JAMS ARBITRATION
CASE REFERENCE NO. 1100084323

FORTY NINERS SC STADIUM COMPANY LLC,

Claimant,

v.

SANTA CLARA STADIUM AUTHORITY,

Respondent.

INTERIM AWARD

THE UNDERSIGNED, having been appointed as the arbitrator, and having examined the submissions, proof and allegations of the parties, finds, concludes and issues this Interim Award, disposing of all matters herein other than those reserved for later determination as specified in Section **V. INTERIM AWARD**, below.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

1. Parties and Counsel. The parties to this arbitration are identified in the above caption and are represented as follows:

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4. Agreement to Arbitrate:

This case is being arbitrated pursuant to Article 27 and Exhibit L of the "Amended and Restated Stadium Lease Agreement By and Between the Santa Clara Stadium Authority and Forty Niners SC Stadium Company, LLC dated as of March 28, 2012, as Amended and Restated as of June 19, 2013" (the "2013 Lease").

5. Pleadings and Arbitrability:

On or about May 3, 2016, Claimant filed a Demand for Arbitration Before JAMS ("Demand"). In June 2016, the parties stipulated to the appointment of the undersigned as Arbitrator. On June 8, 2016, JAMS served a Notice of Appointment of Arbitrator, naming the undersigned as Arbitrator. On July 1, 2016, Respondent filed a Response to Demand for Arbitration (the "Response") consisting of a general denial, three affirmative defenses and a "Fourth Separate Defense" which reserved the right to assert additional affirmative defenses as discovery proceeds. On January 11, 2017, the Arbitrator issued an "Amended Order on Claimant's Motion to Amend Claim, Joint Case Management Order and

Discovery Plan," wherein, *inter alia*, Claimant amended its Demand and Respondent amended its Response.

6. Applicable Law and Rules:

Counsel have agreed that the JAMS Comprehensive Arbitration Rules & Procedures shall apply herein. Pursuant to the 2013 Lease, the arbitration shall be governed by and construed pursuant to the California Arbitration Act, and the Arbitrator shall apply the substantive laws of the State of California.

7. Arbitration Hearing:

The parties submitted pre-hearing arbitration briefs. Prior to the commencement of the hearing, Respondent submitted two motions in limine. The Arbitration Hearing was conducted on July 10-14 and 17-29, 2017, and November 9-10, 2017. The proceedings were reported by a certified shorthand reporter. On the first day of the hearing, the Authority's motion in limine re privileged communications was deferred pending further briefing. With respect to the Authority's second motion in limine, regarding the Stadco rent model, the evidence was deemed to have been objected to and was admitted subject to a continuing motion to strike, to be fully briefed at a time and in a manner to be determined. The parties stipulated to a joint exhibit list and a number of witnesses testified during the hearing. Post-arbitration hearing briefs and replies thereto were submitted by the parties. The motions in limine were renewed in Respondent's closing briefs and are addressed in section III.A., below.

8. Date of this Interim Award: June 18, 2018

II. FACTS

The following is a statement of those facts found by the Arbitrator to be true and necessary to this Interim Award. To the extent this recitation differs from either party's position, that is the result of the Arbitrator's resolution of the factual disputes, including the making of determinations as to credibility of witnesses and the relevancy of evidence, as well as determinations of the burden of proof, and an overall weighing of the evidence, both oral and written.

In early 2007, the San Francisco Forty Niners ("the 49ers") and the City of Santa Clara ("the City") commenced discussions about the construction of a stadium in Santa Clara. (MacNeil, 118:22-24.)[1] Larry MacNeil is a certified public accountant who worked for the 49ers from 2003 to 2014 as a chief financial officer and then executive vice president of development and was in charge of the Stadium project for the 49ers beginning in 2004. (MacNeil, 110-112.) As the negotiations began, the key points for the

[1] Throughout the Interim Award, citation to the transcript of the arbitration hearing will appear as "[Last Name of Witness], [page]:[line]-[page]:[line]" and citation to hearing exhibits will appear as "Ex. [Number]."

City were protection of the City taxpayers and the City general fund from any costs associated with construction or operation of the Stadium and obtaining fair market value for the City's land. (MacNeil, 124:4-125:23.) The 49ers wanted a public-private partnership to minimize tax impacts and maximize profits to the private entity. (Garratt, 1178:22-1179:25; Ameling, 941:19-942:15.) Ron Garratt worked for the City as an assistant City Manager and consultant until the end of 2012 and was involved in the development of the Stadium project. (Garratt, 1143-1149.) Gary Ameling was the director of finance for the City from 2010-2017 and the finance director/treasurer/auditor for the Santa Clara Stadium Authority and became involved in the Stadium project in 2010. (Ameling 876-882.)

The Term Sheet

In June 2009, Forty Niners SC Stadium Company LLC ("StadCo"), the City and the Redevelopment Agency of Santa Clara ("the Agency") executed a non-binding "Stadium Term Sheet" ("Term Sheet"). (Ex. 17.) The Term Sheet set forth basic terms of proposed transaction to develop a stadium. The Introduction to the Term Sheet provides in part that:

> The Stadium will be owned by a joint powers authority comprised of the City and the Agency (the "Stadium Authority") . . . The City will ground lease the Stadium Site to the Stadium Authority which will, in turn, enter into a lease of the Stadium to the 49ers Stadium Company (the "Stadium Lease"). The 49ers Stadium Company will sublease the Stadium to the Team. Each of these leases will have an initial term of 40 years, with extension options that could extend the term up to another 20 years.
>
> The Stadium will be developed and operated through a "public-private partnership" consistent with the following guidelines:
>
> - The City will ground lease the Stadium Site for a fixed base rent and performance based rent which is projected to provide a fair market rent to the City's general fund;
>
> - No City general fund or enterprise funds will be used in or pledged to the development of the Stadium . . .;
>
> - 49ers Stadium Company will be responsible for any construction cost overruns and for payment of rent that assures payment of the operating expenses of the Stadium related to NFL and Non-NFL Events, including reasonable costs incurred by the City in providing public safety and traffic management for NFL games and Non-NFL, Events; . . .
>
> . . .

(Ex. 17 at 147-148.) The Term Sheet provides that the Stadium will not be constructed unless and until the voters of the City approve a ballot measure endorsing the

development of the Stadium consistent with the essential elements of the Term Sheet. (Ex. 17 at 148, § 1.1.) Section 2.1 of the Term Sheet provides that:

> City To Form Stadium Authority. The City and the Agency will enter into a joint powers agreement creating the Stadium Authority. The Stadium Authority's governing board will be the seven members of the City Council, The City Manager will be the Executive Director and the City Attorney will be the General Counsel of the Stadium Authority. The Stadium Authority will build, own and operate the Stadium, as further described below, and have all powers granted to it by the City and Agency. The Stadium Authority will be a separate and distinct legal entity, and neither the City nor the Agency will be liable for the debts or obligations of the Stadium Authority.

Article 5 of the Term Sheet addresses, *inter alia*, the Stadium Lease, and provides in part that:

> Section 5.3 Facility Rent to Stadium Authority; Net Operating Expenses. Following completion of the Stadium, 49ers Stadium Company will pay to the Stadium Authority, as rent for the Stadium: (i) an amount equal to Five Million Dollars ($5,000,000) per year ("Facility Rent"); plus (ii) all Net Operating Expenses of the Stadium, as more particularly described in Article 9 below. . ..

(Ex. 17 at 153-154.)

Article 10 of the Term Sheet provides the Authority will receive all "Stadium Operating Revenue," i.e., "all revenue from operation of the Stadium, excluding Team Revenues and revenue from Civic Events," and that Stadium Operating Revenues will include ticket surcharges, naming rights, Senior and Youth program fees, naming rights revenue, and "all net revenues from the sale or transfer of SBLs, except to the extent used to pay initial development costs of the Stadium." ((Ex. 17 at 162-163, §§ 10-10.4.) Stadium Builder Licenses ("SBL") are seat licenses, sold by the Authority that give the holder, among other things, the right to buy Forty Niners season tickets, and a priority right to buy tickets to non-NFL events (like college football games and concerts). (MacNeil, 214:13-215:5.)

The evidence established that StadCo received a large tax advantage by having the Stadium revenues (e.g., SBL revenues) go to the Authority rather to StadCo. While StadCo would have had to pay taxes on the SBL revenues, the Authority, as a public entity, did not have to taxes on such revenues. (Rhoda, 816:17-24; Carey, 576:15-20, 573:21-574:8 Keyser, 1254:23-1255:5; Garratt, 1230:1-1231:1; Doezema, 1422:13-1424:13; Carey, 576:15-20, 578:3-8, 546:4-11; Doezema, 1502:15-1503:2.) The City retained Jerry Keyser and David Doezema of Keyser Marston Associates, a real estate and land use economics firm, as consultants in connection with the Stadium project. (Keyser, 1241-1247.) Mr. Garratt, the Authority's lead negotiator at the time, understood that, if that tax obligation were imposed on StadCo, then there would have been some effect in all of the other moving pieces of the Stadium project, but did not know what

would have happened if the 49ers had to bear this particular tax burden. (Garratt, 1231:2-21.)

With respect to the use of excess revenues, the Term Sheet included a waterfall provision whereby excess revenues would flow first to the capital expenditure reserve, then additional ground rent, then future expenses, with any remainder equally distributed to the General Fund, the reserve and expenses. (Ex. 17 at 169-170, § 14.2.) While not guaranteed, excess revenues were a possibility. (MacNeil, 249:2-10; Garratt, 1189:4-15.)

The Term Sheet also provides that the Authority will fund a capital reserve maintained by the Authority (the "Stadium Capital Expenditure Reserve") with an annual deposit of $1.5 million dollars, escalating three percent (3%) per year, beginning in the second year of operation of the Stadium, and continuing each year thereafter for the term of the Stadium Lease. (Ex. 17 at 169, § 14.1.). The Stadium Capital Expenditure Reserve is to be used by the Stadium Authority "for replacements and capital improvements to the Stadium as provided in the annual Capital Expenditures Plan," with any remaining amounts of the Stadium Capital Expenditure Reserve upon termination of the Stadium Lease will be paid to 49ers Stadium Company to fund any required demolition of the Stadium and as partial reimbursement for capital costs incurred by 49ers Stadium Company in the construction of the Stadium." (*Id.*)

Measure J

In June 2010, the voters of the City of Santa Clara approved ballot Measure J (the "Santa Clara Stadium Taxpayer Protection and Economic Progress Act"), which asked:

> Shall the City of Santa Clara adopt Ordinance 17.20 leasing City property for a professional football stadium and other events; no use of City General or Enterprise [funds] for construction; no new taxes for residents for stadium; Redevelopment Agency funds capped for construction; private party pays all construction cost overruns; no City/Agency obligation for stadium operating/maintenance; private party payment of projected fair market rent; and additional funds for senior/youth/library/recreation to City's General Fund

(Ex. 572.) Measure J amended the City's municipal code to include certain requirements for the development of the Stadium. Part of the Measure J Ordinance, Santa Clara Municipal Code section 17.20.020(l), provides in part that:

> The Private Tenants Lease shall require the Private Tenant to pay rent to the Stadium Authority that the City Council has determined will provide the Stadium Authority with funds required to pay the Ground Rent and operating and maintenance expenses of the Stadium. For this purpose, operating and maintenance expenses shall include, without limitation, day-to-day expenses of operating and maintaining the Stadium, deposits to a reserve for capital improvements, and reimbursement of reasonable costs incurred by the City in providing public safety and traffic management related to NFL Events and Non-

NFL Events, but shall not include expenses of events that are conducted by the City or Stadium Authority that are not approved by the Private Tenant.

The Disposition and Development Agreement

In 2010, Greg Carey, the Chairman of Goldman Sach's Public Sector Infrastructure division and head of its Global Sports Finance group, became involved in the project as the finance structuring agent to develop a financial model for the Stadium for the 49ers and the City in light of Measure J. (Carey, 502-509:25.)
On December 13, 2011, StadCo and the Authority entered into a "Disposition and Development Agreement (Stadium Lease)" (the "DDA"). (Ex. 86.) The Recitals to the DDA provide, *inter alia*, that: (1) the Authority intends to lease the Stadium Site from the City subject to the terms of the Ground Lease to be entered into concurrently with the Stadium Lease; (2) upon satisfaction or waiver of the conditions to Close of Escrow set forth in Article 3 of the DDA, the Authority and StadCo intend to enter into the Stadium Lease, a summary of which is set forth in Exhibit B to the DDA; and (3) the construction of the Stadium will further the goals of the City of creating an entertainment destination in the Redevelopment Project Area and will provide significant economic benefits to the City and its residents and businesses. (Ex. 86 at 154). The DDA "addresses, among other matters, the conditions to the Close of Escrow and the delivery of the Stadium Lease to StadCo from the Stadium Authority, the general scope of the Stadium Authority's obligations to design and construct the Project, and the obligations of the Parties relating to the financing for development of the Project. (Ex. 86, § 2.2.)

The DDA affirmed that the Authority would own all SBL revenues. (Ex. 86, § 9.2.) The DDA differed from the Term Sheet (which called for a triple net lease whereby StadCo paid the operating expenses plus $5 million) in that it provided for a "gross" lease, pursuant to which the Authority would be responsible for paying its own expenses and debt service. (MacNeil, 221:16-222:17.). With respect to "Facility Rent," the DDA provides that:

> Consistent with the Rent Schedule adopted as part of the Final Financing Plan, and incorporated into the Stadium Lease as of the Close of Escrow, the Facility Rent under the Stadium Lease shall be determined or adjusted so as to provide to the Stadium Authority, together with other amounts payable by StadCo under the Stadium Lease and other revenues of the Stadium Authority, funds required to pay the rent payable by the Stadium Authority under the Ground Lease, the Stadium Authority's operating and maintenance expenses of the Stadium and debt service on any Takeout Financing.

(Ex. 86 at 187, § 7.4.) (Emphasis added.) According to StadCo, this articulation indicated how the Facility Rent would work and "that it would be the gap filler between the Authority revenues and the Authority expenses to make sure that the Authority had sufficient cash flow to be able to pay the ground rent to the City and its operating expenses and its debt service." (MacNeil, 136:7-139:13.) Mr. MacNeil testified that, based on his involvement in the development project, and the negotiation of the various

leases between StadCo and the Authority, the description of how facility rent was to be determined or adjusted set forth in section 7.4 of the DDA was maintained through subsequent documentation." (MacNeil, 138:16-23.). "That was the bedrock principle on how we were going to calculate Facility Rent," and it did not change thereafter. (MacNeil, 138:23-139:2.)

The Authority's assertion that the DDA changed who received revenues such as SBLs and Naming Rights from StadCo to the Authority is incorrect. As noted above, the 2009 Term Sheet clearly provided that the Authority would receive all "Stadium Operating Revenue," i.e., and that Stadium Operating Revenues would include ticket surcharges, naming rights, Senior and Youth program fees, naming rights revenue, and "all net revenues from the sale or transfer of SBLs." ((Ex. 17 at 162-163, §§ 10-10.4.)

The DDA further provides that Forty Niners Stadium Management Co. LLC ("ManCo") would provide a $25 million line of credit to the Authority, to cover temporary cash flow shortages. (Ex. 86, § 16.2.) The summary of the future lease between StadCo and the Authority set forth in exhibit B to the DDA provides that the Authority would have the option to convert the Lease back to a triple net lease, and transfer to StadCo the responsibility for paying expenses and debt service, if it was required to draw substantially on the ManCo line of credit (the "Put Right"), and under a variety of other conditions. (Ex. 86 at 241, § 5.1.)

At the public hearing at which the DDA was approved by the Authority Board, Thomas Webber, an attorney and negotiator for the Authority, told the Board that:

> StadCo will pay an annual facility rent to the Stadium Authority under the stadium lease, and this is important because the facility rent will be set, such that when added to other sources of the stadium revenue – so the rent will look at other projected sources of the stadium revenue, and when added to that, the total stadium revenue will be projected to be sufficient to pay all the estimated debt service and operating expenses of the Stadium Authority, including any payments on the long-term debt and the StadCo Subordinated loan. So all the expenses are looked at, all of the debt service is looked . . . we look at what the projected revenue will be, and then the rent will be pegged to make sure that the expenses and the debt service are paid.

(Ex. 124.)

The 2012 Lease

On March 1, 2012, Robbie Evans, then a strategic planning manager for StadCo, sent a projection model to Mr. Doezema. (Ex. 18.) The model shows projected balances in the Authority reserve accounts, with interest at a rate of 1% staying in the reserve account. (*Id.* at 14; MacNeil, 288:23-291:17.) The model also calculated interest earnings remaining in reserve accounts in the "Excess SCSA Funds Waterfall" portion of the model. (Ex. 18 at 14). On March 13, 2012, Mr. Evans sent another model to Mr.

Doezema that shows interest on the reserves accounts staying in the reserve accounts. (Ex. 21.) Mr. MacNeil testified that Mr. Evans models were not used to create and were not the basis for the 2012 Exhibit J. (MacNeil, 294:5-14).

In March 2012, construction financing closed. On March 28, 2012, StadCo and the Authority executed a Stadium Lease Agreement (the "2012 Lease"). (Ex. 22.) Section 6.1 of the 2012 Lease is entitled Facility Rent, and provides in pertinent part as follows:

> 6.1.1 Subject to adjustment as provided in Paragraph 6.2 through Paragraph 6.4, for each Lease Year in the Initial Term, Tenant [StadCo] shall pay to Landlord [the Authority], as fixed rent for the Stadium ("Facility Rent"), a fixed amount as is set forth in a schedule ("Facility Rent Schedule") to be determined in the manner provided in this Paragraph 6.1. Once determined, the Facility Rent Schedule shall be attached to this Lease as Exhibit J, replacing the illustrative example of Facility Rent initially attached hereto as Exhibit J.
>
> 6.1.2 The Facility Rent Schedule shall be determined, at or prior to the Takeout Closing, such that the Facility Rent payable over the Initial Term, together with other amounts payable by Tenant under this Lease and other reasonably estimated revenues of the Stadium Authority will provide the Stadium Authority with funds required to pay all Stadium Authority Expenses (excluding Stadium Authority Discretionary Expenses and costs and expenses paid by the Stadium Authority in connection with Civic Events). Subject to the foregoing, the Facility Rent Schedule shall be determined in a manner generally consistent with the formulas and assumptions used to calculate the illustrative example of Facility Rent attached hereto as Exhibit J (collectively, the "Facility Rent Assumptions"). . .. For purposes of the determination of the Facility Rent Schedule, Landlord and Tenant agree that (a) the "reasonably estimated revenues of the Stadium Authority" shall not include any Stadium Naming Rights Revenue unless the estimate of such revenue is based on amounts payable under a Stadium Naming Rights Agreement entered into by Landlord at or prior to the time the Facility Rent is being determined; provided, however, that, if such a Stadium Naming Rights Agreement has been entered into, then "reasonably estimated revenues of the Stadium Authority" may also include a reasonable estimate of Stadium Naming Rights Revenue for a period extending beyond the term of the executed Naming Rights Agreement, (b) the Facility Rent shall, except as otherwise agreed by the Parties or required by lenders providing Takeout Financing, be level over the term of the Takeout Financing and Subordinated Loan, and (c) the Facility Rent set forth in the Facility Rent Schedule for any Lease Year shall not be less than Five Million Dollars ($5,000,000.00), even after the Takeout Financing has been fully paid. It is acknowledged that the Subordinated Loan does not require payment of scheduled debt service until twelve (12) months following the later to occur of (i) the Takeout Closing or (ii) the Commencement Date, and that Excess Revenues during such period would, as shown in the illustrative example of Facility Rent attached hereto as Exhibit J, be expected to result in funding of the Operating Expense Reserve in the amount set forth therein. The Parties shall

resolve disagreements with respect to the Facility Rent Schedule in accordance with the Dispute Resolution Procedures.

(Ex. 22 at 485.) (emphasis added.)

Exhibit J to the 2012 Lease

Exhibit J to the 2012 Lease (hereinafter "2012 Exhibit J") begins as follows:

- **Fundamental Principle:** The Facility Rent from StadCo to the Authority will be set so that the Authority's <u>total</u> revenues will be sufficient to cover <u>all</u> of its expenses, including:
    - Ground Rent to the City
    - Stadium operating expenses
    - Capital reserves
    - Debt service
- The final rent schedule will be set at the takeout of the construction loan, as will the payment schedule for the StadCo Subordinated Loan
- Key factors that assure the Authority will be able to cover its expenses:
    - Operating reserve of $10M in first year
    - Conservative projections on revenues and expenses
    - Required annual payments on StadCo Subordinated loan reduced for first 10-years
    - StadCo Line of Credit (unlikely to be used, but available as a fail safe)
    - Authority "put right"

(Ex. 22 at 802-803.) (Emphasis in original.)

The final two pages of the 2012 Lease exhibit J is spreadsheet entitled "Annual Illustrative SA Rent Set and Cash Flow Projections." (Ex. 22 at 806-807.) In the projection, the Facility Rent was set at $30 million for years 1-28, and $5 million for years 29-40 (when the debt had been paid off). The other revenue sources listed on the projection were Net Revenues from Non-NFL Events and Other Revenues (e.g., Naming Rights, SBL receivables/resales, Ticket Surcharge, S/Y Fees). (*Id.*)

Mr. Doezema was the primary modeler for Stadium Authority, interfacing with StadCo and Goldman Sachs. (MacNeil, 160:15-161:3; Ameling, 912:25-913:15; Doezema, 1445:17-1446:8.) Mr. Doezema worked with Mr. Evans, who would report to Mr. MacNeil. Mr. MacNeil would also review the final documents. (MacNeil, 278:25-279:4, 280:4-281:20; Ex. 194 (MacNeil Depo.) at 107:18-108:7.)

The parties agreed that Mr. Doezema would maintain the spreadsheet, with input from StadCo and Goldman Sachs, partly to avoid public disclosure of confidential information. (MacNeil, 160:15-161:3; Doezema, 1454:18-1456:20, 1468:8-22.) 2012 Exhibit J was a spreadsheet that Mr. Doezema prepared. (MacNeil, 294:5-14). The back-up worksheets included the 2012 Exhibit J formulas and assumptions, including a "much more detailed spreadsheet that had, for example, more lines for some of these revenues and expenditures that totaled up and rolled up into these more summarized lines than appeared on these two [2012 Exhibit J] pages." (Ameling, 922:14-923:6.)

Interest earnings are not included as a revenue source on the 2012 Exhibit J. (Ameling, 926:12-18, 961:5-9.) However, 2012 Exhibit J modeling calculations (although not included 2012 Exhibit J itself) had interest earnings within the reserve accounts, "providing an added cushion and not as a revenue item that was available to pay debt services and operating expense." (Ex. 32 at 9-10; Doezema, 1470:5-13.) The modeling for the reserve accounts included a line item for interest of 1%. (Doezema, 1537:22-1538:25; Ex. 32 at 9; Doezema, 1469:22-25, 1540:5-16; MacNeil, 296:12-298:7, 281:21-282:15, 288:23-291:17, 340:1-341:25; Ex. 18, p. 9 of 17; Ex. 23, p. SF 774; Doezema, 1470:5-13, 1460:14-1461:14; Ex. 21, pp. 7 of 10.) Mr. Doezema testified that StadCo and the Authority had always modeled interest earnings within the reserve accounts. (Doezema, 1461:9-18.) As to why interest was building up in the reserves rather than being a category of revenues to pay debt service and expenses, Mr. Doezema testified that "[t]he concept was that these were dedicated accounts that … may earn interest at these rates, but that the funding of regular operations of the Stadium Authority and regular debt service that was due every year, wouldn't be the beneficiary of that interest earning." (Doezema, 1461:19-1462:3.)

The 2012 Lease was reviewed and approved by the NFL (which provided a $200 million loan to StadCo for Stadium construction) and Goldman Sachs, which arranged $850 million of financing from other sources. The NFL and the Goldman-led consortium of lenders understood that Facility Rent would be a "gap filler," based on actual revenue and expense information. (Carey, 516:12-519:17; 530:15-532:3; 535:5-538:24.)

The Drafting of the 2013 Lease

Construction on the Stadium began in April 2012. At some point thereafter, the parties began negotiating changes to the 2012 Lease, including setting the Facility Rent. The negotiators included Mr. MacNeil for StadCo and Karen Tiedemann and Tom Webber for the Authority.

Due to a deferred tax deduction concern, StadCo wanted to replace the non-level rent that decreased in later years (from $30 million to $5 million) in the 2012 Lease with a true flat rent for all 40 years. (MacNeil, 180:6-24, 2192:1-2195:1; Sabatino, 692:4-14; Keyser, 1262:25-1263:8.) Scott Sabatino is the Chief Financial Officer of ManCo, which manages the Stadium on behalf of the Authority (and StadCo). ManCo incurs all Stadium operational expenses on behalf of the Authority, and it manages all SBL and non-NFL event revenue. (Sabatino, 411:5-15.) ManCo maintains certain of the Authority's reserve

accounts, prepares annual budgets for the Authority's operations, and reports to the Authority regarding its financial performance. (Sabatino, 415:17-416:12.) "[A] declining rent structure provided some concerns for the IRS in terms of how the tax treatment would be of the 49ers' finances and that they had a strong desire to change it such that they wouldn't trip themselves up from a tax perspective." (Ameling, 940:14-941:1.)

Mr. MacNeil testified that while the 2013 Lease was being negotiated, the parties understood that the Facility Rent initially agreed to would not stay in place throughout the term of the 2013 Lease. (MacNeil, 201:17-24.) The parties understood that, given that they were going to be unable to accurately predict the Stadium's revenues, debt, service and expenses, "the rent going was to be adjusted after the stadium was opened based on actual revenues and expenses." (MacNeil, 201:1-11.) During these discussions, no one from the Authority stated that when the Facility Rent was adjusted, all revenue items on 2013 Exhibit J were going to remain frozen. (MacNeil, 203:1-18.) "No one said that . . . we're going adjust all the expenses but not adjust the revenues, or vice versa." (MacNeil, 203:18-22.) Such a change would have been a "material change," and "would have gotten everyone's attention." (MacNeil, 203:23025.) Mr. MacNeil testified that, during the course of negotiating the 2013 Lease (and the Facility Rent provisions thereof), there was no discussion that the principle of rent as a gap filler plugged number (a bridge between all debt service and expenses on the one hand and all of the revenues on the other) was no longer the guiding principle for facility rent or for adjusting facility rent. (MacNeil, 204, 5:15. There was no discussion during this period of "disregarding or excluding any actual revenues when it came time to adjust the rent." (MacNeil, 204:16-20.)

On April 9, 2013, StadCo forwarded to the Authority's counsel (Ms. Tiedemann) a proposed revision of section 6.1 of the 2012 Lease regarding the determination of Facility Rent. (Ex. 406A.) The internal StadCo email including the proposed revision, prepared by StadCo counsel, states:

> The concept, which has been discussed with Larry [MacNeil], Alan Doris [Tax Attorney] and I, is that we would determine the Facility Rent schedule for the initial term now, in conjunction with the closing of the financing, but the schedule would be subject to a one-time adjustment at April 1, 2015 (the start of the first full Lease Year). **Rent over the initial term would be adjusted to reflect the finally determined amounts of the debt service on the Takeout and Subordinated Loan and updated estimates of operating expenses.**

(Ex. 406A at 368.) (Emphasis added.) The proposed revision made substantial changes to the prior version of section 6.1.2 and eliminated all references to revenues included in section 6.1.2 of the 2012 Lease. (*Id.*) The proposed revision sent to the Authority provides in part that:

6.1.2 ~~The Facility Rent Schedule shall be determined, at or prior to the Takeout Closing, such that the Facility Rent payable over the Initial Term, together with other amounts payable by Tenant under this Lease and other reasonably estimated revenues~~If as of April 1, 2015 (or, if later, within thirty (30) days after the final amount of the Stadium Authority ~~will provide the Stadium Authority with funds required to pay all Stadium Authority Expenses (excluding Stadium Authority Discretionary~~Development Costs[1] is determined), the amount of either scheduled debt service on the Project Debt[2] or the then estimated operating expenses of the Stadium (including, without limitation, Shared Stadium Expenses and ~~costs and~~Utilities expenses ~~paid by the Stadium Authority in connection with Civic Events). Subject to the foregoing, the Facility Rent Schedule shall be determined in a manner generally consistent with~~) is either more or less than the estimated amount thereof set forth in the formulas and assumptions used to calculate the ~~illustrative example of~~ Facility Rent ~~attached hereto as~~on Exhibit J-2 attached hereto (collectively, the "Facility Rent Assumptions") ~~The Facility Rent Assumptions shall be subject to modification as reasonably required by lenders providing Takeout Financing in order to achieve an investment grade credit rating. For purposes of the determination of the Facility Rent Schedule, Landlord and Tenant agree that (a) the "reasonably estimated revenues of the Stadium Authority" shall not include any Stadium Naming Rights Revenue unless the estimate of such revenue is based on amounts payable under a Stadium Naming Rights Agreement entered into by Landlord at or prior to the~~, then a one-time adjustment to the Facility Rent ~~is being determined~~Schedule (including, if necessary, a retroactive adjustment to the Facility Rent payable for the first Lease Year) shall be made to take account of such increase or decrease. Any such adjustment to the Facility Rent Schedule shall be determined in a manner otherwise generally consistent with the Facility Rent Assumptions; provided, however, that, ~~if such a Stadium Naming Rights Agreement has been entered into, then "reasonably estimated revenues of the Stadium Authority" may also include a reasonable estimate of Stadium Naming Rights Revenue for a period extending beyond the term of the executed Naming Rights Agreement~~after any such adjustment, (~~a~~i) the Facility Rent shall, except as otherwise agreed by the Parties ~~as required by lenders providing Takeout Financing,~~ be remain level over the term of the ~~Takeout Financing and Subordinated Loans~~ Project Debt and (~~b~~ii) the Facility Rent ~~set forth in the Facility Rent Schedule~~ for any Lease Year shall not be less than Five Million Dollars ($5,000,000.00), even after the Takeout Financing has been fully paid. ~~It is acknowledged that~~

(Ex. 406A at pages 4 of 6; *see also* the Authority's Post-Hearing Opening Brief at 11.)

According to Mr. Ameling and Mr. Doezema, StadCo attorney's explanation (in the April 9, 2013 email) of how the parties would adjust rent based only on debt service and expenses is the "understanding of how it was to work." (Ameling, 968:4-18; *see* Doezema, 1484:3-1485:4.) However, the version of section 6.1.2 included in the 2013 Lease is not the same as that included in StadCo's April 9 formulation of the clause. For example, the April 9 version of the clause does not include the reference "Net Prepayments" included in the 2013 Lease. Likewise, the April 9 formulation does not include the 2012 Exhibit J or a revised version of 2012 Exhibit J (i.e., 2013 Exhibit J).

During the negotiation of the 2013 Lease, Mr. Doezema was concerned that the proposed modification to the text of Section 6.1.2 in the 2012 Lease could be read to bar the use of updated revenue information in the rent adjustment process. (Doezema, 1643:19-1644:3.) Mr. Doezema wanted to be able to consider revenues and was concerned that if revenues did not meet expectations, and if that underperformance was not taken into account in the rent adjustment process, the adjusted rent would be understated by not considering revenues and would potentially leave the Authority in the red. (Doezema, 1644:4-9; Ex. 196).

At a meeting of the Authority's senior staff, Mr. Webber, Karen Tiedemann, and outside consultants and attorneys with their StadCo counterparts, Mr. Doezema asked Mr. MacNeil to confirm that the rent adjustment process would include updated revenue information. (Doezema, 1644:10-1645:14.) Mr. MacNeil responded that even though revenue was not indicated as something that would be considered in the proposed lease language, the parties would nevertheless consider revenues. (Doezema, 1645:11-1647:2). Mr. Doezema testified that he interpreted the draft document that was passed around at that time to not really provide for consideration of revenue, and that what Mr. MacNeil "was saying was outside what the legal documents would provide for." (Doezema, 1646:12-23.) Mr. Doezema testified that he understood that Mr. MacNeil was asking for exclusion of revenues because it was a tax issue for StadCo to include revenues in the contract language. (Mr. Doezema 1646:24-1647:2.) Mr. Doezema testified, however, that at this meeting and thereafter, no one from the Authority side told him that they shared his interpretation of what Mr. MacNeil was saying, and that the parties did not discuss this issue again during the 2013 period. (Doezema, 1647:3-16.)

In June 2013, the construction loan was replaced with permanent financing. On June 11, 2013, a proposed lease was presented to the Authority's Board. During the Authority's presentation, Ms. Tiedemann stated:

> [T]he facility rent is being set at 24,500,000 a year. That will be a level rent that is paid every year of the lease, **subject to a one-time adjustment that can occur in 2015 that would be adjusted depending on operating costs and operating revenues after we've had one NFL season to determine if we got all the projections right.**

(Ex. 88.) (emphasis added.) The Authority Board subsequently approved the proposed lease.

Mr. Doezema created the PDF that would be attached as exhibit J to the 2013 lease, based on all the parties' and consultants' combined work. (Doezema, 1509:11-1514:3.) On June 7, 2013, Mr. Doezema provided StadCo with a version of Exhibit J. (Ex. 29.) On June 18, 2018, Mr. Sabatino sent an email to Mr. Doezema attaching the final model for the project, essentially asking Mr. Doezema to prepare the version of exhibit J that would attached to the amended lease. (Ex. 30; Sabatino, 699:15-701:3.)

The 2013 Lease

On June 19, 2013, the parties entered into an Amended and Restated Stadium Lease ("the 2013 Lease"). The 2013 Lease "amends and restates and hereby supersedes in its entirety the [2012 Lease]." (Ex. 33 at 611.) Pursuant to the 2013 Lease, StadCo leased the Stadium from the Authority for 40 years. (Ex. 33, § 2.1).

a. Section 6.1

Section 6.1 of the 2013 Lease addresses the Facility Rent, and provides in pertinent part as follows:

> 6.1.1 Subject to adjustment as provided in Paragraph 6.1.2 and Paragraph 6.2 through Paragraph 6.4, for each Lease Year in the Initial Term, Tenant shall pay to Landlord, as fixed rent for the Stadium ("**Facility Rent**"), an amount equal to [$24,500,000.00].
>
> 6.1.2 If as of April 1, 2015 (or, if later, within thirty (30) days after the final amount of the Stadium Authority Development Costs is determined), the amount of either the debt service on the Project Debt (taking into consideration the then estimated Net Prepayments, if any, to be applied to the Subordinated Loan from time to time pursuant to the StadCo Obligations Agreement) or the then estimated operating expenses of the Stadium (including, without limitation, Shared Stadium Expenses and Utilities expenses) are either more or less than the estimated amounts thereof, as set forth in, the formulas and assumptions used to calculate the Facility Rent on Exhibit J attached hereto (collectively, the "Facility Rent Assumptions"), then a one-time adjustment to the Facility Rent Schedule (including, if necessary, a retroactive adjustment to the Facility Rent payable for the first Lease Year) shall be made to take account of such increase or decrease. Any such adjustment to the Facility Rent Schedule shall be determined in a manner otherwise generally consistent with the Facility Rent Assumptions; provided, however, that, after any such adjustment, the Facility Rent shall, except as otherwise agreed by the Parties and subject to the Market Rent reset pursuant to Paragraph 6.2 below, remain level over the Initial Term of this Lease. The Parties shall resolve disagreements with respect to any such adjustment of Facility Rent pursuant to this Paragraph 6.1.2 in accordance with the Dispute Resolution Procedures.

(Ex. 33 at 636.) (emphasis in original.)

With respect to the reference to "the then estimated Net Prepayments" language in section 6.1.2, Mr. Doezema testified that while net prepayments can be affected by adjusting revenues, net prepayments can also be affected without adjusting revenues. (Doezema, 1492:14-23.) Mr. Doezema, when asked whether accurately estimating estimated net prepayments would actually require one to update one's revenue data and revenue projections, testified that better information on revenues would lead to better information on the net payments, and that ignoring updated information on revenues would resulted in a poorer, less good estimate of net prepayments. (Doezema, 1661:6-16.)

b. Exhibit J to the 2013 Lease

Ex. J to the 2013 Lease ("2013 Exhibit J"), the "Facility Rent Assumptions," is a two-page spreadsheet, with six identical "notes" below the spreadsheet on both pages. (Ex. 33 at 021-022) In preparing 2013 Exhibit J, the parties and Goldman Sachs shared, back and forth, modeling and information, and tried to get 2013 Exhibit J right. (Doezema, 1506:10-1507:10.) The parties "focused primarily on revenue and debt service." (Doezema, 1514:21-1515:1.) The focus on revenue and expense lines in 2013 Exhibit J was "intense." (Sabatino, 402:9-17.)

The notes on each page of 2013 Exhibit J, provide that:

> **1. Level Facility Rent set sufficient to fund SCSA expenses and debt service in each Lease Year and repay the StadCo subordinate loan in full by the end of Lease Year 25.**
> 2. StadCo subordinate loan has a 30 year amortization: however, Facility Rent set such that pre-payments from Excess Revenues result in payment in full by end of Lease Year 25.
> 3. Scheduled Principal on the StadCo Subordinate loan may be reduced by application of a ledger credit for prior principal prepayments if necessary.
> **4. Facility Rent set such that Net Cash After Debt Service is positive every year.**
> 5. Effective net margin above mandatory expenses and debt service factors in the ability to reduce StadCo Subordinate Loan payments by applying a ledger credit.
> 6. Operating reserve is first call on excess revenue (after any line of credit balance). First year debt service "holiday" is designed to ensure that $10 million operating reserve is generated in first year.

(*Id.*) (emphasis added.) The notes are formulas and assumptions. (Doezema, 1490:24-1491:8, 1517:19-22, 1518:12-1519:14, 1729:21-1730:6; Ameling, 956:15-20.) Mr. Doezema testified that electronic back-up pages of 2013 Exhibit J also include the formulas and assumptions. (Doezema, 1490:1-23, 1723:19-1724:18; Ameling, 955:25-956:11, 1099:15-1100:7.)

Mr. Doezema testified that requiring annual net positive cash created a margin or cushion that provides comfort in case the 40-year projections were off, and that the combination of annual net positive cash and level rent enhances the margin. (Doezema, 1432:18-1433:25, 1519:15-1520:7 and 1498:7-20.)

Mr. Doezema testified that, focusing on the mandates set forth in notes 1 and 4 of 2013 Exhibit J, someone could create a spreadsheet without updating revenues from the 2013 Exhibit J projections but doing that would be less accurate than inputting updated revenue data. (Doezema, 1740:10-23.). If one were to actually make a best effort to honor the dictates of notes 1 and 4, Mr. Doezema's instinct would be to consider updated revenue data and projections. (Doezema, 1741:24-1742.8.)

On August 2, 2013, roughly two weeks after execution of the 2013 Lease, Mr. Doezema, at the request of Mr. MacNeil, provided StadCo with "Our Exhibit J model," which includes the back-up pages, stating that "There were some final tweaks on June 17 so this version is slightly updated from the June 7 pdf you sent." (Ex. 4) The spreadsheet includes a tab showing projected balances for the Authority's reserve accounts, with a line for interest that shows zero revenue. (*Id.*)

Due to the level rent and net positive cash requirements for all 40 years in 2013 Exhibit J, the parties agree that they are essentially calculating the facility rent adjustment number based on the last "lean" years with the lowest cash flow. (Sabatino, 411:23-412:8, 602:9-603:15; Rhoda, 858:2-859:24, 2377:2-12; Newton, 1844:11-1845:16, 1952:20-1954:20, 2118:23-2120:3; Doezema, 1763:8-1764:15.) "[W]e really solve for year 39 in the lease to make that a positive number, but because rent is level, what it did was lifted all the other years, which were all already cash flow positive, up to this level." (Sabatino, 411:23-412:8, 414:23-415:13, 602:9-603:15; Exs. 577 and 578.) "Debt would be much lower in the late period, but expenditures would still grow. So in order to keep that same principle of solving for all 40 years and not letting any individual year be less than zero, there had to be more rent throughout the 40-year period to keep level rent." (Ameling, 1006:22-1008:1.)

(1) 2013 Exhibit J Revenues

2013 Exhibit J identifies three categories of Revenue (Facility Rent, "Non-NFL event income @3%" and "Other Revenue (SBLs, Naming, Ticket Surch., S/Y Fee)," and provides an estimated revenue for each of the three "revenues" for each year of the Lease. (Ex. 155.) Exhibit 155A is the backup worksheet for 2013 Exhibit J. In the back-up worksheet for the 2013 Exhibit J, the revenue line items are detailed as follows:

Facility Rent
SBL Receivables
Ticket Surcharge @10%
Naming Rights
Non-NFL Events (Net) @3%
SBL Resale Proceeds
Senior / Youth Fee

(Ex. 155A.)

The parties also calculated Non-NFL Events (net) revenue in the 2013 Exhibit J on an accrual method of accounting. (Ex. 155A, revenue line item #4; Ameling, 1125:1-1126:16.) The 2013 Exhibit J includes this revenue starting from Year 1 through Year 40 growing at 3% (and does not include two years of the revenue in Year 40. (Ex. 155A; Sabatino, 2318:5-9; Ameling, 1125:1-1126:16, 1128:24-1129:24, 1112:11-23; Doezema, 1523:4-8.) 2013 Exhibit J, however, does not list several revenue items that are at issue in the arbitration: (1) non-NFL ticket surcharge; (2) STR Marketplace; (3) Fanwalk and (4) interest earnings on reserve accounts. (Exs. 155 and 155A.)

Mr. Ameling testified as to why interest income was excluded from revenues in 2013 Exhibit J:

> One, because it's more conservative to exclude it. And, No. 2, you only earn interest income if you carry balances, and balances in reserve accounts, although certain reserve accounts were required contributions, if the Stadium Authority had experienced greater expenditures than were expected, we would have had to have tapped into what was called the line of credit, and there would not have been contributions into some of those reserve accounts. So those reserve balances that they were suggesting that we earn interest on were not certain.

(Ameling, 997:7-23) StadCo understood that the reserve accounts would bear interest in 2013, and these earnings were never a confidential number that StadCo wanted to "roll-up" from the public. (MacNeil, 342:1-7, 302:2-5.)

The 2013 Exhibit J modeling calculations have interest earnings within the reserve accounts. (Ex. 155B.) The modeling for the reserve accounts included a line item for interest of 0%. or debt and expenses. (Doezema, 1537:22-1538:16, 1469:14-1470:13, 1538:22-25, 1540:5-16; Ex. 155B.)

(2) Excess Revenue

2013 Exhibit J includes a line item for Excess Revenue, citing Article 14 of the Lease. Article 14 of the Lease provides a distribution order (or "waterfall") for any excess revenue as follows:

> 1. Pay any outstanding balance of the Management Company Revolving Loan;
> 2. If the Operating Expense Reserve is less than Two Million Dollars, the lesser of the amount necessary to bring the Operating Expense Reserve to Two Million Dollars or One Million Dollars;
> 3. One Million Dollars to the Stadium Capital Expenditure Reserve;
> 4. The amount necessary to bring the Operating Expense Reserve to Ten Million Dollars;
> 5. Pay any outstanding principal balance of the Subordinated Loan;
> 6. The amount necessary to bring the Operating Expense Reserve to Twenty Million Dollars;
> 7. The amount necessary to bring the Renovation/Demolition Reserve to Seventy Million Dollars; and,
> 8. Payment of any Stadium Authority Discretionary Expenses or any other purpose, including distribution to the City of Santa Clara's general fund.

(Ex. 33 at 673-675.)

(3) Expense Growth Rate and Accrual Method of Accounting

The parties negotiated and included in the 2013 Exhibit J embedded expense growth rates under the concept "that we would both live with the assumptions embedded in Ex. J, including the growth rates." (MacNeil, 376:2-16, Ex. 35; *see* Sabatino, 749:6-11, 750:14-16; Doezema, 1516:13-1517:9; Ameling, 993:14-24, 994:5-13.) The parties agreed to a 3% growth rate for most operating expenses and 5% for utility expenses based on actual expenses incurred in the first two years of operation. (Doezema, 1516:13-1517:9, 1523:9-21; Sabatino, 741:14-742:18.)

c. Additional Relevant Provisions of the 2013 Lease

Section 33.11 of the 2013 Lease is an integration clause, which provides in part as follows:

> This Lease together with the Stadium Lease Documents shall constitute the entire agreement of the Parties with respect to the subject matter thereof and shall supersede all prior written and oral agreements and understandings with respect to such subject matter. Neither the Stadium Lease Documents nor any of the terms thereof may be amended, supplemented, waived or modified orally, but only (a) by an instrument in writing signed by the Party against which the enforcement of the amendment, supplement, waiver or modification shall be sought, and (b) with the written consent of the Team if such amendment, supplement, waiver or modification is made or given during the term of the Team Sublease and . . . amends supplements, waives or modifies any provision of any of the Stadium Lease Documents or any defined terms used in or relating to such provisions, except as may be expressly provided in this Lease.

(Ex. 33 at 748.)

Article 27 of the 2013 Lease is entitled "Dispute Resolution." Section 27.1 provides that in the event of any dispute, controversy or claim between the Parties arises under the Stadium Lease Documents or is connected with or related in any way to the Stadium Lease Documents or any right, duty or obligation arising herefrom or the relationship of the Parties hereunder (a "Dispute or Controversy") . . . , the Parties shall first attempt in good faith to settle and resolve such Dispute or Controversy by mutual agreement in accordance with the terms of this Paragraph 27.1."(Ex. 33, § 27.1.) "In the event a Dispute or Controversy arises, either Party shall have the right to notify the other that it has elected to implement the procedures set forth in this Paragraph 27.1." (*Id.*) "Within fifteen (15) days after delivery of any such notice by one Party to the other regarding a Dispute or Controversy, the Landlord Representative and Tenant Representative shall meet at a mutually agreed time and place to attempt, with diligence and good faith, to resolve and settle such Dispute or Controversy." (*Id.*) Should a mutual resolution and settlement not be obtained at the meeting, "then either Party may by notice to the other Party submit the Dispute or Controversy to mediation to the extent permitted or required by the provisions of Paragraph 27.2 below, and, otherwise, for resolution in

accordance with the alternative dispute resolution process set forth on Exhibit L (the "Dispute Resolution Procedures")." (Id.)

"If a Dispute or Controversy is required to be submitted to mediation in accordance with Paragraph 27.2 of the Stadium Lease, or the Parties otherwise mutually desire to submit a Dispute or Controversy to mediation prior to submitting such Dispute or Controversy to Regular Arbitration, the mediation shall be conducted in accordance" with the procedures set forth in section 2 of exhibit L to the Lease. (Ex. 33, Exhibit L, § 2.) "Either party may initiate Regular Arbitration with respect to the Dispute or Controversy submitted to mediation by filing a written demand for Regular Arbitration at any time following the initial mediation session or at any time following forty-five (45) days from the date of filing the written request for mediation, whichever occurs first ("Earliest Initiation Date")." (Ex. 33, Exhibit L, § 2.4.)

Section 1.1(a) of exhibit L to the 2013 Lease provides that except for certain disputes (not applicable here), "any Dispute or Controversy shall be determined by arbitration in Santa Clara, California before one arbitrator." Ex. 33, Exhibit L, § 1.1(a). "The arbitration (the "Regular Arbitration") shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures." (*Id.*) "Any award rendered pursuant to the foregoing, which may include an award or decree of specific performance hereunder, shall be final and binding on, and nonappealable by, the Parties and judgment thereon may be entered or enforcement thereof sought by either Party in a court of competent jurisdiction." (*Id.*) "Notwithstanding the foregoing, nothing contained herein shall be deemed to give the arbitrator appointed hereunder any authority, power or right to alter, change, amend, modify, waive, add to or delete any of the provisions of the Stadium Lease." (Ex. 33, Exhibit L, § 1.1(b).

"In deciding the substance of any such Dispute or Controversy, the arbitrator shall apply the substantive laws of the State of California." (Ex. 33, Exhibit L, § 1.4.) "The arbitrator shall have authority, power and right to award damages and provide for other remedies as are available at law or in equity in accordance with the laws of the State of California, except that the arbitrator shall have no authority to award incidental or punitive damages under any circumstances (whether they be exemplary damages, treble damages or any other penalty or punitive type of damages) regardless of whether such damages may be available under the laws of the State of California." (*Id.*)

"In any arbitration arising out of or related to this Exhibit, the arbitrator(s) shall award to the prevailing party, if any, the Attorneys' fees and Costs reasonably incurred by the prevailing party in connection with the arbitration in accordance with the terms of Paragraph 26.12 of the Stadium Lease." (Ex. 33, Exhibit L, § 1.8.)

The Rent Adjustment Process

In July 2014, Levi Stadium opened. Based on actual operating information, debt service was lower than the parties estimated, and operating expenses were higher than estimated. (Doezema, 1706:9-1707:9; Sabatino, 437:21-438:24.) As a result, the rent

adjustment process in the 2013 Lease was triggered. (Ameling, 980:18-981:13.) From approximately December 2014 through March 2016, the Parties engaged in the rent adjustment process set forth in section 6.1.2 of the Lease.

In December 2014, the Authority sent an email with attachments to StadCo regarding "Non-NFL Income and Stadium Rent Reset" (the "KMA Roadmap memo"). (Ex. 66.) Attachment B to the email is a memorandum by Mr. Keyser addressing "Stadium Rent Reset including pertinent background, recommended tools to facilitate Rent Reset and a discussion of Rent Reset timing and milestones to meet a suggested target date." (Ex. 66 at 307.) The memorandum notes that while the Lease set Facility Rent for term of the Lease at $24.5 million per year, "Facility Rent is subject in 2015 to a one-time adjustment if certain financial factors are either more or less than the assumptions/projections used in Exhibit J to the Stadium Lease." (Ex. 66 at 130.) The memorandum states that:

> Background to take into account in Rent Reset is:
>
> 1. The $24.5M rent was set based on 3 criteria:
>
>   a. Must be sufficient to repay the StadCo subordinate loan in full be the end of lease year 25, although there is a 30 year amortization schedule.
>   b. Must be sufficient to fund SCSA expenses and debt service in every lease year;
>   c. Must be level for 40 years;
>
> 2. **The fundamental principle operative in the setting of Facility Rent is that SCSA's revenue from rent and all other sources will cover all of SCSA's expenses.** These expenses include ground rent to the City, Stadium operating expenses, capital reserve and debt service.
>
> 3. Existing or adjusted Facility Rent will remain level over the Initial Term of the Lease unless superseded by one of two possible future events.
>
>   a. SCSA exercises its Put Right which terminates the lease, or
>   b. Exercise in year 25 by either party to the lease of Market Rent Reset provisions but which cannot become effective until the commencement of Lease Year 33.
>
> 4. Exhibit J to the Stadium Lease is the document that incorporates the ground rules, assumptions and projections used to establish the current rent set of $24.5M. However, given the multiple line items of Exhibit J, it is a very complex and not easily transparent document. Without separating the various line items into the major components, it would be difficult to reevaluate the key assumptions and variables that went into establishment of the current $24.5M rent set.

(Ex. 66 at 330-331.)

The next section of Mr. Keyser's memorandum is entitled "Recommended Tools to Facilitate Rent Reset," and states:

> KMA has prepared a set of tables that we recommend be used to facilitate the Rent Reset dialogue between StadCo and the City. These tables break the multiple line items of Exhibit J into three key components, identify the key sources for the line item assumptions/projections, and include a recommended action to achieve closure between StadCo and the City on each Exhibit J line item. The three key tables and components plus Exhibit J with additional detail are included as follows:
>
> Table 1: Revenues
> Table 2: Operating Expenses
> Table 3: Capital costs and financing thereof - and Use of Revenues in Excess of Operating Expenses and Debt Service
> Table 4: Exhibit J with additional detail
>
> . . .
>
> Also provided is Exhibit J itself, with additional detail agreed to by the parties but not provided in the lease itself. **Exhibit J with additional detail is the document which needs to be confirmed or modified based on agreement between StadCo and the City as to Facility Rent after taking into account all other line item changes as agreed to in the Rent Reset process.**

(Ex. 66 at 331.) (emphasis added.)

The final section of Mr. Keyser's memorandum is entitled "Rent Reset Timing," and provides that:

> **As to timing, April 1, 2015 was selected for Rent Reset to allow all or most of one year's experience as best guide to future revenues and operating expenses.** That target date may need to be somewhat extended to allow for "True Up" of final costs and finalization of StadCo subordinated and bank loan amounts.
>
> To meet the target deadline of late spring, it is anticipated that review and analysis of pertinent data will need to commence with preliminary meetings and data gathering in December 2014, and an intensive effort throughout the first quarter of 2015. . ..

(Ex. 66 at 330-332) (emphasis added.) The memorandum reflects that debt service projections require updated revenue projections. (*Id.* at 335.) According to Table 3 of the memorandum, in order to project costs for the StadCo Subordinated Loan – a component of the Authority's debt service costs – the parties needed to "[m]odify [the original

projections] as necessary based on actuals and updated revenue projections." (*Id.*) During the parties' subsequent discussions, the Authority made requests for updated revenue information. (Ex. 269.)

From July 2015 through February 2016, the Authority and StadCo exchanged a series of rent adjustment proposals. StadCo made clear during the negotiations that StadCo felt the rent should be lower. (Sabatino, 477:5-17; Doezema, 1587:14-1588:19; Ameling, 993:14-994:4.) In July 2015, StadCo made a first proposal based upon a 30 year model. All parties agreed that this was improper, and StadCo agreed to correct its proposal. (Doezema, 1548:5-1549:2; Ameling, 983:3-984:6; Sabatino, 722:4-17.) At this time, Mr. Doezema raised the issue of whether or not revenues are considered in the calculation. (Doezema 1549:11-20.)

On November 4, 2015, StadCo provided the Authority with a proposal that set the Facility Rent at $19 million. (Exs. 251 and 251A.) StadCo's proposal: (1) lowered the 5% utility growth rate set forth in the 2013 Exhibit J calculations to 3%; (2) included a new revenue item (STR Marketplace); and (3) and adjusted the revenue figures used in 2013 Exhibit J. (Doezema, 1560:10-1563:11.) In response, Mr. Doezema again raised the issue of adjusting revenue. StadCo's response to Mr. Doezema made clear that it believed that revenues should be adjusted as part of the calculation. (Doezema, 1563:12-16, 1587:14-1588:8; Sabatino, 802:10-19.) No one on the StadCo side took the position that revenues should not be updated as part of the rent adjustment negotiation. (Sabatino, 801-802; Doezema, 1563:12-16, 1587:14-1588:8.)

In early January 2015, StadCo representatives asked Mr. MacNeil how hard StadCo could push a 3% growth rate assumption for modeling purposes rather than the 5% included in the 2013 Exhibit J calculations. (Ex. 35.) In response, Mr. MacNeil stated that the Authority was on firmer ground on this issue, stating:

> The concept with Exh. J was that we would both live with the assumptions embedded in Exh J, including the growth rates.
>
> . . .
>
> I think there is a ton of risk in the non NFL event revenue in the out years, also naming rights. So if they are sucking that up, then we should eat the 5%.

(*Id.*)

In late January 2016, the Authority informed StadCo that its calculation showed that the rent may not decrease. (Ameling, 1005:14-1006:21, 1010:16-1011:1, Ex. 80.) At this point, the process became a hard-fought negotiation. (Ameling, 1114:2-1115:1; MacNeil, 378:4-10.)

On February 8, the Authority, through Mr. Doezema, sent StadCo the Authority's Rent Reset Model. (Ex. 83.) Mr. Doezema's email accompanying the model states:

> You will find that our draft model is largely unchanged from your analysis with a few important exceptions. The differences will be no surprise as they have been

the subject of our discussions since our first phone calls on this matter in November. Specifically, the adjustments to the analysis include the following:

> (1) Utility expense growth has been modified to 5% per year consistent with Exhibit J.
>
> (2) SBL revenues are adjusted to account for the likelihood that a small portion of SBL holders will pre-pay to avoid the 8.5% interest rate. Prepayments are estimated based on the experience to date. We've accepted all of your other assumptions regarding the SBL revenue projection.
>
> (3) Non-NFL $4 ticket surcharge - the revenue estimate has been adjusted slightly based on actual average attendance.
>
> (4) STR revenues, which are derived from commissions on SBL sales, are adjusted to reflect the expected depreciation of the value of the SBL over time. Given SBLs grant the holder the right to purchase season tickets for the life of the stadium, the value is anticipated to depreciate as the stadium ages and the end of the lease term nears. Based on our discussions last week and the additional information you provided from Candlestick, we are estimating an average residual value at the end of the lease term of 1X the price of season tickets (vs. approx. 5.8X the cost of season tickets at initial sale). Inflation is reflected as an offsetting factor to the projected depreciation. We have adjusted the SBL resale line and the SBL sales expense line proportionately on the same basis.
>
> . . .
>
> (6) We have modified the timing of Non-NFL revenue and rent to an accrual basis, as discussed.

There is a relatively minor reconciliation issue that will need to be addressed regarding the year 1 actuals, as noted, presumably mostly the result of the treatment of the Non-NFL income and performance rent on an accrual basis.

The attached analysis finds no adjustment to rent is warranted. This conclusion reflects the basic fact that the decrease in debt service from the estimates in Exhibit J is more than offset by the increase in operating expenses as compared to the estimates incorporated into Exhibit J.

(*Id.*) (emphasis added.) The Authority's model included revenue items that were not included in the 2013 Exhibit J: STR, Non-NFL ticket surcharge and Fanwalk. (Doezema, 1589:5-1591:5, 1016:25-1017:19; Ex. 83 at 029; Ameling, 1016:25-1017:19.)

On February 10, 2016, StadCo provided the Authority a new proposed model. (Ex. 5.) The accompanying email stated that while StadCo did not agree with some of the points in Mr. Doezema's prior email, "in an effort to reach a final agreed number, we are

willing to make changes based on your recent model." (*Id.*) The email notes that StadCo agreed to the Authority's proposal regarding SBL Proceeds, SBL Resale Proceeds, STR Revenue, SBL Sales and Service Expenses, and that Utilities "are included at the 5% growth rate." (*Id.*) The email concludes as follows:

> We have also updated the non-NFL ticket surcharge and discretionary fund expense to $2M and $1M per year steady state, respectively. We believe this is a fair compromise given that actual attendance of major events has historically been at around 50k, and we are agreed on 10 events per year as a reasonable benchmark. We did not change the spread of non-NFL revenue and performance based rent as this is a cash basis model.
>
> Finally, wanted to note that we have also included a comparison of the cushion versus the Exhibit J from 2013 ("Cushion Comparison" tab). This shows that the actual cushion in this model and the 2013 version are virtually in-line with each other through year 25 (new version provides more cushion), after which there is still positive excess cash flow each year and a considerable buildup of cushion reserves that should protect against any cash flow concerns. **We should also expect these reserves to accumulate interest in the future to add incremental cushion as we go forward — this is not modeled in but it's realistic to expect $1M+ in interest per year when the reserves have reached ~$50M in later rent years.**
>
> Given the changes described above, proposed rent has increased to $19.850M through Lease Year 32 and $23.5M thereafter.

(Ex. 5.) (emphasis added.)

On February 12, 2016, the Authority, through Mr. Doezema, made a rent adjustment proposal to StadCo that again reflected updated revenue projections. (Ex. 67.) The proposal set rent at $20 million for years 2-9, $21.5 million for years 10-30 and $24.5 million for years 31-40, plus a meaningful increase in the Public Safety Cap. (*Id.*) The proposal did not include a single dollar of excess revenues in any year. (*Id.*) The proposal was offered in the spirit of exploring a compromise. (Doezema, 1605:17-1606:3; Ameling, 1018:21-1021:9; Sabatino, 772:5-773:6.)

On February 16, 2016, Mr. Ameling sent a report on the Facility Rent Adjustment Process to the Authority Board. (Ex. 143.) The report states, in part, that:

> **Section 6.1.2 of the Stadium Lease requires a rent adjustment after completion of construction when the actual amount of debt service is determined and when projections of Stadium Authority revenues and operating expenses can be based on the first year's actual operations.** The onetime rent adjustment is designed to adjust the rent to achieve the goals of the Stadium Lease for facility rent based on the most current and best information available. Section 6.1.2 requires that the rent adjustment adhere to the

> assumptions that were used to establish the initial rent which are set out in the Stadium Lease and Exhibit J.

(Ex. 143 at 779.) (Emphasis added.) The February 16 report notes that construction was completed, and that a review of the project revealed a lower overall debt for the Authority. (*Id.*) The report further states that:

> Since this information became available last fall, Finance Department Staff and the Stadium Authority's economic consultants (Keyser Marston Associates) have spent the last few months working through the projections for Stadium Authority revenue, expenses and debt service with Finance staff from StadCo. The staff review has now been completed and the initial results were presented to Stadium Authority management last week. . ..

(Ex. 143 at 779-780.)

On February 18, 2016, StadCo prepared internal models that included for the first time interest on reserves accounts as revenue to pay for debt and expenses. (Sabatino, 774:16-776:6; Exs. 6, 441 and 443.) This is the first time, in 2016, 2015, 2013 or 2012, that any party included interest on reserves earnings as a revenue item in any facility rent adjustment calculation. (Sabatino, 776:16-21; Ameling, 1023:4-14; Doezema, 1608:16-1610:23.)

On February 25, 2016, StadCo sent the Authority a model for $20.25 million, which included projected interest earnings on the Authority's reserve and waterfall accounts as a revenue item. (Exs. 306 and 306A.) Interest earnings being treated as revenues increases revenues in the later lean years, which, correspondingly, significantly decreases StadCo's annual rent number. (Ameling, 1023:24-1025:21, 1026:3-11.) Mr. Ameling and Mr. Doezema both were "surprised at the last-minute addition of interest given how far along we are in the process." (Ameling, 1028:1-8; Ex. 7.) Mr. Ameling and Mr. Doezema did not think it was reasonable to include interest as revenue and thought that it was contrary to 2013 Exhibit J. (Doezema, 1612:2-1613:11; Ameling, 1026:3-11, 1028:1-21, 1031:18-25, 996:22-997:23.) Prior to this proposal from StadCo, Mr. Doezema never saw a model from StadCo where they included interest on reserves as a revenue item to be used to pay operating expenses or debt service. (Doezema, 1600:7-11.)

During a meeting in late February 2016, StadCo's President, Al Guido, and Mr. Sabatino, met with Lisa Gillmor, Chairperson of the Authority Board and mayor of the City, and explained that, at that point, the rent was at $20.25 million "with her staff," and that this was a rent reduction. (Sabatino, 477:18-478:16.) The mayor told the StadCo delegation to have her staff come forward with their number. (Sabatino, 478:14-18.)

On March 8, 2016, the Authority provided the Authority Board with a report (signed by Mr. Ameling and Ruth Shikada, the Authority's Economic Development Officer) that provided information on the Stadium rent adjustment and the status of the

on-going dialogue between the Authority staff and StadCo regarding the determination of a rent amount. (Ex. 147.) The report notes that staff was not making a specific recommendation at this time. (*Id.*) The report provides that:

> The Stadium Lease requires that StadCo pay a Facility Rent to the Stadium Authority each year. **The purpose and method of calculation Facility Rent was that when this amount is added to the other projected revenues of the Stadium Authority, total Stadium Authority revenue would be sufficient to pay all the expected debt service on the Stadium Authority's loans and operating expenses of the Stadium Authority for that year.** Based upon this principle, the Stadium Lease set out an (initial) Facility Rent at $24.5 million per year.
>
> At the time that the Facility Rent was set (June 2013), it was prior to completion of construction of the Stadium and prior to any operating history. **The Facility Rent necessary to pay all of the Stadium Authority debt service and operating expenses was based on the projected amount of debt expected to be outstanding upon completion of construction of the Stadium and a projection of operating expenses and revenues.**
>
> In determining the 2013 Facility Rent, Exhibit J to the Stadium Lease was developed (Attached). Exhibit J is a forty year projection of Stadium Authority revenues and expenses based on assumptions agreed to by the Stadium Authority and StadCo at the time the Stadium Lease was entered into.
>
> Because the rent was being set based on projected debt service and projected operating expenses and revenues in 2013, the Stadium Lease provides for a one-time rent adjustment to the Facility Rent if the amount of debt service or the operating expenses of the Stadium were either more or less than the amounts projected in Exhibit J. **The Stadium Lease provides that this one-time rent adjustment is to be determined in the same manner that the 2013 Facility Rent was determined, based on the formulas and assumptions included in Exhibit J.**

(Ex. 147 at 877-878.) (Emphasis added.) After noting that a review revealed a significant reduction in annual debt service to be paid by the Authority, the report states that:

> Based on the reduction in debt service the provisions of the Stadium Lease providing for a onetime rent adjustment were triggered. **As part of the rent adjustment process, Stadium Authority staff and consultants and StadCo have been working to determine the adjusted rent based not only on the reduced debt service but also on: a) revisions to the operating expenses and b) revenues based on the operating history of the Stadium.** Although debt service has decreased significantly from what was projected in 2013 when the initial Facility Rent was set, operating expenses for the Stadium are greater than

was originally projected. Revenues are also projected to be higher than originally expected.

The Finance Department, along with the Stadium Authority's fiscal and economic consultants, Keyser Marston and Associates (KMA) have worked extensively with StadCo on the rent adjustment model, including reviewing all revenue and expense projections over the 40 year life of the lease. While there is a general agreement on almost all of the projections in the financial model, staff and StadCo continue to discuss the validity of the inclusion of certain assumptions. Based upon their review of the financial model, StadCo has proposed an adjusted rent of $20.25 million per year. Staff is continuing to review this amount to determine whether this is an appropriate rent amount.

. . .

It should be noted that the Stadium Lease provides a variety of protections to the Stadium Authority in the event of a revenue shortfall. These protections remain unchanged as a result of the adjustment in the Facility Rent.

- The Stadium Lease provides for an operating reserve that can be used to fund operating expenses should revenues be insufficient. The operating reserve was funded with an initial deposit of $10 million in the first year of stadium operations. Additionally, if the Stadium Authority has excess revenues at the end of any lease year, a portion of the excess is deposited into the operating reserve. The operating reserve has not been used to fund operating expenses and the balance in the operating reserve remains at approximately $10 million.

- The Forty Niners Stadium Management Company, the Stadium Manager, has also provided the Stadium Authority with a $25 million letter of credit that can be drawn upon by the Stadium Authority to fund operating costs in the event of a shortfall. The Stadium Authority would repay any draw on the line of credit from Stadium Authority revenue not needed to pay expenses, debt service and required reserves.

- The Stadium Lease also contains provisions to allow the Stadium Authority to convert the Stadium Lease to a twelve month triple net lease, known as "Put Rights". If the Stadium Authority exercises its Put Rights, StadCo will be responsible for paying the operating costs of the Stadium on a year-round basis, thus relieving the Stadium Authority of this responsibility. The Stadium Authority will have the unilateral right to exercise its Put Rights in Lease Year 13 to convert the Stadium Lease to a triple net lease beginning in Lease Year 15. The Stadium Authority can also exercise its Put Rights if at any time the outstanding balance on the Line of Credit exceeds $20 million or, at any time after Lease Year 13, the outstanding balance on the line of credit exceeds $10 million for 24 consecutive months. After exercise of the Put, the Facility Rent would equal the amount of ground rent and performance rent (fifty percent of

Net Non-NFL Event Income) to be paid to the City under the Ground Lease. Based on this provision, the put will not affect the amount of ground rent and performance rent that the City receives under the Ground Lease

- The Stadium Lease also requires that a capital reserve fund be funded annually in the amount of $2 million increased by 3% each year. The capital reserve fund will be drawn upon to make necessary and agreed upon capital repairs to the Stadium. If after payment of all operating expenses and debt service, the Stadium Authority has excess revenues, the Stadium Lease requires that an additional $1 million be deposited in to the capital reserve fund.

- Finally, the Stadium Lease provides for the funding of a demolition/ renovation reserve to be used to demolish the Stadium at the end of the lease term should the City, as the owner of the land, require demolition. The demolition/renovation reserve is funded out of excess revenues after the payment of all operating expenses and debt service and can be used for major renovation costs as well as demolition. If the demolition/ renovation fund is not sufficient to pay the demolition costs of the Stadium, StadCo, in the final years of the lease, is required to make additional deposits into the demolition fund.

(Ex. 147 at 879-880.) The report concludes by stating that:

> It should be noted that the City's General Fund would never be responsible for the payment of any Stadium Authority expenses. The Stadium Authority is a separate entity from the City and the City is not obligated on the Stadium Authority debts. Additionally, the City's ground and performance rent under the Ground Lease with the Stadium Authority is required to be paid prior to the payment of debt service on the Stadium Authority financing.

(Ex. 147 at 880.) For the meeting, the Authority also provided the Authority Board with a PowerPoint presentation entitled "Facility Rent Adjustment Per Section 6.1.2 of Stadium Lease." (Ex. 148.).

At the March 8, 2016 Authority Board meeting regarding the rent adjustment, Ms. Tiedemann explained to the Board the process of updating the Authority's financial data, and that it was required by the Lease:

> I understand that this looks like a rent reduction, but I do want to emphasize that this was always called for in the lease and not so much as a rent reduction, but really as the ability to look at the rent in light of information that was more relevant and realistic than what we have in 2013, when we set [$24.5 million as interim rent]. So in 2013 we were definitely shooting in the dark a little bit, we now have a lot more information, and so that's where you get to this rent adjustment number.

(Ex. 41 at 37:8-18.)

At the March 22, 2016 Authority Board meeting, Mr. Ameling and Ms. Shikada submitted a staff report which is very similar to the March 8 report set forth above. (Ex. 43). Whereas the March 8 report did not include a proposal by the Authority staff, the March 22 report concludes as follows:

> The Finance Department [and] Keyser Marston and Associates have worked extensively with StadCo on the rent adjustment model, including reviewing all revenue and expense projections over the 40 year life of the lease. The projections in the financial model show that an adjusted rent of $20.25 million per year is sufficient, when combined with other Authority revenues, to cover debt service and operating expenses in each of the 40 years of the Stadium Lease.
>
> It should be noted that the projections are conservative in that, after the close of 2015-16, the Stadium Authority will already be ahead of the projected amortization of debt, having paid down approximately $14 million more debt than is reflected in the projections. . ..

(Ex. 43 at 853.)

During the March 22 meeting, Mr. Ameling stated that section 6.1.2 of the Lease "calls for [the rent adjustment] and basically it's a mandatory adjustment based on two major factors: one whether or not the actual amount of debt varied from what was anticipated during the take-out financing time; **and then the second factor is whether or not the revenues and expenditures, after operating the stadium in its first fiscal year, varied from what was projected.**" (Ex. 89 at 501:5-16.) (emphasis added.)

Mr. Ameling testified that, at the March 8 and 22 meetings or prior thereto, he did not tell the Authority Board that the $20.25 million proposal was inadequate in his professional judgment, or that the proposal did not meet the requirements of the 2013 Lease. (Ameling, 1045:9-16.) Mr. Ameling did not tell the board that he disagreed with the assumptions and revenue and expenditure expenses supporting the $20.25 million dollar proposal. (Ameling 1045:23-1046:7.) Mr. Ameling, however, told the Executive Director of the Authority, Mr. Fuentes, that:

> [O]ver the course of the discussions with the 49ers, that there was what I saw to be some game playing with respect to the numbers going back and forth and that it appeared that the 49ers were attempting to get to a target number and that some of our modeling, which was conveyed by both David Doezema and myself to Mr. Fuentes, was showing a higher result.

(Ameling, 1046:17-1047:3.)

For the March 22 meeting, the Authority also provided the Authority Board with an updated version of the March 8 PowerPoint presentation entitled "Facility Rent

Adjustment Per Section 6.1.2 of Stadium Lease." (Ex. 60.) The stated purpose of the presentation was to "provide an informational review of stadium rent adjustment process and updated projections for the Stadium Authority (SCSA)." (Ex. 60 at 866.) The presentation notes that while the initial Facility Rent was set at $24.5 million, it was to be adjusted per the 2013 Lease and that the "49ers have proposed an adjusted rent of $20.25 million." (Ex. 60 at 867.) In a slide entitled "Basis for Facility Rent Adjustment," the Authority stated:

> ➢ Based on 40 Year Projection - **The Facility Rent Adjustment is based on an update to the 40 year projection of revenues, expenses, and debt in Exhibit J to the Stadium Lease.**
>
> - Projections have been updated to reflect SCSA's actual final debt amount and initial operating experience.
>
> ➢ Three Main Criteria ~ Exhibit J to Stadium Lease specifies three main criteria to determine rent:
>
> 1. Level Rent over 40 years;
> 2. Sufficient to fund expenses and debt every year; and
> 3. Repay StadCo loan by Year 25.

(Ex. 148 at 884.) With respect to the review process, the presentation states:

> ➢ Joint Review Process- senior City staff and economic consultant, KMA
> ➢ Began November 20 15
> ➢ 49ers have been fully cooperative
>
> - provided all backup materials and inputs upon request:
> - senior operations staff and Goldman Sachs personnel made available; and
> - substantive changes incorporated at request of KMA and City.
>
> ➢ Proposed Rent of $20.25 million incorporates several modifications to 49er projections based on City and KMA comments.

(Ex. 60 at 869.) The presentation next provides comparisons of: (1) the projected Authority Debt per 2013 Exhibit J and updated 2016 projection of Authority Debt; (2) the projected Authority Operating Expenses per 2013 Exhibit J and updated 2016 projection of Authority Operating Expenses; and (3) the projected Authority Revenues per 2013 Exhibit J and updated 2016 projection of Authority Revenues. (Ex. 60 at 870-72.) With respect to the Authority's Revenues, the presentation states:

> SCSA Revenues (before Facility Rent):
> Exhibit J and Updated Projection
> (Cumulative Total for 40 Years in $Millions)
>
> **Updated**

Revenues (Before Facility Rent)	Exhibit J (2013)	Projection (2016)	Net Change	
Naming Rights	$433	$433	$0	
Non-NFL events (Net)	$377	$377	$0	
Ticket Surcharge @10%	$268	$285	$17	
SBLs	$303	$294	$(9)	
Senior Youth Fee	$9	$10	$1	
SBL Marketplace	$0	$27	*$27*	$175 Million
Non-NFL $4 Ticket Surcharge	$0	$80	*$80*	in additional
Interest earnings	$0	$63	*$65*	revenue
Fanwalk	$0	$3	*$3*	sources *added*
Revenue (Before Facility Rent)	**$1 ,390**	**$1,574**	**$184**	

(Ex. 60 at 872.) The presentation stated that the net change of total revenue between the 2013 Exhibit J and StadCo's proposal would result in a $94 million reduction in Net Cash (from $302 million in 2013 to $208) and thus $94 million less in projected reserve deposits. Exs. 60 at 873, 877.

The Authority Board raised a number of concerns at the Board meetings (and thereafter), including that "Potential SBL defaults," "New revenue sources that were not included in [2013] Exhibit J," "Eliminating any impact on potential General Fund revenue resulting from the Facility Rent adjustment," "Lower margins in the new model vs. Exhibit J," "How certain revenues may be affected by swings in the economy," and "Capital expenditures possibly being greater than projected." (Ex. 34; Ameling, 1040:7-1041:6; Doezema, 1631:11-1632:4.)

At the conclusion of the March 22, 2016 Authority Board meeting, the Board voted unanimously to decline to act on the $20.25 million proposal and voted instead resolve the matter through the dispute resolution process set forth in the 2013 Lease. (Ex. 89 at 521, pp. 147:1-148:3; Ameling, 1039:23-1040:6; Doezema, 1628:17-23.) The parties then met to discuss the rent adjustment and try to reach a resolution. The efforts were unsuccessful.

The Arbitration Pleadings

On May 3, 2016, StadCo filed with JAMS its Demand against the Authority. In pertinent part, the Demand alleges that:

> In sum, Forty Niners Stadium Company offered, in good faith and in the interest of avoiding the need for an arbitration, to pay an adjusted rent of $20.25 million per annum, even though that figure exceeded, by more than $1 million per annum, the adjusted rent calculated properly in accordance with the terms of the Lease. Having extended that offer, Forty Niners Stadium Company remains willing, as of the date of the filing of this demand for arbitration, to pay adjusted rent of $20.25 million per annum. If Stadium Authority is prepared to accept that adjusted rent, it should so indicate, and should cooperate in the formal documentation of that agreement, before Forty Niners Stadium Company is obliged to incur further fees and costs in this proceeding. If Stadium Authority fails to promptly accept an

adjusted rent figure of $20.25 million, then the rent should be adjusted to $19.1 25 million, in accordance with the terms of the Lease.

(Attachment 1 to Demand at 4.) The Demand further alleges that the Authority has failed to perform its obligations under: (1) the Lease by (a) refusing to adjust the rent, as required by Section 6.2.1 of the Lease, and (b) failing to resolve and settle the matter as required by section 27.1 of the Lease; and (2) the Lease's implied covenant of good faith and fair dealing by rejecting, without any reasonable basis, the rent adjustment presented to it on March 22, 2016. (*Id.* at 4-5.) In December 2016, the parties stipulated that StadCo's Demand was amended to also seek "a declaration establishing the reduced rent, as adjusted in accordance with Section [6.1.2] of the Lease."

The Authority's Response to the Demand alleges, *inter alia*, that StadCo's request that the Arbitrator adjust the Facility Rent Schedule to $19.125 million is unsupported and inconsistent with the Facility Rent Assumptions." Response at 7. In December 2016, the Authority amended its Response to allege that "an actual controversy has arisen and now exists between Claimant and Respondent concerning the adjustment of the Facility Rent, and Respondent seeks a declaration establishing the adjustment of Facility Rent, if any, in accordance with the Lease, including section 6.1.2."

The parties' December 9, 2016 Joint Case Management and Discovery Plan provides, in part, that "the rent adjustment shall be determined as of March 31, 2016," and that the "parties reserve all rights to object to evidence concerning events that occurred after March 31, 2016, in the event that any party presents such evidence at trial."

The Arbitration Hearing

At the hearing, StadCo offered two proposed rent adjustment models. StadCo's first model (the "StadCo model") proposes an adjusted Facility Rent of $16.775 million. (Ex. 575.). One of three methods was used to project each revenue and expense: (1) set by contract; (2) actual performance in Years 1 and 2, plus a growth rate used in 2013 Exhibit J; or (3) reviewed and approved by an expert witness. (Ex. 580.) The model was prepared by Mr. Sabatino. StadCo's second proposal, with an adjusted Facility Rent of $12.2 million, was prepared by StadCo's expert, Bill Rhoda of CS&L ("CSL"). (Exs. 16A, 73.) StadCo, however, is not proposing that the CSL Model be adopted. StadCo Reply at 30:2-6.

The Authority's retained expert is Mark Newton, CPA/ABV, CFF, of the Hagen, Streiff, Newton & Oshiro firm. Mr. Newton is a forensic accountant who completed thousands of cash flow projections, testified over 150 times, roughly half of which included cash flow projections, and provided cash flow projections in various fields and businesses. (Newton, 1802:13-1805:11, Exh. 46, p. 12 of 49.) Mr. Newton has worked on and testified regarding numerous contract disputes, where cash flow analyses were determined by the contract terms in question. (*Id.*, 1808:2-15; 1821:25-1822:7.) Mr. Newton educated himself regarding unique NFL issues related to this Arbitration, for

example Naming Rights and SBL revenues, but ultimately, the unique-NFL calculations are either undisputed or moot based on the 2013 Exhibit J formulas and assumptions. ((*Id.*, 1805:15-1806:5, 2039:13-2040:5, 2117:22-2118:9, 2129:3-10; 2131:6-19; 2137:22-2141:7.)

Mr. Newton's primary model proposes an adjusted Facility Rent of $25,862 million. Mr. Newton's primary model adjusts only expenses and debt service per the formulas and assumptions of the 2013 Exhibit J and does not adjust revenue. (Newton, 1831:10-1896:20, 1824:16-20, 1993:1-15; Exs. 46, 53, 585 at 1-2, 586, p. 1.) Mr. Newton also prepared an alternative model of $24.762 million that includes certain adjusted revenue items. (Ex. 585 at 3-4.)

III. DISCUSSION

Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Evidence Code § 500. "'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." Evidence Code § 115. "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." *Id.* "'Preponderance of the evidence means evidence that has more convincing force than that opposed to it." *Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325. A party must persuade the trier of fact, by the evidence presented, "that what he or she is required to prove is more likely to be true than not true." CACI 200. If after weighing all of the evidence, the trier of fact "cannot conclude that something is more likely to be true than not true," the trier of fact "must conclude that the party did not prove it." *Id.* The trier of fact "should consider all the evidence, no matter which party produced the evidence." *Id.*

A. Motions in Limine

1. StadCo Model

The Authority's motion in limine no. 2 seeks an order excluding the StadCo Model from evidence in the Arbitration. The Authority contends that the StadCo model, which was not prepared by StadCo's expert (Mr. Rhoda), is not made admissible by Mr. Rhoda's testimony, and that the StadCo model is not admissible through Mr. Sabatino's testimony, given his reliance upon hearsay and third party information to prepare the StadCo model. On the first day of the hearing, the StadCo Model was admitted subject to a continuing motion to strike to be fully briefed by the parties. The post-hearing briefing does not include a motion to strike the StadCo model.

JAMS Rule 22(d) provides in part that "Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product, and that "the Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate."

Mr. Sabatino explained the preparation of the StadCo Model. Consistent with the fact that strict conformity to the rules of evidence is not required, the Authority's motion with respect to the StadCo model is DENIED. The Arbitrator will give the model the weight he deems appropriate.

2. Privileged Communications

Prior to the hearing, the Authority filed motion in limine no. 1 for an order "excluding any testimony or argument that describes, refers to, or includes the unauthorized disclosure of privileged attorney-client communications that occurred between Stadium Authority's attorney, Karen Tiedemann, and Stadium Authority's consultant, David Doezema." More specifically, the Authority requests an order excluding from the Arbitration "any testimony, evidence, or arguments that describe, refer to, or include the privileged attorney-client communications between Ms. Tiedemann and Mr. Doezema, including portions of StadCo's Pre-Hearing Brief (page 17, lines 8-14), and the cited and attached Exhibit M therein (Mr. Newton deposition testimony)." On the first day of the hearing, the Authority argued the motion. In response, StadCo requested the right to submit additional briefing. Consistent therewith, the parties were requested to meet and confer regarding a briefing schedule. StadCo's closing brief addresses the motion, as does the Authority's reply brief.

The Authority contends that the conversation between Ms. Tiedemann and Mr. Doezema was privileged, and Mr. Doezema did not have authority to disclose or waive that privileged communication in his conversation with the Authority's expert, Mr. Newton, which Mr. Newton then disclosed during his deposition. The Authority contends that the Authority is the holder of the privilege, and only the Authority Board may waive the privilege, and the Board did not authorize Mr. Doezema to waive the privilege.

StadCo contends that Mr. Doezema disclosed statements made to him by the Authority's counsel to the Authority's expert, Mr. Newton, and that the Authority did not object to Mr. Newton's disclosure, during his deposition, of the statements made to Mr. Doezema by the Authority's counsel. StadCo contends that: (1) Mr. Doezema's disclosure of Ms. Tiedemann's communications to Mr. Newton waived the privilege; and (2) the Authority waived the privilege again when it allowed Mr. Newton to testify at his deposition about the advice from Mr. Webber to Mr. Doezema.

"The fundamental purpose behind the attorney-client privilege "is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.) A "client" "has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer." (Evidence Code § 954.) A "client" within the meaning of the attorney-client privilege "means a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity." (Evidence Code § 951.) The holder of the attorney-client privilege is the client. (Evidence Code § 953(a).)

"The right of any person to claim a privilege provided by Section 954 (lawyer-client privilege) . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." (Evidence Code § 912(a).) "Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has legal standing and the opportunity to claim the privilege." (*Id.*)

The party claiming the attorney-client privilege "has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) "Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply." (*Costco*, 47 Cal.4th at 733.)

"Failure to claim the privilege constitutes consent to disclosure and a waiver of the privilege only if the holder, in a proceeding in which he or she has the legal standing and opportunity to claim the privilege, fails to claim the privilege knowing that the disclosure of privileged information is sought." (*Kerner v. Superior Court* (2012) 206 Cal. App. 4th 84, 112; *see also* Cal. Prac. Guide Civ. Trials & Ev. Ch. 8E-A, ¶ 8:1890. "If these conditions are satisfied, the holder's failure to assert the privilege through his or her attorney constitutes a waiver if the holder had an opportunity to consult with the attorney." (*Kerner*, 206 Cal.App.4th at 112.) "The waiver rule is not limited to circumstances where the holder of the privilege 'unambiguously manifests his consent' . . . to the disclosure." (*Id.* at 114) "Instead, . . . even an "equivocal statement" by the holder's attorney may support a finding of waiver if the holder, through his or her attorney, fails to claim the privilege knowing that privileged information is sought and the holder is provided an opportunity to object." (*Id.*)

The evidence at the hearing established that the communication between Ms. Tiedemann and Mr. Doezema was made during the course of an attorney-client relationship. As such, the burden rests with StadCo to establish a waiver of the attorney-client privilege. StadCo failed to meet this burden. The Authority, not Mr. Doezema or Mr. Newton, is the holder of the attorney-client privilege in this context. The record presented does not establish that the Authority, at Mr. Newton's deposition, had the opportunity to claim the privilege knowing that the disclosure of privileged information was at issue. As such, StadCo has failed to establish a waiver of the attorney-client privilege with respect to the communications at issue. Accordingly, the Authority's motion in limine for an order excluding any testimony or argument that describes, refers to, or includes the unauthorized disclosure of privileged attorney-client communications that occurred between Ms. Tiedemann and Mr. Doezema is GRANTED.

B. Does the Lease Require Use of Updated Revenue Projections

The parties dispute the appropriate amount for the adjusted Facility Rent under the 2013 Lease. As an initial matter, the parties do not agree as to the appropriate interpretation of section 6.1.2 of the 2013 Lease.

StadCo contends that section 6.1.2 of the 2013 Lease requires the use of updated revenue projections to determine the adjusted Facility Rent. StadCo contends that while section 6.1.2 of the 2013 Lease does not use the word "revenue," the concept of revenue is, and the parties knew that section 6.1.2 requires the use of updated revenue projections. StadCo asserts that: (1) debt service costs cannot be projected without updated revenue information; (2) a rent adjustment that ignores updated revenue information would not be "generally consistent" with 2013 Exhibit J; (3) the "formulas and assumptions" of 2013 Exhibit J require use of updated revenue information; and (4) the parties did not agree to exclude any revenue sources.

The Authority contends that under the unambiguous terms of Section 6.1.2, the parties must adjust the Facility Rent based only on changes to debt service and expenses, and that the adjustment does not provide for any revenue adjustments. The Authority further contends that all the extrinsic evidence supports interpreting section 6.1.2 as written. The Authority asserts that: (1) none of the external evidence presented was sufficient either to create an ambiguity in Section 6.1.2, or to resolve an ambiguity in favor of StadCo's interpretation of adding revenue adjustments that StadCo deleted from the 2013 Lease; (2) there was no "handshake" agreement to consider revenues despite the written terms, and any such agreement is contrary to the terms of the 2013 Lease and would violate the 2013 Lease's integration clause; and (3) the parties specifically discussed the removal of revenue sources from the adjustment process because of StadCo's further tax concerns, and the "Authority accepted a process that excluded revenue adjustments in exchange for a detailed 2013 Exhibit J that included negotiated formulas and assumptions to calculate the one-time adjustment."

"Interpretation of a contract consists in ascertaining the meaning to be given to the expression of the parties." (1 Witkin, *Summary of Cal. Law 10th (2005)*, Contracts § 741.) "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." (Civil Code § 1638.) "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civil Code § 1636.) "California recognizes the objective theory of contracts under which "it is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2013) 109 Cal.App.4th 944, 956 (citations omitted).) "The parties' undisclosed intent or understanding is irrelevant to contract interpretation." (*Id.*) "Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (Cal. Code Civ. Proc. § 1858.) "Any contract must be construed as a whole, with the various individual provisions interpreted together so as to give effect to all, if reasonably possible or

practicable." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473.) "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties." (Civil Code § 1643.) "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (Civil Code § 1647.)

"The rule is well settled that in construing the terms of a contract the construction given it by the acts and conduct of the parties with knowledge of its terms, and before any controversy has arisen as to its meaning, is admissible on the issue of the parties' intent." (*Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851.) "The conduct of the parties may be, in effect, a practical construction thereof, for they are probably least likely to be mistaken as to the intent." (1 Witkin, *Summary 10th* (2005) Contracts, § 749 (case citation omitted).) "This rule of practical construction is predicated on the common sense concept that 'actions speak louder than words.'" (*Id.*) "When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent." (*Id.*) "A party's conduct occurring between execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean." (*City of Hope Nat. Med. Ctr. v. Genentech, Inc.* (2008) 43 Cal.4th 375, 393.) "This rule is not limited to the joint conduct of the parties in the course of performance of the contract." (*Southern Cal. Edison*, 37 Cal.App.4th at 851.) "The practical interpretation of the contract by one party, evidenced by his words or acts, can be used against him on behalf of the other party, even though that other party had no knowledge of those words or acts when they occurred and did not concur in them." (*Id.*)

Section 6.1.2 of the Lease provides that:

> If as of April 1, 2015 . . . , the amount of either the debt service on the Project Debt (taking into consideration the then estimated Net Prepayments, if any, to be applied to the Subordinated Loan from time to time pursuant to the StadCo Obligations Agreement) or the then estimated operating expenses of the Stadium (including, without limitation, Shared Stadium Expenses and Utilities expenses) are either more or less than the estimated amounts thereof as set forth in the formulas and assumptions used to calculate the Facility Rent on Exhibit J attached hereto (collectively, the "Facility Rent Assumptions"), then a one-time adjustment to the Facility Rent Schedule (including, if necessary, a retroactive adjustment to the Facility Rent payable for the first Lease Year) shall be made to take account of such increase or decrease. Any such adjustment to the Facility Rent Schedule shall be determined in a manner otherwise generally consistent with the Facility Rent Assumptions; provided, however, that after any such adjustment, the Facility Rent shall, except as agreed by the parties . . ., remain level over the Initial Term of this Lease. ...

At the hearing, it was undisputed that, as of April 1, 2015, the debt service on the Project decreased and that the then estimated operating expenses increased as compared to the estimated amounts thereof on 2013 Exhibit J. Therefore, under section 6.1.2, a

"one-time adjustment to the Facility Rent Schedule . . . shall be made to take account of such increase or decrease." Section 6.1.2 further provides that the adjustment to the Facility Rent "shall be determined in a manner otherwise generally consistent with the Facility Rent Assumptions," i.e., the formulas and assumptions used to calculate the Facility Rent on 2013 Exhibit J.

The parties' dispute whether the adjustment set forth in section 6.1.2 considers updated revenue information. The Authority interprets the provision to unambiguously state that the adjustment does not provide for any revenue adjustments, focusing on the fact that "only an increase or decrease of debt service or operating expenses triggers the one-time adjustment, and the facility rent adjustment only takes into account that increase or decrease of debt service or operating expenses." In contrast, StadCo contends that the provision is reasonably susceptible to more than one interpretation, and but that the proper interpretation of the provision is that the use of updated revenue projections is required.

"When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is 'reasonably susceptible' to the interpretation urged by the party." (*Southern Cal. Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 847.) "Whether the contract is reasonably susceptible to a party's interpretation can be determined from the language of the contract itself or from extrinsic evidence of the parties' intent." (*Id.* at 848 (citations omitted.)) "When faced with a dispute over the meaning of a contractual provision, the court must first determine whether the provision is ambiguous, i.e., whether, on its face, the language of the provision is capable of different, yet reasonable interpretations." (*Falkowski v. Imation Corp.* (2005) 132 Cal.App.4th 499, 505.) "If an ambiguity is found, the court must determine which of the plausible meanings the parties actually intended." (*Id.* at 505.)

Repeated readings of section 6.1.2 of the 2013 Lease do not support the Authority's assertion that the plain language of the provision is unambiguous with respect to the use of updated revenues in the calculation of the adjusted Facility Rent. An adjustment is required under if "the amount of either the debt service on the Project Debt (taking into consideration the then estimated Net Prepayments, if any, to be applied to the Subordinated Loan from time to time pursuant to the StadCo Obligations Agreement) or the then estimated operating expenses of the Stadium . . . are either more or less than the estimated amounts thereof as set forth in the formulas and assumptions used to calculate the Facility Rent on Exhibit J attached hereto (collectively, the "Facility Rent Assumptions") . . ." A quick look at the sentence indicates that an increase or decrease in debt service or operating expenses alone justify an adjustment, as no reference to revenues is made. However, while this sentence makes no reference to revenues, it requires consideration of the "then estimated Net Prepayments" to be applied to the Subordinated Loan in connection with any increase or decrease in debt service. The sentence does not explain how Net Prepayments are to be calculated. As such, the "trigger" for an adjustment in section 6.1.2 is unclear as to whether updated revenues are to be considered.

The provision continues that if there is an increase or decrease in the debt service, "then a one-time adjustment to the Facility Rent Schedule . . . shall be made to take account of such increase or decrease." While this sentence makes clear that the increase or decrease in debt service/operating expenses is to be taken into account in the adjusted Facility Rent, it is silent as to whether the adjustment may also consider increases or decreases in revenue. While the sentence is reasonably susceptible to the Authority's interpretation, the provision does not unambiguously exclude updated revenues from factoring into the adjustment to Facility Rent. For example, if updated revenues are to be considered in connection with determining an increase/decrease in debt service (through "then estimated Net Prepayments"), would they also be considered in making the adjustment to the Facility Rent? The plain language of the provision does not clearly answer this question.

The next sentence provides, in pertinent part, that the adjustment to the Facility Rent "shall be determined in a manner otherwise generally consistent with the Facility Rent Assumptions" i.e., 2013 Exhibit J. As an initial matter, it is unclear what exactly "in a manner otherwise generally consistent" with 2013 Exhibit J means. Does it mean generally consistent with 2013 Exhibit J? Does it mean that the foregoing portion of the provision precludes complete consistency with 2013 Exhibit J? Again, while the sentence, and the balance of the provision, is reasonably susceptible to the Authority's position (only changes to debt service and operating expenses can be considered), the provision is likewise reasonably susceptible to the interpretation that the Facility Rent be generally consistent with 2013 Exhibit J.

2013 Exhibit J, the Facility Rent Assumptions, reflects that in setting the amount of the Facility Rent, the parties agreed that they would consider the Authority's total revenues (including but not limited to the Facility Rent), the Authority's total expenses before debt and the Authority's debt service. The Notes on each page of 2013 Exhibit J provide that:

> 1. Level Facility Rent set sufficient to fund SCSA expenses and debt service in each Lease Year and repay the StadCo subordinate loan in full by the end of Lease Year 25.
>
> 2. StadCo subordinate loan has a 30 year amortization: however, Facility Rent set such that pre-payments from Excess Revenues result in payment in full by end of Lease Year 25.
>
> 3. Scheduled Principal on the StadCo Subordinate loan may be reduced by application of a ledger credit for prior principal prepayments if necessary.
>
> 4. Facility Rent set such that Net Cash After Debt Service is positive every year.
>
> 5. Effective net margin above mandatory expenses and debt service factors in the ability to reduce StadCo Subordinate Loan payments by applying a ledger credit.

6. Operating reserve is first call on excess revenue (after any line of credit balance). First year debt service "holiday" is designed to ensure that $10 million operating reserve is generated in first year. (emphasis added.)

2013 Exhibit J makes clear that the Authority's revenues (as well as expenses and debt service) along with other considerations (e.g., Facility Rent must be set such that Net Cash After Debt Service is Positive every year) were considered in determining the amount of the Facility Rent. Nothing in 2013 Exhibit J can be read to suggest that updated revenues would be excluded from consideration in the adjustment to the Facility Rent. In order for updated revenues to be excluded from consideration in the adjustment process, section 6.1.2 must make clear that updated revenues are not to be considered. Reading the plain language of section 6.1.2, alone, or together with 2013 Exhibit J, the language used is ambiguous as to whether increases or decreases in revenue are to be considered in making the Facility Rent adjustment.

The extrinsic evidence supports StadCo's interpretation of the 2013 Lease, i.e., section 6.1.2 requires the use of updated revenue projections in making the Facility Rent adjustment. Again, the first sentence of section 6.1.2 provides that an adjustment is made to the Facility Rent if "the amount of either the debt service on the Project Debt (taking into consideration the then estimated Net Prepayments, if any, to be applied to the Subordinated Loan" is more or less the estimated amounts thereof on 2013 Exhibit J. The weight of the evidence at the hearing, including the KMA Roadmap and Mr. Doezema's testimony, established that to properly determine the then estimated Net Prepayments (and thus in determining whether the debt service increased or decreased), the parties needed to look at updated revenue data and projections. The Authority's arguments to the contrary are unpersuasive. As such, the determination of an increase or decrease in debt service requires the consideration of updated revenue projections. The provision further provides that if there is an increase or decrease in the debt service, "then a one-time adjustment to the Facility Rent Schedule . . . shall be made to take account of such increase or decrease." In light of the conclusion that updated revenues must considered in determining an increase or decrease in the debt service, this sentence is reasonably susceptible to an interpretation that the adjustment to the Facility Rent shall consider the updated revenues in addition to the updated debt service and expenses.

Moreover, the evidence of the circumstances surrounding the execution of the 2013 Lease and the parties' conduct pursuant to the 2013 Lease prior to any dispute is consistent with the conclusion that section 6.1.2 requires the use of updated revenue data. During the negotiations preceding the execution of the 2013 Lease, at a meeting attended by representatives of StadCo and the Authority, Mr. Doezema asked StadCo to confirm that the rent adjustment process would include updated revenue information. Mr. MacNeil, on behalf of StadCo, indicated that adjustment process would consider revenues. While Mr. Doezema may personally have interpreted this statement differently, no representative of the Authority at the meeting disputed or challenged Mr. MacNeil's statement, and this issue was not addressed again during the 2013 period.

Thereafter in June 2013, just prior to the Authority Board's approval of the 2013 Lease, the Authority's counsel, Ms. Tiedemann, told the Board that:

> [T]he facility rent is being set at 24,500,000 a year. That will be a level rent that is paid every year of the lease, **subject to a one-time adjustment that can occur in 2015 that would be adjusted depending on operating costs and operating revenues after we've had one NFL season to determine if we got all the projections right.**

(Ex. 88.) (emphasis added.) The Board subsequently approved the 2013 Lease. No evidence was presented to suggest that Board approved the 2013 Lease with an understanding different than that offered to them by the Authority's counsel.

In December 2014, after execution of the 2013 Lease and prior to any dispute regarding the proper interpretation of section 6.1.2 of the 2013 Lease, the Authority sent to StadCo an email with attachments from the Authority's consultant regarding the rent adjustment (the KMA Roadmap). In pertinent part, with respect to the Facility Rent adjustment, the KMA Roadmap stated:

- "Facility Rent is subject in 2015 to a one-time adjustment if certain financial factors are either more or less than the assumptions/projections used in Exhibit J to the Stadium Lease."

- "The fundamental principle operative in the setting of Facility Rent is that SCSA's revenue from rent and all other sources will cover all of SCSA's expenses."

- "Exhibit J with additional detail is the document which needs to be confirmed or modified based on agreement between StadCo and the City as to Facility Rent after taking into account all other line item changes as agreed to in the Rent Reset process."

- "As to timing, April 1, 2015 was selected for Rent Reset to allow all or most of one year's experience as best guide to future revenues and operating expenses."

- Debt service projections require updated revenue projections

(Ex. 66 at 330-332, 335.) Consistent with the foregoing, during the parties' subsequent discussions, the Authority made requests for updated revenue information. (Ex. 269.) The KMA Roadmap, provided by the Authority to StadCo at the beginning of the adjustment process, is strong evidence that the Authority understood the 2013 Lease to be essentially identical to the 2012 Lease with respect to the determination of the Facility Rent, and of the Authority's understanding that the parties would use updated revenues in determining the adjusted Facility Rent.

The record reflects that during the parties' subsequent attempts to negotiate the adjustment, while Mr. Doezema again queried StadCo as to the issue of adjusting revenues in connection with making the adjustment to the Facility Rent, StadCo made clear that revenues should be adjusted as part of the calculation. Then in February 2016, Mr. Ameling sent a report on the adjustment process to the Authority Board that states in pertinent part that:

> **Section 6.1.2 of the Stadium Lease requires a rent adjustment after completion of construction when the actual amount of debt service is determined and when projections of Stadium Authority revenues and operating expenses can be based on the first year's actual operations.** The onetime rent adjustment is designed to adjust the rent to achieve the goals of the Stadium Lease for facility rent based on the most current and best information available. Section 6.1.2 requires that the rent adjustment adhere to the assumptions that were used to establish the initial rent which are set out in the Stadium Lease and Exhibit J.

(Ex. 143 at 779.) (emphasis added.) Again, this evidence reveals that the Authority, like StadCo, understood and intended section 6.1.2 to require the use of updated revenue information.

Finally, in March 2016, after StadCo presented its $20.25 million offer to the chairperson of the Authority Board, Mayor Gillmor, the Authority sent reports to the Board (on March 8 and 22, 2016), signed by Mr. Ameling, wherein the Authority stated:

> The Stadium Lease requires that StadCo pay a Facility Rent to the Stadium Authority each year. **The purpose and method of calculation Facility Rent was that when this amount is added to the other projected revenues of the Stadium Authority, total Stadium Authority revenue would be sufficient to pay all the expected debt service on the Stadium Authority's loans and operating expenses of the Stadium Authority for that year.** Based upon this principle, the Stadium Lease set out an (initial) Facility Rent at $24.5 million per year.
>
> At the time that the Facility Rent was set (June 2013), it was prior to completion of construction of the Stadium and prior to any operating history. **The Facility Rent necessary to pay all of the Stadium Authority debt service and operating expenses was based on the projected amount of debt expected to be outstanding upon completion of construction of the Stadium and a projection of operating expenses and revenues.**
>
> In determining the 2013 Facility Rent, Exhibit J to the Stadium Lease was developed (Attached). Exhibit J is a forty year projection of Stadium Authority revenues and expenses based on assumptions agreed to by the Stadium Authority and StadCo at the time the Stadium Lease was entered into.

> Because the rent was being set based on projected debt service and projected operating expenses and revenues in 2013, the Stadium Lease provides for a one-time rent adjustment to the Facility Rent if the amount of debt service or the operating expenses of the Stadium were either more or less than the amounts projected in Exhibit J. **The Stadium Lease provides that this one-time rent adjustment is to be determined in the same manner that the 2013 Facility Rent was determined, based on the formulas and assumptions included in Exhibit J.**

(Ex. 147 at 877-878.) (emphasis added.) After noting that a review revealed a significant reduction in annual debt service to be paid by the Authority, the report states that:

> Based on the reduction in debt service the provisions of the Stadium Lease providing for a onetime rent adjustment were triggered. **As part of the rent adjustment process, Stadium Authority staff and consultants and StadCo have been working to determine the adjusted rent based not only on the reduced debt service but also on: a) revisions to the operating expenses and b) revenues based on the operating history of the Stadium.** Although debt service has decreased significantly from what was projected in 2013 when the initial Facility Rent was set, operating expenses for the Stadium are greater than was originally projected. Revenues are also projected to be higher than originally expected.

(Ex. 147 at 879-880; see also Ex. 43 (March 22 memo).)

At the March 8, 2016 Authority Board Meeting on March 8, 2016 regarding the rent adjustment, Ms. Tiedemann explained to the Board the process of updating the Authority's financial data, and that it was required by the Lease:

> I understand that this looks like a rent reduction, but I do want to emphasize that this was always called for in the lease and not so much as a rent reduction, but really as the ability to look at the rent in light of information that was more relevant and realistic than what we have in 2013, when we set [$24.5 million as interim rent]. So in 2013 we were definitely shooting in the dark a little bit, we now have a lot more information, and so that's where you get to this rent adjustment number.

(Ex. 41 at 37:8-18.) During the Board meeting, Mr. Ameling stated that section 6.1.2 of the Lease "calls for [the rent adjustment] and basically it's a mandatory adjustment based on two major factors: one whether or not the actual amount of debt varied from what was anticipated during the take-out financing time; **and then the second factor is whether or not the revenues and expenditures, after operating the stadium in its first fiscal year, varied from what was projected.**" (Ex. 89 at 501:5-16.) (emphasis added.)

Mr. Ameling testified that, at the March 8 and 22 meetings or prior thereto, he did not tell the Authority Board that the $20.25 million proposal did not meet the

requirements of the 2013 Lease. (Ameling, 1045:9-16.) Finally, in a PowerPoint presentation regarding the Facility Rent Adjustment presented for the March 22 Board meeting, the Authority stated that "The Facility Rent Adjustment is based on an update to the 40 year projection of revenues, expenses, and debt in Exhibit J to the Stadium Lease." (Ex. 148 at 884.)

Each of the foregoing statements was made by a representative of the Authority, with knowledge of the provisions of the 2013 Lease, prior to any dispute regarding the use of updated revenues in connection with the Facility Rent adjustment. These statements, rather than the Authority's ably argued current interpretation of the 2013 Lease, speak directly to the Authority's understanding and intent with respect to section 6.1.2. Each of these statements support the conclusion that the Authority understood and intended that updated revenues be used as part of the adjustment process set forth in the 2013 Lease.

The additional extrinsic evidence relied upon by the Authority does not require a different conclusion. The Authority first argues that while StadCo's calculations follow the 2012 Lease requirement that the parties determine Facility Rent "together with other amounts payable by Tenant under Lease and other reasonably estimated revenues . . ." undisputed that it was StadCo who deleted those words from the 2013 Lease, and that the 2013 Lease is an integrated contract that superseded the 2012 Lease. While the word revenue was removed from section 6.1.2, section 6.1.2 is ambiguous and does not preclude the use of revenue. StadCo's continued use of the "gap filler" approach is consistent with 2013 Exhibit J ("Facility Rent set such that Net Cash After Debt Service is positive every year") and consistent with the Authority's understanding and interpretation of the 2013 Lease from prior to execution thereof through the Board' rejection of StadCo's $20.25 million proposed Facility Rent adjustment. The evidence establishes that the Authority understood, despite the changes in the relevant language in the 2013 Lease, that the parties intended to consider updated revenue information in connection with the adjustment to the Facility Rent.

The Authority also cites to the April 9, 2013 email wherein StadCo forwarded to the Authority's counsel (Ms. Tiedemann) a proposed revision of section 6.1 of the 2012 Lease regarding the determination of Facility Rent. (Ex. 406A.) The internal StadCo email, prepared by StadCo counsel, forwarded to the Authority stated:

> The concept, which has been discussed with Larry [MacNeil], Alan Doris [Tax Attorney] and I, is that we would determine the Facility Rent schedule for the initial term now, in conjunction with the closing of the financing, but the schedule would be subject to a one-time adjustment at April 1, 2015 (the start of the first full Lease Year). **Rent over the initial term would be adjusted to reflect the finally determined amounts of the debt service on the Takeout and Subordinated Loan and updated estimates of operating expenses.**

(Ex. 406A at 368.) (emphasis added.)

While this statement, standing alone, supports the Authority's interpretation of the 2013 Lease, this statement was not included in the 2013 Lease. The proposed revised language included as an attachment to email stated in part that:

> If as of April 1, 2015 (or, if later, within thirty (30) days after the final amount of the Stadium Authority Development Costs is determined), the amount of either scheduled debt service on the Project Debt or the then estimated operating expenses of the Stadium, (including, without limitation, Shared Stadium Expenses and Utilities expenses is either more or less than the estimated amount thereof set forth in the formulas and assumptions used to calculate the Facility Rent on Exhibit J-2 attached hereto (collectively, the "Facility Rent Assumptions") then a one-time adjustment to the Facility Rent Schedule (including, if necessary, a retroactive adjustment to the Facility Rent payable for the first Lease Year) shall be made to take account of such increase or decrease. Any such adjustment to the Facility Rent Schedule shall be determined in a manner otherwise generally consistent with the Facility Rent Assumptions; . . .

(*Id.*)

This proposed language likewise is not identical to that included in the 2013 Lease, which in pertinent part qualifies the reference to debt service ("taking into consideration the then estimated Net Prepayments, if any, to be applied to the Subordinated Loan from time to time pursuant to the StadCo Obligations Agreement") in the proposed language. Moreover, subsequent thereto and prior to execution of the 2013 Lease, StadCo indicated to the Authority's representatives, without pushback from the Authority, that updated revenues were to be considered when the adjustment to the Facility Rent was made. Finally, while the Authority now claims (based upon testimony at the hearing) that the April 2013 StadCo email reflects the Authority's understanding of how the adjustment process would work, the documented statements of the Authority representatives, noted above, prior to execution of the 2013 Lease and prior to this arbitration, reflect better evidence of the Authority's understanding of the 2013 Lease at the relevant times. Nothing in these statements, or the statement of Mr. MacNeil recalled by Mr. Doezema, conflict with the terms of the 2013 Lease.

The Authority further asserts that the parties specifically discussed the removal of revenue sources from the adjustment process because of StadCo's further tax concerns, and that the Authority "accepted a process that excluded revenue adjustments in exchange for a detailed 2013 Exhibit J that included negotiated formulas and assumptions to calculate the one-time adjustment." While the record reflects that StadCo removed the references to revenues in section 6.1.2 for tax reasons, the record presented does not support the conclusion that there was any agreement to exclude revenue adjustments from the adjustment to the Facility Rent. The weight of the extrinsic evidence instead established that the parties understood and agreed that updated revenues would be considered as part of the rent adjustment process.

In sum, section 6.1.2 of the 2013 Lease, including 2013 Exhibit J, and the extrinsic evidence establish that the parties understood and intended that updated revenues would be included in the adjustment of the Facility Rent. As a result, the Authority's primary rent model, which calculates an adjusted Facility Rent of $25,862,000 and does *not* include adjusted revenues, will not be considered by the Arbitrator in determining the adjusted Facility Rent.

C. Items Not Included as Revenues on 2013 Exhibit J

In the event, as concluded above, that updated revenues are to be included in the adjusted Facility Rent calculation, the parties dispute whether certain items not included on 2013 Exhibit J should be included in the adjusted Facility Rent.

1. STR Marketplace, Fanwalk and Non-NFL Ticket Surcharge

StadCo contends that the Facility Rent adjustment is to take into account all revenue sources, including revenue items that the parties forgot to include on 2013 Exhibit J (STR Marketplace and Non-NFL Ticket Surcharge)[2] and one revenue item that did not exist at the time of the 2013 Lease, Fanwalk. StadCo contends that: (1) the figures in 2013 Exhibit J were "placeholders;" (2) the parties simply forgot to include STR Marketplace, Non-NFL Ticket Surcharge and interest; (2) over the course of the 2013 Lease, StadCo projects that the Authority will earn approximately $270 million in interest, STR Marketplace and Non-NFL ticket surcharge revenues; (3) the parties did not agree to exclude interest or any other revenue sources from the adjustment calculation; and (4) the parties intended the rent adjustment to address the Authority's actual financial condition, and take into account financial data regardless of whether a particular revenue, expense or debt was included on 2013 Exhibit J.

The Authority contends that STR Marketplace, Non-NFL Surcharge, Fanwalk, and interest on reserve accounts were not included as revenue items on 2013 Exhibit J, and thus the inclusion of these revenues items fails to follow the formulas and assumptions of 2013 Exhibit J. The Authority contends that the formulas and assumptions in 2013 Exhibit J are the result of the parties' discussions, assessment and negotiation, and were not simply "placeholders" as argued by StadCo.

Non-NFL Ticket Surcharge is defined in the 2013 Lease as $4 dollar per ticket charge to which the Authority would be entitled for all Non-NFL events for which tickets are sold. (Ex. 33 at 668.) "One-half (1/2) of the proceeds of the Non-NFL Ticket Surcharge will be included in Stadium Authority Revenue in the Lease Year received by the Stadium Authority but shall not constitute Non-NFL Event Revenue." (*Id.*) "The other one-half (1/2) of the proceeds of the Non-NFL Ticket Surcharge will be deposited in the Stadium Authority Discretionary Fund." Non-NFL Ticket Surcharge, however, is not listed on 2013 Exhibit J or the modeling supporting 2013 Exhibit J. (Exs. 155 and 155A.) Fanwalk was a one-time sale, before the Stadium opened in 2014, for fans to have their names imprinted on bricks outside the Stadium walkway. (Sabatino, 423:20-424:1.)

[2] And interest on reserve accounts, which is addressed separately below.

STR Marketplace is an online "marketplace" for SBL holders who want to sell their SBLs. STR pays the Authority a portion of the fees it collects, with an annual minimum payment. At the time 2013 Exhibit J was created, the Authority had not yet executed an agreement with STR and could not have projected those revenues. (Sabatino, 2281:18-2282:25; Newton, 2013:19-2037:21; MacNeil, 238:13-239:10; Ameling, 1016:24-1017:3; Sabatino, 783:11-19.)

Section 6.1.2 provides that if the trigger for adjustment occurs [increase or decrease in debt (taking into consideration Net Prepayments) or expenses], "then a one-time adjustment to the Facility Rent Schedule . . . shall be made to take account of such increase or decrease, and that "any such adjustment to the Facility Rent Schedule shall be determined in a manner otherwise generally consistent with the Facility Rent Assumptions." Again, the "Facility Rent Assumptions" are defined in the provision as "the formulas and assumptions used to calculate the Facility Rent on Exhibit J attached hereto," i.e., 2013 Exhibit J. For the reasons noted above, the parties understood that the adjustment would take into account changes to the debt service, operating expenses and revenues. The evidence at the hearing established that the formulas and assumptions in 2013 Exhibit J were negotiated, detailed terms, not simply "placeholders" as argued by StadCo.

Consistent with the foregoing, use of STR Marketplace, Fanwalk and Non-NFL Ticket Surcharge revenues as part of the adjustment to the Facility Rent must be "generally consistent" with the formulas and assumptions in 2013 Exhibit J. "Generally consistent" does not require strict adherence to the categories and formulas used in 2013 Exhibit J. The evidence at the hearing established that STR Marketplace, Fanwalk and the Non-NFL Ticket Surcharge provide revenue to the Authority and either did not exist or were inadvertently left out of 2013 Exhibit J. There was no evidence that the parties agreed that the list of revenues on 2013 Exhibit J were the only items of revenue that would be considered in the adjustment process, or that the parties agreed that unknown or unlisted revenue sources would be excluded from the adjustment process. Instead, as noted above, the parties intended to use the Stadium's actual financial performance (as to debt, expenses and revenues) as the basis for the adjustment. While none of these revenues are addressed or referenced in 2013 Exhibit J, inclusion of these revenue streams is generally consistent with 2013 Exhibit J and shall be considered in the Facility Rent adjustment.

2. Interest on Reserve Accounts

StadCo contends that section 6.1.2 takes all revenue sources into account, and asserts that: (1) the parties forgot to include interest; (2) the interest the Authority will receive is revenue, is substantial and is increasing; (3) the failure to include interest revenue in 2013 Exhibit J did not constitute an agreement not to take it into account when the time came to adjust the Facility Rent; and (4) because the Authority will earn millions of dollars in interest in the "leanest" year, the exclusion of interest would lead to a multi-million dollar increase in the Facility Rent.

The Authority contends that 2013 Exhibit J does not include interest on earnings on reserve accounts, that the parties never included interest income on reserve accounts as revenue available to service debt and pay operating expenses, and that the parties always modeled interest earnings within the reserve accounts as added cushion. The Authority asserts that by adding interest on reserves to revenues, StadCo decreases its annual rent amount by approximately $4.4 million.

The StadCo model projects that: (1) in year 39 of the 2013 Lease (the "leanest" year of operations), interest revenue would account for $4.3 million of the Authority's $57.516 million total projected revenues; (2) by the end of the 2013 Lease term, the Authority reserve accounts would hold approximately $150 million; and (3) the Authority's annual interest earnings on that sum will be approximately $4 million. (Ex. 575.)

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.

D. Disputed Calculations in the Relevant Rent Adjustment Models

The parties further dispute which proposed Facility Rent model best complies with the 2013 Lease and 2013 Exhibit J.

StadCo contends that the Stadium's actual financial performance, and forecasts of its future performance, exceeded the parties' 2013 forecasts, and the 2013 Lease therefore dictates a downward adjustment in Facility Rent. StadCo asserts that a level rent of $16.775 million, per the model prepared by Mr. Sabatino (the StadCo model), is

sufficient, when combined with the Authority's other projected revenues, to cover the Authority's projected expenses and debt service in every year of the 2013 Lease. (Ex. 575.) The StadCo model, however, includes interest on reserves as revenue. For the reasons noted above, inclusion of interest on reserves as revenues is not permitted by 2013 Exhibit J, and this renders the StadCo model an improper basis for calculation of the adjusted Facility Rent.

The Authority contends that Mr. Newton's alternative model adjusts revenue pursuant to the formulas and assumptions of 2013 Exhibit J (but does not include interest earnings on reserve accounts as a revenue line item) and finds that the appropriate adjusted Facility Rent is $24,762,000. The Authority contends that the StadCo model, prepared by Mr. Sabatino, does not comply with the 2013 Lease and ignores the formulas and assumptions of 2013 Exhibit J.

1. The Newton Alternative Model

As noted above, Mr. Newton's alternative model (hereinafter, the "Authority model") adjusts the Facility Rent to $24,762,000. (Ex. 575 at 3-4.) The Facility Rent in the 2013 Lease is $24,500,000, and thus the Authority model would raise the Facility Rent by $262,000 a year over the balance of the 2013 Lease. Mr. Newton testified that he prepared the Authority model pursuant to the formulas and assumptions of 2013 Exhibit J. (Newton, 1896:7-1897:15.) For example:

- For the revenue items included in the 2013 Exhibit J other than SBL revenues (NFL Ticket Surcharge, Non-NFL Events – Net, Naming Rights, and Senior / Youth Fee), Mr. Newton included the actual revenues from the first two years of operation, and then included the assumed revenues and growth rates from Years 3 to 40 as stated in 2013 Exhibit J. (Newton, 1902:24-1093:25, 1920:8-1923:10, 1930:18-1931:16; Ex. 585 at 3-4.)

- While 2013 Exhibit J does not include STR Marketplace as a revenue line item, the model includes STR Marketplace actuals for the first two years and then included StadCo's revenue values through Year 30. Mr. Newton did not include STR Marketplace revenues after Year 30, following the 2013 Exhibit J formulas and assumptions that SBL resale revenues stop after Year 30. (*Id.*, 1918:3-1919:14, 2130:2-2131:19; Ex. 585 at 3-4, line 13.

- With respect to Non-NFL Ticket Surcharge and Fanwalk revenues, which were not included on 2013 Exhibit J, Mr. Newton included the first two years of actual revenues for Non-NFL Ticket Surcharge, and then StadCo's numbers after Year 2. Mr. Newton also included the one-time revenue of Fanwalk. (*Id.*, 1929:10-1930:7, 1931:9-20, 2134:21-2135:9; Ex. 585 at 3-4, lines 16 and 18.)

- The model Facility Rent of $25,549,000 for Year 4 includes a retroactive payment covering the difference between the adjusted and actual rent paid in the first three years. (Ex. 585 at 3, cells F8 and F9, and row 70.)

- Mr. Newton adjusted a few expense line items (discretionary fund and Ground Rent Performance) in accordance with updated revenue adjustments and made minor adjustments to the debt service modeling. (*Id.*, 1934:17-1936:25.)

Mr. Newton's model provides a flat rent ($24,762,000) and net positive cash flow for the entire 40-years as required by the 2013 Exhibit J, which in turn provides excess revenues for reserve accounts and potential distributions. (Ex. 585 at 3-4, lines 55-69.)

StadCo disputes a number of Mr. Newton's calculations. Each dispute is addressed below.

2. SBLs

SBLs can be purchased outright or financed for up to ten years. (MacNeil, 215:6-25.) Once sold, SBLs can become available for resale by the Authority in two ways. First, a holder who has financed his or her purchase may default on an annual payment. Second, a holder may fail to purchase Forty Niners season tickets. (Sabatino, 419:13-421:5.) In the event of a default, the Authority keeps all payments already received on that SBL, and the Authority may sell a new SBL for that seat. (*Id.*)

By 2013, 75% of the Stadium's SBLs had been sold. (Doezema, 1521:7-23.) The parties used that information to calculate SBL revenues for 2013 Exhibit J. (Doezema, 1504:4-1505:22.) There are two SBL revenue line items, SBL receivables (initial SBL sales and customers who will pay for the license fees plus interest over a 10 year period) and SBL resales (the Authority reselling defaulted SBLs to new customers). The 2013 Exhibit J modeling:

- includes revenues from initial SBL receivables in Years 1 through 9. (Ex. 155A, revenue line item #2; Doezema, 1526:16-1527:7; Ameling, 963:25-964:25.) In year 1, 2013 Exhibit J includes $43,857,000 as the revenue for SBL receivables. For years 2-9, the parties used $30,596,000 as the assumed SBL receivables yearly revenue. (Ex. 155A, revenue line item #2.)

- includes $500,000 a year of SBL resale revenues for years 2- 30, with no further SBL resale revenues in Years 31 through 40. (Ex. 155A, revenue line item #6; Sabatino, 707:6-22, 2263:17-19, Ex. 30, pp. 66-67; Ameling, 963:25-964:25, 954:4-10, 964:10-22; Doezema, 1525:13-1526:15; 1757:21-1758:3.) The $500,000 figure was based upon the assumption that 100 SBL resales would be made each year at $5,000 per SBL.

Mr. Doezema testified that the parties specifically discussed ending the SBL revenues at the 30th year:

> And with respect to the subsequent default and resale of a small fraction of SBLs, our assumption is that that would last through the 30th year of the lease .... As the stadium aged and neared the end of the lease term, it was expected that the value

would diminish at least in the last ten years. So by mutual discussion between Mr. Sabatino and myself, we agreed to end that projection after – at the 30th year.

(Doezema, 1522:2-1523:2.)

a. The Proposed Models' Treatment of SBL Revenues

As noted above, 2013 Exhibit J includes SBL receivables from initial sales through Year 9. The Authority's model includes the first two years of actual SBL receivable revenues ($118,332,000 in year 1 and $21,768,000 in year 2) and projects the same amount as in 2013 Exhibit J for years 3-9, i.e., $30,956,000 per year. (Newton, 1904:1-12, 2126:7-2128:2, 2379:20-2382:3; Ex. 585 at 3-4, line 10.)

The StadCo model has slightly different actual SBL receivable revenues for years 1-2 (2014 and 2015). (Ex. 575.) For years 3-9, the StadCo model starts at $30,196,000 million for year 3, and gradually decreases to $28,304,000 in year 9. (*Id.*) Mr. Rhoda testified that the projections in the StadCo model are based on actual operational experience with the SBL revenue sources, and on information that CSL obtained from other NFL teams, whose season tickets are tied to SBLs or comparable products, and his own experience in projecting and analyzing financial results of NFL seat license programs. (Rhoda, 623:2-643:25.)

2013 Exhibit J includes SBL resale proceeds starting from Year 2, with an assumed annual revenue of $500,000 through Year 30. The Authority model does not include any resale proceeds in Years 1 and 2 because they are included in the actual SBL receivables for these years. For years 3-30, Mr. Newton included $500,000 SBL resales per year, following the formulas and assumptions of the 2013 Exhibit J. (Newton, 1904:13-1906:1, 2071:9-2074:12, 2128:10-2129:24; Ex. 585 at 3-4, line 12.) With respect to SBL revenues, Mr. Newton testified that there was very little difference between the 2013 Exhibit J projected SBL revenues and actual SBL revenue collections through the stipulated adjustment date of March 2016, and that the small difference of 2-3% validates the parties' preparation of the 2013 Exhibit J and is further reason to follow the SBL revenue formulas and assumptions in the 2013 Exhibit J. (*Id.*, 1906:23--1911:15, 1913:19-1917:17, 2120:22-2122:22; Ex. 586 at 3 [Table – Very Little Difference b/w Projected and Actual SBL Collections], 4 [Chart – Projected and Actual SBL Collections, 2012-2015], and 5 [Chart – Actual v. Projected Change in SBLs].)

The StadCo model includes SBL revenues for years 10-40 as "SBL receivables." (Ex. 575.) The projected revenues start at $14,602,000 in year 10, drop to $3,892,000 in year 11, and fluctuate between $2.6 million and roughly $7 million for years 12-30. (*Id.*) Instead of using the $500,000 per year projection, the StadCo model uses projections from CSL. (Sabatino, 782:14-783:10.)

Unlike the Authority model, the StadCo model projects SBL revenues in years 31-40, beginning at $1.85 million and ending in year 40 at roughly $1.15 million. (Ex. 575.) The StadCo model decreases the number of sales in these years and reduces the

price of the SBL by 10% per year. Mr. Rhoda testified that it was his expectation (based upon his experience with Texas Stadium) that, even though it is at the end of term, people will still buy an SBL with the understanding that they are going to get in line for priority seating in a renovated or new building. (Rhoda, 641:10-643:19.) Mr. Rhoda testified that he expected that the Authority would exceed the number of SBLs he included in the two StadCo models. (Rhoda, 643:20-25.)

b. SBL Revenue in Years 31-40

The Authority contends that its projection of no SBL revenues in years 31-40 is identical to 2013 Exhibit J, which includes no SBL revenues in years 31-40. The Authority asserts that the parties discussed and agreed not to include SBL revenues for years 31-40. The Authority contends that StadCo's inclusion of SBL revenues in years 31-40 ignores the formulas and assumptions of 2013 Exhibit J, and thereby decreases its facility rent number by $1,472,000 per year. The Authority asserts that because the actual performance and collection of SBL revenues through March 31, 2016 is only 2-3% different from the 2013 Exhibit J projections, there is no basis for StadCo to ignore or change the parties' formulas and assumptions of the 2013 Exhibit J. The Authority also offered evidence that there are numerous errors in StadCo's SBL revenue calculations.

StadCo contends that the 2013 Exhibit J figures were "placeholders" to be revised when the time came to adjust the rent, and that StadCo did not agree to exclude SBL revenues in years 31-40. StadCo asserts that: (1) based upon the testimony of Mr. Rhoda, that it would be unreasonable to assume zero SBL revenue in years 30-40; (2) the StadCo model projections are conservative and based upon the testimony of the only witness; and (3) the Authority's disagreements with StadCo's SBL projections are not errors, and the only actual error has no effect on rent.

Again, section 6.1.2 provides that if the trigger for adjustment occurs, "then a one-time adjustment to the Facility Rent Schedule . . . shall be made to take account of such increase or decrease, and that "any such adjustment to the Facility Rent Schedule shall be determined in a manner otherwise generally consistent with the "the formulas and assumptions used to calculate the Facility Rent" on 2013 Exhibit J. The parties understood that the adjustment would take into account changes to the debt service, operating expenses and revenues.

Consistent with the foregoing, the adjustment must take into account any changes in SBL revenues and must be "generally consistent" with the formulas and assumptions in 2013 Exhibit J. The Authority's adjustments to the SBL revenues are consistent with the formulas and assumptions set forth in 2013 Exhibit J. The Authority's model uses the updated revenue information, and otherwise follows the relevant assumptions in 2013 Exhibit J (e.g., $500,000 per year in SBL resales, same projected receivables in years 3-9, and no SBL revenues in years 31-40). Moreover, the evidence that the actual SBL revenues through March 31, 2016 are only 2-3% different from the 2013 Exhibit J projections reinforces the parties' assumptions as opposed to providing a basis for significantly different assumptions. In contrast, StadCo's inclusion of SBL revenues in

years 31-40 is not generally consistent with the parties' assumption of no SBL revenue in these years. The evidence established that this issue was discussed during the negotiations of the 2013 Lease, the parties agreed that they would assume no SBL revenues during the final 10 years of the initial term of the 2013 Lease for purposes of calculating the Facility Rent. Changing that assumption at this time, based not upon updated revenue information, but upon StadCo's expert's experience with other NFL franchises seat license sales, is not generally consistent with 2013 Exhibit J.

Consistent with the foregoing, the Arbitrator finds that with respect to its treatment of SBL revenues, the Authority's model complies with section 6.1.2 of the 2013 Lease.

2. STR Marketplace

2013 Exhibit J does not include STR Marketplace as a revenue line item. The Authority's model includes STR actuals for the first two years ($217,000 and $823,000) and then includes year STR Marketplace revenue of $325,000 per year (which is StadCo's arbitration model forecast for this revenue through year 30). (Newton, 1918:3-1919:14, 2130:2-2131:19; Ex. 585 at 3-4, line 13.) The Authority model does not include STR revenues after year 30. (*Id.*) StadCo's model projects that for years 3-40, the Authority will receive approximately $520,000 per year in STR revenues. (Ex. 575.)

Because STR Marketplace is an online "marketplace" for SBL holders who want to sell their SBLs, and the parties' assumption in 2013 Exhibit J that there would be no SBL revenues in years 31-40, the Authority's limitation of STR revenue to years 1-30 is consistent with 2013 Exhibit J. StadCo failed to establish the basis for its calculation or that its proposal is generally consistent with 2013 Exhibit J. Accordingly, the Arbitrator finds that with respect to its treatment of STR Marketplace revenues, the Authority's model complies with section 6.1.2 of the 2013 Lease.

3. Non-NFL Events (Net) Revenue

2013 Exhibit J includes a line item for Non-NFL Events (Net) revenue of $5,000,000 in year 1 and increases the sum, on a yearly basis, by 3% for the balance of the initial terms of the 2013 Lease. (Ex. 155A.)

The Authority's model includes the actual Non-NFL Event (Net) revenues for years 1 and 2 ($5,197,000 and $6,079,000), then uses the 2013 Exhibit J projection for year 3 ($5,305,000) and then increases the yearly sum by 3% for the balance of the least term. (Newton, 1920:9-1923:10.) 2013 Exhibit J and the Authority Model use an accrual method, which reflects when revenue was earned, not when received or anticipated to be received.

The StadCo model, in contrast, has $0 for year 1, $5,197,000 in year 2 and $6,033,000 for year three, then uses the 2013 Exhibit J projection for year 4 ($5,305,000) and increases the yearly sum by 3%. (Ex. 585, line 5.) For year 40, the projected model

has the revenue item as roughly twice as much as year 39, which Mr. Sabatino testified was due to having the Non-NFL revenue from year 39 paid in year 40 plus Non-NFL revenue from year 40 paid in year 40. (Sabatino, 783:20-784:25.) Unlike the Authority's use of the accrual method, the StadCo model uses a cash method, i.e., revenues are reflected in the year that the cash is expected to be deposited to, or paid from, the Authority's account. The difference in methods results in a $570,000 increase in Facility Rent in the Authority Model.

StadCo contends that the accrual method used in the Authority Model is not consistent with the purpose of the rent adjustment, which StadCo asserts is to determine how much cash the Authority will need, in each year of the Lease, to cover expenses and debt service. StadCo asserts that: (1) the cash method of modeling this revenue is consistent with that purpose; (2) when the parties created 2013 Exhibit J, they modeled all revenues and expenses on a cash basis – it shows the Authority receiving Non-NFL Event revenue in each year; (3) in 2015, the parties agreed that the Authority would receive each year's Non-NFL Event revenue at the beginning of the following year; (4) the Authority received no Non-NFL Event in year 1; and (5) the parties did not agree to account for Non-NFL Event revenue differently from all other revenues and expenses.

The Authority contends that StadCo's use of a cash method for Non-NFL Events revenue is contrary to 2013 Exhibit J and done purely to increase cash flow in the "lean" year 40 and decrease its Facility Rent by $822,000. (*See* Newton, 1923:4-1928:2, 1975:1-1979:1, Exs. 155A, 579, 586, p. 13; 2132:17-2134:4.) The Authority asserts that contrary to the StadCo model, the Authority won't have both years of revenue in year 40. ((Doezema, 1765:3-1769:20; Ameling, 112:17-23.)

In brief, the Authority's projection of Non-NFL Event revenue is consistent with the treatment of Non-NFL Event revenue in 2013 Exhibit J. StadCo's projection is contrary to the formulas and assumptions regarding Non-NFL Event in 2013 Exhibit J. Accordingly, the Arbitrator finds that with respect to its treatment of Non-NFL Event revenues, the Authority's model complies with section 6.1.2 of the 2013 Lease.

5. Adjustments to Expenses

Section 6.1.2 provides that if the trigger for adjustment occurs [increase or decrease in debt service or operating expenses], "then a one-time adjustment to the Facility Rent Schedule . . . shall be made to take account of such increase or decrease, and that "any such adjustment to the Facility Rent Schedule shall be determined in a manner otherwise generally consistent with the Facility Rent Assumptions." The formulas and assumptions in 2013 Exhibit J require that the parties use the actual expenses from the first two years of operation, and then calculate utility expenses through year 40 by applying a 5% growth rate to the actual utility expenses in year 2 or a 3% growth rate to actual management expenses in year 2.

The parties' December 9, 2016 Joint Case Management and Discovery Plan provides, in part, that "the rent adjustment shall be determined as of March 31, 2016,"

and that the "parties reserve all rights to object to evidence concerning events that occurred after March 31, 2016, in the event that any party presents such evidence at trial."

The StadCo model includes year 3 utilities expenses that are lower than year 2 actuals, rather than increased by 5%. (Ex. 575.) This results from the fact that StadCo made adjustments to reclassify some of the utilities expenses (to maintenance and engineering expenses) and then adjusted the year 2 utilities balances prior to calculating the growth rates. (Sabatino, 786:4-11.)

StadCo contends that the Authority models contain misclassified expenses, and do not correct projections for non-recurring expenses. With respect to Stadium Manager fees and expenses, StadCo asserts that while the Authority models properly project this expense by applying a 3% growth rate to the actual expenses incurred in Year Two (the "base" year), the Authority models use a base year amount that is approximately $36,000 too high, resulting in an adjusted Facility Rent that is approximately $460,000 too high. With respect to utility expenses, StadCo asserts that while the Authority model properly projects utility expenses by applying a 5% growth to actual expenses incurred in year two, the Authority model uses a base year expense which is $273,000 too high, resulting in the Facility Rent being over-inflated by $1.75 million. StadCo's "corrections" to the base year numbers are found in exhibit 517.

StadCo's unilateral adjustments to the year 2 actual utility expenses are unconfirmed. (Newton, 1970:17-22; 2382:4-2385:1; 2388:2-2390:17; 2396:17-21.) StadCo admitted that these adjustments are only included in StadCo's facility rent modeling for this Arbitration. (Sabatino, 2310:1-20.) StadCo's proposed adjustments are not in the Authority's financial records, which are prepared using information from StadCo's management company and must be made available to the public. (Sabatino, 2305:1-2309:25; Newton, 2389:2-16.)

As a result of the foregoing, StadCo has failed to establish that its corrections to the year 2 actuals are generally consistent with 2013 Exhibit J. The record does not reflect that StadCo's corrected base year amounts are properly before the Arbitrator or consistent with 2013 Exhibit J. For this reason, StadCo has also failed to establish any error or inconsistency in the Authority's modeling of these expenses. Accordingly, the Arbitrator finds that with respect to its treatment of expenses, the Authority's model complies with section 6.1.2 of the 2013 Lease.

6. Conclusion Re Proper Calculation of the Facility Rent Adjustment

Consistent with the foregoing, the Arbitrator finds 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. Accordingly, the Arbitrator enters 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.

E. StadCo's Claim for Breach of Contract

StadCo contends that the Authority breached the 2013 Lease when the Authority refused to act on the March 2016 rent adjustment proposal. StadCo asserts that the parties were obligated, at the very least, to engage in a good faith effort to agree on an adjusted rent figure, and that while StadCo made that effort, the Authority Board did not do so and breached the Lease when it repudiated its obligation under Section 6.1.2 to do so.

Section 6.1.2 of the 2013 Lease provides in part that the parties "shall resolve disagreements with respect to any such adjustment of Facility Rent pursuant to this Paragraph 6.1.2 in accordance with the Dispute Resolution Procedures." Section 27.1 of the 2013 Lease provides that in the event of any dispute "the Parties shall first attempt in good faith to settle and resolve such Dispute or Controversy by mutual agreement in accordance with the terms of this Paragraph 27.1." Exhibit L requires that the parties "attempt, with diligence and good faith, to resolve and settle such Dispute or Controversy."

The elements of a claim for breach of contract are "(1) the existence of [a] contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 (citation omitted).

StadCo failed to establish any breach of the 2013 Lease, or the implied covenant of good faith and fair dealing, by the Authority. The record reflects that the Authority tried to agree on an adjustment with StadCo, and that the Authority Board had concerns about the proposed adjustment submitted to it in March 2016. As such, the record reflects a disagreement regarding the adjustment. The record further reflects that the parties made a good faith attempt to settle and resolve the disagreement. Moreover, even assuming arguendo that the Authority somehow breached the 2013 Lease, StadCo failed to offer evidence of any damages resulting from the breach. The failure to establish damages provides an alternative basis for rejection of StadCo's claim for breach of contract. Accordingly, the Arbitrator enters an Interim Award in favor of the Authority and against StadCo on StadCo's claim for breach of the 2013 Lease.

F. Prevailing Party

Section 1.8 of exhibit L to the 2013 Lease provides that "[i]n any arbitration arising out of or related to this Exhibit, the arbitrator(s) shall award to the prevailing party, if any, the Attorneys' fees and Costs reasonably incurred by the prevailing party in connection with the arbitration in accordance with the terms of Paragraph 26.12 of the Stadium Lease."

Consistent with the balance of this Interim Award, the Authority is the prevailing party in the arbitration, and is entitled to recover attorneys' fees and costs reasonably incurred by the Authority in connection with the arbitration from StadCo. The Authority may file a motion for attorneys' fees and costs pursuant to the schedule set forth below.

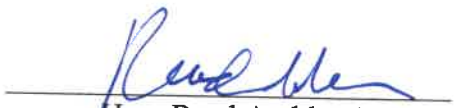
IV. INTERIM AWARD

Consistent with the balance of this Interim Arbitration Award, the Arbitrator hereby enters an Interim Arbitration Award in favor of the Authority and against StadCo. Pursuant to section 6.1.2 of the 2013 Lease, the Facility Rent shall be adjusted to $24,762,000.

The Authority shall have fifteen (15) days from service of this Interim Award to file a motion for attorney's fees and/or costs, together with supporting evidence and argument. StadCo shall have ten (10) days from receipt of a motion to file any opposition evidence and argument. The Authority shall have five (5) days from receipt of any opposition to file a reply. Once the foregoing papers are received, the Arbitrator will deem the attorney's fees and/or costs submitted for decision, unless a party, in writing, requests an oral hearing on this issue. If requested, an oral hearing date will be set by the Arbitrator and the hearing shall be conducted telephonically for the convenience of the parties. Counsel are encouraged to meet and confer on the issue of attorney's fees and costs and explore whether that matter might be resolved by agreement, without incurring additional cost and expenses.

The further determinations to be made at any further hearing or based upon written submissions shall be embodied in the Final Award, which shall also incorporate the contents of the Interim Award. It is not intended that this Interim Award be subject to review either pursuant to 9 U.S.C. §§9, 10 or Cal. Code Civ. Proc. §§ 1284, 1285.

Dated: June 18, 2018



Hon. Read Ambler (Ret.)
Arbitrator

SERVICE LIST

Case Name: Forty Niners SC Stadium Company LLC vs. Santa Clara Stadium Au
Reference #: 1100084323
Panelist: Ambler, Read ,

Hear Type: Arbitration
Case Type: Real Estate/Real Property (

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Party Represented:
Forty Niners SC Stadium Company LLC

PROOF OF SERVICE BY E-Mail

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

I, Josephine Care, not a party to the within action, hereby declare that on June 18, 2018, I served the attached Interim Award on the parties in the within action by electronic mail at San Jose, CALIFORNIA, addressed as follows:

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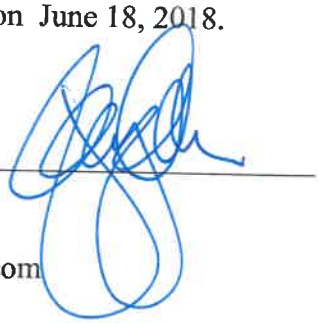
I declare under penalty of perjury the foregoing to be true and correct. Executed at San Jose, CALIFORNIA on June 18, 2018.



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