

**From:** lbs4@columbia.edu  
**Sent:** Friday, October 26, 2012 1:00 PM  
**To:** Duffy, Daniel  
**Cc:** Torres Rojas, Genara; Van Duyne, Sheree  
**Subject:** Freedom of Information Online Request Form

Information:

First Name: Lynne  
Last Name: Sagalyn  
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Required copies of the records: Yes

List of specific record(s):

Copies of the testimony during the second arbitration between 2 WTC LLC, 3 WTC LLLC, and 4 WTC LLC and the Port Authority notice of this arbitration process was dated August 4, 2009 and an opinion dated January 22, 2010. I am requesting a copy, electronic would be fine, of the transcripts of all who testified in the arbitration proceedings. Thank you.

**THE PORT AUTHORITY OF NY & NJ**

Daniel D. Duffy  
*FOI Administrator*

November 9, 2012

Ms. Lynne Sagalyn  
Columbia Business School  
3022 Broadway Uris 816  
New York, NY 10027

Re: Freedom of Information Reference No. 13548

Dear Ms. Sagalyn:

This is a response to your October 26, 2012 request, which has been processed under the Port Authority's Freedom of Information Code (the "Code") for copies of the testimony during the second arbitration between 2 WTC LLC, 3 WTC LLC and 4 WTC LLC and the Port Authority, notice of this arbitration process dated August 4, 2009 and an opinion dated January 22, 2010.

Material responsive to your request and available under the Code can be found on the Port Authority's website at <http://www.panynj.gov/corporate-information/foi/13548-WTC.pdf>. Paper copies of the available records are available upon request

Certain material responsive to your request is exempt from disclosure pursuant to exemption (1) of the Code.

Please refer to the above FOI reference number in any future correspondence relating to your request.

Very truly yours,



Daniel D. Duffy  
FOI Administrator

In the Matter of the Arbitration between

2 WORLD TRADE CENTER LLC,  
3 WORLD TRADE CENTER LLC,  
and 4 WORLD TRADE CENTER LLC

and

THE PORT AUTHORITY OF NEW  
YORK AND NEW JERSEY.

WTC ARBITRATION NO. 2

BEFORE: Eugene McGovern,  
Harry P. Sacks, Esq.  
Hon. George C. Pratt,  
Arbitrators

**DECISION, INTERIM AWARD, AND SUPPLEMENTAL ORDER**

**INTRODUCTION**

This arbitration is brought under the Master Development Agreement for Towers 2/3/4 of the World Trade Center made as of November 16, 2006 ("MDA") by and among the Port Authority of New York and New Jersey, 1 World Trade Center LLC, WTC Retail, LLC, 2 World Trade Center LLC, 3 World Trade Center LLC, 4 World Trade Center LLC, and the Port Authority Trans-Hudson Corporation. Much of the background with respect to the World Trade Center site and the MDA was discussed in the Decision in Arbitration No. 1, rendered in December 2008, and need not be repeated here. As before, the Silverstein interests will, for convenience, be referred to as "SPI" and the Port Authority will be referenced as "the PA". Since Arbitration No. 1,

which involved issues relating to the turnovers of sites 2 and 4 to SPI, Arbitrator Cavanaugh has withdrawn from the standing Panel and, with the consent of both SPI and the PA, has been replaced by Eugene McGovern.

### **PROCEDURE AND CLAIMS**

By Notice of Arbitration dated August 4, 2009, SPI commenced this proceeding, seeking "emergency interim relief" consisting of:

- (1) A realignment of the schedule provided in the MDA to adjust the timetable for SPI's obligations to complete Towers 2, 3, and 4 ( collectively "the Towers") to reflect the delay and damage to the project caused by the PA's alleged failures.
- (2) An award of "ongoing damages" equal to the amount of ground rent SPI would otherwise have to pay until the project "is completed and generating sufficient rents to pay ground rent" to the PA.
- (3) A declaration that the PA "is in material breach of its obligations under the MDA."

In its Post-Hearing Submission, SPI refined its position to seek:

- "Damages to offset ground rent until August 2019, which is the assumed date for the project to become 'stabilized,' *i.e.*, until the project is generating sufficient rents from tenants to justify the payment of ground rent to the PA.
- "Schedule realignment in accordance with the Navigant Schedule. Under that schedule, the latest start and substantial completion dates for construction of the towers would be realigned as follows:
  - T2 – February 2013 / August 2017;
  - T3 – October 2012 / February 2017;
  - T4 – November 2013 / February 2017.
- "Elimination of the cross-default provisions.
- "A declaration that the PA is in material breach of the MDA."

(SPI's Post Hearing Submission at 1-2)

SPI states that hopefully with such declaration of material breach being issued, it and the PA will be able to negotiate a resolution of their remaining disputes and get the project "back on track" and further that such declaration should "serve as a wake-up call to the PA that it is accountable" for its "consistent pattern of delay and mismanagement."

SPI further states that once such interim relief has been secured, it hopes that the PA will engage "in good faith negotiations to reach a settlement", but that absent such settlement SPI plans to commence a second arbitration proceeding designed to obtain the full relief which it claims that it needs and to which it is entitled. As part of such second proceeding, SPI states that it will seek an award of monetary damages resulting from the PA's breaches, "including rescission damages totaling at least \$2.75 billion." In that second proceeding, SPI asserts that it will show that the MDA, itself, was the product of the PA's misrepresentations and/or fraud.

SPI alleges that it has decided to proceed on such bifurcated basis so that in this arbitration the Panel would only be required to presently address the relief which SPI requires immediately. It contends that absent relief abating ground rent and realigning the schedule, the passage of time will dissipate the pool of available insurance proceeds, and it claims that there is reason to believe that the PA is using delay as a tactic to weaken the economic position of SPI, and thus obtain unwarranted leverage in any future negotiation.

With respect to its request for interim relief, SPI contends that the PA has failed to meet its schedule obligations under the MDA and its Exhibit J – the Master

Development Schedule (“MDS”) – particularly with respect to infrastructure elements such as the Transportation Hub, the Vehicle Security Center (“VSC”), the underpinning of the No. 1 Subway Box, and the reconstruction of Greenwich and other streets, all of which, SPI contends, the MDS requires to be completed before completion and leasing of the Towers. The extensive delays relating to the PA’s projects, according to SPI, will extend the period during which SPI would be required to pay ground rent to the PA without any possibility of opening and leasing the Towers. SPI also contends that the PA has breached “one of its most basic obligations” under the MDA – the duty to cooperate – by engaging in a “pattern of withholding critical information from Silverstein . . . to keep Silverstein from learning that the project schedules could not and would not be met.”

The PA denies any breach by it of the MDA, claiming that the schedule delays are all covered by the MDA’s provisions for “unavoidable delay”. The PA advances two main sources of unavoidable delay. The first is in connection with the deconstruction of the Deutsche Bank building at the south end of the site, a necessary predicate to completion of the VSC. Since all the other delays may well be covered by the VSC delay, according to the PA, it is at most premature for any decision now about allocating responsibilities.

The second source of possible unavoidable delay urged by the PA is SPI’s inability to obtain tenants and financing for the Towers due to the economic recession and collapse of the market for commercial mortgages, rather than any failure on the part of the PA. In any event, the PA contends, unavoidable delay extends the MDS schedule dates, both for the PA’s infrastructure and for completion of the Towers.

The ground-rent payments are called for under the 99-year ground leases between the PA and the SPI entities. According to the PA, these ground leases are different contracts from the MDA, and the ground rent payments are unrelated to and unaffected by timing of the construction. Ultimately, according to the PA, if at the end of the construction period it appears that the PA improperly delayed SPI's construction, appropriate damages can be determined at that time. The PA thus insists that fixing any damages at this time would be premature.

The PA also contends that the changes to the MDA's infrastructure dates as reflected in its MS-48 schedule are necessary, are not a breach of contract, and certainly are not a "material breach" of the MDA. Finally, it asserts that "the Port Authority has cooperated with Silverstein."

At a preliminary hearing on September 1, 2009, the parties agreed on a schedule and procedures for the arbitration. The parties' "determinations" were submitted on September 23, 2009, and hearings were held on 15 days between October 12 and November 6, 2009, at which 27 witnesses testified and hundreds of exhibits were presented. Post-hearing main memos and reply memos were submitted by both sides, and final arguments on the issues took place on December 4, 2009. In view of the volume of testimony and exhibits and the complexity and difficulty of the issues, the parties agreed to waive the requirement of MDA § 9.2(b)(v) that the Panel's decision be rendered within five days of the conclusion of the hearings. The Panel has carefully considered all of the evidence and arguments advanced by the parties and has had extensive deliberations over the issues.

## DISCUSSION

The specific issues in this arbitration involve a larger, more fundamental problem – how to reconcile and adjust the parties' interlocked construction obligations on this massive redevelopment project in view of the drastically changed economic conditions, and to do so in a way that will produce within a reasonable time a redeveloped WTC site that is comparable to that contemplated by the MDA and is consistent with its purposes.

The MDA establishes a unique form of arbitration for resolving disputes between the PA and SPI. In addition to the standing Panel and abbreviated schedule, the agreement contemplates that the Panel is empowered to exercise broad powers and discretion in resolving disputes. It provides, *inter alia*, that

- “all Disputes between the parties to this Agreement” shall be resolved in accordance with Article 9 – Dispute Resolution;
- The Arbitrators have “plenary power to resolve any and all Disputes under this Agreement in such manner as they in their discretion deem appropriate”;
- The Arbitrators may “determine what actions any party must take in order to effectuate the intent and purposes of this Agreement”;
- The Arbitrators may “take such other actions as the arbitrators shall deem necessary to enforce or implement a Decision”; and
- “In the case of a Dispute with regard to the appropriate terms of any agreement or other arrangement, the arbitrators' Decision with regard to such terms shall be implemented by the parties' promptly entering into such agreement or other arrangement on the terms determined by the Arbitrators.”

MDA §§ 9.1 and 9.2(iv) (emphasis added).

In view of SPI's claim that the PA has failed to cooperate as required by the agreement, the Panel permitted at the hearing extensive evidence with respect to the

negotiations between the parties, negotiations that were assisted at times by the Governor of New York State and by the Mayor of New York City, all aimed at arriving at solutions for the many problems facing redevelopment of the WTC site. Indeed, with both parties' consent, the Panel engaged in two *in camera* sessions with representatives of both parties, without counsel, for the purpose of obtaining a practical "feel" for the problems and the parties' objectives that would enable the Panel to arrive at a decision that would not only comply with the law and the parties' agreement, but would also make realistic sense in view of the many construction and economic difficulties facing the parties. At all times the Panel has heeded the central purpose of the MDA – to provide for "the redevelopment of the new World Trade Center [which] will result in a world class environment of the highest quality." (MDA § 12.14(c)).

At the heart of SPI's position is its claim that the PA has failed to proceed with the infrastructure elements in a manner that will complete those elements within the times required by the MDS. The PA argues that the MDS dates were not firm but were intended to be merely "aspirational", with more realistic dates to be set later on, and further that SPI has not been delayed due to any failures on the part of the PA, but rather due to a variety of unavoidable delays for which the PA is not responsible. With respect to the PA's view regarding the MDS dates being merely aspirational, we note that several provisions in the MDA provide that the times set in the MDS for completion of various parts of the redevelopment project were, indeed, intended to be met by both sides, subject only to unavoidable delays. See, e.g.: sections 1.1(b), 1.1(c), 1.1(d), 1.2(a), 1.2(b), 1.3(e)(iv), and 2.1.

It is not disputed that the completion dates for a number of the PA's infrastructure elements as specified by the MDS will not be met and that the dates for completion of the Towers by SPI have been impacted by the PA's late turnover of the sites, by SPI's negotiations with Merrill Lynch, and by a number of possible unavoidable delays with respect to the VSC or the credit crunch with the consequent difficulty of financing. This will be further discussed, infra, under "Schedule".

SPI argues that under the MDA it bargained for and was entitled to have the Hub and the VSC completed at least 18 months before it would be required to complete its towers, and to have the Streets completed at least by the completion of T3 and T4. At the hearing it was made clear that the infrastructure dates in the MDS would not be met. Even the PA acknowledges this, and in October 2009 it provided its schedule MS-48 which projects modified infrastructure-completion dates as follows:

	<u>MDS Dates</u>	<u>MS-48 Dates</u>
Hub	6/30/11	5/31/14
VSC	2/28/11	9/30/13
Streets	12/31/12	9/30/16

SPI contends that even these MS-48 dates are unrealistically optimistic, but the PA contends that they will be met. The construction of the VSC by the PA is subject to the demolition of the Deutsche Bank Building, which is being done by the LMCCC and is not under the control of the PA. The date of such demolition has continued to slip. For present purposes, however, the Panel need not determine exactly when these infrastructure elements will actually be completed.

SPI's claim for interim relief is grounded in two principal claimed breaches of the MDA: delays by the PA in constructing the infrastructure required by the MDA, and breach of the requirement that the parties cooperate in carrying on the overall project. As a result of these breaches, SPI contends, it is entitled to interim relief because under the parties' agreements SPI is required to pay ground rents, currently at the rate of \$78 million per year, increasing significantly in 2013. The ground rents are paid out of insurance money SPI recovered as a result of the destruction of the Twin Towers. This insurance money has been earmarked for both ground-rent payments and construction of the Towers. A portion of the insurance moneys has been allocated to the PA, by agreement with SPI, for the PA's having undertaken responsibility for and ownership of Towers 1 and 5 and taking on certain additional infrastructure elements.

According to SPI, a combination of the PA's delay of the project with the PA's breach of the covenant to cooperate has deprived the project of credibility, an essential factor in obtaining the needed tenants. This requires, says SPI, (1) an adjustment of the schedule; (2) removal of the cross-default provision in the MDA, under which SPI could lose all three sites if it fails to meet the completion date for any one of the Towers; (3) an abatement of the ground rents until the now-anticipated dates for completion of the construction and "rent stabilization" of the Towers, approximately 2019; and (4) a declaration that the PA is "in material breach" of the MDA. We discuss each of these claims.

1. Schedule. As stated above, it is not disputed that the PA has not proceeded with construction of the infrastructure elements in accordance with the dates specified in the MDA and as set forth on the MDS, Exhibit J to that document. For SPI,

that ends the liability issue and leaves remaining only a determination of what and how much relief should be granted to it. The PA counters, however, that when the MDA was signed in November 2006, albeit after extended negotiations between the parties, neither side had completed designs for their separate projects, and neither side, therefore, had a reliable basis for fixing a firm schedule. What's more, the PA argues, both sides knew the situation, understood that the dates set forth on the MDS were merely "aspirational", and expected that firm dates would be established later, when the parties would have a better grasp on the problems and needs that must be addressed. That later point, according to the PA, was met when the PA delivered its MS-48 to SPI in October 2009 (shortly before the hearings in this arbitration), containing scheduling information as of August 2009. Although MS-48 was not the result of an agreement between the PA and SPI, but instead was unilaterally created by the PA, the basic concepts of the MDA and the MDS, the PA contends, are covered by MS-48. The PA further argues that as now reorganized under the leadership of Christopher Ward, the PA intends to meet the dates in MS-48 and that the essential infrastructure elements will be completed by the time the Towers will be completed as required under the original MDA schedule as extended by the adjustments for turnover delays, the Merrill Lynch time extensions, and possibly by unavoidable delays from the VSC and the credit freeze and related financing problems.

With respect to progress and delays to date in connection with the project, there have been and will be a variety of occurrences as to which the facts, and particularly their consequences, may have to be further examined and determined in future proceedings. These include, among others: time extensions requested by SPI and

granted by the PA in connection with the Merrill Lynch negotiations; consequences, if any, of negotiations with Deloitte and other prospective tenants; delays in the demolition of the Deutsche Bank Building; relationship, if any, between delays in connection of the VSC and construction of the Towers; delays in completion of the Hub, Greenwich Street utilities, and other infrastructure elements, and their impact on construction of the Towers; delays in the PA's turnover of the Towers' sites; consequences of the credit squeeze and inability to obtain financing; increases in budgets for the Towers and their effects on SPI's financing problems; concurrency of delay factors and consequences of same; promptness and diligence with which SPI proceeded when the sites of the Towers were turned over to it; consequences, if any, of the termination of Phoenix by the PA and introduction of Tishman/Turner; any waivers, by conduct of either or both parties, of the consequences of any delays; delays, if any, caused by third parties other than SPI or the PA, which have impacted or will impact the progress of the project; and finally, whether various delays were unavoidable under the terms of the MDA, and if so, the consequences of such unavoidable delays.

The above is not intended to be an all-inclusive listing of delays, but rather only an identification of many delays and events mentioned during the hearings by one or both parties. A critical question not covered above is what, if anything, has been the impact to SPI of delays by the PA. SPI has acknowledged publicly on a number of occasions that the credit markets are frozen, that its inability to obtain financing for the project is unrelated to delays by the PA, and that a PA guaranty is necessary for SPI to obtain the private financing needed to construct the Towers. The future extent, if any, of

the present credit freeze and SPI's consequent inability to finance the construction of the Towers is not known.

If both parties have delayed – SPI because of the unavailability of financing, and the PA because of its failure to timely complete the infrastructure – how do the delays interact in terms of the parties' respective obligations under the MDA? Stated differently, given the credit freeze and financing difficulties, if in fact the PA had timely started and completed all of the infrastructure activities on its part to be performed, would SPI have been able to timely proceed with and ultimately complete the construction of the Towers? If not, can it be said that SPI has been harmed by the PA's delays on the infrastructure? Moreover, does SPI's inability to obtain financing constitute unavoidable delay, as urged by the PA, and if so, does that, in turn, extend not only SPI's performance times, but also those of the PA? These are questions that may have to be explored and determined, if SPI proceeds with the next arbitration, as it has indicated it may do.

While the PA will not meet the MDS's completion dates for the Hub or the improvements under and in the area of Greenwich Street, and while the VSC construction has been delayed by the stalled demolition of the Deutsche Bank Building by LMCCC, there has been no proof that delay in these infrastructure projects has so far impacted construction of the Towers. In fact, SPI witnesses acknowledged not only that construction of the Towers can proceed without use of the VSC and its access ramp, but also that if the funding problem did not exist, SPI could move ahead today with the construction of the Towers.

SPI disagrees strongly with the PA's dates advanced in MS-48, contending that they are at least one year overly optimistic. Whatever the reliability of those dates, however, they must also be adjusted so as to provide appropriate extensions of time to complete the Towers, and to reflect the realities on the ground. To the extent, if any, that it may ultimately appear that the PA delayed SPI's construction and occupancy of the towers, SPI would be entitled to an adjustment in the schedule in order to fairly and reasonably make up for any delays caused by the PA, or otherwise due to causes not the fault of SPI. But how much of an adjustment, if any, should be made cannot be determined at this time. It will have to await a time in the future when more is known about the actual progress of construction of the Towers and of the infrastructure.

2. Cross-default. This provision was required by the PA to be in the MDA in order to have SPI erect the Towers simultaneously. In its enthusiasm to expedite redevelopment of the WTC site as a showplace for New York City, for the Country, and for the world, the PA evidently envisioned all the improvements at the site – 5 office towers, the Memorial, the Hub, park areas, a new PATH terminal, and others – suddenly bursting into full operation. From today's perspective, after the shock of the collapse of the credit market and its impact on the economy and on the commercial rental market in Lower Manhattan, such a vision seems strangely naïve. All the experts at the hearing, as well as the parties themselves, agreed, and the Panel finds and concludes, that under present circumstances enforcement of the cross-default provision would be unwise, unrealistic, and not in the best interests of the project. Accordingly, the Panel grants SPI's request for a declaration that the "cross-default" and other

remedies provided for under Article 8 of the MDA and the Guaranty and Security Documents referenced therein are terminated and of no further force or effect.

3. Rent abatement. As interim damages for the PA's claimed breaches of the MDA, SPI contends that it is entitled to an amount equal to the total of ground rents that would be paid up through the completion and lease-up stabilizations of the three towers, sometime in 2019, an amount the PA calculates to be \$788 million. At some places in its submissions, SPI characterizes the interim damages as "ongoing damages", but it is not clear whether SPI seeks to have them paid periodically as time goes on, or as a lump sum to be paid now, as the PA assumes. Under the MDA, however, SPI is required to pay the ground rents through the construction and lease-up periods for the Towers. At most, therefore, SPI would be entitled to seek damages for ground rents paid for any excess period over and above the planned and agreed-to construction and lease-up periods.

While there has been some testimony and documentary proof introduced in this proceeding with respect to the PA not meeting various infrastructure related dates specified in the MDS, there has been little, if any, proof of damages suffered so far by SPI as a consequence, except to the extent that additional rent may have to be paid for an excess period which might be needed to complete construction of the Towers.

SPI states in its post-hearing reply brief (at p. 31) that it could seek rescission of the MDA and the return of approximately \$1.5 billion it has transferred to the PA under the MDA, "along with additional damages." Whether it has the grounds to do so has not been shown in this proceeding and remains, if at all, for a possible separate proceeding, which SPI has urged that it might commence.

At this time, however, granting the requested interim relief, or any relief from the ground-rent requirements, would not be appropriate. SPI may well be entitled eventually to recover for "excess" rent that it may be required to pay over the next several years, but at the present time there are too many uncertainties to permit a determination either of the length of the excess period, if any, or of the proper amount of excess rent involved. Therefore, the amount of compensable harm SPI will suffer in the future from the alleged delays and from having to pay "excess rents", if they in fact occur, cannot reasonably be calculated at this time. Moreover, what actually is going to be built on the three tower sites may well be changed by the parties in light of the current economic situation.

In addition to such future uncertainties, the request by SPI for rent abatement is based upon an assumption that the delays in the project to date have been due to failures by the PA. As explained above, however, in our discussion of item 1, "Schedule", the delays to date have been due to many occurrences as to which the facts and consequences will have to be further examined before a determination could be made assigning responsibility. At this juncture, it is not clear to the Panel that the delays in the project to date are all, or substantially all, attributable to the PA. Some of them may be due, in whole or in part, to unavoidable delays, to negotiations with prospective tenants, to SPI's inability to obtain financing unrelated to progress by the PA, or to other factors for which the PA may not be responsible. It would be inappropriate to have the PA respond now in damages for such delays, irrespective of whether the PA did or did not meet, or will or will not meet, certain dates specified in the MDS. In short, on the evidence presented, particularly that related to the current

economic and financial crisis, SPI has not shown that any action or inaction by the PA to date has actually delayed or damaged SPI in its construction of the Towers.

4. Material Breach. SPI seeks a declaration that the PA is "in material breach" of the MDA. It states that such a declaration is needed to "remedy the PA's stated view that it is not obligated to comply with its contractual commitments" (SPI Post-Hearing Br. at 32), and that "[d]eclaratory relief is therefore necessary and appropriate to inject certainty and accountability that the MDA was intended to establish for the good of the project." (*Id.* at 34). The PA counters that declaratory relief is always discretionary, and that the SPI's purpose here is more in the nature of public relations than in determining the rights and obligations of the parties to a contract.

SPI's request for declaratory relief is denied. In the first place, we are not persuaded by SPI's claim that the PA has acted in bad faith and thereby breached the MDA. No doubt, the first two years under the MDA do not represent fine, or even adequate, performance by the PA. Since Mr. Ward took over the directorship, however, much has changed, contracts have been let, and the infrastructure work is moving ahead. Meanwhile, the PA has invested or committed over \$ 2.3 billion to redevelopment of the WTC site, and in the extensive and extended negotiations with SPI that have continued from mid 2008, the PA has made significant offers of concessions and adjustments that go well beyond the PA's obligations under the MDA.

SPI argues that it would be impossible to negotiate a new deal "if the PA is allowed to take the position that its written commitments are merely 'aspirational'" (SPI Post-hearing Br. at 34). While the PA used that term to characterize the times set forth in the MDS, it should be clear to the PA, from the results of this arbitration award, that it

is not free to ignore its contractual obligations to SPI under the MDA, nor can it disregard its obligation to the public to press forward and complete the redevelopment of the WTC site.

Moreover, when dealing with a development project as massive and complex as this one, the failure by one party to meet a particular time deadline, or indeed many time deadlines, cannot automatically be escalated into a “material” breach that would warrant the other party’s rescinding the entire agreement. In such a large and complex project that requires many years to complete, time lost now may well be made up later on, but even if it is not made up, and if the resulting delay has monetary or other consequences, compensation and other adjustments can be provided at an appropriate time. In the context of the MDA, as applied and modified by this decision, the impact, if any, on SPI of the PA’s infrastructure delays is considerably ameliorated by elimination of the cross-default provisions, by our recognition of SPI’s possible future entitlement to a specific adjustment in the schedule for completing the Towers, and by possible ground-rent damages to be assessed, if warranted, in the future.

Accordingly, with respect to the specific points of relief requested by SPI, the Panel makes the following Partial Award:

1. With respect to SPI’s request for a realignment of the schedule, SPI may be entitled to have the schedule for completion of the Towers adjusted to make an appropriate accommodation for any construction problems created by the PA’s delays in completing the infrastructure, but the extent of the adjustment, if any, cannot be determined now but

must await a time in the future when more is known about the actual progress of construction of the Towers and of the infrastructure.

2. SPI's request for a declaration that the "cross-default" and other remedies provided for under Article 8 of the MDA and the Guaranty and Security Documents referenced therein are terminated and of no further force or effect, is granted.
3. SPI's request for a rent abatement at this time is denied, without prejudice to a later claim when the relevant circumstances can be established with sufficient certainty; and
4. SPI's request for a declaration that the PA is in "material breach" of the MDA is denied.

### **THE PA'S REQUESTED RELIEF**

Although not made the subject of a written counterclaim, the PA has requested the Panel to grant affirmative relief in the form of a direction to SPI to forthwith proceed with all due diligence in constructing all three of the Towers. In or about August of 2008 SPI slowed or stopped construction plans on Towers 2 and 3, and slowed and limited construction work on Tower 4. It did so, SPI claims, as a result of Mr. Ward's report to the Governor on the severe extent of delays in the PA's infrastructure work. The PA points out, however, that this was shortly after the credit market for commercial mortgages had collapsed, and the PA argues that regardless of the status of the infrastructure, SPI did not have sufficient finances available for the "completion and operation" of the Towers. SPI responds that it does have sufficient funds to continue

construction of Tower 4 for over a year, and that, unlike the PA, it is not currently in default under any provision of the MDA. SPI's argument, however, downplays the significance of the requirements in the MDA that address not only the times for completing the Towers, but also the times for commencing work on each one. (See: MDA §§1.3(e)(i), 1.3(e)(ii), and 1.3(e)(iii)).

In any event, the PA's request for a direction to SPI that it immediately commence or resume work on the three towers is denied. As discussed below, all parties seem to recognize that there may be a need to alter the plans for those towers. Granting the relief requested by the PA at this time would therefore be unwise and counterproductive to the needs of the project.

### **SUPPLEMENTAL ORDER**

Realistically, present circumstances cry out for the parties to agree to modify the development plan so as to reschedule and re-sequence construction of the Towers, and to do so with a fair and realistic regard for the interests of both parties in light of the current situation with respect to infrastructure construction, economic conditions, and available financing. As presently designed, the Hub needs portions of T2 and T3 for lateral support, mechanical systems, ventilation, and access. A compensating redesign of the Hub would appear to entail substantial additional time and cost. Any new agreement and schedule must recognize the realities of these factors, including the inherent construction problems, the commercial mortgage market, the rental prospects

for prime office space in Lower Manhattan, and the reasonable needs and resources of SPI, and the PA, all to be done in light of the public's special interest in the completion and success of the Trade Center Redevelopment.

Looking at the situation under the MDA today,

1. MDA §1.3(e) requires SPI to proceed with construction of all three towers, subject to possible unavoidable delays resulting either from the current economic situation and unavailability of financing, or from other factors, but SPI has stopped construction progress on the Towers.
2. The PA is proceeding with construction of the infrastructure, but will not meet the MDS schedule in the MDA's Exhibit J, and may not even meet the revised schedule it has proposed in MS-48.
3. Both parties recognize the impracticality of the cross-default provisions in Article 8 of the MDA.
4. Construction of the Hub must begin in the near future, but whether its lateral support and other needs are to be provided by Towers 2 and 3, as contemplated by the MDA, or by a redesign process, is so far undetermined, perhaps pending the result of this arbitration.

Section 1.3(f)(v) of the MDA directs the parties to use good faith efforts immediately after turnover of the sites to agree to a "detailed construction coordination plan and development schedule". It provides that

"[i]f such coordinated plan cannot be arrived at within such sixty (60) day period, such matter shall be a Dispute and shall be resolved pursuant to Article 9 of the Agreement in order to arrive at a coordinated plan and development schedule" (emphasis added).

It is clear to the Panel not only that no such coordinated plan and development schedule was ever agreed to, but also that the PA's MS-48 is inadequate as a schedule for the remaining redevelopment of the WTC site. The parties' submissions in this arbitration have demonstrated attempts extending over many months to agree to "a detailed construction coordination plan and development schedule", but so far, those efforts have been unfruitful. The Panel hesitates, however, to resolve this Dispute without giving the parties one final chance to arrive at a solution mutually acceptable to them.

We therefore direct the parties to meet and agree if possible on a new schedule for the project, one that will provide a detailed schedule for completion of the PA's infrastructure elements and SPI's Towers. Since both parties recognize that immediate construction of all three of SPI's towers is unlikely, if not impossible under present conditions, the parties should first attempt to agree on what structures are to be constructed by SPI and when, and if there is to be a change in the plan that alters either party's rights and obligations as established in the MDA, then the new plan and schedule should so provide and should accommodate that change. The parties shall report back to the Panel in writing no later than 45 days from the date of this Decision as to the results of their efforts, i.e. either with a completed new agreed schedule, or a detailed status report as to the reasons such new schedule could not be agreed upon.

The Panel retains jurisdiction, as part of this arbitration, to review, approve, and implement the new plan and schedule to be so agreed upon between the parties, or alternatively to prescribe for the parties a coordinated plan and development schedule

for the completion of the project. In either event, the Panel shall direct the manner in which the schedule shall be monitored and administered.

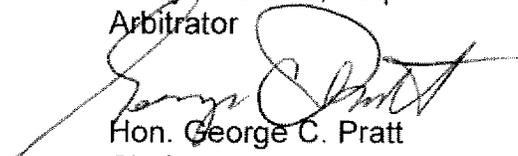
SO ORDERED.

Dated: January 26, 2010



Eugene McGovern  
Arbitrator

Harry P. Sacks, Esq.  
Arbitrator



Hon. George C. Pratt  
Chairman

for the completion of the project. In either event, the Panel shall direct the manner in which the schedule shall be monitored and administered.

SO ORDERED.

Dated: January 22, 2010

Eugene McGovern  
Arbitrator



Harry P. Sacks, Esq.  
Arbitrator

Hon. George C. Pratt  
Chairman

2 World Trade Center LLC  
3 World Trade Center LLC  
4 World Trade Center LLC  
c/o Silverstein Properties, Inc.  
7 World Trade Center  
New York, New York 10007

August 4, 2009

By Federal Express and Email

Hon. George C. Pratt  
Rye Point  
9339A South Lake Road  
Hammondsport, New York 14840

By Federal Express and Email

Mr. Gene McGovern  
3272 St. Charles Way  
Boca Raton, Florida 33434

By Federal Express and Hand

Harry P. Sacks, Esq.  
Holland & Knight LLP  
195 Broadway  
New York, New York 10007

By Federal Express and Hand

The Port Authority of New York  
and New Jersey  
225 Park Avenue South  
New York, New York 10003  
Attention: Director of Real Estate

Re: Arbitration Notice Pursuant to Article 9.2 of the Master Development Agreement Seeking Emergency Interim Relief to Remedy the Port Authority's Material Breach of the Master Development Agreement

Ladies and Gentlemen:

On behalf of 2, 3 and 4 World Trade Center LLC (the "Silverstein Lessees"), I am writing to provide notice of a Dispute (the "Arbitration Notice") and a request for emergency interim relief pursuant to Article 9.2 of the Master Development Agreement, as amended (the "MDA").

**The Nature of the Dispute**

On May 8, 2009, the Silverstein Lessees provided notice to the Port Authority that the Port Authority was in massive breach of its obligations under the MDA. Exhibit A. The

most significant breach is the Port Authority's total failure to satisfy its obligation to complete key elements of infrastructure on the site — infrastructure that is essential to support the three new office towers to be constructed by the Silverstein Lessees, as well as to support other uses at the site. The Port Authority agreed to complete all of this infrastructure by the end of 2012, well before each tower was originally required to be completed.

This promise was an essential element of the 2006 MDA deal in which Silverstein Properties gave up rights to two of its five towers and \$1.2 billion in insurance proceeds in exchange for the specific commitments by the Port Authority to deliver the sites in Construction-Ready Condition and build essential infrastructure. The parties understood that neither lenders nor tenants would or could commit to the towers unless they were confident that the infrastructure necessary to those buildings would be completed in advance of their opening and that the World Trade Center would be a functioning office district, not a half-built construction site.

When the Panel was first convened, the Port Authority had already failed to meet two of the initial critical milestones provided by the MDA: partial turnover of the site of Tower 2 and final turnover of the site of Tower 4 by June 30, 2008. At the first arbitration proceeding, the Port Authority claimed that it had delivered these sites in Construction-Ready Condition. The Panel rejected the Port Authority's claim. Now, more than seven months later, the Port Authority has only just delivered the Tower 3 site and still has not turned over the Tower 2 site; indeed, the Port Authority still has not finalized an access agreement with the MTA, a necessary predicate to site turnover.

The Port Authority also claimed in the first arbitration proceeding that under a new design approach it had identified, the excavation under the No. 1 subway box — the key to Greenwich Street, site utilities and other projects — would be completed within approximately

one year. Seven months later, the Port Authority has not yet even awarded the contract for the excavation and final underpinning under the No. 1 subway box.

But these delays pale in comparison to the delays to come, delays that the Port Authority acknowledges in “Master Schedule 47,” the latest “Master Schedule” that the Port Authority has provided to the Silverstein Lessees. Indeed, by the Port Authority’s admission, every critical component of the infrastructure will be substantially delayed:

- The WTC Transportation Hub will not be completed until the end of May 2014, thirty-five months after the promised completion date of June 2011.
- The Vehicle Security Center — which the Port Authority committed in the MDA to complete by the February 2011 — will not be finished until September 2012, nineteen months late.
- Greenwich Street — the front door to the Silverstein Lessees’ towers and the Memorial — and the other streets and sidewalks will not be completed until April 2016, forty months after the promised completion date of December 2012.

The Port Authority’s own schedules, however, have no credibility with any other stakeholder. A July 14, 2009, draft risk analysis prepared by the Lower Manhattan Construction Command Center (the “LMCCC”) — the government agency charged with supervising and coordinating construction activity in Lower Manhattan — preliminarily concludes that the Port Authority will not meet any aspect of its new, delayed schedule. The preliminary LMCCC report concludes that:

- There is only a 50/50 chance that the Port Authority will complete the WTC Transportation Hub by April 2018 — six full years after the Port Authority is ob-

ligated to do so under the MDA — and an 80% probability that the Port Authority will complete the WTC Transportation Hub by September 2018. Exhibit B at 11.

- There is only a 50/50 chance that the Port Authority will have the Vehicle Security Center operational by April 2014, three years late, and an 80% probability that the Port Authority will have the Vehicle Security Center operational by August 2014. Exhibit B at 15.
- The Port Authority will not complete Greenwich Street until November 2021, nearly nine years after the promised completion date of December 2012, with an 80% probability that it will be completed by July 2022. Exhibit B at 16, 21.

The proofs to be presented in the Silverstein Lessees' Determination will amply demonstrate what is readily apparent from the enclosed pictures of the East Bathtub taken the day before this Notice is being sent: almost eight years after 9/11, and after having collected over \$788 million in rent (before offset for liquidated damages and without giving consideration to prepaid rent of almost \$500 million) and \$1.2 billion in insurance proceeds from the Silverstein Lessees that could have been devoted to rebuilding, the Port Authority has precious little to show for its efforts.

At this stage, some 32 months after the MDA was signed, the Port Authority was supposed to have completed approximately 50% of the WTC Transportation Hub and Vehicle Security Center and to have completed the permanent underpinning of the No. 1 subway line. Instead, as the pictures show, the Port Authority is presiding over an empty hole. Design has not been completed and critical procurement packages have not yet been released, let alone awarded. The only tangible sign of progress in the East Bathtub is in the southeast corner of the site where Tower 4, a project being developed by the Silverstein Lessees, has almost reached sidewalk level

and is on the verge of passing Tower 1, the Freedom Tower, a building that began construction two years before Tower 4.

### **The Reasons for the Port Authority's Failures Are Well Documented**

In 2006, the LMCCC assembled a panel of world class construction and project management experts to perform an independent assessment of the status of the WTC project. In the resulting April 2007 report, the LMCCC identified two major failures of the Port Authority in its stewardship of the project: the total lack of coherent site governance and total failure to properly address issues concerning the constructability of the WTC Transportation Hub. Exhibit C.

With respect to governance, the LMCCC recommended that the Port Authority establish a “unified Construction Authority representing all of the stakeholders . . . in order to rapidly make decisions to progress the project, develop an appropriate mega program management approach using industry accepted tools and techniques, review procurement strategies, address project interface issues, and establish overall site priorities.” *Id.* at 8. The LMCCC pointedly stated: “None of the other recommendations [in this report] are considered as critically important as this one.” *Id.* With respect to constructability of the WTC Transportation Hub, the LMCCC identified “two major impediments to site construction: No access for the construction of the [WTC Transportation] Hub, and the constructability of the Calatrava designs with the MTA Subway 1 Box in place.” *Id.*

According to the LMCCC, if these two issues were not properly addressed, the project would continue to be plagued with delay. One year later, in April 2008, the LMCCC issued a follow-up report that, in a nutshell, concluded that all of the same problems remained. Exhibit D. The LMCCC's assessment of the Port Authority's then schedule showed that “overall

risked dates for the projects had continued to push out due to the continued risks to the project.”

*Id.* at 3.

Indeed, the Port Authority itself has acknowledged its failings. In a June 30, 2008, report to Governor Paterson, Chris Ward, the then newly-appointed Executive Director of the Port Authority, admitted:

1. That “the schedule and cost estimates of the rebuilding effort that have been communicated to the public are not realistic.” Exhibit E at 3.
2. That there were “at least 15 fundamental issues critical to the overall project [that] had not yet been resolved. . . .” As an example of this, Mr. Ward identified the Port Authority’s failure to complete the final design of the WTC Transportation Hub, a failure that made it “difficult both to responsibly predict a completion date and total cost of the Hub or, for that matter, to predict the completion dates and costs of all other projects that are linked to and dependent on the Hub.” *Id.* at 3-4.
3. That the Port Authority had failed to establish a “centralized decision making structure . . . with authority to make final decisions on matters which fundamentally drive schedule and cost” and that, as a result, there was “no effective, centralized command and control structure to efficiently manage the enormously complex construction logistics on the 16-acre WTC site.” *Id.* at 4.
4. That the schedule and cost estimates that had been provided to the public were established “before an adequate analysis was completed as to staging and logistics” and “did not reflect the unprecedented challenges associated with a project this

complex and a project involving so many different public and private stakeholders.” *Id.*

Moreover, the Port Authority’s own contemporaneous risk assessment, which the Port Authority provided to the Silverstein Lessees on June 19, 2008, showed that infrastructure necessary to the viability of the project was years behind schedule. Specifically, the risk assessment showed an 80% probability:

1. That the WTC Transportation Hub and Transit Entrances, which the Port Authority had committed in the MDA to complete by December 2011, would be complete by May 2015, forty-one months late.
2. That the Vehicle Security Center Ramp, which the Port Authority had promised in the MDA to complete by November 2010, would be complete by August 2013, thirty-three months late.
3. That the Vehicle Security Center with all screening equipment, which the Port Authority had committed in the MDA to complete by February 2011, would be complete by March 2014, thirty-seven months late.
4. That Greenwich Street, which the Port Authority had committed in the MDA to complete by the end of 2012, would be complete by June 2017, fifty-four months late.

Mr. Ward was blunt in a July 1, 2008, press release that the schedules that had been provided to the public and included in the MDA were “not realistic. We are not going to make any of them.” Mr. Ward continued: “Unfortunately, far too often those dates and budgets

have been driven by emotional and political needs instead of a clear-eyed sense of how you actually build such a vision.” Exhibit F at 2.

Mr. Ward subsequently claimed in an October 2, 2008, report that the fifteen “critical issues” he identified in June had all been solved and that the WTC Transportation Hub could be completed by the end of 2013, *i.e.*, two-and-a-half years later than promised under the MDA. Exhibit G at 5-6. Mr. Ward proclaimed that “[w]hile we still face many challenges ahead, we believe we have created a level of certainty and control over this project that has been missing since its inception. With the major issues resolved, this effort can finally be managed like a construction project[.]” *Id.* at 3. Mr. Ward went on to state that “we can now present with confidence schedules, and budgets with interim milestones so the public can track our progress and hold the Port Authority and our project partners accountable. . . . But what I can promise is that we will have full transparency. Now, when we miss a milestone, we will not only let the public know — we will tell them why we missed it and how we plan to fix the problem.” *Id.* at 5.

Unfortunately, the same “political needs” that drove the Port Authority to publish unrealistic and unsupported schedules in November 2006 when the MDA was executed (and the Port Authority’s rejected claim that it had completed the work necessary to turnover sites 2 and 4) shaped the new schedule that Mr. Ward announced on October 2, 2008. As noted, Mr. Ward’s June 30, 2008, report to Governor Paterson had criticized the Port Authority’s failure to complete the final design of the WTC Transportation Hub, which made it “difficult . . . to responsibly predict a completion date and total cost of the Hub.” Exhibit E at 4. But when Mr. Ward announced a 2013 completion date for the WTC Transportation Hub on October 2, the Port Authority *still* had not completed the final design for the Hub. Likewise, the Port Authority had not rec-

tified its failure to establish a centralized decision-making structure. And the Port Authority had disbanded the multi-stakeholder Steering Committee originally formed to help the resolve its chronic budget and schedule issues and to address the coordination problems designated in Mr. Ward's June 30 report.

Just two months after Mr. Ward announced the new Port Authority schedule, the Federal Transit Administration (the "FTA"), the U.S. Department of Transportation agency that is providing the principal funding for the WTC Transportation Hub, published a highly pessimistic assessment of the prospect that the Port Authority would meet even the new, delayed schedule. According to the FTA, there was only a 50/50 chance that the WTC Transportation Hub would be completed by November 2014 and an 80% probability that it would be completed by March 2015, nearly a year beyond the Port Authority's then-current estimate, and nearly three-and-a-half years beyond the date committed in the MDA. Exhibit H at 7.

Mr. Ward did announce at this time that the Port Authority had resolved two of the fifteen major issues — issues ten ("Contracting Strategy for the World Trade Center Hub") and eleven ("Procurement and Contracting Inefficiencies") — by electing to keep Phoenix as general contractor to manage the project. Exhibit G at 38-39. Despite repeated requests, and despite Mr. Ward's public commitment to "full transparency," the Silverstein Lessees' construction professionals were not given access to Phoenix. The Port Authority also refused to provide Phoenix's schedule and logistics plans, the basic documents necessary to determine whether the Port Authority really did have a reliable, professional-caliber plan to regain multiple years of delay. And then in late April 2009, Phoenix — which never was able to come to an agreement with the Port Authority on a guaranteed maximum price or schedule — was fired by the Port Authority. In announcing Phoenix's termination, the Port Authority offered a justification exactly

opposite from the rationale it put forth only six months before for its decision to stick with Phoenix.

The Port Authority also failed to make good on its promises of certainty and transparency. The design and procurement for the underpinning of the No. 1 subway line and for the WTC Transportation Hub still have not been finalized. Key procurement packages are being further pushed out. And the Port Authority has repeatedly refused to respond to the most basic questions from the Silverstein Lessees concerning the status of the project, repeatedly refusing to share schedules, logistics plans and other materials developed by Phoenix or, since Phoenix was fired, the Port Authority. The Port Authority has also refused to provide the Silverstein Lessees with copies of the WTC Transportation Hub risk analysis prepared by the Port Authority's consultant or the separate risk analyses prepared by the FTA. And the Port Authority has consistently refused to provide contractor schedules or coordinated logistics plans.

It is no surprise, therefore, that in the period since Mr. Ward delivered his October 2, 2008 report, the schedule has continued to slip. As noted above, the FTA concluded in its December 12, 2008 project assessment that the schedule contained in Mr. Ward's October 2, 2008 report has less than a 10% chance of being met. Exhibit H at 2. The LMCCC preliminarily has come to even more dire conclusions. Mayor Bloomberg has come to a similar conclusion, as evidenced by his public comment today: "I think a lot of the promises that the Port Authority made ten months ago — in ten months, the schedule has slipped years."

As will be detailed in the Silverstein Lessees' Determination, the core issues that have been identified by the LMCCC, the FTA and by the Port Authority itself still remain unresolved. The Port Authority has still failed to address the serious issues surrounding the constructability of the WTC Transportation Hub. The plans call for the construction of an extraordinarily

complicated structure supporting the No. 1 subway line for the 1,000-foot length of the site — a structure that must be built while the subway trains are still running and at tolerances as close as 1/16 of an inch. Paralyzed for years by these complexities, the Port Authority is attempting to shift the design, schedule and logistical risks to the new contractor for the underpinning, prompting one prospective bidder to write: “We have run a preliminary schedule and unfortunately we CANNOT meet [the milestone] dates, even working SEVEN DAYS per week 20 hours per day.” Exhibit I, Addendum No. 3, Question 12 (emphasis in original).

Moreover, notwithstanding the Silverstein Lessees’ complaints — and in the face of the Panel’s admonition that the parties must increase their level of cooperation — the Port Authority has refused to provide Silverstein with basic documents concerning the schedule, constructability and procurement of its revised design, despite repeated written requests. Since Mr. Ward’s October 2, 2008 report, the Steering Committee formed during the Summer of 2008 has held only one meeting — an “update” where the agenda excluded all of the difficult, unresolved issues. And critically, to this day, the Port Authority continues to lack effective project leadership with capable staff and has failed to institute the “centralized decision making structure” that Mr. Ward, the LMCCC and the FTA have all identified as the major impediment to the successful completion of the project.

The result is the situation summarized in the following table, with every major element of the infrastructure facing substantial delay:

	<b>MDA</b>	<b>Port Authority Master Schedule 47</b>	<b>LMCCC 80% Probability</b>
<b>WTC Transportation Hub</b>	June 2011	May 2014	September 2018
<b>Vehicle Security Center</b>	February 2011	September 2012	August 2014
<b>Streets and Sidewalks</b>	December 2012	April 2016	July 2022

### **The Application for Emergency Relief**

In short, the Silverstein Lessees will demonstrate not only that the Port Authority has admitted that it cannot meet the timetable provided by the MDA, but that the Port Authority cannot meet even its *revised* schedule. The Silverstein Lessees will also demonstrate that one of the reasons why the Port Authority has totally failed to meet the timetable provided in the MDA is that the Port Authority violated its obligation under Section 12.14(c) of the MDA to cooperate and coordinate its efforts with the Silverstein Lessees.

Efforts to resolve this dispute under the negotiation provisions of the MDA have failed. The Port Authority never responded to the Silverstein Lessees' May 8, 2009, notice of breach. And during the mandatory pre-arbitration negotiation meetings, the Port Authority refused to engage in any substantive discussion, acknowledging that the infrastructure would not be completed on the MDA schedule, but refusing to explain why this was not a material breach of that agreement.

The Silverstein Lessees are therefore commencing this arbitration in order to obtain three items of immediate relief:

- *First*, the schedule provided in the MDA for the completion of the towers must be realigned with the realities on the ground. It simply makes no sense for the

Silverstein Lessees to be required to complete Tower 4 by April 2013 and complete Towers 2 and 3 by June 2013 (before giving effect to the automatic extensions resulting from delayed site delivery and unavoidable delay) when the infrastructure necessary to make those buildings physically and economically viable will not be completed on anything approaching the schedule provided in the MDA. The Silverstein Lessees are entitled therefore to a declaration adjusting the timetable for their obligation to complete their buildings to reflect the delay and damage to the project caused by the Port Authority's failures. In order to mitigate its damages, the Silverstein Lessees have determined to adjust the pace of construction of the three towers to make sure that they do not wind up with office buildings that cannot even function, let alone attract tenants because they are sitting in the middle of an active construction site without the vital facilities necessary to make the World Trade Center site a world-class business center.

- *Second*, as a remedy for the Port Authority's breaches, the Silverstein Lessees should be awarded ongoing damages equal to the amount of ground rent they would otherwise have to pay until the project is completed and generating sufficient rents to pay ground rent. Since 9/11, the Silverstein Lessees have paid the Port Authority \$788 million in ground rent (before offset for liquidated damages and without giving consideration to almost \$500 million of prepaid rent) to preserve their right to rebuild the World Trade Center. With no chance that the Port Authority will deliver the needed infrastructure that it promised under the MDA on any reasonable timetable, let alone the timetable promised, the Silverstein Les-

sees cannot continue to bleed money needed to fund the construction of the towers.

- *Third*, the Silverstein Lessees are entitled to a declaration by the Panel that the Port Authority is in material breach of its obligations under the MDA. Hopefully, with this established by decision of the Panel, the parties will be able to negotiate a resolution of their remaining disputes and get the project back on track. Unfortunately, however, the Port Authority has heretofore refused to acknowledge that it is in breach of its obligations —presumably for PR reasons — a refusal that has served as an impediment to meaningful negotiations.

### **Further Proceedings**

Once this interim relief has been secured, the Silverstein Lessees hope that the Port Authority will engage in good faith negotiations to reach a settlement. However, absent a settlement, the Silverstein Lessees plan to commence a second arbitration designed to obtain the full relief that they need and are entitled to in order to assure the success of the project. As part of that second phase arbitration, the Silverstein Lessees will seek an award of monetary damages resulting from the Port Authority's breaches, including rescission damages totaling at least \$2.75 billion. This money will be dedicated to the project and will help assure its successful completion.

The Silverstein Lessees also intend to show in that second arbitration that the MDA itself was the product of the Port Authority's negligent misrepresentations and/or fraud. The facts that have come to light since the MDA was executed show that the same public relations considerations that prompted Mr. Ward to admit that "dates and budgets have been driven by emotional and political needs" tainted the negotiation of the MDA itself.

As discussed above, the LMCCC issued its first report to the Port Authority in April 2007. The second report was completed in April 2008. The Silverstein Lessees were not provided with a copy of either report until August 2008. The explanation for the Port Authority's decision to conceal the existence of the reports from the Silverstein Lessees is self-evident, for they show that prior to the time the MDA and the associated Master Development Schedule were executed, the Port Authority either knew or should have known that the Master Development Schedule could not — and would not — be met.

The April 2007 Report by the LMCCC states:

*In the early fall 2006, the LMCCC was made aware of concerns about WTC Site construction coordination challenges and the ability to meet key milestones. There were several issues initially raised. For example, the Port Authority (PA) was concerned that continuing issues with the deconstruction of 130 Liberty would potentially delay the construction of the [Vehicle Security Center] and in turn impact the fit out of the Towers on the site. Second, the Memorial Foundation was concerned that the failure to fully integrate their design and construction needs with the greater site was inhibiting their ability to meet their schedule completion date. Third, general concerns that dates established with both Goldman Sachs and Silverstein Properties Incorporated (SPI) were in jeopardy based on design progress and a lack of effective PA coordination. Exhibit C at 1; emphasis added.*

Thus, according to the April 2007 LMCCC Report, before the MDA was executed, *i.e.*, “in the early fall 2006,” the Port Authority was concerned that the schedule for the Vehicle Security Center was in jeopardy, and there were “general concerns” that the completion dates being negotiated in the MDA could not be met. None of these concerns were shared with the Silverstein Lessees. To the contrary, the Port Authority’s commitment in the MDA was that the schedule would be met.

The April 2007 LMCCC Report continues (at page 2) that when the LMCCC’s expert panel reviewed the project schedules that reflected the commitments to Goldman Sachs and the Silverstein Lessees, “it was clear that . . . the lack of a complete and updated Integrated Master Schedule (IMS) for the site was hindering the ability to identify and understand key challenges.” And the LMCCC was blunt in stating that the “key barrier” in developing an Integrated Master Schedule “was the outside influences on the project schedules,” *i.e.*, that because the schedules were “linked to both financial (GS & SPI) and political milestones,” the schedules “were not appropriate topics for public discussion by project personnel.”

The April 2007 LMCCC Report thus plainly indicates that the desire to publish schedules that would meet the public relations needs of the Port Authority superseded the principles of sound construction management and tainted the negotiation of the MDA. The Lower Manhattan Development Corporation (the “LMDC”) — the state agency charged with coordinating the rebuilding and revitalization of Lower Manhattan — likewise has been blunt that the schedule in the MDA was driven by political needs. According to the *Daily News*, in a December 2007 memo to then-Governor Spitzer, the LMDC wrote: “The original dates were never real and were driven and produced by PR people, not construction and engineering analysis.” Exhibit J at 1. Indeed, as noted, in light of Mr. Ward’s admission in his July 1, 2008 press release,

there can be no dispute that the Port Authority's whole approach to schedule commitments has been driven by political considerations, not by design and construction realities.

### **Procedure and Timetable**

As the Panel knows, the MDA provides for an extremely expedited procedure for the resolution of Disputes. Under that procedure the parties are obligated to deliver their respective Determinations within five business days of this Arbitration Notice, *i.e.*, on August 11, and hearings concerning the Dispute are to commence not more than three business days after the parties have submitted their Determinations, *i.e.*, on August 14.

The Silverstein Lessees, of course, are mindful that at the conclusion of the prior arbitration, this Panel asked that in the event of any future Disputes, the parties should meet and confer and attempt to agree upon a modified schedule that would allow for an orderly, but still accelerated, resolution. To that end, on July 27, counsel for the Silverstein Lessees and the Port Authority conferred in an effort to come to agreement on a modified schedule. Unfortunately, no agreement was reached because counsel for the Port Authority proposed a schedule that would have resulted in hearings commencing in November 2009, and a drawn-out procedure totally at odds with the basic framework laid out in the MDA.

Consistent with the need for expedition, the Silverstein Lessees have decided to proceed on a bifurcated basis so that the Panel would only be required to address at this time the relief that the Silverstein Lessees need immediately. The Silverstein Lessees are prepared to proceed with the arbitration that is the subject of this Notice on the basis they suggested to the Port Authority, with an exchange of Determinations fifteen business days after this notice, *i.e.*, on August 25. Hearings would commence approximately two weeks after the Determinations are submitted to the Panel so that the Panel would have adequate time to review them. In light of the

relative complexity of the issues raised by this demand, the Silverstein Lessees believe that it would be appropriate for this Panel to reserve twelve days for hearing. The time for a decision would, of course, be within the discretion of this Panel. The parties can revisit issues of timing and discovery in any second arbitration.

In connection with this application for immediate relief, however, the Silverstein Lessees are not prepared to and will not agree to the Port Authority's proposal — which provides for the Port Authority delivering its Determination three weeks after the Silverstein Lessees submit their Determination; pre-hearing discovery based on the Federal Rules of Civil Procedure; depositions of expert witnesses; and a hearing to commence in 90 to 120 days. The MDA provides for a streamlined procedure involving the simultaneous exchange of Determinations, no discovery, a prompt hearing and a prompt decision. The parties agreed to expedition in the MDA because both sides recognized at the time that the MDA was signed that delay was the enemy of the project.

If anything, the need for speedy action is greater now than it was when the MDA was signed. In June 2008, when the Port Authority first acknowledged to the Silverstein Lessees and then the public that the project was seriously behind schedule, the Port Authority undertook to renegotiate the MDA to redress the damage that the Port Authority's delay had caused. That effort failed after a 13-month process extended by repeated Port Authority delays. Absent relief abating ground rent and realigning the schedule, the passage of time will simply dissipate the pool of insurance proceeds available for rebuilding and bring closer the dates for completion of the three towers. Plainly, there is reason to believe that the Port Authority is simply using delay as a tactic to weaken the economic position Silverstein Lessees and thereby obtain unwarranted leverage in any future negotiation.

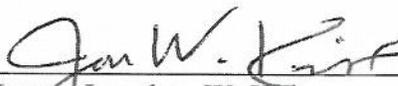
The Port Authority should not be allowed to complain that it would in any way be prejudiced by the schedule that the Silverstein Lessees have proposed for this arbitration. The Port Authority agreed to the MDA expedited procedures and has had ample notice of the substance of this Dispute. The Port Authority was given written notice describing its breaches on May 8, 2009, and was provided with a formal Notice of Dispute on July 8, 2009. The agency is fully aware of the delays that have plagued the project and of the LMCCC's criticisms of the Port Authority's stewardship. In short, the Port Authority has had more than sufficient notice of its breaches and ample opportunity to prepare for this arbitration proceeding.

The Silverstein Lessees, of course, welcome the Panel's intervention to assist the parties in coming to an agreement on a revised, but still expedited procedure for the resolution of this Dispute. But the schedule must recognize that the Silverstein Lessees need emergency relief: (a) to stop the bleeding of the rebuilding insurance fund by rent payments that should instead be going toward construction; and (b) declaring that the Port Authority is in material breach of the MDA, a finding that should serve as a wake-up call to the Port Authority that it is accountable to the Silverstein Lessees and to all stakeholders for the agency's consistent pattern of delay and mismanagement.

Sworn to this 4th day of August, 2009

2, 3 and 4 World Trade Center LLC

By:

  
Name: Jonathan W. Knipe  
Title: Vice President

cc: The Port Authority of New York  
and New Jersey  
225 Park Avenue South  
New York, New York 10003  
Attention: General Counsel

Shand Stephens, Esq.  
DLA Piper Rudnick