Donerail Corp. N.V. v 405 Park LLC

2011 NY Slip Op 33622(U)

September 23, 2011

Sup Ct, NY County

Docket Number: 602187/09

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 602108/2009
DONERAIL CORPORATION N.V.
VS.
405 PARK, LLC
SEQUENCE NUMBER : 005
RENEWAL

INDEX NO.
MOTION DATE 05/26/11
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/for

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | PAPERS NUMBERED 303-305, 321-326, 312-320, 328, 330, 331, 336

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☒ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 9/23/11 JUSTICE SHIRLEY WERNER KORNREICH J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

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DONERAIL CORPORATION N.V.,

Plaintiff, Index No. 602108/09

-against- **DECISION & ORDER**

405 PARK LLC,

Defendant,

----------X

405 PARK LLC,

Plaintiff, Index No. 602187/09

-against-

DONERAIL CORPORATION N.V. and
TWO RIVERWAY HOLDINGS, LLC,

Defendants.

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KORNREICH, SHIRLEY WERNER, J:

Motion Sequences 004 and 005 are consolidated for disposition.

These actions arise out of a purchase and sale agreement (the Agreement) concerning real property located at 405 Park Avenue, Manhattan (the Property), between Donerail Corporation N.V. (Donerail or Seller) and 405 Park LLC (405 Park or Purchaser). The sale was never consummated and both parties contend the cause of this failure was the other's breach of the Agreement. 405 Park's motion and Donerail's cross-motion for summary judgment were denied in their entirety by the court's decision of February 2, 2011 (Prior Decision). Both parties now move for leave to renew and leave to reargue the motions (Mot. Seq. 004). 405 Park also moves to compel certain discovery from non-party Tia Cottey

(Cottey), the attorney representing one of Donerail's lenders in connection with a defeasance transaction of a mortgage on the Property (the Existing Mortgage). (Mot. Seq. 005).

I. *Background*

The facts of this case are set forth in the Prior Decision with which the reader's familiarity is assumed. The abbreviations used here mirror those in the Prior Decision, unless otherwise indicated.

II. *Discussion*

"A motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and shall contain reasonable justification for the failure to present such facts on the prior motion." CPLR § 2221(e)(2)-(3). A motion to renew may not be brought "where a party proceeds on one legal theory and then moves for renewal on a different theory, merely because it was unsuccessful on the original application." *See Venuti v Novelli,* 179 AD2d 477, 478-9 (1st Dept 1992); *accord Albany Community Dev. Agency v Abdelgader,* 205 AD2d 905, 906 (3d Dept 1994); *see also Wilmington Trust Co. v Metropolitan Life Insur. Co.,* 2009 NY Slip Op 30258U (Sup Ct, NY Co, 2009) (key fact of renewal motion is that new facts must have been extant at time of original motion.) Were it otherwise, renewal motions could repeatedly occur and there would be no end to the litigation.

"A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision.'" [citations omitted] *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992); CPLR §

2221(d)(3). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." *Id.*

If a motion for leave to renew or leave to reargue is granted, "the court may adhere to the determination on the original motion or may alter the determination." CPLR § 2221(f).

A. 405 Park's Motion for Leave to Renew and Compel Discovery

405 Park seeks leave to renew based on what it claims is new evidence that Bryan Cave's[1] Escrow Instruction Letter and "cover email" to Fidelity contained conditions precedent to Donerail's entitlement to a discharge of the Existing Mortgage. *See* 405 Park Opposition MOL at 14. This alleged "new evidence" consists of the deposition testimony of Ms. Bellouny, Senior Vice President and Senior Underwriting Counsel for Fidelity, and Dawn Holland – the deal manager charged by Commercial Defeasance with overseeing the defeasance process. 405 Park claims the testimony of Bellouny and Holland shows Fidelity was not authorized to release the Satisfaction of Mortgage from escrow until the conditions contained in the Escrow Instruction Letter were met.

As discussed in the Prior Decision, the alleged "conditions" of the escrow letter are irrelevant to this controversy because they do not bear on whether Donerail offered to pay the Existing Mortgage. *See* Prior Decision at 21. Section 2.2 of the Agreement required Donerail to "pay, discharge, or remove of record" the Existing Mortgage, and the court has interpreted "pay" to mean satisfying the conditions ***that entitled*** Donerail to a discharge. *See* Prior Decision at 17. The conditions to Donerail's entitlement to a discharge are contained

[1] Bryan Cave represented the lender in the defeasance transaction of the Existing Mortgage.

exclusively in Donerail's Promissory Note to the lender. As a matter of simple contract law, the Lender's counsel, Bryan Cave could not unilaterally alter or add conditions to the Promissory Note through writing a letter to a third party – the escrow agent, Fidelity. The contents of Bryan Cave's Escrow Instruction Letter and "cover email" are, therefore, irrelevant to Donerail's entitlement to a discharge of the Existing Mortgage. Consequently, they are irrelevant to whether Donerail offered to pay the Existing Mortgage pursuant to Section 2.2 of the Agreement.

405 Park's motion to compel discovery from Cottey – the Bryan Cave lawyer representing the Lender in the defeasance transaction – is premised on the theory that Bryan Cave's Escrow Instruction Letter and "cover email" to Fidelity added "conditions precedent" to Donerail's entitlement to a discharge of the Mortgage, and, thus, its ability to pay it. (Mot. Seq. 004). As discussed, this theory lacks merit. Hence, 405 Park's motion to compel, in so far as it is based on this theory, is denied.

Holland's testimony is also insufficient to grant 405 Park's motion for leave to renew. That the Satisfaction of Mortgage would not be released from escrow until the day after the closing would not change the determination in the Prior Decision. As discussed, Section 2.2 did not require the Satisfaction of Mortgage to be released at the closing. It required that Donerail pay, discharge ***or*** remove of record the Existing Mortgage on or prior to closing. The court determined that Donerail would have paid the Existing Mortgage – and, thus, complied with Section 2.2 – if it paid the Existing Mortgage by satisfying the conditions *entitling* it to a discharge. The timing of the release of the Satisfaction of Mortgage, therefore, is irrelevant to whether Donerail offered to satisfy the conditions ***entitling it*** to a discharge

of the Existing Mortgage on the day of closing.

Finally, 405 Park claims that Karyn Fulton, counsel for Donerail, "admitted [during her deposition] that 405 Park's performance of its closing obligations were not concurrent with Donerail's performance under Section 2.2." *See* 405 Park Opposition MOL at 17. Even if the court credited 405 Park's interpretation of Ms. Fulton's testimony, the testimony is insufficient for granting the motion to renew. When the language of the contract is unambiguous, it is to be interpreted by the court; Fulton's alleged interpretation is not dispositive. *See West, Weir & Bartel, Inc. v Marty Carter Paint Co.*, 25 NY2d 535, 540 (1969). In sum, 405 Park has introduced no new evidence that would alter the court's prior determination. Accordingly, 405 Park's motion for leave to renew is denied. *See* CPLR § 2221(e)(2)-(3).

B. 405 Park's Motion for Leave to Reargue

With two exceptions, in its motion to reargue, 405 Park advances the same arguments it made in its original motion. The arguments were addressed in the Prior Decision and the analysis will not be repeated here. 405 Park's contentions regarding "mistakes" and "inconsistencies" in the Prior Decision result from a less than careful reading of the court's analysis.

405 Park, however, makes two ***new*** arguments in its motion to reargue. As an initial matter, the court notes that reargument "is not designed to afford the unsuccessful party successive opportunities . . . to present arguments different from those originally asserted." *See William P. Pahl*, 182 AD2d at 27.

1. Marketable Title

405 Park contends that, under Sections 4.2(a) and 1.2 of the Agreement, Donerail was required to tender at the closing both insurable and marketable title. Marketable title "is one which can be readily sold or mortgaged to a person of reasonable prudence, the test of the marketability of a title being whether there is an objection thereto such as would interfere with a sale or with the market value of the property." *Regan v Lanze*, 40 NY2d 475,481 (1976).

Section 4.2(a) of the Agreement provides that at the Closing, Donerail was to deliver: "bargain and sale deed without covenants against grantor's acts (the "Deed"), in recordable form conveying ***insurable title to the Land and Improvements, subject only to Permitted Exceptions***." [emphasis supplied] *See* Banyasz Aff., Exh. A. 405 Park interprets this language to impose two requirements on Donerail: (1) "to tender at the Closing a deed conveying title to the Property unencumbered by the Existing Mortgage; and (2) a title insurance policy insuring title free of all encumbrances other than Permitted Exceptions."[2] *See* 405 Park Opposition MOL at 3. According to 405 Park, the first requirement is tantamount to a requirement to deliver marketable title.

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[2] As the court explained in the Prior Decision, Donerail was not required to tender a title insurance policy at closing but insurable title subject only to the Permitted Exceptions. The relevant portion of the decision is cited below:

> 405 Park, however, further contends that even if Fidelity was "willing" to issue an insurance policy on the title without exception for the Existing Mortgage, the "insurable title" provision in Section 4.2(a) required "actual" issuance of the policy. *See* Purchaser Mem. at 26. That is not the law. If, on the day of the closing, Fidelity was willing to insure title unconditionally and without exception, other than the exceptions contemplated by the Agreement, Donerail complied with its obligation to deliver "insurable title," under Section 4.2(a). *See Stenda Realty*, at 997-99; *Laba*, at 307-08.

See Prior Decision at 15.

The Agreement, however, does not impose the first requirement on Donerail. 405 Park interprets the clause "subject only to Permitted Exceptions" in Section 4.2(a) to qualify ***both*** the "bargain and sale deed" and the "insurable title" phrases. This interpretation is mistaken. The phrase "Permitted Exceptions" refers to certain enumerated encumbrances on the title to the Property. *See* Banyasz Aff., Exh. § 2.1. The deed itself, by contrast, is a legal instrument – "***a writing*** signed by grantor, whereby title to realty is transferred from one to another." [emphasis supplied] *See* Black's Law Dictionary (5th ed.) ("Deed"). As such, the deed, that is the writing itself, cannot be subject to an encumbrance or mortgage and, therefore, not "subject only to the Permitted Exceptions" clause.

The "subject-to" phrase only qualifies "insurable title" in Section 4.2(a). So interpreted, Section 4.2(a) requires that the ***insurable title*** to be conveyed at closing, alone, be subject to Permitted Exceptions. This was the court's interpretation of Section 4.2(a) in the Prior Decision and remains its interpretation now.[3] In sum, Section 4.2(a) did not require Donerail to deliver marketable title to the Property "subject only to Permitted Exceptions." It required that Donerail deliver insurable title to the Property "subject only to Permitted Exceptions."

This case is distinguishable from *Hudson-Port* and *Laba* – the two cases that 405 Park cites in support of its argument. In both cases the contract at issue called for delivery of insurable title and marketable title. In *Laba*, the contract expressly called for "marketable

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[3] Even if Section 4.2 required that the bargain and sale deed not be subject to the Existing Mortgage– as discussed, an absurd requirement – the deed in this case satisfied the alleged "requirement" because it makes no mention of the Existing Mortgage.

title" in addition to "insurable title."[4] *See Laba v Carey*, 36 AD2d 823 (2d Dept 1971). In *Hudson-Port*, the contract provided that "[t]he deed shall be the usual Bargain & Sale * * * duly executed and acknowledged by the seller(s) * * * so as to convey to the purchaser(s) ***the fee simple of said premises, free of all encumbrances, except as herein stated."*** [emphasis supplied]. *Hudson-Port Ewen Assoc., L.P. v Chien Kuo*, 165 AD2d 301, 304 (3d Dept 1991). Here, the title provision in Section 4.2(a) does not require the bargain and sale deed to convey "the fee simple of said premises, free of all encumbrances, except as herein stated." It requires it to "convey[] insurable title to the Land and Improvements, subject only to Permitted Exceptions." The clauses are different. The *Hudson-Port* clause calls for delivery of ***marketable title*** subject to certain permitted exceptions. Section 4.2(a) calls for delivery of ***insurable title*** "subject only to Permitted Exceptions."

405 Park next argues that Section 1.2 of the Agreement required Donerail to tender "marketable title" at closing. 405 Park's counsel stated during oral argument that this is "a very important clause, respectfully, the decision missed." Transcript at 11:16-17. During oral argument on the motion to reargue, 405 Park also argued that the court's decision "gives no meaning to section 1.2." Transcript at 16:12-13.[5]

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[4] "The contract provided that the premises were sold subject to '4. Covenants, restrictions, utility agreement and easement of record, if any, now in force, provided same are not now violated" and '5. Any state of facts an accurate survey may show, ***provided same does not render title unmarketable.***' The contract also included a 'title insurance clause' which provides: 'The seller shall give and the purchaser shall accept ***a title such as reputable any title company [sic] will approve and insure***.'" [emphasis supplied]

[5] The court notes that 405 Park did not cite Section 1.2 in support of this position in its original motion papers ***or*** in the papers accompanying its motion to reargue. It only relied on Section 1.2 during the oral argument in its motion to reargue. In rendering the Prior Decision, the court interpreted the provisions in the agreement by reading the agreement in

Section 1.2 provides that "[t]he Property shall be conveyed subject only to the matters which are, or are deemed to be, Permitted Exceptions pursuant to Article 2 hereof (collectively the "Permitted Exceptions")." *See* Banyasz Aff., Exh. A. Article 2 which is titled "Condition of Property and Title" defines the Permitted Exceptions (Section 2.1) and imposes certain obligations regarding other encumbrances on the Seller, Donerail (Section 2.2). Specifically, Section 2.2 of Article 2 provides that "***[n]otwithstanding anything to the contrary contained herein***, Seller shall, on or prior to the Closing, ***pay***, discharge or remove of record . . . all mortgages . . . (other than the Permitted Exceptions) . . . " [emphasis supplied]

405 Park interprets Section 1.2 to require that Donerail discharge or remove of record the Existing Mortgage on or prior to closing. "[A] court should not 'adopt an interpretation' which will operate to leave a 'provision of a contract without force and effect.'" *See Laba v Carey*, 29 NY2d 302, 308 (1971). 405 Park's interpretation – if adopted– would leave the option to pay in Section 2.2 with no force and effect. It, thus, must be rejected.

In sum, 405 Park has neither made an argument nor introduced new evidence that would change the court's Prior Decision.

C. Donerail's Motion for Leave to Reargue

Donerail's motion for leave to reargue is denied. The motion is based on what Donerail contends was an admission by Mr. Meister, counsel for 405 Park, during oral argument on October 14, 2010. According to Donerail, Mr. Meister admitted during oral argument that at the closing, he was offered title insurance without exception for the Existing

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its entirety, including Section 1.2. For the reasons stated below, Section 1.2 does not change the court's prior determination.

Mortgage. The court finds Mr. Meister's alleged admission to be at best ambiguous, and, therefore, an improper basis for leave to reargue a summary finding. While Donerail's interpretation of Mr. Meister's statements is a plausible one, Mr. Meister's statement could also be interpreted as merely stating that Fidelity made him an offer *conditioned* on his waiver of other rights under the Agreement. In any event, Mr. Meister's alleged admission would merely duplicate in content Ms. Bellouny's testimony that Fidelity was willing to issue title insurance without exception for the Existing Mortgage rendering this issue moot. *See* Sec. D, *infra*.

D. Donerail's Motion for Leave to Renew

In the Prior Decision, the court denied Donerail's cross-motion for summary judgment, in part, because of an outstanding material issue of fact as to whether Fidelity was willing to issue, on the day of the closing, title insurance on the Property without exception for the Existing Mortgage as required by Section 4.2(a) of the Agreement. Donerail seeks leave to renew its cross-motion to introduce deposition testimony that did not exists at the time of the cross-motion to the effect that Fidelity was willing to issue title insurance on the Property meeting the contractual requirements. Specifically, Kristin Bellouny (Bellouny), was responsible for "decid[ing] whether any exceptions in the title report should be omitted." *See* Heck Aff. Exh. B. at 59-60. During her deposition, she was asked "if the purchase and sale . . . had closed on Monday, and the purchase price had been paid . . . would Fidelity have issued title insurance without exception for the [E]xisting [M]ortgage?" *Id.* at 63-64. Bellouny answered "yes." *Id.*

This testimony demonstrates that Donerail delivered insurable title on the day of

closing as required by Section 4.2(a) of the Agreement. *See e.g., Conklin v Davi*, 76 NJ 468 601-02, 388 A2d 598 [1978] (condition of insurable title satisfied where vice-president of title insurance company testified that company would insure title, even though title was imperfect of record). Donerail's motion for leave to renew based on Ms. Bellouny's testimony – which introduces new facts that were not available at the time of Donerail's cross-motion for summary judgement – is, therefore, granted. *See Luna v Port Authority of New York and New Jersey*, 21 AD3d 324, 325-26 (1stt Dept 2005) (reversing trial court's denial of motion to renew based on non-party's deposition testimony obtained after summary judgment motion return date) citing *Nelson v RPH Const. Corp.*, 278 AD2d 465 (2d Dept 2000) (trial court "erred in denying . . . motion . . . for leave to renew [where] . . . deposition testimony . . . was previously unavailable to the appellant as [plaintiff's] deposition did not take place until after the appellant filed its original motion. Accordingly, it constituted ***new facts*** upon which the appellant properly sought renewal"). [emphasis supplied].

In opposition, 405 argues that Ms. Bellouny's testimony should not change the court's prior determination denying Donerail's motion for summary judgment because Donerail still has not shown that it offered to pay the Existing Mortgage "under circumstances that would lead a reasonable person in the position of [405 Park] to believe that performance will be forthcoming." *See* Prior Decision at 11 citing Williston on Contracts § 43.31 (discussing the requirement); *see also* Transcript at 19:7-20:6 (arguing this position). During oral argument on the motion, Mr. Meister, counsel for 405 Park both on these motions and during closing, argued in support of this position as follows:

> I, as 405's attorney, asked if there is a satisfaction of mortgage. I am told there is. I asked if I can see a copy of the satisfaction of mortgage. I am

> told it's not in the closing room. I asked if there is an escrow agreement governing the satisfaction of mortgage. I am told there is. I ask to see that. I am told that it's not in the closing room. I ask to make a call to someone who can enlighten me. I am told by the title closer present to call someone named Kristin Bellouny. I call Miss Bellouny. She confirms to me that she has a satisfaction and that it's governed by an escrow agreement. I ask her to fax copies at the closing room. She refuses to do so. I say, why will you not do so? She said because Donerail has told me I may not do so. I asked Donerail's attorney's, please tell Kristin Bellouny of Fidelity to send me these documents. They said we will not do that. Your Honor, that made me ***impossibly insecure*** on Fidelity's ability to carry out its obligations under the policy. My head was worrying what would be in that escrow agreement or what did that satisfaction say that they were so anxious to conceal from me. I was being asked to tell a client to pass $140 million to take a policy to leave a $25 million mortgage . . . that wouldn't be cleared off that day, based on documents that wouldn't be shown to me. [emphasis supplied]
>
> *See* Transcript at 19:7-20:6.

405 Park's alleged insecurity at closing was at best unreasonable and perhaps pretextual. As discussed in the Prior Decision, Donerail's counsel at closing, Thomas B. Kinzler (Kinzler) and Karyn Fulton (Fulton), offered that 405 Park hold back **twice the amount of the Existing Mortgage**, approximately $50 million, as guaranty that the Existing Mortgage would be paid through payment of the Defeasance Securities:

> **Kinzler**: We are prepared to hand the title free and clear. You tell me you [Purchaser] are prepared to fund, which quite frankly, I will accept at face value for the moment. So why don't we just get in line with our respective financial banks and fund. Fulton Aff. Exh. N at 65:19-24.
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> * * * *
>
> **Kinzler**: We are prepared to pay off that mortgage [the Existing Mortgage]. We are prepared to get the satisfaction today. Fulton Aff. Exh. N at 74:10-12.
>
> * * * *
>
> **Kinzler**: We are willing to do it [pay off the Existing Mortgage] simultaneously [with Purchaser paying the balance of the purchase price]. Fulton Aff. Exh. N at 76:19.
>
> * * * *
>
> **Kinzler**: I am telling you, you want to hold back the amount of the mortgage

[the Existing Mortgage], hold back. Fulton Aff. Exh. N at 77:2-4.

* * * *

Fulton: Hold ***back twice the amount of the mortgage*** [the Existing Mortgage]. [emphasis supplied] Fulton Aff. Exh. N at 77:5-6.

Mr. Meister rejected these offers, responding that while "you [Donerail] are saying you are going to pay off the mortgage, you are not. And you can't. And I am not going to give you 130 million dollars." Fulton Aff. Exh. N at 75:1-4. Mr. Meister later explained his position by adding: "How do I know that the mortgage is repayable? Quite frankly we are not willing to put up money for you [to] walk out [of] the room and you not fund it." Fulton Aff. Exh. N at 75:8-12.

The court has already determined that Donerail was not required to record the Satisfaction of Mortgage on the day of closing. As to payment of the Existing Mortgage, the court determined that the Existing Mortgage was payable and that by offering to pay for the Defeasance Securities Donerail offered to pay the Existing Mortgage. *See* Prior Decision at 18. The cited portions of the transcript conclusively show that Donerail's counsel at closing repeatedly offered to pay for the Defeasance Securities and, by extension, the Existing Mortgage. These repeated offers to pay the Existing Mortgage with Donerail's own funds, coupled with the additional offer that 405 Park hold back twice the amount of the Existing Mortgage as guaranty of payment, conclusively establish that Donerail's offer to pay the Existing Mortgage was made under circumstances "that would lead a reasonable person in the position of [405 Park] to believe that performance will be forthcoming."

The court, also, has considered 405 Park's other arguments in opposition to Donerail's motion to renew and its cross-motion for summary judgment and finds them unavailing. Therefore, Donerail's motion to renew is granted, and upon renewal Donerail's cross-motion for summary judgment is granted as to the first cause of action for breach of contract seeking

"Pre-Effective Date Interest" under Section 2(d) of the Amendment to the Agreement and dismissing 405 Park's complaint. Accordingly, it is

ORDERED that 405 Park's motion for leave to reargue and renew is denied; and it is further

ORDERED that Donerail's motions for leave to reargue is denied; and it is further

ORDERED that Donerail's motion for leave to renew is granted and upon renewal, the court grants Donerail's cross-motion for summary judgment dismissing 405 Park's complaint is dismissed with prejudice; and it is further

ORDERED that Donerail's cross-motion for summary judgment on its first cause of action for breach of contract seeking "Pre-Effective Date Interest" under Section 2(d) of the Amendment to the Agreement is granted and the issue of the amount of "Pre-Effective Date Interest" is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for Donerail shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed information sheet upon the Special Referee Clerk in the Motion Support Office, who is directed to place this matter on the calendar of the Special Referee's Part and notify the parties of that date.

Dated: September23, 2011

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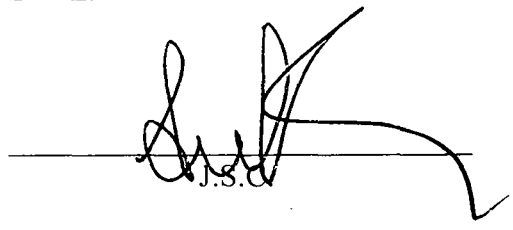

J.S.C.