Signal Capital Holdings Corp. v Banc of Am. Leasing & Capital, LLC
2012 NY Slip Op 33490(U)
April 20, 2012
Sup Ct, New York County
Docket Number: 651192/2011
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich Justice PART 54

Signal Capital Holding

INDEX NO. 651192/11

MOTION DATE

- v -

MOTION SEQ. NO. 001

Bank of America Leasing

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	6,7,8,9,10,11,12,13
Answering Affidavits — Exhibits	14-19,20 25,26,27-40,41,42,
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision/order.

Dated: 4/20/12

JUSTICE SHIRLEY WERNER KORNREICH

JUSTICE SHIRLEY WERNER KORNREICH

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 54

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SIGNAL CAPITAL HOLDINGS CORPORATION, in its individual capacity and as successor-in-interest by assignment and merger to SCAP Associates, LLC., and as successor-in-interest by merger to Railcar Management Partners LLP, as Manager and attorney-in-fact of Second Rail Statutory Trust,

Plaintiff,

v.

Index No. 651192/2011
DECISION & ORDER

BANC OF AMERICA LEASING & CAPITAL, LLC , as successor-in-interest to First of St. Louis Leasing Corporation No. 1 and BancBoston Leasing Inc.; THE FIFTH THIRD LEASING COMPANY; WELLS FARGO BANK, N.A., as successor-in-interest to First Security Bank of Idaho, N.A. and First Security Bank of Utah, N.A.;WELLS FARGO EQUIPMENT FINANCE, INC., as successor-in-interest to First Security Leasing Company; METLIFE CAPITAL, LIMITED PARTNERSHIP; NAT-LEA, INC.; U.S. BANCORP EQUIPMENT FINANCE, INC. f/k/a U.S. Bancorp Leasing & Financial; FIRST UNION COMMERCIAL LEASING GROUP, LLC; PHOENIX LIFE INSURANCE COMPANY f/k/a Phoenix Home Life Mutual Insurance Company; SUN LIFE ASSURANCE COMPANY OF CANADA (U.S.),

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In this action, plaintiff Signal Capital Holdings Corporation (plaintiff or Seller) asserts two causes of action against defendant institutional investors (defendants or Purchasers) for breach of an agreement to purchase a majority of plaintiff's beneficial interest in a railcar trust (the Purchase Agreement). In its first cause of action, plaintiff seeks to recover the full amount allegedly due as a purchase price adjustment under section 5.2 (a) of the Purchase Agreement. In its second cause of action, plaintiff seeks repayment of all principal and interest allegedly due on

a loan, intended to cover defendants' administrative expenses in connection with those trust interests, under section 5.5 of the Purchase Agreement.

In motion sequence number 001, defendants move (a) to compel arbitration of plaintiff's first cause of action, pursuant to the alternative dispute resolution provision set forth in section 5.2 (e) of the Purchase Agreement, and (b) to stay or dismiss the remainder of this action pending the outcome of such proceeding (9 USC §§ 3 and 4 [Federal Arbitration Act]; CPLR 7503; CPLR 2201; CPLR 3211 [a] [1]). In motion sequence number 002, defendants move to stay all disclosure pending resolution of its motion to compel arbitration (9 USC §§ 3 and 4; CPLR 3103 [a]). Plaintiff cross-moves for an order compelling defendants to respond to its First Request for the Production of Documents and its First Set of Interrogatories (CPLR 3124).

I. Background

Pursuant to the terms of the Purchase Agreement, dated October 21, 1994, defendants acquired 78.5% of plaintiff's beneficial interest in a trust owning tens of thousands of railcars that were subject to two railcar lease agreements: a Master Lease Agreement and a Capital Lease Agreement. In exchange for this trust interest, defendant-Purchasers made a cash payment to plaintiff-Seller at closing, and agreed to pay Seller a post-closing adjustment to the purchase price if, as of the leases' scheduled expiration date, the amounts that Purchasers had received under the leases surpassed certain thresholds (*see* Gilbert Affirm. Exh. 1-C: Purchase Agreement § 5.2). Specifically, section 5.2 (a) of the Purchase Agreement provides:

> As an adjustment to the Purchase Price, each Purchaser agrees to pay or cause to be paid to Sellers solely from Excess Residual Proceeds an amount equal to (x) such Purchaser's Assumed Residual Amount less (y) such Purchaser's Adjusted Residual Amount as of the date of scheduled expiration of the Leases, together with interest on such sum at the Interest Rate from the scheduled expiration of the Leases to the date paid to Sellers hereunder (such portion of Excess Residual

> Proceeds, the "Available Amount"). The Available Amount shall be applied (I) first, in payment of the RVI Loan Amount, (ii) second, in payment of the Administrative Expense Loan Amount and (iii) third, any remaining amounts in payment to Seller of a Purchase Price adjustment

(*id.*).[1]

At the time the Purchase Agreement was executed, both the Master Lease and Capital Lease agreements were scheduled to terminate on June 1, 2004, " the twelfth anniversary" of their June 1, 1992 commencement date (*see* Gilbert Affirm. Exh. 1-A: Master Lease Agreement § 5; Exh.1- B: Capital Lease Agreement § 5). However, on January 30, 2001, the leases were amended by defendants, allegedly without plaintiff's knowledge, and both termination dates were

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[1]Section 5.2 (b) defines "Adjusted Residual Amount," as follows:

> "Adjusted Residual Amount" as of any date of calculation on or after the expiration of the Leases shall mean, with respect to the Acquired Trust Interests purchased by any Purchaser, the amount which, were:
>
> (I) the Earned Additional Rent substituted for the Assumed Additional Rent;
> (ii) the Expended Professional Fees substituted for the Assumed Professional Fees;
> (iii) the Prepayment Premium Paid substituted for the Assumed Prepayment Premium; and
> (iv) the actual facts with respect to any other Assumption, the inaccuracy of which as of the Closing Date (or such other date as to which such Assumption was made) (A) may or would cause an amount to become due to the Purchaser pursuant to Section 8.2 (iv), but in such case only if and to the extent any such amount has not been paid pursuant to Section 8.2 or (B) would otherwise lead to an adjustment to the Purchase Price as contemplated by the proviso to the definition of Assumptions,
>
> would substitute for the Assumed Residual Amount to result in a net after-tax yield, calculated using the multiple investment sinking fund method, and total net after-tax cash flow equal to the Anticipated Yield and Cash Flow, all other of the Initial Assumptions remaining unchanged

(*id.*).

extended until June 1, 2010, the "eighteenth anniversary" of their commencement date (*id.*, Exh: 1-D: Amendment No. 1 to Master Lease Agreement, ¶ 6; Exh. 1-E Amendment No. 1 to Capital Lease Agreement, ¶ 4).

Sometime prior to the amended June 1, 2010 termination date, a dispute arose between plaintiff and defendants whether, in light of the 2001 lease extensions, the Purchase Price adjustment should be determined using Purchasers' Adjusted Residual Amount as of June 1, 2004, the original termination date of the leases, or as of June 1, 2010, the termination date of the leases, as amended. The dispute centered upon the meaning of the phrase "date of scheduled expiration of the Leases" as used in section 5.2 (a) of the Purchase Agreement.

Defendants contend that the phrase, "date of scheduled expiration of the Leases," means June 1, 2004, the date upon which the leases had been scheduled to terminate at the time the Purchase Agreement was executed. Defendants contend that the Purchase Agreement requires each Purchaser to calculate its Adjusted Residual Amount in conformity with the whole of section 5.2, thus giving effect to, among other things, "its Initial Assumptions and the Model." Defendants argue that the Adjusted Residual Amount for each Purchaser must be measured as of June 1, 2004, because that is the date of scheduled expiration, as shown in the Model.

Plaintiff contends that, as a result of the 2001 lease amendments, the"date of scheduled expiration of the Leases" means June 1, 2010; thus, the Adjusted Residual Amount to be used in determining the purchase price adjustment must be measured as of that date (Levy Affirm., Exh. 2). Plaintiff notes that the Purchase Agreement uses three separate defined terms in referencing the lease agreements: (1) "Capital Lease Agreement," which is defined to mean "that certain Capital Lease Agreement between the Partnership and GE Railcar, dated as of June 1, 1992, as in

effect on the Closing Date"; (2) "Master Lease Agreement," which is defined to mean "that certain Master Lease Agreement between the Partnership and GE Railcar, dated as of June 1, 1992, as in effect on the Closing Date"; and, (3) "Leases," which is defined to mean,

> (I) that certain Master Lease Agreement dated as of June 1, 1992 between the Partnership and GE Railcar, as lessee, *as the same may be amended, supplemented and modified from time to time*, and (ii) that certain Capital Lease Agreement dated as of June 1, 1992 between the Partnership and GE Railcar, as lessee, *as the same may be amended, supplemented and modified from time to time*

(Gilbert Affirm., Exh. 1-C, Art. I: Certain Definitions [emphases added]). Plaintiff contends that the defined term "Leases" was created for, and used solely in, section 5.2 (a) of the Purchase Agreement; therefore, the phrase "date of scheduled expiration of the Leases" clearly means the date of termination of the Capital and Master Lease Agreements, as amended, i.e., June 1, 2010.

It is undisputed that the Adjusted Residual Amount is a key, if not the key, component in determining the purchase price adjustment. Plaintiff alleges that, because defendants had insisted that their financial expectations, assumptions, and the Model that they would use in determining the Adjusted Residual Amount be kept confidential from plaintiff, the parties agreed to provide a means by which plaintiff could obtain independent verification of each and any Purchaser's calculation of its Adjusted Residual Amount. As a result, section 5.2 (e) of the Purchase Agreement provides, in pertinent part, that:

> At the request of Sellers, each Purchaser shall determine its Adjusted Residual Amount as of any requested date. If the Sellers dispute any such calculation or any calculation of Loss based on Anticipated Yield and Cash Flow for purposes of Section 8.2, at the written request of the Sellers made within ten business days from receipt of such calculation, such calculation shall be verified by an independent firm of public accountants or financial advisors chosen by such Purchaser and reasonably acceptable to the Sellers. The firm so chosen shall make its determination within 30 days. Such Purchaser shall provide such firm, subject to an appropriate confidentiality agreement, such information as is necessary to determine whether the computation of the Adjusted Residual Amount or Loss is

> mathematically accurate and in conformity with the provisions of this Section 5.2 and Section 8.2 as applicable, including copies of the Initial Assumptions and the Model. ... The computations of such firm shall be binding and conclusive on all parties

(*id.*).

In light of the parties' ongoing dispute over the meaning of the phrase "date of scheduled expiration of the Leases" in section 5.2 (a) of the Purchase Agreement, by letter dated May 6, 2010, plaintiff requested, *inter alia*, a "determination of the Adjusted Residual Amounts as of each of June 1, 2004 and June 1, 2010 for each Purchaser," as provided by Section 5.2 (e) of the Purchase Agreement (*see* Levy Affirm., Exh. 11). By letter dated May 27, 2010, defendants provided plaintiff with calculations of Purchasers' Adjusted Residual Amounts totaling $374,428,801 as of June 1, 2004, and $172,499,814 as of June 1, 2010 (*id.*, Exh. 12). That same day, but prior to receipt of Purchasers' calculations, plaintiff commenced an action in the Supreme Court, Nassau County, seeking, among other things, a declaratory judgment that the "'date of scheduled expiration of the Leases' within the meaning of Section 5.2 (a) of the Purchase Agreement is June 1, 2010" (*id.*, Exh. 4: Complaint ¶ 28).[2]

Days later, on June 1, 2010, defendants paid plaintiff a purchase price adjustment in the total amount of $15,736,481. Defendants determined the amount of the purchase price adjustment based upon Purchasers' Adjusted Residual Amount as of June 1, 2004.

On June 7, 2010, within10 business days of receiving the May 27, 2010 letter containing Purchasers' Adjusted Residual Amount calculations, plaintiff requested independent verification

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[2]In addition to asserting three declaratory judgment/contract causes of action in the Nassau County action, plaintiff also asserted causes of action for breach of contract, unjust enrichment, as well as for an accounting with respect to the proceeds of the Administrative Expense Loan in that action (*id.*).

of each and every calculation contained therein, pursuant to section 5.2 (e) of the Purchase Agreement. Plaintiff's letter of request also stated that, "[n]otwithstanding the foregoing, we hereby reserve our rights and remedies in respect of any dispute arising out of the interpretation or application of the Agreement or any aspect of the underlying transactions" (*id.*, Exh. 6).

Following plaintiff's request for verification, the parties corresponded and engaged in discussion regarding the choice of a verifier. During those discussions, plaintiff also suggested that the parties consider engaging in a broader alternative dispute resolution procedure to resolve the matters of contract interpretation raised by plaintiff. Plaintiff alleges that, to facilitate these discussions, plaintiff agreed to withdraw, without prejudice, its complaint in the Nassau County action if defendants agreed to waive any statute of limitations defenses to plaintiff's claims. On November 24, 2010, following execution of a tolling agreement, plaintiff withdrew its complaint in the Nassau County action.

Ultimately, the parties were unable to agree on the choice of a verifier. Defendants also rejected plaintiff's suggestion to consider an alternative dispute resolution procedure to resolve any issues of contract interpretation, asserting that the dispute resolution provision provided by Section 5.2 (e) of the Purchase Agreement governed all issues in the parties' dispute.

Plaintiff then commenced the instant action on May 3, 2011. In its first cause of action, plaintiff alleges that defendants breached Section 5.2 (a) of the Purchase Agreement by determining the purchase price adjustment based upon Purchasers' Adjusted Residual Amounts measured as of June 1, 2004, rather than as of June 1, 2010, and thereby failing to pay plaintiff the full amount that it is due. In its second cause of action, plaintiff alleges that defendants breached Section 5.5 of the Purchase Agreement, by failing to repay the principal and accrued interest on

the $1,972,000 administrative expense loan.[3]

Defendants now move (1) to compel arbitration of plaintiff's first cause of action, pursuant to Section 5.2 (e) of the Purchase Agreement, and to stay litigation of plaintiff's second cause of action pending such arbitration, and (2) to stay all disclosure pending arbitration. Plaintiff cross-moves to compel defendants to respond to its disclosure requests.

II. Discussion

The key issue to be determined on these motions is whether the parties' dispute over the purchase price adjustment, and in particular, their dispute over the meaning of the phrase "date of scheduled expiration of the Leases" as used in section 5.2 (a) of the Purchase Agreement, is subject to the dispute resolution provision set forth in section 5.2 (e) of the Purchase Agreement.

As a threshold matter, the parties are in agreement that the dispute resolution provision contained in Section 5.2 (e) of the Purchase Agreement is governed by the Federal Arbitration Act (FAA) (9 USC § 1, *et seq.*). Our Court of Appeals has held that, "where a contract containing an arbitration provision 'affects' interstate commerce, disputes arising thereunder are subject to the FAA" (*Matter of Diamond Waterproofing Sys., Inc. v 55 Liberty Owners Corp.*, 4 NY3d 247, 252 [2005]). Here, the parties' transaction, involving the acquisition by numerous out-of-state entities of a beneficial interest in a trust owning rolling railcar stock, affects interstate commerce sufficiently to trigger application of the FAA.

The FAA "establishes an 'emphatic' national policy favoring arbitration which is binding

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[3]Just prior to filing their motion to compel arbitration and stay this action, defendants apparently did repay $1,000,000 of that loan. Plaintiff alleges, however, that loan principal in the amount of $972,106 remains outstanding and defendants have yet to provide any accounting of the loan proceeds.

on all courts, State and Federal" (*Singer v Jefferies & Co.*, 78 NY2d 76, 81 [1991] [citations omitted]). Nevertheless, the Second Circuit has noted that, "[w]hile federal policy generally favors arbitration, the obligation to arbitrate nevertheless remains a creature of contract" (*Louis Dreyfus Negoce S.A. v Blystad Shipping and Trading Inc.*, 252 F3d 218, 224 [2d Cir], *cert denied* 534 US 1020 [2001]). "[T]he mere invocation of the FAA does not operate to convert a nonarbitrable claim into an arbitrable one" (*Gerling Global Reins. Corp. v Home Ins. Co.*, 302 AD2d 118, 125 [1st Dept 2002], *lv denied* 99 NY2d 511 [2003]). Consequently, "'a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit'" (*Louis Dreyfus Negoce*, 252 F3d at 224, quoting *AT & T Techs., Inc. v Communications Workers of Am.*, 475 US 643, 648 [1986]). It typically is for the courts to determine the issue of "whether parties have agreed to 'submi[t] a particular dispute to arbitration'" (*Granite Rock Co. v International Broth. of Teamsters*, ___ US ___, 130 S Ct 2847, 2855 [2010] [citation omitted]).

When considering a motion to compel arbitration under the FAA, a court must determine "(1) whether there exists a valid agreement to arbitrate at all ... and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement" (*Hartford Acc. and Indem. Co. v Swiss Reins. Am. Corp.*, 246 F3d 219, 226 [2d Cir 2001] [citation and internal quotation marks omitted]). Here, the parties are not disputing whether the Purchase Agreement contains an enforceable alternative dispute resolution provision, but whether the parties' dispute falls within the scope of that provision.

The Second Circuit has established a three-part inquiry for determining whether, under the FAA, a particular dispute falls within the scope of an agreement's arbitration clause:

> First, recognizing there is some range in the breadth of arbitration clauses, a court should classify the particular clause as either broad or narrow. Next, if reviewing a

> narrow clause, the court must determine whether the dispute is over an issue that is on its face within the purview of the clause, or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause. Where the arbitration clause is narrow, a collateral matter will generally be ruled beyond its purview. Where the arbitration clause is broad, there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it

(*Louis Dreyfus Negoce*, 252 F3d at 224 [internal quotation marks and citations omitted]).

In general, an arbitration clause is considered broad if "the language of the clause, taken as a whole, evidences the parties' intent to have arbitration serve as the primary recourse for disputes connected to the agreement containing the clause" (*id.* at 225). The language in a broad arbitration clause typically is expansive, requiring arbitration of "any and all" disputes. On the other hand, the language in a narrow arbitration clause typically specifies which issues or types of disputes will be arbitrated, thus indicating that "arbitration was designed to play a more limited role in any future dispute" (*id.*; *see also McDonnell Douglas Fin. Corp. v Pennsylvania Power & Light Co.*, 858 F2d 825, 832 [2d Cir 1988] ["'(B)road' clauses ... purport to refer all disputes arising out of a contract to arbitration" while "'narrow' clauses ... limit arbitration to specific types of disputes"]). When dealing with a narrow arbitration clause, the court "must 'consider whether the [question at] issue is on its face within the purview of the clause'" (*McDonnell Douglas*, 858 F2d at 832, quoting *Rochdale Vill., Inc. v Public Serv. Emp. Union, Local No. 80*, 605 F2d 1290, 1295 [2d Cir 1979]).

The dispute resolution provision contained in Section 5.2 (e) of the Purchase Agreement does not contain the expansive language typically found in a broad arbitration clause, but instead specifies the particular disputes to which it will apply. Hence, because it is a narrow arbitration clause, the court must determine whether the issue sought to be arbitrated is, on its face, within

the purview of the clause or is a "collateral matter" that, although connected to the main agreement, is not subject to arbitration.

Defendants argue that, even though section 5.2 (e) may contain a narrow arbitration clause, that clause expressly governs any disputes involving the determination of the purchase price adjustment. They contend that section 5.2 (e) requires plaintiff to submit any dispute over Purchasers' calculation of the purchase price adjustment to an independent third-party verifier, who then must determine whether that calculation is "mathematically accurate" and "in conformity with the provisions of this section 5.2 and section 8.2." Defendants argue that because the disputed phrase, "date of scheduled expiration of the Leases," appears at the beginning of section 5.2 (a), it is the verifier who must interpret this phrase, as it is the verifier who has been given the task of reading and applying the provisions of Section 5.2 as they pertain to defendants' calculation of the purchase price adjustment. In sum, plaintiff's contend that the lease expiration date impacts on the purchase price adjustment, falls squarely within the scope of section 5.2 (e), and must be arbitrated. Defendants further argue that plaintiff, having itself invoked the verification process in its June 7, 2010 letter, should not now be permitted to abandon that process in order to litigate an issue that falls squarely within the scope of this provision.

Plaintiff, on the other hand, contend that defendants are attempting to expand Section 5.2 (e) well beyond its plain meaning to encompass a broader range of disputes than the parties had intended. Plaintiff notes that Section 5.2 (e) expressly and repeatedly states that the disputed calculations that are subject to review by the independent verifier are the Purchasers' Adjusted Residual Amount calculations, and not the Purchasers' calculation of the purchase price adjustment. Although the Adjusted Residual Amount is a key component in determining the

amount of the purchase price adjustment, plaintiff observes that it is but one component in that determination.

Additionally, plaintiff argues that Section 5.2 (e) expressly requires each Purchaser to calculate its Adjusted Residual Amount as of any date requested by plaintiff. Thus, to the extent that plaintiff disputes such calculation, the sole role of the verifier is to determine whether the Purchaser's calculation as of the requested date is mathematically accurate and in accordance with the provisions of Section 5.2, and not to determine the appropriateness of the requested date, or to determine whether the requested date is the scheduled expiration date of the leases. Indeed, the arbiter is to be an accounting firm or a financial advisor.

Plaintiff also notes that while, initially, it did request verification of each Purchaser's Adjusted Residual Amount calculation as of both June 1, 2004 and June 1, 2010, it did so solely to preserve its right to challenge those calculations within the allowable period. In any event, plaintiff states that it since has declared that it no longer disputes Purchasers' calculation of their Adjusted Residual Amounts as of June 1, 2010 (*see* Transcript at 11, 40, and 45); thus, there is no longer any need for independent verification of that particular calculation. Plaintiff further has indicated that it does not, currently, dispute Purchasers' calculation of their Adjusted Residual Amounts as of June 1, 2004.[4] Moreover, plaintiff observes that, contrary to defendants' contention, its request for verification was made after plaintiff already had commenced litigation seeking a declaratory judgment with respect to the meaning of the phrase "date of scheduled expiration of the Leases."

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[4]However, plaintiff appears to have left open the possibility that it could dispute that calculation, in the event that this court were to determine that the "date of scheduled expiration of the Leases" in section 5.2 (a) of the Purchase Agreement means June 1, 2004.

Defendants' motion to compel arbitration of Plaintiff's first cause of action, and to stay the remainder of this action pending such arbitration, is denied. The dispute resolution provision contained in Section 5.2 (e) of the Purchase Agreement appears to be a very narrow provision. On its face, the provision applies only to two specific types of dispute: (1) disputes by Seller over any Purchaser's calculation of "its Adjusted Residual Amount *as of any requested date*," and (2) disputes by Seller over "any calculation of Loss based on Anticipated Yield and Cash Flow for purposes of Section 8.2" (*see* Gilbert Affirm., Exh. 1-C: Purchase Agreement § 5.2 [e] [emphasis added]). While the calculation of the Purchasers' Adjusted Residual Amount is a key, if not the key, component in the determination of the amount of the purchase price adjustment under section 5.2 (a) of the Purchase Agreement, the two calculations are separate. Defendants have not identified any language in section 5.2 (e) of the Purchase Agreement that specifically requires plaintiff to submit every dispute involving the determination of the purchase price adjustment to verification under this provision.

Additionally, although plaintiff initially did invoke the verification process set forth in section 5.2 (e) of the Purchase Agreement, when it requested verification of each of its requested calculations, plaintiff since has declared expressly that it does not dispute Purchasers' Adjusted Residual Amount calculation as of June 1, 2010, and that it currently does not dispute Purchasers' Adjusted Residual Amount calculation as of June 1, 2004. To the extent that plaintiff has accepted Purchasers' Adjusted Residual Amount calculations as of the requested dates, the verification process provided by section 5.2 (e) would appear to be unnecessary, if not unavailable.

Moreover, the dispute raised by plaintiff's first cause of action does not involve the accuracy of Purchasers' calculation of the Adjusted Residual Amounts as of either June 1, 2004 or

June 1, 2010, but rather, which of these two calculations should be used in determining the amount of the purchase price adjustment, in light of the 2001 Amendments that extended the termination date of leases. Section 5.2 (a) provides that the purchase price adjustment should be determined using "Purchasers' Adjusted Residual Amount as of the date of scheduled expiration of the Leases." The parties' dispute whether the phrase, "date of scheduled expiration of the Leases" as used in section 5.2 (a), was intended to be a constant, which was fixed as of the date of execution of the Purchase Agreement, or was intended to be a variable, which would incorporate amendments, supplements, and modifications to the leases. The interpretation of this phrase clearly is required to calculate the purchase price adjustment accurately pursuant to section 5.2 (a); however, it appears not to have been required to calculate Purchasers' Adjusted Residual Amounts accurately, as of plaintiff's requested dates under section 5.2 (e). Thus, because the instant dispute, over the interpretation of the phrase "date of scheduled expiration of the Leases" as used in Section 5.2 (a) of the Purchase Agreement, does not, on its face, clearly fall within the purview of Section 5.2 (e), it is not subject to arbitration pursuant to this particular provision.

In light of the foregoing, defendants' motion, to stay all discovery pending arbitration, is denied, and plaintiff's cross motion, for an order compelling defendants to respond to its First Request for the Production of Documents and its First Set of Interrogatories, is granted. Accordingly, it is

ORDERED that defendants' motion to compel arbitration of plaintiff's first cause of action and to stay or dismiss the remainder of plaintiff's action pending the outcome of such proceeding (Motion Sequence Number 001) is denied; and it is further

ORDERED that the defendants' motion to stay all disclosure pending resolution of its

motion to compel arbitration (Motion Sequence Number 002) is denied; and it is further

ORDERED that plaintiff's cross motion, for an order compelling defendants to respond to its First Request for the Production of Documents and its First Set of Interrogatories, is granted.

Dated: April 20, 2012

ENTER: