

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPT.  
CIVIL ACTION NO.# MICV2003-2512

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CROWN CASTLE ATLANTIC LLC	)
	)
Plaintiff	)
	)
vs.	)
	)
GUY A. MCKAY AND	)
SHERYLL MCKAY	)
	)
Defendants	)
	)



**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Crown Castle Atlantic LLC ("Crown") moves the Court pursuant to Rule 56 to enter summary judgment in its favor on Count I of the Complaint, charging the defendants Guy A. and Sheryll McKay (the "McKays") with breach of contract. As grounds supporting the motion, the Plaintiff offers the following:

1. Crown has the right under a valid lease ("Lease") with the McKays to install underground landline telephone wires and upgrade its technology on the McKays' property.
2. Verizon New England ("Verizon"), the local landline telephone company, requires landowners to execute its standard Easement Agreement ("Easement Agreement") before it will perform an installation.
3. The Lease requires the McKays to execute the Easement Agreement for Crown to exercise its rights to install telephone lines and upgrade its technology.
4. The McKays have refused, and continue to refuse to execute the Easement Agreement, which constitutes a breach of contract.
5. Crown is entitled to specific performance because of its unique interest in land for which there is no adequate remedy at law. Requiring the McKays to sign the Easement Agreement and allowing fiber optic telephone lines to be installed in an existing conduit will not give Crown an inequitable advantage or cause the McKays any undue hardship.

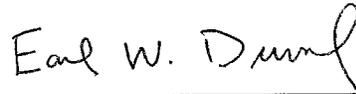
In support of its motion, Crown refers the Court to the following documents attached as exhibits hereto:

- A. Statement of Facts and Law in Support of Plaintiff's Motion For Summary Judgment Pursuant to Rule 9(A)(b)(5);
- B. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment;
- C. Affidavit of Jeffrey Barbadora, District Manager for Crown's Northeast Area-New England and Exhibits; and
- D. Affidavit of Attorney Earl W. Duval and Exhibits.

WHEREFORE, the Plaintiff respectfully requests that the Court grant this motion and enter judgment against the Defendant as demanded in its Complaint.

**The Plaintiff, Crown Castle Atlantic LLC respectfully requests that this court schedule a hearing on this Motion for Summary Judgment.**

Respectfully Submitted,  
Crown Castle Atlantic LLC  
by its Attorneys,



Earl W. Duval, Jr.  
BBO # 565909



Daniel D. Klasnick  
BBO # 629142

Duval, Bellone, Cranford & Celli, P.C  
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Dated: 9-4, 2003

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SHERYLL MCKAY	)
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Defendants	)
	)

**STATEMENT OF FACTS AND LAW IN SUPPORT OF PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 9A(b)(5)**

**STATEMENT OF FACTS**

1. On or about August 12, 1996, the McKays entered into a binding and enforceable Lease with Crown’s predecessor-in-interest, Cellco Partnership d/b/a Bell Atlantic NYNEX Mobile (“BANM”). (Duval Aff. ¶ 6, Ex. 4; Def.’s Answer ¶ 4.)
2. The McKays, as Lessors, agreed to lease the Property – a sixty (60) foot by sixty (60) foot parcel of their land at 982-988 Main Street in North Acton, Massachusetts – to Crown’s predecessor-in-interest, as Lessee, to the Lease for the purpose of “constructing, maintaining, and operating a communications facility and uses incidental thereto together with one (1) antenna structure and all necessary connecting appurtenances.” (Duval Aff. ¶ 7, Ex. 4; Def.’s Answer ¶ 5.)
3. In the Lease, the McKays granted its Lessee “the non-exclusive right for ingress and egress, seven (7) days a week twenty-four (24) hours a day, on foot or motor vehicle, including trucks, and for installation and maintenance of underground utility wires, cables, conduits, and pipes under, or along a fifteen (15’) foot wide right-of-way extending from the nearest public right-of-way, Main Street, to the demised premises,…” (“Right-of-Way”). (Duval Aff. ¶ 8, Ex. 4; Def.’s Answer ¶ 7.)
4. In the Lease, the McKays agreed that “[i]n the event any public utility is unable to use the aforementioned right-of-way, the Lessor hereby agrees to grant a substitute right-of-way either to the Lessee or to the public utility at no cost to the Lessee.” The Lease further states that the “installation of all improvements shall be at the discretion and option of the Lessee.” (Duval Aff. ¶ 8, Ex. 4; Def.’s Answer ¶¶ 7, 8.)

5. To provide for the necessary connection to the traditional landline telephone network, Crown's predecessor-in-interest BANM contracted with Mirra Construction to install the existing underground conduit and New England Telephone Company ("NETC") installed its copper wire telephone line through the underground conduit at the Property. (Barbadora Aff. ¶ 16.)
6. Mirra Construction installed the underground conduit running under the Right-of-Way from Main Street across the Property to the communications tower facility. (Barbadora Aff. ¶ 16.)
7. NETC installed the telephone line in the underground conduit running under the Right-of-Way from Main Street across the Property to the Tower. (Barbadora Aff. ¶ 16.)
8. BANM, by and through its contractor, Mirra Construction, installed the underground conduit running under the Right-of-Way from Main Street to the Property in the location on the Property requested by the McKays. (Barbadora Aff. ¶ 16.)
9. On November 10, 1997, the McKays and BANM executed a binding and enforceable First Amendment to the Lease ("First Amendment"). (Duval Aff. ¶ 10; Def.'s Answer ¶ 13.)
10. The First Amendment expressly provides that Crown has the right to sublet any portion of the Property, without the consent of the McKays to any third Party. (Duval Aff. ¶ 11, Ex. 4.)
11. By letter dated January 8, 1999 from Attorney Michael S. Giaimo of Robinson & Cole LLP, legal counsel for Bell Atlantic Mobile ("BAM"), the McKays were notified of BAM's formation of a joint venture with Crown Castle International Corp and the intent to assign BAM's interest in the Lease to the joint venture company, Crown. (Barbadora Aff. ¶ 17, Ex. 1; Def.'s Answer ¶ 31.)
12. The McKays were requested to accept, and agree to, the proposed assignment. (Barbadora Aff. ¶ 17, Ex. 1; Def.'s Answer ¶ 31.)
13. The McKays consented to the assignment of the Lease to Crown by signing a letter from BAM dated January 8, 1999. (Barbadora Aff. ¶ 18, Ex. 1; Def.'s Answer ¶ 32.)
14. On or about March 31, 1999, BAM assigned its interest in the Lease and corresponding subleases to Crown as evidenced by the Memorandum of Assignment. (Barbadora Aff. ¶ 19, Ex. 2; Def.'s Answer ¶ 33.)
15. The Tower is currently serviced by a copper wire telephone line that had been installed in an underground conduit from Main Street to a demarcation point within the wireless telecommunications compound. (Barbadora Aff. ¶ 10.)

16. Bell Atlantic n/k/a Verizon Communications informed Crown for reasons unknown to it that its predecessor NETC had not obtained the standard executed Easement Agreement with the McKays before the underground conduit and copper wire telephone lines were initially installed, and that the Easement Agreement would be necessary to install fiber optic telephone lines. (Barbadora Aff. ¶ 30.)
17. For a period in excess of three (3) years, Crown has repeatedly reminded the McKays that the Lease permitted Crown to upgrade the telephone lines at the Property and that the terms of the Lease required the McKays to sign the necessary Easement Agreement required by Verizon Communications. (Barbadora Aff. ¶ 33.)
18. As of this filing, despite repeated requests, the McKays have refused to execute an Easement Agreement with Verizon Communications. (Barbadora Aff. ¶ 43; Def.'s Answer ¶ 41.)
19. As of this filing, Verizon Communications has not installed the fiber optic telephone line to the Property needed by Crown's six (6) Subtenants in order to provide adequate coverage to their many wireless customers in the area who rely upon this service to make not only calls of convenience and business, but calls requesting emergency services. (Barbadora Aff. ¶ 44.)

## STATEMENT OF LAW

### *Breach of Contract*

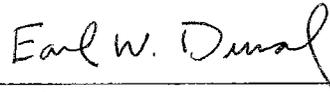
1. A lease is a contract for the possession of property. See Wesson v. Leone Enters., 774 N.E.2d 611, 619, 621 (Mass. 2002).
2. Covenants may be expressly contained in a lease or they may be implied from its language viewed in light of the intent of parties. See Stop & Shop, Inc. v. Ganem, 200 N.E.2d 248, 251 (Mass. 1964).
3. The undertakings of each promisor in a lease must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included. Stop & Shop, Inc., 200 N.E.2d at 251.
4. The grant of any thing [in a lease] carries an implication, that the grantee shall have all that is necessary to the enjoyment of the grant, so far as the grantor has power to give it. Winchester v. O'Brien, 164 N.E. 807, 809 (Mass. 1927).
5. The reality of a commercial lease "contemplates a continuing flow of necessary services from landlord to tenant, services that are normally under the landlord's control." Wesson, 774 N.E.2d at 621.
6. A tenant is entitled to relief if a landlord breaches a covenant contained in a lease. Wesson, 774 N.E.2d at 622.

7. A material breach of contract violates “an essential and inducing feature of the contract.” Anthony’s Pier Four, Inc. v. HBC Assocs., 583 N.E.2d 806, 819 (Mass. 1991).

### *Specific Performance*

8. Specific performance is an equitable remedy that may be granted within the sound discretion of the judge. Greenfield Country Estates Tenants Ass’n v. Deep, 666 N.E.2d 988, 993 (Mass. 1996).
9. Specific performance may be granted if it does not impose an undue hardship upon a party or permit a party to obtain an inequitable advantage. Greenfield Country Estates Tenants Ass’n, 666 N.E.2d at 994.
10. Although specific performance is generally not available to a party who can be adequately compensated at law, the availability of money damages does not bar a suit in equity for specific performance. Greenfield Country Estates Tenants Ass’n, 666 N.E.2d at 993.
11. Specific performance is appropriate in cases involving an interest in real property because real property is unique and money damages will often be inadequate to address a deprivation of an interest in land. Greenfield Country Estates Tenants Ass’n, 666 N.E.2d at 993.
12. Courts often grant specific performance in cases where a lessor breaches a covenant in a lease. Eg., Hook Brown Co. v. Farnsworth Press, Inc., 203 N.E.2d 681, 684-85 (Mass. 1965); Carey’s, Inc. v. Carey, 517 N.E.2d 850, 856 (Mass. App. Ct. 1988); Leisure Sports Inv. Corp. v. Riverside Enter., Inc., 388 N.E.2d 719, 722 (Mass. App. Ct. 1979).

Respectfully Submitted,  
Crown Castle Atlantic LLC  
by its Attorneys,



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Earl W. Duval, Jr.  
BBO # 565909



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Daniel D. Klasnick  
BB0 # 629142

Duval, Bellone, Cranford & Celli, P.C  
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 SHERYLL MCKAY )  
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 Defendants )  
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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

Plaintiff Crown Castle Atlantic LLC ("Crown") respectfully submits the following Memorandum of Law in Support of its Motion for Summary Judgment against Defendants Guy A. and Sheryll McKay ("McKays") on Count I of the Complaint dated June 13, 2003 and filed with this Court on the same date pursuant to MASS. R. CIV. P. 56.

**INTRODUCTION**

Crown commenced this action after the McKays materially breached the terms, covenants and conditions of a Land Lease Agreement dated August 12, 1996 ("Lease") between the McKays, as Lessor, and Crown as successor by assignment to Cellco Partnership d/b/a Bell Atlantic Mobile, as Lessee. The McKays have prevented Crown from upgrading the existing underground landline telephone service to the previously constructed and operating wireless telecommunications tower ("Tower") at property leased by Crown at 982-988 Main Street, Acton, Massachusetts ("Property"). The Lease permits Crown, as successor by assignment, to upgrade the underground landline telephone service at the Tower at its discretion. Since March of 2000, the McKays have prevented Crown from upgrading the landline telephone service by

their persistent refusal, in material breach of the Lease, to execute a standard Easement Agreement for Verizon New England, Inc. (the landline telephone company) (“Verizon Communications”), which would permit Crown to upgrade the existing underground landline telephone service to meet the critical operational needs of Crown’s wireless service subtenants/licensees on the Tower.

Crown’s has six (6) Federal Communications Commission (“FCC”) licensed Commercial Mobile Radio Services (“CMRS”) provider subtenants/licensees on the Tower, which have installed wireless telecommunications equipment for the transmission of wireless telephone and/or data signals through the air. Crown’s subtenant/licensees have demanded that Crown upgrade the existing underground landline telephone service to the Tower by installing fiber optic telephone lines at the Property. The upgrade necessitates the installation of a fiber optic telephone line in an existing conduit under the existing Right-of-Way granted in the Lease and the installation of an approximately 41” Long x 36” Wide x 54” deep Cabinet within Crown’s leased Property.

Verizon Communications (the landline phone company formerly known as Bell Atlantic (“BA”)) and its predecessor telephone companies require that landowners execute their standard Easement Agreement before they will perform the installation of a telephone line (“Easement Agreement”). By its terms, the Easement Agreement is coterminous with the requirement to serve the Tower. The McKays have refused, and continue to refuse, to execute the Easement Agreement of Verizon Communications and its predecessor telephone companies for the upgrade of telephone lines for the Property. This refusal constitutes a material breach of the Lease, and has prevented Crown’s subtenants/licensees from effectively meeting the increasing operational coverage, performance and capacity needs of their customers including, but not limited to, reliable emergency service calls being broadcast and received by their equipment on the Tower, including 911 calls.

Crown respectfully submits that the McKays' refusal to permit the upgrade to the existing underground telephone lines constitutes a material breach of their obligations under the Lease, and asks that the Court enter summary judgment against the defendants on Count I of the Complaint. Crown respectfully requests that the Court grant it declaratory relief stating that Crown has the right, now and in the future, to install telephone lines in accordance with the terms, covenants and conditions of the Lease and make improvements on the Property. Crown also asks the Court to grant it specific performance under the Lease by a permanent injunction preventing the McKays from interfering with Crown's right to utilize its easement for the aforesaid purposes, and requiring the McKays to execute the Easement Agreement to facilitate the installation of telephone lines.

### **STATEMENT OF FACTS<sup>1</sup>**

Crown is a Delaware limited liability company with a mailing address for its Northeast Area-New England office at 46 Broadway, Albany, NY 12204. (Barbadora Aff. ¶ 4.) Crown is a full-service tower company that leases, monitors and maintains wireless telecommunications towers and is authorized to conduct business in the Commonwealth of Massachusetts. (Id. ¶ 5.) Crown provides space on its telecommunications towers for the leading FCC-licensed Commercial Mobile Radio Service providers such as: AT&T Wireless, Verizon Wireless, Nextel Communications, Cingular Wireless, T Mobile and Sprint PCS. (Id. ¶ 6.)

#### **A. Lease Between the McKays and Bell Atlantic NYNEX Mobile**

On or about August 12, 1996, the McKays entered into a binding and enforceable Lease with Crown's predecessor-in-interest, Cellco Partnership d/b/a Bell Atlantic NYNEX Mobile ("BANM"). (Duval Aff. ¶ 6, Ex. 4; Def.'s Answer ¶ 4.) The McKays, as Lessors, agreed to lease the Property – a sixty (60) foot by sixty (60) foot parcel of their land at 982-988 Main

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<sup>1</sup> The facts recited herein are taken from the sworn Affidavits of Earl W. Duval and Jeffrey Barbadora and from the exhibits submitted therewith.

Street in North Acton, Massachusetts – to Crown’s predecessor-in-interest, as Lessee, for the purpose of “constructing, maintaining, and operating a communications facility and uses incidental thereto together with one (1) antenna structure and all necessary connecting appurtenances.” (Duval Aff. ¶ 7, Ex. 4; Def.’s Answer ¶ 5.) Crown’s predecessor-in-interest commenced construction of the communications tower facility on or about March of 1997 and completed construction on or about June, 1997. (Barbadora Aff. ¶ 16.)

In the Lease, the McKays granted its Lessee:

the non-exclusive right for ingress and egress, seven (7) days a week twenty-four (24) hours a day, on foot or motor vehicle, including trucks, **and for installation and maintenance of underground utility wires, cables, conduits, and pipes under, or along a fifteen (15’) foot wide right-of-way extending from the nearest public right-of-way, Main Street, to the demised premises,**... (“Right-of-Way”) (emphasis added).

**[i]n the event any public utility is unable to use the aforementioned right-of-way, the Lessor hereby agrees to grant a substitute right-of-way either to the Lessee or to the public utility at no cost to the Lessee.** (emphasis added).

(Duval Aff. ¶ 8, Ex. 4; Def.’s Answer ¶ 7.) The Lease further states that the “installation of all improvements shall be at the discretion and option of the Lessee.” (Duval Aff. ¶ 7, Ex. 4; Def.’s Answer ¶ 8.)

On November 10, 1997, the McKays and BANM executed a binding and enforceable First Amendment to the Lease (“First Amendment”). (Duval Aff. ¶ 10, Ex. 5; Def.’s Answer ¶ 13.) The First Amendment expressly provides that the Lessee has the right to sublet any portion of the Property without the consent of the McKays to any third party. (Duval Aff. ¶ 11, Ex. 5.)

#### **B. Connection With Landline Public Telephone Network**

To allow a CMRS provider to adequately service its customers’ needs, a wireless service carrier is required to connect to the traditional landline public telephone network. (Barbadora Aff. ¶ 10.) This is accomplished by the installation of a traditional landline telephone cable that directs the wireless call through a Mobile Telephone Switching Office (“MTSO”), which is a central computer that connects wireless phone calls to the public telephone network. (*Id.*) The

ability to connect to the traditional landline telephone network is essential to the effective operation by a CMRS provider of a wireless telecommunications system. (Id.)

To provide for the necessary connection to the traditional landline telephone network, Crown's predecessor-in-interest, BANM, contracted with Mirra Construction to install the existing underground conduit and New England Telephone Company ("NETC") (a landline telephone company), installed its copper wire telephone line through the underground conduit running under the Right-of-Way from Main Street to the Property. (Id. ¶ 16.) Mirra Construction installed the underground conduit running under the Right-of-Way from Main Street across the Property to the communications tower facility. (Id.) NETC installed the telephone line in the underground conduit running under the Right-of-Way from Main Street across the Property to the Tower without first obtaining from the McKays its standard Easement Agreement. (Id.) BANM, by and through its contractor, NETC, performed the installation in the location on the Property requested by the McKays. (Id.)

### **C. Assignment of Lease to Crown**

By letter dated January 8, 1999 from Attorney Michael S. Giaimo of Robinson & Cole LLP, legal counsel for Bell Atlantic Mobile ("BAM"), the McKays were notified of BAM's formation of a joint venture with Crown Castle International Corp. and the intent to assign BAM's interest in the Lease to the joint venture company, Crown. (Barbadora Aff. ¶ 17, Ex. 1; Def.'s Answer ¶ 31.) The McKays were requested to accept, and agree to, the proposed assignment. (Id.) The McKays consented to the assignment of the Lease to Crown by signing a letter from BAM dated January 8, 1999. (Barbadora Aff. ¶ 18, Ex. 1; Def.'s Answer ¶ 32.) On or about March 31, 1999, BAM assigned its interest in the Lease and corresponding subleases to Crown as evidenced by the Memorandum of Assignment. (Barbadora Aff. ¶ 19, Ex. 3; Def.'s Answer ¶ 33.)

#### **D. Crown's Subtenants/Licensees**

By such described assignment, Crown, as sublessor, has an existing sublease/license for tower space and ground space within the Property with: Omnipoint Communications MB Operations, Inc. n/k/a T-Mobile ("T-Mobile"); Nextel Communications of the Mid-Atlantic, Inc., ("Nextel"); Southwestern Bell Mobile Systems, Inc. d/b/a Cellular One, n/k/a Cingular Wireless ("Cingular"); Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless"); and Sprint Spectrum, L.P., ("Sprint PCS"). (Barbadora Aff. ¶¶ 20, 21, 23-25.) Crown has an existing sublease/license agreement for tower space only with AT&T Wireless ("AT&T Wireless"). (Id. ¶ 22.) The subtenants/licensees make their payments directly to the McKays. (Id. ¶¶ 21-25.) (T-Mobile, Nextel, Cingular, AT&T Wireless, Verizon Wireless and Sprint PCS are collectively referred to herein as "Subtenants").

On or about February 2000, the Subtenants requested that Crown upgrade the existing underground landline telephone lines servicing the Tower with fiber optic telephone lines. (Id. ¶ 28.) The Tower is currently serviced by a copper wire telephone line that had been installed in an underground conduit from Main Street to a demarcation point within the wireless telecommunications compound. (Id. ¶ 10.) The existing copper wire telephone line is subject to limitations in the amount and type of voice and/or data that may be transmitted by the CMRS provider's wireless network to the traditional landline public telephone network. (Id.)

#### **E. Requirement of Standard Easement Agreement**

Following its Subtenants' request, Crown contacted Bell Atlantic, (the landline telephone company formerly known as NETC), to upgrade the telephone lines at the Property. (Id. ¶ 30.) Bell Atlantic n/k/a Verizon Communications informed Crown that for reasons unknown to it, its predecessor, NETC, had not obtained the standard Easement Agreement from the McKays when the underground conduit and copper wire telephone lines were initially installed. (Id.) Verizon Communications informed Crown that in order to run the fiber optic telephone line, it would

require the McKays to execute the Easement Agreement that was never obtained when the original copper wire telephone line was installed in the underground conduit. (Id.)

**F. McKays' Continuing Refusal to Execute Standard Easement Agreement**

On or about March 2000, Crown contacted the McKays and informed them that the newest Subtenant on the Tower, Sprint PCS, had also repeated the prior request of Crown's existing Subtenants that Crown upgrade to fiber optic lines at the Property. (Id. ¶ 31.) Crown informed the McKays that the work would simply require the installation of a fiber optic telephone line in the existing underground conduit and the placement of a new 41" Long x 36" Wide x 54" deep Cell Site Cabinet ("CSC") within the leased area of the established wireless telecommunications compound on the Property. (Id.)

Crown, through correspondence and in meetings with the McKays, has described to the McKays that the Subtenants' request to upgrade the telephone landline service to the Tower is necessary to allow for the increasing operational, coverage, performance and capacity demands made upon the communications equipment installed on the Tower by the Subtenants including, but not limited to, emergency service calls being able to be broadcast and received by such equipment on the Tower, including 911 calls. (Id. ¶ 32.) For a period in excess of three (3) years, Crown has repeatedly informed the McKays that the Lease permitted Crown to upgrade the telephone lines at the Property and that the terms of the Lease required the McKays to sign the Easement Agreement. (Id. ¶ 33.) Notwithstanding Crown's repeated requests for a period that has exceeded three (3) years, and in violation of the Lease, the McKays have refused to execute Verizon Communications' Easement Agreement. (Id. ¶ 33.)

By letter dated February 14, 2002, Attorney Earl W. Duval ("Attorney Duval"), legal counsel for Crown, of Duval, Bellone & Cranford, P.C. (n/k/a Duval, Bellone, Cranford & Celli, P.C.), requested that the McKays "adhere to the terms of the Land Lease and execute an

Easement with Verizon for the installation of telephone lines.” (Duval Aff. ¶ 15, Ex. 8; Def.’s Answer ¶ 45.)

By letter dated February 28, 2002, Attorney Duval informed the McKays that Verizon Communications is “upgrading the existing telephone lines in the existing conduit.” (Duval Aff. ¶ 16, Ex. 9; Def.’s Answer ¶ 46.) Along with the letter dated February 28, 2002 from Attorney Duval to the McKays, Attorney Duval forwarded a letter dated February 25, 2002 to Attorney Duval from Jeffrey Barbadora to the McKays. (Duval Aff. ¶ 16, Ex. 9; Def.’s Answer ¶ 47.) In the letter dated February 25, 2002 from Barbadora to Attorney Duval, Barbadora explained that Crown “must install” a fiber optic line to “allow carriers to upgrade their communication at the North Acton site.” (Duval Aff. ¶ 16, Ex. 9; Def.’s Answer ¶ 48.)

On March 20, 2002, Crown Representatives’ Jeffrey Barbadora, James Donahue, former Crown Vice President/General Manager, and Kristian Zoeller, along with Attorney Duval, met with the McKays at the Property. (Barbadora Aff. ¶ 37; Def.’s Answer ¶ 49.) They explained to the McKays that the upgrade of the existing telephone service was essential to the operation of the wireless communications equipment located on the Tower by the Subtenants. (Barbadora Aff. ¶ 37.) They also explained that because the fiber optic telephone line would utilize the existing underground conduit, there would be no disruption to the McKays’ operations at the site and would require not more than two (2) days installation time. (Id.) It was further explained that the Lease granted Crown the right to install the fiber optic telephone line, and that the execution of the Easement Agreement was provided for in the Lease to satisfy the documentation requirements of Verizon Communications. (Id.)

At the March 20, 2002 meeting between the representatives of Crown and the McKays, Mr. McKay was very hostile and confrontational. (Id. ¶ 38.) He was particularly abusive to Mr. Donahue, which prompted Mrs. McKay to repeatedly request that Mr. McKay “calm down.” (Id.) Continuing with his confrontational behavior, Mr. McKay further demanded \$600.00 per

month from Crown in exchange for signing the Easement Agreement. (Id.) Mr. McKay asserted that CSC unit should be installed outside the leased area telecommunications compound so he could make more money and the McKays refused to acknowledge the terms and conditions of the Lease and Crown's rights thereunder. (Id. ¶ 39.)

Following months of unproductive efforts to reach a mutually acceptable resolution, Attorney Duval was informed that the McKays had sought representation from Attorney Francis A. DiLuna of the Law Firm of Murtha, Cullina, Roche, Carens & DeGiacomo. On July 8, 2002, the McKay's attorney, Francis A. DiLuna ("Attorney DiLuna") sent correspondence to Attorney Duval alleging that the McKay's were entitled to certain revenues from ground space leases from collocators on the communications tower. (Duval Aff. ¶ 22, Ex. 13; Def.'s Answer ¶ 54.)

By letter dated July 12, 2002, Attorney Duval sent a reply to Attorney DiLuna's July 8th correspondence clarifying the nature of the financial arrangements that allows the McKays to receive revenue for ground space from the collocating wireless service providers and suggesting that Attorney Duval and Attorney DiLuna meet to discuss resolution of the easement and access issues. (Duval Aff. ¶ 23, Ex. 14; Def.'s Answer ¶ 55.) On November 7, 2002, Attorney Duval sent Attorney DiLuna a revised draft of the proposed Easement Agreement that specifically addressed the McKay's concern of the duration of the easement. (Duval Aff. ¶ 24, Ex. 15; Def.'s Answer ¶ 56.) By its terms, the Easement Agreement is coterminous with the requirement to serve the Tower. (Barbadora Aff. ¶ 40.)

By letter dated February 28, 2003, Attorney DiLuna informed Attorney Duval "...that all communications concerning Butterbrook Farm are to be directed to Guy McKay," providing notice of his withdrawal as counsel for the McKays. (Duval Aff. ¶ 28, Ex. 18.)

As of this filing, despite repeated requests, the McKays, in material breach of the Lease, have refused to execute an Easement Agreement with Verizon Communications. (Barbadora Aff. ¶ 43.) As of this filing, Verizon Communications has not installed the fiber optic telephone

line to the Property needed by Crown's six (6) Subtenants in order to provide adequate coverage to their many wireless customers in the area who rely upon this service to make not only calls of convenience and business, but calls requesting emergency services. (Id. ¶ 44.)

### **ISSUES PRESENTED**

1. Whether the McKays' continued obstruction of the installation of the fiber optic telephone line in the existing underground conduit that is located in the approved Right-of-Way, by refusing to execute Verizon Communications' standard Easement Agreement, is a breach of the terms, covenants and conditions of the Lease.
2. Whether Crown is entitled to specific performance of the Lease to allow the installation of the fiber optic telephone line in the existing underground conduit that is located in the approved Right-of-Way, which would require the McKays to sign the Easement Agreement.

### **STANDARD OF REVIEW**

Summary judgment is appropriate where there is no genuine issue as to any material fact and, where viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. Harrison v. Netcentric Corp., 744 N.E.2d 622, 627 (Mass. 2001). The party moving for summary judgment assumes the burden of affirmatively demonstrating that there is no genuine issue of material fact on every relevant issue. Pederson v. Time, 532 N.E.2d 1211, 1213 (Mass. 1989). Disputed issues of fact must be material; that some facts are in dispute will not necessarily defeat a motion for summary judgment. Hudson v. Comm'r of Corr., 725 N.E.2d 540, 543 (Mass. 2000). If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat a motion for summary judgment. Id. The opposing party may not rest on the allegations of the pleadings, nor may it rely on bare assertions and conclusions regarding its own understandings, beliefs, and assumptions. See Key Capital Corp. v M & S Liquidating Corp., 542 N.E.2d 603,

607 (Mass. App. Ct. 1989). If the opposing party fails to establish a triable issue, summary judgment is appropriate and must be entered. MASS. R. CIV. P. 56.

### **SUMMARY OF ARGUMENT**

In August, 1996, the McKays entered into a binding and enforceable Lease with Crown's predecessor-in-interest for the purpose of constructing, maintaining, and operating a wireless communications facility. The McKays signed a Lease for a use that requires the installation of landline telephone service and that specifically allows Crown to upgrade the telephone service at the Property. The Lease also requires the McKays to cooperate with the Lessee in the development, construction and operation of the wireless telecommunications facility on the Property and refrain from any action that would adversely affect the use of the Property for the purpose permitted in the Lease. Crown desires to upgrade the telephone service at the Property by installing fiber optic lines, which requires the execution of an Easement Agreement in favor of the telephone company. The McKays' refusal to sign a standardized easement document that is necessary for the upgrade of the landline telephone service represents a material breach of the terms, covenants and conditions of the Lease and prevents Crown from providing essential operational service to the Subtenants.

In this instance, Crown is entitled to the equitable remedy of specific performance because the McKays' material breach of the Lease is of such a nature that no adequate remedy at law will wholly compensate Crown. In light of the unique attributes of the Property, which provides an essential location for CMRS providers to fulfill the mandate of the Federal Communications Commission to provide an established level of service, this Court should recognize that money damages will not be wholly adequate to address the deprivation of the full and complete use of the Property. Because the requested relief is consistent with the previously agreed upon terms of the Lease, granting specific performance would not give Crown anything that was not provided for in the Lease nor would it place any undue hardship on the McKays.

## ARGUMENT

- I. **The McKays' obstruction of the installation of the fiber optic telephone line represents a material breach of the terms of an unambiguous, written Lease that allows Crown to install telephone lines and requires the cooperation of the McKays, as Lessor.**

The Court should grant Crown's Motion for Summary Judgment because the McKays materially breached an unambiguous and essential term of the Lease requiring them to execute the Easement Agreement. A commercial lease is a contract, and the breach of its covenants by a lessor is actionable by the lessee. See Wesson v. Leone Enters., 774 N.E.2d 611, 622 (Mass. 2002). Covenants may be expressly contained in a lease or they may be implied from its language viewed in light of the intent of parties. See Stop & Shop, Inc. v. Ganem, 200 N.E.2d 248, 251 (Mass. 1964). The undertakings of each promisor in a lease must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included. Id.; see Winchester v. O'Brien, 164 N.E. 807, 809 (Mass. 1927). Furthermore, the reality of a commercial lease "contemplates a continuing flow of necessary services from landlord to tenant, services that are normally under the landlord's control." Wesson, 774 N.E.2d at 621.

Crown's Lease expressly allows it to install fiber optic lines, and it requires the McKays to execute Verizon's Easement Agreement. The McKays' continued refusal to execute the Easement Agreement, which is required for every installation in the country, constitutes a violation of a Lease covenant and a breach of contract. See Wesson, 774 N.E.2d at 622; RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 7.1 (1977). Because this breach deprives Crown of its right to the full enjoyment of an interest in land, to which there exists no adequate remedy at law, Crown is entitled to specific performance of the contract. See Greenfield Country Estates Tenants Ass'n v. Deep, 666 N.E.2d 988, 993 (Mass. 1996).

**A. The Lease expressly allows Crown to install underground telephone lines and upgrade its equipment at its own discretion.**

On or about August 12, 1996, the McKays entered into a binding and enforceable Lease with Crown's predecessor-in-interest, BANM. (Duval Aff. ¶ 6, Ex. 4; Def.'s Answer ¶ 4.) The Lease in paragraph 1 unambiguously allows the "installation and maintenance of underground utility wires, cables, conduits, and pipes under, or along a fifteen (15') foot wide right-of-way...." (Duval Aff. ¶ 8, Ex. 4; Def.'s Answer ¶ 7.) In addition, paragraph 7 states that "Lessee shall use the property for the purpose of constructing, maintaining, and operating a Communications Facility" and that "the installation of all improvements shall be at the discretion and option of the Lessee." (Duval Aff. ¶ 7, Ex. 4; Def.'s Answer ¶¶ 5, 8.)

It is reasonable for this Court to conclude that these provisions clearly and unequivocally grant Crown, as lessee under the Lease, the right to upgrade the existing underground landline telephone service by installing new fiber optic telephone lines. Fiber optic lines clearly qualify as "utility wires" since they accomplish the same ends as the existing copper lines, except that fiber optic lines do so with greater efficiency and reliability. Fiber optic lines are the telecommunications equivalent of a Pentium® processor. Since the installation of fiber optic lines would substantially improve the service at the Tower, they must be considered a permitted "improvement" under the Lease. Furthermore, the fact that the McKays entered into a lease for a high-tech structure on their land indicates their willingness to accommodate the latest innovations and technologies at the site. The McKays knew that a wireless telecommunications facility would be installed on their land, and therefore cannot now object to a routine upgrade that is consistent with the site's intended purpose.

Not only does the express language of the Lease clearly provide for the proposed upgrade of the existing underground landline telephone line with a fiber optic telephone line, the permitted use provided for in the Lease impliedly grants Crown the right. The express permitted

use in the Lease is for “constructing, maintaining, and operating a Communications Facility and uses incidental thereto together with one (1) antenna structure and all necessary connecting appurtenances.” (Duval Aff. ¶ 7, Ex. 4; Def.’s Answer ¶ 5.) The First Amendment to the Lease expressly provides that the Lessee shall have the right to sublet any portion of the Property without the consent of the McKays to any third party. (Duval Aff. ¶ 11.) By enabling Crown’s Subtenants to meet their critical operational, coverage, performance and capacity needs, the upgrade of the existing copper wire telephone line with the fiber optic telephone line is required to fulfill the permitted use provided for in the Lease.

**B. The requirement that the McKays sign Verizon Communication’s Easement Agreement comports with a Lease term permitting the installation and maintenance of underground utility lines, and the McKays’ refusal to sign the Easement Agreement constitutes a material breach of the Lease.**

The McKays refusal to execute the Easement Agreement constitutes a material breach of the terms of the Lease. The Lease grants to the Lessee the right to install and maintain underground utility wires, cables, conduits and pipes. The Lease also provides:

**[i]n the event any public utility is unable to use the aforementioned right-of-way, the Lessor hereby agrees to grant a substitute right-of-way either to the Lessee or to the public utility at no cost to the Lessee** (emphasis added).

(Duval Aff. ¶ 8, Ex. 4; Def.’s Answer ¶ 7.) The Lease states further that the “Lessor... shall take no action which would adversely affect the status of the Property with respect to the proposed use thereof by Lessee.” (Duval Aff. ¶ 7, Ex. 4.)

The Lease obligations require the McKays to not only permit the installation of underground utility wires but also to take the affirmative action in granting directly to the public utility an easement that is necessary to provide the necessary utility service. Verizon Communications is currently unable to use the existing Right-of-Way, and therefore the Lease obligates the McKays to execute the Easement Agreement. In addition, the proper enjoyment of Crown’s leasehold interest hinges upon Crown’s ability to upgrade the existing underground

landline telephone service with a fiber optic telephone line. The nature of the telecommunications industry requires Crown to keep up with the latest technologies in order to remain competitive.

The McKays' continued refusal to execute the Easement Agreement constitutes a violation of a Lease covenant and a material breach of contract, and severely handicaps Crown's ability to remain competitive. See Wesson, 774 N.E.2d at 622 (finding that tenant was entitled to relief after landlord breached his covenant to maintain the roof by failing to adequately repair its chronic leaking, which directly interfered with the tenant's business by depriving it of a substantial benefit significant to the purpose of the lease); RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 7.1. The power to sign the Easement Agreement is exclusively within the control of the McKays, and as the Court noted in Wesson v. Leone Enterprises, the reality of a commercial lease "contemplates a continuing flow of necessary services from landlord to tenant, services that are normally under the landlord's control." See 774 N.E.2d at 621. By failing to cooperate in, the McKays have not only breached the terms of the Lease, but they have acted in bad faith.

It is clear from the facts presented that the McKays' refusal to sign the Easement Agreement is not motivated by a reasonable dispute of the terms of the Lease or the obligations thereunder, but rather by the McKays' desire to increase their revenues at the expense of Crown and its Subtenants. This point became painfully clear at the March 20, 2002 meeting between the McKays and representatives of Crown in which Mr. McKay eliminated any pretext and demanded \$600.00 per month for his and his wife's signature on the Easement Agreement. (Barbadora Aff. ¶ 38.) The McKays already receive a substantial financial benefit from Crown and Crown's Subtenants and should not be rewarded for their efforts at extortion.

Even if this Court were to conclude that the Lease does not explicitly require the McKays to execute the Easement Agreement, such a requirement may be implied because Crown

justifiably understood that it would have the McKays' cooperation in operating its facility. See Stop & Shop, Inc., 200 N.E.2d at 251. The facts of the present case closely parallel those of Winchester v. O'Brien, where the court found that there was an implied covenant for the lessor not to interfere with his lessee's business. See 164 N.E. at 809. Just as the landlord in Winchester was implicitly required to refrain from harming his tenant's business, the McKays likewise must not be permitted to interfere with Crown's right and obligation to provide the essential operational services to the Subtenants.

From the undisputed facts presented, this Court could reasonably conclude that under the terms of the Lease Crown has the right to install fiber optic telephone lines in the already-existing conduit, and that the McKays are obligated to sign the Easement Agreement to facilitate this installation. Crown is therefore entitled to such legal and equitable relief as is necessary to remedy this material breach of the Lease.

**C. Crown is entitled to specific performance because the McKays have interfered with its unique, compelling, and significantly invested interest in the Property as a wireless telecommunications facility, to which there can be no wholly adequate remedy at law.**

As this Court is well aware, specific performance is an equitable remedy that may be granted within the sound discretion of the judge. Greenfield Country Estates Tenants Ass'n, 666 N.E.2d at 992. It may be granted if it does not impose an undue hardship upon a party or permit the moving party to obtain an inequitable advantage. Id. at 994. Although specific performance is generally not available to a party who can be adequately compensated at law, the availability of money damages does not bar a suit in equity for specific performance. Id. at 993.

Specific performance is especially appropriate in cases involving an interest in real property because "real property is unique and money damages will often be inadequate to address a deprivation of an interest in land." Id. Courts often grant specific performance in cases where a lessor breaches a covenant in a lease. Eg., Hook Brown Co. v. Farnsworth Press.

Inc., 203 N.E.2d 681, 684-85 (Mass. 1965); Carey's, Inc. v. Carey, 517 N.E.2d 850, 856 (Mass. App. Ct. 1988); Leisure Sports Inv. Corp. v. Riverside Enter., Inc., 388 N.E.2d 719, 722 (Mass. App. Ct. 1979).

Specific performance should be granted in favor of Crown because of the unique nature of its leasehold interest in the Property and the substantial investment it made in reliance on the McKays' promises in the Lease. Cell tower sites such as Crown's epitomize the uniqueness of an interest in land. See Greenfield Country Estates Tenants Ass'n, 666 N.E.2d at 993. The development of a location for a wireless telecommunications tower can require a time period of over eighteen (18) months from the site selection process through the permitting and construction of the tower facility. (Barbadora Aff. ¶ 12.) The process begins for a CMRS provider by analyzing gaps in wireless service coverage in geographical areas and then finding an appropriate site to build a facility to bridge the gaps in coverage. (Id. at ¶ 13.) Tower owners must then negotiate long-term leases with landowners, obtain easements from all necessary parties, and undergo a lengthy approval process with cities and towns. (Id. ¶ 12.) Once the tower is approved and constructed, subleases must be negotiated with CMRS providers for space on the tower, which often requires an amendment of the original lease, as in this case. (Id.) It is the very unique qualities of height and location that only one site will satisfy the necessary coverage objectives of the CMRS provider. (Id. ¶ 9.) A loss of any one site will cause a hole or gap in the coverage of a CMRS provider. Thus, tower owners like Crown make substantial investments of time, effort, and capital to acquire and maintain critical sites like the Tower in the present case.

Crown assumed the Lease and subleases with CMRS providers in reliance on the promises of the McKays in the Lease that it could operate a wireless telecommunications facility, and further, that the "Lessor...[would] take no action which would adversely affect the status of the Property with respect to the proposed use thereof by Lessee." (Duval Aff. ¶ 7, Ex. 4.) In doing so, Crown not only invested time and capital, but invested its reputation as a capable

provider of tower space for the nation's leading wireless companies. The investment Crown made based on its reliance on the McKays' promises in the Lease mirrors the actions of the plaintiff in Hook Brown Co. v. Farnsworth Press, Inc., who surrendered a lease and moved its business equipment in reliance on the promise of the defendant to lease space to the plaintiff. See 203 N.E.2d at 684-85. The court granted specific performance because of the plaintiff's unique interest in the property and its detrimental reliance on the defendant's promises. See id.

As evidenced by the fact that the six (6) major CMRS providers have sublet space on the Tower, the site uniquely satisfies the coverage objectives of the carriers for the Acton area. (Barbadora Aff. ¶ 14.) If Crown were not granted specific performance, it would not be able to meet the legitimate and crucial service, performance, and capacity needs of its Subtenants. (Id. at ¶ 41.) This failure could lead to a loss of Subtenants and the potential necessity of locating a new site, negotiating new leases, gaining local approval, and finding new subtenants. Such a disruption to operations at the Tower, coupled with the impending loss of goodwill and damage to Crown's reputation, cannot be adequately compensated at law. See Greenfield Country Estates Tenants Ass'n, 666 N.E.2d at 993.

Allowing Crown to install telephone lines would not enlarge its rights or give it any advantage over the McKays. As was explained by correspondence and at the meeting between Crown and the McKays, the fiber optic telephone line would be installed inside the existing underground conduit and therefore there should be no disruption to the McKays' operations at the Property. (Barbadora Aff. ¶ 37.) All that would be required of them is the signing of a standard document that is used nationwide by Verizon Communications. In fact, Crown persuaded Verizon to alter the language in the Easement Agreement to address the McKays' concerns about the removal of the equipment upon termination of the need for service to the Tower. (Duval Aff. ¶ 25, Ex. 16.) As provided in the Lease, Crown would also bear all expenses related to the installation. Crown therefore asks the Court to grant it specific

performance under the Lease by a permanent injunction preventing the McKays from interfering with its right to utilize the easement for the aforesaid purposes, and requiring the McKays to execute the Easement Agreement to facilitate the installation of telephone lines.

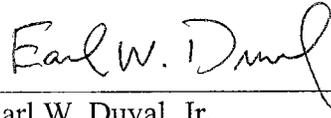
### CONCLUSION

The Court should grant Crown's motion for summary judgment because there is no genuine issue of material fact in dispute concerning the McKays' material breach of the Lease, and Crown is entitled to judgment as a matter of law. The Lease expressly allows Crown to install telephone lines and upgrade its technology at its discretion. The McKays must execute the Easement Agreement because the Lease requires them to cooperate with Crown, grant such further rights-of-way as may be required by a public utility company, and allow Crown the full enjoyment of its leasehold interest. The McKays' continued refusal to cooperate with Crown constitutes a material breach of contract.

No adequate legal remedy exists that could wholly compensate Crown for the injury it will suffer if it cannot enjoy the full use of its leasehold interests. Wireless tower sites such as Crown's are of such a unique nature that equitable relief, in the sound discretion of the court, is the only appropriate remedy. Granting Crown specific performance would not give it an inequitable advantage nor would it place any undue hardship on the McKays. The installation would be of minimal impact to the property, as it would take place in the existing conduit, and all equipment would be removed upon the termination of the need for the landline telephone service. Simply put, the copper wires would be taken out, and the fiber optic ones would be installed in their place. Crown therefore respectfully requests the Court to grant its motion for summary judgment.

Respectfully Submitted,

Crown Castle Atlantic LLC  
by its Attorney,



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Earl W. Duval, Jr.  
BBO # 565909



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Dated: 9.4, 2003

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COMMONWEALTH OF MASSACHUSETTS  
SUPERIOR COURT DEPARTMENT

Middlesex, SS.

Docket No. 03-2512

\*\*\*\*\*  
**CROWN CASTLE ATLANTIC, LLC,** \*  
**Plaintiff** \*  
 \*  
 vs. \*  
 \*  
**GUY A. MCKAY and SHERYLL MCKAY,** \*  
 \*  
**Defendants** \*  
 \*\*\*\*\*

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF  
OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

**I. RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS**

Pursuant to Superior Court Rule 9A(b)(5), below is the Defendants, Guy A.

McKay and Sheryll McKay's (hereinafter referred to as the "McKays") response to the Plaintiff, Crown Castle Atlantic, LLC's (hereinafter referred to as "Crown") statement of facts:

1. The McKays entered into a binding and enforceable Land Lease Agreement (hereinafter referred to as the "Lease") with Crown's predecessor in interest, Cellco Partnership d/b/a Bell Atlantic NYNEX Mobile ("BANM") on August 12, 1996, which was drafted by BANM. See Land Lease Agreement, (Exhibit 1), and Affidavit of Guy A. McKay and Sheryll E. McKay, (Exhibit 3), ¶ 2.
2. Under the terms of the Lease, the McKays agreed to lease "that certain parcel of property (hereinafter called "Property"), located at 982-988 Main Street, Acton,

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Massachusetts, and being described as a parcel containing about 3600 square feet, as shown on the attached Exhibit 'A1.'" See Exhibit 1, ¶ 1, and Cell Site Plan dated July 1996 and prepared by R.E. Cameron & Associates, Inc., for Bell Atlantic NYNEX Mobile (Exhibit 2), p. 2. This Plan was attached as Exhibit A1 to the Lease, but although the Lease was used as an exhibit in Crown's Complaint and its Motion for Summary Judgment, Crown did not include the Plan in either document.

3. Under the terms of the Lease, the McKays granted Crown's predecessor in interest "the non-exclusive right for ingress and egress, seven (7) days a week twenty-four (24) hours a day, on foot or motor vehicle, including trucks, and for the installation and maintenance of underground utility wires, cables, conduits, and pipes under, or along a fifteen (15') foot wide right-of-way extending from the nearest public right-of-way, Main Street, to the demised premises, *said Property and right-of-way for access being substantially as described herein in the attached Exhibit 'A1.'* See Exhibit 1, ¶1 (emphasis added), and Exhibit 2, p. 2. Again, Crown did not attach the Cell Site Plan to its Complaint or Motion for Summary Judgment, even though it specifically shows where the right-of-way granted under the Lease is located.
4. Under the terms of the Lease, the McKays agreed that "in the event any public utility is *unable to use* the aforementioned right-of-way, the Lessor hereby agrees to grant a *substitute* right-of-way either to the Lessee or to the public utility at no cost to the Lessee." See Exhibit 1, ¶ 1 (emphasis added). Also under the terms of the Lease, "all improvements shall be at Lessee's expense and the installation of

all improvements shall be at the discretion and option of the Lessee. See Exhibit 1, ¶ 7.

5. The McKays have no knowledge or information about any contract between BANM and Mirra Construction (hereinafter referred to as "Mirra") to install the existing underground conduit, or whether New England Telephone Company (hereinafter referred to as "NETC") installed its copper wire telephone line through the underground conduit at the Property, as the McKays were not parties to these contracts. See Exhibit 3, ¶¶ 3 and 4.
6. The McKays have no knowledge or information about whether Mirra installed the underground conduit running under the right-of-way from Main Street across the Property to the communications tower facility, as the McKays were not parties to this contract. See Exhibit 3, ¶ 5.
7. The McKays have no knowledge or information about whether NETC installed the telephone line in the underground conduit running under the right-of-way from Main Street across the Property to the tower, as the McKays were not parties to this contract. See Exhibit 3, ¶ 6.
8. The McKays did not request that the underground conduit running under the right-of-way from Main Street to the Property be located in a certain location. Rather, during construction of the communications tower facility, the McKays consulted with Crown's predecessor as to where the right-of-way granted in the Lease running from Main Street to the Property should be constructed, given the constraints of zoning including setback requirements, as well as the McKays' use of the remainder of their property. See Exhibit 3, ¶ 7.

9. The McKays entered into a binding and enforceable First Amendment to Land Lease Agreement (hereinafter referred to as the "Amendment") with Crown's predecessor in interest, Cellco Partnership, on November 10, 1997. See First Amendment to Land Lease Agreement (Exhibit 4).
10. Under the Amendment, the McKays agreed that the "Lessee has the right to sublet any portion of the Property, without consent of Lessor to any third party." Pursuant to the Zoning By-Law of the Town of Acton, purposes of the Special Requirements for Wireless Communication Facilities include limiting "the overall number and height of such facilities to what is essential to serve the public convenience and necessity" and promoting "the shared use of facilities to reduce the need for new facilities." Acton, Mass., Zoning By-Law § 3.10 (1997). As such, the McKays entered into several site license agreements as lessors with cellular telephone companies so that those companies could collocate their equipment within the leased property. The McKays maintain separate agreements with those companies for the use of the land within the 3600 square foot area, and Crown maintains separate agreements with those companies for connections to the communications tower. See Exhibit 4, ¶ 4.
11. By letter dated January 8, 1999, Attorney Michael S. Giaimo, legal counsel for Bell Atlantic Mobile ("BAM"), notified the McKays that BAM and Crown Castle International Corp. had formed a joint venture tower company, and that BAM assigned all of its right, title, interest and obligation under the Lease and the Amendment to the joint venture company. See Letter to the McKays from Attorney Michael S. Giaimo, (Exhibit 5), ¶ 1.

12. In his letter, Attorney Giaimo requested that the McKays indicate their consent to the assignment. See Exhibit 5, ¶ 4.
13. Before signing the letter from Attorney Giaimo, the McKays first inquired of BAM as to whether the assignment would change any terms of the Lease. They received a letter from Sheila R. Becker, Manager, Real Estate/Zoning for BAM, that the joint venture was to be owned 1/3 by BAM and 2/3 by Crown, but that nothing but the Lessee would change under the Lease. See Letter to the McKays from Sheila R. Becker (Exhibit 6), ¶ 1. Having received such assurance, the McKays indicated their consent to the assignment by signing the letter from Attorney Giaimo and mailing it back to him.
14. As per the Memorandum of Assignment provided by Crown at Exhibit 5 of its Complaint, on March 31, 1999, BAM assigned its interest in the Lease to Crown.
15. The McKays have no knowledge or information as to whether the tower is currently serviced by a copper wire telephone line that had been installed in the underground conduit, as they did not oversee the installation. See Exhibit 3, ¶ 8.
16. The McKays have no knowledge or information as to whether Bell Atlantic n/k/a Verizon Communications (hereinafter referred to as "Verizon") informed Crown that its predecessor, NETC, had not obtained an easement agreement with the McKays prior to initially installing the underground conduit and copper wire telephone lines, neither do the McKays have knowledge or information that the easement agreement would be necessary to install fiber optic telephone lines, as the McKays were not privy to the conversations between the aforementioned parties. See Exhibit 3, ¶¶ 9 and 10.

17. Although the Lease does permit Crown to update the telephone lines at the Property, the Lease does not require the McKays to execute a separate easement agreement with Crown or any third party. See Exhibit 1. The Lease granted a right-of-way in a specific location on the Property as identified on Exhibit 2, p. 2. This right-of-way is for the term of the lease only, and is not an easement. As stated in ¶ 4 of Section I of this Memorandum, the Lease states that "in the event any public utility is *unable to use* the aforementioned right-of-way, the Lessor hereby agrees to grant a *substitute* right-of-way either to the Lessee or to the public utility at no cost to the Lessee." See Exhibit 1, ¶ 1 (emphasis added). Unless and until this condition occurs, Crown is not entitled to a substitute right-of-way. Although not addressed in its Statement of Facts, Crown has alleged in the Argument section of its Memorandum in Support of Summary Judgment that Verizon Communications (hereinafter referred to as "Verizon") is unable to use the existing right-of-way. Crown does not explain why Verizon cannot use the existing right-of-way to install the fiber optic upgrades. See Crown Memorandum, Section I.B., p. 14. Moreover, even if Crown was entitled to a substitute right-of-way, such right-of-way would be in place of the existing right-of-way, not in addition to it. Crown has not even indicated where this proposed new right-of-way would be located, beyond language in its proposed easement that states, "It is agreed that the exact location of the facilities shall be established by the installation and placements of said facilities within said easement area." See Proposed Easement (Exhibit 7), ¶ 2. In any event, Crown is not entitled to two rights of way and is certainly not entitled to further encumber the McKays'

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land with an easement. Indeed, the Statement of Facts do not even allege that the McKays were required to sign the easement agreement, just that Crown has *reminded* the McKays that they are required to do so.

18. The McKays have refused to execute an easement agreement with Verizon because they are under no obligation to do so. See Defendants' Answer to Plaintiff's Complaint (Exhibit 8) , ¶ 41.
19. The McKays have no knowledge or information as to whether or not Verizon has installed the fiber optic telephone line to the Property, nor do the McKays have knowledge or information as to whether such is needed by Crown's subtenants. See Exhibit 3, ¶ 11. Regarding Crown's assertion that the upgrades are necessary in order to provide 911 service to its customers, during the summer of 2003, the McKays were approached by the Town of Carlisle Police Department about the possibility of the Department installing a police antenna to the communications tower so that they would be able to obtain 911 coverage in the Curve Street area of Carlisle. The McKays were agreeable to that arrangement, but they referred the Department to Crown because it is their tower. At this time, the McKays have not heard back from the Department or Crown regarding this issue, but are presenting it to show that the communications tower has 911 capabilities without the fiber optic upgrades. See Exhibit 3, ¶ 18.
20. From the beginning of the Lease period until the present day, the McKays have never obstructed Crown's use of the existing right-of-way granted under the Lease. See Exhibit 3, ¶¶ 12 and 13.
21. From the beginning of the Lease period until the present day, the McKays have

never prevented Crown from upgrading the existing underground landline telephone service to the telecommunications tower. See Exhibit 3, ¶¶ 12 and 13.

22. The McKays have repeatedly told Crown that, if they claim they have the right to do something under the Lease, then they are free to do so. See Exhibit 3, ¶ 14.
23. From the beginning of the Lease period, and continuing to the present time, the McKays have personally observed various personnel including cell technicians, repair technicians, and people delivering propane for the backup generator at the cell tower, performing work at the Property. The McKays have observed that these people access the Property by cars and trucks through the existing right-of-way. See Exhibit 3, ¶ 15.
24. The McKays stand ready, willing and able to allow Crown to continue to use the right-of-way as they always have in the past. See Exhibit 3, ¶ 16.
25. From the beginning of the Lease period up until the time Crown filed suit in June 2003, and especially at the March 20, 2002, meeting, various parties representing Crown have threatened to sue the McKays if they did not grant an easement. These parties include but are not limited to James Donahue, Jeffrey Barbadora, Earl Duval and Daniel Klasnick. When the McKays were originally approached in 2000 regarding Crown's demands for an easement, they attempted to negotiate with Crown changes to the existing Lease. Crown, through its representatives, cut off negotiations with the McKays by simply stating that if they did not grant an easement, they would be sued, even though Crown did not offer any additional consideration for the McKays' granting the easement. See Exhibit 3, ¶ 17.

## II. DEFENDANT'S ELEMENTS OF LAW

1. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass.R.Civ.P. 56(c).
2. The moving party bears the burden of affirmatively demonstrating the absence of a triable issue of fact and that it is entitled to judgment as a matter of law, and the moving party assumes this burden on every relevant issue, even on those issues on which it would have no burden if the case were to go to trial. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989), 532 N.E.2d 1211, 1213; *see also* Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716, 575 N.E.2d 734, 740 (1991).
3. "All doubt as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment." Correllas v. Viveiros, 410 Mass. 314, 316-17, 572 N.E.2d 7, 9 (1991). (Citing Attorney Gen. v. Bailey, 386 Mass. 367, 371, 436 N.E. 2d 139, 143 (1982)).
4. It is the function of the trial judge, in ruling on a summary judgment motion, to look beyond formal allegations of facts in the pleadings and to determine whether further explanation of facts is necessary. Quincy Mutual Fire Insurance Co. v. Abernathy, 393 Mass. 81, 87, 469 N.E.2d 797, 801 (1984).
5. In analyzing the record on summary judgment, a court looks first to the moving party's affidavits to determine whether the moving party has satisfied its burden of showing no genuine issue of material fact. Salem Building Supply Co. v. J.B.L. Construction Co., Inc., 10 Mass.App, 360, 364, 407 N.E.2d 1302, 1306

(1980).

6. "Summary judgment, when appropriate, may be rendered against the moving party." Mass.R.Civ.P. 56(c).
7. When both parties to a case set out essentially the same set of facts, the dispute is over what those facts mean, and in such case, summary judgment is appropriate. Genatossio v. Hanover Ins. Co., 6 Mass.L.Rptr. 619, 1997 WL 225694, 2 (Mass.Super. 1997).
8. "On a party's motion for summary judgment, judgment may pass for his opponent if the record warrants it, even in the absence of a cross-motion for that relief." Charlesbank Apartments, Inc. v. Boston Rent Control Administration, 379 Mass. 635, 636 n.2, 399 N.E.2d 1078, 1079 n.2 (1980).
9. A court may order full summary judgment even where a party only moves for partial summary judgment, provided the court gives sufficient notice to the parties, an opportunity for the parties to submit affidavits, and a right to be heard on the matter. Gamache v. Mayor of N. Adams, 17 Mass.App.Ct. 291, 296-296, 458 N.E. 2d 334, 337 (1983).
10. If the parties essentially agree on the facts, but the dispute is regarding the legal implications of those facts, the dispositive issue is purely one of law. Can-Am Drilling & Blasting Co., Inc. v. Intercoastal Development Corp., 1996 Mass.App.Div. 14, 1996 WL 63034, 3 (1996).
11. "When the words of a contract are clear they alone determine the meaning of the contract but, when a contract term is ambiguous, its import is ascertained from the parties' intent ..." Merrimack Valley Nat. Bank v. Baird, 372 Mass. 721, 723-24,

363 N.E.2d 688, 690 (1977).

12. "An omission to specify an agreement in a written lease is evidence that there was no such understanding." Stop & Shop, Inc. v. Ganem, 347 Mass. 697, 701, 200 N.E.2d 248, 251 (1964) (Citing Snider v. Deban, 249 Mass. 59, 65, 144 N.E. 69, 72 (1924)).
13. "Covenants [in a contract] will not be extended by implication unless the implication is clear and undoubted." Id. (Citing Smiley v. McLauthlin, 138 Mass. 363, 364-365 (1884)).
14. The intent of the parties to a contract is manifested by "the circumstances surrounding [the Lease's] creation, such as relationship of the parties, actions of the parties and established business usages." Merrimack at 724; 363 N.E.2d at 690.
15. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Donaldson v. Farrakhan, 436 Mass. 94, 96, 762 N.E.2d 835, 837 (2002) (Quoting Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2512, 477 U.S. 242, 252 (1986)).
16. Where a lease "has terms that are ambiguous, uncertain, or equivocal in meaning, the intent of the parties is a question of fact to be determined at trial." Seaco Ins. Co. v. Barbosa, 435 Mass. 772, 779, 761 N.E.2d 946, 951 (2002).
17. The word "substitute" is defined as "that which stands in the place of another; that which stands in lieu of something else." Black's Law Dictionary 1429 (6th ed. 1990).

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18. An easement is an interest in land and it must be in writing to be enforceable. Mass. Gen. Laws ch. 259, § 1; Cook v. Stearns, 11 Mass. 533, 536 (1814).
19. "Ambiguous language in an agreement is to be construed against the drafter of the agreement." DeMoulas v. DeMoulas Super Markets, Inc., 424 Mass. 501, 570 n.72, 677 N.E.2d 159, 203 n.72 (1997) (Citing Massachusetts Turnpike Auth. v. Perini Corp., 349 Mass. 448, 454, 208 N.E.2d 807, 812 (1965)).
20. Intent of the parties to a contract can be shown by the parties' conduct, prior dealings, or established trade usage. Restatement (Second) of Contracts § 203 (1981).

### **III. ARGUMENT**

#### **A. Standard for Summary Judgment**

The standard for summary judgment is set forth in Rule 56 of the Massachusetts Rules of Civil Procedure, which provides in part "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Mass.R.Civ.P. 56(c).

Crown, the moving party, bears the burden of affirmatively demonstrating the absence of a triable issue of fact and that it is entitled to judgment as a matter of law.

Pederson v. Time, Inc., 404 Mass. 14, 17 (1989), 532 N.E.2d 1211, 1213; *see also*

Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716, 575 N.E.2d 734, 740

(1991). Crown assumes this burden on every relevant issue, even on those issues on

which it would have no burden if the case were to go to trial. Pederson at 17, 532 N.E.2d

at 1213. Moreover, "all doubt as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment." Correllas v. Viveiros, 410 Mass. 314, 316-17, 572 N.E.2d 7, 9 (1991). (Citing Attorney Gen. v. Bailey, 386 Mass. 367, 371, 436 N.E. 2d 139, 143 (1982)).

It is the function of the trial judge, in ruling on a summary judgment motion, to look beyond formal allegations of facts in the pleadings and to determine whether further explanation of facts is necessary. Quincy Mutual Fire Insurance Co. v. Abernathy, 393 Mass. 81, 87, 469 N.E.2d 797, 801 (1984). In analyzing the record on summary judgment, a court looks first to the moving party's affidavits to determine whether the moving party has satisfied its burden of showing no genuine issue of material fact. Salem Building Supply Co. v. J.B.L. Construction Co., Inc., 10 Mass.App, 360, 364, 407 N.E.2d 1302, 1306 (1980).

In addition, "summary judgment, when appropriate, may be rendered against the moving party." Mass.R.Civ.P. 56(c). When both parties to a case set out essentially the same set of facts, the dispute is over what those facts mean, and in such case, summary judgment is appropriate. Genatossio v. Hanover Ins. Co., 6 Mass.L.Rptr. 619, 1997 WL 225694, 2 (Mass.Super. 1997). "On a party's motion for summary judgment, judgment may pass for his opponent if the record warrants it, even in the absence of a cross-motion for that relief." Charlesbank Apartments, Inc. v. Boston Rent Control Administration, 379 Mass. 635, 636 n.2, 399 N.E.2d 1078, 1079 n.2 (1980). Further, a court may order full summary judgment even where a party only moves for partial summary judgment, provided the court gives sufficient notice to the parties, an opportunity for the parties to submit affidavits, and a right to be heard on the matter. Gamache v. Mayor of N. Adams,

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17 Mass.App.Ct. 291, 296-296, 458 N.E. 2d 334, 337 (1983).

**B. The Legal Implications of the Material Facts Preclude Finding Summary Judgment for Crown and Mandate Entering Summary Judgment for the McKays**

In this case, the dispositive issue is purely one of law, because the McKays and Crown essentially agree on the facts, but the dispute is regarding the legal implications of those facts. Can-Am Drilling & Blasting Co., Inc. v. Intercoastal Development Corp., 1996 Mass.App.Div. 14, 1996 WL 63034, 3 (1996). Crown, as the moving party, has not met its burden of showing that the resolution of the issues of material fact necessitate a finding of summary judgment in its favor. The issue in this case is whether or not the McKays are obligated under the Lease to execute an easement agreement to Verizon. This is a matter of contract interpretation, and thus one of law.

**1. Both of Crown's arguments -- that the Lease is unambiguous and that it is ambiguous -- fail to show that the McKays are obligated to grant an easement**

In its Memorandum of Law in Support of its Motion for Summary Judgment, Crown's arguments are incongruous. See Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment. Crown argues both that the Lease is unambiguous and that the covenant on which it bases its claim for breach of contract -- that the McKays are obligated to grant Crown an easement -- is implied. Id., p. 12. "When the words of a contract are clear they alone determine the meaning of the contract but, when a contract term is ambiguous, its import is ascertained from the parties' intent ..." Merrimack Valley Nat. Bank v. Baird, 372 Mass. 721, 723-24, 363 N.E.2d 688, 690 (1977).

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If Crown's assertion that the contract is unambiguous is to stand, then there would be no reason to look to the parties' intent in forming the contract. Crown states that the lease requires the McKays to execute an easement agreement, yet nowhere in the lease is this language found. See Exhibit 1. "An omission to specify an agreement in a written lease is evidence that there was no such understanding." Stop & Shop, Inc. v. Ganem, 347 Mass. 697, 701, 200 N.E.2d 248, 251 (1964) (Citing Snider v. Deban, 249 Mass. 59, 65, 144 N.E. 69, 72 (1924)). Therefore Crown is wrong in stating that this is an unambiguous term in the Lease.

Since this is not an unambiguous term in the Lease, we would look to the intent of the parties in forming the contract. "Covenants will not be extended by implication unless the implication is clear and undoubted." Id. (Citing Smiley v. McLauthlin, 138 Mass. 363, 364-365 (1884)). The intent of the parties to a contract is manifested by "the circumstances surrounding [the Lease's] creation, such as relationship of the parties, actions of the parties and established business usages." Merrimack at 724; 363 N.E.2d at 690. Crown has proffered no evidence in any of these areas to show that the intent of the parties was for the McKays to grant an easement under the Lease. Crown has made nothing but a bald assertion that such in the case. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Donaldson v. Farrakhan, 436 Mass. 94, 96, 762 N.E.2d 835, 837 (2002) (Quoting Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2512, 477 U.S. 242, 252 (1986)). A reasonable jury could not find for Crown on the evidence it has presented.

Also, if Crown's assertion that we need to look at the intent of the parties in

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forming the Lease stands, this implied term is by definition ambiguous. Where, as here, a lease "has terms that are ambiguous, uncertain, or equivocal in meaning, the intent of the parties is a question of fact to be determined at trial." Seaco Ins. Co. v. Barbosa, 435 Mass. 772, 779, 761 N.E.2d 946, 951 (2002). Therefore, Crown cannot prevail on its Motion for Summary Judgment were the court to find that the term at issue in the contract is ambiguous.

**2. Whether the Court finds that the Lease is unambiguous or ambiguous, the McKays are not obligated under the Lease to grant an easement**

In contrast to Crown's position, the McKays are entitled to summary judgment whether the court finds that the Lease is clear or unclear.

**a. It is clear that the Lease does not obligate the McKays to grant an easement**

First, the Lease is clear on the issue that it does *not* obligate the McKays to grant an easement. As stated in Section I of this Memorandum, at ¶ 3, under the terms of the Lease, the McKays granted Crown's predecessor in interest "the non-exclusive right for ingress and egress, seven (7) days a week twenty-four (24) hours a day, on foot or motor vehicle, including trucks, and for the installation and maintenance of underground utility wires, cables, conduits, and pipes under, or along a fifteen (15') foot wide right-of-way extending from the nearest public right-of-way, Main Street, to the demised premises."

Such right-of-way is drawn on a plan that was Exhibit A1 to the Lease, and is attached as Exhibit 2 to this Memorandum. This provision is very clear as to what the McKays grant for access and installation at the site, and does not contemplate the granting of some

future easement to either Crown's predecessor in interest, or any third party.

The only condition under which a different *right-of-way* would be granted is stated in Section I of this Memorandum at ¶ 4, and states, "in the event any public utility is unable to use the aforementioned right-of-way, the Lessor hereby agrees to grant a substitute right-of-way either to the Lessee or to the public utility at no cost to the Lessee."

Crown has offered two mutually exclusive premises upon which it bases its argument that the McKays must grant an easement. Crown states that "Verizon Communications is currently unable to use the existing Right-of-Way, and therefore the Lease obligates the McKays to execute the Easement Agreement." Crown does not explain why Verizon cannot use the existing right-of-way to install the fiber optic upgrades. See Crown Memorandum, Section I.B., p. 14. Then Crown states that it "has the right to install fiber optic telephone lines in the already-existing conduit, and that the McKays are obligated to sign the Easement Agreement to facilitate this installation." Crown Memorandum, Section I.B., p. 16. If in fact Crown wants to install fiber optic telephone lines in the already existing conduit, this begs the question of how it proposes to do this if, as it claims, the company that is to install the lines, Verizon, is unable to use the existing right-of-way, which contains the existing conduit.

To the contrary, the condition in the Lease specifies that if a public utility is unable to use the right-of-way granted under the Lease, Crown would be entitled to a substitute right-of-way. Even if Crown were entitled to a substitute right-of-way, such right-of-way would be in place of the existing right-of-way, not in addition to it, as the word "substitute" is defined as "that which stands in the place of another; that which

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stands in lieu of something else." Black's Law Dictionary 1429 (6th ed. 1990). Crown has not specified a) whether it wants a new right-of-way and will surrender the existing right-of-way or b) whether it wants a new right-of-way in addition to the existing one. Crown has not indicated, nor provided plans for, where this proposed new right-of-way would be located, beyond language in its proposed easement that states, "It is agreed that the exact location of the facilities shall be established by the installation and placements of said facilities within said easement area." See Proposed Easement (Exhibit 7), ¶ 2. In any event, Crown is not entitled to two rights of way and is certainly not entitled to further encumber the McKays' land with an easement.

**b. The obligation for the McKays to grant an easement is not an implied term in the Lease**

Second, if the court finds that the Lease is unclear as to whether or not it obligates the McKays to grant an easement, Crown also fails on that argument, and the reasons are twofold. The first is that the Lease states, "It is agreed and understood that this Agreement contains all agreements, promises and understandings between the Lessor and Lessee and that no verbal or oral agreements, promises or understandings shall be binding upon either the Lessor or Lessee in any dispute, controversy or proceeding at law, and any addition, variation or modification to this Agreement shall be void and ineffective unless made in writing and signed by the Parties." See Exhibit 1, ¶ 15. Therefore, even if Crown produced some evidence to show the intent of the parties for the McKays to grant an easement, they have produced nothing in writing signed by both Crown and the McKays, and so would not be able to show the contemplated easement that way. Indeed, even if this language did not exist in the Lease, an easement is an interest in land and it

must be in writing to be enforceable. Mass. Gen. Laws ch. 259, § 1; Cook v. Stearns, 11 Mass. 533, 536 (1814).

The second is that Crown's predecessor is the party who drafted the Lease. See Exhibit 3, ¶ 2. "Ambiguous language in an agreement is to be construed against the drafter of the agreement." DeMoulas v. DeMoulas Super Markets, Inc., 424 Mass. 501, 570 n.72, 677 N.E.2d 159, 203 n.72 (1997) (Citing Massachusetts Turnpike Auth. v. Perini Corp., 349 Mass. 448, 454, 208 N.E.2d 807, 812 (1965)). Since Crown is the successor to the drafter of the Lease and was assigned all of its successor's right, title, interest and obligation under the Lease (see Exhibit 5), any ambiguity shall be construed against Crown.

In sum, both of Crown's arguments that the Lease obligates the McKays to grant an easement fail. Its argument that the term of the Lease that requires the McKays to grant an easement is unambiguous fails because there is no such express term in the Lease. Correspondingly, its argument that such term shall be implied by the intent of the parties also fails because not only does such an ambiguous term get construed against Crown, but also Crown has shown no evidence of intent to grant an easement by the parties' conduct, prior dealings, or established trade usage. Restatement (Second) of Contracts § 203 (1981). Most importantly, Crown has produced no writing to show an easement agreement, which is required by the Statute of Frauds and the Lease itself.

**C. The McKays have not Breached the Lease and have not Interfered with Crown's Advantageous Relations**

The only obligation under the Lease that Crown alleges the McKays breached is to grant an easement. Because the McKays are under no obligation to grant an easement

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to Crown, Verizon, or any party, their refusal to do so is not a breach of the Lease. Count I of Crown's Complaint is Breach of Contract, and that is the only count upon which Crown moves for summary judgment. However, Count II, Interference with Advantageous Relations, is directly predicated on Count I. Because the McKays are not in breach of contract, it follows that they also have not interfered with Crown's advantageous relations. As such, the McKays respectfully request this Court to order full summary judgment even though Crown has only moved for partial summary judgment. Gamache v. Mayor of N. Adams, 17 Mass.App.Ct. 291, 296-296, 458 N.E. 2d 334, 337 (1983). The McKays incorporate all the arguments herein for the Court to enter summary judgment for the McKays on Counts I and II of Crown's Complaint.

**D. Conclusion**

For the reasons set forth above, this Court should 1) Deny Crown's Motion for Summary Judgment; 2) Enter summary judgment for the McKays; and 3) Grant such further relief as this Court deems just and proper.

Respectfully submitted,  
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By their attorney:

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