DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS

Cover Sheet for Electronic Filing

I am filing the attached papers at the Office of Administrative Hearings.

1. Check one of the boxes below.

☒ The case number is: 2016 DHCD TP 30,855

☐ This is a new case, and a case number has not yet been assigned.

2. Briefly describe the paper that you are filing:

Housing Providers' Opposed Motion for Partial Summary Adjudication

3. My name, mailing address, telephone number, and e-mail address are:

Name:	Richard W. Luchs, Esq. Spencer B. Ritchie, Esq.	Telephone:	202-452-1400
		E-mail address:	rwl@gdllaw.com sbr@gdllaw.com
Address:	Greenstein DeLorme & Luchs, P.C. 801 17th Street, NW, Ste. 1000	Representing:	Respondent
City, State, Zip:	Washington, DC 20006		

I agree to receive documents from the court at my email address. ***No***

4. You should complete this form, save it to your computer, and then attach it to an e-mail, along with the papers you are filing. The e-mail address for filing papers at OAH is oah.filing@dc.gov. Papers sent to any other e-mail address will **not** be accepted for filing.

I sent a copy of the attached papers to all other parties or their representatives as listed below.

Person to Whom the Papers Were Sent:

Harry Gural
3003 Van Ness Street NW
Apt. S-707
Washington, D.C. 20008

Method of sending:
☒ Mail
☐ Fax (Give Fax number) ________________
☐ Hand delivery
☒ Email (only if the person has agreed; provide email address: harrygural@gmail.com)

Date the papers were sent: January 23, 2023

If you sent the papers to more than two people, provide the above information for the additional people on a separate sheet.

DISTRICT OF COLUMBIA
Office of Administrative Hearings

HARRY GURAL, Tenant/Petitioner, v. SMITH PROPERTY HOLDINGS VAN NESS L.P., Housing Provider/Respondent.	Case No.: 2016 DHCD TP 30,855 3003 Van Ness Street, N.W., Apt. S-707 Chief Judge M. Colleen Currie Pre-Hearing Conference: 3-21-2023

HOUSING PROVIDER/RESPONDENT'S OPPOSED MOTION FOR PARTIAL SUMMARY ADJUDICATION

Housing Provider/Respondent Smith Property Holdings Van Ness L.P. ("Smith"), through counsel, hereby moves pursuant to Office of Administrative Hearing Rule 2819.1, that this Administrative Court enter summary adjudication in the claims contained and remaining in 2016 DHCD TP 30,855, with the exception of the remaining claims for retaliation. In support thereof, Respondent submits the attached Memorandum of Points and Authorities.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

Dated: January 23, 2023

/s/ Spencer B. Ritchie

Spencer B. Ritchie (D.C. Bar 1673542)
Richard W. Luchs (D.C. Bar No. 243931)
Gwynne L. Booth (D.C. Bar No. 996112)
801 17th Street, NW Suite 1000
Washington, DC 20006
Telephone: (202) 452-1400
Email: rwl@gdllaw.com; glb@gdllaw.com; sbr@gdllaw.com;
Counsel for Respondent

Certificate of Service

I hereby certify that a copy of the foregoing was postmarked on January 23, 2023, to be picked up on January 24, 2023, by U.S. mail, postage prepaid and was served by email upon:

Harry Gural
3003 Van Ness Street, N.W.
Apt. S-707
Washington, D.C. 20008
harrygural@gmail.com

/s/ Spencer B. Ritchie
Spencer B. Ritchie

Certificate Regarding Consent

Respondent is not required to seek consent to the instant Motion pursuant to OAH Rule 2813.5. Regardless, Respondent sought consent on August 12, 2022, and January 20, 2023 via email. Petitioner did not consent so the Motion should be treated as opposed.

/s/ Spencer B. Ritchie
Spencer B. Ritchie

DISTRICT OF COLUMBIA
Office of Administrative Hearings

HARRY GURAL, Tenant/Petitioner, v. SMITH PROPERTY HOLDINGS VAN NESS L.P., Housing Provider/Respondent.	Case No.: 2016 DHCD TP 30,855 3003 Van Ness Street, N.W., Apt. S-707 Chief Judge M. Colleen Currie Pre-Hearing Conference: 3-21-2023

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HOUSING PROVIDER/RESPONDENT'S OPPOSED MOTION FOR PARTIAL SUMMARY ADJUDICATION

COMES NOW RESPONDENT and moves pursuant to OAH Rule 2819.1 for Summary Adjudication. In support thereof, Respondent states as follows:

I. BACKGROUND.

A. Facts.

Mr. Gural is a resident at the 3003 Van Ness Apartments, which are owned by Smith Property Holdings Van Ness LP and managed by Equity Residential Management. *See* RHC Order of February 18, 2020, attached as Exhibit A at 2-3. Mr. Gural resides in Unit S707 (the "Unit") and has resided there since at least April 1, 2014. *Id.* at 3. Mr. Gural signed a one-year lease on March 19, 2014 for the Unit through March 31, 2015. *Id.* The "term sheet" of the lease identified two monthly recurring charges: "Monthly Apartment Rent" of $2,048.00 per month and a "Monthly Reserved Parking" of $100.00. *Id.* The term sheet also identified a "Monthly Recurring Concession" of $278.00 per month. *Id.* Through the term of the written lease, Tenant paid $1,870.00 per month to Housing Provider. *Id.* Tenant continued to reside in the Unit after the

written lease expired on March 31, 2015. *Id.* On January 15, 2015, Housing Provider provided Tenant with a RAD Form 8, "Housing Provider's Notice to Tenants of Adjustment in Rent Charged" which stated that his rent would be increased from $2,048.00 to $2,118.00 (a 3.4% increase), effective April 1, 2015. *Id.* at 4.

On January 27, 2015, Housing Provider filed RAD Form 9, "Certificate of Notice to RAD of adjustments in rent charged," with the RAD. The appendix attached listed the Unit and stated that the "prior rent" was $2,048.00, the increase was $70, the new "rent charged" was $2,118.00, the percentage increase was 3.4%, and the effective date was April 1, 2015. *Id.* For the months of April 2015 through March 2016, Tenant paid $1.930.00 to Housing Provider each month, which included $100.00 for reserved parking. *Id.* On January 15, 2016, Housing Provider gave Tenant another RAD Form 8, which stated that the "rent charged" for the Unit would increase from $2,118.00 to $2,192.00 (a 3.5% increase) effective April 1, 2016. *Id.* On February 2, 2016, Housing Provider filed RAD Form 9 with the RAD. *Id.* Housing Provider agreed to accept $1,895.00 for monthly apartment rent starting April 1, 2016, provided Tenant sign a one-year lease which identified "Monthly Apartment Rent" as $2,192.00 and provided for "Monthly Recurring Concession" of $297.00. Tenant refused to sign the lease. *Id.*

B. **Procedural History.**

Mr. Harry Gural ("Gural" or "Petitioner") filed the instant Tenant Petition on or about August 30, 2016. *See* Tenant Petition, attached as Exhibit B. In the petition, Tenant alleged that Housing Provider violated various provisions of the Rental Housing Act of 1985 in relation to his tenancy at 3003 Van Ness Street, NW. *See id.* In particular, Tenant asserted that (1) the rent increase that he received was larger than the increase permitted by law; (2) that the Housing Provider did not file the correct rent increase forms with the Rental Accommodations Division (the RAD); (3) that the Housing Provider, property manager, or other agent of the Housing

Provider took retaliatory action against him; and (4) that a Notice to Vacate had been served on Tenant in violation of D.C. Code § 42-3505.01.[1] *Id.*

On April 12, 2017, this Honorable Court entered an Order Granting in Part and Denying in Part Housing Provider's Motion for Summary Judgment; Denying Tenant's Motion for Partial Summary Judgment, and Granting Tenant's Request to Withdraw One Claim in his Tenant Petition. *See* Order of April 12, 2017, attached as Exhibit C. Mr. Gural filed his Notice of Appeal on September 28, 2017. On February 18, 2020, Chief Administrative Judge Spencer of the District of Columbia Rental Housing Commission entered a Decision and Order reversing and remanding in part the Summary Judgment Order. *See* Exhibit A. The RHC vacated the Order in part and remanded for further proceedings to provide the Tenant the opportunity to call the Community Manager, Ms. Duvall, as a witness regarding his retaliation claims arising from the demand to sign a new lease term and the initiation of an action for possession against the Tenant. The Court dismissed the Tenant's appeal on the issue of the Housing Provider's conduct in pursuing the action for possession. The Court affirmed the Order on the issue of whether the late fees imposed by the Housing Provider were retaliatory. In its Order, the Court relied on *Fineman v. Smith Prop. Holdings Van Ness, LP*, which held that the Act is ambiguous in its use of the phrase "rent charged" as either a maximum legal rent or the rent actually demanded or received from a tenant.

C. **District of Columbia v. Equity Residential Management, L.L.C., *et al.***

The District of Columbia brought a D.C. Consumer Protection Procedures Act ("CPPA") Complaint against Equity Residential Management, L.L.C. ("Equity") for its advertising and leasing practices regarding the 3003 Van Ness Apartments. *See generally* Third Amended Complaint ("TAC"), 2017 CA 008334 B, attached as Exhibit D. This litigation related to, and

[1] Petitioner withdrew this claim at a status hearing on January 13, 2017. *See* Exhibit C at 2.

revolved around, Equity's rent concessions structure. *See* Order issued by Judge Yvonne Williams on April 23, 2021 at 2, attached as Exhibit E. In the Final Order in that case, the instant Tenant Petition was specifically mentioned. *See id.* at 5 ("In six different proceedings between 2013 and 2017 against Equity 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 . . . Gural v. Equity Residential Mgmt., L.L.C.*, 2016 DHCD-TP 30,855") (internal footnotes omitted). In its Order, the Court noted that the holding of *Fineman II*, could not be applied retroactively. *See id.* at 21 ("*Fineman II* Constituted a Legislative Rule and Does Not Apply Retroactively."). The Court noted that "while the RHC purported to clarify the previously ambiguous definition of 'rent charged,' the effect of the clarification was a change in how housing providers could legally interpret and report 'rent charged.'" *Id.* at 25; *see also id.* at 27 ("Rent concessions are commonly used in the District of Columbia. A retroactive application in this case would give rise to an onslaught of lawsuits against housing providers who followed similar rental adjustment calculations that were reviewed and permitted at the time.") (internal citations omitted).

The Court found that Equity violated the CPPA by making material misrepresentations and omissions to *prospective tenants* which had the tendency to mislead, and granted judgment in favor of the District *for only the CPPA claims*. *See* Exhibit E at 28. The Court went on to say "However, the Court does not find sufficient evidence to hold Equity liable for violations of D.C. Code sections 28-3904(a), (b), and (l), and enters judgment in favor of Equity on these claims. The Court also does not find Equity liable for violations of the RHA, and enters judgment in favor of Equity on the *Bassin* claim." *See* Exhibit E at 28.

On October 8, 2021, Judge Williams entered an Order that Defendant Equity Residential pay damages to the District based solely on the liability ruling set forth in the April 23, 2021 Order. Order of Oct. 8, 2021 at 21, attached as Exhibit F.

II. LEGAL STANDARD

The District of Columbia Office of Administrative Hearings ("OAH") Rule 2819 provides, "A party may request that an Administrative Law Judge decide a case summarily, without an evidentiary hearing. Such a motion must include sufficient evidence of undisputed facts and citation of controlling legal authority." 1 DCMR §2819.

Where a procedural rule is not specifically addressed by the OAH Rules, OAH may rely upon the District of Columbia Superior Court Rules of Civil Procedure as persuasive authority. *See* 1 DCMR § 2801.1. District of Columbia Superior Court Rule of Civil Procedure 56 provides that summary judgment is appropriate if there is "no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *See also Musa v. Continental Ins. Co.*, 644 A.2d 999, 1001-02 (D.C. 1994). Only disputes over facts, viewed in the light most favorable to the non-moving party, which might legitimately affect the outcome of a trial are "material" under Rule 56. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (There is no issue to be decided at trial unless there is sufficient evidence favoring the non-moving party for the finder of fact to return a verdict for that party.); *see also Barnstead Broadcasting Corp. v. Offshore Broadcasting Corp.*, 886 F. Supp. 874, 878 (D.C. Cir. 1995) (Disputed material facts are those that might affect outcome of the suit under governing law.); *Clayton v. Owens-Corning Fiberglass Corp.*, 662 A.2d 1374, 1381 (D.C. 1995).

Housing Provider may discharge its burden of showing the absence of any genuine issues of material fact by demonstrating an absence of evidence to support Tenant's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (The burden on the moving party "may be discharged

by 'showing' – that is, pointing out to the [Court] – that there is an absence of evidence to support the nonmoving party's case."); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (Summary judgment is warranted in cases where the nonmoving party can produce no direct evidence on essential elements of its claim.).

III. ANALYSIS

A. *Fineman* Cannot be Held to Apply Retroactively

Petitioner cannot prevail on his claim that the rent increase was larger than permitted under the Rental Housing Act because *Fineman* cannot be held to apply retroactively. In Judge Williams' Order of April 23, 2021, the Court specifically noted that *Fineman II* "constituted legislative rulemaking that was invalid within the formalities of the DCAPA" and does not have retroactive effect. *See* Order of April 23, 2021, at 25. In its analysis, the Superior Court pointed out that prior to *Fineman II*, there was no interpretation of the RHA's ambiguous use of "rent charged" other than the OAH decisions. *Id.* The Superior Court credited that "before *Fineman II*, the OAH repeatedly held that Equity' use of the pre-concession rent as 'rent charged' to calculate adjustments was not prohibited under the RHA, so long as the amount did not exceed the maximum legal rent." *Id.* Plainly, *Fineman*, cannot be held to apply retroactively in the instant case. *See* Exhibit A at 10 ("The Housing Provider acknowledges that the two cases [*Fineman* and *Gural*] are not factually distinguishable.").[2] Prudential reasons also caution against holding *Fineman II* to apply retroactively. *See id.* at 27 ("Rent concessions are commonly used in the District of Columbia. A retroactive application in this case would give rise to an onslaught of lawsuits against housing providers who followed similar rental adjustment calculations that were reviewed and

---

[2] For this same reason, the Rent Charged Clarification Act of 2018 represents a substantial departure from prior law and cannot be used as a basis for retroactive application of the *Fineman* definition of rent charged. *See* RHA Order of Feb. 18, 2011, at 11 ("The Clarification Act essentially ratified the Commission's decision in Fineman, which was decided based on the text and history of the 2006 Amendments.").

permitted at the time.")[3] (internal citations omitted). Summary adjudication should be entered on Petitioner's rent increase claims.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully requests the entry of Partial Summary Adjudication on all claims except for the remaining retaliation claims of the instant Tenant Petition.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

/s/ Spencer B. Ritchie

Dated: January 23, 2023

Spencer B. Ritchie (D.C. Bar 1673542)
Richard W. Luchs (D.C. Bar No. 243931)
Gwynne L. Booth (D.C. Bar No. 996112)
801 17th Street, NW Suite 1000
Washington, DC 20006
Telephone: (202) 452-1400
Email: rwl@gdllaw.com; glb@gdllaw.com; sbr@gdllaw.com;
Counsel for Respondent

[3] Of note, the District of Columbia Office of Attorney General did not appeal Judge Williams' extensive opinion.

DISTRICT OF COLUMBIA
Office of Administrative Hearings

HARRY GURAL, Tenant/Petitioner, v. SMITH PROPERTY HOLDINGS VAN NESS L.P., Housing Provider/Respondent.	Case No.: 2016 DHCD TP 30,855 3003 Van Ness Street, N.W., Apt. S-707 Chief Judge M. Colleen Currie Pre-Hearing Conference: 3-21-2023

HOUSING PROVIDER/RESPONDENT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. Mr. Gural is a resident at the 3003 Van Ness Apartments, which are owned by Smith Property Holdings Van Ness LP and managed by Equity Residential Management. *See* RHC Order of February 18, 2020, attached as Exhibit A

2. Mr. Gural resides in Unit S707 (the "Unit") and has resided there since at least April 1, 2014. *Id.* at 3.

3. Mr. Gural signed a one-year lease on March 19, 2014 for the Unit through March 31, 2015. *Id.*

4. The "term sheet" of the lease identified two monthly recurring charges: "Monthly Apartment Rent" of $2,048.00 per month and a "Monthly Reserved Parking" of $100.00. *Id.*

5. The term sheet also identified a "Monthly Recurring Concession" of $278.00 per month. *Id.*

6. Through the term of the written lease, Tenant paid $1,870.00 per month to Housing Provider. *Id.*

7. Tenant continued to reside in the Unit after the written lease expired on March 31, 2015. *Id.*

8. On January 15, 2015, Housing Provider provided Tenant with a RAD Form 8, "Housing Provider's Notice to Tenants of Adjustment in Rent Charged" which stated that his rent would be increased from $2,048.00 to $2,118.00 (a 3.4% increase), effective April 1, 2015. *Id.* at 4.

9. On January 27, 2015, Housing Provider filed RAD Form 9, "Certificate of Notice to RAD of adjustments in rent charged," with the RAD. The appendix attached listed the Unit and stated that the "prior rent" was $2,048.00, the increase was $70, the new "rent charged" was $2,118.00, the percentage increase was 3.4%, and the effective date was April 1, 2015. *Id.*

10. For the months of April 2015 through March 2016, Tenant paid $1.930.00 to Housing Provider each month, which included $100.00 for reserved parking. *Id.*

11. On January 15, 2016, Housing Provider gave Tenant another RAD Form 8, which stated that the "rent charged" for the Unit would increase from $2,118.00 to $2,192.00 (a 3.5% increase) effective April 1, 2016. *Id.*

12. On February 2, 2016, Housing Provider filed RAD Form 9 with the RAD. *Id.*

13. Housing Provider agreed to accept $1,895.00 for monthly apartment rent starting April 1, 2016, provided Tenant sign a one-year lease which identified "Monthly Apartment Rent" as $2,192.00 and provided for "Monthly Recurring Concession" of $297.00.

14. Tenant refused to sign the lease. *Id.*

15. Mr. Harry Gural ("Gural" or "Petitioner") filed the instant Tenant Petition on or about August 30, 2016. *See* Tenant Petition, attached as Exhibit B.

16. In the petition, Tenant alleged that Housing Provider violated various provisions of the Rental Housing Act of 1985 in relation to his tenancy at 3003 Van Ness Street, NW. *See id.*

17. In particular, Petitioner asserted that (1) the rent increase that he received was larger than the increase permitted by law; (2) that the Housing Provider did not file the correct rent increase forms with the Rental Accommodations Division (the RAD); (3) that the Housing Provider, property manager, or other agent of the Housing Provider took retaliatory action against him; and (4) that a Notice to Vacate had been served on Tenant in violation of D.C. Code § 42-3505.01. *Id.*

18. On April 12, 2017, this Honorable Court entered an Order Granting in Part and Denying in Part Housing Provider's Motion for Summary Judgment; Denying Tenant's Motion for Partial Summary Judgment, and Granting Tenant's Request to Withdraw One Claim in his Tenant Petition. *See* Order of April 12, 2017, attached as Exhibit C.

19. Mr. Gural filed his Notice of Appeal on September 28, 2017. On February 18, 2020, Chief Administrative Judge Spencer of the District of Columbia Rental Housing Commission entered a Decision and Order reversing and remanding in part the Summary Judgment Order. *See* Exhibit A.

20. The RHC vacated the Order in part and remanded for further proceedings to provide the Tenant the opportunity to call Ms. Duvall as a witness regarding his retaliation claims arising from the demand to sign a new lease term and the initiation of an action for possession against the Tenant.

21. The Court dismissed the Tenant's appeal on the issue of the Housing Provider's conduct in pursuing the action for possession.

22. The Court affirmed the Order on the issue of whether the late fees imposed by the Housing Provider were retaliatory.

23. In its Order, the Court relied *on Fineman v. Smith Prop. Holdings Van Ness, LP*, which held that the Act is ambiguous in its use of the phrase "rent charged" as either a maximum legal rent or the rent actually demanded or received from a tenant.

24. The District of Columbia brought a D.C. Consumer Protection Procedures Act ("CPPA") Complaint against Equity Residential Management, L.L.C. ("Equity") for its advertising and leasing practices regarding the 3003 Van Ness Street, NW Apartments. *See generally* Third Amended Complaint ("TAC"), 2017 CA 008334 B, attached as <u>Exhibit D</u>.

25. This litigation related to, and revolved around, Equity's rent concessions structure. *See* Order of April 23, 2021 at 2, attached as <u>Exhibit E</u>.

26. In the Final Order assessing liability in that case, the instant Tenant Petition was specifically mentioned. *See id.* at 5 ("In six different proceedings between 2013 and 2017 against Equity 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 . . . Gural v. Equity Residential Mgmt., L.L.C.*, 2016 DHCD-TP 20,855") (internal footnotes omitted).

27. In its Order, the Court ruled that Equity's concession practices did not violate the RHA and further ruled that neither the Rent Charged Clarification Act of 2018 nor the holding of *Fineman II* could be applied retroactively. *See id.* at 21.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

/s/ Spencer B. Ritchie

Dated: January 23, 2022

Spencer B. Ritchie (D.C. Bar 1673542)
Richard W. Luchs (D.C. Bar No. 243931)
Gwynne L. Booth (D.C. Bar No. 996112)
801 17th Street, NW Suite 1000
Washington, DC 20006
Telephone: (202) 452-1400
Email: rwl@gdllaw.com; glb@gdllaw.com; sbr@gdllaw.com;
Counsel for Respondent

EXHIBIT A

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-16-30,855

In re: 3003 Van Ness Street, N.W.
Unit S-707

Ward Three (3)

HARRY GURAL
Tenant/Appellant

v.

EQUITY RESIDENTIAL MANAGEMENT and SMITH PROPERTY HOLDINGS LP
Housing Providers/Appellees

DECISION AND ORDER

February 18, 2020

SPENCER, CHIEF ADMINISTRATIVE JUDGE: This case is on appeal to the Rental Housing Commission ("Commission") from a final order issued by the Office of Administrative Hearings ("OAH"),[1] based on a petition filed in the Rental Accommodations Division ("RAD") of the Department of Housing and Community Development ("DHCD"). The applicable provisions of the Rental Housing Act of 1985 ("Act"), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01 -3509.07 (2012 Repl.), the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. OFFICIAL CODE §§ 2-501 -510 (2012 Repl.), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR chapters 28 & 29 (2016) and 14 DCMR chapters 38-44 (2004), govern these proceedings.

[1] OAH assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversion Division ("RACD") of the Department of Consumer and Regulatory Affairs ("DCRA") pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.01 -1831.03(b-1)(1) (2007 Repl.). The functions and duties of RACD were transferred to DHCD by § 2003 of the Rental Housing Operations Transfer Amendment Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04B (2010 Repl.).

I. PROCEDURAL HISTORY

On August 30, 2016, tenant/appellant Harry Gural ("Tenant"), residing at 3003 Van Ness Street, N.W. ("Housing Accommodation"), filed tenant petition 30,855 ("Tenant Petition") with the RAD against housing providers/appellees Equity Residential Management and Smith Property Holdings, LP (collectively, "Housing Provider"). Tenant Petition at 1-4; R. at Tab 1. In the Tenant Petition, the Tenant alleged that the Housing Providers violated the Act as follows:

1. The rent increase was larger than the increase allowed by any applicable provision of the Act.
2. The Housing Provider did not file the correct rent increase forms with the RAD.
3. The Housing Provider, property manager, or other agent of the Housing Provider has taken retaliatory action against me/us in violation of D.C. OFFICIAL CODE § 42-3505.02 (Supp. 2008).
4. A Notice to Vacate has been served on me/us, which violates D.C. OFFICIAL CODE § 42-3505.01 (Supp. 2008).[2]

Id. at 2-3.

The parties cross-moved for summary judgment, and, on April 12, 2017, Administrative Law Judge M. Colleen Currie ("ALJ") issued an Order Granting in Part and Denying in Part Housing Provider's Motion for Summary Judgment; Denying Tenant's Motion for Partial Summary Judgment; and Granting Tenant's Request to Withdraw One Claim in His Tenant Petition ("Summary Judgment Order"). R. at unmarked part.[3] In the Summary Judgment Order, the ALJ found that the following facts were not in dispute:

1. The Housing Accommodation located at 3003 Van Ness is owned by Smith Property Holdings Van Ness LP and managed by Equity Residential

[2] The Tenant subsequently withdrew claim number 4.

[3] The certified record transmitted to the Commission by OAH contains 36 marked tabs dividing pleadings, orders, and other documents, but a large number of documents are unordered and stacked together with no numbering or division.

Management.

2. The Housing Accommodation is subject to the rent stabilization provisions of the Act.

3. Tenant has resided in unit S707 (the Unit) since at least April 1, 2014.

4. Tenant signed a one-year lease on March 19, 2014 for the Unit for the period April 1, 2014 through March 31, 2015. The "term sheet" of the lease identified two "monthly recurring charges:" "Monthly Apartment Rent" of $2,048 per month and "Monthly Reserved Parking" of $100.

5. The term sheet also identified a "Monthly Recurring Concession" of $278 per month. The term sheet stated: "The Total Monthly Rent shown above will be adjusted by these lease concession amounts." The concession reduced the amount Tenant was obligated to pay to Housing Provider during the term of the lease from $2,048 to $1,870 per month.

6. The lease included a "Concession Addendum." That addendum states in pertinent part:

   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.

   Consistent with the provisions of the Rental Housing Act of 1985 (DC Law 6-10) as amended (the Act), we reserve the right to increase your rent once each year. In doing so, we will deliver to you a "Housing Provider's Notice to Tenants of Adjustment in Rent Charged," which will reflect the "new rent charged." If you allow your Lease to roll on a month to month basis after the Expiration Date, your monthly rent will be the "new rent charged" amount that is reflected on the Housing Provider's Notice.

   It is understood and agreed by all parties that the monthly recurring concession is being given to you as an inducement to enter into the Lease. You acknowledge and agree that you have read and understand the Lease Concessions provision contained in the Terms and Conditions of your Lease.

7. Through the term of the written lease, Tenant paid $1,870 per month to Housing Provider. This sum equals the "Monthly Apartment Rent" and the "Monthly Reserved Parking" combined, less the "Monthly Concession."

8. Tenant continued to reside in the Unit after the written lease expired on March 31, 2015.

9. On January 15, 2015, Housing Provider provided Tenant with RAD Form 8, "Housing Provider's Notice to Tenants of Adjustment in Rent Charged"

which stated that "your current rent charged" for the Unit would increase from $2,048 to $2,118 (a 3.4% increase), effective April 1, 2015.

10. On January 27, 2015, Housing Provider filed RAD Form 9, "Certificate of Notice to RAD of adjustments in rent charged," with the RAD. The appendix attached to the Certificate listed the Unit and stated that the "prior rent" was $2,048, the increase was $70, the new "rent charged" was $2,118, the percentage increase was 3.4%, and the effective date was April 1, 2015.

11. For the months April 2015 through March 2016, Tenant paid to Housing Provider $1,930 each month, which amount included $100 for reserved parking.

12. On January 15, 2016, Housing Provider gave Tenant another RAD Form 8. This one stated that "rent charged" for the Unit would increase from $2,118 to $2,192 (a 3.5% increase), effective April 1, 2016.

13. On February 2, 2016, Housing Provider filed RAD Form 9 with the RAD. The appendix attached to that Certificate listed the Unit and noted that the "rent charged" was $2,118, the increase was $74, the new "rent charged" was $2,192, the percentage increase was 3.5%, and the effective date was April 1, 2016.

14. Housing Provider agreed to accept $1,895 for monthly apartment rent starting April 1, 2016, provided Tenant sign a one-year lease which identified "Monthly Apartment Rent" as $2,192 and provided for a "Monthly Recurring Concession" of $297.

15. Tenant refused to sign the offered lease.

16. On March 25, 2016, Tenant paid Housing Provider $1,995, which amount included $100 for reserved parking, for the month of April, 2016.

17. On April 27, 2016, Housing Provider filed a complaint for non-payment of rent in the Landlord-Tenant Branch of D.C. Superior Court (the LTB Case). It was assigned case number 2016 LTB 010863.

18. Tenant filed Tenant Petition 30,818 on May 12, 2016 alleging that Smith Properties Holdings Van Ness LP and Equity Property Management violated various provisions of the Act.

19. At the initial hearing in the LTB Case on May 19, 2016, a *Drayton* stay was entered by consent. Additionally, a protective order was signed requiring Tenant to pay $297 per month into the court registry during the pendency of the case.

20. In TP 30,818, Housing Provider filed a motion for summary judgment on June 28, 2016. In his response to that motion, Tenant stated that he wished

to voluntarily dismiss the Petition without prejudice. Presiding Administrative Law Judge Vergeer granted that request and on July 28, 2016, TP 30,818 was dismissed without prejudice.

21. On August 23, 2016, Housing Provider filed a motion to vacate the Drayton stay in the LTB Case.

22. On August 30, 2016, Tenant filed the Tenant Petition in this matter.

23. On September 1, 2016, Housing Provider's motion to vacate the *Drayton* stay was denied and the stay remains in place as of the date of this order.

Id. at 3-6.

The ALJ concluded that the $297 rent increase in April 2016 did not violate the Act and that the Housing Provider's filing of a greater "rent charged" on the RAD form than the Tenant was actually required to pay under the "rent concession" lease was permissible. *Id.* at 18. Accordingly, the ALJ dismissed those claims from the Tenant Petition. The ALJ found that there were material facts in dispute with respect to retaliation and denied the Housing Provider's motion for summary judgment on those claims. *Id.* at 20-21.

An evidentiary hearing was held with respect to the Tenant's retaliation claims on May 22, 23, and 24, 2017. *See* Hearing Transcript ("Tr.") at 1, 75, & 116; R. at unmarked part; Hearing CD (OAH May 22, 2017); Hearing CD (OAH May 23, 2017); Hearing CDs 1-7 (OAH May 24, 2017).[4] On September 12, 2017, the ALJ issued a final order in this case: Gural v. Equity Residential Mgmt., 2016-DHCD-TP 30,855 (OAH Sept. 12, 2017) ("Final Order"); R. at Tab 35. In the Final Order, the ALJ addressed the Tenant's claims that the Housing Provider had retaliated against him in the following ways:

1. Requiring Tenant to sign a written lease in order to obtain a rent concession;

[4] The certified record includes a transcript that does not appear to be official or prepared by a certified reporter. Nonetheless, the Commission has reviewed the audio recordings of the evidentiary hearing and verified the general accuracy of the transcript for all parts cited in this decision and order. For reasons that are unclear, OAH was unable to provide the recordings of the May 24, 2017 portion of the hearing on a single CD or set of audio files.

2. failing to file a 30-day notice to quit before filing the [District of Columbia Superior Court Landlord-Tenant Branch ("LTB")] case;

3. Filing the LTB case;

4. Obtaining a protective order in the LTB case;

5. Assessing late fees;

6. Filing a motion to vacate the Drayton stay in the LTB case accompanied by a proof of service that was false; and

7. Reporting a delinquency in his rental payments to TransUnion.

Id. at 18. The ALJ determined that the statutory presumption of retaliatory action, *see* D.C. OFFICIAL CODE § 42-3505.02(b), applied to each of the acts taken by the Housing Provider, but found that the Housing Provider proved, by clear and convincing evidence, that its motive was not retaliatory or, with respect to the conduct of the Housing Provider's attorney in the course of litigating the LTB case, such actions are not covered by the retaliation provisions of the Act. *Id.* at 18-26.

On September 28, 2017, the Tenant filed a notice of appeal with the Commission ("Notice of Appeal"). The Tenant asserts that the ALJ erred by granting partial summary judgment on his rent increase claims, by denying him the opportunity to directly examine the Housing Provider's witness, Ms. Duvall, and by denying his claims of retaliatory actions in the Final Order. *See* Notice of Appeal at 1-5.

The Tenant filed a brief on March 5, 2019 ("Tenant's Brief"), and the Housing Provider filed a brief on March 14, 2019 ("Housing Provider's Brief"). On March 19, 2019, the Commission held a hearing on this appeal, at which the Tenant appeared *pro se* and the Housing Provider appeared through counsel. Hearing CD (RHC Mar. 19, 2019) at 11:02.

II. ISSUES ON APPEAL

A. Rent Increase – Whether the Act permits the Housing Provider to preserve a higher "rent charged" than the Tenant is actually required to pay

B. Witnesses and Evidence

1. Whether the ALJ erred by quashing the subpoena for Ms. Duvall and not permitting the Tenant to call her as a witness

2. Whether the ALJ erred by limiting the Tenant's presentation of evidence related to his advocacy regarding "concession" leases

C. Claims of Retaliation

1. Whether the ALJ erred in concluding that the Housing Provider did not retaliate against the Tenant with respect to its lease renewal and eviction policies or practices

2. Whether the ALJ erred in concluding that the Housing Provider's attorney's conduct in the LTB case is not covered by the retaliation provisions of the Act

3. Whether the ALJ erred in concluding that the Housing Provider's assessment of late fees and reporting of their nonpayment to a credit agency were not retaliatory

III. DISCUSSION

The Commission's standard of review is found at 14 DCMR § 3807.1 and provides as follows:

> The Commission shall reverse final decisions of the [OAH] which the Commission finds to be based upon arbitrary action, capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceedings before the [OAH].

The Commission has consistently defined substantial evidence as "such relevant evidence as a reasonable mind might accept as able to support a conclusion." *See* Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 n.10 (D.C. 1994); Waller v. Novo Dev. Corp., RH-TP-16-30,764 (RHC Feb. 15, 2018) at 28. Where the Commission determines that substantial evidence exists to support a hearing examiner's findings, "even 'the existence of

substantial evidence to the contrary does not permit the reviewing agency to substitute its judgment for that of the [ALJ].'" Hago v. Gerwirz, RH-TP-08-11,552 & RH-TP-08-12,085 (RHC Feb. 15, 2012) at 6 (citing WMATA v. D.C. Dep't of Emp't Servs., 926 A.2d 140, 147 (D.C. 2007)). When reviewing an ALJ's findings of fact, "the relevant inquiry is whether the [ALJ's] decision was supported by substantial evidence, not whether an alternative decision might also have been supported by substantial evidence." Gary v. D.C. Dep't of Emp't Servs., 723 A.2d 1205, 1209 (D.C. 1998); *see* Waller, RH-TP-16-30,764 at 29. The Commission has consistently held that "credibility determinations are 'committed to the sole and sound discretion of the [ALJ].'" *See, e.g.*, Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sept. 25, 2014); Notsch v. Carmel Partners, LLC, RH-TP-06-28,690 (RHC May 16, 2014) at 32.

"Guiding legal principles" commit the management and conduct of trials or other evidentiary proceedings to the sound discretion of the presiding judge. Bolton v. Crowley, Hoge & Fein, P.C., 110 A.3d 575, 587-89 (D.C. 2015); Petropoulos v. Borger Mgmt., Inc, RH-TP-13-30,343 (RHC July 9, 2019) at 7. However, an error of law or the application of an incorrect legal standard by definition constitutes an abuse of discretion. In re: K.C., 200 A.3d 1216, 1233 (D.C. 2019); Petropoulos, RH-TP-13-30,343 at 11. The Commission will review the ALJ's legal conclusions under the Act *de novo*. United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426, 430-31 (D.C. 2014).

A. Rent Increase – Whether the Act permits the Housing Provider to preserve a higher "rent charged" than the Tenant is actually required to pay

The ALJ granted summary judgment for the Housing Provider on the Tenant's claims that his rent was increased by more than allowed under the rent stabilization provisions of the Act and that the Housing Provider had filed an incorrect notice of rent adjustment with the RAD, because provisions of the Tenant's lease stated that his rent was one amount (consistently over

$2,000 per month) but that, due to a "monthly recurring concession," he was only required to pay a lower amount (consistently less than $1,900 per month). The ALJ reasoned, and the Housing Provider argues on appeal, that the Act permits a housing provider to preserve a regulated, maximum amount of rent for a rental unit, known in the statute and RAD forms as the "rent charged," while giving a discount to a specific tenant in the actual amount of rent due under the terms of a contract.

The Commission has previously determined that the ALJ's interpretation of the phrase "rent charged" is incompatible with the structure and purpose of the Act, as amended in 2006. Fineman v. Smith Prop. Holdings Van Ness, LP, RH-TP-16-30,842 (RHC Jan. 18, 2018). In Fineman, the Commission found that the Act is ambiguous in its use of the phrase "rent charged" as either a maximum legal rent or the rent actually demanded or received from a tenant. *Id.* at 22-26. This ambiguity arises in part from the Rent Control Reform Amendment Act of 2006 (D.C. Law 16-145; 53 DCR 4889) ("2006 Amendments"), which abolished "rent ceilings" as the primary mechanism of the Act's rent stabilization provisions. *Id.* at 19.

The Commission reviewed the legislative history of the 2006 Amendments, *see* Council of the District of Columbia, Committee on Consumer & Regulatory Affairs, Addendum to the Committee Report, Bill 16-109 "Rent Control Reform Amendment Act of 2006" (2006), and prior decisions of the Commission and the District of Columbia Court of Appeals ("DCCA") explaining the varying uses of "rent," "rent charged," "rent adjustment," and "rent ceiling." *See, e.g.,* Winchester Van Buren Tenants Ass'n v. D.C. Rental Hous. Comm'n, 550 A.2d 51, 53-54 (D.C. 1988). The Commission concluded that the phrase "rent charged" is intended to refer to the rent actually demanded or received from a tenant and that the Act does not permit a housing provider to use the RAD forms to preserve a maximum, legal rent in excess of what is actually

charged. Fineman, RH-TP-16-30,842, at 31-32. Reviewing the lease agreements between the Housing Provider and the tenant in that case, the Commission found no basis in the course of dealings between the parties to treat the higher amount of rent stated in the leases and on the RAD forms as having ever been an actual "condition of occupancy or use of [the] rental unit." *Id.* at 35-36 (quoting D.C. OFFICIAL CODE § 42-3501.03(28) (2012 Repl.) (defining "rent")).

In this case, the Tenant resides at the same Housing Accommodation with the same Housing Provider and an identical concession addendum to his lease (other than the amount of rent) as was at issue in Fineman. The Housing Provider acknowledges that the two cases are not factually distinguishable on this issue. Hearing CD (RHC Mar. 19, 2019) at 11:29. The Housing Provider nonetheless maintains that the Commission's prior interpretation of the Act was erroneous. Housing Provider's Brief at 3-14. The Housing Provider further asserts that Fineman should only be given prospective application to claims arising after January 2018 and that, in any event, because the Commission's decision in Fineman resulted in a remand to OAH, and both parties have appealed from OAH's decision on remand, that case is not "final" and cannot be applied in a separate case. Housing Provider's Brief at 14-15.[5]

The Commission is satisfied that its determinations in Fineman are correct interpretations of the Act and that the statutory interpretation articulated in that case applies here. We start from the principle that "judicial decisions interpreting statutes are "given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.'" Zanders v. Baker, 207 A.3d 1129, 1139 (D.C. 2019) (quoting Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993)). The Housing Provider's

[5] The Commission notes that the Housing Provider has moved to vacate the Commission's decision in Fineman on the grounds that the case is moot. As of the date of this decision and order, the Commission has not yet acted on that motion or issued a decision on the tenant's appeal of the final order after remand in that case.

arguments in its brief in this case reiterate, without significant difference, the arguments made in its motion for reconsideration of the Commission's decision in Fineman. *See* Fineman v. Smith Prop. Holdings Van Ness, LP, RH-TP-15-30,284 (RHC Mar. 13, 2018) (Order Denying Reconsideration). Moreover, the Commission has subsequently followed that interpretation of the Act in determining that notices provided to a tenant that contain "preserved" rent levels above the actual rent may constitute unlawful demands for rent. Washington v. A&A Marbury, LLC/UIP Prop. Mgmt., RH-TP-11-30,151 (RHC Sept. 28, 2018). To the extent there may be any question of the finality or precedential value of those decisions, which resulted in remands to OAH and have not become ripe for judicial review, the Commission adopts and incorporates here its prior reasoning in the three orders just cited.

The parties also dispute the effect of the recently-enacted Rent Charged Definition Clarification Act of 2018, effective March 13, 2019 (D.C. Law 22-248; 66 DCR 973) ("Clarification Act"). *Compare* Tenant's Brief at 7-8 *with* Housing Provider's Brief at 15-16. The Commission observes that the "general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision." Webb v. D.C. Dep't of Emp't Servs., 204 A.3d 843, 850 (D.C. 2019) (quoting Thorpe v. Hous. Auth. of the City of Durham, 393 U.S. 268, 282 (1969)). That rule may be limited, however, where it interferes with vested rights of a party. *See* Holzsager v. D.C. Alcoholic Bev. Control Bd., 979 A.2d 52, 59-60 (D.C. 2009); Scholtz P'ship v. D.C. Rental Accommodations Comm'n, 427 A.2d 905, 914-18 (D.C. 1981) ("A vested right must be more than a mere expectation based on the anticipated application of existing law.").

The Housing Provider asserts that the Clarification Act is a substantial departure from prior law, thus altering its vested rights. The Commission is satisfied, however, that the Clarification Act does not result in any change in the legal standards that applied to the Housing

Provider from 2006 to 2019. The Clarification Act essentially ratified the Commission's decision in Fineman, which was decided based on the text and history of the 2006 Amendments. *See* Council of the District of Columbia, Committee on Housing & Neighborhood Revitalization, Report on B22-0999, the "Rent Charged Definition Clarification Amendment Act of 2018" at 2 (Nov. 7, 2018) (stating, in its second sentence, that "[t]he bill clarifies the definition of 'rent charged' in a manner consistent with the recent Rental Housing Commission decision in *Fineman v. Smith*, [sic] RH-TP-16-30842, January 18, 2018."). Nothing in the plain language of the Clarification Act unambiguously requires a different result from what the Commission reached in Fineman. *Cf.* 1215 CT, LLC t/a Rosebar Lounge v. D.C. Alcoholic Beverage Control Bd., 213 A.3d 605, 610 (D.C. 2019) (notwithstanding statement in committee report of Council's intent to "clarify and codify the current state of the law in light of [a prior DCCA] decision," legislation contained further provisions clearly establishing additional legal standard). The Housing Provider's argument presupposes that Fineman was decided incorrectly and that the 2006 Amendments allowed preservation of higher rent levels. The Commission, as stated, rejects that position in the absence of a contrary decision from the DCCA. Moreover, the Commission is satisfied that Fineman (or the Clarification Act) may be applied to conduct that occurred before 2019 because the Housing Provider had only "a mere expectation based on the anticipated application of existing law," not a vested right. Scholtz, 427 A.2d at 918.

Accordingly, the Summary Judgment Order is reversed.

B. Witnesses and Evidence

1. Whether the ALJ erred by quashing the subpoena for Ms. Duvall and not permitting the Tenant to call her as a witness

On May 17, 2017, the Wednesday before the start of the evidentiary hearing on Monday, May 22, 2017, the Tenant filed a request for OAH to issue a subpoena to Avis Duvall, an

employee of the Housing Provider, as well as two other witnesses, to appear and testify. That same day, the Housing Provider filed its pre-hearing list of witnesses and exhibits, which named Ms. Duvall as its sole, planned witness.

On May 19, 2017, a subpoena was issued for Ms. Duvall by the Clerk of OAH pursuant to OAH Rule 2934.1, which provides that up to three subpoenas shall be issued to compel testimony relating to housing conditions, repairs, maintenance, and rent increases. On the same day, the Housing Provider moved to quash the subpoena, and the ALJ granted the motion on the grounds that Ms. Duvall was not personally served with the subpoena and that the Tenant's request form was marked, incorrectly, to state that illegal rent increases were an issue in the case, despite the Summary Judgment Order having dismissed those claims. Order Granting Motion to Quash at 1; R. at Tab 26. Nonetheless, Ms. Duvall was called by and testified on behalf of the Housing Provider and cross-examined by the Tenant. Tr. at 118-83.[6] Several times during the Tenant's questioning, the ALJ sustained objections by the Housing Provider that the questions exceeded the scope of the Housing Provider's direct examination. *Id.* at 131-32, 135-37, 162-65, & 171-72;[7] *see also id.* at 184-85 (denying Tenant's request to call Ms. Duvall as a rebuttal witness, after her direct and cross-examination in Housing Provider's case, on same grounds as Order Granting Motion to Quash).[8]

The Commission reviews an ALJ's decision to grant or deny a subpoena for abuse of discretion. *See* Jones v. D.C. Dep't of Emp't Servs., 451 A.2d 295, 297 (D.C. 1982); Bettis v.

[6] Hearing CD 1 (OAH May 24, 2019) at 6:00 - Hearing CD 6 (OAH May 24, 2017) at 10:45.

[7] Hearing CD 2 (OAH May 24, 2019) at 3:00-5:40, *id.* at 11:20-17:45, *id.* at 1:00:00 - Hearing CD 3 (OAH May 24, 2017) at 1:45, & Hearing CD 4 (May 24, 2017) at 11:00-13:30.

[8] Hearing CD 6 (OAH May 24, 2017) at 10:45-14:45.

Horning Assocs., RH-TP-15-30,658 (RHC July 20, 2018) at 39. The OAH Rules provide, for subpoena requests in rental housing cases, that:

> The Clerk shall issue no more than three subpoenas to the tenant side . . . under subsection 2824.5 to compel . . . [t]he appearance at a hearing of any witnesses, including housing inspectors, with knowledge of conditions, repairs, or maintenance in a party's rental unit or any common areas . . . [or] [t]he production at or before a hearing of all records in a housing provider's possession relating to any rent increases demanded or implemented for a party's rental unit for the three year period immediately before the filing of the petition with the Rent Administrator.

1 DCMR § 2934.1(a). All other subpoena requests "for the appearance of witnesses and production of documents at a hearing shall only be issued by an Administrative Law Judge" and "unless otherwise provided by law or order of an Administrative Law Judge, any request for a subpoena shall be filed no later than five calendar days prior to the hearing." 1 DCMR § 2824.1 & .4 (emphasis added). Once issued by OAH, "[s]ervice of a subpoena for a witness to appear at a hearing shall be made by personally delivering the subpoena to the witness. Unless otherwise ordered by an Administrative Law Judge, service shall be made at least four calendar days before the hearing." 1 DCMR § 2824.7 (emphasis added).

It is unnecessary to determine whether the ALJ erred in quashing the Clerk-issued subpoena for Ms. Duvall for two reasons. First, as to the Tenant's rent increase claims, the ALJ quashed the Tenant's subpoena because OAH Rule 2934.1 limits Clerk-issued subpoenas in rental housing cases to witnesses or documents relating to "rent increases demanded or implemented" or "conditions, repairs, or maintenance" of the housing accommodation. At the time the subpoena was issued, the ALJ had dismissed the Tenant's rent increase claims in the Summary Judgment Order, and the only issues remaining to be heard in this case were the Tenant's retaliation claims. Order Granting Motion to Quash at 1. Because the Commission

now reverses the Summary Judgment Order, the Tenant will have a renewed opportunity on remand to call witnesses in support of his rent increase claims.[9]

Second, as to the Tenant's claims of retaliation, the Commission determines that the ALJ abused her discretion in limiting the Tenant to cross-examination of Ms. Duvall. Despite the procedural irregularities of the Tenant's subpoena request identifying Ms. Duvall as a witness (on which he was entitled to leeway), it is clear from the record that OAH and the Housing Provider had sufficient advance notice that the Tenant intended to call her as a witness during his case-in-chief when he filed and served the subpoena the week before the evidentiary hearing. *See* 1 DCMR § 2924.4 & .7 (filing and service deadlines for subpoenas); *cf.* 1 DCMR § 2821.2 ("At least five (5) calendar days before any evidentiary hearing . . . a party shall serve on all other parties and file with the Clerk . . . [a] list of the witnesses, *other than a party* or a charging inspector, whom the party intends to call to testify[.]" (emphasis added)).[10]

In its Motion to Quash, the Housing Provider "acknowledge[d] that it ha[d] identified Ms. Duvall as a witness for the evidentiary hearing[,]" but asserted that "it is not obligated by the rules of [OAH] to offer Ms. Duvall as a witness on behalf of the [Tenant]." Motion to Quash at 1. To the contrary, under District of Columbia law, a party to litigation is "compellable to give evidence on behalf of any other party to the action or proceeding." D.C. OFFICIAL CODE § 14-

[9] The ALJ also quashed the subpoena because of its improper service upon Ms. Duvall. The Commission notes that a *pro se* litigant should be given the opportunity to correct defects in service, *see* Reade v. Saradji, 994 A.2d 368, 373 (D.C. 2010), and that, in the short window before the scheduled hearing, no such opportunity was given. However, the Commission does not need to address whether this was an abuse of discretion because, as to the rent increase issues, a new hearing is in order and, as to the retaliation claims, Ms. Duvall was available to and did testify at the hearing. For the same reasons, the Commission does not need to address the Tenant's allegation that the quick issuance of the Order Granting Motion to Quash evinces *ex parte* coordination between the ALJ and the Housing Provider.

[10] By contrast, the only notice in the record of the Tenant's intent to call Mr. Fineman and Mr. Janzen appears to be the subpoena request forms filed the same day as the request for Ms. Duvall, but the Housing Provider made no objection to their being called by the Tenant.

301; Wash. Times v. D.C. Dep't of Emp't Servs., 530 A.2d 1186, 1189-90 (D.C. 1987); Abbey v. Jackson, 483 A.2d 330, 335 (D.C. 1984). Although it was not explicitly stated on the Housing Provider's pre-hearing witness list, it was made clear during the evidentiary hearing that Ms. Duvall's testimony was offered as "the corporate representative in this hearing." Tr. at 131-32.[11] Because Ms. Duvall stood in the shoes of the Housing Provider, the Tenant was entitled to call her as a respondent-party witness.

When the Tenant renewed his request to call Ms. Duvall as a witness, the ALJ repeatedly denied his request because she had already ruled on the issue in the Order Granting Motion to Quash. *See* Tr. at 3 & 184-85.[12] However, because Ms. Duvall was already present at the evidentiary hearing as the Housing Provider's witness, there would have been no prejudice to the Housing Provider, inconvenience to Ms. Duvall personally, or harm to the administration of justice by allowing the Tenant to directly examine her, either during his case in chief or during his opportunity for cross-examination after she was called by the Housing Provider. Given a trial judge's "extensive discretion in controlling the examination of witnesses," the ALJ could have, at a minimum, overruled the Housing Provider's objections that the Tenant's questions were outside the scope of direct examination. *See* Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP, 68 A.3d 697, 717 (D.C. 2013) (no abuse of discretion where "the judge explicitly warned [plaintiff] not to hold back from asking any questions necessary to prove his case because the scope of his redirect would be limited").[13] Failing to exercise that discretion to

---

[11] Hearing CD 2 (OAH May 24, 2019) at 3:00-5:40.

[12] Hearing CD (OAH May 22, 2017) at 4:43-5:30 & Hearing CD 6 (OAH May 24, 2017) at 10:45-14:45.

[13] The Commission also observes that, although the plaintiff in Pietrangelo was *pro se* and yet the DCCA found no abuse of discretion, the plaintiff there, unlike the Tenant, was himself an attorney who had "deliberately disregarded orders of the trial court and exhibited an attitude of disrespect to the trial judge and the administrative of justice." 68 A.3d at 706-07.

permit a *pro se* party to fully examine the opposing party deprived the Tenant of the ability to "participate effectively in the trial process." *See* Reade, *supra* note 9, 994 A.2d at 373 (quoting Moore v. Agency for Int'l Dev., 994 F.2d 874, 876 (D.C. Cir. 1993)); Wash. Times, 530 A.2d at 1189-90.

Accordingly, on remand the Tenant shall be provided the opportunity to call Ms. Duvall (or another corporate representative of the Housing Provider) as a witness for direct examination on his rent increase claims and his retaliation claims, to the extent the latter are consistent with the remainder of this decision.

2. Whether the ALJ erred by limiting the Tenant's presentation of evidence related to his advocacy regarding "concession" leases

The Tenant's Notice of Appeal asserts that "[t]he ALJ denied the Tenant's efforts to introduce into evidence emails essential to his case that provided evidence of his activities as president of the tenant association and his work against fraudulent 'concession' leases[.]" Notice of Appeal at 4. Somewhat differently, the Tenant's Brief asserts that "[t]he ALJ did not apply the correct standard of proof for retaliation, given [the Tenant's] active record as president of the tenants' association in the preceding period." Tenant's Brief at 14.

A notice of appeal must make a clear and concise statement of errors made by an ALJ, and the party filing the appeal must be "aggrieved" by the ALJ's allegedly erroneous decision. 14 DCMR §§ 3802.1 & 3802.5(c); *see, e.g.,* Siegel v. B.F. Saul Co., RH-TP-06-28,524 (RHC Sept. 9, 2015) at 29-31. An appellant's brief must be limited to the issues raised in his or her notice of appeal. *See* B.F. Saul Prop. Co. v. Nelson, TP 28,519 (RHC Feb. 18, 2016) at 85 ("the use of the brief as a means of advancing issues that were not raised in the notice of appeal 'exceeds the permissible scope of the brief'").

In the Final Order, the ALJ concluded that the Tenant had engaged in protected acts under D.C. OFFICIAL CODE § 42-3505.02(b) within six months of all of the allegedly retaliatory acts by the Housing Provider, triggering a presumption of retaliation.[14] Final Order at 17-18. The Tenant therefore has not identified an issue on which he is aggrieved, even if additional evidence of his protected activities would have bolstered his argument, because he ultimately prevailed on the question of whether the statutory presumption should be applied. The Tenant does not identify any other claims of retaliation to which the statutory presumption was not applied.[15] To the extent the burden of proof on rebuttal was allegedly not met, the Tenant's specific claims of error are addressed below.

Accordingly, this issue is dismissed.

C. Claims of Retaliation

In the Final Order, the ALJ concluded that the Housing Provider had not retaliated against the Tenant for his advocacy work and complaints regarding the legitimacy of concession leases under the Rent Stabilization Program. The retaliation provision of the Act, D.C. OFFICIAL CODE § 42-3505.02, provides, in relevant part, as follows:

> (a) No housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant by this chapter, by any rule or order issued pursuant to this chapter, or by any other provision of law. Retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action

[14] The applicable standards for establishing and rebutting the presumption of retaliation are discussed in detail in the next section of this decision.

[15] The Commission observes that the Tenant attempted to introduce several emails while questioning Ms. Duvall about the decision-making process of the Housing Provider and its employees' knowledge of his advocacy work, and he was prevented from doing so because it was not within the scope of the Housing Provider's direct examination. Tr. at 163-65; Hearing CD 2 (OAH May 24, 2017) at 1:11:30 - Hearing CD 3 (OAH May 24, 2017) at 1:45. It is not entirely clear, but this may be what the Tenant references in his Notice of Appeal. As the Commission has reversed the ALJ's ruling on the scope of the Tenant's questioning of Ms. Duvall, our dismissal of this issue on appeal should not be read to preclude the Tenant, on remand, from questioning Ms. Duvall and confronting her with any particular evidence, to the extent that it is relevant to live issues and not unnecessarily cumulative of other evidence that was already sufficient to trigger the presumption of retaliation.

which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.

(b) In determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact shall presume retaliatory action has been taken, and shall enter judgment in the tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption, if within the 6 months preceding the housing provider's action, the tenant: . . .

(4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization . . . [.]

The regulations further clarify what constitutes retaliatory action, providing that "'[r]etaliatory action,' is action intentionally taken against a tenant by a housing provider to injure or get back at the tenant for having exercised rights protected by § 502 of the Act." 14 DCMR § 4303.1.

The Commission has consistently explained that the determination of retaliation is a two-step process: first, the ALJ must determine whether a housing provider committed an act that can be considered retaliatory under D.C. OFFICIAL CODE § 42-3505.02(a). *See, e.g.*, Wilson v. D.C. Rental Hous. Comm'n, 159 A.3d 1211, 1218 n.6 (D.C. 2017) (cases of retaliatory action have included "a landlord's repossession of property, failure to repair a fixture, monetary or service-related increase of rent, or the enforcement of previously unenforced lease provisions"); Novak v. Sedova, RH-TP-15-30,653 (RHC Sept. 28, 2018) at 14-15 (discussing severity of action required to establish "harassment, threats, or coercion"). Second, the ALJ must determine whether the housing provider acted with retaliatory intent, which must be presumed if the tenant establishes that the housing provider's conduct occurred within six months of the tenant performing one of the six protected acts listed in D.C. OFFICIAL CODE § 42-3505.02(b). *See, e.g.*, Jackson v. Peters, RH-TP-07-28,898 (RHC Feb. 3, 2012) at 15-17.

If a tenant establishes a presumption of retaliation under D.C. OFFICIAL CODE § 42-3505.02(b), the evidentiary burden shifts to the housing provider to come forward with "clear and convincing" evidence that its actions were not retaliatory, that is, not "intentionally taken . . . to injure or get back the tenant for having exercised" the protected right. 14 DCMR § 4303.1; Gomez v. Independence Mgmt. of Delaware. Inc., 967 A.2d 1276, 1291 (D.C. 2009) (citing Robinson v. Diamond Hous. Corp., 463 F.2d 853, 865 (1972) ("Once the presumption is established, it is then up to the landlord to rebut it by demonstrating that he is motivated by some legitimate business purpose rather than by the illicit motive which would otherwise be presumed.")). "Clear and convincing evidence" has been defined by the DCCA as "the evidentiary standard that lies somewhere between a preponderance of evidence and evidence probative beyond a reasonable doubt." In re Estate of Frances Walker, 890 A.2d 216, 223 (D.C. 2006); In re K.A., 484 A.2d 992, 995 (D.C. 1984) (citing Addington v. Texas, 441 U.S. 418, 423 (1979)); Jackson, RH-TP-07-28,898. It "is such evidence as would 'produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.'" Dawkins v. United States, 535 A.2d 1383, 1384 (D.C. 1988) (citing District of Columbia v. Hudson, 404 A.2d 175, 178 (D.C. 1979)); Jackson, RH-TP-07-28,898.

If the housing provider does not rebut the presumption of retaliation with clear and convincing evidence, an ALJ is required to enter judgment in favor of the tenant.[16] Smith v. Christian, TP 27,661 (RHC Sept. 23, 2005) at 22-23 (upholding determination that housing provider failed to produce clear and convincing evidence that rent increase was not retaliatory

[16] The Tenant's Brief, under the heading "Penalties," states that he "requests $5,000 per incidence of retaliation." Tenant's Brief at 17. For clarity, the Commission notes that civil fines of up to $5,000 may be imposed for *willful* violations of the Act, including willful retaliation, but such fines are payable to the District Government, not to the affected tenant. D.C. OFFICIAL CODE § 42-3509.01(b); *see* Burkhardt v. Klingle Corp., RH-TP-10-29,875 (RHC Sept. 25, 2015) (finding that tenants may litigate such administrative claims without meeting ordinary requirements of standing).

where housing provider testified about increased expenses for the housing accommodation as a whole, but was unable to show that the tenant's rent increase was proportional to the expenses attributable to her unit). Moreover, "when the statutory presumption comes into play, it will not suffice merely to articulate a legitimate, non-retaliatory reason, because the legislature has assigned a substantial burden of proof ('clear and convincing evidence') to the landlord." Gomez, 967 A.2d at 1291 (citing D.C. OFFICIAL CODE § 42-3505.02(b)); *see, e.g.*, Hoskinson v. Solem, TP 27,673 (RHC July 20, 2005) (explaining that clear and convincing evidence to rebut a presumption of retaliation must "extend beyond the defense that a law permitted the alleged retaliatory action" (quoting Redman v. Graham, TP 27,104 (RHC Apr. 30, 2005))); Kornblum v. Charles E. Smith Residential Realty, TP 26,155 (RHC Mar. 11, 2005) (presumption sufficiently rebutted where housing provider testified that it cleaned up tenant's belongings in area outside of storage unit because they presented fire hazard, not in response to tenant's letter objecting to charge of late fee).

Following these legal principles, the Commission addresses the Tenant's issues on appeal related to his specific allegations of retaliation.

1. Whether the ALJ erred in concluding that the Housing Provider did not retaliate against the Tenant with respect to its lease renewal and eviction policies or practices

The Tenant argued before OAH and maintains on appeal that the Housing Provider retaliated against him in several ways by singling him out for treatment that was inconsistent with general policies and practices for dealing with other tenants in the Housing Accommodation: first, that the Housing Provider demanded the Tenant sign a term lease in order to continue paying a concession rate (or that the policy on term leases was changed in response to his advocacy work); second, that the Housing Provider brought a suit for possession after only one under-payment of the rent demanded; third, that the Housing Provider brought the suit based

on a relatively small amount of unpaid rent (*i.e.*, the amount of the disputed rent concession), and fourth, that the Housing Provider brought the suit without providing a 30-day notice to quit (purportedly waived in the Tenant's lease).

The Commission's review of the record reveals substantial evidence with respect to each of these issues, namely, direct and cross-examination testimony by Ms. Duvall.[17] However, the record also shows that the Tenant sought to question Ms. Duvall on several relevant aspects of the Housing Provider's policy- and decision-making, but he was precluded from doing so on the grounds that the lines of questioning were outside the scope of the Housing Provider's direct examination. *See* Tr. at 131-32 & 135-37 (corporate structure & chain of command), 162-65 (policy changes regarding leases), & 171-72 (decision to sue for possession).[18]

The Commission will ordinarily affirm a decision by an ALJ if there is any substantial evidence in the record to support a finding of fact. However, the record before the ALJ must be complete so that the ALJ can weigh the competing evidence. As discussed above, the Tenant was precluded from fully questioning the Housing Provider's party witness, Ms. Duvall. Because "the legislature has assigned a substantial burden of proof ('clear and convincing evidence') to the landlord" to demonstrate "a legitimate, non-retaliatory reason" for a presumptively retaliatory action, beyond the mere legal right to take it, *see* Gomez, 967 A.2d at 1291,[19] the Final Order must be vacated on these issues and the case remanded to allow the

---

[17] See also RX 204, an email dated April 1, 2016, less than a month before the LTB case was filed, from the Tenant to Ms. Duvall, with the subject "Equity's rent practices are illegal – **please feel free to sue me**" (emphasis added).

[18] Hearing CD 2 (OAH May 24, 2017) at 3:00-5:40; Hearing CD 2 (OAH May 24, 2017) at 1:00:00 - Hearing CD 3 (OAH May 24, 2017) at 1:45; Hearing CD 4 (May 24, 2017) at 11:00-13:30.

[19] The Tenant also maintains that the statutory requirement for a 30-day notice to quit cannot be waived in a lease. *But see* Diamond Housing Corp. v. Robinson, 257 A.2d 492, 493-94 (D.C. 1969). The Commission does not need to decide whether such a waiver is lawful, however, because, as explained in Gomez, "a retaliatory motive may 'taint' an action that would otherwise be lawful." 967 A.2d at 1290.

Tenant to put on all relevant evidence of the Housing Provider's decision-making before the ALJ can properly weigh the competing evidence and determine if the Housing Provider's evidence meets its burden.

Accordingly, the Final Order is vacated on these issues.

2. Whether the ALJ erred in concluding that the Housing Provider's attorney's conduct in the LTB case is not covered by the retaliation provisions of the Act

In the Final Order, the ALJ denied the Tenant's claims that several acts by the Housing Provider (or its counsel) in the course of litigating its suit for possession in the Superior Court were retaliatory. Final Order at 22-23. The ALJ reasoned that, although D.C. OFFICIAL CODE § 42-3505.02(a) describes potentially retaliatory actions as including suits for possession, that provision should not be interpreted to cover "each act an attorney takes within the context of previously filed cases." *Id.* at 23.

The Tenant asserts in his Notice of Appeal that this decision was erroneous, but he does not address the issue in his brief and did not do so at the Commission's hearing. Therefore, the Commission determines that the Tenant has abandoned this issue on appeal. Moreover, as the ALJ noted, "[t]here is little law directly on point" with respect to this issue, and, given that the ALJ's reasoning does not plainly contradict the statutory language or any prior case law, the Commission will not address it for the first time in the absence of substantial supporting arguments.

Accordingly, this issue is dismissed.

3. Whether the ALJ erred in concluding that the Housing Provider's assessment of late fees, including reporting of their nonpayment to a credit agency, was not retaliatory

The Tenant contends that the ALJ erred in evaluating his claim that the Housing Provider's assessment of late fees was retaliatory, because she failed to consider that late fees

continued to be assessed after the date the Tenant Petition was filed or that the unpaid late fees were reported to a credit agency ("TransUnion").[20] The ALJ found, explicitly crediting Ms. Duvall's testimony, that:

> Housing Provider uses a computer bookkeeping system to keep track of the rental account for each unit in the Housing Accommodation. The system is automatic. Each month it automatically charges the amount of "Monthly Apartment Rent" for an apartment. If the "Monthly Apartment Rent" (less any applicable credits, such as a rent concession) is not paid in full within the appropriate grace period, the system automatically assesses a late fee. Tenant was not singled out; the late fees were assessed without discretion by an automatic computer system. Housing Provider had a legitimate business reason for acting the way it did: in a large housing complex, automation increases efficiency.

Final Order at 24-25.

The Commission notes that, in the Final Order, the ALJ treated the assessment of late fees and the TransUnion reporting as separate claims for retaliation, finding neither to be retaliatory because they were done automatically. *See* Final Order at 24-26. The ALJ also concluded, in the alternative, that the issue of the TransUnion reporting was "not properly before this administrative court" because the Tenant did not become aware that a report had been made until four days after he filed the Tenant Petition. *Id.* at 25 (citing Hawkins v. Jackson, TP 29,201 (RHC Aug. 31, 2009)). Nonetheless, the ALJ did not exclude any evidence of the TransUnion reporting on the grounds that it was created after the Tenant Petition was filed. *See* Final Order at 4 ("Insofar as PX 104 makes it more or less likely that Housing Provider reported a delinquency to the credit agencies, this document is relevant and therefore admissible.").

[20] Unlike the Tenant's questioning of Ms. Duvall with respect to the Housing Provider's leasing and eviction policies, the ALJ did not limit the Tenant with respect to this issue because it was within the scope of cross-examination. Tr. at 147; Hearing CD 2 (OAH May 24, 2017) at 38:00-39:30. Similarly, we do not understand the Tenant to have alleged or to have sought to introduce evidence that any credit-reporting *policy* was changed in retaliation for his advocacy work. *See* Tr. at 56-60 & 146-49; Hearing CD (OAH May 22, 2017) at 48:00-1:04 & Hearing CD (OAH May 24, 2017) at 37:00-42:10.

The Commission's review of the record shows, and the Tenant maintains on appeal, that the TransUnion reporting was not a separate claim (arguably arising after the filing of the petition) but rather was raised as additional evidence of the circumstances and effects of the assessment of late fees. *See* Tr. at 117 ("The credit rating agency is just a result of the late fees. So they're the same thing. The late fees as we've said . . . the credit happened after the tenant petition but it was a result of the late fees.");[21] Tenant's Brief at 16 ("The ALJ denied this *corroborating* evidence and failed to use it to scrutinize the evidence that the Housing Provider *had already acted against* the Tenant" (emphasis added)). Because the ALJ's analysis was, substantively, essentially the same, *i.e.*, that both actions were not retaliatory because they were done automatically, the Commission is satisfied that any error in treating the TransUnion reporting as a separate claim was harmless.

Whether a housing provider has carried its burden of proving a non-retaliatory basis for its action by clear and convincing evidence is a question of fact, *see* Gomez, 967 A.2d at 1289-90, and the creditability of testimony and weight of evidence is committed to the ALJ as long as there is substantial evidence in the record. *See, e.g.,* Karpinski v. Evolve Prop. Mgmt., LLC, RH-TP-09-29,590 (RHC Aug. 19, 2014). Substantial evidence in the record supports the ALJ's finding that the Housing Provider's computerized records system automatically generated the late fees and the credit reporting. PX 113; Tr. at 127-28.[22] Because the late fees were issued by an automated system, the Commission is satisfied that the ALJ could rationally conclude that the Housing Provider did not act with the purpose of retaliating against the Tenant because of his protected activities.

---

[21] Hearing CD 1 (OAH May 24, 2017) at 3:55-4:30.

[22] Hearing CD 1 (OAH May 24, 2017) at 26:45-31:30.

The automatic assessment of the late fees does not necessarily absolve the Housing Provider of *all* liability under the Act if they were unlawfully demanded. *Cf.* Washington, RH-TP-11-30,151 at 16-17 & n.12 (in claim for rent refund, notices of non-payment of rent, based on ledger containing unlawfully high amount of rent, may constitute unlawful demand for amount stated). However, a claim of retaliatory action is primarily a claim about the intent, purpose, or motivation for a housing provider's action. *See* 14 DCMR § 4303.1; Wilson, 159 A.3d at 1218; Gomez, 967 A.2d at 1291 n.19 ("a retaliatory motive is a question of fact"). Ultimately, of course, any computerized or automated system is designed, used, and managed by persons who are capable of acting with retaliatory intent, so the use of such systems does not necessarily preclude a finding of retaliation. Nonetheless, a reasonable fact-finder could determine that the use of an automated system supports a conclusion that the Housing Provider did not have a retaliatory intent when issuing the late fee notices or notifying TransUnion. Therefore, the ALJ was within her discretion in weighing the evidence of retaliatory purpose, and nothing about the TransUnion reporting precluded the ALJ from finding by clear and convincing evidence that the late fees were not assessed as retaliation. *See* Karpinski, RH-TP-09-29,590.

Accordingly, the Final Order is affirmed on this issue.

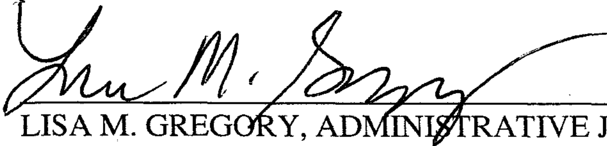
IV. CONCLUSION

For the foregoing reasons, the Commission reverses the Summary Judgment Order and remands for further proceedings on the Tenant's rent increase claims. The Commission vacates the Final Order in part and remands for further proceedings to provide the Tenant the opportunity to call Ms. Duvall as a witness regarding his retaliation claims arising from the demand to sign a new term lease and the initiation of an action for possession against the Tenant. The Commission dismisses the Tenant's appeal on the issue of the Housing Provider's conduct in

litigating the LTB case. The Commission affirms the Final Order on the issue of whether the late fees imposed by the Housing Provider were retaliatory.

SO ORDERED.

MICHAEL T. SPENCER, CHIEF ADMINISTRATIVE JUDGE



LISA M. GREGORY, ADMINISTRATIVE JUDGE

RUPA RANGA PUTTAGUNTA, ADMINISTRATIVE JUDGE

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (2004), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (2004), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2012 Repl.), "[a]ny person aggrieved by a decision of the Rental Housing Commission . . . may seek judicial review of the decision . . . by filing a petition for review in the District of Columbia Court of Appeals. Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

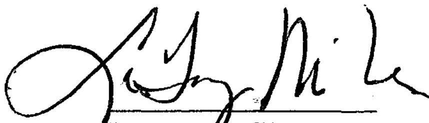
D.C. Court of Appeals
Office of the Clerk
430 E Street, N.W.
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** in RH-TP-16-30,855 was served by first-class mail, postage prepaid, on this **18th day** of **February, 2020,** to:

Richard W. Luchs, Esq.
Greenstein, Delorme & Luchs, PC
1620 L Street, N.W.
Suite 900
Washington, DC 20036

Harry Gural
3003 Van Ness St., N.W.
Unit S-707
Washington, DC 20008



LaTonya Miles
Clerk of the Court
(202) 442-8949

EXHIBIT B

District of Columbia
Department of Housing and Community Development
Rental Accommodations Division (RAD)
1800 Martin Luther King Jr. Avenue SE, 2nd Floor
Washington, DC 20020
(202) 442-9505
*442-9094

RAD Date Stamp
RECEIVED
2016 AUG 30 AM 9 07
HRA-DHCD
RENTAL ACCOMMODATIONS DIVISION

RAD Form 23 (rev 09/10)

Tenant Petition / Complaint

This petition is filed under provisions of D.C. OFFICIAL CODE §§ 42-3501.01 et seq. (Supp. 2008) (DC Law 6-10 § 216).
Please type or print clearly, complete all areas, and make sure to sign the form.
ATTACH ADDITIONAL PAGES FOR RESPONSES, IF NEEDED.

NW3

RAD Use Only

Case number	Intake Representative	Date Filed
TP 30,855	cweston	8/30/16
☑ Walk-in ☐ Mail	Approved For Filing By	Date Approved For Filing

TO FILE THIS PETITION, TENANT(S) MUST PROVIDE:

☑ Proof of tenancy, including rent receipts, cancelled checks, or a copy of a lease.
☐ Copy of any Notice to Vacate and/or Notice of Increase in the Rent Charged
☐ Original & 4 copies of this Petition/Complaint and all documents submitted in support of this Petition/Complaint

Part 1 – Tenant Information

Who is filing this petition? ☐ Tenant ☐ Tenant Representative ☐ Tenant Association ☐ Group of Unassociated Tenants

Name of tenant(s), tenant association, or representative		Email Address
Harry Gural		harrygural@gmail.com
Cell phone (202) 527-2280	Home phone same	Work phone

Date when you became a tenant of the property for which this petition is being filed: March 9, 2010	Current monthly rent you are charged $1,895 (from April 2016)

Street address of property that is subject of petition/compliant

Street Address (No P.O. Box)
300 Van Ness Street, NW

Unit(s)	City	State	Zip Code
S-707	Washington	DC	20008

Current Address of Tenant(s) (if different than above)

Street Address (No P.O. Box)

Unit	City	State	Zip Code

RECEIVED 2016 AUG 30 AM 9 07 HRA-DHCD RENTAL ACCOMMODATIONS DIVISION

Petitioner(s)' Representative (Attorney or Other) information (if applicable)

Name of Representative		Email Address
Cell phone	Home phone	Work phone

Street Address (No P.O. Box)

Unit	City	State	Zip Code

Part 2 – Housing Provider Information

Name of Owner of Housing Accommodation			Email Address
Equity Residential / Smith Property Holdings			
Cell phone	Home phone		Work phone (202) 244-3100
Owner's Street Address (No P.O. Box) 3003 Van Ness Street, NW			
Unit	City Washington	State DC	Zip Code 20008
Title/Name of Agent of Owner Avis Duval	(check the appropriate box for Title): □ Property Manager □ Real Estate Agent □ Other: ____		Email Address aduvall@eqr.com
Cell phone (202) 463-3511	Home phone		Work phone (202) 344-3100
Agent's Street Address (No P.O. Box) 3003 Van Ness Street, NW			
Unit	City Washington	State DC	Zip Code 20008

Part 3 – Previously Filed Tenant Petitions for this Houisng Accommodation or Rental Unit (1985 to present) (ATTACH ADDITIONAL PAGES, IF NEEDED)

Petition Number	*Filing Date*	*Current Status (check the box)*	*Date of Decision/Order*
2016-DCHD-TP 30,818	May 12, 2016	□ *Open or* □ *Closed*	July 28, 2018
		□ *Open or* □ *Closed*	
		□ *Open or* □ *Closed*	
		□ *Open or* □ *Closed*	
		□ *Open or* □ *Closed*	

Part 4 – Tenant Complaint

I/We believe that the following violation(s) of the Rental Housing Act of 1985, as amended, (the Act) at D.C. OFFICIAL CODE §§ 42-3501.01 et seq. (Supp. 2008) has/have occurred (check below):

Rent Increase

- ☐ A. The building where my/our Rental Unit(s) is/are located is not properly registered with the RAD.
- ☑ B. The rent increase was larger than the increase allowed by any applicable provision of the Act.
- ☐ C. There was no proper 30-day notice of rent increase within 30 days of the effective date of the increase.
- ☑ D. The Housing Provider did not file the correct rent increase forms with the RAD.
- ☐ E. *(See ☐ N.)*
- ☐ F. The rent was increased while my/our Rental Units was/were not in substantial compliance with the D.C. Housing Regulations.
- ☐ G. The rent ceiling exceeds the legally-calculated rent for my/our units.
- ☐ H. The rent charged is in excess of the rent ceiling for my Rental Unit.

Part 4 – Tenant Complaint (continued)

Services and Facilities

☐ I. Services and/or facilities provided as part of my/our rent have been permanently eliminated.

☐ J. Services and/or facilities provided as part of my/our rent have been substantially reduced.

☐ K. Services and/or facilities, as set forth in the Voluntary Agreement filed with and approved by the Rent Administrator have not been provided as specified.

Retaliation/Notice to Vacate

☑ L. The Housing Provider, property manager, or other agent of the Housing provider has taken retaliatory action against me/us in violation of D.C. OFFICIAL CODE § 42-3505.02 (Supp. 2008).

☑ M. A Notice to Vacate has been served on me/us, which violates D.C. OFFICIAL CODE § 42-3505.01(Supp. 2008).

Security Deposit

☐ N. A security deposit was demanded of me/us by the Housing Provider, property manager, or other agent of the Housing Provider after the date when I/we moved in. No security deposit was demanded before I/we moved in by the Housing Provider, property manager, or other agent of the Housing Provider.

☐ O. The Housing Provider, property manager, or other agent of the Housing Provider has improperly withheld my security deposit after the date when I/we moved out.

☐ P. The Housing Provider, property manager, or other agent of the Housing provider failed to return the interest on my security deposit after the date when I/we moved out.

Establishment or Operation of a Tenant Organization

☐ Q. The owner interfered with (1) distribution of literature in common areas, including lobby areas, (2) placing of literature at or under tenants' doors, (3) posting of information on all building bulletin boards, (4) assistance to tenants to participate in tenant organization activities, (5) convening of tenant or tenant organization meetings, (6) formulation of responses to owner actions, (7) that the owner or management company modify services and facilities, and/,or (8) any other activity reasonably related to the establishment or operation of a tenant organization, in violation of the provisions of D.C. OFFICIAL CODE §§ 42-3505.06(d)(1)-(8) (Supp. 2008).

Part 5 - Complaint Details

Use this space to describe in detail the events, dates, experiences, and observations that cause(d) you to file this Tenant Petition/Complaint.

THIS SECTION MUST BE COMPLETED IN ORDER TO FILE THIS TENANT PETITION/COMPLAINT. ATTACH ADDITIONAL PAGES, IF NEEDED.

Recent actions against me by Equity Residential in Landlord and Tenant court force me to refile my Tenant Petition (previous case number 2016-DCHD-TP 30,818) in the Office of Administrative Hearings.

I believe that Equity Residential's actions against me are in part because I am the President of the Van Ness South Tenants Association. I have advised over three dozen tenants about how to respond to illegal rent increases by Equity. I have been called the leading advocate for this issue in the District of Columbia.

Here is the background to the current filing. I filed a Tenant Petition against Smith Property Holdings / Equity Residential on May 12, 2012. (see attached.) As a result, the judge in Landlord and Tenant Court issued a Drayton stay.

After further consideration of my case against Equity I decided, on the advice of a highly-regarded attorney that has successfully battled Equity in the past, to pursue remedy in DC District Court's Civil Division or in U.S. Federal Court. I based this decision in part on the fact that some issues in the case extend beyond housing law.

More importantly, as President of the Van Ness South Tenants Association, I have specific evidence showing that Equity's actions are widespread -- over three dozen tenants have come to me reporting similar issues. I believe that Equity's predatory actions affect hundreds of people in our 600+ unit building, and hundreds or thousands more in Equity's other DC properties.

Part 5 - Complaint Details (c[illegible]nued)

Equity filed a Motion for Summary Judgment in OAH against me. I filed a motion in opposition. OAH denied Equity's Motion, rendering it moot.

At the same time, I filed a Motion for Voluntary Dismissal of my Tenant Petition because I wished to investigate the possibility of filing in DC Superior or in U.S. Federal Court. OAH granted my motion, dismissing the tenant petition without prejudice. However, before formally retaining an authority and thus before filing a case in either DC Superior or U.S. Federal Court, I was forced to travel to Boston to deal with an urgent family health issue.

Equity has now filed in Landlord and Tenant Court a Motion to Vacate the Drayton stay. Equity's attorney signed a Certificate of Service claiming that Equity's motion had been served to me "by hand delivery" on August 23. However, I have boarding passes to prove that I did not return to Washington until the evening of August 28.

Equity made no effort to contact me to discuss a hearing date on its Motion to Vacate, so the first time I was made aware of a hearing was on the evening of August 28 when I returned to Boston and found an envelope outside my door.

Equity's Motion to Vacate states that a hearing has been scheduled in Landlord and Tenant Court this Thursday, September 1st. This leaves me only three days, acting in my own defense while holding a full-time job, to file a counter motion to postpone the hearing. I understand that paperwork move at a glacial pace in Landlord and Tenant Court. Also, Equity Residential has implied to the judge that I moved to dismiss my case from OAH because I had second thoughts about the merits of my case. But as stated, I asked for dismissal in order to pursue the case in another venue.

Equity's actions force me to fight a three-front battle -- blocking its efforts to evict me in Landlord and Tenant Court, re-filing a tenant petition in OAH, and filing a case in either DC District Court or in Federal Court that may have broader implications for all residents of rent-controlled Equity buildings in DC. I plan to fight on all three fronts.

In appearing before OAH, will offer specific evidence showing that I paid $1,830 last year for my one-bedroom apartment and that the maximum legal increase under DC law is $65 so that my total rent beginning in April 2016 should be $1,895. Equity's suit against me in Landlord and Tenant Court is based on its claim that I should pay an increase $297 higher. In fact, Equity's property manager had agreed in person that my new rent would be $1,895 as I proposed, but only if I were to sign a lease stating that the rent is actually $2,192. As a matter of principal in as my right in the District of Columbia I declined to sign such a lease.

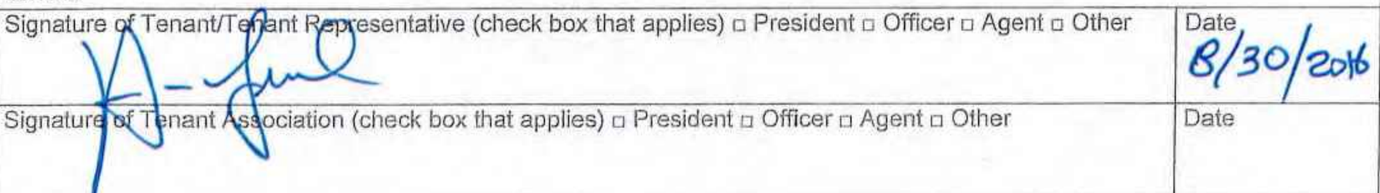
For these reasons, I ask the Office of Administrative Hearings to accept my new tenant petition against Equity Residential so my case can be heard.

Part 6 – Certification

I/we understand that:

- It is my/our responsibility to report any substantive changes in the information provided here, while this Complaint is pending.
- Any Tenant Petition/Complaint filed with the RAD must result from a true and valid impression that a violation of the Act or the Security Deposit Act has occurred.
- A Tenant Petition/Complaint must contain a description or explanation of the alleged violation of the Act.
- Any person who willfully makes a false statement in any document filed under the Act shall be subject to a fine of not more than $5,000 for each violation.

I/We hereby certify that the information that I/we will give on this form, according to the best of my knowledge and belief, is correct.



Signature of Tenant/Tenant Representative (check box that applies) □ President □ Officer □ Agent □ Other	Date 8/30/2016
Signature of Tenant Association (check box that applies) □ President □ Officer □ Agent □ Other	Date

RAD Form 23 (rev 09/10)

EXHIBIT C

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
One Judiciary Square
441 Fourth Street, NW, Suite 450 North
Washington, DC 20001-2714
TEL: (202) 442-9094
FAX: (202) 442-4789

DISTRICT OF COLUMBIA OFFICE OF ADMINISTRATIVE HEARINGS
2017 APR 12 PM 3:54

HARRY GURAL, Tenant/Petitioner,		
v.	Case No.:	2016-DHCD-TP 30,855
EQUITY RESIDENTIAL MANAGEMENT and SMITH PROPERTY HOLDINGS VAN NESS LP, Housing Providers/Respondents.	*In re*:	3003 Van Ness Street, NW S-707

ORDER GRANTING IN PART AND DENYING IN PART HOUSING PROVIDER'S MOTION FOR SUMMARY JUDGMENT; DENYING TENANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT; AND GRANTING TENANT'S REQUEST TO WITHDRAW ONE CLAIM IN HIS TENANT PETITION

This matter is before this administrative court on Equity Residential Management and Smith Property Holdings Van Ness LP's (collectively referred to as Housing Provider) motion for summary judgment and Tenant Harry Gural's motion for partial summary judgment. For the reasons stated below, Housing Provider's motion is granted in part and denied in part, and Tenant's motion is denied. In a separate Case Management Order, an evidentiary hearing on the claim of retaliation is scheduled for Monday, May 22, 2017 at 9:30 a.m.

I. INTRODUCTION AND PROCEDURAL HISTORY

On August 30, 2016, Tenant filed Tenant Petition 30,855. In his petition, Tenant alleges that Housing Provider violated various provisions of the Rental Housing Act of 1985 at 3003 Van Ness Street, NW. In particular, Tenant alleges (1) that the rent increase was larger than the

increase allowed by any applicable provision of the Act (Box B on the Tenant Petition); (2) that Housing Provider did not file the correct rent increase forms with the Rental Accommodations Division (the RAD) (Box D on the Tenant Petition); (3) that the Housing Provider, property manager, or other agent of the Housing Provider have taken retaliatory action against Tenant (Box L on the Tenant Petition); and (4) that a Notice to Vacate has been served on Tenant in violation of D.C. Code § 42-3505.01 (Supp. 2008) (Box M on the Tenant Petition).

By order dated October 13, 2016, this matter was scheduled for mediation on November 7, 2016. On October 25, 2016, Housing Provider filed a motion for summary judgment. Tenant filed a response to Housing Provider's motion for summary judgment on November 4, 2017. Mediation was rescheduled at the request of Tenant and was held on November 16, 2016. It was unsuccessful. By order dated December 6, 2016, oral argument on the motion for summary judgment was scheduled for January 13, 2017.

At the January 13, 2017 hearing, Tenant withdrew his claim that a Notice to Vacate had been served on him in violation of D.C. Code § 42-3505.01 (Supp. 2008). At the conclusion of oral argument, the parties were invited to brief the issue of whether the doctrine of laches applies. Housing Provider submitted a brief on January 26, 2017 and Tenant submitted a brief on February 13, 2017. Tenant also filed a motion for partial summary judgment on March 3, 2017. [1] Housing Provider filed a response to that motion on March 17, 2017. Having considered the motions, briefs, attendant exhibits, and arguments of the parties and counsel, this administrative court finds as follows.

[1] In his motion, Tenant filed extensive documentation related to, and seeks relief on behalf of, other tenants both at the same complex and at other residences owned and/or managed by Housing Provider. Tenant is the only party named as Petitioner in this administrative action. As such, I will address the arguments and relief requested only as they relate to him. Additionally, insofar as Tenant requests that I issue an order requiring the Superior Court to take specific action, this administrative court has neither the authority nor the jurisdiction to do so.

II. JURISDICTION

This matter is governed by the Rental Housing Act of 1985 (D.C. Code §§ 42-3501.01 *et seq.*) (the Act or the Rental Housing Act), Chapters 38-43 of 14 District of Columbia Municipal Regulations (DCMR), the District of Columbia Administrative Procedures Act (D.C. Code §§ 2-501 *et seq.*), and OAH Rules (1 DCMR 2800 *et seq.* and 1 DCMR 2920 *et seq.*).

III. MATERIAL FACTS NOT IN DISPUTE

Solely for the purposes of deciding the motions for summary judgment, I conclude that the following facts are not in dispute:

1. The Housing Accommodation located at 3003 Van Ness is owned by Smith Property Holdings Van Ness LP and managed by Equity Residential Management.
2. The Housing Accommodation is subject to the rent stabilization provisions of the Act.
3. Tenant has resided in unit S707 (the Unit) since at least April 1, 2014.[2]
4. Tenant signed a one-year lease on March 19, 2014 for the Unit for the period April 1, 2014 through March 31, 2015. The "term sheet" of the lease identified two "monthly recurring charges:" "Monthly Apartment Rent" of $2,048 per month and "Monthly Reserved Parking" of $100.[3]
5. The term sheet also identified a "Monthly Recurring Concession" of $278 per month.[4] The term sheet stated: "The Total Monthly Rent shown above will be adjusted by these lease concession amounts." The concession reduced the amount Tenant was obligated to pay to Housing Provider during the term of the lease from $2,048 to $1,870 per month.

---

[2] Lease attached to Housing Provider's motion as Exhibit D.
[3] *Id.*
[4] *Id.*

6. The lease included a "Concession Addendum."[5] That addendum states in pertinent part:

> 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.
>
> Consistent with the provisions of the Rental Housing Act of 1985 (DC Law 6-10) as amended (the Act), we reserve the right to increase your rent once each year. In doing so, we will deliver to you a "Housing Provider's Notice to Tenants of Adjustment in Rent Charged," which will reflect the "new rent charged." If you allow your Lease to roll on a month to month basis after the Expiration Date, your monthly rent will be the "new rent charged" amount that is reflected on the Housing Provider's Notice.
>
> It is understood and agreed by all parties that the monthly recurring concession is being given to you as an inducement to enter into the Lease. You acknowledge and agree that you have read and understand the Lease Concessions provision contained in the Terms and Conditions of your Lease.

7. Through the term of the written lease, Tenant paid $1,870 per month to Housing Provider.[6] This sum equals the "Monthly Apartment Rent" and the "Monthly Reserved Parking" combined, less the "Monthly Concession."

8. Tenant continued to reside in the Unit after the written lease expired on March 31, 2015.

9. On January 15, 2015, Housing Provider provided Tenant with RAD Form 8, "Housing Provider's Notice to Tenants of Adjustment in Rent Charged" which stated that "your current rent charged" for the Unit would increase from $2,048 to $2,118 (a 3.4% increase), effective April 1, 2015.[7]

10. On January 27, 2015, Housing Provider filed RAD Form 9, "Certificate of Notice to RAD of adjustments in rent charged," with the RAD. The appendix attached to the Certificate listed the Unit and stated that the "prior rent" was $2,048, the increase was

---

[5] *Id.*
[6] *Id.*
[7] Notice attached to Housing Provider's motion as Exhibit F.

$70, the new "rent charged" was $2,118, the percentage increase was 3.4%, and the effective date was April 1, 2015.[8]

11. For the months April 2015 through March 2016, Tenant paid to Housing Provider $1,930 each month, which amount included $100 for reserved parking.
12. On January 15, 2016, Housing Provider gave Tenant another RAD Form 8. This one stated that "rent charged" for the Unit would increase from $2,118 to $2,192 (a 3.5% increase), effective April 1, 2016.[9]
13. On February 2, 2016, Housing Provider filed RAD Form 9 with the RAD. The appendix attached to that Certificate listed the Unit and noted that the "rent charged" was $2,118, the increase was $74, the new "rent charged" was $2,192, the percentage increase was 3.5%, and the effective date was April 1, 2016.[10]
14. Housing Provider agreed to accept $1,895 for monthly apartment rent starting April 1, 2016, provided Tenant sign a one-year lease which identified "Monthly Apartment Rent" as $2,192 and provided for a "Monthly Recurring Concession" of $297.[11]
15. Tenant refused to sign the offered lease.[12]
16. On March 25, 2016, Tenant paid Housing Provider $1,995, which amount included $100 for reserved parking, for the month of April, 2016.[13]
17. On April 27, 2016, Housing Provider filed a complaint for non-payment of rent in the Landlord-Tenant Branch of D.C. Superior Court (the LTB Case). It was assigned case

[8] Certificate attached to Housing Provider's motion as Exhibit G.
[9] Notice attached to Housing Provider's motion as Exhibit H.
[10] Certificate attached to Housing Provider's motion as Exhibit I.
[11] Tenant's motion, memorandum of points and authorities, page 4, paragraph 8.
[12] *Id.*, paragraph 9.
[13] *Id.*

number 2016 LTB 010863.[14]

18. Tenant filed Tenant Petition 30,818 on May 12, 2016 alleging that Smith Properties Holdings Van Ness LP and Equity Property Management violated various provisions of the Act.[15]

19. At the initial hearing in the LTB Case on May 19, 2016, a *Drayton* stay was entered by consent. Additionally, a protective order was signed requiring Tenant to pay $297 per month into the court registry during the pendency of the case.[16]

20. In TP 30,818, Housing Provider filed a motion for summary judgment on June 28, 2016. In his response to that motion, Tenant stated that he wished to voluntarily dismiss the Petition without prejudice. Presiding Administrative Law Judge Vergeer granted that request and on July 28, 2016, TP 30,818 was dismissed without prejudice.

21. On August 23, 2016, Housing Provider filed a motion to vacate the *Drayton* stay in the LTB Case.[17]

22. On August 30, 2016, Tenant filed the Tenant Petition in this matter.

23. On September 1, 2016, Housing Provider's motion to vacate the *Drayton* stay was denied and the stay remains in place as of the date of this order.[18]

---

[14] http://www.dccourts.gov/cco/maincase.jsf. I take official notice of the on-line docket sheets for D.C. Superior Court cases. The dockets are public records available on the internet and therefore "not subject to reasonable dispute [and] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Courts may take official notice of proceedings in other courts. *U.S. ex rel Robinson Racheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (citing *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169 (10th Cir. 1979)).

[15] An administrative court may take official notice of its own records. *See Sherman v. Comm'n on Licensure*, 407 A.2d 595, 598 (D.C. 1979); D.C. Code § 2-509(b).

[16] http://www.dccourts.gov/cco/maincase.jsf.

[17] *Id.*

[18] *Id.*

IV. STANDARD OF REVIEW

The rules of this administrative court provide that a party may request that an Administrative Law Judge decide a case summarily, without an evidentiary hearing, so long as the motion includes sufficient evidence.[19] The summary judgment standard set forth in the Super. Ct. Civ. R. 56(c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The District of Columbia Court of Appeals described the substantive standard for entry of summary judgment in *Behradrezaee v. Dashtara*, 910 A.2d 349, 364 (D.C. 2006):

> Summary judgment is appropriate only if no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *GLM Partnership v. Hartford Cas. Ins. Co.*, 753 A.2d 995, 997-998 (D.C. 2000) (*citing Colbert v. Georgetown Univ.*, 641 A.2d 469, 472 (D.C. 1994) (*en banc*)). 'A motion for summary judgment is properly granted if (1) taking all reasonable inferences in the light most favorable to the nonmoving party, (2) a reasonable juror, acting reasonably, could not find for the non-moving party, (3) under the appropriate burden of proof.' *Kendrick v. Fox Television*, 659 A.2d 814, 818 (D.C. 1995) (quoting *Nader v. de Toledano,* 408 A.2d 31, 42 (D.C. 1979)).

Although the moving party has the burden of demonstrating the absence of a genuine issue of material fact, "[o]nce the movant has made such a *prima facie* showing, the nonmoving party has the burden of producing evidence that shows there is 'sufficient evidence supporting the claimed

---

[19] 1 DCMR 2819.

factual dispute ... to require a jury or judge to resolve the parties' differing versions of the truth at trial.'"[20]

V. ANALYSIS AND CONCLUSIONS

A. Rent increases

In his petition, Tenant alleges that the rent increase was larger than the increase allowed by any applicable provision of the Act. In seeking dismissal of that claim, Housing Provider argues that the use of a concession does not invalidate the higher, legal rent for a unit, and that therefore the rent increases were not greater than that permitted by law. In seeking summary judgment in his favor, Tenant argues that (1) rent concessions are not permitted under the Act, and (2) because he paid to Housing Provider an amount lower than what Housing Provider identifies as "rent charged," the lower amounts should constitute what is defined as "rent" under the Act, and, therefore, those lower amounts should be used in calculating the percentage of rent increase. Because Housing Provider used the higher amounts of rent in calculating the percentage of rent increase, the increases were greater than were permitted by law. The parties therefore raise two issues that must be addressed in determining whether the rent increases exceeded the amounts permitted by the Act: (1) whether rent concessions are permitted under the Act, and (2) what "rent" means.

1. Rent concessions are not contrary to the Act

The Rental Housing Act regulates the rent for each rental unit under the Rent Stabilization Program by setting terms and conditions for every increase or decrease in rent for covered units.[21] The Act defines "rent" as "the entire amount of money, money's worth, benefit,

[20] *Kendrick v. Fox Television*, 659 A.2d at 818 (*quoting Nader v. de Toledano,* 408 A.2d at 48).
[21] 14 DCMR 4200.

bonus, or gratuity demanded, received, or charged by a housing provider as a condition of occupancy or use of a rental unit, its related services, and its related facilities."[22]

Under the Rental Housing Act and regulations, a housing provider may increase a tenant's rent once every 12 months by an amount authorized by the Act. The most common type of rent increase is known as an adjustment of general applicability or a "CPI-W" increase. The Rental Housing Commission (RHC) determines the amount of the adjustment annually.[23] The adjustment of general applicability allows housing providers to increase rents annually in order to keep up with inflation. For most tenants, the maximum amount their rent can be increased is the CPI-W percentage plus 2%, but not more than 10% of the current rent charged.[24] If a housing provider does not "perfect" a rent increase, the increase cannot be imposed.

To perfect a rent increase, the Act requires that a housing provider: (a) provide the tenant with at least 30 days written notice; (b) certify that the unit and common elements are in substantial compliance with the housing regulations; (c) provide the tenant with a notice of rent adjustment filed with the RAD; (d) provide the tenant with a summary of tenant rights under the Act; and (e) simultaneously file with the RAD a sample copy of the notice of rent adjustment along with an affidavit of service.[25]

The pre-August 2006 Rental Housing Act provided for rent ceilings, which placed an upper limit on the rent for each apartment. A housing provider had to take and perfect (by filing with the RAD) a CPI-W increase within 30 days of first being eligible to do so. The housing

---

[22] D.C. Code § 42-3501.03(28).
[23] D.C. Code § 42-3502.06(b).
[24] *Id.*
[25] D.C. Code § 42-3502.08(f); 14 DCMR 4205.4.

provider could, however, choose not to implement the increase and hold it in reserve for the future.[26]

The August 2006 amendments to the Act abolished rent ceilings.[27] The current rent charged at the effective date of the amendments in rent-controlled buildings became the base rent and the maximum allowable rent for all units subject to rent control. The 2006 Amendments also abolished a housing provider's ability to hold CPI-W increases for future imposition. As long as a CPI-W increase occurs at least 12 months after the last increase, a housing provider can implement it at any time in the CPI-W year.

Here, Housing Provider perfected a CPI-W increase effective April 1, 2015 by notifying Tenant of the increase through RAD Form 8 and informing the RAD of it and other unit increases by filing RAD Form 9. In Tenant's lease, Housing Provider identified the maximum legal rent as the "total monthly rent" but offered Tenant a lease which was subject to a "monthly recurring concession" in the rent, *i.e.*, a temporary and conditional reduction in the amount Tenant was required to pay as rent. The process was transparent to Tenant as the terms of the pricing are set forth in the Lease and its Concession Addendum. Tenant signed the lease. The lease therefore identifies the maximum legal rent as the total monthly rent and the concession from it. The Concession Addendum explains that if the concession lapses by failing to renew on a 12-month basis, the amount Tenant must pay as rent returns to the maximum legal rent. The rent is not increased. Rather, the temporary, conditional reduction provided for in the 12-month lease ends. For these reasons, the rent concession as described in Tenant's lease does not violate the Act as it relates to rent increases.

---

[26] 14 DCMR 4205.9.

[27] D.C. Code § 42-3502.06(1). Although rent ceilings were abolished in 2006, they "live on" because the rent ceiling regulations have not been amended.

In addition to describing the procedure for perfecting a rent increase, the Act provides five statutory purposes for its enactment:

(1) To protect low- and moderate-income tenants from the erosion of their income from increased housing costs;
(2) To provide incentives for the construction of new rental units and the rehabilitation of vacant rental units in the District;
(3) To continue to improve the administrative machinery for the resolution of disputes and controversies between housing providers and tenants;
(4) To protect the existing supply of rental housing from conversion to other uses; and
(5) To prevent the erosion of moderately priced rental housing while providing housing providers and developers with a reasonable rate of return on their investments.[28]

On their face, rent concessions do not contradict these purposes. Rent concessions benefit both parties: tenants most obviously by reducing, in some cases substantially, the rent for an apartment; and housing providers by having the predictability of a lease for a fixed term.[29] A 12-month lease also protects a tenant from changes in the concession amount. Rent concessions benefit a housing provider because they allow housing providers some ability to respond to fluctuations in the housing market. Using concessions in a slow rental market also benefits housing providers because they can retain past increases to use if and when the market changes.

If a housing provider were required to report the rent a tenant was paying as the "current rent charged" and "prior rent" on RAD Forms 8 and 9, the practical consequence is that a housing provider would lose past authorized increases in the legal rent. When a CPI-W increase became available, there would be pressure to add it to the rent amount in order not to lose it. A housing provider would be less likely to agree to a concession in the relatively short run because it would control the long run.

[28] D.C. Code § 42-3501.02.

[29] *Double H Housing Corp. v. David*, 947 A.2d 38, 42 n. 9 (D.C. 2008).

In 2016, three members of the Council of the District of Columbia introduced the Rent Concession and Rent Ceiling Abolition Clarification Amendment Act of 2016.[30] It was intended to address concerns that rent concessions were a way to avoid rent control. For example, once a rent concession expired, the additional amount would simply become part of the rent, independent of any approved rent increase. The bill would have prohibited a housing provider from preserving all or part of a rent adjustment for future implementation, unless the housing provider was not permitted to immediately implement an approved rent increase. In that situation, the housing provider could preserve the rent increase, but would have to implement it within 30 days of the housing provider's first opportunity to do so.[31]

In the bill, two terms related to rent concessions were defined: "rent charged" and "temporarily reduced rent." "Rent charged" was defined as the "maximum amount of monthly rent that the landlord may demand or receive, which shall be no greater than the amount of rent that the tenant is currently obligated to pay," with one exception. "Temporarily reduced rent" was an "amount of monthly rent that is less than the rent charged that the housing provider and tenant agree shall be the maximum amount of rent that the housing provider is entitled to demand or receive for a certain period of time."

Under the bill, a housing provider could not calculate an increase in "rent charged" on any basis other than the "rent charged" or the "temporarily reduced rent" (whichever is lower). The bill did not define "rent concession." But, a housing provider could increase the rent by the amount of a "rent concession" when it expired. A housing provider would lose that right unless the housing provider had a written agreement with the tenant stating the "current rent charged," the "temporarily reduced rent," the amount of the "rent concession," the date it expires and that

[30] B21-0880.
[31] D.C. Code § 42-3502.08(g).

the concession is unconditional and cannot be rescinded. A housing provider would also have to file with the Rent Administrator the same information.

Thus, the bill would not have prohibited a housing provider from using rent concessions. It would, however, have established procedural limitations to doing so. The bill died in the Committee on Housing and Community Development, the committee to which it was referred. There is nothing in the bill as drafted that would cause me to think that rent concessions used by Housing Provider in its leases with Tenant are illegal.

Although there are no cases in the District of Columbia that directly discuss the validity of rent concessions within the regulatory scheme of rent stabilization, the District of Columbia Court of Appeals has stated, in a case not involving rent control, that a housing provider is not

> precluded from offering to charge [a tenant] a discounted rent amount if he signed a new lease but charging him a higher monthly rent if he continued his month-to-month tenancy. To hold otherwise would, we think, encroach on the [housing provider's] - and tenant's - basic freedom to contract as he will, which we have said remains one of the rather basic rights incident to the ownership of property [that] ought not to be summarily dismissed as obsolete even under our modern statutory rental housing law.[32]

The Court of Appeals found that, absent the situation in which the disparity between the monthly rent charged for a month-to-month tenant and the monthly rent charged if a new lease is signed is so large as to effectively force a tenant to sign a new lease and therefore deny a tenant a meaningful opportunity to remain as a month-to-month tenant, such negotiations are not prohibited. In this case, Housing Provider offered Tenant two options: a lower monthly payment with a one-year lease, or a higher monthly payment with no lease. There is no evidence in the record, and Tenant does not argue, that the difference in rental charges for continuing month-to-month ($2,192 per month starting April 1, 2016) versus signing a lease ($1,895 per

[32] *Double H Housing Corp.*, 947 A.2d at 42 (internal quotations, footnote, and citation omitted).

month, or $297 per month less, starting April 1, 2016) was so substantial as to deny him a meaningful opportunity to remain on a month-to-month basis.

2. "Rent charged" is defined by both the lease and the Act

Tenant argues that, in parsing the term "your current rent charged," the term "rent" must be interpreted independently of any contract between the parties,[33] and that as used in the statutory definition of "rent," the words "demanded," "received" and "charged" should be given their plain English meanings. Looking to principles of statutory interpretation and various dictionaries, Tenant defines "charged" as "the price demanded for something," "an amount of money you have to pay," or "demand (an amount) as a price from someone for a service rendered or goods supplied."[34] Therefore, Tenant argues, the "rent charged" must be the rent that Housing Provider hoped or expected to receive each month from Tenant. Since Tenant paid $1,770 per month through March 31, 2015 and $1,830 per month for April 2015 through March 2016, under this argument, the figure called for as "your current rent charged" and "prior rent" on RAD Forms 8 and 9 must be $1,770 for the 2015 forms and $1,830 for the 2016 forms.

Leases are to be construed as contracts.[35] This jurisdiction adheres to an "objective" law of contracts, meaning that the parties' rights and liabilities are governed by the written language unless it is not clear and definite.[36] A contract should "generally be enforced as written, absent a showing of good cause to set it aside, such as fraud, duress, or mistake."[37]

In *Double H Housing Corp.*, the Court of Appeals found, albeit outside the rent control

---

[33] Tenant's motion, memorandum of points and authorities at 5.
[34] *Id.* at 6 and exhibit Z.
[35] *Sobelsohn v. Am. Rental Mgmt. Co.*, 926 A.2d 713 (D.C. 2007).
[36] *Id.* at 718.
[37] *Akassy v. William Penn Apts. Ltd. P'ship,* 891 A.2d 291, 298 (D.C. 2006) (*quoting Camalier & Buckley, Inc., v. Sandoz & Lamberton, Inc.,* 667 A.2d 822, 825 (D.C. 1995).

context, that a housing provider can "condition a discount from an otherwise applicable rent increase on a month-to-month tenant's agreement to enter into a new lease."[38] A tenant and a housing provider are free to contract to rental terms as long as those terms are not contrary to the law.[39] In this case, Tenant knowingly signed a contract agreeing to pay a rent amount lowered by a concession applicable for only the one-year term of the lease. The lease signed by Tenant identifies the "total monthly rent" as the maximum legal rent, from which a "monthly recurring concession" is subtracted.

Tenant argues that the definition of rent in a contract between a housing provider and a tenant should not supersede the definition of rent in the Act.[40] The amount debited from Tenant's account for rent exists in the context of the Rental Housing Act and its implementing regulations as well as the lease agreement. There are no statutory or regulatory provisions that constrain a housing provider from offering an apartment for lease at less than the maximum amount possible under the regulatory schema.

Tenant maintains that any reference to the lease between a tenant and housing provider would lead to multiple definitions of the term "rent" and a distortion of the statutory definition of the term.[41] I disagree. Tenant's lease identifies the maximum legal rent that could be charged for the unit. The lease is a permissible private agreement between tenant and housing provider that decreases the rent that a housing provider will charge tenant over the term of the lease.

The term "rent charged" has become a term of art in the rent-controlled housing industry. It is beyond doubt that newly revised regulations or revised forms with definitions of terms, consistent with the amended Act, would be useful to both tenants and housing providers. As

---

[38] 947 A.2d at 46.
[39] *Id.*
[40] Tenant's motion, memorandum of points and authorities at 5.
[41] Tenant's motion, exhibit Z at 2-3.

discussed above, the Council of the District of Columbia has considered changes to the Rental Housing Act itself to address some concerns about concessions but has not enacted any changes as of yet.[42]

3. Housing Provider's acceptance of less than "rent charged" between April 1, 2015 to March 31, 2016 does not invalidate the rent increase effective April 1, 2016.

Having established that rent concessions are not prohibited by the Act, and that the definition of "rent" must be considered within the context of both the Act and the written lease, I next turn to Tenant's argument that because Housing Provider accepted an amount of rent lower than what Housing Provider identified as "new rent" in the 2015 RAD forms, this effectively reduced the maximum permissible amount of rent Housing Provider, going forward, could demand to that lower amount. I am not persuaded by this argument.

Housing Provider perfected a rental increase from $2,048 to $2,118 effective April 1, 2015. The written lease had terminated, and with it, the concession. However, Tenant opted to pay a lower amount, $1,830 per month, instead. While there is no evidence in the record regarding whether negotiations continued during this time, it appears that Tenant simply resisted the demand for higher rent made in the January 2015 RAD Form 8. Housing Provider accepted those payments for a year.

Once Tenant continued residing in the Unit after the written lease had expired, he became a month-to-month tenant.[43] "In tenancies from month-to-month each month is regarded as a new 'periodic tenancy,' – a tenancy for a month certain plus an expectancy or possibility of

---

[42] Various bills have also proposed revised definitions of the term "rent." *See* The Rental Housing Affordability Stabilization Amendment Act of 2017 (B22-0025).

[43] *See* D.C. Code § 42-3505.01(a); *Administrator of Veterans Affairs v. Valentine*, 490 A.2d 1165, 1170 (D.C. 1985); *Double H Housing Corp.*, 947 A.2d at 40 n. 2.

continuation for one or more similar periods."[44] As such, acceptance by a housing provider of an amount of rent in one month that is lower than the amount demanded may act as an accord and satisfaction of the obligation for that month.[45] But accepting the lower amount of rent does not reduce the maximum amount of rent a housing provider could charge. As discussed above, there is nothing in the current regulatory scheme which requires a housing provider to demand the full amount of rent it could charge under the Act. Interpreting the acceptance of a lower amount of rent as a reformation of the maximum rent allowable would negate any past authorized increases in legal rent, a consequence of which would be that housing providers would be less likely to accept less than the maximum amount allowable for fear of losing the opportunity to charge the maximum amount altogether. Here, Housing Provider had perfected the rent increase, but opted not to enforce it immediately.

Housing Provider eventually did seek to enforce a perfected rent increase. In January 2016, Housing Provider again notified Tenant that the rent it would charge for the Unit would increase effective April 1, 2016. Although the regulatory scheme guarantees a tenant the opportunity to continue his tenancy on a month-to-month basis so long as he pays the rent, with some caveats that do not apply here, that does not preclude a housing provider from demanding, unilaterally, that a tenant pay the maximum amount of rent permitted.[46]

Because Housing Provider properly perfected a rent increase effective in both April 2015 and April 2016, even though it accepted less than the maximum rent it could have demanded from April 2015 through March 2016, Housing Provider was free to condition its continued acceptance of a lower amount of rent on the signing of a one-year lease.

---

[44] *Double H Housing Corp.*, 947 A.2d at 44 n. 12, citing *Keuroglian v. Wilkins*, 88 A.2d 581 (D.C. 1952).
[45] *Id.* at 43-44.
[46] *See id.* at 41-42.

4. The amount of rent increases were not more than that permitted under the Act

On January 15, 2015, Housing Provider gave Tenant notice that rent would increase by $70, from $2,048 to $2,118, effective April 1, 2015. That was an increase of 3.4%. On January 15, 2016, Housing Provider gave Tenant notice that rent would increase by $74, from $2,118 to $2,192, effective April 1, 2016. That was an increase of 3.5%. Both increases were identified as annual CPI-W increases pursuant to D.C. Code §§ 42-3502.06(b) and 42-3502.08(h). The applicable CPI-W increase, effective May 1, 2014, was 3.4%.[47] The applicable CPI-W increase, effective May 1, 2015, was 3.5%.[48] For the reasons stated above, neither increase was more than was permitted under the Act. Summary dismissal of this claim is appropriate. Housing Provider's motion is granted and Tenant's motion is denied.

B. Rent increase forms

Tenant alleges in his petition that Housing Provider "did not file the correct rent increase forms" with the RAD (Box D on the Tenant Petition). Housing Provider seeks dismissal of this claim, arguing that it did, in fact, file the correct forms. Tenant argues that the amount listed as "rent charged" on the forms is not correct and seeks summary judgment in his favor. I conclude both that the correct forms were filed and that the information on the forms was accurate.

14 DCMR 4205.4 states in pertinent part:

> A housing provider shall implement a rent adjustment by taking the following actions, and no rent adjustment shall be deemed properly implemented unless the following actions have been taken:
>
> (a) The housing provider shall provide the tenant of the rental unit not less than thirty (30) days written notice…;

[47] 61 D.C. Reg. 1378 (Feb. 14, 2014).
[48] 62 D.C. Reg. 2202 (Feb. 13, 2015).

(c) The housing provider shall advise the tenant with the notice of rent adjustment by petition filed with the Rent Administrator; and

(d) The housing provider shall simultaneously file with the Rent Administrator a sample copy of the notice of rent adjustment along with an affidavit containing the names, unit numbers, date and type of service provided, certifying that the notice was served on all affected tenants in the housing accommodation.

On January 27, 2015, Housing Provider filed Form 9 with the RAD. Included with that form is an appendix listing the current rent, the new rent, the amount of increase, and the percentage of increase, and a sample notice to tenants. On February 2, 2016, Housing Provider filed Form 9 with the RAD, which included the same data for each unit and a sample notice. Thus, Housing Provider filed the correct forms with RAD as required by the Act. In addition, for the reasons stated above, the information on the forms is also accurate. Therefore, there are no genuine issues of material fact in dispute and summary judgment of this claim is appropriate. Housing Provider's motion is granted and Tenant's motion is denied.

C. Retaliation

In his petition, Tenant alleges that Housing Provider retaliated against him. Housing Provider seeks dismissal of this claim. Tenant does not address the relation claim in his motion for partial summary judgment, but argues in his response to Housing Provider's motion that there are genuine issues of material fact in dispute which preclude summary judgment. "'Retaliatory action,' is action intentionally taken against a tenant by a housing provider to injure or get back at the tenant for having exercised rights protected by § 502 [D.C. Code § 42-3505.02] of the Act."[49]

Protected tenant activities are:

[49] 14 DCMR 4303.1.

> (a) Ma[king] a written request or an oral request in the presence of a witness to the housing provider to make repairs necessary to bring the housing accommodation or the rental unit into compliance with the housing regulations;
> (b) Contact[ing] appropriate officials of the District of Columbia government, either orally in the presence of a witness or in writing, concerning existing violations of the housing regulations in the rental unit the tenant occupies or pertaining to the housing accommodation in which the rental unit is located, or reported to the officials suspected violations which, if confirmed, would render the rental unit or housing accommodation in noncompliance with the housing regulations;
> (c) Legally with[olding] all or part of the tenant's rent after having given a reasonable notice to the housing provider, either orally in the presence of a witness or in writing, of a violation of the housing regulations;
> (d) Organiz[ing], [being] a member of, or [being] involved in any lawful activities pertaining to a tenant organization;
> (e) Ma[king] an effort to secure or enforce any of the tenant's rights under the tenant's lease or contract with the housing provider; or
> (f) Br[inging] legal action against the housing provider.[50]

Retaliatory acts include:

> seek[ing] to recover possession of a rental unit, action which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.[51]

Tenant alleges that Housing Provider retaliated against him because he is president of a tenant association at the accommodation by, among other things: charging late fees despite the fact that he has been paying into the D.C. Superior Court's registry pursuant to a protective order; reporting unpaid rent to a credit agency; filing this motion for summary judgment; and

[50] D.C. Code § 42-3505.02.
[51] D.C. Code § 42-3505.02(a).

filing a motion to lift the *Drayton* stay in the LTB Case. Taking the documentation and exhibits presented by both parties, and all reasonable inferences from that evidence, in a light most favorable to Tenant as the non-moving party, I conclude that there are genuine issues of material fact in dispute which preclude summary dismissal of this claim. Therefore, Housing Provider's motion with respect to the claim for retaliation is denied.

VI. ORDER

Therefore, it is **HEREBY ORDERED** on this **12th day of April, 2017**:

1. Tenant's request to withdraw his claim that a Notice to Vacate was served on him in violation of D.C. Code § 42-3505.01 (Box M on the Tenant Petition) is **GRANTED**;

2. Tenant's claim that a Notice to Vacate was served on him in violation of D.C. Code § 42-3505.01 (Box M on the Tenant Petition) is **DISMISSED WITH PREJUDICE**;

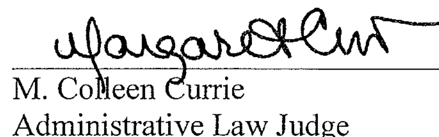
3. Housing Provider's motion for summary judgment is **GRANTED IN PART AND DENIED IN PART**;

4. Tenant's motion for summary judgment is **DENIED**;

5. Tenant's claim that the rent increase was larger than the increase allowed by any applicable provision of the Act (Box B on the Tenant Petition) is **DISMISSED WITH PREJUDICE**;

6. Tenant's claim that Housing Provider did not file the correct rent increase forms with the Rental Accommodations Division (the RAD) (Box D on the Tenant Petition) is **DISMISSED WITH PREJUDICE**; and

7. By separate Case Management Order, an evidentiary hearing on the remaining claim of retaliation is scheduled for Monday, May 22, 2017 at 9:30 a.m.



M. Colleen Currie
Administrative Law Judge

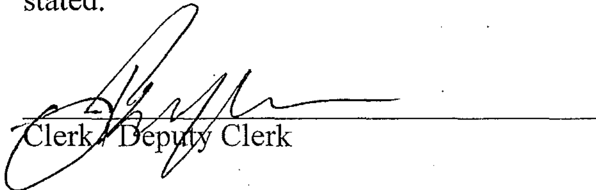
Certificate of Service:

By First-Class Mail (Postage Prepaid):

Harry Gural
3003 Van Ness Street, NW
S-707
Washington, DC 20008

Richard Luchs and
Debra F. Leege
Greenstein Delorme & Luchs, P.C.
1620 L Street, NW
Suite 900
Washington, DC 20036

I hereby certify that on 4/12, 2017 this document was caused to be served upon the parties listed on this page at the addresses listed and by the means stated.



Clerk / Deputy Clerk

EXHIBIT D

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA a municipal corporation 441 4th Street, N.W. Washington, D.C. 20001, Plaintiff, v. EQUITY RESIDENTIAL MANAGEMENT, L.L.C. Two North Riverside Plaza, Suite 400 Chicago, IL 60606, and SMITH PROPERTIES HOLDINGS VAN NESS, L.P. 3003 Van Ness St., N.W. Washington, DC 20008, Defendants.	Civil Action No. 2017 CA 08334 B Judge: Yvonne Williams Next Event Date: April 1, 2020 Event: Pretrial Conference

THIRD AMENDED COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

The District of Columbia ("District"), by the Office of the Attorney General, brings this action pursuant to D.C. Code § 28-3909 for injunctive relief, consumer restitution, costs, and civil penalties against Defendants Equity Residential Management, L.L.C. and Smith Properties Holdings Van Ness, L.P. for violations of the District's Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901, *et seq*. In support of its claims, the District states as follows:

1. Defendants Equity Residential Management, L.L.C. and Smith Properties Holdings Van Ness, L.P., collectively referred to herein as "Defendants," own, manage, and lease apartments to consumers in the District of Columbia at an apartment complex located at 3003 Van Ness St., N.W., Washington, D.C. 20008 ("3003 Van Ness" or the "property"). The

property is subject to Title II of the District's Rental Housing Act of 1985, D.C. Code § 42-3501, *et seq*. (the "rent control law").

2. The rent control law was enacted to, among other things, "protect low- and moderate-income tenants from the erosion of their income from increased housing costs." D.C. Code § 42-3501.02(1). Accordingly, § 42-3502.08(h) of the D.C. Code limits the standard annual increase in the rent charged for units in rent-controlled buildings based on changes in the Consumer Price Index from the prior year. This rent control protection extends to tenants who enter into leases with landlords, as well as to those who occupy their units on a month-to-month tenancy basis.

3. Defendants advertise apartments at 3003 Van Ness by listing available apartments and their monthly rental amounts. However, Defendants calculate the advertised rental amounts, or "concession rent," after the application of a substantial monthly reduction, referred to herein as a "rent concession." Defendants' advertisements fail to disclose the application of these rent concessions to the prices stated in the advertisements.

4. When Defendants finally present consumers with a lease, Defendants' leases contain a higher rental amount that does *not* include a rent concession, referred to herein as the "pre-discount rent." Consumers who question the conflicting rental amounts are often given various explanations by Defendants, including: (1) that the advertised rent, which includes application of the rent concession, is the actual rent amount consumers are required to pay; (2) that rent concessions offered to consumers are sponsored by the District of Columbia; (3) that the same or similar rent concession amount would be offered in future leases; and (4) that the property is subject to the District's rent control law, so that future rental amounts will be stable and predictable. Taken together, Defendants' advertisements and explanations of the conflicting

rental amounts convey to consumers the net impression that the advertised rental amount is the rental amount on which future rent increases would be based under the District's rent control law.

5. In fact, Defendants only report the "pre-discount rent" amount to the District of Columbia Department of Housing and Community Development, Housing Regulation Administration, Rental Accommodations Division. Consequently, the rent concessions in the initial leases are temporary and, upon lease renewal, Defendants calculate the new rental amounts based on the "pre-discount rent" amount, not the concession rent. As a result, Defendants offer consumers renewal leases for rental amounts that are significantly higher than Defendants had led consumers to believe when they entered into the initial leases. For consumers to obtain the best rent concessions at renewal, the amount of which is often lower than the previous year's rent concessions, Defendants require consumers to sign new one-year leases.

6. Defendants' advertising and leasing practices deprive consumers of basic rights guaranteed by District landlord-tenant law – the right to stable and predictable rent increases in both future renewal leases and month-to-month tenancies.

7. Through this case, the District seeks to stop Defendants from engaging in the unlawful trade practices set forth more fully below in connection with their offer and leasing of apartments in the District of Columbia, including their practices of: (1) failing to disclose the pre-discount rent amounts for apartments in their advertisements; (2) failing to disclose material terms to consumers during the leasing process, including that the rent concession amount will not be included when calculating future rent increases; and (3) misleading consumers about the District of Columbia government's role in Defendants' rent concession practices. The District

seeks injunctive relief to prevent Defendants from engaging in these and similar unlawful trade practices, civil penalties to deter Defendants from engaging in these and similar unlawful trade practices, costs, attorney's fees, and restitution for consumers harmed by Defendants' conduct.

JURISDICTION

8. This Court has jurisdiction over the subject matter of this case pursuant to D.C. Code § 11-921 and D.C. Code § 28-3909.

9. This Court has personal jurisdiction over the Defendants pursuant to D.C. Code § 13-423(a).

PARTIES

10. Plaintiff, the District of Columbia, a municipal corporation that is authorized to sue and be sued, is the local government for the territory constituting the seat of the government for the United States of America. The District brings this action, through its Office of Attorney General, pursuant to the CPPA, D.C. Code § 28-3909, which authorizes the Attorney General to bring court actions to enforce the District's consumer protection laws, including the CPPA.

11. Defendant Equity Residential Management, L.L.C. ("Equity Management"), is a Delaware Limited Liability Corporation headquartered at Two North Riverside Plaza, Suite 400, Chicago, IL 60606. Equity Management engages in the business of managing residential rental properties throughout the United States, including the District of Columbia. At times, Equity Management used employees of related corporate entities—Equity Residential Services, L.L.C. and Equity Residential Services II, L.L.C.—and Equity Management is legally responsible for the acts and omissions of such employees.

12. Defendant Smith Property Holdings Van Ness, L.P. ("Smith"), is a Delaware limited partnership with its headquarters at Two North Riverside Plaza, Suite 400, Chicago, IL

60606, and its principal place of business in the District at 3003 Van Ness St., N.W., Washington, DC, 20008. Smith engages in the business of providing real estate services and owns various rental properties in the District of Columbia.

13. Defendants have, at all relevant times, engaged in trade or commerce in the District of Columbia by advertising and leasing rental properties located in the District of Columbia to consumers.

DEFENDANTS' BUSINESS PRACTICES

14. Defendants own and operate rental properties throughout the United States, including in the District of Columbia. Since February 2013, Defendants have owned and offered for lease apartment units at 3003 Van Ness, which is a large residential property that is subject to the District's rent control law.

15. Defendants advertise their rental properties at 3003 Van Ness through various mediums including, but not limited to, posting available units on their own Internet website, equityapartments.com, and on third-party websites, such as Craigslist.org.

16. The Defendants' advertisements usually include information about the rental amounts of available apartments, their size, and the date each apartment is available for rent. In their advertisements, Defendants quote a monthly rental amount but do not disclose that this amount reflects the rent after the application of a temporary monthly rent concession. This concession rent is often a thousand dollars or more less than the pre-discount rent amount set forth in the leases Defendants ultimately offer to consumers.

17. Prior to March 2016, Defendants made no disclosure in their advertisements explaining that the advertised rental amounts were reduced by a temporary rent concession.

18. Sometime in March 2016, Defendants began adding a brief statement - which appeared in small print following numerous listings of available apartments – that, "The quoted rent may include a concession." The additional statement, however, was not clear and conspicuous because it: (1) was difficult for consumers to locate as it was not adjacent to the quoted rental prices; (2) did not define what a concession was or state the amount of the concession; (3) did not identify which of the listed rents were subject to a concession; and (4) did not state that the concession was temporary. Moreover, this statement was not included in Defendants' advertisements on Craigstlist.org.

19. When consumers contact Defendants regarding the advertised apartments and rental amounts, Defendants foster the impression that the advertised rents are the rental amounts used for rent-control purposes and that future rent increases would be calculated based on the advertised rental amount. Defendants either (1) falsely inform consumers that similar rent concessions would be offered to consumers throughout their tenancies, or (2) neglect to inform consumers that the advertised rental amounts reflect the application of a temporary rent concession. Defendants further mislead consumers by telling them the rent concessions are offered by the District of Columbia as subsidies and by emphasizing that the property is regulated by the rent control law, thereby creating the net impression that the advertised rental amounts that included the rent concessions are stable.

20. Later, when Defendants provide consumers with leases to execute, the lease documents actually only state the "pre-discount rent" – *i.e.*, the rental amount without the rent concession. When questioned concerning the two disparate rent amounts reflected in the advertisements as compared to the leases, Defendants typically assure consumers that they will receive similar rent concessions in future leases.

21. Moreover, Defendants' leases make no mention of the fact that the "pre-discount rent" will serve as the basis for future rent increases. Defendants' leases typically consist of a two page "Residential Lease – Term Sheet" and a five page document titled "Residential Lease – Terms and Conditions," followed by approximately 30 pages of various addenda and disclosures. While these documents include references to a "concession," they fail to disclose that future rents will be calculated based on the "pre-discount rent," instead of the concession rent. Rather, the net impression Defendants convey through their advertising and leasing practices is that any future rent increases would be calculated based on the rent amount that included the rent concession.

22. Moreover, notwithstanding Defendants' assurances that consumers will receive similar rent concessions in future leases, the renewal leases Defendants offer their tenants at or before the expiration of their initial leases contain unexpected and significantly increased rental amounts that are calculated based on the "pre-discount rent" in consumers' initial leases, without the application of a rent concession. Defendants send tenants a "Housing Provider's Notice to Tenants of Adjustment in Rent Charged," stating that their "current rent charged" is the higher rent amount that excludes the concession, and that their rent increase is calculated based on this higher amount.

23. If consumers question or object to the higher rental amounts in Defendants' proposed renewal leases, Defendants typically offer consumers a new rent concession that is lower than the previous rent concession amount.

24. Facing significantly elevated rental amounts, consumers are forced to (1) accept the renewal leases at significantly higher monthly rent amounts; (2) move out of their apartments; (3) enter into month-to-month tenancies at significantly higher rent amounts than

both their previous rent amounts and the amount stated in a renewal lease (even with a new concession); or (4) forego their rights to a month-to-month tenancy and sign new one-year leases, but with rent concessions that are often significantly less than those in their previous leases. For example, Defendants offered one tenant at 3003 Van Ness a renewal lease with a rent concession that would result in her monthly rent being $2,160.00 if she signed a new lease. However, if she decided to go on a month-to-month tenancy, her monthly rent would be $3,097.00 – which is almost a $1,000.00 per month difference.

25. Defendants have made misrepresentations of material fact to consumers by (1) advertising apartments for rent with rental amounts that were not the "pre-discount rents" that Defendants treated as effective for rent-control purposes, (2) representing that the rent stated in Defendants' advertisements would be stable and not likely to increase significantly because the properties are rent-controlled, and (3) representing that the rent concessions are permanent or were offered through a District-sponsored subsidy program. In fact, Defendants treat the "pre-discount rent" as the rent upon which future increases will be based. The rent concessions are temporary and have no connection with the District government. Therefore, Defendants' misrepresentations of material fact tend to mislead consumers.

26. Defendants have also failed to disclose material facts to consumers, including that: (1) the rental amounts stated in Defendants' advertisements are reduced by a rent concession; (2) future rent increases would not be determined based on the concession rent but instead would be based on the "pre-discount rent" amount; (3) consumers will most likely not be offered the same rent concession amount if they decide to renew their leases; and (4) consumers will most likely be offered a much lower rent concession amount, if any, should they decide to

transition to a month-to-month tenancy instead of signing a new lease. Therefore, Defendants' failure to disclose these material facts tends to mislead consumers.

DEFENDANTS' VIOLATIONS OF THE CONSUMER PROTECTION PROCEDURES ACT (CLAIMS ONE THROUGH FIVE)[1]

27. The allegations of paragraphs 1 through 26 are re-alleged as if fully set forth herein.

28. The CPPA is a remedial statute that is to be broadly construed. It establishes an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia.

29. The rental units Defendants offer to lease or supply consumers are leased for personal, household, or family purposes and, therefore, are consumer goods and services. Defendants, in the ordinary course of business, offer to lease or supply consumer goods and services and, therefore, are merchants.

30. The CPPA prohibits unlawful, unfair or deceptive trade practices in connection with the offer, sale, and supply of consumer goods and services.

31. Section 28-3904(a) of the CPPA makes it an unlawful, unfair or deceptive practice under the CPPA to "represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have." Defendants violated § 28-3904(a), including when they:

[1] The header includes "Claims One through Five" in light of the parties' agreement that the Second Amended Complaint supported the formulation of five claims—namely, under D.C. Code § 28-3904(a), (b), (e), (f) and (*l*). *See* Joint Pretrial Statement at 3.

a. Represented that Defendants' rent concessions had a characteristic of being always available to tenants in the same or equivalent amounts of money in subsequent lease renewals, when they did not have that characteristic.

b. Represented that Defendants' apartment units and leases had the characteristic of being limited to annual increases in the amount of net rent (i.e., the amount of rent after taking account of any rent concession), when they did not have that characteristic.

c. Represented that Defendants' apartment units had the benefit or characteristic of receiving subsidies from the District government, when they did not.

d. Represented that Defendants' rent concessions had the source or characteristic of being provided by the District government, when they did not.

32. Section 28-3904(b) of the CPPA makes it an unlawful, unfair or deceptive practice under the CPPA to "represent that the person has a sponsorship, approval, status, affiliation, certification, or connection that the person does not have." Defendants violated § 28-3904(b), including when they:

a. Represented that Defendants were affiliated with, connected to, or sponsored by the District government, when they represented to prospective tenants that the District government provided Defendants with subsidies in order to provide tenants with rent concessions, when they were not.

33. Section 28-3904(e) of the CPPA makes it an unlawful, unfair or deceptive practice under the CPPA to "misrepresent as to a material fact which has a tendency to mislead." Defendants violated § 28-3904(e), including when they:

a. Misrepresented that the rent offered in Defendants' advertisements would be stable and would not increase significantly because the properties are rent controlled.

b. Misrepresented that the rent concessions offered by Defendants are permanent.

c. Misrepresented that the rent concessions offered by Defendants are provided by the District government.

34. Section 28-3904(f) of the CPPA makes it an unlawful, unfair or deceptive practice under the CPPA to "fail to state a material fact if such failure tends to mislead." Defendants violated § 28-3904(f), including when they:

a. Failed to state to prospective tenants that the advertised rent is determined by subtracting a rent concession from a higher pre-concession rent identified in their leases.

b. Failed to state to prospective tenants that their future rent increases would be based on the higher pre-concession rent identified in their leases, rather than the amount that tenants actually paid in rent.

35. Section 28-3904(*l*) of the CPPA makes it an unlawful, unfair or deceptive practice under the CPPA to "falsely state the reasons for offering or supplying goods or services at sale or discount prices." Defendants violated § 28-3904(*l*), including when they:

a. Falsely stated that the reason Defendants' offered apartment units with rent concessions, or discounted prices, is that the District government provided the concessions in order to subsidize tenants' rental payments.

36. Defendants' misrepresentations and omissions concerning future rent and how they would calculate future rent increases violated the CPPA *regardless* of whether the Rental Housing Act permitted them as landlords to raise rent based upon a pre-concession rental amount rather than the post-concession rental amount. Even if Defendants had the authority under the Rental Housing Act to engage in this practice, they were not permitted to make misleading or deceptive statements and omissions about the amount of future rent they would charge.

DEFENDANTS' *PER SE* VIOLATION OF THE CONSUMER PROTECTION PROCEDURES ACT (CLAIM SIX)

37. The allegations of paragraphs 1 through 36 are re-alleged as if fully set forth herein.

38. A trade practice that violates another District law in the context of a consumer transaction is *per se* unlawful, unfair or deceptive under the CPPA. *See Dist. Cablevision Ltd. P'ship v. Bassin*, 828 A.2d 714, 723 (D.C. 2003) ("Trade practices that violate other laws, including the common law, also fall within the purview of the CPPA."); *Osbourne v. Capital City Mortg. Corp.*, 727 A.2d 322, 325-26 (D.C. 1999) ("[T]he CPPA's extensive enforcement mechanisms apply not only to the unlawful trade practices proscribed by § 28-3904, but to all other statutory and common law prohibitions."); *see also, e.g.*, *In re Packaged Seafood Prod. Antitrust Litig.*, 242 F. Supp. 3d 1033, 1073 (S.D. Cal. 2017) (denying a motion to dismiss because of the "clear statement from D.C.'s highest court" and because "Plaintiffs have plausibly alleged a violation of federal antitrust law"); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1125 (N.D. Cal. 2008) (rejecting argument that "none of the claims alleged by the D.C. plaintiffs describes conduct specifically prohibited by the statute" because it was sufficient, under District law, to allege that the conduct violated another statute); *In re Processed*

Egg Prod. Antitrust Litig., 851 F. Supp. 2d 867, 899 (E.D. Pa. 2012) (rejecting argument that "more than simply the elements of an antitrust violation must be alleged" because there are no "valid arguments that an antitrust violation by itself cannot comprise an unlawful trade practice within the meaning of the DCCPPA."); *Hakki v. Zima Co.*, No. 03-9183, 2006 WL 852126, at *3 (D.C. Super. Ct. Mar. 28, 2006) ("To state a claim under the CPPA, a plaintiff must allege one of the unlawful trade practices enumerated in D.C. Code § 28-3904 *or* one that is prohibited by another District of Columbia law." (emphasis added)).

39. Such a trade practice violates the CPPA regardless of whether merchants subjectively believe they are violating other District laws. *See, e.g.*, *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013).

40. Defendants engaged in a trade practice of raising the rent on many of their tenants in amounts that exceeded the allowable amount of rent increases under the Rental Housing Act, D.C. Code §§ 42-3501.01, *et seq*. ("RHA").

41. Since at least 1985, the RHA has made it unlawful for a landlord to increase rent for any rental units except in amounts specifically authorized by the RHA. D.C. Code § 42-3502.08.

42. During all relevant times, including prior to the 2019 amendment of the law, the RHA limited annual rent increases for most tenants in rent-controlled buildings, like 3003 Van Ness, to the increase in the Consumer Price Index ("CPI-W") plus 2% as applied to the rent *actually* charged to a tenant (i.e., the post-concession rent), rather than as applied to whatever pre-discount rent might be specified in a lease. D.C. Code § 42-3502.08(h)(2)(A). The RHA limited annual increases even further with respect to certain tenants, like senior citizens and individuals with disabilities. D.C. Code § 42-3502.08(h)(2)(B).

43. Defendants raised rent on some tenants in amounts that exceeded the applicable CPI-W plus 2% as applied to the post-concession rent the tenants paid in the expiring lease.

44. For example, the following tenants (listed by their Resident ID) had their rent raised by Defendants in excess of the applicable CPI-W plus 2% as applied to the post-concession rent the tenants had paid in the expiring lease:

a. Tenant 29819-W-0930-1

b. Tenant 29819-S-0805-1

c. Tenant 29819-W-0826-1

d. Tenant 29819-S-1012-1

e. Tenant 29819-W-0920-1

f. Tenant 29819-S-0707-1

g. Tenant 29819-W-0411-1

h. Tenant 29819-S-0117-2

i. Tenant 29819-S-0506-3

j. Tenant 29819-W-0101-2

k. Tenant 29819-W-0819-2

l. Tenant 29819-S-0617-3

m. Tenant 29819-S-0702-3

n. Tenant 29819-W-0617-3

o. Tenant 29819-W-0233-3

p. Tenant 29819-W-1016-3

45. For some tenants, Defendants raised their rent in multiple lease renewals by more than the applicable CPI-W plus 2% as applied to the post-concession rent the tenants paid in the expiring leases.

46. Defendants violated the RHA each time they increased rent on a tenant in excess of CPI-W plus 2% as applied to the post-concession rent the tenant paid in the expiring lease.

47. In some cases, the RHA-violative rent increases amounted to overcharging tenants by thousands of dollars. For example, Defendants overcharged Tenant 29819-S-0707-1 by $9,070.56 over the course of three lease renewals.

48. The RHA contains enforcement procedures that allow the Rent Administrator or Rental Housing Commission to impose administrative fines on landlords, as well as provides certain remedies for tenants. D.C. Code § 42-3509.01 (penalties under RHA). However, those provisions are separate and apart from the Office of Attorney General's available remedies under the CPPA. D.C. Code § 28-3909(a-b).

49. Defendants violated the CPPA each time they charged rent increases in amounts violating the Rental Housing Act, regardless of whether they subjectively understood that they were engaging in unlawful rent increases.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully requests this Court enter a judgment in its favor and grant relief against Defendants, as follows:

(a) Permanently enjoin and restrain Defendants, pursuant to D.C. Code § 28-3909(a), from engaging in conduct determined by the Court to be in violation of the CPPA;

(b) Order the Defendants to pay restitution pursuant to D.C. Code § 28-3909(a), for

amounts collected from District of Columbia consumers in violation of the CPPA;

(c) Order the payment of statutory civil penalties in the amount of $1,000 per violation, pursuant to D.C. Code § 28-3909(b), as in effect through July 16, 2018, for each and every violation of the CPPA as alleged herein that Defendants committed on or before July 16, 2018;

(d) Order the payment of statutory civil penalties in the amount of $5,000 per violation, pursuant to D.C. Code § 28-3909(b)(1), as in effect commencing on July 17, 2018, for each and every violation of the CPPA as alleged herein that Defendants committed on or after July 17, 2018;

(e) Award the District the costs of this action and reasonable attorney's fees pursuant to D.C. Code § 28-3909(b); and

(f) Grant such further relief as the Court deems just and proper.

JURY DEMAND

The District of Columbia demands a trial by jury on all issues triable by jury by the maximum number of jurors permitted by law.

Dated: February 24, 2020

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

KATHLEEN KONOPKA
Deputy Attorney General
Public Advocacy Division

JIMMY R. ROCK
Assistant Deputy Attorney General
Public Advocacy Division

/s/ Benjamin Wiseman
BENJAMIN WISEMAN [1005442]
Director, Office of Consumer Protection
Public Advocacy Division

/s/ James Graham Lake
JAMES GRAHAM LAKE [1028853]
GARY M. TAN [987796]
Assistant Attorneys General
441 4th Street, N.W., Suite 600 South
Washington, D.C. 20001
(202) 807-0369
Graham.Lake@dc.gov
Gary.Tan@dc.gov

Attorneys for the District of Columbia

EXHIBIT E

Filed
D.C. Superior Court
04/23/2021 14:11PM
Clerk of the Court

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

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 matter appeared before the Court for a non-jury trial from December 7, 2020 through December 16, 2020. Thereafter, the District and Equity filed their respective Post-Trial Briefs on January 29, 2021. The Court makes the following findings of fact and conclusions of law.

I. BACKGROUND

This matter concerns the District's allegations that Equity's advertising and leasing practices regarding a 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* Third Amended Complaint ("TAC"). Equity has owned, operated, and managed the Property since February 28, 2013 and is responsible for leasing all apartment units. *Id.* ¶ 2. The Property was built prior to 1975 and is subject to District of Columbia rent control laws. PTX385 ¶ 3; *see* D.C. Code §§ 42-3501, *et seq.*

[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.

A. Equity's Business Practices

From February 2013 to February 2019, Equity leased apartments using a pricing structure where it offered monthly concessions, or recurring discounts, subtracted from the total monthly rent on the lease.[2] *See, e.g.*, DTX264 at 1. Prospective and existing tenants of the Property had various understandings of apartment pricing that arose out of communications and representations from Equity at distinct stages of the leasing process—spanning from initial engagement online, to signing a first lease at the Property, to lease renewals.

Many prospective tenants' initial engagement with the Property was through online advertisements 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, there was no disclosure regarding a concession at all. *See* DTX005 ¶ 2(a); PTX350. A disclosure first appeared on Equity's website on May 20, 2015, that 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."

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

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 ad from May 23, 2017 with no disclosure), *with* PTX004 (Craigslist ad 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 rent concessions or that the quoted price included a 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 a tenant was applying for. *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.

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, 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

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

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 the RHA contained no express definition for the term "rent charged," and the RHA's plain language and inconsistent uses of the term rendered it ambiguous; further explaining:

> some uses of the phrase lend themselves to the Housing Provider's view that it refers to a maximum legal limit; some uses are mixed, appearing to refer, even within a single sentence, to both the actual rent and a maximum legal limit; and some uses provide no immediate, contextual suggestion that the phrase refers to a maximum legal limit, rather than the actual rent.

PTX056 at 22. The RHC then looked to the legislative history and purpose of the RHA to illuminate the meaning of "rent charged." *Id.* at 26-31. The RHC determined that the definition of "rent charged" most consistent with the RHA's legislative history and purpose 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).

C. 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. Specifically, 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. *See* TAC ¶¶ 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 RHA (hereinafter "*Bassin* claim"). See TAC ¶¶ 38-49. The non-jury trial in this matter commenced on December 7, 2020 and concluded on December 16, 2020. Both the District and Equity filed respective Post-Trial Briefs on January 29, 2021.

II. DISCUSSION

A. Claims 1-5: CPPA Violations

The District's TAC alleges that Equity engaged in unfair or deceptive trade practices in violation of the CPPA; with specific violations occurring under D.C. Code sections 28-3904(a), (b), (e), (f), and (l). *See* TAC ¶¶ 27-36. Under the CPPA, it is a violation to "(a) represent that goods or services have a source, sponsorship, approval, certification . . . that they do not have;" "(b) represent that the person has a sponsorship, approval, status, affiliation, or certification that the person does not have;" "(e) misrepresent as to a material fact which has a tendency to mislead;" "(f) fail to state a material fact if such a failure tends to mislead;" and (l) "falsely state

the reasons for offering or supplying goods or services at sale or discount prices." D.C. Code §§ 28-3904(a), (b), (e), (f), (l). The CPPA finds it is a violation to engage in such unfair or deceptive trade practices, whether or not any consumer is in fact, misled, deceived, or damaged thereby. *See* D.C. Code § 28-3904. Because the CPPA is a remedial statute, it must be construed and applied liberally to promote its purpose. *See* D.C. Code § 28-3901(c); *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013).

Upon review of the evidence presented at trial and the record in its entirety, the Court finds substantial evidence to establish Equity violated D.C. Code sections 28-3904(e) and (f), but does not find sufficient evidence to establish a violation of D.C. Code sections 28-3904(a), (b), or (l). The Court will address the sections in turn.

1. Equity's Alleged Violations of D.C. Code sections 28-3904(e) and (f)

The District alleges that Equity violated the CPPA by misrepresenting and/or failing to disclose material facts during the leasing and renewal processes. *See generally* TAC. 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 District of Columbia Court of Appeals has established that an alleged trade practice is considered in terms of how the practice would be viewed and understood by a reasonable consumer. *See Saucier*, 64 A.3d at 442. To prevail on a claim under sections 28-3904(e) and (f), a plaintiff must establish that the defendant made a material misrepresentation or failed to disclose a material fact, but does not need prove the misrepresentation or failure to disclose was intentional. *Id.* A misrepresentation or failure to disclose is "material" if "a reasonable man [or woman] would attach importance to its existence or nonexistence in determining his [or her] choice of action in the transaction in question;" or if

"the maker of the representation knows or has reason to know" that the recipient likely "regard[s] the matter as important in determining his or her choice of action." *Id.* (quoting THE RESTATEMENT OF THE LAW (SECOND) TORTS § 538(2)).

i. Equity's Misrepresentations and Failures to Disclose

The evidence of Equity's misrepresentations and omissions is largely interwoven; therefore, the two will be analyzed together. The Court finds Equity made several misrepresentations and failures to disclose, beginning on Equity's website. While not all apartments at the Property had a rent concession, it was Equity's policy to advertise those apartments with rent concessions at the post-concession rent price. PTX390 ¶ 13. Up until May 2015, Equity entirely omitted any indication about its use of concessions on the website. *See* DTX005 ¶ 2(a); PTX350. Beginning on May 20, 2015, Equity's website included a disclosure that read, "Quoted rent may include a concession. Contact the community for more information." DTX005 ¶ 2(a); PTX327 at 30. Equity's corporate representative, Kristen Miller, testified at trial that this disclosure was in "one of the lower [font sizes] within legibility for a human." *See* 12/9/20 PM Tr. at 73:8-12. Further, this disclosure was placed near the bottom of the website, and could only be seen after scrolling through multiple apartment listings. *See* PTX327 at 19-32. In July 2017, the disclosure was moved higher on the website and 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." PTX327 at 49-57; PTX390 ¶ 24.

It is possible that a disclosure, if seen by prospective tenants, may have put them on alert of a possible concession. But the Court views that prior to the 2017 change on Equity's website, the small font of the disclosure located at the bottom of the website would likely not have been easily noticeable to a reasonable consumer searching for apartment information. Indeed, most of

the tenants called at trial testified that they did not see the disclosure when they viewed the website during their apartment search. *See, e.g.*, 12/7/20 AM Tr. at 75:7-13 (Stevens); 12/7/20 PM Tr. at 28:11-29:6 (Rosenfeld), 86:5-87:3, 89:19-90:1 (Sanderlin); 12/8/20 AM Tr. at 33:5-34:10 (Serinsky); 12/8/20 PM Tr. at 21:4-24 (Pennisi), 61:1-12, 62:3-15 (Giertych), 76:13-17 (Rogers); 12/9/20 AM Tr. at 35:20-36:2 (Shavelson), 89:14-20 (Makinde); 12/9/20 PM Tr. at 12:9-16 (Pettet); 12/10/20 AM Tr. at 40:2-40:10 (Janzen).[4]

In 2017, Equity increased the likelihood of a prospective tenant noticing the disclosure by moving it closer to the top of the website, and increased the disclosure's effectiveness by including the additional information, "Actual rental rates may be higher than the amounts quoted." PTX327 at 49-57; PTX390 ¶ 24. Notwithstanding this improvement, none of the versions of the website provided any further information regarding the "actual rent" amount, whether a concession had been applied to an apartment listing, and if so, the concession amount.

With this information, or lack thereof, prospective tenants toured the Property in-person, where Equity's employees continued to make similar misrepresentations and omissions. Leasing agents quoted the post-concession amount as the "rent" for the apartment viewed, without disclosing whether this amount included a concession, or the pre-concession rent amount which would appear on the lease. *See, e.g.*, 12/7/20 PM Tr. at 90:2-10 (Stevens); 12/9/20 AM Tr. at 91:18-92:5 (Makinde). Amy Shavelson, a former tenant, testified that she toured the Property in early 2014 to view a specific unit. 12/9/20 AM Tr. at 36:9-14. The leasing agent discussed the price on the website, $1,700, as the monthly rent for the unit. *Id.* at 37:18-19. At the time of the tour, the leasing agent did not discuss any information about concessions, and Ms. Shavelson was not aware that the quoted price was after a concession. *Id.* at 37:20-38:3. Katie Pettet,

[4] These former or current tenants all viewed Equity's website prior to the July 2017 updates to the disclosure.

another former tenant, testified that she visited the Property in 2015 before leasing. *See* 12/9/20 PM Tr. at 11:11-14:6. She was told that the monthly rent listed on the website for her unit was the same, $1,770. *Id.* at 13:14-18. Similarly, the Equity leasing agent only quoted this number, without indicating that it was a post-concession rent price. *Id.* at 13:19-14:6.

In addition, leasing agents discussed rent control as a feature of the Property. They explained to prospective tenants that any future rent increases would be within the limits permitted under D.C. rent control law. *See, e.g.*, *id.* at 13:7-11 (Pettet). Since the rent control discussion occurred where prospective tenants were only aware of the post-concession rent amount, because Equity represented the post-concession amount as the "rent" while omitting information about the pre-concession rent, prospective tenants inferred that rent control increases would be applied to the post-concession amount. Ms. Shavelson explained that after her tour, her understanding of how rent control applied to her rent was "that two or two-and-a-half percent maximum increase would be applied to the $1,700, but that there was a chance maybe there wouldn't be an increase at all." 12/9/20 AM Tr. at 38:22-39:3. This appeared to be the common understanding among tenants shortly after their tours. *See, e.g.*, 12/7/20 AM Tr. at 77:5-10 (Stevens explaining that he understood the first-year monthly rent was $1,975, and would thereafter increase according to D.C. rent control rules based on the $1,975); 12/7/20 PM Tr. at 93:5-9 (Sanderlin stating he understood rent increases would be calculated based off what he was paying). As such, due to Equity misrepresenting the post-concession rent as if it was the actual rent for a given apartment and omitting key information about the application of concessions, tenants were not aware that Equity used the higher pre-concession rent when calculating the increase under rent control laws.

Equity's application also omitted information about the applicability of concessions related to the apartment for which a prospective tenant applied. *See* PTX064 (online application); PTX060.F (online application); PTX372 (paper application). The applications only included a "Monthly Apartment Rent," and did not include information if the monthly rent for the specific apartment included a concession. *See id.* After approval, a tenant received the apartment lease, and learned the monthly rent and concession amounts for the first time. *See, e.g.*, 12/10/20 Tr. at 121:5-13 (Sparveri); 12/9/20 AM Tr. at 94:4-7 (Makinde). When tenants sought clarification about the higher rent number from leasing agents, Equity continued to mislead by stating "don't worry about it," informing them that the higher amount was for only "internal accounting." *See* 12/10/20 Tr. at 121:16-20 (Sparveri); 12/9/20 AM Tr. at 94:8-22 (Makinde).

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.

The Court acknowledges that the record contains no evidence of a tenant paying more than the advertised post-concession rent for an initial lease term. However, the issue here lies with the dearth of information a tenant has on the front-end when searching, applying, and signing the lease at the Property; and the resulting confusion when that tenant receives a renewal

lease and significantly higher rent that does not align with his or her understanding of how Equity calculated increases. For these reasons, the Court finds substantial evidence to establish that Equity made misrepresentations and omissions in its communications with prospective tenants.

ii. The Misrepresentations and Failures to Disclose Were Material

The next step of the Court's analysis is to determine whether a reasonable consumer would view Equity's misrepresentations and omissions as "material." *Saucier*, 64 A.3d at 442. As provided above, a misrepresentation or failure to disclose is material under the CPPA if a reasonable consumer would attach importance to its existence or nonexistence in determining his or her choice of action in the transaction in question; or if the maker of the representation knows or has reason to know that the recipient likely regards the matter as important in determining his or her choice of action. *Id.*

In *Saucier*, the District of Columbia Court of Appeals provided guidance on what constitutes a material omission in violation of section 28-3904(f), as this is less evident than a material misrepresentation in violation of section 28-3904(e). *See Saucier*, 64 A.3d at 442-45. In this case, defendants failed to disclose a notice which was intended to make a potential condominium unit purchaser aware of possible financing choices. *Id.* at 444. The Court of Appeals found this notice "material" because "a significant number of unsophisticated consumers could find the information in the notice important in determining a course of action." *Id.* at 444-45.

Here, the trial evidence illustrates that prospective tenants considered the misrepresentations and omissions involving price to be material, and demonstrates that a reasonable consumer would consider the misrepresentations and omissions similarly. At trial,

tenant after tenant testified that price was an important factor in determining where to lease an apartment. To many tenants, price was one of the most important factors considered when choosing their apartment. *See, e.g.*, 12/8/20 PM Tr. at 61:25-62:2 (Giertych voicing that rental price was her "number one priority"); 12/7/20 PM Tr. at 37:5-6 (Rosenfeld recalling that "price was paramount" when picking his place to live); 12/8/20 AM Tr. At 69:13-20 (Sanderlin recalling that pet accommodation, location, and price were the most important factors in his search). Since price was an important factor, some tenants filtered their online apartment searches by price to eliminate apartment search results outside of their desired range. *See, e.g.*, 12/8/20 PM Tr. at 18:11-22 (Pennisi explaining that budget was "probably the biggest concern," so he refined search results for a rent that was feasible with his income); 12/9/20 AM Tr. at 89:11-15 (Makinde explaining that she filtered the search results on apartments.com to hide apartments outside of her maximum budget). The Court believes that a reasonable consumer looking for an apartment would surely consider price to be an important factor in determining whether and where to sign a lease.

Equity was also aware that a tenant was likely to regard pricing and concession information as important in determining whether to lease at the Property. *See Saucier*, 64 A.3d at 442. During trial, the District asked Equity's corporate representative, Kristen Miller, why the concession disclosure was not right next to each of the listed prices or at least in close proximity to the listed prices. *See* 12/9/20 PM Tr. at 78:5-7. Ms. Miller responded that she "certainly could have," but did not want to "put anything on the site that may make [prospective tenants]. . . not have a conversation if the property meets the lifestyle and price point they can afford." *Id.* at 78:8-20.

A reasonable consumer could also attach importance to a clear understanding of how the rental price is expected to increase in future leases. As shown at trial and discussed above, many prospective tenants discussed rent control with leasing agents and were told that the price could only increase a certain percentage per year. *See* 12/8/20 PM Tr. at 8:9-13 (leasing agent testifying that she "always mentioned to everyone that [the Property] was rent controlled"). Former tenant Zachary Rosenfeld stated, "knowing that the rent would not be increased significantly year over year was important" during his search, so he valued a rent controlled building. 12/7/20 PM Tr. at 37:5-11; *see also* 12/8/20 PM Tr. at 79:6-12 (Rogers testifying that, at the time of the tour, his understanding of how rent would be calculated was "very important" to his decision to apply); 12/7/20 PM Tr. at 93:5-9 (Sanderlin). The emphasis placed on rent control shows that tenants attached importance not only to whether the initial lease would be within their budget, but also to the predictability of rental increases remaining within rent control limits to ensure that future leases *stay* within their budget.

During trial, Equity emphasized that the turnover at the Property is approximately 30% to support its assertion that prospective tenants are concerned with the immediate term, not the price at an undetermined time in the future; meaning any representations about future pricing were immaterial. Def.'s Br. at 16-17. On the contrary, the Court views this evidence to more concretely establish that approximately 70% of tenants are, in fact, concerned with future pricing of their units beyond the "immediate term." Indeed, a tenant seeking to lease only for the immediate term would not be concerned about whether the subsequent leases at the Property were rent-controlled if they did not intend to enter a subsequent lease.

The Court recognizes Equity's argument that the testifying witnesses considered a range of factors other than price when choosing where to lease, but still ultimately decided to lease at

Equity's Property. However, the Court disagrees that this fact renders any misrepresentations or omissions involving price immaterial. The liberally-construed CPPA only requires that a reasonable consumer would "attach importance" to the existence or nonexistence of a fact in determining a choice of action; not that the fact is the most important part of the determination. *See Saucier*, 64 A.3d at 442. Accordingly, the Court determines that a reasonable consumer would attach importance to knowing the actual rent and concession information of an apartment prior to paying the application fee, as the actual rent is the amount Equity used to determine future increases within rent control laws.

iii. The Misrepresentations and Failures to Disclose Tended to Mislead

The Court also finds that Equity's misrepresentations and omissions had the tendency to mislead a reasonable consumer into applying for an apartment with inaccurate information and expectations. The record does not contain sufficient evidence to establish that prospective tenants were informed of the higher pre-concession rent at any point before submitting an application and paying the application fee. *See* 12/9/20 AM Tr. at 94:4-7 (Makinde testifying that she first learned about her higher pre-concession rent after she applied and was "about to sign [her] lease"); 12/10/20 Tr. at 121:5-13 (Sparveri). Accordingly, the operative, and only, rent figure in a prospective tenant's mind during the application process was the post-concession rent listed in advertisements and discussed during tours. A reasonable consumer considering a lower post-concession rent that fits within their desired budget may decide to submit an apartment application and pay fees. *See, e.g.*, 12/9/20 AM Tr. At 92:21-23 (Makinde explaining that she ultimately decided to apply for an apartment at the Property because the listed price fit within her budget).

Not only does a consumer not know that the actual rent may be over their budget, the consumer also does not know that rent increases in a subsequent year's lease, if no concession is applied at Equity's discretion, may be well over their budget. Even after a future tenant receives the lease and sees the higher pre-concession rent, Equity continued to mislead the tenant by stating "don't worry about it," informing them that the higher amount is for "internal accounting." *See* 12/10/20 Tr. at 121:16-20 (Sparveri); 12/9/20 AM Tr. at 94:8-22 (Makinde). On the contrary, this pre-concession amount is significant because it was used as the base amount for future rent increases.

On former tenant Matthew Sparveri's initial lease, the pre-concession Monthly Rent was $4,198, and post-concession rent was $2,525. *See* DTX115. At all times prior to receiving his lease, Equity employees only discussed the post-concession rent, and he was unaware of the larger number until after receiving the lease. 12/10/20 Tr. at 121:5-11. Mr. Sparveri asked about the $4,198, and the Equity employee gave him the impression that he did not need to worry about it since he would be paying the post-concession rent. *See id.* at 121:10-13, 16-19. He "did not know the impact would affect [him] in a year." *Id.* at 121:19-20. A year later, Equity informed Mr. Sparveri that the Monthly Rent on his renewed lease would be $4,345, causing him to feel "shock, anger as well," explaining "My rent should be, you know, maybe $100 more than what I was paying, but not $2,000 more than what I was paying." *Id.* at 122:1-13.

Similarly, when Equity provided a renewal lease to Adeola Makinde, it contained a rent amount that was significantly higher than what she expected, and budgeted for, based on her communications when signing her initial lease. *See* 12/9/20 AM Tr. at 114:1-15. Even after Equity applied a concession to the second year rent amount, the new post-concession rent was higher than what she understood would have been her rent if Equity applied the rent control

percentage to the post-concession rent she paid during the first year. *Id.* at 113:23-114:5; *see also* 12/8/20 PM Tr. at 84:9-13 (Rogers testifying that the renewal letter stated a monthly rent of $3,000 which "was shocking to [him] because it was significantly more than [he] could afford or were [sic] promised that [he] would have to afford."). These tenants were all mislead by Equity's misrepresentations and omissions during the initial lease signing, and noticed the impact of the misrepresentations and omissions a year later at the time of renewal. The Court believes that a reasonable consumer would be similarly misled if Equity presented them with the same misrepresentations and omissions prior to signing a lease at the Property.

During apartment searches, tours, and applications, Equity made material misrepresentations and omissions to prospective tenants, creating a net impression which was incomplete and excluded concession and pricing information. A reasonable consumer could find this information to be important in determining where to lease an apartment, particularly if they are concerned with both initial and future rent amounts. Accordingly, the Court finds Equity liable for violations of D.C. Code sections 28-3904(e) and (f), and enters judgment in favor of the District on these claims.

2. Equity's Alleged Violations under D.C. Code sections 28-3904(a), (b) and (l)

The District's Complaint alleges that Equity violated the CPPA by representing that the concessions had certain characteristics and sources they did not have. *See* TAC ¶¶ 31,32, 35. Pursuant to the CPPA, it is a violation to "(a) represent that goods or services have a source, sponsorship, approval, certification . . . that they do not have;" "(b) represent that the person has a sponsorship, approval, status, affiliation, or certification that the person does not have;" and (l) "falsely state the reasons for offering or supplying goods or services at sale or discount prices." §§ 28-3904(a), (b), (l).

This Court has recognized that falsely stating a connection to the government or government agencies is a deceptive practice in violation of the CPPA. *See District of Columbia v. Student Aid Center, Inc.*, No. 2016 CA 003768 B, 2017 D.C. Super. LEXIS 18, at *6-7 (D.C. Super. Ct. Sept. 8, 2017). In *Student Aid Center, Inc.*, the evidence demonstrated that defendants repeatedly conveyed to consumers that their services were connected to the United States Department of Education and that their organization had a special relationship with the United States government. *Id.* These misrepresentations supported the court's decision to sustain claims under CPPA sections 28-3904(a) and (b). *Id.*

Here, the District's Third Amended Complaint alleges a host of deceptive and unlawful trade practices in connection to the District of Columbia government. TAC ¶¶ 31, 32, 35. The District specifically alleges:

- In violation of section 28-3904(a), Equity represented that a rent concession would be available to tenants in subsequent lease renewals, when they did not have that characteristic; and represented that concessions were subsidized or provided by the District government, when they were not. *Id.* ¶ 31(a), (c), (d).

- In violation of section 28-3904(b), Equity represented that it was affiliated with, connected to, or sponsored by the District government when it represented to prospective tenants that the government provided Equity with subsidies in order to provide tenants with concessions, when they were not. *Id.* ¶ 32.

- In violation of section 28-3904(l), Equity falsely stated that the reason it offered apartment units with rent concessions is that the District government provided the concession in order to subsidize tenants' rental payments. *Id.* ¶ 35.

The only evidence presented by the District during trial in support these allegations was excerpts of former tenant Eser Yildirim's deposition testimony from January 8, 2019. PTX394. When Mr. Yildirim received his lease and did not understand the rent and concession amounts, he contacted an Equity leasing agent, Julie Jackson, by phone and email. *Id.* at 19:2-9. In the deposition, he recalled Ms. Jackson stating that a District of Columbia agency provided funds to

Equity to offset the cost of rent and make the apartments more affordable. *Id.* at 20:1-19. In the contemporaneous emails, Ms. Jackson indicated that the higher pre-concession rent was the "price that is calculated by the city," and the price "the city calculated that [Equity] could charge." PTX052 at 1, 2. Based on the context in the emails, the Court infers that Ms. Jackson may have been explaining the CPI-W plus 2% calculation as provided under District of Columbia rent control laws. *See id.* No other witness testified that Equity made similar representations connecting the concessions to the District of Columbia government.

Mr. Yildirim's deposition testimony alone is insufficient for the Court to find that Equity violated CPPA sections 28-3904(a), (b) and (l). The District did not otherwise address its claims under sections 28-3904(a), (b) and (l) during trial, and its Post-Trial Brief wholly excludes discussion about these sections or violations. Based on this limited evidence, the Court is unable to determine whether this conversation was an isolated misunderstanding or an unlawful trade practice. As such, the District has failed to establish that Equity violated sections 28-3904(a), (b), and (l), and the Court enters judgement in favor of Equity on these claims.

B. CLAIM 6: BASSIN CLAIM

The District's TAC alleges that Equity violated the CPPA each time it charged rent increases in amounts that exceeded what was permissible under the RHA. *See* TAC ¶¶ 37-49. The District asserts that at all relevant times before the 2019 Act, the RHA limited rent increases based on the amount actually charged. *Id.* ¶ 42. Equity argues that it reasonably relied on the OAH decisions which found that as long as "rent charged" does not exceed the legally allowable amount, the RHA does not prohibit the use of concessions to lower tenants' actual payment amounts.

"The CPPA is a comprehensive statute designed to provide procedures and remedies for a broad spectrum of practices which injure consumers." *Atwater v. District of Columbia Dep't of*

Consumer & Reg. Affairs, 566 A.2d 462, 465 (D.C. 1989). Although the CPPA enumerates a number of specific unlawful trade practices, this list is not exclusive. *Dist. Cablevision Ltd. P'ship v. Bassin*, 828 A.2d 714, 723 (D.C. 2003) (citing D.C. Code § 28-3904). Thus, courts have repeatedly held that trade practices which violate other laws in the District of Columbia also fall within the purview of the CPPA. *Id.* (citing *Atwater*, 566 A.2d at 465-66); *see also Osbourne v. Capital City Mortg. Corp.*, 727 A.2d 322, 325-26 (D.C. 1999) ("[T]he CPPA's extensive enforcement mechanisms apply not only to the unlawful trade practices proscribed by § 28-3904, but to all other statutory and common law prohibitions.").

Price increases of rental housing in the District of Columbia are regulated under the Rental Housing Act of 1985 ("RHA"). *See* D.C. Code §§ 42-3501.01, *et seq.* The RHA provides that an adjustment in the amount of rent charged "shall not exceed the current allowable amount of rent charged for the unit, plus the adjustment of general applicability plus 2%, taken as a percentage of the current allowable amount of rent charged; provided, that the total adjustment shall not exceed 10%." D.C. Code § 42-3502.08(h)(2)(A). Housing providers commonly refer to this adjustment to "rent charged" as "CPI-W plus 2%." *See id.* At issue is the appropriate figure to be used as "rent charged" in this adjustment calculation.

1. *Fineman II* Constituted a Legislative Rule and Does Not Apply Retroactively

i. RHC's Decision in Fineman II *Constituted Legislative Rulemaking*

The Court finds that the RHC's interpretation of "rent charged" in *Fineman II* constituted legislative rulemaking, effecting a change of law. When an agency rule "merely describes the effect of an existing [statute,] rule or regulation, it does not fall within the DCAPA definition of 'rule' and the procedural formalities of the APA are unnecessary." *Andrews v. D.C. Police & Firefighters Ret. & Relief Bd.*, 991 A.2d 763, 770 (D.C. 2010) (internal quotations omitted).

Such a rule is referred to as an "interpretive" rule. *Id.* (citing *Rosetti v. Shalala*, 12 F.3d 1216, 1222 n.15 (3d Cir. 1993) ("Interpretive rules . . . merely clarify or explain existing law or regulations.")). An interpretive rule "serves an advisory function explaining the meaning given by the agency to a particular word or phrase in a statute or rule it administers." *Id.* at 771.

In contrast, when an agency exercises its authority to "to supplement [a statute], not simply to construe it," it makes new law and thereby engages in "substantive" or "legislative" rulemaking." *Id.* Substantive or legislative rules do more than simply clarify or explain a statutory or regulatory term; but are "self-imposed controls over the manner and circumstances in which the agency will exercise its plenary power." *Id.* Legislative rules "grant rights, impose obligations, produce other significant effects on private interests, or . . . effect a change in existing law or policy." *Ciox Health, LLC v. Azar*, 435 F. Supp. 3d 30, 66 (D.D.C. 2020) (elaborating that a rule is legislative when it "changes the law or effectively amends a prior legislative rule."). Whereas an agency action that "merely clarifies the agency's interpretation of the legal landscape" and "neither binds the agency nor creates a new burden on regulated entities" is not a legislative rule. *Id.*

When an agency "announces a new statutory interpretation–and thus engages in interpretive rulemaking–it may do so through adjudication, and (in many cases) may give retroactive effect to the interpretation in the case in which the new interpretation is announced, because the agency is not really effecting a change in the law." *Andrews*, 991 A.2d at 771. But when an agency supplements a statute, such as by adopting new requirements or limits or imposing new obligations, the rule is invalid unless it has been adopted through notice-and-comment rulemaking and published in compliance with the DCAPA. *Id.* In distinguishing between interpretive and legislative rules, courts consider "both the actual legal effects of the

agency action and the agency's characterization of the action." *Ciox Health*, 435 F. Supp. 3d at 66. Courts have articulated that "sometimes, the line between an adjudicative determination and a 'rule' under the DCAPA is a thin one." *Andrews*, 991 A.2d at 772.

In *Andrews*, the Police and Firefighters Retirement and Relief Board (the "Board") denied plaintiff's survivor's benefit claim because it was untimely filed. *See* 991 A.2d at 767. The relevant statute provided that if a member of the police department died, his survivors or beneficiary must file with the Board to receive the automatic survivor's benefit and submit evidence of eligibility. *Id.* The parties agreed that the neither the relevant act nor implementing regulations established a deadline by which a survivor must file a claim for benefits. *Id.* at 768. Additionally, while the legislative history of the act could suggest that a deadline may or may not be consistent with the statutory purpose, no definitive guidance could be drawn either way. *Id.* The court settled that the Board was effectively imposing an additional requirement where one did not previously exist. *Id.* at 772-73. The Board did not purport interpret a phrase in the statute or regulations, "but instead contemplate[d] supplementing the statute and regulations with a new substantive rule of general application." *Id.* at 773 (citing *United States v. Articles of Drug*, 634 F. Supp. 435, 457 (N.D. Ill. 1985) ("policies that 'create precise, objective limitations where none previously existed' are substantive rules."). Accordingly, the court concluded that the Board's imposition of a new requirement constituted a legislative rule. *Id.*

In *Ciox Health*, the Department of Health and Human Services ("HHS") issued a Guidance document to supplement the "Privacy Rule," a rule falling under the Health Insurance Portability and Accountability Act ("HIPAA"). *See Ciox Health*, 435 F. Supp. 3d at 38-39, 42. In the Guidance, HHS concluded that a certain fee was to be applied to additional third-party directives. *See id.* at 42. The Guidance made the fee unequivocally applicable to third-party

directives where the legislation and regulations had not done so, and the Court of Appeals determined that this change could not be sourced to an existing body of law. *Id.* For these reasons, the court held that the Guidance was a legislative rule because it worked a change in the law. *Id.* at 66.

Whereas the determinations in the above cases were more clear-cut, the determination in present case as to whether *Fineman II* constituted an interpretive or legislative rule is a close call. Similar to the relevant statutes in *Ciox Health* and *Andrews*, the RHA on its face did not provide definitive guidance on how to interpret "rent charged" at the time.[5] *See Ciox Health*, 435 F. Supp. 3d at 66; *Andrews*, 991 A.2d at 768; PTX056 at 22 (establishing that the meaning of "rent charged" in the RHA's plain language was ambiguous). But unlike the HHS in *Ciox Health* and the Board in *Andrews*, the RHC in *Fineman II* was interpreting a term found in the RHA, "rent charged," and could look to the legislative history and purpose of the RHA for guidance. *Compare Ciox Health*, 435 F. Supp. 3d at 66, *and Andrews*, 991 A.2d at 773 (explaining that rules could not be sourced to the legislative history), *with* PTX056 at 26-30 (discussing the RHA's legislative history). These factors would generally be an indication that *Fineman II* was merely an interpretive decision.

However, the Court must also analyze the actual legal effects of the RHC's definition of "rent charged." *See Ciox Health*, 435 F. Supp. 3d at 66. The OAH retains jurisdiction over tenant petitions arising under the RHA. *See* PTX056 at 1 n. 1. Before *Fineman II*, the OAH repeatedly upheld that Equity's use of the pre-concession rent as "rent charged" to calculate adjustments was not prohibited under the RHA, so long as the amount did not exceed the maximum legal rent. *See* DTX070 at 11 ("There are no statutory or regulatory provisions that

[5] The RHA has since been amended to include an explicit definition of "rent charged" as the amount a tenant "must actually pay" as a condition of occupancy or use of a rental unit. *See* D.C. Code § 42-3501.03(29A).

define the terms on the RAD forms to preclude using the maximum legal rent as the 'current rent charged' and 'prior rent'"); *see generally* DTX074; DTX001; DTX069; DTX068; DTX073. After *Fineman II*, Equity's same practice of using the pre-concession rent to calculate increases was illegal. *See* DTX056 at 37 (defining "rent charged" as the post-concession rent the tenant actually pays, not the pre-concession rent). Thus, while the RHC purported to clarify the previously ambiguous definition of "rent charged," the effect of the clarification was a change in how housing providers could legally interpret and report "rent charged." The decision in *Fineman II* was essentially a change in law because it "created precise limitations where none previously existed," and made a previously permitted industry practice an illegal method to calculate rent adjustments. *See Andrews*, 991 A.2d at 773. For this reason, the Court determines that *Fineman II* constituted legislative rulemaking which was invalid without the formalities of the DCAPA.

ii. Fineman II Does Not Apply Retroactively

To the extent that *Fineman II* constituted a change in law, the Court declines to apply this interpretation to Equity retroactively.[6] When an agency engages in adjudicative rulemaking, the rules normally apply prospectively because they usually effect a change in settled law. *Reichley v. D.C. Dep't of Empl't Servs.*, 531 A.2d 244, 247 (D.C. 1987). "A fundamental unfairness would inevitably result if new regulations were applied to parties who had previously established their legal positions in reliance upon the former regulations." *Id.* at 248. Courts should apply four factors when determining if an agency's adjudicative rule should be applied retroactively or prospectively:

[6] The Court conducts this analysis notwithstanding its above finding that *Fineman II* constituted legislative rulemaking and was invalid without notice-and-comment in compliance with the DCAPA. *See Andrews*, 991 A.2d at 771.

> (1) whether the decision is a clear break with the past precedent or was foreshadowed by trends in the law; (2) the extent to which the party against whom the new decision is invoked reasonably relied upon the old rule, including the nature and degree of the burden a retroactive decision would impose on that party; (3) the importance of rewarding the real party in interest, if any, who initiated the agency's changed decision; and (4) whether administering both the new and the old rules for some period of time would pose a severe administrative burden or otherwise interfere with a significant statutory interest.

Id. at 251.

Here, *Fineman II* defined rent charged as the amount of money a tenant must actually pay to a housing provider as a condition of occupancy or use of a rental unit. *See* PTX056 at 31. With respect to the first factor, this decision is a clear break with the past precedent. *Reichley*, 531 A.2d at 251. It is well-settled that OAH decisions are non-precedential and cannot set rules for general applicability. *See* PTX056 at 28 n. 20. However, prior to *Fineman II*, there was no interpretation of the RHA's ambiguous use of "rent charged" other than the OAH decisions. Before *Fineman II*, the OAH repeatedly held that Equity's use of the pre-concession rent as "rent charged" to calculate adjustments was not prohibited under the RHA, so long as the amount did not exceed the maximum legal rent. *See* DTX070 at 11. Although the decisions were not judicially speaking "precedential," they signaled to Equity that no change in its practice was necessary. The interpretation of "rent charged" in *Fineman II* was a clear break from this interpretation since Equity's previously permitted practices were made impermissible.

With respect to the second factor, the Court finds that Equity reasonably relied on the OAH's "interpretation of rent charged." Equity was not relying on OAH decisions in the abstract as applied to other parties to guide its own conduct. On the contrary, these six decisions were all against Equity and specifically reviewed how Equity calculated rent charged. *See generally* DTX074; DTX070; DTX001; DTX069; DTX068; DTX073. As noted by the RHC,

the plain language of the RHA was ambiguous and could lend itself to multiple interpretations. *See* PTX056 at 22. The OAH continuously upheld a certain interpretation of "rent charged," thereby reaffirming that Equity's use of the pre-concession rent to calculate increases was not illegal. Without any authority stating otherwise, Equity maintained its interpretation of "rent charged" in line with the OAH's contemporaneous decisions. Thus, the Court finds that Equity reasonably relied on the OAH's interpretation of an ambiguous statute; to find this reliance unreasonable would go against principles of fundamental fairness. Notably, Equity ended the practice of offering concessions shortly before the D.C. Council enacted the 2019 Act, and now uses the amount actually paid by a tenant to calculate adjustments.

The third factor does not apply in this case because neither party in this matter initiated the decision in *Fineman II*. With respect to the fourth factor, applying *Fineman II* retroactively would pose a severe administrative burden. Rent concessions are commonly used in the District of Columbia. *See* DTX068 at 4. A retroactive application in this case would give rise to an onslaught of lawsuits against housing providers who followed similar rental adjustment calculations that were reviewed and permitted at the time. For the aforementioned reasons, the Court will not hold Equity retroactively liable for calculating rent adjustments using the pre-concession rent. As such, the Court enters judgment in favor of Equity on the *Bassin* claim.[7]

[7] Holding Equity retroactively liable for its interpretation of "rent charged" would also raise due process and fair notice concerns. When the text of regulations administered by an agency is unambiguous, the agency does not need to provide any other notice to regulated entities. *Hosp. of the Univ. of Pa. v. Sebelius*, 847 F. Supp. 2d 125, 135 (D.D.C. 2012). "But when regulations can reasonably be interpreted in a way other than the agency does, the agency must give regulated entities notice before enforcing requirements based on that interpretation." *Id.*; *see also Epstein v. D.C. Dep't of Empl. Servs.*, 850 A.2d 1140, 1144 (D.C. 2004) ("when a new rule is established through individual adjudication, due process requires that the agency 'provide notice which is reasonably calculated to inform all those whose legally protected interest may be affected by the new principle.'").

III. CONCLUSION

In sum, the Court finds that Equity violated the CPPA by making material misrepresentations and omissions to prospective tenants which had the tendency to mislead. Equity shall be liable for violations of D.C. Code sections 28-3904(e) and (f), and judgment shall be entered in favor of the District for these claims. However, the Court does not find sufficient evidence to hold Equity liable for violations of D.C. Code sections 28-3904(a), (b), and (l), and enters judgment in favor of Equity on these claims. The Court also does not find Equity liable for violations of the RHA, and enters judgment in favor of Equity on the *Bassin* claim. With these findings, the Court concludes the liability phase of this bifurcated matter. The Parties are hereby ordered to appear before the Court for a virtual Status Hearing on May 17, 2021 at 2:00 p.m. in Courtroom 221 to discuss the damages phase and procedural posture of this case.

Accordingly, it is this 23rd day of April, 2021 hereby,

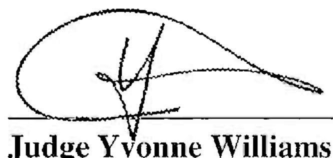
ORDERED that judgment shall be entered in favor of the District and against Equity with respect to claims under D.C. Code sections 28-3904(e) and (f); and it is further

ORDERED that judgment shall be entered in favor of Equity and against the District with respect to claims under D.C. Code sections 28-3904(a), (b), and (l); and it is further

ORDERED that judgment shall be entered in favor of Equity and against the District with respect to the *Bassin* claim; and it is further

ORDERED that the parties shall appear virtually for a Status Hearing on **May 17, 2021 at 2:00 p.m. in Courtroom 221**.[8]

IT IS SO ORDERED.



Judge Yvonne Williams

Date: April 23, 2021

[8] Hearing instructions and access code will be emailed to the parties a week before the scheduled hearing.

Copies to:

James Graham Lake
Ben Wiseman
Gary M. Tan
Counsel for Plaintiff

Carey S. Busen
John Letchinger
Robert C. Gill II
Counsel for Defendants

EXHIBIT F

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,

[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.

* * *

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

---

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,

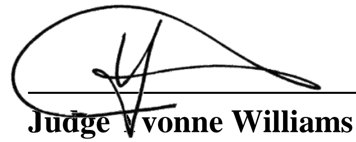
ORDERED that within sixty (60) days of the entry of a concurrently issued Judgment and Order, Defendants shall pay **$869,344.19 plus 2 percent simple prejudgment interest** in restitution to the District of Columbia; and it is further

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

Copies to:

James Graham Lake
Ben Wiseman
Gary M. Tan
Laura Beckerman
Counsel for Plaintiff

Carey S. Busen
John Letchinger
Robert C. Gill II
Counsel for Defendants