No.

IN THE

Supreme Court of the United States

CENTURY III MALL PA LLC, PETITIONER

v.

SEARS ROEBUCK & CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

While courts exercise prudential restraint when considering whether to vacate an arbitration award under 9 U.S.C. § 10(a)(4) ("where arbitrators exceeded their powers . . . ."), and while the scope of a court's review is limited under that statute, this must be balanced with the principle that the scope of an arbitrator's power in a case is limited by the terms of the parties' agreement to arbitrate, and courts must correct arbitration awards that exceed the scope of the authority granted to the arbitrator. Pursuant to these competing concepts: At what point does an arbitrator's exercise of his or her authority to interpret a contract cross a boundary into an impermissible re-writing of that contract?

PARTIES TO THE PROCEEDING

The petitioner is Century III Mall PA LLC.
The respondent is Sears Roebuck & Co.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

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Century III Mall PA LLC, by and through its attorneys Thomas M. Pohl (Counsel of Record), Kirk B. Burkley, and John J. Richardson, all of Bernstein-Burkley, P.C., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a (Appendix A)) is reported at Nos. 17-2284 and 17-2759, 758 Fed. Appx. 242 (unpublished), 2018 WL 6721092, *1 (3d Cir. Dec. 20, 2018), *petitions for rehearing and rehearing en banc denied*, Mar. 18, 2019 (App., *infra*, 53a-54a (Appendix D)). The

memorandum opinion and order of the district court (App., *infra*, 11a-23a (Appendix B)) is reported at No. 16-cv-1839, 2017 WL 1927737, *1 (W.D. Pa. May 10, 2017). The foregoing both relate to a November 10, 2016 American Arbitration Association, Commercial Arbitration Tribunal opinion and order, No. 01-15-0002-8820 (App., *infra*, 24a-52a (Appendix C)).

JURISDICTION

The judgment of the court of appeals was entered on Dec. 20, 2018. *See* App., *infra*, 1a-10a (Appendix A). Petitions for rehearing and rehearing *en banc* were denied on Mar. 18, 2019. *See* App., *infra*, 53a-54a (Appendix D). The mandate of the court of appeals issued on Mar. 26, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The opinions involved and petitioner's challenge thereto involve the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and specifically involve 9 U.S.C. § 10(a)(4), which addresses the power of a United States court to vacate an arbitration award, *inter alia*, "where the arbitrators exceeded their powers." *See* App., *infra*, 55a-56a (Appendix E).

STATEMENT

This matter involves a dispute between petitioner Century III Mall PA LLC ("Century III" or "Petitioner") and respondent Sears Roebuck & Co. ("Sears" or "Respondent") (collectively, the "Parties"). The Parties' dispute, which involves a commercial lease agreement, was submitted to an American Arbitration Association Commercial Arbitration Tribunal pursuant to the terms of the Parties' lease

agreement; but, in rendering a decision, the arbitrators exceeded the scope of authority granted to them by re-writing express provisions of the Parties' written contract. Applying extreme deference to the point of error, the courts on review failed to correct this overstepping of arbitral authority.

1. Century III was the Landlord and Sears was the Tenant under a May 29. 1979 Lease Agreement (the "Lease") for anchor space at the Century III Mall (the "Mall") in Pittsburgh, Pennsylvania. The Lease contained explicit terms describing the process for Century III to exercise an election to purchase Sears' leasehold improvements in the event that Sears ceased operations at the Mall. The process set forth in the Lease required the parties to submit appraisals of fair market value of the leasehold improvements.

2. The Lease also contained a limited arbitration clause stating that in any arbitration the arbitrators "shall have no power to change any terms of this Lease or deprive any party of any right provided for herein or modify or extinguish any obligation of either party imposed hereby."

3. The Lease did not provide Sears with an option to terminate, but did provide that if Sears intended to discontinue the operation of the department store, it must give Century III written notice, and Century III could discontinue the Lease. Section 6.3(b) of the Lease sets forth two different scenarios for determining the transaction price if Century III elects to terminate the Lease. If the termination occurs after the expiration of Sears' operating covenant (the first twenty years of the Lease), the valuation is less generous to Sears (*i.e.,* only the "leasehold improvements" are valued), because the value of the leasehold interest to Sears has declined over the years

(*e.g.,* because Sears would have less time left to use/sublet the property).

4. Sears provided formal notice to Century III on September 18, 2014 that it would discontinue operations of the Sears store, triggering the provisions of Section 6.3 of the Lease. Sears gave its notice, and Century III elected to terminate the Lease, after the expiration of Sears' initial twenty-year operating covenant.

5. Pursuant to Section 6.3(b)(ii) of the Lease, if Sears provided notice after the initial twenty-year operating covenant period, the parties were contractually required to look to both Sears' "depreciated book value or the appraised fair market value *of the leasehold improvements* made by [Sears], determined as in (i) above." (Emphasis added.) Section 6.3(c) of the Lease sets forth a method for computing the "depreciated book value of [Sears'] Building and Improvements," stating that it "shall be computed on a straight line basis in accordance with [Sears'] customary method of computing book value of similar types [sic] buildings and improvements." In contrast, the Lease does *not* set forth any method for computing the depreciated book value of "leasehold improvements."

6. After Sears provided its notice, Century III invoked the termination provisions of Section 6.3 of the Lease. Sears provided an appraisal as required under Section 6.3 on January 23, 2015, but notified Century III that it would not provide any information regarding the "depreciated book value" of the leasehold improvements. Century III timely provided an appraisal in February 2015, and supplements and addenda thereafter. Sears issued a demand for arbitration on March 9, 2015.

7. Hearings were held before an arbitration panel on June 27, 2016, June 28, 2016, and August 30, 2016. The Arbitration Panel issued an award (the "Award") on November 10, 2016. The Award, *inter alia*, concluded:

(a) "Buildings and Improvements" in Section 6.3(b)(i) had the same meaning as "leasehold improvements made by Tenant" in Section 6.3(b)(ii);

(b) Century III's appraisals cannot be considered;

(c) the Award amount should be based solely on the book value of the "Buildings and Improvements" submitted by Sears;

(d) Sears' calculation of book value of the "Buildings and Improvements" was in accord with generally accepted accounting principles ("GAAP")

(e) the phrase in Section 6.3(b)(ii) of the Lease stating "provided, however, that if Landlord does not elect to so purchase" did not provide Century III with an election not to purchase.

See App., *infra*, 24a-52a (Appendix C).

8. Century III filed suit in the United States District Court for the Western District of Pennsylvania on December 9, 2016 seeking vacatur of the Award. In its amended complaint, Century III pled five separate bases upon which the arbitration panel irrationally, and in contravention of the Lease and of the parties' agreed-upon scope of arbitral issues, exceeded their powers. Sears filed a motion to dismiss the amended complaint on March 10, 2017.

On May 10, 2017, the district court issued a memorandum opinion and order granting Sears' motion to dismiss the amended complaint. It held that the arbitration panel did not "depart dramatically" from the Lease, exceed their authority, or commit irrational error. *See* App., *infra*, 11a-23a (Appendix B).

9. Century III appealed to the United States Court of Appeals for the Third Circuit. A panel of that court upheld the district court's decision. In its panel opinion, the Third Circuit held, *inter alia*: (1) the arbitration panel arrived at a "reasonable interpretation" of the Lease when it opined that the terms "leasehold improvements" and "Building and Improvements" were intended to be defined and valued identically; (2) the arbitration panel properly disregarded Century III's appraisal of the Sears' "leasehold improvements" and determined that "the same result would have been obtained" had it accepted both appraisals; (3) the arbitration panel "rationally applied" the formula provided by the Lease for determining book value; (4) the arbitration panel correctly determined that GAAP principles did not apply and that even if they did, they were actually satisfied; and (5) the arbitration panel "reasonably determined" that Century III's unambiguously exercised its option to terminate the Lease at purchase the Building and Improvements and that language in the Lease stating "provided, however, that if [Century III] does not elect to so purchase" "cannot be fairly interpreted to provide" Century III with the ability to opt-out of the Lease termination and repurchase option. *See* App., *infra*, 1a-10a (Appendix A).

10. Century III's petitions for rehearing *en banc* and panel rehearing were denied on Mar. 18, 2019. *See* App., *infra*, 53a-54a (Appendix D). The mandate of the court of appeals issued on Mar. 26, 2019.

REASONS FOR GRANTING THE PETITION

The important question—with national, wide-reaching impact—that this case permits the Court to address is: At what point does an arbitrator's exercise of his or her authority to interpret a contract cross a boundary into an impermissible re-writing of that contract?

A. The Question Presented Is Of Exceptional Importance Because Parties' Contractual Dealings And Disputes Are Increasingly Adjudicated In Binding Arbitration In Lieu Of Civil Litigation Before The Courts.

1. Arbitration of commercial, contractual agreements has become a critical element of modern business, with parties increasingly selecting arbitration as a streamlined and cost-effective alternative to traditional litigation. Such selections have assisted the courts, too, by reducing their civil caseloads. But, while arbitration agreements amongst commercial parties have facilitated the administration of justice in these regards, it is critical that parties maintain confidence in the arbitration system. In that regard, when parties give up valuable rights by contractually agreeing to binding arbitration in lieu of traditional litigation, parties must have faith that the scope of the arbitration will not exceed the boundaries of the parties' contractual agreement to arbitrate.

2. Relatedly, while courts exercise prudential restraint when considering whether to vacate an

arbitration award under 9 U.S.C. § 10(a)(4) ("where arbitrators exceeded their powers . . . ."), and while the scope of a court's review is limited under that statute, this must be balanced with the principle that the scope of an arbitrator's power in a case is limited by the terms of the parties' agreement to arbitrate, and courts must correct arbitration awards that exceed the scope of the authority granted to the arbitrator.

B. This Case Highlights Elements of Others Nationwide Where, While Parties Cede Valuable Rights To Arbitrators For Expedient Dispute Resolution, Arbitrators Then Overstep Their Authority By Exceeding The Bounds Of Their Contractual Authority And Thereby Beg Guidance From This Court To Protect Parties' Rights Not Ceded.

1. Parties—in making the important decision to cede rights that they would otherwise have in order to avail themselves of contractually-agreed-upon arbitration in lieu of traditional litigation—deserve peace of mind that whatever they cede to an arbitrator will be the outer limits of what that arbitrator may decide; and, conversely, in so conceding, parties, of course, intend to preserve any rights not clearly ceded, such that an arbitrator may not weigh-in on them. This case addresses instances where arbitrators have exceeded their bounds.

2. Examining pertinent cases:

In *Coast Trading Co. v. Pacific Molasses Co.*, 681 F2d 1195. (9th Cir. 1982), the court exceeded its authority in extending delivery date of contract.

In *Matteson v. Ryder Sys.*, 99 F3d 108 (3d Cir. 1996), the arbitration panel exceeded its authority in

arbitration of collective bargaining agreement where the only issue submitted to the panel was increase in toll schedule and final award included references to ancillary charges.

In *Concourse Assocs. v. Fishman*399 F3d 524, 176 (2d Cir. 2005), the district court's vacatur of arbitration award was affirmed because arbitrator exceeded his authority.

3. In the foregoing cases, in others nationwide, and in the case that is the subject of this petition, the issue presented for the Court is that arbitration—while an effective and valuable means of alternative dispute resolution—must be bounded by recognition that, as a contractually-agreed-to process, arbitrators may not exceed the bound of their authority.

As set forth herein, and as more minutely detailed within the following section so that the court has an opportunity to fully evaluate the arbitrators' overstepping of authority, the overstepping of authority that occurred in this case with respect to the specific details at hand unfolded as follows. As an additional note, the petitioner does not seek review from this Court for purpose of merely correcting the errors below in this case; but, instead, brings this petition for writ of certiorari guided by the principle that determination as to the specific issues in this case will, in a larger sense, provide guidance from this Court with respect to the appropriate level of deference that should be given by the courts to arbitration proceedings and the related issue of defining the outer-bound of agreed-upon authority afforded to any arbitration proceeding.

C. This Case Presents A Superior Vehicle For Addressing The Question Presented

Because, Here, The Court Of Appeals' Decision Endorses An Impermissible Re-Writing Of Express Contractual Provisions.

1. The panel of the Third Circuit that addressed this case correctly recognized that the arbitration panel's task was to "interpret and enforce" the terms of the Lease. The Third Circuit also correctly recognized that, pursuant to the Parties' Lease, the arbitration panel was "without power 'to change any terms of [the] Lease or deprive any party of any right provided for [in the Lease] or modify or extinguish any obligation of either party imposed [by the Lease]."

2. In *Roadway Package*, *Roadway Package Sys. v. Kayser*, 257 F. 3d. 287, 300 (3d Cir. 2001) *abrogated on other grounds by Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008), the Third Circuit held that, while "judicial review under the FAA is 'narrowly circumscribed,' the scope of an arbitrator's authority is *defined and confined* by the agreement to arbitrate." *Id.* (internal citations omitted; emphasis added). Thus, a district court may "make an order vacating [an] award . . . [w]here the arbitrator[] exceeded [its] power[]" *Id.* (citing 9 U.S.C. § 10(a)(4)). The Third Circuit has further explained that "[b]y contractually restricting the issues they will arbitrate, the individuals with whom they will arbitrate, and the arbitration procedures that will govern, parties to an arbitration agreement may place limits upon the arbitrator's powers that are enforceable by the courts. *Sutter v. Oxford Health Plans LLC,* 675 F. 3d 215, 219 (3d. Cir. 2012)." Arbitration is fundamentally a creature of contract . . . an arbitrator's authority is derived from an agreement to arbitrate." *Puleo v. Chase Bank USA N.A.*, 605 F.3d 172, 181 (3d Cir. 2010) (limiting the

scope of the parties' arbitration because the Federal Arbitration Act only requires courts to enforce arbitration agreements "in accordance with their terms.").

In *Metromedia Energy, Inc. v. Enserch Energy Servs., Inc.* 409 F.3d 574, 578 (3d Cir. 2005), the Third Circuit stated that "[i]t is the responsibility of the arbitrator in the first instance to interpret the scope of the parties' submission, but it is within the courts' province to review an arbitrator's interpretation." *Id.* at 579 (*citing Matteson v. Ryder Sys. Inc.*, 99 F.3d 108, 113 (3d Cir. 1996)). A court's review will then "focus upon the record as a whole in determining whether the arbitrators manifestly exceeded their authority in interpreting the scope of the parties' submissions" as well as the parties' conduct. *Id.* "Courts are neither entitled nor encouraged simply to 'rubber stamp' the interpretations and decisions of arbitrators." *Id.* (*citing Matteson v. Ryder Sys. Inc.*, 99 F.3d at 113).

3. Similar to the arbitrator's scope of authority in *Roadway Package*, the Third Circuit panel's authority in the present case, was "defined and confined" by the terms of the Lease. By the Lease's terms, the parties agreed that the arbitrators have "*no power* to change any term of this Lease or deprive any party of any right provide for herein or modify or extinguish any obligation of either party imposed hereby."

4. Where, as in this appeal, it is alleged that the court "oversteps these limits," and "strays from interpretation and application of the agreement and effectively 'dispenses [its] own brand of industrial justice,' [the court] exceeds [its] powers" and the award will be subject to judicial vacatur. *Sutter,* 675 F. 3d at 219 (internal citations omitted). In its

opinion, the Third Circuit panel overlooked or misapprehended this overarching directive imposed by the Lease upon the arbitration panel and exceeded the authority granted to it by the parties to the Lease. This is illustrated by examination of the five primary holdings set forth in the Third Circuit's opinion, which, in turn, collectively illustrate that an impermissible re-writing of the parties' contract occurred.

5. Certiorari is warranted in this case so that the Court can address the wide-reaching arbitration issue concerning scope of authority in arbitration. This case provides a superior vehicle for doing so because—as noted, and as set forth below—in this case, portions of the parties' specific contract were effectively ignored or re-written by the arbitrators, with such actions uncorrected on appeal under the auspices of limited review of arbitral decisions.

Turning to the specific decisions below:

(1) The Third Circuit overlooked or misapprehended important points of law in holding that "leasehold improvements made by Tenant" and "Buildings and Improvements" were intended to be defined and valued identically under the Lease.

1. The Third Circuit overlooked or misapprehended the above-referenced limitations imposed by the Lease upon the arbitration panel in holding that the undefined term "leasehold improvements" had the same meaning, and was to be interpreted the same as, the defined term "Building and Improvements" with respect to the method for

computing depreciated book value upon receipt of notice of Century III's election to terminate the Lease.

2. Century III's amended complaint alleged that the arbitrators exceeded their powers by rewriting the Lease terms. The Third Circuit determined that "'Building and Improvements' in Section 6.3(b)(i) had the same meaning as 'leasehold improvements made by Tenant' in Section 6.3(b)(i)." However, the amended complaint alleged that this decision was unilateral, incorrect, and irrational, in contravention of the Lease, and in violation of the of the parties' agreed-upon scope of arbitral issues. Where an arbitral panel "interprets unambiguous language in any way different from its plain meaning," it is "amend[ing] or alter[ing] the agreement and act[ing] without authority." *Commw. v. Philip Morris*, 114 A.3d 37, 62-63 (Pa. Commw. 2014) (quoting *Greater Nanticoke Area Sch. Dist. v. Greater Nanticoke Area Ed. Assoc.*, 760 A.2d 1214, 1219 (Pa. Commw. Ct. 2000) and *Delaware Cnty. v. Delaware Cnty. Prison Emps. Indep. Union.*, 552 Pa. 184, 713 A.2d 1135, 1138 (Pa. 1998).

3. As alleged in the Amended Complaint, the terms "building and improvements" have a different meaning than the simple term "leasehold improvements." For instance, "the relevant section of the Lease's valuation provisions for calculating the transaction price was §6.3(B)(ii), valuing 'leasehold improvements,' not §6.3(b)(i), valuing "Building and Improvements." Thus, when taking the allegations as true, there is a sufficient basis to find that the Third Circuit's decision should be vacated because it was not permitted to "unilaterally and incorrectly re-wr[ite] the Lease as if 'leasehold improvements made by Tenant' were the same as 'Building and Improvements.'"

(2) The Third Circuit overlooked or misapprehended important points of law in holding that the arbitration panel correctly rejected both parties' appraisals and determined that the same result would have obtained had it accepted both appraisals.

1. The Amended Complaint alleged that the arbitrators exceeded their powers by disregarding Century III's appraisal. The Third Circuit determined that "Century III's appraisal could not be considered." However, as Century III alleged, this decision was not only unilateral, incorrect, and irrational, but also in contravention of the Lease terms requiring use and averaging of appraised values and of the parties' agreed-upon scope of arbitral issue. Here, as in *Roadway Package*, the arbitrators embarked on a fairness inquiry outside of the scope of the issue before them. Moreover, the Third Circuit chose to "interpret[] unambiguous language in [a] way different from its plain meaning," thereby "amend[ing] or alter[ing] the agreement and act[ing] without authority." *Philip Morris*, 114 A.3d at 62-63 (quoting *Greater Nanticoke*, 760 A.2d at 1219 and *Delaware Cnty.*, 713 A.2d at 1138). The Third Circuit's decision should be vacated because, pursuant to the terms of the contract, it was not within the court's discretion to simply ignore Century III's appraisal.

(3) The Third Circuit overlooked or misapprehended important points of law in holding that the arbitration panel "rationally applied" a specific formula allegedly provided by the Lease for determining book value.

1. The arbitrators exceeded their powers by basing the Award solely on "book value." The Third Circuit determined that "the Award should be based solely on the book value of the 'Buildings and Improvements' submitted by Sears." This decision, however, was not only unilateral, incorrect, and irrational, but also in contravention of the Lease terms requiring use and averaging of appraised values and of the parties' agreed-upon scope of arbitral issue. Thus, the Third Circuit's decision should be vacated because it was not within the court's discretion to fashion its Award solely on the basis of book value.

(4) The Third Circuit overlooked or misapprehended important points of law in holding that GAAP principles did not apply to Sears' determination of depreciated book value and that even if they did, those principles were satisfied.

1. The arbitrators exceeded their powers in their application of GAAP principles to the Award. The Third Circuit determined that "Sears' calculation of book value of the 'Building and Improvements' was in accord with generally accepted accounting principles ("GAAP")." However, as Plaintiff has alleged, this decision was not only unilateral, incorrect, and irrational, but also in contravention of the issue before the Panel since the Panel failed to apply GAAP "governing the manner in which such book value was required to be calculated."

(5) The Third Circuit overlooked or misapprehended important points of law in holding that Century III had "unambiguously" exercised its option to purchase the Buildings and Improvements and that the Lease does

provide Century III with the option to opt-out of that purchase.

1. The arbitrators exceeded their powers by disregarding the unambiguous language in section 6.3(b)(ii) regarding Appellant's right of election. The Third Circuit determined that "the phrase in Section 6.3(b)(ii) of the Lease stating 'provided, however, that if Landlord does not elect to so purchase' did not provide Century III with an election not to purchase." However, as Century III alleged, this decision was not only unilateral, incorrect, and irrational, but also in contravention of the Lease terms "providing that the Landlord may choose not to elect to proceed with the purchase following the §6.3(b)(ii) valuation process."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 14, 2019

APPENDIX

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 17-2284 and 17-2759

CENTURY III MALL PA., LLC.,

Appellant in No. 17-2284

v.

SEARS ROEBUCK & CO.,

Appellant in No. 17-2759

On Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. No. 2-16-cv-01839)
Honorable Lisa P. Lenihan,
United States Magistrate Judge

Submitted under Third Circuit L.A.R. 34.1(a)
May 22, 2018

BEFORE: MCKEE, SHWARTZ, and COWEN,
Circuit Judges

(Filed: December 20, 2019)

OPINION*

COWEN, Circuit Judge.

Plaintiff Century III Mall PA LLC ("Century III") appeals from the order of the United States District Court for the Western District of Pennsylvania granting the motion to dismiss its amended complaint filed by Defendant Sears Roebuck and Co. ("Sears") and confirming the arbitration award in Sears's favor. Sears, in turn, appeals from the District Court's subsequent order granting Century III's motion for an extension of time to file its notice of appeal. We will affirm both orders.

I.

In 1979, Sears (the "Tenant") entered a 40-year lease (the "Lease") with Century III (the "Landlord") pursuant to which Sears constructed and maintained an anchor store at Century III Mall. Sears was subject to an operating covenant requiring the space to be operated as a Sears store for the first fifteen years and as a Sears or another department store for the subsequent five years. The Lease further provided that, if Sears elects to discontinue the operation of a department store, Century III may within sixty days "'elect to terminate this Lease and acquire the Sears Building and Improvements as hereinafter set forth', upon which acquisition the lease automatically terminates." Century III Mall PA LLC v. Sears

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 and does not constitute binding precedent.

Roebuck & Co., Civil Action No. 16-1839, 2017 WL 1927737, at *1 (W.D. Pa. May 10, 2017). "[Section] 6.3(b) then addresses valuation and potential continued other use of the space by Sears, if Sears elects to cease retail operations during (*subparagraph i*) or after expiration of (*subparagraph ii*) of the 20-year operating covenant[.]"[1] Id. at *1. The Lease also specified a method of calculating the depreciated book value of the Tenant's "Building and Improvements" (specifically on a straight line basis in accordance with Sears's customary method of computing the book value of similar types of buildings and improvements).

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[1] Section 6.3(b) specifically stated the following:

(i) if termination of operation shall occur during the period of Tenant's operating covenant, as set forth in Subparagraphs 6.1 (a) and (b), Landlord agrees to pay Tenant, within ninety (90) days after exercising its election to terminate, Tenant's depreciated book value of its Building and Improvements or the appraised fair market value thereof, whichever is greater. Each party shall appoint one (1) appraiser for the purpose of the determining the fair market value and in the event they cannot jointly agree upon the value, the arithmetical average of the values submitted by such appraisers shall be deemed to be the fair market value of Tenant's Building and Improvements. . . .; and

(ii) If Tenant shall discontinue the operations of a retail Department Store after the expiration of Tenant's operating covenant . . . and Landlord exercises its option to terminate this Lease, Landlord shall pay Tenant, within ninety (90) days after exercising its election to terminate, the amount of Tenant's depreciated book value or the appraised fair market value of the leasehold improvements made by Tenant, determined as in (1) above, whichever is greater, provided, however, that if Landlord does not elect so to purchase Tenant's Building and Improvements, Tenant may use Tenants' Building for any lawful purpose.

Century III, 2017 WL 1927737, at *1.

Finally, the Lease included an arbitration provision, stating, inter alia, that "the arbitrators are without power 'to change any terms of this Lease or deprive any party of any right provided for herein or modify or extinguish any obligation of either party imposed hereby.'" Id. at *2 (quoting JA27- JA28.).

In 2014, Sears notified Century III of its election to cease operation of its store. Century III elected to terminate the Lease and acquire the "Building and Improvements." Sears offered an appraisal of $9,200,000 (as well as a book value calculation of $3,937,636). Century III's appraisal was a negative $11,100,000. The parties disputed the respective findings and Sears sought arbitration. A panel of three arbitrators was selected (the "Panel") and hearings were conducted on three separate days. In a 19-page opinion (the "Opinion"), "[t]he Panel found that [Century III] had unambiguously exercised its option; both appraisers valued an incorrect property interest; even if the Panel looked to the average of the appraisers' values, it would not be the purchase price because the depreciated book value was greater; and Sears had properly established that book value." Id. at *2 (citing Dist. Ct. ECF No. 6, Ex. A). The Panel ultimately awarded $3,937,636 to Sears.

Century III brought this Federal Arbitration Act ("FAA") action seeking vacatur under 9 U.S.C. § 10. Sears filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). In an order entered on May 10, 2017, the District Court[2] granted this motion, dismissed the amended complaint with prejudice, and "further ordered that the Arbitration

[2] The parties consented to a United States Magistrate Judge conducting any and all proceedings in this matter.

Award in favor of Sears, Roebuck and Co., is confirmed pursuant to 9 U.S.C. § 9." (JA3.) On June 11, 2017, Century IIII filed its notice of appeal with the District Court. In a June 13, 2017 order, the Third Circuit Clerk informed the parties that the notice of appeal was not filed within the time prescribed by Federal Rule of Civil Procedure 4(a)(1) and that only the District Court may extend the time to file a notice of 5 appeal in limited circumstances provided by Federal Rules of Appellate Procedure 4(a)(5) and 4(a)(6). The parties were directed to file written responses addressing our authority to consider the appeal within fourteen days from the date of the Clerk's order. On June 26, 2017, Century III filed with the District Court a motion for extension of time to file its notice of appeal. On June 27, 2017, Sears filed its response to this Clerk's order, the District Court granted the extension motion, and Century III filed its own response. The District Court subsequently granted Sears's motion for reconsideration and vacated its June 27, 2017 order. After additional briefing by the parties, the District Court again granted Century III's extension motion. In turn, the Clerk referred the issue of jurisdiction to the merits panel.

II.

While the notice of appeal in a civil case generally must be filed within thirty days after entry of the judgment or order, see 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A), the district courts do possess "limited authority to grant an extension of the 30-day time period," Bowles v. Russell, 551 U.S. 205, 208 (2007). A district court may extend the time to file a notice of appeal if the party moves no later than thirty days after this period of time and shows, inter alia, excusable neglect. See 28 U.S.C. § 2107(c); Fed. R.

App. P. 4(a)(5). This concept of excusable neglect calls for a case-specific equitable inquiry by the district court, which we review for an abuse of discretion. See, e.g., Ragguette v. Premier Wines & Spirits, 691 F.3d 315, 322, 324-27 (3d Cir. 2012). We have looked to a number of factors as relevant to this inquiry, e.g., "the danger of prejudice . . . , the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.'" Id. at 324 (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993)); see also Consolidated Freightways Corp. of Del. v. Larson, 827 F.2d 916, 919 (3d Cir. 1987) (identifying similar list of factors). "'This court interprets Rule 4(a)(5) to require a finding of excusable neglect in those instances where the court, after weighing the relevant considerations is satisfied that counsel has exhibited substantial diligence, professional competence and has acted in good faith to conform his or her conduct in accordance with the rule, but as a result of some minor neglect, compliance was not achieved.'" Ragguette, 691 F.3d at 326 (quoting Consolidated, 827 F.2d at 920). In turn, excusable neglect must be demonstrated up to the time the extension motion is filed. See, e.g., id. at 330.

We conclude that, given the specific circumstances, the District Court did not abuse its discretion by granting Century III relief under Rule 4(a)(5). Sears takes particular issue with the proffered reason for the delay as well as whether Century III's counsel really exhibited substantial diligence and professional competence. It also looks to the amount of time it took to file the extension motion. According to Century III, the notice of appeal was filed on Sunday, June 11,

2017, rather than on the Friday, June 9, 2017 deadline, "'[d]ue to a mistake in communication between the company and counsel, and a misunderstanding of instructions internally related to conveyance of the financial information to the broker and how that conveyance was to trigger the filing of a notice of appeal.'" (Sears's Second-Step Brief at 17 (quoting Dist. Ct. ECF No. 17 at 2).) By itself, this terse explanation is rather problematic. See, e.g., Ragguette, 691 F.3d at 328 ("We also are troubled by the fact that Rohn [the moving party's attorney] essentially and rather conveniently sought to shift at least some of the blame from herself to another person (who actually was no longer with the firm by the time of the Rule 4(a)(5) hearing, did not submit any declaration in support of the motion, and did not appear at the hearing itself)."). However, the District Court appropriately found that "counsel did make an error, but it was not the result of professional incompetence, and counsel was not ignorant of the rules of procedure." (JA24.) Unlike his counterpart in Ragguette, 691 F.3d at 322 (notice of appeal filed after extension motion granted on remand), Century III's counsel immediately filed the notice of appeal over the weekend following the Friday deadline. It is also uncontested that the notice of appeal was served upon counsel for Sears. Cf., e.g., Consolidated, 827 F.2d at 919-20 (vacating order denying extension motion because, among other things, appellant timely serviced notice of appeal upon opposing counsel). In Ragguette, the attorney "purportedly did not discover that no notice of appeal had been filed until her preparation for the March 1, 2010 fee hearing—approximately a month after the deadline for filing a notice of appeal and approximately two months after the District Court's summary judgment order." Ragguette, 691 F.3d at 331. She likewise did not

mention the mistake or possibility of an appeal at the fee hearing, id., and did not file the extension motion until "the 59th day of the 60-day period" with "only . . . one more business day" remaining to request relief under Rule 4(a)(5), id. at 332. Counsel in this proceeding, however, filed the extension motion on June 26, 2017, even though the responses addressing our authority to hear this appeal were not due until the next day and he still had until July 10, 2017 to file the motion. It also appears that, on June 15, 2017 and June 16, 2017 (during the same week the notice of appeal was filed), "counsel for Century III communicated with counsel for Sears by way of telephone and email regarding the untimely notice of appeal" and unsuccessfully sought to "reach agreement with Sears' counsel regarding an extension for the notice of appeal."[3] (Century III's Third-Step Brief at 4.)

We accordingly turn to the merits of Century III's appeal.[4] We agree with the District Court that, given the applicable FAA standards, "[Century III's] assertions that the [Panel] Opinion 'departed

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[3] Sears asserts that Century III has continued to miss deadlines imposed by this Court. It provides no authority for why such considerations have any real bearing on the present inquiry.

[4] The District Court had subject matter jurisdiction under 9 U.S.C. §§ 9 and 10 and 28 U.S.C. § 1332. Although Century III asserts that Sears never alleged facts sufficient to show a basis for subject matter jurisdiction, it is clear that such jurisdiction exists given the uncontested diversity allegations set forth in Century III's own pleading. This Court has appellate jurisdiction pursuant to 9 U.S.C. § 16(a) and 28 U.S.C. § 1291. The parties appear to agree that we exercise de novo review over the District Court's ruling on the merits. See, e.g., Mut. Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co., 868 F.2d 52, 56 (3d Cir. 1989).

dramatically from the unambiguous terms of the Lease', 'exceeded the Arbitrator's authority', and was an 'irrational error requiring vacatur', [JA35], do not pass muster." Century III, 2017 WL 1927737, at *6.

Century III acknowledges, that while "'courts are neither entitled nor encouraged simply to "rubber stamp" the interpretations and decisions of arbitrators,'" they still "apply a highly deferential standard of review in these instances." (Century III's FirstStep Brief at 17-18 (quoting Metromedia Energy, Inc. v. Enserch Energy Servs, Inc., 409 F.3d 574, 579 (3d Cir. 2005)).) It was the Panel's task to interpret and enforce the parties' contract. See, e.g., Sutter v. Oxford Health Plans LLC, 675 F.3d 215, 220 (3d Cir. 2012), aff'd, 133 S. Ct. 2064 (2013). "When [the arbitrator] makes a good faith attempt to do so, even serious errors of law or fact will not subject his award to vacatur." Id. (citing Brentwood Med. Assocs. v. United Mine Workers of Am., 396 F.3d 237, 243 (3d Cir. 2005)). Century III argues that the Panel rewrote the unambiguous terms of the Lease "'as if "leasehold improvements made by Tenant" were the same as "Building and Improvements."'" (Century III's First-Step Brief at 19.) However, the Panel adopted a reasonable interpretation of the terms "leasehold improvements" (a term that was not defined in the Lease) and "Buildings and Improvements." With respect to the Panel's rejection of the appraisals offered by Century III as well as Sears, "it took care to note that the same result would have obtained had it accepted both appraisals." Century III, 2017 WL 1927737, at *4 (citing Dist. Ct. ECF No. 6 Ex. A at 9 n.3; Dist. Ct. ECF No. 6 at 13-14). In addition, the Lease provided a specific formula for determining the book value, which the Panel rationally applied. Given Sears's appraisal of $9.2 million and Century III's

appraisal of a *negative* $11.1 million, the book value was higher than the arithmetical average of the appraisers' figures. Likewise, the Panel, even though it believed that "GAAP" principles did not apply, went on to determine that these principles were actually satisfied. See, e.g., Mutual Fire, 868 F.2d at 56 (noting that court does not sit as arbitration panel reexamining evidence under guise of determining whether panel exceeded authority). Finally, the Panel reasonably determined that Century III's letter unambiguously stated that it was exercising its option pursuant to Section 6.3(a) and that the language of 6.3(b) "could not 'be fairly interpreted to provide the Landlord a second option.'"[5] Century III, 2017 WL 1927737, at *4 (quoting Dist. Ct. ECF No. 6, Ex. A at 5).

III.

For the foregoing reasons, we will affirm the orders of the District Court.

[5] Century III also argues that the District Court erred by entering an order enforcing the arbitration award despite the absence of a formal application to enforce. However, Sears expressly asked the District Court to confirm in its motion to dismiss.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 16-1839

CENTURY III MALL PA LLC, Plaintiff

v.

SEARS ROEBUCK AND CO., Defendant.

LISA PUPO LENIHAN,
United States Magistrate Judge

(Filed: May 10, 2017)

MEMORANDUM OPINION
ON DEFENDANT'S MOTION TO DISMISS

LENIHAN, Magistrate Judge.

I. Summation

The Motion to Dismiss filed by Defendant Sears Roebuck and Co. ("Sears"), ECF No. 5, will be granted, as the arbitration decision at issue reflects a thorough, specifically-supported and clearly-worded judgment on the commercial contract matters at issue.

II. Factual and Procedural History

Plaintiff, Century III Mall PA LLC ("Century III"), as landlord, and Sears, as tenant, entered into a May 29, 1979 lease with a forty (40) year term (*i.e.*, from October, 1980 through October, 2020), pursuant to which Sears constructed and maintained an over 230,000 square foot "anchor" store as part of the Century III Mall (the "Lease Agreement"). Pursuant to Section 6.1 of the Lease Agreement, Sears was subject to an "operating covenant" requiring that the space be operated as a Sears (for the first fifteen (15) years) or other (for an additional five (5) years) department store. See Amended Complaint, ECF No. 3 at 3-4.

Section 6.3 of the Lease Agreement, headed "Landlord's Option to Terminate", sets forth the termination provisions as follows:

> 6.3(a) provides that if (as it did) Sears elects "to discontinue the operation" of a department store, Century III may (as it did), within sixty (60) days "elect to terminate this Lease and acquire the Sears Building and Improvements as hereinafter set forth", upon which acquisition the lease automatically terminates. If Century III "elects not to so terminate, Landlord and Tenant" continue to be bound by the lease.

6.3(b) then addresses valuation and potential continued other use of the space by Sears, if Sears elects to cease retail operations during (*subparagraph i*) or after expiration of (*subparagraph ii*) the 20-year operating covenant:

> (i) if termination of operation shall occur during the period of Tenant's operating covenant, as

> set forth in Subparagraphs 6.1 (a) and (b), Landlord agrees to pay Tenant, within ninety (90) days after exercising its election to terminate, Tenant's depreciated book value of its Building and Improvements or the appraised fair market value thereof, whichever is greater. Each party shall appoint one (1) appraiser for the purpose of determining the fair market value and in the event they cannot jointly agree upon the value, the arithmetical average of the values submitted by such appraisers shall be deemed to be the fair market value of Tenant's Building and Improvements. . . .; and
>
> (ii) if Tenant shall discontinue the operations of a retail Department Store after the expiration of Tenant's operating covenant . . . and Landlord exercises its option to terminate this Lease, Landlord shall pay Tenant, within ninety (90) days after exercising its election to terminate, the amount of Tenant's depreciated book value or the appraised fair market value of the leasehold improvements made by Tenant, determined as in (1) above, whichever is greater, provided, however, that if Landlord does not elect so to purchase Tenant's Building and Improvements, Tenant may use Tenants' Building for any lawful purpose.

6.3(c) provides that "the depreciated book value of Tenant's Building and Improvements shall be computed on a straight line basis in accordance with Tenant's customary method of computing book value of similar types buildings and improvements" and 6.3(d) provides for the real estate closing to occur within ninety (90) days of Landlord's notice exercising

its option to terminate the lease. See ECF No. 6, Ex. A at 2-3.

Sears elected to cease operation of its retail store by notice to Century III on September 8, 2014. And by reply of November 17, 2014 Century III "elect[ed] to terminate the Lease and acquire the Building and Improvements" in accordance "with Section 6.3(a)" of the Lease Agreement. See ECF No. 6, Ex. A at 1. Sears ceased operations on December 7, 2014 and, as of June 27, 2016, had continued to pay rent and other expenses to Century III. See id. at 1.

The parties exchanged appraisals, with Sears appraisal at $9,200,000 and Century III's at *negative* $11,100,000. The parties, of course, disputed each other's findings and, in accordance with Section 34 of the Lease Agreement (requiring adjudication by a three-member arbitration panel), Sears then sought arbitration through the American Arbitration Association. A tribunal of three (3) highly-credentialed arbitrators was elected (the "Panel"),[1] and hearings were held on June 27, June 28, and August 30, 2016. The evidence included the parties' appraisals[2] and Sears' spreadsheet calculation of

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[1] See ECF No. 6 at 3-4 (detailing individual arbitrators' qualifications and experience).

[2] The Court observes Plaintiff's own appraiser's testimony that he was "not appraising a 231,000 square foot building," and instead was "interpreting the lease into the modern world of valuation" by valuing the Leasehold Estate instead of the Building and Improvements. That is, Plaintiff's appraiser was stating an understanding that the applicable Lease Agreement provision was a valuation of "Building and Improvements" which he was re-interpreting by (in his opinion more appropriately) valuing the "Leasehold Estate". See ECF No. 6, Ex. A at 7; ECF No. 6 at 4.

depreciated book value of $3,937,636, with testimony that it was "calculated on a straight-line basis and in accordance with Sears' customary procedure for similar types of building and improvements" in accordance with the Lease Agreement. See ECF No. 6, Ex. A at 10-11. The Panel issued its 19-page Opinion on November 10, 2016 (the "Opinion"). See ECF No. 6, Ex. A. The Panel found that Plaintiff had unambiguously exercised its option; both appraisers valued an incorrect property interest; even if the Panel looked to the average of the appraisers' values, it would not be the purchase price because the depreciated book value was greater; and Sears had properly established that book value. ECF No. 6, Ex. A. It awarded Sears $3,937,636 to be paid by Century III on sale/closure to occur within thirty (30) days of the Opinion. Id. at 19.

Century III brought this action on December 9, 2016, ECF No. 1, and filed an Amended Complaint on December 16, 2016 (ECF No. 3). Plaintiff seeks vacatur and a stay of enforcement of the Opinion and maintains that the Panel exceeded its authority by rewriting rather than interpreting the terms of the Lease Agreement. See Amended Complaint, ECF No. 3. Plaintiff cites to the Lease Agreement provision that the arbitrators are without power "to change any terms of this Lease or deprive any party of any right provided for herein or modify or extinguish any obligation of either party imposed hereby" and asserts that the Award "cannot be rationally derived from the Lease because it changed the terms of the Lease and deprived Century III of its express rights". See ECF No. 3 at 1-2. Currently pending is Sears' Motion to Dismiss, ECF No. 5.

III. Applicable Standards

A. General Standard of Review Applicable to Decision

It is well established that a court's review of an arbitration award governed by the Federal Arbitration Act ("FAA") is extremely limited and highly deferential. See generally ECF No. 6 at 6 (citing Third Circuit cases noting "exceedingly narrow" circumstances under which an arbitration award may be set aside). The FAA provides four (4) grounds for vacatur: (a) procured by corruption, fraud, undue means; (b) evidence of partiality or corruption of an arbitrator; (c) misconduct of an arbitrator in refusing postponement on sufficient cause or refusing to hear pertinent and material evidence, or other misconducting resulting in prejudice; or (d) "where the arbitrators exceeded their power, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." See 9 U.S.C. Section 10(a). Plaintiff seeks vacatur under the last provision. As it acknowledges, the Court "must determine if the form of the arbitrator's award can be rationally derived from the agreement at issue." ECF No. 3 at 8 (citing Ario v. Underwriting Memb. of Syndicate 53 at Lloyds for 1998 Year of Account, 618 F.3d 277, 288 (3d Cir. 2010)). Judicial review assesses whether the award made under the evidence presented to the arbitrator's may have been rationally derived from an interpretation of the contract. See ECF No. 6 at 7 (citing Sutter v. Oxford Health Plans LLC, 675 F.3d 215 (3d Cir. 2012), aff'd Oxford Health Plans v. Sutter, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013)); id. at 8; Mutual Fire, Marine, & Inland Ins. Co. v. Norad Reins, Co., Ltd., 868 F.2d 52, 56 (3d Cir. 1989).

The standards of review applicable to the arbitration decision inform this Court's application of the general 12(b)(6) standards to the case and pending motion.

B. General Motion to Dismiss Standards

In deciding a motion to dismiss under Rule 12(b)(6), the Courts apply the following standard, as recently reiterated by the Court of Appeals:

> A complaint may be dismissed under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted". . . . "To survive a motion to dismiss, a complaint must contain sufficient *factual matter, accepted as true*, to state a claim to relief that is plausible on its face." Iqbal, 556 U.S. at 678, 129 S. Ct. 1937 (citation and internal quotation marks omitted) (emphasis added). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.; see also Sheridan v. NGK Metals Corp., 609 F.3d 239, 262 n.27 (3d Cir. 2010). Although the plausibility standard "does not impose a probability requirement," Twombly, 550 U.S. at 556, 127 S. Ct. 1955, it does require a pleading to show "more than a sheer possibility that a defendant has acted unlawfully," Iqbal, 556 U.S. at 678, 129 S. Ct. 1937. A complaint that pleads facts "merely consistent with a defendant's liability . . . stops short of the line between possibility and plausibility of entitlement to relief." Id. (citation and internal quotation marks omitted). The plausibility

> determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679, 129 S. Ct. 1937.

Connelly v. Lane Constr. Corp., 809 F.3d 780, 786-87 (3d Cir. 2016).

Building upon the landmark Supreme Court decisions in Twombly and Iqbal, the Court of Appeals in Connelly reiterated the three-step process District Courts must undertake to determine the sufficiency of a complaint:

> First, it must "tak[e] note of the elements [the] plaintiff must plead to state a claim." Iqbal, 556 U.S. at 675, 129 S. Ct. 1937. Second, it should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Id. at 679, 129 S. Ct. 1937. See also Burtch v. Milberg Factors, Inc., 662 F.3d 212, 224 (3d Cir.2011) ("Mere restatements of the elements of a claim are not entitled to the assumption of truth." (citation and editorial marks omitted)). Finally, "[w]hen there are *well-pleaded factual allegations, [the] court should assume their veracity* and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679, 129 S. Ct. 1937 (emphasis added).

Id. at 787. At the motion to dismiss stage, "for purposes of pleading sufficiency, a complaint need not establish a *prima facie* case in order to survive a motion to dismiss[,]" but need allege "'enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element[s].'" Connelly, 809 F.3d at 788-89 (quoting Phillips v. Cnty. of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008) (quoting

Twombly, 550 U.S. at 556)) (footnote omitted). As Defendant observes in its Reply Brief in Support of its Motion, ECF No. 11, the Court accepts factual allegations as true.

IV. Analysis

Plaintiff complains that the Opinion issued an award based on book value "without proper application of GAAP governing the manner in which such book value was to be calculated." See ECF No. 3 at 10. As Defendant notes, the Opinion dedicates numerous pages to the issue of GAAP compliance, with extensive citation to the evidence. As noted *supra*, and in the Opinion, the Lease Agreement specifically provides, in subparagraph 6.3(c), only that "the depreciated book value of Tenant's Building and Improvements" be "computed on a straight line basis in accordance with Tenant's customary method . . . ." But, after expressly stating its belief that "Sears has complied with the Lease", the Panel "nonetheless" went on to dot each "i" and cross each "t". It still considered Plaintiff's assertions regarding GAAP compliance and found them, with explanation both thorough and reasonable, meritless. See ECF No. 6, Ex. A at 9-15 (discussing use of book value and calculation).

Plaintiff complains that the Opinion "disregarded Century III's appraisal entirely, without regard to the express Lease provisions requiring use and averaging of appraised values." ECF No. 3 at 10. As noted, *supra*, the Panel determined that neither appraisal was valid/in conformance with the Lease Agreement. See ECF No. 6, Ex. A at 6-9 (Opinion's discussion of grounds for finding invalidity of each appraisal). In issuing an award based on depreciated book value it took care to note that the same result would have

obtained had it accepted both appraisals. See discussion, *supra;* ECF No. 6, Ex. A at 9, n.3 (stating that "the Award in this case would not change"). See also ECF No. 6 at 13-14 (discussing arbitrator's authority, under applicable standard of review, as to weight of evidence, credibility, determinations of fact and law).

Plaintiff also complains that the Opinion "disregarded the entire last clause in Section 6.3(b)(ii) providing that the Landlord may choose not to elect to proceed with the purchase following the 6.3(b)(ii) valuation process." ECF No. 3 at 10. On its face, under any reasonable interpretation, the Lease Agreement provides no such thing. It contains no language suggesting a subsequent "opt-out" from Landlord's written exercise of its option to terminate the lease if it is unhappy with the purchase price valuations. The Panel not surprisingly and eminently reasonably concluded that Century III's letter of November 17, 2014 unambiguously stated that it was exercising its option pursuant to Section 6.3(a)[3] and that the language of 6.3(b) could not "be fairly interpreted to provide the Landlord a second option". See ECF No. 6, Ex. A at 5.

Plaintiff's final objection is to the Opinion's interpretation of provisions of the Lease Agreement referring to "Building and Improvements" and "leasehold improvements" in determining the landlord's elective purchase price on the tenant's cessation of operations. Century III asserts that Section 6.3(b) of the Lease Agreement "sets forth . . . two different transaction prices" depending on

[3] In arbitration, Plaintiff contented that it had expressed an "intent to investigate, then perform its due diligence and decide whether or not to proceed to closing." See ECF No. 6, Ex. A at 5.

whether operations are terminated during or after expiration of the operating covenant. Amended Complaint, ECF No. 3 at 4. It asserts that Section 6.3(b)(i) provides Sears a "more beneficial valuation" including "Building and Improvements" during the first 20 years, but includes only "leasehold improvements", which it interprets as "leasehold interest", *e.g.*, "carpeting, lighting, cabinets", during the second 20 years "because the value of the leasehold interest to Tenant has declined". Id. at 4-5. The Court notes that Plaintiff offers no rationalization for a dramatic reduction in its purchase price one day after, as opposed to one day prior to, the expiration of the operating covenant.[4] More to the point, Plaintiff offers no reasonable basis for its assertion that the arbitrators exceeded their authority.

As set forth above, Section 6.3(b)(i) directs that Century III pay[5] "Tenant's *depreciated book value of its Building and Improvements* or the appraised fair market value *thereof*, whichever is greater" and that each party appoint an appraiser to determine fair market value, with the arithmetical average "deemed to be the fair market value of Tenant's Building and Improvements. . . ." while 6.3(b)(ii) directs that Century III pay "Tenant's *depreciated book value* or the appraised fair market value of the leasehold improvements made by Tenant, *determined as in (1)*

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[4] See ECF No. 6, Ex A at 7 (Opinion's similar observation that "Century III offers no plausible explanation as to why the purchase price would be different based upon the expiration of the operating covenant.")

[5] The Court notes that, in addressing the amount Landlord is to pay, the contract reflects no contemplation that the tenant's interest would ever be worthless or, as the landlord now asserts, negative $11M. See ECF No. 6, Ex. A at 8 (making similar observations).

above, whichever is greater . . . ." See *supra* (emphasis added).[6] The Court notes that once the subject of valuation is identified in clause (b)(i) it is referred back to rather than re-specified. Similarly, clause (b)(ii) does not follow "depreciated book value" with a subject of valuation. It may be reasonably read to be the same "depreciated book value" as in clause (i), and the provision on its face may be read to provide that *each* alternative ("depreciated book value *or* the appraised fair market value . . .") is "determined as in (1) above", *i.e.*, that "depreciated book value" is determined with reference to "Buildings and Improvements". See ECF No. 6, Ex. A at 7 (noting that "the valuation to be performed under" both subsections was the same, as indicated by the phrase "determined as in [i] above").

Both of these observations regarding reasonable interpretation of the Lease Agreement provisions are, as noted above, set forth in the Opinion, as is the further observation that the contract provides no definition of "leasehold improvements" — which the arbitrators reasonably understood to be synonymous with "Building and Improvements".[7] See ECF No. 6,

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[6] This generally less-than-ideally-drafted post-operating clause subsection concludes by reminding the parties that once the operating covenant is expired, "if Landlord does not elect so to purchase Tenant's Building and Improvements, Tenant may use Tenants' Building for any lawful purpose." Cf. Section 6.1(a) (concluding by noting that "[i]f Landlord elects not to so terminate, Landlord and Tenant shall continue to be bound by all the terms and conditions of this Lease").

[7] As Plaintiff observes, Lease Agreement Section 6.1(c) provides the method for computing depreciated book value of "Building and Improvements" but makes no mention of any method for computation of depreciated book value of "leasehold improvement". This is consistent with the arbitrators' conclusion that the latter was a descriptor of the former. See ECF No. 3

Ex. A at 6 ("The Lease does not seek a valuation of any particular property interest. It easily could have, but it did not."); id. at 7 ("The term 'Tenant's Leasehold Estate' is a defined term in the Lease, and if it was intended that that interest was to be valued it could have been so stated."). Cf. ECF No. 3 at 10 (object that arbitrators "incorrectly re-wrote the Lease").

For these reasons, Plaintiff's assertions that the Opinion "departed dramatically from the unambiguous terms of the Lease", "exceeded the Arbitrator's authority", and was an "irrational error requiring vacatur", ECF No. 3 at 9, do not pass muster. The Court also refers Plaintiff back to the applicable standard. Cf. Defendant's Reply Brief in Support of Motion to Dismiss, ECF No. 11 (discussing distinction in standard of review of decision under the FAA).

V. Conclusion

For the reasons set forth above, Plaintiff has failed to set forth a claim as a matter of law, and an Order consistent with this Memorandum Opinion, granting Defendant's Motion to Dismiss the Amended Complaint, ECF No. 5, will be entered.

Dated: May 10, 2017

BY THE COURT:

/s/ Lisa Pupo Lenihan

LISA PUPO LENIHAN

United States Magistrate Judge

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at 5. See also ECF No. 6 at 12 (discussing Opinion and absence of contractual definition of "leasehold improvements").

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the matter of Arbitration Between:

Re: 01-15-0002-8820

SEARS, ROEBUCK AND CO. "Claimant"

v.

CENTURY III MALL PA LLC "Respondent"

OPINION

INTRODUCTION

On May 29, 1979, Century III Associates (now Century III Mall PA LLC and hereinafter "Century III" or "Landlord") and Sears, Roebuck & Company (hereinafter "Sears" or "Tenant") entered into the Lease, Shopping Center, Construction, Operating and Easement Agreement, and Grant of Certain Rights Over Premises Other Than Those Leased (hereinafter the "Lease"). The subject of this Arbitration is a building, formerly occupied by Sears, situated on land owned by Century III, attached to the Century III Mall ("Mall") and located in West Mifflin, Pennsylvania. Until the events giving rise to this arbitration, Sears operated a retail store in the building, a building Sears had constructed, improved and maintained over the years, pursuant to the Lease.

By letter dated September 18, 2014, Sears advised Century III that under Section 6.3(a) of the Lease, it elected to "discontinue operations of the Sears store." On November 17, 2014, Century III sent a letter to Scars stating: "Pursuant to Section 6.3(a) of the Lease, Landlord elects to terminate the Lease and acquire the Sears Building and Improvements." It is undisputed that the Sears facility continued operations until December 7, 2014, and it is further undisputed that the notice provided by Sears was given after the expiration of its operating covenant under the Lease. Finally, it is undisputed that through the date of this opinion, Sears continues to pay rents and other expenses to Century III, an amount totaling $745,333.24 as of June 27, 2016.

THE PARTIES' CONFLICTING CLAIMS UNDER SECTION 6.3 OF THE LEASE

Section 6.3 of the Lease entitled Landlord's Option to Terminate governs Century III's acquisition of the Sears' Building and Improvements. Because of its importance to this proceeding, this provision is set forth in its entirety:

> 6.3. Landlord's Option to Terminate.
>
> (a) The parties covenant and agree that in the event Tenant shall intend to discontinue the operation of a Department Store in substantially all of the Floor Area of Tenant's Main Building at any time during the term hereof (except for temporary cessations of business for remodeling or restoration, or rebuilding or repairing in respect of a casualty, Unavoidable Delays as set forth in Paragraph 35, Condemnation and any other reasons set forth in this Lease), Tenant shall give Landlord six (6) months written notice of

its election to discontinue the operation of a Department Store and, if known, of the proposed change of use, and in the event such proposed use or non-use is not in landlord's sole judgment in keeping and compatible with Landlord's use and operation of a Shopping Center on the Shopping Center Site, Landlord may, within sixty (60) days of receipt of such notice given to Tenant, elect to terminate this Lease and acquire the Sears Building and Improvements as hereinafter set forth and upon the acquisition of the Sears Building and Improvements, this Lease shall automatically terminate and expire and the parties shall have no further liability to the other. Notwithstanding the foregoing, Landlord shall have no such election or right to terminate this Lease and acquire such Improvements if prior to the date when Sears shall have given Landlord the notice as above set forth, Landlord shall then be in default of its covenant to operate a Shopping Center set forth in Subparagraph 1.3 (f) of this Lease, or if there is then no longer being operated on the Shopping Center Site a Shopping Center. If Landlord elects not to so terminate, Landlord and Tenant shall continue to be bound by all the terms and conditions of this Lease.

(b) In the event that Landlord elects to terminate, then Landlord's sole obligation to Tenant shall be determined as follows:

(i) if termination of operation shall occur during the period of Tenant's operating covenant, as set forth in Subparagraphs 6.1 (a) and (b), Landlord agrees to pay Tenant, within ninety (90) days after exercising its

election to terminate, Tenant's depreciated book value of its Building and Improvements or the appraised fair market value thereof, whichever is greater. Each party shall appoint one (1) appraiser for the purpose of determining the fair market value and in the event they cannot jointly agree upon the value, the arithmetical average of the values submitted by such appraisers shall be deemed to be the fair market value of Tenant's Building and Improvements. In making such appraisals, the appraisers shall take into account Tenant's contribution to On and Off-Site Work as provided for in the Supplemental Agreement between Landlord and Tenant of even date herewith; and

(ii) if Tenant shall discontinue the operations of a retail Department Store after the expiration of Tenant's operating covenant as provided for in Subparagraphs 6.1 (a) and (b) and Landlord exercises its option to terminate this Lease, Landlord shall pay Tenant, within ninety (90) days after exercising its election to terminate, the amount of Tenant's depreciated book value or the appraised fair market value of the leasehold improvements made by Tenant, determined as in (1) above, whichever is greater, provided, however, that if Landlord does not elect so to purchase Tenant's Building and Improvements, Tenant may use Tenants' Building for any lawful purpose.

(c) The depreciated book value of Tenant's Building and Improvements shall be computed

> on a straight line basis in accordance with Tenant's customary method of computing book value of similar types buildings and improvements.
>
> (d) In the event Landlord shall exercise its option as aforesaid, the provisions of paragraphs 11.5, 11.6 and 11.7 shall govern the real estate closing between the parties, except that paragraph 11.5 shall be deemed modified for the purpose hereof so that the closing shall take place on the ninetieth (90th) day, provided that be a business day, and if not, the first business day following the ninetieth (90th) day after Landlord shall have given Tenant Landlord's notice exercising Landlord's option as aforesaid.

Following the letters referenced above, the parties undertook to obtain fair market value appraisals as called for in the pricing formula set forth in Section 6.3. While more detail will be provided in the discussion to follow, Sears's appraisal was in the amount of $9,200,000, and Century III's appraisal was in the amount of negative $11,100,000. Although Section 6.3 of the Lease states that "Landlord shall pay Tenant" the greater of the arithmetical average of the appraisal values submitted or Sears's depreciated book value, by email dated February 12, 2015, Sears stated that it "won't be providing" the "depreciated book value" and was "relying solely" on the appraisal.

Within days of the exchange of appraisals, both parties contended that the appraisals submitted by the other party did not comply with the Lease requirements. Sears then commenced this arbitration. The relief sought by Sears, as stated in its Reply Brief, is as follows:

> ". . . this Panel should find that Century III is in breach of the Lease and that Sears is entitled to the average of the appraised values or its depreciated book value, whichever is greater, for its Buildings and Improvements along with restitution of $745,333.24, plus interest, paid to Century III after it failed to close within 90 days of November 17, 2014.

Century III also seeks an order directing the transfer of "the leasehold interest in the Sears Building and Improvements'" to it, and payment of:

> ". . . $5,500,000 or $3,277,704 plus interest at the statutory rate since the date that Sears should have closed the transaction under the Lease, less any portion thereof that Sears has paid since store closing, plus Landlord's attorney fees and costs, plus Landlord's arbitration costs."

THE ARBITRATION[1]

Hearings in this matter were held on June 27, 2016, June 28, 2016 and August 30, 2016. Transcripts of the hearings were produced. Sears was represented by William P. Bresnahan, II, Adam Ventura and Paul Roman of Dickie McCamey. Century III was represented by Sharon DiPaolo and Kieran Jennings of Siegel Jennings.

Each party submitted post-hearing briefs and reply briefs in support of their positions. The record was closed on October 17, 2016.

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[1] Pursuant to party agreement and correspondence dated April 23, 2015, the arbitration proceeded as to Century III after Moonbeam Leasing, who was named in the Demand for Arbitration, was removed.

This Opinion and Award is entered after review of the transcripts, admitted exhibits, and briefs, and following deliberations by the panel of arbitrators.

CENTURY III EXERCISED ITS OPTION TO ACQUIRE

While the Panel believes that its principal obligation in this proceeding is to determine the transfer price as directed by the Lease, Century III raises the following threshold argument:

> "Section 6.3 of the Lease Provides Landlord the Option, but not the Obligation, to Terminate the Lease and Take Back the Leasehold Interest in the Building and Improvements after the Formula has been Applied and the Price of the Transaction is Determined." (Century III Brief, p. 34).

On pages 34 through 38 of its closing brief, Century III contends that its letter of November 17, 2014, was not, despite its terms, an election to terminate, but was instead mere "notice of its intent to investigate, then perform its due diligence and decide whether or not to proceed to closing." Century III argues that no other interpretation is supported by the terms of the Lease and that any determination otherwise does not comport with common sense or equity because Century III would not know the price term until the pricing formula in the Lease is applied.

For the following reasons, the Panel cannot agree with this argument. It is inconsistent with both the parties' course of performance and the express terms of the Lease. Initially, Century III's letter of November 17, 2014 says nothing of the sort. It is clear and direct in slating that: "Pursuant to Section 6.3 (a) of the Lease, Landlord hereby elects to terminate the

Lease and acquire the Building and Improvements." (Emphasis added.) There is no evidence of record that at any time contemporaneous with the events at issue, Century III had indicated it was conducting due diligence to see what it wanted to do. Its acceptance was unambiguous.

Further, the lease phrase "provided, however, that if Landlord does not elect to so purchase" cannot be fairly interpreted to provide the Landlord a second option that Century III now argues. The Lease already grants a full sixty day period from the date of the notice for Landlord to "elect to terminate [the] Lease and acquire the Sears Building and Improvements," and the allotted time was used in its entirety. The "provided, however" language, plainly read, applies to the circumstance where Century III chooses not to elect to acquire within the Lease's sixty day window. Such interpretation does not render the language mere surplusage as Century III contends.

The Panel also finds that although price is an essential element to an enforceable contract in Pennsylvania, the formula provided in the Lease is sufficiently definite for an enforceable contract to exist. In support of this, we accept the argument and authorities provided by Sears on pages 6-7 of its Reply Brief in this regard. See Portnoy v. Brown, 243 A.2d 444 (Pa. 1968); Stuart v. McChesney, 424 A.2d 1375 (Pa. Super. 1981), *aff'd* 444 A.2d 659 (Pa. 1982).

APPLICATION OF SECTION 6.3

Section 6.3 of the Lease is the governing section in this case. Scott Nierman, Senior Real Estate Strategist at Sears, testified as to the general purpose of such provisions:

A. Well, the purpose of the provisions is really to protect the landlord and the mall owner from avoiding a situation where they have a dark anchor box.

If you took a mall as being a communal marketplace, you need to attract customers. And there are of course anchor stores, but they are really the draw for the customer. And then they are the small shop owners and tenants that the mall operator generally will make his money off of.

The last - - a mall owner wants to avoid having a dark box, if at all possible. And they want to control their destiny. So a clause like this is necessary and favorable to the landlord because then they can recapture it and keep the vision of the mall going. And they can control their own destiny.

In other words, they can backfill it with whatever they want to.

Q. It also benefits the tenant. Right?

A. Well, in the sense that the anchor store doesn't – will not get shorted, if you will. I mean, most of these clauses do have, as in this one, a formula by which you have to abide by. And it's - - in this instance it's the greater of the book value or the appraised value. That protects both parties. The anchor store doesn't want to give it away on a fire sale or be leveraged or whatever.

At the same time, the mall owner will have control of his destiny by being able to backfill the box. (Transcript, pp. 18-19).

The Panel agrees that the purpose of Section 6.3 is as stated above. With this in mind, the analysis in this case begins by considering the respective fair market value appraisals of the parties. Both parties contend that the appraisal of the other party valued an incorrect property interest. We agree with both patties in this regard.

Section 6.3(b)(ii) – which is applicable here because the operating covenant has expired – seeks the value of the "leasehold improvements made by Tenant." The Panel reads this phrase to have the same intended meaning as "Building and Improvements" in Section 6.3(b)(i), since the former section is directly referred to in the latter section. The Lease does not seek a valuation of any particular property interest. It easily could have, but it did not. It instead seeks a determination of the value of the Building and Improvements without regard to appraisal principles, procedures and methodologies utilized for valuation of properly interests. Both appraisals err in this same regard.

CENTURY III APPRAISAL

The appraisal of Century III sets forth a valuation of negative $11.1 million for Sears "leasehold interest." However there is nothing within the Lease itself which directs that that is the property interest to be valued. Indeed, Century III's appraiser so testified. As set forth in Scars' opening brief:

> Conversely, Century III's appraiser valued the Leasehold Estate and not the Buildings and Improvements. Specifically, Century III's expert, Mr. Barna testified that "I am not appraising a 231,000 square foot building. I am appraising the right to occupy 3.1 acres." (Hr'g Tran., at 344; 20-24). Instead, Mr. Barna

> testified that he was "interpreting the lease into the modern world of valuation" by valuing the Leasehold Estate instead or the Building and Improvements as required by the Lease. (Hr'g Tran., at 342; 12-13). Mr. Barna further explained his decision testifying that "whoever wrote this lease may have been a schmuck, I don't know. But did not understand valuation theory." (Hr'g Tran., at 342; 2-4). (Sears Brief, p. 22)

We believe that the language of the Lease, not the dictates of appraisal methodology, must control in this dispute. Accordingly, the Century III appraisal cannot be considered.[2]

Century III's efforts to somehow justify valuation of a leasehold interest from the language of the Lease fails. Century III correctly notes that Section 6.3(b)(i), applicable if operations cease during the period of Sears's operating covenant, calls for valuation of the "Building and Improvements," while Section 6.3(b)(ii), applicable here because the operating covenant has expired, directs valuation of the "leasehold improvements made by Tenant."

We do not read "leasehold improvements'" to mean the real property interest known as a "leasehold interest." The term "Tenant's Leasehold Estate" is a defined term in the Lease, and if it was intended that that interest was to be valued it could have been so stated. (See Section 40.26) Moreover, the Lease equates the valuation to be performed under Section 6(b)(ii) with that in Section 6.3(b)(i) by

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[2] We note that Section 34 of the Lease states that the "arbitrators shall have no power to change any terms of this Lease." We are guided by that direction throughout this Opinion.

including the phrase "determined as in (i) above." Century III offers no plausible explanation as to why the purchase price would be different based upon the expiration of the operating covenant. We believe the language in Section 6.3(b)(ii) is just another way of stating the language in Section 6.3(b)(i). We note also that in its letter of November 17, 2014, Century III itself uses the phrase "Building and Improvements" and not "leasehold improvements" to describe what it would acquire.

We are likewise not persuaded by Century III's efforts in its Reply Brief to construe provisions in Section 11 of the Lease to somehow dictate that Century III is purchasing a leasehold interest. While certain provisions of Section 11 are incorporated into Section 6.3 for purposes of closing procedure, Section 6.3 states what is to be acquired and valued – Sears' "Building and Improvements" or "leasehold improvements." We do not and cannot find that Section 11 says something different than Section 6.3 regarding what is to be valued and acquired. As noted by Century III, Section 11 principally addresses Sears' remedies if Century III had not fulfilled its obligations regarding the initial construction of the Mall. Section 6.3 governs the matter at issue.

SEARS APPRAISAL

Similarly, we find that the appraisal proffered by Sears misses the mark. Although Sears' appraisal states that it is valuing the physical assets in accord with the language or the Lease, it in actuality is an appraisal of the fee simple interest with a deduction of the value of the land.

In this regard, Century III correctly states in its brief:

> First, Sears' appraisal does not conform to the requirements of the Sears Lease. Sears' appraisal, while nominally labeled as a leasehold appraisal, is functionally a fee simple appraisal. Sears' appraiser admits he did a fee simple appraisal. (Landlord Exhibit 19, McHale Tr. 111, 126). The first version of Sears' appraisal actually was labeled fee simple. The only change between Version 1 and Version 2 of Sears' appraisal was the change of this label. (McHale, Tr. 78). Sears' appraisal characterizes the change as a typo and says that valuation methodology was the same. (Century III Brief, p. 44).

Again, we think the use of a property interest appraisal methodology renders a result not in accordance with terms of the Lease or the intent of the parties.

Just as importantly, we find that the Sears appraisal is fundamentally flawed in a number of material respects. These arc artfully catalogued on pages 45 through 48 of Century III's Brief and need not be discussed at length here. While we do not accept those "flaws" attributable to failure to value the leasehold interest as Century III advocates, the errors relating to the selection of rent comparables and sales comparables demonstrate unacceptable inconsistencies with the appraiser's approach of determining the fee simple value and deducting the land value to determine the value of the physical improvements. By way of example only, the appraiser's rent comparables included rent for building and land (p. 46, 4(a)); some of the comparables were second generation space even though stated to be otherwise (p. 46, 4(b)); and no comparable is even half the size of the subject (p.46,

4(a).) Similarly, fee simple sales were labelled on some occasions as leased fee sales (p. 46, l); and all comparables included land and building contrary to the espoused appraisal theory. We do note that Sears offered no rebuttal to those points in its Reply. We believe they are correct.[3]

BOOK VALUE DETERMINATION

Having found that neither party's appraisal was prepared in accordance with the Lease, we turn next to determination of the book value of the leasehold improvements to establish the acquisition price. Again, Century III raises threshold issues relating to this alternative aspect of the pricing formula.

First, Century III contends that in an e-mail dated February 12, 2015, from Sears's in-house counsel to Century III's in-house counsel, Sears expressly waived its right to use book value in computing the purchase price. The e-mail states:

> Also, you are correct, we won't be providing Landlord with depreciated book value and are relying solely on appraisal.

The Lease does contain a detailed and specific provision regarding waiver. It states:

> No Waiver. No failure by Landlord or Tenant to insist upon the performance or the strict performance of any covenant, agreement, term or condition of this Lease or to exercise any

[3] The Panel notes that even if it had opted to reject the parties' arguments that the respective appraisals should be disregarded, the Award in this case would not change. The book value we have determined would be greater than the average of the two appraisals exchanged and, pursuant to Section 6.3, the book value would be the price in any event.

> right or remedy consequent upon a breach thereof, and no acceptance of rent, Taxes or other charges by Landlord during the continuance of any breach shall constitute a waiver (other than of a breach based upon failure to pay the items so paid) of any such breach or of such covenant, agreement, term or condition. No covenant, agreement, term or condition of this Lease to be performed or complied with shall be waived, altered or modified except by a written instrument executed by the parties. No waiver of any breach shall affect or alter this Lease, but each and every covenant, agreement, term and condition of this Lease shall continue in full force and effect with respect to any other then-existing or subsequent breach thereof.

Sears has correctly argued that Century III has failed to offer any evidence of any writing, executed by both Century III and Sears, expressly waiving the depreciated book value pricing alternative as required by the waiver provision. Century III opts not to address this Lease provision at all. For this reason alone, we reject this claim of waiver.

More fundamentally, however, we find no prejudice to Century III stemming from our determination to permit evidence of book value. Century III engaged in extensive discovery relating to book value from the outset of this proceeding, and the depreciated book value maintained by Sears was provided via a spreadsheet produced in response to Century III's discovery served on September 8, 2015, many months before the hearing in this case. That book value was an issue in this case came as no surprise to anyone.

Century III also contends that Sears evaded discovery regarding its book value and should have been sanctioned by precluding any evidence of it or estopped from claiming book value as a result of its actions. Because disposition of this argument depends, at least in part, on the proper scope of such discovery under the terms of the Lease, we will address this claim later in this Opinion.

CALCULATIONS OF BOOK VALUE

The Lease requirements for calculation of book value are simple and straightforward. Section 6.3(c) provides that book value is "the depreciated book value of Tenant's Building and Improvements computed on a straight line basis in accordance with Tenant's customary method of computing book value of similar types of buildings and improvements."

A spreadsheet setting forth the detailed calculation of the depreciated book value of $3,937,636 was admitted into evidence as Sears Exhibit 2. It includes entries from 1980 through 2014, and Keith Stopen, an employee of Sears in its consolidated and external reporting department, testified that straight line depreciation was used.[4] (Transcript, pp. 157-166).

Mr. Stopen also provided testimony that Exhibit 2 reflected the normal and customary method used by Sears for determining book value of its assets. He stated:

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[4] Mr. Stopen also testified that in 2005, the merger between K-Mart and Sears took effect, and assets were reset to current value based on a valuation. Century III has not contended that this somehow violated the straight line depreciation requirement. (Transcript, p. 167)

Q. So again when calculating the book value, you don't have any judgment calls, do you?

A. In computing the net book value is a mathematical formula. There is a capital policy that says what falls under the umbrella of what is tenant improvements versus maintenance and repairs. Once that pol icy is established, that book value of those capitals runs mathematically.

* * *

Q. Explain to me again in dumb lawyer vernacular what this is. What is Exhibit 2?

A. Exhibit 2 is the asset registry for this location as kept in a separate system in an asset system that maintains its components such as the cost, the life of the asset or any other transactions that would have occurred on any of our real or personal property.

Q. Why do you keep this?

A. We keep it obviously for several reasons, one is to maintain books and records for an individual store. The other reason would be that various improvements would have to be tested for audit purposes.

Also in addition to that, if we were to at any location replace a roof or replace an air conditioner, we have to identify the asset that would have to be disposed of, the asset would be capitalized. Or if there was some type of transfer of an asset.

In general, it's the subdetail that basically keeps all our details so that we know the books and records, the original purchase price, the

invoice data would be linked into this type of asset registry.

Q. Would this type of registry – this is essential for book value. Is that right?

A. This system computes our book value. Because it runs it on mathematical formula generated, and it would feed our general ledger.

Q. And is this –is a ledger like this kept or updated on a regular basis by Sears?

A. Yes. It is. Obviously every month any retirements, any additions would be – it would go into the system.

Also, it does the calculation of the accumulated depreciation that would go to our general ledger monthly.

Q. And did you create this document for this litigation?

A. Yes. I produced a document for what we had for an asset value as of November 30th, 2013.

Q. Maybe my question wasn't very good. Do you do this on a regular basis, do you keep this ledger updated on all your assets?

A. Yes. We do.

Q. So you didn't start doing this just for litigation we are here for today?

A. I'm sorry. I thought you were asking when we procured – was I responsible for procuring the document. No, this registry would exist in our system throughout every month. It's the record for the whole company, the record for every unit.

So there was nothing created in particular for this litigation.

Q. So looking through all of this, you have – you can come to a conclusion even as we sit here right now that what the book value is. Correct?

A. That is correct.

Q. Okay.

So tell us what is the book value?

A. The book value which was run which would be the end of our period, 2014, would have been 3.937 – 636.

Q. Is that 3 million --

A. 3,937,636.

Q. Does Sears handle all of its K-Mart and their Sears assets just like this?

A. Yes. We do.

Q. Is it common in your industry to handle your assets like this?

A. Yes. It is.

This testimony was uncontradicted at hearing. Accordingly, the precise safeguards set forth in the Lease to assure the legitimacy and integrity of the proffered book value were fully satisfied. We believe that Sears met its burden to prove book value with this evidence alone, and nothing further was required.

GAAP COMPLIANCE

Although we believe that Sears has complied with the Lease, we will nonetheless address Century III's claim that the book value is not in accord with Generally Accepted Accounting Principles ("GAAP").

We will also address Century III's claim that remaining lease obligations of $3,277,704 were "sunk costs" which should have caused the write-down of Sears's book value in that amount.

Century III's initial argument is that Scars failed to conduct an impairment test on September 17, 2014, the date of its notice to Century III that it intended to close the store. It further claims that the decision to close the store by Sears constituted a "triggering event" which required Sears to undertake an impairment test to determine if the book value exceeded the fair market value of the asset. Century III contends that based on its own appraisal of a leasehold interest at negative $11.1 million, the book value calculated according to GAAP would have been a negative number.[5]

There is no dispute that Sears performed an impairment test in 2013. As stated by Mr. Stopen:

> Q. There was an impairment test that was run in 2013. Right?
>
> A. On this unit, yes. There was an impairment test.
>
> Q. Was that pursuant to the Ernst & Young audit?
>
> A. The impairment test that was run on '13 was pursuant to a potential impairment or triggering event.
>
> Q. Did you review the Ernst & Young report?

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[5] We question whether an appraisal of a leasehold interest even addresses the nature of the asset for which Sears maintained a book value. In light of our conclusion that Sears complied with GAAP in any event, we do not decide this issue.

> A. I have only reviewed it in the capacity that I realized that an evaluation is out there. We use it as part of our policy as one for the tests for impairment. (Transcript, p. 169)

Century III stressed in its Reply Brief, however, that "Sears was required to perform an impairment test in 2014, at the very latest as of September 18, 2014, when it announced to Landlord its decision to close the store." Century III then cites testimony of Mr. Stopen that an impairment test was not performed in 2014. However, we note that although an impairment test was not done, the functional equivalent of such an analysis was done. As Mr. Stopen testified:

> Q. Do you have a copy of that impairment test for the last impairment that was done?
>
> A. I'm sorry, again we do have documentation that shows we closed the store. And it would have been on the store closure list. Then the cost associated with exit activities. A column on there would represent what the net book value is. And then the next step would be that the fair market value supported that net book value.
>
> So when you say impairment test, yes, there was a triggering event. There was an impairment. However, it is part of our note that discloses our exit activities. And that exit activity has to look at net book value and determine whether or not that carrying cost is valid. (Transcript, p. 190)

At the request of counsel for Century III, and at the direction of the Panel, the closing note referenced in Mr. Stopen's testimony was immediately produced and admitted as Exhibit 23. It reveals that in 2014,

there was a determination that the 2011 Ernst and Young valuation of the property exceeded Sears net book value and that the net book value did not need to be adjusted downward. Consequently, as regards GAAP compliance, the only genuine issue for consideration is whether use of a 2011 valuation to determine fair market value in either 2013 or 2014 was proper. We conclude that Sears's book value determination was GAAP compliant.

Regarding GAAP compliance, Century III produced Dr. Barry Epstein as an expert witness who testified that "using an old valuation, even if it was valid at the time, at a later point in time, when the world has changed, is not appropriate." (Transcript, p. 428.) Dr. Epstein nonetheless recognized that in accordance with Generally Accepted Accounting Standards 328.35, so long as Sears itself would "make adjustments, themself that bring the values current," GAAP would be satisfied. Mr. Stopen testified that it is the practice of Sears to do just that:

> Q. The use of 2011 fair value in comparing it to the current value, 2013, or for that matter your shareholders are relying on this same test currently in 2016 using 2011 fair values.
>
> Isn't that a little disingenuous?
>
> A. I'm going to answer the question no, and describe it in the sense as you are applying this you arc applying to the whole portfolio. And we have disclosed time and time again publicly we are an asset rich company, and our transactions show that as we enter transactions, whether that be disposing of owned buildings or terminating leases or doing transactions such as growth properties or others, we do not take any type

> of impairment that would be an indicator that the values we are applying show us that there have been market changes.
>
> So we conclude the values we have that were provided by Ernst & Young back in 2011 are the best estimate to the carrying value that we have.
>
> Q. For those that are out there operating?
>
> A. And closed.
>
> Q. And closed?
>
> A. And disclosed as property for resale. That's correct.

(Transcript, pp. 184-185)

Accordingly, we find that reliance on 2011 valuations in either 20l3 or 2014 was not an unknowing and uninformed reliance as Century III contends. Rather, consistent with GAAP §328.25, Sears's real estate department would, as a matter of course and practice, consider the propriety of continued use of the 2011 values. We also note that as reflected in Sears's 10-K filings, and as detailed by Sears's GAAP expert Vadim Riber, Sears is audited by Deloitte Touche annually, and it has not had any issues with any accounting, including Sears's capitalization policy, for book value determinations. (Transcript, pp. 471-476).

Century III further contends that once Sears made the decision to close the store, GAAP required it to accrue and recognize remaining Lease obligations of $3,277,704. It thus contends that Sears must pay this negative book value to Century III and also transfer the leasehold improvements to it. We cannot agree.

We find no support in either the Lease or GAAP for such a conclusion.

On cross-examination, counsel for Century III raised this precise issue with Sears's expert, Vadim Riber. Mr. Riber explained that contrary to Century III's assertion, future minimum lease payments need not be recorded on September 17, 2014, the date the store closing was announced by Sears. Instead, and as stated in Sears's 10-K filings, such liability would be recorded on the cease-use date, the actual store closing, which did not occur until December 7, 2014. Prior to that date, Century III sent its November 17, 2014, letter stating its election to terminate the Lease and acquire the Building and Improvements. Under such circumstances, the probability of the contingent liability is removed and it does not need to be recorded. The Lease would terminate. (Riber testimony, pp. 519-522).

DISCOVERY ISSUES

Century Ill asserts that evidence of book value should be disregarded as a sanction for Sears's failure to comply with discovery requests. Century III outlines its extensive discovery efforts regarding book value on pages 16 through 19 of its Brief. Despite claims that Sears "repeatedly evaded and possibly lied" in its discovery responses, and engaged in "dodgy, bad faith" behavior, Century III never filed any motion regarding any discovery matter throughout the entirety of the discove1y period. Nonetheless, approximately two weeks before the hearing, Century III filed a Motion in Limine seeking case dispositive evidence preclusion as a sanction for alleged discovery disputes never previously made known to the Panel. Case dispositive sanctions were never warranted in this case. See 6 Standard Pa.

Practice 2d §34.96 and cases cited therein ("Thus, generally, sanctions for failure to provide discovery requests are not imposed until there has been a refusal to comply with a court order.")

This Panel took all steps to assure that Century III was not in any way prejudiced by discovery shortcomings it both perceived and apparently accepted. The Panel limited Mr. Stopen's testimony regarding book value to responses provided in discovery; required Sears to either produce documentation of any impairment testing or verify that none existed; and directed testimony from Sears that all documentation of impairment testing in Sears's possession be produced. That testimony was provided by Andrew Johnstone, deputy general counsel of Sears. The record is clear that all impairment testing documentation relevant to the store and in Sears's possession has been produced.

During the course of the hearing, and as discussed previously, a closing note was identified by Mr. Stopen of Sears which related to book value considerations in 2014 and use of a 2011 Ernst & Young valuation in that process. Upon direction of the Panel, the closing note was immediately produced at hearing. (Transcript, p. 196). Moreover, in light of the fact that the use of an Ernst & Young valuation had not been made known until the hearing, Century III was granted a continuance of nearly a month to develop and submit expert testimony as to whether Sears' book value determinations complied with GAAP in light of the 2011 valuation. (Tr. 259) Century III has not been prejudiced and had a full and fair opportunity to present its GAAP defenses.

Century III strenuously argues that Sears's failure to introduce or produce the Ernst & Young report is

fatal to its book value proof. Initially, we note that Mr. Johnstone testified that the 2011 repo1t was not in Sears's possession. (Transcript, pp. 154-155, 195). More importantly, neither the Ernst & Young report nor any other evidence of GAAP compliance was necessary for Sears to prove its book value case. The Lease itself set forth the safeguards required to assure the accuracy of the book value calculation. There is no evidence anywhere in the record that the calculation of book value for the subject store varied in any way from Sears customary, usual and accepted treatment of any similarly situated store. Sears has met its burden.

Finally, Century III goes so far as to claim that Sears has violated the record retention provisions of the Sarbanes-Oxley Act of 2002 by not having in its immediate possession the 2011 Ernst & Young valuation report. This violation of law, Century III contends, is another reason to disregard Sears' book value proofs. Given that there is not a single piece of evidence, documentary or testimonial, that Sears treated the subject store in any way other than its customary fashion for all of its stores, Century III would have to prove a system-wide fraud in Sears' accounting for book value to prevail. Century III states in its Brief that it is not so alleging. Any proof short of that, however, would be inadequate, given the record in this case, and any discovery directed to it is inappropriate and unnecessary and significantly overbroad. This is particularly so in light of the annual audits of Deloitte Touche. The arguments of Century III in this regard are rejected in their entirety.

RECOVERY OF RENTS PAID

Sears also seeks restitution of $745,333.24 that it has paid to Century III throughout the course of this arbitration for rent and other costs due under the Lease. Sears contends that Century III should have closed the transaction within 90 days of its election to terminate on November l7, 2014. We must disagree.

From a review of this Opinion, it appears that the pricing machinery of Section 6.3 of the Lease clearly sputtered when the dramatically different appraisals were exchanged following Century III's election to terminate. We suspect that each party was surprised, shocked and dismayed by the appraisal proffered by the other. Based on our determination that neither party's appraisal properly identified the subject matter to be appraised, we find that the conduct of both parties created the need for this very arbitration. Indeed, it was not until this proceeding that the book value was exchanged, and it was not until this Opinion that the acquisition price was determined. Consequently, no such restitution for rents and other costs shall be due or payable to Sears through the Closing date required in the first section of the AWARD section below.

COSTS OF ARBITRATION

Section 34 of the Lease, the arbitration provisions, provides in part as follows:

> Except as otherwise provided in this Lease, and except for the payment by each participant in any such arbitration of its own counsel, experts' and witnesses' fees and expenses, the cost of such arbitration shall be borne as directed by the arbitrators.

Similarly, Rule 47(c) of the Commercial Arbitration Rules provides:

> In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.

As we have noted throughout this Opinion, we believe that this arbitration was necessary to resolve an issue of importance to both parties, *i.e.*, the acquisition price for the Sears Building and Improvements. The actions of both parties led to this arbitration. Accordingly, we find that the costs of arbitration should be borne equally by the parties.

AWARD

Accordingly, we enter an Award for Sears and direct that within thirty (30) days of the dale of this Order, and in accordance with the Lease and, in particular, Sections 6.3, 11.5, 11.6 and 11.7 thereof, the parties close on the sale transaction with Century III paying the sum of $3,937,636. to Sears. Sears shall have no obligation under the Lease or otherwise to continue to make payment of rents or other costs following such thirty (30) day period.

The administrative fees of the American Arbitration Association totaling $22,200.00 shall be borne as incurred. The compensation and expenses of the arbitrators totaling $43,231.87 shall be borne equally.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied

Date: *November 10, 2016* *Steven Petrikis*
Steven Petrikis,
Arbitrator

I, Steven Petrikis, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

Dated: *November 10, 2016* *Steven Petrikis*
Steven Petrikis,
Arbitrator

Date: *Nov. 10, 2016* *Brian M. Albert*
Brian M. Albert,
Arbitrator

I, Brian M. Albert, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

Dated: *Nov. 10, 2016* *Brian M. Albert*
Brian M. Albert,
Arbitrator

Date: *November 10, 2016* *Donald J. Snyder, Jr.*
Donald J. Snyder, Jr.,
Arbitrator

I, Donald J. Snyder, Jr., do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

Dated: *November 10, 2016* *Donald J. Snyder, Jr.*
Donald J. Snyder, Jr.,
Arbitrator

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-2284

CENTURY III MALL PA LLC,

Appellant

v.

SEARS ROEBUCK & CO.,

On Appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. No. 2-16-cv-01839)
Honorable Lisa P. Lenihan,
United States Magistrate Judge

SUR PETITION FOR REHEARING

BEFORE: SMITH, Chief Judge, and MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, and COWEN, Circuit Judges

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The petition for rehearing filed by appellant, Century III Mall PA LLC in the above captioned

matter having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the Court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service who are not disqualified not having voted for rehearing by the Court en banc, the petition for rehearing by the panel and the Court en banc is denied. Judge Cowen's vote is limited to denying rehearing before the original panel.

BY THE COURT:

s/ Robert E. Cowen
Circuit Judge

DATED: March 18, 2019
MB/cc: Kirk B. Burkley, Esq.
Stephen S. Stallings, Esq.
Arthur W. Zamosky, Esq.
Adam J. Ventura, Esq.

APPENDIX E

UNITED STATES CODE

TITLE 9. ARBITRATION

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than

a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.