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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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

ORDER

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:

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[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]

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[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,

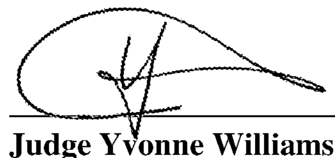
ORDERED that judgment shall be entered in favor of the District and against Equity with respect to claims under D.C. Code sections 28-3904(e) and (f); and it is further

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:

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