

COMMONWEALTH OF MASSACHUSETTS

Suffolk County

Superior Court

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JOSEPH R. MULLINS,  
Plaintiff,

vs.

C.A. No. SUCV2014-2302-BLS2

JOSEPH E. CORCORAN and  
GARY A. JENNISON,  
Defendants.

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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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I N D E X

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P R O C E E D I N G S

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.

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

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

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

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

22       Let me start by making some findings about the general  
23       background regarding this case. Mr. Corcoran, Mr. Mullins,  
24       and Mr. Jennison have been in business together since the  
25       early 1970s. They were working closely together in the

1 1970s and 1980s, working to develop residential real estate  
2 projects, mostly multifamily apartment buildings.

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

7 At the beginning, Mr. Corcoran owned 80 percent of that  
8 business and Mr. Mullins and Mr. Jennison each owned  
9 10 percent, but at some point, Mr. Mullins and Mr. Jennison  
10 agreed to transfer full ownership of three of CMJ's  
11 projects to Mr. Corcoran and, in exchange, their interest  
12 in CMJ increased to 20 percent each, with the remaining  
13 60 percent owned by Mr. Corcoran.

14 At some later point, Mr. Jennison transferred  
15 beneficial interest in some or a large portion of his  
16 20 percent share, at least with respect to particular  
17 projects, to various trusts that were created for tax  
18 planning purposes.

19 Now, even though Mr. Corcoran owned a majority share of  
20 CMJ, the company's bylaws always provided that the business  
21 would be managed by a three-member board of directors,  
22 consisting of Mr. Corcoran, Mr. Mullins, and Mr. Jennison,  
23 or their designees, and that the board could act by a  
24 majority vote. So the daily business of the company was  
25 not controlled by Mr. Corcoran; and, instead, CMJ could

1 make business decisions so long as at least two of the  
2 three board members agreed.

3 For decades, Mr. Corcoran, Mr. Mullins, and  
4 Mr. Jennison were the three board members. Only in recent  
5 years have Mr. Corcoran and Mr. Mullins designated somebody  
6 else to serve on the CMJ board of directors in their place.

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

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

23 By the mid 1980s, CMJ had developed and owned roughly  
24 25 residential apartment projects. Each project was  
25 typically owned directly by a separate limited partnership

1 or limited liability company, which was owned by  
2 Mr. Corcoran, Mr. Mullins, and Mr. Jennison, sometimes with  
3 other limited partners or members also holding minority  
4 interests in a particular project, and the project would be  
5 managed by a separate CMJ subsidiary.

6 Throughout this time, up through the mid 1980s, each of  
7 CMJ's projects was financed in, essentially, the same way;  
8 CMJ would cover the costs of doing an initial feasibility  
9 analysis and the cost of seeking entitlements, zoning  
10 approvals and other regulatory approvals, essentially, out  
11 of its working capital.

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

19 CMJ usually obtained long-term financing through  
20 different government-subsidized loan programs. CMJ's aim,  
21 when it obtained long-term financing for a project, was to  
22 borrow as much as it could in an amount that exceeded what  
23 was needed to retire the construction loan so that it could  
24 distribute the excess capital, that portion of the equity  
25 in the project, to the three CMJ owners. In other words,

1 CMJ used long-term financing as a way to take equity out of  
2 its projects, convert the equity to cash, and distribute  
3 those amounts to Mr. Corcoran, Mr. Mullins, and  
4 Mr. Jennison, or trusts that they designated.

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

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

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

21 The essence of this 1987 agreement is that Mr. Mullins  
22 was free to do his own projects going forward; that  
23 Mr. Corcoran and Mr. Jennison were free to do their own  
24 projects, without Mr. Mullins, going forward; they would  
25 divide up some, but not all of the existing CMJ projects,

1 and the other existing projects would continue to be owned  
2 and managed by CMJ.

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

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

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

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

1 Mr. Jennison.

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

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

15 The parties chose not to amend the CMJ bylaws when they  
16 entered into their 1987 agreement, so the general rule  
17 remained that CMJ's business decisions could be made by a  
18 two-thirds vote of the CMJ board.

19 Now, the 1987 agreement made some exceptions that are  
20 at the center of this case, exceptions that either required  
21 unanimous consent of Mr. Corcoran, Mr. Mullins, and  
22 Mr. Jennison for certain actions or barred certain actions  
23 altogether, which, in effect, meant that such actions could  
24 only be undertaken with unanimous consent of Mr. Corcoran,  
25 Mr. Mullins, and Mr. Jennison, since, under Massachusetts

1 law, they remain free to amend their 1987 agreement at any  
2 time.

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

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

19 The 1987 agreement provided that CMJ would not "merge,  
20 sell, pledge, or transfer a major portion of its assets."  
21 During the negotiations over the 1987 agreement,  
22 Mr. Mullins wanted the right to veto any sale, transfer, or  
23 encumbrance of any CMJ property. Mr. Corcoran and  
24 Mr. Jennison, on the other hand, wanted majority rule, with  
25 nobody having a veto over any sale or encumbrance. The

1     compromise reflected in the contract language is that  
2     unanimous approval would be needed to sell or encumber a  
3     "major portion" of CMJ's assets, but that neither  
4     Mr. Mullins, nor the other two principals, would be able to  
5     veto the sale or encumbrance of a single property or  
6     anything else that did not amount to a major portion of  
7     CMJ's total assets.

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

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

23            I find that this provision is ambiguous, because it  
24    does not make clear when, during the process of planning  
25    and undertaking a new real estate development venture,

1 unanimous consent of the CMJ principals must be obtained.  
2 Since the provision is ambiguous, its meaning is a question  
3 of fact, not a question of law. See, for example, Seaco  
4 Insurance Company v. Barbosa, 435 Mass. 772, 779 (2002).

5 The general principles of interpreting a contract,  
6 including the 1987 agreement, are familiar. As with any  
7 contract concerning a business venture, I must construe  
8 this 1987 agreement in a manner that will give it "effect  
9 as a rational business instrument and in a manner which  
10 will carry out the intent of the parties." That's the  
11 Supreme Judicial Court of Massachusetts in the case of  
12 Robert and Ardis James Foundation v. Meyers, 474 Mass. 181,  
13 188 (2016).

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

21 Since this provision requiring unanimous consent where  
22 CMJ could enter into any new ventures without unanimous  
23 consent, since this provision is ambiguous, I may consider  
24 what the law refers to as extrinsic or parol evidence,  
25 evidence other than the language of the contract itself,

1 "in order to give a reasonable construction" to this  
2 contract "in light of the intentions of the parties at the  
3 time of formation of the contract." That's from President  
4 and Fellows of Harvard College v. PECO Energy Company, 57  
5 Mass. App. Ct. 888, 896 (2003).

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

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

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

22 The second stage was seeking and obtaining all  
23 necessary zoning and other regulatory approvals. Real  
24 estate developers and the principals in CMJ refer to this  
25 as the process of seeking "entitlements," those legal --

1 I'm sorry -- those legal approvals that, once obtained,  
2 mean that the landowner is now entitled to build a  
3 particular project.

4 The third stage was implementation of those  
5 entitlements by constructing the project and putting it  
6 into operation, which, in the case of the multifamily  
7 residential buildings typically constructed by CMJ, means  
8 renting out the apartments or residential units.

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

19 The practice of Corcoran, Mullins, and Jennison before  
20 they entered into the 1987 agreement had always been to  
21 treat the decision to seek entitlements as a decision to  
22 build the project. If entitlements were obtained, they did  
23 not reconsider their prior decision to go forward; to the  
24 contrary, in every instance when CMJ received entitlements,  
25 it then built the project based on the decision they had

1 made at the end of the feasibility stage to proceed with  
2 the project.

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

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

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

24 I also find that the parties did not intend to require  
25 unanimous consent to make any subsequent decisions about

1    how to best proceed with a new venture. In other words,  
2    the parties' intent was to require unanimous consent to  
3    enter into or pursue a new venture, but once such consent  
4    to seek entitlements was given for a new venture, then all  
5    subsequent decisions about that project could be made by  
6    two-thirds of the CMJ directors, in accord with the CMJ  
7    bylaws.

8        Now, at trial, Mr. Mullins has argued through counsel  
9    that under this contract provision, he could not give or be  
10   asked to give consent to enter into a new venture until he  
11   was given full information about and the opportunity to  
12   accept or reject all material facts concerning long-term  
13   financing for the project and concerning ownership of the  
14   project. I disagree, and I find that is not what the  
15   parties intended.

16        Let's separate out those two parts of the argument,  
17   starting with the argument about consent to long-term  
18   financing. I find that it would not have made rational  
19   business sense in 1987 to give each of the CMJ principals  
20   absolute veto power over a new real estate development  
21   project at any time before the terms of long-term financing  
22   were finalized. Those terms could not be known until after  
23   construction was complete, or at least nearly complete,  
24   and, therefore, not until after CMJ had already incurred  
25   the cost to build and develop the new venture. It was not

1     until that point in time that CMJ was able to go into the  
2     market and seek long-term financing and find out what terms  
3     would be available.

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

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

17            It's interesting that this provision appears in the  
18    1987 agreement on Page 7 in the sentence immediately  
19    preceding the unanimous consent requirement for new  
20    ventures. This provision guaranteed that Mr. Mullins would  
21    own 20 percent of any new venture approved by all three  
22    principals. As a result, the parties did not intend that  
23    unanimous consent would be tied to any discussion regarding  
24    ownership structure.

25            Of course, since Mr. Mullins was guaranteed a

1 20 percent ownership interest, that could not be changed  
2 without his consent. It could not be changed, perhaps,  
3 without unanimous consent. I don't need to reach that  
4 issue, but I do find that the provision requiring unanimous  
5 consent before entering into a new venture was not tied to  
6 further discussion about ownership structure, because that  
7 was resolved in the 1987 agreement.

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

15 After Mr. Mullins sued him, Mr. Corcoran was no longer  
16 willing to meet or speak directly with Mr. Mullins about  
17 business matters, and so, instead, Mr. Corcoran and  
18 Mr. Jennison arranged for top-level staff of CMJ and CJ to  
19 have quarterly meetings with Mr. Mullins and his Mullins  
20 Management Company team to keep them apprised of and answer  
21 their questions regarding CMJ's projects and businesses.

22 Marty Jones, who at least for some time was president  
23 of CMJ, ran these meetings until she left the company in  
24 2001, and thereafter, Chris Holmquest ran these quarterly  
25 meetings until he left CMJ and CJ in November of 2014.

1        Mr. Mullins typically went to these quarterly meetings,  
2 accompanied by key members of his small staff at Mullins  
3 Management Company. Sometimes Mullins Management Company  
4 staff would attend those meetings without Mr. Mullins.

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

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

17       Kayla Lessin joined Mullins Management Company in  
18 January of 2010. She is trained as a lawyer, having earned  
19 her JD from Northeastern Law School. Her responsibilities  
20 at Mullins Management Company include, among other things,  
21 helping Mr. Mullins and his son, Michael Mullins, oversee  
22 the CMJ portfolio.

23       David Sullivan is the outside consultant for Mullins  
24 Management Company. He's not a full-time employee of the  
25 company, but he's been involved in the finances of

1 Mr. Mullins and Mullins Management Company for years.

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

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

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

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

25 In September of 2003, CMJ decided to refinance the

1 Cobble Hill Apartments. As part of that transaction, the  
2 three principals, Mr. Corcoran, Mr. Mullins, and  
3 Mr. Jennison, decided to legally separate the western  
4 portion of the Cobble Hill site, where the one-story retail  
5 building was located, from the rest of the site, where the  
6 four apartment buildings were located, so that the  
7 refinancing would be secured only by the four apartment  
8 buildings and their revenue and the portion of the site  
9 occupied by the retail building would be separated and  
10 become available for redevelopment separate and apart from  
11 any financing of the Cobble Hill Apartments.

12 Consistent with CMJ's past practice, they formed a new  
13 entity to control that retail or commercial portion of the  
14 site. They called the new entity Cobble Hill Center, LLC.  
15 That new entity obtained a 99-year lease of the existing  
16 commercial building and the 3.9 acres surrounding it from  
17 the Cobble Hill Apartments Company that was the owner of  
18 the land, and it obtained that lease in exchange for an  
19 initial payment equal to the site's then-appraised value or  
20 \$1.326 million, plus annual rent of \$10 a year thereafter.

21 This lease gave Cobble Hill Center, LLC, the right to  
22 purchase and take fee simple title to the building and  
23 leased parcel for nominal additional consideration, one  
24 dollar, if subdivision and regulatory approval for doing so  
25 was obtained.

1 Cobble Hill Center, LLC, was operated by CMJ and was  
2 indirectly owned by Mr. Corcoran, Mr. Mullins, and  
3 Mr. Jennison as follows: CMJ was the manager of Cobble  
4 Hill Center, LLC. Cobble Hill Center, LLC, consisted of a  
5 single member, the Cobble Hill Trust, which owned  
6 100 percent of the interest in Cobble Hill Center, LLC.  
7 The sole beneficiary of the Cobble Hill Trust was an entity  
8 called CMJ Cobble Hill, LLP, and CMJ Cobble Hill, LLP, was  
9 owned 60 percent by Mr. Corcoran, 20 percent by  
10 Mr. Mullins, and 20 percent by Mr. Jennison.

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

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

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

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

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

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

25 I find that Mr. Mullins' agreement in 2003 to legally

1 separate the Cobble Hill Center site and to explore the  
2 feasibility of redeveloping it was not consent to enter  
3 into -- for CMJ to enter into a new venture at that site.

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

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

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

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

25 During the regular quarterly meeting with Mr. Mullins

1 and the Mullins Management Company staff that was held in  
2 January of 2012, Chris Holmquest informed Mr. Mullins that  
3 CMJ and Mr. Joseph Corcoran were working on plans to  
4 develop a 160- to 170-unit apartment building at the Cobble  
5 Hill Center site.

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

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

23 The report also informed Mr. Mullins that it would cost  
24 roughly \$1.25 million to obtain entitlements and get to the  
25 point where CMJ would be able to close on a construction

1 loan.

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

7 In the report, Joseph J. Corcoran estimated it would  
8 cost a total of about \$36.7 million to develop a 167-unit  
9 building, including the payment that had already been made  
10 to CMJ for the land. He estimated the stabilized net  
11 operating income once the building, if constructed, was  
12 rented out. Joseph J. Corcoran estimated annual gross  
13 income and operating expenses from such a building,  
14 subtracting the two resulting in an estimate that the  
15 stabilized building would produce \$2.836 million in annual  
16 net operating income before debt service. In other words,  
17 that would be its cash flow.

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

25 Joseph J. Corcoran also calculated and reported in this

1 report to Mr. Mullins that on a HUD Section 221(d)(4) loan  
2 of \$36.7 million, the estimated total development costs,  
3 the annual debt service would be about \$2.2 million. This  
4 meant that the projected net cash flow in these pro formas,  
5 after accounting for operating expenses and debt service,  
6 would be a positive of more than \$600,000 a year.

7 The pro formas that were sent to Mr. Mullins in January  
8 of 2012 or so showed that, assuming that the completed and  
9 stabilized project were valued in the market at a 5 percent  
10 cap rate, a 167-unit residential apartment building at that  
11 site would be worth \$56.7 million once stabilized, and,  
12 therefore, that the building would be worth roughly  
13 \$20 million more than it would cost to develop the  
14 building, a potentially huge return.

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

23 If Mr. Mullins or Michael Mullins thought that the  
24 assumed cap rate of 5 percent were too low, it would have  
25 taken them just a quick moment to recalculate the projected

1 profit using a higher cap rate.

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

7 For example, if one were to assume that the cap rate to  
8 value the stabilized building would be 6 percent, rather  
9 than 5 percent, the building would still be worth over  
10 \$10 million more than the projected development costs. The  
11 math here is simple. Dividing Joseph J. Corcoran's  
12 estimate that the stabilized building would generate  
13 \$2.836 million in annual net operating income by a  
14 6 percent cap rate produces a market value of \$47.3 million  
15 for the completed project, which is more than  
16 \$10-1/2 million higher than the \$36.7 million in  
17 development costs projected at that time by Joseph J.  
18 Corcoran.

19 This December 2011 report by Joseph J. Corcoran  
20 included a number of possible rough site plans showing a  
21 167-unit building recommended by Joseph J. Corcoran as  
22 Phase I of redevelopment of Cobble Hill Center and showing  
23 that there would be room available to construct a second  
24 large apartment building on the site in a hypothetical  
25 future Phase II.

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

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

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

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

24        Plumb House estimated that it would -- estimated what  
25 it would cost to construct the building that Joseph J.

1 Corcoran had recommended in his December 2011 feasibility  
2 analysis, as I explained, a six-story building consisting  
3 of five stories of wood framing over a one-story podium,  
4 and Plumb House assumed that it would have 168 residential  
5 units.

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

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

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

19 At this time, Mr. Holmquest sent Ms. Lessin and  
20 Mr. Sullivan another copy of Joseph J. Corcoran's December  
21 2011 report. This is the same report that had been  
22 provided already to Mr. Mullins in January of 2012.

23 At the same time, in a separate e-mail, Mr. Holmquest  
24 also forwarded a copy of a more recent status report from  
25 Joseph J. Corcoran about the Cobble Hill Center project

1     dated June 15, 2012. In that report, Joseph J. Corcoran  
2     explained that a condition for obtaining HUD financing for  
3     new construction is to pay prevailing wage rates that equal  
4     union rates, and that preliminary estimates showed that  
5     prevailing wage rates would increase construction costs by  
6     8 or \$9 million. Mr. Corcoran attached to his June 2012  
7     status report a copy of the analysis by Plumb House that  
8     I've already described.

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

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

19    I infer and I, therefore, find that before this  
20    meeting, Mr. Mullins and Michael Mullins read at least the  
21    two-page cover memo at the front of Joseph J. Corcoran's  
22    December 2011 status report, reviewed the attachments, and  
23    reviewed Joseph J. Corcoran's June 2012 updated status  
24    report. Therefore, both Mr. Mullins and his son, Michael  
25    Mullins, knew from the very first sentence to Joseph J.

1 Corcoran's December 2011 memorandum that Joseph J. Corcoran  
2 was recommending that CMJ "proceed forward with a plan to  
3 build 167 units in a six-story wood frame structure with a  
4 podium" at the Cobble Hill Center site in Somerville.

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

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

21 After Joseph J. Corcoran finished his presentation at  
22 the July 17th, 2012, meeting, Mr. Mullins made clear that  
23 he approved the project and fully supported going forward  
24 with it. Mr. Mullins said he agreed with Joseph J.  
25 Corcoran's recommendation. I find that Mr. Mullins

1 understood that he was agreeing with the recommendation to  
2 seek entitlements for and then proceed forward with  
3 building the planned 167-unit building.

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

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

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

22 Once all three principals, Mr. Corcoran, Mr. Mullins,  
23 and Mr. Jennison, had given their unanimous consent to this  
24 new venture, Joseph J. Corcoran proceeded to seek and  
25 obtain all necessary entitlements from the City of

1 Somerville.

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

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

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

25 In October of 2012, Joseph J. Corcoran sent a

1 substantial portion of the zoning submission package for  
2 the project that had been drafted. He sent this, at that  
3 time, to Ms. Lessin at Mullins Management Company, and  
4 Ms. Lessin immediately forwarded that to Mr. Mullins, to  
5 Michael Mullins, and to Dave Sullivan.

6 The materials that were sent on in October of 2012 made  
7 clear that CMJ's proposal to the City was going to be for a  
8 159-unit building, with 25 studio apartments, 59  
9 one-bedroom apartments, and 45 two-bedroom apartments. And  
10 I may have some of those numbers wrong. I don't think the  
11 math is right, but it was a 159-unit building.

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

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

25 I find that CMJ did not provide Mr. Mullins with all

1 internal memoranda and communications regarding the Cobble  
2 Hill Center project, but I also find that from December of  
3 2011 on, including throughout 2013, Joseph J. Corcoran  
4 prepared regular status reports regarding this project;  
5 that Mr. Holmquest forwarded those status reports to Kayla  
6 Lessin at Mullins Management Company in order to keep  
7 Mr. Mullins apprised of the progress of the entitlements  
8 process; and that Ms. Lessin, in turn, forwarded those  
9 status reports to Mr. Mullins and to Michael Mullins.

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

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

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

23 The City granted all necessary zoning approvals, the  
24 special permit with the required variances, on October 16th  
25 of 2013. By law, any aggrieved party wishing to challenge

1 those approvals had 21 days to file a lawsuit challenging  
2 them. That appeal period expired on November 12, 2013, and  
3 no appeals or challenges were filed, which meant that the  
4 special permit and variances were final and that CMJ had  
5 all the entitlements it needed to go forward with the  
6 project.

7 With the zoning approvals in hand, in December of 2013,  
8 Joseph J. Corcoran prepared a further detailed status  
9 report on the Cobble Hill Center project, and he sent  
10 copies on to his father, Joseph E. Corcoran, to  
11 Mr. Jennison, and to Mr. Mullins.

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

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

21 In this December 2013 report, Joseph J. Corcoran  
22 reported that total development costs, excluding the cost  
23 of the land, were currently budgeted at \$36.25 million,  
24 with the goal of bringing in construction costs below that.  
25 This amount was slightly, but not materially, higher than

1 the development cost estimate, including the land  
2 acquisition cost, of \$36.7 million that Joseph J. Corcoran  
3 had communicated to Mr. Mullins two years earlier at the  
4 end of 2011 and had communicated again in connection with  
5 the July 2012 quarterly meeting.

6 Also as part of this December 2013 report, Joseph J.  
7 Corcoran reported that the firm of Fantini & Gorga had been  
8 hired to place construction and permanent debt for the  
9 project and that Fantini & Gorga had asked CMJ to retain  
10 the firm of CBRE to conduct an independent market study for  
11 the project. Joseph J. Corcoran attached CBRE's detailed  
12 analysis to that December 2013 report. In it, CBRE  
13 concluded that CMJ should have little difficulty in leasing  
14 out all of the residential units in the building at very  
15 favorable rates.

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

1 calculation and understood that it must always assume a  
2 terminal event, like a sale.

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

11 The IRR calculation in the December 2013 pro formas was  
12 based on assumptions that project construction would be  
13 completed in 2016; that the building would be fully leased  
14 and, thus, stabilized by the end of the 2017; that the  
15 construction loan would be replaced with long-term debt in  
16 2017; and that a hypothetical sale of the building would  
17 take place at the end of 2020.

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

25 As part of this December 2013 report, Joseph J.

1 Corcoran also sent the three CMJ principals a draft of a  
2 new LLC agreement for Cobble Hill Center, LLC, and he noted  
3 in his cover memo that this draft new LLC agreement would  
4 assign a 10 percent ownership interest in the project to  
5 Joseph J. Corcoran.

6 The attached draft LLC agreement would reduce each of  
7 the principals' stakes in the project by 10 percent in  
8 order to free up a cumulative 10 percent stake for Joseph  
9 J. Corcoran. Specifically, the draft agreement would have  
10 reduced Joseph E. Corcoran's ownership interest in Cobble  
11 Hill Center from 60 percent to 54 percent, would have  
12 reduced Mr. Mullins' ownership interest from 20 percent to  
13 18 percent, and would have reduced the ownership interest  
14 of Mr. Jennison or an estate planning trust he created, if  
15 Mr. Jennison decided to transfer his ownership interest to  
16 that trust, also from 20 percent to 18 percent.

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

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

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

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

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

19       Joseph J. Corcoran responded to the January 10th letter  
20       on January 21, 2014. He responded in writing. In that  
21       letter, he reminded Mr. Mullins that he had been kept fully  
22       informed about the progress of the Cobble Hill Center  
23       redevelopment. He invited Mr. Mullins to attend a planned  
24       meeting with Fantini & Gorga scheduled for February 5th,  
25       2014, where Mr. Mullins could learn in detail the

1 construction and permanent financing plans.

2 He reminded Mr. Mullins that the most recent  
3 construction cost estimates were included in the December  
4 2013 status report that Mr. Mullins had just received, and  
5 he provided Mr. Mullins with copies of the Somerville  
6 Planning Board's subdivision approval and the Board of  
7 Appeals' approval of the special permit with variance for  
8 the project, as Mr. Mullins had requested.

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

19 Neither Mr. Mullins, Michael Mullins, or anybody else  
20 from Mullins Management Company attended the February 12th,  
21 2014, meeting with Fantini & Gorga.

22 Just over a week after the meeting, on February 20th,  
23 Mr. Mullins received another e-mail from Teresa Foisy of CJ  
24 with minutes from the February 12 meeting that had taken  
25 place with Fantini & Gorga. The minutes informed

1 Mr. Mullison -- I'm sorry, the minutes informed Mr. Mullins  
2 that the financing strategy agreed upon in the meeting with  
3 Fantini & Gorga was to obtain a construction loan, to  
4 finance the construction of the Cobble Hill Center  
5 redevelopment, to replace that construction loan with a  
6 permanent loan when the construction was complete and the  
7 building was stabilized or rented out, and to do so on  
8 terms that would allow for a refinance of the project  
9 within three to five years after stabilization using a HUD  
10 223(f) loan.

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

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

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

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

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

16 In other words, I find that Mr. Mullins knew or should  
17 have known that there was no plan to sell the property in  
18 2020 and that the sale assumption in the financial pro  
19 formas was made solely for purposes of calculating an IRR  
20 and for showing potential lenders what the -- excuse me, to  
21 show potential lenders what an exit strategy might look  
22 like.

23 On February 28, 2014, Mr. Mullins sent a fairly long  
24 letter to Karen Meyer, who was then CMJ's president. In  
25 that letter, Mr. Mullins asserted that he never consented

1 to the Cobble Hill Center project and said that he did not  
2 consent to it at that time. I find that Mr. Mullins was  
3 not acting in good faith when he sent this letter.

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

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

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

25 In his February 28th letter, Mr. Mullins asserted that

1 the last time the Cobble Hill project had been discussed in  
2 any meeting with him or his staff was in July of 2012.  
3 That assertion was also not true. Notes that Mullins  
4 Management Company staff themselves kept regarding their  
5 quarterly meetings with CMJ and CJ personnel confirmed that  
6 at the very least, the Cobble Hill Center project was  
7 discussed during meetings on February 13 of 2013, June 5th  
8 of 2013, and November 13th of 2013.

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

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

23 I also find that at this June of 2013 meeting,  
24 Mr. Mullins did not assert that he had never consented to  
25 the project or that any further consent to the project was

1 required of him.

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

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

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

16 Turning back to Mr. Mullins' letter of February 28,  
17 2014, in that letter, Mr. Mullins also asserted that CMJ  
18 could not sell, liquidate, or refinance any of its assets  
19 without unanimous consent of all three principals. That,  
20 too, was incorrect.

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

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

7        Mr. Mullins also said in his letter that the assumption  
8        in the December 2013 pro formas that the building could be  
9        sold in 2020 was, itself, too risky, because interest rates  
10       and those cap rates were likely to be higher in a few years  
11       and that could "lead to a large drop in value."

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

20       Mr. Mullins' assertion that it was too risky to finance  
21       the project based upon an assumption that the building  
22       would be sold in 2020 was not made in good faith. I find  
23       that Mr. Mullins and Michael Mullins both understood that  
24       there was no such plan to sell the building and that the  
25       2020 sale assumption was made solely for purposes of

1 calculating an IRR and presenting pro formas in a format  
2 that would be familiar to potential lenders.

3 Also in the February 28, 2014, letter, Mr. Mullins  
4 objected to a 10 percent ownership interest in Cobble Hill  
5 Center being transferred to Joseph J. Corcoran. He most  
6 certainly was entitled to object to and withhold his  
7 consent from any such transfer, because, as I've explained,  
8 the 1987 agreement specified that Mr. Mullins would have a  
9 20 percent ownership interest, and he had no obligation to  
10 give 2 percentage points of his ownership share away to  
11 Joseph J. Corcoran. But I find that Mr. Mullins' objection  
12 to transferring any ownership interest to Joseph J.  
13 Corcoran was not a good-faith basis for trying to withdraw  
14 his prior consent to the project.

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

1        Bonz and Company had appraised the project for purposes  
2 of estate planning for Mr. Mullins at \$5.76 million. I  
3 understand that Michael -- I'm sorry. I find that Michael  
4 Corcoran understood that this offer was a low-end offer and  
5 he didn't expect Mr. Mullins would accept an offer for  
6 \$1.488 million. Joseph J. Corcoran had just told  
7 Mr. Corcoran -- Joseph E. Corcoran, had told Mr. Mullins,  
8 had told Mr. Jennison in the December of 2013 report that  
9 the Cobble Hill Center, now that it was fully entitled, was  
10 probably worth around \$12 million.

11        I find that in the March 20th letter, Michael Corcoran  
12 was trying to get a sales negotiation started, but no such  
13 negotiation went forward because Mr. Mullins chose never to  
14 make any counteroffer to sell his interest in the property.

15        Instead, Mr. Mullins, a few days later on March 28,  
16 2004 [sic], responded in a letter that he sent to Joseph E.  
17 Corcoran and to Gary Jennison. In that letter, Mr. Mullins  
18 proposed moving forward with the Cobble Hill Center project  
19 as a so-called presale transaction, in which CMJ would  
20 contract before starting construction to sell the property  
21 in the future to a third-party investor at some future  
22 date.

23        I find that agreeing to such a presale transaction  
24 would mean that CMJ would still shoulder risks that the  
25 construction might not be completed, that the project might

1 not be leased up, and it would sell off the future upside  
2 potential of the project to a third-party investor.

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

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

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

1     successful.

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

10           Over the next several months, during the first part of  
11     2014, CMJ moved forward with evicting retail tenants from  
12     the retail building that was on the Cobble Hill Center site  
13     so that construction could begin. Mr. Mullins objected to  
14     that.

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

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

24           Indeed, that had been CMJ's experience quite recently  
25     in connection with the refinancing of the Quaker Meadows

1 project. Mr. Corcoran and Mr. Jennison had wanted to  
2 refinance the project through a HUD program. Because doing  
3 so did not involve pledging of a major portion of CMJ's  
4 assets, unanimous consent was not required, but Mr. Mullins  
5 nonetheless objected, interfered with the refinancing of  
6 Quaker Meadows by contacting HUD, telling them there was  
7 not unanimous consent to refinance the deal.

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

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

16 A few months later, on September 13th of 2014, Michael  
17 Corcoran informed Mr. Mullins by e-mail that he had  
18 received two offers to purchase the Cobble Hill Center  
19 land. One offer was for \$14.1 million from an entity known  
20 as JPI, and a second offer for \$13.5 million was made by  
21 Joseph J. Corcoran and his cousin. Mr. Mullins never  
22 responded to that e-mail.

23 Ten days later, Michael Corcoran received a second  
24 offer from JPI. This was an offer, again, to pay  
25 \$14.1 million for the property and entitlements to build

1 the current project, but also to pay an additional  
2 \$10 million if the zoning code were ever changed to allow  
3 for construction of a Phase II second residential apartment  
4 building at the site.

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

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

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

25 IPA completed the study and delivered its report in the

1 middle of July of 2015. IPA verified that market rates --  
2 market rental rates for residential apartment units in that  
3 area were increasing and verified that the Cobble Hill  
4 Center project approved by the City of Somerville was  
5 likely to be very successful and very profitable.

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

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

11 First, IPA estimated that if CMJ built and held the  
12 project, the project could be built by October of 2016,  
13 stabilized by April of 2018, meaning by then 95 percent of  
14 the residential units would be leased out and there would  
15 be 90 percent occupancy of the retail space in the  
16 building, and IPA estimated that at that point in time, the  
17 project would be worth somewhere in the range of  
18 \$65.75 million to \$70.6 million, and, thus, be worth well  
19 in excess of the cost of developing the project.

20 The second scenario that IPA considered was to estimate  
21 that construction could again be completed by October of  
22 2016, that 60 percent occupancy of the residential and  
23 retail space could be achieved within one year, by October  
24 of 2017; and IPA estimated that under those circumstances,  
25 at 60 percent occupancy, in October of 2017, CMJ could sell

1 the property to some third-party investor for between  
2 60.3 million and \$64.25 million. IPA referred to this as  
3 its "as-built scenario."

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

7 Shortly after IPA released its report, on July 21,  
8 2015, Mr. Mullins sent another letter to Mr. Corcoran and  
9 Mr. Jennison. In that letter, Mr. Mullins said he was  
10 "prepared to consent in principle" to CMJ proceeding with  
11 the Cobble Hill Center development project under IPA's  
12 as-built scenario; in other words, build the project, start  
13 leasing it up, and commit to selling it once 60 percent  
14 occupancy was achieved, probably around October of 2017.

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

19 In September of 2015, Mr. Corcoran and Mr. Jennison  
20 essentially responded to the July 2015 letter by offering  
21 to pay out -- to buy out Mr. Mullins' share of the project,  
22 essentially on the terms that Mr. Mullins himself had  
23 proposed in his July 2015 letter. Specifically,  
24 Mr. Corcoran and Mr. Jennison offered to enter into a  
25 contract under which they would purchase Mr. Mullins' share

1 of the Cobble Hill Center redevelopment once 60 percent  
2 occupancy was achieved, and they would do so based on an  
3 independent appraisal to determine fair market value of the  
4 property at that time.

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

14 Now, in the meantime, on or about May 21, 2015,  
15 Joseph J. Corcoran sent a memo to the three CMJ principals,  
16 Mr. Corcoran, his father, Mr. Mullins, and Mr. Jennison,  
17 informing them that the special permit and variances for  
18 Cobble Hill Center were going to lapse come July 20th of  
19 2015. In this memo, Joseph J. Corcoran explained that CMJ  
20 would be able to, he believed, obtain a six-month  
21 extension, but no more, and that CMJ would have to begin  
22 construction before the special permit and variance lapsed  
23 or it would lose those entitlements.

24 Joseph J. Corcoran was right about the extension. He  
25 succeeded in getting a six-month extension of the special

1 permit and variances, through January of 2016, but the  
2 special permit and variances lapsed at that time because  
3 Mr. Mullins remained steadfast in his refusal to allow the  
4 project to move forward on the terms that he had agreed to  
5 in July of 2012.

6 I find that if Mr. Mullins had not tried to withdraw  
7 his consent to the project and had not then brought a  
8 lawsuit to stop the project, that, in fact, CMJ would have  
9 been able to construct the new Cobble Hill Center apartment  
10 building as approved by the City, and I find that CMJ would  
11 have been able to stabilize it, achieving at least  
12 95 percent residential occupancy, by October of 2016.

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

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

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

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

7       I do find that Mr. Corcoran and Mr. Jennison breached  
8 their contractual obligation to provide Mr. Mullins with  
9 "all reports prepared for the management" of CMJ and with  
10 all material information regarding CMJ's projects and  
11 businesses, but I find that this failure to provide  
12 Mr. Mullins with all the reports and information he was  
13 entitled to did not cause him to suffer any compensable  
14 injury and I also find that Mr. Mullins was not deprived of  
15 any material information that he needed in order to be able  
16 to decide, as of July of 2012, whether to consent to the  
17 redevelopment of the Cobble Hill Center site, as  
18 recommended at that time by Joseph J. Corcoran.

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

25       To the contrary, as I've already explained, I find that

1 Mr. Mullins gave informed consent in July of 2012 to enter  
2 into a new venture in redeveloping the Cobble Hill Center  
3 site by seeking entitlements for and, if approved, building  
4 a roughly 160-unit, six-story apartment building in place  
5 of the existing one-story retail building.

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

11 Turning to the counterclaims asserted by Mr. Corcoran  
12 and Mr. Jennison against Mr. Mullins, having given his  
13 consent to the proposed new venture at Cobble Hill Center  
14 in July of 2012, I find that Mr. Mullins breached his  
15 contractual duties and his fiduciary duties by trying to  
16 withdraw that consent in 2014 and by deliberately  
17 interfering with the efforts of CMJ to finance and  
18 construct the project as approved by Mr. Mullins in July of  
19 2012 and as approved by the City in the fall of 2013.

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

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

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

12 Under either theory, a prevailing claimant is entitled  
13 to be put in the position they would have been in if there  
14 had been no breach of duty. See, for example, Mailman's  
15 Steam Carpet Cleaning Corp. v. Lizotte, 415 Mass. 865, 869  
16 (1993). That was a breach of contract case. And see also  
17 Berish v. Bornstein or Bornstein [pronounced differently],  
18 437 Mass. 242, 270 (2002). That was a breach of fiduciary  
19 duty case.

20 Under Massachusetts law, lost profits or lost potential  
21 capital gain is an appropriate measure of damages either  
22 for breach of contract or breach of fiduciary duty. See,  
23 for example, Situation Management Systems, Inc. v. Malouf,  
24 Inc., 430 Mass. 875, 880 (2000) -- that's a breach of  
25 contract case -- and also O'Brien v. Pearson, 449 Mass.

1 377, 387 (2007).

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

8 The Massachusetts Appellate Courts have explained that  
9 a party seeking to be compensated for a lost business  
10 opportunity is "not required to prove its lost profits with  
11 mathematical precision. Under our cases, an element of  
12 uncertainty is permitted in calculating damages and an  
13 award of damages can stand on less than substantial  
14 evidence. This is particularly the case in business torts,  
15 where the critical focus is on the wrongfulness of the  
16 defendant's conduct." That's from Herbert A. Sullivan,  
17 Inc. v. Utica Mutual Insurance Company, 43 Mass. 387, 413  
18 (2003).

19 I am not convinced by Mr. Mullins' argument that when  
20 the 1987 agreement was signed, it was not foreseeable that  
21 a party to the contract could suffer lost profits if one of  
22 the principals wrongfully prevented CMJ from entering into  
23 a new real estate venture. I find to the contrary, that  
24 when the three parties entered into their 1987 agreement,  
25 it was, in fact, foreseeable that if one of the three

1 principals wrongfully prevented CMJ from undertaking a new  
2 real estate venture, then CMJ may suffer lost profits or  
3 lost capital gain as a result.

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

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

14 I find that argument is without merit. I find that, to  
15 the contrary, the possibility of redeveloping Cobble Hill  
16 Center was foreseeable to the parties in 1987. CMJ had  
17 developed the Cobble Hill Apartments and the strip mall on  
18 the Cobble Hill Center site just five years earlier, in  
19 1982.

20 CMJ principals were all experienced real estate  
21 developers and understood opportunities for undertaking  
22 further development on a site where some buildings had  
23 already been built, and they agreed in 1987 that CMJ would  
24 retain ownership of the Cobble Hill property. I find they  
25 understood, in doing so, that there was ample room on the

1 western part of the site to develop additional housing, and  
2 it was, therefore, foreseeable at that time that a breach  
3 of contract that interfered with redevelopment of the  
4 Cobble Hill Center site could cause CMJ to lose profits  
5 from capital gains.

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

10 I find that if Mr. Mullins had not breached his  
11 contractual and fiduciary duties, that the Cobble Hill  
12 Center project, as approved by the City in October of 2013,  
13 could have been built by late 2015 and would have been  
14 stabilized -- in other words, rented out -- by October of  
15 2016.

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

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

25 First, I need to subtract the likely cost to complete

1 the project. And as I was trying to come up with an  
2 appropriate number for this, I credited the testimony by  
3 the defendants' expert witness, Mr. Simon Butler, that  
4 construction costs for this project were increasing sharply  
5 between 2013 and 2016, at some points in time by as much as  
6 1 percentage point a month, and, therefore, that  
7 construction cost -- I, therefore, find that construction  
8 cost to complete the project would have been materially  
9 higher than Joseph J. Corcoran was estimating as of  
10 December of 2013.

11 I find that it would have cost CMJ something in excess  
12 of \$45 million to complete construction of the project and  
13 that the economic value of that cost, as of the date the  
14 counterclaims were first asserted in 2014, would be  
15 \$45 million.

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

23 Now, the parties disagree. They presented contrasting  
24 argument/evidence as to whether I should value the land  
25 assuming that it had or -- entitlements on it or that the

1 same entitlements could have been obtained, but I don't  
2 need to resolve that directly because I find that  
3 Mr. Mullins has proved that Mr. Corcoran and Mr. Jennison  
4 could have mitigated some of their damages by selling the  
5 property in the middle of 2015, when it was still fully  
6 entitled and when a purchaser could have begun construction  
7 before lapse of the special permit and the variances, and I  
8 credit IPA's opinion that the undeveloped entitled land  
9 could have been sold at that time for \$15 million.

10 So the bottom line is I find that CMJ lost \$15 million  
11 of economic value due to Mr. Mullins' breach of contract  
12 and breach of fiduciary duty. That's the \$75 million value  
13 of the project if it had been built, minus the \$45 million  
14 in additional cost to complete the project, minus the  
15 \$15 million value of the undeveloped entitled land if CMJ  
16 had mitigated its damages, meaning that the total loss to  
17 the owner of the project, CMJ and Cobble Hill, LLP, is  
18 \$15 million.

19 I find that Mr. Corcoran, Joseph E. Corcoran, is  
20 entitled to recover 60 percent of that amount, or  
21 \$9 million, and that Gary Jennison is entitled to recover  
22 20 percent of that amount, or \$3 million.

23 Turning just a little bit more to the issue of  
24 mitigation of damages, since I found that Mr. Mullins  
25 breached his contractual and fiduciary obligations, the

1     burden is on Mr. Mullins to prove that Mr. Corcoran and  
2     Mr. Jennison failed to make reasonable efforts to mitigate  
3     their damages. See, for example, Kiribati Seafood Company,  
4     LLC, versus Dechert LLP, 478 Mass. 111, 123 (2017).

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

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

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

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

1 Hill Center sites.

2 So just to recap, the bottom line, judgment will enter  
3 in favor of the two defendants with respect to the claims  
4 asserted against them by Mr. Mullins and in their favor, as  
5 well, on their counterclaims against Mr. Mullins, and  
6 judgment will provide that Mr. Corcoran, Joseph E.  
7 Corcoran, may recover \$9.0 million, plus prejudgment  
8 interest and any taxable costs that are demonstrated, and  
9 Mr. Jennison may recover \$3.0 million, plus prejudgment  
10 interest and any taxable costs.

11 That concludes my findings and rulings. Thank you all.

12 COURT OFFICER: Court. All rise.

13 You may be seated.

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

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C E R T I F I C A T E

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