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COURT SERVICES

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

PROMETHEUS REAL ESTATE GROUP, INC.,

Plaintiff,

v.

RONALD JOSEPH MARAZZO, individually and as Trustee of the RONALD J. MARAZZO LIVING TRUST DATED 8/2/1990, and DOES 1-50, inclusive,

Defendants.

Case No. 1-12-CV-228173

DEFENDANT'S CLOSING TRIAL BRIEF

BY FAX

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Quick Review

With all the evidence now in, this case may fairly be summarized as follows. A landowner and a developer entered into a contract which contemplated—following a due diligence period—that the developer would obtain entitlements required to turn the existing retail use into a multi-unit residential use. The due diligence period was extended on four separate occasions, for a total of eight months rather than the originally planned two months.

In the end, the developer did not issue a Due Diligence Approval Letter by the last deadline, as extended, which deadline fell due at midnight April 10, 2012. Between April 11, 2012 and June 22, 2012 the parties tried to put the deal back together. During that period, the developer spent additional money (approximately $150,000) in further attempting to entitle the property even in the absence of any contract with the landowner. On July 11, 2012, the developer sued the landowner, initially (and falsely) claiming the landowner had defrauded the developer by making a false promise to sign a fifth extension/amendment to the contract. That claim was dropped when the developer's point person recanted his previously sworn declaration testimony to that effect.

The evidence at trial established that the contract expired at midnight April 10, 2012, even though the landowner took no steps to clear a cross-parking easement and did not sign any proposed fifth amendment. Just as importantly, the evidence established that both the landowner and the developer understood that, once the contract expired, ***only*** another signed document could have revived it. But no extension or renewal was executed, because (i) the parties differed as to what would be the right way to proceed in business together and/or (ii) the landowner came to mistrust the business ethics of the developer.

An expired contract cannot be breached, because no further performance is due. For that reason, the developer's three contract-based causes of action—for breach of contract, anticipatory breach of contract and specific performance—all fail. That leaves only the developer's cause of action for restitution (which it mislabels as a cause of action for "unjust enrichment").

The landowner was admittedly somewhat slow to call off the developer's efforts to entitle the landowner's property after midnight April 10, 2012, and, as noted above, the developer incurred $150,000 in costs in that post-contractual period. But the developer knowingly took the risk that the deal would not come back together after April 10, 2012. The landowner, moreover, derived no benefit from what the developer did do to attempt to entitle the property at any time, and given its conduct, the developer is not deserving of equitable relief in any case.

Any restitution of expenses incurred prior to midnight April 10, 2012, is unwarranted for additional reasons. Two of the four extensions (taking the expiration date out to January 10, 2012, and not November 30, 2011) were made while the wrap design was still very much under active consideration by the City of Mountain View, and the last two extensions—both of which were obtained in Q1 2012—were sought by the developer, not the landowner, and did not just extend time. Rather, each such Q1 2012 extension also expressly reaffirmed every single existing term of the contract. Those terms included the specific provision that entitlement costs were the responsibility of the developer at all times while the contract was still in force, i.e., through midnight April 10, 2012. In addition, and all during Q1 2012, the developer must certainly have been aware that its attempt to get an extra 6% interest (for a total of 15% interest) might well jeopardize its ability to obtain the landowner's consent to ***any*** new contract terms.

All these things being so obviously true, the Court most certainly ***ought*** not to apply the doctrine of equitable estoppel to bar the assumption of the risk defense to the restitution count for any period of time ***prior*** to midnight April 10, 2012 and should also be at least somewhat reluctant to award any restitution damages to the developer ***after*** midnight April 10, 2012.

Argument

1 DTREX A Terminated by its own Terms at Midnight on April 10, 2012 Through no Fault of MFT.[1]

Prometheus argued that DTREX A did not terminate by its own terms at midnight on April 10, 2012, because MFT had wrongfully failed to sign both PTREX 71 (an instrument clearing a cross-parking easement) and DTREX Q (a proposed fifth amendment). See RT 485:17-19, 490:17-26, 578:10-579:17, 619:7-27, 640:9-642:21, 660:6-24, 665:17-675:9; 723:17-725:11.3.

MFT declined to sign PTREX 71 and DTREX Q, but that was its right. As to PTREX 71 (the cross-parking easement) we refer the Court to what MFT said on this subject in its DOTB at 9:18-12:8:

/ / /

/ / /

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/ / /

[1] This Defendant's Closing Trial Brief (DCTB) adopts all terms defined in Defendant's Opening Trial Brief (DOTB) filed January 16, 2014. Defendant's and plaintiff's trial exhibits are referred to herein as DTREX and PTREX respectively. The various daily transcripts of proceedings previously prepared for this case have been collected by MFT and assigned Bates numbers in the sequence the testimony was given. References to these transcripts are hereafter identified as RT 0001-2903.

§ 3.01(a) of [DTREX A] expressly allocated the risk of any known title problems respecting [Blackacre] to Prometheus not MFT:

> Prometheus shall obtain a current extended coverage preliminary title report on the … [Blackacre] … ; and … Prometheus shall advise [MFT in writing] at least fifteen (15) days prior to the end of the Due Diligence Period, what exceptions to title, if any, are objected to by Prometheus … [MFT] shall have seven (7) days after receipt of Prometheus's [written] objections [if any] to give Prometheus: (i) notice that MFT will remove such objectionable exceptions on or before the Closing Date; or (ii) notice that [MFT] elects not to cause such exceptions to be removed. ***If Marazzo gives Prometheus notice [that it elects not to cause such exceptions to be removed] or fails to give any notice within such seven (7) day period (which shall [itself] be deemed to be notice) [that MFT elects not to cause such exceptions to be removed], Prometheus shall have until the end of the Due Diligence Period to elect to proceed with the purchase or terminate this [Original Deal]. If Prometheus shall fail to give [MFT] notice of its election [to proceed with the purchase] on or before the end of the Due Diligence Period [i.e., by midnight April 10, 2012] Prometheus shall be deemed to have elected to terminate this Agreement.***
>
> (***Emphasis*** added.)

The cross-parking easement was quite literally an exception to title given that it was evidenced by a document recorded in the Official Records of Santa Clara County, and, as such, was expressly listed as an exception to title on a title report dated October 10, 2011 as item number 4 at p. 8, which title report Prometheus admits it received on or about the date of its issuance.

Absolutely nothing in the Original Deal placed either any express or implied duty on MFT to do or not do anything about the cross-parking easement unless and until MFT had first agreed in writing it would do something in response to Prometheus' written objection to the cross-parking easement. Which written objection to item number 4 on the title report, the evidence will show, was something Prometheus itself never bothered to send to MFT in the first place.

*** * ***

Prometheus claims that—because of the alleged importance to Prometheus of its eliminating the cross-parking easement before the expiration of the Due Diligence Period—this Court can and should employ the implied covenant (i) to disregard all the relevant contractual risk-allocation language quoted in the preceding section of this trial brief respecting title issues as well as (ii) to hold that MFT's alleged failure to lend more of a hand in Prometheus' independent efforts to eliminate the cross-parking easement prior to the expiration of the Due Diligence Period should relieve Prometheus from the consequences of its having first fallen out of contract with MFT on and after midnight on April 10, 2012.

Prometheus' assumption that the implied covenant is even possibly available as a means of allowing Prometheus to avoid the entirely predictable consequences of its own voluntary decision not to deliver a Due Diligence Approval Letter to MFT before midnight on April 10, 2012 is wrong as a matter of law. Thus, controlling California Supreme Court authority clearly holds that the covenant of good faith and fair dealing can never be used to limit parties' freedom to contract the implied covenant itself entirely out of a particular contract on any particular point. See, e.g., Steiner v. Thexton, 48 Cal.4th 411, 418-419 (2010):

> [P]laintiffs argue the Court of Appeal should have applied the implied covenant of good faith and fair dealing to narrow the escape clause to give Steiner only a limited power to terminate the agreement. We disagree. While this court has held that all contracts impose a duty of good faith and fair dealing and that the covenant particularly applies when "one party is invested with a discretionary power affecting the rights of another" it has also noted the implied covenant does not trump an agreement's express language.

> "'The general rule [regarding the covenant of good faith] is plainly subject to the exception that the parties may, by express provisions of the contract, grant the right to engage in the very acts and conduct which would otherwise have been forbidden by an implied covenant of good faith and fair dealing.'" Given the broad and express language of the escape clause, Steiner's power to withdraw was not constrained by the implied covenant of good faith and fair dealing.
>
> Emphasis in original, internal citations omitted; see also Thrifty Payless, Inc. v. Mariners Mile Gateway, LLC, 185 Cal. App. 4th 1050, 1060-61 (2010); 1 Witkin, Summary of California Law, *Contracts* §797 (10th ed. 2013 supp.); Judicial Council of California Jury Instructions (CACI) No. 325 ("[T]he implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract").
>
> In this case the ordinary constraints of the implied covenant cannot and should not be held to trump the rights granted MFT pursuant to plain language of § 3.01(a) of the [DTREX A] as quoted in the prior section of this brief. Meaning (i) MFT's express rights ***not*** to lend a hand to fix the cross-parking easement for Prometheus' benefit and (ii) MFT's rights to instead run the risk that Prometheus might respond to any such unhelpfulness on MFT's part by itself deciding to terminate the [DTREX A] by way of Prometheus' not giving MFT notice of its election to proceed. Which is just what happened here *vis-à-vis* the cross-parking easement (ignoring, for the moment at least, that Prometheus never objected in writing to the cross-parking easement in the first place).

As for MFT's refusal to sign any version of DTREX Q (the Proposed Fifth Amendment), Prometheus' earlier false promise claim was entirely laid to rest by Mr. Millham's concession at the first trial that it was *his* decision not to issue the Due Diligence Approval Letter by midnight April 10, 2012. Again this subject was well covered in the initial DOTB at 8:6-9:13:

> As is stated at § 3.01(f) of [DTREX A]: "If Prometheus shall not have delivered the Due Diligence Approval Letter to Marazzo prior to the end of the Due Diligence Period [midnight April 10, 2012], then this Agreement shall automatically terminate."
>
> Prometheus' decision not to send the Due Diligence Approval Letter was entirely conscious and informed. Thus, Prometheus' point person Mr. Millham testified on how this decision got made and how MFT had no responsibility for Prometheus' making that decision as follows:
>
> Q. You knew April 10 [2012] was drop-dead day?
> A. I did.
> [DTREX XXXXX at] pp. 641:23-25.
>
> Q. You let midnight [April 10, 2012] come and go and took a chance and you knew you were taking a chance.
> A. I didn't have an option, right?
> Q. Well, you could have done [sic: gone] to Mr. Diller and said I need to go hard. You could have. There's no law against it, right?
> A. No.
> Q. You had acknowledged that you had that choice.
> A. Yes.
> Q. And that the way contingency periods work, they don't go on forever.
> A. That's correct.
> Q. Now, it would be wrong for somebody to lie to you about what their intent is to trick you into not exercising a due diligence letter. I mean, you understand that, right?
> A. Yes.

Q. But you don't think anybody tricked you into not exercising due diligence by lying to you about what they were or were not going to do in terms of signing that thing at some point in the future, do you?
A. No.
[DTREX XXXXX at] pp. 644:18-645:14

Q. I understand. I mean you manage risk when you're in a contingency period. You make a decision about whether the risk is manageable when you decide to go hard, right?
A. That's correct, yes.
Q. And that is you don't get a free look for the rest of your life; you have to make a decision?
A. That's correct.
Q. Decision date was April 10 [2012] at midnight?
A. Yes.
[DTREX XXXXX at] p. 685:3-12

2 A Renewal of DTREX A Required Another Signed Document.

While it is true that—unless DTREX A is treated as the equivalent of an expired option[2]—it is at least theoretically possible that, post-midnight April 10, 2012, DTREX A might have been extended/amended under Civil Code section 1698(b). But that could not have occurred here. There was no evidence of any post-April 10, 2012 oral agreement

[2] "Whether any particular document is … an 'option' … depends on the nature and terms of the document … The test is whether … there is a mutuality of obligation. If both parties are obligated to perform, it is an agreement of sale; if only one party (the optionor-offeror) is obligated to perform, it is merely an option." (1 Miller & Starr, California Real Estate, *Specific Contracts* § 2:8, pp. 26-27 (3d ed. 2000) (fn. omitted.)) Here, and when it came to DTREX A, only one party (MFT) was ever obligated to enter into contract, while Prometheus was free to enter into contract or not by the simple expedient of issuing or not issuing a Due Diligence Approval Letter. In Simons v. Young, 93 Cal. App. 3d 170, 182 (1979) the court ruled that the expiration date of an option contract must be strictly construed, i.e., that "while a court may grant relief on traditional grounds for equitable intervention such as fraud, accident or mistake, it may not grant equitable relief to extend an option period beyond that agreed to by the parties when, as here, the failure to timely exercise the option is due entirely to the inadvertence or neglect of the optionee to which the optionor in no way contributed … An option is an offer by which a promisor binds himself in advance to make a contract if the optionee accepts upon the terms and within the time designated in the option. Since the optionor is bound while the optionee is free to accept or not as he chooses, courts are strict in holding an optionee to exact compliance with the terms of the option." See also Palo Alto Town & Country Village, Inc. v. BBTC Co., 11 Cal. 3d 494, 498 (1974); Holiday Inns of America, Inc. v. Knight, 70 Cal. 2d 327, 330 (1969).

here to begin with,[3] and—even if there had been—such an oral agreement would have been legally ineffectual in light of the parties' mutual understanding that assent to amend/extend DTREX A needed to be manifested by way of a signed document. RT 434:12-27 (Millham) and RT 2804:22-2805:6, 2831:13-18 (Marazzo); see also Rennick v. O.P.T.I.O.N. Care, Inc., 77 F.3d 309, 314 (9th Cir. 1996), *cert. denied, 519 U.S. 865* (applying California law and holding that "if a party knows that the other intends no obligation to exist until the written agreement is made, the earlier manifestation does not constitute a contract"); see also Apablasa v. Merritt & Co., 176 Cal. App. 2d 719, 729 (1959) (where the court said: "It is a general rule … that, when it is a part of the understanding between the parties that the terms of their contract are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract" [emphasis added, internal quotations removed]); see also Kessinger v. Organic Fertilizers, Inc., 151 Cal. App. 2d 741, 749 (1957) (holding that physical signatures are always required when physical signatures are what is contemplated by the parties prior to contract formation).

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[3] See RT 2335:1-2336:16 (testimony of Prometheus Chairman of the Board Sanford Diller respecting DTREX GG). In light of Mr. Diller's testimony, the most GG can be said to mean is MFT agreed to further negotiate with Prometheus to try and renew DTREX A on mutually agreeable terms (see 1 Witkin, Summary of California Law, *Contracts*, § 148 at pp 187-190 (10th ed. 2005) [discussing issues respecting enforceability of collateral agreements to further negotiate unagreed contracts]). In this case MFT did negotiate with Prometheus between April 11, 2012-June 22, 2012 (see DTREX BB, UU, QQQ), after which time Prometheus filed its completely reckless fraud-based lawsuit on July 11, 2012 and Evidence Code § 1152 became applicable. NOTE: As Prometheus has never once pled any breach of any purported contract to further negotiate any underlying contract with Prometheus, that subject will not be further discussed in this DCTB as, in the absence of any such pleading, restitution must be (and is) assumed by MFT to be Prometheus' only possible source of monetary recovery in this case.

The fact that the testimony given at the prior trial was entirely consistent on the need for an executed document to renew DTREX A was obviously worrisome to Prometheus. It actually had John Millham—the same John Millham who had previously recanted other sworn testimony, leading Prometheus to amend its complaint to drop its specific performance claim directed at DTREX Q—recant his testimony yet again. At this trial what Mr. Millham repeatedly attempted to recant (see RT 485:3-25, 527:14-531:17) was his prior sworn testimony given before Judge Rushing:

> Q. Mr. Millham, before we turn to that for a moment, okay, there never was a time after April 10 when you thought any deal with Ron wouldn't be evidenced by a signature, correct?
>
> A. I think I understand your question. That ultimately in order to go forward we needed a signature –
>
> Q. Yeah.
>
> A. -- is that your question? Yes.
>
> Q. So, I mean, you had a signature on the first document, right? The July 28, Exhibit A that's in front of you.
>
> A. Yes.
>
> Q. And you had signatures on the other four extensions, right?
>
> A. That's right.
>
> Q. And the fifth extension, fifth amendment, didn't have his signature on it, right?
>
> A. That's right.
>
> Q. So until some version of that was signed, you didn't have a deal, right?
>
> A. That's right.
>
> Q. Any kind of a deal?

A. That's right. Sorry. That's right.

DTREX XXXXX at 672:10-673:9

No party should ever be permitted to play so fast and loose with the sworn testimony of its principal witness. If a trial is to have any meaning as an instrument for determining the truth, then a party cannot be free to present constantly shifting versions of that "truth." Legal theories can "evolve." Factual testimony is not supposed to.

There is, of course, no law or rule that bars a witness from offering contradictory testimony, just as there is no law or rule that requires a trier of fact to give credence to the second, third or fourth version of events from the same witness. It is, however, a matter of common sense and common experience that a witness who testifies to facts that hurt his case should be viewed skeptically when his subsequent appearance on the stand—after ample time to reflect on the implications of his original testimony, perhaps with the guidance of his counsel—becomes increasingly favorable to him.

In any case—and like Lady Macbeth when she finally reached the point in her murderous career where guilt so overcame her that she cried "Out, damned spot! Out, I say!" (see Macbeth, act 5, sc.1)—just one attempt at laundering the truth out of this case (the truth being that DTREX A ended on midnight April 10, 2012 and never again sprang back into existence thereafter) is of little assistance to Prometheus given how many other times besides his "signature" testimony Mr. Millham has previously testified that he always understood midnight, April 10, 2012 was the final, no questions asked end of the road for DTREX A. See DTREX XXXXX at 644:18-645:4, 685:3-12.

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/ / /

3 Even if DTREX A had not Expired it Still Could not be Specifically Enforced.

A. DTREX A was Obtained by Prometheus by Means of Either Fraudulent or Negligent Misrepresentation.

The Poison Pill Provisions were the subject of considerable evidence and briefing at trial. They are described in MFT's Second Amended Answer as follows:

> DTREX B provides that the Project which the limited liability company (JV Company) contemplated by DTREX B is being formed with respect to is a JV Company that will "… own, develop … and actively operate the Property for the production of cash flow and profit." (DTREX B at Recital B; see also DTREX B at § 1.7(uu)). There is nothing in DTREX B […] § 1.7(uu) or, most significantly […] § 1.7(s), which in any manner specifies how long the Company must "… own, develop … and actively operate the Property for the production of cash flow and profit[,]" before a sale of "the entire Project" as is otherwise provided for by § 1.7(s) must be considered and either accepted or rejected for Deadlock purposes. When combined with the extraordinary provisions of DTREX B §§ 1.7(k), (bb), 2.2(b) and 7.4, DTREX B §§ 1.7(s) and (uu) all amount to provisions (the Poison Pill Provisions) which would allow Prometheus to either achieve extraordinary economic advantages over MFT or, in the alternative, to force MFT out of all of the Project and the Property and the JV Company defeating any MFT long term hold and leaving MFT with very adverse tax consequences.

It is clear from Messrs. Marazzo and Widman's testimony that these Poison Pill Provisions were not recognized for what they were by MFT when DTREX A was first executed on August 2, 2011. RT 2475:20-2476:14, 2488:9-26, 2821:26-2822:9, 2825:8-28. Even Mr. Volpe, the Berliner Cohen attorney who came in after the fact and was otherwise aghast at the one-sided nature of DTREX B (the Operating Agreement which was itself Exhibit L to DTREX A) failed to fully grasp the deleterious implications of the Poison Pill Provisions. RT 2111:15-2112:7.[4]

[4] In fairness to Mr. Volpe, and despite his admission that he did not appreciate how harmful the Poison Pill Provisions were to MFT, he did at least inadvertently wind up eliminating one aspect of the Poison Pill Provisions when he entirely eliminated DTREX B §7.4 (the Buy-Sell Provisions of the Operating Agreement) in DTREX UUUUU (the MFT counter offer which was drafted by Mr. Volpe and transmitted to Prometheus by Mr. Shenk on June 22, 2012 [DTREX PPP]). Unfortunately, however, Mr. Volpe's elimination of DTREX B §7.4 (the buy-sell provision triggered by deadlock) did nothing

Mr. Millham's response to the Poison Pill Provisions was to deny that Prometheus would ever have actually taken advantage of them. But Mr. Millham was never a decision maker when it came to Prometheus' best financial interests. DTREX XXXXX at 633:6-8; RT 592:10-593:21. The fact remains that these provisions are in DTREX A, that they were inserted therein by Prometheus, and that they confer on Prometheus an enormous, and particularly unfair, advantage.

In any case, Section 3391(3)-(4) of the Civil Code provides:

> Specific performance cannot be enforced against a party to a contract in any of the following cases:
>
> ***
>
> If his assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled … [or] if his assent was given under the influence of mistake, misapprehension, or surprise …

Even if the Poison Pill Provisions are somehow characterized as a mistake—and, given Prometheus' refusal to let Mr. Levine explain just how such unfair terms wound up in DTREX A to begin with, this approach seems much too charitable a characterization of this situation to MFT—that mistake did not have to be a mutual one. A unilateral mistake is enough to vitiate any party's consent to an objectively unconscionable contract. See 1 Witkin, Summary of California Law, *Contracts,* § 264, p. 294 (10th ed. 2005) (explaining that, under the Second Restatement of Contracts § 153(a) an unconscionable term may void a contract [or here, prevent its enforcement] based on

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to eliminate the similarly evil effects the Poison Pill Provisions would have had in case of a dissolution case brought by Prometheus in its capacity as a 50% Percentage Interest member of the proposed JV Company pursuant to Corporations Code section 17707.3(b)(4) (allowing dissolution of any limited liability company based on evidence of deadlock).

even a merely unilateral mistake). The Poison Pill Provisions were unconscionable as a matter of law.

B. DTREX A Presents too Much of an Economic Threat to MFT to be Ordered Specifically Enforced.

A court will not order a party to turn over control of its property to another without that party's having an effective say in what might happen to his or her property thereafter. Such situations are deemed unjust and unreasonable as a matter of law. See Civil Code section 3391(2); Handy v. Gordon, 65 Cal. 2d 578 (1967) (Handy); Citizens Business Bank v. Gevorgian, 218 Cal. App. 4th 602 (2013); Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn., 18 Cal. App. 3d 1023 (1971).

In Handy, for instance, the Court refused to order specific performance in favor of a buyer and against a subordinating seller because there were insufficient limits on how the property might be further encumbered by the buyer. "[T]he seller is forced to rely entirely on the buyer's good faith and ability as a developer to insure that he will not lose both his land and the purchase price." *Id* at 581. Given the presence of the Poison Pill Provisions in DTREX A, MFT will never have any actual control over events here, and MFT certainly has no remaining basis for putting its trust in Prometheus' good faith. That well has been entirely poisoned. RT 2782:22-25; 2784:22-2785:1(Marazzo). Even worse, putting Ron Marazzo's two adult children in the position of having to deal with an unchained Prometheus would be disastrous. Lisa Keller is "a mother and an educator" who has her "plate full" nursing a badly disabled child, and who, along with her brother, is in no position to deal with Prometheus over the short or long haul. RT 2014:2-2015:17, 2017:9-23, 2020:08-17, 2022:20.

C. DTREX A is Both too Vague and too Complex to be Ordered Specifically Enforced.

Prometheus' call for specific enforcement is not limited to requiring MFT to clear title to the cross-parking easement. Prometheus is asking the Court to provide full-time supervision to see to it that MFT "perform [MFT's] obligations under [DTREX A] and enters into the joint venture arrangement contemplated by [DTREX A] and each of the four amendments thereto, including the deeded conveyance of the Property to the joint venture entity which will own and develop the Property." FAC at ¶ 36.

Civil Code section 3390(5) prohibits specific performance of a contract "the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable." "[A] greater degree or amount of certainty is required in the terms of an agreement which is to be specifically executed in equity than is necessary in a contract which is the basis of an action at law for damages … In order for a court of equity to decree that an obligation is specifically enforceable the terms of the contract must be complete and certain in all particulars essential to its enforcement. The agreement must not only contain all the material terms but also express each in a reasonably definite manner." Eldridge v. Burns, 76 Cal. App. 3d 396, 420 (1978). See also White Point Co. v. Herrington, 268 Cal. App. 2d 458, 465 (1968); Magna Development Co. v. Reed, 228 Cal. App. 2d 230, 236 (1964). Also, "No material element must be left to future agreement." Roskamp Manley Assocs. v. Davin Dev. & Inv. Corp., 184 Cal. App. 3d 513, 520-521 (1986).

A close corollary to the need for certainty is the canon that specific performance is available only when it is "practically feasible." Husain v. McDonald's Corp., 205 Cal. App. 4th 860, 871 (2012). Under the so-called modern rule, the courts will undertake to

supervise the parties, but only up to a point. The more ambiguous the contract, the more supervision will be required by the court to specifically enforce it. Here are but a few examples of how intimately the Court will have to become involved in the affairs of the parties if it were to order specific performance:

I. Uncertain Nature of the Apartment Complex.

DTREX A specifically states that its subject is a wrap. This was no accident, as both the podium and wrap were considered before the parties entered into DTREX A. Against Mr. Millham's strong advice, MFT specifically chose wrap. DTREX DDDD, EEEE; RT 0381:26-382:19. As a precaution against unilateral changes in the proposed design of the apartment complex, DTREX A, § 3.02(b) even provided that "Prometheus shall not alter the Project from being an apartment community in a 'wrap' condition containing approximately two hundred thirty-eight (238) units (as such unit count may be increased as provided in Section 3.02(a) above) without the consent of Marazzo."

An order to enforce a contract is not an occasion for re-writing the contract. See E.M.M.I. Inc. v. Zurich American Ins. Co., 32 Cal. 4th 465, 485 (2004) ("It is not for this court to rewrite the parties' contract by construing language to mean something it does not mean."); Series AGI West Linn of Appian Group Investors DE, LLC v. Eves, 217 Cal. App. 4th 156, 164 (2013) ("courts will not rewrite contracts to relieve parties from bad deals nor make better deals for parties than they negotiated for themselves.")

Specific enforcement of the only contract the parties signed is enforcement of a contract to build a wrap. This is likely a fool's errand—the City of Mountain View will almost certainly never approve a wrap. RT0266:19-22 (Millham); RT 1704:19-1705:10 (Moss); DTREX BBBB at EE00187-194. "The law neither does nor requires idle acts." Civil Code section 3532.

Like the character in the Greek myth from whom it took its name, Prometheus hopes the Court will release it so that it can build whatever it wants on Blackacre, so long as "anything" exceeds 238 units and is profitable. To accomplish this task, Prometheus would enmesh the Court in every aspect of the future development of the Project, including whether—at any point in the future—MFT can legitimately exercise its contractual right to refuse to sign off on any application that is ***not*** a wrap. There is nothing in the law of specific performance that contemplates that degree of judicial entanglement.

II. Uncertain Profitability.

DTREX A § 2.02(a) gives Prometheus the ability to abandon the transaction if the appraised value of Blackacre is greater than $16 million and if, in the sole discretion of Prometheus, Prometheus determines the Project would not be profitable. At trial, Prometheus asserted that—despite this "sole discretion" language—its ability to exit the Project was actually intended to be circumscribed by whether the Project was ***objectively*** profitable. RT 1156:7-1160:24. Prometheus would thus have the Court involve itself in the details of, *inter alia*, the accuracy of the final Project Budget. Again, there is nothing in the law of specific performance that contemplates that level of judicial involvement in the parties' business affairs.

III. Uncertain Major Decisions.

DTREX B § 4.4 states that MFT would be involved in "Major Decisions." Thus Prometheus would have the Court involve itself in the major decisions of the joint venture, to see to it that MFT performed its obligations under the Operating Agreement. Again, that is not the Court's role.

IV. Uncertain DTREX A Decision Tree Decisions.

Additional aspects of the predictable need for the Court's intimate involvement in the affairs of both parties were included in the DTREX A Decision Tree, which is attached hereto as Appendix A. It is just not "practically feasible" for the Court to assume the role of hall monitor, supervising the parties at every stop along the very complicated path to a stabilized multi-family apartment house complex. Decisions permitting the Court to order specific performance contemplate far less day-to-day involvement and burden than what Prometheus would impose on the Court. Thus, in Barndt v. County of L.A., 211 Cal. App. 3d 397, 403 (1989) the Court of Appeal explained one of the key reasons that courts will not order specific performance of personal service contracts (Civil Code section 3390(2)): "The rule evolved because of the inherent difficulties courts would encounter in supervising the performance of uniquely personal efforts. A fundamental reason why courts will not order specific performance of personal services contracts is because such an order would impose on the courts a difficult job of enforcement and of passing judgment upon the quality of performance" (internal quotes omitted). This principle underlying subdivision 2 of section 3390 is equally applicable to subdivision 5.

V. DTREX A is Too Impracticable to be Ordered Specifically Enforced.

All DTREX A ever contemplated was a wrap. And, while a wrap has never been turned down by the City of Mountain View, neither party has seriously contended that a wrap—while not impossible—is anything other than completely impracticable in the sense that there is almost no chance the City of Mountain View will ever change its mind and accept a wrap design in lieu of podium. DTREX F; RT 0844:24-0845:27.

Impracticability is just as fatal to specific performance as impossibility; as

discussed in Defendant's Reply in Support of Motion for Judgment at 2:18-4:21:

> Prometheus' exclusive reliance on the Paramount case, which addresses only the doctrine of complete impossibility, misses the thrust of the motion for judgment.[1] The premise of the motion is not the doctrine of complete impossibility.[2] It is, rather, the doctrine of impracticability, i.e., that "practically speaking, the Court cannot now order specific performance of [DTREX A] given that Blackacre … is undevelopable as a residential project without the (now gone) Whiteacre …." Motion for Judgment at 2:13-15.
>
> This approach to defeating the specific performance count in this case is entirely consistent with what Witkin describes as the defense "***not only [of] objective impossibility in the true sense, but also impracticability due to excessive and unreasonable difficulty or expense."*** (Id. at Fn. 3.)[3]
>
> * * *
>
> DTREX A is a contract providing for a maximum 242 wrap on Blackacre. That contract, as written, contains not the least contemplation of more than 242 units ever being put on Blackacre. Nor does it contain the least contemplation of an abandonment of wrap in favor of a podium design. Not, at least, without the specific express written agreement of MFT. Prometheus sought that consent—see DTREX Q—but never obtained it.
>
> ---
>
> [1] In the Paramount case, the outbreak of World War II prevented timely payment by a Japanese entity of royalties otherwise coming due to Paramount Pictures during the war. The Court of Appeal found that certain Japanese nationals who were agents of the Japanese entity—and who were themselves held captive as enemy aliens in the United States for the duration of the war—had not shown that their own personal incarceration had prevented them from at least attempting to see that Paramount was paid timely. Resulting in a holding that the doctrine of complete impossibility did not excuse timely payment to Paramount, such that Paramount was entitled to pre-judgment interest on what should have been paid it during the war.
>
> [2] Witkin says "The defense is impossibility in the nature of things (C.C. 1597); i.e., the impossibility must be in the nature of the thing to be done (objective impossibility), and not in the inability of the promisor to do it … Hence, mere unforeseen difficulty or expense does not constitute impossibility and ordinarily will not excuse performance … ***However, modern cases recognize as a defense not only objective impossibility in the true sense, but also impracticability due to excessive and unreasonable difficulty or expense.*** 1 Witkin, Summary of California Law, 10th Ed. (2005) Contracts, § 830 at p. 918 (all internal citations and quotations omitted). (***Emphasis*** added.)
>
> [3] By way of example, entitling Blackacre as a 238 wrap is not completely impossible. But it is impracticable, not just because Whiteacre is gone, but because the uncontradicted record establishes that a 238 wrap has no political support at the City of Mountain View. Neither does a 242 podium that can't deliver a renovated retail strip as part of a multi-use project. The simple fact of the matter is that the practical redevelopment of Blackacre requires the cooperation of the Whiteacre Site, LLC landowner and Prometheus has made getting that cooperation impossible for itself given its course of conduct over the past several years (as well as during this very trial) where its disregard for the truth (suing for fraud and then recanting) and for contracts (ignoring its obligation to issue a Due Diligence Approval Letter and yet suing anyway) has become obvious to MFT and Whiteacre Site, LLC both.

D. Ancillary Damages in Connection With Specific Performance Were Never Adequately Proven by Prometheus, Which Failed to Properly Estimate Delay Costs or Otherwise Account for Mitigating Factors Respecting Delay Costs.

In this connection, MFT relies on the testimony of its expert witness, Randy Sugarman, MBA, CPA, CFE at RT 2606:15-2618:26, as well as on the testimony of its expert witness Paul Waszink, CPE at RT 2558:2-2563:27.

In Ellis v. Mihelis, 60 Cal. 2d 206, 219-220 (1963) the Court explained the principles underlying an award of damages incidental to an order of specific performance:

> The compensation awarded as incident to a decree for specific performance is not for breach of contract and is therefore not legal damages. The complainant affirms the contract as being still in force and asks that it be performed. If the court orders it to be performed, the decree should as nearly as possible require performance in accordance with its terms. One of the terms is the date fixed by it for completion, and since that date is past, the court, in order to relate the performance back to it, gives the complainant credit for any losses occasioned by the delay and permits the defendant to offset such amounts as may be appropriate. The result is more like an accounting between the parties than like an assessment of damages.

In Bravo v. Buelow, 168 Cal. App. 3d 208 (1985), the Court ordered specific performance transferring property from the defendant to the plaintiff, and awarded incidental damages to the plaintiff to offset the increase in building costs from $40/psf in 1978 to $60/psf in 1983. The Court explained that the monetary award was rendered pursuant to an accounting, and not damages on the contract:

> In California the compensation which may be awarded incident to a decree of specific performance is not for breach of contract and is not legal damages. The complainant affirms the contract and asks that it be performed. Since the time for performance has passed, the court relates that performance back to that date, by treating the parties as if the change in ownership had taken place at that time. Thus the buyer is entitled to the rents and profits from the time the contract should have been performed, and the seller is entitled to an offset for the interest on the purchase money which he would have received had the contract been performed.

> The process is more like an accounting between the parties than an assessment of damages.
>
> Id at 210.
>
> The rule that compensation incident to a decree of specific performance is different in kind than damages for breach of contract, and that the right of recovery is predicated on equitable principles of accounting, is reflected in holdings that a defaulting seller is entitled to offsetting credit against compensation awarded to a successful plaintiff purchaser. These offsets are allowed notwithstanding the absence of purchaser's knowledge that they are being accrued for the defaulting seller's benefit during the delay period solely caused by his failure to convey title.
>
> Id. at 214.

There was no consideration given in Bravo to the increased value of the house that the plaintiff built on the property attributable to a later start of construction and the effect of inflationary and/or market conditions at the time of completion. This missing accounting for any such possible mitigation was the subject of criticism in 12 Miller & Starr, California Real Estate, *Judicial Remedies* § 34:26 (3d ed. 2014): "The court does not appear to have considered whether the house would also be worth more when completed." Bravo was cited with approval in Ekberg v. Sharp, 2003 WY 123, 76 P.3d 1250, 1258 (2003), which cautioned against putting the plaintiff in a better position than if the contract had been performed:

> Had the district court granted Ekberg the damages he requested, which are at issue in this appeal, Ekberg would have been placed in a position that was better than he would have been placed had there been no default on the option to purchase real property. As noted above, the guiding principle in specific performance cases is to relate the contract back to the date set therein and to only place the party without fault in as nearly the same position as he would have been had there been no default by the other party.

4 Prometheus' Various Contract-Based Damages Claims are Too Speculative.

In this connection, MFT relies on the testimony of its expert witness, Randy Sugarman, MBA, CPA, CFE at RT 2606:15-2618:26. MFT also relies on its written objections to the purported qualifications of party witness and potential investor in the Project Jon Moss to testify as to damages for breach of contract, all as was set forth in its Memorandum of Points and Authorities in Support of Motion to Strike etc. at 5:9-7:6 as follows:

> [PTREX] 88 and the related testimony were proffered as evidence of the damages suffered by Prometheus on the breach of contract claim. The testimony was introduced by way of a hypothetical question [RT 1780:24-1781:5]
>
> > Q Let me ask you to assume this, Mr. Moss. I'm going to ask you to assume an agreement of the terms contained within the July 28, 2011 agreement with Mr. Marazzo, and further to assume that that agreement provided for and the parties had agreed to build a 300-unit podium project pursuant to that agreement. Make those assumptions. Further assume that that agreement had followed the path that it was on through 2012 and was on its way to a project being built. Got those assumptions?
> > A Yes, I do.
> > Q All right. And that that project was not – in fact, no project was built on the subject Safeway site. Would this $110,000,000 figure represent, in your opinion, Prometheus' economic loss for the failure to build that project?
> > A Yes.
>
> "Each assumed fact in a hypothetical question must be supported by the evidence." Raoul D. Kennedy, James C. Martin, California Expert Witness Guide § 13.9 (OnLaw ed. 2014). In People v. Moore, 51 Cal. 4th 386, 405 (2011) the Court explained:
>
> > Generally, an expert may render opinion testimony on the basis of facts given in a hypothetical question that asks the expert to assume their truth. Such a hypothetical question must be rooted in facts shown by the evidence, however. It is true that it is not necessary that the question include a statement of all the evidence in the case. The statement may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question. On the other hand, the expert's opinion may not be based 'on assumptions of fact without evidentiary support, or on speculative or conjectural factors … [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide.
> >
> > (Emphasis added; citations omitted; quotation marks omitted.)
>
> The only breaches of the contract alleged by Prometheus in its First Amended Complaint (FAC) were the failure of MFT to assist in eliminating the cross-parking easement, and the failure of MFT to sign the Fifth Amendment. FAC ¶ 54.

> Of course, MFT contends that neither of these breaches has been proved. But even at that, the hypothetical does not tie the damages to the specific breaches alleged. For instance, the Fifth Amendment changed the economics of the Original Deal—with Prometheus forcing the Joint Venture to pay 15% interest on its loans. Defendant's Trial Exhibit Q at Section 6.1 Allocation of Profit and Losses. The testimony of Moss did not take into account that added expense in any way. The express assumptions in the hypothetical are false. The most glaring is the assumption that the Original Deal called for a 300-unit podium project. It did not. Less obvious perhaps is the assumption that the "agreement had followed the path that it was on through 2012." The Original Deal gave Prometheus many opportunities to get out of the Project. For instance, if [Blackacre] was valued over $16 million—the evidence shows that it was valued at about $27 million. Following "the path" does not lead to an apartment complex; it only leads to many other decision points where Prometheus could leave the Project in its "sole discretion." Thus to give any valid opinion at all, Moss would have had to go step by step through the Decision Tree graphic, used as a demonstrative exhibit in trial and attached here as [Appendix A], to show that the apartment complex would have been built. Having the Court merely assume away much of the contract does no good.

5 At Most, Limited Restitution May be Available.

Prometheus pled unjust enrichment in lieu of its original fraud claim when it filed its First Amended Complaint (FAC) on March 11, 2013. MFT responded to that FAC on March 11, 2013 by way of a general denial plus, *inter alia*, the affirmative defense of assumption of the risk. That affirmative defense in turn relied on the existence of DTREX A § 3.02(d) (putting all entitlement expenses on Prometheus through the date DTREX A was in effect).

To put first things first, there is no such thing under California law as a cause of action for unjust enrichment. See Durell v. Sharp Healthcare, 183 Cal. App. 4th 1350, 1370 (2010). What actually exists is an equitable cause of action for restitution, which Durrell describes as follows:

> An individual is required to make restitution if he or she is unjustly enriched at the expense of another. ***A person is [only] enriched if the person receives a benefit at another's expense.*** However, the fact that one person benefits another is not, by itself, sufficient to require restitution. The person receiving the benefit is required to make restitution only if the circumstances are such that, as between the two [parties], it is unjust for the person to retain it. As a matter of law, an unjust enrichment claim does not lie where the parties have an enforceable express contract.

Id. at p. 1371 (***emphasis*** added; all internal quotes and citations omitted).

After midnight April 10, 2012, Prometheus continued its efforts to obtain development entitlements, spending $150,000. But it made those efforts pursuing its own vision for the Project, in the speculative hope that it would eventually be able to negotiate a deal with MFT to accommodate that vision. In other words, Prometheus took a normal business risk. Its vision of how to develop the Project was, however, at variance with MFT's views on density transfer and so conferred no benefit on MFT, and, even if it's efforts were of some benefit to MFT here (they weren't), there would be no injustice in having MFT retain it. As a matter of law, therefore, we do not believe that Prometheus has a viable claim for unjust enrichment/restitution.

But perhaps Prometheus has by now come up with a new theory by which it hopes to recover some portion of its entitlement-related expenses. We have no idea what that theory would be. In the meantime, it is useful, as always, to focus on the evidence.

And what is that evidence? First, while it is certainly possible to criticize MFT for Ron Marazzo's inertia during Q1 2012—meaning that retired gentleman's constant vacationing in distant places and his leaving negotiations with Prometheus to agents like his accountant, Kevin Walters, who had only the most limited kind of authority to speak for MFT (meaning authority to negotiate but not commit)—there is nothing to suggest that MFT was ever engaged in any sort of deliberate or predatory rolling over of DTREX A. Quite the opposite, Prometheus itself was the one who asked for two Q1 2012 extensions, and then used the fact that it was still in some sort of contractual relationship with MFT to flout City of Mountain View rules and submit an informal application without the required MFT signature and, more to the point, without ever even informing MFT what it was up to in wrongfully presenting unsigned by MFT documents to the City.

RT 2748:18-23, 2751:12-2752:4, 2792:26-2793:5, 2850:15-2851:19.

As for any implication that MFT may have had an early attack of seller's remorse, it should be recalled that it was Prometheus, not MFT, which was the only one who sought to substantially renegotiate DTREX A once the parties tentatively agreed that a 310 podium seemed appropriate. DTREX G. And it was that Prometheus-driven attempt at substantial renegotiation which absorbed literally all of Q1 2012 in what turned out to be fruitless renegotiation. DTREX BBBB at EE00198-302, GGGG. Also, and as is illustrated on the What is the What graphic (attached hereto as Appendix B), that Q1 renegotiation could, for good or ill, likely have been entirely avoided had Prometheus been content to stay with DTREX A as originally drafted; sent a Due Diligence Approval Letter; and then gotten MFT's signature on an informal application for a 310 podium. But Prometheus never even considered that course, so anxious was Prometheus to squeeze an additional 6% interest out of MFT in the event of a shortfall of funds needed to cover Hard Costs for a 310 podium. DTREX Q.

Here is what really happened: sometime after November 29, 2011 (to MFT's knowledge the exact date is not in the record), MFT commissioned an appraisal from Hulberg & Associates, trying to see what its land value might wind up being in a 310 podium scenario. DTREX MMMM. That value came in at $27.9 million on April 9, 2012. DTREX V. On April 10, 2012 Ron Marazzo read DTREX Q. DTREX S. He noted that, according to DTREX Q, $16 million was still the only land value number being used by Prometheus. The eight figure disparity between $16 million and $27.9 million angered Mr. Marazzo. DTREX W, RT 342:26-347:13. So he signed nothing on April 10, 2012, and on April 11, 2012, in a heated call with Mr. Millham, he complained bitterly about that eight figure difference. DTREX W and XXXXX at 645:15-649:1.

Time passed. Things went from bad to worse. John Shenk was hired. DTREX FFFFF. The Berliner firm was hired. DTREX XXXX. Jeff Widman's inadequacy in negotiating the deal began to be revealed. DTREX RR. Prometheus itself became intractable. DTREX VV. Finally, Prometheus filed its completely reckless, fraud-based lawsuit, and recorded a *lis pendens* on the strength of a phony declaration by Mr. Millham. Original Complaint filed July 11, 2012; compare DTREX SSS, NNNN, and XXXXX at 595:14-610:20 and First Amended Complaint filed March 11, 2013.

In response to this last act of betrayal by Prometheus, MFT hired litigation counsel. And now here we all are, with no possibility of any continuing relationship between Prometheus and MFT and with no one really disputing that, at the latest, DTREX A terminated on midnight April 10, 2012 (it did) but only whether DTREX A should—for any reason—be held to have terminated even earlier than midnight April 10, 2012 (it shouldn't).

So here is the real bottom line: DTREX A terminated at midnight on April 10, 2012. MFT can be faulted only for possibly not being as quick on the draw as it might have been in thereafter ceasing negotiations when it knew Prometheus was spending money ($150,000, as it turns out) while those negotiations were pending. DTREX YYYYY. We can understand why Prometheus is motivated to blame MFT for "causing" Prometheus to incur that expense. But we see no equitable basis for extracting it from MFT, and we can identify no legal or equitable theory that would entitle Prometheus to such relief. And even if such a legal or equitable theory did exist, Prometheus' request for relief would be barred by the doctrine of unclean hands.

The unclean hands defense is based on the existence of the Poison Pill Provisions, which MFT believes were deliberately stuck in DTREX A by Prometheus to gain an

unfair advantage, as well as on MFT's having been forced, at enormous cost, to deal with all the misdirection and concocted testimony that have plagued this case from its very beginnings. In that regard, the Court should note that unclean hands is an available traverse to equitable estoppel, which is, in turn, an available traverse to assumption of the risk, which is, in turn, an affirmative defense to restitution.[5]

Conclusion

A joint venture between a landowner and a developer must and should be founded on mutual trust. Here MFT's trust was violated by Prometheus right from the start by virtue of the Poison Pill Provisions, and this initial violation of MFT's trust was then compounded by Prometheus' attempt to work a *sub rosa* density transfer (which was itself a function of the wrap/podium problem and the Whiteacre/Blackacre/Greyacres problem) and was finally—and utterly—violated by Prometheus filing of a completely reckless fraud-based lawsuit that was itself accompanied by a *lis pendens*. Which *lis pendens* was soon thereafter supported by an admittedly perjured declaration.

Given MFT's present and entirely justifiable lack of trust of Prometheus, specific performance of DTREX A should be treated as a dead letter. In any case, specific performance of an expired DTREX A is impossible anyway, as is any award of damages based on such an expired DTREX A. All that is possibly left for Prometheus is restitution. The amount of any such restitution (while concededly within the sound discretion of the Court)—should be set at zero, based on the lack of benefit to MFT; the

[5] As law and equity are merged in this state, the Court need not trouble itself in determining whether any of the links in this chain of allegations followed by affirmative defenses followed by implied traverses are legal or equitable in nature. Equity can defend law and *vice versa*. See 13 Witkin, Summary of California Law, *Equity* § 9, p. 290 (10th ed. 2005).

existence of the Poison Pill Provisions in DTREX A; and, last—but by no means least in any self-respecting judicial system—by virtue of both MFT's and the Court's having been forced to deal with all the admitted perjury that has plagued this case from its very beginnings.

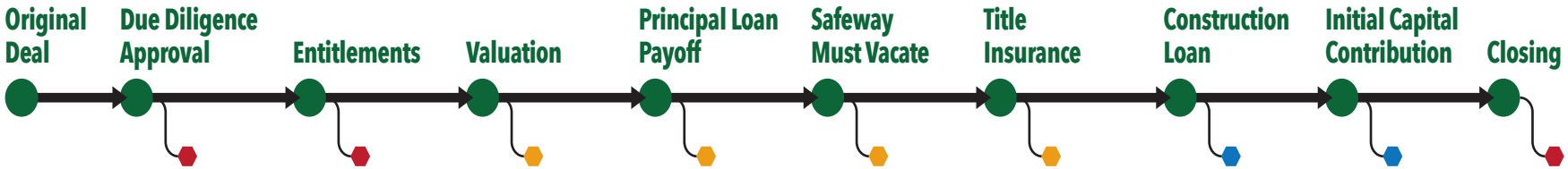
Dated: March 8, 2014

McGRANE LLP

By: _____
William McGrane
Attorneys for Ronald J. Marazzo and Ronald J. Marazzo Living Trust Dated 8/2/1990

Appendix A

Original Deal Decision Tree



- **Due Diligence Approval** — Original Deal automatically terminated if Prometheus elected not to deliver Due Diligence Approval Letter. Original Deal § 3.01(f)
- **Entitlements** — Original Deal automatically terminated if at least 238 residential apartment unit wrap condition project not approved by the City. Original Deal §§ 3.02(a), (b), (c)
- **Valuation** — Original Deal terminated at Prometheus' election if appraisal value of Safeway Site greater than $16M. Original Deal § 2.02(a) *
- **Principal Loan Payoff** — Original Deal terminated at Prometheus' election if Principal loan not paid in full by September 1, 2016. Original Deal § 3.07(c) *
- **Safeway Must Vacate** — Original Deal terminated at Prometheus' election if Safeway not out by December 1, 2016. Original Deal §§ 3.04(c), 3.07(d) *
- **Title Insurance** — Original Deal terminated at Prometheus' election if Title Insurance endorsements satisfactory to Prometheus not issued. Original Deal § 3.04(d) *
- **Construction Loan** — Original Deal terminated at MFT's election if the ratio of the proposed construction loan to project cost (including but not limited to acquisition of the Safeway Site and construction cost) is less than 55%. Original Deal § 3.03
- **Initial Capital Contribution** — Original Deal terminated at MFT's election if Prometheus refused to make its Initial Capital Contribution. Original Deal § 3.08(b)
- **Closing** — Original Deal automatically terminated if closing not completed by March 31, 2017. Original Deal § 2.04

* Any of these asterisked issues could possibly affect the profitability of the project. The Original Deal could be terminated at any time prior to closing at Prometheus' election if it determined that the project would not be profitable.
Original Deal § 6.03

Appendix B

What Is The What...

What Was:

1. Informal application made for a 266 wrap. [DTREX UUUU]

2. A 266 wrap is contra indicated by city. [DTREX F]

3. Switch from a 238 wrap to a 310 podium is approved orally by the parties. [PTREX 17]

What Is:

4. Rather than leave the terms of the Original Deal in place in a 310 podium scenario, Prometheus instead attempts to renegotiate the Original Deal by way of a Proposed Fifth Amendment that would keep MFT in at 50% of equity but also increase the 9% interest rate payable on a portion of the unsecured debt which may be incurred to fund $27 million in increased project cost associated with a 310 podium up to 15%, which Proposed Fifth Amendment MFT ultimately refuses to execute. [DTREX G], [DTREX GGGG], [DTREX Q], [DTREX BB]

5. Apparently preferring to wait for MFT's execution of the Proposed Fifth Amendment, Prometheus decides not to issue a due diligence approval letter for the Original Deal on or before midnight April 10, 2012. [Reporter's Transcript of Proceedings January 28, 2014 at 12:25-28]

6. Kathy Siple is hired and MFT then finally learns about the destructive nature of the density transfer which Prometheus has been proposing go from the Strip Mall Site over to the Safeway Site and MFT thereafter refuses to agree to having any such density transfer go from the Strip Mall Site over to the Safeway Site. [DTREX QQQ, see also Defendant's Trial Brief Exhibit E at page 10], [DTREX RR]

What might have been:

4. Prometheus leaves the terms of the Original Deal in place in a 310 podium scenario, thus allowing MFT to remain in at 50% despite the orally approved switch from wrap to podium.

5. Prometheus issues a due diligence approval letter for the Original Deal on or before midnight April 10, 2012.

6. Consistent with its earlier oral approval of a switch from a 238 wrap to a 310 podium, MFT executes an application for 310 podium and 310 podium is then submitted to and approved by city.