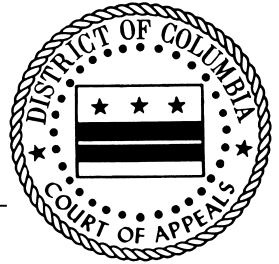


No. 21-CV-0550



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**DISTRICT OF COLUMBIA
COURT OF APPEALS**

ROBERT DE CARVALHO, *et al.*,

Appellants,

v.

OSPWEST, LLC, *et al.*,

Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Division

2018 CA 007937 B
The Honorable Robert R. Rigsby

Brief of Appellee OSPWEST, LLC

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LIST OF ALL PARTIES PURSUANT TO D.C. APP. R. 28(a)(2)(A)

Appellants-Third-Party/ Proposed Intervenors:	Roberto de Carvalho, Vania de Carvalho, Celina Ochoa, Moises Nunez, and Dora Martinez (collectively “Movants”)
Appellants-Third-Party/ Proposed Intervenors’ Counsel:	Eleni P. Cristidis, Jamie Long, Amanda Korber, and Jonathan H. Levy with the Legal Aid Society of the District of Columbia. Eleni P. Cristidis and Jamie Long represented Movants in the action before the Superior Court.
Appellee-Plaintiff ¹ :	OSPWEST, LLC
Appellee-Plaintiff’s Counsel:	Mathew M. Moore and Alison H. Graham of the firm Shulman, Rogers, Gandal, Pordy & Ecker, P.A.
Appellee-Receiver:	Long Gate Associates, LLC
Appellee-Receiver’s Counsel:	Constantinos G. Panagopoulos of the firm Ballard Spahr LLP
Defendant in Superior Court Action:	Randolph Towers Cooperative, Inc.

¹ In the Superior Court action Mathew M. Moore and Alison H. Graham of the firm Shulman, Rogers, Gandal, Pordy & Ecker, P.A. along with Michael A. Brown, Michael E. Blumenfeld and Timothy M. Hurley of the firm Nelson Mullins Riley & Scarborough LLP represented the Plaintiff Lapis Municipal Opportunities Fund III, LP (“Lapis”). Lapis subsequently transferred its interest to OSPWEST, LLC (“OSPWEST”). In the Superior Court action OSPWEST was substituted as party Plaintiff in place of Lapis. On December 21, 2021, the Court of Appeals granted OSPWEST’s motion to substitute OSPWEST in place of Lapis in this appeal.

Defendant in Superior
Court Action's Counsel:

Eric M. Rome of the firm
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Proposed-Intervenor:

Randolph Towers Condominium
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Proposed-Intervenor's Counsel:

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& Preston LLP

**CORPORATE DISCLOSURE STATEMENT
PURSUANT TO D.C. APP. R. 28(a)(2)(B)**

Appellee OSPWEST, LLC ("OSPWEST") is a limited liability company. It does not have a parent corporation. It does not have any publicly owned stock.

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I. STATEMENT PURSUANT TO D.C. APP. R. 28(a)(5)

Roberto de Carvalho, Vania de Carvalho, Celina Ochoa, Moises Nunez, and Dora Martinez (collectively “Movants”) appeal from the order entered on July 14, 2021, by the Honorable Robert R. Rigsby (“Judge Rigsby”) in the Superior Court of the District of Columbia (the “Superior Court”). [JA 626-637]. The Superior Court denied Movants’ Motion to Intervene filed on May 19, 2021. [JA 626, 635-637]. The order appealed from constitutes a final order and disposes of all of Movants’ claims. *See e.g., Vale Properties, Ltd. v. Canterbury Tales, Inc.*, 431 A.2d 11, 14 (D.C. 1981) (citing *Calvin-Humphrey v. District of Columbia*, D.C. App., 340 A.2d 795, 798 n.9 (1975) (“Denial of leave to intervene as of right is appealable to this court as a final order.”)).

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. Did the Superior Court act within its discretion by denying Movants’

Motion to Intervene as untimely?

B. Did the Superior Court act within its discretion by denying Movants’

Motion to Intervene in which they seek to oppose the Motion to

Amend Receivership Order to Expand and Clarify the Authority of the
Receiver filed by Lapis Municipal Fund III LP on May 5, 2021?

III. STATEMENT OF THE FACTS AND OF THE CASE

A. Formation of the Cooperative

Prior to 2006, the property located at 3900-3902 14th Street, NW, Washington, D.C., 20011 (the “Property”) consisted of approximately 145 rental units leased to tenants. In 2006, the tenants at the Property, known collectively then as the Randolph Towers Tenant Association, overwhelmingly voted to relinquish their tenancies and to form the Randolph Towers Cooperative, Inc. (the “Cooperative”) for the sole purpose of converting the Property from a cooperative to a condominium. [JA 332]. Each member of the Cooperative, including the Movants, entered into an Occupancy Agreement reiterating this purpose [JA 356]. After the conversion to a condominium, several Cooperative members vacated or purchased their units and became members of the Randolph Towers Condominium Association, Inc. (the “Association”). Movants, however, failed to purchase their units and remain in possession of units owned by the Cooperative. As a result, Movants have effectively undermined the fundamental purpose for the Cooperative’s existence by failing to comply with their membership obligations,

which in turn prevents the Cooperative from satisfying its financial responsibilities to its lender.

B. Nature of the Case, Course of Proceedings and Disposition Below

i. Commencement of Action

This appeal arises from the Superior Court’s denial of Movant’s Motion to Intervene in a straightforward breach of contract action originally filed by Lapis Municipal Fund III LP (“Lapis”) against the Cooperative. [JA 626, 635-637]. On September 26, 2007, the Cooperative secured two loans—(1) a loan in the principal amount of \$19,000,000; and (2) a junior loan in the principal amount of \$2,800,000 (collectively the “Loan Agreements”). [JA 11-35]. Deeds of Trust encumbering various units and parking spaces at the Property secure the Loan Agreement [JA 11-35]. On August 28, 2018, the Loan Agreements and their associated security interests were assigned to Lapis. [JA 19]. Subsequently, Lapis assigned the Loan Agreements and associated security interests to OSPWEST, LLC (“OSPWEST”).

On November 9, 2018, prior to Lapis’ assignment to OSPWEST, Lapis filed the underlying breach of contract action against the Cooperative due to the Cooperative’s default and material breach of the terms of the Loan Agreements (the “Breach of Contract Action”). [JA 11-303]. Lapis sought to recover the outstanding principal amounts owed under the Loan Agreements, as well as outstanding accrued

and unpaid interest, post-judgment interest, and attorneys' fees and costs. [JA 11-35]. Following Lapis' assignment to OSPWEST, the Superior Court granted OSPWEST's motion to substitute. [JA 11-35]. As a result, the Superior Court substituted OSPWEST in place of Lapis in the underlying Breach of Contract Action. [JA 9]. Accordingly, OSPWEST now seeks to recover the outstanding accrued and unpaid interest on the Loan Agreements as well as post-judgment interest, and attorneys' fees and costs due to the Cooperative's default and material breach of the terms of the Loan Agreements.

C. Appointment of Long Gate Associates, LLC ("Long Gate" or "Receiver") as Receiver over the Property

On May 2, 2019, the Superior Court granted Lapis' Emergency Motion for Appointment of a Receiver (the "May 2019 Receivership Order") on the grounds that a receiver was necessary to protect Lapis' secured interest in the Property based on the Cooperative's failure to manage its affairs, including, but not limited to, failing to repay its indebtedness to Lapis, demonstrating an inability to sell units and to collect occupancy charges sufficient to cover its operating expenses, and failing to pay debts owed to various third-parties. [JA 304-317]. The Superior Court authorized Long Gate to, among other things, take possession and control of vacant units, maintain possession of all of the Cooperative's books, accounts, and finances, select and engage a property management company to assist with the

day-to-day operations at the Property, maintain the Property, employ third parties as necessary to preserve and maintain the Property, and place units in a condition for sale. [JA 309]. The Superior Court also authorized Long Gate to pursue various actions for possession in the Landlord & Tenant Branch. [JA 310]. Specifically, the Superior Court authorized Long Gate “to engage legal counsel for the purpose of bringing actions in the Landlord & Tenant Branch of the D.C. Superior Court.” [JA 310]. The Superior Court also authorized Long Gate “to retain legal counsel to bring actions for non-payment of rent or carrying charges . . . to exercise remedies, as provided by law, for breaches of lease or breaches of Occupancy Agreement(s), including bringing legal action . . . to bring all other causes of actions as permitted by this Order, the Bylaws, an [sic] applicable law as may be necessary . . . to pursue settlement of any legal action brought, to enter into settlement agreements, and to fully litigate matters that are not resolved via settlement as it sees fit.” [JA 310].

On May 5, 2021, Lapis filed a Motion to Amend Receivership Order to Expand and Clarify the Authority of the Receiver (“Motion to Amend”). [JA 316-401]. The Motion to Amend sought to: (1) strengthen and clarify the language giving Long Gate standing to pursue actions and (2) permit Long Gate to terminate the interests of delinquent Cooperative members without the consent of the

Cooperative's board or a majority of the Cooperative's members. [JA 316-326].

Notably, the Cooperative did not file a response or opposition to the Motion to

Amend. The Superior Court granted the Motion to Amend on July 14, 2021.

Accordingly, the Court entered a new receivership order expanding and clarifying

the authority of the Receiver (the "July 2021 Receivership Order"). In granting the

Motion to Amend, the Superior Court concluded that:

The spirit of this Court's May 2, 2019 Receivership Order was to preserve and maintain Plaintiff's Interest in the Property. [Plaintiff] represents that the Court's Order is effectively nullified due to "[t]he COVID-19 pandemic, the Public Health Emergency ("PHE") and related restrictive legislation" and that Plaintiff's interest is at imminent risk of deterioration without the Receiver being granted expanding powers. Receiver states that the "unforeseeable impact of the PHE prevented Receiver from taking further legal action to enforce the increase in carrying charges through Landlord & Tenant actions." Mot. At 7. Receiver demonstrates good reason to expand the Receivership Order and, the Motion being unopposed, the Court finds good cause to grant the Motion. However, the Court notes that the modified Receivership Order will still be subject to the COVID-19 legislation and that this Court's Order will not supersede the legislation in any way nor give Receiver additional powers otherwise stayed during the pendency of the PHE and related legislation.

[JA 635].

D. Landlord & Tenant Actions

Pursuant to the authority given to it by the Superior Court in the May 2019 Receivership Order, Long Gate commenced Landlord & Tenant actions against

Movants. Specifically, on September 17, 2019, Long Gate filed an action against

Roberto de Carvalho and Vania de Carvalho based on their status as tenants at sufferance who failed to vacate after receipt of a Notice to Quit, *Long Gate Associates, LLC as Receiver for Randolph Towers v. Vania Rocha de Carvalho, et. al.*, Case No. 2019 LTB 020177. [JA 406]. On January 22, 2020, Long Gate filed an action against Celina Ochoa and Moises Nunez based on their status as tenants at sufferance who failed to vacate after receipt of a Notice to Quit, *Long Gate Associates, LLC as Receiver in the name of “Randolph Towers Cooperative” v. Celina Ochoa, et. al.*, Case No. 2020 LTB 001453. [JA 406]. On February 18, 2020, Long Gate filed two actions against Dora Martinez and Ever Diaz, one based on their status as tenants at sufferance who failed to vacate after receipt of a Notice to Quit and one based on their failure to pay carrying charges, respectively *Long Gate Associates, LLC as Receiver in the name of “Randolph Towers Cooperative” v. Dora Martinez, et. al.*, Case No. 2020 LTB 004041 and *Long Gate Associates, LLC as Receiver in the name of “Randolph Towers Cooperative” v. Dora Martinez, et. al.*, Case No. 2020 LTB 004094. [JA 406].

Movants have had a full and complete opportunity to raise all claims and defenses relevant in these Landlord & Tenant actions, including, but not limited to, challenges related to Long Gate’s standing. In fact, Roberto de Carvalho and Vania de Carvalho and Celina Ochoa and Moises Nunez both obtained judgments

for summary judgment in their favor. Long Gate appealed both judgments, and those appeals remain pending before this Court as consolidated Case Nos. 21-CV-171 and 21-CV-207. The Superior Court recently denied the motion for summary judgment filed by Dora Martinez, which, among other things, challenged Long Gate's standing.

**E. Motion to Intervene, Oppositions to Motion to Intervene, and
Order Denying Motion to Intervene**

i. Motion to Intervene

Movants, well aware of the Breach of Contract Action and appointment of Long Gate as Receiver over the Property, waited until May 19, 2021, more than two years after the Superior Court appointed Long Gate as Receiver, to seek intervention in this Breach of Contract Action between Lapis and the Cooperative (and now between OSPWEST and the Cooperative based on the substitution of OSPWEST). [JA 402-415]. Despite this significant delay, Movants claimed their request to intervene was timely. [JA 409]. Movants failed to provide any information regarding when they first learned of the Breach of Contract Action but acknowledged being aware of cases filed in 2019. [JA 402-415]. Notably, however, Movants did not claim to have only recently learned of the existence of the Breach of Contract Action. [JA 402-415]. Rather, Movants' claimed their Motion to Intervene was timely, as it was filed "immediately upon learning" of the

Motion to Amend and within the fourteen-day period to file an Opposition thereto. [JA 409].

Movants included in their Motion to Intervene a proposed complaint with eight new, separate claims against the Cooperative, Lapis, and Long Gate, including a claim for termination of receivership, none of which were the subject of the Motion to Amend. [JA 415-426]. Movants, without providing support, also argued that amending the Receivership Order as sought in the Motion to Amend would “[o]verrule final judgments” entered in actions brought by Long Gate against the Roberto de Carvalho/Vania De Carvalho and Celina Ochoa/Moises Nunez. [JA 409].

ii. Oppositions to Motion to Intervene

Both Lapis and Long Gate opposed Movants’ Motion to Intervene [JA 501-625]. Lapis argued that Movants had no right to intervene in the Breach of Contract Action because the disposition of the Breach of Contract Action will not have any effect on their claimed interest in the Property. [JA 521-522]. Additionally, Lapis argued that the Court should reject Movants’ attempt to terminate the receivership and to insert unrelated claims into the Breach of Contract Action. [JA 522-524]. Long Gate argued that Movants’ Motion to Intervene was untimely and that Movants could otherwise pursue their claims

separately. [JA 507-511]. Long Gate therefore respectfully requested that the Court deny any effort by Movants to intervene in the Breach of Contract Action for the purpose of opposing the Motion to Amend. [JA 511-513].

iii. Order Denying Motion to Intervene

On July 14, 2021, the Superior Court issued an Order addressing three separate motions (the “July 2021 Order”). [JA 626-645]. Specifically, in the July 2021 Order the Superior Court: (1) denied Randolph Towers Condominium Association, Inc.’s Motion to Intervene and Motion to Terminate Receivership, or Alternatively to Modify the Order Appointing Receiver, filed on April 7, 2021; (2) granted Lapis’ Motion to Amend Receivership Order to Expand and Clarify the Authority of the Receiver, which included entry of the July 2021 Receivership Order; and (3) denied Movants’ Motion to Intervene. [JA 626].

With regard to the Movants’ Motion to Intervene, the Superior Court evaluated whether the request was timely and held that it was not. In support of this, the Superior Court determined that: (1) Movants failed to state exactly when they first learned of the Breach of Contract Action but otherwise made clear that they have been generally aware of the Breach of Contract Action since 2019; (2) Movants failed to “provide any reason for why intervention was not sought when they became aware” of the Breach of Contract Action in 2019; and (3) Movants

“will not suffer any prejudice as the impetus of this intervention is to challenge the expanded powers the Receiver seeks but which this Court has denied for reasons stated above.” [JA 636-637].

IV. SUMMARY OF ARGUMENT

The Superior Court acted within its discretion when it denied Movants’ Motion to Intervene as untimely. Because the July 2021 Receivership Order is consistent with the spirit of the May 2019 Receivership Order, the Superior Court properly exercised its discretion in determining that Movants’ motion was untimely for failing to provide any reason for waiting approximately two years before seeking to intervene. Further, Movants’ interest in intervening and Movants’ options for raising claims and defenses remain unchanged even under the July 2021 Receivership Order. As such, the prejudice to Movants is minimal because they may separately assert any claims or defenses related to the July 2021 Order. The remaining considerations pursuant to Super. Ct. Civ. R. 24(a)(2) do not otherwise support intervention. Specifically, Movants failed to establish that they have standing to intervene or to otherwise establish the existence of any legal basis pursuant to which their interests should be individually represented in a Breach of Contract Action to which they are not individually parties in the underlying contractual agreements.

V. STANDARD OF REVIEW

“The invocation and the operation of Rule 24(a)(2) are premised ‘upon timely application’ by the proposed intervenor.” *Vale Properties, Ltd.*, 431 A.2d at 15 quoting Super. Ct. Civ. R. 24(a). “The determination of the timeliness of the proposed intervenor’s motion lies within the trial court’s ‘sound discretion,’ and ‘unless that discretion is abused, the court’s ruling will not be disturbed on review.’” *Vale Properties, Ltd.*, 431 A.2d at 15 quoting *NAACP v. New York*, 413 U.S. 345, 366, 37 L. Ed. 2d 648, 93 S. Ct. 2591 (1973) (footnote omitted); accord, *Natural Resources Defense Council v. Costle*, 183 U.S.App.D.C. 11, 14, 561 F.2d 904, 907 (1977). Where intervention of right is sought pursuant to Super. Ct. Civ. Rule 24(a)(2), “the court must exercise its discretion in determining whether the application is timely made and whether the proposed intervenor’s interest is adequately represented by existing parties.” *McPherson*, 833 A.2d at 994 citing *Hodgson v. United Mine Workers of America*, 153 U.S. App. D.C. 407 414 n.36, 473 F.2d 118, 125 n.36 (citing J. MOORE, FEDERAL PRACTICE para. 24.13 [1] at 24-524 (2d ed. 1969)). “‘To the extent that [the trial] court’s ruling on a motion to intervene as a right is based on questions of law, it is reviewed *de novo*; to the extent that it is based on questions of fact, it is ordinarily reviewed for abuse of discretion.’” *McPherson v. D.C. Hous. Auth.*, 833

A.2d 991, 994 (D.C. 2003) quoting *Mova Pharm. Corp. v. Shalala*, 341 U.S. App. D.C. 355, 140 F.3d 1060, 1074 (1998).

VI. ARGUMENT

In evaluating whether to grant or deny a motion to intervene pursuant to Super. Ct. R. 24(a)(2), the Superior Court considers: (1) the timeliness of the request; (2) whether the proposed intervenor has an interest in the transaction or property before the Court; (2) whether the disposition of the action would impair or impede the proposed intervenor's ability to protect their interest in the transaction or property; and (4) the adequacy of representation of that interest by existing parties. *Vale Properties, Ltd.*, 431 A.2d at 14.

A. The Superior Court acted in its discretion when it denied Movants' Motion to Intervene pursuant to Super. Ct. R. 24(a)(2) as untimely.

The Superior Court correctly evaluated the timeliness of Movants' Motion to Intervene and appropriately exercised its discretion in holding that Movants failed to demonstrate that their request to intervene was timely. When evaluating whether a motion to intervene is timely, the Court considers the following factors:

- (1) the length of the intervenor's delay in filing its application (the length is to be measured from the time that the applicant actually knew or reasonably should have known of its interest in the main action);
- (2) the reason for the delay;

- (3) the stage to which the litigation had progressed when intervention was sought;
- (4) the prejudice that the original parties may suffer if the application is granted; and
- (5) the prejudice that the intervenor may suffer if its application is denied.

Emmco Ins. Co. v. White Motor Corp., 429 A.2d 1385, 1387 (D.C. 1981).

i. Movants’ delay in seeking intervention constitutes a sufficient basis for denial regardless of the July 2021 Receivership Order.

Movants’ Motion to Intervene did not explicitly address the delay factors nor provide a reason that they did not pursue their claims sooner. Instead, Movants claimed their request was timely because they filed it “immediately upon learning of the Motion to Amend, which they claimed was “intended to expand the Receiver’s powers to nullify the legal effect of final judgments issued in the Members’ [Movants’] favor, and to moot out pending disputes.” [JA 409]. Movants also noted that their Motion to Intervene was filed within the fourteen-day period to file an opposition to the Motion to Amend. [JA 409]. Movants provided no other explanations for untimeliness nor arguments that they were timely.

On appeal, Movants attempt to justify for the first time why they did not seek to intervene upon becoming aware of the Breach of Contract Action back in

2019 by attempting to distinguish between the authority vested in the Receiver pursuant to the May 2019 Receivership Order and the July 2021 Receivership Order. Movants now claim that the Superior Court erred because it should have measured “the length of any delay from the time it became apparent that Lapis sought an impermissible expansion of the Receiver’s power to include unilaterally terminating and/or evicting members.” [Movants’ Brief at p. 21]. Movants, however, did not expressly make this argument in their Motion to Intervene and do so now only in response to the Superior Court denying their request to intervene. As such, they are precluded from making these arguments on Appeal, and the Superior Court’s Order should be upheld.

However, even if Movants’ arguments were not precluded, the Superior Court clearly did not find that the July 2021 Receivership Order was a significant deviation from the May 2019 Receivership Order nor was it an “impermissible expansion of the Receiver’s power” as characterized by Movants. In fact, the Superior Court found that the “spirit” of the May 2019 Receivership Order “was to preserve and maintain Plaintiff’s Interest in the Property” and that good cause was demonstrated for the entry of the July 2021 Order, as it is consistent with the intended purpose of the original granting of a Receiver. [JA 635]. In short, the July 2021 Receivership Order is consistent with the spirit of the May 2019

Receivership Order. Accordingly, Movants' argument that its Motion to Intervene was timely because it was based on a change in the Receiver's powers must fail. The appropriate time for requesting to intervene would have been in 2019 when Movants first learned of the Breach of Contract Action and May 2019 Receivership Order. Thus, the Superior Court properly exercised its discretion in determining that Movants' motion was untimely.

ii. Movants own conduct demonstrates that intervention is not necessary to preserve their claims and defenses.

Despite Movants being well aware of the Breach of Contract Action and the appointment of a receiver in 2019 and well aware of Long Gate pursuing eviction actions, Movants did not previously seek to intervene to challenge the May 2019 Receivership Order. Movants argue that there previously was no need to intervene because "the Superior Court repeatedly validated their understanding" that Long Gate lacked standing. [Movants' Brief at p. 20]. This ignores the fact that not all Superior Court judges have ruled in Movants' favor on the issue of Long Gate's standing and also ignores that there remain disputes regarding whether Long Gate lacks standing as demonstrated by the fact that this is among the issues on appeal. The point of an intervention is to allow a proposed-intervenor to step into a case when its interests are endangered based on the case at bar, not so that the proposed-intervenor can make new arguments in a tangentially related case

to its own to preemptively circumvent any risk of an adverse decision. If Movants wish to challenge the authority of the Receiver, the appropriate place for this is in actions brought by the Receiver against Movants individually and not as part of this Breach of Contract Action brought against the Cooperative.

Movants, without providing any support, also claim that the July 2021 Receivership Order intends “to subvert the legal conclusions the Superior Court had reached . . . on the merits of their claims”. [Movants’ Brief at p. 20]. The “legal conclusions” referenced by Movants pertain to cases presently on appeal based on the May 2019 Receivership Order. It is premature to assess the effect, if any, of the July 2021 Order with regard to these actions. Further, the appropriate place for Movants to pursue challenges of this nature is within the allegedly affected actions rather than requesting that the Superior Court summarily decide these disputes in the Breach of Contract Action. Allowing Movants to circumvent the appropriate place for raising these concerns is prejudicial to OSPWEST and would require that the Superior Court dramatically expand the scope of the Breach of Contract Action to consider factors not appropriately before it and not otherwise relevant to disposing of whether the Cooperative breached the terms of the Loan Agreements.

iii. The prejudice to Movants from the denial of their Motion to Intervene is at best minimal as the denial does not deprive them of any claims or defenses in future actions.

The Superior Court premised its finding that Movants' Motion to Intervene was untimely on the following three basis: (1) Movants did not state when they first learned of the Breach of Contract Action; (2) Movants' "do not provide any reason for why intervention was not sought when they first became aware" of the Breach of Contract Action; and (3) Movants "will not suffer any prejudice at the impetus of this intervention is to intervention is to challenge expanded powers the Receiver seeks but which this Court has denied for reasons stated above." [JA 637]. As detailed above, the first two reasons are sufficient to support the Superior Court's denial of Movants' Motion to Intervene. Nevertheless, Movants' assert that the Superior Court abused its discretion because it claimed that Movants would not suffer any prejudice from denying the Motion to Amend when the Court then granted that Motion. [JA 626, 633-635, 637-644].

Contrary to Movants' contentions, the July 2021 Order does not imply or constitute a concession by the Superior Court that Movants' would be prejudiced by the denial of intervention. [Movants' Brief p. 16-17]. In fact, the Superior Court did not engage in an analysis of the prejudice factor as doing so was unnecessary due to the Movants' failure to seek intervention in 2019 or otherwise

specify a reason for delay. However, even if the Court did engage in such an analysis, it would still find the Movants' position without merit.

Movants only sought to intervene for the purpose of opposing the Receiver's authority pursuant to the July 2021 Receivership Order. Movants claim that the only way for them to oppose the Motion to Amend was to intervene and that they would suffer profound and inherently irreparable harm if their intervention is denied. Movants, however, will not suffer irreparable harm from being denied intervention in this Breach of Contract Action because they can still bring their arguments in the appropriate actions at the appropriate times. Further, the harm that Movants cite to as "irreparable" is harm that may potentially result based on the application of the July 2021 Receivership Order—harm that is based on events that have not yet occurred and is speculative at best. Far from causing irreparable harm, denying Movants intervention allows them to appropriately bring their challenges elsewhere. Thus, denying Movants' Motion to Intervene does not prejudice Movants as nothing deprives them from separately raising claims and defenses pertaining to the July 2021 Order.

B. The remaining considerations pursuant to Super. Ct. Civ. R. 24(a)(2) do not otherwise support intervention.

i. The Breach of Contract Action will not impact Movants' rights or interests.

As detailed above, the Superior Court correctly determined that Movants' Motion to Intervene was untimely. As a result, the Superior Court did not engage in further analysis regarding the other considerations set-forth in Super. Ct. Civ. R. 24(a)(2). Movants, however, argue that their interest in the property constitutes a sufficient basis to grant intervention. [Movants' Brief at 23]. Movants claim a possessory interest in individual units located within the Property but urge an extraordinarily broad definition of the word "interest". [Movants' Brief at 22-23].

It is well established, however, that a "[m]ere interest in the outcome of an action . . . will not alone justify the inevitable cost to judicial economy which intervention entails." *Vale Props., Ltd.*, 431A.2d. at 14 (internal citations and quotations omitted). Rather, the moving party "must show that the disposition of the action may as a practical matter impair or impede its ability to protect its interest." *Id.* Neither OSPWEST's claims against the Cooperative nor a judgment in favor of OSPWEST will impair or impede the Movants' interest in the Property, as the Breach of Contract Action does not seek to evict Movants. In fact, Movants themselves do not even focus on the impact of OSPWEST's claims against the Cooperative or the effect of a judgment in OSPWEST's favor with regard to their interests in the Property. Rather, Movants' intervention would require that this Court sub-divide the term "Property" to account for their individual possessory

interests in specific units located within the Property that are not directly threatened in the Breach of Contract Action, which focuses on the Property as a whole. Movants' definition of "interest" would require expanding the scope of the case to an extraordinary degree.

Movants' possessory interest in the units they presently occupy or Movants' alleged rights under the Bylaws are not appropriately raised as part of the underlying Breach of Contract Action. This interest, which Movants' erroneously claim constitutes a property interest justifying intervention, is not being disposed of as part of the Breach of Contract Action. Accordingly, Movants lack standing to assert these claims in this Breach of Contract Action. Similarly, any alleged procedural rights available under the Bylaws are not being litigated in the Breach of Contract Action. Therefore, the appropriate place to raise these claims is in actions seeking possession of their individual units pursuant to the July 2021 Receivership Order, or, in a separate action altogether. In effect, Movants seek to expand the scope of this litigation extensively to collaterally attack the July 2021 Receivership Order. Movants even attempt to use this Breach of Contract Action to pursue their own separate civil claims against Lapis, Long Gate, and the Cooperative rather than pursuing those in a separate action. [JA 415-426].

Movants further claim that “it would simply be harder . . . to challenge the validity of the Receiver’s purported expanded powers in a separate suit.” [Appellants’ Brief at p. 24]. The perceived difficulty in separately challenging the July 2021 Receivership Order, however, does not justify nor render appropriate such a challenge by non-parties to the underlying contracts at issue in the Breach of Contract Action. Allowing Movants to challenge the Receivership Order in the Breach of Contract Action would require drastically expanding the scope of the litigation.

C. Movants’ fail to establish any legal basis pursuant to which their interests should be individually represented in the Breach of Contract Action.

Movants do not focus on their interest in the outcome of the Breach of Contract Action in support of their claim that “no existing party can adequately represent” their interests. [Movants’ Brief at p. 25]. No existing party represents their interests because their interests are not within the scope of this litigation. Movants are not parties to the underlying contracts at issue in the Breach of Contract Action, nor is there right to possession of individual units subject to the litigation. Movants focus on what may happen if Long Gate pursues claims pursuant to the July 2021 Receivership Order to seek evictions based on a potential outcome of this tangentially related Breach of Contract Action. Notably, the July

2021 Receivership Order does not permit Long Gate to use self-help to achieve possession. The Breach of Contract Action is not designed to litigate issues related to Movants' possessory interest in the units they presently occupy. Claims and defenses related to that interest are appropriately raised in actions seeking possession of those units. Movants fail to establish any interest pertaining to the disposition of the Breach of Contract Action that is separate and apart from that of the Cooperative.

VII. Conclusion

It is clear from the record that Movants sought to intervene in the Breach of Contract Action to challenge the July 2021 Receivership Order and bring affirmative claims of their own, terminate the receivership, and oppose the Motion to Amend, not to otherwise participate with regard to the breach of contract claims raised which serves as the underlying purpose for this Breach of Contract case. [JA 415-426]. Movants are best served bringing those claims in the appropriate cases.

For the foregoing reasons, OSPWEST respectfully requests that this Court affirm the Superior Court's judgment.

Respectfully submitted,

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REDACTION CERTIFICATE DISCLOSURE FORM

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

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

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:
 - An individual’s social-security number
 - Taxpayer-identification number
 - Driver’s license or non-driver’s’ license identification card number
 - Birth date
 - The name of an individual known to be a minor
 - Financial account numbers, except that a party or nonparty making the filing may include the following:
 - (1) the acronym “SS#” where the individual’s social-security number would have been included;
 - (2) the acronym “TID#” where the individual’s taxpayer-identification number would have been included;
 - (3) the acronym “DL#” or “NDL#” where the individual’s driver’s license or non-driver’s license identification care number would have been included;
 - (4) the year of the individual’s birth;
 - (5) the minor’s initials; and
 - (6) the last four digits of the financial-account number.
2. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.
4. Information about protection orders, restraining orders, and injunctions that “would be likely to publicly reveal the identity or location of the protected party,” 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining “protection order” to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.
6. Any other information required by law to be kept confidential or protected from public disclosure.



Signature

21-CV-550

Case Number(s)

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2/2/2022

Date

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of February, 2022 a copy of the foregoing Brief of Appellee OSPWEST, LLC was electronically served on all counsel that have appeared in this matter.



Matthew M. Moore