ORAL ARGUMENT NOT YET SCHEDULED
No. 11-7048

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE ARMENIAN GENOCIDE MUSEUM & MEMORIAL, INC., ET AL.,

Appellants/Cross-Appellees,

v.

GERARD L. CAFESJIAN, ET AL.,

Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANTS' FINAL RESPONSE AND REPLY BRIEF

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Dated: October 29, 2013

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The following is a complete list of all parties who have appeared before the United States District Court for the District of Columbia in the underlying civil action or who have appeared in this appeal:

Armenian Genocide Museum & Memorial, Inc.

Armenian Assembly of America, Inc.

Cafesjian Family Foundation, Inc.

Gerard L. Cafesjian

John J. Waters, Jr.

John J. Waters, Sr.

K&L Gates LLP

TomKat Limited Partnership

Stephen G. Mehallis

Hirair Hovnanian

B. Rulings Under Review

The rulings under review are: (1) the district court's (Kollar-Kotelly, J.) May 9, 2011 entry of final judgment as to all claims in the case, save Count VII of Defendants' Streamlined Counterclaims, which relates to opinions published at 772 F. Supp. 2d 20 and 772 F. Supp. 2d 129; (2) the district court's (Kollar-Kotelly, J.) September 12, 2011 denial of Defendants' post-judgment Motion to Enforce

Judgment and For Amended Findings And Judgment pursuant to Federal Rules of Civil Procedure 52, 59 and 70, which is published at 811 F. Supp. 2d 120; (3) the district court's (Kollar-Kotelly, J.) February 20, 2013 denial of Plaintiffs' Rule 60 Motion, which will be published at --- F. Supp. 2d ---, and is available electronically at 2013 WL 619570; and (4) the district court's (Kollar-Kotelly, J.) March 7, 2013 order entering final judgment for Defendants on Count VII of their Streamlined Counterclaims regarding indemnification for attorneys' fees, which encompasses an opinion that will be published at --- F. Supp. 2d ---, and is available electronically at 2013 WL 619609.

C. Related Cases

This case is a consolidation of appeal Nos. 11-7048, 11-7049, 11-7054, 11-7055, 11-7056, 11-7057, 11-7110, 11-7111, 11-7112, 13-7050, and 13-7051. It is related to appeal No. 10-742, which was previously before this Court. It is also related to *Cafesjian v. Armenian Genocide Museum & Memorial, Inc., et al.*, Civil File No. 0004450-11 (D.C. Super. Ct.), which was filed on June 7, 2011, and seeks the involuntary dissolution of AGM&M.

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FEDERAL CASES

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STATE CASES

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OTHER AUTHORITIES

GLOSSARY

Adjacent Properties	1334-36, 1338, 1340, and 1342 G Street, adjacent to the Bank Building
Assembly	The Armenian Assembly of America
Adalian	Rouben Adalian
AGM&M	The Armenian Genocide Museum & Memorial, Inc.
ANI	Armenian National Institute
Bank Building	National Bank of Washington Building
BOC	The AGM&M Building and Operations Committee
Cafesjian	Gerard L. Cafesjian
CFF	Cafesjian Family Foundation, Inc.
DX	Defendants' Trial Exhibit
Families USA building	Building at 1334-36 G Street, one of the Adjacent Properties
Grant Agreement	Grant Agreement dated November 1, 2003 between Cafesjian, CFF, and the Assembly
Grant Property	Bank Building and Adjacent Properties
HPRB	District of Columbia Historic Preservation Review Board
Hovnanian	Hirair Hovnanian
IRS	Internal Revenue Service
Krikorian	Van Krikorian

Mathevosian	Anoush Mathevosian
Met	Metropolitan Museum of Art
MOA	Memorandum of Agreement
Museum Project	A planned museum and memorial in Washington, D.C. to commemorate the Armenian Genocide
PX	Plaintiffs' Trial Exhibit
TomKat	TomKat Limited Partnership, a company controlled by Cafesjian
Transfer Agreement	Transfer Agreement dated November 1, 2003 between the Assembly and AGM&M
Unanimous Written Consent	One of the documents creating AGM&M
USAPAC	United States-Armenian Public Affairs Committee
Vartian	Ross Vartian
Waters	John J. Waters

STATEMENT OF ISSUES

The issue on cross-appeal is whether the district court erred in ruling that The Armenian Genocide Museum and Memorial, Inc.'s ("AGM&M") lease of the "Families USA" building (1334-36 G Street) building to the Armenian Assembly of America, Inc. ("Assembly") is valid.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are included in an addendum to Plaintiffs' opening brief.

STATEMENT OF FACTS

The facts relevant to the cross-appeal are as follows. In 2009, after unsuccessful attempts to lease space in the Families USA building to third parties, AGM&M, through its Building and Operations Committee ("BOC"), leased space to the Assembly. Defendants' Exhibit 165 ("DX") (JA-769). The lease ran from May 1, 2009 to December 31, 2010, with an automatic renewal for 60 months beginning January 1, 2011, provided neither party gave 90 days' notice. *Id.* at 3 (JA-771). No notice was given; the Assembly remains an occupant.

Following the district court's May 9 entry of judgment, Defendants filed a Motion to Enforce Judgment and for Amended Findings and Judgment under Federal Rules of Civil Procedure 52, 59 and 70. Dkt. 320 (June 6, 2011). Defendants argued that the Assembly's refusal to vacate the building following the

transfer of property to The Cafesjian Family Foundation, Inc. ("CFF") constituted a "refus[al] to comply with the Court's ruling that 'the reversion clause in the Grant Agreement is valid and enforceable.'" *Id.* at 1-2. The district court denied the motion, concluding that TomKat Limited Partnership ("TomKat"), a Cafesjian company, transferred a fee simple interest in the building to AGM&M, and that any lease held by the Assembly therefore survived the transfer under principles of property law. Sept. Op. 12 (JA-1520).

SUMMARY OF ARGUMENT

The district court's decision, which required AGM&M to transfer title to prized real estate to Cafesjian even though its value far exceeds his actual donations to the museum project, is unsustainable as a matter of law and fact. Among other things, the district court misinterpreted the Grant Agreement's reversion clause, applied the wrong legal standard to Plaintiffs' contractual and fiduciary duty claims, allowed those legal errors to infect its factual analysis, and denied Plaintiffs the relief to which they were entitled. The only aspect of the decision below that should be upheld is the rejection of Defendants' argument, now on cross-appeal, that the Assembly's lease of the Families USA building is invalid. Put simply, none of Defendants' arguments possess merit.

In their response brief, Defendants fail even to address the claim that Cafesjian breached his contractual duty of good faith and fair dealing, presumably

resting on the district court's conclusion that this claim is duplicative of the fiduciary duty claim. But that conclusion was incorrect. The two legal standards are materially different. The contractual duty of good faith and fair dealing, unlike fiduciary duty law, includes a "prevention doctrine." That doctrine prohibits one party to a contract from frustrating the other party's performance and then benefitting from the non-performance. *Aronoff v. Lenkin Co.*, 618 A.2d 669, 682 (D.C. 1992).

As the record makes clear, that is precisely what occurred here. Cafesjian (directly and through his agent, Waters) did everything within his power—from inappropriately seeking rescission of the Grant Agreement in the Minnesota litigation, to filing a *lis pendens* with the D.C. Recorder of Deeds, to discouraging donations, publishing damaging newspaper articles, and asking the D.C. Historic Preservation Review Board ("HPRB") to enjoin the project—to keep AGM&M from meeting the December 31, 2010 deadline and avoiding the triggering of the "reversion clause." The duty of good faith and fair dealing does not permit Cafesjian to profit—to the tune of multiple millions of dollars—from non-performance attributable to his own misconduct. For this reason alone, the clause is unenforceable.

Even if the reversion clause is enforceable, Defendants' interpretation of it to allow CFF/Cafesjian to obtain a massive windfall, at the expense of other

donors, is fundamentally flawed. The express terms of the Grant Agreement and the Transfer Agreement, the agreements' drafting history, the trial testimony, and the intent of the parties all point in the same direction: the clause provides CFF/Cafesjian with a contractual right to recoup money actually donated or the property equivalent thereof. But neither the relevant contractual terms nor parol evidence allow Cafesjian to walk away with property he never owned and donations he never made. Although Cafesjian may have had the right to get back what he put into this charitable endeavor, it strains credulity and belies the record to conclude that he had the right to the full value of a multi-million-dollar, historic building when he contributed less than *half* of its purchase price.

In support of the argument that Cafesjian and Waters did not violate their fiduciary duty of loyalty, Defendants rely on the same "good faith" standard as the district court. This issue was analyzed under the wrong legal standard too. "Even when directors act in good faith, their conduct may unintentionally violate the duty of loyalty," and the ultimate question is whether the behavior is "substantively fair." *Willens v. 2720 Wis. Ave. Co-Op Ass'n Inc.*, 844 A.2d. 1126, 1136 n.13 (D.C. 2004). The district court's reliance on *Clancy v. King*, 954 A.2d 1092, 1106 (Md. 2008), was legal error because that case, which is not even District of Columbia law, did not turn on any fiduciary standard but a superseding standard in a partnership agreement. The district court compounded the problem by failing to

shift the burden to Cafesjian and Waters to show that their actions were in the best interest of AGM&M after it had been established that they acted purely out of self-interest, and by looking at their individual actions in isolation instead of examining the totality of their conduct. These multiple legal errors are an ample basis to reverse the judgment below.

Under the correct legal standard, Cafesjian and Waters violated their fiduciary duties. They have never disputed that they acted in a self-interested manner, and they have proffered no defense for their gratuitous attempts to damage the museum project by dissuading donors, publishing damaging newspaper articles, and trying to halt the project through administrative interference. Cafesjian's admittedly unwarranted decision to seek rescission of the entire Grant Agreement—coupled with the filing of a *lis pendens*—based on a relatively minor dispute over the promissory note is no more defensible. He may have been entitled to protect his rights as a creditor, but he was not entitled to needlessly hurt the project in the process; indeed, he had a legal duty *not* to do so. By these actions, Cafesjian and Waters prevented AGM&M from obtaining millions of dollars in donations and from meeting the deadline.

In light of Defendants' fiduciary breaches, Plaintiffs were properly entitled to a remedy for those wrongs. The district court could have ensured that Defendants did not profit from their conduct by, for example, imposing a

constructive trust, quieting title in favor of Plaintiffs, or equitably reforming the Grant Agreement. If equitable relief were inappropriate, however, Plaintiffs would at least be owed compensatory damages. In particular, they are entitled to the present market value of the Grant Property, their carrying and associated costs, and the amount of donations not made to AGM&M due to the breaches. If the Court is not inclined to address remedies in the first instance, remand for further factual development on these issues would also be appropriate.

With respect to the cross-appeal, Defendants' attacks on the district court's decision upholding the Assembly's lease of the Families USA building all fail. The court correctly held that the lease is authorized as "part of" the museum project. Defendants cannot square their suggestion that the building should have remained vacant for the last decade with the Grant Agreement or common sense. Their argument that the lease was *ultra vires* is equally meritless and relies on factual claims that do not approach the clear error standard.

Defendants' further contention that principles of equity require this Court to terminate the lease before its 2015 expiration date only highlight why this case merits careful consideration. Beginning in 2006, Defendants began undermining a non-profit project dedicated to an issue of vital importance to the Armenian community and to which they owed undisputed contractual and fiduciary duties in an effort to secure title to valuable real estate. When their plan succeeded,

Defendants sued to gain title to *all* of the property (including property partially funded with *other* people's money) based on language they slipped into the Grant Agreement under a provision designed, according to their own testimony, to protect all donors—not just Cafesjian.

Having prevailed below despite their case's deficiencies, Defendants now argue that it would be inequitable to allow the Assembly the modest right to retain office space that it legally leased and is willing to pay rent to occupy. Allowing the Assembly to complete its lease is the only equitable thing about the decision below. Defendants are correct that "[a]n equity court's powers are at its greatest where the public interest is involved." Opp'n 58. Yet they fail to see that this principle requires reversal of the decision to grant them ownership of all of the Grant Property—thereby conferring upon them a multi-million-dollar profit in the context of what all involved agree was a charitable cause—rather than allowing AGM&M finally to bring the museum project to fruition.

ARGUMENT

I. THE DISTRICT COURT ERRED BY ENFORCING THE GRANT AGREEMENT AND ALLOWING CAFESJIAN TO TAKE ALL OF THE PROPERTIES.

The district court erred as a matter of law in finding that the Grant Agreement's "reversion clause" requires AGM&M to transfer the Grant Property at their full present value (on the order of tens of millions of dollars, Jan. Op. 16

(JA-1079) (finding that Bank Building was purchased in 2000 for $7.25 million); *id.* at 109 (JA-1172) (stating that "the Adjacent properties had a present market value of approximately $20 million but could be worth as much as $40 million if sold to a developer") to CFF/Cafesjian. Br. 29-47. Defendants' attempt to sustain this aspect of the decision below falls short. First, Cafesjian breached his contractual duty of good faith and fair dealing by frustrating AGM&M's ability to meet the December 31, 2010 deadline. Second, the clause, by its plain terms and based on extrinsic evidence, only allowed Cafesjian to recoup his donated funds or the property equivalent thereof—not to secure a windfall in violation of AGM&M's obligations to other donors and at their expense.

A. The District Court Erred By Enforcing The Reversion Clause Because Cafesjian And Waters Frustrated AGM&M's Ability To Meet The December 31, 2010 Deadline.

Cafesjian breached his duty of good faith and fair dealing by frustrating Plaintiffs' ability to develop the museum by the end of 2010 as required by the Grant Agreement. Br. 33-36. Instead of substantively addressing this argument, the district court found it "duplicative" of the breach of fiduciary duty claim, Jan. Op. 173 (JA-1236), and Defendants have failed to brief it on appeal. The contractual and fiduciary claims are *not* duplicative, however.

The duty of good faith and fair dealing includes a "prevention doctrine." 13 Williston on Contracts § 39:6 (4th ed.) ("The principle of prevention is based on

the implied agreement of the parties to a contract to proceed in good faith and cooperate in performing the contract in accordance with its expressed intent[.]") (cited in *In re Estate of Drake*, 4 A.3d 450, 455 n.21 (D.C. 2010)). Under this doctrine, a party to a contract must "extend reasonable cooperation in clearing the way for performance" of the agreement. *Aronoff*, 618 A.2d at 682 (quotation omitted). "[I]f a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure." *Drake*, 4 A.3d at 455; *R.A. Weaver & Assocs., Inc. v. Haas & Haynie Corp.*, 663 F.2d 168, 176 (D.C. Cir. 1980).

Accordingly, "non-occurrence is normally excused when fairly attributable to the promisor's own conduct," *Aronoff*, 618 A.2d at 682, and the non-performing party is "not required to show that the condition would have occurred but for the promisor's lack of cooperation," *Drake*, 4 A.3d at 454. The "rule is properly invoked not only when the promissor completely forecloses occurrence of the condition, but also when he substantially hinders its occurrence." *R.A. Weaver & Assocs.*, 663 F.2d at 176.

Because the "prevention doctrine" is rooted in contract law, it is analytically distinct from the legal test for fiduciary duty claims. The duty of loyalty—the principal fiduciary duty at issue here—turns on other factors entirely. *Infra* at 31-

32. The district court therefore erred by treating the claims as one and the same.[1] Because the district court did not independently analyze whether Cafesjian breached the duty of good faith and fair dealing, any findings of fact that "result from [such] a misapprehension as to the applicable law … lose the insulation of the 'clearly erroneous' rule." *Application of L.L.*, 653 A.2d 873, 880 (D.C. 1995); *Singletary v. District of Columbia*, 351 F.3d 519, 524 (D.C. Cir. 2003) ("While we may not set aside the court's factual findings unless they are clearly erroneous, we owe no such deference to findings that rest on an erroneous view of the law.") (quotation omitted).

When considered under the proper legal standard, the record shows that Cafesjian failed to "extend reasonable cooperation in clearing the way for [AGM&M's] performance" of its obligation to develop the museum by the end of 2010 in order to avoid triggering the reversion clause. *Aronoff*, 618 A.2d at 682. As Defendants acknowledge, Opp'n 7, AGM&M had a plan in place to complete the museum in spring 2010. Plaintiffs' Exhibits 131, 132 ("PX") (JA-510, 534). But the intentionally destructive manner in which Cafesjian prosecuted the Minnesota litigation over the promissory note severely hindered—if not completely prevented—AGM&M from meeting that goal or the December 31,

[1] The court also misconstrued the standard for the fiduciary duty of loyalty, *infra* at 32-34, thus *doubly* erring as a matter of law.

2010 deadline. Cafesjian ostensibly initiated that litigation to enforce AGM&M's obligation under the Grant and Transfer Agreements to reissue the $500,000 promissory note (even though the claim was time-barred, Jan. Op. 178-79 (JA-1241-42)). Yet as recourse for that ancillary dispute, he sued the Assembly for rescission of the *entire* Grant Agreement and the return of *all* "donations made pursuant to" that agreement. PX-202 (JA-590). Cafesjian testified that he knew rescission was an inappropriate remedy but had decided—nearly *three years* before the deadline—that the project should be scuttled because he "didn't think something would happen within three years" to fulfill his vision. 11/19 AM Tr. 94 (JA-413); Jan. Op. 113 (JA-1176) (quoting Waters's testimony "that the rescission demand was like a big hammer for a baby issue"). Thus, as the district court itself found, Cafesjian's goal since at least April 2007, when the Minnesota complaint was filed, was to terminate the entire project and secure ownership of the Grant Property. Jan. Op. 113 (JA-1176).

Cafesjian's misuse of the promissory-note dispute to frustrate the museum project is a clear violation of his duty of good faith and fair dealing. "The obligation of good faith and fair dealing extends to … litigation of contract claims and defenses" and "is violated by dishonest conduct such as … asserting an interpretation contrary to one's own understanding." Restatement (Second) of Contracts § 205 cmt. e; *Riveredge Assocs. v. Metro. Life Ins. Co.*, 774 F. Supp.

897, 900 (D.N.J. 1991) (holding that a party violates duty of good faith and fair dealing when it institutes litigation "with knowledge that it [is] not entitled under the agreements to the relief it sought"). Cafesjian's attempt to seek rescission was not calculated to vindicate any rights he might have held regarding the promissory note or actually to produce reissuance of the note. It was designed to frustrate AGM&M's ability to timely develop the museum.

The district court's conclusion that Cafesjian had a legal right to initiate litigation over the promissory note is beside the point. Jan. Op. 161-63 (JA-1224-26). He did not have a right to use that ancillary dispute as a wedge to break apart the entire project. Rather, his contractual duty to extend reasonable cooperation to ensure that Plaintiffs could meet the deadline required him to refrain from exercising his legal rights in a provocative and illegitimate manner.

Moreover, Cafesjian's efforts to frustrate performance extended beyond the initial rescission claim; he followed up this first lawsuit with others designed to advance the same agenda. In September 2007, Cafesjian filed another action against AGM&M and its Trustees seeking an injunction to stop the BOC from taking further action regarding the museum without his input. PX-211 at 15 (JA-613). In July 2008, Cafesjian again sought an injunction against further development of the museum based on a series of meritless claims that were rejected below and that he has not appealed. Answer and Counterclaims 48, No.

08-255, Dkt. 23 (July 17, 2008). And in July 2010, when the parties consolidated their claims and requests for relief in this action, Defendants yet again sought an injunction halting progress on the museum. Dkt. 156-1 at 28 (July 22, 2010) (JA-122).

Cafesjian threw up other, non-litigation-related roadblocks in Plaintiffs' path. Among other things, he discouraged donations, published damaging newspaper articles, and asked the D.C. HPRB to suspend approval of the project. *Infra* at 40-42. These were not the actions of a contracting party seeking to provide reasonable cooperation; they were actions of an individual intent on frustrating performance.

This misconduct had the desired effect. Cafesjian's claims led to the filing of a *lis pendens* on June 25, 2008, which put the world on notice that Cafesjian was claiming the properties for himself and that AGM&M, the legal owner, might lose them. PX-214 (JA-615). More importantly, when such a filing is made, "nothing relating to the subject matter of the suit can be changed while it is pending and one acquiring an interest in the property involved therein from a party thereto takes such interest subject to the parties' rights as finally determined, and is conclusively bound by the results of the litigation." *Heck v. Adamson*, 941 A.2d 1028, 1029 n.1 (D.C. 2008). Thus, construction was halted by operation of law based on

Cafesjian's actions, making it literally impossible to meet the December 31, 2010 deadline, and the significant litigation risk introduced into the entire situation.

Unsurprisingly, once ownership was in doubt and progress stalled, the well of potential donations dried up. For example, one individual who had intended to donate $1 million to the project testified that he decided not to do so "because knowing the fact that it's been in litigation, [I] simply did not want that money to go toward this litigation." 11/15 PM Tr. 70 (JA-369). Another declined to follow through with a $10 million donation for similar reasons. 11/9 AM Tr. 105-106 (JA-339-40); PX-158-59 (JA-568-69). Not leaving it to chance, Cafesjian and Waters took affirmative action to make sure that potential donors—through direct intervention, newspaper articles, and other attempts to undermine the project's viability in the Armenian community—would feel uncomfortable contributing. The record is replete with evidence showing that these efforts to undermine the project made it practically impossible to obtain the donations needed to finance the project. PX-160 (JA-571); 11/16 PM Tr. 99-100 (JA-380-81).

For all of these reasons, AGM&M's inability to meet the deadline was "fairly attributable" to Cafesjian's improper conduct, and Defendants are barred as a matter of law from enforcing the reversion clause. *Aronoff*, 618 A.2d at 682. Accordingly, the Court need not determine whether the district court properly

interpreted the reversion clause—Cafesjian's breach of his contractual duty of good faith and fair dealing renders it unenforceable.

B. The District Court Erred In Construing The Grant Agreement To Allow Cafesjian To Receive More Than He Donated To The Museum Project.

Even if the Grant Agreement's reversion clause is enforceable, the district court erred by failing to honor its plain terms and the parties' intent. Finding the clause "unambiguous," the court interpreted it to give Cafesjian an unconditional right to take all of the properties at their full, present value, May Op. 23-26 (JA-1455-58), despite the undisputed fact that he contributed less than half of the purchase price of the Bank Building (and avoided all carrying costs for years). That interpretation is untenable, Br. 29-33, 37-41, and Defendants' arguments to the contrary are unavailing, Opp'n 28-29. The contractual language unambiguously favors *Plaintiffs'* position. But even if the Grant Agreement is ambiguous, the extrinsic evidence shows that the parties intended the clause to allow Cafesjian to recoup what he contributed to the project—not to obtain a massive windfall at the expense of the other donors.

1. The Grant Agreement's Reversion Clause Unambiguously Precludes Defendants' Attempt To Obtain A Windfall At The Expense Of Other Donors.

If contractual language is unambiguous, the court must honor it. *Dyer v. Bilaal*, 983 A.2d 349, 354-55 (D.C. 2009). The reversion clause provides:

> If the Grant Property [the Bank Building and all adjacent G Street properties] is not developed prior to December 31, 2010 in accordance with the Plans [for the AGM&M approved by the AGM&M Board of Trustees], or if the Grant Property is not developed in substantial compliance with the Plans including with respect to the deadlines for completion of the construction, renovation, installation and other phases detailed in the Plans, then:
>
> (i) in the event any portion of the Grants has not been funded, this Agreement terminates; and
>
> (ii) to the degree any portion of the Grants has been funded, at the Grantor's sole discretion, the Assembly shall return to the Grantor the Grant funds or transfer to the Grantor the Grant Property.

PX-112, § 3.1(B) (JA-463).

The district court found that the museum was not substantially completed by December 31, 2010 and thus that subsections (i) and (ii) of the clause were triggered. Jan. Op. 175 (JA-1238). The parties now contest the legal consequences of that triggering.

There is no dispute, however, over subsection (i), which governs the effect of failure to meet the deadline on the Grant Agreement. The Agreement terminates "in the event any portion of the Grants has not been funded." PX-112, § 3.1(B)(i) (JA-463). The Agreement defines the "Grants" as both the First Grant and the Second Grant—*i.e.*, the funds for the purchase of the Bank Building and the Adjacent Properties. *Id.* §§ 1.1, 2.1 (JA-461, 462). Notably, the Grant Agreement did not require "the Grants" to be delivered at once, PX-112, § 1.3 (JA-462), and

thus contemplated that some of the "Grants" would not be funded by December 31, 2010. That is how things turned out: at the end of 2010, Cafesjian had not funded approximately $3 million of the Grants. Consequently, the Grant Agreement "terminate[d]."

The controversy here is limited to subsection (ii), which addresses the *additional* consequences of AGM&M's failure to meet the deadline. Subsection 3.1(B)(ii) provides that "to the degree any portion of the Grants has been funded, at the Grantor's sole discretion, the Assembly shall return to the Grantor the Grant funds or transfer to the Grantor the Grant Property." In other words, Cafesjian could elect to recoup the Grant funds "to the degree" that he had actually provided them or require the Assembly to transfer the Grant Property "to the degree" that he had provided funds to purchase it. Br. 37-38.

As of December 31, 2010, Cafesjian had delivered approximately $13,850,000 in Grant funds to the Assembly.[2] Under the clause, he could have elected to demand that sum. Alternatively, he could have demanded the Grant Property "to the degree" that he had funded its purchase: $3.5 million of the $7.25 million purchase price of the Bank Building; the entire purchase price of 1334-36,

[2] Cafesjian claims the amount is approximately $14.4 million. Opp'n 9, 31. But the Grant Agreement called for him to donate $13,850,000 by December 31, 2010, and only funds donated under the terms of the Grant Agreement can be considered "Grant funds."

1338, and 1342 G Street, and $1.5 million of the $3 million purchase price of 1340 G Street. This follows from the plain meaning of the phrase "to the degree," which clearly denotes a *limitation* on the right of reversion as to the Grant Property. Indeed, the parties used the phrase "in the event" in subsection (i) and would have repeated it in subsection (ii) if they had wanted to incorporate that same, unqualified trigger. They did not. *Cf. Sacks v. Rothberg*, 569 A.2d 150, 157 (D.C. 1990) ("[T]he same words appearing in different parts of a contract should generally be given consistent meaning[.]").

The district court disagreed because it was "not persuaded that the phrase 'to the degree any portion of the Grants has been funded' places any restriction on [Cafesjian's] right to elect a transfer of the Grant Property, particularly where the record demonstrates that Cafesjian and CFF have fulfilled their obligations under the Grant Agreement." May Op. 25 (JA-1457). That reasoning is non-responsive: that Cafesjian had an unqualified right to choose between a return of funds and a transfer of property does not mean that he *also* had an unqualified right to the transfer of property he had not fully funded. "[T]o the degree" necessarily limits the transfer of property under the Grant Agreement.

The district court's ruling also violates basic rules of contract interpretation. "In reading contract provisions [courts] take the contract's entirety into account, seeking to give all its provisions effect." *Hunt Constr. Grp., Inc. v. Nat'l Wrecking*

Corp., 587 F.3d 1119, 1121 (D.C. Cir. 2009); Restatement (Second) of Contracts § 203(a). The district court's interpretation reads the phrase "to the degree any portion of the Grants has been funded" out of the Grant Agreement, as it would mean the same thing with or without that phrase. In contrast, Plaintiffs' construction gives the phrase effect: it ensures that, at the very least, CFF/Cafesjian could not obtain funds or property provided by other donors.

The district court defended its reading of subsection (ii) by concluding that "all parties knew at the time they entered into the agreement" that "the Grantor's choice was not between two options that were equal in value." May Op. 24 (JA-1456). But that reasoning assumes the district court's conclusion as to the interpretive question, and then reasons backward from there. If Plaintiffs' interpretation of the contract were correct, there would of course be no support for the district court's "all parties knew" argument. This reasoning likewise does not assist in resolving the interpretive issue here.[3]

[3] The court found it "inconceivable that the parties would have intended for the transfer of the Grant Property to be a nonprofit transaction without specifying any provisions for determining the value of the Grant Property at the time of transfer." May Op. 24 (JA-1456). But a valid contract requires offer, acceptance, and consideration; there is no requirement that a method of calculating damages be set out in advance. Regardless, the absence of a contractual method of valuation cannot change the Grant Agreement's plain meaning or the parties' intent as to whether Cafesjian would be entitled to property he did not pay for.

The district court's reading also violates the cardinal rule that "[w]hen a written agreement incorporates a second writing, the two documents must be read together as constituting the contract between the parties" and the court must "read the two documents in a manner that gives a reasonable, lawful, and effective meaning to all their terms." *Vicki Bagley Realty, Inc. v. Laufer*, 482 A.2d 359, 366 (D.C. 1984); *Sheriff v. Medel Elec. Co.*, 412 A.2d 38, 41 (D.C. 1980); *Trans-Bay Eng'rs & Builders, Inc. v. Hills*, 551 F.2d 370, 379 (D.C. Cir. 1976). Here, Section 5 of Grant Agreement incorporates by reference the Transfer Agreement; the two therefore must be read in tandem. Br. 31, 39.

The Grant Agreement required the Assembly to enter into a separate agreement under which AGM&M would "honor all of the existing donor requirements at time of transfer, or, in the alternative, to obtain donor consent to the transfer and any modification of donor terms." PX-112, § 5.3(B) (JA-467). Section 1.2(A) of the Transfer Agreement implemented this requirement. PX-114, § 1.2(A) (JA-472-73). Yet the district court's interpretation allowing CFF/Cafesjian to demand all of the Grant Property, beyond the extent of Cafesjian's actual funding, prevented AGM&M from honoring the "requirements" of those donors. The only way to honor *all* donor requirements in accordance with the Transfer Agreement is to interpret "to the degree" as limiting Cafesjian's reversionary interest to the money or property he donated.

Defendants incorrectly argue that the Transfer Agreement can be ignored because Cafesjian was not a party to it. Opp'n 22-23. Not only is the Transfer Agreement expressly referenced in the Grant Agreement, to which he *was* a party, but the Assembly's willingness to enter into the Transfer Agreement with AGM&M was a bargained-for part of the Grant Agreement: Cafesjian's obligation to make the grants expressly depended on the Assembly entering into a Transfer Agreement by which AGM&M would agree to abide by all pre-existing donative conditions. PX-112, § 5.3 (JA-467). In fact, the requirement that the Transfer Agreement "honor all of the existing donor requirements at the time of transfer" was the mechanism by which Cafesjian could be assured that AGM&M would honor *his* donative terms.

For these reasons, the plain terms of the Grant Agreement, particularly when read in light of the Transfer Agreement, preclude Cafesjian's recovery of more than he donated to the museum project.

2. Extrinsic Evidence Shows That The Parties Never Intended For Cafesjian To Obtain A Windfall At The Expense Of Other Donors.

Even if the reversion clause does not unambiguously support Plaintiffs' interpretation, the district court's holding that the "the terms of the reversion clause are clear and unambiguous" in *Defendants'* favor cannot be sustained. May Op. 27 (JA-1459). At the very least, the use of the phrase "to the degree" and the

reference to the Transfer Agreement render the clause ambiguous. The extrinsic evidence shows that the parties never intended that Cafesjian would be entitled to demand money that he never donated or property in excess of the value of his monetary contributions; certainly, no reasonable person would think, given this charitable context, that Cafesjian was entitled to full ownership of a multi-million-dollar building for essentially half price.

A contract is ambiguous "[i]f the court finds that [it] has more than one reasonable interpretation," *Tillery v. D.C. Contract Appeals Bd.*, 912 A.2d 1169, 1176 (D.C. 2006), or if "the proper interpretation of the contract cannot be derived from the contractual language exclusively, and requires consideration of evidence outside the contract itself," *Steele Founds., Inc. v. Clark Constr. Grp., Inc.*, 937 A.2d 148, 153 (D.C. 2007); *see, e.g.*, *1836 S Street Tenants Ass'n, Inc. v. Estate of B. Battle*, 965 A.2d 832, 837 (D.C. 2009). If the Grant Agreement is deemed ambiguous, the Court should consider "probative extrinsic evidence" to shed light on "what a reasonable person in the position of the parties would have thought the disputed language meant." *Tillery*, 912 A.2d at 1176; *Nest & Totah Venture, LLC v. Deutsch*, 31 A.3d 1211, 1219 (D.C. 2011). "Extrinsic evidence may include the circumstances before and contemporaneous with the making of the contract, … the circumstances surrounding the transaction and the course of conduct of the parties[.]" *In re Bailey*, 883 A.2d 106, 118 (D.C. 2005).

Several categories of extrinsic evidence reveal an intention to afford Cafesjian a limited right of reversion consistent with the conditions imposed by other donors.[4] First, the "circumstances surrounding" the Bank Building's purchase support Plaintiffs' interpretation of the reversion clause. The Bank Building was the first property acquired for purposes of creating a museum. The Assembly purchased the museum in its own name in 2000 for $7.25 million, using funds from a variety of sources: Anoush Mathevosian pledged $3.5 million for the purchase, Cafesjian pledged $3.5 million, and the remainder of the funds came from the Assembly. PX-111 (JA-458).[5] In making her donation, Mathevosian made clear her intention that the Bank Building be used only for the museum and that it should not be encumbered in any way. PX-110 (JA-457). Thus, Cafesjian never owned the Bank Building or donated it to the Assembly such that it might later "revert" to him, granted less than half of the funds sufficient to cover its

[4] Although Defendants argue that Plaintiffs have no extrinsic evidence to offer because the Assembly's representative signed the Grant Agreement without reading it, Opp'n 29-30, they misunderstand the inquiry. The question is not what Plaintiffs *actually thought* the Agreement meant when they signed it, but what the evidence shows a reasonable person *would have thought* the Agreement meant when the parties signed it in light of surrounding circumstances. *Tillery*, 912 A.2d at 1176; *Nest & Totah Venture*, 31 A.3d at 1219.

[5] Because Mathevosian could not free up the $3.5 million she had pledged by closing, Cafesjian provided the Assembly with a $4 million bridge loan. Stip. Facts ¶ 31 (JA-240). The Assembly repaid Cafesjian with $3.5 million from Mathevosian and a $500,000 promissory note. *Id*. ¶ 32 (JA-240).

purchase, and did not indicate at the time of its purchase any intention to have the Bank Building or his $3.5 million donation "revert" to him. PX-111 (JA-458). According to Waters, it was a "straight up" grant. 11/22 PM Tr. 88-89 (JA-438-39). These circumstances contradict the district court's theory that the parties were aware that the Bank Building would be transferred to CFF/Cafesjian if the museum was not developed by December 31, 2010. *Supra* at 19.

Second, the Grant Agreement's drafting history buttresses Plaintiffs' interpretation. Once Cafesjian decided to donate the Adjacent Properties to the museum project, he made clear that he wanted to be protected in the event the museum project was not completed. Thus, Waters prepared an initial draft grant agreement, dated October 15, 2001, that provided for a grant of money (defined as the "Grant") to the Assembly for use in the purchase of 1338, 1340, and 1342 G Street (defined as the "Property") from him. PX-327 at 2-3 (JA-620-21). It further provided that:

> Failure to obtain [CFF's] approval for the plans for use and development of the AGM&M, or failure to develop the property in accordance with the plan, will cause (i) *in the event* the Grant has not been funded, termination of the Grant; *or* (ii) *in the event* the Grant has been funded, at [CFF's] sole discretion, a return to the Foundation of either the Grant funds or the Property.

Id. at 3 (JA-621) (emphasis added). This draft contemplated that, should the right of reversion vest, Cafesjian would be entitled only to the money that he had donated or the property actually acquired with that money.

The next draft, dated August 22, 2002, was substantially similar and contemplated a future grant of the Families USA building if and when TomKat was able to purchase it from its then-owner. DX-59 (JA-665). A further draft, dated January 22, 2003, made the minor change of linking reversion to a "[f]ailure to develop the property in accordance with the plan approved by the Board of Trustees of the AGM&M, Inc., prior to December 31, 2008," but still contemplated a donation of the three G Street properties and a reversionary right in those specific properties. DX-104 at 2 (JA-674).

On October 13, 2003, another draft was emailed to the Assembly trustees. It had been amended to incorporate the Families USA building, which Cafesjian had contracted to purchase. PX-330 at 1 (JA-625); DX-502N (JA-1017). The reversion clause was identical to the one in the prior draft, except the trigger date was changed to December 31, 2010.[6] PX-330 at 3 (JA-627). That date was chosen to give the parties more time to develop the museum. 11/22 PM Tr. 119 (JA-444).

[6] The district court's May 9, 2011 Opinion, without citation, mistakenly states that the October 13 draft agreement includes the Bank Building within the reversion clause. May Op. 12 (JA-1444).

On October 27, 2003, Waters emailed the relevant parties and suggested a meeting the next day to finalize all of the key documents necessary to bring AGM&M into existence. DX-92 (JA-705). He attached the then-current drafts of all of the key documents, including the October 13, 2003 draft of the Grant Agreement. *Id.* 26-30 (JA-730-34). That meeting took place via conference call. According to a contemporaneous account of the call, the only comment "[r]egarding the use of property, dissolution & right of reversion" clause was that "A. Kaloosdian proposed that the term 'develop' be more fully defined." DX-94 at 2 (JA-740). There is no evidence of any discussion of the Bank Building or of any other revisions to the Grant Agreement.

However, the final version of the Grant Agreement, which the parties signed on November 1, 2003, was substantially different from the draft discussed on the call four days earlier. Rather than simply granting sufficient funds to cover AGM&M's purchase of the Adjacent Properties, the agreement added a provision memorializing the contribution that Cafesjian had made three years earlier toward the purchase of the Bank Building, which was referred to as the "First Grant." PX-112, § 1 (JA-461-62). The donation of funds to acquire the Adjacent Properties was now referred to as the "Second Grant." *Id.* § 2 (JA-462-63). Like the October 13, 2003 draft, it linked reversion to a failure to develop the museum by December 31, 2010, but, unlike that draft, it claimed a right of reversion in both the Adjacent

Properties *and the Bank Building*. *Id.* § 3.1(B) (JA-463). The agreement accomplished this by re-defining "Grant Property" to include both the Adjacent Properties and the Bank Building, instead of just the Adjacent Properties.

Notably, the agreement also changed the language of the reversion clause from "(i) in the event the Grant has not been funded, termination of the Grant; *or* (ii) *in the event* the Grant has been funded, at the Foundation's sole discretion, a return to the Foundation of either the Grant funds or the Property," PX-330 at 3 (JA-627) (emphasis added), to "(i) in the event any portion of the Grants has not been funded, this Agreement terminates; *and* (ii) *to the degree* any portion of the Grants has been funded, at the Grantor's sole discretion, the Assembly shall return to the grantor the Grant funds or transfer to the Grantor the Grant Property," PX-112, § 3.1(B) (JA-463) (emphasis added).

These changes were meant to retroactively ensure that Cafesjian's contribution to the purchase of the Bank Building received the same reversionary protection that the agreement provided with respect to the Adjacent Properties. But when Cafesjian and Waters decided to expand the scope of the reversion clause to include the Bank Building, they needed to modify the language of the agreement to account for the fact that Cafesjian had donated only *part* of the funds necessary to purchase that property, unlike the other properties. The prior version of subsection (ii) was no longer appropriate because it was premised on the

assumption that Cafesjian had paid for everything and thus provided for an unqualified reversion of all money donated or the "Grant Property" in its entirety. That problem was solved by providing that any reversion was limited "to the degree" that Cafesjian had funded the Grant Property.

Thus, the drafting history strongly supports Plaintiffs' interpretation of the reversion clause. It shows that the deletion of "in the event" and the addition of "to the degree" coincided with the inclusion of the Bank Building and was logically necessary to account for the fact that Cafesjian was not the sole donor for the acquisition of that property. The clause should be construed consistent with that history.

Third, and last, Plaintiffs' interpretation is the only one that vindicates the intentions of a party—Mathevosian—that the Transfer Agreement was designed to protect. In 2000, long before the Grant Agreement and Transfer Agreement were signed, the Assembly had received Mathevosian's $3.5 million and letter setting forth her expectations for the use of her donation. PX-110 (JA-457). That letter specifically required that "no mortgages [be] taken against the [Bank Building] and that the Museum's perpetuation [be] not jeopardized as such or encumbered in any way[.]" PX-110 (JA-457). And Waters testified that although he had not seen Mathevosian's conditions at the time AGM&M was formed, the Transfer Agreement *required* AGM&M to honor those requirements. 11/15 AM Tr. 116

(JA-357) (testifying that provisions of Transfer Agreement regarding donor requirements "relate to any and all donors" and "the terms of that agreement are to be honored"); 11/19 AM Tr. 93 (JA-412) (Cafesjian testifying that he did not want Mathevosian's money).

The district court found that "Mathevosian ratified and approved the Grant Agreement through the Unanimous Written Consent agreement, … so Cafesjian's reversionary interest cannot be said to violate her condition that the Bank Building not be encumbered." Jan. Op. 161 (JA-1224); Opp'n 24-25. Again, the district court's reasoning is circular: it rests on the court's *own* finding that the clause unambiguously provides Cafesjian with a right of "reversion" beyond his own contributions to demonstrate that Mathevosian knew she was ratifying a Grant Agreement that undermined her own donative intent. As demonstrated above, that is an unsustainable reading of the Grant Agreement. Moreover, nothing on the face of the Unanimous Written Consent or Grant Agreement signals that Mathevosian intended to abrogate her donative intent as set out in her February 28, 2000 letter. Rather, this body of evidence—like the rest of the extrinsic evidence—is only consistent with an interpretation of the Grant Agreement protecting both Cafesjian *and* Mathevosian.

In short, no reasonable person would think that the parties ever intended to confer upon any donor—including Cafesjian—the right to ownership of property

beyond the extent to which he or she actually contributed to its purchase. This is especially so given the larger context of this case: there is no *conceivable* charitable interest in awarding Cafesjian a multi-million-dollar windfall as a result of his involvement in this civic effort.

II. DEFENDANTS PRESENT NO BASIS FOR SUSTAINING THE DISTRICT COURT'S REJECTION OF PLAINTIFFS' FIDUCIARY DUTY CLAIM.

In rejecting Plaintiffs' claim that Cafesjian and Waters breached fiduciary duties they owed as officers and directors of AGM&M, the district court committed crucial legal errors, viewed the facts through a lens distorted by those errors, and consequently reached an improper conclusion. Br. 48-54. Had the district court understood that Cafesjian and Waters could not place their own interests above AGM&M's well-being—regardless of their good faith—it would have found that they breached their duty of loyalty and that AGM&M was harmed as a result. Defendants' arguments to the contrary fall short.

A. The District Court Committed Three Fundamental Errors In Analyzing Plaintiffs' Fiduciary Duty Claim.

Directors and officers of nonprofit corporations owe fiduciary duties to the corporation. *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1210 (D.C. 2002) (citing 3 Fletcher Cyc. Corp. § 844.10). Fiduciary duties include the duties of loyalty, honesty, and good faith. 3 Fletcher Cyc. Corp. § 837.50. For purposes of this appeal, in which Plaintiffs allege that Cafesjian and Waters

benefited themselves at AGM&M's expense, the key fiduciary duty is the duty of loyalty.

The duty of loyalty "mandates that the best interest of the corporation … take precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the shareholders generally," *id* § 837.60, and prohibits fiduciaries from engaging in self-interested transactions that are unfair to the corporation, *Willens*, 844 A.2d at 1136 n.13. "The duty of loyalty is transgressed when a corporate fiduciary, whether director or officer, uses his or her corporate office to promote, advance or effectuate a transaction between the corporation and such person, and that transaction is not substantively fair to the corporation." *Id.* In analyzing whether Cafesjian and Waters breached the duty of loyalty, the district court committed three legal errors that infected its resolution of this claim.

1. The District Court Used An Improper "Good Faith" Standard When Evaluating Plaintiffs' Fiduciary Duty Claims.

In resolving the fiduciary duty claims, the district court held that Plaintiffs could prevail only if they proved that Cafesjian and Waters took actions in "bad faith." Jan. Op. 141-42 (JA-1204-05) (citing *Clancy v. King*, 954 A.2d 1092, 1106 (Md. 2008)); *id.* at 146, 157, 159, 161, 162, 164, 166 (applying "good faith" standard) (JA-1209, 1220, 1222, 1224, 1225, 1227, 1229). Defendants rely on that same standard on appeal. Opp'n 18-21. This is not the right standard.

A corporation harmed by a director's self-interested actions is "not required to present evidence that the directors were motivated by a desire for personal gain or otherwise acted in bad faith. 'Even when directors act in good faith, their conduct may unintentionally violate the duty of loyalty.'" *Willens*, 844 A.2d at 1136-37 (quoting 3 Fletcher Cyc. Corp. § 837.60). A corporate fiduciary "is held to something stricter than the morals of the market place." 3 Fletcher Cyc. Corp. § 837.60. Because a director "may well offend his or her duty of loyalty though his or her heart is pure," the "question is whether there is a rational basis for a belief that the [] action was in the best interest and not whether in fact the officer held such a belief." *Id.*; D.C. Code § 29-406.30(a)-(b) (codifying common law and providing that directors of non-profit corporations "shall act: (1) in good faith; *and* (2) in a manner the director reasonably believes to be in the best interests of the nonprofit corporation," and "discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances") (emphasis added). "Good faith" is not the standard; the district court and Defendants erred by relying on it.

The district court's reliance on the Court of Appeals of Maryland decision in *Clancy* as the basis for its "good faith" standard was mistaken. Whatever the rule might be under Maryland law, it is undisputed that this case must be resolved under District of Columbia law, and *Willens* sets forth the governing standard. To

the extent that the Maryland and District of Columbia standards for breach of fiduciary duty diverge, the district court was bound to apply the law of the forum jurisdiction. It did not do so.

In any event, *Clancy* does not even stand for the asserted proposition. *Clancy* involved a partnership that author Tom Clancy and Wanda King, his ex-wife, formed to manage Clancy's business affairs. The partnership agreement reserved to Clancy the right to determine how and when his name would be used commercially. *Clancy*, 954 A.2d at 1095-98. After Clancy rejected an offer to continue to allow the use of his name on a series of paperback books, King filed suit alleging that Clancy had violated his fiduciary duty to the partnership by declining the income from the book deal. *Id.* at 1097-98.

While the case ostensibly focused on the "fiduciary duties" that Clancy owed to the partnership, the court held that the law of contracts would govern instead. Clancy conceded that "his pertinent actions … *would* violate the fiduciary duty" he owed the partnership under Maryland law. *Id*. at 1099-1100 (emphasis added). But he argued that the partnership agreement set forth a different rule, which superseded the background fiduciary duty rule under Maryland law, and under which he could "withhold or withdraw any license to use his name in Joint Venture business endeavors for any reason, including for purely personal competitive reasons." *Id*. at 1098; *id*. at 1100 nn.13-14.

The court agreed, finding that the partnership agreement "trumped the usual duty not to compete with the limited partnership and, to a large extent, the duty not to usurp partnership opportunities." *Id.* at 1102. As the court explained, "[i]f traditional common law and statutory fiduciary duty principles were paramount to the analysis and outcome of the present case in the posture in which it reaches us, portions of this contract clearly would be improper self-dealing and a usurpation of a partnership opportunity." *Id.* at 1104. But as the partnership agreement provided that Clancy's actions would be judged under a "good faith" standard, consistent with the common law of contracts, that standard applied. *Id.* at 1106. Thus, *Clancy* does not support the conclusion that the fiduciary duties Cafesjian and Waters owed to AGM&M should be evaluated under a "good faith" standard. *Clancy* is a contracts case.

The district court's erroneous reliance on this "good faith" standard was fundamental and pervasive. It repeatedly referenced the absence of "bad faith" and evidence of "good faith" throughout its evaluation of the fiduciary duty claim. *See, e.g.*, Jan. Op. 146 (JA-1209) ("Although Plaintiffs view Cafesjian's acts as manifestations of naked self-interest, the record as a whole does not establish that Cafesjian (or Waters) acted in bad faith."); *id.* at 157 (JA-1220) (no bad faith in abruptly resigning and demanding property years before reversion); *id.* at 159 (JA-1222) (good-faith transfer of control); *id.* at 161 (JA-1224) (filing lawsuit in good

faith); *id.* at 162 (JA-1225) (good-faith basis for pursuing rescission); *id.* at 164 (JA-1227) (no showing that *Armenian Reporter* articles were published in bad faith or that Waters sent letter to HPRB in bad faith); *id*. at 166 (JA-1229) (litigation not pursued in bad faith).

Not only was the district court's reliance on the "good faith" standard extensive, it was material. In the district court's view, Cafesjian and Waters did not violate their fiduciary duties because they were seeking in "good faith" to vindicate rights they held by contract. *Id.* at 161-62 (JA-1224-25). Setting aside the inaccuracy of that depiction, *infra* at 40-42, it still does not resolve the issue. As creditors, Cafesjian and Waters were entitled to protect their rights. 3 Fletcher Cyc. Corp. § 907; *Storetrax.com, Inc. v. Gurland*, 915 A.2d 991 (Md. 2007). But that right did not free them from fiduciary duties owed to AGM&M. "A director of a corporation may become its creditor …, but the director is not thereby divested of his or her responsibility as a director nor the duties that as such he or she owes to the corporation[.]" 3 Fletcher Cyc. Corp. § 907.

In *Storetrax*, for example, a decision upon which the district court relied, the alleged breach of fiduciary duty was the director's purported failure to give the corporation notice of the suit so that it could defend itself. The court found that fiduciary duties beyond those owed to a litigation opponent existed irrespective of whether the lawsuit was initiated and prosecuted in good faith. 915 A.2d at 1005-

1006. Both *Union Ice Co. of Philadelphia v. Hulton*, 140 A. 514 (Pa. 1928), and *Marr v. Marr*, 70 A. 375 (N.J. 1908), which were favorably cited in *Storetrax*, found that directors had breached fiduciary duties by failing to provide the corporation with notice of the lawsuit and then purchasing the corporation's assets at a fire sale post-judgment. *Union Ice*, 140 A. at 514-15; *Marr*, 70 A. at 377-78. In all of these cases, the relevant legal question was whether the director, by bringing suit, was obtaining some collateral advantage at the expense of the corporation and its owners—not whether the director was acting in "good faith" to protect his rights as a creditor.

The relevant question, then, is *not* whether Cafesjian and Waters acted in "good faith" to protect their rights as creditors. The question is whether they took those actions in a fashion that would still advance *AGM&M's* interests to the maximum extent possible. The district court did not examine the claims in that way because it used the wrong legal standard. As a consequence, this Court cannot defer to its fact-finding on this issue. *Application of L.L.*, 653 A.2d at 880; *Singletary*, 351 F.3d at 524. When considered under the proper standard, it becomes clear that Cafesjian and Waters violated the fiduciary duty of loyalty. *Infra* at 39-44.

2. The District Court Misallocated The Burden Of Proof And Thus Allowed Cafesjian And Waters To Escape Liability Without Demonstrating That Their Actions Were Substantively Fair To AGM&M.

The district court also misallocated the burden of proof on the fiduciary duty claim. Once a plaintiff shows that corporate officers acted in their self-interest, the burden shifts to those officers "to prove that they fulfilled their fiduciary duties." *Willens*, 844 A.2d at 1136 (citation omitted). The plaintiffs are not required to present evidence that the directors were "motivated by a desire for personal gain or otherwise acted in bad faith." *Id.* Rather, the *directors* have the burden of proving that their self-interested actions were nevertheless "substantively fair to the corporation." *Id.* at 1136 n.13 (quoting 3 Fletcher Cyc. Corp. § 837.60).

There is no question that Cafesjian and Waters took actions that furthered their own interests, rather than AGM&M's. The district court noted that "Cafesjian felt that he had to file the lawsuit to protect *his* rights" and "clearly hoped that the Grant Agreement would be rescinded" because "he wanted to get the properties back." Jan. Op. 113 (JA-1176) (emphasis added). It further found that "Waters testified that they demanded rescission in order to preserve their rights with respect to their breach of contract claim," *id.*, and that "Cafesjian filed the lawsuit *to protect his contractual rights*," *id.* at 162 (JA-1225) (emphasis added). Instead of disputing that their actions were self-interested, Cafesjian and

Waters argued—and the district court found—that they had a justifiable basis for protecting their own interests regardless of the effect on AGM&M.

At that point, however, the burden should have shifted to them to show that their actions were substantively fair to the corporation. Yet the district court made no mention of any burden-shifting, indicating that it improperly placed the burden on Plaintiffs to show "bad faith." The opinion presumes that Plaintiffs bore the burden from beginning to end. *Id.* at 162-65 (JA-1225-28). This legal error is, in and of itself, grounds for reversal. *Connors v. Incoal, Inc.*, 995 F.2d 245, 251 (D.C. Cir. 1993). Furthermore, this error directly contributed to the mistaken rejection of Plaintiffs' duty of loyalty claim, as Cafesjian and Waters produced no evidence that they even considered whether—let alone took steps to ensure that—their actions as creditors were substantively fair to AGM&M. *Infra* at 39-44.

3. The District Court Failed To Examine The Totality Of The Circumstances And Thus Ignored That Cafesjian And Waters Continually Worked To Thwart The Museum Project.

Finally, the district court incorrectly treated Plaintiffs' single claim for breach of fiduciary duty as if it were thirteen separate claims of breach. *Compare* Consolidated Complaint ¶¶ 290-99, Dkt. 162 (Aug. 18, 2010) (JA-184-88), *with* Jan. Op. 145-65 (JA-1208-28). The district court looked to see whether each particular action taken by Cafesjian and Waters could be deemed lawful in

isolation (under the wrong standard and misallocating the burden of proof). Defendants have taken this same approach before this Court. Opp'n 18-21.

This was legal error. "Whether a director or officer has properly discharged his or her duty of loyalty is a question of fact to be determined in each case *in view of all the circumstances*." *Willens*, 844 A.2d at 1136 (quoting 3 Fletcher Cyc. Corp. § 837.60) (emphasis added)). Plaintiffs pled a breach of the duty of loyalty *as evidenced by* certain conduct; the district court should have asked whether that course of conduct was a breach, and not whether each individual action they took over a two-year period was an independent breach. The failure to examine the totality of Cafesjian's and Waters's actions likewise led to a mistaken rejection of Plaintiffs' fiduciary duty claim. *Infra* at 39-44.

B. Cafesjian And Waters Violated Their Fiduciary Duties By Undermining The Museum Project.

To recap, Plaintiffs needed to show, under the totality of the circumstances, that Cafesjian and Waters, both of whom owed a fiduciary duty of loyalty to AGM&M, Jan. Op. 144-45 (JA-1207-08); Br. 48-49, engaged in a course of conduct that was not in the best interests of the corporation. Once they made that showing, it was incumbent on Cafesjian and Waters to prove that their self-interested actions were nevertheless "substantively fair" to AGM&M. If they cannot do so, then Plaintiffs have established a breach. Although the district court did not analyze the issue in this manner due to the multiple legal errors discussed

above, a review of the record evidence shows that Cafesjian and Waters breached their fiduciary duty of loyalty to AGM&M.

Beginning in May 2006, when Cafesjian began rumbling about quitting the museum project and his attorney proposed that Cafesjian depart with the Adjacent Properties, PX-187 (JA-574); DX-138 (JA-741); PX-193 (JA-578); PX-194 (JA-580), Cafesjian and Waters embarked upon a self-interested mission to undermine the project and secure as much of the Grant Property as possible for their own use. In fact, in September 2006, years before the December 31, 2010 deadline, Cafesjian "washed his hands" of the museum project, resigned as an officer of AGM&M, and informed Waters that it was his goal to secure title by virtue of the reversion clause. PX-195 (JA-582); DX-506N at 2 (JA-1023); 11/16 AM Tr. 9 (JA-372); 11/15 PM Tr. 107 (JA-370); Jan. Op. 97 (JA-1160) (finding credible Rouben Adalian's account of his conversation with Waters). Waters accordingly began taking (both in his individual capacity and as Cafesjian's agent) self-interested actions that can only be interpreted as furthering that goal at the expense of AGM&M. These efforts proceeded on two fronts.

First, Cafesjian and Waters took a series of steps to cloud title to the Grant Property, including by: (1) seeking rescission of the Grant Agreement in the Minnesota litigation, PX-202 (JA-590); (2) surreptitiously filing a Memorandum of Agreement with the D.C. Recorder of Deeds, PX-199 (JA-584), 11/10 PM Tr. 96-

97 (JA-349-50); (3) filing a *lis pendens*, PX-214 (JA-615); and (4) contacting the D.C. HPRB and asking it to suspend approval of plans while litigation was pending, PX-147 (JA-563), PX-143 (JA-560), PX-390 (JA-631), PX-127 (JA-500). These actions were clearly self-interested attempts to gain ownership over the Grant Property; they certainly were not undertaken in AGM&M's best interests.

Second, Waters discouraged investment in the project by warning against participation in the project and predicting a litigation victory for the Cafesjian "side," as well as pursuing litigation itself, which he knew turned off potential donors. PX-128 (JA-503); PX-129 (JA-506). Waters also discouraged investment by publishing dozens of articles in Cafesjian's newspaper that continually publicized AGM&M's infighting, *see, e.g.*, DX 152 (JA-748-768), even though he knew that publicizing the litigation and failing to provide a "coherent message" would doom the museum's chances of being developed, DX-138 (JA-741); 11/15 PM Tr. 57-59 (JA-365-67). Discouraging investment in the project and attempting to discredit it in the press was obviously not done for AGM&M's benefit either.

Viewed in its totality, then, the course of conduct in which Cafesjian and Waters engaged was not taken in the best interest of AGM&M. "[O]fficers and directors must exert all reasonable and lawful efforts to ensure that the corporation is not deprived of any advantage to which it is entitled." 3 Fletcher Cyc. Corp. § 837.60. Cafesjian and Waters were required to "exercise[] their unbiased

judgment" and take "action[s] [to] promote the corporate interests." *Id*. Cafesjian's and Waters's behavior flunks this test. Not only did their actions fail to promote AGM&M's interests, they were intentionally designed to *undermine* those interests. Indeed, the district court found that their goal was to dissolve the project and secure the Grant Property, 11/19 AM Tr. 37, 94 (JA-404, 413); Jan. Op. 113 (JA-1176), not to assist AGM&M in building a museum.

Thus, Cafesjian and Waters bore the burden of proving that their actions were necessary to protect their own contractual rights as well as "substantively fair" to AGM&M. That is a logically impossible showing with respect to their discouraging donors from contributing, publishing newspaper articles, and asking the D.C. HPRB to suspend approval. Those actions were gratuitous. Reasonable, loyal directors would have sought to meet fundraising goals even if they harbored some doubt about the project's chances for success and would have down-played any litigation or differences of opinion in the press in order to maximize those chances. This course of conduct amply shows that their actions were not substantively fair to AGM&M.

Cafesjian and Waters' litigation-related conduct fares no better. The most the record shows is that *some* of these steps might have been taken in good faith. *But see supra* at 10-13; Jan. Op. 160 (JA-1223) (concluding that surreptitious filing of a Memorandum of Agreement with D.C. Recorder of Deeds was a breach even

under "bad faith" standard). But it does not show that Cafesjian's decision to seek rescission was "substantively fair" to AGM&M. Cafesjian has *admitted* that rescission was neither necessary to vindicate his interest in having the promissory note reissued nor even appropriate. Moreover, the deadline for completion of the museum was over three and a half years away, and damages or re-issuance of the note would have made him whole. Worse still, Cafesjian had no obligation to file a *lis pendens*, which was a *de jure* barrier to progress on the museum. Finally, Cafesjian knew that the project's success depended on an influx of capital, whether by donation or bank financing, DX-138 at 2 (JA-742); 11/15 PM Tr. 57-59 (JA-365-67), and that he could jeopardize that effort by clouding title to the Grant Property, PX-202 at 4-5 (JA-593-94).

Thus, while Cafesjian might have believed that he had a right to have the Assembly or AGM&M re-issue the promissory note, he had no basis for requesting rescission or filing a *lis pendens* to redress that narrow issue, and he knew it. 11/23 PM Tr. 17-19 (JA-446-48). A reasonable, loyal director would have enforced a claim on the promissory note—if at all—on its own terms but would not have gone out of his way to drag the Grant Property into the litigation morass. These decisions were not substantively fair to AGM&M.

In sum, the record demonstrates that Cafesjian and Waters breached their fiduciary duty of loyalty by taking self-interested actions that were not substantively fair to AGM&M.

C. AGM&M Was Harmed By Cafesjian's And Waters's Breaches.

The final element in proving a breach of fiduciary duty claim is damage.[7] The record is clear that, at least as of June 26, 2008, when the *lis pendens* was filed, AGM&M was legally barred from changing the properties until the litigation was resolved. *Supra* at 13. This was, and continues to be, a *de jure* barrier to progress on completing the museum.

The record also clearly shows that the course of conduct damaged the project by discouraging donations, which in turn caused Plaintiffs to miss the December 31, 2010 deadline. The promissory-note litigation, whisper campaign to potential donors, and negative publicity would have made it impossible for Plaintiffs to meet the deadline even in the absence of the *lis pendens*. *Supra* at 40-43. Peter Vosbikian, former Chairman of the Assembly's Board of Directors, testified that the problem was wide-spread: "certain[ly] there are many Armenians (I being one of them) waiting, with their hand on their checkbooks, for a resolution

[7] The district court concluded that certain aspects of Cafesjian's and Waters's course of conduct did not independently cause damage. Jan. Op. 147-165 (JA-1210-28). Again, the question is not whether isolated instances caused damage; the question is whether the course of conduct caused damage in light of the totality of the circumstances. *Supra* at 38-39.

to this conflict." PX-160 (JA-571). Cafesjian acknowledged that the lack of a "coherent message" would impede progress by dissuading donations. DX-138 at 1 (JA-741). And Waters knew that the continuing publication of litigation-related stories in the *Armenian Reporter* would harm the project, yet he continued to publish inflammatory stories. 11/15 PM Tr. 57-59 (JA-365-67).

In sum, both the loss of donations and the consequential injury of missing the December 31, 2010 deadline constitute damage resulting from the breach of fiduciary duty.

D. The District Court Should Have Awarded Equitable Or Legal Relief Based On The Breach Of Fiduciary Duty.

The district court did not reach the issue of remedies because it found that Cafesjian and Waters did not violate any fiduciary duties. Jan. Op. 185 (JA-1248). Because those conclusions were legally and factually mistaken, Plaintiffs are entitled to both equitable and legal relief. Under these circumstances, equitable relief is the appropriate remedy. Damages could not make AGM&M whole, as any compensatory remedy would leave AGM&M with money but no place to build a museum. *Tauber v. Quan*, 938 A.2d 724, 732 (D.C. 2007) ("When land is the subject matter of the agreement, the legal remedy is assumed to be inadequate, since each parcel of land is unique.").

There are a number of equitable remedies available here. Br. 33, 39. Foremost, the district court could have imposed a constructive trust. A

constructive trust "is a flexible remedial device used to force restitution in order to prevent unjust enrichment." *Hertz v. Klavan*, 374 A.2d 871, 873 (D.C. 1977). Constructive trusts are "appropriate in a wide range of situations," including "where the transfer of property was induced by … breach of a fiduciary duty." *Id*. Imposition of a constructive trust conveying the property back to Plaintiffs would remedy the principal harm they suffered: the loss of the Grant properties. The district court could have achieved the same equitable result by issuing a declaration quieting title and vesting title to each of the properties in AGM&M. *Hughes v. Abell*, 634 F. Supp. 2d 110, 115 (D.D.C. 2009) ("[T]he Court's equitable powers allow it to quiet title[.]").

Equitable reformation of the Grant Agreement was also available. Equitable reformation is appropriate where "one party is mistaken as to [the contract's] contents and the other party has engaged in fraud or inequitable conduct." *Cafritz v. Cafritz*, 347 A.2d 267, 269 (D.C. 1975). Here, no person other than Waters had ever seen the last-minute changes made to the Grant Agreement prior to signing it. *Supra* at 24-27. Cafesjian and Waters should not be rewarded for slipping the Bank Building into the Grant Agreement at the last minute and then engaging in a course of conduct designed to ensure that they would obtain the property. The Court can remedy this by reforming the agreement, for example, to ensure that

CFF/Cafesjian cannot take more out in property than they donated in cash. Br. 30-31.

If equitable remedies are unavailable, Plaintiffs are entitled to compensatory damages. *Beckman v. Farmer*, 579 A.2d 618, 651-52 (D.C. 1990). Because Cafesjian's and Waters's actions deprived AGM&M of the property itself, leaving it no place to build a museum, the most appropriate measure would have compensated AGM&M for the value of the properties at the time they were transferred to Cafesjian plus AGM&M's carrying costs and any costs incurred in planning a museum specifically for the Bank Building or any of the Adjacent Properties.[8]

AGM&M also is entitled to damages for donations not made to AGM&M. *Samaritan Inns, Inc. v. District of Columbia*, 114 F.3d 1227, 1236-37 (D.C. Cir. 1997) (charitable organization may recover lost contributions). Although the district court was unable to conclude that any donations were lost because of Cafesjian's and Waters's wrongful conduct, that determination depended on its

[8] Relying on a pretrial order, Defendants contend that Plaintiffs cannot pursue this theory of damages. Opp'n 27-28. But that order provided that "[t]he Court may revisit this issue if necessary after it makes a determination as to whether the Properties should revert to Cafesjian." Pretrial Conference Memorandum Opinion and Order, Dkt. 204 at 26 (Oct. 22, 2010) (JA-330). The Court never revisited the issue because it found no breach. Thus, if this Court upholds the reversion but finds that Defendants breached fiduciary duties, a retrial limited to damages would be appropriate. *See Basiliko v. Pargo Corp.*, 532 A.2d 1346, 1348 (D.C. 1987).

erroneous finding that "Defendants pursued the litigation in good faith and cannot be penalized[.]" Jan. Op. 166 (JA-1229). When viewed under the proper standard, and in light of the totality of the circumstances, the amount of lost donations is directly attributable to Defendants' wrongful conduct and not speculative.[9]

E. Cafesjian And Waters Are Not Entitled To Indemnification.

Because Cafesjian and Waters are liable to AGM&M for breach of fiduciary duties, AGM&M has no obligation to indemnify them for their attorney fees and costs in connection with this suit.[10] Although there should not be any duty to indemnify, Br. 61-64, the district court correctly found that the sole claim for which Cafesjian and Waters could seek indemnification is the fiduciary breach claim. Jan. Op. 184-85 (JA-1247-48). But because "there shall be no

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[9] Although the facts in the record allow the Court to conclude that Cafesjian prevented AGM&M from performing under the Grant Agreement, that Cafesjian and Waters breached the duty of loyalty, and to award appropriate relief, remand is an alternative course if the Court determines that Plaintiffs have identified material legal errors but that the record is insufficient to allow final resolution. *See, e.g*, *United States v. Western Elec. Co.*, 900 F.2d 283, 308 (D.C. Cir. 1990) (reversing district court because it applied incorrect legal standard to its factual findings); *California Forestry Ass'n v. U.S. Forest Service*, 102 F.3d 609, 613-14 (D.C. Cir. 1996) (remand appropriate to allow district court to consider in first instance whether equitable relief is appropriate).

[10] For this same reason, indemnification would also violate AGM&M's by-laws as prohibited self-dealing. Br. 64. As the district court ultimately found, the IRS has deemed AGM&M a private foundation. Order, Dkt. 372 at 3 (Feb. 20, 2013) (JA-1708); Dkt. 368-1 (JA-1668) (E. Hovnanian Declaration) (IRS classification of AGM&M as private foundation effective January 1, 2010); *but see* Opp'n 42.

indemnification in relation to matters as to which he or she shall be adjudged in such claim, action, suit or proceeding to be … liable to the Corporation for damages arising out of his or her own … misconduct in the performance of a duty to the Corporation," PX-122, § 4.1 (JA-498), a finding of breach of fiduciary duty means that Defendants' contractual claim for indemnification must fail.[11]

III. THE DISTRICT COURT CORRECTLY HELD THAT AGM&M'S LEASE OF THE FAMILIES USA BUILDING TO THE ASSEMBLY IS VALID.

Defendants' attempt to overturn the district court's decision upholding the lease of the Families USA building to the Assembly must fail.[12] First, the district court correctly ruled that the lease was "part of" the museum project within the meaning of the Grant Agreement, and Defendants' attempt to second-guess that common-sense determination lacks legal and factual support. Second, Defendants' equitable claims were not even arguably raised below and fail on the merits in any event. The only inequity here would be if the Court were to allow CFF/Cafesjian—after securing property worth millions of dollars at a substantial discount through questionable means—to avoid their legal obligations to the Assembly under the lease.

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[11] Plaintiffs will address in supplemental briefing their objections to the district court's indemnification methodology set forth in the March 7, 2013 order.

[12] Defendants' final brief is limited to the issue on cross-appeal addressed in this section. Fed. R. App. P. 28.1(c)(4).

A. Standard Of Review

The district court's findings of fact—specifically, its finding that the BOC was validly formed and authorized to lease property—must be sustained unless clearly erroneous. *Draim v. Virtual Geosatellite Holdings, Inc.*, 522 F.3d 452, 455 n.3 (D.C. Cir. 2008). The district court's interpretation of the Grant Agreement and its other legal conclusions are reviewed *de novo*. *Id.* The availability of equitable remedies is reviewed for abuse of discretion. *Massachusetts v. Microsoft*, 373 F.3d 1199, 1208 (D.C. Cir. 2004).

B. The District Court Correctly Concluded That The Lease Did Not Violate The Grant Agreement.

Defendants' main argument is that the lease is invalid because it violates Section 3.1(A) of the Grant Agreement, which provides that the Families USA building "may only be used as part of the [museum project], subject to plans for the [project] approved by the Board of Trustees[.]" PX-112, § 3.1(A) (JA-463). The district court correctly rejected Defendants' argument.

The lease is "part of" the museum project because AGM&M entered into it as "an effort to support the project financially." Jan. Op. 183 (JA-1246). Although Black's Law Dictionary does not define "part of," it does define "part and pertinent" as synonymous with "appurtenant." Black's Law Dictionary 1150 (8th ed. 2004). In turn, "appurtenance" is a term "generally employed in deeds and leases" and "'means anything corporeal or *incorporeal* which is incident of, and

belongs to some other thing as principal.'" *Id*. (quoting A Treatise on the Law of Landlord and Tenant § 291, at 442-43 (1909)) (emphasis added). The lease is "incident" to the museum project given the need for financing, and it "belong[s] to" the project given the building owner's status as landlord; nothing in the Grant Agreement requires every foot of the Grant Property to function as a museum *per se*.

Defendants object to this straightforward interpretation as "overbroad" because, in their words, it would allow AGM&M to lease space to "a McDonald's restaurant, a menswear store, or a law office" and still be "part of" the museum project. Opp'n 48. But the problem with Defendants' *reductio ad absurdium* argument is that it does not, in fact, yield absurd results. It would have been an eminently reasonable business decision for AGM&M to build a museum on the footprint of the Bank Building and some of the adjacent G Street properties, and use the rental income from the Families USA building to help fund or defray the costs of running the principal enterprise.

If anything, Defendants' position would lead to absurd results. Their view requires the Families USA building to sit vacant and unproductive unless and until it is being used for a museum and a museum only. But just as a trustee has a duty to invest trust assets and put trust property to productive use (and is subject to suit for *not* doing so), Restatement (Third) Trusts § 90 cmt. a (2007) ("the trustee has a

duty to preserve the trust property and to make it productive") (citations omitted), the most reasonable construction of the Grant Agreement would allow AGM&M to use its own property to generate income to further its institutional purposes. The income generated from the lease, and the tax savings attributable to the property being treated as occupied, lowered AGM&M's overhead, which supported and thus was "part of" the project. Defendants' construction leads to especially illogical results during the time period when the museum has not yet been built, as the district court noted. Jan. Op. 182-83 (JA-1245-46).[13]

Defendants also incorrectly contend that the district court's interpretation is inconsistent with Section 3.1(A)'s requirement that AGM&M "take any necessary steps to terminate [existing] leases as soon as possible … and … not consent to any renewals [and] extensions." Opp'n 49-50. That provision was included to ensure that AGM&M was not saddled with tenants who had established leasing arrangements with the prior owner. It allowed AGM&M's Board to control how

[13] Defendants also argue that, at a minimum, the lease became invalid as a matter of contract interpretation post-reversion; it could no longer be considered "part of" the museum project at that point, the argument goes, because the court ruled that "CFF is not legally obligated to use the [Grant] Properties … for that purpose." Opp'n 49 (citations and quotations omitted). But that argument depends on Defendants' incorrect assumption that CFF/Cafesjian had a reversionary interest as a matter of property law—the only kind of right that would terminate a lease upon transfer. Moreover, Defendants' reliance on their right to use the Grant Property for purposes other than the museum project is odd given their argument that equity demands termination of the lease *so that the museum can be built by April 2015*. Opp'n 57-58.

the properties would be used both on an interim and permanent basis. But the provision does not by its terms—or by implication—impose any forward-looking constraints on AGM&M and certainly does not provide a basis for ignoring the Grant Agreement's ordinary meaning.[14]

Finally, Defendants incorrectly argue that the lease is *ultra vires*. Opp'n 51-52. Defendants' argument depends on proving that the AGM&M Board invalidly formed the BOC. But they offer *no* record evidence to support overturning the district court's finding that Waters voluntarily left the meeting in which the BOC was later formed. On the other hand, there is ample support for the district court's finding of fact on this point. PX-207 at 3 (JA-598). The district court's finding that the BOC was validly delegated authority to manage the property should be upheld. Jan. Op. 120, 183 (JA-1183, 1246) ("Although there is much in dispute about that meeting, the Court finds that Waters left the meeting voluntarily and that

[14] Defendants' cursory reliance on extrinsic evidence fares no better. Opp'n 50. Because the relevant portion of the Grant Agreement is not ambiguous, there is no basis for relying on extrinsic evidence. *Supra* at 15-21. Moreover, a determination in 2002 that the Assembly's offices would not be housed in the museum complex does not undermine the district court's interpretation of the Grant Agreement. The AGM&M Board later agreed at its May 7, 2007 meeting that the Assembly and ANI would be housed in buildings adjacent to the museum. DX-521N at 3 (JA-1026); Jan. Op. 121 (JA-1184). In any event, because there is no museum yet, the lease does not transgress the purported condition. Cafesjian's general intent to donate the adjacent properties to expand the museum's "footprint" likewise sheds no light on this issue.

the remaining quorum of trustees unanimously agreed to delegate 'building management' authority to the Building & Operations Committee.").

Defendants next argue that even if the BOC were validly formed, the lease was entered into without the BOC's permission. But the district court's factual finding on this issue also was not clearly erroneous. The lease was signed by Rouben Adalian, a director of AGM&M, DX-165 (JA-769), and AGM&M has never contended that the lease is invalid. Defendants had every opportunity to build a record showing that the BOC did not approve the lease. Yet they are unable to produce even *one* record citation in support of their argument.

Because the BOC was validly formed and it approved the lease, Defendants are left to argue that the BOC did not have the power to lease space because it exceeds activities related to "building management." DX-521N (JA-1024). Defendants' contention that the power to lease property is not a power of "building management" is contrary to the plain meaning of that term, as the building manager—as opposed to the owner—is often the party responsible for leasing space in a building. And Defendants' argument that leasing property is more akin to "selling property" than "building management" does not pass muster under any reasonable conception of those terms. For this, and the others reasons set forth above, the lease was not *ultra vires*.

C. The District Court Did Not Abuse Its Discretion In Declining To Terminate The Lease On Equitable Grounds.

Having failed to demonstrate that the lease was invalid from its inception under the Grant Agreement, Defendants argue that the lease became invalid as a matter of equity once the Grant Property "reverted" to CFF/Cafesjian. Opp'n 52-58. The Court need not reach this issue because the district court's judgment awarding the Grant Property to CFF/Cafesjian should be reversed. Even if the Court does reach this issue, however, it is notable that Defendants do *not* take issue with the district court's conclusion that their argument failed on property law grounds—the only argument they made below. Sept. Op. 10-12 (JA-1518-20).

Defendants instead argue that equitable principles should trump the Assembly's contractual rights under the lease. But because these additional claims were clearly not pressed or passed on below, they cannot be raised on appeal. *See, e.g.*, *Potter v. District of Columbia*, 558 F.3d 542, 547 (D.C. Cir. 2009); *Figueroa v. District of Columbia Metro. Police Dep't*, 633 F.3d 1129, 1133 n.3 (D.C. Cir. 2011). In any event, the arguments lack merit.

First, Defendants contend that the Assembly is not a *bona fide* lessee because a lessee can only take "property subject to the known equities" and the Assembly knew that the district court might eventually order AGM&M to transfer the Families USA building to CFF/Cafesjian. Opp'n 52-53 (collecting cases). But the argument simply assumes—without record support—that it would be unfair or

inequitable for the Assembly to continue to lease the building after it was transferred to CFF. Transfers of property are made subject to active leases as long as they are recorded or the person taking ownership has knowledge of the lease. D.C. Code § 42-401.

Defendants try to solve this problem by suggesting that the Assembly knew its conduct was inequitable because the only valid purpose of the lease would be rental income and the Assembly was not paying any rent. Opp'n 54. But the district court found that there was no evidence that the Assembly had not been paying AGM&M rent. Jan. Op. 138-39 (JA-1201-02). And Defendants further fail to mention that the Assembly has offered to pay rent to CFF and that offer has been refused. Plaintiffs' Opposition to Motion to Enforce Judgment at 4, Dkt. 326 (June 21, 2011) (JA-1499). While the Assembly was aware that a transfer of title to CFF/Cafesjian was possible and that it would have to pay rent to the building's owner post-transfer, the Assembly never acted in a knowingly inequitable fashion.

Second, Defendants argue that the Assembly should be "equitably estopped" from continuing to lease the Families USA building "to prevent lessees from benefiting from their own misleading statements or conduct." Opp'n 55. But this argument also proceeds from faulty assumptions, *e.g.*, "repeated assurances" that Cafesjian would obtain the property if it were not developed by December 31, 2010, an "agreement with the Assembly that the Assembly offices would not be

housed on the property," an argument that the BOC was not legitimately formed, and the allegation that a five-year lease was made with the specific intention of undermining "virtual certainty" of Cafesjian being able to take the property. *Id.* at 55-56. These allegations have been addressed elsewhere in this brief and in Plaintiffs' opening brief, and those responses to Defendants' mischaracterization of the evidence need not be repeated. As the absence of record citations suggests, Defendants' narrative has no basis in the record or reality. Defendants thus fail to demonstrate how the Assembly misled anyone, or how CFF/Cafesjian relied to its detriment on such statements.

Finally, Defendants' retreat to general principles of equity—based on an inapposite habeas corpus decision—is no more persuasive than its reliance on more particular equitable doctrines. *Id.* at 57-58. Defendants argue that the leasing power exercised by AGM&M here could be used to defeat all executory interests. This argument is legally and factually unsupportable. If a party holds a true "reversionary" interest in property, as Defendants unsuccessfully claimed before the district court, it will take the property free of any leases. Sept. Op. 10-11 (JA-1518-19). And if a party has a contractual right to acquire property upon certain conditions, the party will have a remedy if a lease to a third party violates the contract's terms, which is not the case here. The fact that CFF must honor a lease

that will expire in 2015 is not a justifiable basis for using general principles of equity to uproot longstanding District of Columbia contract and property law.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the matter remanded to the district court for further proceedings consistent with this Court's decision.

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Dated: October 29, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28.1(e)(3) and 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 28.1(e)(2)(A)(i) of the Federal Rules of Appellate Procedure because this brief contains 13,976 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2010 version of Microsoft Word in 14-point Times New Roman.

/s/ Helgi C. Walker

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October 2013, a copy of the foregoing document was filed electronically with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I further certify that a copy of the foregoing document was served electronically on the following counsel:

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