observation or standby hours were also submitted at a senior attorney's full rate. For example, on November 4, 2020, Mr. Wiseman, an experienced attorney of 12 years, "Observed witness call;" on November 10, 2020, he "Observed Witness Interviews;" and on December 10, 2020, he was on "Standby for Trial Testimony." *Id.* at 6, 30, 71.

The District also seeks multiple fees for tasks ordinarily handled by one or only a few attorneys. For example, Mr. Tan and Ms. Mills attended every deposition together despite that both are extensively experienced litigators. *Id.*, Ex. 4, Tan Decl., Attach. 1; *id.*, Ex. 5, Declaration of Sondra Mills, Attach 1 (June 21, 2021) ("Mills Declaration"). The District frequently held team meetings, even prior to trial, in which a large group of attorneys would attend; such would be unlikely to be paid for at a private firm. *See, e.g., id.*, Tan Decl., Attach. 1

at 6 (on January 28, 2020, Mr. Tan spent 3 hours "[m]eeting with Ben, Graham, Jimmy, Kate, and Zach).

To highlight unnecessary hours, in at least two instances, Mr. Tan even lists time for listing time—a practice no paying client would tolerate. Mr. Tan submitted fees for "[w]orking on updating Equity time log" on March 19, 2020. *Id.* at 7. On November 20, 2020, he submits "Calculating time." *Id.* at 11.

Other entries are so vague that the Court cannot evaluate if the time was reasonably spent. For example, on September 23, 2020, Mr. Tan lists that he is "working on witness information; checking stuff for jimmy and Graham" for 4 hours. *Id.* at 8. On October 26, 2020, Mr. Tan lists that he is "working on agenda stuff from last week" for 3 hours. *Id.* at 9. From October 16, 2020 to October 19, 2020, Mr. Tan merely entered "Motion to seal" for 20 hours followed by "edits to motion to seal" for 2 hours on October 22, 2020 for what ultimately was a 7-page motion. Elsewhere, Ms. Mills provides descriptions that merely state the name of a brief, date, and hours without any indication of what kind of work she assisted in performing. *See, e.g.*, *id.*, Ex. 5, Mills Decl., Attach. 1 at 5 (listing "District's Reply to Defendant's Opposition to District's MSJ (filed 3/27/19[)]" for 8 hours).

Further problematic, over 1,000 hours of work were submitted without contemporaneous timekeeping. Although Government attorneys are not normally expected to record their hours, the *post facto* entries submitted are especially suspect and sloppy. On several dates, Mr. Tan claims to have worked more than 24 hours in one day without explanation. *See, e.g.*, *id.* at Ex. 4, Tan Decl., Attach. 1 (3/1/18 lists 78 hours; 4/13/18 lists 31 hours; 7/26/18 lists 37.5 hours; 2/25/19 lists 100 hours; 3/20/19 lists 56 hours). Meanwhile, Ms. Mills only provides estimated hours for filing events. *See id.* at Ex. 5, Mills Decl.

For all these reasons, a reduction of fees by half is warranted. The Court opts to make a final award rather than require an additional Bill of Costs. Therefore, the Court awards attorneys' fees and costs in the amount of **$1,010,493.00**.

IV. CONCLUSION

In sum, the Court awards restitution in the amount of **$869,344.19 plus 2 percent simple prejudgment interest** and attorneys' fees and costs in the amount of **$1,010,493.00**. The Court denies all other requests for relief.

Accordingly, it is this 8th day of October, 2021 hereby,

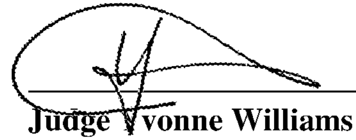
ORDERED that within sixty (60) days of the entry of a concurrently issued Judgment and Order, Defendants shall pay **$869,344.19 plus 2 percent simple prejudgment interest** in restitution to the District of Columbia; and it is further

ORDERED that the District shall use all amounts collected as restitution to pay restitution to consumers who have been harmed by Equity's unlawful practices. The District shall distribute this restitution in an amount equal to the application fees and/or overcharges each consumer paid Equity, less any amount that Equity has already refunded to the consumer, with an applied 2 percent interest. Restitution may be distributed *pro rata* to consumers if Defendants fail to pay all restitution due. The District shall hold any unpaid restitution amounts either as an unclaimed fund for the consumer or it shall use the funds for any other lawful purpose designated by the Attorney General; and it is further

ORDERED that within sixty (60) days of the entry of a concurrently issued Judgment and Order, Defendants shall pay to the District of Columbia **$1,010,493.00** for costs and fees incurred by the District of Columbia in connection with this action; and it is further

ORDERED that all other requests for relief shall be denied.

IT IS SO ORDERED.



Judge Yvonne Williams

Date: October 8, 2021

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