APPENDIX

95 Mass.App.Ct. 1107
Unpublished Disposition

Appeals Court of Massachusetts.

Joseph R. MULLINS
v.
Joseph E. CORCORAN & another.[1]

18-P-1163
|
Entered: April 10, 2019.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

By the Court (Vuono, Blake & Ditkoff, JJ.[2]),

In this case involving claims and counterclaims of breach of contract and breach of fiduciary duties, a

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[1] Gary A. Jennison.

[2] The panelists are listed in order of seniority.

judge of the Superior Court issued final judgments in favor of the defendants, Joseph E. Corcoran and Gary A. Jennison, following a jury-waived trial. The plaintiff, Joseph R. Mullins, appeals from the judgments as subsequently corrected and amended. The defendants also appeal, arguing that the Superior Court judge improperly calculated the damages. We affirm.

1. Background. The parties have been in business together since the 1970s when they formed a company now known as Corcoran, Mullins, Jennison, Inc. (CMJ). The parties' ownership interests in CMJ are not equal. Corcoran has a sixty percent interest, and Mullins and Jennison both have twenty percent interests. Pursuant to CMJ's original bylaws, however, CMJ is managed by a three-member board of directors, consisting of the parties or their designees. The board of directors requires a majority vote to act. Thus, Corcoran does not control the daily business of CMJ despite his majority interest.

CMJ is in the business of developing residential real estate projects, and most of those projects have been multifamily apartment buildings. To finance a project, CMJ historically used its working capital to cover the costs associated with conducting a feasibility study and with obtaining regulatory approvals. CMJ would then take out a construction loan to finance the actual construction and, once the project was built and stabilized, CMJ would obtain long-term financing secured by the property and its revenues. This long-term financing typically came from government-subsidized loan programs.

In 1987, the parties entered into a new agreement after Mullins decided that he wanted to start his own business while still retaining an interest in CMJ. The 1987 agreement provided that CMJ would not guarantee the obligations of any entity and further provided that CMJ would not enter into any new projects without the unanimous consent of all of the parties. A key issue during trial was the timing of this consent provision and whether consent could be revoked once given. The judge concluded that the 1987 agreement was ambiguous on this point, and he thus looked to extrinsic evidence to determine the parties' intent. After reviewing that evidence, including the parties' past practices and the costs associated with obtaining regulatory approvals, the judge found that the 1987 agreement required the parties to determine whether to consent to a new project after the completion of the feasibility study but before CMJ sought regulatory approvals.

The parties worked together amicably until 2001, when Mullins brought his first lawsuit against Corcoran and Jennison. See Mullins v. Corcoran, 65 Mass. App. Ct. 1122 (2006). After that, Corcoran refused to meet or speak directly with Mullins about business matters. Corcoran and Jennison instead arranged for CMJ staff to have quarterly meetings with Mullins to keep him apprised of CMJ's remaining projects.

One of CMJ's remaining projects involved a parcel of land with four apartment buildings on one side and a retail building on the other. This case concerns CMJ's plans to redevelop the retail side, referred to as Cobble Hill Center. In 2009, Corcoran assigned his son the

task of conducting a feasibility study. Mullins was aware of this assignment. Several years later, in January 2012, CMJ staff informed Mullins of plans to develop an apartment building at Cobble Hill Center and also provided him with a detailed report on the project. Mullins received an updated report in June 2012. On July 17, 2012, Mullins had a regularly scheduled quarterly meeting with CMJ staff, during which Corcoran's son made a presentation on the project. After the presentation, Mullins consented to the project and was fully supportive of it. CMJ then proceeded to obtain regulatory approvals, which cost in excess of $ 1 million to obtain.

The project progressed until December 2013, when Mullins received a status report from Corcoran's son. The status report included a proposal to give Corcoran's son a ten percent interest in Cobble Hill Center by reducing Mullins's and Jennison's interests to eighteen percent each and Corcoran's interest to fifty-four percent. In response to the status report, Mullins sent a letter to Corcoran's son requesting additional information on, inter alia, the financing strategy. Mullins also asserted that he had not yet consented to the project. Mullins subsequently received additional information on the financing strategy, which involved obtaining a construction loan, replacing the construction loan with a permanent loan upon completion of construction, and ultimately refinancing the permanent

loan with a government-subsidized loan.[3] In response, Mullins sent a letter to CMJ again asserting that he had not yet consented to the project. The judge found that Mullins's stated reasons for not wanting to proceed with the project, including the proposal to reduce his interest to eighteen percent and the riskiness of the proposed financing strategy, were not made in good faith.

After subsequent conversations during which the parties could not reach an agreement, Mullins filed the underlying lawsuit against Corcoran and Jennison to prevent the project from proceeding, and he was successful in accomplishing that goal. In his complaint, Mullins alleged that Corcoran and Jennison breached their contractual and fiduciary duties by proceeding with the development of Cobble Hill Center without his consent. Corcoran and Jennison counterclaimed, alleging that Mullins breached his contractual and fiduciary duties by interfering with the development of Cobble Hill Center after consenting to the project.

2. Standard of review. In reviewing a judgment entered after a jury-waived trial, we set aside the trial judge's findings of fact only if clearly erroneous. Goddard v. Goucher, 89 Mass. App. Ct. 41, 44 (2016). The trial judge's legal conclusions, however, are reviewed de novo. Id.

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[3] Although not discussed by the Superior Court judge, the financing strategy also included a proposal that CMJ guarantee the initial construction loan.

3. The claims and counterclaims. We first address the successful counterclaims brought by Corcoran and Jennison against Mullins, as they are the focus of the parties' appeals.[4] Corcoran and Jennison alleged that Mullins breached his contractual and fiduciary duties by revoking his consent to develop Cobble Hill Center. On appeal, Mullins argues that (1) he had legitimate business reasons for revoking his consent, and (2) he reasonably believed that, under the terms of an ambiguous contract, he could revoke his consent because of changed circumstances.

We begin our analysis by reviewing the fiduciary duty standard that applies to shareholders in a close corporation such as CMJ. Because of the "trust and confidence which are essential to this scale and manner of enterprise . . . [shareholders] in [a] close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another" (footnote omitted). Donahue v. Rodd Electrotype Co. of New England, Inc.,

[4] As a preliminary matter, Mullins argues that the judgment against him is based, impermissibly, on his constitutional right to petition the courts. Corcoran and Jennison correctly note that Mullins did not raise this issue below. Mullins contends that the issue was raised below, but he points only to a portion of the judge's directed verdict findings that discuss whether Corcoran's and Jennison's counterclaims based on Mullins's refusal to agree to an ownership share for Corcoran's son were based on protected petitioning activity. Mullins does not cite anywhere in the record where he argued that his own lawsuit constituted protected petitioning activity. The argument, therefore, is waived. See Carey v. New England Organ Bank, 446 Mass. 270, 285 (2006) (issue not raised below deemed waived on appeal).

367 Mass. 578, 592-593 (1975). This duty is one of "utmost good faith and loyalty." Allison v. Eriksson, 479 Mass. 626, 636 (2018), quoting Donahue, supra at 593. In analyzing whether the duty of utmost good faith has been breached, we look to whether there was a legitimate business purpose for the action taken and whether there was an alternative, less harmful, way to achieve the intended objective.[5] Koshy v. Sachdev, 477 Mass. 759, 772 (2017).

With this standard in mind, we address Mullins's argument that he had three different legitimate business reasons for revoking his consent and filing his lawsuit against Corcoran and Jennison: (1) the proposal to reduce his interest in the project; (2) the proposal to have CMJ guarantee the construction loan; and (3) the riskiness of the proposed financing strategy. As to Mullins's first and second reasons, we consider whether he had a legitimate business purpose for the action taken. See Koshy, 477 Mass. at 772. We are guided by the fact that Mullins's intent in revoking his consent and filing the underlying action was to prevent the project from proceeding. With that in mind, we acknowledge that Mullins may have had a basis for demanding that Corcoran and Jennison recognize his right to veto a CMJ loan guaranty and a reduction in his interest and, if they refused, to bring a declaratory

[5] The 1987 agreement required the parties to conduct themselves in "scrupulous good faith." The parties disagree whether "scrupulous good faith" is a higher standard than "utmost good faith." As we affirm even applying the "utmost good faith" standard as urged by Mullins, we need not resolve this quandary.

judgment action or take some other action to clarify the parties' rights under their agreements. That does not mean, however, that Mullins had a legitimate business purpose for halting, unilaterally, a project on which the parties had just spent over $ 1 million to obtain regulatory approvals.

Mullins's third reason is also unavailing. Mullins argues that the proposed financing strategy was a different, riskier, strategy than the one that CMJ had used historically. The June 2012 report that Mullins received before initially consenting to the project, however, indicated that CMJ was exploring a different financing strategy. Mullins did not condition his consent on any particular financing strategy, which is otherwise a business decision that would have been determined by a majority vote of the board of directors.[6]

Mullins's second argument, that his reasonable interpretation of an ambiguous contract cannot give rise to a finding of bad faith, is premised on the judge's conclusion that there was some ambiguity in the 1987 agreement as to how long the parties had to decide whether to consent to a new project.[7] Mullins contends

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[6] We further note that we are bound by the judge's findings that Mullins's stated reasons for revoking his consent were not asserted in good faith, and we see nothing clearly erroneous about these findings, which are ultimately based on credibility determinations. See Passero v. Fitzsimmons, 92 Mass. App. Ct. 76, 83 (2017) ("assessing the credibility of the witnesses was squarely within the purview of the judge").

[7] Mullins also argues that the judge erroneously found that Mullins could not revoke his consent under the 1987 agreement

that a mere breach of a contract, based on a reasonable interpretation of ambiguous contractual terms, cannot be the basis for a finding of bad faith. That is not what occurred here, however. In looking at the extrinsic evidence, the judge found that "it would not have made rational business sense . . . to give each of the CMJ principals absolute veto power over a new real estate development project at any time before the terms of long-term financing were finalized." Based on the costs CMJ typically incurred before finalizing long-term financing, we agree that Mullins's interpretation was irrational and thus unreasonable. Moreover, Mullins's actions amount to more than a mere breach of contract. Not only did he revoke his consent, he engaged in bad faith conduct, using false assertions about the information he had received and the riskiness of the project. He then acted in bad faith to prevent the project from proceeding. In these circumstances, we see no merit to Mullins's argument. See, e.g., Federal Deposit Ins. Corp. v. Holbrook & Johnston, 36 Mass. App. Ct. 424, 428-430 (1994) (involving ambiguous contract, defendant was liable for failing to perform his obligations where such failure resulted from his bad faith, gross negligence, actual fraud, or willful misconduct).

Having addressed Mullins's arguments regarding Corcoran's and Jennison's counterclaims, we turn to Mullins's arguments regarding his own claims. Mullins argues that the judgment was based on an erroneous finding that, even though there were material

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once he learned of material changes to the project. This argument has no merit, as discussed infra.

changes to the proposed project, he could not revoke his consent after the July 2012 meeting.[8] We discern no clear error in the judge's finding that the 1987 agreement required the parties to determine whether to consent to a new project before CMJ sought regulatory approvals. See Browning-Ferris Indus., Inc. v. Casella Waste Mgt. of Mass., Inc., 79 Mass. App. Ct. 300, 307-308 (2011) (meaning of ambiguous contract is question of fact subject to "clearly erroneous" standard of review). The judge's finding is supported by the fact that it typically cost CMJ a substantial amount of money to obtain regulatory approvals. In addition, as noted by the judge, material facts regarding a project may change up until the completion of construction, or possibly even later, and it would not have made sense to allow revocation of consent that far into a project. Instead, as the judge found, it made sense for those business decisions to be left to a majority vote of the board of directors.[9]

4. Damages. Mullins, as well as Corcoran and Jennison, argue that the judge erred in calculating the damages. We disagree. To put Corcoran and Jennison

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[8] Our conclusion regarding Mullins's ability to revoke his consent rests on his asserted objections to (1) the proposal to reduce his interest in the project; (2) the proposal to have CMJ guarantee the construction loan; and (3) the riskiness of the proposed financing strategy. We need not decide whether Mullins could have revoked his consent based on other hypothetical changes to the proposed project.

[9] Mullins argues that the judge erred in looking to the parties' past practices in interpreting the timing of the consent provision. Given the judge's other well-grounded reasons for interpreting the 1987 agreement as he did, we need not address this argument.

back in the position they would have been had Mullins not breached, the judge calculated lost profits by determining what Cobble Hill Center would have been worth once stabilized and by then subtracting from that amount (1) the likely cost to complete the project and (2) the value of the land still owned by CMJ. See Pasquale v. Casale, 72 Mass. App. Ct. 729, 736 (2008), quoting Situation Mgmt. Sys., Inc. v. Malouf, Inc., 430 Mass. 875, 880 (2000) ("An award of 'expectancy' damages may include lost profits"). See generally John Hetherington & Sons, Ltd. v. William Firth Co., 210 Mass. 8, 21 (1911) (setting forth long-established rule for breach of contract recovery). In determining the likely cost to complete the project, the judge credited the testimony of Corcoran and Jennison's expert witness that costs were increasing between 2013 and 2016. In determining the value of the land, the judge credited an independent financial analysis indicating that the parties could have sold the land in 2015, with regulatory approvals in place, for $ 15 million.

Corcoran and Jennison argue that the judge erred in considering the effect of inflation when determining the cost to complete the project. In making this argument, Corcoran and Jennison rely on evidence indicating that they had plans to enter into a guaranteed maximum price contract that would have fixed the costs. No such contract had been finalized, however, and we will not speculate on what contingencies any such contract may have included.[10] In these

[10] In fact, a CMJ monthly project report dated June 25, 2014, less than one month before Mullins filed his lawsuit, indicated, "We are expecting final pricing . . . during the first half of July.

circumstances, we see no reason to set aside as clearly erroneous the judge's finding that it would have cost $ 45 million to complete the project.

Mullins argues that the judge's lost profits analysis will result in a double recovery for Corcoran and Jennison, who still have an interest in the land and may one day develop it for a profit. As described above, however, the judge included in his calculation a reduction for the value of the land in 2015, with regulatory approvals in place. This reduction takes into consideration the fact that the parties still control the land and that they may eventually sell it for a profit. Mullins's arguments to the contrary challenge the judge's findings regarding the value of the land and the possibility of future profits, none of which are clearly erroneous.[11]

Corrected and amended judgments affirmed.

The construction contract will still need to be negotiated before issuing notice to proceed. . . ."

[11] For example, we are not persuaded by Mullins's arguments that the parties could have entered into a presale transaction for an amount in excess of $ 60 million. Such a transaction would have required CMJ to contract, before starting construction, to sell the property to a third-party investor at some future date. Where Mullins, himself, testified that he was not aware of any presale transactions in the Boston area, we see no error in the judge's finding that the possibility of any such transaction was completely speculative.

2018 WL 5985275 (Mass.Super.) (Trial Order)
Superior Court of Massachusetts.
Suffolk County

Joseph R MULLINS,
v.
Joseph E CORCORAN et al.

No. SUCV201402302.
June 19, 2018.

Amended Judgment on Finding of the Court

Kenneth W. Salinger, Judge.

***1 JUDGMENT FOR THE FOLLOWING PARTY(S)**

Joseph E Corcoran

JUDGMENT AGAINST THE FOLLOWING PARTY(S)

Joseph R Mullins

This action came on before the Court, Hon. Kenneth W Salinger, presiding, and upon consideration thereof,

After Non-Jury Trial, it is ORDERED AND ADJUDGED:

That judgment enter [sic] as outlined below, Jointly & Severally with interest thereon as provided by law, and the statutory costs of action.

1. Date of Breach, Demand or Complaint	08/12/2014
2. Date Judgment Entered	06/19/2018
3. Number of Days of Prejudgment Interest *(line 2-Line1)*	1407
4. Annual Interest Rate of 0.12/365.25 = Daily Interest rate	.000329
5. Single Damages	$9,000,000.00
6. Prejudgment Interest *(lines 3x4x5)*	$4,166,127.00
7. Double or Treble Damages Awarded by Court *(where authorized by law)*	$
8. Statutory Costs	$5,370.52
9. Attorney Fees Awarded by Court (where authorized by law)	$
10. **JUDGMENT TOTAL PAYABLE TO PLAINTIFF(S)** *(Lines 5+6+7+8+9)*	$13,171,497.52

DATE JUDGMENT ENTERED

06/19/2018

ASST. CLERK

X <<signature>>

COMMONWEALTH OF MASSACHUSETTS

Suffolk County Superior Court

JOSEPH R. MULLINS,

Plaintiff,

vs. C.A. No. SUCV2014-2302-BLS2

JOSEPH E. CORCORAN and GARY A. JENNISON,

Defendants.

BENCH TRIAL DAY 14

BEFORE: The Hon. Kenneth W. Salinger
Thursday, June 14, 2018
10:00 a.m.

Held At: Suffolk Superior Court
3 Pemberton Square, Room 1017
Boston, Massachusetts

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[2117] INDEX

[2118] PROCEEDINGS

COURT OFFICER: Court. All rise.

THE CLERK: Joseph R. Mullins Joseph E. Corcoran, Civil Action 2014-2302.

Counsel, identify themselves for Judge Salinger for the record, please.

MR. DONNELLY: Good morning, your Honor. Christopher Donnelly, Donnelly Conroy Gelhaar, for the plaintiff, Joseph Mullins.

MR. MADDEN: Good morning, your Honor. Timothy Madden, also for the plaintiff, Mr. Mullins.

THE COURT: Good morning.

MR. FALBY: Good morning, your Honor. Bruce Falby for Joseph E. Corcoran.

MR. BARNETT: Bruce Barnett, also for Mr. Corcoran.

MS. BROWN: Jennifer Brown, also for Mr. Corcoran.

MR. LEVIN: Andrew Levin for Gary Jennison.

THE COURT: And good morning to you all, as well.

As everyone in the courtroom knows, this is a lawsuit brought by Mr. Joseph R. Mullins, the plaintiff, against Joseph E. Corcoran and Gary A. Jennison, the defendants. Mr. Mullins has asserted claims for breach of contract and breach of fiduciary duty, and Mr. Corcoran and Mr. Jennison have asserted counterclaims for breach of contract and breach of fiduciary duty.

[2119] This case was tried before me without a jury by agreement of all the parties. I heard evidence over the course of 12 days, considered all of the 300 exhibits, considered the closing arguments by counsel on both sides and the proposed findings that were submitted after that by both sides.

And you all are here, as you know, but I should state for the record, because it is now time for me to make relevant findings of fact and rulings of law and to render a verdict on the claims and counterclaims in this case.

I make the following findings based on all of the evidence presented at trial and on reasonable inferences that I've drawn from that evidence.

I should note that I am not giving any weight to the deposition testimony of Mr. Joseph E. Corcoran because it is apparent to me that when he testified at his deposition, he had no clear memory of any relevant events. I will also note that I do not believe that I would have reached any different conclusions, made any different findings, if I had given substantive weight to that testimony, as it was, essentially, cumulative of other evidence that I've heard.

Let me start by making some findings about the general background regarding this case. Mr. Corcoran, Mr. Mullins, and Mr. Jennison have been in business together since the early 1970s. They were working closely together in the [2120] 1970s and 1980s, working to develop residential real estate projects, mostly multifamily apartment buildings.

Initially, they formed a company that they called Residential Development, and in 1973, they changed the name of the company to Corcoran Mullins Jennison, Inc., which I will refer to, as the parties have, as "CMJ."

At the beginning, Mr. Corcoran owned 80 percent of that business and Mr. Mullins and Mr. Jennison each owned 10 percent, but at some point, Mr. Mullins and Mr. Jennison agreed to transfer full ownership of three of CMJ's projects to Mr. Corcoran and, in exchange, their interest in CMJ increased to 20 percent each, with the remaining 60 percent owned by Mr. Corcoran.

At some later point, Mr. Jennison transferred beneficial interest in some or a large portion of his 20 percent share, at least with respect to particular projects, to various trusts that were created for tax planning purposes.

Now, even though Mr. Corcoran owned a majority share of CMJ, the company's bylaws always provided that the business would be managed by a three-member board of directors, consisting of Mr. Corcoran, Mr. Mullins, and Mr. Jennison, or their designees, and that the board could act by a majority vote. So the daily business of the company was not controlled by Mr. Corcoran; and, instead, CMJ could [2121] make business decisions so long as at least two of the three board members agreed.

For decades, Mr. Corcoran, Mr. Mullins, and Mr. Jennison were the three board members. Only in recent years have Mr. Corcoran and Mr. Mullins

designated somebody else to serve on the CMJ board of directors in their place.

The CMJ bylaws provided that the board could hold regular meetings whenever it wanted without advance notice, and it also provided that a meeting could be held whenever a quorum of at least two board members was present. As a practical matter, Mr. Corcoran, Mr. Mullins, and Mr. Jennison did so by meeting once a week or once every other week in their offices and making whatever business decisions were needed.

These three parties understood that the main business of CMJ had been to develop multifamily rental housing, to lease up, maintain, and hold each project over the long term, and to take equity out of the project and transfer it to Mr. Corcoran, Mr. Mullins, and Mr. Jennison periodically by financing or refinancing the project; in other words, by borrowing money through loans secured by the property and its future income streams.

By the mid 1980s, CMJ had developed and owned roughly 25 residential apartment projects. Each project was typically owned directly by a separate limited partnership [2122] or limited liability company, which was owned by Mr. Corcoran, Mr. Mullins, and Mr. Jennison, sometimes with other limited partners or members also holding minority interests in a particular project, and the project would be managed by a separate CMJ subsidiary.

Throughout this time, up through the mid 1980s, each of CMJ's projects was financed in, essentially, the

same way; CMJ would cover the costs of doing an initial feasibility analysis and the cost of seeking entitlements, zoning approvals and other regulatory approvals, essentially, out of its working capital.

CMJ would then take out a construction loan to cover the cost of building out the project if all approvals that the parties have referred to as entitlements were received, and then once the project was built and then had been leased out and, therefore, financially stabilized, CMJ would obtain long-term financing secured by the property and its revenues.

CMJ usually obtained long-term financing through different government-subsidized loan programs. CMJ's aim, when it obtained long-term financing for a project, was to borrow as much as it could in an amount that exceeded what was needed to retire the construction loan so that it could distribute the excess capital, that portion of the equity in the project, to the three CMJ owners. In other words, [2123] CMJ used long-term financing as a way to take equity out of its projects, convert the equity to cash, and distribute those amounts to Mr. Corcoran, Mr. Mullins, and Mr. Jennison, or trusts that they designated.

As market rates and, thus, the amount that CMJ could charge occupants of particular projects increased over time, the higher rental income stream of a project could support a higher amount of debt, thus creating repeated opportunities to refinance each property, take out equity, and transfer that equity to Mr. Corcoran, Mr. Mullins, and Mr. Jennison.

CMJ was very successful at this business model, and its three principals each made, as I understand it, many millions of dollars through this business.

By the mid 1980s or so, Mr. Mullins decided that he wanted to start his own business, and eventually, in March of 1987, the three principals, Mr. Corcoran, Mr. Mullins, and Mr. Jennison, agreed to separate part, but not all, of their existing business interests. They entered into a written contract to carry out that agreement.

The essence of this 1987 agreement is that Mr. Mullins was free to do his own projects going forward; that Mr. Corcoran and Mr. Jennison were free to do their own projects, without Mr. Mullins, going forward; they would divide up some, but not all of the existing CMJ projects, [2124] and the other existing projects would continue to be owned and managed by CMJ.

As to certain projects, Mr. Mullins sold his interest to Mr. Corcoran and Mr. Jennison. To the extent those projects had been owned by CMJ, rather than by separate entity, they were transferred to a new entity formed by Mr. Corcoran and Mr. Jennison called Corcoran Jennison, Inc. The parties have referred to that company as "CJ," and I will do the same. CJ was owned – as I understand it, it's still owned – two-thirds by Mr. Corcoran and one-third by Mr. Jennison.

Mr. Mullins took ownership of three of CMJ's projects, and he has continued in business through an entity called Mullins Management Company.

Most of the CMJ projects as of 1987 were to remain owned by CMJ, which itself remained owned in 60/20/20 shares by the three principals, as I've already found.

This 1987 agreement specified that Mr. Corcoran, Mr. Mullins, and Mr. Jennison would continue "to enjoy all of the economic benefits of" CMJ and its subsidiaries and affiliates, and they would do so "pro rata in accordance with their present stock ownership." The effect of this language was to guaranty that ownership of the CMJ companies would continue to be allocated 60 percent to Mr. Corcoran, 20 percent to Mr. Mullins, and 20 percent to [2125] Mr. Jennison.

The parties to that 1987 agreement, the three principals, stated in the second "whereas" clause that as to these properties, their intent was "to preserve and continue the business of" CMJ.

The 1987 agreement provided that going forward, CJ would provide all services and duties needed to manage and operate the projects that CMJ continued to own. As a technical matter, the contract provided that an entity called CMJ Management Company, Inc., would manage and operate the CMJ projects and that CJ would provide all services and duties necessary to manage and operate CMJ Management Company, in exchange for being paid 12-1/2 percent of CMJ Management Company's net profit.

The parties chose not to amend the CMJ bylaws when they entered into their 1987 agreement, so the

general rule remained that CMJ's business decisions could be made by a two-thirds vote of the CMJ board.

Now, the 1987 agreement made some exceptions that are at the center of this case, exceptions that either required unanimous consent of Mr. Corcoran, Mr. Mullins, and Mr. Jennison for certain actions or barred certain actions altogether, which, in effect, meant that such actions could only be undertaken with unanimous consent of Mr. Corcoran, Mr. Mullins, and Mr. Jennison, since, under Massachusetts [2126] law, they remain free to amend their 1987 agreement at any time.

The 1987 agreement included a few other provisions or terms that are at issue in this case. The parties agreed that all business dealings of or among Mr. Corcoran, Mr. Mullins, and Mr. Jennison personally, CMJ, the other CMJ entities, or CJ, "shall be conducted in scrupulous good faith according to good established business practices and with full access of all such persons and entities to relevant documentation and records."

The parties also agreed in the 1987 contract not to do or fail to do anything that would either have the effect of frustrating or impeding the business activities or prospects of CMJ or the other named business entities or that would interfere with fulfillment of any obligations under the agreement or that "would unfairly reallocate the economic benefits" of CMJ or the other named business entities.

The 1987 agreement provided that CMJ would not "merge, sell, pledge, or transfer a major portion of its

assets." During the negotiations over the 1987 agreement, Mr. Mullins wanted the right to veto any sale, transfer, or encumbrance of any CMJ property. Mr. Corcoran and Mr. Jennison, on the other hand, wanted majority rule, with nobody having a veto over any sale or encumbrance. The [2127] compromise reflected in the contract language is that unanimous approval would be needed to sell or encumber a "major portion" of CMJ's assets, but that neither Mr. Mullins, nor the other two principals, would be able to veto the sale or encumbrance of a single property or anything else that did not amount to a major portion of CMJ's total assets.

The 1987 contract provided that CMJ would not "guaranty the obligations" of any entity, and it also provided that Mr. Mullins was to be furnished with all reports prepared for the management of CMJ and the other companies named in the agreement, and that this was specifically to include all financial statements, projections, feasibility reports, and budgets, and that Mr. Mullins had the right to be apprised of – kept apprised of all material information.

One other provision of this 1987 agreement may be the most significant in this dispute. At Page 7, the contract provided that CMJ would not "enter into any new ventures without the unanimous consent" of Corcoran, Mullins, and Jennison. There's no requirement in the contract that such consent be in writing; oral consent, if unanimous, would be sufficient.

I find that this provision is ambiguous, because it does not make clear when, during the process of

planning and undertaking a new real estate development venture, [2128] unanimous consent of the CMJ principals must be obtained. Since the provision is ambiguous, its meaning is a question of fact, not a question of law. See, for example, Seaco Insurance Company v. Barbosa, 435 Mass. 772, 779 (2002).

The general principles of interpreting a contract, including the 1987 agreement, are familiar. As with any contract concerning a business venture, I must construe this 1987 agreement in a manner that will give it "effect as a rational business instrument and in a manner which will carry out the intent of the parties." That's the Supreme Judicial Court of Massachusetts in the case of Robert and Ardis James Foundation v. Meyers, 474 Mass. 181, 188 (2016).

In interpreting the contract, "The parties' intent must be gathered from a fair construction of the contract as a whole and not by special emphasis upon any one part." That is from Kingstown Corp. v. Black Cat Cranberry Corp., 65 Mass. App. Ct. 154, 158 (2005). Appeals Court is quoting a few older SJC decisions, but I won't bother to read out those cites.

Since this provision requiring unanimous consent where CMJ could enter into any new ventures without unanimous consent, since this provision is ambiguous, I may consider what the law refers to as extrinsic or parol evidence, evidence other than the language of the contract itself, [2129] "in order to give a reasonable construction" to this contract "in light of the intentions of the parties at the time of formation of the contract."

That's from President and Fellows of Harvard College v. PECO Energy Company, 57 Mass. App. Ct. 888, 896 (2003).

Among the other relevant evidence that I may consider, I'm allowed to consider "the course of dealing between the parties" in deciding what this provision means. That is the SJC in Starr, 420 Mass. at 190, Note 11, and the SJC was quoting the Restatement (Second) of Contracts Section 212, Comment b.

At CMJ, the process for developing a real estate project on a particular site had always involved, essentially, three distinct stages, at least once a property was identified or obtained.

The first stage was a thorough feasibility analysis of what actually could be built at the site, taking into account zoning and other regulatory requirements, and also what could profitably be built at the site, taking into account likely development costs and the stream of net revenue that the project would likely generate once built.

The second stage was seeking and obtaining all necessary zoning and other regulatory approvals. Real estate developers and the principals in CMJ refer to this as the process of seeking "entitlements," those legal – [2130] I'm sorry – those legal approvals that, once obtained, mean that the landowner is now entitled to build a particular project.

The third stage was implementation of those entitlements by constructing the project and putting it into

operation, which, in the case of the multifamily residential buildings typically constructed by CMJ, means renting out the apartments or residential units.

Before the 1987 agreement, the process at CMJ for deciding whether to enter into a new venture had always been the same. Once feasibility planning was complete, Mr. Corcoran, Mr. Mullins, and Mr. Jennison would decide whether they wanted to go forward with the project and seek entitlements. They always treated that as the go/no go point. If the three CMJ principals decided to go forward, they would seek entitlements, and if they successfully obtained entitlements, they would build the project without second-guessing their prior decision.

The practice of Corcoran, Mullins, and Jennison before they entered into the 1987 agreement had always been to treat the decision to seek entitlements as a decision to build the project. If entitlements were obtained, they did not reconsider their prior decision to go forward; to the contrary, in every instance when CMJ received entitlements, it then built the project based on the decision they had [2131] made at the end of the feasibility stage to proceed with the project.

This was CMJ's business practice for several reasons: First, seeking entitlements is expensive. They required very detailed plans, reports, and applications, and CMJ – the three principals did not want to incur that substantial expense if they weren't already committed to going forward with the project should they obtain the entitlements they needed.

Second, CMJ believed that its credibility was on the line with local officials. If they sought entitlements saying they planned to develop a proposed project, it had always been their business practice to follow through by, in fact, developing that project if the necessary entitlements were granted.

I find that when the parties agreed in 1987 that CMJ could not enter into new ventures without unanimous consent, they intended, consistent with CMJ's past practice and the parties' prior course of dealing, that such consent would have to be obtained after feasibility analysis was completed and before seeking entitlements, and that consent to seek entitlements would mean consent to proceed with and build the project if entitlements were obtained.

I also find that the parties did not intend to require unanimous consent to make any subsequent decisions about [2132] how to best proceed with a new venture. In other words, the parties' intent was to require unanimous consent to enter into or pursue a new venture, but once such consent to seek entitlements was given for a new venture, then all subsequent decisions about that project could be made by two-thirds of the CMJ directors, in accord with the CMJ bylaws.

Now, at trial, Mr. Mullins has argued through counsel that under this contract provision, he could not give or be asked to give consent to enter into a new venture until he was given full information about and the opportunity to accept or reject all material facts concerning long-term financing for the project and

concerning ownership of the project. I disagree, and I find that is not what the parties intended.

Let's separate out those two parts of the argument, starting with the argument about consent to long-term financing. I find that it would not have made rational business sense in 1987 to give each of the CMJ principals absolute veto power over a new real estate development project at any time before the terms of long-term financing were finalized. Those terms could not be known until after construction was complete, or at least nearly complete, and, therefore, not until after CMJ had already incurred the cost to build and develop the new venture. It was not [2133] until that point in time that CMJ was able to go into the market and seek long-term financing and find out what terms would be available.

I find the intent of this new venture provision was to require unanimous consent before CMJ incurred the substantial cost of seeking entitlements, never mind the even more substantial cost of building the project.

Now let's turn to the argument about consent to the ownership structure for each project. As I've already explained, the parties resolved this issue when they negotiated and executed the 1987 contract by agreeing and specifying in that contract that Mr. Corcoran, Mr. Mullins, and Mr. Jennison would all "enjoy all of the economic benefits of" CMJ and its subsidiaries and affiliates, and that they would do so "pro rata in accordance with their present stock ownership."

It's interesting that this provision appears in the 1987 agreement on Page 7 in the sentence immediately preceding the unanimous consent requirement for new ventures. This provision guaranteed that Mr. Mullins would own 20 percent of any new venture approved by all three principals. As a result, the parties did not intend that unanimous consent would be tied to any discussion regarding ownership structure.

Of course, since Mr. Mullins was guaranteed a [2134] 20 percent ownership interest, that could not be changed without his consent. It could not be changed, perhaps, without unanimous consent. I don't need to reach that issue, but I do find that the provision requiring unanimous consent before entering into a new venture was not tied to further discussion about ownership structure, because that was resolved in the 1987 agreement.

Let's move forward from 1987. After the three principals executed the 1987 agreement, for several years they continued to meet every Tuesday or every other week as the CMJ board to make any necessary business decisions, as they always had. Those meetings ended in 2001, after Mr. Mullins brought suit against Mr. Corcoran and Mr. Jennison and against CMJ.

After Mr. Mullins sued him, Mr. Corcoran was no longer willing to meet or speak directly with Mr. Mullins about business matters, and so, instead, Mr. Corcoran and Mr. Jennison arranged for top-level staff of CMJ and CJ to have quarterly meetings with Mr. Mullins and his Mullins Management Company team to

keep them apprised of and answer their questions regarding CMJ's projects and businesses.

Marty Jones, who at least for some time was president of CMJ, ran these meetings until she left the company in 2001, and thereafter, Chris Holmquest ran these quarterly meetings until he left CMJ and CJ in November of 2014.

[2135] Mr. Mullins typically went to these quarterly meetings, accompanied by key members of his small staff at Mullins Management Company. Sometimes Mullins Management Company staff would attend those meetings without Mr. Mullins.

During the 2012 to 2014 period of most interest in this case, both Michael Mullins and Kayla Lessin typically accompanied Mr. Mullins at these quarterly meetings with the CJ and CMJ staff. Sometimes David Sullivan joined them, as well.

Michael Mullins is Mr. Mullins' son. He joined Mullins Management Company in 2000 and became president of that company in 2006. He has an MBA and also earned a master's in real estate development from MIT. Michael Mullins became a director of CMJ as of January 1, 2016, succeeding his father as Mr. Mullins' designated director on the CMJ board.

Kayla Lessin joined Mullins Management Company in January of 2010. She is trained as a lawyer, having earned her JD from Northeastern Law School. Her responsibilities at Mullins Management Company

include, among other things, helping Mr. Mullins and his son, Michael Mullins, oversee the CMJ portfolio.

David Sullivan is the outside consultant for Mullins Management Company. He's not a full-time employee of the company, but he's been involved in the finances of [2136] Mr. Mullins and Mullins Management Company for years.

Let's start focusing on the property that's at issue in this lawsuit. Under the 1987 agreement that I've discussed, one of the existing CMJ projects that remained owned by CMJ was the Cobble Hill Apartments in Somerville. The property is located at the intersection of Washington and New Washington Streets, a short distance east of Union Square in Somerville, Massachusetts.

As of the 1987 agreement, the Cobble Hill project consisted of four apartment buildings and a one-story strip mall, essentially, that CMJ had constructed in 1982. The retail strip mall was at the western end of the property and the four apartment buildings were on the eastern side.

The four apartment buildings were each five or six stories tall. Altogether, they contained 224 units, 190 one-bedroom units and 34 two-bedroom units. One unit was occupied by the project superintendent; the other 223 units were all occupied by elderly or disabled tenants, whose rent was publicly subsidized under a so-called Section 8 contract.

The Cobble Hill Apartments and the site as a whole are within walking distance of the MBTA's Sullivan Square Station on the Orange Line and also within walking distance of Union Square in Somerville.

In September of 2003, CMJ decided to refinance the [2137] Cobble Hill Apartments. As part of that transaction, the three principals, Mr. Corcoran, Mr. Mullins, and Mr. Jennison, decided to legally separate the western portion of the Cobble Hill site, where the one-story retail building was located, from the rest of the site, where the four apartment buildings were located, so that the refinancing would be secured only by the four apartment buildings and their revenue and the portion of the site occupied by the retail building would be separated and become available for redevelopment separate and apart from any financing of the Cobble Hill Apartments.

Consistent with CMJ's past practice, they formed a new entity to control that retail or commercial portion of the site. They called the new entity Cobble Hill Center, LLC. That new entity obtained a 99-year lease of the existing commercial building and the 3.9 acres surrounding it from the Cobble Hill Apartments Company that was the owner of the land, and it obtained that lease in exchange for an initial payment equal to the site's then-appraised value or $1.326 million, plus annual rent of $10 a year thereafter.

This lease gave Cobble Hill Center, LLC, the right to purchase and take fee simple title to the building

and leased parcel for nominal additional consideration, one dollar, if subdivision and regulatory approval for doing so was obtained.

[2138] Cobble Hill Center, LLC, was operated by CMJ and was indirectly owned by Mr. Corcoran, Mr. Mullins, and Mr. Jennison as follows: CMJ was the manager of Cobble Hill Center, LLC. Cobble Hill Center, LLC, consisted of a single member, the Cobble Hill Trust, which owned 100 percent of the interest in Cobble Hill Center, LLC. The sole beneficiary of the Cobble Hill Trust was an entity called CMJ Cobble Hill, LLP, and CMJ Cobble Hill, LLP, was owned 60 percent by Mr. Corcoran, 20 percent by Mr. Mullins, and 20 percent by Mr. Jennison.

Neither side has argued in this case that any of the claims or counterclaims should have been asserted as a derivative action on behalf of CMJ Cobble Hill, LLP, or any other entity, and I find that any such claim or defense is waived.

Mr. Mullins did argue for the first time in his post-trial request for findings that Mr. Jennison is not the real party in interest to assert his counterclaims because Mr. Jennison, it is argued, transferred some or all of his share in CMJ Cobble Hill, LLP, to various trusts that had been created for estate planning purposes.

I find that Mr. Mullins waived this issue by failing to assert it as an affirmative defense in his answer, failing to present any evidence on the issue at trial, failing to address it in his opening statement or closing

argument. [2139] In any case, as I just explained, I find that Mr. Jennison personally owned, and still owns, 20 percent of CMJ Cobble Hill, LLP, and I, therefore, find Mr. Jennison is the real party in interest with respect to the counterclaims he's asserted in this case.

I'll also note that if Mr. Mullins had not waived the issue and if the record evidence had, in fact, shown that Mr. Jennison had transferred some or all of his ownership interest in the Cobble Hill Center property to one or more trusts, then I would exercise my discretion under Rules 15(b) and 17(a) of the Massachusetts Rules of Civil procedure to allow Mr. Jennison to amend his counterclaims to substitute or join the real party in interest as plaintiffs-in-counterclaim. Bottom line, I don't see that as a real issue in the case.

Moving forward in time, although Mr. Mullins and the other two CMJ principals agreed in 2003 to separate the Cobble Hill Center site from the rest of the Cobble Hill Apartments site and to explore the feasibility of redeveloping the Cobble Hill Center property, none of the three principals agreed at that time to seek entitlements for a new venture on the Cobble Hill Center site. No feasibility planning had even been done at that point in time.

I find that Mr. Mullins' agreement in 2003 to legally [2140] separate the Cobble Hill Center site and to explore the feasibility of redeveloping it was not consent to enter into – for CMJ to enter into a new venture at that site.

In 2009, CMJ made Joseph J. Corcoran, the son of Joseph E. Corcoran, project director for the Cobble Hill Center, assigning him responsibility to analyze the feasibility of redeveloping that site. Mr. Mullins was aware of that.

In September of 2011, a rent comparability study was prepared and completed for the Cobble Hill Apartments. That study was conducted by a HUD appraiser named Joseph Antonelli, somebody who Mr. Mullins knew and respected. Mr. Antonelli concluded that market rates in the area had increased substantially by September of 2011.

A copy of that report was sent to Mr. Mullins, and he understood that brand-new apartments, if any were constructed at the Cobble Hill Center site next door, would be able to produce even higher market rents than those Mr. Antonelli found were the market rents for the Cobble Hill Apartments.

So at least as of September of 2011, Mr. Mullins had a good idea of the kind of revenue that a new apartment building at Cobble Hill Center could produce on a per-unit basis.

During the regular quarterly meeting with Mr. Mullins [2141] and the Mullins Management Company staff that was held in January of 2012, Chris Holmquest informed Mr. Mullins that CMJ and Mr. Joseph Corcoran were working on plans to develop a 160- to 170-unit apartment building at the Cobble Hill Center site.

At some point before the meeting, Mr. Holmquest sent to Mr. Mullins a much more detailed status report that had been prepared by Joseph J. Corcoran. That report informed Mr. Mullins that Joseph J. Corcoran was recommending that CMJ "proceed forward with a plan to build 167 units in a six-story wood-framed structure over a podium."

In the report that was sent to Mr. Mullins, Joseph J. Corcoran explained that the City of Somerville had made clear to him it wanted more density on the site; that because of building code changes, CMJ could now build a six-story building, consisting of five stories of wood framing, rather than much more expensive steel framing, over a one-story concrete podium, which would make a six-story building of residential apartments economical, and it made clear that Joseph J. Corcoran believed that CMJ could obtain entitlements from the City of Somerville for a building of roughly 167 units.

The report also informed Mr. Mullins that it would cost roughly $1.25 million to obtain entitlements and get to the point where CMJ would be able to close on a construction [2142] loan.

This report, the December 2011 report that was sent to Mr. Mullins no later than early January of 2012, included pro forma financial statements analyzing the feasibility and likely profitability of an apartment building project at the Cobble Hill Center site.

In the report, Joseph J. Corcoran estimated it would cost a total of about $36.7 million to develop a

167-unit building, including the payment that had already been made to CMJ for the land. He estimated the stabilized net operating income once the building, if constructed, was rented out. Joseph J. Corcoran estimated annual gross income and operating expenses from such a building, subtracting the two resulting in an estimate that the stabilized building would produce $2.836 million in annual net operating income before debt service. In other words, that would be its cash flow.

This report provided to Mr. Mullins said these estimates were made assuming that two-thirds of the building would be studio or one-bedroom apartments and that one-third would be two-bedroom apartments, and that the rental rate assumptions used in these pro forma financials were based on actual market rates of two newer developments not too far away in Charlestown and Medford.

Joseph J. Corcoran also calculated and reported in this [2143] report to Mr. Mullins that on a HUD Section 221(d)(4) loan of $36.7 million, the estimated total development costs, the annual debt service would be about $2.2 million. This meant that the projected net cash flow in these pro formas, after accounting for operating expenses and debt service, would be a positive of more than $600,000 a year.

The pro formas that were sent to Mr. Mullins in January of 2012 or so showed that, assuming that the completed and stabilized project were [sic] valued in the market at a 5 percent cap rate, a 167-unit residential

apartment building at that site would be worth $56.7 million once stabilized, and, therefore, that the building would be worth roughly $20 million more than it would cost to develop the building, a potentially huge return.

I just talked about cap rate. As the parties here understand, a cap rate is just the ratio of annual cash flow to property value. It's a standard metric used to describe how real estate investors value commercial real estate. Put another way, annual cash flow divided by the cap rate equals the purchase price that an investor would be willing to pay. For any given cash flow, the higher the cap rate, the lower the purchase price.

If Mr. Mullins or Michael Mullins thought that the assumed cap rate of 5 percent were too low, it would have taken them just a quick moment to recalculate the projected [2144] profit using a higher cap rate.

I find that under the cost and revenue estimates reported by Joseph J. Corcoran in this December 2011 report that was sent to Mr. Mullins, the project would be very profitable even if the market cap rate, once the building were stabilized, were materially higher than 5 percent.

For example, if one were to assume that the cap rate to value the stabilized building would be 6 percent, rather than 5 percent, the building would still be worth over $10 million more than the projected development costs. The math here is simple. Dividing Joseph J. Corcoran's estimate that the stabilized building would generate $2.836 million in annual net operating

income by a 6 percent cap rate produces a market value of $47.3 million for the completed project, which is more than $10-1/2 million higher than the $36.7 million in development costs projected at that time by Joseph J. Corcoran.

This December 2011 report by Joseph J. Corcoran included a number of possible rough site plans showing a 167-unit building recommended by Joseph J. Corcoran as Phase I of redevelopment of Cobble Hill Center and showing that there would be room available to construct a second large apartment building on the site in a hypothetical future Phase II.

[2145] In his December 2011 report, Joseph J. Corcoran explained that this was "a site planning exercise only," undertaken at the request of the City of Somerville, which itself was doing master planning for the area because of the MBTA's plan to extend the Green Line subway system to Union Square.

Joseph J. Corcoran made clear in the report that such a Phase II development would only be possible if the City were to rezone the land and that approval for a second building at the site could not be obtained under the existing zoning code.

In the spring of 2012, Joseph J. Corcoran asked a general contractor named Plumb House to estimate the cost of building a 167-unit apartment building at this site under two alternative scenarios, with and without prevailing wage requirements.

Joseph J. Corcoran understood that one of the HUD programs that might be available to provide long-term financing for the project would require that the project be built using union labor or paying other labor at the prevailing wage available to union labor, and so he wanted to get a better idea of what it would cost to build the project either with or without union labor.

Plumb House estimated that it would – estimated what it would cost to construct the building that Joseph J. [2146] Corcoran had recommended in his December 2011 feasibility analysis, as I explained, a six-story building consisting of five stories of wood framing over a one-story podium, and Plumb House assumed that it would have 168 residential units.

Plumb House's estimates were that at the prevailing wage rates, it would cost around $36 million to construct this project, and if there were no prevailing wage requirement, it would cost almost $27 million to build the project, substantially less.

At the end of June of 2012, Chris Holmquest sent an e-mail to Ms. Lessin and to David Sullivan of Mullins Management Company with a number of updates, including an update about the Cobble Hill Center potential project.

Mr. Holmquest said in this e-mail that he would ask Joseph J. Corcoran to attend the next quarterly meeting between CMJ and Mullins Management Company in order to provide an update on the Cobble Hill project.

At this time, Mr. Holmquest sent Ms. Lessin and Mr. Sullivan another copy of Joseph J. Corcoran's December 2011 report. This is the same report that had been provided already to Mr. Mullins in January of 2012.

At the same time, in a separate e-mail, Mr. Holmquest also forwarded a copy of a more recent status report from Joseph J. Corcoran about the Cobble Hill Center project [2147] dated June 15, 2012. In that report, Joseph J. Corcoran explained that a condition for obtaining HUD financing for new construction is to pay prevailing wage rates that equal union rates, and that preliminary estimates showed that prevailing wage rates would increase construction costs by 8 or $9 million. Mr. Corcoran attached to his June 2012 status report a copy of the analysis by Plumb House that I've already described.

Ms. Lessin forwarded both of these reports, the December 2011 and the June 2012 reports from Joseph J. Corcoran, she forwarded them both to Mr. Mullins and to Michael Mullins before the planned quarterly meeting in July of 2012.

That meeting happened on July 17, 2012. The attendees included Chris Holmquest and Joseph J. Corcoran, as well as Mr. Joseph Mullins, Michael Mullins, Kayla Lessin, and David Sullivan on behalf of Mr. Mullins and Mullins Management Company.

I infer and I, therefore, find that before this meeting, Mr. Mullins and Michael Mullins read at least the two-page cover memo at the front of Joseph J.

Corcoran's December 2011 status report, reviewed the attachments, and reviewed Joseph J. Corcoran's June 2012 updated status report. Therefore, both Mr. Mullins and his son, Michael Mullins, knew from the very first sentence to Joseph J. [2148] Corcoran's December 2011 memorandum that Joseph J. Corcoran was recommending that CMJ "proceed forward with a plan to build 167 units in a six-story wood frame structure with a podium" at the Cobble Hill Center site in Somerville.

At the July 17 meeting, Mr. Joseph J. Corcoran reiterated his recommendation, and he made a detailed presentation recommending that CMJ proceed with and seek entitlements for the 167-or-so-unit residential building that he described in his December 2011 and June 2012 reports.

Mr. Corcoran used many handouts to walk Mr. Mullins and his staff through the details of Mr. Corcoran's feasibility analysis. Mr. Corcoran reiterated what he had already reported in his written feasibility analyses. He explained why he believed the City would approve and grant all necessary entitlements for the planned 167-unit building, he explained the likely cost to seek entitlements, the likely cost to construct the building, and he explained why the building, once complete, was likely to be very profitable for CMJ.

After Joseph J. Corcoran finished his presentation at the July 17th, 2012, meeting, Mr. Mullins made clear that he approved the project and fully supported going forward with it. Mr. Mullins said he agreed with

Joseph J. Corcoran's recommendation. I find that Mr. Mullins [2149] understood that he was agreeing with the recommendation to seek entitlements for and then proceed forward with building the planned 167-unit building.

At the meeting, Mr. Mullins encouraged Joseph J. Corcoran to hire a local Somerville lawyer to help with the zoning approval process, echoing what Joseph J. Corcoran himself had recommended in his December 2011 feasibility analysis report.

Mr. Mullins did not say at this meeting that he needed any more information about how the project would be financed or how its ownership would be structured before he could approve the project. He expressed no reservations or concerns about the project or its financing.

I find that by agreeing at this meeting with Joseph J. Corcoran's recommendations, Mr. Mullins gave his consent for CMJ to enter into a new venture at the Cobble Hill Center site, to seek entitlements for a roughly 167-unit residential apartment building at that site, and to construct the project if the City issued the necessary approvals. Joseph E. Corcoran and Gary Jennison also gave their consent to CMJ entering into this new venture.

Once all three principals, Mr. Corcoran, Mr. Mullins, and Mr. Jennison, had given their unanimous consent to this new venture, Joseph J. Corcoran proceeded to seek and obtain all necessary entitlements from the City of [2150] Somerville.

CMJ needed to obtain several things: First, it needed approval to subdivide the Cobble Hill lot, therefore legally separating the Cobble Hill Center parcel from the Cobble Hill Apartments land, and it also needed a special permit with variances.

It needed a special permit because under the zoning code or zoning ordinance in effect in Somerville, given the zoning district that this property was in, only three units of residential housing could be built as a right. The larger multifamily residential building that Mr. Joseph J. Corcoran had recommended could be built, but only if the City granted a special permit after conducting site plan review.

And, as part of that permit, CMJ was also going to need several variances. It would need a variance to exceed the existing height limitation in order to be able to construct the six-story building that it wanted to put there, and it would need a variance of the per-unit number of parking spaces that are required under the zoning ordinance in order to reduce the number of spaces to something that could reasonably be accommodated on the site without having to incur extra expense of putting parking spaces belowground.

In October of 2012, Joseph J. Corcoran sent a [2151] substantial portion of the zoning submission package for the project that had been drafted. He sent this, at that time, to Ms. Lessin at Mullins Management Company, and Ms. Lessin immediately forwarded that to Mr. Mullins, to Michael Mullins, and to Dave Sullivan.

The materials that were sent on in October of 2012 made clear that CMJ's proposal to the City was going to be for a 159-unit building, with 25 studio apartments, 59 one-bedroom apartments, and 45 two-bedroom apartments. And I may have some of those numbers wrong. I don't think the math is right, but it was a 159-unit building.

The proposal, I find, had been reduced from 167 units to 159 units as a result of Joseph J. Corcoran's ongoing communications with the City's planning department staff regarding what would ultimately be something that the City could approve. I find this was not a material change from the scope of the project that was anticipated when Mr. Mullins gave his consent to enter into this new venture.

The materials prepared for the City and then shared with Mr. Mullins in October of 2012 describe this project in great detail. Mr. Mullins never raised any objection after seeing those detailed plans, either to the number of residential units or otherwise.

I find that CMJ did not provide Mr. Mullins with all [2152] internal memoranda and communications regarding the Cobble Hill Center project, but I also find that from December of 2011 on, including throughout 2013, Joseph J. Corcoran prepared regular status reports regarding this project; that Mr. Holmquest forwarded those status reports to Kayla Lessin at Mullins Management Company in order to keep Mr. Mullins apprised of the progress of the entitlements process;

and that Ms. Lessin, in turn, forwarded those status reports to Mr. Mullins and to Michael Mullins.

The timing of the zoning approvals from the City for this project was, essentially, as follows: Joseph J. Corcoran delayed filing the initial package with the City for several months at the request of a new alderwoman, who asked CMJ to have a number of public meetings with the local community before making this filing.

CMJ's application for subdivision approval was filed on February 7th of 2013, and the City granted subdivision approval on June 20th of 2013.

Once Joseph J. Corcoran knew that the subdivision approval was about to issue, on June 11, 2013, he, on behalf of CMJ, filed the application for the necessary special permit and variances for this project.

The City granted all necessary zoning approvals, the special permit with the required variances, on October 16th of 2013. By law, any aggrieved party wishing to challenge [2153] those approvals had 21 days to file a lawsuit challenging them. That appeal period expired on November 12, 2013, and no appeals or challenges were filed, which meant that the special permit and variances were final and that CMJ had all the entitlements it needed to go forward with the project.

With the zoning approvals in hand, in December of 2013, Joseph J. Corcoran prepared a further detailed status report on the Cobble Hill Center project, and he

sent copies on to his father, Joseph E. Corcoran, to Mr. Jennison, and to Mr. Mullins.

In that December 2013 report, Joseph J. Corcoran reported that all needed zoning approvals were in place and that the project was moving into the construction planning phase, with the goal of being able to start construction by around June of 2014.

He reported that CMJ had spent roughly $1.274 million in predevelopment costs to get through the entitlement phase, that amount being in addition to the $1.326 million transfer payment to CMJ in 2003 for the land.

In this December 2013 report, Joseph J. Corcoran reported that total development costs, excluding the cost of the land, were currently budgeted at $36.25 million, with the goal of bringing in construction costs below that. This amount was slightly, but not materially, higher than [2154] the development cost estimate, including the land acquisition cost, of $36.7 million that Joseph J. Corcoran had communicated to Mr. Mullins two years earlier at the end of 2011 and had communicated again in connection with the July 2012 quarterly meeting.

Also as part of this December 2013 report, Joseph J. Corcoran reported that the firm of Fantini & Gorga had been hired to place construction and permanent debt for the project and that Fantini & Gorga had asked CMJ to retain the firm of CBRE to conduct an independent market study for the project. Joseph J. Corcoran attached CBRE's detailed analysis to that

December 2013 report. In it, CBRE concluded that CMJ should have little difficulty in leasing out all of the residential units in the building at very favorable rates.

Also as part of this December 2013 report, Joseph J. Corcoran provided updated financial pro formas for the project. Some of those pro formas included a calculation of an internal rate of return or IRR for the project. In calculating an IRR for a commercial real estate project, one must make assumptions regarding the project's annual cash flow and also must make an assumption of future sale of the property or some other terminal event that would bring those cash flows to an end. I find that Mr. Mullins and Michael Mullins were very familiar with such an IRR [2155] calculation and understood that it must always assume a terminal event, like a sale.

In addition, I find, based on the evidence in this case, that potential real estate lenders always wanted to see, in financial pro formas, a potential exit strategy, that it was customary in the industry to prepare financial pro formas showing a sale of such a project after stabilization in a form that could eventually be shared with potential lenders, and I find that Mr. Mullins and Michael Mullins understood that, as well.

The IRR calculation in the December 2013 pro formas was based on assumptions that project construction would be completed in 2016; that the building would be fully leased and, thus, stabilized by the end of the [sic] 2017; that the construction loan would

be replaced with long-term debt in 2017; and that a hypothetical sale of the building would take place at the end of 2020.

I find that anyone familiar with the development of multifamily residential real estate would have understood that the 2020 sale in this pro forma was a hypothetical terminal event included for the purpose of calculating an IRR and for the purpose of modeling an exit strategy for potential lenders, and that it was not a binding commitment by CMJ to sell the building in 2020.

As part of this December 2013 report, Joseph J. [2156] Corcoran also sent the three CMJ principals a draft of a new LLC agreement for Cobble Hill Center, LLC, and he noted in his cover memo that this draft new LLC agreement would assign a 10 percent ownership interest in the project to Joseph J. Corcoran.

The attached draft LLC agreement would reduce each of the principals' stakes in the project by 10 percent in order to free up a cumulative 10 percent stake for Joseph J. Corcoran. Specifically, the draft agreement would have reduced Joseph E. Corcoran's ownership interest in Cobble Hill Center from 60 percent to 54 percent, would have reduced Mr. Mullins' ownership interest from 20 percent to 18 percent, and would have reduced the ownership interest of Mr. Jennison or an estate planning trust he created, if Mr. Jennison decided to transfer his ownership interest to that trust, also from 20 percent to 18 percent.

Joseph J. Corcoran had not discussed this proposal with either Mr. Mullins or with Gary Jennison before distributing the December 2013 package.

I find this proposal to change the ownership of the Cobble Hill Center property was something that was never acted on. Joseph J. Corcoran never received a 10 percent ownership interest in Cobble Hill Center and CMJ never reduced Mr. Mullins' 20 percent ownership interest in that project.

[2157] Mr. Mullins responded to this December 2013 status report initially in a short letter to Joseph J. Corcoran on January 10, 2014. In that letter, Mr. Mullins asked for more information about the construction and permanent loan financing strategy for Cobble Hill Center, for construction cost estimates, for copies of all local permits for the project, and for certain documentation regarding Cobble Hill Center, LLC, and its acquisition of the site.

At the end of this January 10 letter, Mr. Mullins asserted that he had not yet consented to this proposed new development and said that CMJ should, therefore, stop spending any money on the project.

I find that Mr. Mullins' assertion that he had never consented to this project was incorrect. In fact, at the July 2012 meeting, Mr. Mullins had given his unconditional assent to the new venture and specifically agreed that CMJ should incur predevelopment costs to pursue all necessary entitlements.

Joseph J. Corcoran responded to the January 10th letter on January 21, 2014. He responded in writing. In that letter, he reminded Mr. Mullins that he had been kept fully informed about the progress of the Cobble Hill Center redevelopment. He invited Mr. Mullins to attend a planned meeting with Fantini & Gorga scheduled for February 5th, 2014, where Mr. Mullins could learn in detail the [2158] construction and permanent financing plans.

He reminded Mr. Mullins that the most recent construction cost estimates were included in the December 2013 status report that Mr. Mullins had just received, and he provided Mr. Mullins with copies of the Somerville Planning Board's subdivision approval and the Board of Appeals' approval of the special permit with variance for the project, as Mr. Mullins had requested.

Shortly thereafter, on February 3, 2014, Teresa Foisy, who works for CJ, sent an e-mail to Joseph E. Corcoran, to Mr. Jennison, to Mr. Mullins, to Kayla Lessin, and to others at CJ, with a January 2014 status report by Joseph J. Corcoran regarding the Cobble Hill Center development project. The status report and the e-mail noted that the Fantini & Gorga meeting had been rescheduled to February 12th of 2014. Attached to the status report was an initial financing memorandum analysis from Fantini & Gorga.

Neither Mr. Mullins, Michael Mullins, or anybody else from Mullins Management Company attended the February 12th, 2014, meeting with Fantini & Gorga.

Just over a week after the meeting, on February 20th, Mr. Mullins received another e-mail from Teresa Foisy of CJ with minutes from the February 12 meeting that had taken place with Fantini & Gorga. The minutes informed [2159] Mr. Mullison – I'm sorry, the minutes informed Mr. Mullins that the financing strategy agreed upon in the meeting with Fantini & Gorga was to obtain a construction loan, to finance the construction of the Cobble Hill Center redevelopment, to replace that construction loan with a permanent loan when the construction was complete and the building was stabilized or rented out, and to do so on terms that would allow for a refinance of the project within three to five years after stabilization using a HUD 223(f) loan.

The HUD 223(f) program was the same program that CMJ had used to refinance and take equity out of other projects, so the report was informing Mr. Mullins that, essentially, the plan was to finance Cobble Hill Center – the Cobble Hill Center project in the same manner that CMJ had financed and realized appreciated value on other similar projects in the past.

A few days later, February 26 of 2014, Mr. Mullins received a further e-mail from Ms. Foisy at CJ. That e-mail had attached to it a February of 2014 status report for the Cobble Hill Center project that was being circulated in preparation for an upcoming CMJ partners meeting scheduled for March 5th of 2014.

The February 2014 status report sent to Mr. Mullins included further summary of the February 12th

meeting with [2160] Fantini & Gorga, as well as an update regarding financial pro formas for the project, and that status report reiterated the financing strategy agreed upon at the Fantini & Gorga meeting, as had already been reported to Mr. Mullins a few days earlier.

I find that Mr. Mullins knew or should have known from the two reports regarding the February 12th, 2014, meeting with Fantini & Gorga that the financing project for the loan was to seek a construction loan that would be refinanced with a so-called mini-perm loan for three to five years or so and that that would then be refinanced through the HUD 223(f) program thereafter, and that the plan was for CMJ to build, lease, and hold the Cobble Hill Center Apartments over the long term, just as CMJ had always done with its residential projects.

In other words, I find that Mr. Mullins knew or should have known that there was no plan to sell the property in 2020 and that the sale assumption in the financial pro formas was made solely for purposes of calculating an IRR and for showing potential lenders what the – excuse me, to show potential lenders what an exit strategy might look like.

On February 28, 2014, Mr. Mullins sent a fairly long letter to Karen Meyer, who was then CMJ's president. In that letter, Mr. Mullins asserted that he never consented [2161] to the Cobble Hill Center project and said that he did not consent to it at that time. I find that Mr. Mullins was not acting in good faith when he sent this letter.

In the letter, Mr. Mullins asserted that he had never consented to the project. I find that assertion was false, incorrect. In fact, Mr. Mullins had expressly consented to CMJ pursuing this new venture at the July 17, 2012, meeting, after having had the chance to review and ask questions about the feasibility analysis prepared by Joseph J. Corcoran and about a market rent study.

In the February 28th letter, Mr. Mullins also asserted that he had never been provided with "any detailed information concerning the new project" and that he had received no information at all about the project between the July 17, 2012, meeting and Mr. Mullins' receipt of the December 2013 status report by Joseph J. Corcoran on December 24, 2013. Those assertions were also not true.

In fact, I find that Joseph J. Corcoran prepared regular status reports about the project that were forwarded to Mr. Mullins' staff at Mullins Management Company throughout this period, and I find that Joseph J. Corcoran had also sent Mr. Mullins' staff a copy of detailed project plans prepared for the special permit applications, and he did so in October of 2012.

In his February 28th letter, Mr. Mullins asserted that [2162] the last time the Cobble Hill project had been discussed in any meeting with him or his staff was in July of 2012. That assertion was also not true. Notes that Mullins Management Company staff themselves kept regarding their quarterly meetings with CMJ and CJ personnel confirmed that at the very

least, the Cobble Hill Center project was discussed during meetings on February 13 of 2013, June 5th of 2013, and November 13th of 2013.

At the June 5th, 2013, meeting, Mr. Mullins was reminded that CMJ was seeking zoning approval, including variances for parking and height; that Joseph J. Corcoran was working with Fantini & Gorga on permanent financing plans that might include financing through HUD's 221(d)(4) program or conventional financing; and that project construction was expected to start by January of 2014.

I credit Mr. Mullins' testimony that he attended this June 5, 2013, meeting and that, at that time, he continued to support and did not object to moving forward with the new venture at Cobble Hill Center. I find Mr. Mullins did not object at that meeting to CMJ working with Fantini & Gorga on financing and did not object to the plans to start construction of the project in early 2014.

I also find that at this June of 2013 meeting, Mr. Mullins did not assert that he had never consented to the project or that any further consent to the project was [2163] required of him.

As best I can tell, Mr. Mullins did not attend the November 13, 2013, quarterly meeting, but Mullins Management Company staff did attend and they were informed at the meeting that all zoning approvals had been obtained for the Cobble Hill project and that the zoning appeal period had ended, with no appeal being taken.

They were also informed at the meeting that CMJ was hoping to begin construction by March or April of 2014. They were reminded of Joseph J. Corcoran's status reports for the project that had been provided throughout 2013.

I find that no member of Mullins Management Company staff asserted at the November of 2013 quarterly meeting that Mr. Mullins had never consented to the project or that any further consent by him was required.

Turning back to Mr. Mullins' letter of February 28, 2014, in that letter, Mr. Mullins also asserted that CMJ could not sell, liquidate, or refinance any of its assets without unanimous consent of all three principals. That, too, was incorrect.

In fact, as I've already found, the 1987 agreement only required unanimous consent to sell, pledge, or transfer a major portion of CMJ's assets. CMJ board could act by two-thirds vote to sell or refinance a single project, including Cobble Hill Center.

[2164] Mr. Mullins asserted in his February 28th letter that the Cobble Hill Center redevelopment project was much too risky, that risks in the financial markets, in the residential real estate market in the area, and in the economy as a whole made it far too risky to go forward with the project.

Mr. Mullins also said in his letter that the assumption in the December 2013 pro formas that the building could be sold in 2020 was, itself, too risky, because

interest rates and those cap rates were likely to be higher in a few years and that could "lead to a large drop in value."

I find that these assertions of risk were not made in good faith. We can see that from the fact that in coming months, as I'll explain in further findings, Mr. Mullins proposed going forward with the project on terms dictated by him, which would not have made any sense if Mr. Mullins truly believed that interest rate risks, financing risks, and market risks outweighed the potential reward from proceeding with the project.

Mr. Mullins' assertion that it was too risky to finance the project based upon an assumption that the building would be sold in 2020 was not made in good faith. I find that Mr. Mullins and Michael Mullins both understood that there was no such plan to sell the building and that the 2020 sale assumption was made solely for purposes of [2165] calculating an IRR and presenting pro formas in a format that would be familiar to potential lenders.

Also in the February 28, 2014, letter, Mr. Mullins objected to a 10 percent ownership interest in Cobble Hill Center being transferred to Joseph J. Corcoran. He most certainly was entitled to object to and withhold his consent from any such transfer, because, as I've explained, the 1987 agreement specified that Mr. Mullins would have a 20 percent ownership interest, and he had no obligation to give 2 percentage points of his ownership share away to Joseph J. Corcoran. But I find that Mr. Mullins' objection to transferring any

ownership interest to Joseph J. Corcoran was not a good-faith basis for trying to withdraw his prior consent to the project.

On March 20th of 2014, Michael Corcoran, another son of Joseph E. Corcoran, sent a letter to Mr. Mullins in which Corcoran Jennison Companies offered to purchase Mr. Mullins' 20 percent interest in Cobble Hill Center, LLC, for 1.488 million. The offer letter explained that the offer was based upon an appraised value of the property that had been prepared in September of 2012 for Mullins Management Company by an appraiser called Bonz and Company, plus a 5 percent premium, plus a return of Mr. Mullins' share of all development costs incurred to date for the project.

[2166] Bonz and Company had appraised the project for purposes of estate planning for Mr. Mullins at $5.76 million. I understand that Michael – I'm sorry. I find that Michael Corcoran understood that this offer was a low-end offer and he didn't expect Mr. Mullins would accept an offer for $1.488 million. Joseph J. Corcoran had just told Mr. Corcoran – Joseph E. Corcoran, had told Mr. Mullins, had told Mr. Jennison in the December of 2013 report that the Cobble Hill Center, now that it was fully entitled, was probably worth around $12 million.

I find that in the March 20th letter, Michael Corcoran was trying to get a sales negotiation started, but no such negotiation went forward because Mr. Mullins

chose never to make any counteroffer to sell his interest in the property.

Instead, Mr. Mullins, a few days later on March 28, 2004 [sic], responded in a letter that he sent to Joseph E. Corcoran and to Gary Jennison. In that letter, Mr. Mullins proposed moving forward with the Cobble Hill Center project as a so-called presale transaction, in which CMJ would contract before starting construction to sell the property in the future to a third-party investor at some future date.

I find that agreeing to such a presale transaction would mean that CMJ would still shoulder risks that the construction might not be completed, that the project might [2167] not be leased up, and it would sell off the future upside potential of the project to a third-party investor.

I find that in the – at that time, in the Boston area, there was a very limited market for such a presale transaction, because most institutional real estate investors or real estate investment trusts were interested only in investing in property that had been built and stabilized and not in committing to buy a property that had neither been built yet, nor leased out.

I also find that income to the three CMJ principals on such a presale transaction would be taxed as ordinary income under the Internal Revenue Code, thus taxed at a much higher rate than any gain realized from a build-and-hold strategy, because those gains were taxed as capital gains.

I find that Mr. Mullins' March 28, 2014, letter helped show that his February 28, 2014, assertion that the project was too risky was not made in good faith. If risks in the financial markets, the residential real estate market, and the economy, as a whole, made it far too risky to go forward with the project, as Mr. Mullins had asserted just one month earlier, then no third-party investor would be willing to agree to such a presale transaction on terms that would allow CMJ to share in any meaningful part of profits if the project were built and commercially [2168] successful.

CMJ, through several people, repeatedly asked Mr. Mullins and Michael Mullins to identify similar presale transactions in the Boston area and to provide information about any such transactions regarding the material terms. Although Michael Mullins identified one or two presale transactions, neither he, nor his father, was ever able to provide information to CMJ regarding material terms of other presale transactions on similar projects.

Over the next several months, during the first part of 2014, CMJ moved forward with evicting retail tenants from the retail building that was on the Cobble Hill Center site so that construction could begin. Mr. Mullins objected to that.

I find that the leases to those retail tenants were only generating net income of about $75,000 per year and that Mr. Mullins' share of that was 20 percent or $15,000 per year.

In July of 2014, Mr. Mullins filed this lawsuit against Mr. Corcoran and Mr. Jennison to stop them from going forward with the Cobble Hill Center project. Mr. Mullins knew when he did so that no one would finance the project so long as one principal is suing the other two.

Indeed, that had been CMJ's experience quite recently in connection with the refinancing of the Quaker Meadows [2169] project. Mr. Corcoran and Mr. Jennison had wanted to refinance the project through a HUD program. Because doing so did not involve pledging of a major portion of CMJ's assets, unanimous consent was not required, but Mr. Mullins nonetheless objected, interfered with the refinancing of Quaker Meadows by contacting HUD, telling them there was not unanimous consent to refinance the deal.

As a result, HUD was unwilling to close and the transaction did not go forward. Mr. Mullins, by voicing his opposition, was able to kill, at least at that time, that refinancing.

I find the same was true in July of 2014, that Mr. Mullins intended, by filing suit, to stop the Cobble Hill Center project from going forward and that he succeeded in doing that.

A few months later, on September 13th of 2014, Michael Corcoran informed Mr. Mullins by e-mail that he had received two offers to purchase the Cobble Hill Center land. One offer was for $14.1 million from an entity known as JPI, and a second offer for $13.5

million was made by Joseph J. Corcoran and his cousin. Mr. Mullins never responded to that e-mail.

Ten days later, Michael Corcoran received a second offer from JPI. This was an offer, again, to pay $14.1 million for the property and entitlements to build [2170] the current project, but also to pay an additional $10 million if the zoning code were ever changed to allow for construction of a Phase II second residential apartment building at the site.

Michael Corcoran never told Mr. Mullins about this second JPI offer. That was a breach of the 1987 agreement. Nonetheless, I find that Michael Corcoran's failure to tell Mr. Mullins about the second JPI offer was not material for two reasons:

First, the zoning code has never been changed in Somerville to allow the construction of a second residential apartment building at the site; and, second, I find it's highly unlikely that the zoning code will be changed in such a manner in the foreseeable future. To the contrary, the mayor of Somerville recently proposed a zoning code change that would, going forward, bar any new residential use of the site.

In March of 2015, Mr. Mullins wanted CMJ to commission an independent financial analysis of the Cobble Hill Center project, including the feasibility of doing some kind of presale transaction, and give a recommendation as to how to proceed. The CMJ board agreed to pay the cost of that study and Mullins Management Company hired Institutional Property Advisors, or IPA, to do the study.

IPA completed the study and delivered its report in the [2171] middle of July of 2015. IPA verified that market rates – market rental rates for residential apartment units in that area were increasing and verified that the Cobble Hill Center project approved by the City of Somerville was likely to be very successful and very profitable.

IPA estimated that residential apartment rental rates would increase for – 3-1/2 percent per year for at least the next ten years in that area.

IPA estimated the value of the project of the Cobble Hill Center property under three different scenarios:

First, IPA estimated that if CMJ built and held the project, the project could be built by October of 2016, stabilized by April of 2018, meaning by then 95 percent of the residential units would be leased out and there would be 90 percent occupancy of the retail space in the building, and IPA estimated that at that point in time, the project would be worth somewhere in the range of $65.75 million to $70.6 million, and, thus, be worth well in excess of the cost of developing the project.

The second scenario that IPA considered was to estimate that construction could again be completed by October of 2016, that 60 percent occupancy of the residential and retail space could be achieved within one year, by October of 2017; and IPA estimated that under those circumstances, at 60 percent occupancy, in October of 2017, CMJ could sell [2172] the property to some

third-party investor for between 60.3 million and $64.25 million. IPA referred to this as its "as-built scenario."

And, third, IPA estimated that the undeveloped land with the entitlements still on it could be sold as of September of 2015 for $15 million.

Shortly after IPA released its report, on July 21, 2015, Mr. Mullins sent another letter to Mr. Corcoran and Mr. Jennison. In that letter, Mr. Mullins said he was "prepared to consent in principle" to CMJ proceeding with the Cobble Hill Center development project under IPA's as-built scenario; in other words, build the project, start leasing it up, and commit to selling it once 60 percent occupancy was achieved, probably around October of 2017.

I find this shows that Mr. Mullins' prior assertion that it would be far too risky for CMJ to undertake the project with any plan to sell it within a few years was not made in good faith.

In September of 2015, Mr. Corcoran and Mr. Jennison essentially responded to the July 2015 letter by offering to pay out – to buy out Mr. Mullins' share of the project, essentially on the terms that Mr. Mullins himself had proposed in his July 2015 letter. Specifically, Mr. Corcoran and Mr. Jennison offered to enter into a contract under which they would purchase Mr. Mullins' share [2173] of the Cobble Hill Center redevelopment once 60 percent occupancy was achieved, and they would do so based on an independent

appraisal to determine fair market value of the property at that time.

Mr. Mullins rejected that proposal. I find this, again, shows he was not acting in good faith. Mr. Mullins had already said he was willing to consent to the project subject to the condition that it be sold at 60 percent occupancy at market rates. He was only willing to do that if the buyer was a third party, and he refused to accept, essentially, the exact same payment terms if the buyers were Mr. Corcoran and Mr. Jennison, rather than a third party.

Now, in the meantime, on or about May 21, 2015, Joseph J. Corcoran sent a memo to the three CMJ principals, Mr. Corcoran, his father, Mr. Mullins, and Mr. Jennison, informing them that the special permit and variances for Cobble Hill Center were going to lapse come July 20th of 2015. In this memo, Joseph J. Corcoran explained that CMJ would be able to, he believed, obtain a six-month extension, but no more, and that CMJ would have to begin construction before the special permit and variance lapsed or it would lose those entitlements.

Joseph J. Corcoran was right about the extension. He succeeded in getting a six-month extension of the special [2174] permit and variances, through January of 2016, but the special permit and variances lapsed at that time because Mr. Mullins remained steadfast in his refusal to allow the project to move forward on the terms that he had agreed to in July of 2012.

I find that if Mr. Mullins had not tried to withdraw his consent to the project and had not then brought a lawsuit to stop the project, that, in fact, CMJ would have been able to construct the new Cobble Hill Center apartment building as approved by the City, and I find that CMJ would have been able to stabilize it, achieving at least 95 percent residential occupancy, by October of 2016.

In 2016, Mullins Management Company sent to CMJ a few conceptual redevelopment studies for not just the Cobble Hill Center site, but also the Cobble Hill Apartments site that was adjacent to it. These studies were prepared one by Peter Quinn Architects and the other by DPZ Partners. They both sketched out possible redevelopment of the combined Cobble Hill Apartments and Cobble Hill Center sites.

The projects, as sketched out, would have been far larger and far riskier than the Cobble Hill Center approved by the City in the fall of 2013. I find that neither of those projects could be built under the existing City of Somerville zoning ordinance.

[2175] So I'm now going to turn to the claims and counterclaims in this case. And as I explain my rulings on each of those claims, I'll be making a few more findings of fact.

I'm going to start with the claims asserted by Mr. Mullins against Mr. Corcoran and Mr. Jennison.

I do find that Mr. Corcoran and Mr. Jennison breached their contractual obligation to provide Mr.

Mullins with "all reports prepared for the management" of CMJ and with all material information regarding CMJ's projects and businesses, but I find that this failure to provide Mr. Mullins with all the reports and information he was entitled to did not cause him to suffer any compensable injury and I also find that Mr. Mullins was not deprived of any material information that he needed in order to be able to decide, as of July of 2012, whether to consent to the redevelopment of the Cobble Hill Center site, as recommended at that time by Joseph J. Corcoran.

With respect to the rest of his claims, I find that Mr. Mullins has not met his burden of proving that Joseph E. Corcoran or Gary Jennison breached their contractual or their fiduciary duties by proceeding with the Cobble Hill Center project without Mr. Mullins' consent.

To the contrary, as I've already explained, I find that [2176] Mr. Mullins gave informed consent in July of 2012 to enter into a new venture in redeveloping the Cobble Hill Center site by seeking entitlements for and, if approved, building a roughly 160-unit, six-story apartment building in place of the existing one-story retail building.

I find that Mr. Mullins had no contractual right to withdraw his consent to this new venture, and, therefore, I find that Mr. Corcoran and Mr. Jennison were proceeding with Mr. Mullins' informed consent and not proceeding without it.

Turning to the counterclaims asserted by Mr. Corcoran and Mr. Jennison against Mr. Mullins, having given his consent to the proposed new venture at Cobble Hill Center in July of 2012, I find that Mr. Mullins breached his contractual duties and his fiduciary duties by trying to withdraw that consent in 2014 and by deliberately interfering with the efforts of CMJ to finance and construct the project as approved by Mr. Mullins in July of 2012 and as approved by the City in the fall of 2013.

I find that Mr. Mullins breached his fiduciary duty to Mr. Corcoran and Mr. Jennison by failing to promote the best interests of CMJ in connection with the Cobble Hill Center site by acting to promote his own self-interest at the expense of CMJ and by not acting in good faith with respect to the Cobble Hill Center project.

[2177] I find that Mr. Mullins similarly breached his contractual duty under the parties' 1987 agreement by failing to act in scrupulous good faith according to CMJ's good established business practices and by frustrating and impeding the business activities and prospects of CMJ with respect to the Cobble Hill Center project.

As I ruled before trial in ruling on a motion in limine, under these circumstances, the general measure of compensatory damages available to Mr. Corcoran and Mr. Jennison is the same for their breach of contract theory as for their breach of fiduciary duty theory.

Under either theory, a prevailing claimant is entitled to be put in the position they would have been in if there had been no breach of duty. See, for example, Mailman's Steam Carpet Cleaning Corp. v. Lizotte, 415 Mass. 865, 869 (1993). That was a breach of contract case. And see also Berish v. Bornstein or Bornstein [pronounced differently], 437 Mass. 242, 270 (2002). That was a breach of fiduciary duty case.

Under Massachusetts law, lost profits or lost potential capital gain is an appropriate measure of damages either for breach of contract or breach of fiduciary duty. See, for example, Situation Management Systems, Inc. v. Malouf, Inc., 430 Mass. 875, 880 (2000) – that's a breach of contract case – and also O'Brien v. Pearson, 449 Mass. [2178] 377, 387 (2007).

So under circumstances like this, the proper measure of damages is lost net profits after subtracting the expenses that would have been incurred to pursue the lost business opportunity. See, for example, Brewster Wallcovering Company v. Blue Mountain Wallcoverings, Inc., 68 Mass. App. Ct. 582, 610 and Note 61 (2007).

The Massachusetts Appellate Courts have explained that a party seeking to be compensated for a lost business opportunity is "not required to prove its lost profits with mathematical precision. Under our cases, an element of uncertainty is permitted in calculating damages and an award of damages can stand on less than substantial evidence. This is particularly the case in business torts, where the critical focus is on the

wrongfulness of the defendant's conduct." That's from Herbert A. Sullivan, Inc. v. Utica Mutual Insurance Company, 43 Mass. 387, 413 (2003).

I am not convinced by Mr. Mullins' argument that when the 1987 agreement was signed, it was not foreseeable that a party to the contract could suffer lost profits if one of the principals wrongfully prevented CMJ from entering into a new real estate venture. I find to the contrary, that when the three parties entered into their 1987 agreement, it was, in fact, foreseeable that if one of the three [2179] principals wrongfully prevented CMJ from undertaking a new real estate venture, then CMJ may suffer lost profits or lost capital gain as a result.

That was foreseeable because the general experience of CMJ had been that it earned substantial profits, and its principals were able to use financings to – sorry, use refinancings to withdraw substantial equity gains on roughly 25 different multifamily residential apartment building projects.

Mr. Mullins argues that redevelopment of the Cobble Hill Center site couldn't have been foreseeable in 1987 because the entity Cobble Hill Center, LLC, was not formed until 2003.

I find that argument is without merit. I find that, to the contrary, the possibility of redeveloping Cobble Hill Center was foreseeable to the parties in 1987. CMJ had developed the Cobble Hill Apartments and the strip mall on the Cobble Hill Center site just five years earlier, in 1982.

CMJ principals were all experienced real estate developers and understood opportunities for undertaking further development on a site where some buildings had already been built, and they agreed in 1987 that CMJ would retain ownership of the Cobble Hill property. I find they understood, in doing so, that there was ample room on the [2180] western part of the site to develop additional housing, and it was, therefore, foreseeable at that time that a breach of contract that interfered with redevelopment of the Cobble Hill Center site could cause CMJ to lose profits from capital gains.

So I need to make findings regarding what amount of compensation, what amount of damages, Mr. Corcoran and Mr. Jennison are entitled to collect in this case on their counterclaims.

I find that if Mr. Mullins had not breached his contractual and fiduciary duties, that the Cobble Hill Center project, as approved by the City in October of 2013, could have been built by late 2015 and would have been stabilized – in other words, rented out – by October of 2016.

I find that at that point in time, the stabilized project would have been worth more than $75 million and that the equivalent economic value as of the date the counterclaims were first asserted in this case in 2014 would be $75 million as the date – as the value of the project if it had been built and stabilized, as it could have been.

Now, in awarding damages, I need to subtract a couple of things from that.

First, I need to subtract the likely cost to complete [2181] the project. And as I was trying to come up with an appropriate number for this, I credited the testimony by the defendants' expert witness, Mr. Simon Butler, that construction costs for this project were increasing sharply between 2013 and 2016, at some points in time by as much as 1 percentage point a month, and, therefore, that construction cost – I, therefore, find that construction cost to complete the project would have been materially higher than Joseph J. Corcoran was estimating as of December of 2013.

I find that it would have cost CMJ something in excess of $45 million to complete construction of the project and that the economic value of that cost, as of the date the counterclaims were first asserted in 2014, would be $45 million.

So the difference between those two, the $75 million project value and the $45 million additional development costs, is essentially the lost net profits suffered by CMJ of $30 million, but I also need to subtract out, as the defendants/the plaintiffs-in-counterclaim, agreed, the residual value of the land itself, because CMJ still owns that.

Now, the parties disagree. They presented contrasting argument/evidence as to whether I should value the land assuming that it had or – entitlements on it or that the [2182] same entitlements could have been obtained, but I don't need to resolve that directly

because I find that Mr. Mullins has proved that Mr. Corcoran and Mr. Jennison could have mitigated some of their damages by selling the property in the middle of 2015, when it was still fully entitled and when a purchaser could have begun construction before lapse of the special permit and the variances, and I credit IPA's opinion that the undeveloped entitled land could have been sold at that time for $15 million.

So the bottom line is I find that CMJ lost $15 million of economic value due to Mr. Mullins' breach of contract and breach of fiduciary duty. That's the $75 million value of the project if it had been built, minus the $45 million in additional cost to complete the project, minus the $15 million value of the undeveloped entitled land if CMJ had mitigated its damages, meaning that the total loss to the owner of the project, CMJ and Cobble Hill, LLP, is $15 million.

I find that Mr. Corcoran, Joseph E. Corcoran, is entitled to recover 60 percent of that amount, or $9 million, and that Gary Jennison is entitled to recover 20 percent of that amount, or $3 million.

Turning just a little bit more to the issue of mitigation of damages, since I found that Mr. Mullins breached his contractual and fiduciary obligations, the [2183] burden is on Mr. Mullins to prove that Mr. Corcoran and Mr. Jennison failed to make reasonable efforts to mitigate their damages. See, for example, Kiribati Seafood Company, LLC, versus Dechert LLP, 478 Mass. 111, 123 (2017).

As I just explained, I do find that Mr. Mullins has proved that Mr. Corcoran and Mr. Jennison could have mitigated their damages, to some extent, by selling the Cobble Hill Center property in mid 2015, and that they could have done so at a price of $15 million.

I also find that Mr. Mullins has not shown that Mr. Corcoran and Mr. Jennison could have, but failed to, take any other reasonable efforts to mitigate damages caused by Mr. Mullins' breaches.

And the assertion that CMJ could have mitigated damages by entering into a presale transaction with Mr. Mullins' consent is, in my view, completely speculative. There's no credible evidence that CMJ could have done so in a manner that would have mitigated damages at all.

And I find Mr. Mullins has not shown that either of the large-scale redevelopment projects outlined in 2016 by Peter Quinn Architects or DPZ Partners was feasible. Neither of those projects could be built under the current zoning code, and I find there's no reasonable prospect that CMJ could obtain rezoning that would allow projects of that scale on the combined Cobble Hill Apartments and Cobble [2184] Hill Center sites.

So just to recap, the bottom line, judgment will enter in favor of the two defendants with respect to the claims asserted against them by Mr. Mullins and in their favor, as well, on their counterclaims against Mr. Mullins, and judgment will provide that Mr. Corcoran, Joseph E. Corcoran, may recover $9.0 million, plus

prejudgment interest and any taxable costs that are demonstrated, and Mr. Jennison may recover $3.0 million, plus prejudgment interest and any taxable costs.

That concludes my findings and rulings. Thank you all.

COURT OFFICER: Court. All rise.

You may be seated.

(Proceedings adjourned at 11:39 a.m.)

[2185] CERTIFICATE

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS.

I, Janet M. Sambataro, a Registered Merit Reporter and a Notary Public within and for the Commonwealth of Massachusetts do hereby certify:

THAT the record of the proceedings contained herein is a true and accurate record of my stenotype notes taken in the foregoing matter, to the best of my knowledge, skill and ability.

I further certify that I am not related to any parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 14th day of June, 2018.

JANET M. SAMBATARO
Notary Public

My Commission Expires:
July 16, 2021

482 Mass. 1106
(This disposition is referenced
in the North Eastern Reporter.)
Supreme Judicial Court of Massachusetts.

Joseph R. MULLINS
v.
Joseph E. CORCORAN & another

June 27, 2019

Reported below: 95 Mass. App. Ct. 1107 (2019).

Opinion

Appellate review denied.

Justice Kafker did not participate.

U.S.C.A. Const. Amend. I-Full text

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.	SUPERIOR COURT
JOSEPH R. MULLINS, Plaintiff, v. JOSEPH E. CORCORAN and GARY A. JENNISON, Defendants.	C. A. NO. SUCV2014-02302

DEFENDANTS' POST-TRIAL PROPOSED FINDINGS AND RULINGS

* * *

Mullins Improperly Caused the CHC Project to Stop

27. In July 2014, Mullins took steps that caused the CHC project to stop. Mullins told Fantini and Gorga that Corcoran and Jennison were proceeding to develop CHC without Mullins' "required consent." TR. EX. 231. Mullins knew that no lender would lend into a project that was the subject of a partnership dispute. TT 808 (Mullins). At that point, seeking financing for CHC was futile because of Mullins' interference. TT 1074, 1109 (M. Corcoran); TT 262-63 (Jennison),

* * *

COMMONWEALTH OF MASSACHUSETTS

Suffolk County Superior Court

JOSEPH R. MULLINS,

Plaintiff,

vs. C.A. No. SUCV2014-2302-BLS2

JOSEPH E. CORCORAN and GARY A. JENNISON,

Defendants.

BENCH TRIAL DAY 4

BEFORE: The Hon. Kenneth W. Salinger
Friday, May 18, 2018
9:04 a.m.

Held At: Suffolk Superior Court
3 Pemberton Square, Room 1017
Boston, Massachusetts

Reporter: Janet M. Sambataro, RMR, CRR, CLR
fab@fabreporters.com www.fabreporters.com
Farmer Arsenault Brock LLC
Boston, Massachusetts
617-728-4404

* * *

[565] Q. All right. want to direct your attention to December 24, 2013, Christmas Eve.

Did you receive a package –

A. Yes, I did.

Q. – of information?

A. Yes: I did. I got a special-delivery package, return receipt requested, and it was a development proposal for Cobble Hill.

[566] Q. And what did you do when you received that package?

A. Well, I gave it to my son and Kayla Lessin. I asked them to look at it and I read it, and we responded, I think, with a letter in January –

Q. Okay.

A. – asking for more information.

Q. And before we get to that January letter, please tell the Court who Michael Mullins is, your son.

A. Michael Mullins is my son, and he works with me.

* * *

COMMONWEALTH OF MASSACHUSETTS

Suffolk County Superior Court

JOSEPH R. MULLINS,

Plaintiff,

vs. C.A. No. SUCV2014-2302-BLS2

JOSEPH E. CORCORAN and GARY A. JENNISON,

Defendants.

BENCH TRIAL DAY 11

BEFORE: The Hon. Kenneth W. Salinger
Wednesday, May 30, 2018
9:01 a.m.

Held At: Suffolk Superior Court
3 Pemberton Square, Room 1017
Boston, Massachusetts

Reporter: Janet M. Sambataro, RMR, CRR, CLR
fab@fabreporters.com www.fabreporters.com
Farmer Arsenault Brock LLC
Boston, Massachusetts
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* * *

[1782] I agree with Mr. Mullins' argument through counsel that unanimous consent of all three of the principals at CMJ would have been needed to make such a change in ownership, at least if it was going to affect Mr. Mullins' ownership share. But there's no

breach of contract and no breach of fiduciary duty from proposing this.

With respect to Mr. Donnelly's arguments as to the counterclaims, to the extent the counterclaims are saying that Mr. Mullins had some sort of duty to go along with that, that's an issue for another day. But I am comfortable in ruling that the assertion of counterclaims in a lawsuit cannot, in and of itself, give rise to legal liability for breach of contract or breach of fiduciary duty, because asserting counterclaims is protected under Massachusetts common law by what's known as the litigation privilege.

* * *

COMMONWEALTH OF MASSACHUSETTS

Suffolk County Superior Court

JOSEPH R. MULLINS,

Plaintiff,

vs. C.A. No. SUCV2014-2302-BLS2

JOSEPH E. CORCORAN and GARY A. JENNISON,

Defendants.

BENCH TRIAL DAY 12

BEFORE: The Hon. Kenneth W. Salinger
Thursday, May 31, 2018
9:01 a.m.

Held At: Suffolk Superior Court
3 Pemberton Square, Room 1017
Boston, Massachusetts

Reporter: Janet M. Sambataro, RMR, CRR, CLR
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* * *

EXHIBITS

* * *

COMMONWEALTH OF MASSACHUSETTS

Suffolk County Superior Court

JOSEPH R. MULLINS,

Plaintiff,

vs. C.A. No. SUCV2014-2302-BLS2

JOSEPH E. CORCORAN and GARY A. JENNISON,

Defendants.

BENCH TRIAL DAY 13

BEFORE: The Hon. Kenneth W. Salinger
Friday, June 1, 2018
9:00 a.m.

Held At: Suffolk Superior Court
3 Pemberton Square, Room 1017
Boston, Massachusetts

Reporter: Janet M. Sambataro, RMR, CRR, CLR
fab@fabreporters.com www.fabreporters.com
Farmer Arsenault Brock LLC
Boston, Massachusetts
617-728-4404

* * *

[2058] In sum, Mullins had no right to obstruct the Cobble Hill Center development in 2014. He, therefore, breached the '87 agreement and his fiduciary duties by reneging on his consent and taking steps to stop the project, including by telling Fantini & Gorga that Corcoran and Jennison were proceeding to develop Cobble

Hill Center without his required consent, knowing that no lender was going to lend into a partnership dispute.

[2059] As Michael Corcoran testified, it was futile to try to get financing when Mr. Mullins would notify lenders that he wasn't on board with it, as he had done in this same time frame by notifying HUD in connection with CMJ's attempt to refinance Quaker Meadows.

And as Gary Jennison testified, he knew when Mullins said he did not consent, the practical effect was that financing would be futile because Mullins would not sign documents a lender would require.

* * *

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

No. 2018-P-1163

JOSEPH R. MULLINS,
Plaintiff-Appellant,

v.

JOSEPH E. CORCORAN AND GARY A. JENNISON,
Defendants-Appellees.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT FOR SUFFOLK COUNTY

BRIEF FOR PLAINTIFF-APPELLANT JOSEPH R. MULLINS

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Attorneys for Plaintiff-Appellant Joseph R. Mullins

September 24, 2018

* * *

B. Mr. Mullins Also Had Legitimate Reasons To File This Action

The Superior Court also ruled that filing this lawsuit was an act of bad faith by Mr. Mullins. A4/562 (Tr. 2176); A4/560 (Tr. 2169). Once again, that cannot be squared with the Superior Court's own ruling as a matter of law that Mr. Mullins "most certainly was entitled to object to and withhold his consent from" Defendants' attempt to reduce his ownership share, a term presented in the December 2013 Proposal and never repudiated by Defendants. A4/559 (Tr. 2165); A4/516 (Tr. 2001) (granting directed verdict for Mr. Mullins on this point in connection with Defendants' counterclaims). The Superior Court's ultimate finding of ambiguity was also necessarily a ruling that Mr. Mullins based his suit on a reasonable interpretation of the 1987 Agreement. See supra pp. 37-38. And the Superior Court never found that Mr. Mullins's suit was vexatious or frivolous. Compare Corcoran, Mullins, Jennison, Inc., 67 Mass. App. Ct. 1117, at *4 (affirming finding that Messrs. Corcoran and Jennison breached their duty by pursuing a declaratory judgment action against Mr. Mullins that served no legitimate corporate purpose).

The Superior Court again did not apply the Wilkes standard here; had it done so, it would necessarily have found that there was no "less harmful" course available to Mr. Mullins. Other efforts had proven insufficient. Mr. Mullins repeatedly tried to raise his concerns, to no avail. See supra pp. 13-17 (summarizing Mr.

Mullins's correspondence attempting to engage Defendants); A4/258 (Tr. 994-995) (Kelly: Mr. Mullins expressed "reasonable" assessment of project's risks in February 28, 2014 letter); A4/330 (Tr. 1272) (Baranski: the letter expressed "fair and reasonable concerns about the project").

None of Mr. Mullins's attempts sparked a meaningful discussion about his concerns. See, e.g., A4/153 (Tr. 584) (Mr. Mullins: no board of director meeting held in response to March 28, 2014 proposal); A4/379 (Tr. 1467) (McReynolds, assistant project director at CJ, testifying that he understood from Joseph J. Corcoran that he was to "ignore Mullins"). He repeatedly sought face-to-face and other meetings with his fellow owners, and they steadfastly declined, insisting instead on their impermissible proposed transfer of one-tenth of Mr. Mullins's ownership share to Joseph J. Corcoran and accusing him of bad faith for resisting. A12/121.[21]

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[21] The Superior Court cited status reports on the Cobble Hill Center LLC project and minutes from meetings with a mortgage broker regarding essentially the same financing terms Mr. Mullins reasonably believed were too risky. See, e.g., A4/557-558 (Tr. 2158-2159). Other interactions included a January 21, 2014 letter from Joseph J. Corcoran that provided some, but not all, of the information Mr. Mullins requested, A9/327-378, and Defendants' "low-end offer" to buy Mr. Mullins's interest, which (as the court found) nobody expected Mr. Mullins to accept. A4/559 (Tr. 2165-2166).These were not meaningful efforts to engage with Mr. Mullins's well-founded concerns. Compare O'Brien v. Pearson, 449 Mass. 377, 385 (2007) ("a reasonably practicable alternative course would have included a more open, communicative, and inclusive manner of engagement between[the shareholders])").

In light of Defendants' failure meaningfully to engage with his expressed concerns, Mr. Mullins was faced with a binary choice: to defend his rights as a minority shareholder and his view of the company's best interests, or to abandon the protections negotiated in the 1987 Agreement. Choosing to stand up rather than roll over is not bad faith. See Medical Air Tech., 303 F.3d at 20, 22 (where shareholder's choices were to either oppose merger vote based on misgivings, or support it, supporting the merger was "not a reasonable and practicable alternative" under Wilkes).[22]

Filing suit based on a reasonable interpretation of a contract later found to be ambiguous is not bad faith or a breach of duty. The Superior Court inherently recognized this with respect to Defendants' counterclaims, which it ruled were "protected under Massachusetts common law by what's known as the litigation privilege." A4/461 (Tr. 1782). The court never explained why Mr. Mullins was not similarly protected. Indeed, finding a breach under these circumstances would chill efforts by minority shareholders to protect their rights by petitioning the court for redress, raising serious constitutional concerns. See, e.g., Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 51, 60 (1993) (unless "no reasonable litigant could realistically expect success on the merits,"

[22] Mr. Mullins alerted mortgage broker Fantini & Gorge to the pending lawsuit, A11/155, but that was unquestionably harmless. A sophisticated broker or lender exercising diligence on a multi-million-dollar deal would be expected to learn of pending litigation from the client, CMJ.

filing suit is constitutionally protected activity and may not form the basis for liability); Blanchard v. Steward Carney Hosp., Inc., 477 Mass. 141, 158 n.24 (2017) ("Both the United States Constitution and the Massachusetts Declaration of Rights provide a right to petition that includes the right to seek judicial resolution of disputes.").

The Superior Court's erroneous decision also contravenes Massachusetts corporate law, which recognizes the need to protect minority shareholders in close corporations. See Goode v. Ryan, 397 Mass. 85, 91 (1986) (minority shareholders in close corporations are uniquely "susceptible to oppression by the majority"); Donahue, 367 Mass. at 588-592, 601 (recognizing abuses that can occur in close corporation context by majority and requiring "strict standard of duty"). No one should be penalized for making a legitimate petition to the courts for relief under these doctrines – especially not a minority shareholder seeking to protect his rights against the repeated depredations of the majority. The judgment against Mr. Mullins should be reversed.

* * *