Nos. 21-CV-358, 21-CV-359, 21-CV-390,
21-CV-391, 21-CV-579, 21-CV-580

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,
APPELLANT,

v.

BET ACQUISITION CORP.; BLACK ENTERTAINMENT TELEVISION LLC,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE DISTRICT OF COLUMBIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Other Authorities

INTRODUCTION

The District of Columbia's opening brief explained that (1) the trial court's liability decision should be reversed because the Mayor's rejection of the proposed assignment of District-owned property was reasonable given her broad discretion under the restrictive use clause in Ground Lease Two; (2) alternatively, Black Entertainment Television LLC ("BET LLC") cannot recover because it did not give proper notice under D.C. Code § 12-309; and (3) at minimum, the damages award should be vacated or reduced to account for the true value of the Campus and certain deposits that the proposed assignee paid to plaintiffs (collectively, "BET"). BET's response brief fails to persuasively rebut these three lines of argument. BET all but ignores the unusual key language in Ground Lease Two, treating it like an average commercial lease. BET likewise gives short shrift to the text of Section 12-309, which requires *written notice* identifying a claimant and is not satisfied by the District's purported *knowledge*. And BET offers nothing that can justify a damages award that indisputably exceeds BET's actual losses by several million dollars.

ARGUMENT

I. The Liability Decision Should Be Reversed.

A. By its very terms, the use restriction in Ground Lease Two is governed by an explicitly *subjective* standard.

Ground Lease Two (covering Parcel C) incorporates an express restriction that prohibits any use that, "in the sole judgment" of the District, "does not offer

sufficient employment opportunities for [District] residents" or otherwise comply with the economic development purposes of the industrial park. Joint Appendix ("JA") 966-67; *see* JA 914. Despite this explicit contractual language, BET argues (Br. 15-19) that whether Mayor Bowser acted reasonably in denying BET Acquisition Corp.'s assignment request turns on an objective standard of commercial reasonableness. That is incorrect. Although such an objective standard may be the *default* yardstick for judging a proposed assignment, the terms of a particular lease can establish different or additional criteria. As this Court has explained, a proposed assignee (or subtenant) must both be "suitable by objective criteria pertinent to acceptability by any landlord *and* [propose to] use the premises lawfully and otherwise *consistently with the lease terms*." *1010 Potomac Assocs. v. Grocery Mfrs. of Am., Inc.*, 485 A.2d 199, 209 n.14 (D.C. 1984) (emphases added). A landlord can thus reasonably reject an assignment that will not comply with a lease's use restrictions, regardless of whether those restrictions themselves are objectively commercially reasonable.

For example, in *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724 (D.C. 2000), the landlord refused to allow assignment of a sandwich-shop lease if the proposed assignee intended to install a salad bar, a refusal that this Court affirmed as reasonable. *Id.* at 729, 737. In doing so, the Court did not ask whether a hypothetical commercially reasonable landlord would object to a salad bar in a

sandwich shop—a dubious proposition. Instead, it focused on the terms of the particular contract: the contract's use clause "would not allow operation of a salad bar or cafeteria type of operation," and nothing in the contract "obligated [the landlord] to change the clause." *Id.* at 737 (internal quotation marks omitted). Regardless of whether the salad-bar prohibition was objectively commercially reasonable, it was a term of the lease, and a landlord can reasonably demand "all the benefits bargained for in the prime lease." *1010 Potomac Assocs.*, 485 A.2d at 210; *see Leonard, Street & Deinard v. Marquette Assocs.*, 353 N.W.2d 198, 200-02 (Minn. Ct. App. 1984) (upholding a landlord's refusal to consent where a commercially unobjectionable assignee was unwilling to comply with a restrictive use clause in the lease).

None of the cases BET cites says otherwise. These cases merely establish a default standard of objective commercial reasonableness when a lease contains "no restrictions" on how the tenant can use the property. *See Am. Book Co. v. Yeshiva Univ. Dev. Found., Inc.*, 297 N.Y.S.2d 156, 161 (Sup. Ct. 1969) (cited at BET Br. 16). But when a lease contains restrictions, a landlord can reasonably deny consent "if the sublessee's activities don't fall within the permitted uses in the lease." *Tenet HealthSystem Surgical, L.L.C. v. Jefferson Parish Hosp.*, 426 F.3d 738, 741 (5th Cir. 2005) (cited at BET Br. 18). Again, whether those use restrictions are themselves objectively commercially reasonable is irrelevant. *See Sayed v. Rapp*, 782 N.Y.S.2d

278, 281 (N.Y. App. Div. 2004) (cited at BET Br. 18 n.34) (upholding a landlord's refusal to approve an assignment based on the lease's use clause, without analyzing whether the clause's restrictions were objectively commercially reasonable).

As noted, Ground Lease Two incorporated a highly restrictive use clause, Section 6.2 of the Declaration of Protective Covenants, that was explicitly framed in terms of the District's *subjective* satisfaction with a given use of the property. JA 914, 966-67; *see* D.C. Br. 27-28. This was not "an implied use restriction," BET Br. 32, but an *express* use restriction. Under *Executive Sandwich Shoppe* and *1010 Potomac Associates*, it was reasonable for the District to reject an assignment that would not satisfy this express lease term—an assignment, that is, that the Mayor did not subjectively believe would offer sufficient employment opportunities for District residents or comply with the economic-development purposes of the industrial park.

BET offers several responses, but none is persuasive. BET first contends (Br. 30-31) that the Mayor could not possibly consider "parking" to be an unacceptable use of Parcel C under the lease terms. This argument misses the mark because, as discussed below in Part I.B and in the District's opening brief, the Mayor reasonably understood Douglas Jemal *not* to intend to keep using Parcel C as parking for the rest of the Campus. *See infra* Part I.B; D.C. Br. 28-29, 31-32.

Next, BET highlights (Br. 31) that Section 6.2 says that its provisions "are subject to the provisions of any Lease." JA 967. This means, to be sure, that if

Ground Lease Two's terms conflicted with Section 6.2, the lease terms would prevail. But there is no conflict between Ground Lease Two's assignment provision and the use restrictions in Section 6.2—which Ground Lease Two explicitly incorporates, JA 914. The two provisions comfortably co-exist, with the use restrictions informing whether a proposed assignment is reasonable. Because there is no conflict, it makes no sense to speak of the assignment provision "tak[ing] precedence over" Section 6.2. BET Br. 31.

BET also argues (Br. 31-32) that the District's interpretation of Section 6.2 "cannot be harmonized with other parts of the leases" because both leases allow BET "to sublet to anyone upon notice to the District—without the District's approval." There is no disharmony, however. The fact that BET could sublease (as opposed to assign) Ground Lease Two without the District's pre-approval does not contradict the District's interpretation of Section 6.2's use restrictions. If BET subleased Parcel C to a subtenant who then used the property in a manner that the Mayor honestly judged unsatisfactory under Section 6.2, the District could (if necessary) sue under the lease to enjoin that use or terminate the lease. *See* JA 944 ("BET shall remain responsible to the District for performance by BET's sublessees of all of the terms and conditions of the Lease."). The District was entitled to reject a proposed assignment for the same reason.

Last, BET contends (Br. 23) that a standard of subjective satisfaction "defies

enforcement as the tenant, its assignee, and ultimately a court will never know whether the standard is met." That is incorrect. Agreements requiring subjective satisfaction "are a common form of enforceable contract." *Silvestri v. Optus Software, Inc.*, 814 A.2d 602, 606 (N.J. 2003); *see, e.g.*, *Mattei v. Hopper*, 330 P.2d 625, 627-28 (Cal. 1958) (holding that a contract requiring "satisfactory" real-estate leases was enforceable). Determining whether the standard is met is straightforward: if the relevant party (here, the District) states that it is unsatisfied, that conclusion is controlling unless a court finds that this was not the party's honest, good faith judgment. *See, e.g.*, *Silvestri*, 814 A.2d at 609; *Mattei*, 330 P.2d at 628; Restatement (Second) of Contracts § 228 cmt. a (1981).

B. Given the Mayor's broad discretion under Ground Lease Two, the denial of consent was reasonable.

The trial court made a clear factual finding about why the Mayor denied consent to assign the leases: she "decided to deny consent for the assignments because the assignments would not create jobs or promote economic development." JA 535 (¶ 60). Given the use restrictions in Ground Lease Two, this judgment about the economic effect of the assignment was a valid basis for denying consent. In concluding otherwise, the trial court faulted the Mayor for resting her judgment on the premise that Jemal intended to use Parcel C for a bus-facility sublease. JA 560. BET reiterates that criticism: "BET's proposed assignment did not provide for any leaseback; that possible use arose solely from the District's negotiations with [Jemal]

that did not involve BET." BET Br. 25.

But like the trial court, BET fails to explain why BET's non-involvement with the leaseback proposal matters. As the District's opening brief noted, what matters is how the proposed assignee (here, Jemal) actually intends to use the property, not how the current tenant (here, BET) *says* the proposed assignee intends to use the property. D.C. Br. 31-32. If the tenant says that the proposed assignee will use the property as a coffee shop but the assignee later tells the landlord directly, without the tenant's involvement, that it will be a liquor store, the landlord should consider the reasonableness of a liquor store, not a coffee shop. BET neither disputes this logic in principle nor argues that it does not apply here.

It does apply here. Contrary to BET's assertion (Br. 31), Jemal did not "affirm[] his intention to continue to use Parcel C for parking to support the rest of the campus." True, he equivocally proposed that use in his May 2017 memo. JA 1502. But he later agreed in principle to a different and incompatible plan: that Parcel C "be used solely as [a bus] storage and repair facility." JA 1256. BET fails to explain why the Mayor should have ignored this more recent expression of Jemal's intent. Instead, BET suggests (Br. 26) that if the Mayor did not like the bus-facility idea, the "solution" was for her to approve the assignment to Jemal but not execute the sublease back to the District. That is no answer. The burden was on Jemal and BET to make clear how Jemal would use the property. *See D'Oca v.*

Delfakis, 636 P.2d 1252, 1253-54 (Ariz. Ct. App. 1981). Once the Mayor reasonably rejected Jemal's most recent and specific proposal, she had no obligation to assume, without further assurances, that Jemal would use the property in some other manner that would be satisfactory. Thus, the real "solution" was for Jemal and BET to provide a clear, specific, updated statement of Jemal's plans for the property.

Unable to impugn the Mayor's actual grounds for denying consent, BET argues that the denial was unreasonable for other reasons that also lack merit. *First*, BET argues (Br. 21) that "[t]he Mayor wrongly assumed that BET lost its right of assignment when it ceased operations" on the Campus. But the trial court made no finding that the Mayor believed that BET had an obligation of continuous operation under the leases, let alone that this was the reason she denied consent. In fact, the Mayor testified that she did *not* believe BET had an obligation to continue operations on the Campus. 10/15/20 PM Tr. 22:14-17.

It is true that the denial letter, drafted by the Mayor's subordinates, incorrectly asserted that BET had "default[ed] under the Ground Leases based upon [its] cessation of operations on the Ground Lease properties." JA 1482; *see* D.C. Br. 13. But that was not the Mayor's rationale for denying consent. Because the Mayor's actual rationale—which the letter also set forth, JA 1482—was reasonable, the letter's inclusion of this additional, mistaken assertion was harmless.

Second, BET invokes (Br. 26-28) a news article written 18 months *after* the

Mayor denied consent as support for the idea that the Mayor's true motivation was "to get the District's land back." But again, the trial court did not accept BET's theory that this was the Mayor's reason for denying consent. It found that she "decided to deny consent for the assignments because the assignments would not create jobs or promote economic development," JA 535 (¶ 60), not because she thought denying consent would "get the District's land back." The latter theory does not even make sense; rejecting the proposed assignment would not terminate the leases or otherwise cause the land to revert to the District, and there was no evidence that the Mayor mistakenly believed otherwise. On the contrary, the Mayor recognized in her testimony that BET remained free to renew its request to assign the leases to Jemal or another party. *See* 10/15/20 PM Tr. 17:15-18:1.

Third, BET argues (Br. 32-33) that even if the District's position here is correct, the case would have to be remanded for the trial court to decide whether the Mayor acted with "an ulterior motive." This remand is allegedly required because "[t]he trial court properly declined to consider the issue of the Mayor's good faith as irrelevant." BET Br. 32. That is inaccurate. The trial court never said that the Mayor's good faith was "irrelevant"; under either party's view of the case, it *was* relevant. Instead, when the District's counsel began to explain why the evidence did not support a finding of bad faith, the trial court dismissed the argumentation as unnecessary because bad faith was "not an issue *for me*." 10/19/20 AM Tr. 121:2

(emphasis added). In other words, the court was persuaded that the Mayor had not acted in bad faith. No remand is needed on this point.

C. The Mayor reasonably denied consent as to *both* leases.

BET contends (Br. 32) that even if the Mayor reasonably rejected the assignment of Ground Lease Two, "the District has failed to explain how it would make reasonable an otherwise unreasonable denial under Lease # 1." But the District explained why the Ground Lease One denial was reasonable: because BET's request (and its deal with Jemal) was for the assignment of *both* leases, as a package. D.C. Br. 33-34. BET has simply chosen not to respond to the District's argument.

Nor does BET's attempt (Br. 32) to distinguish *Executive Sandwich Shoppe*'s proximate cause analysis make sense. *See* D.C. Br. 35-36. BET says that the trial court in that case found at least one of the landlord's reasons for denying consent reasonable, whereas the trial court here did not. But the very premise of the District's proximate cause argument is that this Court will agree that, contra the trial court, the denial as to Ground Lease Two *was* reasonable. Only if the Court rejects that premise would the District's argument as to Ground Lease One also fail.

D. The Court can order rescission.

If the Court agrees that the District's denial was reasonable, it can declare that the written consents to assignment are invalid and rescinded. That is so even though BET already purported to transfer the leases to Jemal. The District executed the

written consents only when compelled by court order and after the District unsuccessfully sought a stay below and in this Court. Thus, unlike the defendant in *Thorn v. Walker*, 912 A.2d 1192, 1196 (D.C. 2006) (cited at BET Br. 33), the District "protested" the assignment and took all the "protective measures" available to it. And the reason this Court denied a stay was that the District would not be irreparably harmed without one, 11/13/20 Order, No. 20-CV-612—a conclusion that makes sense only if a wrongful assignment could later be unwound.

That Jemal is not a party to this case does not matter. The Court does not need to order him to do anything. Although he will of course be *affected* by a rescission of the consents, it is not uncommon for non-parties to be affected a court's judgment, and there is no unfairness in that here. Jemal has been well aware of this litigation from day one but has never sought to intervene, and he executed the new purchase agreement knowing that this case remained ongoing.

II. BET LLC's Non-Compliance With D.C. Code § 12-309 Bars Its Claim.

A. The October 2017 demand letter did not satisfy Section 12-309.

BET maintains (Br. 37-42) that the October 2017 demand letter that Venable LLP sent on behalf of *Acquisition Corp.* satisfied D.C. Code § 12-309 for purposes of *BET LLC's* tort claim. *See* JA 196-99 (letter). In making this argument, BET does not dispute that Acquisition Corp. and BET LLC are legally distinct entities and that the October 2017 letter never even mentioned BET LLC. That omission is

irrelevant, BET contends, because Section 12-309 "does not require the notice to give the claimant's name." BET Br. 40.

That is incorrect. Although Section 12-309 does not use the word "name," it requires that the written notice state the "circumstances of the injury or damage." D.C. Code § 12-309(a). This Court confirmed in *Washington v. District of Columbia*, 429 A.2d 1362 (D.C. 1981) (en banc), what common sense and ordinary English usage would dictate anyway: the "circumstances" of an injury include "the name of the victim." *Id.* at 1367; *accord Smith v. District of Columbia*, 463 F.2d 962, 965 (D.C. Cir. 1972) (requiring written notice to "set[] forth the claimant's identity"). That is true even though, as BET emphasizes (Br. 40-41), Section 12-309's requirements as to the contents of the written notice are given a "liberal construction." *Washington*, 429 A.2d at 1365 n.9. After all, "conduct[ing] a prompt, properly-focused investigation" of an injury, *id.* at 1363 (quoted at BET Br. 40), often entails "contacting the victim," *id.* at 1367, which requires knowing the victim's identity. Indeed, even construing the statute liberally, the idea that a claim notice could be adequate *without identifying the claimant* lacks merit on its face.

BET tries to dodge this problem by arguing, in essence, that regardless of what the demand letter actually *said*, the Mayor must have *known* that a suit by BET LLC was forthcoming. *E.g.*, BET Br. 40 (emphasizing what, allegedly, "the Mayor knew"). But as this Court has made clear, "[w]hether the District had actual notice of [a plaintiff's] potential claim is not an appropriate consideration under section 12-

309." *Doe by Fein v. District of Columbia*, 697 A.2d 23, 29 (D.C. 1997). Because the statute requires "notice *in writing*," D.C. Code § 12-309(a) (emphasis added), the question is whether "the letter itself" satisfied Section 12-309, and the Court must "rely solely on the contents of [that] letter," *Washington*, 429 A.2d at 1367 (deeming it "important to stress" this point). The letter here never mentioned BET LLC. Thus, as the District has explained, this case is no different from *District of Columbia v. World Fire & Marine Insurance Co.*, 68 A.2d 222 (D.C. 1949) (discussed at D.C. Br. 40), which BET makes no effort to distinguish.[1]

Even if the Mayor's knowledge *were* relevant, BET's argument remains unpersuasive. The combination of the demand letter and the Mayor's background knowledge did not reveal that the District should anticipate a suit by BET LLC. BET LLC was not a party to the leases of Parcels B and C. It owned Parcel E in fee simple and could sell it to Jemal whether or not the Mayor agreed to assign the leases. The Mayor had no basis to know whether denying consent would prevent a transaction limited to Parcel E; the demand letter said nothing on that subject. Again, if anything, the demand letter's precise framing as a communication specifically from Acquisition Corp., focused entirely on the lease assignments, would have signaled that it was *not* a threat of suit by BET LLC. *See* D.C. Br. 38-39. The same logic applies to the "litigation standstill" agreement that BET now invokes (Br. 39, 41).

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[1] Lest there be any doubt, *World Fire* remains binding on panels of this Court. *See Wash. Gas Light Co. v. Pub. Serv. Comm'n*, 61 A.3d 662, 676 n.15 (D.C. 2013).

That agreement, drafted by Venable, refers explicitly and exclusively to Acquisition Corp., making no mention of BET LLC or Parcel E. JA 1540.

BET seems to think that Section 12-309 was satisfied so long as the Mayor knew that *someone* (here, Acquisition Corp.) was likely to sue over the lease-assignment denial. The Court's cases contradict that view. *See Snowder v. District of Columbia*, 949 A.2d 590, 601-02 (D.C. 2008); *Chidel v. Hubbard*, 840 A.2d 689, 694-96 (D.C. 2004); *District of Columbia v. Arnold & Porter*, 756 A.2d 427, 436 (D.C. 2000). Rightly so. One purpose of the statute is to facilitate settlement where appropriate. *Farris v. District of Columbia*, 257 A.3d 509, 515 (D.C. 2021). That purpose demands that the District have a reasonably accurate sense of its potential liability, which requires knowing *who* is likely to sue—not just that someone might.[2]

B. *Shehyn* does not excuse BET LLC's noncompliance.

BET also argues (Br. 35-37) that BET LLC was not required to comply with Section 12-309 under the logic of *Shehyn v. District of Columbia*, 392 A.2d 1008 (D.C. 1978). Notably, BET does not attempt to defend *Shehyn*'s "logic" on its

[2] BET cites *Dellums v. Powell*, 566 F.2d 216, 229 (D.C. Cir. 1977), to argue that written notice need not name all claimants. BET Br. 40 n.69. "This [C]ourt, however, has viewed *Dellums* narrowly." *Snowder*, 949 A.2d at 601. At most, its nonbinding interpretation of Section 12-309 applies to class actions where timely written notice has given the District enough information to identify the members of a determinate class. *See id.* at 601-02; *Arnold & Porter*, 756 A.2d at 436-37. As for *Romer v. District of Columbia*, 449 A.2d 1097 (D.C. 1982) (cited at BET Br. 41), it is limited to claims for loss of consortium. *See Chidel*, 840 A.2d at 696; D.C. Br. 38 n.8.

merits. It does not respond to the District's arguments that *Shehyn*'s interpretation of Section 12-309 is wholly atextual, rests on the flawed premise that *actual* (rather than written) notice suffices, and contradicts the principle that the statute be construed narrowly, against claimants. D.C. Br. 42. In short, *Shehyn*'s reasoning (even if not its outcome) was misguided and should not be extended beyond its narrow facts.

Ruling for BET LLC would unjustifiably extend *Shehyn* in two respects. *First*, it would extend *Shehyn* to pure tort claims. BET contends (Br. 37) that *Shehyn* itself involved a tort: conversion. But as the District's opening brief noted, the *Shehyn* Court characterized the conversion claim (Count II) at issue as turning ultimately on *contractual* liability, explaining that "the District would be liable upon its contract of bailment (or in the case of a fixture removed, upon the lease)." 392 A.2d at 1014 (quoted at D.C. Br. 41). Likewise, this Court later described *Shehyn* as a suit against the District "for breaching its *contractual* duty to restore a leased property to its original condition." *Chidel*, 840 A.2d at 695 (emphasis added). In no case has this Court relied on *Shehyn* to excuse a tort plaintiff's noncompliance with Section 12-309. This should not be the first.

Second, in *Shehyn*, the District already had "full notice of the injury" through its direct knowledge of the premises' condition at both the start and end of the lease. 92 A.2d at 1014; *see* D.C. Br. 42-43. BET makes no attempt to show how the same

is true here. As already explained, it is not: "The District could not directly know whether, how, and to what extent BET LLC was injured by the District's refusal to consent to the assignment of *Acquisition Corp.'s* leases." D.C. Br. 42. Given the District's lack of direct knowledge about the nature and scope of BET LLC's injury, BET is wrong that written notice, which the text of Section 12-309 unequivocally demanded, "would [have] serve[d] no purpose" here. BET Br. 34.

III. The Damages Award Should Be Vacated Or Reduced.

A. The trial court erroneously relied on an expert opinion that Smith never offered or defended at trial.

In concluding that the Campus was worth $18 million in 2021, the trial court relied in part on the purported opinion of plaintiffs' expert, Stuart Smith, that Parcel E was worth $4.04 million. *See* JA 577 (¶ 38), 622.[3] That was error because Smith never offered such an opinion. *See* D.C. Br. 43-46.[4] BET offers two unpersuasive responses.

First, BET contends (Br. 45) that it is mere "speculation" that the trial court relied on Smith's putative valuation of Parcel E; the court might have reached its $18 million finding, says BET, without making any use of that valuation. But the

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[3] The court's assertion that "Smith estimated [the Campus's] value at $14.609 million," JA 577 (¶ 38), only makes sense if the court believed that Smith had estimated Parcel E's value at $4.04 million. *See* D.C. Br. 44.

[4] In the paragraph of the District's opening brief spanning pages 44-45, both citations to "10/8/20 AM Tr." should instead read "10/**15**/20 **PM** Tr."

court's reconsideration opinion refutes BET's hypothesis. If the $4.04 million figure had played no part in the court's analysis, the court would have said so in the reconsideration opinion. Instead, the court doubled down on the mistaken premise that Smith "offered testimony as to the 2016 value of the fee simple property" and noted that it "did not rely *solely* on Plaintiffs' expert's testimony," JA 622 (emphasis added), thus making clear that it *had* relied in part on that supposed testimony. That partial reliance is enough to require vacatur and remand. A damages determination anchored to (even if not *equal* to) a non-existent expert opinion cannot stand.

Second, BET argues (Br. 45-46) that the District "cannot now complain" about this error because Smith's Parcel E valuation "was admitted without the District's objection." This argument conflates two different issues: (a) whether Smith wrote a particular number in a 2016 report, and (b) whether he had an opinion about the value of Parcel E that he was willing to offer at trial, under oath, and subject to cross-examination. The District did not object to the court's hearing that Smith had written $4.04 million in his 2016 report, but once it became clear that Smith would not testify that this figure was an accurate valuation of Parcel E (for either 2016 or 2021), the court should have given it no weight. And this *was* undisputed: both Smith himself and BET's counsel stated outright that Smith had not opined on the value of Parcel E. 10/8/20 AM Tr. 107:9-11; 2/8/21 Tr. 41:19-20. In the face of these disclaimers, which left the District no reason or opportunity to cross-examine

Smith on this point, the court could not treat the $4.04 million figure as if it was Smith's expert opinion. Given that error, this Court should vacate and remand the damages award. BET does not dispute that, if the Court does so, the trial court should treat the new sale to Jemal as conclusively establishing the 2021 value of the Campus at $20,175,000. *See* D.C. Br. 46.

B. That BET will make a profit of over $2 million in taxpayer funds is an extraordinary circumstance justifying Rule 60(b) relief.

Like the trial court, BET does not deny the factual heart of the District's Rule 60(b) argument: the judgment requires the District to pay, ostensibly as compensatory damages, $2,175,000 more than BET suffered in actual losses from the diminished value of the Campus. D.C. Br. 46-50. To be sure, BET asserts (Br. 47) that the judgment "does not result in a 'windfall,'" but it does not (and cannot) explain why that is so. Receiving $2,175,000 that does not correspond to any real-world loss is manifestly a windfall. BET's excess recovery is no different from those that justified Rule 60(b) relief in *FDIC v. United Pacific Insurance Co.*, 152 F.3d 1266 (10th Cir. 1998), and the other cases the District cited in its opening brief—none of which BET acknowledges, let alone distinguishes. *See* D.C. Br. 47 & n.11.

BET instead invokes *Havilah Real Property Services, LLC v. VLK, LLC*, 108 A.3d 334 (D.C. 2015), but that case—which did not involve Rule 60(b)—in no sense "specifically rejected the 'windfall' argument the District advances" here. BET Br. 47. In *Havilah*, the only arguable "windfall" (a term the opinion never used) was

that the value of the plaintiff's properties had dropped significantly between the time of the tortious conduct and the trial because of the intervening mortgage crisis, and thus the defendant's liability had correspondingly increased. 108 A.3d at 353. The Court correctly held that the defendant had to pay the full amount of the diminution. *Id.* at 353-54. The District agrees that the same logic applies here: it must pay the full amount of the diminution caused by the pandemic and other market factors (minus any offsets, *see infra* Part III.C), which reduced the Campus's value from $26.75 million to $20.175 million. But it should not be required to pay BET an *extra* $2 million, and nothing in *Havilah* suggests otherwise.

Apart from invoking the inapposite *Havilah*, BET argues (Br. 49) that Rule 60(b) relief is unjustified here because "the post-judgment sale of the property was not extraordinary but rather was anticipated when judgment was entered." But the District has never argued that the mere *fact* of the sale is an extraordinary circumstance. What is extraordinary is that BET sold the Campus for so much more than the trial court's estimate so soon after judgment. BET points to no other case from any jurisdiction with similar facts, thus confirming that the trial court's worry about opening the floodgates was misplaced. Granting Rule 60(b) relief here would not start the courts down a slippery slope; it would simply prevent BET from wrongly turning a *profit* from its injury at taxpayer expense. *See Reid v. District of Columbia*, 391 A.2d 776, 777 (D.C. 1978) ("[A] plaintiff can recover no more than

the actual loss suffered. . . . He or she has no right to make a profit from the injury.").

C. BET offers no reason that it should keep an extra $400,000 of taxpayer funds.

BET does not deny that the trial court's judgment gave it an extra $400,000 that it had already received from Jemal, nor does it attempt to explain why it would be just to allow it to retain this money. *See* BET Br. 49-50. Instead, it urges the Court to "decline to review this issue" because "[t]he District's error was affirmative" and thus an "invited" error. BET Br. 49; *see* BET Br. 44. But there was no invited error here. The District never "affirmatively encouraged" the trial court to disregard the $400,000 in monthly deposits, nor is it "argu[ing] in this [C]ourt the exact opposite of what it told the trial judge." *District of Columbia v. Wical Ltd. P'ship*, 630 A.2d 174, 182-83 (D.C. 1993) (cited at BET Br. 44, 50). The District simply overlooked the issue of the monthly deposits. That the District sought an offset for the $1.5 million *initial* deposit does not show otherwise. Timely raising one argument while overlooking a second (albeit related) argument is an ordinary forfeiture, not invited error. And unlike in *D.D. v. M.T.*, 550 A.2d 37, 48 (D.C. 1988) (cited at BET Br. 49), the District has made "a compelling demonstration of unfairness" to justify overlooking the forfeiture here: it is unfair to let BET pocket $400,000 in public funds that it undisputedly does not deserve.

CONCLUSION

The judgment should be reversed, or at minimum vacated and remanded for a redetermination of damages.

Respectfully submitted,

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January 2022

REDACTION CERTIFICATE DISCLOSURE FORM

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 dentification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card 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 mental-health services.

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

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet

of such information); see also 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

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

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

/s/ Graham E. Phillips
Signature

Nos. 21-CV-358, 21-CV-359, 21-CV-390, 21-CV-391, 21-CV-579, 21-CV-580
Case Number

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CERTIFICATE OF SERVICE

I certify that on January 19, 2022, this reply brief was served through this Court's electronic filing system to:

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