IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LIBERTY PROPERTY LIMITED PARTNERSHIP,	)	
Plaintiff, Counter-Defendant,	)	
v.	)	C.A. No. 3027-VCS
25 MASSACHUSETTS AVENUE PROPERTY LLC,	)	
Defendant, Counter-Plaintiff.	)	

MEMORANDUM OPINION

Date Submitted: January 28, 2008
Date Decided: April 7, 2008

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STRINE, Vice Chancellor.

I. Introduction

This case presents an unusual question for the Delaware Court of Chancery to answer: Does the contract law of the District of Columbia require the owner of a building to accept a lease that no reasonable lessor would ever sign simply to facilitate the lessee's exercise of a contractual option to purchase the building?

This bizarre question arises because an option holder's right to purchase a building was subject to the prior condition that 85% of the building be under leases meeting certain contractually specified conditions. When the option holder faced the expiration of its option — an expiration that began a period when the owner could sell the building free and clear of any option possessed by the option holder — the option holder tendered up a last-minute "master lease" whereby it purported to lease the required space itself. As the option holder has been forced to admit, no reasonable lessor would have ever accepted the lease, because its terms would have been unpalatable to any actual lessor. The only purpose of the so-called lease was to permit the option holder to exercise the purchase option.

Indeed, the plain terms of the supposed lease permitted the option holder to terminate the lease after a mere twelve days if a sale of the building to the option holder was not closed for any reason, even if the reason for the failure in the closing was conduct by the option holder. The lease also contained other commercially suspect provisions, such as the absence of any security deposit, the requirement that a large commission be paid to the option holder for securing the lease it itself was proposing, and a holdback of nearly $10 million premised on the speculative costs that might be required

to improve parts of the building. This holdback would be used to meet the needs of actual tenants who might someday arise to sublease and occupy (for purposes that would not be known until then) the vast quantities of space the option holder was supposedly promising to lease. For these and other reasons, even the option holder's own testimonial expert on commercial leases suggested that no reasonable landlord would enter into a lease of this kind and that the only purpose of the lease was not to act as a lease, but as an artificial fulfillment of the contractual condition to exercise the option.

District of Columbia contract law imposes no obligation on a party to a contract to engage in an act of charity by waiving a condition precedent to enable an option holder to obtain its wishes. In this case, the building owner had the freedom to sell the building to the highest bidder if the condition to the option exercise was not fulfilled. To require the building owner to excuse the failure of that condition by accepting a sham lease that no reasonable landlord would accept would rewrite the parties' agreement and undercut the narrow reading given to option contracts. Therefore, I reject the option holder's demand that I grant it an order of specific performance permitting it to purchase the building at the price it set in its purported exercise of the option.

By contrast, I rule for the option holder as to the claims for damages made by the building owner against it. The premise for that claim is that the building owner lost a unique sales opportunity because the option holder filed a lis pendens against the building under D.C. law and the potential buyer was unwilling to close unless the lis pendens was lifted.

Under the relevant D.C. statute, the filing of a lis pendens that is later lifted can only give rise to damages against the filer in the form of sanctions, when appropriate.[1] The building owner has disclaimed any intent to show that the lis pendens filing by the option holder met that stringent sanctions standard.

Rather, it seeks to have me hold that the logical consequence of the option holder having been found not to have exercised its option rights in compliance with the parties' contract is that the option holder has thereby committed a contractual breach and must pay damages for any harm suffered by the building owner. I do not embrace that argument.

Under the American rule, which applies in the District of Columbia, a losing party to litigation does not indemnify the winning party for any harm suffered merely as a result of the fact that a claim did not succeed. Here, the building owner is unable to identify any specific contractual obligation that the option holder breached by its futile attempt to exercise the option. For a Delaware judge to improvise and impose a consequence for the filing of a lis pendens based on a showing that would not satisfy the statute adopted by the District of Columbia's own government would be a strange and unprincipled exercise in common law making, displaying disrespect for the legislative branch of the District of Columbia by judicially inventing a remedy to address a problem that the policymakers with legitimacy have already addressed in a specific manner.

[1] D.C. CODE § 42-1207(d) ("When appropriate, the court may also impose sanctions for the filing.").

II. Factual Background

A. Founding Republic

25 Massachusetts Avenue Property LLC ("25 Mass") owns as its principal asset Republic Square I, a nine-story, 389,252 square foot Class A "trophy" office property near Union Station in Washington, D.C. The property was developed by Richard Kramer, Steven Grigg, and Mark Keller (collectively the "Republic Founders"), the managers and owners of Republic Properties Corporation and the then-managers of a successful commercial real estate investment fund. At Republic Properties Corporation, a property management and service company, Kramer served as chairman of the board, Grigg served as president and chief executive officer, and Keller served as managing director. Keller indirectly owned approximately 1.3% of 25 Mass, Grigg owned around 15% and Kramer owned most or all of the remainder, having provided most of the capital.

The Republic Founders created a publicly traded REIT in 2004 and 2005 ("Republic").[2] The Republic Founders funded the REIT by transferring many of the properties controlled by them into the REIT structure. In return, they received units of the REIT's operating partnership ("OP Units"). Once Republic was formed, Kramer became chairman, Grigg vice chairman and president, and Keller CEO.

The Republic Founders ultimately contributed 10 fully-constructed commercial real estate properties consisting of 21 institutional grade office buildings and 1,991,252

[2] As part of the REIT creation process, the Republic Founders created Republic Property Trust and Republic Property Limited Partnership as the REIT's operating limited partnership. I will refer to these entities collectively as "Republic" unless the context requires a distinction.

rentable square feet of property to Republic, as well as options to purchase three properties under development, namely Republic Square I, Republic Square II, and Portals III (collectively, the "Option Properties"). On December 20, 2005, Republic was offered for sale to public investors in an initial public offering ("IPO"). After the IPO, Kramer beneficially owned 7.59% of all of Republic's shares and units; Grigg 1.55%; and Keller 1.5%.

B. The Option Agreement

The option to purchase Republic Square I and Republic Square II was memorialized in an "Option Agreement" that was executed on November 28, 2005 by Republic, 25 Mass, and the entity owning Republic Square II.[3] That Option Agreement as well as an option agreement to purchase Portals III were added to Republic's portfolio to increase the attractiveness of the REIT to investors. To achieve that purpose, the Republic Founders decided the options for the Option Properties would need to be at a discount to each property's asset value. Because the Option Agreement represented a transfer of value from 25 Mass to Republic, the terms of the Option Agreement were negotiated. Keller negotiated principally on behalf of Republic with Hogan & Hartson LLP as legal counsel, while Grigg negotiated principally on behalf of the owners of the Option Properties, including 25 Mass, with Arent Fox LLP as legal counsel. Clifford Chance LLP acted as counsel for the REIT IPO underwriters, Bear, Stearns & Co. Inc. and Lehman Brothers. The negotiations were lively, as evidenced by the documented frustration among the parties during this process and Grigg's rejection of an earlier option

[3] JX 31 ("Option Agreement").

proposal setting the price at 90% of fair market value without reference to the state of leasing.

The Option Agreement was executed on November 28, 2005, about a month before the IPO. It recited that the parties desired, "as part of the IPO Transactions," to grant an option to purchase Republic Square I "in accordance with the terms and conditions . . . set forth [in the Agreement]."[4] Similarly, the parties intended the Option Agreement to "constitute[] the entire agreement between the parties with respect to the subject matter . . . and [to] supersede[] all prior agreements and understandings among the parties with respect thereto."[5] Any attempted "addition to or modification of th[e] Agreement" would not be binding unless it was made in writing and signed by both parties.[6] The Option Agreement contained a choice of law provision requiring the application of District of Columbia law. Its detail and complexity is indicative of a bargain struck among sophisticated parties each represented by experienced legal counsel.

The value of the Option Agreement depended on the amount of Republic Square I under lease for two related reasons. First, the favorable purchase price under the Option Agreement would only be triggered if an Option Property had attained leases meeting certain criteria for 85% of a building's square footage at a closing which was required to take place no later than 30 days after the exercise of the option (the "85% Leasing

[4] Option Agreement, at fourth "Whereas" clause.
[5] *Id.* § 15(d).
[6] *Id.*

Condition").[7] The criteria necessary for leases to meet this condition were found in the Operating Agreement's definition of "Rent Paying Space." Section 4 of the agreement defined Rent Paying Space this way:

> For all purposes of this Agreement, Rent Paying Space shall mean rentable space that has been leased, pursuant to a lease having a term of at least three (3) years that has been approved by such Property's first mortgage lender, where the lease commencement date has occurred and the obligation to pay rent . . . has commenced under the applicable lease.[8]

If 85% of the property was not Rent Paying Space at closing, the Option Agreement expressly stated that the price would be "mutually determined by [the parties] in the *sole discretion* of each of them."[9] In other words, if Republic Square I was not 85% leased by the time the Option Agreement expired, the option was worthless. The Option Agreement emphasized the need for the 85% Leasing Condition to be met by making clear that "projected income . . . from space that is not Rent Paying Space as of the date of conveyance" could not be used in setting the purchase price.[10]

Second, the lease-up status of Republic Square I would affect the value of the option because the purchase price would be determined based on cash flows derived from leases that qualified as Rent Paying Space. Provided the 85% Leasing Condition was

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[7] *Id.* §§ 6, 14(a). Technically, the 85% Leasing Condition is a condition only to the favorable pricing term, not the exercise of the option. *Id.* § 4. But if the 85% Leasing Condition was not met, Republic's "right" to purchase was dependent on it offering terms acceptable to 25 Mass. *Id.* § 6. Thus, the 85% Leasing Condition was as a matter of economic reality a condition to Republic's ability to require 25 Mass to sell at the favorable, formula-driven price.

[8] *Id.* § 4.

[9] *Id.* § 6 (emphasis added).

[10] *Id.* § 4(a)(iv); *see id.* § 4(a)(ii); *id.* § 4(a), 4(c).

met, the Option Agreement contemplated two components of the purchase price, an "Initial Purchase Price" and an "Earn-Out" purchase price."[11]

To calculate the Initial Purchase Price, Republic could elect a formula based on dividing the Annualized Net Operating Income — a number based almost entirely on the lease payments qualifying as Rent Paying Space — by either "the then prevailing market capitalization rate for such Property" as determined by an independent appraiser, or a cap rate of 6.5%.[12]

In the event that the option was exercised before 95% of the Option Property qualified as Rent Paying Space, the Option Agreement required payment of the Earn-Out to compensate 25 Mass for the value of additional Rent Paying Space achieved after the option was exercised. The amount of the Earn-Out would be calculated with the same formula as the Initial Purchase Price and paid quarterly until either Republic Square I reached 95% Rent Paying Space, or two years had elapsed after Republic took ownership of the property.[13]

Another important term of the Option Agreement was that both the Initial Purchase Price and the Earn-Out were to be paid in OP Units of Republic rather than cash. Because the acquisition currency depended on the value of Republic, the Option Agreement protected 25 Mass by prohibiting Republic from assigning the option and by

[11] *Id.* § 4.
[12] *Id.* § 4(a), 4(b).
[13] *Id.* § 4(c), 4(f).

allowing 25 Mass to terminate the agreement upon a change of control, including if Kramer or Grigg ceased being a member of the Republic Trust Board.[14]

The final material provision in the Option Agreement was its term. The Option Agreement defined its term so as to provide a potential gap in time when the option was not exercisable by Republic (the "Gap Period"). Thus, during the Gap Period, 25 Mass could sell the property to a third party and Republic would lose the value of having the option. The Gap Period, as such, was not defined in the Option Agreement, but logically resulted from the option term being split into an Initial Option Period and a Second Option Period. The Gap Period was related to the fact that around August 1, 2007, 25 Mass was required to refinance a construction loan with CORUS Bank, and a mezzanine loan from J.E. Roberts that would come due on the same date. If Republic Square I had not already been refinanced, the Initial Option Period would terminate and the Gap Period would commence 60 days before that date and last for 180 days, or until completion of a refinancing.[15] Thereafter, if 25 Mass had not sold the property to a third party, the Second Option Period would begin and Republic would have a second term of the Option Agreement lasting until four years from the date the District of Columbia first issued an occupancy certificate for the building.[16] If the loans were refinanced before the expiration of the Initial Option Period, the Gap Period would never occur.

In marketing the IPO, Keller and Grigg promoted the Option Properties as a potential source of growth for Republic at the road show and in disclosures filed with the

[14] *Id.* §§ 10(b), 14(g).
[15] *Id.* § 3.
[16] *Id.*

SEC. But the Republic Founders cautioned that "management does not believe the acquisition of any of our three option properties is probable as of the date of this presentation."[17] And as noted, the option to purchase Republic Square I was but one of Republic's many assets, which included ten real estate properties held through wholly-owned subsidiaries, and the two other Option Properties subject to option agreements.

C. A Short Interval Of Harmony

After the IPO was concluded, the Republic Founders got down to business. Keller, Kramer, and Grigg each had key roles at both 25 Mass and the new Republic REIT. The parties were focused on maximizing lease earnings at all the relevant properties, including by obtaining tenants for Republic Square I, which was a new building. Grigg was largely in charge of that effort, but Keller and others were also involved.

D. A Change In Tone At Republic

In May of 2006, the tenor changed between Kramer, Grigg, and the other executives at Republic due to an investigation over corruption charges related to Republic's contract to develop the West Palm Beach City Center. The West Palm Beach Community Redevelopment Agency terminated its development contract with Republic as a result of alleged unseemly agreements between Republic and a city commissioner under investigation for corruption charges. Grigg had been the lead on that project and Republic's audit committee placed Grigg on paid leave and instructed him to refrain from conducting business on behalf of Republic, pending an investigation. That investigation

[17] JX 32 at 11.

by outside counsel resulted in a recommendation that Grigg be terminated for cause and that Grigg and Kramer resign from their Republic board positions as vice chairman and chairman, respectively. Grigg then resigned his position as president and was removed from his board position as vice chairman, but he and Kramer remained on the board.

The effective end of Kramer's and Grigg's managerial control of Republic generated a rift. When the IPO was undertaken, they expected to run Republic, as the S-11 Registration Statement itself suggests. After the West Palm Beach events — regardless of who was in the right — this assumption was disrupted. Grigg and Kramer would not chart Republic's course. Thus, after that point the two entities, which were always separate as a legal matter but shared managers and owners, became genuinely arms-length commercial players, each seeking its own advantage. Although Kramer remained as chairman until Republic was sold in 2007, from this period onward relations between 25 Mass and Republic were adversarial. For example, in April 2007, Grigg and Kramer caused all of the entities they controlled to terminate their property management agreements with Republic.[18] A de facto split among the Republic Founders was also cemented. Keller, the smallest equity player among the Founders, remained in office as

[18] On April 9, 2007, Republic Properties Corporation, which still was controlled by Kramer and Grigg, issued a press release stating that Republic Property Trust had been terminated from these agreements. It stated:

> [Republic Property Trust] created a hostile atmosphere filled with acrimony and tension that has led to a breakdown in the owner's confidence in [Republic Property Trust]'s performance and services. Republic [Property Trust] . . . also has made false accusations about the owners that are not only baseless but are devoid of credible legal or factual support.

JX 177.

Republic's CEO. Meanwhile, Grigg and Kramer — who beneficially owned over 95% of 25 Mass — focused on 25 Mass and the other companies they continued to manage.

Therefore, as the June 12, 2007 start to the Gap Period for the execution of the option approached, Republic was well aware that 25 Mass would not engage in acts of charity toward it.

E. Option Exercise

By July of 2006, Republic had raised concerns that the mezzanine loan with J.E. Roberts had not yet been refinanced by 25 Mass.[19] A refinancing would eliminate the Gap Period. 25 Mass did not refinance the loan, although it likely could have done so at a lower interest rate.

At a January 2007 meeting, Republic's board began discussing the exercise of the option to buy Republic Square I. The Republic Board focused on Republic Square I because Republic Square II was still undeveloped and Portals III was not far along in the leasing cycle. Republic Square I, however, was on its way to becoming leased, although it was still well short of 85% Rent Paying Space. Republic estimated that an exercise of its option to purchase Republic Square I would increase Republic's net asset value by $1.12 per share.[20]

Meanwhile, 25 Mass began to consider selling Republic Square I on the open market, recognizing that the 85% Leasing Condition was unlikely to be met before the start of the Gap Period. Because Republic Square I had not been refinanced and Republic

[19] JX 62; Trial Transcript ("Tr.") at 67.
[20] *See* JX 134 at 5.

could not yet exercise the option because of insufficient leasing, the 120-day Gap Period would begin June 12, 2007, during which the property could be sold by 25 Mass at market rates. On March 7, 2007, Grigg emailed notice to Republic on behalf of 25 Mass, informing Republic that 25 Mass had decided to market Republic Square I for sale. In response, the Republic Board formed a special committee to evaluate Republic's rights under the Option Agreement (the "Option Properties Special Committee"). Kramer, Grigg, and Keller were excluded because of their ownership interests and officer positions with 25 Mass.

By this time, Republic was struggling. It had cut its dividend by 40% from 2006, but could not pay for even the reduced dividend out of operations. Because of these struggles, Republic began to consider strategic alternatives beyond exercising the option. At an Option Properties Special Committee meeting held on April 23, 2007, JPMorgan advised Republic on three strategic alternatives: a modified status quo, the pursuit of growth through a joint venture, or a sale of the company. JPMorgan advised Republic that maintaining a modified status quo "would be difficult . . . due to rising interest rates, high leverage and increased competition for acquisition targets."[21] The ability to pursue a growth strategy was complicated by Kramer's desire to receive cash rather than Republic OP Units in any negotiated sale of Republic Square I to Republic. JPMorgan believed that unless Kramer and Grigg accepted Republic OP Units for exercise of the option, Republic would likely need to find an acquisition partner to finance the purchase of the Option Properties.

[21] JX 186.

Meanwhile, 25 Mass had retained an affiliate of Cassidy & Pinkard Colliers to market Republic Square I beginning in May of 2007 and they prepared a confidential offering memorandum complete with estimated rents organized by floor. At this point, it seemed almost certain that 25 Mass would have the chance to sell Republic Square I during the Gap Period. As of May 7, 2007, Republic Square I was 57% under lease or letter of intent, but less than 40% of the space in the building qualified as Rent Paying Space under the Option Agreement. The discrepancy between these numbers was caused by the lack of a present obligation to pay rent or because anticipated leases had not yet commenced over this space.

Influenced by the marketing of Republic Square I and the looming Gap Period, Keller and Gary Siegal, Republic's general counsel and chief operating officer, began to review Republic's alternatives for exercising the option despite Republic Square I being far from meeting the 85% Leasing Condition. Keller and Siegal conceived of a scheme whereby they could cause 85% of Republic Square I to become Rent Paying Space and allow Republic to purchase the building at the favorable price under the Option Agreement. The key to this plan was a putative "Master Lease" between Republic's operating partnership and 25 Mass to achieve the 85% Leasing Condition required for exercise of the option.

F. Master Lease

On May 21, 2007, Republic sent a proposed Master Lease to Grigg at 25 Mass for the purpose of satisfying the 85% Leasing Condition in order to exercise the option to purchase Republic Square I.[22] I will now discuss some of its key terms.

1. The Space To Be Leased

The Master Lease encompassed almost 47% of the rentable space in Republic Square I, which when combined with the existing 40% of the building already considered Rent Paying Space would just exceed the 85% Leasing Condition's threshold for exercising the option. Because about 18% of the building was already committed to actual tenants (i.e., space occupying entities) who were not yet obligated to pay rent, Republic could not achieve 85% Rent Paying Space merely by leasing uncommitted space. Therefore, Republic was forced to resort to the first of many unconventional terms in the Master Lease. Using a "wraparound" feature, Republic would agree to accelerate and guarantee some tenants' obligations to pay rent on committed space, but would disclaim any right to occupy the space physically or interfere with the rights of the tenants in any way.[23] Republic could thus choose from any square footage in the building to fulfill the lease-up condition. The space it chose encompassed the top four floors of the nine-story building, and every square foot of committed space that was not Rent Paying Space.[24] This footprint also allowed Republic to minimize its exposure for

[22] JX 203; *see* JX 204.
[23] JX 203; Tr. at 80; Tr. at 462-64.
[24] JX 203; JX 204.

guaranteeing lease payments because it covered the space likely to become Rent Paying Space the soonest — the already-leased space.

2. The Term

Beyond the odd nature of the wraparound, Republic also tendered up an illusory "ten-year" term provision. To qualify as Rent Paying Space under the Option Agreement, a lease was required to have a term of at least three years. The Master Lease would commence on June 20, 2007 and nominally last for ten years, but § 3.5 provided that: "[Republic] shall have the continuing right to terminate the Lease if it exercises such option and closing does not occur thereunder prior to July 1, 2007."[25] Republic proposed that the option close on June 28, 2007.[26] Republic's expert at trial, Professor Patrick Randolf, admitted that the term of the lease would likely be twelve days at the longest; either Republic would close on the option or it would terminate the Master Lease.[27] If Republic closed on the option, its counter-party to the Master Lease would become its wholly-owned subsidiary. Republic could therefore cause itself to be released from any obligations under the Master Lease. For these reasons, the ten-year term was purely a pretext to satisfy the Option Agreement's three-year term requirement. In reality, the only mandatory term binding on Republic was twelve days.

The termination right granted to Republic affected another requirement in the Option Agreement. Approval by 25 Mass's first mortgage lender, CORUS Bank, was a

[25] JX 204 § 3.5.
[26] Tr. at 678; *see also* JX 204.
[27] Tr. at 352-53, 365.

condition for a lease to qualify as Rent Paying Space.[28] The termination right violated CORUS Bank's established leasing guidelines.[29] Entering into a lease without lender approval would have placed 25 Mass in default of its construction loan and mezzanine loan, and would have subjected its principals to "significant consequences."[30] Republic did not seek lender approval on its own in advance of proffering the Master Lease. Instead, the Master Lease required that the parties "use . . . commercially reasonable efforts and diligence to obtain all necessary Lender Consents . . . within ten (10) business days after a final Lease has been approved by Landlord and Tenant."[31] Grigg did not approach CORUS Bank in part because the lease was so far outside the bounds of the leasing guidelines.[32]

3. The Security Deposit

Another odd feature of the Master Lease was the lack of any provision for the landlord's financial security in the form of a security deposit. In a typical lease, the risk of breach by the tenant is mitigated by a substantial security deposit, commonly held by the landlord.[33] In the event that Republic breached the Lease, 25 Mass had very little recourse other than to chase Republic for damages in court because the Master Lease did not provide for *any* security deposit.

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[28] Option Agreement § 4.
[29] The guidelines stated that "[a]ll leases must have an initial term of at least five (5) years and shall be non-terminable during such five (5) year period." JX 3 at Ex. I.
[30] Tr. at 672.
[31] JX 204.
[32] Tr. at 561.
[33] *See* THOMPSON ON REAL PROPERTY § 40.05(a)(1) (David A. Thomas ed., 2d Thomas ed. 2007) ("A common tenant deposit arrangement is one in which the tenant deposits money with the understanding that, upon a tenant default, the landlord may draw against the deposit to cover losses or damages.").

4. The Leasing Commission

The Master Lease contained two additional terms that required 25 Mass to pay money to Republic without provision for return if the deal failed. Republic wanted 25 Mass to pay a 4.65% leasing commission to Republic TRS LLC, an affiliate of Republic.[34] Nothing in the Master Lease required Republic to return this commission if Republic terminated the lease. In addition, because the Master Lease was not being proffered on behalf of actual space-occupying clients, Republic — which was to pay 25 Mass in OP Units of itself — would have to pay another commission down the road to secure actual occupants.

5. The Tenant Improvement Allowance

The second expense to be borne by 25 Mass, again without a return provision if the deal soured, was payment of a $9,664,284 tenant improvement allowance into escrow. A tenant improvement allowance is a pre-rent cost typically structured into leases for Class A commercial office buildings with which the tenant builds walls, adds lights, and otherwise adapts the office space to fit the tenant's use of the property. This figure was based off of a per-square-foot estimate contained in the Republic Square I offering memorandum. Other tenant improvement allowances at Republic Square I were structured as a line of credit between 25 Mass and CORUS Bank that real tenants could use to make real improvements. The third-party escrow structure here was later described by Dwight Frankfather, a senior vice president and commercial loan officer at

[34] This percentage was listed in the offering memorandum and believed by Keller to be a market rate. Tr. at 81-82; JX 172 at 50; JX 203.

CORUS Bank, as "odd."[35] He predicted the Master Lease would have been rejected because the escrow structure "would [have] violate[d] every cultural tradition in the bank for administering a loan."[36] 25 Mass could have avoided the third-party-escrow under the Master Lease by instead electing a rent reduction. But Republic made a miscalculation and offered to reduce the rent by $7.21 per square foot, more than double the $3.45 per square foot comparable to the $9,664,284 allowance and rate listed in the offering circular.[37]

G. The Master Lease Was Far Different Than A Prior Lease That Republic And 25 Mass Negotiated To Enter

The unusual nature of the Master Lease becomes apparent when its terms are compared to the terms of a prior proposed lease between Republic and 25 Mass. In late 2006, Republic had been searching for actual rental space for its headquarters and had negotiated with 25 Mass over a lease that would cover a little less than 5% of Republic Square I.[38] A lease was never signed, but several features of that contemplated agreement between 25 Mass and Republic were starkly different from the terms of the Master Lease and offer insight into what a commercially reasonable lease between the parties might have looked like. The lease offered by Republic included a one month security deposit and a traditional tenant improvement allowance. And 25 Mass explicitly rejected Republic's request to pay a leasing commission to a Republic affiliate.[39]

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[35] JX 289 at 64.
[36] *Id.*
[37] Tr. at 81-82; JX 172 at 50; JX 203.
[38] JX 101.
[39] Tr. at 285; Tr. at 560; *see* JX 101.

The reason the Master Lease was so different is that Republic did not intend for that lease to provide 25 Mass any benefit as a lessor, but only to proffer up a vehicle to satisfy the 85% Leasing Condition. To accomplish that, Republic refused to bind itself to terms that a reasonable lessor would demand, seeking to economize and only do the bare minimum that it thought was required to force 25 Mass to accept. In that regard, the Master Lease demonstrates its own insufficiency as a binding legal document designed for leasing purposes. The failure to occupy the premises by Republic — an occupancy it never intended to undertake — would constitute a default under its very own proposed Master Lease.[40]

For all these reasons, Keller of Republic admitted at trial that the Master Lease only made sense in the context of exercising the option and did not make sense as a traditional lease agreement.[41]

H. The Back And Forth Over The Master Lease

Republic's gambit to preserve its option was made very late. By the clear terms of the Option Agreement, Republic could only exercise the option before June 12, 2007; otherwise 25 Mass could sell Republic Square I during the Gap Period. Upon exercise of the option, Republic would have 30 days to close on the property and 85% of Republic Square I had to be Rent Paying Space on that date for Republic to enjoy the reduced purchase price. Despite the clear time pressure, Republic waited until May 21, 2007 to tender up a complicated master lease purporting to lease 47% of the building. By its own

[40] JX 204 § 19.1.
[41] *See* Tr. at 119, 124-25, 310; *see*, *e.g.*, Republic Post-Trial Rep. Br. at 21; *see also* Tr. at 542.

conduct, Republic created an artificial commercial exigency, truncating the time period in which 25 Mass as a lessor would have ordinarily had to deal with a prospective lessee. Upon receiving the Master Lease, 25 Mass scrambled to put together a prompt response.

After seeking the advice of 25 Mass's attorneys, Grigg sent a letter on behalf of 25 Mass to Republic on May 22, the very next day.[42] 25 Mass's reaction to the Master Lease was emphatic: Republic's Master Lease proposal "[was] not a bona fide business proposal . . . but [was] a 'ruse' designed to avoid compliance on [Republic]'s part with the provisions of the Option Agreement."[43] The letter continued that:

> "[S]ince the Lease can be terminated if [Republic] exercises its purchase option, it is a sham without any independent significance.
> . . .
> Even if the Option Agreement did not exist or [Republic]'s option lapsed without being exercised and all provisions relating to the Option Agreement were deleted from the proposal, the proposal is not acceptable for a number of reasons, *including without limitation*, the fact that the Landlord is not satisfied with [Republic]'s financial capacity and stability during the entire lease term, the conversion of direct leases with other tenants into subleases, and the brokerage commission payable to an affiliate of [Republic]."[44]

In flatly rejecting Republic's proposal, Grigg admitted that he did not "want to leave the door open to further discussions."[45]

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[42] An email dated May 22, 2007, from Rick Conway at Dickstein Shapiro "counsel[ed] against making [25 Mass'] response too detailed or too comprehensive" because that would "tell [Republic] what they need to address to consummate a deal and to legitimize their sham offer." JX 207. Paul Wolff of Williams & Connolly added that Grigg should not "use the words 'not acceptable'" because they would "indicate[] that there is an acceptable offer." *Id.*
[43] JX 208.
[44] *Id.* (emphasis added).
[45] Tr. at 608-09; *id.* at 599-601.

Grigg did not forward the proposal on to CORUS Bank and explained at trial that it would have been "ridiculous" to do so. He further testified that he "had never taken a lease that wasn't a bona fide lease to them. . . [a]nd [he] certainly wouldn't take a lease that didn't match any of the guidelines that they had, their principal guideline being term."[46]

With the impending Gap Period drawing nearer, 25 Mass waited for Republic's next move. On May 29, 2007, one week after it first sent the Master Lease, Republic retendered the Master Lease *on the exact same terms*.[47] That is, Republic failed to address *any* of 25 Mass's specific concerns, thereby providing no reason for the parties to consider any of the additional terms that might have concerned 25 Mass had it received counter-offer that addressed its already-expressed concerns.

Republic included with the Master Lease a response to the letter dated May 22, 2007, a summary of the Master Lease terms, and a notice of option exercise.[48] In that letter, Republic laid out its position that "[t]he reasons given in [25 Mass's May 22, 2007] letter do not constitute a valid basis for [its] virtually immediate refusal to accept (or even to discuss) the [Master] Lease. Accordingly, I write to indicate . . . why [25 Mass] has no good-faith basis to reject the [Master] Lease . . . ."[49] The letter contended that the lease was "an economically substantive and legally binding instrument" on terms that were "certainly more favorable . . . than those currently available" to 25 Mass, and

[46] *Id.* at 561.
[47] JX 216; Tr. at 288.
[48] JX 216.
[49] *Id.*

that the particular objections that 25 Mass raised "ignore the obvious central point" that once Republic exercised the option, those objections would become "meaningless" to 25 Mass and were otherwise "meritless from a business standpoint."[50] Republic closed the letter by stating: "If there are technical details we need to address together to make the form of the [Master] Lease acceptable to [25 Mass], we of course stand ready to discuss them with you promptly."[51] This, however, was rather odd because its proposed lease was the same as its original, thereby rejecting all of 25 Mass's objections.

25 Mass again rejected this proposal in a letter dated May 30, 2007 stating that "[g]iven the current state of the lease-up at Republic Square I, it is a virtual certainty that Republic Square I will not achieve 85% Rent Paying Space by June 28, 2007. . . . [It is] clear that there has been no effective exercise of the option."[52] Grigg continued: "Your letter and the Republic Option Exercise Notice confirm that the proffered 'lease' is a contrivance made in an attempt to exercise the option and that the lease has no inherent economic value to (and indeed harms) Republic Square I."[53]

Republic filed its complaint in this case seeking specific performance of its option rights on June 15, 2007 and simultaneously filed a lis pendens on Republic Square I with the District of Columbia Recorder of Deeds.

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[50] *Id.*
[51] *Id.*
[52] JX 225.
[53] *Id.*

I. The Aborted Sale Of Republic Square I

Meanwhile, efforts to market Republic Square I had been successful and on June 30, 2007, 25 Mass entered into a purchase and sale agreement with 25 Mass Owner LLC, a special purpose entity formed by Falcon Realty for an unnamed third party (the "Unknown Buyer"). The purchase price was $250 million and the Unknown Buyer put up $5 million in earnest money. During a two-week due diligence period lasting until July 14, 2007, the Unknown Buyer retained the right to terminate the agreement and regain its earnest money deposit. The Unknown Buyer's motivations for buying Republic Square I were supposedly time-sensitive; it needed to close the sale by the end of August 2007 for tax reasons.[54]

Several features of the Unknown Buyer's offer suggested that it was uncertain about consummating the deal. The purchase and sale agreement originally provided the Unknown Buyer with the discretion to terminate the agreement during the due diligence period. The $5 million in earnest money was only 2% of the purchase price. Adding to any hesitancy the Unknown Buyer might otherwise have had about closing on the property, its title insurance company would not agree to insure title unless the lis pendens was lifted or the lawsuit settled. With the litigation unresolved, 25 Mass amended the purchase and sale agreement to extend the due diligence period with respect to the litigation against Republic four times, prolonging the period until August 3, 2007. The

[54] It was seeking a like-kind exchange under § 1031 of the Internal Revenue Code. JX 285 at 16.

Unknown Buyer would not wait any longer, and it terminated the purchase and sale agreement that day.[55]

J. Republic Sells Itself

At the same time Republic was seeking to prevent 25 Mass from consummating a third-party sale of Republic Square I, Republic was conducting its own sale. By April of 2007, Republic had begun to explore its strategic alternatives with the assistance of JPMorgan. Republic's weak strategic and financial position made a sale of the company a key option. It decided to pursue that strategy. The parties did not elaborate upon the precise path or timeline of this process, but it culminated in Liberty's acquisition of Republic on October 4, 2007. This effected a change in control under the Option Agreement and eliminated the options to purchase Republic Square II and Portals III.

III. Republic's Good Faith And Fair Dealing Claim

Republic filed this lawsuit seeking an order of specific performance requiring 25 Mass to sell Republic Square I to it on the terms specified in its May 29, 2007 attempt to exercise the option. By stipulation of the parties, Republic's purchaser, Liberty, was allowed to replace Republic as the plaintiff in this action and continue to seek specific performance of the option to purchase Republic Square I. For simplicity's sake, I continue to refer to the plaintiff as Republic.

Republic premises its right to specific performance on the contention that, but for 25 Mass's breach of the Option Agreement, 85% of Republic Square I would have been subject to leases that would qualify as Rent Paying Space within its window to close the

[55] JX 270; Tr. at 573.

option, thus permitting Republic to exercise its option on an economic basis calculated in reference to those leases. In support of that contention, Republic cannot rely upon any breach by 25 Mass of an express term of the Option Agreement.

Rather, Republic contends that the implied covenant of good faith and fair dealing required 25 Mass to accept the Master Lease tendered up by it, so long as that Master Lease facilitated Republic being able to exercise its option to purchase Republic Square I at a price that approximates the price it would have paid had a third-party lessee leased the required space at Republic Square I on the terms sought by 25 Mass in its advertising to lease the building. In other words, Republic says that 25 Mass was bound to enter into the Master Lease so long as the Master Lease would result in Republic exercising the option at a purchase price materially consistent with the parties' original economic expectations when signing the Option Agreement. Insofar as the Master Lease more or less resulted in an exercise price identical to that which Republic would have paid had General Electric, Microsoft, or the federal government proposed a binding, non-terminable ten-year lease for the space at Republic Square I required to hit the 85% target on the lease terms set in 25 Mass's advertising, 25 Mass was duty bound to accept that lease. That is, 25 Mass supposedly had a contractual duty to accept a lease, even if that lease would not have been reasonable to a lessor actually acting in the capacity as a lessor, so long as the lease was an effective instrumentality to an option exercise price that materially matched the price that Republic would have had to pay if a third-party

lease for 85% of Republic Square I on reasonable terms had been in place as of June 12, 2007.[56]

There is, of course, by now, nothing untraditional about an argument based on the implied covenant of good faith and fair dealing. As is true with most American jurisdictions, the District of Columbia recognizes a duty of good faith and fair dealing between parties to a contract in the performance and enforcement of that agreement. The District of Columbia Court of Appeals in *Allworth v. Howard University* explains:

> The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose *and consistency with the justified expectations of the other party*; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate standards of decency, fairness or reasonableness.[57]

Let me begin my analysis of Republic's argument by a point of agreement. I accept, as Republic contends, that the interaction between the 85% Leasing Condition and Republic's option exercise rights was one that allocated an important policing function to the implied covenant of good faith and fair dealing. 25 Mass controlled the leasing activities at Republic Square I. If 25 Mass refused to accept a commercial lease that was on terms that made commercial sense to it as a lessor in order to ensure that the 85% Leasing Condition remained unsatisfied, that refusal is easy to conceptualize as a

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[56] *See* Republic Post-Trial Op. Br. at 22 ("When the master lease is viewed as part of the purchase under the option, it is apparent that 25 Mass's objections are trivial, theoretical, pretextual — and that 25 Mass advances its purported objections to the lease 'qua lease' . . . in order to obscure that hole in its argument.").

[57] *Allworth v. Howard Univ.*, 890 A.2d 194, 201 (2006) (quoting the RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981)) (emphasis added).

breach of the implied covenant of good faith and fair dealing.[58] The 85% Leasing Condition left 25 Mass in sole control of an important function relevant to Republic's right to exercise the option, and if 25 Mass misused that control by refusing to enter leases that were, from its perspective as a lessor of property, commercially attractive so as to defeat Republic's ability to exercise its option to purchase, a judicial enforcement of the implied covenant would involve a targeted and proportionate act necessary to vindicate the parties' reasonable expectancies.

But that scenario is not what we have here, for several reasons. Let us begin with one that is obvious, but that should not be slighted. If this is a case about reasonable expectancies, the scenario in which this claim would arise would be strikingly different. What would have happened is that in response to 25 Mass's advertising, a reputable, credit-worthy potential tenant would have come forward in early 2007 and evinced an interest in leasing sufficient space to satisfy the 85% Leasing Condition on terms

[58] In *1010 Potomac Associates v. Grocery Manufacturers of America, Inc.*, the District of Columbia Court of Appeals addressed a scenario close to this hypothetical bad faith rejection of commercially valid lease. 485 A.2d 199 (D.C. 1984). A commercial tenant in *1010 Potomac Associates* had both an option to lease additional space at a below-market rent, and a sublease clause requiring landlord consent. *Id.* at 202. It sought to exercise the option in order to sublease that space at a higher, market rate and offered a prospective subtenant to the landlord for approval as a subtenant. *Id.* The landlord rejected that proposal so that it could lease directly to the prospective subtenant and gain some of the excess rent that would otherwise be enjoyed by the tenant because of the discounted rate under the option. *Id.* The Court of Appeals held that the landlord's use of the consent clause was not consistent with that clause's purpose of protecting the landlord from undesirable parties occupying its building, found that the landlord was using its discretion unreasonably and for a different purpose than the parties had intended, and held the rejection to be a breach of the implied covenant of good faith and fair dealing. *Id.* at 210. But had the landlord used the clause within its purpose to reject a sublease that did not make commercial sense, the implied covenant would not have been breached. *See id.*; *see also Adler v. Abramson*, 728 A.2d 86, 90-91 (D.C. 1999) (A party "could not have breached its duty of fair dealing when reasonable persons in the parties' shoes would have expected the contract to be performed as it was.").

materially identical to those demanded by 25 Mass in its advertising.[59] Rather than bring the favorable opportunity to closure through a lease, 25 Mass would have delayed, sought unreasonable and new conditions, and otherwise sought to avoid a transaction — a favorable leasing opportunity — that, but for its desire to take advantage of the Gap Period, it would have sought to embrace as a reasonable lessor.[60]

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[59] Earlier in the case, Republic advanced two other arguments supposedly based on the implied covenant of good faith and fair dealing. Neither appeared in Republic's post-trial briefs and are therefore waived. *Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief."), *aff'd*, 840 A.2d 641 (Del. 2003).

The first waived argument was that 25 Mass had failed to engage in a good faith effort to lease the space in Republic Square I, with the purpose of defeating Republic's ability to exercise its option. By trial, Republic had essentially abandoned that argument, and failed to make any persuasive showing that 25 Mass was not engaging in commercially reasonable efforts to lease the space at Republic Square I.

The other waived argument was that 25 Mass somehow had an implied contractual duty to refinance its construction loans. If it had done so, the Gap Period would not have arisen and Republic would have had an option lasting until four years after the date it received its occupancy certificate. Republic implied that 25 Mass somehow owed it a contractual duty to refinance precisely so as to deprive itself — 25 Mass — of the opportunity presented by the Gap Period. According to Republic, the reason for that unstated duty is that Republic says that the parties never conceived that the Gap Period would be of value to 25 Mass when the Option Agreement was signed. This argument for self-sacrifice and charity in commerce is untenable and seeks to convert the narrow interstitial functioning of the implied covenant of good faith and fair dealing into a broad doctrine vindicating the subjective expectations of one party to a negotiated agreement through a judicial mandate for the other side to engage in charity. As noted previously, 25 Mass refused to grant Republic the right to buy Republic Square I at a fixed, below-market price and obtained the rights to market the property during the Gap Period and to bargain with Republic for a price higher than the price generated under the Option Agreement if the 85% Leasing Condition was not satisfied. To hold that 25 Mass was duty-bound to refinance its debt solely to allow Republic a longer option exercise period would be to require of it an act of commercial generosity nowhere mentioned in the detailed Option Agreement and nowhere implied by any of its terms.

[60] *See, e.g.*, *1010 Potomac Assoc.*, 485 A.2d at 210 (avoiding lease through improper use of landlord consent clause breached implied covenant); *Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Center Assocs.*, 864 A.2d 387 (N.J. 2005) (delaying may breach implied covenant); *Rus Inc. v. Bay Indus., Inc.*, 322 F. Supp. 2d 302, 315 (S.D.N.Y. 2003) (giving pretextual reasons may breach implied covenant when there is an explicit contractual duty to use reasonable best efforts to meet explicit conditions); *cf. Casco Marina Development, L.L.C. v. District of Columbia Redevelopment Land Agency*, 834 A.2d 77, 79, 80, 84 (D.C. 2003) (citing *1010*

It is this situation that the implied covenant would most naturally address, where an actual entity with a genuine need to lease space sought to do so on terms favorable to 25 Mass as a lessor and 25 Mass put the prospective lessee off to defeat Republic's ability to exercise its option.[61] As counsel for Republic admitted, no one contemplated at the time of the Option Agreement that Republic would itself seek to satisfy the 85% Leasing Condition by tendering up a master lease for space it had no intention of ever occupying.[62] If ever there was any unanticipated eventuality, it was that Republic would tender up a lease the only economic purpose of which was to satisfy the 85% Leasing Condition. Rather, it seems obvious that the parties believed that the 85% Leasing Condition's satisfaction would turn on whether entities with an actual need for office space had signed qualifying leases with 25 Mass. Stated bluntly, Republic's attempt to ground its argument in duties clearly implied by the Option Agreement is undercut by its own behavior, which created an unexpected and bizarre situation in which a party sought to "lease" 47% of a large office building without any intention to ever occupy it. Courts should always be careful about implying contractual duties, especially when the parties have carefully spelled out their express duties.[63] That caution is even more appropriate

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Potomac Assocs., 485 A.2d at 209) (exemplifying similar conduct in the context of a tortious interference with prospective business advantage claim).

[61] *Cf. 1010 Potomac Assocs.*, 485 A.2d at 205.

[62] Post-Trial Argument Transcript ("Arg. Tr.") at 12, 15-16.

[63] *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1260 (Del. 2004) (quoting *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 707 (Del. Ch. 2004)) ("Where . . . the relevant contracts expressly grant the plaintiffs certain rights in the event of particular transactions . . . , the court cannot read the contracts as also including an implied covenant to grant the plaintiff additional unspecified rights in the event that other transactions are undertaken. To do so would be to grant the plaintiffs, by judicial fiat, contractual provisions that they failed to secure for themselves at the bargaining table."); *Allied Capital Corp. v. GC-Sun*

when the party seeking to sanction its contractual partner for violating an implied duty has itself created a situation that is entirely out of the ordinary and that bears no resemblance to the foreseeable commercial circumstances in which the need for the operation of implied contractual duties might arise.

Because Republic's behavior was not foreseeable, I cannot accept its contention that it was somehow unreasonable or in bad faith for 25 Mass to react adversely to the proposal of the putative Master Lease.[64] For 25 Mass to view the proffered lease as a pretextual sham intended solely for the purpose of permitting Republic to buy Republic Square I and denying 25 Mass a chance to sell the building during the Gap Period was not a bad faith act, it was an accurate perception of reality. If one were using the Latin form of good faith in vernacular terms, one could easily say that Republic had no bona fide need for 47% of the space at Republic Square I. In fact, it had no bona fide need for any of the space there as it never intended to occupy a square foot of it.

Republic would have me fault 25 Mass because 25 Mass clearly did not desire to enter into a lease with Republic the sole purpose of which would have been to facilitate Republic's exercise of the option. I cannot do so, for reasons that I will explain in full soon. For now, I only note that I do not believe that 25 Mass breached any implied contractual duty by making clear that it viewed the Master Lease as a sham and

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Holdings, L.P., 910 A.2d 1020, 1035 (Del. Ch. 2006) ("[C]ourts should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it."); *see also Hais v. Smith*, 547 A.2d 986, 987-88 (D.C. 1988) (refusing to impose a contractual obligation that "good judgment or a kind heart might have dictated" because it was not contemplated by the agreement).

[64] *See 1010 Potomac Assocs.*, 485 A.2d at 205-06 & n.7 (noting that the meaning of a contract "must be ascertained in the light of the circumstances *at the time the contract was made*") (emphasis added).

articulating an expressly non-exhaustive list of the reasons that it was unsatisfactory when viewed as a genuine lease proposal.

To this point, let me now address Republic's argument that 25 Mass is somehow precluded in this litigation from pointing to deficiencies in the Master Lease that it did not identify with precision in its May 22, 2007 letter to Republic. That argument is based on the so-called "mend-the-hold" doctrine, which, when applicable, bars a party who rejects a contract on certain specified grounds from changing position after litigation is filed when those grounds for rejection do not pan out. In other words, the party cannot mend its hold to come up with new grounds for justifying its prior position.[65] Republic is in no equitable position to rely on that doctrine here.[66]

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[65] *See Railway Co. v. McCarthy*, 96 U.S. 258, 267 (1878) ("Where a party gives a reason for his conduct and decision touching any thing involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it . . . ."); *see also Harbor Ins. Co. v. Continental Bank Corp.*, 922 F.2d 357, 363 (7th Cir. 1990) (Posner, J.) (observing that the doctrine overlaps with the implied covenant of good faith because when "[a] party . . . hokes up a phony defense to the performance of his contractual duties and then when that defense fails (at some expense to the other party) tries on another defense for size [he] can properly be said to be acting in bad faith.").

[66] Contrary to Republic's assertion, § 248 of the Restatement (Second) of Contracts does not advance Republic's cause. In fact, it weighs against Republic's claim that 25 Mass had to provide a comprehensive list of reasons it was rejecting the Master Lease and stick to that list. Section 248 explicitly states that the rejecting party has no duty give its reasons for rejecting deficient performance. RESTATEMENT (SECOND) OF CONTRACTS § 248 cmt. a (1981). In other words, Republic "must determine at [its] peril the reason for that rejection." *Id.* Here, 25 Mass went beyond what was required of it and gave a non-exhaustive list of reasons that were sufficient for it to reject the Master Lease. Republic tries to twist 25 Mass's grab bag of several of the reasons it properly rejected the Master Lease to fit the narrow exception to § 248's general rule. That narrow exception only applies when giving misleading or insufficient reasons induces a failure to cure a deficiency that, but for the misleading reasons, would have been corrected by the other party. *Cawley v. Weiner*, 140 N.E. 724, 725 (N.Y. 1923). Republic's argument might have color had it spent time spinning its wheels in an attempt to resolve insufficient, pretextual reasons advanced by 25 Mass or had it solved all the problems fleshed out by 25 Mass and still received a rejection. But here Republic forfeited any plausible argument it might have under this

It waited until May 21, 2007 — a mere 22 days before the Gap Period would begin — to foist a Master Lease for 47% of Republic Square I on 25 Mass. For that lease to satisfy the 85% Leasing Condition, it had to be in effect before June 28, 2007. A Master Lease covering nearly half of a large commercial office building is a very important commercial agreement. During the course of negotiations over such a document, it is to be expected that issues will arise with provisions that might not have been identified on a first read. Republic itself made no attempt to react to the specific concerns raised by 25 Mass over its first draft and simply re-tendered its original first draft, providing no reason for 25 Mass to start detailing the numerous other problematic features of the Master Lease that would have arisen after more studied consideration.[67] Indeed, within 25 days of tendering the Master Lease in the first instance, Republic commenced litigation. Having generated an artificial exigency by unexpectedly delivering a proposal to lease space it did not need shortly before the Gap Period deadline, Republic cannot invoke the mend-the-hold doctrine to prevent 25 Mass from articulating in this litigation all the reasons the Master Lease was commercially unacceptable.[68]

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estoppel theory when it failed to cure *any* of 25 Mass's objections, thereby demonstrating that Republic was not deceived and indicating that it would not have otherwise cured the Master Lease's deficiencies.

[67] In fact, one commercially reasonable response to a lease proposal with a thematic problem is to identify the overarching difficulty and support that proposition by pointing out specific manifestations of the problem. That is exactly what 25 Mass did in this situation. To require parties to identify every point of disagreement in the first response to a proposal that they oppose at a more detailed level would ignore the reality of how negotiations take place.

[68] This is not a situation where 25 Mass has shifted ground during the litigation, as in some mend-the-hold cases that blend the doctrine with the doctrine of judicial estoppel. *See Harbor Ins. Co.*, 922 F.2d at 364 (describing such cases). Rather, it starkly involves the notion that

A. The Master Lease Was Commercially Unreasonable

By trial, Republic had essentially abandoned any intent to show that a commercially reasonable lessor, intending to benefit from the lease of a property it owned, would have signed the Master Lease proffered by Republic to 25 Mass. The real estate leasing expert tendered by Republic, Professor Patrick Randolf effectively admitted as much.[69] He could hardly have done otherwise. I find it hard to fathom why a reasonable lessor would have agreed to a lease that gave the lessee the effective right to walk after twelve days. Although Republic quibbles a bit, the terms of the Master Lease it proposed plainly gave it the right to walk after July 1, 2007 if the option sale did not close for any reason.[70] Republic's answer that 25 Mass could then have chased Republic for breaching the Option Agreement is an unsatisfactory basis for contending that a commercially reasonable lessor would have accepted a lease with that fleeting a term. And, of course, in the event the option was exercised and the building sold to Republic, Republic could have used its control to relieve itself of the lease obligations. In other words, the lease had no economic substance as a lease. For the same reasons, the Master

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unless 25 Mass raised a problem with the Master Lease in the May 30, 2007 letter, it cannot do so later. In these circumstances, the application of such a bright-line rule would be inequitable and commercially unreasonable. If the mend-the-hold doctrine is to be used sensibly, it must take into account the circumstances and the reality that contractual negotiations over complex instruments often involve some fits-and-starts, when parties identify issues with provisions that they did not originally focus upon. As negotiations proceed, the identification of "oh by the way" issues becomes increasingly more infelicitous, but it is, as a practical matter, unavoidable at initial stages when imperfect humans negotiate complex agreements with many moving parts. Where a party, such as Republic, puts a responding party against an artificially truncated time clock, it would be unreasonable to allow it to use the mend-the-hold doctrine as an offensive weapon.

[69] Arg. Tr. at 374, 379-80, 382.

[70] JX 204 at § 3.5.

Lease's putative term of 10 years was entirely illusory. The Option Agreement required a lease term of "at least three (3) years."[71] When the lessee would be bound by the Master Lease for at most twelve days because it could either terminate the lease because it did not close on the option, or release itself from the Master Lease if it closed on the option, I cannot conclude that that Master Lease contained a term of "at least three (3) years." I will grant Republic that the Master Lease contained a term of "at least twelve days." More important, a commercially reasonable lessor would not have accepted such a term.

Likewise, when viewed as a lease, the absence of any security deposit or other form of recourse for the lessor upon breach is rather remarkable. After all, Republic was purporting to lease 47% of Republic Square I. Yet, if it breached the lease terms in any material way, 25 Mass would not have even a couple months' rent as a guaranteed source of some recompense. Indeed, when 25 Mass was negotiating with Republic for a lease over space Republic actually intended to occupy, 25 Mass demanded a security deposit. Republic has done nothing to satisfy me that a commercially reasonable lessor would have permitted a party like Republic to lease 47% of an office building without a security deposit or some other comparable device to protect the lessor's interest in the event of breach.

Nor was the $9,664,284 million holdback for tenant improvements a term a reasonable lessor would have accepted. Such an escrow might have been negotiated with a specific prospective tenant. But precisely because Republic did not intend to occupy

[71] Option Agreement § 4.

any space itself or purport to be acting for actual prospective space-occupying clients, and because Republic was leasing an enormous 47% of Republic Square I, the estimate represented a material price term a reasonable lessor would likely have rejected.

Related to this, of course, was Republic's desire to pay itself a large commission for delivering this sweet deal to 25 Mass, in the form of 4.65% of the aggregate base rental rate.[72] As will be discussed, in the event the option was exercised, 25 Mass's owners would pay this commission without receiving the benefit of Republic having obtained actual tenants, because Republic would later have to pay a commission to get brokers to find actual tenants for Republic Square I. And in the event Republic failed to close on the option and terminated the lease, 25 Mass would have paid several million dollars to Republic for the dubious benefit of having Republic as a tenant for twelve days. Given these realities, no reasonable lessor would have agreed to pay Republic a commission.

Also relevant is the fact that a qualifying lease had to be approved by 25 Mass's lender. Republic faults 25 Mass for not presenting the Master Lease to its lender for approval. I do not. This bizarre Master Lease would have evoked a lot of reasonable questions by the lender. No doubt the lender would have come to the realization that the lease made no sense as a lease, only as a method for Republic to force 25 Mass to sell Republic Square I to it. Whether the lender would have approved the lease in that circumstance is, as Republic notes, impossible to tell with certainty, because the lender

[72] Neither party has provided me the affiliate commission in the form of its dollar value. An admittedly rough calculation places this amount in the neighborhood of $2.6 million to $4 million. *See* JX 203.

was not asked to approve it. But, unlike Republic, I think it highly probable that the lender would have rejected the lease, at least without extensive negotiations. If the bank viewed the Master Lease as a lease, I think it overwhelmingly probable that the bank would have rejected it. Its actual term was 4 years and 353 days shorter than the lender's required five-year term and contradicted the leasing guideline's explicit prohibition of termination rights. The Master Lease also contained an odd tenant improvement allowance structure mandating immediate payment, another feature that could have condemned it to disapproval.

Moreover, the lender would have seen the lease as what it was, a device being used by Republic to force a sale over 25 Mass's resistance. In that circumstance, the lender would ask more fundamental questions. Republic naturally says that the lender would not have cared, so long as it got paid off in the option sale. That may or may not be true. But in these odd circumstances of Republic's own making, it seems reasonable that Republic should have itself undertaken the burden of interacting with the lender and obtaining assurances. This would have been unusual, no doubt, but less so than would be a judicial finding that 25 Mass was supposed to go to its lender and ask it to give expedited approval to a Master Lease that was, on its face, commercially unreasonable when viewed as a lease.

B. Republic Was Not Required To Accept A Commercially Unreasonable Lease Solely To Facilitate Republic's Exercise Of The Option

Showing that the Master Lease would not have been accepted by any reasonable lessor acting prudently in commerce as a lessor does not dispose of this case, as even

Republic now effectively admits that the Master Lease was deficient when considered in those terms.[73] Rather, it simply brings us to Republic's major argument, which is that 25 Mass was duty-bound to accept the Master Lease so long as that lease resulted in an option exercise price comparable to that which would have been paid had the 85% Leasing Condition been in fact satisfied by leases with bona fide space-occupying tenants. For the following reasons, I find that is not the case.

I begin by noting that Republic, as an option holder, is not in a strong position to ask a court to impose broad implied duties upon its contractual partner. In the District of Columbia, as in most jurisdictions, option contracts "must be performed strictly according to [their] written terms."[74] Precisely because option holders possess an option and no duty, the common law of contracts requires the court to be profoundly skeptical when the non-bound party to an option contract attempts to exceed its express rights by premising an argument on the implied duties of its contractual partner.[75]

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[73] Arg. Tr. at 43; *see also* Republic Post-Trial Op. Br. at 1-2 ("[B]usiness objections by 25 Mass that might be legitimate if the master lease had been proffered by a third party, without being coupled with option exercise, are invalid if . . . the substance of the proffered objections ignores the purchase of the building by the Trust under the Option . . . .").

[74] *Odyssey Glass Corp. v. Simenaur*, 425 A.2d 249, 251 (Md. Spec. App. 1981); *Solid Rock Church, Disciples of Christ v. Friendship Pub. Charter Sch., Inc.*, 925 A.2d 554, 561 (D.C. 2007) (The District of Columbia "derives its common law from Maryland and decisions of Maryland courts on questions of common law are authoritative in the absence of District authority.") (quoting *In re C.A.P.*, 633 A.2d 787, 790 (D.C. 1993)); *see also* 1 WILLISTON ON CONTRACTS § 5:18 (4th ed. 2006) ("When the optionee decides to exercise his option, he must act unconditionally and according to the terms of the option . . . . [T]he general attitude of the courts is to construe the attempt to accept the terms offered under the option strictly.").

[75] *See* RESTATEMENT (SECOND) OF CONTRACTS § 25, Rpt. Note cmt. d (2008) ("[R]equirements governing the time and manner of exercise of a power of acceptance under an option contract are applied strictly . . . [because] any relaxation of terms would substantively extend the option contract to subject one party to greater obligations than he bargained for.").

Here, Republic, an option-holder, seeks a finding that 25 Mass had an implied duty to enter into a lease the only economic purpose of which was to facilitate a sale of Republic Square I to Republic on terms that 25 Mass did not think were advantageous to it. Republic bases this unusual argument in the notion that 25 Mass knew that the option price was favorable to Republic and cannot complain about it.

But that is not the point. To get to its desired end, Republic has to convince me that 25 Mass had a contractual duty to enter a lease that no commercial lessor would have accepted simply to facilitate Republic's exercise of its option. I am not convinced. No such duty can be implied from the Option Agreement. 25 Mass's refusal does not involve the pretextual refusal to enter a favorable lease in order to thwart Republic's rights. Rather, it involves 25 Mass's refusal to accept a pretextual, non-substantive lease simply to satisfy the 85% Leasing Condition. 25 Mass had no duty to engage in such an act of charity.[76] Rather, it had the right and the obligation to conduct its leasing activities in a commercially reasonable manner.[77] In the event, as it turned out, that those activities did not result in the satisfaction of the 85% Leasing Condition, 25 Mass was permitted to

[76] *See Hais v. Smith*, 547 A.2d at 987-88; *see also Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 617 (3d Cir. 1995) ("[C]ourts generally utilize the good faith duty as an interpretive tool to determine the parties' justifiable expectations, and do not enforce an independent duty divorced from the specific clauses of the contract.") (internal quotations omitted). Similarly, the § 8(c) "Further Assurance" clause Republic points to is unavailing because it only required further actions that were "*reasonably* request[ed] in order to effect *the transactions contemplated by this Agreement*." Option Agreement § 8(c) (emphasis added); *see, e.g.*, *Davis v. Yageo Corp.*, 481 F.3d 661, 676 n.10 (9th Cir. 2007) (reasoning that a further assurances clause does not affect contractual obligations that were not contemplated when agreement was made).

[77] *Adler v. Abramson*, 728 A.2d at 90-91 (observing that a party cannot breach the covenant of good faith and fair dealing by performing under the contract in a manner that was reasonably expected by the parties).

sell the building during the Gap Period. 25 Mass also had the right to bargain with Republic over a voluntary sale to Republic because the Option Agreement expressly contemplated a negotiated price between the parties if the 85% Leasing Condition was unmet.

The Option Agreement could easily have been written to require 25 Mass to sell Republic Square I on fixed terms, even terms set in relationship to certain occupancy rates and projected rents. But the parties did not reach agreement on a fixed price option and 25 Mass rejected such a proposal.[78] Indeed, the Option Agreement expressly prohibits the use of projected rents to determine the purchase price once the 85% Leasing Condition is met.[79] The after-the-fact judicial invention of the implied duty of self-sacrifice Republic contends would not honor any reasonable expectancy of Republic, it would simply grant Republic the windfall of a deal it was unable to secure by contract.[80]

C. The Master Lease Did Not Meet 25 Mass's Economic Expectations Under The Option Agreement

Indeed, even if one were to embrace Republic's argument, a ruling in its favor would still not be in order. The Master Lease tendered by Republic does not, even when viewed in the context of an exercise of the option, provide the same economic benefit to

[78] *See* Tr. at 140-41.
[79] Option Agreement § 4(a)(iv).
[80] *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) ("[I]mplied good faith cannot be used to circumvent the parties' bargain, or to create a 'free-floating duty . . . unattached to the underlying legal document.'") (quoting *Glenfed Fin. Corp., Commercial Fin. Div. v. Penick Corp.*, 647 A.2d 852, 858 (N.J. 1994) and citing other cases) (alterations in original); *see also Adler v. Abramson*, 728 A.2d at 90 ("The absence . . . of a limitation on which the parties had explicitly bargained, in a final agreement containing an integration clause . . . is a strong indication that the parties reasonably meant to bind themselves only by the words they employed."); *Hais v. Smith*, 547 A.2d at 987-88.

25 Mass as if the 85% Leasing Condition had been satisfied by leases with actual rent-paying tenants.[81] Why? Under the Option Agreement as originally envisioned, 25 Mass would receive units of a Republic with the financial stability of 85% Rent Paying Space at Republic Square I *from unaffiliated entities*. Instead, accepting the Master Lease and option exercise, the OP Units would reflect the comparatively diminished value of a Republic with only 47% Rent Paying Space at a valuable asset, Republic Square I.

If the 85% Leasing Condition were met by leases with genuine, space-occupying tenants other than Republic, the consideration 25 Mass would have received for Republic Square I — OP Units of Republic — would have been far more confidence-inspiring. In that circumstance, after all, Republic would have been taking ownership of a building that was substantially occupied under long-term leases with rent-paying tenants.[82] In the circumstance of the Master Lease, 25 Mass was put in a very different position. It would have been receiving OP Units from Republic, which would have paid for a building that was still under half occupied. Republic would have then had to undertake the efforts that the Option Agreement presumed were already completed, such as the securing of tenants,

[81] Because the purpose of the duty of good faith and fair dealing is to further the spirit of contract it is a natural corollary that it should only be used to imply a contract term if doing so respects the parties' original bargain. *See Hais v. Smith*, 547 A.2d at 987 (describing the reasons for the covenant); *see, e.g., 1010 Potomac Assocs.*, 485 A.2d at 210 ("[T]he landlord cannot reasonably demand . . . [a higher] price for the landlord's consent to a sublease . . . *under conditions that fully protect the landlord's bargain under the prime lease*.") (emphasis added); *see also Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d at 444 ("[T]he implied covenant of good faith is the obligation to preserve the *spirit* of the bargain rather than the letter, the adherence to *substance* rather than form . . . .") (emphasis in original) (internal quotation and citations omitted).

[82] The lease payments from the area of Republic Square I covered by the Master Lease would constitute a material percentage of Republic's cash flows. Upon option exercise, Republic Square I would constitute approximately 16.35% of the rentable area of Republic Property Trust. *See* JX 36. The Master Lease would constitute approximately 7.68% of the rentable area. *Id.*

in order to gain rent. In other words, if the 85% Leasing Condition had been genuinely satisfied, 25 Mass would have been able to share as a Republic unit-owner a portion (albeit a smaller one) of the robust success in leasing Republic Square I to paying tenants. By contrast, acceptance of the Master Lease as a gateway to the option exercise simply would have left 25 Mass with OP Units in a struggling entity that still needed to pay commissions to a broker who would find rent-paying tenants for the remaining 45% necessary to even get to the 85% threshold the Option Agreement contemplated would have already been met.

Another way in which the Master Lease did not protect 25 Mass' economic expectations in entering into the Option Agreement is in the lack of any protection for 25 Mass's expectation of receiving the Earn-Out. Republic did not seek to lease 95% of Republic Square I and to offer to 25 Mass a price that assumed the fulfillment of the Earn-Out. Instead, it only leased that necessary to satisfy the 85% Leasing Condition. If the 85% Leasing Condition had been satisfied by leases from space-occupying tenants, 25 Mass would expect to receive quarterly Earn-Out payments sooner for additional leases and it would have been much closer to receiving the full Earn-Out when the building achieved 95% Rent Paying Space. Although Republic has tried to argue that it was just as likely that Republic Square I would achieve 95% Rent Paying Space within the Earn-Out period with less than 40% Rent Paying Space going in rather than 85%, I am not persuaded by that argument. Even if the best candidates for leasing the below-ground space Republic did not purport to lease were incoming above-ground tenants who might seek to use these spaces for storage or other back-office uses, as seems to be the

case, it seems much easier to go from 85% to 95%, than from 40% to 95%. Indeed, if that argument is correct, having a full complement of above-ground tenants would allow the leasing agent to concentrate on convincing those tenants to take space below and to otherwise find niche tenants appropriate for the relatively small amount of space left. If Republic wished to have 25 Mass conceive of the Master Lease as a practical instrumentality that simply facilitated the exercise of the option, it would have been in a more sympathetic position had it purported to lease 95% of the space. Instead, it tactically chose to go for as little space as possible, and left 25 Mass in a less advantageous position to achieve the Earn-Out than would have been the case had bona fide leases for 85% of the building been in effect as the parties contemplated when they entered the Option Agreement.

Admittedly, Republic accurately asserts that all concerned parties anticipated that 95% occupancy of Republic Square I would have been achieved within 18 months from June of 2007 and therefore within the two-year time frame provided in the Option Agreement. But I cannot agree that if 25 Mass were valuing only the Earn-Out it would be indifferent between a scenario in which Republic Square I was at 40% Rent Paying Space but full occupancy was anticipated, and one in which Republic Square I was at 85% Rent Paying Space, if it were given such a hypothetical choice. The former would be much less desirable to 25 Mass than the latter because it is less immediate and much less certain. Republic's own projections estimated the value of the Earn-Out purchase price at $19.4 million, and the interest on, say, a year deferment of that payment would

have been significant.[83] And, as current market conditions show, expectancies can change. The volatility of markets is one reason why it is far better to be within 10% of a valuable target (the natural expectancy flowing from the Option Agreement) than within 55% (the artificial situation created by the Master Lease).

D. Remedy Of Specific Performance

To obtain an order of specific performance, Republic must prove that it was "ready, willing, and able" to exercise the option.[84] 25 Mass contends that Republic lacked the financial wherewithal to buy Republic Square I on its own. It also notes that the option could not be assigned to another party and argues that Republic was not permitted to bring in a partner to buy the building in a joint venture. Equally important, Republic never obtained a firm financing commitment from any lender.[85]

Given the strong evidence of Republic's financial vulnerability, its inability to pay even a diminished dividend level, and its need to sell itself a few months later, Republic has not persuaded me that it was capable of financing the purchase of Republic Square I without an outside equity partner.[86] For this additional reason, Republic's claim for specific performance fails.

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[83] For example, one year's interest, at the 6.5% capitalization rate would be $1.25 million, or around 0.5% of Republic Square I's asset value.

[84] *Flack v. Laster*, 417 A.2d 393, 400 (D.C. 1980); *see also Lindsey v. Prillman*, 921 A.2d 782, 787 (D.C. 2007); 25 WILLISTON ON CONTRACTS § 67:15 (4th ed. 2002) ("A prospective purchaser is not able to perform, . . . for purposes of obtaining specific performance, when funds from third parties are needed to make the purchase, and those parties are not bound to furnish the money.") (citing *Acme Inv., Inc. v. Sw. Tracor, Inc.*, 105 F.3d 412 (8th Cir. 1997)).

[85] Tr. 272-73, 274.

[86] *See* JX 160 at 046778 (In March of 2007, Republic was "pretty much tapped out in terms of the line of credit."); JX 199 at 533; *see also* JX 186 at 056694.

IV. 25 Mass's "Mirror Image" Counter-Claims

25 Mass has filed counterclaims seeking a remedy against Republic for filing a lis pendens and thereby supposedly precluding 25 Mass from consummating the sale to the Unknown Buyer. 25 Mass makes an argument that has first-blush appeal, which is that if Republic was wrong about the propriety of its attempt to exercise the option, then it is responsible for any harm it caused to 25 Mass by that action.

But upon a closer look, 25 Mass's argument is less compelling. The District of Columbia has a specific statute that addresses the improper filing of a lis pendens.[87] That statute provides, "[w]hen appropriate, [a] court may impose sanctions for the filing" of a lis pendens.[88] The District of Columbia Court of Appeals has suggested that the circumstances supporting an award of "sanctions" for filing a lis pendens would require a showing that the filing party was prosecuting its lawsuit in bad faith.[89]

25 Mass eschews any attempt to show that Republic's conduct was egregious enough to justify the imposition of sanctions under the District of Columbia Code. Nor has 25 Mass argued that Republic's litigation position is frivolous, in the sense that would constitute grounds for fee-shifting under the bad faith exception to the American

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[87] D.C. CODE § 42-1207(d).
[88] *Id.*
[89] *See Heck v. Adamson*, 941 A.2d 1028, 1030 (D.C. 2008) ("[T]he common law permitted cancellation of a lis pendens notice . . . if the suit was not prosecuted *in good faith* . . . . [S]ection 42-1207(d) appears . . . *to penalize such abuses* by means of post-judgment sanctions.") (emphasis added); *cf. In re Estate of Delaney*, 819 A.2d 968, 998 (D.C. 2003) (noting sanctions under Rule 11 are not appropriate unless "a party . . . has acted in bad faith, vexatiously, wantonly, or for oppressive reasons in connection with the litigation" or for "willful disobedience of a court order"); BLACK'S LAW DICTIONARY 1368 (8th ed. 2004) (defining a 'sanction' to be "[a] penalty or coercive measure that results from failure to comply with a law, rule, or order <a sanction for discovery abuse>") (brackets in original).

Rule.[90] Rather, 25 Mass argues that by filing the lis pendens Republic breached an implied obligation under the Option Agreement to refrain from interfering with the sale of the building during the Gap Period.

It is possible to imagine a scenario in which a court applying D.C. contract law could find that filing a lis pendens constituted a breach of an explicit contractual duty if, for example, there was a contract indicating that the only remedy of the option holder for breach was to seek monetary damages and that no remedy of specific performance was available.[91] This is not such a case. A close review of the Option Agreement, and in particular § 3 regarding the option term, reveals that no explicit contractual provision prohibits Republic from filing suit to protect its perceived rights under the Option Agreement.

Likewise, implying such a prohibition is problematic in this setting because the Gap Period was not defined as a period in which 25 Mass could affirmatively sell the building without any interference from Republic, but rather as the lack of a contrary restriction on 25 Mass's ability to sell.[92] 25 Mass could not sell the building to a third-party during the term of the option.[93] That term was defined to leave a logical hole — the

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[90] Only conduct that is "in bad faith, vexatious[], wanton[], or . . . oppressive" warrants fee shifting. *Jung v. Jung*, 791 A.2d 46, 51 (D.C. 2002).

[91] In such a case, it would be clear that the discharge of the lis pendens would eventually be proper. *Heck v. Adamson*, 941 A.2d at 1031 n.4.

[92] *Cf. Stone Motor Co. v. Gen. Motors Corp.*, 293 F.3d 456, 467 (8th Cir. 2002) (quoted in *Dorocon, Inc. v. Burke*, 2004 U.S. Dist. LEXIS 29052, at *96-97 (D.D.C. 2004)) ("[The] duty of good faith and fair dealing . . . prevents one party to the contract from exercising a judgment conferred by the *express terms* of [the] agreement in such a manner as to evade the spirit of the transaction or so as to deny the other party the expected benefit of the contract.") (emphasis added, other alterations in original).

[93] Option Agreement § 8(a).

Gap Period — if the Initial Option Period had expired, but the Second Option Period had yet to commence.[94] Even if the Gap Period had been defined more affirmatively, it would be difficult to square 25 Mass's argument with District of Columbia law. The mere fact that Republic would have contended that the Gap Period should not have arisen because of a proper exercise of the option and have been found to have been wrong in that contention would not, in traditional terms, constitute a breach of contract. It would have simply constituted the filing of a breach of contract action that did not succeed.[95] Had 25 Mass wanted to bar Republic from filing suit, there are well-known contractual techniques for doing that, such as a non-suit clause. Likewise, it could have bargained to hold Republic responsible for any damages caused by a losing claim for specific performance or an improvidently filed lis pendens. It did not do so. 25 Mass's argument that Republic "evad[ed] the spirit of the contract" by bringing suit and filing a lis pendens must therefore fail since its "spirit" (which must be discerned from its text) does not evidence any explicit or implied covenant barring suit.[96]

Similarly, 25 Mass is not convincing in arguing that Republic's "unwavering (and ultimately unjustified) insistence on specific performance" constituted a breach of contract because Republic could have satisfied itself with a damages claim or the proceeds of the sale to the Unknown Buyer could have been placed in escrow.[97] The

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[94] *See id.* § 3.

[95] Republic's plight is hardly unique. Under the American Rule, winning parties are seldom made whole after litigation because the costs of litigation are usually borne by them. Furthermore, the costs of a tarnished reputation that come from even unsubstantiated claims may never dissipate for some parties. These are costs that come with our society's traditional approach to litigation.

[96] *See Hais v. Smith*, 547 A.2d at 987-88.

parties could have contractually elected to limit their remedies to damages claims, but did not. Moreover, the Option Agreement explicitly contemplated the remedy of specific performance[98] — a likely award if Republic prevailed in this suit.

Therefore, 25 Mass is really arguing that Republic should be responsible for any damages caused by the fact that it filed a lawsuit that did not succeed. A common law judge purporting to embrace such a doctrine should pause, given the wide-scale embrace by our society of the eponymously named "American Rule."[99] A judge in Delaware being asked to invent such a common law rule for the District of Columbia should be even more chary about such creativity.

There are lis pendens statutes that hold parties accountable for any harm caused by an improvidently filed lis pendens.[100] The District of Columbia statute takes a far different approach, limiting the penalties for filing a lis pendens to a stringent sanctions standard "when appropriate."[101] Given that express public policy determination, which can be thought to give heavier weight to the interests in ensuring that parties possessing

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[97] 25 Mass Post-Trial Op. Br. at 10.
[98] Option Agreement § 14(k).
[99] *Jung v. Jung*, 791 A.2d at 51; *see also Pellerin v. 1915 16th St. Co-op Ass'n*, 900 A.2d 683, 689 (D.C. 2006); *cf. Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1016 (D.C. Cir. 1985) (holding that the filing of weak claims does not in itself constitute bad faith on the filer's part).
[100] For example, a California statute allows a judge to require a bond from a claimant for the maintenance of a notice of pendency of action and can later award that bond "upon a showing (a) that the claimant did not prevail on the real property claim and (b) that the person seeking recovery suffered damages as a result of the maintenance of the notice." CAL. CIV. PROC. CODE § 405.34 (West 2008). Other states prevent misuse by increased procedural safeguards including judicial authorization before allowing a lis pendens to be recorded, such as Massachusetts, which amended its lis pendens statute in 1985 for this purpose. *Wolfe v. Gormally*, 802 N.E.2d 64, 67 (Mass. 2004).
[101] D.C. CODE § 42-1207(d).

claims are not deterred from prosecuting them than in ensuring that responding parties are not injured by a lis pendens that is later lifted because the underlying claim lacked merit, there is little legitimate room for the judicial creation of implied contractual duties covering the same policy ground in a manner contrary to the Council of the District of Columbia. Moreover, because District of Columbia common law hews strictly to the traditional American Rule, the mere fact that a party brought a breach of contract action would not support a fee-shifting application, much less an award of substantive contract damages.[102]

As I find Republic did not act in bad faith in seeking to protect its perceived rights under the Option Agreement, I find no occasion to shift fees or award damages for the filing of the lis pendens.

V. Conclusion

For the foregoing reasons neither Republic nor Liberty is entitled to relief. The lis pendens filed on Republic Square I shall be lifted. Each side to bear its own costs.

[102] *See Pellerin*, 900 A.2d at 689.