IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CAMBRIDGE NORTH POINT LLC, a Delaware limited liability company, Plaintiff/Counterdefendant, v. BOSTON AND MAINE CORPORATION, a Delaware corporation, Defendant/Counterclaimant on behalf of itself and NORTH POINT CAMBRIDGE LAND COMPANY, LLC, and NORTH POINT CAMBRIDGE LAND COMPANY, LLC, a Delaware limited liability Company, and SIERRA PLUS TANGO, LLC, a Delaware limited liability company, Nominal Defendants.	)	C.A. No. 3451-VCS

MEMORANDUM OPINION

Date Submitted: March 31, 2010
Date Decided: June 17, 2010

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STRINE, Vice Chancellor.

I. Introduction

This matter involves a dispute between Cambridge North Point LLC ("Cambridge North Point") and its co-venturer, Boston and Maine Corporation ("B&M"). Approximately ten years ago, Cambridge North Point and B&M embarked on a real estate project in the Boston area. The purpose of the project, which was developed on 44 acres of land in Cambridge, Massachusetts owned by B&M and the local transit authority, was to create a mixed-use development that would cater to high-end commercial and residential tenants, who the co-venturers hoped would be attracted by the development's proximity to Harvard University and the Massachusetts Institute of Technology.

Despite a promising start, the parties' relationship deteriorated, leading Cambridge North Point to file an action for breach of contract and fiduciary duties in this court in 2007. That action resulted in a settlement agreement, but the parties' problems were not over. Because B&M did not fulfill its obligations under the settlement agreement, Cambridge North Point filed a motion for contempt in this court. Before a final disposition was reached, the parties settled once again, and executed a second comprehensive settlement agreement. But, shortly after that second settlement agreement was executed, B&M again began to fail to meet its obligations. Thus, Cambridge North Point has come to this court for a third time, now seeking enforcement of the second settlement agreement.

Rather than disputing whether it actually breached the second settlement agreement, B&M argues that that agreement is unenforceable and should be

reformed because B&M was supposedly duped into agreeing to commitments it did not know it was making. Therefore, although the subject of the controversy — a complicated commercial real estate deal — is somewhat complex, the primary legal issue the dispute presents is a straightforward question of whether the second settlement agreement between the parties is enforceable. B&M does not allege that Cambridge North Point committed fraud to induce B&M to enter into the second settlement agreement. Rather, B&M argues that Cambridge North Point "quietly" inserted plain language into the draft settlement agreement requiring B&M to make a $3.5 million settlement payment during the negotiations in a way that led B&M to overlook it, and B&M signed that agreement without noticing the new commitment.[1] On this ground, B&M asks the court to re-write the contract so as to remove the $3.5 million payment.

Because this court's job is not to refashion contracts into the form that parties with the benefit of hindsight wished they had scrivened, or to reward counsel for their own lack of diligence, I reject B&M's argument. B&M is a sophisticated commercial party that was represented by lawyers. Those lawyers read the various iterations of the draft settlement agreement, noticed that extensive revisions were made, and proposed revisions of their own. They should have noticed the new $3.5 million provision — especially given that the settlement

[1] B&M's Op. Post-Trial Br. 28 (arguing that Cambridge North Point "quietly revised the settlement agreement" during the negotiations "while continuing to represent to B&M that the [later] draft [of the agreement] merely confirmed and memorialized [the earlier draft]").

agreement was only six pages in length, and the opening language of the key paragraph in the agreement clearly signaled the importance of the subject matter that it addressed. Indeed, use of comparison software, which is common within the legal industry, would have immediately revealed the changes Cambridge North Point made to the drafts. Or, B&M and its lawyers could have simply lined up successive drafts and performed a manual review of the drafts' half-dozen pages. But, the B&M witnesses testified they did none of those things. Nor did they do the most obvious thing: read the entire agreement and outline what B&M's obligations were under it.

If it is in fact true that B&M did not realize that the language in the successive drafts of the settlement agreement changed its payment obligations, that is unfortunate. But it is not Cambridge North Point's fault, and it is not grounds for reforming the second settlement agreement or finding it unenforceable. Therefore, I find that the settlement agreement is enforceable. B&M must pay Cambridge North Point $3.5 million, and also fulfill a number of additional obligations discussed more fully below.

II. General Factual Background

In this section, I summarize the general facts found after trial necessary to give proper context for all of the issues raised by Cambridge North Point's complaint. For clarity's sake, facts relating to each discrete issue are confined to the analyses of those issues that follow later.

A. In 2001, B&M And Cambridge North Point Initiate A Project To Develop A Parcel Of Land In Massachusetts

On August 24, 2001, B&M and Cambridge North Point established North Point Cambridge Land Company, LLC ("LandCo"). B&M and Cambridge North Point formed LandCo to acquire a leasehold interest in and develop a 44 acre parcel of land located in Cambridge, Somerville, and Boston, Massachusetts (the "Property"). The parties' vision for the Property was to create a mixed-use development of 20 buildings with approximately five million square feet of commercial, retail, and residential space, including 5,000 structured parking spaces. In addition, the parties' plan (the "Project") included the construction of a transit station operated by the Massachusetts Bay Transit Authority.[2] With this rail link to downtown Boston, and by taking advantage of the Property's location between Harvard and the Massachusetts Institute of Technology, the idea was to create a high-tech development similar to Kendall Square, which has become home to a cluster of biotechnology firms located in the Boston area.[3]

When establishing LandCo, B&M and Cambridge North Point executed an operating agreement (the "Operating Agreement"). Under the terms of the Operating Agreement, Cambridge North Point became LandCo's managing member, and acquired a 25% interest in LandCo. B&M acquired the remaining 75% interest in LandCo. Because B&M owed 39 of the 44 acres upon which the

[2] JX-3 (North Point Land Company LLC Agreement (August 24, 2001)) § 1.03(c) (indicating that construction of a transit station was part of the Project's "Master Plan").
[3] Tr. Vol. III, at 126-27 (LaPorte).

Project was to be built,[4] B&M agreed in the Operating Agreement to contribute a 99-year leasehold interest in the Property by way of a lease (the "Ground Lease").

B. The Parties' Relationship Sours, Resulting In This Litigation

By 2007, the relationship between B&M and Cambridge North Point had deteriorated, and Cambridge North Point filed a complaint in this court alleging breaches of contract and fiduciary duty against B&M, and seeking the dissolution of LandCo. Although that litigation resulted in a settlement agreement (the "2007 Settlement Agreement"), the parties' troubles continued as they struggled to agree on the terms upon which LandCo should be sold, and as B&M began to default on its obligations under the 2007 Settlement Agreement. The difficulties in selling LandCo and B&M's failure to perform as required under the 2007 Settlement Agreement were interrelated — B&M could only meet its obligations under the 2007 Settlement Agreement by using its share of the proceeds from a sale of LandCo, but selling LandCo was proving difficult because B&M seemed to want to sell to only one party, Archon Group L.P. ("Archon").

After Cambridge North Point filed a contempt motion in this court, the parties negotiated and executed a second settlement agreement (the "2008 Settlement Agreement"), designed to effect the sale of LandCo and make Cambridge North Point whole for B&M's failure to meet its obligations under the 2007 Settlement Agreement. But, shortly after the 2008 Settlement Agreement

[4] The Project's five remaining acres are owned by the Massachusetts Bay Transit Authority. *See* JX-3.

was signed, the latest deal to sell LandCo to Archon fell through, and B&M once again began to default on its obligations. At approximately the same time, in May 2008, B&M also granted an easement (the "Easement") to one of its affiliates relating to the Property, and entered into a memorandum of agreement (the "MOA") with the City of Cambridge requiring B&M to make a number of improvements to the Property. B&M granted the Easement and entered into the MOA without informing or obtaining the consent of Cambridge North Point as required by the Ground Lease and the 2007 Settlement Agreement.

In response, Cambridge North Point filed a second amended complaint alleging that B&M breached the 2007 and 2008 Settlement Agreements (Counts I and VI). In turn, Cambridge North Point requested the following relief: (1) specific performance of the 2008 Settlement Agreement (Count II); (2) an injunction to prevent the further sale, transfer, hypothecation, encumbrance, or assignment of the Property or the Ground Lease by B&M (Count III); (3) a declaratory judgment that B&M breached the 2008 Settlement Agreement, and that the Easement that it granted should be declared void ab initio (Count IV); and (4) a request for court approval of new bidding procedures for selling LandCo's interest in the Property (Count V). B&M opposes Cambridge North Point's allegations, arguing mainly that it was misled when it agreed to the 2008 Settlement Agreement, and that its multiple breaches of that Agreement have not resulted in any harm to Cambridge North Point.

Trial was held on these issues.[5] Below is my analysis of the issues presented by Cambridge North Point's allegations in light of the facts found in the trial record.

III. Legal Analysis

I address the issues arising from Cambridge North Point's complaint in the following order. First, I address claims relating to B&M's alleged breach of the 2008 Settlement Agreement: (1) whether the 2008 Settlement Agreement is enforceable, and thus requires B&M to make a $3.5 million payment to Cambridge North Point which it has withheld to date; (2) whether Cambridge North Point is entitled to specific performance or damages for B&M's failure to transfer its fee interest in the Property, as required under the 2008 Settlement Agreement; and (3) whether new bidding procedures for LandCo should be approved. I then discuss: (4) whether the Easement should be set aside because it was entered into without Cambridge North Point's consent, contrary to the terms of the Ground Lease, and whether Cambridge North Point is entitled to damages on account of the grant of the Easement; and (5) whether B&M must set aside a reserve to cover costs arising from the MOA it unilaterally entered into with the City of Cambridge. Finally, I address whether Cambridge North Point is entitled to attorneys' fees and costs. In all respects, the issues are resolved against B&M.

[5] The trial of this case was completed slowly because the parties hoped that a sale of LandCo would occur and allow them to resolve their differences. Unfortunately, that did not come to pass.

A. The 2008 Settlement Agreement Is Enforceable, And B&M Must Pay Cambridge North Point $3.5 Million

Cambridge North Point's primary allegation is that B&M has failed to fulfill its obligation under the 2008 Settlement Agreement to pay Cambridge North Point $3.5 million by April 23, 2008. In response, B&M candidly admits that it breached the terms of the 2008 Settlement Agreement, but argues that the agreement is unenforceable and should be reformed because B&M was duped into agreeing to the obligations contained in the agreement. Therefore, the issue here is whether the 2008 Settlement Agreement is an enforceable contract. For the reasons given below, I find that it is.

1. Relevant Factual Background

Because B&M's argument is that it was fooled into entering into the 2008 Settlement Agreement, it is necessary to discuss the 2007 Settlement Agreement, and the negotiations precipitating the 2008 Settlement Agreement. Therefore, I briefly set forth the relevant facts in regard to the 2007 and 2008 Settlement Agreements. Those facts show that B&M was aware of the commitments it was making when it executed the 2008 Settlement Agreement.

a. Litigation Between The Parties Results In The 2007 Settlement Agreement

Nearly six years after the parties' embarked on the Project, on April 9, 2007, Cambridge North Point initiated litigation against B&M, requesting relief on

various contract-based and fiduciary duty claims, and dissolution of LandCo.[6] On June 22, 2007, B&M and Cambridge North filed a stipulation and proposed order providing that LandCo's assets would be sold and LandCo would be dissolved. A key issue for the parties was how LandCo's interest in the Property would be marketed. Under the order, Cambridge North Point was authorized to effect the dissolution, and a real estate broker was retained by LandCo to sell LandCo's assets. On October 18, 2007, Archon Acquisition LLC ("Archon") was identified through those procedures as the highest qualified bidder for LandCo's assets with a bid price of $177 million. Throughout the drawn-out process to sell LandCo's interest that would follow, Archon remained B&M's preferred buyer.[7]

Several months later, B&M and Cambridge North Point entered into a more complete set of settlement agreements (collectively, with the June 22, 2007 order, the aforementioned "2007 Settlement Agreement"), which required B&M to pay Cambridge North Point and LandCo approximately $7.5 million by December 21, 2007.[8] Because of B&M's lack of funds, its only hope for meeting its obligations under the 2007 Settlement Agreement was to pay Cambridge North Point with its

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[6] *See Cambridge North Point LLC v. Boston and Maine Corp*., C.A. 2871-VCS (Del. Ch. 2007).

[7] For example, even though there were other bidders, and even though Archon had dropped its offer price by over $100 million while continually delaying during negotiations, B&M still felt that Archon was the "best possible option" to buy LandCo's interest. *See* JX-28 (letter from Robert Culliford to Peter McGlynn (April 23, 2008)) (stating that "B&M believes that [Archon's most recent offer for $88 million] is the best possible option for the partnership").

[8] JX-8 (settlement agreement between Boston and Maine Corporation and Cambridge North Point LLC (Nov. 15, 2007)); JX-9 (settlement agreement between Boston and Maine Corporation, Sierra Plus Tango LLC, and Cambridge North Point LLC (Nov. 15, 2007)).

portion of the proceeds of a sale of LandCo's interest in the Property.[9] Aware of B&M's situation, and of the fact that a sale might fall through, Cambridge North Point required terms in the 2007 Settlement Agreement providing that, if the sale of LandCo's assets to Archon did not close "for any reason whatsoever," B&M was required to convey all of its right, title, and interest in the Property to LandCo.[10]

b. Cambridge North Point Alleges That B&M Breached The 2007 Settlement Agreement, And Initiates Another Round Of Litigation, Which Results In Another Settlement Agreement

Despite reaching a settlement in 2007, the parties' troubles only continued. On January 8, 2008, Cambridge North Point filed a civil contempt motion with this court, alleging that B&M failed to fulfill its obligations under the 2007 Settlement Agreement by failing to pay to LandCo and Cambridge North Point approximately $7.5 million by December 21, 2007, and to convey all of B&M's interest in the Property to LandCo. Cambridge North Point's contempt motion requested that this court impose a $10,000 per diem fine to compel B&M's compliance with the 2007 Settlement Agreement, and to compensate Cambridge North Point for B&M's contumacious behavior.

A day later, on January 9, 2008, Cambridge North Point, B&M, and Archon executed a purchase and sale agreement by which Archon would purchase

[9] Tr. Vol. II, at 496 (Lawler).
[10] 2007 Settlement Agreement § 4(16).

LandCo's leasehold interest in the Property for $177 million.[11] But, that agreement was short-lived because Archon terminated the agreement shortly thereafter, on January 17, 2008.[12] Soon after Archon terminated, it made another, much lower proposal to buy LandCo's interest in the Property for $150 million. Cambridge North Point thought that price was too low — to wit, Peter Bailey, Cambridge North Point's manager, stated that "CNP thinks the higher [$177 million price] is the right price, and that, if B&M wished to proceed with the lower offer, Cambridge North Point must be made whole by receiving its share of the difference between the two offers, amounting to approximately $6 million."[13]

On February 20, 2008, Archon raised its price a little and offered to reinstate the purchase and sale agreement for $152.5 million.[14] The new offer also required a time extension to complete due diligence, a new closing date, and other requirements, including transaction approval from the Massachusetts Executive Office of Transportation and Construction ("EOTC").[15] Therefore, Archon's bid was materially lower than its original bid of $177 million, and required further delay before closing would occur.

[11] JX-17 (Purchase and Sale Agreement (Jan. 9, 2008)).
[12] JX-18 (letter from Matthew Lynch to Peter Bailey and Robert Culliford (Jan. 17, 2008)) (terminating the purchase and sale agreement).
[13] *See* Tr. Vol. I, at 15 (Bailey).
[14] JX-19 (Reinstatement Purchase and Sale Agreement (Feb. 20, 2008)).
[15] Tr. Vol. I, at 18-20 (Bailey).

c. The Negotiations Leading To The 2008 Settlement Agreement

Despite the existence of other bidders, Archon remained B&M's preferred buyer for LandCo's interest in the Property.[16] On February 25, 2008, Cambridge North Point's counsel, Peter B. McGlynn, outlined for B&M's counsel, Robert Culliford, a number of settlement alternatives for dealing with the lower bid from Archon and the other changes Archon had made to its bid. That letter set the stage for the negotiations that followed.

First, McGlynn wrote that "if Archon again terminates or asks for further concessions, whether as to time, dollars or otherwise, B&M must agree to immediately transfer the fee to [LandCo] and to the re-marketing of the assets."[17] He also stated, "[o]f course, regardless of what alternative(s), if any, CNP and B&M can agree upon, the amounts which B&M owes to CNP and [LandCo] under the November 15, 2007 Settlement Agreements, *including contempt damages, and attorneys' fees, remain outstanding*."[18] That is, Cambridge North Point made it clear from the start that it was concerned about whether Archon would actually close the deal and wanted compensation if Archon did not follow through, and that it was demanding damages for B&M's breach of the 2007 Settlement Agreement.

Because B&M wanted to stick with Archon, even though Archon's offer price had dropped, McGlynn's proposal also required that Cambridge North Point

[16] *See supra* note 7.
[17] JX-53 (letter from Peter McGlynn to Robert Culliford (Feb. 25, 2008)).
[18] *Id*. (emphasis added).

would receive the amount of money it would have received under Archon's original $177 million offer:

> 1. [LandCo] agrees to sell [its interest in the Property] to Archon as outlined in Archon's reinstatement proposal, provided however, that CNP receives that share of net sales proceeds (approximately $44.2 million) it would have received if the sale were completed at Archon's high bid auction price originally agreed upon of $177 million.[19]

The following day, February 26, 2008, Culliford advised McGlynn that B&M would pay $2 million in addition to Cambridge North Point's 25% share of Archon's purchase price offer.[20] McGlynn responded on February 28, 2008 with the following: "[t]he sale of the Assets to [Archon] must occur at a sale price of $152.5 million and must occur no later than *April 2, 2008*. At the closing, B&M shall pay CNP an additional $4 million above CNP's 25% share of the $152.5 million purchase price."[21] It is noteworthy that $4 million is the amount of money Cambridge North Point requested when Archon was still planning on an April 2, 2008 closing date. In short order, that date would slip to April 16, and then to April 23, as Archon delayed further.[22]

On Thursday, February 28, and Friday, February 29, 2008, McGlynn and Culliford discussed terms over the telephone.[23] With respect to the approximately $4 million "make whole" payment, McGlynn and Culliford agreed that, if Archon

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[19] *Id.*
[20] JX-54 (letter from Robert Culliford to Peter McGlynn (Feb. 26, 2008)).
[21] JX-55 (letter from Peter McGlynn to Robert Culliford (Feb. 27, 2008)) (emphasis added).
[22] *See infra* note 34.
[23] *See* Tr. Vol. I, at 188 (Culliford).

purchased LandCo's interest for $152.5 million, Cambridge North Point would receive not only its 25% per share of the proceeds, but also $3.5 million out of B&M's 75% share.[24] That is, Cambridge North Point agreed to reducing the "make whole" payment from $4 million to $3.5 million. Importantly, as of February 29, 2008, B&M's obligation to pay Cambridge North Point $3.5 million was to be conditioned upon the closing of the deal with Archon.

On March 3, 2008, McGlynn sent Culliford a six-page draft of a proposed settlement agreement (the "March 3 Draft").[25] The March 3 Draft's opening sentence stated that it "confirms and memorializes the agreements reached last Friday morning concerning the sale of [LandCo's interest in the Property] . . . and the resolution of our clients' respective claims."[26] Section 3 of the March 3 Draft states:

> The sale of the Assets to Archon must occur in accordance with the provisions of the Reinstatement Agreement not later than April 16, 2008 (the "Outside Closing Date"). At the closing of the Asset sale (or as soon thereafter as sales proceeds are available for distribution to CNP, B&M and LandCo), B&M must pay to CNP an additional $3.5 million in addition to CNP's 25% percent share of the $152.5 million dollar Asset purchase price to be paid by Archon and all amounts due as described in section II above.[27]

Therefore, as of that draft, the $3.5 million payment was conditioned on the closing of the Archon deal (which had already slipped to April 16, 2008), as the parties had discussed on February 29, 2008. The March 3 Draft also required

[24] *See* Tr. Vol. I, at 187-188 (Culliford).
[25] JX-56 (draft settlement agreement (Mar. 3, 2008)) (the "March 3 Draft").
[26] *Id.*
[27] *Id.* § 3(1).

B&M to make a number of other payments to Cambridge North Point — such as B&M's outstanding obligations under the 2007 Settlement Agreement and certain legal expenses — but provided that those payments were to be made "regardless of whether the Archon sale close[d]."[28]

After further negotiation, McGlynn sent Culliford another draft of the agreement on March 6, 2008 (the "March 6 Draft").[29] The March 6 Draft is of central importance because it contained material changes from the March 3 Draft, including the addition of three pages of text, multiple revisions, and an additional section containing a mutual release provision.[30] Three pages of new text increased the length of the original document by approximately 50%. In particular, Section 3 of the draft was entirely overhauled. In the revised Section 3, the requirement that B&M pay Cambridge North Point $3.5 million plus interest was still included, now in paragraph 4(a)(i). That paragraph reads as follows:

> 4. From the Initial Net Proceeds, CNP shall retain and/or disburse the following:
>
> (a) Out of B&M's 75% share (i.e., the amount remaining after the deemed distribution of the Financed Amount to B&M and the other payments described have been made), the following:
>
> (i) To CNP, the sum of $3.5 million dollars representing the additional consideration to be paid by B&M to CNP in partial settlement of the Delaware Action and the Suffolk action.[31]

[28] *Id.* § 3(2).
[29] JX-57 (draft settlement agreement (Mar. 6, 2008)) (the "March 6 Draft").
[30] *Id.*
[31] *Id.* §3(4)(a)(1).

Read alone, that paragraph was not materially different from the requirement to pay $3.5 million in the March 3 Draft.[32] But, the March 6 Draft included new language in the paragraph immediately thereafter, paragraph 5, which provided that:

> Regardless of whether or not the Closing on the Asset sale to Archon occurs on or before the Outside Closing Date, B&M must, on or before the Outside Closing Date, *fully satisfy all the financial obligations contained in Section 4.(a)(i)-(iii), and (v)-(vii)* [of Section 3] hereof and all amounts owed by B&M pursuant to Section I 1. and 2. of the [2007 Settlement Agreement].[33]

Therefore, paragraph 5 stated that the $3.5 million dollar payment now had to be made even if the Archon deal did not close — the provision plainly stated that a number of payments had to be made "regardless of whether or not . . . the Asset sale to Archon occur[ed]," and then expressly, clearly, obviously, and plainly listed those provisions to which that requirement applies.

That elimination of the condition that B&M would pay Cambridge North Point $3.5 million only if the Archon deal closed was made because Cambridge North Point was growing increasingly doubtful that the Archon deal would happen. By this time, Archon was delaying again.[34] Cambridge North Point's Bailey testified that he was growing skeptical that Archon would close, and was

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[32] *See supra* page 14.
[33] March 6 Draft § 3(5) (emphasis added).
[34] For example, the March 3 Draft envisioned an April 2, 2008 closing date for the Archon deal. *See supra* page 14. Only three days later, by the time of the March 6 Draft, that closing date had slipped to April 16, 2008. *See infra* page 17. And, by the time the 2008 Settlement Agreement was finalized, that closing date had moved back further to April 23, 2008. *See infra* page 22.

therefore concerned that B&M would not have the ability to meet its obligations under the settlement agreement, and wanted a contractual assurance that Cambridge North Point would be compensated for all of B&M's past conduct even if the Archon deal did not come through.[35] The importance of the timing of the deal is evidenced in an email from McGlynn to Culliford, where McGlynn stated that "Peter Bailey won't budge from the 4/16 drop dead date."[36] As that deadline slipped, Cambridge North Point had good reason to be concerned that Archon would terminate the deal, as it had in the past.

Culliford testified that he "carefully" read the March 6 Draft and "all other drafts," and that he suggested changes to the March 6 Draft, but never asked for a blacklined version.[37] He also admitted that "virtually all . . . portions of the [March 6 Draft] were changed" from the March 3 Draft, and that the language in Section 3, which contained the change in the terms of the $3.5 million payment, in the March 6 Draft was "changed substantially, if not completely."[38] Therefore, Culliford was aware of the changes that had occurred in the successive drafts.

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[35] Tr. Vol. I, at 126 (Bailey) ("Archon was requesting additional changes, again, the time delays and contingencies. So my faith in that deal was considerably diminished. And the other part was we started to introduce the . . . releasing the lawsuits and all of the things that go with that . . . . We had contempt damages, and there were other fees that hadn't been paid . . . and we were being asked to waive those. I looked at it and said well, those we're being asked to waive on a non-contingent basis. So if the Archon deal went away, I would lose my claim to all those things. So I really ought to make sure I get the $3.5 million.").
[36] JX-58 (email from Peter McGlynn to Robert Culliford (Mar. 3, 2008)).
[37] Tr. Vol. II, at 305-06, 320, 329, 331 (Culliford).
[38] Tr. Vol. II, at 329-35 (Culliford).

Indeed, Culliford admitted that he had read "all of the March 6 Draft,"[39] and that he read "each line" of the March 3 and March 6 Drafts.[40] Culliford was also supported by Eric Hirschhorn of Winston & Strawn, LLP, B&M's outside counsel, who also reviewed the drafts.[41]

Culliford also took an active role in revising the draft Agreement. On the morning of March 7, 2008, Culliford emailed his comments to the March 6 Draft to McGlynn.[42] Those revisions included several changes to Section 3 of the Agreement.[43] In fact, Culliford recommended a change to Section 3, paragraph 4(a)(vi), indicating that he could not agree to "open ended attorneys fees, do you have an estimate that we could discuss?"[44] Culliford was therefore proposing changes to the very section — paragraph 4(a) — that contained the obligation that B&M pay Cambridge North Point the $3.5 million. That further confirms that Culliford was carefully scrutinizing Section 3, paragraph (4)(a) of the March 6 Draft.

Despite participating directly as a drafter and negotiator in the evolution of the draft 2008 Settlement Agreement, Culliford claims that he did not focus on the changes Cambridge North Point inserted requiring B&M to pay Cambridge North

[39] Tr. Vol. I, at 198 (Culliford).
[40] Tr. Vol. II, at 344 ("Q: You also read each line of each of the drafts. Correct? . . . A: Yes, I did.").
[41] *See* JX-64 (email from Robert Culliford to Eric Hirschhorn forwarding draft settlement agreement (Mar. 3, 2008)); JX-65 (email from Robert Culliford to Eric Hisrchhorn (Mar. 6, 2008)) (forwarding the March 6 Draft and requesting that Hirschhorn give Culliford comments).
[42] JX-60 (email from Robert Culliford to Peter McGlynn (Mar. 7, 2008)).
[43] *Id.*
[44] *Id.*

Point an additional $3.5 million regardless of whether the Archon deal closed or not. Culliford testified that he "missed"[45] the new provision because he did not "go back and line up 4(a)(i), three little iii's and check each one off because [he recalled] having seen the same $3.5 million figure at the beginning of the agreement as well as that $3.5 million coming out of the proceeds."[46] Culliford also said that he was "pretty busy" and "struggling to try to get Archon to commit to certain closing dates" at the same time that he was dealing with the 2008 Settlement Agreement negotiations.[47] At his deposition, Culliford said that he was "more focused on the other changes because I thought we had agreed on the three and a half," and that "[u]ltimately, I realized I was wrong."[48]

It is important to note exactly what Culliford claims he missed, and what he admitted that he clearly understood. In questioning at trial, Culliford testified that he read paragraph 5 of the March 6 Draft and fully understood that it required B&M to meet certain obligations even if the Archon deal failed to close, but that he simply never went back and identified what those obligations exactly were:

> The Court: You never went and you never got a compared version of the [March 3 Draft and the March 6 Draft]. Right?
>
> Culliford: No.

[45] Tr. Vol. II, at 334-35 (Culliford) ("The Court: Wait a minute. I want to be clear. You read this? Mr. Culliford: Yes, sir. Mr. McGlynn: You knew at the time that — you knew at the time that § III, ¶ 5, was that paragraph that specified what happened in the event that Archon didn't close on the sale. Correct? Mr. Culliford: Correct. . . . Mr. McGlynn: You weren't confused as of March 10. Correct? Mr. Culliford: No. *I missed this*.") (emphasis added).
[46] Tr. Vol. I, at 200-01 (Culliford).
[47] *Id*.
[48] JX-52 (excerpt of transcript of deposition of Robert Culliford (Aug. 7, 2008)).

> The Court: *You knew they were fundamentally different in structure. Correct?*
>
> Culliford: *Right.*
>
> The Court: You never went through and simply tallied up what it was you are going to pay . . . .
>
> Culliford: I thought I had, by relying on the initial net proceeds and the money remaining the same.
>
> The Court: You never went through this document, the actual draft contract, and said, "It says 4(a)(i) through (iii), and (v) through (vii). What will that cost my client?"
>
> Culliford: Correct.
>
> The Court: *But you knew that your client was responsible for (a)(i) through (a)(iv). Right?*
>
> Culliford: In different scenarios.
>
> The Court: No. No. *You knew that regardless of closing, (a)(i) — what was in (a)(i) through (a)(iv) your client was responsible for*.
>
> Culliford: *Based on the revised language of § 5, correct.*[49]

That is, Culliford admitted that he knew the March 3 Draft and the March 6 Draft were fundamentally different, and, in fact, that he knew B&M was obligated under paragraph 5 to meet certain obligations even if the Archon deal did not close, but that he had not actually looked back to see what the amounts were. Further testimony from Culliford confirmed that he simply had not gone back and read the contract carefully:

[49] Tr. Vol. II, at 338-39 (Culliford) (emphasis added).

> The Court: Neither [Hirschhorn nor] you ever did a cross-reference check on the agreement, but both of you knew that four — all the romanettes specified in that section of the agreement had had to be paid by your client, regardless of whether Archon closed?
>
> Culliford: Correct. We had — *we hadn't cross-referenced it back. That was the mistake we made*.
>
> The Court: *You knew every romanette [(a)(i) through (a)(iv) of paragraph 4] had to be paid. You just never checked what the romanettes were*.
>
> Culliford: *Correct.*[50]

Performing that cross-reference would not have been difficult. In fact, Philip Kingman, a non-lawyer senior vice president at B&M's sole shareholder, Pan Am Systems, Inc., identified in "a few minutes" after being given a copy of the 2008 Settlement Agreement that B&M was obligated under the agreement to pay $3.5 million to Cambridge North Point regardless of whether the Archon sale closed.[51]

Finally, on March 10, 2008, McGlynn sent Culliford an execution-ready version of the Agreement (the "March 10 Draft") which deleted the reference to "last Friday morning" in the first sentence of the agreement, meaning that the opening sentence now stated that the agreement "confirms and memorializes the agreements reached concerning the sale of [LandCo's interest in the Property] . . . and the resolution of our clients' respective claims."[52] B&M executed that Agreement that same day. Notably, Culliford testified at trial that there were no misrepresentations or false statements made during the meeting on March 10,

[50] *Id*. at 344 (emphasis added).
[51] Tr. Vol. II, at 472-73 (Kingman).
[52] JX-63 (draft settlement agreement (Mar. 10, 2008)) (the "March 10 Draft").

2008 when the parties executed the March 10 Draft as the 2008 Settlement Agreement.[53] And, after the 2008 Settlement Agreement was executed, Culliford did not bring any allegations of fraud to this court's attention, and did not mention fraud or misrepresentations in his letters dated May 16 and July 18, 2008 to McGlynn.[54]

d. The Final Terms Of The 2008 Settlement Agreement

Having described the negotiations that led to the 2008 Settlement Agreement, I now set forth the relevant terms that were finally memorialized on March 10, 2008. In its final form, the 2008 Settlement Agreement, B&M and Cambridge North Point reaffirmed their obligations under the 2007 Settlement Agreement and agreed that such obligations remained in full force except as modified by the 2008 Settlement Agreement.[55] And, B&M acknowledged that it had failed to make any of the payments it was obligated to under the 2007 Settlement Agreement.[56]

The 2008 Settlement Agreement also authorized LandCo to execute an amended and restated purchase and sale agreement with Archon at the reduced price of $152.5 million, but required that the sale must occur before April 23, 2008, at which time B&M would be obligated to pay the following amounts out of

[53] Tr. Vol. I, at 251 (Culliford), Tr. Vol. II, at 349 (Culliford).
[54] *See id*. at 357; JX-40 (letter from Robert Culliford to Peter McGlynn (May 16, 2008)); JX-51 (letter from Robert Culliford to Peter McGlynn (July 18, 2008)).
[55] JX-5 (executed settlement agreement (Mar. 10, 2008)) (the "2008 Settlement Agreement") § 2(1).
[56] *Id.* § 2(2).

its share of the sale proceeds: (1) $3.5 million to Cambridge North Point as additional consideration in partial settlement of the present action and litigation pending in the Suffolk County Massachusetts Superior Court (the "Suffolk Action");[57] (2) $1.325 million plus interest of $335.79 per diem beginning on December 21, 2007 to Cambridge North Point;[58] (3) $2.5 million plus interest of $633.56 per diem beginning on December 21, 2007 representing the consideration for Cambridge North Point's indirect interest in Sierra Plus Tango;[59] (4) 75% of all of Cambridge North Point's legal fees and costs in negotiating, drafting, and closing on Archon's purchase of LandCo's interest in the Property, which B&M acknowledged to be, as of February 29, 2008, $140,874.88;[60] (5) 100% of all of Cambridge North Point's legal fees and costs after December 21, 2007 associated with seeking enforcement of the 2007 Settlement Agreement and negotiating and drafting the 2008 Settlement Agreement, which B&M acknowledged to be, as of February 29, 2008, $131,724.40;[61] and (6) 75% of a claims and obligations reserve established for LandCo.[62]

But, if the LandCo sale to Archon did not occur by April 23, 2008 "for any reason whatsoever," then: (1) B&M still remained obligated to fully satisfy all of

[57] *Id.* §§ 3(4)(a)(i), 3(5).
[58] *Id.* §§ 3(4)(a)(ii), 3(5).
[59] *Id.* §§ 3(4)(a)(iii), 3(5).
[60] *Id.* §§ 3(4)(a)(v), 3(5).
[61] *Id.* §§ 3(4)(a)(vi), 3(5).
[62] *Id.* §§ 3(4)(a)(vii), 3(5).

the financial obligations described above no later than April 23, 2008;[63] (2) B&M warranted and represented that it had or would have sufficient funds available to satisfy all of its financial obligations to Cambridge North Point and LandCo even if the sale to Archon did not close;[64] (3) B&M was required to convey to LandCo its interest in the Property, free and clear of all liens and attachments, on April 28, 2008;[65] and (4) Cambridge North Point was authorized to select and employ a new national real estate brokerage firm to proceed in re-marketing the Property.[66] Therefore, all told, the 2008 Settlement Agreement plainly required B&M to pay Cambridge North Point approximately $11.3 million by April 23, 2008 regardless of whether LandCo's assets were sold.

e. Archon Terminates Again, And B&M Fails To Perform Its Obligations Under The 2008 Settlement Agreement

Archon terminated the reinstated purchase and sale agreement on March 17, 2008.[67] Even though the sale of LandCo's interest in the Property to Archon did not close by April 23, 2008, B&M became obligated to satisfy all of its financial obligations on April 23, 2008, and to convey all of its interests in the Property to LandCo free and clear of all liens and attachments.[68] But, B&M failed to perform those obligations.

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[63] *Id.* § 3(5).
[64] *Id.*
[65] *Id.* § 3(6).
[66] *Id.* § 3(7).
[67] JX-21 (letter from Andrew I. Glincher to North Point Cambridge Land Company LLC (Mar. 17, 2008)) (indicating that Archon was terminating the latest purchase and sale agreement).
[68] *See supra* pages 23-24.

From April 23, 2008 to April 28, 2008, B&M wired only a fraction of the money due to Cambridge North Point. After sending $50,000 to Cambridge North Point in partial payment for $210,459.15 in legal fees, and $7,864,124 to Cambridge North Point as required under the 2008 Settlement Agreement,[69] B&M failed to make any other payments, although it repeatedly promised in writing to wire additional funds to Cambridge North Point during May and June 2008.[70] At trial, Eric Lawler, the chief financial officer for Pan Am Systems, Inc., admitted that B&M was not able to make its full payments because it was counting on the Archon sale to have enough money to meet its obligations.[71] In other words, without the sale of LandCo's interest in the Property to Archon, B&M did not have sufficient funds to meet its obligations, thereby breaching its representation that it had sufficient funds to meet its obligations under the 2008 Settlement Agreement regardless of whether the Archon sale closed.

To be precise, B&M has failed to satisfy the following obligations: (1) to pay Cambridge North Point the sum of $3.5 million representing the additional consideration to be paid by B&M in partial settlement of this action and the Suffolk Action; (2) to pay Cambridge North Point approximately $160,000 in legal fees and costs — the balance remaining after B&M's $50,000 payment — as

[69] JX-13 (list of settlement payments made by B&M).
[70] JX-46 (email from Eric Lawler to Jason Manekas (May 7, 2008)) (indicating that he would "get back to [Cambridge North Point] about fees"); JX-59 (email from Eric Lawler to Jason Manekas (June 6, 2008)) (indicating that he "still do[esn't] have a date that we will be paying. I will get back to you as soon as I can").
[71] Tr. Vol. II, at 496 (Lawler) ("Q: [H]ow was B&M planning to pay those financial obligations? A: With the sale to Archon. Q: So B&M was counting on the sale [to] Archon to pay for those. A: Correct.").

required under the 2007 and 2008 Settlement Agreements, and to pay all of Cambridge North Point's fees and costs until B&M fully satisfies all obligations under the 2008 Settlement Agreement; and (3) to transfer B&M's fee interest in the Property to LandCo free and clear of all liens and attachments.

2. B&M Cannot Escape Its Obligations Under The 2008 Settlement Agreement Using Spurious Reformation And Unilateral Mistake Arguments

B&M admits that it is required to pay Cambridge North Point $3.5 million regardless of whether the Archon deal closed under the clear terms of the 2008 Settlement Agreement, but argues that the 2008 Settlement Agreement is unenforceable. B&M argues that the parties had a "meeting of the minds" on February 29, 2008 that B&M would pay Cambridge North Point $3.5 million out of the sale proceeds from the Archon deal, not that B&M would pay $3.5 million no matter what. B&M then argues that Cambridge North Point "quietly revised the settlement agreement" on March 6 by adding the language in paragraph 5 requiring the $3.5 million payment even if the Archon deal did not close.[72] B&M claims that plain language was slipped in under its nose, and that the 2008 Settlement Agreement is therefore unenforceable. B&M asks that this court reform the agreement to reflect the earlier understanding that the $3.5 million would only come out of the proceeds from the sale to Archon.

[72] B&M's Op. Post-Trial Br. 28.

B&M bases that argument on two different theories.[73] First, B&M argues that Cambridge North Point made misrepresentations that misled B&M into executing the 2008 Settlement Agreement. Second, B&M argues that its misunderstanding alone is grounds for reformation of the 2008 Settlement Agreement under the doctrine of unilateral mistake. For the reasons given below, both arguments are rejected.

a. Cambridge North Point Did Not Make Any Material Misrepresentations, And B&M's Purported Belief That The $3.5 Million Payment Was Still Conditioned On The Closing Of The Archon Deal Was Unreasonable

Under Massachusetts law, the law that applies to both the 2007 and 2008 Settlement Agreements,[74] a party must show a "misrepresentation of material fact, made to induce action, and reasonable reliance on the false statement to the detriment of the person relying" to prevail on a claim of misrepresentation.[75] B&M argues that Cambridge North Point's material misrepresentation was stating in the first sentence of the March 6 Draft that the Draft memorialized the parties'

[73] B&M also argues that the fact that the settlement agreement must be approved by this court is a separate ground upon which to reform the contract. But it is not clear how stating this court's authority to approve the settlement is a theory for why the 2008 Settlement Agreement is unenforceable, other than as a vague attempt to pluck this court's equitable heart-strings. Therefore, I focus only on B&M's two actual, if far-fetched, theories for why the contract is unenforceable — its misrepresentation and unilateral mistake arguments.

[74] *See* JX-8 § 8(25); 2008 Settlement Agreement § 5(4).

[75] *Commerce Bank & Trust Co. v. Hayeck*, 709 N.E.2d 1122, 1126 (Mass. App. Ct. 1999); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 166 (1981) (providing for reformation where a party signs an agreement based on the material misrepresentation of the other party and the party is justified on relying on the misrepresentation).

February 29, 2008 discussions.[76] B&M claims that this was a misrepresentation because the March 6 Draft "represented a radical departure" from the understanding the parties had on February 29.[77] And, B&M claims that it relied on that misrepresentation to its detriment "in failing to spot the removal of the condition precedent to the $3.5 million obligation that CNP had slipped into the March 6 Draft."[78]

B&M's argument fails because Cambridge North Point did not attempt to mislead B&M in any way. All Cambridge North Point did in the March 6 Draft was openly revise language in the previous draft. The changes were there for B&M to read. One cannot think of a plainer way of communicating during negotiations than suggesting text and exchanging drafts of the contract itself. That is the very essence of contract negotiations — the proposal of plain language advancing the client's goals. There is no clearer and more straightforward way to ask for a concession than to propose contract language to that end. Here, on

[76] B&M also argues that changing the language "B&M must pay to CNP an additional $3.5 million in addition to CNP's 25% share of the $152.5 million dollar Asset purchase price" in Section 3 of the March 3 Draft to "[B&M will pay] [t]o CNP, the sum of $3.5 million dollars representing the additional consideration to be paid by B&M to CNP in partial settlement of the Delaware Action and the Suffolk Action" in Section 3 of the March 6 Draft was also misleading because the $3.5 million was to make Cambridge North Point whole after Archon dropped its purchase price, not to settle the litigations. But, I cannot see how that inaccuracy — if it be an inaccuracy — would have materially influenced a reader into thinking that the $3.5 million was still conditioned on the Archon deal's closing. Therefore, I do not give this argument further consideration in the analysis that follows.

[77] B&M's Op. Post-Trial Br. 34.

[78] *Id*. at 33.

March 6, 2008, Cambridge North Point sent B&M a nine-page draft,[79] a noticeable increase in length over the six-page March 3 Draft, and clearly required B&M to pay the amounts in paragraph 4 of Section 3 regardless of whether the Archon deal closed. If it is deceptive to be unsubtle, if it is concealment to put something right in an adversary's face, then those concepts have become their own antonyms.

In other words, B&M's argument fails because it misconstrues the role of a draft agreement, which is to *propose* what the final agreement should be. Indicating in the March 6 Draft that the settlement agreement "confirms and memorializes the agreements we reached last Friday evening" was not a statement that the March 6 Draft incorporated the understanding between the parties on February 29 *as a prior binding agreement* between the parties, but instead acknowledged the February 29 understanding was the *starting point* in the negotiations to finalize an agreement. In other words, the March 6 Draft was just that — a *draft*, which by definition indicates that the exact terms of the agreement are evolving, and therefore prior iterations of the agreement were tentative. Indeed, B&M proposed a number of revisions to the draft agreement itself,[80] so it knew that subsequent drafts were different from the original understanding reached on February 29, 2008 even though the language in the first sentence of the drafts stayed the same. And, in any event, the final version of the 2008 Settlement Agreement elided the phrase "last Friday evening" from the allegedly misleading

[79] *See supra* page 15.
[80] *See supra* page 18.

sentence, entirely removing any reference to the earlier discussion that the $3.5 million payment was conditioned on the Archon sale.[81] Therefore, the statement that the March 6 Draft "confirms and memorializes the agreements we reached last Friday evening" was not a misrepresentation.[82]

Furthermore, B&M's purported belief that it was still required to pay $3.5 million only if the Archon deal closed is unreasonable, if not wholly implausible. As mentioned above, the changes in B&M's payment obligations from the March 3 Draft to the March 6 Draft were in plain view. They are so obvious that it strains credulity to argue that B&M's in-house counsel and high-priced outside counsel could have missed them.[83] All B&M had to do to figure out that

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[81] *See supra* page 21.

[82] What B&M is really arguing here is that the initial discussions between B&M and Cambridge North Point at the end of February 2008 should trump the final written agreement executed on March 10, 2008. But that argument is contrary to well-settled precedent in Massachusetts and elsewhere that prior negotiations are excluded from consideration where the parties have integrated their agreement into a single memorial. *See Starr v. Fordham*, 648 N.E.2d 1261, 1268 (Mass. 1995) (stating that a fully integrated agreement is a statement which the parties have adopted as the complete and exclusive expression of their agreement and, if fully negotiated and voluntarily signed, a party may not raise as fraudulent and prior oral statement which is inconsistent with the specific provisions of the contract); 11 RICHARD A. LORD, WILLISTON ON CONTRACTS § 33:23, at 675-76 (4th ed. 1999) ("Courts have generally agreed that if the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements in regard to the same subject matter, whether oral or written, are excluded from consideration.").

[83] If I had to make a finding, I would conclude that Hirschhorn and Culliford understood what B&M was agreeing to in the 2008 Settlement Agreement. Hirschhorn did not testify and deny that he misunderstood the relevant part of the 2008 Settlement Agreement. He is an accomplished business lawyer, and I believe he likely understood what the terms of the Agreement meant. Although it is a closer call on Culliford, I am not convinced he was unaware of the plain implications of Section 3 of the 2008 Settlement Agreement. But he had to face his boss when the Archon deal fell through, a boss whose company did not have the funds it promised it had in Section 3, paragraph 5 of the 2008 Settlement Agreement. It is at least as plausible, given B&M's aggressive

paragraph 5 required the $3.5 million payment to be made even if the Archon deal fell through was to go back and read the provisions in paragraph 4(a)(i)-(iii). Indeed, one would think that any lawyer — much less B&M's Winston & Strawn attorneys — reading language requiring that a number of payments must be made regardless of whether the Archon deal closed would instinctively have looked to see exactly what those payments were.

And, the evidence showed that B&M failed to realize what the revisions meant for no other reason than its own lack of diligence. Culliford testified that B&M never compared the March 3 Draft and the March 6 Draft closely.[84] Furthermore, Culliford testified that *he was aware at the time* of the changes being made to paragraph 5 in the March 6 Draft.[85] Indeed, the only reason he did not figure out that paragraph 5 required B&M to pay $3.5 million even if the Archon deal failed to close was that *he did not go back and read the sections referenced in paragraph 5*.[86] Spotting the change in B&M's obligations was so easy that a non-lawyer, Kingman, picked up on the consequences for B&M almost immediately.[87] And, Cambridge North Point's revisions in the March 6 Draft were hardly surprising — indeed, those changes could be expected — given Cambridge North Point's obvious concerns about getting paid, and given the decreasing likelihood

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tactics and continuing pattern of breaches, that Culliford claimed surprise and came up with an argument for B&M to avoid paying $3.5 million.

[84] *See supra* pages 19-21.

[85] *See supra* pages 20-21.

[86] *See supra* pages 18-21.

[87] *See supra* pages 21.

that the Archon deal would close.[88] Therefore, B&M's purported belief that the $3.5 million payment was still conditioned on the closing of the Archon deal was unreasonable, and B&M must bear any cost flowing from its own lack of care.

b. B&M's Unilateral Mistake Argument Also Fails

B&M also argues that the 2008 Settlement Agreement is unenforceable under the doctrine of unilateral mistake. Under Massachusetts law, in order to reform an agreement on the basis of unilateral mistake, the mistake made by one party must be such that the other party knew or had reason to know about it.[89] The burden is on the party claiming the mistake to present "full, clear, and decisive proof that a mistake occurred and that the other party knew or had reason to know of the mistake."[90]

B&M's unilateral mistake argument must be rejected for the same reasons its misrepresentation argument failed. Here, B&M has produced no evidence indicating that Cambridge North Point knew or should have known that B&M was mistaken. B&M is a sophisticated player, and was lawyered-up during its negotiations with Cambridge North Point.[91] And, the changes in B&M's obligations under the various iterations of the draft settlement agreement were in plain view.[92] Furthermore, the evidence showed that Culliford was actively

[88] *See supra* page 16-17.
[89] *Polaroid Corp. v. Travelers Indem. Co.*, 610 N.E.2d 912, 917 (Mass. 1993).
[90] *Nissan Auto. of Marlborough, Inc. v. Glick*, 816 N.E.2d 161, 165 (Mass. App. Ct. 2004) (internal citations omitted).
[91] *See supra* pages 17-18.
[92] *See supra* pages 15-16 .

participating in the settlement negotiations,[93] proposing changes himself to the drafts,[94] and that he was reading all of the drafts as they came across.[95] Even if B&M did make a genuine mistake — which I find hard to believe given the legal talent in B&M's service — there was no reason for Cambridge North Point to know that B&M was making a mistake during the negotiations. Every indication suggested that B&M knew what it was doing.[96]

* * *

Because B&M's misrepresentation and unilateral mistake theories fail, I find that the 2008 Settlement Agreement is enforceable. Because B&M has breached the 2008 Settlement Agreement, it owes Cambridge North Point compensation. Therefore, B&M must pay Cambridge North Point $3.5 million with interest at the statutory rate.

B. B&M Must Transfer Its Interest In The Property To LandCo

The next issue is whether Cambridge North Point is entitled to relief for B&M's failure to transfer its interest in the Property to LandCo. In addition to requiring B&M to pay Cambridge North Point $3.5 million, the 2008 Settlement

[93] *See supra* pages 12-18.
[94] *See supra* page 18.
[95] *See supra* pages 19-21.
[96] The consequences of relieving a party of a contractual duty in plain sight in multiple drafts and in the final draft of a negotiated contract would be profoundly negative. Indulging "mistake" claims of that kind would undermine the reliability of contracts, and thus reduce the social wealth that results from commercial exchanges induced by the enforceability of the agreements that make it worth the parties' efforts and cost to deal with each other.

Agreement also obligated B&M to transfer all of its interest in the Property it leased to LandCo under the Ground Lease:

> If the Archon Asset sale does not close . . . on or before the Outside Closing Date for any reason whatsoever, B&M must convey to LandCo on or before April 28, 2008 all of its right, title and interests in the real property described in certain Ground Lease and Building Lease dated August, 2001. . . via Release deed which states that the consideration therefore is less than $100.00. B&M shall be responsible for securing the release and discharge of all liens and attachments against the Property at or before the time for delivery of the Deed.[97]

The 2008 Settlement Agreement also provides that "if B&M fails to convey the Property on or before April 28, 2008 . . . CNP shall be entitled to specifically enforce the provisions of this Section . . . by emergency motion in either the Suffolk Action or the Delaware Action and B&M hereby waives all defenses in connection therewith."[98] Because B&M has still not transferred its interest in the Property to LandCo, Cambridge North Point requests this court order B&M to specifically perform its obligation under the 2008 Settlement Agreement to transfer its interest in the Property.

[97] 2008 Settlement Agreement § 3(6). A similar obligation was also contained in the 2007 Settlement Agreement, which B&M failed to perform. JX-8 § 4 ("In the event that the sale of LandCo's assets to Archon does not close for any reason whatsoever, B&M hereby agrees . . . to convey without payment all of its right, title, and interest in the real property described in that certain Ground Lease and Building Lease dated August, 2001.").

[98] 2008 Settlement Agreement § 3(6).

B&M admits that it has breached the 2008 Settlement Agreement because it has not transferred its interest in the Property to Landco.[99] It is also breaching its contractual obligations by raising defenses it promised to waive. But, B&M persists in arguing that it should not be required to transfer its interest in the Property because, by doing so, B&M would not be complying with Chapter 161C § 7 of the Massachusetts General Law, which in this situation requires B&M to extend to the Massachusetts EOTC the right to acquire B&M's interest for the contractual price for 90 days before B&M offers it to anyone else.[100] B&M argues that it cannot be required to violate the law in order to fulfill its contractual commitments.

But, nobody is forcing B&M to break the law. It has had ample time since it first agreed to transfer its interest in the Property in the 2007 Settlement Agreement[101] to give the EOTC 90 days to exercise its right of first refusal. B&M certainly knew how to obtain waivers from the EOTC of its right of first refusal because it had done so before.[102] Rather than taking the necessary steps to transfer its interest in the Property with a clean title as it agreed to do, B&M has made no

[99] *See Cambridge North Point LLC v. Boston and Maine Corporation*, C.A. No. 3451-VCS, at 69 (Del. Ch. Mar. 31, 2010) (TRANSCRIPT) (B&M's counsel conceding that B&M had violated the 2008 Settlement Agreement's literal terms).
[100] Massachusetts Gen. L. c. 161C, § 7.
[101] 2007 Settlement Agreement § 4(16).
[102] *See* JX-15 (letter from Massachusetts Executive Office of Transportation and Construction to Boston & Maine Corporation (Sept. 27, 2001)) (waiving right of first refusal).

good faith effort to prepare for the transfer.[103] Furthermore, despite Culliford's awareness of the "right of first refusal process" under Chapter 161C § 7 of the Massachusetts General Law, B&M did not include any language in the 2008 Settlement Agreement making B&M's conveyance of its fee interest in the Property subject to the EOTC's right of first refusal.[104]

Therefore, B&M has two choices. First, it can give the Massachusetts government 90 days to buy B&M's fee interest at "less than $100" — the amount of consideration the parties referred to in the 2008 Settlement Agreement.[105] If the government waives the right, B&M shall transfer its interest to LandCo. But, if the EOTC accepts an offer to buy B&M's interest for $100 and B&M cannot deliver the fee interest as it promised, then B&M must pay Cambridge North Point $5.9 million in damages. But second and perhaps best, B&M could be sensible and do the following: (1) acknowledge that the promise to transfer its fee interest in the Property to LandCo was to remedy multiple claims and to give valuable consideration to address those claims, and accept that the best estimate of the value of the fee interest is the amount I will award in damages, $5.9 million; and (2) extend the right of first refusal to the EOTC at a strike price of $5.9 million. If the EOTC declines the offer, then B&M will transfer the fee to Cambridge North

[103] *See Cambridge North Point LLC*, C.A. No. 3451-VCS, at 67 (Del. Ch. Mar. 31, 2010) (TRANSCRIPT) (B&M's counsel conceding that there was no evidence in the record that B&M had sought a waiver from the EOTC of its right of first refusal).
[104] Tr. Vol. I, at 220, 265, 268 (Culliford).
[105] 2008 Settlement Agreement §3(6).

Point. But, if the EOTC accepts the offer to buy B&M's interest at $5.9 million, then B&M will remit that amount to Cambridge North Point in damages.

At trial, and in its briefs, B&M says that it does not want the EOTC to snatch up B&M's fee interest for $100 at LandCo's expense. Yet it obstinately refused to offer up a constructive solution, despite realizing that the $100 figure was not the real value of the exchange. So, if B&M does not want the EOTC to get its fee interest for a song, then it can choose the second option above. B&M, which has had substantial experience getting waivers from the EOTC in the past,[106] can also get on with doing what it should have done long ago: seeking in good faith to get the EOTC to approve the transfer B&M unconditionally promised to make.

I use the $5.9 million figure because that is the best estimate of the value of B&M's fee interest as of the time of B&M's breach. Cambridge North Point's expert, Pamela McKinney, testified persuasively as to that value.[107] The valuation range McKinney used to make her valuation was based on the recent sales of 24 commercial properties in Boston and Cambridge,[108] and on McKinney's assumption that the fully developed property would be prudently managed and

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[106] *See supra* note 102.

[107] Tr. Vol. III, at 7 (McKinney); *see also* Trial Ex. 169 (expert report of Pamela McKinney). McKinney used a discounted cash flow ("DCF") analysis to reach this valuation, and employed a 3% annual escalation rate and a 10% discount rate. *Id*. In constructing her DCF model, McKinney estimated that the value of the fully improved land was $500 per square foot (the low end of her $500-600 per square foot valuation range), and that the Property had 4,925,000 square feet of developable building area. *Id*.

[108] JX-71 (list of recent sales of offices and life sciences buildings in Boston, Brookline, and Cambridge, Massachusetts).

that "reinvestment in the buildings w[ould] be an ongoing matter, that major capital repairs w[ould] be reserved for as typical in the market place, and that the interests of the tenant . . . w[ould] be to preserve and enhance and maximize the value over the life of the lease."[109] Those assumptions were more reasonable than those made by B&M's expert, Robert LaPorte, who reached a much lower estimate of $1,320,000 for B&M's fee interest in the Property.[110] Although he used the same escalation and discount rates as McKinney (3% and 10%, respectively),[111] LaPorte speculated that, at the end of the Ground Lease term, the Property's improvements would be downgraded to Class B or C and would have to be redeveloped.[112] In making that assumption, LaPorte looked at comparables such as a forty-year old asbestos-infested courthouse in Cambridge, Massachusetts in tear-down condition that had a leaky roof and inoperable elevators, and a list of building sales, which he admitted are "really not going to be comparable to what would be constructed on the North Point site."[113] At trial, LaPorte provided no plausible justifications for these assumptions. Nor did he convince me that it would be probable that a rational leaseholder would or could drastically cut its

[109] Tr. Vol. III, at 35 (McKinney). When asked whether the Ground Lease tenant would invest money in the Property near the end of the Ground Lease term, McKinney stated: "What happens is the tenant is extremely interested in preserving the revenue stream, and therefore, the obligations to the tenancies in the building and to the lender at the time precipitate a renovation or a maintenance attitude which remains about preserving value and keeping the cash flow going. So I don't think that the attitude of the parties changes as you approach the end of the term." Tr. Vol. III, at 37-38 (McKinney).
[110] Tr. Vol. III, at 76 (LaPorte).
[111] JX-79 (expert report of Robert LaPorte); *cf.* Trial. Ex. 169.
[112] *Id.*; Tr. Vol. III, at 70-71, 135 (LaPorte).
[113] Tr. Vol. III, at 120-23 (LaPorte).

maintenance outlays near the end of the lease, and thereby markedly reduce the grade of the Property. Therefore, I adopt McKinney's estimate as the most reasonable valuation of B&M's interest in the Property.

C. The New Bidding Procedures Must Be Approved

As mentioned above, the 2008 Settlement Agreement provided that a new set of bidding procedures would be issued if the Archon deal did not close by April 23, 2008.[114] On July 14, 2008, Cambridge North Point sent B&M a new set of bidding procedures (the "New Bidding Procedures") that call for submission of offers from interested parties within thirty days, and a closing on the sale within sixty days.[115] Cambridge North Point's briefing indicates that, although B&M has agreed to those new procedures, B&M apparently has not agreed to the form of the revised purchase and sale agreement.[116] But, none of B&M's pre-trial or post-trial briefs address the issue. Therefore, I deem B&M's argument waived, and the New Bidding Procedures, including the new purchase and sale agreement, are approved.

D. The Easement B&M Granted To Sierra Plus Tango Is Void, And B&M Must Pay Cambridge North Point Damages For Granting The Easement

In 2005, nearly two acres of the Property owed by B&M, known as Parcels S and T, were conveyed by B&M to one of its wholly-owned affiliates, Sierra Plus Tango, LLC ("Sierra Plus Tango"). Eventually, Parcels S and T were developed

[114] 2008 Settlement Agreement § 3(7).
[115] JX-66 (letter from Robert Culliford to Peter McGlynn (July 14, 2008)) (setting forth revised bidding procedures).
[116] Cambridge North Point's Op. Post-Trial Br. 48.

into residential space. Because of limited space, Parcels S and T could not accommodate parking spaces for all of the residents' cars. Therefore, additional parking space located somewhere else on the Property was necessary.

In order to give residents access to adequate parking spaces, B&M, as holder of the fee interest in its 39 acres of the Property, granted a perpetual easement (the aforementioned "Easement") on the Property to Sierra Plus Tango on May 22, 2008 consisting of a "nonexclusive right and easement to allow the residents and other authorized users of the S/T Parcels access to and use of the roads, common areas, parks and sidewalks and other land described [in the Easement], along with the parking facilities as they may be designated by [B&M] from time to time."[117] Under the Easement, the residents on Parcels S and T were given access to 128 parking spaces on the Property leased to LandCo. The Easement was granted to Sierra Plus Tango one month *after* the date when B&M was obligated to transfer its fee interest in the Property to LandCo, and without the knowledge or consent of Cambridge North Point or LandCo.[118]

The Ground Lease between B&M and LandCo includes a covenant by B&M that it would not further encumber or lien the Property, or cause or permit the Property to be encumbered or liened in any manner whatsoever.[119] Therefore,

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[117] JX-54 (easement from Boston and Maine Corporation to Sierra Plus Tango LLC (May 22, 2008)).
[118] Tr. Vol. II, at 454 (Kingman) (testifying that B&M never provided a copy of the Easement to Cambridge North Point, nor did B&M ask Cambridge North Point or LandCo to review it).
[119] Ground Lease § 9.3.

the grant of the Easement violated provisions in the Ground Lease that precluded B&M from encumbering the Property or the Ground Lease.

B&M does not dispute that it breached the terms of the Ground Lease. Rather, it argues that the breach has not *yet* caused any harm. For support, B&M points to the fact that only a fraction of the residential space in Parcels S and T is currently being used, and therefore all of the residents are currently parking on Parcels S and T, not making use of the rights granted to them under the Easement to park elsewhere on the Property.[120]

But, those arguments miss the point entirely. The fact is that the Easement is an encumbrance on the Property. Anyone interested in buying the Property must now take this Easement into consideration, and they will naturally want to pay less for shouldering those obligations. That is, by granting this Easement without Cambridge North Point's consent, B&M has negatively affected the marketability of LandCo's interest in the Property. It is precisely to guard against such encumbrances that the Ground Lease prohibited B&M from entering into an easement like this without Cambridge North Point's permission.

Therefore, B&M's grant of an Easement to Sierra Plus Tango materially harmed Cambridge North Point and LandCo. Because that grant was made without Cambridge North Point's consent, as required under the Ground Lease and the Operating Agreement, the Easement is void.

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[120] *See Cambridge North Point LLC*, C.A. 3451-VCS, at 79 (Del. Ch. Mar. 31, 2010) (TRANSCRIPT).

B&M must also compensate Cambridge North Point in damages for the value of the parking spaces made available to the residents of Parcels S and T through the Easement. Even if all of those parking spaces have not been used continually since the Easement was granted, the reality is that parking space in a densely populated area such as Cambridge, Massachusetts is valuable. McKinney estimated that the market value for the 128 parking spaces was $100 per space/month,[121] based on a model in which no maintenance expenses were included because parking land leases are typically triple net.[122] I accept that reasonable estimate and reject LaPorte's valuation, which deducted $50 per space/month for the cost of maintaining parking spaces.[123] LaPorte could not explain the basis for his deduction of maintenance costs, and admitted that a number of the largest property owners in the Boston area did most of their parking leases on a triple net basis.[124] Therefore, the parties shall use McKinney's $100 per space/month estimate to calculate damages from the time the Easement was granted to the present time.

E. B&M Breached The 2008 Settlement Agreement By Entering Into The MOA Without Cambridge North Point's Consent

Granting the Easement was not B&M's only secretive act. In May 2008, B&M executed a memorandum of agreement (the aforementioned "MOA") with

[121] Tr. Vol. III, at 17 (McKinney); *see also* Trial Ex. 169 (expert report of Pamela McKinney (Aug. 15, 2009)).
[122] Tr. Vol. III, at 19 (McKinney).
[123] Tr. Vol. III, at 142-43 (LaPorte).
[124] *Id*. at 144.

the City of Cambridge in violation of the 2008 Settlement Agreement. Apparently, the purpose of the MOA was to obtain the City of Cambridge's approval of infrastructure work which B&M performed on and around the condominium development located on Sierra Plus Tango's property. The City of Cambridge required such work as a condition of its issuance of Certificates of Occupancy for Sierra Plus Tango's condominium development.[125] The MOA also requires B&M to perform operation, maintenance, indemnity, insurance, and other obligations that directly affect LandCo's interest in the Property.[126]

The 2007 Settlement Agreement required B&M to deliver to Cambridge North Point copies of all contracts pertaining to its work on LandCo's property, and required Cambridge North Point's prior written consent for such work.[127] Because B&M did not notify Cambridge North Point of the MOA when it entered into the contract,[128] B&M breached its obligation to notify Cambridge North Point

[125] *See* JX-12 (Memorandum of Agreement (May 20, 2008)).
[126] *Id*.
[127] JX-8 §§ 3(12) ("On or before November 15, 2007, B&M shall deliver to CNP a list (the "List") of all contracts, agreements, arrangements and understandings, together with copies thereof, which B&M executed or plans to execute on behalf of B&M, Pan Am Systems, Inc. ("Pan Am"), LandCo or any other entity relating to S Plus T, infrastructure work, and any other work to satisfy the requirements of the City of Cambridge."), 3(13) ("In addition, to the extent that any of the Third-Party Contracts are performing or planning to perform work on any of LandCo's property, CNP's advance written consent shall be required before such work continues or is commenced. CNP's consent will not be unreasonably withheld; however, withholding of such consent by CNP shall be deemed reasonable in the event that B&M is in breach of any provision of this [2007 Settlement Agreement] at the time such request is made.").
[128] Tr. Vol. II, at 373-375 (Culliford) (admitting that neither LandCo nor Cambridge North Point were provided a copy of the MOA).

or obtain its written consent to the contractual commitments it made to the City of Cambridge under the MOA.

B&M admits it breached the contract, but again argues that no harm has resulted from the breach because the MOA was necessary to obtain the occupancy permits. But, B&M's argument is belied by its own secretive behavior. That is, if the MOA was in Cambridge North Point's self-interest, then surely it would have willingly consented to entering into it. But, B&M purposefully deprived Cambridge North Point of its contractual right to consent to the work plan. Having foisted commitments to public authorities on Cambridge North Point without its consent, B&M is in no position to claim it has caused Cambridge North Point no harm. That is especially so when Cambridge North Point's expert reasonably testified that the MOA has a negative effect, because it exposes LandCo "to the negative consequences of a potential nonperformance . . . but without conferring any rights to cure the problem."[129] She also said that the MOA depressed the Property's marketability because it created a potential for conflict between LandCo's interest in developing the property and B&M's performance under the MOA.[130] The risk that B&M will default on the obligations it made in the MOA is material, especially because the evidence showed that B&M was already behind schedule on meeting them.[131]

[129] Tr. Vol. III, at 22 (McKinney).
[130] *Id*. at 52-53.
[131] *Id*. at 56-7.

Even though B&M breached its contractual commitments by entering into the MOA without Cambridge North Point's permission, thereby harming LandCo and Cambridge North Point, I cannot order the agreement to be set aside because the MOA is a contract between B&M and the City of Cambridge, and Cambridge North Point is not a party to it. But that does not mean there is not relief available to remedy the harm B&M has caused Cambridge North Point and LandCo. To wit, B&M must establish a reserve sufficient to cover future costs arising from the MOA. B&M has promised in the past that it has had enough money to cover obligations, only to come up way short.[132] B&M has also granted security interests in Sierra Plus Tango, meaning that Cambridge North Point look to the value of Sierra Plus Tango for any relief if B&M again defaults on a legal obligation. Thus, a reserve is necessary to ensure that LandCo and Cambridge North Point are not left holding the bag resulting from the improper commitments B&M unilaterally made to the City of Cambridge. The amount of that reserve will be $7.2 million, in accordance with McKinney's reasonable estimate that a reserve of that size was required to cover B&M's obligations relating to the MOA.[133]

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[132] *See supra* pages 10, 24-26.

[133] Tr. Vol. III, at 26 (McKinney). LaPorte's expert report states that there would be "no value or adverse marketability influence caused by or resulting from the MOA." JX-170. But, during his cross-examination, LaPorte acknowledged that at least one of the potential buyers of LandCo's interest required that the issues concerning the MOA be resolved before closing. Tr. Vol. III, at 147 (LaPorte). LaPorte also acknowledged that he had not verified whether B&M had met all of its obligations under the MOA before he came to his opinion. *Id*. at 102, 149-50. He also admitted that there was "development risk" for the cost of correcting or performing work under the MOA in the future. *Id*. at 151-54. And, even if McKinney's estimate was uncertain — which it is not — it is the law of Massachusetts that remedial uncertainties are resolved the breaching party. *See*

F. Cambridge North Point Is Entitled To Attorneys' Fees In Enforcing The 2007 And 2008 Settlement Agreements

Under the 2008 Settlement Agreements, B&M was obligated to cover Cambridge North Point's attorneys' fees and costs in the event of a breach.[134] Because B&M has repeatedly breached the 2008 Settlement Agreement, I find that Cambridge North Point is entitled to attorneys' fees and costs arising from enforcing the Agreement. B&M does not even contest this issue in its briefing, only asserting in a pre-trial brief that "it intends to resolve these [issues] with [Cambridge North Point] prior to trial."[135] Although B&M has paid some of Cambridge North Point's attorneys' fees, there is no indication that it has come through on its promise to resolve this issue. Therefore, B&M must pay the remainder of the attorneys' fees and costs that it owes Cambridge North Point. The parties shall immediately exchange information and try to agree on the amounts due. If B&M objects to the amount sought by Cambridge North Point, it

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Augat, Inc. v. Aegis, Inc., 417 N.E.2d 995, 999 (Mass. 1994) ("[A]lthough proof of the precise of amount of loss is impossible, the defendants should not be permitted to escape the consequences of their wrongful conduct that caused harm to the plaintiffs if some reasonable damages calculation can be made." (citing *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-66 (1946))); *Thermo Electron Corp. v. Schiavone Const. Co.*, 958 F.2d 1158, 1166 (1st Cir. 1992) (noting that "where the defendant's wrongdoing created the risk of uncertainty, the defendants cannot complain about imprecision" (quoting *Jay Edwards, Inc. v. New England Toyota Distributor Inc.*, 708 F.2d 814, 818 (1st Cir. 1983))). Therefore, my conclusion is that McKinney's estimate is the more reliable one, and that a $7.2 million reserve is necessary to cover ongoing obligations under the MOA.

[134] *See* 2008 Settlement Agreement §§ 3(6) (entitling Cambridge North Point to specifically enforce B&M's obligation to convey its interest in the Property to Cambridge North Point, and providing that Cambridge North Point is entitled to attorneys' fees in connection with that enforcement action), 5(2) (entitling Cambridge North Point, as the prevailing party, to recover from B&M attorneys' fees and legal costs).

[135] B&M Op. Pre-Trial Br. 27.

shall certify to the court that its own fees and costs were materially lower than the amounts sought by Cambridge North Point, and provide a full accounting of its own costs.

V. Conclusion

For the foregoing reasons, I find that: (1) B&M must pay Cambridge North Point $3.5 million plus interest as required under the 2008 Settlement Agreement; (2) B&M must transfer its fee ownership interest in the Property to Cambridge North Point in accordance with the election afforded by this decision; (3) the New Bidding Procedures are approved; (4) the Easement B&M granted Sierra Plus Tango is void, and B&M must pay Cambridge North Point damages for granting that Easement; (5) B&M must set aside $7.2 million in a reserve to cover costs arising from the MOA; and (6) B&M must pay Cambridge North Point's attorneys' fees and costs. The parties shall submit an implementing final judgment that shall reflect B&M's choice of approach as to the fee ownership interest issue within ten days. IT IS SO ORDERED.