COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

MORDECHAI LEVIN and
STAVROS FRANTZIS, as Trustees
of the M&S Realty Trust,

Plaintiffs,

v.

RUSSELL L. PETERSON and
JOSEPH VECCHIO, as Trustees
of the Ashton Amory Realty
Trust,

Defendants.

Civil Action
No. 00-1944-C

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR ALLOW PLAINTIFF'S COMPLAINT FOR SPECIFIC PERFORMANCE TO A NEAR DATE CERTAIN OR DEFAULT PLAINTIFFS AND GRANT INTERIM PARTIAL RELIEF FROM PRELIMINARY INJUNCTION AND IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Mordechai Levin and Stavros Frantzis, as Trustees of the M&S Realty Trust ("M&S"), submit this memorandum (1) in opposition to Defendants' motion to dismiss or allow Plaintiffs' complaint for specific performance to a near date certain or default Plaintiffs and grant interim partial relief from preliminary injunction (the "Motion to Dismiss"), and (2) in support of their motion for summary judgment.

Preliminary Statement

This is an action for specific performance of a written contract for the purchase and sale of certain real property in Jamaica Plain. Soon after the contract was executed, Defendants,

the sellers, began to demand material terms and conditions benefitting them that were neither contained in nor consistent with the contract.

As a result, Plaintiffs filed this action and moved for a preliminary injunction prohibiting Defendants from conveying to any third party any interest in the property. On May 10, 2000, this Court (Hinkle, J.) granted the motion. The injunction is still in effect.

After the injunction issued, Defendants withdrew their demand for the most significant extra-contractual condition they had been demanding. With that obstacle removed, the parties began the process of preparing for a closing. Unfortunately, Defendants began in that connection and otherwise to insist on additional terms and conditions benefitting them that are neither contained in the contract nor consistent with its terms. For example, they demanded that the promissory note contemplated by the contract contain a pre-payment penalty. For example, they demanded that Plaintiffs pay the fees of the attorney <u>they</u> had retained to draft the necessary instruments. And most recently, they have repudiated a contract obligation to remove an underground oil storage tank in accordance with all state, federal, and local laws and regulations.

Defendants' (1) insistence on additional terms and conditions that favor them and that are neither contained in nor consistent with the contract, and (2) repudiation of express

terms and conditions of the contract prevent the parties from closing. Defendants' claim to the contrary notwithstanding, Plaintiffs are not, therefore, to blame for the fact that the transaction has not been consummated. The parties have not closed only because Defendants continue to attempt to extract a better deal.

Thus, the Motion to Dismiss is frivolous. In the first instance, since the motion relies on matters and materials outside the pleadings, it is no motion to dismiss. Further, it contains not one citation to any rule, statue, or court decision, which simply reflects that it has no basis in law. Further still, Defendants' claim that Plaintiffs are in breach is demonstrably false. Dismissal of the complaint is not warranted.

What is warranted is summary judgment in Plaintiffs' favor. There are no genuine issues of material fact: The parties agree that there is an enforceable contract. There is no genuine issue of fact concerning the requirements thereof. Dividing the parties are, instead, claims by Defendants for terms and conditions that are, as a matter of law, more than that to which they are entitled under the contract. Under these circumstances, summary judgment granting Plaintiffs specific performance should be granted.

## Facts/Background[1]

Shortly before February 4, 2000, M&S made a written offer to purchase the real property owned by the Ashton Amory Realty Trust ("Ashton") and known as 59 Amory Street, Jamaica Plain (the "Premises"). Defendants are the trustees of Ashton. On February 4, 2000, Kevin L. Quinlan, counsel to Ashton, faxed to M&S written comments on the "proposed offer."

On or about February 11, 2000, M&S extended a revised written offer to Ashton. The written offer identifies the buyer, the seller, the price, and the property. It also contains as an express condition that Ashton will provide financing in the form of a take-back mortgage for 70% of the purchase price at the rate of 9%, with payments of interest only for the four-year term of the note. It also provides that the mortgage will be a standard commercial mortgage form customarily used by banks in greater Boston. It also provides that the "first mortgage will allow for additional junior mortgages." The offer says nothing about any penalty for pre-payment of the mortgage loan.

The offer also provides that it was the intention of the parties that, on or before March 31, 2000, the "definitive terms of [the offer to purchase were to be] embodied in a more comprehensive Purchase and Sale Agreement ("P&S") which will

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[1] The Statement of Facts tracks the concurrently filed separate and more detailed Rule 9A(b)(5) statement of facts as to which there is no genuine issue, which contains citations to the supporting evidence.

carry out the terms of the [offer to purchase] and will contain such agreements, [etc.,] as are customary in transactions of the nature contemplated by [the offer to purchase]." The written offer also contains a provision requiring the seller to remove the underground fuel storage tank at the Premises "in accordance to city, state and federal regulations, at its own cost and expense." It provides further that M&S will reimburse Ashton for the cost to remove the tank and any asbestos, up to a maximum of $20,000.

Ashton accepted the written offer, in writing, on February 11, 2000, forming the contract. During the negotiations leading up to the formation of the contract, Ashton was represented by counsel. M&S was not.

Nearly two months later, after the parties had exchanged various correspondence, drafts of the anticipated purchase and sale agreement, and comments on drafts, Mr. Quinlan asked Marie Lee, Plaintiffs' real estate counsel, to add the following provision to the P&S:

> Buyers shall personally and individually, jointly and severally, guarantee the note.

This was the **first** mention, in any of the correspondence, drafts (including the first draft of the P&S, which Mr. Quinlan himself prepared), and comments on drafts, of personal guaranties by Messrs Levin and Frantzis. There is nothing in the contract itself concerning personal guarantees.

Because personal guarantees had not been agreed upon and were not referenced in the contract, Ms. Lee objected to Mr. Quinlan's request for the provision quoted above. Mr. Quinlan responded by claiming that personal guarantees are part and parcel of the "standard commercial mortgage form, which is customarily used by banks in the greater Boston area" (the term that appears in the contract) and indicated that the seller would not provide the agreed-upon financing without them.

At or about this time, defendant Peterson made the same demand for personal guarantees directly to Messrs. Levin and Frantzis. In addition, he told them that Defendants wanted a commitment in the P&S that M&S would use the proceeds from the **secondary** financing exclusively for improvements on the building. The contract contains no such requirement, and no such requirement had been agreed to.

Thereafter, Plaintiffs asked Defendants to execute the purchase and sale agreement contemplated by the contract. They refused and indicated that they would not close absent the personal guarantees by Plaintiffs (and even threatened legal action on the issue). Nevertheless, at or about this time, Mr. Quinlan faxed to Ms. Lee a "first draft mortgage re Amory sale" that contained no personal guarantees.

On May 3, 2000, Defendants changed the basis for their demand for personal guarantees. Whereas they previously had

asserted as the basis for their demand for personal guarantees that standard form mortgages contain them, they claimed on May 3 that Messrs. Levin and Frantzis had orally agreed to provide personal guarantees. (Messrs. Levin and Frantzis deny that they ever agreed to the personal guaranties.)

In view of Defendants' refusal to proceed absent personal guarantees, Plaintiffs filed this action on May 5, 2000, along with a motion for a preliminary injunction prohibiting Defendants from, among other things, conveying any interest in the property to any third party. Judge Hinkle heard argument on the motion on May 9, 2000. During the argument, she pointed out that, even assuming an oral promise of personal guarantees had been made (which Plaintiffs deny), the promise would be barred by the Statute of Frauds. Thus, on May 10, 2000, Judge Hinkle granted the motion.

On or about May 18, 2000, Defendants indicated in writing that they had "acquiesced to conveying the subject . . . properties to M & S Realty Trust by way of payment including a take back purchase money mortgage **without personal guaranty** providing the damage action against the seller(s) is dismissed." Defendants insisted at this time, however, that they would not proceed unless Plaintiffs agreed to pay the legal fees of Marijo McCarthy, the new counsel they had retained to prepare, for them, the mortgage and title insurance documentation. There is

no provision in the contract for Plaintiffs' payment of Defendants' legal fees. Defendants also insisted that Plaintiffs "shortly escrow the $20,000.00 tank removal and asbestos removal monies with an agent to be mutually agreed upon." The contract, while requiring Plaintiffs to credit against the purchase price <u>at closing</u> up to $20,000 to cover the cost of removing the tank and any asbestos, contains no provision requiring the money to be escrowed in advance. Defendants also insisted that "any last months (sic) rents and security deposits now existing or collected by mortgagor during the lifetime of the mortgage will likewise be escrowed." There is absolutely no provision in the contract for such an arrangement.

By letter dated May 24, 2000, Plaintiffs objected to these latest extra-contractual demands. The letter explained why the demands were inconsistent with the contract. Thereafter, Defendants apparently dropped a number of the demands but refused to proceed unless Plaintiffs paid Ms. McCarthy's fees. As an accommodation only, and in order to preserve the deal, Plaintiffs agreed to pay, and have paid, Ms. McCarthy's fees, even though they have no contractual obligation to do so.

Defendants also demanded yet another term to which they were not entitled. They insisted that the promissory note provide that if Plaintiffs were to repay the loan in advance, they would pay Defendants a substantial prepayment penalty (up

to approximately $60,000). There is absolutely no provision in the contract for a prepayment penalty, and standard mortgage loans do not provide for such a penalty **unless they have been agreed upon in advance; there was no such agreement here**. Nevertheless, as yet another accommodation designed to resolve matters, and based on the condition that there be no other demands for extra-contractual terms and conditions, Plaintiffs agreed to the prepayment penalty.[2]

During the summer months, drafts of the requisite mortgage instrument, assignment, and promissory note were exchanged. The most recent drafts, prepared by Ms. McCarthy, are dated August 28, 2000. As discussed below, the drafts contain even more terms and conditions that are inconsistent with the contract.

On August 10, 2000, Mr. Quinlan (knowing that Ms. Lee was on vacation) wrote to Ms. Lee's partner, Mark McCue, who had not been directly involved in this matter. The principal subject of the letter was the mandatory clean-up of the contamination that had been revealed when Defendants removed the underground oil storage tank and associated piping (as the contract required). Mr. Quinlan enclosed a copy of the environmental report on the contamination that Defendants' consultant had prepared, and

[2] Plaintiffs sought a quid pro quo for the pre-payment penalty. They asked Defendants to extend the term of the loan from four years to nine. Defendants refused. Unlike Defendants, who to this day insist on terms and conditions that have no basis in the contract, Plaintiffs dropped the request to extend the term. The much ado in Defendants' motion about Plaintiffs' extension request is, therefore, about nothing.

indicated that the “seller” (sic) will escrow with Ms. McCarthy “one and one half times” the “estimated” cost to clean up the contamination. He then dictated that the escrowed funds would be applied only to the costs of the remediation and compliance activities “made necessary” by the sellers’ licensed site professional. He then dictated that, upon certification of site compliance, the balance of the escrowed funds would be released to the sellers. He then made various threats concerning what would happen if Plaintiffs were to attempt to use the funds for any other purpose (not that there was any basis for suggesting that they would). Turning to another subject, he then dictated that there “will be no other changes to the mortgage documents” (even though, as noted above and explained below, the documents contain numerous provisions that are inconsistent with the contract). Next, he claimed that it is in everyone's interest to expedite the transaction, and he dictated an arbitrary and unilaterally-determined deadline for Plaintiffs to confirm in writing their willingness to close by August 22 (another unilaterally-set and arbitrary deadline) and their acceptance of his dictated conditions concerning remediation. He then made a second threat, viz. that absent such confirmation, Defendants would “file for relief from the preliminary injunction, dissolution of the lis pendens, and summary judgment.” Although the letter correctly acknowledged Defendants’ obligation to fund the remediation, the demands concerning the scope of the clean-

up, the escrowing of funds, the mortgage documents, and the closing date were, among other things, inconsistent with the contract.

Mr. Quinlan wrote to Mr. McCue and Ms. Lee on August 14, 2000. In this letter, he announced that his clients were willing to postpone the legal action he had threatened on August 10, provided Plaintiffs sent to his clients an additional non-refundable deposit of $25,000. This demand, like so many others, had no basis in the contract.

On August 17, 2000, Plaintiffs' counsel responded to Mr. Quinlan's letters of August 10 and 14, complaining that the letters appeared to have been timed to take advantage of Ms. Lee's absence and stating, among other things, that "there is no basis whatsoever in the agreement for the conditions your letters purport to impose."

During the first week of September, Defendants reversed field with respect to their obligation to clean-up the tank-related contamination. Whereas they previously had admitted that they were to bear the costs of the remediation, they took the position that all the contract required of them was to remove the tank and that they had no further obligation with respect to the **legally mandated** clean-up of the contamination. This new contention is not only inconsistent with Defendants'

prior position, it is flat wrong. Defendants are legally (and therefore contractually) responsible to conduct the clean-up.

Moreover, as noted above, Defendants continue to insist that the mortgage, assignment, and promissory note contain terms and conditions that, as a matter of law, are not included in the contract and/or that are inconsistent therewith:

> 1. Defendants insist that the mortgage identify by number of mortgages, mortgagee, and amount the junior mortgages on the Premises. Such specific identification, and the resulting limitation on Plaintiffs' ability to place other or substitute junior mortgages, are inconsistent with the contract, which provides only that the mortgage "**will allow for additional junior <u>mortgage(s)</u>**." (Emphasis added.) The contract does not provide either that the mortgage identify the junior mortgages or that plaintiffs will be in any respect limited in the ability to effect substitute or additional mortgages.
>
> 2. Defendants insist that Plaintiffs indemnify them even with respect to claims arising out of the tank removal. The tank removal is, however, clearly Defendants' responsibility. Defendants are seeking broader indemnification than that to which they are entitled.
>
> 3. Defendants also insist that the mortgage provision covering events of default contain language that also would limit Plaintiffs' ability to effect junior mortgages. For the reasons stated above, this position conflicts with the language of the contract.
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> 4. Defendants also insist that the assignment instrument provide that Plaintiffs are prohibited from executing any lease longer than one year. There is no language in the contract that requires such a limitation, and "standard commercial mortgage form[s] . . . customarily used by banks in the greater Boston area . . ." (the contract language governing the requirements of the mortgage instruments) do not contain such a time limitation. Furthermore, the inclusion of such a provision is inconsistent with the

parties' shared interest in enhancing the financial performance of the property.

5. Defendants also insist that the assignment provide that Plaintiffs may not accept security deposits or rent in excess of one month in advance. This position is inconsistent with the contract because (1) there is no express language in the contract that requires such a limitation, and (2) "standard commercial mortgage form[s] . . . customarily used by banks in the greater Boston area . . ." do not contain such a limitation. (This is a commercial property.)

6. Defendants also insist that the provision in the assignment concerning insurance not reference custom in Boston. This position is inconsistent with the custom incorporated in the contract by reference.

7. Defendants also insist that the assignment contain a provision indemnifying them against all claims arising out of the current leasing arrangements at the Premises. (At the same time, they refuse to provide certifications based on which Defendants can be assured that they are not assuming undisclosed liabilities arising out of such arrangements.) There is no express language in the contract that requires Plaintiffs to provide such protection.

8. Defendants also insist that the promissory note provide for a substantial prepayment penalty. There is no express language in the contract that requires plaintiffs to pay such a penalty, and custom dictates that such a penalty obtains only where it is agreed to in advance, which is not the case here.

9. Finally, as noted above, Defendants now appear to contend that it is not their responsibility to conduct the response and remedial activities necessitated by the removal of the tank. This position conflicts with the language of the contract. It is also diametrically opposed to Defendants' consistent position until last week. Before last week, defendants, by word and deed, had confirmed that the response and remedial activities were their obligation under the contract.

**Defendants' positions are all that stand in the way of a closing.**[3]

Argument

DEFENDANTS' MOTION IS MERITLESS, AND
PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT

Defendants' acceptance of Plaintiffs' written offer to purchase created an enforceable contract on which Defendants refuse to perform. In McCarthy v. Tobin, 429 Mass. 84, 706 N.E.2d 629 (1999), the Supreme Judicial Court held that, if the parties intend to be bound, an accepted offer to purchase real estate is a binding contract, even if it requires the execution of a purchase and sale agreement. The facts of McCarthy are indistinguishable from those at bar. McCarthy executed an offer to purchase real estate. The offer contained a description of the premises, the price, deposit requirements, limited title requirements, and the time and place for the closing. The offer also required the parties to execute a purchase and sale agreement and provided that the agreement "when executed, shall be the agreement between the parties . . .." 429 Mass. at 85, 706 N.E.2d at 631. Elsewhere the offer provided, as an

[3] By letter dated September 18, 2000, Plaintiffs specified the points of disagreement, explained why Defendants' position on each such point is inconsistent with the contract, identified the precise language or position with respect to each such position that is consistent with the contract, and indicated that, with one exception, if Defendants were to agree to such language or position in each instance, they would close. The exception is that Plaintiffs are prepared to honor their prior commitment to prepayment penalties, provided Defendants drop their position on the remaining eight issues in dispute. Defendants refused.

additional term or condition, "Subject to a Purchase and Sale Agreement satisfactory to Buyer and Seller." It also provided that it was a legal document that created binding obligations and urged the recipient to consult counsel.

Tobin, the prospective seller, signed the offer. For reasons not relevant to the current situation, no purchase and sale agreement was signed. Tobin later signed a purchase and sale agreement with another party. Before that deal could close, McCarthy filed suit for specific performance. Tobin and the other party moved for summary judgment and won. McCarthy appealed.

The Appeals Court reversed, and the Supreme Judicial Court granted an application for further review. The primary issue before the Supreme Judicial Court and the parties' positions thereon were:

> [W]hether the OTP (offer to purchase) executed by McCarthy and Tobin was a binding contract. Tobin and the DiMinicos argue that it was not because of the provision requiring the execution of a purchase and sale agreement. McCarthy urges that he and Tobin intended to be bound by the OTP and that execution of the purchase and sale agreement was merely a formality.

Id. at 86, 706 N.E.2d at 631. The court began its analysis by noting that "the controlling fact is the intention of the parties." The court rejected Tobin's argument that a present intention to be bound could not be inferred because the offer required the execution of a purchase and sale agreement.

Quoting prior precedent, the court noted that if there has been agreement on all material terms, it may be inferred that the purpose of a final document is only to serve as a "polished memorandum of an already binding contract." Id. at 87, 706 N.E.2d at 632 (citation to quoted case omitted). The court went on to note that the provisions of a final purchase and sale agreement can be negotiated, but such negotiations do not prevent a conclusion that a contract exists, because there are norms for the resolution of such negotiated items.[4] Further, requests for revisions as to ministerial and nonessential terms, the court noted, do not show an intention not to be bound. The court also noted that a conclusion that there exists an intention to be bound is bolstered if the offer to purchase contains "familiar contractual language." Such a conclusion is bolstered also if the offer sets forth the amount to be paid and

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[4] That all details have not been worked out is no bar to enforcement. As Judge Agnes recently explained,

> The fact that parties have reached agreement for the sale of real property and memorialize their agreement in a signed offer form like the one involved in McCarthy and in this case does not preclude the parties from reaching additional agreements relating to the property that is the subject of the sale or with respect to the terms of the sale, and does not prevent the parties from agreeing to modify or even abrogate the terms of the agreement. However, the mere fact that parties may discuss matters relating to the sale of real property but do not indicate in their otherwise complete, signed offer . . . that they have not reached agreement on such matters and do not, therefore, intend to be bound by what they have signed, will not detract from legally binding effect of such signed agreement.

Marshall v. McDonnell, Civil Action No. 00-1440-D, Memorandum and Order on Plaintiff's Motion for Lis Pendens and a Preliminary Injunction (Essex Superior Court, August 28, 2000) (copy attached hereto as Exhibit A).

when, describes the property, and specifies for how long the offer is open. The court also added, in a footnote, that if parties wish not to be bound by an offer to purchase, they should employ language suggested in an Appeals Court case, to wit,

> The purpose of this document is to memorialize certain business points. The parties mutually acknowledge that their agreement is qualified and that they, therefore, contemplate the drafting and execution of a more detailed agreement. They intend to be bound only by the execution of such an agreement and not by this preliminary document.

Goren v. Royal Investments Inc., 25 Mass. App. Ct. 137, 143, 516 N.E.2d 173, 175 (1987) (cited by McCarthy court). McCarthy has been applied in other cases like the one at bar. See, e.g., Gardner v. Lazure, Civil Action No. 99-2447B, Memorandum of Decision and Order on Plaintiffs Motion for Preliminary Injunction at 3 (Worcester Superior Ct., Jan. 7, 2000) (copy attached hereto as Exhibit B).

In view of McCarthy, there is and can be no question that an accepted offer to purchase real estate, such as the one at bar, is binding, notwithstanding a requirement for the negotiation and execution of a purchase and sale agreement, provided an intent to be bound is indicated. There is and can be no question that the indicia of such an intent include (1) that the offer set forth the price and describe the property, (2) that the offer contain typical contract language, (3) that the offer not contain the language quoted above, and (4) that

the unresolved issues are immaterial, ministerial, or capable of resolution by resort to norms.

The test established by McCarthy and applied by its progeny applies directly here: The written offer (which Defendants' counsel reviewed and on which he commented in writing) sets forth all of the material terms. Further, its paragraph 4 indicates that it was considered an agreement and not a precursor to an agreement: It states that the contemplated purchase and sale agreement is merely to embody the definitive terms of the offer and to carry out the terms of the offer, and that it is to contain in addition merely customary provisions. Other provisions contain traditional contractual language, e.g., paragraph 7 ("in the event of a default under this Offer"), paragraph 8 ("the obligations of the Buyer and Seller under this Offer"). Also, the offer does not contain the language that the Supreme Judicial Court indicated should be used to indicate that a binding contract is not intended, or any language like it. Finally, the issues left unresolved by the offer are only immaterial, ministerial, or capable of resolution by resort to norms. Thus, under McCarthy, M&S and Ashton have a binding and enforceable contract for the purchase of the property in question.

Defendants do not disagree that there is a contract and that it is enforceable. Indeed, that the contract exists and is enforceable is the gravamen of Defendants’ motion.

The disagreement at bar has to do with what the contract requires in respect of certain specific issues. This disagreement raises no genuine issues of material fact. (Indeed, it is an issue for the Court.) Determining what the contract requires on these issues requires simply a comparison of the contract language (and the custom and law incorporated therein by reference) with the parties' respective positions on the issues and selecting the position that corresponds with the contract requirement. (Stated differently, that Defendants' positions are inconsistent with the contract can be demonstrated based on matters that are not in dispute, to wit, the contract language and the custom and law incorporated therein by reference.) The conclusion that this process yields is that, as described in detail above, Defendants' positions on the issues that divide the parties are, as a matter of law, inconsistent with the contract. Thus, Defendants, not Plaintiffs, are in breach because they are insisting, yet again, on terms and conditions to which the parties did not agree.

Accordingly, summary judgment requiring Defendants to honor their obligations under the contract (by withdrawing their positions on the points in dispute and performing according to the terms of the contract) is warranted.

## Conclusion

For the foregoing reasons, Defendants' motion should be denied, and summary judgment providing for specific performance of the contract (per the terms and conditions Plaintiffs proposed (see Lee Dec., Ex. Q)) should be granted.

Dated: September 25, 2000

Respectfully submitted,

MORDECHAI LEVIN and
STAVROS FRANTZIS, Trustees
of the M&S Realty Trust,

By their attorneys,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September 2000, a true and correct copy of the foregoing document was served by hand on counsel of record for defendants.

David B. Chaffin

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