COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. DAR-____

MICHAEL GERHARDT and LAUREN SEAVERNS,

Plaintiff-Appellees

v.

ROBERT S. BURR, COLLEGE STREET PARTNERS LLC, 140 COMMONWEALTH AVENUE – DANVERS LLC, and HAWTHORNE HILL DEVELOPMENT LLC,

Defendant-Appellants

On Appeal from Judgment of the Suffolk County Superior Court
Case No. 2184CV01017-BLS2

Appeals Court No. 2025-P-0523

DEFENDANT-APPELLANTS' APPLICATION FOR DIRECT APPELLATE REVIEW

Richard C. Pedone (BBO #630716)
Melanie P. Cahill (BBO #707100)
Ronaldo Rauseo-Ricupero (BBO #670014)
NIXON PEABODY LLP
Exchange Place
53 State Street
Boston, Massachusetts 02109
Tel: (617) 345-1000
Fax: (617) 345-1300
rpedone@nixonpeabody.com

May 20, 2025

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REQUEST FOR DIRECT APPELLATE REVIEW

Pursuant to Mass. R. App. P. 11, this Court should grant Direct Appellate Review because this case implicates an important issue of Massachusetts law, to which this Court has not yet directly spoken, namely: should the highly unique statute providing for the extension of the statutes of limitations for certain contractual claims from six years to twenty years be construed strictly and narrowly, or do trial courts have the power to apply extended filing deadlines even for contracts that do not strictly meet the statutory requirements?

The trial court here erred when it failed to bar, as precluded by the statute of limitation, the Complaint of Plaintiffs who commenced this breach of contract action more than eight years after the causes of action accrued.

Specifically, the trial court erroneously held the agreements at issue were ‘sealed’ instruments subject to a twenty-year statute of limitations, rather than the ordinary six-year limitation period for breach of contract claims. The trial court’s ruling was based on

an inappropriate and expansive reading of the statute governing sealed instruments.

Here, under an appropriate reading of the statute, the four nearly identical subject contracts failed to qualify as 'sealed' instruments because:

(i) The contracts do not include a clear "recital" indicating that the agreements are under seal. Notably, while each of the contracts at issue contains a "RECITAL" section, no reference to seal is made in those sections. The mere placement of the words "under seal" above the signature block is insufficient by the statute's own terms.

(ii) Even if the language providing that the contracts were under seal is not required to be included in the RECITAL section of each contract, the contracts also fail to qualify as sealed instruments because the minor reference to seal was only placed above one of the two required signature blocks. Here, to be binding, the contracts called for each party to sign twice. Even if a minor reference to "under seal" above a signature block instead of in the "RECITAL" was sufficient, the trial court erred because the reference was above only one of the two signature blocks. Here, the contracts' essential financial terms are contained in separately signed

schedules (containing material terms) that fail to include even a notation, much less a "recital," that the contracts are under seal. With only one of the two dual required signature blocks indicating that the signatures are affixed under seal, the contract is not a contract under seal for statute of limitations purposes.

The statutory requirement that a "recital" of the sealed nature be included, as opposed to a mere mark or note near a signature block, is not difficult to comply with, is not hyper-technical, and serves a crucial purpose. A recital flags for parties signing, clearly and up-front, that the special statutory provisions applicable only to seal instruments apply. As the history surrounding the statute makes clear, the special recital replaced the extraordinary formality of the process of attachment of a wax seal.

Granting Plaintiffs the longer statute of limitation when the contracts did not meet the statute's requirements has substantially altered the rights and liabilities of the parties.

Here, it is undisputed that Defendant Burr believed that his contractual obligations to the Plaintiffs had ceased in 2013 and he so informed the Plaintiffs. Add.127. It is also undisputed that the Plaintiffs

waited in silence for nearly eight years, while a witness died and evidence became stale, before springing their claims on Burr. Add.128.

Strictly and narrowly applying the sealed instrument statute and its six-year contract limitations period also would comport with recent trends of this Court, which have:

(i) strictly construed the statute;

(ii) refused to expand the scope of the statute beyond its text and maintained its application in narrow circumstances; and

(iii) questioned the merits of the statute in light of the fact that Massachusetts stands in a small minority in continuing to have such a legal relic originally designed to only be applicable to real estate transactions. *See Knott v. Racicot*, 442 Mass. 314, 319-322 (2004)(“Whatever the merits of upholding the common-law sealed contract doctrine may have been when *Johnson v. Norton Hous. Auth., supra,* was decided, they seem far less apparent today […]”) (Marshall, C.J.).

STATEMENT OF PRIOR PROCEEDINGS

Plaintiffs Gerhardt and Seaverns filed this action in the Suffolk Superior Court on May 3, 2021, including

inter alia, Breach of Contract claims against Defendants Add.102.

On March 8, 2024, following discovery, Defendants moved for summary judgment, on the grounds, *inter alia*, that the action was time-barred because the applicable contracts were not 'sealed' and therefore a standard six-year deadline for initiating the action should have applied. Add.113. Plaintiffs cross-moved for summary judgment on the contract claim and agreed to waive the remaining counts if summary judgment were granted. Add.188.

On June 5, 2024, after briefing and argument, the trial court issued a decision that, *inter alia*, declined to grant summary judgment based on Defendants' argument that the claims were time-barred because the instruments did not qualify as sealed, and instead granted Plaintiffs summary judgment on the contract claim. Add.188.

With the matter deemed timely by the trial court and other counts waived by Plaintiffs, the matter proceeded to a bench trial as to damages on the Breach of Contract count in January 2025. In February 2025 the trial court awarded Plaintiffs damages in the amount of $1,606,502, with $970,034 in twelve percent pre-judgment

interest (statutory interest running back to each alleged breach), leading to a total recovery of $2,576,536. Add.218. The instant appeal followed. Add.219.

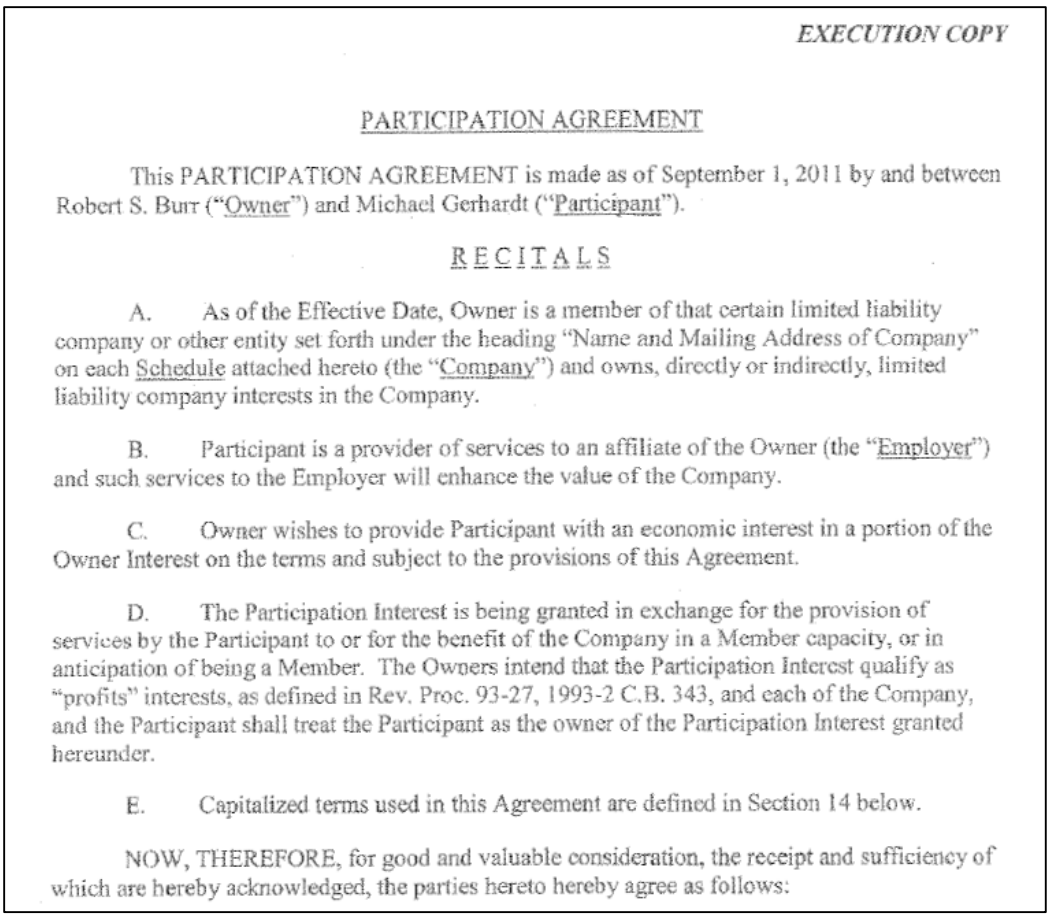
STATEMENT OF FACTS

Defendant Robert S. Burr ("Burr") is the founder of Co-Defendant College Street Partners ("College Street"), a real estate advisory and development company. Add.108. By 2008, College Street employed Plaintiff Michael Gerhardt ("Gerhardt") as a project manager and Plaintiff Lauren Seaverns ("Seaverns") as an administrative assistant. Add.143.

In 2008, Burr formed Co-Defendant 140 Commonwealth Avenue – Danvers LLC ("140 Commonwealth Avenue") to redevelop real estate, and in 2010 Burr formed Co-Defendant Hawthorne Hill Development LLC ("Hawthorne Hill") to develop a skilled nursing facility. Add.143. Burr was the 100% owner of each of those entities. *Id.*

In July 2009, Gerhardt and Burr each executed a Participation Agreement that related to an interest in 140 Commonwealth Avenue and functionally identical agreements were signed for Hawthorne Hill. Add.73,

Add.144. Each of the four Participation Agreements begins with a section labeled "R E C I T A L S":



EXECUTION COPY

PARTICIPATION AGREEMENT

This PARTICIPATION AGREEMENT is made as of September 1, 2011 by and between Robert S. Burr ("Owner") and Michael Gerhardt ("Participant").

RECITALS

A. As of the Effective Date, Owner is a member of that certain limited liability company or other entity set forth under the heading "Name and Mailing Address of Company" on each Schedule attached hereto (the "Company") and owns, directly or indirectly, limited liability company interests in the Company.

B. Participant is a provider of services to an affiliate of the Owner (the "Employer") and such services to the Employer will enhance the value of the Company.

C. Owner wishes to provide Participant with an economic interest in a portion of the Owner Interest on the terms and subject to the provisions of this Agreement.

D. The Participation Interest is being granted in exchange for the provision of services by the Participant to or for the benefit of the Company in a Member capacity, or in anticipation of being a Member. The Owners intend that the Participation Interest qualify as "profits" interests, as defined in Rev. Proc. 93-27, 1993-2 C.B. 343, and each of the Company, and the Participant shall treat the Participant as the owner of the Participation Interest granted hereunder.

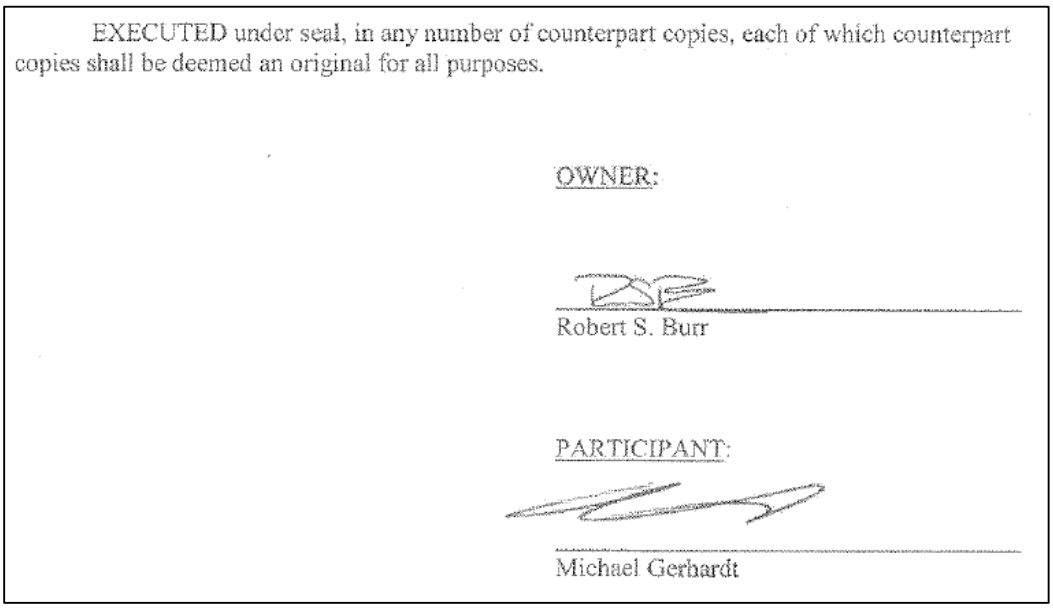
E. Capitalized terms used in this Agreement are defined in Section 14 below.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

See, e.g., Add.73 (Gerhardt's 2011 Participation Agreement); *see also*, Add.45, Add.59, Add.87. As discussed below, the RECITALS do not contain any reference to the agreements being under seal and this failing renders them out of compliance with G.L. c. 4 § 9A. Importantly, each Participation Agreement required

each party to sign in two different places: once on page 13 and once on a schedule containing material terms.

While the language above one of the signature blocks on page 13 of each Participation Agreement is preceded by a note that states, in part: "EXECUTED under seal . . ." followed by the signatures of Burr, and Gerhart or Seaverns, as applicable:



EXECUTED under seal, in any number of counterpart copies, each of which counterpart copies shall be deemed an original for all purposes.

OWNER:

Robert S. Burr

PARTICIPANT:

Michael Gerhardt

See, e.g., Add.85, these words, appearing thirteen pages after the clearly delineated section containing the RECITALS, constitute the sole reference to any "seal" and clearly do not apply to the second required signature block.

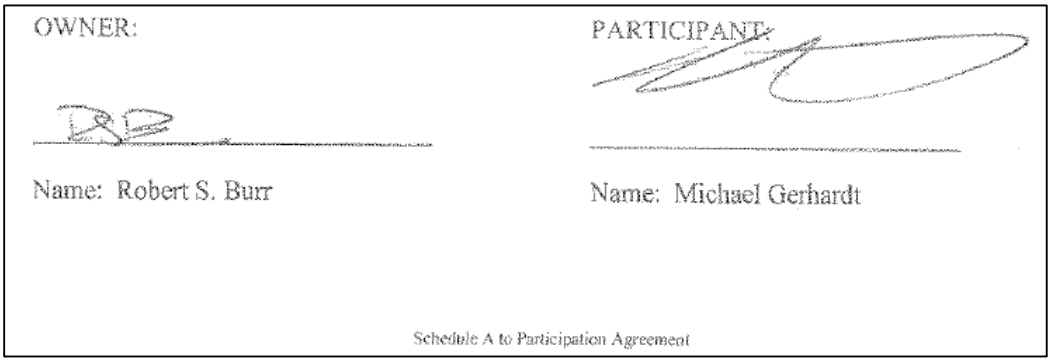
Each Participation Agreement features an identically structured "Schedule A" which contains critical financial terms of the transactions which were

not included in the body of the Participation Agreement, including:

- o the names and addresses of the parties;
- o the name of the entity in which the participation interest relates to;
- o the governing documents of the entity in which the participation interest relates to;
- o the effective date of the Participation Agreement;
- o the amount of the interest being transferred in the applicable entity (the "Participation Interest"); and
- o the necessary ratio amounts and percentages that are necessary to calculate a repurchase price of the Participation.

Add.86.

Each Schedule A is signed by both Burr, and Gerhardt or Seaverns as applicable. Schedule A does not contain *any* reference to a seal:


OWNER:

PARTICIPANT:

Name: Robert S. Burr

Name: Michael Gerhardt

Schedule A to Participation Agreement

See, e.g., Add.86.

During their employment, Gerhardt and Seaverns received certain payments pursuant to the Participation Agreements. Add.147-448. In 2013, when Plaintiffs concluded their employment for Defendants, Burr believed

that his obligations to the Plaintiffs had concluded and no further payments were made. Add.149-50.

Importantly, believing that he had no participants, Burr did not cause the entities to maintain records and correspondence related to the Participation Agreements and did not undertake the calculations required by them. Add.150.

From the time their employment ended until the commencement of this action, the Plaintiffs sat silent. The Plaintiffs never made a demand for any distributions or payments under the Participation Agreements, or for tax forms or reporting related to the Participation Agreements. Burr's accountant ceased sending tax forms to Plaintiffs regarding the Participation Agreements shortly after they left College Street. Add.150-51.

Eight years later, Plaintiffs' silence ended when they filed their Complaint in the Superior Court. Add.102.

STATEMENT OF ISSUES, INCLUDING PRESERVATION

The two issues advanced by this Application are:

(i) whether the mere notation "under seal" above only one of two required signature blocks is sufficient pursuant to G.L. c. 4 § 9A to render a contract a sealed

instrument where that contract contained a clearly delineated and prominent RECITALS section, which itself contains no reference to the sealed nature of the agreement; and

(ii) whether the absence of any reference to "under seal" above the second required signature block on each agreement is a deficiency sufficient to cause the agreements to fail to qualify as sealed instruments pursuant to G.L. c. 4 § 9A.

These issues were preserved below.

Defendant-Appellants preserve for appeal several other subsidiary issues listed in the Docketing Statement. Add.187. Those issues alone would not meet the standard for Direct Appellate Review, but need only be reached in the event that this Court declines to correct the threshold statute of limitations issue, which is the pure legal question presented by this Application.

ARGUMENT

I. BECAUSE THEY LACK THE REQUIRED RECITAL, THE PARTICIPATION AGREEMENTS ARE NOT SUBJECT TO G.L. c. 260, § 2 AND THEREFORE THIS ACTION IS TIME-BARRED.

Each of the Participation Agreements contains a clearly identifiable series of recitals, in a specific

section with the heading "R E C I T A L S." Add.69.

By dedicating a specific section to "Recitals," the Parties intended that any and all recitals be articulated there, at the beginning of the agreement "in order to explain the reasons upon which the transaction is founded." *Recital*, Black's Law Dictionary (2d. Ed. 1910). Here, the parties did not include an expression of their intention, *i.e.*, a recital, that the Participation Agreements be treated as contracts under seal and subject to a fourteen-year (333%) longer statute of limitations. To be a recital, language must be in the recital section, and without a proper recital, the Participation Agreements are not agreements under seal.

As this Court explained in *Knott*, "[q]uestions concerning the validity of option contracts are simply too important to our highly literate, highly mobile society to be decided by formalities that have lost all practical utility." *Knott*, 442 Mass. at 322.

In this case, a fleeting reference to a seal in *a* signature block (one of two), is not sufficient to more than triple the limitations period for a breach of contract action and is incompatible with modern commerce and the plain text of the statute. Plaintiffs' reliance

on this expansive reading of the statute conferred a windfall on them. Plaintiffs already rested on their claims for eight years. Were the trial court's decision to be upheld, Plaintiffs, who sat on their payment claims for nearly a decade -- years in which the interest rate earned on funds held in a savings bank account was between 0.05% and 0.09%[1] -- as 12% annual interest accrued, would be rewarded for needless delay. Under the trial court's decision, a plaintiff could wait two full decades while witnesses' memories faded, died, and the statutory interest would come to dwarf the principal. Here, if the trial court's decision is upheld, Plaintiffs' strategy of 'lie-in-wait' will have literally earned them roughly $1 million. Such a sizable reward for a flatly non-compliant effort to invoke a rare extension of the statute of limitation should not be countenanced, as it creates perverse incentives and undermines the public interest in maintaining carefully circumscribed statutes of limitations.

II. BECAUSE THE SECOND MATERIAL PART OF THE CONTRACTS, CONTAINING ESSENTIAL TERMS AND SEPARATE SIGNATURES, LACKED ANY NOTATION OF SEAL, THE PARTICIPATION AGREEMENTS ARE NOT

[1] See, Taylor Tepper, "History of Savings Account Interest Rates," *Forbes*, (April 5, 2025) *available at https://www.forbes.com/advisor/banking/savings/history-of-savings-account-interest-rates/*

SUBJECT TO G.L. c. 260, § 2 AND THEREFORE THIS ACTION IS TIME-BARRED.

Here, the parties to the contracts deemed it important to have two signatures blocks: one on page 13, and another on Schedule A. The first signature block on page 13 to each Participation Agreement is preceded by a note that states, in part: "EXECUTED under seal . . ." Add.85. In contrast, Schedule A to each Participation Agreement does not contain any reference to the Participation Agreements being under seal and material part of the agreements can't be deemed to be under seal. Add.15-70. The inclusion of the signature block in each Schedule A makes sense because without Schedule A, the Participation Agreements are meaningless. Without Schedule A, the Participation Agreements are incomplete statements of the parties' intent. Indeed, without Schedule A, it would be impossible for any person to understand the rights and obligations of either party. This Court can only infer from the dual signature blocks that the second signature was essential, and should give effect to the parties' decision not to recite their intention that it is under seal. In the absence of any notation at all in connection with the second set of required signatures, let alone a "recital," in the

critically important Schedule A, the agreements do not comply with § 9A, and therefore the Participation Agreements unequivocally are not "sealed" contracts subject to G.L. c. 260 § 1.

Such a holding not only makes sense given this Court's sentiment in *Knott* to narrow the statute's scope where possible, but also aligns with the fundamental principle of contract law that "separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated." Restatement (Second) of Contracts § 203. Courts have often looked to specific exhibits rather than a master agreement, when interpreting a contract. *See, e.g., Journey Acquisition-II, L.P. v. EQT Production Co.*, 39 F. Supp. 3d 877, 887, 892, 900 (E.D.Ky. 2014).

III. BURR WAS PREJUDICED BY PLAINTIFFS' DELAY IN PURSUING THEIR RIGHTS.

The immense passage of time between Burr's purported 2013 breach of the Participation Agreements and the filing of this Complaint has prejudiced Burr. Around the time that College Street was shut down in 2013, Burr, Kerri Burr (Burr's wife), Seaverns, and Gerhardt met for a 'going-away lunch.' Add.145. At that lunch, Burr reiterated to Gerhardt and Seaverns

that their respective distributions under the Participation Agreements would end (or had ended) when they ceased working for College Street. Add.149. Mr. Burr and Kerri Burr both testified that at the lunch, Gerhardt and Seaverns acknowledged that they would no longer receive distributions under the Participation Agreements because they were no longer working for College Street. Add.146. Between 2013 and the date Plaintiffs commenced this action in late May 2021, Plaintiffs never made a demand to Burr for any distributions or payments under the Participation Agreements, or for tax forms related to the Participation Agreements. Add.150-51. Burr's accountant ceased sending tax forms to Plaintiffs regarding the Participation Agreements shortly after they left College Street. Add.150.

Burr's accountant has since passed away, and Burr no longer has emails related to the Participation Agreements in his possession. Add.150. For eight years Burr managed his affairs, and the affairs of his businesses, under the belief that the Participation Agreements terminated with the end of Gerhardt and Seaverns' employment with College Street. Add.151.

Beginning eight years after Burr purportedly breached the Participation Agreements, he was forced to defend an action for millions of dollars with one hand tied behind his back. Notably, the trial on damages occurred nearly a dozen years after the first alleged breach. Limitations periods were enacted precisely to ensure that parties like the Plaintiffs pursue their rights when evidence is "fresh and available" to guard against prejudicing parties like Burr who have relied on repose. *Franklin v. Albert*, 381 Mass. 611, 618 (1980).

STATEMENT OF REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

Direct Appellate Review should be granted because this case presents a novel and important question about a unique feature of Massachusetts law which this Court should resolve.

A limitations period of approximately six years for contract actions has been a pillar of Anglo-American law since 1623, when Parliament passed the Limitation Act (the original 'statute of limitation'), which limited most civil actions to six years. 21 Ja. I, Ca. 16. Limitations periods are "'vital to the welfare of society . . . They promote repose by giving security and stability to human affairs.' In addition to the

policy of affording repose, limitation statutes encourage plaintiffs to bring actions within prescribed deadlines when evidence is fresh and available. . . . They 'stimulate to activity and punish negligence.'" *Franklin v. Albert*, 381 Mass. at 618 (*quoting Wood v. Carpenter*, 101 U.S. 135, 139 (1879)).

The generally applicable six-year statute of limitations period for contracts has remained unchanged in Massachusetts since 1770, when the Massachusetts Provincial Legislature changed the limitations period from four years to six years for a majority of civil actions. *See An Act for Repealing the Several Laws Now in Force Which Relate to the Limitation of Personal Actions, and for the Limitation of Personal Actions for the Future, and for Avoiding Suits at Law*, Province Laws 1770-1771, 3d. Session, Chapter 9 (expanding limitations period to six years).

In medieval times, seals were required to authenticate the predominate (practically speaking, only) form of contract between parties, a deed of a conveyance of real estate. *See*, 2 William Blackstone, Commentaries, Chapter 20, *Alienation by Deed* ("Sixthly, it is requisite that the party, whose deed it is, should seal, and in most cases I apprehend should sign it also.

The use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely ancient"). As this Court explained in *Knott*:

> In medieval England, a time when most adults were illiterate, unable even to sign their names, contracts routinely were executed 'under seal.' That is, each party impressed on the physical document a wax seal or other mark bearing his individual sign of identification. Under the common law, the seal became proof of the parties' identities and the document's authenticity, and loss or destruction of the sealed contract terminated the bargain.

442 Mass. at 320.

Despite the ancient origins of the contract under seal doctrine, Massachusetts' statutory scheme is a relatively recent development. Massachusetts is one of the few states that has codified a twenty-year limitations period for contracts under seal. G.L. c. 260 § 1. Massachusetts did not codify the twenty-year statute of limitations for contracts under seal until 1902.[2] Revised Laws of the Commonwealth of Massachusetts Enacted November 21, 1901 to Take Effect January 1, 1902

[2] Massachusetts first enacted a statute of limitations in 1718. *AN ACT FOR THE REGULATION AND LIMITED CREDIT IN TRADE, AND FOR THE PREVENTING THE DOUBLE PAYMENT OF DEBT*, Provincial Laws 1718-19, Ch. 10. The six-year limitations period for contract actions has remain essentially unchanged since 1770. *AN ACT FOR REPEALING THE SEVERAL LAWS NOW IN FORCE WHICH RELATE TO THE LIMITATION OF PERSONAL ACTIONS, AND FOR THE LIMITATION OF PERSONAL ACTIONS FOR THE FUTURE, AND FOR AVOIDING SUITS AT LAW*, Provincial Laws 1770-71, Ch. 9.

(1902). This statute of limitations period is now codified at G.L. c. 260 § 1. Importantly, Massachusetts is in the minority of states that has not abolished the distinction between sealed and unsealed contracts. *Knott*, 442 Mass. at 320 (*citing* 1 S. Williston, Contracts, at § 2:17 (table of statutory provisions modifying or abolishing distinction between sealed and unsealed instruments)).

While historically a seal required an impression of melted wax, it was not until 1929 that Massachusetts removed the requirement for a wax impression. 1929 Mass. Acts. Ch. 377, *An Act Relative to Seals and Sealed Instruments* (the "1929 Seal Act"); *codified at* G.L. c. 4 § 9A. The 1929 Seal Act, however, placed strict requirements that the contract contain a *recital* that the parties intended for the contract to qualify as one under seal.

G.L. c. 4 § 9A provides in pertinent part (emphasis added):

> In any written instrument, a **recital** that such instrument is sealed by or bears the seal of the person signing the same or is given under the hand and seal of the person signing the same, or that such instrument is intended to take effect as a sealed instrument, shall be sufficient to give such instrument the legal effect of a sealed instrument without the addition of any seal of wax, paper or other

> substance or any semblance of a seal by scroll, impression or otherwise . . .

The 1929 Seal Act does not define the term "recital." The second edition of *Black's Law Dictionary*, the edition in effect when the 1929 Seal Act was passed, defined "recital" as follows:

> The formal statement or setting forth of some matter of fact, in any deed or writing, in order to explain the reasons upon which the transaction is founded. The recitals are situated in the premises of a deed, that is, in that part of a deed between the date and a habendum, and they usually commence with the formal word "whereas."
>
> The formal preliminary statement in a deed or other instrument, of such deed, agreement, or matter of fact as are necessary to explain the reasons upon which the transaction is founded.

Recital, Black's Law Dictionary (2d. Ed. 1910).[3] This clear definition of the word *recital*, fundamentally unchanged since 1910, also comports with the current understanding in practice that the recitals are the prefatory section of a contract that sets the stage for the transaction. *See also* Commercial Contract Drafting

[3] The 11th (and current) edition of Black's Law Dictionary gives the following pertinent definition of recital: "A preliminary statement in a contract or deed explaining the reasons for entering into it or the background of the transaction, or showing the existence of particular facts <*the recitals in the settlement agreement should describe the underlying dispute*>. Traditionally, each recital begins with the word whereas." *Recital*, Black's Law Dictionary (11th. Ed. 2019).

and Review, LexisNexis May 22, 2019,[4] ("[Recitals] set forth the parties' basic understanding of the circumstances and purpose(s) of the transaction."); Term, Recitals, and Definitions, LexisNexis May 11, 2023[5] ("Recitals identify the purpose of and provide context for the agreement. They typically are used to guide the interpretation of the agreement."). As noted, the contracts at issue in this case contain an explicit RECITAL section and that section does not contain any reference at all to the alleged sealed nature of the agreements.

In addition to Massachusetts being an outlier in having a statutory twenty-year limitations period for contracts under seal, this Court has narrowed the applicability of this antiquated statutory exception at every turn. The most recent decision by this Court is *Knott,* which explained:

> Thirty years ago, for example, in the *Nalbandian* case this court abolished the common-law sealed contract doctrine with

[4] *Available at* https://www.lexisnexis.com/supp/largelaw/no-index/coronavirus/commercial-transactions/commercial-transactions-commercial-contract-drafting-and-review.pdf

[5] *Available at* https://plus.lexis.com/document?pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5NP8-B2B1-F873-B06V-00000-00&pdsourcegroupingtype=&pdcontentcomponentid=500749&pdisurlapi=true&pdmfid=1530671&crid=cf357198-760d-40d6-b940-24ddf784adb3

> respect to contracts executed on behalf of an undisclosed principal. . . . While disinclined to abolish the sealed contract doctrine in all cases, this court was 'unable to perceive any reason to merit preservation of the distinction between sealed and unsealed instruments in the circumstances.'

442 Mass. at 321 (*quoting Nalbandian v. Hanson Rest. & Lounge*, 369 Mass. 150, 156-57 (1975)). Highlighting the historical anomaly of sealed contract doctrine, the Court in *Knott also* stated "[w]hatever the merits of upholding the common-law sealed contract doctrine may have been when *Johnson v. Norton Hous. Auth*., was decided, they seem far less apparent today . . .". 442 Mass. at 322.

Knott narrowed the use of the antiquated seal doctrine by abolishing the ability of a seal to substitute for consideration in connection with option contracts. *Knott*, 442 Mass at 323. The clear takeaway from *Knott* is that the statute conferring special benefits on sealed instruments should be strictly construed, and it should not be judicially expanded.

Knott's passing reference that "[o]ver time, simply the words 'under seal' or a similar phrase appearing in a mass-produced, form contract became sufficient to invest that document with the privileged status of a sealed instrument" is *dicta*. 442 Mass. at 320. The

relevant issue in *Knott* concerned whether a seal was sufficient substitute for consideration in the question of contract *formation*. This Court did not address what 'magic words' are required in order for the parties to form a contract under seal, nor where they must be placed to constitute the statutorily required "recital." These issues were not litigated. Now, more than twenty years after *Knott*, this case presents an appropriate vehicle for this Court to complete its work in clarifying how 'sealed contracts' with extended statutes of limitations can only be imposed when the parties clearly intend such treatment by including that provision as a recital.

Defendants are aware of no case involving a contract where the only reference to the contract being under seal was a notation above the signature block notwithstanding that the contract specifically delineated a series of recitals in an appropriately labeled section called "Recitals."[6]

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[6] In *Lawrence H. Oppenheim Co. v. Bloom*, 325 Mass. 301, 302 (1950), the Court noted that the guaranty "recited that it was under seal, for good and valuable consideration, that it was a continuing guaranty . . ." but the opinion does not provide any context for the location of the recital in question within the contract. While there are a number of much older reported cases stating that a reference to a seal above a signature block is sufficient to satisfy § 9A, a closer examination of those cases reveals that the law, in addition to not having been addressed in the last approximately fifty years, is hardly the product of deep analysis.

In *Hayden v. Beane*, 293 Mass. 347, 351 (1936), this Court concluded that a stock voting agreement was not void for lack of consideration because the testimonium clause referenced a seal, but disposed of the § 9A question in *three* sentences (one of which quoted the testimonium clause itself). In *Vigdor v. Nelson*, 322 Mass. 670, 674 (1948), this Court, in enforcing an extension of a lease by a trustee from three to ten years, addressed the sufficiency of the "recital" in *two* sentences. In *Marine Contractors Co. v. Hurley*, 365 Mass. 280, 285 n.2 (1974), this Court's discussion of the sufficiency of the recital was a two-sentence footnote. Finally, in, *Nalbandian v. Hanson Rest. & Lounge*, this Court abolished the distinction between sealed and unsealed contracts with respect to undisclosed principals. 359 Mass. 150, 156-57 (1975) While the *Nalbandian* court did discuss the contract under seal doctrine in more detail, its analysis of the sufficiency of the location and form of the recital was relegated to a footnote. *Id*. at 151 n.2.[7]

[7] In other cases, the discussion of the recital's sufficiency is *dicta*. *See, e.g.*, *City of Boston v. Roxbury Action Program, Inc.*, 68 Mass. App. Ct. 468 (2007) (action brought almost thirty-years after the instrument was executed time-barred under *any* limitations period; determination of sufficiency of recital *dicta*); *Kingston Hous. Auth. v. Sandonato & Bogue, Inc.*, 31 Mass. App. Ct. 270 (1970) (the typewritten word "(seal)" was

Undersigned counsel is unaware of *any* reported case in Massachusetts in which the parties actually litigated, and a court squarely analyzed, the question presented here: What constitutes a sufficient "recital" under § 9A such that the contract is one "under seal" and therefore subject to the twenty-year limitations period.[8]

Because of the rare opportunity that this case represents for this Court to clarify a key issue that bears heavily on the rights and obligations of parties to contracts in the Commonwealth, and because it has been two decades since this Court has issued any ruling on this important public issue, Direct Appellate Review should be granted.

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alone insufficient to comply with § 9A; suggestion of other verbiage that *might* have been sufficient *dicta*); *Glendale Coal Co. v. Nesson*, 312 Mass. 293, 294 (1942) (interpreting scope of effect of release of claims in decedent's will in which statute of limitations was not at issue; two sentences of *dicta* noting that words "witness hand and seal" were sufficient to give the will the legal effect of a sealed instrument).

[8] To be clear, in the unreported summary disposition case *Revolution Portfolio, LLC v. Goodrich*, 2001 WL 844502, No. 99-P-804, 52 Mass.App.Ct. 1106 (Mass. App. Ct. July 25, 2001) (Summary Rule 23.0 disposition), which pre-dates *Knott*, the principal argument on appeal was whether a sole reference to a "seal" in a signature block, was insufficient under § 9A to deem it a sealed instrument. While the court found in the affirmative, the court's analysis in *Revolution* was limited to conclusory citations to the cases discussed above. Given the scant analysis of the issue, *Revolution* should not be afforded any weight. Additionally, Mass. App. Ct. R. 23.0(2) prohibits a citation to *Revolution*, as the case predates February 26, 2008.

Respectfully Submitted,

ROBERT S. BURR, COLLEGE STREET PARTNERS LLC, 140 COMMONWEALTH AVENUE – DANVERS LLC, and HAWTHORNE HILL DEVELOPMENT LLC,

By Their Attorneys,

/s/ Richard C. Pedone

Richard C. Pedone (BBO #630716)
Melanie P. Cahill (BBO #707100)
Ronaldo Rauseo-Ricupero (BBO #670014)
NIXON PEABODY LLP
Exchange Place
53 State Street
Boston, Massachusetts 02109
Tel: (617) 345-1000
Fax: (617) 345-1300
rpedone@nixonpeabody.com

May 20, 2025

CERTIFICATE OF SERVICE

I hereby state under the pains and penalties of perjury that I caused a true copy of the above document to be served on this this 20th day of May, 2025, on counsel indicated below by electronic mail:

David H. Rich, Esq.
Gregory R. Browne, Esq.
TODD & WELD LLP
1 Federal Street, 27th Fl.
Boston, MA 02110
drich@toddweld.com
gbrowne@toddweld.com

/s/ Ronaldo Rauseo-Ricupero
Ronaldo Rauseo-Ricupero

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(K)

In accordance with Massachusetts Rules of Appellate Procedure 16(k) I certify that this Application complies with the rules relevant to filing Applications for Direct Appellate Review, including with the length limit of Rule 11(b) because it was prepared using Microsoft Word with a Courier New, 12 pt. font, and the Argument contains 1,090 words.

/s/ Ronaldo Rauseo-Ricupero
Ronaldo Rauseo-Ricupero

ADDENDUM INDEX

STATUTORY ADDENDUM INDEX

2184CV01017 Gerhardt, Michael vs. Burr, Robert S.

- Case Type:
- Business Litigation
- Case Status:
- Open
- File Date
- 05/03/2021
- DCM Track:
- B - Special Track (BLS)
- Initiating Action:
- Fraud, Business Torts, etc.
- Status Date:
- 05/03/2021
- Case Judge:
-
- Next Event:
-

All Information | Party | Subsequent Action/Subject | Event | Docket | Disposition

Docket Information

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/03/2021	Complaint electronically filed.	1	Image
05/03/2021	Civil action cover sheet filed.	2	Image
05/14/2021	General correspondence regarding NOTICE OF ACCEPTANCE INTO BUSINESS LITIGATION SESSION "BLS2" This matter has been accepted into the Suffolk Business Litigation Session. It has been assigned to BLS2. Hereafter, as shown above, all parties must include the initials "BLS2" at the end of the docket number on all filings. Dated: May 5, 2021 Notice sent 5/12/21	3	Image
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07/01/2021	Attorney appearance On this date Thomas J Hogan, Esq. added for Defendant 140 Commonwealth Avenue - Danvers, Llc		
07/01/2021	Attorney appearance On this date Thomas J Hogan, Esq. added for Defendant Hawthorne Hill Development Llc		
07/01/2021	Service Returned for Defendant College Street Partners Llc: Service accepted by counsel; (Filed on 06/28/2021)	6	Image
07/01/2021	Attorney appearance On this date Thomas J Hogan, Esq. added for Defendant College Street Partners Llc		
07/01/2021	Service Returned for Defendant Burr, Robert S.: Service accepted by counsel; (Filed on 06/28/2021)	7	Image
07/01/2021	Attorney appearance On this date Thomas J Hogan, Esq. added for Defendant Robert S. Burr		
08/10/2021	Attorney appearance On this date David B Mack, Esq. added for Defendant Robert S. Burr		
08/10/2021	Attorney appearance On this date David B Mack, Esq. added for Defendant College Street Partners Llc		
08/10/2021	Attorney appearance On this date David B Mack, Esq. added for Defendant 140 Commonwealth Avenue - Danvers, Llc		
08/10/2021	Attorney appearance On this date David B Mack, Esq. added for Defendant Hawthorne Hill Development Llc		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
08/10/2021	Attorney appearance On this date Stephanie Parker, Esq. added for Defendant Robert S. Burr		
08/10/2021	Attorney appearance On this date Stephanie Parker, Esq. added for Defendant College Street Partners Llc		
08/10/2021	Attorney appearance On this date Stephanie Parker, Esq. added for Defendant 140 Commonwealth Avenue - Danvers, Llc		
08/10/2021	Attorney appearance On this date Stephanie Parker, Esq. added for Defendant Hawthorne Hill Development Llc		
08/24/2021	Answer to original complaint Applies To: Burr, Robert S. (Defendant); College Street Partners Llc (Defendant); 140 Commonwealth Avenue - Danvers, Llc (Defendant); Hawthorne Hill Development Llc (Defendant)	8	Image
08/30/2021	Answer to original complaint Applies To: Burr, Robert S. (Defendant); College Street Partners Llc (Defendant); 140 Commonwealth Avenue - Danvers, Llc (Defendant); Hawthorne Hill Development Llc (Defendant); Hogan, Esq., Thomas J (Attorney) on behalf of 140 Commonwealth Avenue - Danvers, Llc, Burr, Robert S., College Street Partners Llc, Hawthorne Hill Development Llc (Defendant); Mack, Esq., David B (Attorney) on behalf of 140 Commonwealth Avenue - Danvers, Llc, Burr, Robert S., College Street Partners Llc, Hawthorne Hill Development Llc (Defendant); Parker, Esq., Stephanie (Attorney) on behalf of 140 Commonwealth Avenue - Danvers, Llc, Burr, Robert S., College Street Partners Llc, Hawthorne Hill Development Llc (Defendant) With Counterclaim *amended answer*	9	Image
08/31/2021	Counterclaim filed.	10	
09/17/2021	Plaintiff Michael Gerhardt's Notice of Motion to Dismiss Defendant's Counterclaims	11	Image
09/17/2021	Attorney appearance On this date Brendan Sweeney, Esq. added for Plaintiff Michael Gerhardt		
10/08/2021	Plaintiffs Michael Gerhardt, Lauren Seaverns's Notice of Withdrawal Applies To: Sweeney, Esq., Brendan (Attorney) on behalf of Gerhardt, Michael (Plaintiff)		Image
10/08/2021	Attorney appearance On this date Brendan Sweeney, Esq. dismissed/withdrawn for Plaintiff Michael Gerhardt		
10/28/2021	Plaintiff Michael Gerhardt's Motion to dismiss under some, not all counts Defendant College Street Partners LLCs Counterclaims	12	Image
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11/18/2021	The following form was generated: Notice to Appear Sent On: 11/18/2021 15:27:46 Notice Sent To: Patricia A Washienko, Esq. Freiberger and Washienko, LLC 211 Congress St Suite 720, Boston, MA 02110 Notice Sent To: Thomas J Hogan, Esq. Tinti and Navins, P.C. 27 Congress St Suite 414, Salem, MA 01970 Notice Sent To: David B Mack, Esq. O'Connor Carnathan and Mack LLC 67 South Bedford St Suite 400W, Burlington, MA 01803 Notice Sent To: Stephanie Parker, Esq. O'Connor Carnathan And Mack LLC 67 South Bedford St Suite 400W, Burlington, MA 01803		
02/14/2022	Matter taken under advisement: Rule 12 Hearing scheduled on: 02/14/2022 10:00 AM		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Has been: Held - Under advisement Hon. Kenneth W Salinger, Presiding Staff: Brenda Shisslak, Assistant Clerk Magistrate		
02/24/2022	Endorsement on Motion to dismiss under some, not all counts Defendant College Street Partners LLCs Counterclaims (#12.0): ALLOWED (date 2/15/22) Allowed See memorandum and Order Notice 2/17/22		Image
02/24/2022	MEMORANDUM & ORDER: Allowing Michael Gerhardts Motion to Dismiss Counterclaims Motion Allowed Date 2/15/22 Notice 2/17/22 Judge: Salinger, Hon. Kenneth W	16	Image
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03/30/2022	ORDER: Stipulated Protective Order (dated 3/23/22) notice sent 3/30/22	18	Image
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05/27/2022	Attorney appearance On this date David H Rich, Esq. added for Plaintiff Lauren Seaverns		
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12/22/2022	Superior Court rule 9A List of Documents		Image
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01/17/2023	Victim Michael Gerhardt, Lauren Seaverns's Notice of Filing		Image
01/20/2023	The following form was generated: Notice to Appear Sent On: 01/20/2023 14:28:49		
02/09/2023	Event Result:: Motion Hearing scheduled on: 03/08/2023 02:00 PM Has been: Rescheduled For the following reason: By Court prior to date Hon. Kenneth W Salinger, Presiding		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Staff: Beatriz E Van Meek, Assistant Clerk Magistrate		
03/03/2023	The following form was generated: Notice to Appear Sent On: 03/03/2023 16:18:12		
03/08/2023	Event Result:: Motion Hearing scheduled on: 03/08/2023 02:30 PM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Beatriz E Van Meek, Assistant Clerk Magistrate		
03/08/2023	The following form was generated: Notice to Appear - BLS Sent On: 03/08/2023 16:03:06		
03/10/2023	Endorsement on Motion for Protective Order and/or to Quash Plaintiffs' Subpoena to Rockland Trust, with Incorporated Memorandum of Law (#19.0): DENIED after hearing, for the reasons stated on the record. (dated 3/08/23) notice sent 3/10/23		Image
03/10/2023	Endorsement on Motion for a Protective Order and/or to Quash Defendants' Subpoenas Seeking Personal Financial Information (#22.0): ALLOWED after hearing, for the reasons stated on the record. (dated 3/08/23) notice sent 3/10/23		Image
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03/22/2023	The following form was generated: Notice to Appear for Final Pre-Trial Conference Sent On: 03/22/2023 15:39:03		
03/22/2023	Endorsement on Motion for entry of case management order (#24.0): No Action Taken See Scheduling order dated 3/22/2023 (Dated 3/22/2023) Notice sent 3/27/2023		Image
03/27/2023	ORDER: Scheduling Order (see paper No. 25 for details). (dated 3/22/23) notice sent 3/27/23	25	Image
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10/11/2023	Event Result:: Conference to Review Status scheduled on: 10/11/2023 02:00 PM Has been: Held as Scheduled Hon. Michael D Ricciuti, Presiding		
10/12/2023	Endorsement on Request for Status Conference (#27.0): ALLOWED After argument, and pending a Rule 9C conference ALLOWED. (Dated: 10/11/23) Notice sent 10/13/23		Image
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	Proposed Order and Request for New Trial Date		
12/05/2023	Event Result:: Final Pre-Trial Conference scheduled on: 12/05/2023 02:00 PM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding		
12/11/2023	ORDER: Order See page #28 The Court shall re-schedule the Trial date the parties, by 12/13/2023, shall submit agreed to dates in August or September 2024, with their best estimates of Trial length assuming half-day Trials. SO ORDERED. (Dated 12/7/2023) Notice Sent 12/11/23	28	Image
12/21/2023	Attorney appearance electronically filed.		Image
12/21/2023	Attorney appearance On this date Allison Love Williard, Esq. dismissed/withdrawn for Plaintiff Michael Gerhardt		
12/21/2023	Attorney appearance On this date Allison Love Williard, Esq. dismissed/withdrawn for Plaintiff Lauren Seaverns		
01/03/2024	Event Result:: Jury Trial scheduled on: 08/12/2024 09:00 PM Has been: Rescheduled For the following reason: Joint request of parties Comments: Parties have not complied with that part of the Order in which they are directed to submit by 12/13/23, "agreed to dates in August and September 2024, with their best estimates of trial length assuming half day trials." (Ricciuti, J.) 12/7/23 Hon. Michael D Ricciuti, Presiding		
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01/26/2024	Attorney appearance electronically filed.		Image
01/26/2024	Attorney appearance On this date Gregory R Browne, Esq. added for Plaintiff Michael Gerhardt		
01/26/2024	Attorney appearance On this date Gregory R Browne, Esq. added for Plaintiff Lauren Seaverns		
03/08/2024	Defendant Robert S. Burr, College Street Partners Llc, 140 Commonwealth Avenue - Danvers, Llc, Hawthorne Hill Development Llc's Motion for Summary Judgment	30	Image
03/08/2024	Robert S. Burr, College Street Partners Llc, 140 Commonwealth Avenue - Danvers, Llc, Hawthorne Hill Development Llc's Memorandum in support of motion for summary judgment	31	Image
03/08/2024	Affidavit of David B. Mack, Esq. in support of Defendants' motion for summary judgment	32	Image
03/08/2024	Defendant Robert S. Burr, College Street Partners Llc, 140 Commonwealth Avenue - Danvers, Llc, 140 Commonwealth Avenue - Danvers, Llc's Statement of material facts (consolidated)	33	Image
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03/08/2024	Reply/Sur-reply Defendants' Reply in Support of their Motion for Summary Judgment	36	Image
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03/12/2024	Michael Gerhardt, Lauren Seaverns's Memorandum in support of motion for partial summary judgment	42	Image
03/12/2024	Plaintiff Michael Gerhardt, Lauren Seaverns's Statement of material facts (consolidated)	43	Image
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03/12/2024	Notice of Filing and List of Documents		Image
03/12/2024	Event Result:: Trial Assignment Conference scheduled on: 03/13/2024 02:00 PM Has been: Not Held For the following reason: Event Changed Comments: ZOOM: Summary Judgments filed. Hearing dates to be determined. Hon. Kenneth W Salinger, Presiding		
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04/02/2024	Attorney appearance electronically filed.		Image
05/09/2024	Matter taken under advisement: Rule 56 Hearing scheduled on: 05/09/2024 02:00 PM Has been: Held - Under advisement Hon. Kenneth W Salinger, Presiding		
06/07/2024	Endorsement on Motion for Summary Judgment (#30.0): DENIED See Decision and Order (Dated: 6/5/24) Notice Sent 6/10/24		
06/07/2024	Endorsement on Motion for Partial Summary Judgment (#37.0): ALLOWED See Decision and Order. (Dated: 6/5/24) Notice Sent 6/10/24		Image
06/07/2024	MEMORANDUM & ORDER: On Cross Motions for Summary Judgment ORDERS: Plaintiff's motion for partial summary judgment as to Robert Burr's liability for breaching the Participation Agreements, under Count 1 of their Complaint, is ALLOWED. Defendants' motion for summary judgment is DENIED. A final pre-trial conference will be held on September 5, 2023 at 2:00 p.m. The parties shall file their joint pre trial memorandum by August 29, 2024. (Dated: 6/5/24) (Notice Emailed to Counsel 6/6/24) Judge: Salinger, Hon. Kenneth W	44	Image
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07/09/2024	Attorney appearance On this date Stephanie Parker, Esq. dismissed/withdrawn for Defendant Robert S. Burr		
07/09/2024	Attorney appearance On this date David B Mack, Esq. dismissed/withdrawn for Defendant Robert S. Burr		
07/09/2024	Attorney appearance On this date Stephanie Parker, Esq. dismissed/withdrawn for Defendant College Street Partners Llc		

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
07/09/2024	Attorney appearance On this date David B Mack, Esq. dismissed/withdrawn for Defendant College Street Partners Llc		
07/09/2024	Attorney appearance On this date David B Mack, Esq. dismissed/withdrawn for Defendant 140 Commonwealth Avenue - Danvers, Llc		
07/09/2024	Attorney appearance On this date Stephanie Parker, Esq. dismissed/withdrawn for Defendant 140 Commonwealth Avenue - Danvers, Llc		
07/09/2024	Attorney appearance On this date Stephanie Parker, Esq. dismissed/withdrawn for Defendant Hawthorne Hill Development Llc		
07/09/2024	Attorney appearance On this date David B Mack, Esq. dismissed/withdrawn for Defendant Hawthorne Hill Development Llc		
08/22/2024	Plaintiffs, Defendants Michael Gerhardt, Lauren Seaverns, Robert S. Burr, College Street Partners Llc, 140 Commonwealth Avenue - Danvers, Llc, Hawthorne Hill Development Llc's Joint Motion to Extend Pre-Trial Conference Date	45	Image
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08/27/2024	Endorsement on Motion to Extend Pre-Trial Conference (Joint) (#45.0): ALLOWED FPTC to be moved to last week of September (dated 8/26/24) Notice Sent 8/27/24		Image
09/18/2024	Conference Memorandum Joint Pre-Trial Memorandum Applies To: Gerhardt, Michael (Plaintiff); Seaverns, Lauren (Plaintiff); Burr, Robert S. (Defendant); College Street Partners Llc (Defendant); 140 Commonwealth Avenue - Danvers, Llc (Defendant); Hawthorne Hill Development Llc (Defendant)	46	Image
09/19/2024	Event Result:: Final Pre-Trial Conference scheduled on: 09/19/2024 02:00 PM Has been: Held as Scheduled Hon. Debra A Squires-Lee, Presiding Staff: Beatriz E Van Meek, Assistant Clerk Magistrate		
09/20/2024	ORDER: Tracking Order See paper #47 dated (9/19/24) Notice sent 9/23/2024.	47	Image
09/26/2024	ORDER: Tracking Order See paper #48 dated (9/26/24) Notice sent 9/27/2024.	48	Image
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10/24/2024	Michael Gerhardt, Lauren Seaverns's Memorandum in support of Plaintiff's Motion to Compel	50	Image
10/30/2024	Endorsement on Motion to Compel (#49.0): Other action taken Not an emergency, should have been served under 9A. Defendant's to file response by November 6, 2024. (Dated 10/30/2024) Notice sent Via email 10/30/2024		Image
11/06/2024	Opposition to And Response To Plaintiffs' Motion To compel filed by Robert S. Burr, College Street Partners Llc, 140 Commonwealth Avenue - Danvers, Llc, Hawthorne Hill Development Llc	51	Image
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11/18/2024	Endorsement on Stipulation of the Parties and Joint Request to Modify Scheduling Order (#52.0): ALLOWED (dated 11/15/2024) Notice Sent 11/18/24		Image

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12/12/2024	Event Result:: Motion Hearing scheduled on: 12/12/2024 02:00 PM Has been: Held as Scheduled Hon. Debra A Squires-Lee, Presiding Staff: Erin Coronado, Assistant Clerk Magistrate		
12/12/2024	Event Result:: Hearing on Motion(s) in Limine scheduled on: 12/12/2024 02:00 PM Has been: Held as Scheduled Comments: Motions to be decided by trial judge. Hon. Debra A Squires-Lee, Presiding Staff: Erin Coronado, Assistant Clerk Magistrate		
12/13/2024	Endorsement on Motion to Compel (#49.0): Other action taken Now Moot. (dated 12/11/2024)		Image
12/18/2024	ORDER: Decision and Order Allowing Plaintiffs¿ Motion to Strike the Second Expert Report of Michael Goldman and Limiting the Opinions that Robert Burr May Offer at Trial from Mr. Goldman¿s First Expert Report Motion is ALLOWED (see P#56 for complete Decision and Order) (dated 12/17/24) notice sent by email 12/18/24	56	Image
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01/06/2025	Defendants Robert S. Burr, College Street Partners Llc, 140 Commonwealth Avenue - Danvers, Llc, Hawthorne Hill Development Llc's EMERGENCY Motion in limine to Exclude Evidence	57	Image
01/07/2025	Event Result:: Final Trial Conference scheduled on: 01/07/2025 02:00 PM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Erin Coronado, Assistant Clerk Magistrate		
01/08/2025	Event Result:: Jury Waived Trial scheduled on: 01/08/2025 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Erin Coronado, Assistant Clerk Magistrate		
01/09/2025	Event Result:: Jury Waived Trial scheduled on: 01/09/2025 09:00 AM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding Staff: Erin Coronado, Assistant Clerk Magistrate		
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01/28/2025	Plaintiff Michael Gerhardt, Lauren Seaverns's Submission of Post-Trial Brief	59	Image
01/28/2025	Event Result:: Conference to Review Status scheduled on: 01/28/2025 04:30 PM Has been: Held as Scheduled Hon. Kenneth W Salinger, Presiding		

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	Staff: Erin Coronado, Assistant Clerk Magistrate		
02/12/2025	Attorney appearance electronically filed.		Image
02/13/2025	FINDINGS AND CONCLUSIONS AFTER A BENCH TRIAL ON DAMAGES AND ORDER FOR JUDGMENT: Final judgment shall enter that: (1) Michael Gerhardt shall take $1,030,744 from Robert S. Burr and that Lauren Seaverns shall take $575, 758 from Burr, plus prejudgment interest for each Plaintiff calculated by the clerk in a manner that is consistent with (s) 2 of the Court's findings and rulings, (2) Mr. Gerhardt and Ms. Seaverns shall take nothing from College Street Partner LLC, 140 Commonwealth Avenue - Danvers, LLC, of Hawethorne Hill Development, LLC nd (3) College Street Partners LLC shall take Nothing from Mr. Gerhardt. entered 2/15/2025 (Salinger, J.,) notice sent by email 2/13/2025	59.1	Image
02/14/2025	Judgment. It is ORDERED and ADJUDGED:: Following a bench trial on damages and consistent with the Findings and Conclusions After Bench Trial on Damages in this case, Judgment enters as follows: Michael Gerhardt shall take $1,030,744 plus prejudgment interest of $618,191.82, calculated in accordance with the Order for Judgment, for a total of $1,648,935.82, from Robert S. Burr. Lauren Seaverns shall take $575,758 plus prejudgment interest of $351,842.55, calculated in accordance with the Order for Judgment, for a total of $927,600.55, from Robert S. Burr. Michael Gerhardt and Lauren Seaverns shall take nothing from College Street Partners LLC, 140 Commonwealth Avenue-Danvers LLC, or Hawthorne Hill Development LLC. College Street Partners LLC shall take nothing from Michael Gerhardt. This case is hereby DISMISSED Entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d)	60	Image
02/18/2025	Defendant Robert S. Burr's EMERGENCY Motion for Court to Reevaluate its Decision on the Parties' Motions for Summary Judgment	61	Image
02/18/2025	Opposition to Defendant Robert S. Burr's "Emergency" Motion to "Reevaluate" the Court's June, 2024 Summary Judgment Decision and Cross-Request for an Award of Attorney's Fees filed by Michael Gerhardt, Lauren Seaverns	62	Image
02/26/2025	Endorsement on Motion for Court to Reevaluate its Decision on the Parties' Motions for Summary Judgment (#61.0): DENIED Denied. See Decision and Order. (dated 2/20/25) Notice sent by email 2/25/25		Image
02/26/2025	ORDER: Decision and Order Denying Robert Burr's Motion for Reconsideration of Summary Judgment See p#63 for complete Decision and Order. (dated 2/20/25) Notice sent by email 2/25/25	63	Image
03/11/2025	Defendant Robert S. Burr, College Street Partners Llc, 140 Commonwealth Avenue - Danvers, Llc, Hawthorne Hill Development Llc's Notice of Appeal	64	Image
03/11/2025	Notice of appeal filed. (See p#64) Notice sent 3/13/25 Applies To: Burr, Robert S. (Defendant); College Street Partners Llc (Defendant); 140 Commonwealth Avenue - Danvers, Llc (Defendant); Hawthorne Hill Development Llc (Defendant)		
03/24/2025	Transcript of 5/9/24 9/19/24 12/12/24 1/7/25 1/8/25 1/9/25 received (via email)		
03/24/2025	Defendant Robert S. Burr, College Street Partners Llc, 140 Commonwealth Avenue - Danvers, Llc, Hawthorne Hill Development Llc's Request to Assemble the Record	65	Image
04/14/2025	Appeal: Statement of the Case on Appeal (Cover Sheet).		Image
04/14/2025	Notice of assembly of record sent to Counsel		Image
04/14/2025	Notice to Clerk of the Appeals Court of Assembly of Record		Image

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/30/2025	Notice of Entry of appeal received from the Appeals Court In accordance with Massachusetts Rule of Appellate Procedure 10(a)(3), please note that the above-referenced case (2025-P-0523) was entered in this Court on April 29, 2025.	66	Image

EXECUTION COPY

PARTICIPATION AGREEMENT

This PARTICIPATION AGREEMENT is made as of July 1, 2009 by and between Robert S. Burr ("Owner") and Michael Gerhardt ("Participant").

RECITALS

A. As of the Effective Date, Owner is a member of that certain limited liability company or other entity set forth under the heading "Name and Mailing Address of Company" on each Schedule attached hereto (the "Company") and owns, directly or indirectly, limited liability company interests in the Company.

B. Participant is a provider of services to an affiliate of the Owner (the "Employer") and such services to the Employer will enhance the value of the Company.

C. Owner wishes to provide Participant with an economic interest in a portion of the Owner Interest on the terms and subject to the provisions of this Agreement.

D. The Participation Interest is being granted in exchange for the provision of services by the Participant to or for the benefit of the Company in a Member capacity, or in anticipation of being a Member. The Owners intend that the Participation Interest qualify as "profits" interests, as defined in Rev. Proc. 93-27, 1993-2 C.B. 343, and each of the Company, and the Participant shall treat the Participant as the owner of the Participation Interest granted hereunder.

E. Capitalized terms used in this Agreement are defined in Section 14 below.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

1. Grant of Participation Interest. As of the Effective Date, Owner hereby assigns the Participation Interest to Participant. Notwithstanding anything in this Agreement to the contrary, the rights of Participant in the Participation Interest:

(a) are subject to the terms and conditions of the Company Agreement;

(b) as between Participant and Owner, shall provide Participant with the same economic interest in the Company that Participant would have if the economic interest of the Participation Interest were recited in the Company Agreement;

(c) shall provide Participant solely with the economic interest and Tax Items described herein, and Participant shall have no other rights or interest in (including but not limited to any right to vote or otherwise participate in the management or other affairs of) the Company, any Company Affiliate, Owner, any Owner Controlled Entity or any other direct or indirect property of Owner;

(d) shall be subject to dilution, *pari passu*, with and on the same terms as the Owner Interest, without regard to the reason for such dilution; and

(e) shall be subject to all of the terms and conditions provided herein.

2. Distributions.

(a) Cash Flow Distributions. Within a reasonable period after receipt by Owner of any Owner Distribution other than a Distribution in respect of a Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash (or, if such Owner Distribution is made in kind, then at Owner's sole discretion, a portion of such other property equal in value, or cash equal in value to such property) equal to the product of (i) the Participation Percentage and (ii) such Owner Distribution.

(b) Distribution Upon Capital Transactions Other Than a Terminating Capital Transaction. Within a reasonable period of receipt by Owner of Owner Distributions from Capital Transaction Proceeds with respect to any Capital Transaction other than a Terminating Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash computed as though the Owner Distributions from such Capital Transaction Proceeds are divided between the Owner and all Participants in the following manner:

1. First, 100% to Owner until Owner has received all unreturned Contributed Amounts;

2. Thereafter, pro rata, to the Owner and to each of the Participants, in accordance with each person's Participation Percentage (assuming, for this purpose, that the Owner's Participation Percentage is equal to the result of subtracting all the Participants' Participation Percentages from 100%).

(c) Distributions Upon Terminating Capital Transactions.

1. Within a reasonable period of receipt by Owner of Owner Distributions from Capital Transaction Proceeds with respect to a Terminating Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash equal to the Participant's Capital Account, after giving effect to all contributions, distributions and allocations of Tax Items for periods, including the year during which the Terminating Capital Transaction occurs. If the Participant has a deficit balance in its Capital Account (after giving effect to all contributions, distributions and allocations for all periods, including the year during which such liquidation occurs), Participant shall have no obligation to make any contribution to the capital of the Company with respect to such deficit, and such deficit shall not be considered a debt owed to the Company or to any other person for any purpose whatsoever.

2. Notwithstanding the provisions of Section 3 hereof, in the year of the Terminating Capital Transaction, items of net income and deduction shall be allocated to the Participant and the Owner to the extent necessary to

produce Capital Accounts for the Participant and Owner such that amounts distributed pursuant to this Section 2(c) will be in the amounts Participant would have received under Section 2(b) hereof had the distribution not been a distribution upon a Terminating Capital Transaction.

(d) Acknowledgements. Participant acknowledges that (i) Participant's interest in the Participation Interest does not entitle Participant to any share of any fee or any other payment by the Company to Owner, any Owner Controlled Entity or any affiliate thereof, or of any other fee or payment made to any other member of the Company for any reason whatever, (ii) Participant's Participation Interest in the Owner Interest does not include any interest which Owner may hereafter acquire in the Company or any Company Affiliate (iii) the Company may make repayments on intercompany debt held by Owner or any Owner Controlled Entity, which, at the discretion of the Manager, may be of first priority on the use of the Company's available cash; and (iv) Owner, the Company, or any other person shall not be obligated to make funds available to Participant to facilitate the payment of any taxes that may be attributable to Participant's ownership of the Participation Interest.

(e) Safe Harbor Valuation Election. Notwithstanding any provision of this Agreement to the contrary, Owner or the Company, without the consent of Participant, is hereby authorized and directed to elect, on behalf of Participant, to make the "safe harbor election" (the "Safe Harbor Valuation Election") described in Internal Revenue Service Notice 2005-43 (the "IRS Notice") pursuant to which each "safe harbor partnership interest" (as defined in the IRS Notice) that is transferred to Participant (and in the case that the Participant is an entity, any person that is a partner or member of that entity) while the election is in effect, in connection with services provided to the Company or any affiliate, will be treated as having a value equal to the "liquidation value" of such interest as determined in the manner described in the IRS Notice. Owner or the Company is directed to make the Safe Harbor Valuation Election after the revenue procedure proposed in the IRS Notice is issued in final form, and may, in its discretion, make such an election or a similar election if such revenue procedure (or guidance of a similar nature) is ultimately issued by the Internal Revenue Service in modified form. The Safe Harbor Valuation Election will be binding on Participant with respect to each transfer of such a "safe harbor partnership interest" while such election is in effect. Participant agrees to comply with any reasonable request of Owner or the Company that, in Owner or the Company's good faith judgment, is necessary to comply with the requirements of the Safe Harbor Valuation Election described in the proposed revenue procedure, as incorporated in the anticipated revenue procedure or other guidance issued in final form, with respect to all Participation Interests that are transferred in connection with the performance of services while such election remains in effect. Such Safe Harbor Valuation Election will remain in effect until terminated in accordance with the rules set forth in the anticipated Internal Revenue Service guidance described in the IRS Notice as ultimately issued. Owner or the Company is further authorized, in its discretion and without the consent of Participant, to revoke a Safe Harbor Valuation Election previously made; *provided* that such revocation may be made only with the written consent of Participant if such revocation would result in an inclusion in Participant's income in connection with the transfer of a Participation Interest to Participant, or in other adverse tax consequences to Participant.

3. Capital Account and Allocations of Tax Items. A separate capital account (a "Capital Account") shall be established for the Participant and shall be maintained in accordance

with applicable regulations ("Treasury Regulations") under the Internal Revenue Code of 1986, as amended (the "Code"). As of the Effective Date, the initial value of the Capital Account of the Owner shall be deemed to be equal to the "book value," as such term is used in Treasury Regulation Section 1.704-1, which is equal to the sum of (i) the unreturned Contributed Amounts as of the Effective Date, and (ii) the Gap Amount. Tax Items shall be allocated between Owner and Participant in the ratio of their respective Participation Percentages (the Owner's Participation Percentage, for this purpose, being the result of subtracting all the Participants' Participation Percentages from 100%) as though the provisions of this Agreement had been recited in the Company Agreement.

Without limiting the foregoing, (a) the provisions of the Treasury Regulations related to "qualified income offsets," "partner minimum gain," "partnership minimum gain," "partnership nonrecourse debt," "partner nonrecourse debt," "minimum gain chargebacks" and "partner minimum gain chargebacks" are incorporated herein by reference, (b) Participant shall be allocated from Owner the Participation Percentage of "nonrecourse deductions" and of "excess nonrecourse liabilities" (as such terms are defined in applicable Treasury Regulations) allocable to Owner, and Owner shall be allocated the remainder of such amounts with respect to the Owner Interest and (c) the allocations of Tax Items pursuant to this Section 3 are intended to have "substantial economic effect" or otherwise reflect Owner's and Participant's "interests in the partnership" or the economic effect equivalence test of Treasury Regulation Section 1.704-1(b)(2)(ii)(*I*), all determined as if the provisions of this Agreement were recited in the Company Agreement.

Losses allocated pursuant to the provisions of this Section 3 shall not exceed the maximum amount of losses that can be so allocated without causing any Participant to have a deficit balance in its Adjusted Capital Account at the end of any year. Net income shall be specially allocated to the Participant to the extent necessary so that distributions pursuant to Section 2 will not result in a deficit balance in Participant's Adjusted Capital Account. Allocations of net income shall be made in proportion to categories of net income rather than gross income items. In the event that the Owner Interest is subject to other participation interests, the allocations in this Section 3 shall be made to the Participant in the proportion that the Participation Interest bears to all other such participation interests. To the maximum extent permitted by law, any distributions by the Company to the Owner, and any Distributions to Participant of Owner Distributions under this Agreement, shall be treated as being properly allocable to the proceeds of a non-recourse liability proceeds using any reasonable method permitted by Treasury Regulation Section 1.704-2(h)(2).

Participant and Owner agree that Participant shall be treated for federal, state and local income and other tax purposes as though the Participation Interest were held directly by Participant as a member of the Company and in accordance therewith, Participant shall be treated as a partner for federal, state and local income and other tax purposes and shall be treated as such on the tax returns of the Company. The arrangement contemplated hereby shall not and is not intended to be a partnership or joint venture for any other purpose, and the tax treatment of the Participation Interest shall not in any way affect the rights and obligations of the parties for any non-tax purpose.

4. Transfers.

(a) Limitations. The Participation Interest shall not be transferred or otherwise disposed of in any manner, for value or otherwise, and whether by sale, gift, bequest, assignment, pledge or encumbrance and whether effected by contract, by operation of law or otherwise. Notwithstanding the foregoing, subject to the limitations on transfer set forth in the Company Agreement, and provided that Owner has previously consented (which consent may be given or withheld in Owner's sole discretion), the Participation Interest may be so transferred, in whole or in part, to, but only to, members of Participant's immediate family (other than minors, unless in trust) and/or to one or more trusts primarily for their benefit, and any such transferee shall be required to acknowledge and agree to be bound by all of the terms and conditions of this Agreement.

(b) For a period of one year from and after (i) the death or Disability of Participant or the termination of Participant's employment, with or without cause, with any Owner Controlled Entity (without Participant being hired by any other Owner Controlled Entity), or (ii) Owner or any senior executives of any Owner Controlled Entity obtaining actual knowledge that Participant is performing any professional services for any person which develops, acquires, owns, operates or manages any property in the geographic area in which either Owner or an Owner Controlled Entity owns or is then actively pursuing real estate opportunities (the "Competing Services"), and has not otherwise committed a Bad Boy Act (in which case Participant shall forfeit the Participation Interests pursuant to Section 12 hereof), then Owner shall have the right, at Owner's option, to purchase the Participation Interest for an amount equal to the product of the Liquidation Amount and the Sale Ratio. Owner shall have the right to assign the rights under this option. The purchase price for the Participation Interest may be paid, at the election of the purchaser, over four years with no more than 20% of the purchase price being paid on the closing date for the purchase and at least an additional 20% of the aggregate purchase price being paid on the first, second, third and fourth year anniversary of such closing date (except in the case of any final payment if the prior annual payments were greater than 20%), with interest calculated at 225 basis points above the average effective yield on U.S. Treasury obligations maturing on the date closest to the fourth anniversary of such closing date as reported in the Wall Street Journal or any successor thereto plus any and all accrued interest on the outstanding principal amount at the time of each annual payment. If Participant and the purchaser are unable to agree on the purchase price for the Participation Interest within 15 days after the exercise of the option to purchase, then a qualified appraiser, selected by the purchaser, shall determine the purchase price under the terms of this Section 4, the cost of such appraisal to be borne equally by the purchaser and the Participant. If, after closing on a purchase of the Participation Interest in accordance with this Section 4(b), Owner determines that clause (ii) of this Section 4(b) applies, then subsequent payments to be made to Participant under this Section 4(b) shall be reduced, as necessary, by the application of clause (ii) of this Section 4(b) to the calculation of the purchase price hereunder.

(c) Disposition of Owner Interest. If Owner sells or otherwise disposes of all or a portion of the Owner Interest, other than as provided in the sentence immediately following this sentence, then the net sale proceeds, as reasonably determined by Owner, with respect to such disposition, shall be treated as Owner Distributions for purposes of Section 2(b). The provisions of the preceding sentence shall not apply to (i) any transfers to affiliates as long as Owner or members of Burr's Family own substantially all of the indirect or direct interest in such affiliates, (ii) any charitable dispositions, (iii) any dispositions directly, in trust or otherwise as gifts or for

estate planning purposes, or (vi) any dispositions to employees of any Owner Controlled Entity, of an Owner Interest, in all of which events the Participation Interest shall continue to encumber the remaining Owner Interest but shall not encumber any of the portion thereof which has been so disposed of. In the event of any transfer or disposition as described in the immediately preceding sentence, the Participation Percentage of Participant in the portion of the Owner Interest retained by Owner shall be appropriately adjusted.

(d) Consolidation Event. Subject in all events to Section 4(c) of this Agreement, in the event that a Consolidation Event occurs, Participant shall retain the same Participation Interest in the Owner Interest that Participant had before any such Consolidation Event, with the Owner Interest being the interest in any such new or other entity or assets properly attributable to the Owner Interest, all as reasonably determined by Owner (the "New Owner Interest"). The New Owner Interest shall remain subject to the provisions of this Agreement, subject to a replacement Schedule provided by Owner. Notwithstanding the foregoing, in the event of any Consolidation Event, Owner, at Owner's option and sole discretion, may substitute for the Participation Interest granted hereunder a more direct interest in the ultimate surviving entity involved in such Consolidation Event or in any upper tier entity holding an interest in such ultimate surviving entity, *provided that* Owner holds an interest in such entity, directly or indirectly, on account of the Owner Interest. Such substitute interest for the Participation Interest shall be determined by Owner, in Owner's reasonable judgment, based upon the relative values used by the various parties to any such Consolidation Event, and any contributed amounts and all other economic factors relevant to the determination of the value of the Participation Interest vis-à-vis the remainder of the Owner Interest. In addition, Participant agrees that Participant will execute an acknowledgement of any changes in the description of the Participation Interest contemplated by the above upon notice of such changes by Owner.

5. Lack of Authority to Act. Participant acknowledges and agrees that Participant has no interest in the Company or any Company Affiliate as a member, that Participant has no right to participate in the management of the Company or any Company Affiliate and that Participant's rights with respect to the Company and any Company Affiliate are limited to those expressly set forth in this Agreement. Without limiting the foregoing, Participant acknowledges and agrees that any sale or other disposition by the Company or any Company Affiliate, directly or indirectly, of any of its property or, except as provided in Section 4(d) above, by the Owner of all or any portion of the Owner Interest, shall be valid, binding and enforceable against Participant, with the same force and effect as if Participant had assented thereto, and that, in such event, Participant's rights shall be limited to receiving the Participation Interest's share, if any, of the net proceeds of any such disposition, which share shall be determined as described in Section 4(d) of this Agreement.

Participant agrees not to assert any right or claim at any time, either individually or derivatively, against Owner, the Company, any Company Affiliate, members of Burr's Family, any of their respective affiliates, any entity in which any of them has an interest, or any equity holder in any of them (the foregoing persons, the "Mentioned Persons") based on any allegation or assertion to the effect that any such person breached any duty to any other person involved or that the business or affairs of Owner, the Company, any Company Affiliate or any such affiliate (or any successor thereto) shall not have been conducted prudently or in the best interests of any of the Mentioned Persons or Participant, or any other similar allegation regarding the conduct of

the affairs of any such person and further, hereby irrevocably waives any and all duties and obligations of any nature whatsoever that any of the Mentioned Persons may otherwise have at law or in equity except for the duty to make the distributions under Section 2 hereof; provided, however, that this provision shall not be applicable with respect to any rights or claims asserted by Participant against Owner predicated upon intentional action or inaction in bad faith which discriminates in favor of Owner and against Participant.

Participant hereby specifically acknowledges that the Participation Interest is subordinate to any pledge or other hypothecation by Owner of the Owner Interest as security for any loan. Participant acknowledges that in the event of a foreclosure or other disposition as a result of such pledge or other hypothecation, the Participation Interest hereunder shall be only as to Participant's share of the proceeds of such foreclosure or other disposition, if any, determined without regard to any such pledge or other hypothecation, unless such pledge or other hypothecation was made for the benefit of the Company or any Company Affiliate and/or such proceeds are used by or for the Company or any Company Affiliate, in which event the Participation Interest hereunder shall be only as to Participant's share of the excess proceeds, if any, resulting from such foreclosure or other disposition, in each case as if any part of the Owner Interest had been voluntarily disposed of by Owner.

6. No Right to Advances of Funds. Participant shall not have any right to advance funds to or on behalf of Participant to participate in any funding of the Company.

7. Representations and Warranties. Participant hereby represents and warrants to Owner, the Company, and each of the other members of the Company as follows:

(a) Either alone or together with Participant's investment advisor or other representative ("Purchaser Representative"), Participant has such knowledge and experience in financial and business matters that Participant is capable of evaluating the merits and risks of Participant's participation in this Agreement.

(b) Participant is familiar with the properties and project(s) of the Company and the risks associated therewith and Participant and/or Purchaser Representative has received a copy of the Company Agreement and has had an opportunity to ask questions of and receive answers from the Company and Owner, or a person or persons acting on behalf of Owner and the Company, concerning the terms and conditions of Participant's participation in the Company.

(c) Participant acknowledges that the Participation Interest has not been registered under the Securities Act of 1933, as amended (the "Securities Act") in reliance on an exemption for private offerings, and that the Participation Interest is being acquired solely for Participant's own account, for investment, and is not being acquired with a view to or for the resale, distribution, subdivision or fractionalization thereof, and Participant has no present plans to enter into any contract, undertaking, agreement or arrangement relating thereto.

(d) Participant acknowledges and is aware that: (i) there are substantial restrictions on the transfer of the Participation Interest, under the Company Agreement, the governing documents of other Company Affiliates, this Agreement and the Securities Act, (ii) the Participation Interest has not been registered under the Securities Act and cannot be sold unless it

is registered under the Securities Act or an exemption from registration is available and any proposed transfer is also made in compliance with applicable state securities law, and (iii) Participant has no right to require that the Participation Interest be registered under the Securities Act and, accordingly, that it may not be possible for Participant to liquidate the Participation Interest at any given time because there is no public market for such interest and no such market is expected to develop, and that Participant will have to hold such interest indefinitely. Participant acknowledges that Participant has no need for liquidity with respect to the Participation Interest and has sufficient liquidity for Participant's current and foreseeable future needs.

(e) Participant understands the tax consequences of holding the Participation Interest and agrees to report the Tax Items and distributions consistent with the terms hereof.

(f) Neither Participant, nor any of Participant's affiliates, is, nor will they become, a person or entity with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control ("OFAC") of the Department of the Treasury (including those named on OFAC's Specially Designated and Blocked Persons List) or under any statute, executive order (including the September 24, 2001, Executive Order Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism), or other governmental action and is not and will not engage in any dealings or transactions or be otherwise associated with such persons or entities.

(g) Participant understands the meaning and legal consequences of the representations and warranties contained in this Section 7, and hereby agrees to indemnify and hold harmless each of the Mentioned Persons from and against any and all loss, cost, damage, expense or liability (including attorneys' fees) due to or arising out of a breach of any representation, warranty, or covenant of Participant contained in this Section 7 or any other provision of this Agreement.

(h) The representations and warranties set forth in this Section 7 are true and accurate as of the date hereof and shall survive execution of this Agreement. By executing any Schedule attached hereto, Participant acknowledges that the representations and warranties set forth in this Section 7 are true and accurate as of the Effective Date set forth on such Schedule.

8. Further Assurances. Each of Participant and Owner agrees to execute, acknowledge and deliver such further instruments as may be deemed necessary or desirable to confirm and carry out the foregoing undertakings set forth herein, provided that the same do not result in a breach of Owner's obligations under the Company Agreement or any governing documents of any Company Affiliate.

9. Governing Law. This Agreement is, in accordance with the express intent and agreement of Owner and Participant, to be construed according to and governed by the laws of The Commonwealth of Massachusetts.

10. Binding Agreement. This Agreement shall be binding upon and shall inure to the benefit of Owner and Participant and their respective permitted heirs, executors, representatives, successors and assigns.

11. No Right to Be a Service Provider. Participant acknowledges that Participant has and has acquired no right to be an employee or service provider of the Employer or any Owner Controlled Entity or any other entity as a result of the receipt of the Participation Interest described in this Agreement.

12. Forfeiture of Participation Interest Upon Termination of Employment for Bad Boy Acts. Notwithstanding anything in this Agreement to the contrary, if Owner or any senior executive of any Owner Controlled Entity obtains actual knowledge that Participant has committed a Bad Boy Act against the Company, the Owner or any affiliate thereof, Participant shall forfeit the Participation Interest without consideration or payment of any kind, and this Agreement shall be automatically terminated.

13. Construction. Whenever the term "member" is used herein in reference to any entity that is not a limited liability company, such term shall be deemed to refer to the applicable equity owner in such entity.

14. Definitions. The following terms used in this Agreement have the meanings set forth below.

"Adjusted Capital Account" means, with respect to any Member, such Member's Capital Account as of the date of determination, after crediting to such Capital Account (without duplication and to the extent not previously taken into account) any amounts that the Member is obligated or deemed obligated to restore (to the extent recognized under Treasury Regulations Sections 1.704 1(b)(2)(ii)(c) and 1.704-2) and debiting to such Capital Account the items described in Treasury Regulations Section 1.704 1(b)(2)(ii)(d)(4), (5) or (6). The foregoing definition of Adjusted Capital Account and the provisions of Section 3 are intended to comply with the provisions of Treasury Regulations Section 1.704 1(b)(2)(ii)(d) and shall be interpreted and applied consistently therewith.

"Agreement" shall mean this Participation Agreement as the same may be amended from time to time.

"Bad Boy Act" means any act or omission to act that constitutes willful misconduct (including without limitation misappropriation of funds), intentional fraud, or willful violation of law, or results in conviction by a court of competent jurisdiction for a felony predicated upon fraud or financial dishonesty or a felony that results in a prison sentence.

"Burr" shall mean Robert S. Burr.

"Burr's Family" shall mean, and is limited to, Burr, Burr's spouse, parents, parents-in-law, grandparents, children, siblings (and their lineal descendents), and grandchildren. A trust, estate, family partnership, limited liability company or corporation, substantially all of the beneficiaries, partners, members or shareholders of which consist of Burr or members of Burr's Family, shall be considered part of Burr's Family for the purposes of this Agreement.

"Capital Account" has the meaning set forth in Section 3 hereof.

"Code" has the meaning set forth in Section 3 hereof.

"Capital Transaction" means refinancing, financing, or sale of Company assets.

"Capital Transaction Proceeds" means proceeds of the Company from any Capital Transaction, less all costs, expenses, liabilities and obligation of the Company, or of the Owner in respect of the Owner Interests, as the case may be, and together with reasonable reserves for any such costs, expenses, liabilities and obligations, known or unknown, at the time of such Capital Transaction.

"Company" shall have the meaning set forth in Recital A to this Agreement.

"Company Affiliate" shall mean any entity in which the Company owns any direct or indirect interest.

"Company Agreement" shall mean the limited liability company agreement, operating agreement or other governing documents of the Company, as amended from time to time.

"Competing Services" shall have the meaning set forth in Section 4(b).

"Consolidation Event" shall mean any event in which either the Company or Owner, as to the Owner Interest, merges or consolidates with and/or contributes all or substantially all of the Company's property or Owner contributes the Owner Interest, as the case may be, to another corporation, limited liability company, partnership, business trust or any other form of incorporated or unincorporated entity or the Company exchanges all or any part of its assets or Owner exchanges the Owner Interest for other assets, whether in a taxable or non-taxable transaction.

"Contributed Amount" shall mean the amount of all capital contributions by the Owner in respect of the Owner Interest.

"Disability" shall mean any physical or mental incapacity or incapacities as a result of which Participant has been unable to substantially perform the duties assigned to him by Employer for an aggregate of 120 days during any 12-month period or 90 consecutive days during any 12-month period.

"Effective Date" shall have the meaning set forth on each Schedule attached hereto, which shall be the date on which the Participation Interest in respect of the Company named on such Schedule is granted.

"Employer" shall have the meaning set forth in Recital B to this Agreement.

"Gap Amount" means the amount Owner would have received on the Effective Date, excluding the Contributed Amount to be returned to Owner, had the Company sold all of its property for fair market value, all debts of the Company were then paid, and the remaining balance were distributed to the Owner. For purposes of this agreement, the Gap Amount in respect of the Company, if any, shall be set forth on the applicable Schedule attached hereto.

"IRS Notice" shall have the meaning set forth in Section 2(d) of this Agreement.

"Liquidation Amount" shall mean the net proceeds that would be distributed as to the Participation Interest under Section 2 hereof if (i) the Company's property (determined without reduction for discounts relating to lack of control or lack of marketability) were sold for its fair market value, (ii) all debts of the Company were then paid, and (iii) the Company were liquidated.

"Mentioned Persons" shall have the meaning set forth in Section 5 of this Agreement.

"New Owner Interest" shall have the meaning set forth in Section 4(d) of this Agreement.

"OFAC" shall have the meaning set forth in Section 7(f) of this Agreement.

"Owner" shall have the meaning set forth in the introductory statement to this Agreement.

"Owner Controlled Entity" shall mean any entity in which Owner and/or members of Burr's Family (i) are directly or indirectly more than a 50% equity holder or (ii) otherwise have control.

"Owner Distribution" shall mean any distribution of cash or other property from the Company to Owner pursuant to Section 6 of the Company Agreement, including a distribution upon liquidation of the Company pursuant to Section 9(c) of the Company Agreement or other Capital Transaction.

"Owner Interest" shall mean the interest of Owner in the Company.

"Participant" shall have the meaning set forth in the introductory statement to this Agreement.

"Participants" shall mean the Participant and each other person who holds participation interests issued by the Owner with respect to the Owner Interest.

"Participation Interest" shall mean the interest in the Owner Interest granted to Participant by Owner hereunder and subject to the terms and conditions hereof.

"Participation Percentage" shall having the meaning set forth on the applicable Schedule attached hereto.

"Purchaser Representative" shall have the meaning set forth in Section 7(a) of this Agreement.

"Safe Harbor Valuation Election" shall have the meaning set forth in Section 2(d) of this Agreement.

"Sale Ratio" shall refer to the amount so designated on Schedule A attached hereto.

"Securities Act" shall have the meaning set forth in Section 7(c) of this Agreement.

"Tax Items" shall mean each item of income, gain, loss, deduction and credit allocable to Owner on account of his Owner Interest under the terms of the Company Agreement, as determined without regard to this Agreement.

"Terminating Capital Transaction" means a sale of substantially all of (i) the assets of the Company that results in the liquidation of the Company or (ii) all of the limited liability company interests in the Company.

"Treasury Regulations" has the meaning set forth in Section 3 hereof.

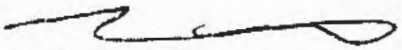
[Remainder of page intentionally left blank]

EXECUTED under seal, in any number of counterpart copies, each of which counterpart copies shall be deemed an original for all purposes.

OWNER:

Robert S. Burr

PARTICIPANT:



Michael Gerhardt

SCHEDULE A
140 COMMONWEALTH AVENUE, DANVERS MA

Name and Mailing Address of Owner:
Robert S. Burr
College Street Partners LLC
900 Cummings Center
Beverly, MA 01915

Name and Mailing Address of Participant:
Michael Gerhardt
Address: 27 Martin St. Essex, MA 01929

Name and Mailing Address of Company to which Participation Interest Relates:
140 Commonwealth Avenue-Danvers LLC
c/o Robert S. Burr
College Street Partners LLC
900 Cummings Center
Beverly, MA 01915

Company Agreement as most recently amended and in effect:
Operating Agreement of 140 Commonwealth Avenue-Danvers LLC, dated as of September 4, 2008.

Participation Percentage: 10%

Effective Date: July 1, 2009

Gap Amount: $171,669.

Sale Ratio: 100%, if Owner exercises his purchase option set forth in Section 4(b) of the Agreement upon the death or Disability of Participant or upon termination of Participant's employment with Employer without cause.

70%, if Owner exercises his purchase option set forth in Section 4(b) of the Agreement upon termination of Participant's employment with Employer with cause or in the event that Participant performs any Competing Services.

OWNER:

Name: Robert S. Burr

PARTICIPANT:

Name: Michael Gerhardt

PARTICIPATION AGREEMENT

This PARTICIPATION AGREEMENT is made as of July 1, 2009 by and between Robert S. Burr ("Owner") and Lauren Seaverns ("Participant").

RECITALS

A. As of the Effective Date, Owner is a member of that certain limited liability company or other entity set forth under the heading "Name and Mailing Address of Company" on each Schedule attached hereto (the "Company") and owns, directly or indirectly, limited liability company interests in the Company.

B. Participant is a provider of services to an affiliate of the Owner (the "Employer") and such services to the Employer will enhance the value of the Company.

C. Owner wishes to provide Participant with an economic interest in a portion of the Owner Interest on the terms and subject to the provisions of this Agreement.

D. The Participation Interest is being granted in exchange for the provision of services by the Participant to or for the benefit of the Company in a Member capacity, or in anticipation of being a Member. The Owners intend that the Participation Interest qualify as "profits" interests, as defined in Rev. Proc. 93-27, 1993-2 C.B. 343, and each of the Company, and the Participant shall treat the Participant as the owner of the Participation Interest granted hereunder.

E. Capitalized terms used in this Agreement are defined in Section 14 below.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

1. Grant of Participation Interest. As of the Effective Date, Owner hereby assigns the Participation Interest to Participant. Notwithstanding anything in this Agreement to the contrary, the rights of Participant in the Participation Interest:

(a) are subject to the terms and conditions of the Company Agreement;

(b) as between Participant and Owner, shall provide Participant with the same economic interest in the Company that Participant would have if the economic interest of the Participation Interest were recited in the Company Agreement;

(c) shall provide Participant solely with the economic interest and Tax Items described herein, and Participant shall have no other rights or interest in (including but not limited to any right to vote or otherwise participate in the management or other affairs of) the Company, any Company Affiliate, Owner, any Owner Controlled Entity or any other direct or indirect property of Owner;

(d) shall be subject to dilution, *pari passu*, with and on the same terms as the Owner Interest, without regard to the reason for such dilution; and

(e) shall be subject to all of the terms and conditions provided herein.

2. Distributions.

(a) Cash Flow Distributions. Within a reasonable period after receipt by Owner of any Owner Distribution other than a Distribution in respect of a Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash (or, if such Owner Distribution is made in kind, then at Owner's sole discretion, a portion of such other property equal in value, or cash equal in value to such property) equal to the product of (i) the Participation Percentage and (ii) such Owner Distribution.

(b) Distribution Upon Capital Transactions Other Than a Terminating Capital Transaction. Within a reasonable period of receipt by Owner of Owner Distributions from Capital Transaction Proceeds with respect to any Capital Transaction other than a Terminating Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash computed as though the Owner Distributions from such Capital Transaction Proceeds are divided between the Owner and all Participants in the following manner:

1. First, 100% to Owner until Owner has received all unreturned Contributed Amounts;

2. Thereafter, pro rata, to the Owner and to each of the Participants, in accordance with each person's Participation Percentage (assuming, for this purpose, that the Owner's Participation Percentage is equal to the result of subtracting all the Participants' Participation Percentages from 100%).

(c) Distributions Upon Terminating Capital Transactions.

1. Within a reasonable period of receipt by Owner of Owner Distributions from Capital Transaction Proceeds with respect to a Terminating Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash equal to the Participant's Capital Account, after giving effect to all contributions, distributions and allocations of Tax Items for periods, including the year during which the Terminating Capital Transaction occurs. If the Participant has a deficit balance in its Capital Account (after giving effect to all contributions, distributions and allocations for all periods, including the year during which such liquidation occurs), Participant shall have no obligation to make any contribution to the capital of the Company with respect to such deficit, and such deficit shall not be considered a debt owed to the Company or to any other person for any purpose whatsoever.

2. Notwithstanding the provisions of Section 3 hereof, in the year of the Terminating Capital Transaction, items of net income and deduction shall be allocated to the Participant and the Owner to the extent necessary to

produce Capital Accounts for the Participant and Owner such that amounts distributed pursuant to this Section 2(c) will be in the amounts Participant would have received under Section 2(b) hereof had the distribution not been a distribution upon a Terminating Capital Transaction.

(d) Acknowledgements. Participant acknowledges that (i) Participant's interest in the Participation Interest does not entitle Participant to any share of any fee or any other payment by the Company to Owner, any Owner Controlled Entity or any affiliate thereof, or of any other fee or payment made to any other member of the Company for any reason whatever, (ii) Participant's Participation Interest in the Owner Interest does not include any interest which Owner may hereafter acquire in the Company or any Company Affiliate (iii) the Company may make repayments on intercompany debt held by Owner or any Owner Controlled Entity, which, at the discretion of the Manager, may be of first priority on the use of the Company's available cash; and (iv) Owner, the Company, or any other person shall not be obligated to make funds available to Participant to facilitate the payment of any taxes that may be attributable to Participant's ownership of the Participation Interest.

(e) Safe Harbor Valuation Election. Notwithstanding any provision of this Agreement to the contrary, Owner or the Company, without the consent of Participant, is hereby authorized and directed to elect, on behalf of Participant, to make the "safe harbor election" (the "Safe Harbor Valuation Election") described in Internal Revenue Service Notice 2005-43 (the "IRS Notice") pursuant to which each "safe harbor partnership interest" (as defined in the IRS Notice) that is transferred to Participant (and in the case that the Participant is an entity, any person that is a partner or member of that entity) while the election is in effect, in connection with services provided to the Company or any affiliate, will be treated as having a value equal to the "liquidation value" of such interest as determined in the manner described in the IRS Notice. Owner or the Company is directed to make the Safe Harbor Valuation Election after the revenue procedure proposed in the IRS Notice is issued in final form, and may, in its discretion, make such an election or a similar election if such revenue procedure (or guidance of a similar nature) is ultimately issued by the Internal Revenue Service in modified form. The Safe Harbor Valuation Election will be binding on Participant with respect to each transfer of such a "safe harbor partnership interest" while such election is in effect. Participant agrees to comply with any reasonable request of Owner or the Company that, in Owner or the Company's good faith judgment, is necessary to comply with the requirements of the Safe Harbor Valuation Election described in the proposed revenue procedure, as incorporated in the anticipated revenue procedure or other guidance issued in final form, with respect to all Participation Interests that are transferred in connection with the performance of services while such election remains in effect. Such Safe Harbor Valuation Election will remain in effect until terminated in accordance with the rules set forth in the anticipated Internal Revenue Service guidance described in the IRS Notice as ultimately issued. Owner or the Company is further authorized, in its discretion and without the consent of Participant, to revoke a Safe Harbor Valuation Election previously made; *provided* that such revocation may be made only with the written consent of Participant if such revocation would result in an inclusion in Participant's income in connection with the transfer of a Participation Interest to Participant, or in other adverse tax consequences to Participant.

3. Capital Account and Allocations of Tax Items. A separate capital account (a "Capital Account") shall be established for the Participant and shall be maintained in accordance

with applicable regulations ("Treasury Regulations") under the Internal Revenue Code of 1986, as amended (the "Code"). As of the Effective Date, the initial value of the Capital Account of the Owner shall be deemed to be equal to the "book value," as such term is used in Treasury Regulation Section 1.704-1, which is equal to the sum of (i) the unreturned Contributed Amounts as of the Effective Date, and (ii) the Gap Amount. Tax Items shall be allocated between Owner and Participant in the ratio of their respective Participation Percentages (the Owner's Participation Percentage, for this purpose, being the result of subtracting all the Participants' Participation Percentages from 100%) as though the provisions of this Agreement had been recited in the Company Agreement.

Without limiting the foregoing, (a) the provisions of the Treasury Regulations related to "qualified income offsets," "partner minimum gain," "partnership minimum gain," "partnership nonrecourse debt," "partner nonrecourse debt," "minimum gain chargebacks" and "partner minimum gain chargebacks" are incorporated herein by reference, (b) Participant shall be allocated from Owner the Participation Percentage of "nonrecourse deductions" and of "excess nonrecourse liabilities" (as such terms are defined in applicable Treasury Regulations) allocable to Owner, and Owner shall be allocated the remainder of such amounts with respect to the Owner Interest and (c) the allocations of Tax Items pursuant to this Section 3 are intended to have "substantial economic effect" or otherwise reflect Owner's and Participant's "interests in the partnership" or the economic effect equivalence test of Treasury Regulation Section 1.704-1(b)(2)(ii)(*i*), all determined as if the provisions of this Agreement were recited in the Company Agreement.

Losses allocated pursuant to the provisions of this Section 3 shall not exceed the maximum amount of losses that can be so allocated without causing any Participant to have a deficit balance in its Adjusted Capital Account at the end of any year. Net income shall be specially allocated to the Participant to the extent necessary so that distributions pursuant to Section 2 will not result in a deficit balance in Participant's Adjusted Capital Account. Allocations of net income shall be made in proportion to categories of net income rather than gross income items. In the event that the Owner Interest is subject to other participation interests, the allocations in this Section 3 shall be made to the Participant in the proportion that the Participation Interest bears to all other such participation interests. To the maximum extent permitted by law, any distributions by the Company to the Owner, and any Distributions to Participant of Owner Distributions under this Agreement, shall be treated as being properly allocable to the proceeds of a non-recourse liability proceeds using any reasonable method permitted by Treasury Regulation Section 1.704-2(h)(2).

Participant and Owner agree that Participant shall be treated for federal, state and local income and other tax purposes as though the Participation Interest were held directly by Participant as a member of the Company and in accordance therewith, Participant shall be treated as a partner for federal, state and local income and other tax purposes and shall be treated as such on the tax returns of the Company. The arrangement contemplated hereby shall not and is not intended to be a partnership or joint venture for any other purpose, and the tax treatment of the Participation Interest shall not in any way affect the rights and obligations of the parties for any non-tax purpose.

4. Transfers.

(a) Limitations. The Participation Interest shall not be transferred or otherwise disposed of in any manner, for value or otherwise, and whether by sale, gift, bequest, assignment, pledge or encumbrance and whether effected by contract, by operation of law or otherwise. Notwithstanding the foregoing, subject to the limitations on transfer set forth in the Company Agreement, and provided that Owner has previously consented (which consent may be given or withheld in Owner's sole discretion), the Participation Interest may be so transferred, in whole or in part, to, but only to, members of Participant's immediate family (other than minors, unless in trust) and/or to one or more trusts primarily for their benefit, and any such transferee shall be required to acknowledge and agree to be bound by all of the terms and conditions of this Agreement.

(b) For a period of one year from and after (i) the death or Disability of Participant or the termination of Participant's employment, with or without cause, with any Owner Controlled Entity (without Participant being hired by any other Owner Controlled Entity), or (ii) Owner or any senior executives of any Owner Controlled Entity obtaining actual knowledge that Participant is performing any professional services for any person which develops, acquires, owns, operates or manages any property in the geographic area in which either Owner or an Owner Controlled Entity owns or is then actively pursuing real estate opportunities (the "Competing Services"), and has not otherwise committed a Bad Boy Act (in which case Participant shall forfeit the Participation Interests pursuant to Section 12 hereof), then Owner shall have the right, at Owner's option, to purchase the Participation Interest for an amount equal to the product of the Liquidation Amount and the Sale Ratio. Owner shall have the right to assign the rights under this option. The purchase price for the Participation Interest may be paid, at the election of the purchaser, over four years with no more than 20% of the purchase price being paid on the closing date for the purchase and at least an additional 20% of the aggregate purchase price being paid on the first, second, third and fourth year anniversary of such closing date (except in the case of any final payment if the prior annual payments were greater than 20%), with interest calculated at 225 basis points above the average effective yield on U.S. Treasury obligations maturing on the date closest to the fourth anniversary of such closing date as reported in the Wall Street Journal or any successor thereto plus any and all accrued interest on the outstanding principal amount at the time of each annual payment. If Participant and the purchaser are unable to agree on the purchase price for the Participation Interest within 15 days after the exercise of the option to purchase, then a qualified appraiser, selected by the purchaser, shall determine the purchase price under the terms of this Section 4, the cost of such appraisal to be borne equally by the purchaser and the Participant. If, after closing on a purchase of the Participation Interest in accordance with this Section 4(b), Owner determines that clause (ii) of this Section 4(b) applies, then subsequent payments to be made to Participant under this Section 4(b) shall be reduced, as necessary, by the application of clause (ii) of this Section 4(b) to the calculation of the purchase price hereunder.

(c) Disposition of Owner Interest. If Owner sells or otherwise disposes of all or a portion of the Owner Interest, other than as provided in the sentence immediately following this sentence, then the net sale proceeds, as reasonably determined by Owner, with respect to such disposition, shall be treated as Owner Distributions for purposes of Section 2(b). The provisions of the preceding sentence shall not apply to (i) any transfers to affiliates as long as Owner or members of Burr's Family own substantially all of the indirect or direct interest in such affiliates, (ii) any charitable dispositions, (iii) any dispositions directly, in trust or otherwise as gifts or for

estate planning purposes, or (vi) any dispositions to employees of any Owner Controlled Entity, of an Owner Interest, in all of which events the Participation Interest shall continue to encumber the remaining Owner Interest but shall not encumber any of the portion thereof which has been so disposed of. In the event of any transfer or disposition as described in the immediately preceding sentence, the Participation Percentage of Participant in the portion of the Owner Interest retained by Owner shall be appropriately adjusted.

(d) Consolidation Event. Subject in all events to Section 4(c) of this Agreement, in the event that a Consolidation Event occurs, Participant shall retain the same Participation Interest in the Owner Interest that Participant had before any such Consolidation Event, with the Owner Interest being the interest in any such new or other entity or assets properly attributable to the Owner Interest, all as reasonably determined by Owner (the "New Owner Interest"). The New Owner Interest shall remain subject to the provisions of this Agreement, subject to a replacement Schedule provided by Owner. Notwithstanding the foregoing, in the event of any Consolidation Event, Owner, at Owner's option and sole discretion, may substitute for the Participation Interest granted hereunder a more direct interest in the ultimate surviving entity involved in such Consolidation Event or in any upper tier entity holding an interest in such ultimate surviving entity, *provided that* Owner holds an interest in such entity, directly or indirectly, on account of the Owner Interest. Such substitute interest for the Participation Interest shall be determined by Owner, in Owner's reasonable judgment, based upon the relative values used by the various parties to any such Consolidation Event, and any contributed amounts and all other economic factors relevant to the determination of the value of the Participation Interest vis-à-vis the remainder of the Owner Interest. In addition, Participant agrees that Participant will execute an acknowledgement of any changes in the description of the Participation Interest contemplated by the above upon notice of such changes by Owner.

5. Lack of Authority to Act. Participant acknowledges and agrees that Participant has no interest in the Company or any Company Affiliate as a member, that Participant has no right to participate in the management of the Company or any Company Affiliate and that Participant's rights with respect to the Company and any Company Affiliate are limited to those expressly set forth in this Agreement. Without limiting the foregoing, Participant acknowledges and agrees that any sale or other disposition by the Company or any Company Affiliate, directly or indirectly, of any of its property or, except as provided in Section 4(d) above, by the Owner of all or any portion of the Owner Interest, shall be valid, binding and enforceable against Participant, with the same force and effect as if Participant had assented thereto, and that, in such event, Participant's rights shall be limited to receiving the Participation Interest's share, if any, of the net proceeds of any such disposition, which share shall be determined as described in Section 4(d) of this Agreement.

Participant agrees not to assert any right or claim at any time, either individually or derivatively, against Owner, the Company, any Company Affiliate, members of Burr's family, any of their respective affiliates, any entity in which any of them has an interest, or any equity holder in any of them (the foregoing persons, the "Mentioned Persons") based on any allegation or assertion to the effect that any such person breached any duty to any other person involved or that the business or affairs of Owner, the Company, any Company Affiliate or any such affiliate (or any successor thereto) shall not have been conducted prudently or in the best interests of any of the Mentioned Persons or Participant, or any other similar allegation regarding the conduct of

the affairs of any such person and further, hereby irrevocably waives any and all duties and obligations of any nature whatsoever that any of the Mentioned Persons may otherwise have at law or in equity except for the duty to make the distributions under Section 2 hereof; provided, however, that this provision shall not be applicable with respect to any rights or claims asserted by Participant against Owner predicated upon intentional action or inaction in bad faith which discriminates in favor of Owner and against Participant.

Participant hereby specifically acknowledges that the Participation Interest is subordinate to any pledge or other hypothecation by Owner of the Owner Interest as security for any loan. Participant acknowledges that in the event of a foreclosure or other disposition as a result of such pledge or other hypothecation, the Participation Interest hereunder shall be only as to Participant's share of the proceeds of such foreclosure or other disposition, if any, determined without regard to any such pledge or other hypothecation, unless such pledge or other hypothecation was made for the benefit of the Company or any Company Affiliate and/or such proceeds are used by or for the Company or any Company Affiliate, in which event the Participation Interest hereunder shall be only as to Participant's share of the excess proceeds, if any, resulting from such foreclosure or other disposition, in each case as if any part of the Owner Interest had been voluntarily disposed of by Owner.

6. No Right to Advances of Funds. Participant shall not have any right to advance funds to or on behalf of Participant to participate in any funding of the Company.

7. Representations and Warranties. Participant hereby represents and warrants to Owner, the Company, and each of the other members of the Company as follows:

(a) Either alone or together with Participant's investment advisor or other representative ("Purchaser Representative"), Participant has such knowledge and experience in financial and business matters that Participant is capable of evaluating the merits and risks of Participant's participation in this Agreement.

(b) Participant is familiar with the properties and project(s) of the Company and the risks associated therewith and Participant and/or Purchaser Representative has received a copy of the Company Agreement and has had an opportunity to ask questions of and receive answers from the Company and Owner, or a person or persons acting on behalf of Owner and the Company, concerning the terms and conditions of Participant's participation in the Company.

(c) Participant acknowledges that the Participation Interest has not been registered under the Securities Act of 1933, as amended (the "Securities Act") in reliance on an exemption for private offerings, and that the Participation Interest is being acquired solely for Participant's own account, for investment, and is not being acquired with a view to or for the resale, distribution, subdivision or fractionalization thereof, and Participant has no present plans to enter into any contract, undertaking, agreement or arrangement relating thereto.

(d) Participant acknowledges and is aware that: (i) there are substantial restrictions on the transfer of the Participation Interest, under the Company Agreement, the governing documents of other Company Affiliates, this Agreement and the Securities Act, (ii) the Participation Interest has not been registered under the Securities Act and cannot be sold unless it

is registered under the Securities Act or an exemption from registration is available and any proposed transfer is also made in compliance with applicable state securities law, and (iii) Participant has no right to require that the Participation Interest be registered under the Securities Act and, accordingly, that it may not be possible for Participant to liquidate the Participation Interest at any given time because there is no public market for such interest and no such market is expected to develop, and that Participant will have to hold such interest indefinitely. Participant acknowledges that Participant has no need for liquidity with respect to the Participation Interest and has sufficient liquidity for Participant's current and foreseeable future needs.

(e) Participant understands the tax consequences of holding the Participation Interest and agrees to report the Tax Items and distributions consistent with the terms hereof.

(f) Neither Participant, nor any of Participant's affiliates, is, nor will they become, a person or entity with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control ("OFAC") of the Department of the Treasury (including those named on OFAC's Specially Designated and Blocked Persons List) or under any statute, executive order (including the September 24, 2001, Executive Order Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism), or other governmental action and is not and will not engage in any dealings or transactions or be otherwise associated with such persons or entities.

(g) Participant understands the meaning and legal consequences of the representations and warranties contained in this Section 7, and hereby agrees to indemnify and hold harmless each of the Mentioned Persons from and against any and all loss, cost, damage, expense or liability (including attorneys' fees) due to or arising out of a breach of any representation, warranty, or covenant of Participant contained in this Section 7 or any other provision of this Agreement.

(h) The representations and warranties set forth in this Section 7 are true and accurate as of the date hereof and shall survive execution of this Agreement. By executing any Schedule attached hereto, Participant acknowledges that the representations and warranties set forth in this Section 7 are true and accurate as of the Effective Date set forth on such Schedule.

8. Further Assurances. Each of Participant and Owner agrees to execute, acknowledge and deliver such further instruments as may be deemed necessary or desirable to confirm and carry out the foregoing undertakings set forth herein, provided that the same do not result in a breach of Owner's obligations under the Company Agreement or any governing documents of any Company Affiliate.

9. Governing Law. This Agreement is, in accordance with the express intent and agreement of Owner and Participant, to be construed according to and governed by the laws of The Commonwealth of Massachusetts.

10. Binding Agreement. This Agreement shall be binding upon and shall inure to the benefit of Owner and Participant and their respective permitted heirs, executors, representatives, successors and assigns.

11. No Right to Be a Service Provider. Participant acknowledges that Participant has and has acquired no right to be an employee or service provider of the Employer or any Owner Controlled Entity or any other entity as a result of the receipt of the Participation Interest described in this Agreement.

12. Forfeiture of Participation Interest Upon Termination of Employment for Bad Boy Acts. Notwithstanding anything in this Agreement to the contrary, if Owner or any senior executive of any Owner Controlled Entity obtains actual knowledge that Participant has committed a Bad Boy Act against the Company, the Owner or any affiliate thereof, Participant shall forfeit the Participation Interest without consideration or payment of any kind, and this Agreement shall be automatically terminated.

13. Construction. Whenever the term "member" is used herein in reference to any entity that is not a limited liability company, such term shall be deemed to refer to the applicable equity owner in such entity.

14. Definitions. The following terms used in this Agreement have the meanings set forth below.

"Adjusted Capital Account" means, with respect to any Member, such Member's Capital Account as of the date of determination, after crediting to such Capital Account (without duplication and to the extent not previously taken into account) any amounts that the Member is obligated or deemed obligated to restore (to the extent recognized under Treasury Regulations Sections 1.704 1(b)(2)(ii)(c) and 1.704-2) and debiting to such Capital Account the items described in Treasury Regulations Section 1.704 1(b)(2)(ii)(d)(4), (5) or (6). The foregoing definition of Adjusted Capital Account and the provisions of Section 3 are intended to comply with the provisions of Treasury Regulations Section 1.704 1(b)(2)(ii)(d) and shall be interpreted and applied consistently therewith.

"Agreement" shall mean this Participation Agreement as the same may be amended from time to time.

"Bad Boy Act" means any act or omission to act that constitutes willful misconduct (including without limitation misappropriation of funds), intentional fraud, or willful violation of law, or results in conviction by a court of competent jurisdiction for a felony predicated upon fraud or financial dishonesty or a felony that results in a prison sentence.

"Burr" shall mean Robert S. Burr.

"Burr's Family" shall mean, and is limited to, Burr, Burr's spouse, parents, parents-in-law, grandparents, children, siblings (and their lineal descendents), and grandchildren. A trust, estate, family partnership, limited liability company or corporation, substantially all of the beneficiaries, partners, members or shareholders of which consist of Burr or members of Burr's Family, shall be considered part of Burr's Family for the purposes of this Agreement.

"Capital Account" has the meaning set forth in Section 3 hereof.

"Code" has the meaning set forth in Section 3 hereof.

"Capital Transaction" means refinancing, financing, or sale of Company assets.

"Capital Transaction Proceeds" means proceeds of the Company from any Capital Transaction, less all costs, expenses, liabilities and obligation of the Company, or of the Owner in respect of the Owner Interests, as the case may be, and together with reasonable reserves for any such costs, expenses, liabilities and obligations, known or unknown, at the time of such Capital Transaction.

"Company" shall have the meaning set forth in Recital A to this Agreement.

"Company Affiliate" shall mean any entity in which the Company owns any direct or indirect interest.

"Company Agreement" shall mean the limited liability company agreement, operating agreement or other governing documents of the Company, as amended from time to time.

"Competing Services" shall have the meaning set forth in Section 4(b).

"Consolidation Event" shall mean any event in which either the Company or Owner, as to the Owner Interest, merges or consolidates with and/or contributes all or substantially all of the Company's property or Owner contributes the Owner Interest, as the case may be, to another corporation, limited liability company, partnership, business trust or any other form of incorporated or unincorporated entity or the Company exchanges all or any part of its assets or Owner exchanges the Owner Interest for other assets, whether in a taxable or non-taxable transaction.

"Contributed Amount" shall mean the amount of all capital contributions by the Owner in respect of the Owner Interest.

"Disability" shall mean any physical or mental incapacity or incapacities as a result of which Participant has been unable to substantially perform the duties assigned to him by Employer for an aggregate of 120 days during any 12-month period or 90 consecutive days during any 12-month period.

"Effective Date" shall have the meaning set forth on each Schedule attached hereto, which shall be the date on which the Participation Interest in respect of the Company named on such Schedule is granted.

"Employer" shall have the meaning set forth in Recital B to this Agreement.

"Gap Amount" means the amount Owner would have received on the Effective Date, excluding the Contributed Amount to be returned to Owner, had the Company sold all of its property for fair market value, all debts of the Company were then paid, and the remaining balance were distributed to the Owner. For purposes of this agreement, the Gap Amount in respect of the Company, if any, shall be set forth on the applicable Schedule attached hereto.

"IRS Notice" shall have the meaning set forth in Section 2(d) of this Agreement.

"Liquidation Amount" shall mean the net proceeds that would be distributed as to the Participation Interest under Section 2 hereof if (i) the Company's property (determined without reduction for discounts relating to lack of control or lack of marketability) were sold for its fair market value, (ii) all debts of the Company were then paid, and (iii) the Company were liquidated.

"Mentioned Persons" shall have the meaning set forth in Section 5 of this Agreement.

"New Owner Interest" shall have the meaning set forth in Section 4(d) of this Agreement.

"OFAC" shall have the meaning set forth in Section 7(f) of this Agreement.

"Owner" shall have the meaning set forth in the introductory statement to this Agreement.

"Owner Controlled Entity" shall mean any entity in which Owner and/or members of Burr's Family (i) are directly or indirectly more than a 50% equity holder or (ii) otherwise have control.

"Owner Distribution" shall mean any distribution of cash or other property from the Company to Owner pursuant to Section 6 of the Company Agreement, including a distribution upon liquidation of the Company pursuant to Section 9(c) of the Company Agreement or other Capital Transaction.

"Owner Interest" shall mean the interest of Owner in the Company.

"Participant" shall have the meaning set forth in the introductory statement to this Agreement.

"Participants" shall mean the Participant and each other person who holds participation interests issued by the Owner with respect to the Owner Interest.

"Participation Interest" shall mean the interest in the Owner Interest granted to Participant by Owner hereunder and subject to the terms and conditions hereof.

"Participation Percentage" shall having the meaning set forth on the applicable Schedule attached hereto.

"Purchaser Representative" shall have the meaning set forth in Section 7(a) of this Agreement.

"Safe Harbor Valuation Election" shall have the meaning set forth in Section 2(d) of this Agreement.

"Sale Ratio" shall refer to the amount so designated on Schedule A attached hereto.

"Securities Act" shall have the meaning set forth in Section 7(c) of this Agreement.

"Tax Items" shall mean each item of income, gain, loss, deduction and credit allocable to Owner on account of his Owner Interest under the terms of the Company Agreement, as determined without regard to this Agreement.

"Terminating Capital Transaction" means a sale of substantially all of (i) the assets of the Company that results in the liquidation of the Company or (ii) all of the limited liability company interests in the Company.

"Treasury Regulations" has the meaning set forth in Section 3 hereof.

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EXECUTED under seal, in any number of counterpart copies, each of which counterpart copies shall be deemed an original for all purposes.

OWNER:

Robert S. Burr

PARTICIPANT:

Lauren Seaverns

SCHEDULE A
140 COMMONWEALTH AVENUE, DANVERS MA

Name and Mailing Address of Owner:
Robert S. Burr
College Street Partners LLC
900 Cummings Center
Beverly, MA 01915

Name and Mailing Address of Participant:
Lauren Seaverns
Address:

Name and Mailing Address of Company to which Participation Interest Relates:
140 Commonwealth Avenue-Danvers LLC
c/o Robert S. Burr
College Street Partners LLC
900 Cummings Center
Beverly, MA 01915

Company Agreement as most recently amended and in effect:
Operating Agreement of 140 Commonwealth Avenue-Danvers LLC, dated as of September 4, 2008.

Participation Percentage: 10%

Effective Date: July 1, 2009

Gap Amount: $171,669.

Sale Ratio: 100%, if Owner exercises his purchase option set forth in Section 4(b) of the Agreement upon the death or Disability of Participant or upon termination of Participant's employment with Employer without cause.

70%, if Owner exercises his purchase option set forth in Section 4(b) of the Agreement upon termination of Participant's employment with Employer with cause or in the event that Participant performs any Competing Services.

OWNER:

RSB

Name: Robert S. Burr

PARTICIPANT:

Lauren Seaverns

Name: Lauren Seaverns

PARTICIPATION AGREEMENT

This PARTICIPATION AGREEMENT is made as of September 1, 2011 by and between Robert S. Burr ("Owner") and Michael Gerhardt ("Participant").

RECITALS

A. As of the Effective Date, Owner is a member of that certain limited liability company or other entity set forth under the heading "Name and Mailing Address of Company" on each Schedule attached hereto (the "Company") and owns, directly or indirectly, limited liability company interests in the Company.

B. Participant is a provider of services to an affiliate of the Owner (the "Employer") and such services to the Employer will enhance the value of the Company.

C. Owner wishes to provide Participant with an economic interest in a portion of the Owner Interest on the terms and subject to the provisions of this Agreement.

D. The Participation Interest is being granted in exchange for the provision of services by the Participant to or for the benefit of the Company in a Member capacity, or in anticipation of being a Member. The Owners intend that the Participation Interest qualify as "profits" interests, as defined in Rev. Proc. 93-27, 1993-2 C.B. 343, and each of the Company, and the Participant shall treat the Participant as the owner of the Participation Interest granted hereunder.

E. Capitalized terms used in this Agreement are defined in Section 14 below.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

1. Grant of Participation Interest. As of the Effective Date, Owner hereby assigns the Participation Interest to Participant. Notwithstanding anything in this Agreement to the contrary, the rights of Participant in the Participation Interest:

(a) are subject to the terms and conditions of the Company Agreement;

(b) as between Participant and Owner, shall provide Participant with the same economic interest in the Company that Participant would have if the economic interest of the Participation Interest were recited in the Company Agreement;

(c) shall provide Participant solely with the economic interest and Tax Items described herein, and Participant shall have no other rights or interest in (including but not limited to any right to vote or otherwise participate in the management or other affairs of) the Company, any Company Affiliate, Owner, any Owner Controlled Entity or any other direct or indirect property of Owner;

(d) shall be subject to dilution, *pari passu*, with and on the same terms as the Owner Interest, without regard to the reason for such dilution; and

(e) shall be subject to all of the terms and conditions provided herein.

2. Distributions.

(a) Cash Flow Distributions. Within a reasonable period after receipt by Owner of any Owner Distribution other than a Distribution in respect of a Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash (or, if such Owner Distribution is made in kind, then at Owner's sole discretion, a portion of such other property equal in value, or cash equal in value to such property) equal to the product of (i) the Participation Percentage and (ii) such Owner Distribution.

(b) Distribution Upon Capital Transactions Other Than a Terminating Capital Transaction. Within a reasonable period of receipt by Owner of Owner Distributions from Capital Transaction Proceeds with respect to any Capital Transaction other than a Terminating Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash computed as though the Owner Distributions from such Capital Transaction Proceeds are divided between the Owner and all Participants in the following manner:

1. First, 100% to Owner until Owner has received all unreturned Contributed Amounts;

2. Thereafter, pro rata, to the Owner and to each of the Participants, in accordance with each person's Participation Percentage (assuming, for this purpose, that the Owner's Participation Percentage is equal to the result of subtracting all the Participants' Participation Percentages from 100%).

(c) Distributions Upon Terminating Capital Transactions.

1. Within a reasonable period of receipt by Owner of Owner Distributions from Capital Transaction Proceeds with respect to a Terminating Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash equal to the Participant's Capital Account, after giving effect to all contributions, distributions and allocations of Tax Items for periods, including the year during which the Terminating Capital Transaction occurs. If the Participant has a deficit balance in its Capital Account (after giving effect to all contributions, distributions and allocations for all periods, including the year during which such liquidation occurs), Participant shall have no obligation to make any contribution to the capital of the Company with respect to such deficit, and such deficit shall not be considered a debt owed to the Company or to any other person for any purpose whatsoever.

2. Notwithstanding the provisions of Section 3 hereof, in the year of the Terminating Capital Transaction, items of net income and deduction shall be allocated to the Participant and the Owner to the extent necessary to

produce Capital Accounts for the Participant and Owner such that amounts distributed pursuant to this Section 2(c) will be in the amounts Participant would have received under Section 2(b) hereof had the distribution not been a distribution upon a Terminating Capital Transaction.

(d) Acknowledgements. Participant acknowledges that (i) Participant's interest in the Participation Interest does not entitle Participant to any share of any fee or any other payment by the Company to Owner, any Owner Controlled Entity or any affiliate thereof, or of any other fee or payment made to any other member of the Company for any reason whatever, (ii) Participant's Participation Interest in the Owner Interest does not include any interest which Owner may hereafter acquire in the Company or any Company Affiliate (iii) the Company may make repayments on intercompany debt held by Owner or any Owner Controlled Entity, which, at the discretion of the Manager, may be of first priority on the use of the Company's available cash; and (iv) Owner, the Company, or any other person shall not be obligated to make funds available to Participant to facilitate the payment of any taxes that may be attributable to Participant's ownership of the Participation Interest.

(e) Safe Harbor Valuation Election. Notwithstanding any provision of this Agreement to the contrary, Owner or the Company, without the consent of Participant, is hereby authorized and directed to elect, on behalf of Participant, to make the "safe harbor election" (the "Safe Harbor Valuation Election") described in Internal Revenue Service Notice 2005-43 (the "IRS Notice") pursuant to which each "safe harbor partnership interest" (as defined in the IRS Notice) that is transferred to Participant (and in the case that the Participant is an entity, any person that is a partner or member of that entity) while the election is in effect, in connection with services provided to the Company or any affiliate, will be treated as having a value equal to the "liquidation value" of such interest as determined in the manner described in the IRS Notice. Owner or the Company is directed to make the Safe Harbor Valuation Election after the revenue procedure proposed in the IRS Notice is issued in final form, and may, in its discretion, make such an election or a similar election if such revenue procedure (or guidance of a similar nature) is ultimately issued by the Internal Revenue Service in modified form. The Safe Harbor Valuation Election will be binding on Participant with respect to each transfer of such a "safe harbor partnership interest" while such election is in effect. Participant agrees to comply with any reasonable request of Owner or the Company that, in Owner or the Company's good faith judgment, is necessary to comply with the requirements of the Safe Harbor Valuation Election described in the proposed revenue procedure, as incorporated in the anticipated revenue procedure or other guidance issued in final form, with respect to all Participation Interests that are transferred in connection with the performance of services while such election remains in effect. Such Safe Harbor Valuation Election will remain in effect until terminated in accordance with the rules set forth in the anticipated Internal Revenue Service guidance described in the IRS Notice as ultimately issued. Owner or the Company is further authorized, in its discretion and without the consent of Participant, to revoke a Safe Harbor Valuation Election previously made; *provided* that such revocation may be made only with the written consent of Participant if such revocation would result in an inclusion in Participant's income in connection with the transfer of a Participation Interest to Participant, or in other adverse tax consequences to Participant.

3. Capital Account and Allocations of Tax Items. A separate capital account (a "Capital Account") shall be established for the Participant and shall be maintained in accordance

with applicable regulations ("Treasury Regulations") under the Internal Revenue Code of 1986, as amended (the "Code"). As of the Effective Date, the initial value of the Capital Account of the Owner shall be deemed to be equal to the "book value," as such term is used in Treasury Regulation Section 1.704-1, which is equal to the sum of (i) the unreturned Contributed Amounts as of the Effective Date, and (ii) the Gap Amount. Tax Items shall be allocated between Owner and Participant in the ratio of their respective Participation Percentages (the Owner's Participation Percentage, for this purpose, being the result of subtracting all the Participants' Participation Percentages from 100%) as though the provisions of this Agreement had been recited in the Company Agreement.

Without limiting the foregoing, (a) the provisions of the Treasury Regulations related to "qualified income offsets," "partner minimum gain," "partnership minimum gain," "partnership nonrecourse debt," "partner nonrecourse debt," "minimum gain chargebacks" and "partner minimum gain chargebacks" are incorporated herein by reference, (b) Participant shall be allocated from Owner the Participation Percentage of "nonrecourse deductions" and of "excess nonrecourse liabilities" (as such terms are defined in applicable Treasury Regulations) allocable to Owner, and Owner shall be allocated the remainder of such amounts with respect to the Owner Interest and (c) the allocations of Tax Items pursuant to this Section 3 are intended to have "substantial economic effect" or otherwise reflect Owner's and Participant's "interests in the partnership" or the economic effect equivalence test of Treasury Regulation Section 1.704-1(b)(2)(ii)(*l*), all determined as if the provisions of this Agreement were recited in the Company Agreement.

Losses allocated pursuant to the provisions of this Section 3 shall not exceed the maximum amount of losses that can be so allocated without causing any Participant to have a deficit balance in its Adjusted Capital Account at the end of any year. Net income shall be specially allocated to the Participant to the extent necessary so that distributions pursuant to Section 2 will not result in a deficit balance in Participant's Adjusted Capital Account. Allocations of net income shall be made in proportion to categories of net income rather than gross income items. In the event that the Owner Interest is subject to other participation interests, the allocations in this Section 3 shall be made to the Participant in the proportion that the Participation Interest bears to all other such participation interests. To the maximum extent permitted by law, any distributions by the Company to the Owner, and any Distributions to Participant of Owner Distributions under this Agreement, shall be treated as being properly allocable to the proceeds of a non-recourse liability proceeds using any reasonable method permitted by Treasury Regulation Section 1.704-2(h)(2).

Participant and Owner agree that Participant shall be treated for federal, state and local income and other tax purposes as though the Participation Interest were held directly by Participant as a member of the Company and in accordance therewith, Participant shall be treated as a partner for federal, state and local income and other tax purposes and shall be treated as such on the tax returns of the Company. The arrangement contemplated hereby shall not and is not intended to be a partnership or joint venture for any other purpose, and the tax treatment of the Participation Interest shall not in any way affect the rights and obligations of the parties for any non-tax purpose.

4. Transfers.

(a) Limitations. The Participation Interest shall not be transferred or otherwise disposed of in any manner, for value or otherwise, and whether by sale, gift, bequest, assignment, pledge or encumbrance and whether effected by contract, by operation of law or otherwise. Notwithstanding the foregoing, subject to the limitations on transfer set forth in the Company Agreement, and provided that Owner has previously consented (which consent may be given or withheld in Owner's sole discretion), the Participation Interest may be so transferred, in whole or in part, to, but only to, members of Participant's immediate family (other than minors, unless in trust) and/or to one or more trusts primarily for their benefit, and any such transferee shall be required to acknowledge and agree to be bound by all of the terms and conditions of this Agreement.

(b) For a period of one year from and after (i) the death or Disability of Participant or the termination of Participant's employment, with or without cause, with any Owner Controlled Entity (without Participant being hired by any other Owner Controlled Entity), or (ii) Owner or any senior executives of any Owner Controlled Entity obtaining actual knowledge that Participant is performing any professional services for any person which develops, acquires, owns, operates or manages any property in the geographic area in which either Owner or an Owner Controlled Entity owns or is then actively pursuing real estate opportunities (the "Competing Services"), and has not otherwise committed a Bad Boy Act (in which case Participant shall forfeit the Participation Interests pursuant to Section 12 hereof), then Owner shall have the right, at Owner's option, to purchase the Participation Interest for an amount equal to the product of the Liquidation Amount and the Sale Ratio. Owner shall have the right to assign the rights under this option. The purchase price for the Participation Interest may be paid, at the election of the purchaser, over four years with no more than 20% of the purchase price being paid on the closing date for the purchase and at least an additional 20% of the aggregate purchase price being paid on the first, second, third and fourth year anniversary of such closing date (except in the case of any final payment if the prior annual payments were greater than 20%), with interest calculated at 225 basis points above the average effective yield on U.S. Treasury obligations maturing on the date closest to the fourth anniversary of such closing date as reported in the Wall Street Journal or any successor thereto plus any and all accrued interest on the outstanding principal amount at the time of each annual payment. If Participant and the purchaser are unable to agree on the purchase price for the Participation Interest within 15 days after the exercise of the option to purchase, then a qualified appraiser, selected by the purchaser, shall determine the purchase price under the terms of this Section 4, the cost of such appraisal to be borne equally by the purchaser and the Participant. If, after closing on a purchase of the Participation Interest in accordance with this Section 4(b), Owner determines that clause (ii) of this Section 4(b) applies, then subsequent payments to be made to Participant under this Section 4(b) shall be reduced, as necessary, by the application of clause (ii) of this Section 4(b) to the calculation of the purchase price hereunder.

(c) Disposition of Owner Interest. If Owner sells or otherwise disposes of all or a portion of the Owner Interest, other than as provided in the sentence immediately following this sentence, then the net sale proceeds, as reasonably determined by Owner, with respect to such disposition, shall be treated as Owner Distributions for purposes of Section 2(b). The provisions of the preceding sentence shall not apply to (i) any transfers to affiliates as long as Owner or members of Burr's Family own substantially all of the indirect or direct interest in such affiliates, (ii) any charitable dispositions, (iii) any dispositions directly, in trust or otherwise as gifts or for

estate planning purposes, or (vi) any dispositions to employees of any Owner Controlled Entity, of an Owner Interest, in all of which events the Participation Interest shall continue to encumber the remaining Owner Interest but shall not encumber any of the portion thereof which has been so disposed of. In the event of any transfer or disposition as described in the immediately preceding sentence, the Participation Percentage of Participant in the portion of the Owner Interest retained by Owner shall be appropriately adjusted.

(d) Consolidation Event. Subject in all events to Section 4(c) of this Agreement, in the event that a Consolidation Event occurs, Participant shall retain the same Participation Interest in the Owner Interest that Participant had before any such Consolidation Event, with the Owner Interest being the interest in any such new or other entity or assets properly attributable to the Owner Interest, all as reasonably determined by Owner (the "New Owner Interest"). The New Owner Interest shall remain subject to the provisions of this Agreement, subject to a replacement Schedule provided by Owner. Notwithstanding the foregoing, in the event of any Consolidation Event, Owner, at Owner's option and sole discretion, may substitute for the Participation Interest granted hereunder a more direct interest in the ultimate surviving entity involved in such Consolidation Event or in any upper tier entity holding an interest in such ultimate surviving entity, *provided that* Owner holds an interest in such entity, directly or indirectly, on account of the Owner Interest. Such substitute interest for the Participation Interest shall be determined by Owner, in Owner's reasonable judgment, based upon the relative values used by the various parties to any such Consolidation Event, and any contributed amounts and all other economic factors relevant to the determination of the value of the Participation Interest vis-à-vis the remainder of the Owner Interest. In addition, Participant agrees that Participant will execute an acknowledgement of any changes in the description of the Participation Interest contemplated by the above upon notice of such changes by Owner.

5. Lack of Authority to Act. Participant acknowledges and agrees that Participant has no interest in the Company or any Company Affiliate as a member, that Participant has no right to participate in the management of the Company or any Company Affiliate and that Participant's rights with respect to the Company and any Company Affiliate are limited to those expressly set forth in this Agreement. Without limiting the foregoing, Participant acknowledges and agrees that any sale or other disposition by the Company or any Company Affiliate, directly or indirectly, of any of its property or, except as provided in Section 4(d) above, by the Owner of all or any portion of the Owner Interest, shall be valid, binding and enforceable against Participant, with the same force and effect as if Participant had assented thereto, and that, in such event, Participant's rights shall be limited to receiving the Participation Interest's share, if any, of the net proceeds of any such disposition, which share shall be determined as described in Section 4(d) of this Agreement.

Participant agrees not to assert any right or claim at any time, either individually or derivatively, against Owner, the Company, any Company Affiliate, members of Burr's Family, any of their respective affiliates, any entity in which any of them has an interest, or any equity holder in any of them (the foregoing persons, the "Mentioned Persons") based on any allegation or assertion to the effect that any such person breached any duty to any other person involved or that the business or affairs of Owner, the Company, any Company Affiliate or any such affiliate (or any successor thereto) shall not have been conducted prudently or in the best interests of any of the Mentioned Persons or Participant, or any other similar allegation regarding the conduct of

the affairs of any such person and further, hereby irrevocably waives any and all duties and obligations of any nature whatsoever that any of the Mentioned Persons may otherwise have at law or in equity except for the duty to make the distributions under Section 2 hereof; provided, however, that this provision shall not be applicable with respect to any rights or claims asserted by Participant against Owner predicated upon intentional action or inaction in bad faith which discriminates in favor of Owner and against Participant.

Participant hereby specifically acknowledges that the Participation Interest is subordinate to any pledge or other hypothecation by Owner of the Owner Interest as security for any loan. Participant acknowledges that in the event of a foreclosure or other disposition as a result of such pledge or other hypothecation, the Participation Interest hereunder shall be only as to Participant's share of the proceeds of such foreclosure or other disposition, if any, determined without regard to any such pledge or other hypothecation, unless such pledge or other hypothecation was made for the benefit of the Company or any Company Affiliate and/or such proceeds are used by or for the Company or any Company Affiliate, in which event the Participation Interest hereunder shall be only as to Participant's share of the excess proceeds, if any, resulting from such foreclosure or other disposition, in each case as if any part of the Owner Interest had been voluntarily disposed of by Owner.

6. No Right to Advances of Funds. Participant shall not have any right to advance funds to or on behalf of Participant to participate in any funding of the Company.

7. Representations and Warranties. Participant hereby represents and warrants to Owner, the Company, and each of the other members of the Company as follows:

(a) Either alone or together with Participant's investment advisor or other representative ("Purchaser Representative"), Participant has such knowledge and experience in financial and business matters that Participant is capable of evaluating the merits and risks of Participant's participation in this Agreement.

(b) Participant is familiar with the properties and project(s) of the Company and the risks associated therewith and Participant and/or Purchaser Representative has received a copy of the Company Agreement and has had an opportunity to ask questions of and receive answers from the Company and Owner, or a person or persons acting on behalf of Owner and the Company, concerning the terms and conditions of Participant's participation in the Company.

(c) Participant acknowledges that the Participation Interest has not been registered under the Securities Act of 1933, as amended (the "Securities Act") in reliance on an exemption for private offerings, and that the Participation Interest is being acquired solely for Participant's own account, for investment, and is not being acquired with a view to or for the resale, distribution, subdivision or fractionalization thereof, and Participant has no present plans to enter into any contract, undertaking, agreement or arrangement relating thereto.

(d) Participant acknowledges and is aware that: (i) there are substantial restrictions on the transfer of the Participation Interest, under the Company Agreement, the governing documents of other Company Affiliates, this Agreement and the Securities Act, (ii) the Participation Interest has not been registered under the Securities Act and cannot be sold unless it

is registered under the Securities Act or an exemption from registration is available and any proposed transfer is also made in compliance with applicable state securities law, and (iii) Participant has no right to require that the Participation Interest be registered under the Securities Act and, accordingly, that it may not be possible for Participant to liquidate the Participation Interest at any given time because there is no public market for such interest and no such market is expected to develop, and that Participant will have to hold such interest indefinitely. Participant acknowledges that Participant has no need for liquidity with respect to the Participation Interest and has sufficient liquidity for Participant's current and foreseeable future needs.

(e) Participant understands the tax consequences of holding the Participation Interest and agrees to report the Tax Items and distributions consistent with the terms hereof.

(f) Neither Participant, nor any of Participant's affiliates, is, nor will they become, a person or entity with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control ("OFAC") of the Department of the Treasury (including those named on OFAC's Specially Designated and Blocked Persons List) or under any statute, executive order (including the September 24, 2001, Executive Order Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism), or other governmental action and is not and will not engage in any dealings or transactions or be otherwise associated with such persons or entities.

(g) Participant understands the meaning and legal consequences of the representations and warranties contained in this Section 7, and hereby agrees to indemnify and hold harmless each of the Mentioned Persons from and against any and all loss, cost, damage, expense or liability (including attorneys' fees) due to or arising out of a breach of any representation, warranty, or covenant of Participant contained in this Section 7 or any other provision of this Agreement.

(h) The representations and warranties set forth in this Section 7 are true and accurate as of the date hereof and shall survive execution of this Agreement. By executing any Schedule attached hereto, Participant acknowledges that the representations and warranties set forth in this Section 7 are true and accurate as of the Effective Date set forth on such Schedule.

8. Further Assurances. Each of Participant and Owner agrees to execute, acknowledge and deliver such further instruments as may be deemed necessary or desirable to confirm and carry out the foregoing undertakings set forth herein, provided that the same do not result in a breach of Owner's obligations under the Company Agreement or any governing documents of any Company Affiliate.

9. Governing Law. This Agreement is, in accordance with the express intent and agreement of Owner and Participant, to be construed according to and governed by the laws of The Commonwealth of Massachusetts.

10. Binding Agreement. This Agreement shall be binding upon and shall inure to the benefit of Owner and Participant and their respective permitted heirs, executors, representatives, successors and assigns.

11. No Right to Be a Service Provider. Participant acknowledges that Participant has and has acquired no right to be an employee or service provider of the Employer or any Owner Controlled Entity or any other entity as a result of the receipt of the Participation Interest described in this Agreement.

12. Forfeiture of Participation Interest Upon Termination of Employment for Bad Boy Acts. Notwithstanding anything in this Agreement to the contrary, if Owner or any senior executive of any Owner Controlled Entity obtains actual knowledge that Participant has committed a Bad Boy Act against the Company, the Owner or any affiliate thereof, Participant shall forfeit the Participation Interest without consideration or payment of any kind, and this Agreement shall be automatically terminated.

13. Construction. Whenever the term "member" is used herein in reference to any entity that is not a limited liability company, such term shall be deemed to refer to the applicable equity owner in such entity.

14. Definitions. The following terms used in this Agreement have the meanings set forth below.

"Adjusted Capital Account" means, with respect to any Member, such Member's Capital Account as of the date of determination, after crediting to such Capital Account (without duplication and to the extent not previously taken into account) any amounts that the Member is obligated or deemed obligated to restore (to the extent recognized under Treasury Regulations Sections 1.704 1(b)(2)(ii)(c) and 1.704-2) and debiting to such Capital Account the items described in Treasury Regulations Section 1.704 1(b)(2)(ii)(d)(4), (5) or (6). The foregoing definition of Adjusted Capital Account and the provisions of Section 3 are intended to comply with the provisions of Treasury Regulations Section 1.704 1(b)(2)(ii)(d) and shall be interpreted and applied consistently therewith.

"Agreement" shall mean this Participation Agreement as the same may be amended from time to time.

"Bad Boy Act" means any act or omission to act that constitutes willful misconduct (including without limitation misappropriation of funds), intentional fraud, or willful violation of law, or results in conviction by a court of competent jurisdiction for a felony predicated upon fraud or financial dishonesty or a felony that results in a prison sentence.

"Burr" shall mean Robert S. Burr.

"Burr's Family" shall mean, and is limited to, Burr, Burr's spouse, parents, parents-in-law, grandparents, children, siblings (and their lineal descendents), and grandchildren. A trust, estate, family partnership, limited liability company or corporation, substantially all of the beneficiaries, partners, members or shareholders of which consist of Burr or members of Burr's Family, shall be considered part of Burr's Family for the purposes of this Agreement.

"Capital Account" has the meaning set forth in Section 3 hereof.

"Code" has the meaning set forth in Section 3 hereof.

"Capital Transaction" means refinancing, financing, or sale of Company assets.

"Capital Transaction Proceeds" means proceeds of the Company from any Capital Transaction, less all costs, expenses, liabilities and obligation of the Company, or of the Owner in respect of the Owner Interests, as the case may be, and together with reasonable reserves for any such costs, expenses, liabilities and obligations, known or unknown, at the time of such Capital Transaction.

"Company" shall have the meaning set forth in Recital A to this Agreement.

"Company Affiliate" shall mean any entity in which the Company owns any direct or indirect interest.

"Company Agreement" shall mean the limited liability company agreement, operating agreement or other governing documents of the Company, as amended from time to time.

"Competing Services" shall have the meaning set forth in Section 4(b).

"Consolidation Event" shall mean any event in which either the Company or Owner, as to the Owner Interest, merges or consolidates with and/or contributes all or substantially all of the Company's property or Owner contributes the Owner Interest, as the case may be, to another corporation, limited liability company, partnership, business trust or any other form of incorporated or unincorporated entity or the Company exchanges all or any part of its assets or Owner exchanges the Owner Interest for other assets, whether in a taxable or non-taxable transaction.

"Contributed Amount" shall mean the amount of all capital contributions by the Owner in respect of the Owner Interest.

"Disability" shall mean any physical or mental incapacity or incapacities as a result of which Participant has been unable to substantially perform the duties assigned to him by Employer for an aggregate of 120 days during any 12-month period or 90 consecutive days during any 12-month period.

"Effective Date" shall have the meaning set forth on each Schedule attached hereto, which shall be the date on which the Participation Interest in respect of the Company named on such Schedule is granted.

"Employer" shall have the meaning set forth in Recital B to this Agreement.

"Gap Amount" means the amount Owner would have received on the Effective Date, excluding the Contributed Amount to be returned to Owner, had the Company sold all of its property for fair market value, all debts of the Company were then paid, and the remaining balance were distributed to the Owner. For purposes of this agreement, the Gap Amount in respect of the Company, if any, shall be set forth on the applicable Schedule attached hereto.

"IRS Notice" shall have the meaning set forth in Section 2(d) of this Agreement.

"Liquidation Amount" shall mean the net proceeds that would be distributed as to the Participation Interest under Section 2 hereof if (i) the Company's property (determined without reduction for discounts relating to lack of control or lack of marketability) were sold for its fair market value, (ii) all debts of the Company were then paid, and (iii) the Company were liquidated.

"Mentioned Persons" shall have the meaning set forth in Section 5 of this Agreement.

"New Owner Interest" shall have the meaning set forth in Section 4(d) of this Agreement.

"OFAC" shall have the meaning set forth in Section 7(f) of this Agreement.

"Owner" shall have the meaning set forth in the introductory statement to this Agreement.

"Owner Controlled Entity" shall mean any entity in which Owner and/or members of Burr's Family (i) are directly or indirectly more than a 50% equity holder or (ii) otherwise have control.

"Owner Distribution" shall mean any distribution of cash or other property from the Company to Owner pursuant to Section 6 of the Company Agreement, including a distribution upon liquidation of the Company pursuant to Section 9(c) of the Company Agreement or other Capital Transaction.

"Owner Interest" shall mean the interest of Owner in the Company.

"Participant" shall have the meaning set forth in the introductory statement to this Agreement.

"Participants" shall mean the Participant and each other person who holds participation interests issued by the Owner with respect to the Owner Interest.

"Participation Interest" shall mean the interest in the Owner Interest granted to Participant by Owner hereunder and subject to the terms and conditions hereof.

"Participation Percentage" shall having the meaning set forth on the applicable Schedule attached hereto.

"Purchaser Representative" shall have the meaning set forth in Section 7(a) of this Agreement.

"Safe Harbor Valuation Election" shall have the meaning set forth in Section 2(d) of this Agreement.

"Sale Ratio" shall refer to the amount so designated on Schedule A attached hereto.

"Securities Act" shall have the meaning set forth in Section 7(c) of this Agreement.

"Tax Items" shall mean each item of income, gain, loss, deduction and credit allocable to Owner on account of his Owner Interest under the terms of the Company Agreement, as determined without regard to this Agreement.

"Terminating Capital Transaction" means a sale of substantially all of (i) the assets of the Company that results in the liquidation of the Company or (ii) all of the limited liability company interests in the Company.

"Treasury Regulations" has the meaning set forth in Section 3 hereof.

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EXECUTED under seal, in any number of counterpart copies, each of which counterpart copies shall be deemed an original for all purposes.

OWNER:

Robert S. Burr

PARTICIPANT:

Michael Gerhardt

SCHEDULE A
HATHORNE HILL DEVELOPMENT, LLC

Name and Mailing Address of Owner:
Robert S. Burr
College Street Partners LLC
900 Cummings Center
Beverly, MA 01915

Name and Mailing Address of Participant:
Michael Gerhardt
Address: 27 MARTIN ST
ESSEX, MA 01929

Name and Mailing Address of Company to which Participation Interest Relates:
Hathorne Hill Development, LLC
c/o Robert S. Burr
College Street Partners LLC
900 Cummings Center
Beverly, MA 01915

Company Agreement as most recently amended and in effect:
Operating Agreement of Hathorne Hill Development, LLC, dated as of September 1, 2011.

Participation Percentage: 10%

Effective Date: September 1, 2011

Gap Amount: $1,650,000.

Sale Ratio: 100%, if Owner exercises his purchase option set forth in Section 4(b) of the Agreement upon the death or Disability of Participant or upon termination of Participant's employment with Employer without cause.

50%, if Owner exercises his purchase option set forth in Section 4(b) of the Agreement upon termination of Participant's employment with Employer with cause or in the event that Participant performs any Competing Services.

OWNER:

Name: Robert S. Burr

PARTICIPANT:

Name: Michael Gerhardt

EXECUTION COPY

PARTICIPATION AGREEMENT

This PARTICIPATION AGREEMENT is made as of September 1, 2011 by and between Robert S. Burr ("Owner") and Lauren Seaverns ("Participant").

RECITALS

A. As of the Effective Date, Owner is a member of that certain limited liability company or other entity set forth under the heading "Name and Mailing Address of Company" on each Schedule attached hereto (the "Company") and owns, directly or indirectly, limited liability company interests in the Company.

B. Participant is a provider of services to an affiliate of the Owner (the "Employer") and such services to the Employer will enhance the value of the Company.

C. Owner wishes to provide Participant with an economic interest in a portion of the Owner Interest on the terms and subject to the provisions of this Agreement.

D. The Participation Interest is being granted in exchange for the provision of services by the Participant to or for the benefit of the Company in a Member capacity, or in anticipation of being a Member. The Owners intend that the Participation Interest qualify as "profits" interests, as defined in Rev. Proc. 93-27, 1993-2 C.B. 343, and each of the Company, and the Participant shall treat the Participant as the owner of the Participation Interest granted hereunder.

E. Capitalized terms used in this Agreement are defined in Section 14 below.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

1. Grant of Participation Interest. As of the Effective Date, Owner hereby assigns the Participation Interest to Participant. Notwithstanding anything in this Agreement to the contrary, the rights of Participant in the Participation Interest:

(a) are subject to the terms and conditions of the Company Agreement;

(b) as between Participant and Owner, shall provide Participant with the same economic interest in the Company that Participant would have if the economic interest of the Participation Interest were recited in the Company Agreement;

(c) shall provide Participant solely with the economic interest and Tax Items described herein, and Participant shall have no other rights or interest in (including but not limited to any right to vote or otherwise participate in the management or other affairs of) the Company, any Company Affiliate, Owner, any Owner Controlled Entity or any other direct or indirect property of Owner;

(d) shall be subject to dilution, *pari passu*, with and on the same terms as the Owner Interest, without regard to the reason for such dilution; and

(e) shall be subject to all of the terms and conditions provided herein.

2. Distributions.

(a) Cash Flow Distributions. Within a reasonable period after receipt by Owner of any Owner Distribution other than a Distribution in respect of a Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash (or, if such Owner Distribution is made in kind, then at Owner's sole discretion, a portion of such other property equal in value, or cash equal in value to such property) equal to the product of (i) the Participation Percentage and (ii) such Owner Distribution.

(b) Distribution Upon Capital Transactions Other Than a Terminating Capital Transaction. Within a reasonable period of receipt by Owner of Owner Distributions from Capital Transaction Proceeds with respect to any Capital Transaction other than a Terminating Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash computed as though the Owner Distributions from such Capital Transaction Proceeds are divided between the Owner and all Participants in the following manner:

1. First, 100% to Owner until Owner has received all unreturned Contributed Amounts;

2. Thereafter, pro rata, to the Owner and to each of the Participants, in accordance with each person's Participation Percentage (assuming, for this purpose, that the Owner's Participation Percentage is equal to the result of subtracting all the Participants' Participation Percentages from 100%).

(c) Distributions Upon Terminating Capital Transactions.

1. Within a reasonable period of receipt by Owner of Owner Distributions from Capital Transaction Proceeds with respect to a Terminating Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash equal to the Participant's Capital Account, after giving effect to all contributions, distributions and allocations of Tax Items for periods, including the year during which the Terminating Capital Transaction occurs. If the Participant has a deficit balance in its Capital Account (after giving effect to all contributions, distributions and allocations for all periods, including the year during which such liquidation occurs), Participant shall have no obligation to make any contribution to the capital of the Company with respect to such deficit, and such deficit shall not be considered a debt owed to the Company or to any other person for any purpose whatsoever.

2. Notwithstanding the provisions of Section 3 hereof, in the year of the Terminating Capital Transaction, items of net income and deduction shall be allocated to the Participant and the Owner to the extent necessary to

produce Capital Accounts for the Participant and Owner such that amounts distributed pursuant to this Section 2(c) will be in the amounts Participant would have received under Section 2(b) hereof had the distribution not been a distribution upon a Terminating Capital Transaction.

(d) Acknowledgements. Participant acknowledges that (i) Participant's interest in the Participation Interest does not entitle Participant to any share of any fee or any other payment by the Company to Owner, any Owner Controlled Entity or any affiliate thereof, or of any other fee or payment made to any other member of the Company for any reason whatever, (ii) Participant's Participation Interest in the Owner Interest does not include any interest which Owner may hereafter acquire in the Company or any Company Affiliate (iii) the Company may make repayments on intercompany debt held by Owner or any Owner Controlled Entity, which, at the discretion of the Manager, may be of first priority on the use of the Company's available cash; and (iv) Owner, the Company, or any other person shall not be obligated to make funds available to Participant to facilitate the payment of any taxes that may be attributable to Participant's ownership of the Participation Interest.

(e) Safe Harbor Valuation Election. Notwithstanding any provision of this Agreement to the contrary, Owner or the Company, without the consent of Participant, is hereby authorized and directed to elect, on behalf of Participant, to make the "safe harbor election" (the "Safe Harbor Valuation Election") described in Internal Revenue Service Notice 2005-43 (the "IRS Notice") pursuant to which each "safe harbor partnership interest" (as defined in the IRS Notice) that is transferred to Participant (and in the case that the Participant is an entity, any person that is a partner or member of that entity) while the election is in effect, in connection with services provided to the Company or any affiliate, will be treated as having a value equal to the "liquidation value" of such interest as determined in the manner described in the IRS Notice. Owner or the Company is directed to make the Safe Harbor Valuation Election after the revenue procedure proposed in the IRS Notice is issued in final form, and may, in its discretion, make such an election or a similar election if such revenue procedure (or guidance of a similar nature) is ultimately issued by the Internal Revenue Service in modified form. The Safe Harbor Valuation Election will be binding on Participant with respect to each transfer of such a "safe harbor partnership interest" while such election is in effect. Participant agrees to comply with any reasonable request of Owner or the Company that, in Owner or the Company's good faith judgment, is necessary to comply with the requirements of the Safe Harbor Valuation Election described in the proposed revenue procedure, as incorporated in the anticipated revenue procedure or other guidance issued in final form, with respect to all Participation Interests that are transferred in connection with the performance of services while such election remains in effect. Such Safe Harbor Valuation Election will remain in effect until terminated in accordance with the rules set forth in the anticipated Internal Revenue Service guidance described in the IRS Notice as ultimately issued. Owner or the Company is further authorized, in its discretion and without the consent of Participant, to revoke a Safe Harbor Valuation Election previously made; *provided* that such revocation may be made only with the written consent of Participant if such revocation would result in an inclusion in Participant's income in connection with the transfer of a Participation Interest to Participant, or in other adverse tax consequences to Participant.

3. Capital Account and Allocations of Tax Items. A separate capital account (a "Capital Account") shall be established for the Participant and shall be maintained in accordance

with applicable regulations ("Treasury Regulations") under the Internal Revenue Code of 1986, as amended (the "Code"). As of the Effective Date, the initial value of the Capital Account of the Owner shall be deemed to be equal to the "book value," as such term is used in Treasury Regulation Section 1.704-1, which is equal to the sum of (i) the unreturned Contributed Amounts as of the Effective Date, and (ii) the Gap Amount. Tax Items shall be allocated between Owner and Participant in the ratio of their respective Participation Percentages (the Owner's Participation Percentage, for this purpose, being the result of subtracting all the Participants' Participation Percentages from 100%) as though the provisions of this Agreement had been recited in the Company Agreement.

Without limiting the foregoing, (a) the provisions of the Treasury Regulations related to "qualified income offsets," "partner minimum gain," "partnership minimum gain," "partnership nonrecourse debt," "partner nonrecourse debt," "minimum gain chargebacks" and "partner minimum gain chargebacks" are incorporated herein by reference, (b) Participant shall be allocated from Owner the Participation Percentage of "nonrecourse deductions" and of "excess nonrecourse liabilities" (as such terms are defined in applicable Treasury Regulations) allocable to Owner, and Owner shall be allocated the remainder of such amounts with respect to the Owner Interest and (c) the allocations of Tax Items pursuant to this Section 3 are intended to have "substantial economic effect" or otherwise reflect Owner's and Participant's "interests in the partnership" or the economic effect equivalence test of Treasury Regulation Section 1.704-1(b)(2)(ii)(*l*), all determined as if the provisions of this Agreement were recited in the Company Agreement.

Losses allocated pursuant to the provisions of this Section 3 shall not exceed the maximum amount of losses that can be so allocated without causing any Participant to have a deficit balance in its Adjusted Capital Account at the end of any year. Net income shall be specially allocated to the Participant to the extent necessary so that distributions pursuant to Section 2 will not result in a deficit balance in Participant's Adjusted Capital Account. Allocations of net income shall be made in proportion to categories of net income rather than gross income items. In the event that the Owner Interest is subject to other participation interests, the allocations in this Section 3 shall be made to the Participant in the proportion that the Participation Interest bears to all other such participation interests. To the maximum extent permitted by law, any distributions by the Company to the Owner, and any Distributions to Participant of Owner Distributions under this Agreement, shall be treated as being properly allocable to the proceeds of a non-recourse liability proceeds using any reasonable method permitted by Treasury Regulation Section 1.704-2(h)(2).

Participant and Owner agree that Participant shall be treated for federal, state and local income and other tax purposes as though the Participation Interest were held directly by Participant as a member of the Company and in accordance therewith, Participant shall be treated as a partner for federal, state and local income and other tax purposes and shall be treated as such on the tax returns of the Company. The arrangement contemplated hereby shall not and is not intended to be a partnership or joint venture for any other purpose, and the tax treatment of the Participation Interest shall not in any way affect the rights and obligations of the parties for any non-tax purpose.

4. Transfers.

(a) Limitations. The Participation Interest shall not be transferred or otherwise disposed of in any manner, for value or otherwise, and whether by sale, gift, bequest, assignment, pledge or encumbrance and whether effected by contract, by operation of law or otherwise. Notwithstanding the foregoing, subject to the limitations on transfer set forth in the Company Agreement, and provided that Owner has previously consented (which consent may be given or withheld in Owner's sole discretion), the Participation Interest may be so transferred, in whole or in part, to, but only to, members of Participant's immediate family (other than minors, unless in trust) and/or to one or more trusts primarily for their benefit, and any such transferee shall be required to acknowledge and agree to be bound by all of the terms and conditions of this Agreement.

(b) For a period of one year from and after (i) the death or Disability of Participant or the termination of Participant's employment, with or without cause, with any Owner Controlled Entity (without Participant being hired by any other Owner Controlled Entity), or (ii) Owner or any senior executives of any Owner Controlled Entity obtaining actual knowledge that Participant is performing any professional services for any person which develops, acquires, owns, operates or manages any property in the geographic area in which either Owner or an Owner Controlled Entity owns or is then actively pursuing real estate opportunities (the "Competing Services"), and has not otherwise committed a Bad Boy Act (in which case Participant shall forfeit the Participation Interests pursuant to Section 12 hereof), then Owner shall have the right, at Owner's option, to purchase the Participation Interest for an amount equal to the product of the Liquidation Amount and the Sale Ratio. Owner shall have the right to assign the rights under this option. The purchase price for the Participation Interest may be paid, at the election of the purchaser, over four years with no more than 20% of the purchase price being paid on the closing date for the purchase and at least an additional 20% of the aggregate purchase price being paid on the first, second, third and fourth year anniversary of such closing date (except in the case of any final payment if the prior annual payments were greater than 20%), with interest calculated at 225 basis points above the average effective yield on U.S. Treasury obligations maturing on the date closest to the fourth anniversary of such closing date as reported in the Wall Street Journal or any successor thereto plus any and all accrued interest on the outstanding principal amount at the time of each annual payment. If Participant and the purchaser are unable to agree on the purchase price for the Participation Interest within 15 days after the exercise of the option to purchase, then a qualified appraiser, selected by the purchaser, shall determine the purchase price under the terms of this Section 4, the cost of such appraisal to be borne equally by the purchaser and the Participant. If, after closing on a purchase of the Participation Interest in accordance with this Section 4(b), Owner determines that clause (ii) of this Section 4(b) applies, then subsequent payments to be made to Participant under this Section 4(b) shall be reduced, as necessary, by the application of clause (ii) of this Section 4(b) to the calculation of the purchase price hereunder.

(c) Disposition of Owner Interest. If Owner sells or otherwise disposes of all or a portion of the Owner Interest, other than as provided in the sentence immediately following this sentence, then the net sale proceeds, as reasonably determined by Owner, with respect to such disposition, shall be treated as Owner Distributions for purposes of Section 2(b). The provisions of the preceding sentence shall not apply to (i) any transfers to affiliates as long as Owner or members of Burr's Family own substantially all of the indirect or direct interest in such affiliates, (ii) any charitable dispositions, (iii) any dispositions directly, in trust or otherwise as gifts or for

estate planning purposes, or (vi) any dispositions to employees of any Owner Controlled Entity, of an Owner Interest, in all of which events the Participation Interest shall continue to encumber the remaining Owner Interest but shall not encumber any of the portion thereof which has been so disposed of. In the event of any transfer or disposition as described in the immediately preceding sentence, the Participation Percentage of Participant in the portion of the Owner Interest retained by Owner shall be appropriately adjusted.

(d) Consolidation Event. Subject in all events to Section 4(c) of this Agreement, in the event that a Consolidation Event occurs, Participant shall retain the same Participation Interest in the Owner Interest that Participant had before any such Consolidation Event, with the Owner Interest being the interest in any such new or other entity or assets properly attributable to the Owner Interest, all as reasonably determined by Owner (the "New Owner Interest"). The New Owner Interest shall remain subject to the provisions of this Agreement, subject to a replacement Schedule provided by Owner. Notwithstanding the foregoing, in the event of any Consolidation Event, Owner, at Owner's option and sole discretion, may substitute for the Participation Interest granted hereunder a more direct interest in the ultimate surviving entity involved in such Consolidation Event or in any upper tier entity holding an interest in such ultimate surviving entity, *provided that* Owner holds an interest in such entity, directly or indirectly, on account of the Owner Interest. Such substitute interest for the Participation Interest shall be determined by Owner, in Owner's reasonable judgment, based upon the relative values used by the various parties to any such Consolidation Event, and any contributed amounts and all other economic factors relevant to the determination of the value of the Participation Interest vis-à-vis the remainder of the Owner Interest. In addition, Participant agrees that Participant will execute an acknowledgement of any changes in the description of the Participation Interest contemplated by the above upon notice of such changes by Owner.

5. Lack of Authority to Act. Participant acknowledges and agrees that Participant has no interest in the Company or any Company Affiliate as a member, that Participant has no right to participate in the management of the Company or any Company Affiliate and that Participant's rights with respect to the Company and any Company Affiliate are limited to those expressly set forth in this Agreement. Without limiting the foregoing, Participant acknowledges and agrees that any sale or other disposition by the Company or any Company Affiliate, directly or indirectly, of any of its property or, except as provided in Section 4(d) above, by the Owner of all or any portion of the Owner Interest, shall be valid, binding and enforceable against Participant, with the same force and effect as if Participant had assented thereto, and that, in such event, Participant's rights shall be limited to receiving the Participation Interest's share, if any, of the net proceeds of any such disposition, which share shall be determined as described in Section 4(d) of this Agreement.

Participant agrees not to assert any right or claim at any time, either individually or derivatively, against Owner, the Company, any Company Affiliate, members of Burr's Family, any of their respective affiliates, any entity in which any of them has an interest, or any equity holder in any of them (the foregoing persons, the "Mentioned Persons") based on any allegation or assertion to the effect that any such person breached any duty to any other person involved or that the business or affairs of Owner, the Company, any Company Affiliate or any such affiliate (or any successor thereto) shall not have been conducted prudently or in the best interests of any of the Mentioned Persons or Participant, or any other similar allegation regarding the conduct of

the affairs of any such person and further, hereby irrevocably waives any and all duties and obligations of any nature whatsoever that any of the Mentioned Persons may otherwise have at law or in equity except for the duty to make the distributions under Section 2 hereof; provided, however, that this provision shall not be applicable with respect to any rights or claims asserted by Participant against Owner predicated upon intentional action or inaction in bad faith which discriminates in favor of Owner and against Participant.

Participant hereby specifically acknowledges that the Participation Interest is subordinate to any pledge or other hypothecation by Owner of the Owner Interest as security for any loan. Participant acknowledges that in the event of a foreclosure or other disposition as a result of such pledge or other hypothecation, the Participation Interest hereunder shall be only as to Participant's share of the proceeds of such foreclosure or other disposition, if any, determined without regard to any such pledge or other hypothecation, unless such pledge or other hypothecation was made for the benefit of the Company or any Company Affiliate and/or such proceeds are used by or for the Company or any Company Affiliate, in which event the Participation Interest hereunder shall be only as to Participant's share of the excess proceeds, if any, resulting from such foreclosure or other disposition, in each case as if any part of the Owner Interest had been voluntarily disposed of by Owner.

6. No Right to Advances of Funds. Participant shall not have any right to advance funds to or on behalf of Participant to participate in any funding of the Company.

7. Representations and Warranties. Participant hereby represents and warrants to Owner, the Company, and each of the other members of the Company as follows:

(a) Either alone or together with Participant's investment advisor or other representative ("Purchaser Representative"), Participant has such knowledge and experience in financial and business matters that Participant is capable of evaluating the merits and risks of Participant's participation in this Agreement.

(b) Participant is familiar with the properties and project(s) of the Company and the risks associated therewith and Participant and/or Purchaser Representative has received a copy of the Company Agreement and has had an opportunity to ask questions of and receive answers from the Company and Owner, or a person or persons acting on behalf of Owner and the Company, concerning the terms and conditions of Participant's participation in the Company.

(c) Participant acknowledges that the Participation Interest has not been registered under the Securities Act of 1933, as amended (the "Securities Act") in reliance on an exemption for private offerings, and that the Participation Interest is being acquired solely for Participant's own account, for investment, and is not being acquired with a view to or for the resale, distribution, subdivision or fractionalization thereof, and Participant has no present plans to enter into any contract, undertaking, agreement or arrangement relating thereto.

(d) Participant acknowledges and is aware that: (i) there are substantial restrictions on the transfer of the Participation Interest, under the Company Agreement, the governing documents of other Company Affiliates, this Agreement and the Securities Act, (ii) the Participation Interest has not been registered under the Securities Act and cannot be sold unless it

is registered under the Securities Act or an exemption from registration is available and any proposed transfer is also made in compliance with applicable state securities law, and (iii) Participant has no right to require that the Participation Interest be registered under the Securities Act and, accordingly, that it may not be possible for Participant to liquidate the Participation Interest at any given time because there is no public market for such interest and no such market is expected to develop, and that Participant will have to hold such interest indefinitely. Participant acknowledges that Participant has no need for liquidity with respect to the Participation Interest and has sufficient liquidity for Participant's current and foreseeable future needs.

(e) Participant understands the tax consequences of holding the Participation Interest and agrees to report the Tax Items and distributions consistent with the terms hereof.

(f) Neither Participant, nor any of Participant's affiliates, is, nor will they become, a person or entity with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control ("OFAC") of the Department of the Treasury (including those named on OFAC's Specially Designated and Blocked Persons List) or under any statute, executive order (including the September 24, 2001, Executive Order Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism), or other governmental action and is not and will not engage in any dealings or transactions or be otherwise associated with such persons or entities.

(g) Participant understands the meaning and legal consequences of the representations and warranties contained in this Section 7, and hereby agrees to indemnify and hold harmless each of the Mentioned Persons from and against any and all loss, cost, damage, expense or liability (including attorneys' fees) due to or arising out of a breach of any representation, warranty, or covenant of Participant contained in this Section 7 or any other provision of this Agreement.

(h) The representations and warranties set forth in this Section 7 are true and accurate as of the date hereof and shall survive execution of this Agreement. By executing any Schedule attached hereto, Participant acknowledges that the representations and warranties set forth in this Section 7 are true and accurate as of the Effective Date set forth on such Schedule.

8. Further Assurances. Each of Participant and Owner agrees to execute, acknowledge and deliver such further instruments as may be deemed necessary or desirable to confirm and carry out the foregoing undertakings set forth herein, provided that the same do not result in a breach of Owner's obligations under the Company Agreement or any governing documents of any Company Affiliate.

9. Governing Law. This Agreement is, in accordance with the express intent and agreement of Owner and Participant, to be construed according to and governed by the laws of The Commonwealth of Massachusetts.

10. Binding Agreement. This Agreement shall be binding upon and shall inure to the benefit of Owner and Participant and their respective permitted heirs, executors, representatives, successors and assigns.

11. No Right to Be a Service Provider. Participant acknowledges that Participant has and has acquired no right to be an employee or service provider of the Employer or any Owner Controlled Entity or any other entity as a result of the receipt of the Participation Interest described in this Agreement.

12. Forfeiture of Participation Interest Upon Termination of Employment for Bad Boy Acts. Notwithstanding anything in this Agreement to the contrary, if Owner or any senior executive of any Owner Controlled Entity obtains actual knowledge that Participant has committed a Bad Boy Act against the Company, the Owner or any affiliate thereof, Participant shall forfeit the Participation Interest without consideration or payment of any kind, and this Agreement shall be automatically terminated.

13. Construction. Whenever the term "member" is used herein in reference to any entity that is not a limited liability company, such term shall be deemed to refer to the applicable equity owner in such entity.

14. Definitions. The following terms used in this Agreement have the meanings set forth below.

"Adjusted Capital Account" means, with respect to any Member, such Member's Capital Account as of the date of determination, after crediting to such Capital Account (without duplication and to the extent not previously taken into account) any amounts that the Member is obligated or deemed obligated to restore (to the extent recognized under Treasury Regulations Sections 1.704 1(b)(2)(ii)(c) and 1.704-2) and debiting to such Capital Account the items described in Treasury Regulations Section 1.704 1(b)(2)(ii)(d)(4), (5) or (6). The foregoing definition of Adjusted Capital Account and the provisions of Section 3 are intended to comply with the provisions of Treasury Regulations Section 1.704 1(b)(2)(ii)(d) and shall be interpreted and applied consistently therewith.

"Agreement" shall mean this Participation Agreement as the same may be amended from time to time.

"Bad Boy Act" means any act or omission to act that constitutes willful misconduct (including without limitation misappropriation of funds), intentional fraud, or willful violation of law, or results in conviction by a court of competent jurisdiction for a felony predicated upon fraud or financial dishonesty or a felony that results in a prison sentence.

"Burr" shall mean Robert S. Burr.

"Burr's Family" shall mean, and is limited to, Burr, Burr's spouse, parents, parents-in-law, grandparents, children, siblings (and their lineal descendents), and grandchildren. A trust, estate, family partnership, limited liability company or corporation, substantially all of the beneficiaries, partners, members or shareholders of which consist of Burr or members of Burr's Family, shall be considered part of Burr's Family for the purposes of this Agreement.

"Capital Account" has the meaning set forth in Section 3 hereof.

"Code" has the meaning set forth in Section 3 hereof.

"Capital Transaction" means refinancing, financing, or sale of Company assets.

"Capital Transaction Proceeds" means proceeds of the Company from any Capital Transaction, less all costs, expenses, liabilities and obligation of the Company, or of the Owner in respect of the Owner Interests, as the case may be, and together with reasonable reserves for any such costs, expenses, liabilities and obligations, known or unknown, at the time of such Capital Transaction.

"Company" shall have the meaning set forth in Recital A to this Agreement.

"Company Affiliate" shall mean any entity in which the Company owns any direct or indirect interest.

"Company Agreement" shall mean the limited liability company agreement, operating agreement or other governing documents of the Company, as amended from time to time.

"Competing Services" shall have the meaning set forth in Section 4(b).

"Consolidation Event" shall mean any event in which either the Company or Owner, as to the Owner Interest, merges or consolidates with and/or contributes all or substantially all of the Company's property or Owner contributes the Owner Interest, as the case may be, to another corporation, limited liability company, partnership, business trust or any other form of incorporated or unincorporated entity or the Company exchanges all or any part of its assets or Owner exchanges the Owner Interest for other assets, whether in a taxable or non-taxable transaction.

"Contributed Amount" shall mean the amount of all capital contributions by the Owner in respect of the Owner Interest.

"Disability" shall mean any physical or mental incapacity or incapacities as a result of which Participant has been unable to substantially perform the duties assigned to him by Employer for an aggregate of 120 days during any 12-month period or 90 consecutive days during any 12-month period.

"Effective Date" shall have the meaning set forth on each Schedule attached hereto, which shall be the date on which the Participation Interest in respect of the Company named on such Schedule is granted.

"Employer" shall have the meaning set forth in Recital B to this Agreement.

"Gap Amount" means the amount Owner would have received on the Effective Date, excluding the Contributed Amount to be returned to Owner, had the Company sold all of its property for fair market value, all debts of the Company were then paid, and the remaining balance were distributed to the Owner. For purposes of this agreement, the Gap Amount in respect of the Company, if any, shall be set forth on the applicable Schedule attached hereto.

"IRS Notice" shall have the meaning set forth in Section 2(d) of this Agreement.

"Liquidation Amount" shall mean the net proceeds that would be distributed as to the Participation Interest under Section 2 hereof if (i) the Company's property (determined without reduction for discounts relating to lack of control or lack of marketability) were sold for its fair market value, (ii) all debts of the Company were then paid, and (iii) the Company were liquidated.

"Mentioned Persons" shall have the meaning set forth in Section 5 of this Agreement.

"New Owner Interest" shall have the meaning set forth in Section 4(d) of this Agreement.

"OFAC" shall have the meaning set forth in Section 7(f) of this Agreement.

"Owner" shall have the meaning set forth in the introductory statement to this Agreement.

"Owner Controlled Entity" shall mean any entity in which Owner and/or members of Burr's Family (i) are directly or indirectly more than a 50% equity holder or (ii) otherwise have control.

"Owner Distribution" shall mean any distribution of cash or other property from the Company to Owner pursuant to Section 6 of the Company Agreement, including a distribution upon liquidation of the Company pursuant to Section 9(c) of the Company Agreement or other Capital Transaction.

"Owner Interest" shall mean the interest of Owner in the Company.

"Participant" shall have the meaning set forth in the introductory statement to this Agreement.

"Participants" shall mean the Participant and each other person who holds participation interests issued by the Owner with respect to the Owner Interest.

"Participation Interest" shall mean the interest in the Owner Interest granted to Participant by Owner hereunder and subject to the terms and conditions hereof.

"Participation Percentage" shall having the meaning set forth on the applicable Schedule attached hereto.

"Purchaser Representative" shall have the meaning set forth in Section 7(a) of this Agreement.

"Safe Harbor Valuation Election" shall have the meaning set forth in Section 2(d) of this Agreement.

"Sale Ratio" shall refer to the amount so designated on Schedule A attached hereto.

"Securities Act" shall have the meaning set forth in Section 7(c) of this Agreement.

"Tax Items" shall mean each item of income, gain, loss, deduction and credit allocable to Owner on account of his Owner Interest under the terms of the Company Agreement, as determined without regard to this Agreement.

"Terminating Capital Transaction" means a sale of substantially all of (i) the assets of the Company that results in the liquidation of the Company or (ii) all of the limited liability company interests in the Company.

"Treasury Regulations" has the meaning set forth in Section 3 hereof.

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EXECUTED under seal, in any number of counterpart copies, each of which counterpart copies shall be deemed an original for all purposes.

OWNER:

Robert S. Burr

PARTICIPANT:

Lauren Seavems

SCHEDULE A
HATHORNE HILL DEVELOPMENT LLC

Name and Mailing Address of Owner:
Robert S. Burr
College Street Partners LLC
900 Cummings Center
Beverly, MA 01915

Name and Mailing Address of Participant:
Lauren Seaverns
Address:

Name and Mailing Address of Company to which Participation Interest Relates:
Hathorne Hill Development, LLC
c/o Robert S. Burr
College Street Partners LLC
900 Cummings Center
Beverly, MA 01915

Company Agreement as most recently amended and in effect:
Operating Agreement of Hathorne Hill Development, LLC, dated as of September 1,2011

Participation Percentage: 5%

Effective Date: September 1, 2011

Gap Amount: $1,650,000.

Sale Ratio: 100%, if Owner exercises his purchase option set forth in Section 4(b) of the Agreement upon the death or Disability of Participant or upon termination of Participant's employment with Employer without cause.

10%, if Owner exercises his purchase option set forth in Section 4(b) of the Agreement upon termination of Participant's employment with Employer with cause or in the event that Participant performs any Competing Services.

OWNER:

Name: Robert S. Burr

PARTICIPANT:

Name: Lauren Seaverns

Development		
Development Cap Rate		9.14%
Stable Cap Rate	Year 5	10.09%
Cost		$ 18,700,000
per sq ft		*$263.38*
All In Price		$ 18,700,000
per sq ft		*$263.38*
LTC		*88%*
Debt		$16,500,000
Total Equity		$ 2,200,000

New Debt		
Amount		$ 16,500,000
Rate		5.25%
Amortization		30

Other			
Rentable Square Feet			71,000
General Vacancy			0.0%
Rent Escalator			1.025
Capital Reserve	psf	$	1.00
Inflation			3.0%

Exit Cap Rate	
Rate	8.0%

Scenario 1 Disposition (5 Year)		
Sales NOI		$ 1,934,708
Cap Rate		8.0%
Sale Price		21,454,328
Scenario 2 Disposition (5 Year)		
Sale Price		21,334,964
per sq ft		*$300.49*

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
Base Rental Revenue w/Escalation Revenue	$ 1,710,000	$ 1,752,750	$ 1,796,569	$ 1,841,483	$ 1,887,520	$ 1,934,708
Scheduled Base Rental Revenue	**1,710,000**	**1,752,750**	**1,796,569**	**1,841,483**	**1,887,520**	**1,934,708**
Net Operating Income	**1,710,000**	**1,752,750**	**1,796,569**	**1,841,483**	**1,887,520**	**1,934,708**
Asset Management Fee	$ 95,000	$ 97,375	$ 99,809	$ 102,305	$ 104,862	$ 107,484
Capital Reserve	71,000	73,130	75,324	77,584	79,911	82,308
Total Leasing & Capital Costs	166,000	170,505	175,133	179,888	184,773	82,308
Cash Flow Before Debt Service	**1,544,000**	**1,582,245**	**1,621,435**	**1,661,595**	**1,702,747**	**1,852,400**
Interest Payments	866,250	853,761	840,617	826,783	812,222	796,897
Principal Payments	237,879	250,368	263,512	277,347	291,908	307,233
Total Debt Service	1,104,129	1,104,129	1,104,129	1,104,129	1,104,129	1,104,129
Cash Flow After Debt Service	**$ 439,871**	**$ 478,116**	**$ 517,306**	**$ 557,465**	**$ 598,617**	**$ 748,270**
Capital Event						$ 21,334,964
Debt Payoff						$ (15,178,986)
Return of Capital						$ (2,200,000)
Proceeds						$ 3,955,978
Promote	**$ 439,871**	**$ 478,116**	**$ 517,306**	**$ 557,465**	**$ 598,617**	**$ 748,270**
L Seaverns **5.0%**	**$ 21,994**	**$ 23,906**	**$ 25,865**	**$ 27,873**	**$ 29,931**	**$ 37,414**
Capital Event $ 21,334,964						
Debt Payoff $ (15,178,986)						
Return of Equity $ (2,200,000)						
Equals Net Proceeds $ 3,955,978					5.0%	$ 197,799

Debt					
Sr. Loan - Beginning Balance	16,500,000	16,262,121	16,011,753	15,748,240	15,470,893	15,178,986
Interest Expense	866,250	853,761	840,617	826,783	812,222	796,897
Principal	237,879	250,368	263,512	277,347	291,908	307,233
Debt Service	1,104,129	1,104,129	1,104,129	1,104,129	1,104,129	1,104,129
Sr. Loan - Ending Balance	16,262,121	16,011,753	15,748,240	15,470,893	15,178,986	14,871,753

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DEPARTMENT
OF THE TRIAL COURT

MICHAEL GERHARDT AND
LAUREN SEAVERNS,

Plaintiffs,

v.

ROBERT S. BURR;
COLLEGE STREET PARTNERS LLC;
140 COMMONWEALTH AVENUE - DANVERS, LLC;
and
HAWTHORNE HILL DEVELOPMENT LLC,

Defendants.

CIVIL ACTION NO.

5/3/2021

COMPLAINT AND DEMAND FOR JURY TRIAL

NATURE OF THE ACTION

Plaintiff Michael Gerhardt, the former Development Manager at College Street Partners LLC, and Plaintiff Lauren Seaverns, the former Director of Operations and Property Management at College Street Partners LLC, hereby file this action against Defendants Robert S. Burr; College Street Partners LLC; 140 Commonwealth Avenue – Danvers, LLC; and Hawthorne Hill Development LLC; seeking redress for Defendants' failure to pay Plaintiffs for work performed. As a result of Defendants' conduct, Plaintiffs bring claims for breach of contract (Count I), promissory estoppel / detrimental reliance (Count II), quantum meruit (Count III), and unjust enrichment (Count IV).

PARTIES

1. Plaintiff Michael Gerhardt ("Mr. Gerhardt") is a resident of Essex, Essex County, Massachusetts. At times relevant hereto, Mr. Gerhardt was employed by College Street Partners LLC as a Development Manager.

2. Plaintiff Lauren Seaverns ("Ms. Seaverns") is a resident of the town of Hamilton, Essex County, Massachusetts. At times relevant hereto, Ms. Seaverns was employed by College Street Partners LLC as the Director of Operations and Property Management.

3. Defendant Robert S. Burr ("Mr. Burr") is, upon information and belief, a resident of Florida. Upon information and belief, Mr. Burr was / is at all times relevant hereto the owner and manager of College Street Partners LLC.

4. Defendant College Street Partners LLC ("College Street Partners") was / is, upon information and belief, a Massachusetts limited liability company with a principal office in Beverly, Massachusetts. Upon information and belief, Mr. Burr was / is the sole owner and manager of College Street.

5. Defendant 140 Commonwealth Avenue – Danvers, LLC ("140 Commonwealth") was / is a Massachusetts limited liability company. Upon information and belief, its principal office was / is located in Marblehead, Massachusetts. Upon information and belief, Mr. Burr was / is the sole owner and manager of 140 Commonwealth.

6. Defendant Hawthorne Hill Development LLC ("Hawthorne Hill") is a Massachusetts limited liability company. Its principal office is located at 75 Nanepashemet Street, Marblehead, Massachusetts 01945. Upon information and belief, Mr. Burr is the sole owner and manager of Hawthorne Hill.

JURISDICTION

7. This court has subject matter jurisdiction over this case pursuant to M.G.L. c. 212, § 3 because it is a civil action and there is no reasonable likelihood that recovery by Plaintiffs will be less than or equal to $50,000.

STATEMENT OF FACTS

The Corporate Entities

8. On or around October 15, 2003, Mr. Burr organized College Street as a limited liability company located in Beverly, Massachusetts. A true and accurate copy of College Street's Certificate of Organization, on record at the Office of the Secretary of the Commonwealth, is attached at **Exhibit A**. Upon information and belief, until its administrative dissolution by the Secretary of the Commonwealth in 2019, College Street operated as a real estate advisory and development firm specializing in health care real estate development. A true and accurate copy of the record of the Office of the Secretary of the Commonwealth, indicating that College Street was involuntarily dissolved, is attached hereto at **Exhibit B**. Upon information and belief, Mr. Burr was the sole owner and manager of College Street. A true and accurate copy of College Street's Amended and Restated Certificate of Organization, on record at the Office of the Secretary of the Commonwealth and listing Mr. Burr as the only manager of College Street, is attached hereto at **Exhibit C**.

9. Upon information and belief, on or around September 4, 2008, Mr. Burr organized 140 Commonwealth Ave – Danvers LLC ("140 Commonwealth") as a limited liability company in Massachusetts, for the purpose of and in connection with College Street's (*i.e.*, his) development and management of the real property located at 140 Commonwealth Avenue, Danvers, Massachusetts. Upon information and belief, Mr. Burr was the sole owner and manager of 140

Commonwealth. A true and accurate copy of 140 Commonwealth's Certificate of Organization, on record at the Office of the Secretary of the Commonwealth, is attached at **Exhibit D**. Upon information and belief, Mr. Burr was the sole owner and manager of 140 Commonwealth. See **Exhibit D**.

10. Upon information and belief, on or around April 26, 2010, Mr. Burr organized Hawthorne Hill as a limited liability company in Massachusetts, for the purpose of and in connection with College Street's (*i.e.*, his) development of the Hawthorne Hill Rehabilitation Center, a 120 bed, 77,000 square foot skilled nursing facility in Danvers, Massachusetts. A true and accurate copy of Hawthorne Hill's Certificate of Organization, on record at the Office of the Secretary of the Commonwealth, is attached at **Exhibit E**.[1] Upon information and belief, Mr. Burr was the sole owner and manager of Hawthorne Hill. See **Exhibit E**.

11. Upon information and belief, in 2015, Burr filed a Certificate of Cancellation on 140 Commonwealth. A true and accurate copy of 140 Commonwealth's Certificate of Cancellation, on record at the Office of the Secretary of the Commonwealth, is attached at **Exhibit F**. In 2018, 2019, 2020, and 2021, however, Burr resumed filing Annual Reports with the Office of the Secretary of the Commonwealth. True and accurate copies of the 140 Commonwealth's Annual Reports, on record at the Office of the Secretary of the Commonwealth, are attached at **Exhibit G**.

Burr Hires Mr. Gerhardt and Ms. Seaverns to Work for College Street

12. In or around 2004, Mr. Burr hired Mr. Gerhardt to be College Street's Development Manager, reporting directly to Mr. Burr. Mr. Gerhardt's duties at College Street included,

[1] The name "Hathorne Hill Development LLC" (i.e., without a "w") appears to have been used interchangeably with Hawthorne Hill Development LLC. As the records of the Secretary of the Commonwealth use the spelling "Hawthorne Hill Development LLC," this spelling is used herein. See **Exhibit E**.

among other things, executing development of healthcare projects, site planning, due diligence, budget management, and construction contract procurement and administration.

13. When Mr. Burr hired Mr. Gerhardt, he paid to him a cash salary as compensation for his employment. At the same time, Mr. Burr represented to Mr. Gerhardt that, in the future, he (Mr. Gerhardt) would be given an ownership interest in certain of College Street's development projects as part of his compensation. Mr. Burr further explained to Mr. Gerhardt that this ownership stake would compensate for / offset a lower salary and/or bonuses – *i.e.*, Mr. Gerhardt would secure his ownership stake in these development projects not by making capital contributions, but through sweat equity.

14. In or around 2008, Mr. Burr hired Ms. Seaverns to be College Street's Director of Operations and Property Management, also reporting directly to Mr. Burr. Ms. Seaverns' duties at College Street included, among other things, maintaining budgets for the business and its projects, rent collection, reconciliation of tenant invoices, financial planning and reporting, and overall management of College Street's office functions.

15. When Mr. Burr hired Ms. Seaverns, he also paid to her a cash salary as compensation for her employment. At the same time, Mr. Burr made to Ms. Seaverns the same representation that he did to Mr. Gerhardt, *i.e.*, that, in the future, she (Ms. Seaverns) would be given an ownership interest in certain of College Street's development projects as part of her compensation. Mr. Burr further explained to Ms. Seaverns that this ownership stake would compensate for / offset a lower salary and/or bonuses – *i.e.*, Ms. Seaverns would secure her ownership stake in these development projects not by making capital contributions, but through sweat equity.

16. Thereafter and throughout their employment, Mr. Gerhardt and Ms. Seaverns diligently and capably performed their duties for College Street.

Mr. Burr Grants To Plaintiffs Ownership Interests In College Street's Development Projects

17. In or around July 2009, in exchange for the valuable services that Mr. Gerhardt had provided and was continuing to provide to College Street, which inured to the benefit of 140 Commonwealth, Mr. Burr, as the owner of 140 Commonwealth, granted to Mr. Gerhardt a "Participation Percentage" of 10% of his ownership interest in 140 Commonwealth, doing so in a contract executed under seal. A true and accurate copy of the Gerhardt 140 Commonwealth Participation Agreement is attached hereto at **Exhibit H**.

18. Upon information and belief, at or around the same time and also in exchange for the valuable services Ms. Seaverns had provided and was continuing to provide to College Street, which inured to the benefit of 140 Commonwealth, Mr. Burr granted to Ms. Seaverns a "Participation Percentage" of 10% of his ownership interest in 140 Commonwealth, doing so in a contract executed under seal. A true and accurate copy of the Seaverns 140 Commonwealth Participation Agreement is attached hereto at **Exhibit I**.

19. In or around September 2011, in exchange for the services that Mr. Gerhardt had provided and was continuing to provide to College Street, which also inured to the benefit of Hawthorne Hill, Mr. Burr, as the owner of Hawthorne Hill, granted to Mr. Gerhardt a "Participation Percentage" of 10% of his ownership interest in Hawthorne Hill, doing so in a contract executed under seal. A true and accurate copy of the Gerhardt Hawthorne Hill Participation Agreement is attached hereto at **Exhibit J**.

20. Upon information and belief, at or around the same time and also in exchange for the services that Ms. Seaverns had provided and was continuing to provide to College Street, which inured to the benefit of Hawthorne Hill, Mr. Burr granted to Ms. Seaverns a "Participation Percentage" of 5% of Mr. Burr's ownership interest in Hawthorne Hill, doing so in a contract

executed under seal. A true and accurate copy of the Seaverns Hawthorne Hill Participation Agreement is attached hereto at **Exhibit K.**

21. Plaintiffs' Participation Agreements with Mr. Burr for 140 Commonwealth and Hawthorne Hill provided that Mr. Burr was required to make distributions to Mr. Gerhardt and Ms. Seaverns when making "Owner Distributions" to himself:

> (a) Cash Flow Distributions. Within a reasonable period after receipt by Owner of any Owner Distribution other than a Distribution in respect of a Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash (or, if such Owner Distribution is made in kind, then at Owner's sole discretion, a portion of such other property equal in value, or cash equal in value to such property) equal to the product of (i) the Participation Percentage and (ii) such Owner Distribution.
>
> (b) Distribution Upon Capital Transactions Other Than a Terminating Capital Transaction. Within a reasonable period of receipt by Owner of Owner Distributions from Capital Transaction Proceeds with respect to any Capital Transaction other than a Terminating Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash computed as though the Owner Distributions from such Capital Transaction Proceeds are divided between the Owner and all Participants in the following manner:
>
> 1. First, 100% to Owner until Owner has received all unreturned Contributed Amounts;
>
> 2. Thereafter, pro rata, to the Owner and to each of the Participants, in accordance with each person's Participation Percentage (assuming, for this purpose, that the Owner's Participation Percentage is equal to the result of subtracting all the Participants' Participation Percentages from 100%).
>
> (c) Distributions Upon Terminating Capital Transactions.
>
> 1. Within a reasonable period of receipt by Owner of Owner Distributions from Capital Transaction Proceeds with respect to a Terminating Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash equal to the Participant's Capital Account, after giving effect to all contributions, distributions and allocations of Tax Items for periods, including the year during which the Terminating Capital Transaction occurs. If the Participant has a deficit balance in its Capital Account (after giving effect to all contributions, distributions and allocations for all periods, including the year during which such liquidation occurs), Participant shall have no obligation to make any contribution to the capital of the Company

with respect to such deficit, and such deficit shall not be considered a debt owed to the Company or to any other person for any purpose whatsoever.

2. Notwithstanding the provisions of Section 3 hereof, in the year of the Terminating Capital Transaction, items of net income and deduction shall be allocated to the Participant and the Owner to the extent necessary to produce Capital Accounts for the Participant and Owner such that amounts distributed pursuant to this Section 2(c) will be in the amounts Participant would have received under Section 2(b) hereof had the distribution not been a distribution upon a Terminating Capital Transaction.

See **Exhibits H, I, J, & K**, Section 2.

Pursuant To Plaintiffs' Participation Agreements, Burr Paid to Plaintiffs Distributions

22. After granting to Mr. Gerhardt and Ms. Seaverns the "Participation Interests" in 140 Commonwealth and in Hawthorne Hill, the properties related to the two LLCs continued to generate income for Mr. Burr and, in accord with the Participation Agreements, Mr. Burr made distributions to Mr. Gerhardt and Ms. Seaverns until their respective separations from employ in 2013, discussed below.

Mr. Burr Stops Paying to Plaintiffs Their Regular Wages, Terminates Them, and Fails / Refuses To Pay Them For Their Participation Interests In 140 Commonwealth and Hawthorne Hill

23. In or around June 2013, Mr. Burr moved both Mr. Gerhardt and Ms. Seaverns to part-time schedules at College Street.

24. In or around June 2013, Mr. Burr stopped paying to Mr. Gerhardt and Ms. Seaverns regular paychecks. As a result, the entirety of the remuneration for their employment consisted solely of distributions from 140 Commonwealth and Hawthorne Hill.

25. Shortly thereafter, Ms. Seaverns left College Street. Mr. Burr stopped paying to Ms. Seaverns distributions pursuant to her Participation Agreements in 140 Commonwealth and Hawthorne Hill. When Ms. Seaverns inquired into this, Mr. Burr told her that her receipt of

distributions was dependent on her employment with College Street and that as a result of her separation, he would not be making any distribution payments to her.

26. In or around September 2013, Mr. Burr laid off Mr. Gerhardt. At that time, Mr. Burr stopped paying to Mr. Gerhardt distributions under his Participation Agreements in 140 Commonwealth and Hawthorne Hill.

27. In or around June 2014, Mr. Gerhardt met with Mr. Burr specifically to discuss his economic interests in both entities. Mr. Burr told Mr. Gerhardt that his receipt of distributions was dependent on his employment with College Street and that as a result of his separation, he would not be making any distribution payments to him. Mr. Burr stated that Mr. Gerhardt (and Ms. Seaverns) would, however, receive a distribution for their interests when 140 Commonwealth and Hawthorne Hill "transacted" or words to that effect – *i.e.*, when either property sold.

28. Upon information and belief, Mr. Burr continues to regularly receive income from the real estate located at 140 Commonwealth Avenue in Danvers, Massachusetts.

29. Also upon information and belief, Mr. Burr continues to regularly receive income from Hawthorne Hill.

30. In or around March 2020, Plaintiffs came to be reliably informed and believe that, since 2013, Mr. Burr has continued to receive income on the Hawthorne Hill property in excess of $800,000 per year.

31. Pursuant to the terms of the Participation Agreements, Plaintiffs' economic interests in 140 Commonwealth and Hawthorne Hill were / are not dependent on their employment. Since Plaintiffs' separations from College Street, however, Mr. Burr has failed and/or refused to pay to Plaintiffs any distributions for their interests in either entity.

Corporate Machinations

32. Upon information and belief, on or around March 19, 2014, Mr. Burr organized 140 Liberty LLC as a limited liability company in Massachusetts, for the purpose of engaging in the business of real estate. A true and accurate copy of 140 Liberty LLC's Certificate of Organization, on record at the Office of the Secretary of the Commonwealth, is attached at **Exhibit L**. Upon information and belief, Mr. Burr was the sole manager and owner of 140 Liberty, LLC. Upon information and belief, Mr. Burr transferred some of the property(ies) located at 140 Commonwealth Avenue and which was/were managed by 140 Commonwealth, to and from 140 Liberty LLC, which Mr. Burr solely controlled. Mr. Burr did not pay to Plaintiffs any distributions from their ownership interest in 140 Commonwealth in connection with any of these transfers. In light of Mr. Burr's sole control over 140 Commonwealth and 140 Liberty, LLC, it is reasonable to infer that Mr. Burr organized this entity and made any such transfers in an effort to deprive Plaintiffs of their ownership interests granted to them in their Participation Agreements.

33. Upon information and belief, also on or around March 19, 2014, Mr. Burr organized RSB Hathorne LLC, as a limited liability company in Massachusetts, also for the purpose of engaging in the business of real estate. A true and accurate copy of RSB Hathorne LLC's Certificate of Organization on record at the Office of the Secretary of the Commonwealth, is attached at **Exhibit M**.[2] Upon information and belief, Mr. Burr was the sole manager and owner of RSB Hathorne LLC. Upon information and belief, Mr. Burr transferred some of the property(ies) located at the Hawthorne Hill Rehabilitation Center and managed by Hawthorne Hill, to and

[2] RSB Hathorne LLC was originally organized as "RSB Hawthorne LLC." On or about March 20, 2014, the LLC's name was amended to RSB Hathorne LLC. A true and accurate copy of the Certificate of Amendment of RSB Hathorne LLC, on record with the Office of the Secretary of the Commonwealth, is attached hereto at **Exhibit N**.

from RSB Hathorne, which Mr. Burr solely controlled. Mr. Burr again did not pay to Plaintiffs any distributions from their ownership in Hawthorne Hill in connection with any transfers. In light of Mr. Burr's sole control over Hawthorne Hill and RSB Hathorne, it is again reasonable to infer that Mr. Burr organized this entity and made any such transfers in an effort to deprive Plaintiffs of their ownership interests granted to them in their Participation Agreements.

34. On or around March 10, 2015, Mr. Burr filed a Certificate of Cancellation with the Massachusetts Secretary of the Commonwealth for 140 Commonwealth. See **Exhibit F**. Mr. Burr did not pay to Plaintiffs any distributions from his ownership interest in 140 Commonwealth in connection with this "cancellation." Notwithstanding this purported "cancellation," however, 140 Commonwealth has filed Annual Reports at the Office of the Secretary of the Commonwealth for 2018, 2019, 2020, and 2021, i.e., after its purported cancellation. See **Exhibit G**. Again Mr. Burr has not paid to Plaintiffs *any* distributions nor provided to them any information about the operation of the LLC during this time.

35. On or about June 30, 2017, upon information and belief, the Secretary of the Commonwealth entered administrative dissolution of 140 Liberty LLC. (Upon information and belief, Mr. Burr did not file any annual reports in connection with this entity. None appear in the records of the Office of the Secretary of the Commonwealth, a true and accurate copy of which is attached at **Exhibit O**.)

36. On or about June 30, 2018, upon information and belief, the Secretary of the Commonwealth entered administrative dissolution of RSB Hathorne LLC. (Upon information and belief, Mr. Burr filed only one annual report, in 2015, in connection with this entity. No other reports appear in the records of the Office of the Secretary of the Commonwealth, a true and accurate copy of which is attached at **Exhibit P**.)

37. Based on Mr. Burr's conduct in organizing, transferring property to and from, cancelling and/or dissolving entities of which he was the sole manager and which had similar if not identical corporate purposes, it is again reasonable to infer that he acted to deprive Plaintiffs of the ownership interest granted to them in their Participation Agreements.

COUNT I
Breach of Contract
(Against Burr)

Plaintiffs adopt and incorporate all of the above allegations herein.

38. Plaintiffs Mr. Gerhardt and Ms. Seaverns have a valid contractual relationship with Mr. Burr. See Participation Agreements at **Exhibits H, I, J & K**.

39. Pursuant to Section 2 of the Participation Agreements, Mr. Burr is required to pay to Mr. Gerhardt and Ms. Seaverns distributions from any Ownership Distributions made to Mr. Burr.

40. Upon information and belief, since Plaintiffs' termination from College Street, Mr. Burr has continued to regularly receive Ownership Distributions from the property located at 140 Commonwealth Avenue, Danvers, Massachusetts and from Hawthorne Hill.

41. Despite Burr's obligation to provide distributions to Mr. Gerhardt and Ms. Seaverns, since September 2013, Mr. Burr has completely and repeatedly failed to do so, in breach of the Participation Agreements.

42. As a direct and proximate result of Mr. Burr's conduct, Plaintiffs have suffered and continue to suffer economic harm and other damages, including but not limited to lost profit distributions, in an amount to be determined at trial.

COUNT II
Promissory Estoppel / Detrimental Reliance
(Against Burr)

Plaintiffs adopt and incorporate all of the above allegations herein.

43. By his conduct set forth above, Mr. Burr made promises or representations that he would grant Plaintiffs ownership interests in 140 Commonwealth and Hawthorne Hill in exchange for their services to College Street.

44. Plaintiffs reasonably relied on these promises and/or representations to their detriment by continuing to work at and provide services for College Street at a reduced salary rate and then by working at College Street without salary at all.

45. As a direct and proximate result of Mr. Burr's conduct, Plaintiffs have suffered and continue to suffer economic harm and other damages, including but not limited to lost profit distributions, in an amount to be determined at trial

COUNT III
Quantum Meruit
(Against All Defendants)

Plaintiffs adopt and incorporate all of the above allegations herein.

46. By performing their duties as employees of College Street, Plaintiffs provided valuable services to Mr. Burr and College Street, which services inured to the benefit of 140 Commonwealth and Hawthorne Hill.

47. Nevertheless, Defendants have failed or refused to pay them in full for the value of the work Plaintiffs performed.

48. Plaintiffs are entitled to the fair and reasonable value of their services.

49. As a direct and proximate result of Defendants' conduct, Plaintiffs have suffered and continue to suffer economic harm and other damages, including but not limited to lost profit distributions, in an amount to be determined at trial.

COUNT IV
Unjust Enrichment
(Against All Defendants)

Plaintiffs adopt and incorporate all of the above allegations herein.

50. By performing their duties as employees of College Street, Plaintiffs provided valuable services to Mr. Burr and College Street, which services inured to the benefit of 140 Commonwealth and Hawthorne Hill.

51. Defendants did not pay to Plaintiffs for the fair and reasonable value of their services.

52. As a result of Defendants' failure to pay Plaintiffs for the fair and reasonable value of their services, Defendants have retained the benefit of Plaintiffs' services under circumstances which make such acceptance or retention of Plaintiff's services inequitable.

53. As a direct and proximate result of Defendants' conduct, Plaintiffs have suffered and continue to suffer economic harm and other damages, including but not limited to lost profit distributions, in an amount to be determined at trial.

RELIEF REQUESTED

WHEREFORE, the Plaintiffs respectfully request that this Court award them the following relief:

1. Enter judgment in favor of Plaintiffs against Defendant Mr. Burr under Count I (Breach of Contract), in the amount of all damages sustained by Mr. Gerhardt and Ms. Seaverns as a result of Mr. Burr's breach of contract, to be determined at trial;

2. Enter judgment in favor of Plaintiffs against Defendant Mr. Burr under Count II (Promissory Estoppel / Detrimental Reliance), in the amount of all damages sustained by Mr. Gerhardt and Ms. Seaverns as a result of Mr. Burr's conduct, to be determined at trial;

3. Enter judgment in favor of Plaintiffs against all Defendants under Count III (Quantum Meruit), in the amount of all damages sustained by Mr. Gerhardt and Ms. Seaverns as a result of Defendants' conduct, to be determined at trial;

4. Enter judgment in favor of Plaintiffs against all Defendants under Count IV (Unjust Enrichment), in the amount of all damages sustained by Mr. Gerhardt and Ms. Seaverns as a result of Defendants' conduct, to be determined at trial;

5. Award to Plaintiffs pre- and post-judgment interest as required by law; and

6. Grant such other legal or equitable relief as may be deemed just and appropriate and which will make the Plaintiffs whole.

JURY DEMAND

Plaintiffs request a trial by jury on all claims so triable.

Respectfully submitted,

MICHAEL GERHARDT and
LAUREN SEAVERNS,
By their attorneys,

Patricia A. Washienko, BBO# 641615
pwashienko@fwlawboston.com
Brendan T. Sweeney, BBO# 703992
bsweeney@fwlawboston.com
FREIBERGER & WASHIENKO, LLC
211 Congress Street, Suite 720
Boston, MA 02110
p: 617.723.0008 f: 617.723.0009

Dated: May 3, 2021

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 2184cv01017-BLS2

MICHAEL GERHARDT,
LAUREN SEAVERNS

Plaintiffs,

v.

ROBERT S. BURR,
COLLEGE STREET PARTNERS LLC,
140 COMMONWEALTH AVENUE – DANVERS LLC,
HAWTHORNE HILL DEVELOPMENT LLC

Defendants.

Served via e-mail

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Massachusetts Rules of Civil Procedure and Massachusetts Superior Court Rule 9A, Defendants Robert S. Burr ("Burr"), College Street Partners LLC ("College Street"), 140 Commonwealth Avenue - Danvers, LLC ("140 Commonwealth Avenue"), and Hawthorne Hill Development, LLC ("Hawthorne Hill", and with Burr, College Street, and 140 Commonwealth Avenue, collectively, the "Defendants") hereby move for summary judgment in their favor on all the claims asserted in Plaintiffs' Complaint in the above-referenced action.

Plaintiffs filed their complaint in May 2021, seeking damages for purported breaches of four identical Participation Agreements that occurred, according to the Complaint, no later than 2013. However, Defendants are entitled to summary judgment as a matter of law that the six-year statute of limitations of Mass. Gen. Laws Ch. 260 § 2 bars Plaintiffs' action.

As described in detail in Defendants' accompanying Memorandum of Law, summary judgement should be entered on all counts in favor of the Defendants because this case was commenced after the applicable statute of limitations lapsed. Contrary to the assertions of the Plaintiffs, the Participation Agreements at issue do not qualify as sealed instruments under Mass. Gen. Laws. Ch. 4 § 9A and are not subject to a twenty-year statute of limitations under Mass. Gen. Laws Ch. 260 § 2. Plaintiffs' action is subject to the ordinary six-year limitation period of under Mass. Gen. Laws. Ch. 260 § 2, which expired no later than 2019. The Supreme Judicial Court in *Knott v. Raciott*, 442 Mass. 314, 319-320 (2004) strictly construed and further narrowed the contract under seal doctrine, and Defendants' are entitled to summary judgment as a matter of law.

In support of its Motion, Defendants rely upon and incorporate by reference the accompanying Memorandum of Law, the Statement of Material Undisputed Facts, the Affidavit of David B. Mack and the Appendix of Exhibits filed herewith. For the reasons stated in the Memorandum of Law, Defendants respectfully requests that the Court enter an Order:

a) Allowing Defendants' Motion for Summary Judgment;

b) Entering judgment for Defendants on all claims asserted against them in Plaintiffs' Complaint; and

c) Granting such other and further relief as the Court deems just and appropriate.

REQUEST FOR HEARING

Defendants hereby requests a hearing on their Motion pursuant to Massachusetts Superior Court Rule 9A(c)(2) and (3), and respectfully submits that a hearing will aid the Court in deciding the issues presented herein.

Respectfully submitted,

ROBERT S. BURR,
COLLEGE STREET PARTNERS LLC, 140 COMMONWEALTH AVENUE – DANVERS, LLC, and HAWTHORNE HILL DEVELOPMENT LLC,

By their attorneys,

/s/ David B. Mack

David B. Mack (BBO # 631108)
dmack@ocmlaw.net
Stephanie R. Parker (BBO# 687610)
sparker@ocmlaw.net
O'Connor Carnathan and Mack LLC
10 Burlington Mall Road, Suite 301
Burlington, MA 01803
Telephone: 781.359.9005

Richard C. Pedone (BBO #630716)
rpedone@nixonpeabody.com
John E. Murray (BBO #706250)
jmurray@nixonpeabody.com
NIXON PEABODY LLP
Exchange Place
53 State Street
Boston, MA 02109
Phone: 617-345-100

Dated: January 26, 2024

CERTIFICATE OF COMPLIANCE WITH SUPERIOR COURT RULE 9C

I, Stephanie Parker, certify that, pursuant to Massachusetts Superior Court Rule 9C, counsel for the Parties (myself on behalf of Defendants and Attorney Gregory Browne on behalf of Plaintiffs) conferred by telephone regarding this Motion on January 23, 2024 at approximately 1:00 P.M.

/s/ Stephanie Parker
Stephanie Parker

CERTIFICATE OF SERVICE

I, David B. Mack, hereby certify that on January 26, 2024, I served a copy of the foregoing document upon Plaintiffs' counsel of record via e-mail.

David Rich, Esq.
Todd & Weld, LLP
One Federal Steet
Boston, MA 02110
(617) 720-2626
drich@toddwed.com

/s/ David B. Mack
David B. Mack

BC

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 2184cv01017-BLS2

31

MICHAEL GERHARDT,
LAUREN SEAVERNS

Plaintiffs,

v.

ROBERT S. BURR,
COLLEGE STREET PARTNERS LLC,
140 COMMONWEALTH AVENUE – DANVERS LLC,
HAWTHORNE HILL DEVELOPMENT LLC

Defendants.

Served via e-mail

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants Robert S. Burr ("Burr"), College Street Partners LLC ("College Street"), 140 Commonwealth Avenue – Danvers, LLC ("140 Commonwealth Avenue"), Hawthorne Hill Development, LLC ("Hawthorne Hill", and with Burr, College Street, and 140 Commonwealth Avenue, collectively, the "Defendants") submit this Memorandum of Law in support of their Motion for Summary Judgment. The Court should dismiss all counts of the Complaint of Plaintiffs Lauren Seaverns ("Seaverns") and Michael Gerhardt ("Gerhardt") because Plaintiffs commenced this breach of contract action approximately eight years after the alleged cause of action accrued. Contrary to Plaintiffs' contention, the agreements at issue are not sealed instruments subject to a twenty-year statute of limitations. Rather, the ordinary six-year limitation period for breach of contract claims applies.

Here, the four subject contracts, which are substantively identical, fail to qualify as sealed instruments because:

(i) The contracts' essential financial terms are contained in a separately signed schedule that fails to include even a notation, much less a "recital," that the contract is under seal. With only one of the two dual required signature blocks indicating that that the signatures are affixed under seal, the contract is not a contract under seal for statute of limitations purposes; and

(ii) Even assuming arguendo that a notation on one of two required signature blocks is sufficient, the contracts are nevertheless not contracts under seal because the agreements do not include a clear "recital" indicating that the agreements are under seal.

The statutory requirement that a "recital" be included, as opposed to a mere mark or note near a signature block, is not difficult to comply with, is not hyper-technical, and serves a crucial purpose. A recital flags for parties signing, up-front, that the special statutory provisions applicable only to seal instruments apply.

Here, it is undisputed that Defendant Burr personally believed that his contractual obligations to the Plaintiffs had ceased in 2013 and he so informed the Plaintiffs. It is undisputed that the Plaintiffs never communicated their disagreement to Burr subsequent to 2014, but instead waited in silence for about seven years while a witness died[1] and evidence became stale.[2] Burr, if

[1] Burr's accountant passed away in 2018. SOF ¶ 31 (Ex. 3, Burr Aff. ¶ 16).

[2] Defendants did not produce in discovery any information or documents prepared subsequent to their departure from College Street in which they referenced their profits interest.

this case were to go to trial, faces the evidentiary prejudice that the six-year statute of limitations is designed to prevent.[3]

Applying the six-year contract limitations period also would comport with recent trends, as the Supreme Judicial Court has:

(i) strictly construed the statute on which Plaintiffs rely in their attempt to escape the standard six-year statute of limitations;

(ii) refused to expand the scope of the statute beyond what is absolutely required by its text; and

(iii) questioned the merits of the statute in light of the fact that Massachusetts stands in a small minority in continuing to have such a legal relic originally designed to be applicable only to real estate transactions.

See Knott v. Raciott, 442 Mass. 314, 319-320 (2004).

UNDISPUTED FACTS

Burr formed College Street as a real estate advisory and development company, which over time focused on healthcare. Statement of Material Undisputed Facts ("SOF"), ¶ 1 (Ex. 1[4] - Burr Depo, pp. 15-17; Ex. 3 - Burr Aff. ¶ 1). College Street hired Seaverns in 2008 as an administrative assistant. SOF, ¶ 2 (Ex. 1 - Burr Depo., pp. 22-25; Ex. 12 - Burr Aff. ¶ 2). College Street hired Gerhardt prior to 2008. Gerhardt served as a project manager for College Street. (SOF ¶ 3; Ex. 1 - Burr Depo, p. 33; Ex. 3 - Burr Aff. ¶ 3).

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[3] If the Plaintiffs are correct, then they could have continued to lay in wait for another thirteen years and this case could have been commenced by them or their heirs, against Mr. Burr or his heirs, twenty years after the alleged breach!

[4] References to exhibits are to the exhibits attached to the Affidavit of David B. Mack.

In 2008, Burr formed 140 Commonwealth Avenue to acquire title to and redevelop real estate in Danvers, Massachusetts. (SOF ¶ 4; Ex. 1 - Burr Depo., p. 54; Ex. 3 - Burr Aff. ¶ 4). In 2010 Burr formed Hawthorne Hill to acquire title to and develop a skilled nursing facility in Danvers, Massachusetts. (SOF ¶ 5; Ex. 1 - Burr Depo., pp. 100-101; Ex. 3 - Burr Aff. ¶ 5). At all relevant times Burr was the 100% owner of Comm Ave and is currently the 100% owner of Hawthorne Hill. (SOF ¶ 6; Ex. 3 - Burr Aff. ¶ 6; Ex. 13 - Answer and Counterclaim ¶¶ 8-10).

In July 2009, Gerhardt and Burr executed a Participation Agreement that related to an interest in 140 Commonwealth Avenue. (SOF ¶ 7). In July 2009, Seaverns and Burr executed a Participation Agreement that related to an interest in 140 Commonwealth Avenue. (SOF ¶ 8).

Each of the four Participation Agreements is substantively identical:

- Page 1 of each Participation Agreement begins with a section labeled "R E C I T A L S." Copied below is the entire Recital section from Gerhardt's 2011 Participation Agreement (Ex. 4):

EXECUTION COPY

PARTICIPATION AGREEMENT

This PARTICIPATION AGREEMENT is made as of September 1, 2011 by and between Robert S. Burr ("Owner") and Michael Gerhardt ("Participant").

RECITALS

A. As of the Effective Date, Owner is a member of that certain limited liability company or other entity set forth under the heading "Name and Mailing Address of Company" on each Schedule attached hereto (the "Company") and owns, directly or indirectly, limited liability company interests in the Company.

B. Participant is a provider of services to an affiliate of the Owner (the "Employer") and such services to the Employer will enhance the value of the Company.

C. Owner wishes to provide Participant with an economic interest in a portion of the Owner Interest on the terms and subject to the provisions of this Agreement.

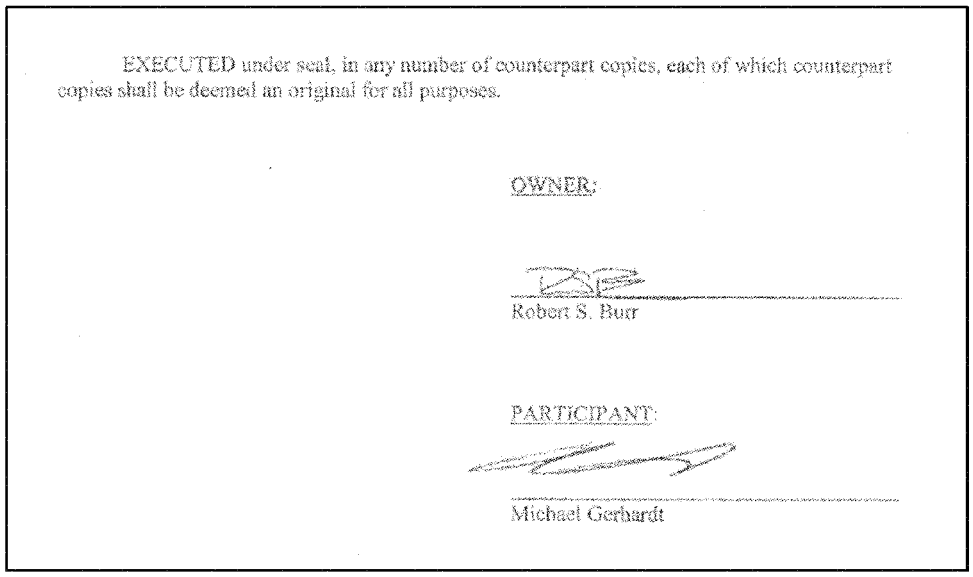
D. The Participation Interest is being granted in exchange for the provision of services by the Participant to or for the benefit of the Company in a Member capacity, or in anticipation of being a Member. The Owners intend that the Participation Interest qualify as "profits" interests, as defined in Rev. Proc. 93-27, 1993-2 C.B. 343, and each of the Company, and the Participant shall treat the Participant as the owner of the Participation Interest granted hereunder.

E. Capitalized terms used in this Agreement are defined in Section 14 below.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

(SOF ¶ 12; Exs. 4, 5, 6, 7 - Participation Agreements).

- Page 13 to each Participation Agreement is preceded by a note that states, in part: "EXECUTED under seal . . ." followed by the signatures of Burr, and Gerhart or Seaverns, (as applicable). Copied below is the signature page from Gerhardt's 2011 Participation Agreement (Ex. 4):



EXECUTED under seal, in any number of counterpart copies, each of which counterpart copies shall be deemed an original for all purposes.

OWNER:

Robert S. Burr

PARTICIPANT:

Michael Gerhardt

(SOF ¶ 12, Exs. 4, 5, 6, 7 - Participation Agreements)

- Attached to each Participation Agreement is an identically structured "Schedule A." (SOF ¶ 13; Exs. 4, 5, 6, 7 - Participation Agreements).

Schedule A contains critical financial terms of the transactions, including:

- the names and addresses of the parties;
- the name of the entity in which the participation interest relates to;
- the governing documents of the entity in which the participation interest relates to;
- the effective date of the Participation Agreement;
- the amount of the interest being transferred in the applicable entity (the "Participation Interest"); and
- the necessary ratio amounts and percentages that are necessary to calculate a repurchase price of the Participation.

(SOF ¶ 13; Exs. 4, 5, 6, 7 - Participation Agreements).

- Each Schedule A is signed by both Burr, and either Gerhardt or Seaverns (as applicable). Schedule A does not contain *any* reference to a seal. (SOF ¶ 14; Exs. 4, 5, 6, 7 - Partcicipation Agreements). Copied below is the signature block from Gerhardt's 2011 Participation Agreement (Ex. 6):

(SOF ¶ 14; Exs. 4, 5, 6, 7 - Paticipiation Agreements).

Seaverns received distributions related to 140 Commonwealth Ave for the years 2009, 2010, 2011, 2012, and a portion of 2013. (SOF ¶ 18; Ex. 1 - Burr Depo, p. 93; Ex. 9 - Seaverns K-1). Seaverns received distributions related to Hawthorne Hill for the years 2012 and a portion of 2013. (SOF ¶ 19; Ex. 9 - Seaverns K-1).

Gerhardt received distributions related to 140 Commonwealth Ave. for the years 2009 through 2013. (SOF ¶ 20; Ex. 1 - Burr Depo, pp. 91-92; Ex. 8 - Gerhardt K-1). Gerhardt received distributions related to Hawthorne Hill for the years 2012 and 2013. (SOF ¶ 21; Ex. 1 - Burr Depo, p. 92-92; Ex. 8 - Gerhardt K-1).

In 2013, College Street stopped doing business and was wound down. (SOF ¶ 22; Ex. 1 - Burr Depo, p. 27; Ex. 3 - Burr Aff. ¶ 7.). Seaverns left College Street in 2013. (SOF ¶ 23; Ex. 1 - Burr Depo, p. 29; Ex. 3 - Burr Aff. ¶ 8). Gerhardt left College Street at the end of 2013. (SOF ¶ 24; Ex. 1 - Burr Depo, p. 39; Ex. 3 - Burr Aff. ¶ 9).

Burr ceased making distributions to Seaverns in or about the middle of 2013, after Seaverns left College Street. (SOF ¶ 25; Ex. 1 - Burr Depo, p. 94; Ex. 3 - Burr Aff. ¶ 10). Burr ceased making distributions to Gerhardt in early 2014, shortly after Gerhardt stopped working for College Street. (SOF ¶ 26; Ex. 1 - Burr Depo, p. 94; Ex. 3 - Burr Aff. ¶ 11).

Burr had separate conversations with each of Gerhardt and Seaverns in 2013, in which Burr told Gerhardt and Seaverns that their respective distributions under the Participation Agreements would end when they ceased working for College Street. (SOF ¶ 27; Ex. 1 - Burr Depo, pp. 113-119; Ex. 3 - Burr Aff. ¶ 12). On a separate occasion, at a 'going-away lunch' in 2013 attended by Burr, Seaverns, Gerhardt, and Kerri Burr (Burr's wife), Burr reiterated to Gerhardt and Seaverns that their respective distributions under the Participation Agreements would end (or had ended) when they ceased working for College Street. (SOF ¶ 28; Ex. 1 - Burr Depo, pp. 113-119; Ex. 3 - Burr Aff. ¶ 13).

Burr testified that at the lunch, Gerhardt and Seavers acknowledged that they would no longer receive distributions under the Participation Agreements because they were no longer working for College Street. (SOF ¶ 29; Ex. 1 - Burr Depo, p. 118-19; Ex. 3 - Burr Aff. ¶ 14; Ex. 2 - K. Burr Depo, p 35-36). Although Gerhardt and Seaverns both testified that they disagreed with Burr's view of the Participation Agreements, neither of them said anything to Burr about being owed distributions between sometime in 2014 and the date they filed the complaint in 2021. (SOF ¶ 36; Ex. 11 - Seaverns Depo, p. 101; Ex. 10 - Gerhardt Depo, pp. 123-24). Both Plaintiffs had reason to believe in 2014 that Burr received distributions from Hawthorne Hill and 140 Commonwealth Ave. (SOF ¶ 37; Ex. 10 - Gerhardt Depo, p. 118; Ex. 11 - Seaverns Depo, p. 99).

The Plaintiffs have had nothing to do with the operations of the Defendants' businesses since 2013 when their employment with College Street ended. (SOF ¶ 20; Ex. 3 - Burr Aff. ¶ 15).

The person who served as Burr's accountant during the time that Gerhardt and Seaverns received distributions under the Participation Agreements died in 2018. (SOF ¶ 31; Ex. 3 - Burr Affidavit at ¶ 16). Due to the passage of time, Burr did not maintain records and correspondence related to the Participation Agreements. In connection with this litigation, despite a diligent search, Burr was able to retrieve less than two dozen email messages between himself, Gerhardt and Seaverns regarding the Participation Agreements. (SOF ¶ 32; Ex. 1 - Burr Depo, p 124-125; Ex. 3 - Burr. Aff. ¶ 17).

At bottom, the Plaintiffs, two former employees of College Street, seek millions of dollars in payments under agreements that they allege continued to be operable past the termination of their employment at College Street upon College Street winding down in 2013, approximately eight years before Plaintiffs commenced this case. In contrast, Burr firmly believed that any right that the Plaintiffs had under the Participation Agreements were contingent on their continued employment with College Street, and so informed Plaintiffs in 2013 when College Street shut down.[5] While there is clearly a material fact dispute regarding the date that the Plaintiffs' profits interests rights ended, this case can be resolved without a jury delving into that quagmire (or into defenses such as waiver) because it is clear that the asserted claims are all barred by the applicable six-year statute of limitations.

[5] The Defendants also assert that the Plaintiffs' claims are barred by the doctrine of laches, estoppel and waiver since the Plaintiffs delayed asserting any rights for years, even though it is undisputed that Gerhardt and Seaverns stopped receiving distributions and K-1s no later than 2014, and, Burr had clearly articulated that the agreements ended. (SOF ¶ 28; Ex. 1 - Burr Depo, pp. 113-119; Ex. 3 - Burr Aff. ¶ 13).

ARGUMENT

I. Statutory framework

A limitations period of approximately six-years for contract actions has been a pillar of Anglo-American law since 1623, when Parliament passed the Limitation Act (the original 'statute of limitation'), which limited most civil actions to six-years. 21 Ja. I, Ca. 16. Limitations periods are "'vital to the welfare of society . . . They promote repose by giving security and stability to human affairs.' In addition to the policy of affording repose, limitation statutes encourage plaintiffs to bring actions within prescribed deadlines when evidence is fresh and available. . . . They 'stimulate to activity and punish negligence.'" *Franklin v. Albert*, 381 Mass. 611, 618 (1980) (*quoting Wood v. Carpenter*, 101 U.S. 135, 139 (1879)).

The generally applicable six-year statute of limitations period for contracts has remained unchanged in Massachusetts since 1770, when the Massachusetts Provincial Legislature changed the limitations period from four years to six years for a majority of civil actions. *See*, *An Act for Repealing the Several Laws Now in Force Which Relate to the Limitation of Personal Actions, and for the Limitation of Personal Actions for the Future, and for Avoiding Suits at Law*, Province Laws 1770-1771, 3d. Session, Chapter 9 (expanding limitations period to six-years).

A. The history of the contract under seal

In medieval times, seals were required to authenticate the predominate (practically speaking, only) form of contract between parties, a deed of a conveyance of real estate. *See*, 2 William Blackstone, Commentaries, Chapter 20, *Alienation by Deed* ("Sixthly, it is requisite that the party, whose deed it is, should seal, and in most cases I apprehend should sign it also. The use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely ancient"). As the SJC explained in *Knott*:

> In medieval England, a time when most adults were illiterate, unable even to sign their names, contracts routinely were executed 'under seal.' That is, each party impressed on the physical document a wax seal or other mark bearing his individual sign of identification. Under the common law, the seal became proof of the parties' identities and the document's authenticity, and loss or destruction of the sealed contract terminated the bargain.

442 Mass. at 320.

B. While Massachusetts has codified the contract under seal doctrine, it also enacted strict statutory requirements for its application.

Despite the ancient origins of the contract under seal doctrine, Massachusetts' statutory scheme is a relatively recent development. Massachusetts is one of the few states that has codified a twenty-year limitations period for contracts under seal. G.L. c. 260 § 1. Massachusetts did not codify the twenty-year statute of limitations for contracts under seal until 1902.[6] Revised Laws of the Commonwealth of Massachusetts Enacted November 21, 1901 to Take Effect January 1, 1902 (1902). This statute of limitations period is now codified at G.L. c. 260 § 1. Importantly, Massachusetts is in the minority of states that has not abolished the distinction between sealed and unsealed contracts. *Knott*, 442 Mass. at 320 (*citing* 1 S. Williston, Contracts, at § 2:17 (table of statutory provisions modifying or abolishing distinction between sealed and unsealed instruments)).

While historically a seal required an impression of melted wax, it was not until 1929 that Massachusetts removed the requirement for a wax impression. 1929 Mass. Acts. Ch. 377, *An Act Relative to Seals and Sealed Instruments* (the "1929 Seal Act"); *codified at* G.L. c. 4 § 9A. The

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[6] Massachusetts first enacted a statute of limitations in 1718. *AN ACT FOR THE REGULATION AND LIMITED CREDIT IN TRADE, AND FOR THE PREVENTING THE DOUBLE PAYMENT OF DEBT*, Provincial Laws 1718-19, Ch. 10. The six-year limitations period for contract actions has remain essentially unchanged since 1770. *AN ACT FOR REPEALING THE SEVERAL LAWS NOW IN FORCE WHICH RELATE TO THE LIMITATION OF PERSONAL ACTIONS, AND FOR THE LIMITATION OF PERSONAL ACTIONS FOR THE FUTURE, AND FOR AVOIDING SUITS AT LAW*, Provincial Laws 1770-71, Ch. 9.

1929 Seal Act, however, placed strict requirements that the contract contain a *recital* that the parties intended for the contract to be one under seal.

G.L. c. 4 § 9A provides in pertinent part:

> In any written instrument, a **recital** that such instrument is sealed by or bears the seal of the person signing the same or is given under the hand and seal of the person signing the same, or that such instrument is intended to take effect as a sealed instrument, shall be sufficient to give such instrument the legal effect of a sealed instrument without the addition of any seal of wax, paper or other substance or any semblance of a seal by scroll, impression or otherwise . . . (emphasis added).

The 1929 Seal Act does not define the term "recital." The second edition of Black's Law Dictionary, the edition in effect when the 1929 Seal Act was passed, defined "recital" as follows:

> The formal statement or setting forth of some matter of fact, in any deed or writing, in order to explain the reasons upon which the transaction is founded. The recitals are situated in the premises of a deed, that is, in that part of a deed between the date and a habendum, and they usually commence with the formal word "whereas."
>
> The formal preliminary statement in a deed or other instrument, of such deed, agreement, or matter of fact as are necessary to explain the reasons upon which the transaction is founded.

Recital, Black's Law Dictionary (2d. Ed. 1910).[7] This clear definition of the word *recital*, fundamentally unchanged since 1910, also comports with what any business lawyer will tell you: a recital is a prefatory section of a contract that sets the stage for the transaction. *See also* Commercial Contract Drafting and Review, LexisNexis May 22, 2019,[8] ("(Recitals) set forth the parties' basic understanding of the circumstances and purpose(s) of the transaction."); Term,

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[7] The 11th (and current) edition of Black's Law Dictionary gives the following pertinent definition of recital: "A preliminary statement in a contract or deed explaining the reasons for entering into it or the background of the transaction, or showing the existence of particular facts <*the recitals in the settlement agreement should describe the underlying dispute*>. Traditionally, each recital begins with the word whereas."

[8] *Available at* https://www.lexisnexis.com/supp/largelaw/no-index/coronavirus/commercial-transactions/commercial-transactions-commercial-contract-drafting-and-review.pdf

Recitals, and Definitions, LexisNexis May 11, 2023[9] ("Recitals identify the purpose of and provide context for the agreement. They typically are used to guide the interpretation of the agreement.").

C. There is a clear trend in Massachusetts to narrow the scope of the twenty-year limitations period.

In addition to Massachusetts being an outlier in having a statutory twenty-year limitations period for contracts under seal, the SJC has narrowed the applicability of this antiquated statutory exception at every turn. The most recent SJC decision is *Knott,* where the Court stated:

> Thirty years ago, for example, in the *Nalbandian* case this court abolished the common-law sealed contract doctrine with respect to contracts executed on behalf of an undisclosed principal. . . . While disinclined to abolish the sealed contract doctrine in all cases, this court was 'unable to perceive any reason to merit preservation of the distinction between sealed and unsealed instruments in the circumstances.'

442 Mass. at 321 (*quoting Nalbandian v. Hanson Rest. & Lounge*, 369 Mass. 150, 156-57 (1975)). Highlighting the historical anomaly of the sealed contract doctrine, the Court in *Knott also* stated "(w)hatever the merits of upholding the common-law sealed contract doctrine may have been when *Johnson v. Norton Hous. Auth*., was decided, they seem far less apparent today . . .". 442 Mass. at 322.

The SJC in *Knott* took the opportunity to narrow the use of the antiquated seal doctrine, by abolishing the ability of a seal to substitute for consideration in connection with option contracts. *Knott*, 442 Mass at 323. The clear takeaway from *Knott* is that the statute conferring special benefits on sealed instruments should be strictly construed, and <u>not</u> judicially expanded.

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[9] *Available at* https://plus.lexis.com/document?pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5NP8-B2B1-F873-B06V-00000-00&pdsourcegroupingtype=&pdcontentcomponentid=500749&pdisurlapi=true&pdmfid=1530671&crid=cf357198-760d-40d6-b940-24ddf784adb3

The SJC's passing reference in *Knott* that "(o)ver time, simply the words 'under seal' or a similar phrase appearing in a mass-produced, form contract became sufficient to invest that document with the privileged status of a sealed instrument" 442 Mass. at 320, is *dicta.* The relevant issue in *Knott* concerned whether a seal was sufficient substitute for consideration in the question of contract *formation*. The Court did not address what 'magic words' are required in order for the parties to form a contract under seal, nor where they must be placed to constitute the statutorily required "recital."

Defendants are aware of no case involving a contract where the only reference to the contract being under seal was a notation above the signature block notwithstanding that the contract specifically delineated a series of recitals in an appropriately labeled section called "Recitals."[10] While there are a number of much older reported cases stating that a reference to a seal above a signature block is sufficient to satisfy § 9A, a closer examination of those cases reveals that the law, in addition to not having been addressed in the last approximately fifty years, is hardly the product of deep analysis.

In *Hayden v. Beane*, 293 Mass. 347, 351 (1936), the SJC concluded that a stock voting agreement was not void for lack of consideration because the testimonium clause referenced a seal, but disposed of the § 9A question in *three* sentences (one of which quoted the testimonium clause itself). In *Vigdor v. Nelson*, 322 Mass. 670, 674 (1948), the SJC, in enforcing an extension of a lease by a trustee from three to ten years, addressed the sufficiency of the "recital" in *two* sentences. In *Marine Contractors Co. v. Hurley*, 365 Mass. 280, 285 n.2 (1974), the Court's discussion of the

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[10] In *Lawrence H. Oppenheim Co. v. Bloom*, 325 Mass. 301, 302 (1950), the Court noted that the guaranty "recited that it was under seal, for good and valuable consideration, that it was a continuing guaranty . . ." but the opinion does not provide any context for the location of the recital in question within the contract.

sufficiency of the recital was a two-sentence footnote. Finally, in *Nalbandian v. Hanson Rest. & Lounge*, 369 Mass. 150, 151 n.2, 156-57 (1975), the SJC abolished the distinction between sealed and unsealed contracts with respect to undisclosed principals. While the Court did discuss the contract under seal doctrine in more detail, its analysis of the sufficiency of the recital was relegated to a footnote. 369 Mass. at 151 n.2.[11]

Undersigned counsel is unaware of *any* reported case in Massachusetts in which the parties actually litigated, and a court squarely analyzed, the question presented here: what constitutes a sufficient "recital" under § 9A such that the contract is one "under seal" and therefore subject to the twenty-year limitations period.[12] Thus, while older cases, with little analysis, have addressed the sufficiency of the recital, in none of the cases was the issue the lynchpin to the entire controversy.

Knott, therefore, sets the background and provides the foundation for any current analysis of what constitutes a statutorily required recital.

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[11] In other cases, the discussion of the recital's sufficiency is *dicta.* See, e.g., *City of Boston v. Roxbury Action Program, Inc.*, 68 Mass. App. Ct. 468 (2007) (action brought almost thirty-years after the instrument was executed time-barred under *any* limitations period; determination of sufficiency of recital dicta); *Kingston Hous. Auth. v. Sandonato & Bogue, Inc.*, 31 Mass. App. Ct. 270 (1970) (the typewritten word "(seal)" was *alone* insufficient to comply with § 9A; suggestion of other verbiage that *might* have been sufficient dicta); *Glendale Coal Co. v. Nesson*, 312 Mass. 293, 294 (1942) (Effect of release of claims; *two* sentences of irrelevant dicta that words "witness hand and seal" were sufficient to give document the legal effect of sealed instrument. (need an explanation of why it was dicta)

[12] To be clear, in the unreported summary disposition case *Revolution Portfolio, LLC v. Goodrich*, 2001 WL 844502, No. 99-P-804, 52 Mass.App.Ct. 1106 (Mass. App. Ct. July 25, 2001) (Summary Rule 23.0 disposition), which pre-dates *Knott*, the principal argument on appeal was whether a sole reference to a "seal" in a signature block, was insufficient under § 9A to deem it a sealed instrument. While the court found in the affirmative, the court's analysis in *Revolution* was limited to conclusory citations to the cases discussed above. Given the scant analysis of the issue, *Revolution* should not be afforded any weight. Additionally, Mass. Appeals Court Rule 23.0(2) prohibits a citation to *Revolution*, as the case predates February 26, 2008.

II. The Court should dismiss the Complaint for failure to commence the action within six years of the alleged breach of contract.

A. The Participation Agreements do not meet the requirements of G.L. c. 260, §2 because the second material part of the Participation Agreements, containing essential contract terms and a separate signature block, lacked any notation that the agreements were executed under seal.

Here, the parties to the contracts deemed it important to have two signatures: one on page 13, and another on Schedule A. The first signature block on page 13 to each Participation Agreement is preceded by a note that states, in part: "EXECUTED under seal . . ." (SOF ¶ 12; Exs. 4, 5, 6, 7 – Participation Agreements). In contrast, Schedule A to each Participation Agreement does not contain any reference to the Participation Agreements being under seal. (SOF ¶¶ 14-17; Exs. 4, 5, 6, 7 – Participation Agreements).

The inclusion of the signature block in Schedule A makes sense because without Schedule A, the Participation Agreements are meaningless. Schedule A contains critical financial terms including:

- the names and addresses of the parties;
- the name of the entity in which the participation interest relates to;
- the governing documents of the entity in which the participation interest relates to;
- the effective date of the Participation Agreement;
- the amount of the interest being transferred in the applicable entity (the "Participation Interest"); and
- the necessary ratio amounts and percentages that are necessary to calculate a repurchase price of the Participation.

(SOF ¶ 13; Exs. 4, 5, 6, 7 - Participation Agreements)

Without Schedule A, the Participation Agreements are incomplete statements of the parties' intent. Indeed, without Schedule A, it would be impossible for any person to understand the rights and obligations of either party. The Court can only infer from the dual signature blocks that the second signature was essential, and should give effect to the parties' decision not to recite their intention that it is under seal. The Court should hold that the absence of any notation at all, let alone a "recital," in the critically important Schedule A, does not comply with § 9A, and therefore that the Participation Agreements unequivocally are not "sealed" contracts subject to G.L. c. 260 § 1.

Such a holding not only makes sense given the SJC's sentiment in *Knott* to narrow the statute's scope where possible. It also aligns with the fundamental principle of contract law that "separately negotiated or added terms are given greater weight than standardized terms or other terms not separately negotiated." Restatement (Second) of Contracts § 203. Courts have looked to specific exhibits rather than a master agreement, when interpreting a contract. *See, e.g., Journey Acquisition-II, L.P. v. EQT Production Co.*, 39 F.Supp.3d 877, 887, 892, 900 (E.D.Ky. 2014).

All four Participation Agreements are substantively identical. (SOF ¶ 11; Exs. 4, 5, 6, 7 - Participation Agreements). The parties did not renegotiate a single item in the Participation Agreements in the two years between the execution of the 2009 Participation Agreements, and the 2011 versions. The only substantive distinctions between the four Participation Agreements are the material elements of the bargain, set forth on the respective Schedule A. *See*, Exs. 4, 5, 6, 7 - Participation Agreements. That the Schedules A are devoid of any reference to a seal voids any

argument that the Participation Agreements are entitled to the twenty-year limitations period for contracts under seal.[13]

B. The Participation Agreements are not subject to G.L. c. 260, § 2 because of the absence of the required recital.

Even if the Court determines that it was not necessary to include a separate "recital" somewhere in Schedule A, the Court should nevertheless dismiss the Complaint because the one notation that does appear in the Participation Agreements is not a "recital" under § 9A. Each of the Participation Agreements contains a clearly identifiable series of recitals, in a specific section with the heading "R E C I T A L S." (SOF ¶ 12; Exs. 4, 5, 6, 7 - Participation Agreements).

Clearly, the parties, by dedicating a specific section to "Recitals," intended that any and all recitals be articulated in that section, up front, "in order to explain the reasons upon which the transaction is founded." *Recital*, Black's Law Dictionary (2d. Ed. 1910). Yet the parties did not see fit to include an expression of their intention, i.e. a recital, that the Participation Agreement be treated as a contract under seal and subject to a 333% longer statute of limitations. To be a recital, language must be in the recital section, and without a proper recital, the Participation Agreements are not under seal.

As the SJC in *Knott* noted, "(q)uestions concerning the validity of option contracts are simply too important to our highly literate, highly mobile society to be decided by formalities that have lost all practical utility." *Knott*, 442 Mass. at 322. This Court similarly should hold that a fleeting reference to a seal in a signature block (one of two), is not sufficient to more than triple

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[13] In the alternative, there is no sound reason to hold that the 'tie goes to the runner' and to permit the Plaintiffs to enforce a twenty-year limitations period of G.L. c. 260 § 1 under the main body of the Participation Agreements, when the Schedules A are unambiguously not sealed instruments and fall within the six-year limitations period of G.L. c. 260 § 2. Such a holding would run headlong into the central reasoning in *Knott*, to narrow the effect of sealed instruments in modern practice.

the limitations period for a breach of contract action, and is incompatible with modern commerce and the plain text of the statute.

C. Burr has been prejudiced by the Plaintiffs' delay in pursuing their purported rights.

The immense passage of time between Burr's purported 2013 breach of the Participation Agreements, and the filing of this Complaint, has prejudiced Burr. Around the time that College Street was shut down in 2013, Burr, Kerri Burr (Burr's wife), Seaverns, and Gerhardt met for a 'going-away lunch.' (SOF ¶¶ 28-29; Ex. 1 - Burr Depo, pp. 113-119; Ex. 3 - Burr Aff. ¶¶ 13-14; Ex. 2 - K. Burr Depo, p 35-36). At that lunch, Burr reiterated to Gerhardt and Seaverns that their respective distributions under the Participation Agreements would end (or had ended) when they ceased working for College Street. (SOF ¶ 28; Ex. 1 - Burr Depo, pp. 113-119; Ex. 3 - Burr Aff. ¶ 13) (Ex. 1 - Burr Depo, p. 113; 116-17). Mr. Burr and Kerri Burr both testified that at the lunch, Gerhardt and Seaverns acknowledged that they would no longer receive distributions under the Participation Agreements because they were no longer working for College Street. (SOF ¶ 29; Ex. 1 - Burr Depo, p. 118-19; Ex. 3 - Burr Aff. ¶ 14; Ex. 2 - K. Burr Depo, p 35-36). Between 2013 and the date Plaintiffs commenced this action in late May 2021, Plaintiffs never made a demand to Burr for any distributions or payments under the Participation Agreements, or tax forms related to the Participation Agreements. (SOF ¶ 33; Ex. 3 - Burr Aff. ¶ 18). Burr's accountant ceased sending tax forms to Plaintiffs regarding the Participation Agreements shortly after they left College Street. (SOF ¶ 31; Ex. 3 - Burr Aff. ¶ 16).

Burr's accountant has since passed away, and Burr no longer has emails related to the Participation Agreements in his possession. (SOF ¶¶ 31-32; Ex. 3 - Burr Aff. ¶¶ 16-17). Burr made no effort to preserve documentary evidence in support of his position. (SOF ¶ 35; Ex. 3 - Burr Aff. ¶ 19). Burr has managed his affairs, and the affairs of his businesses, on the belief that

the Participation Agreements were terminated along with the termination of Gerhardt and Seaverns' employment with College Street. (SOF ¶ 35; Ex. 3 - Burr Aff. ¶ 19). Eight years after Burr purportedly breached the Participation Agreements, he is forced to defend an action for millions of dollars with one hand tied behind his back. Limitations periods were enacted precisely to ensure that parties like the Plaintiffs pursue their rights when evidence is "fresh and available" to guard against prejudicing parties like Burr who have relied on repose. *Franklin v. Albert*, 381 Mass. at 618.[14]

CONCLUSION

For the foregoing reasons, the Court should hold that the six-year statute of limitations applies to this contract action and, there being no dispute that the Plaintiffs commenced this action well in excess of six years after the alleged breach, and enter judgment in Defendant's favor on all counts.

[14] Indeed, the first time Seaverns surfaced after the extended silence is when she learned of marital strife between Burr and his wife, Kerri Burr in 2019. (SOF ¶ 34, Ex. 2 - K. Burr Depo, pp.19-35). Seaverns, having (inaccurately) heard that Ms. Burr had been "institutionalized" and was separated from Burr (they reconciled later), reached out to Ms. Burr and sought to gather information about Hawthorne Hill from Kerri. (SOF ¶ 34, Ex. 2 - K. Burr Depo, pp.19-35).

Respectfully submitted,

ROBERT S. BURR,
COLLEGE STREET PARTNERS LLC, 140 COMMONWEALTH AVENUE – DANVERS, LLC, and HAWTHORNE HILL DEVELOPMENT LLC,

By their attorneys,

/s/ David B. Mack

David B. Mack (BBO # 631108)
dmack@ocmlaw.net
Stephanie R. Parker (BBO# 687610)
sparker@ocmlaw.net
O'Connor Carnathan and Mack LLC
10 Burlington Mall Road, Suite 301
Burlington, MA 01803
Telephone: 781.359.9005

Richard C. Pedone (BBO #630716)
rpedone@nixonpeabody.com
John E. Murray (BBO #706250)
jmurray@nixonpeabody.com
NIXON PEABODY LLP
Exchange Place
53 State Street
Boston, MA 02109
Phone: 617-345-100

Dated: January 26, 2024

CERTIFICATE OF SERVICE

I, David B. Mack, hereby certify that on January 26, 2024, I served a copy of the foregoing document upon Plaintiffs' counsel of record via e-mail.

David Rich, Esq.
Todd & Weld, LLP
One Federal Steet
Boston, MA 02110
(617) 720-2626
drich@toddwed.com

/s/ David B. Mack
David B. Mack

BC

COMMONWEALTH OF MASSACHUSETTS

33

Suffolk, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 2184cv01017-BLS2

MICHAEL GERHARDT,
LAUREN SEAVERNS

Plaintiffs,

v.

ROBERT S. BURR,
COLLEGE STREET PARTNERS LLC,
140 COMMONWEALTH AVENUE – DANVERS LLC,
HAWTHORNE HILL DEVELOPMENT LLC

Defendant.

Served via e-mail

CONSOLIDATED STATEMENT OF MATERIAL FACTS PURSUANT TO SUPERIOR COURT RULE 9A(b)(5)

Defendants Robert S. Burr ("Mr. Burr"), College Street Partners LLC ("College Street"), 140 Commonwealth Avenue – Danvers LLC ("140 Commonwealth Avenue"), and Hawthorne Hill Development LLC ("Hawthorne Hill") (collectively "Defendants") and Plaintiffs Michael Gerhardt ("Mr. Gerhardt") and Lauren Seavers ("Ms. Seaverns") (collectively "Plaintiffs") submit the following consolidated statement of undisputed facts and responses thereto:

1. Burr formed College Street as a real estate advisory and development company, which over time focused on healthcare. (Ex. 1[1] - Burr Depo., pp. 15-17; Ex. 3 - Burr Aff. ¶ 1).

RESPONSE: For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute this statement.

[1] All Exhibit citations are to the Exhibits in the Joint Appendix.

2. College Street hired Seaverns in 2008 as an administrative assistant. (Ex. 1 - Burr Depo., pp. 22-25; Ex. 3 - Burr Aff. ¶ 2).

RESPONSE: For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute this statement but further state that Ms. Seaverns' duties expanded over time while she was working for College Street to include "more than just the basic office administration functions," e.g., collecting rent from tenants, sending tenants invoices, communicating with tenants about delinquencies. Ex. 1 – Burr Depo. p. 26.

3. College Street hired Gerhardt prior to 2008. Gerhardt served as a project manager for College Street. (Ex. 1 - Burr Depo., p. 33; Ex. 3 - Burr Aff. ¶ 3).

RESPONSE: For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute this statement.

4. In 2008, Burr formed 140 Commonwealth Avenue to acquire title to and redevelop real estate in Danvers, Massachusetts. (Ex. 1 - Burr Depo., p. 54; Ex. 3 - Burr Aff. ¶ 4).

RESPONSE: For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute this statement.

5. In 2010 Burr formed Hawthorne Hill to acquire title to and develop a skilled nursing facility in Danvers, Massachusetts. (Ex. 1 - Burr Depo., pp. 100-101; Ex. 3 - Burr Aff. ¶ 5).

RESPONSE: For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute this statement.

6. At all relevant times, Burr has been the 100% owner of 140 Commonwealth Ave, and Burr is currently the 100% owner of Hawthorne Hill. (Ex. 3 - Burr Aff. ¶ 6; Ex. 13 - Answer and Counterclaim ¶¶ 8-10).

RESPONSE: For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute this statement.

7. In July 2009, Gerhardt and Burr executed a Participation Agreement, and Schedule A attached thereto, related to an interest in 140 Commonwealth Avenue. (Ex. 4 - Gerhardt Participation Agreement, 140 Commonwealth Avenue-Danvers, LLC).

RESPONSE: Undisputed.

8. In July 2009, Seaverns and Burr executed a Participation Agreement, and Schedule A attached thereto, related to an interest in 140 Commonwealth Avenue. (Ex. 5 - Seaverns Participation Agreement, 140 Commonwealth Avenue-Danvers, LLC).

RESPONSE: Undisputed.

9. In September 2011, Gerhardt and Burr executed a Participation Agreement, and Schedule A attached thereto, related to Hawthorne Hill. (Ex. 6 - Gerhardt Participation Agreement, Hawthorne Hill Development, LLC).

RESPONSE: Undisputed.

10. In September 2011, Seaverns and Burr executed a Participation Agreement, and Schedule A attached thereto, related to Hawthorne Hill. (Ex. 7 - Seaverns Participation Agreement, Hawthorne Hill Development, LLC).

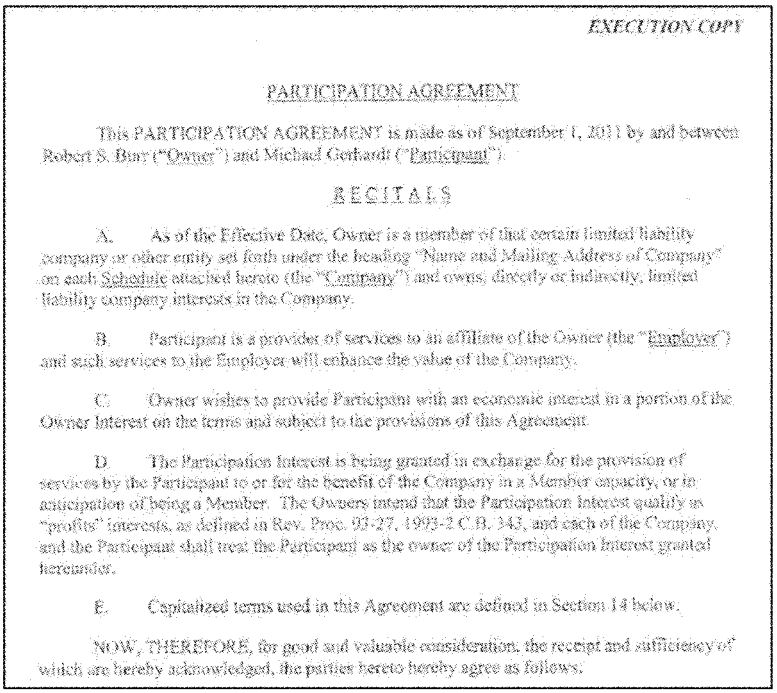
RESPONSE: Undisputed.

11. Each of the Participation Agreements are identically structured, and are each substantively identical, except as set forth below. (Exs. 4, 5, 6, 7 - Participation Agreements).

RESPONSE: For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute this statement but further state that the terms of the Participation Agreements described in Paragraph 11 speak for themselves. Additionally, this Paragraph seeks to characterize the terms of the Participation Agreements in violation of Superior Court Rule 9A(5)(i) and is, therefore, improper.

12. Each of the Participation Agreements contain the following identical elements:

- Recitals A through E that appear as follows:



EXECUTION COPY

PARTICIPATION AGREEMENT

This PARTICIPATION AGREEMENT is made as of September 1, 2011 by and between Robert S. Burr ("Owner") and Michael Gerhardt ("Participant").

RECITALS

A. As of the Effective Date, Owner is a member of that certain limited liability company or other entity set forth under the heading "Name and Mailing Address of Company" on each Schedule attached hereto (the "Company") and owns, directly or indirectly, limited liability company interests in the Company.

B. Participant is a provider of services to an affiliate of the Owner (the "Employer") and such services to the Employer will enhance the value of the Company.

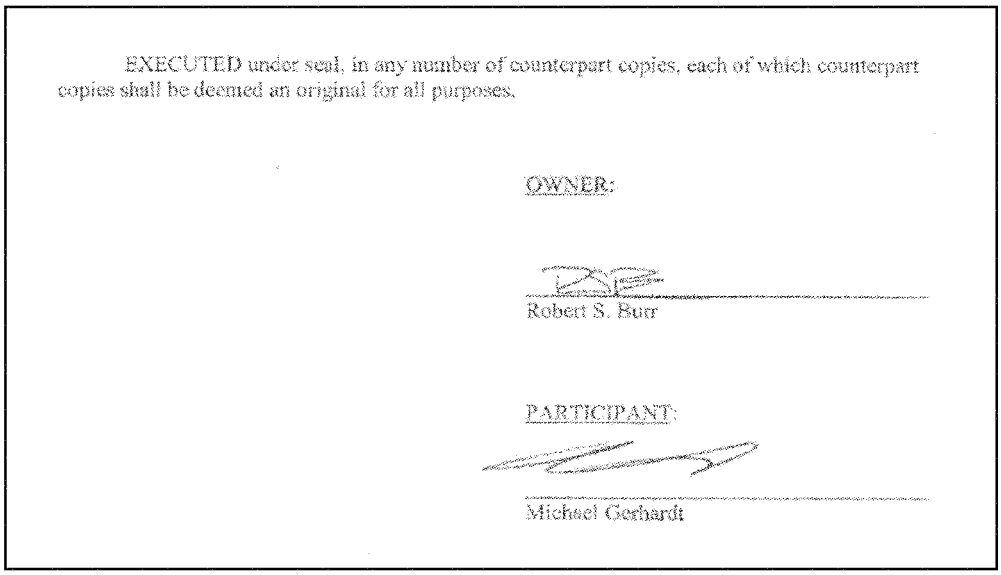
C. Owner wishes to provide Participant with an economic interest in a portion of the Owner Interest on the terms and subject to the provisions of this Agreement.

D. The Participation Interest is being granted in exchange for the provision of services by the Participant to or for the benefit of the Company in a Member capacity, or in anticipation of being a Member. The Owners intend that the Participation Interest qualify as "profits" interests, as defined in Rev. Proc. 93-27, 1993-2 C.B. 343, and each of the Company, and the Participant shall treat the Participant as the owner of the Participation Interest granted hereunder.

E. Capitalized terms used in this Agreement are defined in Section 14 below.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

- A signature page that appears as follows:



EXECUTED under seal, in any number of counterpart copies, each of which counterpart copies shall be deemed an original for all purposes.

OWNER:

Robert S. Burr

PARTICIPANT:

Michael Gerhardt

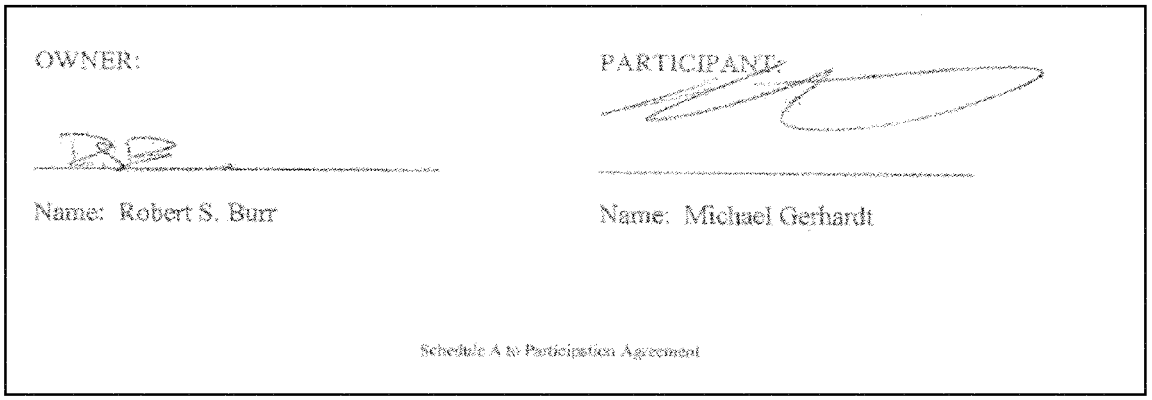
(Ex. 6 above; see also Exs. 4, 5, 7 - Participation Agreements).

RESPONSE: For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute this statement but further state that the terms of the Participation Agreements described in Paragraph 12 speak for themselves. Additionally, this Paragraph seeks to quote from the Participation Agreements in violation of Superior Court Rule 9A(5)(i) and is, therefore, improper.

13. Attached to each Participation Agreement is a "Schedule A" that sets forth the material elements of the Participation Agreements: the names and addresses of the parties; the name of the entity in which the participation interest relates to; the governing documents of the entity in which the participation interest relates to; the effective date of the Participation Agreement; the amount of the interest being transferred in the applicable entity (the "Participation Interest"); and the necessary ratio amounts and percentages that are necessary to calculate the repurchase price of the Participation. (Exs. 4, 5, 6, 7 - Participation Agreements)

RESPONSE: Disputed in part. For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute the statement in Paragraph 13 that each of the Participation Agreements includes an attachment, called a "Schedule A," but Plaintiffs dispute whether any Schedule A sets forth "material elements of the Participation Agreements;" rather, each Schedule A lists information that would theoretically vary depending upon the recipient of the participation interest and the amount of the participation interest. E.g., Ex. 4, p. 14 ("Name and Mailing Adress of Participant: Michael Gerhardt."). Plaintiffs further state that the Participation Agreements, including each attached Schedule A, speak for themselves. Additionally, this Paragraph seeks to characterize the terms of the Participation Agreements in violation of Superior Court Rule 9A(5)(i) and is, therefore, improper.

14. Each "Schedule A" also contains an identical signature block, that appears as follows:


OWNER:

PARTICIPANT:

Name: Robert S. Burr

Name: Michael Gerhardt

Schedule A to Participation Agreement

(Ex. 6 above; see also Exs. 4, 5, 7 - Participation Agreements).

RESPONSE: For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute the statement in Paragraph 14 that each of the Participation Agreements include an attachment, called a "Schedule A," which contains a signature block; however, Plaintiffs further state that the Participation Agreements, including each Schedule A, speak for themselves. Additionally, this Paragraph seeks to characterize and/or quote from the terms of the

Participation Agreements in violation of Superior Court Rule 9A(5)(i) and is, therefore, improper.

15. Other than on the signature page to each Participation Agreement, there is no reference to a "seal" in the Recitals of the Participation Agreements, or anywhere else in the Participation Agreements. (Exs. 4, 5, 6, 7 - Participation Agreements)

RESPONSE: For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute the implicit acknowledgement in Paragraph 15 that each of the Participation Agreements include a signature block which refers to a "seal;" however, Plaintiffs further state that the Participation Agreements speak for themselves. Additionally, this Paragraph seeks to characterize and/or quote from the terms of the Participation Agreements in violation of Superior Court Rule 9A(5)(i) and is, therefore, improper.

16. There is no reference to a "seal" anywhere in Schedule A. (Exs. 4, 5, 6, 7 - Participation Agreements).

RESPONSE: For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute the statement in Paragraph 16 that the Schedule A does not refer to a "seal," but Plaintiffs further state that the Participation Agreements, including each attached Schedule A, speak for themselves. Plaintiffs do, however, dispute whether the statement in this paragraph represents a relevant or material fact necessary to determine Defendants' Motion for Summary Judgment. Additionally, this Paragraph seeks to characterize and/or quote from the terms of the Participation Agreements in violation of Superior Court Rule 9A(5)(i) and is, therefore, improper.

17. There is no reference to a "seal" in the signature block of Schedule A of any of the Participation Agreements. (Exs. 4, 5, 6, 7 - Participation Agreements)

RESPONSE: For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute the statement in Paragraph 17 that the signature block within the Schedule A does not refer to a "seal;" however, Plaintiffs state that the Participation Agreements, including each attached Schedule A, speak for themselves. Plaintiffs also dispute whether the statement in this paragraph represents a relevant or material fact necessary to determine Defendants' Motion for Summary Judgment. Additionally, this Paragraph seeks to characterize and/or quote from the terms of the Participation Agreements in violation of Superior Court Rule 9A(5)(i) and is improper.

18. Seaverns received distributions related to 140 Commonwealth Ave for the years 2009, 2010, 2011, 2012, and 2013. (Ex. 1 - Burr Depo., p. 93-94; Ex. 9 - Seaverns K-1).

RESPONSE: Undisputed.

19. Seaverns received distributions related to Hawthorne Hill for the years 2012 and 2013. (Ex. 9 - Seaverns K-1).

RESPONSE: Undisputed.

20. Gerhardt received distributions related to 140 Commonwealth Ave. for the years 2009, 2010, 2011, 2012, and 2013. (Ex. 1 - Burr Depo., p. 91-21; Ex. 8 - Gerhardt K-1).

RESPONSE: Undisputed.

21. Gerhardt received distributions related to Hawthorne Hill for the years 2012 and 2013. (Ex. 1 - Burr Depo., p. 91-21; Ex. 8 - Gerhardt K-1).

RESPONSE: Undisputed.

22. In 2013, College Street stopped doing business and was wound down. (Ex. 3 - Burr Aff. ¶ 7).

RESPONSE: For the purpose of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute this statement in Paragraph 22.

23. Seaverns left College Street in 2013. (Ex. 1 - Burr Depo., p. 29; Ex. 3 - Burr Aff. ¶ 8).

RESPONSE: Undisputed.

24. Gerhardt left College Street at the end of 2013. (Ex. 1 - Burr Depo., p. 39; Ex. 3 - Burr Aff. ¶ 9).

RESPONSE: For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute this statement in Paragraph 24.

25. Burr ceased making distributions to Seaverns in or about the middle of 2013, after Seaverns left College Street. (Ex. 1 - Burr Depo., p. 94; Ex. 3 - Burr Aff. ¶ 10).

RESPONSE: Undisputed.

26. Burr ceased making distributions to Gerhardt in early 2014, after Gerhardt left College Street. (Ex. 1 - Burr Depo., p. 94; Ex. 3 - Burr Aff. ¶ 11).

RESPONSE: Undisputed.

27. Burr had separate conversations with each of Gerhardt and Seaverns in 2013, in which Burr told Gerhardt and Seaverns that their respective distributions under the Participation Agreements would end when they ceased working for College Street. (Ex. 1 - Burr Depo., pp. 113, 116-17; Ex. 3 - Burr Aff. ¶ 12).

RESPONSE: For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute this statement in Paragraph 27. Further responding, however, though Mr. Burr told Plaintiffs that their respective distribution under the Participation Agreements would end when they ceased working for College Street, Mr. Burr was fully aware that Plaintiffs each remained entitled to certain percentages of Owner distributions Mr. Burr made to himself regarding 140 Commonwealth Avenue and Hawthorn Hill under the Participation Agreements even though their employment had ceased. Ex. 11- Seaverns Depo., p. 104-106

28. On a separate occasion, at a 'going-away lunch' in 2013 attended by Burr, Seaverns, Gerhardt, and Kerri Burr (Burr's wife), Burr reiterated to Gerhardt and Seaverns that their respective distributions under the Participation Agreements would end (or had ended) when they ceased working for College Street. (Ex. 1 - Burr Depo., pp. 113, 116-17; Ex. 3 - Burr Aff. ¶ 13; Ex. 2 - K. Burr Depo., p 35-36).

RESPONSE: Disputed. Ms. Seaverns recalls a lunch conversation in which Mr. Burr clarified that her right to receive distributions under the Participation Agreements was not contingent on her continued employment at College Street. Ex. 11 – Seaverns Depo, p. 85. Further responding, Mr. Gerhardt also recalls a lunch conversation, in 2014, where Mr. Burr stated he would stop making distributions under the Participation Agreements because Mr. Gerhardt was no longer working for College Street; however, Mr. Gerhardt remembers objecting to Mr. Burr's interpretation of the agreements and indicating that his prior communications with Mr. Burr conflicted with Mr. Burr's contention that Plaintiffs' rights to receive distributions required their ongoing employment. Ex. 10 – Gerhardt Depo, p. 118. Likewise, Ms. Seaverns recalls not speaking to Mr. Burr for many months after she left College Street in 2013. Ex. 15 – Seaverns Answers to Interrogatories, Answer No. 9. However, when she did speak with Mr. Burr, he explained that he believed distributions under the Participation Agreements required her continued employment. Id. In response, Ms. Seaverns told Mr. Burr that she did not believe her right to receive distributions required her continued employment. Id.

29. Gerhardt and Seavers acknowledged that they would no longer receive distributions under the Participation Agreements because they were no longer working. (Ex. 1 - Burr Depo., pp. 113, 116-17; Ex. 3 - Burr Aff. ¶ 14; Ex. 2 - K. Burr Depo., pp. 35-36).

RESPONSE: Disputed. Both Plaintiffs expressed to Mr. Burr that they disagreed with his interpretation of the Participation Agreements and specifically Mr. Burr's contention that Plaintiffs' rights to earn distributions under the Participation Agreements were contingent upon their continued employment. See Response No. 28; Ex. 11 – Seaverns Depo, p. 85; Ex. 15 – Seaverns Answers to Interrogatories, Answer No. 9; Ex. 10 – Gerhardt Depo, p. 118; Ex. 14 – Gerhardt Answers to Interrogatories, Answer No. 9.

30. Neither Gerhardt nor Seaverns have played any role in the operations of any of Defendants' businesses since 2013 when their employment with College Street ended. (Ex. 3 - Burr Aff. ¶ 15).

RESPONSE: Disputed in part. Mr. Gerhardt continued as a trustee of 140 Commonwealth Avenue after his employment at College Street ended. Ex. 10 – Gerhardt Depo, p. 39. Further, Plaintiffs dispute whether this statement in Paragraph 30 represents a relevant or material fact necessary to determine Defendants' Motion for Summary Judgment.

31. The person who served as Burr's accountant during the time that Gerhardt and Seaverns received distributions under the Participation Agreements died in 2018, and ceased sending tax forms to Plaintiffs after they left College Street. (Ex. 3 - Burr Aff. ¶ 16).

RESPONSE: For the purposes of Defendants' Motion for Summary Judgment, Plaintiffs do not dispute this statement in Paragraph 31; however, Plaintiffs dispute whether this statement represents a relevant or material fact necessary to determine Defendants' Motion for Summary Judgment.

32. Due to the passage of time, Burr did not maintain records and correspondence related to the Participation Agreements. In connection with this litigation, despite a diligent search, Burr was able to retrieve less than two dozen email messages between himself, Gerhardt and Seaverns regarding the Participation Agreements. (Ex. 1 - Burr Depo., p 124-125; Ex. 3 - Burr Aff. ¶ 17).

RESPONSE: Disputed. Mr. Burr was also able to locate Mr. Gerhardt's personal file, located on Mr. Burr's server. Ex. 1 – Burr Depo., p. 125. Further, it is disputed whether Mr. Burr conducted a diligent search, as he did not provide the information technology personnel who conducted a search for documents on his behalf any parameters or keywords to guide the search. Id. p. 124-125. That Mr. Burr now indicates he did not recover more than a dozen responsive documents does not mean these documents do not exist, and it certainly does not mean that these documents did not exist at one time. By definition, an email is between two or more people, and Mr. Burr does not state that he sought communications no longer in his possess from other participants to these communications. Ms. Seaverns has also witnessed Mr. Burr review requests for documents in other lawsuits and destroy the documents he did not want to share. Ex. 11 – Seaverns Depo., p. 152. Finally, Plaintiffs dispute whether this statement in Paragraph 32 represents a relevant or material fact necessary to determine Defendants' Motion for Summary Judgment.

33. Since their employment terminated in 2013, neither Gerhardt nor Seaverns has made any request to Burr for any distributions or payments under the Participation Agreements, until the above captioned lawsuit was initiated in May 2021. (Ex. 3 - Burr Aff. ¶ 18).

RESPONSE: Undisputed for the purposes of Defendants' Motion for Summary Judgment.

34. After 2013, the first substantive contact between Plaintiffs and Burr occurred in 2019, when Seaverns contacted Kerri Burr (Burr's wife) in an effort to gather information about Hawthorne Hill from Kerri Burr. (Ex. 2 - K. Burr Depo., pp 19-35).

RESPONSE: Disputed in part. The parties communicated between 2013 and Mr. Seaverns telephone conversation with Ms. Burr, in 2019 or 2020, so it is disputed that this telephone conversation with Ms. Burr was the "first substantive contact between Plaintiffs and Burr" between 2013 and 2019. See, e.g., Ex. 10 – Gerhardt Depo, p. 117. Further, it is disputed that Ms. Seaverns contacted Ms. Burr in an effort to gather information about Hawthorne Hill. Ex. 11- Seaverns Depo., p. 104-105. It is undisputed, however, that it was not until Ms. Seaverns spoke to Ms. Burr by telephone in 2019 or 2020 that Plaintiffs first obtained information that placed Plaintiffs on notice that Mr. Burr was cheating them by issuing to himself large distributions from income generated through Hawthorne Hill without making a corresponding pro rata distribution to Plaintiffs. Id.

35. Burr has managed his affairs since 2013 on the assumption that the Participation Agreements were terminated along with the termination of Gerhardt and Seaverns' employment with College Street. (Ex. 3 - Burr Aff. ¶ 19).

RESPONSE: Disputed. At all relevant times, Mr. Burr has remained fully aware that Plaintiffs were entitled to certain percentages of Owner distributions Mr. Burr made to himself regarding 140 Commonwealth Avenue and Hawthorn Hill under the Participation Agreements. Ex. 11- Seaverns Depo., p. 104-106. For example, during a phone call between Ms. Seavers and Mrs. Burr (who at the time was estranged from Mr. Burr), Mrs. Burr stated that (i) Mr. Burr was taking distributions of about $800,000 a year from Hawthorne Hill, and (ii) Mr. Burr had privately acknowledged to Ms. Burr that "technically" a certain percentage of the funds "belonged" to Plaintiffs. Id. at 104. During a second phone conversation with Ms. Seaverns on this topic, Mrs. Burr confirmed that Mr. Burr was "well aware" that 10% of the funds Mr. Burr was earning from Hawthorne Hill "belonged" to Mr. Gerhardt and 5% belonged to Ms. Seaverns. Id. at 104-106.

36. Although Gerhardt and Seaverns both testified that they disagreed with Burr's view of the Participation Agreements, neither of them said anything to Burr about being owed distributions between sometime in 2014 and the date they filed the complaint in 2021. (Ex. 11 - Seaverns Depo., p. 101; Ex. 10 - Gerhardt Depo., pp. 123-24).

RESPONSE: Disputed. Mr. Burr indicates in Paragraph 34 that "the first substantive contact between Plaintiffs and Burr" occurred in 2019, when Ms. Seaverns communicated with Mrs. Burr over the phone, which contradicts this statement in Paragraph 36.

37. Both Plaintiffs had reason to believe in 2014 that Burr received distributions from Hawthorne Hill and 140 Commonwealth Ave. (Ex. 10 - Gerhardt Depo., p. 118; Ex. 11 - Seaverns Depo., p. 99).

RESPONSE: Disputed. It was not until 2019 or 2020 that Ms. Seaverns obtained information that placed Plaintiffs on notice that Mr. Burr was cheating them by issuing to himself large distributions from income generated through Hawthorne Hill without making a corresponding pro rata distribution to Plaintiffs. Ex. 11 - Seaverns Depo., p. 104. During an initial phone call on this topic, Mrs. Burr (who at the time was estranged from Mr. Burr) informed Ms. Seaverns that (i) Mr. Burr was taking distributions of about $800,000 a year from Hawthorne Hill, and (ii) Mr. Burr had privately acknowledged to Ms. Burr that "technically" a certain percentage of the funds "belonged" to Plaintiffs. Id. During a second phone conversation with Ms. Seaverns, Mrs. Burr confirmed that Mr. Burr was "well aware" that 10% of the funds Mr. Burr was earning from Hawthorne Hill "belonged" to Mr. Gerhardt and 5% belonged to Ms. Seaverns. Id. at 104-106. Soon after, Ms. Seaverns informed Mr. Gerhardt about Mr. Burr "taking large distributions," and that Mr. and Mrs. Burr both "knew" Plaintiffs were "being screwed." Ex. 14 - Gerhardt Answers to Interrogatories, Answer No. 16. Prior to speaking with Mrs. Burr, in or around 2019 or 2020, Ms. Seaverns "had no proof" that Mr. Burr was continuing to receive distributions from 140 Commonwealth and Hawthorne Hill. See Ex. 15 - Seaverns Answers to Interrogatories, Answer No 11. Previously, she did not know of Mr. Burr's breaches

of the agreements because Plaintiffs had no ability to access financial records to ascertain whether and to what extent Mr. Burr was taking distributions from either real estate development project. Ex. 11 - Seaverns Depo., p. 99.

Respectfully submitted,

ROBERT S. BURR,
COLLEGE STREET PARTNERS LLC, 140 COMMONWEALTH AVENUE – DANVERS, LLC, and HAWTHORNE HILL DEVELOPMENT LLC,

By their attorneys,

/s/ *David B. Mack*
David B. Mack (BBO # 631108)
dmack@ocmlaw.net
Stephanie R. Parker (BBO# 687610)
sparker@ocmlaw.net
O'Connor Carnathan and Mack LLC
10 Burlington Mall Road, Suite 301
Burlington, MA 01803
Telephone: 781.359.9005

Richard C. Pedone (BBO #630716)
rpedone@nixonpeabody.com
John E. Murray (BBO #706250)
jmurray@nixonpeabody.com
NIXON PEABODY LLP
Exchange Place
53 State Street
Boston, MA 02109
Phone: 617-345-100

MICHAEL GERHARDT, and
LAUREN SEAVERNS,

By their attorneys,

/s/ *David H. Rich*

David H. Rich (BBO # 634275)
Gregory R. Browne (BBO # 708988)
drich@toddweld.com
gbrowne@toddweld.com
Todd & Weld LLP
1 Federal Street, 27th Floor
Boston, MA 02110
(617) 720-2626
(617) 227-5777 (fax)

Dated: March 8, 2024

CERTIFICATE OF SERVICE

I, David B. Mack, hereby certify that on March 8, 2024, I served a copy of the foregoing document upon Plaintiffs' counsel of record via e-mail.

David Rich, Esq.
Gregory Browne, Esq.
Todd & Weld, LLP
One Federal Steet
Boston, MA 02110
(617) 720-2626
drich@toddwed.com
gbrowne@toddweld.com

/s/ David B. Mack
David B. Mack

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

MICHAEL GERHARDT and LAUREN SEAVERNS, Plaintiffs, v. ROBERT S. BURR, COLLEGE STREET PARTNERS LLC, 140 COMMOWNEALTH AVENUE - DANVERS, LLC and HAWTHORNE HILL DEVELOPMENT LLC, Defendants.	C.A. No. 2184CV01017-BLS2

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

MICHAEL GERHARDT, and
LAUREN SEAVERNS,

By their attorneys,

/s/ David H. Rich

David H. Rich (BBO # 634275)
Gregory R. Browne (BBO # 708988)
drich@toddweld.com
gbrowne@toddweld.com
Todd & Weld LLP
1 Federal Street, 27th Floor
Boston, MA 02110
(617) 720-2626
(617) 227-5777 (fax)

Dated: February 16, 2024

i. Introduction

Defendants' summary judgment motion would have this Court ignore nearly a century of black letter Massachusetts law and adopt a position which has never been embraced by any court in the Commonwealth, including the Supreme Judicial Court. Defendants ask this Court to conclude that contracts (drafted by Defendants' lawyers), which expressly state that they have been "**EXECUTED under seal**," should not be treated as executed under seal. See e.g. Knott v. Racicot, 442 Mass. 314, 319 (2004) (inclusion of the words "under seal" or "a similar phrase" is sufficient to create a sealed instrument). The Defendants' efforts to contort the specific language of M.G.L. c. 4, § 9 into a pretzel is unavailing and itself would require a holding which no Massachusetts court has ever come close to adopting. So too would the Defendants' argument that because the exhibits to the parties' Participation Agreements do not say that the exhibit has been executed under seal that the clear seal language set forth in the body of the contracts should be disregarded. The Defendants' invitation to have this Court act as the Massachusetts legislature and abolish M.G.L. c. 260, § 1 should not be accepted. To the extent any court in the Commonwealth has the authority to "reimagine" M.G.L. c. 4, § 9 (and such a contention is dubious at best), it is for the Supreme Judicial Court to rewrite nearly a century of law in this area.

Even if this Court chooses to rewrite Massachusetts law and determine that the Participation Agreements were not executed under seal, summary judgment in favor of the Defendants remains improper. Record evidence makes clear that it was not until 2019, at the earliest, that Plaintiffs first gained credible knowledge about Mr. Burr's wrongful conduct. Indeed, through Mr. Burr's then estranged wife ("Mrs. Burr"), Plaintiffs were first informed that Mr. Burr was paying himself large sums of money without complying with his corresponding

obligation to make pro rata distributions to the Plaintiffs. Prior to hearing from Mrs. Burr, Plaintiffs had no reason or means to discover that Mr. Burr was paying himself distributions, nor did the Plaintiffs have any ability to understand the financial condition of the real estate development projects from which profit distributions would be made to them. Mr. Burr's failures in this regard implicate concepts of equitable tolling, particularly the fraudulent concealment doctrine and/or the discovery rule. At worst, the Plaintiffs would be able to recover damages for Mr. Burr's breaches of contract committed in the six years prior to commencing suit. But to be clear, the statute of limitations which applies to Plaintiffs' action is twenty years under M.G.L. c. 260, § 1. As discussed further below, Defendants' summary judgment motion should be denied.

ii. Facts

I. The Participation Agreements

Sometime during the spring and summer of 2009, Mr. Burr "invented" the idea of Participation Agreements for Mr. Gerhardt or Ms. Seaverns. Ex. 1 (Burr. Depo., pp. 67-69). Neither Mr. Gerhardt nor Ms. Seaverns "ever came to [Mr. Burr] and asked for participation, or partnership, or otherwise." Id. at 67.

Mr. Burr hired attorneys from Goulston & Storrs P.C. to draft the Participation Agreements. Id. In or around July 1, 2009, Mr. Burr and each Plaintiff separately executed a Participation Agreement granting each a "Participation Percentage" of 10% of Mr. Burr's 100% ownership interest in his real estate development project, 140 Commonwealth. See Ex. 4; see Ex. 5. Then, in or around September 1, 2011, Mr. Burr granted Mr. Gerhardt a "Participation Percentage" of 10% and Ms. Seaverns a 5% "Participation Percentage" of his 100% ownership interest in a second real estate development project, Hawthorne Hill. See Ex. 6; see Ex. 7. The

Participation Agreements are substantially identical but for the parties and the companies involved. See SOF, ¶ 11; see also Exs. 4, 5, 6, 7 ("Participation Agreements.").

The Participation Agreements are structured to provide profit payments or "distributions" whenever Mr. Burr receives profit benefits, either through "Cash Flow Distributions" during the life of the development project or upon a specifically defined Capital Transaction (i.e., a sale of the asset). Participation Agreements, § 2. In effect, the Participation Agreements serve to provide phantom equity to both Mr. Gerhardt and Ms. Seaverns in these real estate development projects.

The Participation Agreements each include a signature block, preceded by the phrase: "**EXECUTED under seal**, in any number of counterpart copies, each which counterpart copies shall be deemed an original for all purposes." Participation Agreements, p. 13 (emphasis added). The "Schedule A," appended as an exhibit to the Participation Agreements, provides, among other things, the name of the participant, the company to which the participation interest pertained, the effective date, and the participation percentage. Id. at p. 14. The Participation Agreements themselves are substantially identical (SOF, ¶ 11), and the Schedule A lists information that would theoretically vary depending upon the recipient of the participation interest and the amount of the participation interest. See, e.g., Ex. 4, p. 14 ("Name and Mailing Adress of Participant: Michael Gerhardt.").

Section 7(h) of the Participation Agreements provides: "By executing any Schedule attached hereto, Participant acknowledges that the representations and warranties set forth in Section 7 are true and accurate…" Participation Agreements, § 7(h). Section 7 outlines the "Representations and Warranties" which the "Participant hereby represents and warrants to Owner, the Company, and each of the other members of the Company." Id. § 7(a) through (g).

As such, the signature block within the Schedule A memorializes Plaintiffs' acknowledgment of certain representations and warranties set forth in Section 7(a) through (g). Of course, the warranties in Section 7 are not the subject of Plaintiffs' breach of contract claim, which focuses on Mr. Burr's breach of Section 2, governing distributions.

As articulated in Plaintiffs' Motion for Partial Summary Judgment, Mr. Burr incorrectly contends that Plaintiffs' right to receive distributions was contingent on their continued employment, Ex. 1 (Burr. Depo., p. 94). The agreements however contain no provision which provide for the forfeiture of Plaintiffs' participation interests upon the termination of their employment. See generally Participation Agreements. Indeed, the Participation Agreements provide for the exact opposite. See Plaintiffs' Memorandum in Support of Their Motion for Partial Summary Judgment, pp. 5-7.

II. Mr. Burr Abruptly Stops Paying Plaintiffs Distributions

After execution of the Participation Agreements, it is undisputed that Mr. Burr made profit participation distributions to Plaintiffs for several years without incident and stopped after the termination of their employment with College Street. See SOF ¶¶ 18, 19, 20, 21.[1]

Mr. Burr's testimony confirms that the only reason he stopped paying Plaintiffs distributions from the Participation Agreements was because Plaintiffs were no longer employed by College Street:

Q: Why didn't Ms. Seaverns receive participation payments after 2013?
A: Because her Participation Agreements were tied to her providing services.
Q: Okay.
A: Provision of services.
Q: Okay. Any other reason why?

[1] Mr. Burr did continue to make participation payments to Mr. Gerhardt after his employment with College Street ended, but this fact is not material to Defendants' summary judgment motion.

A: Not that I can recall.
Q: And same thing for Mr. Gerhardt…
A: Yes.
Q: Any other reason?
A: Not that I can recall.

See Ex. 1 (Burr Depo., p. 94-95).

III. In 2019 or 2020, Plaintiffs Received Credible Information that Mr. Burr was Continuing to Pay Himself Distributions Despite Being Fully Aware that Certain Percentages Belong to Plaintiffs

It was not until 2019 or 2020 that Ms. Seaverns obtained information that placed Plaintiffs on notice that Mr. Burr was cheating them by issuing to himself large distributions from income generated through Hawthorne Hill without making a corresponding pro rata distribution to Plaintiffs. Ex. 11 (Seaverns Depo., p. 104).[2] During an initial phone call on this topic, Mrs. Burr (who at the time was estranged from Mr. Burr) informed Ms. Seaverns that (i) Mr. Burr was taking distributions of about $800,000 a year from Hawthorne Hill, and (ii) Mr. Burr had privately acknowledged to Ms. Burr that "technically" a certain percentage of the funds "belonged" to Plaintiffs. Id. During a second phone conversation with Ms. Seaverns, Mrs. Burr confirmed that Mr. Burr was "well aware" that 10% of the funds Mr. Burr was earning from Hawthorne Hill "belonged" to Mr. Gerhardt and 5% belonged to Ms. Seaverns. Id. at 104-106. Soon after, Ms. Seaverns informed Mr. Gerhardt about Mr. Burr "taking large distributions," and that Mr. and Mrs. Burr both "knew" Plaintiffs were "being screwed." See Ex. 14 (Gerhardt Answers to Interrogatories), Answer No. 16.

[2] Regarding 140 Commonwealth, Mrs. Burr informed Ms. Seaverns during a second conversation "something about that being sacred property for [Mr. Burr] and [they] don't even talk about 140 Comm. Ave." Ex. 11 (Seaverns Depo., p. 106).

Prior to speaking with Mrs. Burr, in or around 2019 or 2020, Ms. Seaverns "had no proof" that Mr. Burr was continuing to receive distributions from 140 Commonwealth and Hawthorne Hill. See Ex. 15 (Seaverns Answers to Interrogatories), Answer No 11. Previously, she did not know of Mr. Burr's breaches of the agreements because the Plaintiffs had no ability to access financial records to ascertain whether and to what extent Mr. Burr was taking distributions from either real estate development project. Ex. 11 (Seaverns Depo., p. 99). Indeed, the Participation Agreements did not provide for automatic, recurring distributions to Plaintiffs of any set amount; they were paid out upon Mr. Burr's receipt of Owner distributions. Id; Participation Agreements, § 2.

iii. Argument

I. The Participation Agreements were Executed "Under Seal," and the Twenty-Year Statute of Limitations Set Forth in M.G.L. c. 260, § 1 Applies to Plaintiffs' Claims

Pursuant to M.G.L. c. 260, § 1, the statute of limitations for "[a]ctions upon contracts under seal" is twenty years. To have the effect of being "under seal," a contract need only include "a recital that such instrument is sealed by or bears the seal of the person signing the same or is given under the hand and seal of the person signing the same, or that such instrument is intended to take effect as a sealed instrument." M.G.L. c. 4, § 9A. The statute's use of "recital" has never been associated with the "recital section" included in certain contracts. The inclusion of the words "under seal" or "a similar phrase" has been deemed sufficient to vest a contract with the status of a sealed instrument. Knott, 442 Mass. at 319 (citing Marine Contractors Co. v. Hurley, 365 Mass. 280, 285 n. 2 (1974) (finding that a recitation in a contract that parties have "set their hands and seals" to the agreement is sufficient, under M.G.L. c. 4, §

9A, to create sealed contract)).[3]

As Defendants readily acknowledge in their Opening Brief, the Appeals Court has expressly held that the use of the phrase: "WITNESS the execution hereof under seal…," appearing directly above the signatures was sufficient to give the legal effect of an instrument under seal. Revolution Portfolio, LLC v. Goodrich, 52 Mass. App. Ct. 1106 (2001). Here, the Participation Agreements each include a signature block, preceded by the words: "EXECUTED under seal…" Participation Agreements, p. 13 (emphasis added). It cannot reasonably be disputed that **for nearly a century, the exact use of the words set forth in the Participation Agreements have been deemed sufficient to grant a contract the effect of a sealed instrument**. Nalbandian, 369 Mass. at 155 (acknowledging the same requirements have been in place "[s]ince 1929."). Undoubtedly, Massachusetts law is clear that the statute of limitations applicable to Plaintiffs' action is twenty years. See M.G.L. c. 260, § 1.

In the face of nearly a century of law which is directly contrary to their position, Defendants lob a proverbial "Hail Mary" by claiming that M.G.L. c. 4, § 9A's use of the word "recital" actually requires a "recital section" in the contract which expressly declares that the instrument is under seal in order for M.G.L. c. 260, § 1's twenty-year limitations period to apply. Defendants' Memorandum of Law ("MOL"), p. 17. Defendants' position is directly contradicted by the very case law they cite which holds the opposite. That law makes clear that "simply the

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[3] See also Nalbandian v. Hanson Restaurant & Lounge, Inc., 369 Mass. 150, 155 (1975) ("Since 1929, the mere recital that an instrument is sealed by or bears the seal of the person signing the same or is given under the hand and seal of the person signing the same, or that such instrument is intended to take effect as a sealed instrument is sufficient to give the instrument the legal effect of a sealed instrument") (internal quotations and citations omitted); Kingston Hous. Auth. v. Sandonato & Bogue, 31 Mass. App. Ct. 270, 275 (1991) (finding words such as "signed as a sealed instrument" or "witness our hands and seals hereto" are sufficient to create a sealed document).

word 'under seal' or a similar phrase" grants an instrument the effect of a sealed instrument. See MOL, at p. 13-14, n. 12 (citing Knoll, among other cases which reiterate the straightforward requirements for a contract to be executed under seal).

Defendants' position, taken to its illogical conclusion, would require every contract executed under seal to include a specific recital section setting for an express confirmation that the contract is being executed under seal. **No case in Massachusetts jurisprudence has ever suggested that such a requirement exists, and no such case is cited by Defendants**. See generally MOL. M.G.L. c. 4, § 9A was intended to relieve contracting parties of the inconvenience of physically stamping documents with wax as a mark of authenticity; it follows logically that recitations under the statute have almost universally been associated with contracting parties' signatures (the modern-day mark of authenticity). See Knott, 442 Mass. at 319-20 ("Under the common law, the seal became proof of the parties' identities and the document's authenticity, and loss or destruction of the sealed contract terminated the bargain.").

Defendants also ignore completely that Mr. Burr's own attorneys drafted the Participation Agreements. Ex. 1 (Burr. Depo., p. 67). Therefore, any ambiguity about whether the Participation Agreements were executed under seal, and there is none, must be construed against Defendants. James B. Nutter & Company & Co. v. Estate of Murphy, 478 Mass. 664, 669 (2018) ("When the language is ambiguous, it is construed against the drafter.").

Equally meritless is Defendants' assertion that the Participation Agreements should not be treated as having been executed under seal because the Schedule A makes no reference to the agreements being "EXECUTED under seal." Defendants' position is baseless as Schedule A is an exhibit to the Participation Agreement and not the agreement itself. Moreover, Schedule A includes a signature, at least partly, to memorialize Plaintiffs' acknowledgment of the accuracy

of certain representations and warranties contained in the agreement's Section 7(a) through (g). See Participation Agreement, § 7(h) ("By executing any Schedule attached hereto, Participant acknowledges that the representations and warranties set forth in Section 7 are true and accurate…"). This detail is omitted from Defendants' Opening Brief. Of course, the warranties in Section 7 are not the subject of Plaintiffs' claims, which focus on Mr. Burr's breach of Section 2, governing distributions. Indeed, the straightforward payment mechanism the parties intended, which Mr. Burr is alleged to have breached, is fully delineated in Section 2 without any references to the Schedule A. The Schedule A merely lists information that would theoretically vary depending on who the agreement applied to and what company was involved. It is clear that Mr. Burr's counsel drafted the Participation Agreements in such a way as to allow Mr. Burr the ability to grant future participation interests simply by preparing a new Schedule A and without having to pay counsel to prepare entirely new agreements. Doing so functioned as nothing more than a time and cost saving mechanism for Mr. Burr and nothing else.

Even if the Court accepted Defendants assertion that the Schedule A was "critically important," Defendants fail to cite any case establishing that the omission of the words "under seal" in an ancillary document attached to a document executed under seal would somehow negate the clear seal language set forth in the body of the agreement. Again, Mr. Burr's failure to cite any legal authority for his position is telling. With nearly a century of law maintaining that a contract need only include the words "under seal" to constitute a sealed instrument, there is no legal requirement to include those same words a second time in a contract's exhibit. See Erickson v. Ames, 264 Mass. 436, 445 (1928) (finding that widespread opinion as to law, justified by judicial opinions, must be given weight in ascertaining intent of parties to particular instrument). At minimum, the omission of the "magic words," MOL, p. 13, in the Schedule A

should be resolved against Defendants, whose attorneys prepared the agreements. If Mr. Burr's attorneys did not intend for the Participation Agreements to be treated as sealed instruments, they certainly could have omitted "EXECUTED under seal" from the body of the agreements themselves. They did not and are stuck with the consequences of the specific language set forth therein.

Defendants' Motion effectively asks this Court to create new law regarding the requirements of M.G.L. c. 4, § 9A and disregard nearly a century of well-settled precedent. If there is to be a material change in the law, it is for the Supreme Judicial Court to do, not the trial court. See Dayton v. Peck, Stow & Wilcox Co. (Pexto), 739 F.2d 690, 694 (1st Cir. 1984) ("We must apply the law of the forum as we infer it presently to be, not as it might come to be."). It is likewise not the role of the trial court to revisit the policy considerations of the Massachusetts legislature, which has not abolished or eliminated the sealed contract doctrine codified in M.G.L. c. 260, § 1. See Joslyn v. Chang, 445 Mass. 344, 352 ("[T]he duty of the court [is] to adhere to the very terms of the statute, and not, upon imaginary equitable considerations, to escape from the positive declarations of the text…It is not for this court to revisit these policy considerations") (internal quotations and citations omitted).

Although the Knott Court acknowledged that the sealed contract doctrine has "eroded considerably in the Commonwealth," the holding by no means suggests that trial courts should disregard the doctrine altogether. Knott, 442 Mass. at 320-22 (recognizing that the Supreme Judicial Court previously "reaffirmed the sealed contract doctrine as part of our common law" in the Johnson v. Norton Hous. Auth. decision). After all, despite many jurisdictions eliminating the doctrine, "the Commonwealth is one of the minority of American jurisdictions that have carried over significant elements of the sealed contract doctrine to the Twenty-first Century."

Knott, 442 Mass. at 320. The Massachusetts legislature and the Supreme Judicial Court have each refrained from abolishing the doctrine despite having ample opportunity. Id. And while they each have modified principles of the doctrine to limit its scope,[4] no such modifications have ever affected the requirements under M.G.L. c. 4, § 9 for affixing a seal to an instrument. Id. at 319. Likewise, Defendants point to no case or statute suggesting the doctrine would not apply to participation agreements which themselves expressly confirm that the agreements have been "EXECUTED under seal…" For the foregoing reasons, the twenty-year statute of limitations set forth in M.G.L. c. 260, § 1 applies to Plaintiffs' claims and said claims are not time barred.

II. Even if the Court Finds the Participation Agreements Were Not Executed "Under Seal," Plaintiffs' Claims Are Not Time-Barred Due to Principles Of Equitable Tolling

Plaintiffs' claims are not time-barred, in any event, because the six-year statute of limitations, under M.G.L. c. 260, § 2 would be equitably tolled based upon the fraudulent concealment doctrine and/or the discovery rule. At a minimum, issues of fact permeate around these issues and make summary judgment on this basis improper. See Riley v. Presnell, 409 Mass. 239, 248 (1991) ("any disputed issues relative to the statute of limitations ought to be decided by the jury"); see also Vittands v. Sudduth, 49 Mass. App. Ct. 401, 408 (2000) (summary judgment is disfavored "where state of mind is an essential element of the cause of action.").

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[4] See, e.g., M.G.L. c. 106, § 2A-203 ("The affixing of a seal to a writing evidencing a lease contract or an offer to enter into a lease contract does not render the writing a sealed instrument and the law with respect to sealed instruments does not apply to the lease contract or offer"); M.G.L. c. 106, § 2-203 ("The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer"); see also Nalbandian v. Hanson Restaurant & Lounge, Inc., 369 Mass. 150, 154 (1975) (citing to early criticisms of the doctrine).

a. Fraudulent Concealment

When a defendant fraudulently conceals a cause of action from the knowledge of a plaintiff, the statute of limitations is tolled, under M.G.L. c. 260, § 12, for the period prior to the plaintiff's discovery of the cause of action. Demoulas v. Demoulas Super Markets, Inc., 424 Mass. 501, 519 (1997). "The statute of limitations may be tolled under G.L. c. 260, § 12, if the wrongdoer…concealed the existence of a cause of action through some affirmative act done with intent to deceive." Puritan Med. Ctr., Inc. v. Cashman, 413 Mass. 167, 175 (1992) (internal quotations and citations omitted). Additionally, where a fiduciary relationship exists, the failure to adequately disclose the facts that would give rise to knowledge of a cause of action constitutes fraudulent conduct and is equivalent to fraudulent concealment for purposes of applying M.G.L. c. 260, § 12. Demoulas, 424 Mass. at 519.

Notably, Massachusetts courts do not equate suspicion with knowledge, and they are explicit in requiring actual knowledge, or, as an equivalent, "full means of detecting the fraud." Tracelab, Inc. v. Industrial Nucleonics Corp., 313 F.2d 97, 102 (1963) (in action against former employees' corporation for trade secret violation under Massachusetts law, plaintiff had only suspicion, opinion, and conjecture, not actual knowledge, and lacked means to obtain facts, until patent issued). Indeed, the Supreme Judicial Court "has only attributed knowledge to a plaintiff who had actual knowledge of the facts, or had the means to acquire such facts, in circumstances where the probability of wrongdoing was so evident that possession of the means was equivalent to actual knowledge." Demoulas, 424 Mass. at 520, n. 25.

The record suggests that, prior to speaking with Mr. Burr's wife in or around 2019 or 2020, Ms. Seaverns "had no proof" that Mr. Burr was continuing to receive distributions from 140 Commonwealth and Hawthorne Hill. See Answer No. 11. Until speaking with Mrs. Burr,

Ms. Seaverns had no way of knowing that Mr. Burr was breaching the Participation Agreements by making Owner distributions to himself and failing to pay distributions to Plaintiffs. Ex. 11 (Seaverns Depo., p. 104). Mr. Gerhardt learned from Ms. Seaverns about Mr. Burr "taking large distributions," and that Mr. Burr "knew" Plaintiffs were "being screwed." See Answer No. 16.

Even if Plaintiffs suspected Mr. Burr was continuing to make Owner distributions to himself,[5] suspicion, opinion, or conjecture does not constitute knowledge. Tracelab, Inc., 313 F.2d at 102 (finding that a "full means of detecting the fraud" equates to actual knowledge). Due to the nature of the agreements' terms, requiring Mr. Burr to pay Plaintiffs each time made Owner distributions to himself, Plaintiffs could not have known of Mr. Burr's breaches without knowing when he was making Owner distributions to himself. Participation Agreements, § 2. The distributions did not recur automatically, and they were in varying amounts, presumably based on the economic health of the properties and available capital. Id. Following the termination of their employment, Plaintiffs received no financial disclosures from Mr. Burr, knew nothing of the economics of 140 Commonwealth and Hawthorn Hill, and they were not privy to the amounts Mr. Burr was paying himself.[6] As such, prior to Ms. Seaverns call with Mrs. Burr in 2019 or 2020, Plaintiffs did not have "actual knowledge of the facts" or "the means to acquire such facts, in circumstances where the probability of wrongdoing was so evident that possession of the means was equivalent to actual knowledge." Demoulas, 424 Mass. at 520, n.

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[5] Mr. Burr claims that "[b]oth Plaintiffs had *reason to believe* in 2014 that Burr received distributions from Hawthorn Hill and 140 Commonwealth Avenue." SOF, ¶ 37 (emphasis supplied). This fact is highly disputed.

[6] Cf Lynch v. Signal Fin. Co. of Quincy, 367 Mass. 503, 507-508 (1975) (statute not tolled where plaintiff, who knew loan terms and extent of lender's disclosures, could have discovered nondisclosures by merely making mathematical calculations from known data). Here, Plaintiffs had no such access to data.

25. At best, Plaintiffs were suspicious of their former employer, who they also understood to be acrimonious towards his former partners, litigious, and easily angered. See, e.g., Ex. 10 (Gerhardt Depo., pp. 134-135).

Despite knowing full well that "technically" certain percentages of the funds still "belonged" to Plaintiffs, Mr. Burr represented to Plaintiffs that their right to receive distributions was contingent upon their continued employment. See Ex. 11 (Seaverns Depo., p. 104-106); see SOF, ¶ 37). Mr. Burr's position, however, has absolutely no support in the contracts his own attorneys prepared.[7] See generally Participation Agreements. In knowingly assuming a bogus position about Plaintiffs' rights to continue receiving distributions under the agreements, all while continuing to make Owner distributions to himself, there is a genuine issue of material fact as to whether Mr. Burr acted affirmatively with the "intent to deceive." Puritan Med. Ctr., Inc., 413 Mass. at 175.

So too, given the nature of the parties' relationship and the nature of the Participation Agreements, Mr. Burr owed a fiduciary duty to Plaintiffs to disclose the facts giving rise to knowledge of their cause of action. Demoulas, 424 Mass. at 519. A fiduciary relationship is one founded on the trust and confidence reposed by one party in the integrity and fidelity of another. Locator Servs. Group, Ltd. v. Treasurer & Receiver Gen., 443 Mass. 837, 853-855 (2005). At minimum, the existence of a fiduciary relationship here is a question of fact, and there is a genuine dispute as to whether Mr. Burr owed Plaintiffs a fiduciary duty of disclosure. Yousif v. Yousif, 61 Mass. App. Ct. 686, 696 (2004).

[7] The fact that Defendants have moved for summary judgment not on contractual grounds or based on any contractual defense but by raising a statute of limitations defense confirms their lack of confidence in the terms of the agreements.

Indeed, the parties' relationship is one where Mr. Burr, as their employer, agreed to distribute to Plaintiffs a certain percentage of rental income generated from 140 Commonwealth and Hawthorn Hill each time he decided to make an Owner distribution to himself. Participation Agreements, §2. The participation payments to which Plaintiffs are entitled are akin to phantom income profit distributions which owners of a closed corporation or limited liability company typically receive. Analogously, Massachusetts courts "have long recognized that the relationship among the stockholders [of a close corporation] must be one of trust, confidence and absolute loyalty." Selmark Assocs., Inc. v. Ehrlich, 467 Mass. 525, 536 (2014); see also Demoulas, 424 Mass. at 528-29. "This is particularly so given that the very structure of the close corporation may provide an opportunity for the majority stockholders to oppress or disadvantage minority stockholders [through] a variety of oppressive devices, termed freeze-outs," which can "occur when a minority shareholder is deprived of employment…, or, more generally, "when the reasonable expectations of a shareholder are frustrated." Id. (internal citations and quotations omitted). Based on the similarities between the Plaintiffs' participation interests in 140 Commonwealth and Hawthorn Hill, and those of shareholders to a closed corporation or owners of a limited liability company, there is at minimum a genuine issue of material fact as to whether Mr. Burr had a fiduciary duty to disclose to Plaintiffs that he was continuing to pay himself distributions.

In the context of a fiduciary relationship, "mere failure to reveal information may be sufficient to constitute fraudulent conduct for the purposes of [M.G.L. c. 260, § 12]." Maggio v. Gerard Freezer & Ice Co., 824 F.2d 123, 130–131 (1st Cir. 1987); see also Jamesbury Corp. v. Worcester Valve Co., 443 F.2d 205, 209 (1st Cir. 1971) ("silence can be fraudulent concealment by a person, such as a fiduciary, who has a duty to disclose"); Samia v. Cent. Oil Co. of

Worcester, 339 Mass. 101, 113 (1959) ("mere failure to reveal may be fraudulent where there is a duty to reveal."). Here, without notifying Plaintiffs as to what he was doing so, Mr. Burr continued to take large distributions and failed to provide any financial disclosures about the financial performance of the real estate development project despite knowing that "technically" certain percentages of the funds "belonged" to Plaintiffs. Ex. 11 (Seaverns Depo., p. 104). As such, there is at minimum a genuine factual dispute as to whether the applicable statute of limitations should be tolled by the doctrine of fraudulent concealment.

b. Discovery Rule

It has long been established that the discovery rule "tolls the statute of limitations until a plaintiff knows, or reasonably should have known, that it has been harmed or may have been harmed by the defendant's conduct." Taygeta Corp. v. Varian Assocs., Inc., 436 Mass. 217, 229 (2002). Generally, the rule operates in matters involving causes of action, such as this, which are "based on inherently unknowable wrongs." See White v. Peabody Const. Co., 386 Mass. 121, 129 (1982).

Here, Mr. Burr's wrongdoing in, among other things, failing to pay distributions to Plaintiffs was "inherently unknowable." It was not until Ms. Seaverns' phone conversations with Mrs. Burr, in or around 2019 or 2020, that she gained credible information of Mr. Burr's breaches. (Seaverns Depo. p. 104). Mr. Burr's Owner distributions were discretionary, not automatically recurring, and they theoretically relied on the economics of the properties and available capital. Plaintiffs had no means of determining the economics of 140 Commonwealth and Hawthorn Hill, and they were not privy to the amounts (and whether) Mr. Burr was paying himself. Thus, the applicable statute of limitations should be tolled. At a minimum, this issue is one for the finder of fact. Riley, 409 Mass. at 248.

III. Even If Some Portion Of Mr. Burr's Breaches Allegedly Occurred More Than Six Years Before the Filing Of The Complaint, That Would Not Result In Plaintiffs' Entire Acting Being Time-Barred

Mr. Burr is alleged to have breached the Participation Agreements each time he made an Owner distribution to himself and did not fulfill his obligation to make pro rata distributions to Plaintiffs. Presumably, Mr. Burr continues to make Owner distributions without properly distributing funds to Plaintiffs and will do so until the properties are sold. He is certainly alleged to have breached the agreements within the six-year period leading up to the filing of the Complaint. Yet, without citing to any legal support in their brief, Defendants seem to suggest that because some portion of Mr. Burr's breaches allegedly occurred more than six years before the filing of the Complaint, Plaintiffs' entire action is time-barred. However, Massachusetts law provides that a distinct cause of action accrues each time Mr. Burr decides to distribute funds to himself and fails to make the required distributions to Plaintiffs. Each Owner distribution he makes on a discretionary basis theoretically depends on the rental income (and profits) generated from the development properties as well as the available capital. Massachusetts courts recognize that when an instrument is payable in separate payments, e.g., installments, a distinct cause of action accrues each time a payment becomes due. See Larson v. Larson, 30 Mass. App. Ct. 418, 426-27 (1991) (finding each violation of a "continuing monthly payment obligation…as with any contract calling for continuous separate performances over a period of time" constitutes "a new claim."); see also Cropanese v. Lafever, 2018 Mass. App. Div. 147 (Dist. Ct. 2018). As such, even if the Court accepts Defendants' assertion that the six-year statute of limitations is applicable and the equitable tolling and discovery rule principles do not apply, the Plaintiffs would simply be entitled to recover for breaches which took place in the six years prior to suit being filed.

Relatedly, Delaware courts (as well as some older Massachusetts courts) recognize a "continuing contract" doctrine, where the statute of limitations does not run until the termination of the entire contract if the contract at issue is "continuous in nature." See Kaplan v. Jackson, No. 90C–JN–6, 1994 WL 45429, at *2 (Del.Super.Jan.20, 1994); see also Palisades Collection, LLC v. Unifund CCR Partners, No. CVN14C08036EMDCCLD, 2015 WL 6693962, at *6-7 (Del. Super. Ct. Nov. 3, 2015) (finding the allegations in the complaint were sufficient to support that a profit-sharing agreement was a "continuing contract," and that the parties' obligation remained ongoing, which foreclosed the defendants' statute of limitation arguments); see Powers v. Manning, 154 Mass. 370, 377 (1891) (affirming that "the contract of an attorney with his client was an entire and continuous contract; and that the statute of limitations did not begin to run until the final service was performed"); see Czelusniak v. Ossolinski, 273 Mass. 441, 446-47 (1930) ("In the case of [a continuing] contract the statute of limitations does not begin to run until full performance by the plaintiff or termination of the contract otherwise.").

Here, the Participation Agreements as well as Mr. Burr's obligations to make payments to Plaintiffs under the agreements are ongoing as they theoretically do not terminate until the properties are sold, or forfeiture occurs pursuant to Section 12.[8] Therefore, at minimum, a genuine dispute of fact exists as to whether the Participations Agreements are continuing in nature, and whether the statute of limitations should begin only when Mr. Burr's payment obligations are effectively terminated. No such termination has occurred.

In sum, Defendants fail to cite any law suggesting that simply because a portion of Mr. Burr's breaches may have occurred more than six years ago, Plaintiffs' entire action is barred.

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[8] The one-year period during which Mr. Burr could buyback Plaintiffs' interests pursuant to Section 4(b) has, of course, expired.

IV. Mr. Burr is not at all Prejudiced by Plaintiffs' Purported Delay in Pursuing their Rights

Mr. Burr argues that he has somehow been prejudiced by Plaintiffs' supposed delay in filing suit. MOL, p. 18. On the contrary, the unambiguous terms of the Participation Agreements are all that is needed to determine Mr. Burr's liability as a matter of law. Further, each of the parties to the agreements have been deposed, and even Mrs. Burr has been deposed. Defendants concede that the clear contractual language of the Participation Agreements does not support their position by suggesting that additional, unidentified, unavailable evidence is needed for Mr. Burr to defend this action. Mr. Burr's claim is without basis. Mr. Burr openly admits that he stopped paying Plaintiffs distributions because he contends their right to distribution was contingent on their continued employment. See, e.g., SOF, ¶ 29. Thus, the Court need only decide whether the agreed upon contractual terms support Mr. Burr's position to determine whether he breached the Participation Agreements. His argument that his defense is somehow prejudice is entirely meritless.

iv. Conclusion

For the above reasons, Plaintiffs respectfully requests that the Court deny Defendants' Motion for Summary Judgment in its entirety. See Mass. R. Civ. P. 56(c).

Respectfully submitted,

MICHAEL GERHARDT, and
LAUREN SEAVERNS,

By their attorneys,

/s/ David H. Rich

David H. Rich (BBO # 634275)
Gregory R. Browne (BBO # 708988)
drich@toddweld.com
gbrowne@toddweld.com
Todd & Weld LLP
1 Federal Street, 27th Floor
Boston, MA 02110
(617) 720-2626
(617) 227-5777 (fax)

Dated: February 16, 2024

CERTIFICATE OF SERVICE

I, Gregory R. Browne, certify that a copy of this pleading was served on counsel of record on February 16, 2024 via email.

/s/ Gregory R. Browne
Gregory R. Browne (BBO # 708988)

BC

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

35

MICHAEL GERHARDT and LAUREN SEAVERNS,

Plaintiffs,

v.

ROBERT S. BURR, COLLEGE STREET PARTNERS LLC, 140 COMMOWNEALTH AVENUE - DANVERS, LLC and HAWTHORNE HILL DEVELOPMENT LLC,

Defendants.

C.A. No. 2184CV01017-BLS2

AFFIDAVIT OF GREGORY R. BROWNE, ESQ. IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Gregory R. Browne, under oath do hereby depose and say:

1. I am counsel for Plaintiffs Michael Gerhardt ("Mr. Gerhardt") and Lauren Seaverns ("Ms. Seaverns."). I submit this affidavit in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment.

2. Attached to the Joint Appendix filed herewith as Exhibit 1 is a true and accurate copy of excepts from the deposition of Robert S. Burr in addition to the excerpts relied upon in Defendants' Memorandum of Law in Support of Motion for Summary Judgment.

3. Attached to the Joint Appendix filed herewith as Exhibit 2 is a true and accurate copy of excepts from the deposition of Michael Gerhardt in addition to the excerpts relied upon in Defendants' Memorandum of Law in Support of Motion for Summary Judgment.

4. Attached to the Joint Appendix filed herewith as Exhibit 3 is a true and accurate copy of excepts from the deposition of Lauren Seaverns in addition to the excerpts relied upon in Defendants' Memorandum of Law in Support of Motion for Summary Judgment.

5. Attached to the Joint Appendix filed herewith as Exhibit 14 is a true and accurate copy of Michael Gerhardt's Answers to Defendants' First Set of Interrogatories.

6. Attached to the Joint Appendix filed herewith as Exhibit 15 is a true and accurate copy of Lauren Seaverns' Answers to Defendants' First Set of Interrogatories.

Respectfully submitted,

MICHAEL GERHARDT, and
LAUREN SEAVERNS,

By their attorneys,

/s/ Gregory R. Browne
David H. Rich (BBO # 634275)
Gregory R. Browne (BBO # 708988)
drich@toddweld.com
gbrowne@toddweld.com
Todd & Weld LLP
1 Federal Street, 27th Floor
Boston, MA 02110
(617) 720-2626
(617) 227-5777 (fax)

Dated: March 7, 2024

CERTIFICATE OF SERVICE

I, Gregory R. Browne, certify that a copy of this pleading was served on counsel of record on March 7, 2024 via email.

/s/ Gregory R. Browne
Gregory R. Browne (BBO # 708988)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 2184cv01017-BLS2

MICHAEL GERHARDT,
LAUREN SEAVERNS

Plaintiffs,

v.

ROBERT S. BURR,
COLLEGE STREET PARTNERS LLC,
140 COMMONWEALTH AVENUE – DANVERS LLC,
HAWTHORNE HILL DEVELOPMENT LLC

Defendants.

Served via E-mail

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants Robert S. Burr ("Burr"), College Street Partners LLC ("College Street"), 140 Commonwealth Avenue, LLC ("140 Commonwealth Avenue"), Hawthorne Hill Development, LLC ("Hawthorne Hill", and with Burr, College Street, and 140 Commonwealth Avenue, collectively, the "Defendants") submit this Reply in support of their Motion for Summary Judgment, and in response to the *Plaintiffs' Opposition to Defendants' Motion for Summary Judgement* (the "Opposition"). For the reasons stated in the Defendants' *Memorandum of Law in Support of Their Motion for Summary Judgement* (the "Memorandum of Law"), and as set forth herein, the Court should enter summary judgment in favor of Defendants. While the question is one of first impression, the answer is the product of a strict reading of the statute: to benefit from an extended statute of limitations, Massachusetts law requires that a contract contain a *recital* that the agreement is under seal, and the Participation Agreements lack such a *recital*. A strict

interpretation of the statute, in accordance with the prevailing guidance of the Supreme Judicial Court, compels the conclusion that the Participation Agreements are not contracts under seal entitled to special protections of an extended limitations period. The remaining arguments of Plaintiffs Lauren Seaverns ("Seaverns") and Michael Gerhardt ("Gerhardt"), that their claims are entitled to equitable tolling or that certain claims remain viable under a six-year limitations period, are unavailing and procedurally improper.

REPLY

A. The Participation Agreements are not Subject to G.L. c. 260 § 2 Because of the Absence of a Recital Required under G.L. c. 4, § 9A.

Defendants' requested relief is straightforward – that this Court construe G.L. c. 4, § 9A narrowly and literally and hold that, because the Participation Agreements do not contain the "recital" required under G.L. c. 4 § 9A to transform them into sealed instruments, the Participation Agreements are not subject to the twenty-year limitations period set forth in G.L. c. 260 § 2, and the Plaintiffs' claims are time-barred. This Court can and should interpret the plain text of G.L. c. 4 § 9A narrowly and literally and in accord with the Supreme Judicial Court's most recent guidance on the application of the sealed contract doctrine. *See generally*, *Knott v. Raciott*, 442 Mass. 314 (2004).

G.L. c. 4 § 9A[1] is clear and unambiguous: a contract is only a sealed instrument if it contains a sufficient ***recital*** that the instrument is in fact, sealed. There is no dispute that the

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[1] G.L. c. 4, § 9A provides, in pertinent part:

> In any written instrument, a ***recital*** that such instrument is sealed by or bears the seal of the person signing the same or is given under the hand and seal of the person signing the same, or that such instrument is intended to take effect as a sealed instrument, shall be sufficient to give such instrument the legal effect of a sealed instrument without the addition of any seal of wax, paper or other substance or any semblance of a seal by scroll, impression or otherwise . . . (emphasis added).

sections of the Participation Agreements labeled "RECITALS" are bereft of *any* reference to a seal whatsoever. SOF ¶ 12; Ex. 4, 5, 6, 7. On their face, the Participation Agreements do not comply with the plain text of G.L. c. 4 § 9A. Defendants are therefore entitled to summary judgment. *See Joslyn v. Chang,* 445 Mass. 344, 352 (2005) ("[t]he duty of the court [is] to adhere to the very terms of the statute, and not, upon imaginary equitable considerations, to escape from the positive declarations of the text . . . It is not for this court to revisit these policy considerations") (cited by Plaintiffs).

The Supreme Judicial Court's guidance is clear: post-*Knott*, this antiquated appendage of medieval times should be given the narrowest possible reading, and G.L. c. 4 § 9A should be read narrowly and strictly as Plaintiffs suggest: a contract is only a sealed instrument if it "include[s] a specific recital section setting forth an express confirmation that the contract is being executed under seal."[2] *See Opposition* at p. 8. This position is neither illogical nor absurd, as Plaintiffs' suggest. To the contrary, it fits squarely within the plain text of the statutory scheme that requires a "recital." Nor would such a holding violate the *policy* of the statute enacted nearly one hundred years ago, which was to dispense with the requirement that a seal consist of a melted wax impression. Such policy would not be offended by requiring a clear and unambiguous textual

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[2] While there are no doubt cases that contain references to signature blocks of contracts that allude to a "seal," neither Plaintiffs' counsel nor the undersigned counsel have identified a single case, post-*Knott*, in which a court has squarely considered the issue presented here. *See Memorandum of Law*, pp. 13-14 (collecting pre-*Knott* cases). As discussed in the *Memorandum of Law*, the weight of authority that alludes in passing to what language is sufficient for a contract to be considered one under seal consists of cursory, conclusory language. *See, e.g.*, *Marine Contractors Co. v. Hurley*, 365 Mass. 280, 285 n.2 (1974) (discussion of sufficiency of recital limited to a two-sentence footnote). Furthermore, here, only one of the two signature blocks contains even a vague reference to "seal."

reference to the parties' mutual understanding as to a fundamental attribute of a contract.[3] The failure to include the required *recital* renders the Participation Agreements unsealed, and therefore subject to the ordinary six-year limitations period of G.L. c. 260 § 2. As Plaintiffs allege that Burr breached the Participation Agreements in 2014, the Plaintiffs' Complaint, filed in 2021, is untimely and barred by the statute of limitations of G.L. c. 260 § 2. Defendants are entitled to summary judgment on all counts of the Plaintiffs' Complaint.

B. Plaintiffs' Claims are not Entitled to Equitable Tolling.

Contrary to the Plaintiffs' argument, equitable tolling does not save their claims from dismissal. *See Opposition* at p. 11.

The record demonstrates that Plaintiffs were certainly aware that they had received monthly distributions from Hawthorne Hill and quarterly distributions from 140 Commonwealth after executing the Participation Agreements. Ex. 11 (Seaverns Depo.), pp. 99-100, 120-24; Exs. 8 & 9 (K-1s to Gerhardt and Seaverns reflecting distributions); *see also* Ex. 10 (Gerhardt Depo.), pp. 108-10. Seaverns, while employed by College Street, was responsible, among other things, for rent collection, dealing with billing and invoicing, and financial planning and reporting. Ex. 11, pp. 48-49, 82, 127. She was also responsible for preparing the distribution checks for herself

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[3] Similarly, the Opposition belittles the importance of the "Schedule A" components of the Participation Agreements. *Opposition* at pp. 8-9. The Schedules are not mere "exhibits" to the Participation Agreements; rather, they contain the *essential* material terms of those Agreements, without which the Agreements are little more than a template. The Schedules identify the entity to which the Participation Interest relates, as well as the amount of that interest. Notably, the amount of the interest was not always the same – Seaverns received a 10% interest with respect to distributions from 140 Commonwealth but only a 5% interest with respect to distributions from Hawthorne Hill. Plaintiffs could not even calculate their alleged damages in this case without reference to the Schedules. They are, without a doubt, an integral and material part of the parties' contracts, which is why the absence of any language regarding a seal on those Schedules is telling. Because the Schedules are unquestionably not sealed, the Participation Agreements are not sealed.

and Gerhardt. Ex. 11, pp. 119-20. Seaverns, therefore, was intimately familiar with the frequency with which the properties generated income and the frequency with which distributions were issued.

It is also undisputed that, no later than 2014, (i) Burr ceased making distributions to Plaintiffs after Plaintiffs were terminated from College Street, and (ii) Burr informed Plaintiffs that their distributions would cease along with their termination from College Street. Ex. 10 (Gerhardt Depo.), pp. 116-18; Ex. 14 (Gerhardt ATI), at No. 9; Ex. 11 (Seaverns Depo.), pp. 134, 156-60; Ex. 15 (Seaverns ATI), at No. 9. Seaverns said that Burr was "firm and clear" with respect to his intention not to continue paying. Ex. 11, pp. 159-60. Therefore, assuming *arguendo* that the Participation Agreements were *not* tied to Plaintiffs' continued employment (which they were) and, therefore, that the Agreements survived the end of Plaintiffs' employment, Plaintiffs had *actual notice* of Defendants' breach of the Participation Agreements in 2014, when (a) the distributions ceased, and (b) *when Burr told Plaintiffs that the distributions would cease.* Plaintiffs' claims for non-payment of distributions accrued then, in 2014, not in 2019 as the Plaintiffs suggest. *See Abdallah v. Bain Capital LLC*, 880 F. Supp.2d 190, 196 (D. Mass. 2012) ("[t]he amount of notice necessary to commence the running of the statute of limitations is likely notice of the cause of injury"). While the parties have dueling views as to whether the distributions under the Participations Agreements were tied to Plaintiffs' continued employment with the Defendants, Burr could not have been clearer about his intentions than he was in 2014, and Plaintiffs' injuries could not have been more manifest in 2014. Equitable tolling does not apply here. *Abdullah*, 880 F. Supp.2d at 198 (equitable tolling "should only be applied when the plaintiff could not have discovered, with reasonable diligence, information that was essential to the cause of action within the statute of limitations").

Indeed, Seaverns acknowledged in her deposition that *she assumed that Burr had been making distribution payments for which she had not been paid.* Seaverns claimed that, when she met for dinner with her husband, Burr, and Burr's wife, she had not spoken to Burr in a while because she was "aggravated" and "ticked off" at him for not paying her distributions. Ex. 11 (Seaverns Depo.), pp. 98-99. Seaverns testified that, at that time, she assumed that Bob had received distributions "based on history," – i.e., based on the frequency with which he took distributions in the past. Ex. 11, p. 99. Seaverns thought that dinner occurred around 2014. Ex. 11, p. 98.

Under Massachusetts law, Plaintiffs bear the burden of proving "both the actual lack of knowledge and the objective reasonableness of that lack of knowledge during the tolling period." *Abdullah*, 880 F.Supp.2d at 195 (*quoting D.B. Zwirin Special Opportunities Fund L.P. v. Mehrotra*, 2001 WL 317752, at *1 (D. Mass. Jan. 31, 2011)). Plaintiffs cannot meet their burden and are not entitled to equitable tolling.

C. The Doctrine of Fraudulent Concealment is Inapplicable to this Dispute.

Plaintiffs cannot escape the consequences of the discovery rule's "knew or should have known" standard by invoking the doctrine of fraudulent concealment and G.L. c. 260, § 12. Similarly, Plaintiffs' belated fiduciary duty argument is belied by the facts and foreclosed by the express waiver of such claims in the text of the Participation Agreements themselves.

Burr's express declarations to Plaintiffs that the distributions would cease upon employment termination defeats any plausible argument that G.L. c. 260 § 12 tolled the applicable limitations period. "By the statute's clear language, the party causing the injury must take action to conceal the cause of action from the injured party." *Abdullah*, 880 F.Supp.2d at 197. Unless there is a fiduciary relationship (which did not exist here, as explained below), silence is not

sufficient to establish fraudulent concealment. *Szymanski v. Bos. Mut. Life Ins. Co.*, 56 Mass. App. Ct. 367, 381 (2002). Plaintiffs have not identified any affirmative act done by Burr that could constitute active concealment of any fact relevant to their claims.[4] To the contrary, the record demonstrates precisely the opposite of concealment, as Burr expressly told Plaintiffs that he did not intend to keep paying them under the Participation Agreements because their compensation was tied to their continued employment.

In their Opposition, Plaintiffs' assert *for the first time* that Burr may have had a fiduciary duty to Plaintiffs. *See Opposition,* at pp. 14-15; *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501 (1997). Plaintiffs, however, are bound by the allegations of the Complaint, which is devoid of *any* assertion or allegation that Burr owed or breached a fiduciary duty. As a matter of law, Plaintiffs cannot raise this argument for the first time in opposition to summary judgment. *See generally Estrada v. Progressive Direct Ins. Co.*, 53 F.Supp.3d 484, 497 (D. Mass. 2014) ("Plaintiffs cannot now introduce an entirely new theory of liability in their summary judgment papers").

Even if this argument were procedurally proper, it is expressly foreclosed by the text of the Participation Agreements. Plaintiffs expressly disclaimed the right to assert a claim for breach of fiduciary duties in Section 5 of the Participation Agreements. See Exs. 4-7 ("Participant agrees not to assert any right or claim at any time, either individually or derivatively, against [Defendants]

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[4] Notably, the Plaintiffs do not point to any admissible evidence of concealment, nor even any evidence that they made inquiry into facts concerning the status of the projects after their employment terminated and the date that distributions to them ceased.

. . . . based on any allegation or assert to the effect that any [Defendant] breached any duty to another person . . .").[5]

D. Plaintiffs' Entire Action is Time-barred.

Plaintiffs' claims under the Participation Agreements are time-barred, in their entirety. Plaintiffs' assertion that the Participation Agreements are "continuing contracts" and that each failure by Burr to make a distribution triggers a distinct injury and a new limitations period, is misplaced. It is well established in Massachusetts that a cause of action for breach of contract accrues at the time of the breach. *Melrose Hous. Auth. v. New Hampshire Ins. Co.*, 402 Mass. 27, 32 (1988) ("contract claim accrues at the time of the breach"). If the Participation Agreements were breached (which Burr contests), they were breached in 2014, when the distributions ceased, and Burr informed Plaintiffs that distributions would cease.

Even if the "continuing contract" doctrine applied to the Participation Agreements, *see Opposition* at p. 18, the six-year statute of limitations began to run in 2014 – when Burr gave the Plaintiffs actual notice that the distributions would cease, as Burr's action was tantamount to a repudiation of the Participation Agreements. *See Czelusniak v. Ossolinski*, 273 Mass. 441, 446-47 (1930) ("[i]n the case of [a continuing] contract the statute of limitations does not begin to run until full performance by the plaintiff or termination of the contract otherwise"). When a contracting party clearly and unequivocally repudiates that party's contractual obligation, as Burr did in 2014, the statute of limitations begins to run from the date of such repudiation, even where payment was to be made in subsequent installments. *See Callender v. Suffolk County*, 57 Mass.

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[5] Furthermore, Plaintiffs' new fiduciary duty argument violates the terms of the Participation Agreements and the assertion is itself arguably "willful misconduct," and an intentional and knowing breach of the Participation Agreements. Defendants reserve all rights with regard to the advancement of such new arguments, including to assert that Plaintiffs' fiduciary duty argument causes them to forfeit all rights under the Participation Agreements.

App. Ct. 361, 364-65 (2003); *Barber v. Fox*, 36 Mass. App. Ct. 525, 527-28 (1994). To hold otherwise – that Plaintiffs may assert breach of contract claims against Defendants every time Burr fails to make a distribution under the Participation Agreements – would leave Defendants exposed to *perpetual* liability. That is not the law.

CONCLUSION

For the foregoing reasons, the Court should hold that the six-year statute of limitations applies to this contract action and, there being no dispute that the Plaintiffs commenced this action well in excess of six years after the alleged breach, enter judgment in Defendants' favor on all counts.

Respectfully submitted,

ROBERT S. BURR,
COLLEGE STREET PARTNERS LLC, 140 COMMONWEALTH AVENUE – DANVERS, LLC, and HAWTHORNE HILL DEVELOPMENT LLC,

By their attorneys,

/s/ *David B. Mack*
David B. Mack (BBO # 631108)
dmack@ocmlaw.net
Stephanie R. Parker (BBO# 687610)
sparker@ocmlaw.net
O'Connor Carnathan and Mack LLC
10 Burlington Mall Road, Suite 301
Burlington, MA 01803
Telephone: 781.359.9005

Richard C. Pedone (BBO #630716)
rpedone@nixonpeabody.com
John E. Murray (BBO #706250)
jmurray@nixonpeabody.com
NIXON PEABODY LLP
Exchange Place
53 State Street
Boston, MA 02109
Phone: 617-345-100

Dated: March 8, 2024

CERTIFICATE OF SERVICE

I, David B. Mack, hereby certify that on March 8, 2024, I served a copy of the foregoing document upon Plaintiffs' counsel of record via e-mail.

David Rich, Esq.
Gregory Browne, Esq.
Todd & Weld, LLP
One Federal Steet
Boston, MA 02110
(617) 720-2626
drich@toddwed.com
gbrowne@toddweld.com

/s/ David B. Mack
David B. Mack

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT

MICHAEL GERHARDT and LAUREN SEAVERNS, Plaintiffs, v. ROBERT S. BURR, COLLEGE STREET PARTNERS LLC, 140 COMMOWNEALTH AVENUE - DANVERS, LLC and HAWTHORNE HILL DEVELOPMENT LLC, Defendants.	C.A. No. 2184CV01017-BLS2

PLAINTIFFS MICHAEL GERHARDT AND LAUREN SEAVERNS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Mass. R. Civ. P. 56, Plaintiffs Michael Gerhardt ("Mr. Gerhardt") and Lauren Seaverns ("Ms. Seaverns") respectfully seek the entry of partial summary judgment as to liability on their Breach of Contract Claim (Count I) against Defendant Robert Burr ("Mr. Burr."). Plaintiffs' Breach of Contract claim turns on a simple and straightforward interpretation of the parties' written contracts called "Participation Agreements." These Participation Agreements were granted by Mr. Burr to Plaintiffs, two key employees in his business, College Street Partners LLC ("College Street."). It is undisputed that the Participation Agreements were prepared by Mr. Burr's counsel at Goulston & Storrs and intended to grant Mr. Gerhardt and Ms. Seaverns contractual profit interests in two real estate projects they each helped develop.

Mr. Burr made participation payments to Mr. Gerhardt and Ms. Seaverns during the terms of their employment but stopped after their employment ended. Mr. Burr has acknowledged and admitted that the sole and exclusive reason why he stopped making participation payments to Plaintiffs was because their employment at College Street terminated. This contractual defense fails as a matter of law because the Plaintiffs' interests in the Participation Agreements cannot reasonably be read to be forfeited at the end of their employment at College Street. Instead, the Participation Agreements provide for the exact opposite. For example, Section 4(b) of the Participation Agreements expressly afforded Mr. Burr the right to "buy back" Plaintiffs' participation interests within one year of their employment terminating or working for a competitor in the area. Of course, if Plaintiffs' rights under the Participation Agreements extinguished upon the termination of their employment, there would be nothing for Mr. Burr to buy back, and this provision would be rendered meaningless. Basic tenants of contractual construction prohibit such an outcome.

Likewise, Section 12 of the Participation Agreement expressly identifies narrow circumstances which give rise to the "[f]orfeiture of [p]articipation [i]nterest[s]." This provision provides:

> 12. Forfeiture of Participation Interest Upon Termination of Employment for Bad Boy Acts. Notwithstanding anything in this Agreement to the contrary, if Owner or any senior executive of any Owner Controlled Entity obtains actual knowledge that Participant has committed a Bad Boy Act against the Company, the Owner or any affiliate thereof, Participant shall forfeit the Participation Interest without consideration or payment of any kind, and this Agreement shall be automatically terminated.

The mere fact that Section 12 lists the conduct which results in the forfeiture of a Participation Interest "without consideration" and expressly omits the termination of employment at College Street as one such basis is outcome determinative. There is no

reasonable reading of Section 12 which would permit the Court to infer any additional basis for forfeiture without consideration, particularly one as basic as the termination of employment.

The Court can and should interpret the unambiguous terms of the Participation Agreements as a matter of law and in accordance with their plain meanings. The Court should hold that the Plaintiffs' rights to obtain benefits under the Participation Agreements are not conditioned upon continued employment, and that summary judgment as to liability should enter on Plaintiffs' Breach of Contract Claim (Count I).

WHEREFORE, and for the reasons set forth in Plaintiffs' Memorandum of Law in Support, Plaintiffs respectfully request that the Court enter partial summary judgment in their favor.

REQUEST FOR ORAL ARGUMENT

Pursuant to Superior Court Rule 9A(c), Plaintiffs request oral argument on their Motion for Partial Summary Judgment.

Respectfully submitted,

MICHAEL GERHARDT, and
LAUREN SEAVERNS,
By their attorneys,

/s/ David H. Rich

David H. Rich (BBO # 634275)
Gregory R. Browne (BBO # 708988)
drich@toddweld.com
gbrowne@toddweld.com
Todd & Weld LLP
1 Federal Street, 27th Floor
Boston, MA 02110
(617) 720-2626
(617) 227-5777 (fax)

Dated: January 26, 2024

CERTIFICATE OF SERVICE

I, David H. Rich, certify that a copy of this pleading was served on counsel of record on January 26, 2024 via email.

/s/ David H. Rich
David H. Rich (BBO # 634275)

CERTIFICATE OF COMPLIANCE IN ACCORDANCE WITH SUPERIOR COURT RULE 9C

I, Gregory R. Browne, certify that, on January 23, 2024, at or around 1:00 p.m., I conferred with counsel for Defendants, Stephanie Parker, via telephone to confer in advance of serving the foregoing Motion and made a good faith effort to narrow the areas of disagreement to the fullest extent.

/s/ Gregory R. Browne
Gregory R. Browne (BBO # 708988)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

MICHAEL GERHARDT and LAUREN SEAVERNS, Plaintiffs, v. ROBERT S. BURR, COLLEGE STREET PARTNERS LLC, 140 COMMOWNEALTH AVENUE - DANVERS, LLC and HAWTHORNE HILL DEVELOPMENT LLC, Defendants.	C.A. No. 2184CV01017-BLS2

PLAINTIFFS MICHAEL GERHARDT AND LAUREN SEAVERNS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

MICHAEL GERHARDT, and
LAUREN SEAVERNS,

By their attorneys,

/s/ David H. Rich

David H. Rich (BBO # 634275)
Gregory R. Browne (BBO # 708988)
drich@toddweld.com
gbrowne@toddweld.com
Todd & Weld LLP
1 Federal Street, 27th Floor
Boston, MA 02110
(617) 720-2626
(617) 227-5777 (fax)

Dated: January 26, 2024

i. Introduction

Plaintiffs' breach of contract claim turns on a simple and straightforward interpretation of the parties' written contracts called "Participation Agreements." As discussed below, these Participation Agreements were granted by Defendant Robert Burr ("Mr. Burr") to Plaintiffs Michael Gerhardt ("Mr. Gerhardt") and Lauren Seaverns ("Ms. Seaverns"), two key employees in his business, College Street Partners LLC's ("College Street."). It is undisputed that the Participation Agreements were prepared by Mr. Burr's counsel at Goulston & Storrs and were intended to grant Mr. Gerhardt and Ms. Seaverns contractual profit interests in two real estate projects they helped develop, 140 Commonwealth Ave – Danvers LLC ("140 Commonwealth") and Hawthorne Hill Development LLC ("Hawthorne Hill.").

Mr. Burr made participation payments to Mr. Gerhardt and Ms. Seaverns during the terms of their employment but stopped after their employment ended. Mr. Burr has acknowledged and admitted that the sole and exclusive reason why he stopped making participation payments to Plaintiffs was because their employment at College Street terminated. This contractual defense fails as a matter of law because the Plaintiffs' interests in the Participation Agreements cannot reasonably be read to be forfeited at the end of their employment at College Street. Instead, the Participation Agreements provide for the exact opposite. For example, Section 4(b) of the Participation Agreements expressly afforded Mr. Burr the right to "buy back" Plaintiffs' participation interests within one year of their employment terminating or going to work for a competitor. Of course, if Plaintiffs' rights under the Participation Agreements extinguished upon the termination of their employment, there would be nothing for Mr. Burr to buy back, and this provision would be rendered meaningless. Basic tenants of contractual construction prohibit such an outcome.

Likewise, Section 12 of the Participation Agreement expressly identifies narrow circumstances which give rise to the "[f]orfeiture of [p]articipation [i]nterest[s]." This provision provides:

> 12. Forfeiture of Participation Interest Upon Termination of Employment for Bad Boy Acts. Notwithstanding anything in this Agreement to the contrary, if Owner or any senior executive of any Owner Controlled Entity obtains actual knowledge that Participant has committed a Bad Boy Act against the Company, the Owner or any affiliate thereof, Participant shall forfeit the Participation Interest without consideration or payment of any kind, and this Agreement shall be automatically terminated.

The mere fact that Section 12 lists the conduct which results in the forfeiture of a Participation Interest "without consideration" and expressly omits the termination of employment at College Street as one such basis is outcome determinative. There is no reasonable reading of Section 12 which would permit the Court to infer any additional basis for forfeiture without consideration, particularly one as basic as the termination of employment.

The Court can and should interpret the unambiguous terms of the Participation Agreements as a matter of law and in accordance with their plain meanings. In so doing, the Court should hold that the Plaintiffs' rights to obtain benefits under the Participation Agreements are not conditioned upon continued employment, and that summary judgment as to liability should enter on Plaintiffs' Breach of Contract Claim (Count I).

ii. Factual Background

Sometime after Mr. Gerhardt joined College Street, Mr. Burr approached Mr. Gerhardt about the possibility of a "management bonus" which would financially reward Mr. Gerhardt based upon the performance of a particular development project, 30 Newcrossing Road LLC ("30 Newcrossing Road."). See SOF ¶ 8 (Burr Depo, at p. 44). College Street had developed 30 Newcrossing Road and was receiving rent, and Mr. Burr agreed to pay Mr. Gerhardt a "management bonus" of 15% of the net proceeds from the sale of the asset. See id. ¶¶ 9, 10.

Their arrangement was memorialized in a written letter agreement, which the parties executed on or around January 1, 2008 ("Management Bonus Agreement."). See id. ¶ 7.

Mr. Burr's attorneys from Goulston & Storrs P.C. drafted the Management Bonus Agreement. See SOF ¶ 11 (Ex. E ("GSDOCS" in the left-hand corner)). Prior to execution, one draft exchanged between the parties conditioned Mr. Gerhardt's right to receive payments under the bonus agreement upon his continued employment at College Street, among other things. See id. ¶ 12 (Ex. G). Per the draft language, Mr. Gerhardt would receive 15% of the net proceeds from a sale "[i]n exchange for [his] continuing management and oversight of the Property, so long as [he] continued to be employed by the Company…and continue[d] to perform substantially the same or increased duties…". Id. However, this language was ultimately removed and replaced with language terminating Mr. Gerhardt's right to receive a management bonus only if he was then working for a direct competitor or he committed a specifically defined "Bad Boy Act," as defined in the agreement. See id. ¶ 7 (Ex. E).

Sometime during the spring and summer of 2009, Mr. Burr "invented" the idea of a Participation Agreements. See SOF ¶ 14 (Burr Depo, at p. 67-69). Neither Mr. Gerhardt nor Ms. Seaverns "ever came to [Mr. Burr] and asked for participation, or partnership, or otherwise." See id. ¶ 15. The Participation Agreements were entirely Mr. Burr's idea. See id. ¶ 16.

Mr. Burr hired attorneys from Goulston & Storrs P.C. to draft the Participation Agreements. See SOF ¶ 16. At first, the arrangement closely resembled the Management Bonus Agreement. See id. ¶ 17. Indeed, an early draft even formatted the participation agreement in letter form and offered Mr. Gerhardt a bonus (ten percent of "Excess Proceeds") in the event of a "Capital Transaction" relating to 140 Commonwealth. See id. ¶ 19 (Ex. H).[1]

[1] On or about March 12, 2009, Mr. Burr's counsel forwarded him an email (which Mr. Burr then forwarded to Mr. Gerhardt) confirming the "core business deal" contemplated by the Participation

However, the business terms of the Participation Agreement changed from a bonus opportunity tied solely to a future transaction (i.e., a sale of the asset) to a participation interest in profits generated from the development (in addition to a profit participation upon the occurrence of a specifically defined "Capital Transaction."). See generally Participation Agreements. The executed contracts required Mr. Burr to pay distributions to Plaintiffs whenever he made "Owner Distributions" to himself. Id., § 2.

The draft Participation Agreements provided that Mr. Gerhardt would earn payment "[i]n exchange for [his] continued oversight of the Property," "continue[d] employment by the company," and "continue[d] [performance of] substantially the same duties." SOF ¶ 18 (Ex. H). Again, however, this language was stricken and not included in the final, executed Participation Agreements. See generally Participation Agreements.[2]

In or around July 1, 2009, Mr. Burr and each Plaintiff separately executed a Participation Agreement granting each a "Participation Percentage" of 10% of Mr. Burr's 100% ownership interest in his real estate development project, 140 Commonwealth-Danvers. See SOF ¶ 5 (Exs. A and B). Then, in or around September 1, 2011, Mr. Burr granted Mr. Gerhardt a "Participation Percentage" of 10% and Ms. Seaverns a 5% "Participation Percentage" of his 100% ownership interest in a second real estate development project, Hawthorne Hill Development, LLC. See SOF ¶ 6 (Exs. C and D) The Participation Agreements are substantially

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Agreement was for Mr. Gerhardt's to receive participation payments which would "continu[e] after termination of his employment, and [be] forfeited in the event of [Mr. Gerhardt] committing a bad boy act or going to work for a competitor of College Street." SOF ¶ 20 (Ex. H) (emphasis added). This concept was ultimately embraced in Section 12 of the Participation Agreements. Participation Agreements, § 12.

[2] The Plaintiffs' reference to earlier draft versions of the Participation Agreements is not intended to suggest that the Court need to resort to extrinsic evidence in interpreting the agreements themselves. Instead, Plaintiffs' reference to the negotiating history is provided for context.

identical but for the parties and the companies involved. See generally Participation Agreements.

The Participation Agreements are structured to provide profit payments or "distributions" whenever Mr. Burr receives profit benefits, either through "Cash Flow Distributions" during the life of the development project or upon a specifically defined Capital Transaction (i.e., a sale of the asset). Participation Agreements, § 2. The terms set forth a simple and straightforward payment mechanism (which was adhered to for many years without issue):

> (a) Cash Flow Distributions. Within a reasonable period after receipt by Owner of any Owner Distribution other than a Distribution in respect of a Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash (or, if such Owner Distribution is made in kind, then at Owner's sole discretion, a portion of such other property equal in value, or cash equal in value to such property) equal to the product of (i) the Participation Percentage and (ii) such Owner Distribution.
>
> (b) Distribution Upon Capital Transactions Other Than a Terminating Capital Transaction. Within a reasonable period of receipt by Owner of Owner Distributions from Capital Transaction Proceeds with respect to any Capital Transaction other than a Terminating Capital Transaction, Owner shall remit or cause to be remitted to Participant an amount of cash computed as though the Owner Distributions from such Capital Transaction Proceeds are divided between the Owner and all Participants in the following manner:
>
> 1. First, 100% to Owner until Owner has received all unreturned Contributed Amounts;
>
> 2. Thereafter, pro rata, to the Owner and to each of the Participants, in accordance with each person's Participation Percentage (assuming, for this purpose, that the Owner's Participation Percentage is equal to the result of subtracting all the Participants' Participation Percentages from 100%).

Id.

The Participation Agreements contain no provision which provide for the forfeiture of Plaintiffs' participation interests upon the termination of their employment. See generally

Participation Agreements. Instead, the agreements expressly contemplate that Plaintiffs shall retain their rights under the Participation Agreement after the termination of their employment. For example, Section 12 of the Participation Agreement expressly sets forth the limited criteria whereby the Plaintiffs' participation interests would be forfeited "without consideration." This provision provides:

> 12. Forfeiture of Participation Interest Upon Termination of Employment for Bad Boy Acts. Notwithstanding anything in this Agreement to the contrary, if Owner or any senior executive of any Owner Controlled Entity obtains actual knowledge that Participant has committed a Bad Boy Act against the Company, the Owner or any affiliate thereof, Participant shall forfeit the Participation Interest without consideration or payment of any kind, and this Agreement shall be automatically terminated.

Participation Agreements, § 12.

Section 4(b) of the Participation Agreement goes further and provided Mr. Burr with the right "for a period of one year from and after…the termination of Participant's employment, with or without cause, with any Owner Controlled Entity…to purchase the Participation Interest for an amount equal to the product of the Liquidation Amount and the Sale Ratio." Participation Agreements, § 4(b). Of course, if Plaintiffs' rights under the Participation Agreement extinguished upon the termination of their employment, there would be nothing for Mr. Burr to buy back, and this provision would be a nullity.

Further, Section 4(b) also provided Mr. Burr the option to buy back either Plaintiffs' interest within one-year of either engaging in "Competing Services," which is defined as "performing any professional services for any person which develops, acquires, owns, operates or manages any property in the geographic area in which either Owner or an Owner Controlled Entity owns or is then actively pursuing real estate opportunities." Id. If the Participation Agreements terminated automatically when Plaintiffs left College Street, as Mr. Burr contends,

then it would be unnecessary for the agreements to grant Mr. Burr the option to buy back Plaintiffs' interests if Plaintiffs engaged in "Competing Services."

After execution of the Participation Agreements, it is undisputed that Mr. Burr made profit participation distributions to Plaintiffs for several years without incident and stopped after the termination of their employment with College Street. See SOF ¶¶ 21-22.[3]

Finally, Mr. Burr's testimony confirms that the only reason he stopped paying Plaintiff distributions from the Participation Agreements was because Plaintiffs were no longer employed by College Street:

Q: Why didn't Ms. Seaverns receive participation payments after 2013?
A: Because her Participation Agreements were tied to her providing services.
Q· Okay.
A: Provision of services.
Q: Okay. Any other reason why?
A: Not that I can recall.
Q: And same thing for Mr. Gerhardt…
A: Yes.
Q: Any other reason?
A: Not that I can recall.

See SOF ¶ 22 (Burr Depo, at p. 94-95).

iii. Legal Standard

This Court is well aware of the standard at summary judgment. "Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." See NG Bros. Constr., Inc. v. Cranney, 436 Mass. 638, 643-44 (2002). "The moving party bears the burden of affirmatively showing that there is no triable issue of fact." Id. at 644.

[3] For a brief period, Mr. Burr did continue to make participation payments to Mr. Gerhardt after his employment with College Street ended, but given this fact is disputed, Plaintiffs do not rely upon it in seeking partial summary judgment.

In determining whether genuine issues of fact exist, the Court must draw all inferences from the underlying facts in the light most favorable to the opposing party. See Attorney Gen. v. Bailey, 386 Mass. 367, 371 (1982). Whether a fact is material or not is determined by the substantive law, and "an adverse party may not manufacture disputes by conclusory factual assertions." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). See Ng. Bros. Constr., Inc., 436 Mass. at 648. "If the opposing party fails to present specific facts establishing a genuine, triable issue, summary judgment should be granted." See O'Rourke v. Hunter, 446 Mass. 814, 821–22 (2006) (quoting Cullen Enters., Inc. v. Mass. Prop. Ins. Underwriting Ass'n, 399 Mass. 886, 890 (1987)).

Given the simple and straightforward undisputed facts outlined above, the Court should conclude that Mr. Burr breached the Participation Agreements by stopping the issuance of participation payments solely because Plaintiffs were no longer employed by College Street.

iv. Argument

I. No Reasonable Reading of the Participation Agreements Compels a Conclusion that Rights to Compensation Required Continued Employment

"If a contract…is unambiguous, its interpretation is a question of law that is appropriate for a judge to decide on summary judgment. Seaco Ins. Co. v. Barbosa, 435 Mass. 772, 779 (2002). A contract is not "ambiguous" merely because the parties disagree as to the meaning of a disputed contractual provision. See Citation Insurance. Co. v. Gomez, 426 Mass. 379, 381 (1998) (further citations omitted). Rather, language in an agreement is only "ambiguous" when the terms at issue are inconsistent on their face or where the phraseology can support a reasonable difference of opinion as to their meaning. See Den Norske Bank AS v. First National Bank of Boston, N.A., 838 F. Supp. 19, 26 (D. Mass. 1993) (applying Massachusetts law). But "[w]hen the words of a contract are clear they alone determine the meaning of the contract..."

EventMonitor, Inc. v. Leness, 473 Mass. 540, 549 (2016). Here, the language of the Participation Agreements are clear and unambiguous, and their interpretation is appropriate for the Court to decide as a matter of law.

The Participation Agreements, drafted by Mr. Burr's attorneys, do not contain a single provision extinguishing Plaintiffs' rights thereunder or conditioning their right to receive profit distributions upon continued employment at College Street. On the contrary, the Participation Agreements unambiguously entitle Plaintiffs the right to receive profit distributions whenever Burr received profit benefits, either through "Cash Flow Distributions" during the life of the development project or upon a specifically defined Capital Transaction (i.e., a sale of the asset). Participation Agreements, § 2. It is well established that "[c]ontract language is [only] ambiguous if it is susceptible of more than one meaning and reasonably intelligent persons would differ as to which meaning is the proper one." James B. Nutter & Co. v. Estate of Murphy, 478 Mass. 664, 669 (2018) (internal quotations omitted). Here, the Participation Agreements, including the terms of Section 2, are not susceptible of more than one meaning. Certainly the Participation Agreements do not state, imply or suggest that a Plaintiffs' rights are forfeited upon the termination of their employment. Rather, the Participation Agreement sets forth a simple and straightforward payment mechanism through which distributions were made for several years without issue. See SOF ¶ 21. Had Mr. Burr wanted the Participation Agreements to contain a provision which extinguished Plaintiffs' rights at the conclusion of their employment (or some other condition, such as College Street remaining in business), he could have bargained for such a term. However, as written and signed, the agreements unambiguously lack such a term. See Rogaris v. Albert, 431 Mass. 833, 835 (2000) ("It is not the role of the court to alter the parties' agreement.").

Indeed, the very provision which sets forth the circumstances required for the Plaintiffs to forfeit their participation interests (for "no consideration") expressly omits the termination of employment as a basis. Participation Agreements, § 12. Instead, forfeiture for no consideration occurs only when Mr. Burr obtains "actual knowledge that Participant has committed a Bad Boy act against the Company." Id.

Given this very clear language, the Court may not rewrite the parties agreement to include a new provision "to suppose a meaning which the parties have not expressed ..." Rogaris v. Albert, 431 Mass. at 835; see also Anderson St. Assocs. v. Boston, 442 Mass. 812, 819 (2004) ("[W]here sophisticated parties choose to embody their agreement in a carefully crafted document, they are entitled to and should be held to the language they chose"); AccuSoft Corp. v. Palo, 237 F.3d 31, 41 (1st Cir. 2001) ("We have also made clear that we do not consider it our place to rewrite contracts freely entered into between sophisticated business entities").

The Participation Agreements cannot reasonably be interpreted to compel forfeiture upon the termination of employment when the precise provision addressing forfeiture says no such thing. Moreover, Section 4(b) of the Participation Agreement makes Mr. Burr's assertion that "the receipt of distributions was dependent on [Plaintiffs] continued employment with College Street" all the more farfetched. See SOF ¶ 21 (Amd. Ans. ¶ 25). Section 4(b) grants Mr. Burr the option, "[f]or a period of one year and after (i) death or Disability of Participant **or the termination of Participant's employment**, without or without cause, with any Owner Controlled Entity…" to purchase the Participation Interest back from Plaintiffs. Participation Agreements, § 4(b) (emphasis added). Section 4(b) further provided Mr. Burr the option to buy back Plaintiffs' interests within one-year of either engaging in "Competing Services" for another developer in the area. Id. "It is a canon of construction that every word and phrase of an

instrument is if possible to be given meaning, and none is to be rejected as surplusage if any other course is rationally possible." Tupper v. Hancock, 319 Mass. 105, 109 (1946). "Every phrase and clause must be presumed to have been designedly employed, and must be given meaning and effect, whenever practicable, when construed with all the other phraseology contained in the instrument, which must be considered as a workable and harmonious means for carrying out and effectuating the intent of the parties." Charles I. Hosmer, Inc. v. Com., 302 Mass. 495, 501 (1939).

Given this well-established and basic tenet of contractual construction, there is no rational reading of Section 4(b) which can be squared with the conclusion that Plaintiffs' rights under the Participation Agreements were forfeited upon the termination of their employment. Such an interpretation would not only render Section 4(b) "surplusage," but it would render the provision utterly non-sensical. Balles, 476 Mass. at n. 17. Stated simply, there would be nothing for Mr. Burr to repurchase if the participation interests were automatically forfeited for no consideration upon the termination of the Plaintiffs' employment. So too, if the Participation Agreements terminated as soon as Plaintiffs left College Street, that would make Mr. Burr's option to buy back Plaintiffs' interests if they engaged in "Competing Services" entirely superfluous.

At his deposition, Mr. Burr desperately sought to point to other provisions of the Participation Agreement which he claimed must be read to tie the Plaintiffs' participation interests to continued employment.[4] None of the provisions come close to suggesting such a condition precedent. For example, Mr. Burr's anticipated reliance on Recital D's language which confirms that the Plaintiffs' participation interest was "granted in exchange for the

[4] See Burr Depo, at p. 88-90 ("You know, this is for you guys to lawyer up on, but there may be some relevance here."

provision of services" fails to make the Participation Agreements ambiguous or upend the express and specific language found in Sections 4(b) and 12. "Provisions are not ambiguous simply because the parties have developed different interpretations of them." Basis Tech. Corp. v. Amazon.com, Inc., 71 Mass. App. Ct. 29, 36 (2008). "[A]n ambiguity is not created simply because a controversy exists between the parties, each favoring an interpretation contrary to the other." Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc., 419 Mass. 462, 466 (1995). Recital D says nothing about continued employment. Participation Agreements, Recital D. It merely states that the participation interest grant was being tendered for services rendered. Id. There is no time requirement associated with the grant, nor does the provision suggest that the interest would be forfeited at any point in the future. Id. Interpreting Recital D as conditioning payment on Plaintiffs' continued employment requires the Court to improperly defy well-known rules of contract interpretation that the specific terms set forth in Sections 4(b) and 12 should control over general ones. See Astra USA, Inc. v. Bildman, 455 Mass. 116, 141 (2009).

Moreover, it is undisputed that Plaintiffs *did* provide services to 140 Commonwealth and Hawthorne Hill. Per the Participation Agreement's plain language, the Plaintiffs were entitled to receive benefits under the Participation Agreements until either Mr. Burr repurchased the interests pursuant to Section 4(b) or Plaintiffs "committed a Bad Boy Act" as contemplated by Section 12. Participation Agreements, §§ 4(b), 12. Recital D must be "construed with all the other phraseology contained in the instrument." Charles I. Hosmer, 302 Mass. at 501.

While the Court need not resort to extrinsic evidence, Mr. Burr's reliance on Recital D to claim that Plaintiffs' rights under the Participation Agreement are conditioned upon continued employment expressly contradicts a contemporaneously prepared email from his own attorney. Ex. I (including "continuing after termination of his employment" as part of the "core deal.").

Even if the Court were to contemplate that any provision of the Participation Agreements was ambiguous, and there is no ambiguity, such ambiguities must be construed against Mr. Burr. "When the language is ambiguous, it is construed against the drafter, if the circumstances surrounding its use…do not indicate the intended meaning of the language." James B. Nutter & Company, 478 Mass. at 669 (internal quotations omitted). "The author of the ambiguous term is held to any reasonable interpretation attributed to that term which is relied on by the other party." Id. The drafting history leading up to the execution of the Participation Agreements demonstrates that the parties did not intend for the receipt of conditions to be contingent on continued employment.[5] Should the Court find these circumstances to be inconclusive, any ambiguities must be construed against Mr. Burr because his attorneys drafted the Participation Agreements (and he credits himself for "invent[ing]" the concept behind the agreements). James B. Nutter & Co., 478 Mass. at 669; see SOF ¶ 13 (Burr Depo, at p. 67-69).[6]

In sum, Mr. Burr does not dispute that he stopped paying Plaintiffs, nor does he dispute his reason for doing so. The express terms of the Participation Agreements make clear that Plaintiffs' rights are not extinguished upon the termination of their employment; any finding to the contrary would render Section 4(b) impermissible surplusage and require the Cout to literally rewrite its forfeiture provision (Section 12).

II. Plaintiffs' Did Not Waive Their Rights To Pursue Claims For Relief Based Upon Breaches of the Participation Agreement

Mr. Burr may claim in opposing summary judgment that by not pursuing their rights in Court for several years (but well within the statute of limitations), the Plaintiffs have waived

[5] Language conditioning payment on continued employment was removed from a draft of the Management Bonus and a draft of the Participation Agreement. See SOF ¶ 12 (Ex. G); see SOF ¶ 18 (Ex. H).

[6] Notably, Mr. Burr referred the Participation Agreements as being "poorly drafted." See Burr Depo, at p. 87.

their right to seek redress here. To the extent Mr. Burr advances such an argument, it is without basis in law or fact.

"Under the common law of contracts, waiver is the 'intentional relinquishment of a known right." BourgeoisWhite, LLP v. Sterling Lion, LLC, 91 Mass. App. Ct. 114, 119 (2017) "[T]he Massachusetts standard for waiver is an uncompromising one. A finding of waiver must be premised upon "clear, decisive and *unequivocal* conduct on the part of an authorized representative ... indicating that [defendant] would not insist on adherence to the [provision]." Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co., 840 F.2d 985, 992 (1st Cir. 1988) quoting D. Federico Co. v. Com., 11 Mass. App. Ct. 248, 253 (1981) (quoting Glynn v. Gloucester, 9 Mass.App.Ct. 454, 462 (1980). Mr. Burr can identify no conduct, let alone "clear, decisive and unequivocal conduct" which would suggest a wavier by the Plaintiffs of their rights to seek redress for Mr. Burr's breach of the Participation Agreements.

III. If the Court Grants Summary Judgment in Favor of Plaintiffs' Breach of Contract Claim (Count I), Plaintiffs are Prepared to Waive their Claims for Promissory Estoppel/Detrimental Reliance (Count II), Quantum Meruit (Count III), and Unjust Enrichment (Count IV).

To resolve this matter as expeditiously as possible, Plaintiffs are prepared to waive their claims for Promissory Estoppel/Detrimental Reliance, Quantum Meruit, and Unjust Enrichment upon the Court's entry of summary judgment on their breach of contract claim. To the extent the Court denies Plaintiffs' summary judgment motion, they intend to proceed to trial on these claims.

iv. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court enter summary judgment in their favor as to liability on their breach of contract claim (Count I). If this Motion

is granted, the only remaining triable issue is Plaintiffs' damages resulting from Mr. Burr's breach of contract, which Plaintiffs are prepared to establish at trial.

Respectfully submitted,

MICHAEL GERHARDT, and
LAUREN SEAVERNS,
By their attorneys,

/s/ David H. Rich

David H. Rich (BBO # 634275)
Gregory R. Browne (BBO # 708988)
drich@toddweld.com
gbrowne@toddweld.com
Todd & Weld LLP
1 Federal Street, 27th Floor
Boston, MA 02110
(617) 720-2626
(617) 227-5777 (fax)

Dated: January 26, 2024

CERTIFICATE OF SERVICE

I, David H. Rich, certify that a copy of this pleading was served on counsel of record on January 26, 2024 via email.

/s/ David H. Rich
David H. Rich (BBO # 634275)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
2184CV01017-BLS2

MICHAEL GERHARDT AND LAUREN SEAVERNS

v.

ROBERT S. BURR; COLLEGE STREET PARTNERS, LLC;
140 COMMONWEALTH AVENUE – DANVERS, LLC;
AND HAWTHORNE HILL DEVELOPMENT LLC

DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Michael Gerhardt and Lauren Seaverns used to work for a real estate development company called College Street Partners LLC, which was owned and managed by Robert Burr. In 2009 and 2011, Burr entered into written Participation Agreements giving Gerhardt and Seaverns economic interests in two projects as partial compensation for their work. Gerhardt and Seaverns claim that Burr breached his obligation under these contracts to pay them a share of any profits that Burr received from either project.[1]

Defendants seek summary judgment on the ground that this action is time-barred. The Court will **deny** Defendants' motion because the Participation Agreements for the 140 Commonwealth Avenue and Hawthorne Hill projects were executed under seal, and this action was brought less than 20 years after Gerhardt's and Seaverns' claims accrued.

Gerhardt and Seaverns seek partial summary judgment as to Burr's liability for breach of contract. The Court will **allow** Plaintiffs' motion because it is undisputed that Burr stopped distributing profits to Gerhardt and Seaverns once their employment with College Street Partners ended in 2013, Burr's contractual obligation did not end when Gerhardt and Seaverns stopped working for College Street, and this claim is not barred by waiver or estoppel.

Notice emailed to counsel 06/6/24 BKL Asst Clerk

[1] Burr contracted in July 2009 to pay Gerhardt and Seaverns 10 percent each of the profit distributions he receives from 140 Commonwealth Avenue-Danvers LLC, which owns certain property located at that address. He contracted in September 2011 to pay Gerhardt 10 percent and to pay Seaverns 5 percent of profit distributions from Hawthorne Hill Development, LLC, which owns a skilled nursing facility known as the Hawthorne Hill Rehabilitation Center in Danvers. Burr is the 100 percent owner of both of these LLCs.

1. **The Action Is Not Time-Barred.** Burr contends that this action for breach of contract is time-barred because it is subject to a six-year limitation period under G.L. c. 260, § 2, this claim accrued in 2013 when Burr said he was going to stop sharing profits, and Plaintiffs did not file this action until 2021.[2]

The Court disagrees. It finds that the Participation Agreements are sealed instruments, and that this claim is therefore subject to a 20-year limitation period under G.L. c. 260, § 1.

Each Participation Agreement states, immediately above the signature block, that it was "Executed under seal." This recital was sufficient to give the agreements the legal effect of a sealed instrument, pursuant to G.L. c. 4, § 9A. See *Lawrence H. Oppenheim Co.* v. *Bloom*, 325 Mass. 301, 302 (1950); see also *Nalbandian* v. *Hanson Restaurant & Lounge, Inc.*, 369 Mass. 150, 151 n.2 (1975) (words "signed and sealed" sufficient); *Marine Contractors Co. Inc.* v. *Hurley*, 365 Mass. 280, 285 n.2 (1974) (words "set their hands and seals" sufficient); *Glendale Coal Co.* v. *Nesson*, 312 Mass. 293, 294 (1942) (words "witness hand and seal" sufficient). Since the Lease was signed in 2004 under seal, claims for breach of that contract are subject to a twenty year limitations period. See G.L. c. 260, § 1.

Defendants contend that the reference to the agreements being "executed under seal" is not effective because it does not appear until the end of the main body of the contracts, and was not included in the section titled "Recitals" at the beginning of each contract. This argument is unavailing.

Where a contract or other legal instrument states "witness our hands and seals" or contains similar language at the end of the document, just before any signatures, that "is a recital within the meaning of G.L. c. 4, § 9A;" the statute does not require an indication that a contract is being executed under seal to be included in recitals labelled as such at the beginning of the document. *Johnson* v. *Norton Housing Authority*, 375 Mass. 192, 194–195 & n.3 (1978); accord *Finer* v. *City of Boston*, 334 Mass. 234, 238 & n.2 (1956); *City of Boston* v. *Roxbury Action*

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[2] The quasi-contract claims for quantum meruit and unjust enrichment are subject to the same limitation period as the claims asserting breach of contract formed by consideration or by reasonable reliance. See *Suffolk Const. Co.* v. *Benchmark Mechanical Sys., Inc.*, 475 Mass. 150, 156 (2016); *City of New Bedford* v. *Lloyd Inv. Associates, Inc.*, 363 Mass. 112, 118–119 (1973); *Kagan* v. *Levenson*, 334 Mass. 100, 103 (1956); see generally *Hendrickson* v. *Sears*, 365 Mass. 83, 85 (1974) ("limitation statutes should apply equally to similar facts regardless of the form of proceeding").

Program, Inc., 68 Mass. App. Ct. 468, 473 n.10 (2007) (recital "just prior to the signature" that instrument was "'signed and sealed' ... was sufficient to create a sealed instrument").

Defendants also argue that the contracts are not under seal because critical terms (including the participation percentage in each project LLC, and the name of the project LLC addressed by that contract) are included in a separate Schedule A that is attached to each Participation Agreement, the parties separately signed each Schedule A, and those pages say nothing about being under seal. This contention is also without merit.

Each Schedule A is part of a Participation Agreement. It is not a separate contract or instrument. Each Participation Agreement grants either Gerhardt or Seaverns an economic interest in part of Burr's "Ownership Interest" in a particular "Company." The first substantive paragraph of each Agreement says that the Company is identified on the attached Schedule. Paragraph 7(h) of each Agreement says that Gerhardt or Seaverns acknowledges that the various representations and warranties set forth in § 7 are true as of the effective date set forth on the attached Schedule. The attached schedules have no independent meaning or legal effect, other than as providing some of the terms of the overall Participation Agreements. That is why each schedule says at the bottom that it is "Schedule A to Participation Agreement." In sum, each Participation Agreement incorporates and includes the accompanying Schedule A.

The governing statute, G.L. c. 4, § 9A, requires only a single recital that an instrument is sealed or executed under seal in order for the document to "give such instrument the legal effect of a sealed instrument." Nothing in the statute or in case law applying it requires that a recital that a contract is executed under seal be repeated multiple times merely because the parties have opted to manifest their acceptance of contract terms by signing or initialing the contract in more than one place.

2. **Burr's Liability**. The summary judgment record establishes that Burr is liable for breach of contract because he stopped paying Gerhardt and Seaverns their shares of profits from the 140 Commonwealth Avenue and Hawthorne Hill projects after their employment with College Street Partners ended, and College Street stopped doing any business, in 2013.

2.1. **The Participation Interests Survived Termination of Employment.** The plain language of each Participation Agreement makes clear that Gerhardt's and Seaverns' contractual right to Participation Interests in the project LLCs continued in effect after they stopped working for College Street Partners. As a result, Burr's failure to keep paying over Gerhardt's and Seaverns' shares of the project profits constituted a breach of contract.[3]

The Court concludes that the Participation Agreements are unambiguous when considered as a whole, so their meaning is a question of law that the Court may decide on a summary judgment motion.[4] Though the contract language may be hard to parse, that does not make it ambiguous.[5] And the fact that the parties disagree about how to read their contracts does not make them ambiguous either.[6] A contracting party's subjective understanding of what they thought their agreement provided cannot trump the plain meaning of unambiguous written contract terms.[7]

The Participation Agreements do not have any fixed term, and do not say that they will no longer be effective after Gerhardt or Seaverns stopped working for College Street Partners.

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[3] Since Burr is liable for breach of a contract formed by consideration, there is no need and no basis for the plaintiffs to press their claims in the alternative for breach of a contract formed by reasonable reliance, quantum meruit, or unjust enrichment. Gerhardt and Seaverns state in their memorandum that they will waive these other claims if they obtain partial summary judgment in their favor on the claim for breach of contract in Count I.

[4] See *Seaco Ins. Co.* v. *Barbosa*, 435 Mass. 772, 779 (2002); *Trustees of Beechwood Village Condominium Trust* v. *USAlliance Federal Credit Union*, 95 Mass. App. Ct. 278, 284–285 (2019). "Whether a contract is ambiguous is also a question of law." *Eigerman* v. *Putnam Investments, Inc.*, 450 Mass. 281, 287 (2007).

[5] See *Sullivan* v. *Southland Life Ins. Co.*, 67 Mass. App. Ct. 439, 443 (2006).

[6] See *Indus Partners, LLC* v. *Intelligroup, Inc.*, 77 Mass. App. Ct. 793, 795 (2010) (affirming summary judgment).

[7] See, e.g., *Eigerman* v. *Putnam Investments, Inc.*, 450 Mass. 281, 288 n.8 (2007); (parties' alleged "practical understanding" of how their agreement should be implemented cannot trump unambiguous contract language); *Cody* v. *Connecticut Gen. Life Ins. Co.*, 387 Mass. 142, 147 n.9 (2007) (parties' subjective understanding of contract terms cannot create ambiguity); accord *Herson* v. *New Boston Garden Corp.*, 40 Mass. App. Ct. 779, 791–792 (1996).

Section 12 provides that Gerhardt or Seaverns would forfeit their contractual Participation Interests, and that their Participation Agreements "shall be automatically terminated," if they committed a "Bad Boy Act" against Burr, the project LLC, or any affiliate. The term "Bad Boy Act" is limited to intentional fraud or other willful misconduct or willful violation of law. Burr does not contend that either plaintiff did anything to trigger this provision.

The Participation Agreements make clear that these contracts, and the Participation Interests that they grant, continue in effect after Gerhardt and Seaverns stopped working for College Street Partners. Paragraph 4(b) gave Burr the right to purchase the Participation Interests within one year after "the termination of Participant's employment" with any entity controlled by Burr. If the Participation Interests terminated automatically as soon as Gerhardt or Seaverns stopped working for any of Burr's companies, there would have been no need and it would have made no sense to create a conditional right for Burr to buy back those interests upon termination of Gerhardt's or Seaverns' employment.

In other words, if one were accept Burr's argument that the Participation Agreements terminated automatically when Gerhardt or Seaverns stopped working for College Street Partners, that would make superfluous the ¶ 4(b) right of repurchase that is triggered when their employment ends. That is not an appropriate way to read an unambiguous business contract. See, e.g., *Lieber* v. *President and Fellows of Harvard College*, 488 Mass. 816, 823 n.15 (2022) ("every word and phrase" of contract should be "given meaning, and none is to be rejected as surplusage if any other course is rationally possible") (quoting *Tupper* v. *Hancock*, 319 Mass. 105, 109 (1946)).

Burr's reliance on one of the contract recital paragraphs, which states that Burr was granting Participation Interests "in exchange for the provision of services" by Gerhardt and Seaverns, is misplaced. This provision merely specifies the consideration that makes each Participation Agreement a binding contract. No rule of law requires that a contract be read so that the rights granted to a contracting party are limited in any way by the nature of the consideration that they provided in exchange. Nominal consideration, such as payment of one dollar or merely handing over a peppercorn, is enough to make a contract binding.[8] Providing valuable services to Burr's companies for several years is

[8] See *Commonwealth* v. *Cartwright*, 447 Mass. 1015, 1016 (2006) (rescript) (affirming trespass conviction based on evidence that property previously

more than adequate consideration to make the Participation Agreements binding, without in any was suggesting that the contracts would terminate when Gerhardt's or Seaverns' employment ended.

2.2. **Parole Evidence May Not Be Considered.** Burr insists that he told Gerhardt and Seaverns that: (i) Burr was structing their employment compensation to be part salary (based on oral agreements) and part profit distributions from the two project (as defined in the written Participation Agreements); and (ii) Gerhardt and Seaverns would qualify for profit distributions under the Participation Agreements only so long as they continued to work for College Street Partners. Burr also contends that Gerhardt and Seaverns accepted these oral terms before the parties executed their written Participation Agreements.

The Court finds and concludes that this extrinsic evidence is barred by the parol evidence rule.

Where the parties intend their contract to be a fully integrated document, and the relevant terms of the contract are clear and unambiguous, no extrinsic or parol evidence may be used to contradict, change, or create an ambiguity in the written terms of the contract. *General Convention of New Jerusalem in the United States of America, Inc.* v. *MacKenzie*, 449 Mass. 832, 835 (2007) (describing parole evidence rule). This rule applies if and only if court determines "that it has before it a written contract intended by the parties as a statement of their complete agreement." *Sound Techniques, Inc.* v. *Hoffman*, 50 Mass. App. Ct. 425, 429 (2000).

"Whether an agreement is integrated 'is an issue of fact for the decision of the trial judge, entirely preliminary to any application of the parol evidence rule.' " *Green* v. *Harvard Vanguard Med. Associates, Inc.*, 79 Mass. App. Ct. 1, 9 (2011), quoting *Wang Labs., Inc.* v. *Docktor Pet Centers, Inc.*, 12 Mass. App. Ct. 213, 219 (1981). "It is 'a question of fact [that] turns upon the intention of the parties.' " *Id.*, quoting *Holmes Realty Trust* v. *Granite City Storage Co.*, 25 Mass. App. Ct. 272, 275 (1988).

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owned by defendant had been conveyed for one dollar); *Barry* v. *Goodrich*, 98 Mass. 335, 338 (1867) ("[B]y agreement of parties a thing of very little or even nominal value may be a legal consideration for a contract. Even a peppercorn may be sufficient."); *Pierce* v. *Fuller*, 8 Mass. 223, 228-229 (1811) ("The consideration of one dollar is in law a valuable consideration.")

Though the Participation Agreements do not expressly state that they were intended to be fully integrated, an explicit merger or integration clause "is not required" to establish that the parties intended for the written agreement to be a fully integrated document that contains all contract terms and conditions. *Steinke* v. *Sungard Financial Systems, Inc.*, 121 F.3d 763, 771 n.5 (1st Cir. 1997), quoting *Mellon Bank Corp.* v. *First Union Real Estate Equity & Mortgage Invs.*, 951 F.2d 1399, 1406 n.6 (3d Cir. 1991); accord, e.g., *Home Ins. Co.* v. *Chicago and Northwestern Transp. Co.*, 56 F.3d 763, 767 (7th Cir. 1995); *Odens Family Properties, LLC* v. *Twin Cities Stores, Inc.*, 393 F.Supp.2d 824, 828 (D.Minn. 2005). "The absence of an integration clause ... does not necessarily mean that the parties did not intend the contract to be the final and complete expression of their agreement." *Carrow* v. *Arnold*, 2006 WL 3289582, *5 (Del. Ch. Oct. 31, 2006).

"In the absence of a merger clause, as here, the court must determine whether or not there is an integration 'by reading the writing in light of surrounding circumstances, and by determining whether or not the agreement was one which the parties would ordinarily be expected to embody in the writing.' " *Braten* v. *Bankers Trust Co.*, 456 N.E.2d 802, 805 (N.Y. 1983), quoting *Ball* v. *Grady*, 196 N.E. 402, 403 (N.Y. 1935).

It is apparent from the detailed terms of the Participation Agreements that these contracts were intended to be complete statements of the terms of the parties' profit sharing agreements. The form of the Participation Agreements was carefully crafted by Burr's attorneys. Each contract is fourteen single-spaced pages long, includes all terms needed to establish an enduring profit-sharing arrangement, and addresses contingencies including, as discussed above, what rights Burr would have if Gerhardt or Seaverns stopped working for his companies. Paragraph 14 emphasizes that the Agreement "shall be binding upon and shall inure to the benefit of Owner and Participant and their respective permitted heirs, executors, representatives, successors and assigns." That would be an odd thing to emphasize if the parties did not intend for the written Agreements to be complete and fully integrated.

The fact that the parties executed written agreements that include all terms "necessary to constitute a contract" is a strong indication that they "placed the terms of their bargain in this form to prevent misunderstanding and dispute, intending it to be a complete and final statement of the whole transaction." *Realty Finance Holdings, LLC* v. *KS Shiraz Manager, LLC*, 86 Mass. App. Ct. 242, 249 (2014), quoting *Glackin* v. *Bennett*, 226 Mass. 316, 319-320 (1917); accord, e.g.,

Berman v. *Geller*, 325 Mass. 377, 379-380 (1950). Where, as here, parties to an agreement "have reduced a contract to writing, it alone is presumed to express their final conclusions, and all previous and contemporaneous oral discussions or written memoranda are assumed to have been either rejected or merged in it." *Florimond Realty Co.* v. *Waye*, 268 Mass. 475, 479 (1929).

In sum, the Participation Agreements are unambiguous and fully integrated. It follows that Burr may not offer extrinsic or parol evidence in an attempt to create a new contract term that would make superfluous the conditional repurchase right in ¶ 4(b) in the event that Gerhardt's or Seaverns' employment was terminated. "When the words of a contract are clear they alone determine the meaning of the contract." *EventMonitor, Inc.* v. *Leness*, 473 Mass. 540, 549 (2016), quoting *Merrimack Valley Nat'l Bank* v. *Baird*, 372 Mass. 721, 723 (1977).

2.3. **No Waiver**. Burr's argument that Gerhardt and Seaverns waived their rights under the Participating Agreements "by their conduct," because they did not promptly bring suit in 2013 when Burr announced he would no longer share profits with them after they stopped working for College Street Partners, is without merit.

Waiver occurs when a party intentionally gives up a known right under the contract. See *Psychemedics Corp.* v. *City of Boston*, 486 Mass. 724, 745 (2021). "Waiver must be shown clearly, unmistakably, and unequivocally." *Id.*, quoting *Boston* v. *Labor Relations Comm'n*, 48 Mass. App. Ct. 169, 174 (1999).

The fact that Gerhardt and Seaverns did not seek to enforce their contractual rights before 2021 does not constitute a clear, unmistakable, or unequivocal waiver of their right to do so. See generally *Dana* v. *Wildey Sav. Bank*, 294 Mass. 462, 467 (1936) (failure to exercise contractual rights immediately does not constitute waiver of other's party's breach of contract). As explained in a leading treatise on contract law:

> Mere silence, acquiescence, or inactivity is insufficient to show a waiver of contract rights where there is no duty to speak or act.... Similarly, forbearance to assert or insist upon a right does not, by itself, constitute waiver. A party's reluctance to terminate a contract upon a breach and its attempts to encourage the breaching party to adhere to its obligation under the contract should not ordinarily lead to a waiver of the innocent party's rights.

15 Richard A. Lord, Williston on Contracts § 39:35 at 653 (4th ed. 2000).

2.4. **No Equitable Estoppel.** Burr's similar argument that Gerhardt and Seaverns are equitably estopped from pressing their claims is also unavailing.

The sole basis for the estoppel argument is that Gerhardt and Seaverns did not contradict Burr when he told them in 2013 that their rights under the Participating Agreements would end when they their employment by College Street Partners was terminated, and then waited almost eight years to assert their contract rights. Burr insists that he "would have promptly repurchased Plaintiffs' interests under Section 4(b)" if he had "known that Plaintiffs believed that the Participation Agreements were still in effect and that they intended to seek continued payments under" these contracts.

This evidence cannot support a finding that Gerhardt and Seaverns should be equitably estopped from pressing their claims for breach of contract.

"Equitable estoppel may be raised where the defendant can prove that he was harmed because the plaintiff's conduct or representation induced him to do something different from what he otherwise would have done." *Barrow* v. *Dartmouth House Nursing Home, Inc.*, 86 Mass. App. Ct. 128, 133 (2014).

To establish the defense of equitable estoppel, a party must show "(1) 'a representation or conduct amounting to a representation intended to induce a course of conduct on the part of a person to whom the representation is made;' (2) an act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made;' and (3)' detriment to the reliant person as a consequence of the act or omission' " (cleaned up). *Renovator's Supply, Inc.* v. *Sovereign Bank*, 72 Mass. App. Ct. 419, 426–427 (2008), quoting *Turnpike Motors, Inc.* v. *Newbury Group, Inc.*, 413 Mass. 119, 123 (1992).

Burr has not mustered any evidence that Gerhardt of Seaverns made any representation to him, or engaged in conduct amount to a representation, suggesting that they would never exercise their rights under the Participation Agreements. Even if plaintiffs' silence could somehow constitute a representation, which it cannot, no reasonable factfinder could infer that they made this representation in order to induce Burr not to repurchase their Participating Interests.

Plaintiffs' failure to press their claim for breach of contract until 2021 cannot support a finding that they are now equitably estopped from doing so. "Silence will give rise to an estoppel only where there is a duty to speak or act." *Marsh* v. *S.M.S. Co.*, 289 Mass. 302, 307 (1935); accord *J.H. Gerlach Co.* v. *Noyes*, 251

Mass. 558, 565 (1925). Since the parties agreed by contract that their Participation Agreements were under seal, Gerhardt and Seaverns had no duty to say they disagreed with Burr until 20 years after those claims first accrued.

ORDERS

Plaintiffs' motion for partial summary judgment as to Robert Burr's liability for breaching the Participation Agreements, under Count I of their Complaint, is **allowed**. Defendants' motion for summary judgment is **denied**.

A final pre-trial conference will be held on September 5, 2024, at 2:00 p.m. The parties shall file their joint pretrial memorandum by August 29, 2024.

Kenneth W. Salinger
Justice of the Superior Court

5 June 2024

NOTIFY

JUDGMENT	Trial Court of Massachusetts The Superior Court
DOCKET NUMBER 2184CV01017	John E Powers, III Suffolk County Civil
CASE NAME Gerhardt, Michael vs. Burr, Robert S.	COURT NAME & ADDRESS Suffolk County Superior Court - Civil Suffolk County Courthouse, 12th Floor Three Pemberton Square Boston, MA 02108

This action came before the Court, Hon. Kenneth W Salinger, presiding, and upon consideration thereof,

It is ORDERED and ADJUDGED:

Following a bench trial on damages and consistent with the Findings and Conclusions After Bench Trial on Damages in this case, Judgment enters as follows:

Michael Gerhardt shall take $1,030,744 plus prejudgment interest of $618,191.82, calculated in accordance with the Order for Judgment, for a total of $1,648,935.82, from Robert S. Burr.

Lauren Seaverns shall take $575,758 plus prejudgment interest of $351,842.55, calculated in accordance with the Order for Judgment, for a total of $927,600.55, from Robert S. Burr.

Michael Gerhardt and Lauren Seaverns shall take nothing from College Street Partners LLC, 140 Commonwealth Avenue-Danvers LLC, or Hawthorne Hill Development LLC.

College Street Partners LLC shall take nothing from Michael Gerhardt.

This case is hereby DISMISSED.

Judgment entered on docket Feb 14 25
pursuant to the provisions of Mass. R. Civ. P.
and notice send to parties pursuant to the pro
visions of Mass. R. Civ. P. as follows

Notice sent 2-14-25

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
02/13/2025	X

Date/Time Printed: 02-13-2025 15:28:52

SCV131: 05/2016

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 2184cv01017-BLS2

MICHAEL GERHARDT,
LAUREN SEAVERNS

Plaintiffs,

v.

ROBERT S. BURR,
COLLEGE STREET PARTNERS LLC,
140 COMMONWEALTH AVENUE –
DANVERS LLC,
HAWTHORNE HILL DEVELOPMENT LLC

Defendants.

DEFENDANTS' NOTICE OF APPEAL

Notice is hereby given that Defendants Robert S. Burr, College Street Partners LLC, 140 Commonwealth Avenue – Danvers LLC, and Hawthorne Hill Development LLC, appeal from the following decisions, orders, and judgment:

1. Decision and Order on Cross-Motions for Summary Judgment, docketed June 7, 2025 [P. 44].

2. Findings and Conclusions after a Bench Trial on Damages and Order for Judgment, docketed February 13, 2025 [P. 59.1].

3. Judgment, docketed February 14, 2025 [P. 60].

4. Decision and Order Denying Robert Burr's Motion for Reconsideration of Summary Judgment, docketed February 26, 2025 [P. 63].

[*Signature page follows.*]

Dated: March 11, 2025

Respectfully Submitted,

ROBERT S. BURR,
COLLEGE STREET PARTNERS LLC,
140 COMMONWEALTH AVENUE – DANVERS LLC, and
HAWTHORNE HILL DEVELOPMENT LLC,
By their Attorneys,

By: */s/ Richard C. Pedone*
Richard C. Pedone (BBO #630716)
Melanie P. Cahill (BBO #707100)
NIXON PEABODY LLP
53 State Street
Boston, MA 02109
(617) 345-1000
(617) 345-1300 (fax)
rpedone@nixonpeabody.com
mcahill@nixonpeabody.com

CERTIFICATE OF SERVICE

I, Richard C. Pedone, certify that a copy of this document was served on counsel of record on March 11, 2025 via email.

/s/ Richard C. Pedone
Richard C. Pedone

MASSACHUSETTS APPEALS COURT
CIVIL DOCKETING STATEMENT

Appeals Court Docket Number 2025 -P- 0523

Caption used in the lower court

Plaintiff(s): Gerhardt, Michael, et al.

v.

Defendant(s): Burr, Robert S., et al.

1. Party Information

Name of the appellant(s) or cross-appellant(s) on whose behalf this statement is being filed:

140 Commonwealth Avenue - Danvers, LLC

2. Attorney Information

Name Richard C. Pedone BBO# 630716

☐ Or, check this box if you are self-represented and provide your name

3. Lower Court, Board or Agency Information

a. Court Department Trial Court, Suffolk Superior Court, Business Litigation Session

b. Lower Court Docket Number(s) 2184CV01017

c. Specify the name and the role of each judge whose orders are at issue on appeal [not applicable for appeals directly from a board or agency]:

Judge, first and last name Hon. Kenneth Salinger Role Trial Judge

Judge, first and last name Role

Judge, first and last name Role

d. Was the case or any information in the record designated as impounded in the lower court? (see Section 3) ☐ Yes ☑ No

In addition to providing the information below, parties filing a brief or record appendix that contains impounded materials must comply with Uniform Rule on Impoundment Procedure Rule 12(c), Supreme Judicial Court Rule 1:15 s. 2(c), and M.R.A.P. 16(d), 16(m), 18(a), and 18(g). If this case or any material therein is impounded, specify which documents are impounded and the authority for impoundment, e.g. court order, statute:

4. Nature of the Case

Select the most appropriate description, or enter description: Breach of Contract

5. Perfection of Appeal

a. Is the appeal from a final judgment, i.e., judgment disposing of all parties and claims? (•) Yes ( ) No

b. If no, identify the basis on which the interlocutory order is immediately appealable.

c. Docketing Date of Judgment or Interlocutory Order Appealed February 13, 2025

d. Date Notice of Appeal Filed March 11, 2025

Please provide information regarding the following post-judgment motions that may affect the timeliness of the notice of the appeal.

Type of Motion	Check if filed		Date Served (not date filed)
Motion for Judgment (Rule 50(b)) Notwithstanding the Verdict	( ) Yes	( ) No	
Motion to Amend or Make Additional Findings (Rule 52(b))	( ) Yes	( ) No	
Motion to Alter or Amend Judgment (Rule 59)	( ) Yes	( ) No	
Motion for Relief from Judgment (Rule 60)	( ) Yes	( ) No	
Other (specify) _____	( ) Yes	( ) No	

6. Appellate Issues

In cases other than child welfare appeals, please provide a short statement of the anticipated issues on appeal. If the appellate issue involves the interpretation of a particular statute or regulation, please provide a citation to that statute or regulation. (Note: This statement is for informational purposes only and failure to raise an issue here will not preclude an appellant from raising the issue in its brief.):

A. Whether the trial court erred when it held on summary judgment that (1) the contracts at issue were contracts under seal and thus applied the twenty-year statute of limitations rather than the six-year period under G.L. c. 260, Section 2; (2) Plaintiffs' claims were not barred by estoppel; (3) Plaintiffs' claims were not waived; (4) extrinsic evidence should be barred by the parole evidence rule; (5) that the Participation Agreements were "unambiguous and fully integrated" contracts; (6) that the Plaintiffs' rights under the Participation Agreements continued after the termination of their employment; and (7) that a contract could be deemed under seal when no seal was included in the RECITAL section of the contract but rather the words 'under seal' were merely pasted on one of the two signature blocks.
B. Whether the trial court erred when, in ruling upon motions in limine, it (1) struck Defendants' Second Expert Report of Michael Goldman; (2) precluded Defendant Robert Burr from offering highly relevant factual testimony at trial relating to key topics in dispute; and (3) precluded the examination of any witness, such as Plaintiff Seaverns, on key topics in dispute.
C. Whether the trial court erred at trial by (1) not permitting Mr. Burr to testify about the subject matter in the proffer; (2) precluding the introduction of the deposition testimony of Keri Burr; (3) excluding evidence regarding the fact that Defendant Burr would have exercised the purchase option contained in the Participation Agreements; and (4) admitting testimony concerning damages from the Plaintiff's expert that did not adhere to any recognized method for determining distributions pursuant to the applicable operating agreement.
D. Whether the trial court erred in its post-trial decision when it (1) calculated damages without considering the cumulative impact of Plaintiffs' having declined to exercise any rights as participants for more than eight years after the termination of their employment; (2) ruled that Plaintiffs' expert could apportion value in connection with the 140 Commonwealth Avenue project; and (3) calculated damages by assigning an amount to asset management fees paid to South Lake Management LLC that was unsupported by the evidence.
E. Whether the court erred when it denied Defendant Robert S. Burr's Emergency Motion for the Court to Reevaluate its Decision on the Parties' Motions for Summary Judgment.

7. Related Appeals

Are there any pending, past, or anticipated future appeals or original appellate proceedings that involve these parties or this case which have been entered in the Appeals Court or Supreme Judicial Court? ( ) Yes (•) No

Do you know of any pending or anticipated appeals raising related issues? ( ) Yes ( ) No

If you answered yes to either question, provide the case name and docket number and describe below the related matter or issue:

Respectfully Submitted,

/s/ Richard C. Pedone

Signature

Richard C. Pedone

Address

Nixon Peabody LLP
Exchange Place
53 State Street
Boston, MA 02109

BBO Number

630716

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on this date of May 13, 2025 I have made service of a copy of the Massachusetts Appeals Court Docketing Statement filed on behalf of

140 Commonwealth Avenue - Danvers, LLC , upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by ●eFileMA.com ○hand delivery ○first class mail ●e-mail to the following person(s) and at the following address(es). Note: Service may be made by e-mail only with the consent of each party or opposing counsel:

David H. Rich
Gregory R. Browne
TODD & WELD LLP
1 Federal Street, 27th Floor
Boston, MA 02110
drich@toddweld.com
gbrowne@toddweld.com

/s/ Richard C. Pedone

Signature

617-345-1000

Telephone

Nixon Peabody LLP
Exchange Place
53 State Street
Boston, MA 02109

Address

MASSACHUSETTS APPEALS COURT
CIVIL DOCKETING STATEMENT

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v.

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Hawthorne Hill Development LLC

2. Attorney Information

Name Richard C. Pedone BBO# 630716

☐ Or, check this box if you are self-represented and provide your name

3. Lower Court, Board or Agency Information

a. Court Department Trial Court, Suffolk Superior Court, Business Litigation Session

b. Lower Court Docket Number(s) 2184CV01017

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Judge, first and last name Hon. Kenneth Salinger Role Trial Judge

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Judge, first and last name Role

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d. Date Notice of Appeal Filed March 11, 2025

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Other (specify) _____	( ) Yes	( ) No	

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D. Whether the trial court erred in its post-trial decision when it (1) calculated damages without considering the cumulative impact of Plaintiffs' having declined to exercise any rights as participants for more than eight years after the termination of their employment; (2) ruled that Plaintiffs' expert could apportion value in connection with the 140 Commonwealth Avenue project; and (3) calculated damages by assigning an amount to asset management fees paid to South Lake Management LLC that was unsupported by the evidence.
E. Whether the court erred when it denied Defendant Robert S. Burr's Emergency Motion for the Court to Reevaluate its Decision on the Parties' Motions for Summary Judgment.

7. Related Appeals

Are there any pending, past, or anticipated future appeals or original appellate proceedings that involve these parties or this case which have been entered in the Appeals Court or Supreme Judicial Court? ( ) Yes (•) No

Do you know of any pending or anticipated appeals raising related issues? ( ) Yes ( ) No

If you answered yes to either question, provide the case name and docket number and describe below the related matter or issue:

Respectfully Submitted,

/s/ Richard C. Pedone

Signature

Richard C. Pedone

Address

Nixon Peabody LLP
Exchange Place
53 State Street
Boston, MA 02109

BBO Number

630716

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on this date of May 13, 2025 I have made service of a copy of the Massachusetts Appeals Court Docketing Statement filed on behalf of

Hawthorne Hill Development LLC , upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by ●eFileMA.com ○hand delivery ○first class mail ●e-mail to the following person(s) and at the following address(es). Note: Service may be made by e-mail only with the consent of each party or opposing counsel:

David H. Rich
Gregory R. Browne
TODD & WELD LLP
1 Federal Street, 27th Floor
Boston, MA 02110
drich@toddweld.com
gbrowne@toddweld.com

/s/ Richard C. Pedone

Signature

617-345-1000

Telephone

Nixon Peabody LLP
Exchange Place
53 State Street
Boston, MA 02109

Address

MASSACHUSETTS APPEALS COURT
CIVIL DOCKETING STATEMENT

Appeals Court Docket Number 2025 -P- 0523

Caption used in the lower court

Plaintiff(s): Gerhardt, Michael, et al.

v.

Defendant(s): Burr, Robert S., et al.

1. Party Information

Name of the appellant(s) or cross-appellant(s) on whose behalf this statement is being filed:

Robert S. Burr

2. Attorney Information

Name Richard C. Pedone BBO# 630716

☐ Or, check this box if you are self-represented and provide your name

3. Lower Court, Board or Agency Information

a. Court Department Trial Court, Suffolk Superior Court, Business Litigation Session

b. Lower Court Docket Number(s) 2184CV01017

c. Specify the name and the role of each judge whose orders are at issue on appeal [not applicable for appeals directly from a board or agency]:

Judge, first and last name Hon. Kenneth Salinger Role Trial Judge

Judge, first and last name Role

Judge, first and last name Role

d. Was the case or any information in the record designated as impounded in the lower court? (see Section 3) ☐ Yes ☑ No

In addition to providing the information below, parties filing a brief or record appendix that contains impounded materials must comply with Uniform Rule on Impoundment Procedure Rule 12(c), Supreme Judicial Court Rule 1:15 s. 2(c), and M.R.A.P. 16(d), 16(m), 18(a), and 18(g). If this case or any material therein is impounded, specify which documents are impounded and the authority for impoundment, e.g. court order, statute:

4. Nature of the Case

Select the most appropriate description, or enter description: Breach of Contract

5. Perfection of Appeal

a. Is the appeal from a final judgment, i.e., judgment disposing of all parties and claims? (•) Yes ( ) No

b. If no, identify the basis on which the interlocutory order is immediately appealable.

c. Docketing Date of Judgment or Interlocutory Order Appealed February 13, 2025

d. Date Notice of Appeal Filed March 11, 2025

Please provide information regarding the following post-judgment motions that may affect the timeliness of the notice of the appeal.

Type of Motion	Check if filed		Date Served (not date filed)
Motion for Judgment (Rule 50(b)) Notwithstanding the Verdict	( ) Yes	( ) No	
Motion to Amend or Make Additional Findings (Rule 52(b))	( ) Yes	( ) No	
Motion to Alter or Amend Judgment (Rule 59)	( ) Yes	( ) No	
Motion for Relief from Judgment (Rule 60)	( ) Yes	( ) No	
Other (specify) _____	( ) Yes	( ) No	

6. Appellate Issues

In cases other than child welfare appeals, please provide a short statement of the anticipated issues on appeal. If the appellate issue involves the interpretation of a particular statute or regulation, please provide a citation to that statute or regulation. (Note: This statement is for informational purposes only and failure to raise an issue here will not preclude an appellant from raising the issue in its brief.):

A. Whether the trial court erred when it held on summary judgment that (1) the contracts at issue were contracts under seal and thus applied the twenty-year statute of limitations rather than the six-year period under G.L. c. 260, Section 2; (2) Plaintiffs' claims were not barred by estoppel; (3) Plaintiffs' claims were not waived; (4) extrinsic evidence should be barred by the parole evidence rule; (5) that the Participation Agreements were "unambiguous and fully integrated" contracts; (6) that the Plaintiffs' rights under the Participation Agreements continued after the termination of their employment; and (7) that a contract could be deemed under seal when no seal was included in the RECITAL section of the contract but rather the words 'under seal' were merely pasted on one of the two signature blocks.
B. Whether the trial court erred when, in ruling upon motions in limine, it (1) struck Defendants' Second Expert Report of Michael Goldman; (2) precluded Defendant Robert Burr from offering highly relevant factual testimony at trial relating to key topics in dispute; and (3) precluded the examination of any witness, such as Plaintiff Seaverns, on key topics in dispute.
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Richard S. Burr , upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by ●eFileMA.com ○hand delivery ○first class mail ●e-mail to the following person(s) and at the following address(es). Note: Service may be made by e-mail only with the consent of each party or opposing counsel:

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College Street Partners LLC

2. Attorney Information

Name Richard C. Pedone BBO# 630716

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M.G.L.A. 4 § 9A

§ 9A. Recital giving unsealed instrument effect of sealed instrument; “person” defined

Currentness

In any written instrument, a recital that such instrument is sealed by or bears the seal of the person signing the same or is given under the hand and seal of the person signing the same, or that such instrument is intended to take effect as a sealed instrument, shall be sufficient to give such instrument the legal effect of a sealed instrument without the addition of any seal of wax, paper or other substance or any semblance of a seal by scroll, impression or otherwise; but the foregoing shall not apply in any case where the seal of a court, public office or public officer is expressly required by the constitution or by statute to be affixed to a paper, nor shall it apply in the case of certificates of stock of corporations. The word “person” as used in this section shall include a corporation, association, trust or partnership.

Notes of Decisions (23)

M.G.L.A. 4 § 9A, MA ST 4 § 9A
Current through the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

End of Document

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title V. Statutes of Frauds and Limitations (Ch. 259-260)
Chapter 260. Limitation of Actions (Refs & Annos)

M.G.L.A. 260 § 1

§ 1. Actions requiring commencement within twenty years

Currentness

The following actions shall be commenced only within twenty years next after the cause of action accrues:

First, Actions upon contracts under seal.

Second, Actions upon bills, notes or other evidences of indebtedness issued by a bank.

Third, Actions upon promissory notes signed in the presence of an attesting witness, if brought by the original payee or by his executor or administrator.

Fourth, Actions upon contracts not limited by the following section or by any other law.

Fifth, Actions under section thirty-two of chapter one hundred and twenty-three to recover for the support of inmates in state institutions.

Credits
Amended by St.1970, c. 888, § 28.

Notes of Decisions (203)

M.G.L.A. 260 § 1, MA ST 260 § 1
Current through the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

End of Document

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title V. Statutes of Frauds and Limitations (Ch. 259-260)
Chapter 260. Limitation of Actions (Refs & Annos)

M.G.L.A. 260 § 2

§ 2. Contract actions; actions upon judgments or decrees of courts of record

Currentness

Actions of contract, other than those to recover for personal injuries, founded upon contracts or liabilities, express or implied, except actions limited by section one or actions upon judgments or decrees of courts of record of the United States or of this or of any other state of the United States, shall, except as otherwise provided, be commenced only within six years next after the cause of action accrues.

Credits
Amended by St.1948, c. 274, § 1.

Notes of Decisions (450)

M.G.L.A. 260 § 2, MA ST 260 § 2
Current through the 2024 2nd Annual Session. Some sections may be more current, see credits for details.

End of Document