

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPARTMENT  
CIVIL ACTION NO. \_\_\_\_\_

THE NEIMAN MARCUS GROUP LLC and  
NMG TERM LOAN PROPCO LLC,

*Plaintiffs,*

v.

COPLEY PLACE ASSOCIATES, LLC,

*Defendant.*

**VERIFIED COMPLAINT**

Plaintiffs THE NEIMAN MARCUS GROUP LLC (“Neiman Marcus”) and NMG TERM LOAN PROPCO LLC (“Propco,” and together with Neiman Marcus, the “Plaintiffs”) bring this action against Defendant COPLEY PLACE ASSOCIATES, LLC (“CPA” or “Defendant,” and together with Plaintiffs, the “Parties”) seeking specific performance and damages for breach of contract. Plaintiffs seek lost profits, amounts due under the Parties’ agreement, and attorneys’ fees, as well as other fees and damages incurred as a result of CPA’s breach of contract and subsequent misrepresentation, as well as specific performance and declaratory judgment.

**INTRODUCTION**

1. Neiman Marcus is a renowned specialty store dedicated to merchandise leadership and superior customer service. Since 1907, Neiman Marcus has offered shoppers an elevated experience, combining the finest fashion and quality products in a welcoming environment. In furtherance of that mission, Neiman Marcus has operated a luxury department store at Copley Place since the 1980s.

2. Copley Place is one of Boston's premier luxury shopping mall destinations. Copley Place is operated by CPA, a subsidiary of Simon Property Group, Inc. ("SPG", or, with CPA, "Simon Property"), which is a publically-traded, real estate investment trust that invests in shopping malls, outlet centers, and community/lifestyle centers, and is one of the largest owners of shopping malls in the United States.

3. In or around 2014, Simon Property embarked on a plan to expand Copley Place by constructing a residential tower above the Neiman Marcus store (the "Tower Project").

4. For Simon Property to build the support columns for the Tower Project, it needed Neiman Marcus to vacate a part of its store and significantly reorganize the remaining portions, including building temporary walls and reducing or eliminating certain departments.

5. Neiman Marcus understood that contracting the store and placing it in a temporary, subpar condition would negatively impact sales and the customer experience, and would cause it to lose profits in the short term. Neiman Marcus, however, was willing to suffer this temporary negative impact in exchange for obtaining a larger, fully renovated store and new lease terms, which CPA promised to provide.



Rendering of a renovated Neiman Marcus Store at Copley Place<sup>1</sup>

6. To that end, on January 15, 2016, Neiman Marcus and CPA entered into the Fifth Amendment to Lease (the “Fifth Amendment”, attached hereto as **Exhibit A**).

7. Under the Fifth Amendment, CPA was entitled to reduce the size of Neiman Marcus’s store to allow for the construction of support columns for the Tower Project in exchange for Neiman Marcus’s receipt of, among other things, (i) contractually-defined Landlord’s Work toward an expanded and fully renovated store; (ii) a \$27 million contribution to pay for renovations; and (iii) updated lease terms, providing, among other things, protections if CPA’s delivery of the expanded store was delayed.

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<sup>1</sup> Copley Place Retail Expansion and Residential Addition Project Summary (“Copley Place Retail Expansion”), at 15, <http://www.bostonplans.org/getattachment/1867fa8a-3264-466c-9f87-60a1fa695170>.

8. The Fifth Amendment permitted CPA to void this new deal in only one limited instance: “in the event [CPA] is **unable** to obtain all necessary [governmental] Approvals to perform and complete such redevelopment and expansion project [the Tower Project].” (Emphasis added.)

9. Moreover, upon information and belief, Simon Property, a sophisticated commercial property developer familiar with the Boston market, knew that obtaining permits from the Massachusetts Department of Transportation (“MassDOT”), as would be required for the Tower Project, could be difficult and time-consuming. Thus, the Parties built flexibility into the Fifth Amendment to allow for changes to the plans for the Tower Project to accommodate governmental requirements.

10. Despite its knowledge that, given its size and location, the Tower Project would present significant complexities, Simon Property repeatedly expressed its confidence that, given its unparalleled development expertise, it could navigate the Tower Project to a successful conclusion.

11. Following execution of the Fifth Amendment, Neiman Marcus immediately performed, allowing the reduction in the size of the store, the construction of temporary walls, the rearrangement of the store, and the loss or reduction of certain departments.

12. Yet on or about October 18, 2016—only ten months after signing the Fifth Amendment and after Simon Property had obtained all but one of the necessary governmental approvals—Simon Property advised Neiman Marcus that it was cancelling the Tower Project and purported to void the Fifth Amendment, claiming that it was doing so because it was unable to obtain all the necessary governmental approvals.

13. Simon Property's claim that it was unable to obtain all necessary approvals, however, was contradicted by its own statements made a week later. On October 26, 2016, SPG's Chief Executive Officer advised stock analysts, in an earnings call in which SPG was obligated by securities laws to provide materially accurate disclosures, that Simon Property would likely "postpone the construction of the Copley Residential Tower due to the ***rapidly rising construction cost*** and our beginning ***concerns around supply and demand*** in the Boston residential market" and that the Tower Project may be reinstated "***as market conditions warrant.***" In explaining why Simon Property was considering postponement, he stressed that Simon Property "would encourage everybody to study what's going on in ***construction cost*** and what's going on in ***supply and demand there . . . the reality is when we started seeing the construction cost, it just – not the right time to do it, with all the supply and the cost there . . . In the case of Copley, I got nervous about it. I'd be the first to admit.***" Rather than assert that Simon Property cancelled the Tower Project because it was "*unable to obtain all necessary Approvals,*" he asserted that Simon Property would exercise "*the right judgment . . . when to pull the plug on Copley and when not.*" (Emphases added.)

14. SPG's statements to the investing public and in public filings subject to securities laws never claim that Simon Property was unable to obtain the final governmental approval.

15. Neiman Marcus, however, did not grant CPA the right to void the Fifth Amendment simply because of some uncertainty or concern over how much money Simon Property might make on the Tower Project. Had CPA been permitted to do so, it could have stripped Neiman Marcus of its contractual benefits, after saddling it with the burden of the store's disruption and lost profits. Yet that is precisely what Simon Property did when CPA impermissibly voided the Fifth Amendment based on the cancellation of the Tower Project.

16. In essence, CPA induced Neiman Marcus to endure the business disruption and degradation of the store premises necessary to allow CPA to pursue the potential profit of the Tower Project on the basis of the promises that CPA made to Neiman Marcus, and then when that profit potential turned out to be less than anticipated, CPA sought to avoid its contractual obligations.

17. Now, almost six years later, as a result of CPA's wrongful termination and breaches of the Fifth Amendment, the Copley Place Neiman Marcus remains in its reduced and temporary condition, which continues to have a significant impact on sales and profits. Neiman Marcus did not bargain for this outcome in the Fifth Amendment, and it should not be forced to suffer these effects to accommodate Simon Property's effort to protect its own profit margins.

18. Instead, Neiman Marcus is entitled to the benefits of a new, fully renovated, modern store, along with the \$27 million CPA promised to contribute to the construction and renovation, the tens of millions of dollars in lost profits Neiman Marcus has suffered in the contracted store, and benefits of the new lease terms contained in the Fifth Amendment.

### **PARTIES**

19. Neiman Marcus is a limited liability company organized under the laws of Delaware with its usual place of business at One Marcus Square, 1618 Main Street, Dallas, Texas 75201, in Dallas County, Texas.

20. Propco is a limited liability company organized under the laws of Delaware with its usual place of business at One Marcus Square, 1618 Main Street, Dallas, Texas 75201, in Dallas County, Texas.

21. CPA is a limited liability company organized under the laws of Delaware with its usual place of business at 2 Copley Place, Boston, Massachusetts 02116, in Suffolk County, Massachusetts.

### **JURISDICTION & VENUE**

22. This Court has personal jurisdiction over Defendant, pursuant to M.G.L. c. 223A, § 3, based on Defendant's ownership and operation of Copley Place, a shopping center located in Boston, Massachusetts.

23. Venue, pursuant to M.G.L. c. 223, § 1, is proper in Suffolk County, Massachusetts because of Defendant's ownership and operation of Copley Place, a shopping center located in Boston, Massachusetts.

### **STATEMENT OF FACTS**

#### *The Lease at Copley Place*

24. On November 23, 1981, Urban Investment and Development Co. and Carter Hawley Hale Stores, Inc. entered into a lease (the "Lease", attached hereto as **Exhibit B**) for certain premises located at Copley Place (the "Leased Premises").

25. Since that date and through the present, Neiman Marcus has operated a luxury department store at the Leased Premises (the "Store").

26. CPA is the current successor-in-interest to the landlord under the Lease.

27. CPA is a wholly owned subsidiary of SPG, which controls its operation and management.

28. Propco, a wholly owned subsidiary of Neiman Marcus, is currently the successor-in-interest to the tenant under the Lease.

29. Neiman Marcus was the successor-in-interest to the tenant when the Fifth Amendment was negotiated and signed, and at the time of CPA's breach in October 2016.

30. On September 4, 2019, Neiman Marcus entered into an Assignment with Propco, whereby Neiman Marcus assigned its interest in the Lease to Propco. On the same date, Propco subleased its interest in the Lease to Neiman Marcus. Presently, Neiman Marcus is Propco's subtenant at the Leased Premises and continues to operate a luxury department store there. The terms of the Assignment left Neiman Marcus's and CPA's relationship unaffected for all practical purposes. Following the Assignment, Neiman Marcus remained "liable and responsible for the payment, performance and discharge of all liabilities, obligations, covenants and agreements under the Lease." Neiman Marcus was permitted to make this assignment and Section 39 of the Lease, regarding successors and assigns, states that "[a]ll covenants and agreements of this Lease shall run with the land for the term of this Lease."

*Neiman Marcus and CPA Execute the Fifth Amendment*

31. In or about 2014, Simon Property planned an extensive redevelopment of Copley Place. As a part of this redevelopment, it planned to construct the Tower Project, a residential tower above the Store. It was widely reported that the Tower Project was budgeted as a \$500 million development.

32. To allow construction of the structural support columns for the residential tower, Simon Property needed to wall-off and take back control of a portion of the Store.

33. CPA, however, had no right under the Lease to contract the store or undertake a construction project in a portion of the Store, which inevitably would cause significant disruption.

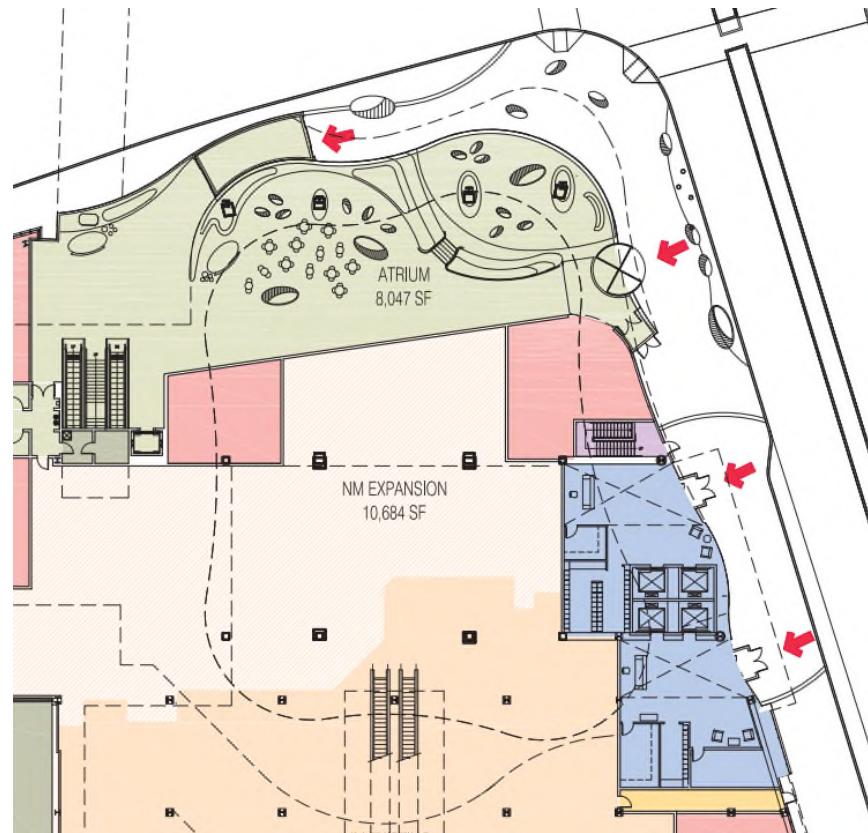
34. Simon Property undertook to persuade Neiman Marcus that the Tower Project would be highly beneficial to Neiman Marcus, that Simon Property had exceptional development

experience that would allow them to successfully complete the Tower Project, and that CPA would amend the Lease to provide material economic benefits and inducements to Neiman Marcus in exchange for agreeing to the temporary contraction and the disruption.

35. Following those discussions and negotiation of a lease amendment, CPA and Neiman Marcus entered into the Fifth Amendment on January 15, 2016.

36. In exchange for the disruption of losing retail space and operating in a construction zone, CPA agreed to provide Neiman Marcus with the benefits of an expanded, modern, and fully renovated store, including, among other things, (i) an expanded space, and contractually defined Landlord's Work toward the fully renovated store, (ii) a \$27 million contribution ("Landlord's Contribution") towards construction of the new store ("Tenant's Expansion Work"), and (iii) updated lease terms, which contained protections for any delay in the Tower Project.

37. With regard to Landlord's Work, CPA agreed "at its sole cost and expense, [to] renovate and/or construct a portion of the Existing Premises, the Reduced Premises and the Expansion Premises," to be "commence[d] and diligently pursue[d]" "[f]ollowing the receipt of all necessary Approvals." Ex. A, Fifth Amendment § 10(a)-(b). The Expansion Premises included "approximately 12,948 additional gross square feet" of Store space. *Id.*, at 1. After construction of the Expansion Premises, the Leased Premises would "include the Existing Premises and the Expansion Premises for all purposes of the Lease and the Leased Premises shall contain a total of 128,899 gross square feet." *Id.* § 2.



A drawing of the expanded store, including thousands of additional square feet.<sup>2</sup>

38. Landlord's Contribution of \$27 million would be "paid to Tenant in quarterly installments after commencement of Tenant's Expansion Work in the amount requisitioned by Tenant." *Id.* § 12(a). Tenant's Expansion Work is defined as "all work required to place the Leased Premises (including the Existing Premises and the Expansion Premises) in a condition ready to open for business in the Leased Premises. *Id.* § 11(a).

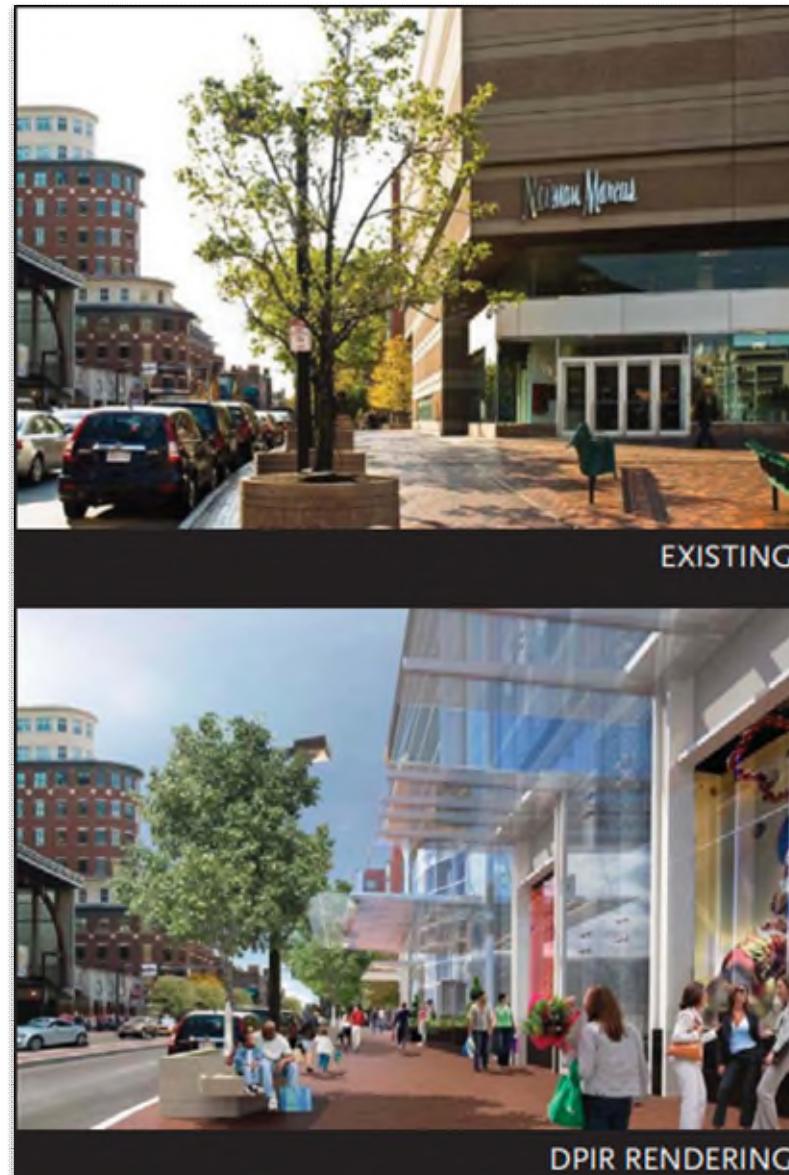
39. With regard to the new lease terms, CPA agreed to provide Neiman Marcus a rent abatement if the Tower Project were delayed: "[I]n the event that the Delivery Date [substantial completion of Landlord's Work] has not occurred by [] March 1, 2021[,]” Neiman Marcus's rent

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<sup>2</sup> Copley Place Retail Expansion, at 20.

would revert to “the lesser of: (a) Tenant’s then-current annual Rent plus Common Area Charge . . . or (b) two percent (2%) of Tenant’s Gross Sales.” *Id.* § 9(b).

40. CPA has never provided any of these bargained-for benefits.



Side-by-side rendering of the renovated façade.<sup>3</sup>

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<sup>3</sup> Copley Place Retail Expansion, at 28.

*Neiman Marcus Undertakes a Significant Contraction of its Store*

41. Under the Fifth Amendment, Neiman Marcus had to undertake the contraction of the store, “temporarily reduc[ing] the size of [its] Existing Premises,” *Id.*, § 16(a), and rearranging its departments.

42. Specifically, Neiman Marcus had to:

- “provide temporary partitions, walls, perimeter fixturing, finishes, ceiling and flooring” (*id.* § 16(b));
- “relocate, modify or replace [] store operating equipment (such as stock shelving, fixturing, sales equipment)” (*id.*);
- “relocate and reconnect utilities (including mechanical, electric and plumbing, security, CCTV, intrusion alarm, fire alarm, fire sprinkler, cable service and telephone) within the Reduced Premises” (*id.*);
- “[r]elease and/or provide rooftop smoke purge fans, rooftop ductwork, including all structure, controls, etc. to tie back into the existing ductwork, in accordance with applicable code” (*id.*, Ex. E); and
- “relocate[e] all necessary vendor shops to the Reduced Premises and complet[e] all other work required to place the Reduced Premises in a finished condition ready to open for business” (*id.* § 16(b)).

43. Neiman Marcus also had to temporarily relocate a portion of its Store to a wholly separate, non-contiguous area of the mall, and “place [those] Premises in a finished condition ready to open for business.” *Id.* § 15(b).

44. Neiman Marcus performed in accordance with each of the above terms.

45. Neiman Marcus reduced the square footage of its Store, rearranged its remaining retail space, and moved a portion of its Store to a separate area of the mall. Neiman Marcus also complied with all applicable phasing plans and the construction schedule.

46. In complying with these obligations, Neiman Marcus put the Store into what it thought would be a temporary condition, with mismatched floors and ceilings, fewer sections,

temporary walls, and an incongruous layout. As a result, the Store did not meet Neiman Marcus's normal design standards, which Neiman Marcus anticipated would hurt sales. It did so only because CPA had promised Neiman Marcus the benefit of an expanded, modern, and fully renovated store.

*CPA Misleads Neiman Marcus about Its Basis for Voiding the Fifth Amendment*

47. In convincing Neiman Marcus to enter into the Fifth Amendment, CPA stressed that Simon Property was an incredibly experienced developer that had the expertise and resources to develop the project and obtain the necessary governmental approvals.

48. To cement its commitment, CPA agreed to "diligently prosecute its application for any required permits and approvals to meet the deadlines set forth in the Phasing Plans and shall cooperate with, and make such reasonable changes as may be reasonably required by, the applicable government agency." *Id.* § 10(b).

49. Fully anticipating that changes to the scope of the Tower Project could be required to obtain the necessary governmental approvals and the Parties' commitment to do what was needed to get the project developed, the Parties acknowledged and agreed that "changes to Landlord's Work and Tenant's Work may be required due to governmental requirements, current building codes and other causes outside the control of Landlord and Tenant. Landlord and Tenant shall make reasonable efforts to accommodate the other party with regard to such changes." *Id.* § 23.

50. Finally, the Fifth Amendment provides only one limited basis under which CPA could unilaterally void the Fifth Amendment; Section 23, entitled “Government Approvals; Contingency,” states:

***[I]n the event [CPA] is unable to obtain all necessary Approvals to perform and complete such redevelopment and expansion project, [CPA] shall have the option to provide Tenant written notice of such failure and the terms and provisions of this Amendment shall be null and void*** and the parties shall continue to abide by the terms of the Lease that were in effect prior to the execution of this Amendment; provided however, Landlord shall reimburse Tenant for any and all actual out of pocket and/or third party costs related to this Amendment and Landlord shall return and restore the Leased Premises to a condition substantially similar to the condition of the Leased Premises prior to the commencement of Landlord's Work.” (Emphasis added.)

51. Section 23 of the Fifth Amendment defines Approvals as “all necessary governmental and related public agency approvals.”

52. On or about October 18, 2016, David Contis of Simon Property orally informed Neiman Marcus that Simon Property was unable to obtain the necessary Approvals and, therefore, CPA was voiding the Fifth Amendment under Section 23.

53. Neither Mr. Contis nor anyone else at Simon Property provided Neiman Marcus with “written notice of [the] failure” to obtain such Approvals, as required under the Fifth Amendment.

54. At the time that Mr. Contis delivered this news, the Store was already operating in the contracted and subpar space.

55. The Store had significantly reduced square footage, with a less efficient and appealing space, with inconsistent ceiling tiles, and mismatched flooring, as well as an incongruous layout due to the substantial modifications that the Fifth Amendment had required Neiman Marcus to complete.

56. Contrary to its public statement and securities filings, Simon Property did not advise Neiman Marcus that it was cancelling the Tower Project because of rapidly rising construction costs, concerns around supply and demand in the Boston residential market, or simply because of some uncertainty in obtaining Approvals or a change in approval dynamics.

57. Based on Simon Property's misrepresentation, Neiman Marcus believed that the Fifth Amendment had been properly voided and that it had no alternative but to obtain from CPA, pursuant to Section 23 of the Fifth Amendment, merely the "return and restor[ation of] the Leased Premises to a condition substantially similar to the condition of the Leased Premises prior to the commencement of Landlord's Work" ("Return and Restore Obligation").

*CPA's Misrepresentation Leads Neiman Marcus to Bring Claims via Arbitration*

58. In the almost six years since CPA voided the Fifth Amendment in 2016, CPA has failed to comply with the Return and Restore Obligation, and the Store remains to this day in the reduced and subpar condition.

59. Following multiple attempts to compel CPA to honor the Return and Restore Obligation, and believing, as result of Simon Property's misrepresentation, that its sole claim was for breach of that obligation, Neiman Marcus sought to vindicate its rights under Section 23 of the Fifth Amendment by filing a demand for arbitration with the American Arbitration Association on May 18, 2021.

60. That matter is captioned *The Neiman Marcus Group LLC and NMG Term Loan Propco LLC v. Copley Place Associates, LLC*, AAA Case No. 01-21-0003-9327 (the "Arbitration"). It is currently ongoing, and the hearing is scheduled for October 2022.

61. Neiman Marcus brought its Return and Restore Obligation claim in an arbitral forum because Section 34 to the Lease (the "Limited Arbitration Clause") provides that "[i]n the

event of any dispute arising **only** out of the provisions of this Lease in respect of the approval of plans, and the construction and reconstruction of improvements and elsewhere arbitration is expressly provided for, such dispute shall be determined by arbitration.” Lease, § 34 (emphasis added).

62. As the Return and Restore Obligation is triggered only upon a failure to obtain the necessary Approvals, it is a provision “in respect of the approval of plans, and the construction and reconstruction of improvements” and, accordingly, falls under the Limited Arbitration Clause.

*Neiman Marcus Discovers CPA’s Deception*

63. The Arbitration proceeded in normal course, and document discovery took place in late 2021 and early 2022.

64. During that discovery, CPA produced an email in which Simon Property remarked that the relevant governmental authorities were “disappointed” that Simon Property had cancelled the project—a statement that made little sense if those same governmental authorities were refusing to work with Simon Property to advance the project and ultimately provide the necessary Approvals. Instead, it supported a conclusion that Simon Property had cancelled the project for its own reasons.

65. Further investigation revealed that Simon Property admitted, in statements in which it was obligated by securities laws to make materially accurate disclosures (attached hereto as **Exhibit C**), that it was Simon Property's concerns about increased construction costs and oversupply in the residential market that led to the cancellation, not an inability to obtain Approvals. As set forth more fully above, *see ¶¶ 13-14, supra*, these disclosures explained:

**S&P Global**  
Market Intelligence

**Simon Property Group, Inc. NYSE:SPG**  
**FQ3 2016 Earnings Call Transcripts**  
**Wednesday, October 26, 2016 3:00 PM GMT**

- Simon Property “would encourage everybody to study what’s going on in *construction cost* and what’s going on in *supply and demand there . . . the reality is when we started seeing the construction cost, it just – not the right time to do it, with all the supply and the cost there . . . In the case of Copley, I got nervous about it. I’d be the first to admit.*” Ex. C, at 19.

**S&P Global**  
Market Intelligence

**Simon Property Group, Inc. NYSE:SPG**  
**FQ4 2016 Earnings Call Transcripts**  
**Tuesday, January 31, 2017 4:00 PM GMT**

- Simon Property would “postpone the construction of the Copley Residential Tower due to the *rapidly rising construction cost* and our beginning *concerns around supply and demand* in the Boston residential market.” *Id.*, at 4.

66. In fact, the closest SPG came to referencing governmental approvals was months later, in a January 31, 2017 quarterly earnings call, in which its CEO stressed *uncertainty, not*

**inability** to obtain **one** single approval. In that call, he stated that the decision to cancel was due to a “change in the project approval dynamics and the uncertainty of receiving the last approval, combined with the rapidly rising construction cost and our heightened concern about supply in the Boston residential market.” *Id.*, at 24.

67. SPG expressed this same sentiment in its 2017 and 2018 Forms 10-K: “[w]e determined we would no longer pursue to construction of the Copley residential tower given a **change in property approval dynamics, construction pricing in the Boston market and the continued increase in residential supply in the market.**” *Id.*, at 51, 56 (emphasis added).

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 10-K

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15 (d) OF THE  
SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2016

SIMON PROPERTY GROUP, INC.  
SIMON PROPERTY GROUP, L.P.

(Exact name of registrant as specified in its charter)

Delaware  
(Simon Property Group, Inc.)  
Delaware  
(Simon Property Group, L.P.)  
(State of incorporation  
or organization)

001-14469  
(Simon Property Group, Inc.)  
001-36110  
(Simon Property Group, L.P.)  
(Commission File No.)

04-6268599  
(Simon Property Group, Inc.)  
34-1755769  
(Simon Property Group, L.P.)  
(I.R.S. Employer  
Identification No.)

During the fourth quarter of 2016, we determined we would no longer pursue the construction of Copley residential tower given a change in property approval dynamics, construction pricing in the Boston market and the continued increase in residential supply in the market.

Simon Property Group, Inc.	Title of each class Common stock, \$0.0001 par value	Name of each exchange on which registered New York Stock Exchange
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68. None of these statements indicate that Simon Property was unable to obtain the necessary Approvals. The conclusion that Simon Property cancelled the project for its own business reasons was later reinforced in connection with statements made in the arbitration.

69. On April 8, 2022, Richard Sokolov, a Director and Vice Chairman of SPG, submitted a declaration in which he stated that the Tower Project could have moved forward with

some changes to architectural and engineering plans at a relatively *de minimus* cost of \$2 million for the \$500 million Tower Project. He further admitted that Simon Property was motivated, not by an inability to obtain Approvals, but by significantly rising construction costs. *Id.*

70. On the same day, Patrick Peterman, SPG's Senior Vice President of Development and Asset Intensification, also submitted a declaration stating that Simon Property would need to redesign the foundation—a possibility that the Fifth Amendment provided accommodation for—and only expressed the view that there was risk that MassDOT could refuse to approve the foundation design plans.

71. These documents and declarations make clear that the cancellation of the Tower Project, and the subsequent voiding of the Fifth Amendment, was not due to an inability to obtain Approvals. At most, Simon Property faced some uncertainty or changing dynamics and concern that it could no longer make the financial return it hoped for on the Tower Project because of increased costs and decreased demand.

72. The approximately \$2 million additional cost represents a reasonable effort to make on a \$500 million project. CPA did not have the right to void the Fifth Amendment on that basis.

73. Simon Property's financial concerns may have been bolstered by the dramatic stock price fall that SPG incurred from August through October of 2016. Again, CPA did not have the right to terminate the Fifth Amendment on this basis.

74. The cancellation of the Tower Project took place as SPG's stock price tumbled:<sup>4</sup>



#### Neiman Marcus Seeks to Vindicate its Rights under the Fifth Amendment

75. If Neiman Marcus had known when it filed the Arbitration that it had a claim for wrongful termination of the Fifth Amendment, rather than for failure to meet the Return and Restore Obligation, it would not have filed the Arbitration. Neiman Marcus's belief in May 2021 that its claim was for breach of the Return and Restore Obligation, and thus subject to the Limited Arbitration Provision, is a direct result of CPA's misrepresentation in 2016.

76. If CPA had not misrepresented the basis upon which it purported to terminate the Fifth Amendment, Neiman Marcus would have filed an action in Massachusetts state court because the action would not be subject to the Limited Arbitration Clause, or any other arbitration provision in the Lease or its amendments.<sup>5</sup>

<sup>4</sup> S&P GLOBAL MARKET INTELLIGENCE, *Simon Property Group, Inc., FQ4 2016 Earnings Call Transcripts*, dated January 31, 2017.

<sup>5</sup> In addition to Section 34, the Lease and its amendments expressly provide for arbitration in regard to only (1) certain construction occurring prior to February 13, 1984, Complaint, Ex. B § 4(D); (2) sales records audits, Complaint, Ex. B § 4(F); (3) the allocation of Ownership Taxes, Complaint, Ex. B § 6(B); (4) maintenance of Common Areas, Complaint, Ex. B § 9(D); and (5) Common Area Charge audits, Complaint, Ex. B § 9(F).

77. The present claims based on Simon Property's misrepresentation and CPA's breach of the Fifth Amendment do not arise "**only**" out of the provisions of this Lease in respect of the approval of plans, and the construction and reconstruction of improvements." Ex. B, Lease § 34 (emphasis added). Instead, they rest on the much broader and more fundamental dispute over the wrongful termination of the Fifth Amendment and the loss of all the benefits bargained for in that agreement. For that reason, the present action does not fall under the Limited Arbitration Clause.

78. Additionally, as the Arbitration Panel ruled in an April 10, 2022 Panel Decision, "the denial and/or cancellation of a proposed expansion at Copley Place *fall[s] outside* of the scope" of the Arbitration. (Emphasis added.)

79. Neiman Marcus now seeks to recover its entitlements under the Fifth Amendment, as well as lost profits for the amount of time it spent operating out of a smaller, un-renovated, temporary Store.

80. Specifically, Plaintiffs seek compensation for CPA's deprivation of the benefits of an expanded, modern, and fully renovated store, including (i) Landlord's Work toward a renovated Store; (ii) a contribution of \$27,000,000.00; (iii) renewed rental terms; and (iv) lost profits.

81. Neiman Marcus also seeks attorneys' fees incurred as a result of CPA's misrepresentation, which compelled Neiman Marcus to arbitrate over the Return and Restore Obligation.

82. As a result of CPA's breach, Neiman Marcus has been damaged in an amount no less than \$50,000,000.00, plus accruing fees, expenses, and other charges.

#### **COUNT I – BREACH OF CONTRACT**

83. Plaintiffs repeat and incorporate by reference the allegations set forth above in paragraphs 1 through 82, as if fully set forth herein.

84. Neiman Marcus entered into an agreement with CPA supported by valid consideration.

85. Neiman Marcus performed under the Fifth Amendment by completing the Tenant's Reduced Premises Work, as well as complying with all applicable construction phasing plans and requirements.

86. Neiman Marcus remained ready, willing, and able to perform all contractual obligations under the Fifth Amendment.

87. CPA was not permitted to void the Fifth Amendment for reasons other than its inability to obtain governmental approvals. By doing so, CPA materially breached the Fifth Amendment.

88. CPA further breached the Fifth Amendment by failing to perform Landlord's Work and provide the Expansion Premises pursuant to Section 10, by failing to make Landlord's Contribution of \$27,000,000 pursuant to Section 12, and by failing to provide Plaintiffs with the benefit of the rent terms in Section 9(b).

89. The benefit of an expanded, modern, and fully renovated store is unique, and money damages would be inadequate to compensate Plaintiffs. Defendant controls Copley Place and money damages alone would not permit Plaintiffs to obtain an expanded, modern, and fully renovated store because it could not perform Landlord's Work or take possession of the Expansion Premises, which are necessary for the renovation of the Store as contemplated by the Fifth Amendment.

90. CPA should be ordered to specifically perform in accordance with the Fifth Amendment, including but not limited to performing Landlord's Work, delivering the newly

constructed and expanded Leased Premises, including the Expansion Premises, and making Landlord's Contribution.

91. In alternative, Plaintiffs should be compensated with money damages for the value of Landlord's Work, and the loss of the Expansion Premises and Landlord's Contribution.

92. As a direct and proximate result of CPA's improper termination and breaches of the Fifth Amendment, Plaintiffs have been damaged, including without limitation as follows:

- Plaintiffs have been wrongfully denied the \$27,000,000 Landlord's Contribution due to them;
- Plaintiffs have been wrongfully denied Landlord's Work and the Expansion Premises;
- Plaintiffs have suffered significant lost profits; and
- Plaintiffs have paid excess amounts of rent because Section 9(b) of Fifth Amendment's more favorable rental terms have not been implemented.

93. Plaintiffs have also incurred legal expenses in the Arbitration that they would not have incurred but for Simon Property's improper termination and misrepresentation.

94. These damages in total equal an amount no less than \$50,000,000.00.

#### **COUNT II – DECLARATORY JUDGMENT**

95. Plaintiffs repeat and incorporate by reference the allegations set forth above in paragraphs 1 through 94, as if fully set forth herein.

96. Defendant's termination of the Fifth Amendment was improper and ineffective.

97. Pursuant to M.G.L. c. 231A, § 1, Plaintiffs are entitled to a Declaratory Judgment (a) that Defendant was not permitted to void the Fifth Amendment, (b) that, therefore, the Fifth Amendment remains in full force and effect, and (c) that Neiman Marcus is entitled to the bargained for benefits of the Fifth Amendment, including a reduction in rent under Section 9(b)

beginning on March 1, 2021, until "the opening of the Expansion Premises and the renovated Existing Premises to the public."

**COUNT III – ATTORNEYS' FEES**

98. Plaintiffs repeat and incorporate by reference the allegations set forth above in paragraphs 1 through 97, as if fully set forth herein.

99. Under Section 26 of the Lease, "Landlord shall pay all reasonable attorneys' fees and expenses of Tenant incurred in successfully enforcing any of the obligations of Landlord under this Lease."

100. Neiman Marcus has brought this action to enforce CPA to comply with its obligations under the Fifth Amendment and is incurring attorney's fees and expenses as a result.

101. Therefore, pursuant to Section 26 of the Lease, Defendant is liable for all reasonable attorneys' fees and expenses in the present action.

**DEMAND FOR JURY TRIAL**

102. Plaintiffs hereby demand a trial by jury on all claims and issues so triable.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment on all counts against CPA as follows:

- i. An award for specific performance, directing CPA to perform in accordance with the Fifth Amendment, including but not limited to, performing Landlord's Work, delivering the newly constructed and expanded Leased Premises, including the Expansion Premises, and remitting Landlord's Contribution, and an award of all additional actual, compensatory, consequential, incidental and/or special damages, including, but not limited to, profits lost as a result of CPA's breach of the Fifth Amendment; or, in the alternative, an award of all actual, compensatory, consequential, incidental and/or special damages resulting from CPA's breach of the Fifth Amendment, estimated to be no less than \$50,000,000 U.S. Dollars; and

- ii. An award of all costs, expenses, and attorneys' fees incurred by Plaintiffs in readying, bringing, and prosecuting the Arbitration against CPA; and
- iii. An award of all costs, expenses, and attorneys' fees incurred by Plaintiffs in enforcing CPA's obligations under the Fifth Amendment; and
- iv. A declaratory judgment that defendant was not permitted to void the Fifth Amendment, and that it remains in full force and effect, including the rent provisions in Section 9(b); and
- v. Such other and further relief as this Court may deem just and proper.

Dated: July 18, 2022

Respectfully submitted,

THE NEIMAN MARCUS GROUP LLC and  
NMG TERM LOAN PROPCO LLC  
By their attorneys,

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**EXHIBITS FILED/MAILED SEPARATELY TO THE COURT**