JAMS ARBITRATION
CASE REFERENCE NO. 1100084323

FORTY NINERS SC STADIUM COMPANY LLC,

Claimant,

v.

SANTA CLARA STADIUM AUTHORITY,

Respondent.

ORDER RE THE PARTIES INTERIM AWARD RESPONSES

On February 9, 2018, the Arbitrator signed the parties "Stipulation and Order Re Post-Arbitration Briefing Schedule and Related Matters" (the "Stipulation"). The Stipulation provides in part as follows:

> 7. The Parties agree that the Arbitrator shall decide this matter in two stages: an Interim Award, and a Final Award,
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> 9. Within seven days after the issuance of the Interim Award, the Parties may submit a Response to the Interim Award (the "Interim Award Response"). The Interim Award Response shall be limited to addressing (a) any subjects set forth in JAMS Rule 24(j), and (b) any factual errors in the Interim Award. Per JAMS Rule 24(j), either party may file an opposition to the other Party's Interim Award Response. If neither Party submits an Interim Award Response, the Interim Award shall be final upon the 8th day after it is issued. If any Party submits an Interim Award Response, the Interim Award is final on the date that the Arbitrator rules upon the issues set forth in such Interim Award Response, and any opposition thereto.
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> 10. In the Final Award, the Arbitrator shall determine (a) the amount and terms of any Facility Rent "true-up" payments that may be owed by either Party, (b) the prevailing party in relation to the parties' respective claims for an award of attorneys' fees and costs in accordance with the Stadium Lease, and (c) [the] amount of attorneys' fees and costs to be paid.
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> 11. Thirty days after the Interim Award is final, the Parties shall submit briefing on the subjects to be determined in the Final Award ("Final Award Opening Briefs"), The Parties shall file responsive briefs 30 days after the filing of the Final Award Opening Briefs.

February 9, 2018 Stipulation and Order at 2.

On June 18, 2018, the Arbitrator issued the Interim Award. On June 29 and July 2, 2018, Respondent Santa Clara Stadium Authority ("Authority") filed a response and amended response to the Interim Award. On July 9, 2018, Claimant Forty Niners SC Stadium Company LLC ("StadCo") filed a response to the Interim Award. On July 16, 2018, the Authority filed an opposition to StadCo's response. On July 17, 2018, Stadco filed a response to the Authority's amended response. Having considered the parties papers, the Arbitrator order as follows:

Discussion

A. Issues Raised by the Authority

1. Factual Error in the Interim Award

The Authority's amended response first identifies a factual error on page 14 of the Interim Award. StadCo's response and opposition to the Authority's amended response do not address this issue.

Rule 24(j) of the JAMS Comprehensive Arbitration Rules and Procedures (the "JAMS Rules") provides in part that:

> . . . any Party may serve upon the other Parties and on JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award . . .. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file any objection. The Arbitrator may make any necessary and appropriate corrections to the Award . . .

The Arbitrator's reference to a June 8, 2018 email (Ex. 30) on page 14 of the Interim Award reflects a factual error. The email is actually dated June 18, 2013. The Final Award issued by the Arbitrator will correct this factual error in the Interim Award.

2. True-Up Payment

The Authority contends that under the section 6.1.2 of the 2013 Lease, StadCo is obligated to pay the Authority a retroactive payment to account for the adjusted Facility Rent from first year of the Lease, and that based upon the Interim Award, StadCo is obligated to pay the Authority $1,040,000 as "true-up" retroactive payment. The Authority requests that the Final Award include computation of StadCo's obligation to pay this amount within ninety (90) days of issuance of the Final Award.

StadCo contends that pursuant to the Stipulation, the amount and entitlement to any "true up" payment will be addressed in briefing that will be filed after the Interim Award becomes final, and thus the Authority's request is premature, and should be the subject of further briefing by the Parties.

Paragraph 10 of the Stipulation provides that in the Final Award, the Arbitrator "shall determine (a) the amount and terms of any Facility Rent "true-up" payments that may be owed by either Party . . ." Paragraph 11 provides that thirty days after the Interim Award is final, the Parties shall submit briefing on the subjects to be determined in the Final Award.

Consistent with the Stipulation, the Authority's request for determination of the amount of the "true-up" payment is premature. Absent the parties' resolution of the issue beforehand, the amount of the "true-up" payments shall be addressed in the parties Final Award Opening Briefs.

B. Stadco's Response

StadCo's Interim Award response argues that there are two factual errors in the Interim Award. The Authority asserts that the response does not identify any factual errors in the Interim Award.

1. Year 40 Margin Calculation

StadCo contends that while the Interim Award adopted Mr. Newton's "alternate" model, which proposed a rent of $24.762 million, "the adoption of that figure suffers from a plain factual error: . . . a $250,000 'cushion' in Year 40." StadCo asserts that: (1) nothing in the 2013 Lease or in 2013 Exhibit J requires or allows a cushion; (2) the footnotes of 2013 Exhibit J only require that the rent model reflect a positive cash position each year; (3) "Mr. Newton himself acknowledged that his $250,000 margin, or cushion, did not reflect the terms of the Lease, that it was essentially a made-up number," "it was an admitted error in his model, and it was a factual mistake, therefore, to use it to inflate the annual Rent by a quarter of a million dollars;" and (4) the "cushion" should be reduced to one dollar, and the Rent should be reduced by $249,999, to $24.512 million.

The Authority contends that StadCo's argument regarding the Year 40 margin calculation is baseless and disingenuous. The Authority asserts that Mr. Newton's calculation of a $250,000 margin in Year 40 was not a factual error by Mr. Newton, let alone a factual error in the Interim Award subject to a correction.

After addressing the parties' disputes regarding the use of updated revenues and whether certain items not included on 2013 Exhibit J should be included in the adjusted Facility Rent, section III(D) of the Interim Award addressed which parties proposed Facility Rent model best complies with the 2013 Lease and 2013 Exhibit J. After addressing the parties' arguments, the Arbitrator concluded that "the alternative model prepared by Mr. Newton, which sets an adjusted Facility Rent of $24,762,000, properly takes into the account the increases or decreases to the Authority's debt service, revenues and expenses, and that the proposed adjustment to the Facility Rent Schedule was determined in a manner otherwise generally consistent with the formulas and assumptions set forth on 2013 Exhibit J," and entered an "Interim Award in favor of the Authority and against StadCo with respect to the appropriate calculation of the adjusted

Facility Rent. Pursuant to section 6.1.2 of the 2013 Lease, the Facility Rent shall be adjusted to $$24,762,000." Interim Award at 56-57.

In brief, StadCo has failed to identify a factual error in the Interim Award in connection with the Arbitrator's adoption of Mr. Newton's alternate model. With respect to a "margin" in the yearly rent calculation, 2013 Exhibit J provides in pertinent part that "Facility Rent set such that Net Cash after Debt Service is Positive every year." At the hearing, each side presented evidence regarding the Year 40 margin calculation. Each side cross-examined the other side regarding their calculations. The evidence reflected that the 2013 Lease and 2013 Exhibit J did not set any specific margin other than it was to be positive each year. The Arbitrator concluded that Mr. Newton's calculation, which included a margin of $250,000 best complied with the 2013 Lease. By comparison, 2013 Exhibit J, agreed to by the parties, set the Year 40 margin at over $13 million. Contrary to StadCo's argument, there was no testimony that the $250,000 figure adopted by Mr. Newton was an error in his model, or that the Year 40 margin had to be $1. Indeed, StadCo necessarily asserted that an $8 million Year 40 margin complied with the 2013 Lease. *See* Ex. 575 at 2. In sum, StadCo has failed to establish that the Arbitrator's adoption of Mr. Newton's calculation of the Year 40 margin was a factual error warranting a reduction in the Facility Rent.

2. The Deposit and Disbursement Agreement

a. The Interim Award

The Interim Award addressing the parties' disputes regarding whether certain items not included on 2013 Exhibit J (such as interest on reserve accounts) should be included in the adjusted Facility Rent. With respect to interest on reserve accounts, after summarizing the parties' arguments, the Interim Award concluded that:

> As set forth above, the use of interest on reserves accounts as revenue as part of the adjustment to the Facility Rent is proper only if it is "generally consistent" with 2013 Exhibit J. While "generally consistent" does not require strict adherence to the categories and formulas used in 2013 Exhibit J, the proposed inclusion of interest as revenue cannot be inconsistent with parties' intention with respect to 2013 Exhibit J. 2013 Exhibit J does not include interest on earnings on reserve accounts as revenue. The evidence further established that the parties understood and intended that interest on reserves would be used as a cushion for the Authority, not as revenue for purposes of determining the Facility Rent. The evidence established that throughout the process of negotiating the 2012 Lease, negotiating the 2013 Lease, and throughout virtually all of the parties' negotiations regarding the adjustment to the Facility Rent between 2014 and February 2016, the parties modeled interest earnings within the reserve accounts as added cushion, not as a source of revenue to the Authority for purposes of determining the Facility Rent. The record is silent with respect to any disagreement on this point until the virtual endpoint of negotiations on February 25, 2016, when StadCo, for the first time, shifted interest on reserve accounts to

> revenue as part of its effort to reduce the Facility Rent. In sum, the circumstances surrounding the execution of the 2013 Lease and the parties subsequent conduct evidence an understanding that interest on reserves would not be included as revenue for purposes of determining the Facility Rent and any adjustment thereto. As such, StadCo's proposed use of interest on reserves accounts as revenue is inconsistent with the formulas and assumptions of the 2013 Exhibit J, and therefore improper.

Interim Award at 49.

b. StadCo's Asserted Error Re Interest on Reserves Determination

StadCo asserts that while the "the Interim Award states that interest revenue should be disregarded, because it was not included in the 2013 Exhibit J, and was a known, or knowable, revenue source as of that time, the "Interim Award appears, however, to have overlooked the Parties' agreement that interest would be treated as a Stadium Authority revenue item, and, indeed, that it is required to be treated as Stadium Authority revenue," citing the Deposit and Disbursement Agreement, which defines "Authority Revenue" as "all revenues" (with two exceptions) "received by the Authority from the Stadium Project,. . . and all interest income and investment earnings related thereto." StadCo asserts that: (1) the March 1, 2012 email and model from Robbie Evans, which reflected interest being held in the reserve accounts and which were relied on by the Interim Award, pre-dated the Deposit and Disbursement Agreement, which is dated March 28, 2012; (2) StadCo and the Authority (and their lenders) are the parties to the Deposit and Disbursement Agreement, the purpose of which was to establish detailed treatment for StadCo and Stadium Authority revenues; (3) the Parties did not agree to recognize interest— and no other revenue item— as "revenue" for one purpose (actual operations and debt service), but to disregard it for another purpose (the Rent calculation); and (4) the rent model should acknowledge the existence of interest revenue and incorporate it at some reasonable level.

The Authority contends, *inter alia*, that: (1) StadCo's Deposit and Disbursement Agreement arguments at the hearing and the closing briefs did not change that finding; and (2) "the overwhelming evidence showed that the parties' treated interest on reserves accounts as an added cushion in the reserve accounts rather than revenue available to cover debt service and expenses even after 2012, through 2013, 2014, 2015 and 2016, when the Deposit and Disbursement Agreement was in full effect and operation."

As noted by the Authority, StadCo's argument mischaracterizes the Interim Award. The Interim Award does not state that the interest revenue should be "disregarded." The Interim Award instead found that "the parties understood and intended that interest on reserves would be used as a cushion for the Authority, and not as revenue for purposes of determining the Facility Rent." Moreover, StadCo's current argument was included in its arbitration briefs. The Interim Award provides that the statement of facts therein was "found by the Arbitrator to be true and necessary to this Interim Award." The March 2012 Deposit and Disbursement Agreement (the "DDA")

was not included in the Arbitrator's factual background. StadCo's argument in reliance upon the DDA, while not expressly rejected in the Interim Award was outweighed by the Arbitrator's interpretation of the 2013 Lease, including the drafting of the 2013 Exhibit J and the parties' subsequent conduct with respect to the treatment of interest on reserves in connection with the determination of the Facility Rent. In short, StadCo has identified a disagreement with, not a factual error in, the Arbitrator's conclusion with respect the parties' treatment of interest on reserves for purposes of determining the Facility Rent.

Consistent with the foregoing, StadCo has failed to identify any factual error in the Interim Award. The parties shall therefore proceed with the briefing set forth in paragraph 11 of the Stipulation.

IT IS SO ORDERED.

Dated: August 2, 2018

Hon. Read Ambler (Ret.)
Arbitrator

PROOF OF SERVICE BY E-Mail

Re: Forty Niners SC Stadium Company LLC vs. Santa Clara Stadium Authority
Reference No. 1100084323

I, Michelle Penuliar, not a party to the within action, hereby declare that on August 02, 2018, I served the attached Order Re the Parties Interim Award Responses on the parties in the within action by electronic mail at San Jose, CALIFORNIA, addressed as follows:

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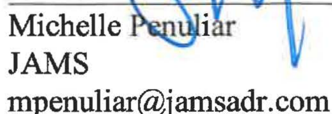
I declare under penalty of perjury the foregoing to be true and correct. Executed at San Jose, CALIFORNIA on August 02, 2018.



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