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COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT DEPARTMENT
C.A. No. 2182 CV 00603

E STREET LLC,
Plaintiff,

v.

TOWN OF BRAINTREE, MAYOR
CHARLES C. KOKOROS,
INDIVIDUALLY, and MAYOR
CHARLES C. KOKOROS, TRUSTEE
OF PETERSEN TRUST,
Defendants.

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

Plaintiff E Street LLC's ("E Street") motion for preliminary injunction should be denied because it was E Street, not Defendants, who breached the Ground Lease agreement in existence between the parties. Through its motion, E Street seeks to hold Defendants Town of Braintree and Mayor Charles C. Kokoros, in all his capacities¹ (herein "Braintree"), hostage forcing Braintree to keep E Street as a tenant and developer after E Street has repeatedly failed to meet its obligations under the existing Ground Lease. Awarding such a drastic remedy would irreparably harm Braintree who is still attempting to carry out the wishes of Captain August Petersen by constructing a pool complex to benefit the citizens of Braintree (the "Project").²

After being let down by its initial contractor for the Project, Braintree was introduced to E Street. After a period of due diligence, E Street agreed to assume the obligations of the Ground

¹ Plaintiff names Mayor Kokoros in his "Individual" capacity but all the allegations of the Complaint refer to actions Mayor Kokoros took in his official capacity as Mayor of Braintree. Based on the allegations as presented Defendants submit Plaintiff misnamed the Mayor and intended to name him only in his official capacity. While Defendants submit argument on behalf of all Defendants in Opposition to Plaintiff's motion, Defendants reserve all rights to move to dismiss claims against Mayor Kokoros in his individual capacity as his official acts as Mayor are protected under qualified immunity.

² Over time the Project has grown from a pool facility to a facility including a pool and an ice rink.

Lease with certain amendments and complete the construction of the Project. Under the Ground Lease Agreement as amended, E Street agreed to act diligently to obtain the required permits, financing and begin and complete construction. If it performed, E Street stood to be rewarded for these efforts by operating the envisioned facility while it paid rent to Braintree. Despite numerous promises to perform, E Street never met its obligations. Because E Street breached the Ground Lease, E Street cannot show a likelihood of success on the merits of its claims.

Besides lacking any likelihood of success on the merits, E Street cannot demonstrate that any harm it may suffer outweighs the harm that would be imposed on Braintree. Braintree has had to endure two delinquent contractors who have delayed the Project for over five (5) years. This prevented Braintree from collecting rents, taxes and most importantly, delivering the promised facility to the citizens. If E Street succeeds here, Braintree faces further delays, with no guarantee E Street will meet its obligations, or that the Project will ever be completed. Regardless of whether E Street can or cannot recover alleged loss of business revenue or future profits, which Braintree disputes at this early stage, that potential harm does not outweigh the long-term harm visited on Braintree and the public by allowing E Street to stay.

E Street's request for preliminary determinations on the merits, based on an abbreviated record and without discovery is a bridge too far. This case is a transparent effort to leverage Braintree to allow E Street to hold onto this lucrative contract but not force E Street to do anything more than maintain the *status quo* – doing enough to give the appearance of progress but accomplishing nothing concrete. The citizens of Braintree deserve better.

The Motion for Preliminary Injunction should be denied.

FACTUAL BACKGROUND

Background of Project

The Project results from a gift from Captain August Petersen through his estate to build a public swimming pool in Braintree. *Affidavit of Nicole Taub (“Taub Aff.”)*, ¶ 3. The Project was originally awarded to 5 Capital Management/BSC Partners (“BSC”) in 2015, who was paid \$1M under a the original Ground Lease upon meeting certain milestones. *Id.* at ¶ 4. Braintree’s total contribution to the project was agreed to be \$1.5M. The original permit process took about 2 years to obtain a special permit, zoning variance and order of conditions. *Id.* The permit process for the Project began in 2015 and BSC and Braintree executed a Ground Lease (the “Ground Lease”) for the Project. *Id.* ¶ 5-7. In early 2019, BSC was served with a Notice of Termination because of its failure to comply with the Ground Lease. *Id.* at ¶ 9, *Exhibit A*.

Near the end of BSC’s cure period and as a resolution to the termination, BSC proposed assigning all of BSC’s rights to E Street. *Id.* at ¶ 10. After discussions about the assignment, Braintree agreed to allow BSC to extend the cure period to permit for due diligence by E Street and BSC. *Id.* at ¶ 11-13.

E Street’s Due Diligence

As part of the due diligence period, E Street was provided access to, and copies of, all approved plans for the Project, access to the site and a chance to conduct whatever due diligence on the site it required. *Id.* at ¶ 12. During the due diligence period E Street conducted multiple meetings with Braintree and its officials about the Project. *Id.* at ¶ 14, 18, 21-23. During the due diligence period, E Street’s manager, Paul Cokinos (“Cokinos”) provided a letter to former Mayor Joseph Sullivan (“Mayor Sullivan”) from Main Street Bank. *Id.* at ¶ 15, *Exhibit B*. This letter, authored by Main Street Bank’s Chief Executive Officer Walter J. Dwyer, IV (“Dwyer”), indicated support for Jack Corbett’s (Cokinos’ partner) proposal for the development of the

Project and the success Jack Corbett and Cokinos had with their ice rink in Dedham. *Id.* This letter is the only written communication Braintree received from Main Street Bank relative to the Project and not qualify as a commitment letter for E Street. *Id.* at ¶ 16. In May 2019, Town Counsel Nicole Taub spoke with Dwyer who indicated the bank would need more information before the bank could provide a commitment of financing. *Id.* at ¶ 17.

The due diligence period expired and E Street gave no indication that it would not proceed. *Id.* at ¶ 24.

E Street's Ground Lease

After agreeing in principle to assume the Project, Braintree and E Street entered into a Ground Lease Modification Agreement (“Modification Agreement”). *Id.* at ¶ 33, *Exhibit C.* Under the Ground Lease, as amended by the Modification Agreement, E Street had multiple obligations it was required to accomplish in short order. *Id.* Specifically, E Street agreed that under Article 3.1(a), it would commence construction within thirty (30) days of the latter of (1) obtaining all permits, and (2) obtaining financing. *Id.*, *Exhibit C.* ¶ 8. E Street also agreed under Article 3.1(a), that the Project would be completed no later than fifteen (15) months from the latest date beyond any appeal periods of any required permits. *Id.*, *Exhibit C.* ¶ 9. As it relates to the current motion, E Street further agreed to provide Braintree documentation within sixty (60) days of the execution of the Modification Agreement that it had obtained a commitment of financing sufficient to cover costs through completion of construction. *Id.*, *Exhibit C.* ¶ 10. And, if E Street failed to do so, it agreed that Braintree may terminate the agreement upon thirty (30) days’ notice. *Id.* Further, through the Ground Lease Modification Agreement, E Street was provided a way out which entitled it to cancel the Ground Lease without penalty if it could not obtain all the required permits by November 30, 2019. *Id.*, *Exhibit C.* ¶ 11. Finally, both parties

agreed that, consistent with the short timelines specifically stated in several operative paragraphs, “time was of the essence.” *Id.*, *Exhibit C*. ¶ 16.

E Street’s Breaches

E Street accomplished some work on the site in 2019 following the assumption of the Ground Lease but never met its obligations as outlined in the Modification Agreement. Indeed, from the start of E Street’s involvement Braintree was constantly forced to accommodate E Street’s requests for extensions only to be disappointed. *Id.*, at ¶ 39, 41, 48, 56, 62.

As of October 4, 2019, there were several conditions from both the Special Permit and Order of Conditions that needed to be met before site work could begin. *Id.*, at ¶ 34. These included, among other things, a meeting with staff to review the permit and schedule a pre-authorized site visit, identification of an individual responsible for all activities on the site, review of the existing Drainage Operation and Maintenance Plan to determine if modifications were needed, placement of the appropriate signage on the site, submission of a dewatering plan, application for a water and sewer permit, marking of the wetlands, filing of a bond and submission of Construction Phasing Plans. *Id.*

To try to address these issues Braintree met with Cokinos multiple times. *Id.*, at ¶ 35. After these meetings, it was agreed that E Street would accomplish these multiple outstanding items by October 30, 2019. *Id.*

As of February 2020, several items remained outstanding including a written commitment from a lending institution, timeline for completion of stamped construction documents, a construction schedule, CORI checks for contractors, installation plan for a cross country line, a written construction phasing plan and a dewatering plan. *Id.*, at ¶ 36. During a meeting on February 4, 2020, with Cokinos and Mayor Charles Kokoros (“Mayor Kokoros”) several of the outstanding items were discussed. *Id.* Based on the current status of the Project,

priority action items included submission of architectural plans, a list of firms that will be involved in the Project, their contact information, role(s) and a contact person, a Construction Schedule including a description of the work to be completed and company responsible, the dewatering plan, Construction Phasing Plans, proof of licenses and permits and other administrative and construction related items. *Id.* According to Cokinos, it would take 3-4 weeks of clearing land, with drainage installation occurring concurrently, and that the steel would be relocated to the site in March. *Id.*

E Street then all but abandoned the Project in mid-March 2020, because of what it now claims were delays brought on by the Covid 19 pandemic. *Id.*, ¶ 37. Despite the pandemic, Braintree never issued a halt in its construction projects. *Id.* E Street could have continued to work on the Project throughout 2020. *Id.* Further, even if the Covid 19 pandemic qualified as, as E Street now argues, a period of Unavoidable Delays, E Street did not comply with the terms of the Ground Lease to have this period recognized as such. *Id.* Under Article 3.1(b), E Street had to notify (“...shall notify”) the Town “not later than thirty (30) days after discovering the occurrence of the Unavoidable Delay.” *Id.*, *Exhibit D.* E Street sent no notice to Braintree that the Project was delayed by an Unavoidable Delay and, therefore, it could not perform its obligations under the Ground Lease. *Id.*, ¶ 37.

Indeed, work did continue through 2020. E Street and Braintree conducted multiple meetings between May and July about site changes including a revised drainage plan and a revised design plan. *Id.*, at ¶ 38-41. It was unclear to Braintree why E Street had a concern about the design this far into the site work. *Id.*, ¶ 39. It was further explained to E Street that if the plan was going to change there would need to be a clear explanation as to why the plans had received all necessary approvals and were now not believed to work. *Id.* During many of these

meetings the issue of E Street's lack of foundation plans was also discussed. *Id.* Cokinos reported that they were in progress and almost complete but was not ready to submit them as of this date. *Id.* In June 2020, E Street hired a new engineer for the project, Allen & Majors Associates ("Allen & Majors"). *Id.*, ¶ 40. It was only after Allen & Majors were involved that E Street claimed the foundation needed to be redesigned. *Id.*, ¶ 40. Braintree inquired whether the drainage plan would also have to be redesigned, but Cokinos denied that would be necessary. *Id.*

Despite Cokinos' statement, just over one month later, Allen & Majors submitted a memo recommending redesign of the drainage system for the Project. *Id.*, ¶ 41. To implement the changes, approval of a major modification was required by the Planning Board. *Id.* The matter was scheduled for discussion before the Planning Board at the July 14, 2020 meeting; however, the E Street did not file an application until September 2020 to be heard at the Planning Board's October 13, 2020 meeting. *Id.* To help move the requested modification through the planning process, Town staff facilitated an expedited peer review, which usually takes a minimum of approximately sixty (60) days to complete. *Id.* As a result, the requested major modification was approved by the Planning Board at the November 2020 meeting. *Id.* Despite these approvals, E Street did not commence site work.

A meeting was held on February 4, 2021 to discuss the status of the project including raising the foundation and including a diving well. *Id.*, ¶ 42. Around this time Cokinos requested that Braintree not involve PMA in the Project when work began again. *Id.*, ¶ 43. Braintree agreed as long as Cokinos continued to make progress. Despite this meeting in February, E Street had still not submitted Foundation plans as of the March 4, 2021, Conservation Commission meeting and there remained conditions outstanding relative to the Special Permit. *Id.*, ¶ 44.

E Street also continued to change the team. Around this time the Town was also informed that E Street had new contractors engaged to work on the Project and an introductory meeting with all parties was to be scheduled. *Id.*, ¶ 45. In March 2021, Cokinos also confirmed for the first time in over a year that he had finally engaged an architect. *Id.*, ¶ 47.

During 2021, E Street continued to miss deadlines and failed to submit required information to Braintree. *Id.*, ¶ 46. Finally, on March 31, 2021, E Street and several Braintree officials met to discuss the status of the Project. *Id.*, ¶ 47. At the meeting, Cokinos reported that the Foundation Plan was completed and he would provide a draft. *Id.* Finally, Cokinos stated that he would provide a commitment letter from his bank. *Id.* With these promises Cokinos promised that E Street would meet weekly and accomplish certain milestones for the following four weeks. *Id.*, ¶ 48. E Street failed to make any agreed meeting or meet the promised milestones. *Id.*, ¶ 49-53.

Having failed to live up to the promises made, on April 15, 2021, Mayor Kokoros sent a letter to Cokinos regarding his failure to meet the milestones set at the March 2021 meeting and to express his disappointment in the cancellation of the Week 2 meeting. *Id.*, ¶ 53, *Exhibit F*. Mayor Kokoros reiterated the Week 2 milestones and again requested the information that was due the previous week including financing information from the bank, drawings sufficient to obtain a foundation permit and responses to the permit conditions. *Id.* Finally, Mayor Kokoros raised concerns regarding the outstanding balances owed to contractors that had performed work on the site. Cokinos did not provide any of the requested information. *Id.*

Having seen E Street fail to deliver on its promises yet again, on April 16, 2021, Town Counsel notified E Street it was in default of the Ground Lease and had 30 days to cure. *Id.*, ¶ 54, *Exhibit G*. At this point, E Street was in default of three specific terms of the Ground Lease:

- Under Article 3.1(c), E Street had failed to demonstrate through written documentation that E Street obtained financing sufficient to commence and complete the construction. This confirmation was due on or before December 24, 2019, but E Street had yet to provide this information;
- Under Article 3.5, E Street was required to pay all costs related to the Project. As of April 16, 2021, the Town had been provided sufficient information that E Street was delinquent in payments to two vendors, C. Carney Environmental and Metro Equipment Corporation, totaling over \$500,000;³
- Under Article 3.1(a) and 3.3(a), E Street had failed to meet the established deadlines to obtain a building permit necessary to commence construction. E Street's failure in this regard was related to their failure to obtain and submit foundation and architectural plans.

Id.

In response to the Default Letter, E Street requested a meeting with the Mayor. *Id.*, ¶ 55. A meeting was scheduled with Mayor Kokoros and E Street for May 10, 2021, to discuss an extension of the time allowed to cure the defaults. During the meeting, Cokinis acknowledged that the only correspondence provided from Main Street Bank was the letter dated May 2019 and could not provide further details with regard to the financing of the Project. *Id.*, ¶ 57. E Street's counsel represented that he would personally ensure that the financing commitment was obtained; however, he would not be able to get a final commitment without a thirty (30) day extension. *Id.* In the interim, E Street's counsel agreed to provide a pre-commitment letter no

³ In addition, when assuming the Ground Lease, E Street entered in an Agreement titled Compromise and Settlement Agreement with Braintree and Studio Troika. *Taub Aff.*, ¶ 28. Studio Troika was the initial architect on the Project hired by BSC. *Id.* at ¶ 20. When E Street assumed the Ground Lease, Troika was owed a significant amount of money. *Id.* Through this settlement, Troika agreed to accept \$80,000 as a full and final payment for its plans. *Id.* at ¶ 28. E Street and Braintree were required to make initial payments of \$15,000 each and E Street was required to make a further payment of \$50,000. *Id.* E Street defaulted on its obligations and Braintree was forced to step in and make the \$50,000 payment to Troika. *Id.*, ¶ 29.

later than Monday, May 16, 2021. *Id.* Additionally, E Street agreed to provide the following by June 15, 2021:

- a. Architectural drawings and renderings showing sufficient level of detail, including but not limited to, the pool, landscaping and steel. Additionally, E Street will provide a 3D model of the facility by this date;
- b. A completed foundation permit application and proof of filing; and
- c. Proof of meaningful negotiations with any contractor with an outstanding balance for work performed related to the Project.

Id.

At the meeting, E Street agreed to waive litigation against Braintree in exchange for the thirty (30) day extension. *Id.*, ¶ 58. This agreement was memorialized in a letter from Town Counsel on May 12, 2021. *Id.*, *Exhibit K*. To avoid surprises or confusion, Braintree put E Street on notice that should it fail to meet these agreed milestones, Braintree would terminate the Ground Lease. *Id.*, ¶ 59.

E Street's efforts to meet the agreed milestones were half-hearted and insufficient. As of May 18, 2021, E Street failed to provide a pre-committee commitment letter of financing from Main Street Bank as agreed during the May 10th meeting. *Id.*, ¶ 60. As a result of this failure, Town Counsel sent a request for an update to Attorney Kelley, noting that no such letter had been received and instead Cokinos indicated that he was bringing on a partner. *Id.* E Street provided no further details of the partnership and, despite Braintree's attempt to schedule a meeting with E Street and the supposed new partner, E Street was unable to appear at Town Hall at the scheduled time and the meeting was cancelled. *Id.*

The next few days and weeks continued with little action and more requests for extensions from E Street. *Id.*, ¶ 61-63. This included another request for an extension to obtain financing. *Id.*, ¶ 63. Finally on June 15, 2021, Cokinos delivered what he stated were completed

plans for the Project to the Town and stated he would have a letter confirming financing later that afternoon/evening. Those plans were reviewed by Russell Forsberg (“Forsberg”), Braintree’s Chief Building Inspector. Based on his review, Forsberg concluded the plan package lacked essential details that would make it impossible to issue a permit for either a foundation or structural frame. *Affidavit of Russell Forsberg*, ¶ 4-9. Specifically, as to the deficiencies in the submitted foundation plans Forsberg noted:

- d. The plans were not stamped by a Structural Engineer;
- e. The corresponding Construction Control Affidavit required by the State for this portion of the project was not provided;
- f. The foundation plans did not include plans which accurately reflect the “pool” portion of the building which needed to be elevated due to ground water tables and the inclusion of a diving well;
- g. There were no details relative to interior column pads;
- h. There was no Soil Analysis Report confirming the required bearing strength of existing soil as called for in the specifications; and
- i. There were no details relative to the slab construction.

Id. at ¶ 5.

With respect to the submitted structural frame plans, Forsberg noted the following deficiencies:

- j. The plans were not stamped by a Structural Engineer;
- k. The corresponding Construction Control Affidavit required by the State for this portion of the project was not provided;
- l. There is a general lack of any form of structural framing plans with the exception of a single cross-section at a specified column line and no information relative to any portion of the pools structural frame; and
- m. There were no structural steel connection details.

Id. at ¶ 6.

Forsberg notified E Street, through Cokinos, of the deficiencies in the plans in writing on June 16th. *Id.* at ¶ 9, *Exhibit A*.

Further, no letter guaranteeing financing was ever provided. *Taub Aff.* at ¶ 65. E Street did provide a letter from a company called “RF| Boston” or Real Estate Finance Boston dated June 15, 2021. *Id.* at ¶ 66, *Exhibit M*. This letter did not mentioned the correct project or correct party. *Id.* Further, the letter only mentions that the named party had been approved for a line of credit for the purchase of the property. *Id.* E Street had no agreement to purchase the property or even an option to purchase the property where the Project was located. *Id.* at ¶ 67. This letter is in substance a standard form “pre-approval” letter generated by a bank prior to land acquisition. *Id.*; *See also Affidavit of Crystal Huff*, ¶ 2-4. The letter made no mention of the Project or construction of the pool, ice rink or any other feature and was not signed. *Id.* This letter did not meet E Street’s obligations from the May 10th meeting. *Id.*

Also, E Street failed to deliver a completed foundation permit application or proof of filing. This is not surprising because despite being on the Project for almost two years by June 2021, it still had yet to obtain completed plans. Therefore, it could not submit a permit application.

As E Street had been warned, following its spiritless submissions, Braintree sent E Street the Notice of Termination it had promised in earlier communications. *Taub Aff.*, ¶ 68, *Exhibit N*.

ARGUMENT

As the moving party, E Street bears a heavy burden. “A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To succeed here it must show “(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the likelihood of success on the merits, the risk of irreparable harm outweighs the potential harm in granting the

injunction.” *Tri-Nel Mgmt., Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 219 (2001); *see also GTE Products Corp. v. Stewart*, 414 Mass. 721, 722-23 (1993). E Street cannot meet this high burden.

1. E Street has no likelihood of success on the merits.

The first element, a likelihood of success on the merits analysis, is “the touchstone of the preliminary injunction inquiry.” *Philip Morris, Inc. v. Harshbarger*, 159 F.3d 670, 674 (1st Cir. 1998). E Street bears this burden. *See Berrios v. Dep’t of Pub. Welfare*, 411 Mass. 587, 598 (1992). Lacking a likelihood of success on the merits, the “other factors become matters of idle curiosity,” and the preliminary injunction must be denied. *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002), *accord Doe v. Sex Offender Registry Bd.*, 33 Mass. L. Rptr. 598, *7 (Mass. Super. Aug. 16, 2016); *Wilson v. Comm’r of Transitional Assistance*, 441 Mass. 846, 858 (2004); *Breene v. NSTAR*, 28 Mass. L. Rptr. 666, *1 (Mass. Super. Mar. 2, 2011) (“Failure to establish a likelihood of success on the merits is fatal to the request for a preliminary injunction.”).

E Street claims it can demonstrate a likelihood of success on its breach of contract claim and its breach of good faith and fair dealing claim. It cannot show a likelihood of success on either. E Street does not even attempt to offer arguments to the other claims it asserts in the Complaint, and, therefore, they will not be addressed here.

a. E Street cannot show a likelihood of success because it breached the Ground Lease and remains in default.

To show a likelihood of success on its contract claim, E Street must show: (1) the existence of a contract; (2) E Street’s performance of its obligations; (3) Braintree’s breach of its obligations; and (4) damage caused by the breach. *Singarella v. City of Boston*, 342 Mass. 385,

387 (1961); *Loranger Constr. Corp. v. E.F. Hauserman Co.*, 1 Mass. App. Ct. 801 (1973). E Street cannot meet this burden.

After assuming the Ground Lease and agreeing to meet certain milestones it is E Street, not Braintree, that has repeatedly failed to live up to the agreement. *Taub Aff.* at ¶ 29-74. E Street's series of excuses for its failure to perform cannot be reconciled with the evidence and only confirm that it, rather than Braintree, breached the Ground Lease. First, E Street claims it could not perform because of the Unavoidable Delay caused by "Covid 19 pandemic, the site raising work and the need to make substantial revisions to the stormwater discharge system." *Memorandum*, p. 7. E Street cannot claim these as Unavoidable Delays now because it did not notify Braintree when these occurrences were discovered that these events constituted Unavoidable Delay. *See* Ground Lease, Article 3.1(b) ("The Tenant shall notify the Town herein not later than thirty (30) days after discovering the occurrence of the Unavoidable Delay enumerated herein...").

E Street was the Unavoidable Delay, nothing else. Contrary to E Street's presentation, E Street knew of the required site raising work and likely drainage issues before agreeing to assume the Ground Lease or signing the agreements. *Taub Aff.* at ¶ 19. Indeed, according to the Affidavit of Paul Cokinos, he learned as early as the Fall of 2019, based on due diligence at the site, that amendments would need to be made to the pre-existing design. (Cokinos Aff., ¶ 35). Before the execution of any agreement, E Street was provided a substantial period within which to conduct due diligence, which included having Braintree pay for test pits to be dug to assess the water table and time to analyze the data provided. *Taub Aff.* at ¶ 13-24. E Street knew before entering into these agreements that substantial site changes would be necessary yet still agreed to the deadlines for performance outlined in the Modification Agreement, deadlines, all of which expired before the Covid 19 pandemic. *Id.*, *Exhibit C*. And Braintree never issued a stop construction order so E

Street could have performed much, if not all, of the site work during 2020. It was E Street's decision not to pursue the Project diligently. *Taub Aff.* at ¶ 37.

E Street indisputably failed to provide a written commitment for financing of the Project by June 15, 2021. Instead, it argues that its purported self-funding shows its dedication. First, according to Cokinos' affidavit, E Street did not finance the Project, only Cokinos did. *Cokinos Affidavit*, ¶ 35. Further, the parties agreed that E Street was to obtain a commitment demonstrating that E Street would have access to sufficient financing necessary to commence and complete construction of the Project. *Taub Aff.* at *Exhibit C*, ¶ 10. This was material term for Braintree as this obligation acts as a safety measure protecting Braintree from unwanted collection lawsuits, mechanics liens, or the possibility that it would be left with a giant hole in the ground or a partially constructed facility. This was an agreed upon term and E Street did not meet its obligation.

E Street also failed to act diligently to obtain the permits.⁴ When E Street took over the Project, it knew what work needed to be completed and how long it had to perform that work. It did not meet those initial deadlines. *Taub Aff., Exhibit C*. When E Street failed to meet its initial deadlines in the fall of 2019 (before Covid) Braintree did not immediately send a default notice. Braintree consistently worked with E Street to extend deadlines to provide it more time to work through problems. *Taub Aff.* at ¶ 36, 38-39, 41. For every inch Braintree gave, however, E Street took a mile. No extension was ever long enough for E Street to pull together coherent plans to accomplish the Project. And based on past practice, there is no evidence this pattern will change.

⁴ As an example, Cokinos states in his affidavit that E Street initially "anticipated that some [of the existing permits] would need modification as the project proceeded", including a permit based upon the Stormwater Management and Drainage Aplan. Cokinos Affidavit, ¶ 43. Yet, Cokinos admits that E Street waited until April of 2020, when flooding actually became an issue, rather than affirmatively investigate the adequacy of the related permit or design. *Id.* at ¶¶ 43-44.

E Street argues Braintree is focused solely on the last few months. That is not accurate. While the last few months sufficiently justify the Ground Lease termination, E Street's delays have been endemic to its involvement here. *Taub Aff.* at ¶ 26-74. It has consistently failed to work as if "time was of the essence," despite agreeing that it was.

E Street's failures under the Ground Lease preclude injunctive relief. Where a tenant has engaged in wrongful conduct or otherwise breached provisions of a lease agreement between himself and the landlord, a grant of equitable relief is inappropriate. *See Eno Systems v. Eno*, 311 Mass. 334, 338 (1942) ("where the conduct of a lessee has been such as not to commend itself to a court of equity or where the circumstances of a particular case are such that the granting of relief would impose an unjust and unreasonable hardship on the lessor," tenant unable to obtain equitable relief in form of setting aside forfeiture of lease); *Finkovitch v. Cline*, 236 Mass. 196, 200 (1920) (equitable relief inappropriate where party "was asking the court to guard him against the legal consequences of his own willful act committed in conscious violation of his agreement"); *Healthsouth Corp. v. HRES1 Properties Trust*, 2006 WL 2864247, at *5 (Mass. Super. Sept. 25, 2005).

b. Braintree has continuously acted in good faith.

E Street also cannot show a likelihood of success on its breach of good faith and fair dealing claim. A plaintiff seeking to make a claim for breach of the implied covenant must prove a lack of good faith by the defendant. *Weiler v. Portfolioscope, Inc.*, 469 Mass. 75, 82 (2014). E Street's argument is a piggy-back on its contract argument unsupported by facts or evidence. The entire argument rests on the claim Braintree's attempt to terminate is "classic bad faith" because Braintree purportedly "does not have a legitimate basis for terminating" the Ground Lease and other agreements. As reviewed at length above, this argument ignores reality and is nonsensical. There is no benefit to Braintree to act in bad faith here. Braintree wants the Project completed

more than any party involved. Braintree has more than ample justification to terminate the Ground Lease. Most simply because E Street breached on multiple occasions.

Despite those multiple breaches, Braintree has worked tirelessly to help E Street succeed only to be consistently disappointed. *Taub Aff.* at ¶ 39, 41, 48, 56, 62. There have been multiple times over the last almost two years when the Ground Lease could have been terminated. *Id.* But Braintree did not do so. It is not in Braintree's best interest to continue to cycle through contractors. It is unfortunate the situation has devolved to where it is, but that is not the result of any bad faith on Braintree's part. E Street cannot meet its burden here on this argument.

Once E Street's claims are scrutinized, the factual allegations crumble and reveal the futility of the claims. E Street has no likelihood of success.

2. E Street cannot show that any irreparable harm it may suffer outweighs the harm Braintree would suffer.

Even assuming E Street could show harm, that harm, if any, does not outweigh the harm to Braintree. Here the Court must weigh and balance the risk of harm to Braintree if the preliminary injunction is granted with the risk of harm to E Street if it is denied. "What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue." *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980). Braintree will face significant harm if a preliminary injunction is granted. Braintree will effectively lose control of its ability to enforce the Ground Lease against E Street and will be shackled with E Street's continued substandard and dilatory performance. With the already momentous delays, E Street has caused harm to Braintree with lost rent, lost tax payments and a further delay of being

able to provide the promised facility to its citizens. *Taub Aff. at Exhibits C and D*. An injunction will increase that harm to Braintree.

E Street agreed to meet certain deadlines and on multiple times it failed. Braintree needs to act in the interest of its citizens and devote its time and money to a competent and committed contractor who will meet its deadlines.

While Cokinos may not recover his personal investment, that is not relevant here, nor enough to carry the day. Specifically, because E Street cannot claim harm based on its manager's investment. The potential losses facing E Street are business risks that it accepted. The Ground Lease is not a guarantee, and E Street should no longer be allowed to treat it as such.

Therefore, the balance of harms weighs in Braintree's favor as the citizens, who have already been waiting for 5 years for this Project, will be forced to wait longer and Braintree will be forced to deal with E Street through even more delays. *Taub Aff.*, ¶ 74.

Finally, knowing it cannot make its case, E Street tries to hijack harm it alleges will befall Braintree as its own. Specifically, E Street claims termination will cause harm by way of water damage caused by water runoff that will purportedly occur if a contractor cannot perform necessary site work soon. *Memorandum*, p. 13. But E Street again misses the issue. Braintree is not seeking to terminate the Project in its entirety, only E Street's role in the Project. Braintree will locate someone to address these issues which are, in any event, Braintree's issues and not E Street's.

3. E Street's delay in service shows it is not entitled to injunctive relief.

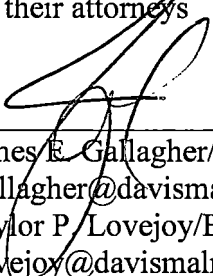
Despite seeking Court intervention on an immediate basis, E Street waited more than a week to serve the current matter on Braintree⁵. E Street filed the Complaint and the current motion for preliminary injunction on June 29, 2021. On July 1, 2021, the Court issued its short order of notice and other orders directing E Street to provide notice to the Town for the injunction hearing on July 19, 2021. Despite the alleged urgency E Street claims, it waited until Friday, July 9, 2021 to make service on the Town. This is more of the same. Delay. Delay. Delay.

CONCLUSION

Time and again Braintree granted extensions and leeway to E Street only to be taken advantage of. Braintree cannot stand by any longer. Braintree has legitimate basis because of E Street's breaches to exercise its rights to terminate the Ground Lease. Because of its own actions, E Street cannot show a likelihood succeed on its claims in the underlying action and is not entitled to injunctive relief here. The motion should be denied.

⁵ And, even when service was attempted Braintree disputes that proper service has been made as required under Mass.R.Civ.P. 4(d). Plaintiff's Special Process server delivered copies of the pleadings in this matter to the Mayor's office. No service packages have been delivered or mailed to the Town Clerk as required under the Rule.

Respectfully submitted,
**TOWN OF BRAINTREE, MAYOR CHARLES
C. KOKOROS, INDIVIDUALLY, and MAYOR
CHARLES C. KOKOROS, TRUSTEE OF
PETERSEN TRUST,**
By their attorneys

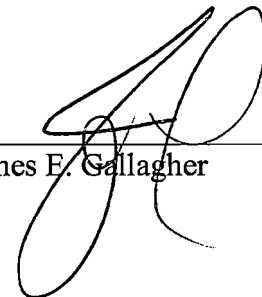


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Dated: July 16, 2021

CERTIFICATE OF SERVICE

I certify that on July 16, 2021, a true and accurate copy of the above document was served upon counsel for the Plaintiff by electronic mail.



James E. Gallagher