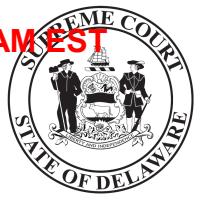

IN THE SUPREME COURT OF THE STATE OF DELAWARE

VIACOM INTERNATIONAL INC., Plaintiff and Counter-Defendant Below, Appellant, v. WALTER A. WINSHALL, in his capacity as the Stockholders Representative, Defendant and Counter-Plaintiff Below, Appellee.	No. 513, 2012 On appeal from the Court of Chancery of the State of Delaware C.A. No. 7149-CS

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I. Preliminary Statement

The answering brief from Winshall is most instructive for what it does *not* say and does *not* dispute:

1. It seeks to avoid vacatur under Section 10(a)(3) of the FAA, but does not dispute that the evidence the Resolution Accountants refused to hear -- the Inventory Write-Down -- was "pertinent and material" to resolving the single biggest issue, the unsold inventory. Winshall asserts instead that the evidence was "admitted," a meaningless non-sequitur given that none of the evidence was considered. He also argues that 10(a)(3) is limited to mere "procedural irregularities," but the law holds that vacatur is appropriate to ensure "fundamental fairness" when a party has been denied the opportunity to present its case.

2. It denies that Winshall's Summary of Issues raised the "matching" method of accounting -- and thereby put the Inventory Write-Down at issue -- but does not dispute that Winshall advocated that method and persuaded the Resolution Accountants to adopt it. Winshall argues instead that Viacom had no right to rebut or correct his matching arguments because he did not use the word "matching" in the Summary of Issues. But Winshall undeniably used the concept of matching. Winshall's argument is akin to describing a shape as having four equal sides and four right angles, while denying that he is talking about a "square" because he did not use the word "square."

3. It seeks affirmance on the ground that the Resolution Accountants purportedly determined that the Inventory Write-Down was not an arbitrable issue, but it does not quote what the Resolution Accountants actually held. That is because, in language conspicuously omitted by Winshall, the Resolution Accountants stated clearly that they "are prepared" to make a determination of arbitrability if asked, and thus had not done so already.

4. It seeks a ruling that the arbitrability of the Inventory Write-Down was a decision for the Resolution Accountants, not the Court, but it does not cite any provision in the Merger Agreement in which Viacom agreed to submit questions of arbitrability to the limited-purpose accountants. Winshall tries to distinguish the cases holding that arbitrability is a question for the Court, but as the Court of Chancery already "confess[ed]," those cases support Viacom's arguments and cannot be distinguished. Winshall thus resorts to claiming that Viacom "waived" its arbitrability arguments.

That is what this appeal comes down to -- fundamental fairness versus procedural pettiness. No one denies that the central Earn-Out Disagreement was how to account for the cost of the unsold inventory. Based on its reading of the

Merger Agreement, Viacom delivered an Earn-Out calculation that deducted the entire variable cost of manufacturing the unsold goods, rather than writing down their lost value. Viacom does not contest that. But when Winshall commenced this dispute and disagreed with Viacom's calculation -- based on what he called the "fundamental accounting principle of matching" -- nothing in the parties' agreement prevented Viacom from arguing for the proper application of Winshall's proposed accounting method. This was not a baseball arbitration.

Winshall does not dispute that the Inventory Write-Down is an appropriate calculation under the "matching" method he urged. Nor does he dispute that had the Inventory Write-Down been considered and accepted by the Resolution Accountants, their recalculation of the Earn-Out would have been reduced by $191 million.

The Resolution Accountants' failure to hear that highly pertinent and material evidence was not justified and, accordingly, the Court of Chancery committed legal error in not vacating the determination of the 2008 Earn-Out pursuant to Section 10(a)(3) of the FAA.

II. Argument

A. The Resolution Accountants' Refusal to Hear Evidence About the Inventory Write-Down is Grounds for Vacating the Award Under the FAA

Winshall does not dispute that, as shown in our opening brief ("Opening Br." at 14-16), a court may vacate an arbitration award under Section 10(a)(3) of the Federal Arbitration Act where the arbitrator "refus[es] to hear evidence pertinent and material to the controversy." 9 U.S.C. § 10(a)(3). Nor does he dispute that the evidence about the Inventory Write-Down was "pertinent and material to the controversy." As the parties agreed, and the Resolution Accountants and the Court of Chancery acknowledged, the proper treatment of unsold inventory was by far the single largest item in dispute. A559; Opening Br. Ex. A at 14.

Winshall responds that Section 10(a)(3) does not apply here because "all of Viacom's evidence bearing on [the Inventory Write-Down] was *admitted*." (Appellee's Br. at 2 (emphasis added).) But the issue under the FAA is not whether the evidence was "admitted" -- whatever that means in an accounting proceeding without any rules of evidence. The issue is that the Resolution Accountants "refus[ed] to hear" it.

There is no dispute about that. The Resolution Accountants said so themselves: they did not and would not consider the Inventory Write-Down absent an agreement or court order. A705-06. Such an undeniable refusal to hear critical evidence warrants vacatur under Section 10(a)(3), whether or not the evidence was "admitted." *Gulf Coast Indus. Workers Union* v. *Exxon Co., USA*, 70 F.3d 847, 850 (5th Cir. 1995) (affirming vacatur where arbitrator allowed employer to present evidence of a drug test but then refused to consider it); *Hoteles Condado Beach, La Concha & Convention Ctr.* v. *Union de Tronquistas Local 901*, 763 F.2d 34, 40 (1st Cir. 1985) (affirming vacatur of an arbitration award where the arbitrator accepted a transcript into evidence but "refused to give [it] any weight").

Winshall's argument that an arbitrator's refusal to hear this pertinent and material evidence is entitled to broad deference is contrary to controlling case law. Courts consistently have held that an arbitration award may be overturned under Section 10(a)(3) where the arbitrator's refusal to hear such evidence renders the proceedings fundamentally unfair. (*See* Opening Br. at 14-16 & nn. 6-7.) Winshall's assertion that Section 10(a)(3) does not apply whenever "arbitrators rule that particular issues are irrelevant under their view of the case, or subject to a procedural defense" (Appellee's Br. at 15) ignores these holdings. The

cases Winshall cites hold only that on the facts of those cases, the exclusion of peripheral evidence did not render the proceedings unfair.[1]

Winshall also argues that 10(a)(3) applies only to "procedural irregularities" such as "evidentiary ruling[s]." (Appellee's Br. at 13-14.) He cites no cases so holding, and we are not aware of any. The fact that some 10(a)(3) cases happen to involve such "irregularities" does not mean that the law is confined to those situations. Vacatur under 10(a)(3) is proper whenever a party is deprived of "the chance to present its case in full." *See Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 506* v. *E.D. Clapp Corp.*, 551 F. Supp. 570, 577-78 (N.D.N.Y. 1982) (vacating arbitration award where arbitration suffered not from an incorrect evidentiary ruling, but rather had "ended without both sides being allowed to fully present all of their evidence"). Winshall's artificially narrow construction of 10(a)(3) is inconsistent with its central purpose of protecting the "fundamental fairness" of the arbitral process. *See Tempo Shain Corp.* v. *Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997) (emphasizing that fundamental fairness is the key issue).

Finally, Winshall argues that, even if the proceeding was fundamentally unfair to Viacom, it was Viacom's fault. He maintains that Viacom did not address the Inventory Write-Down in the Earn-Out Statement or in its opening submission, and that Viacom urged the Resolution Accountants not to consider new disagreements that Winshall had raised. (Appellee's Br. at 15.)

Winshall cites no authority for excusing the Resolution Accountants' refusal to hear evidence on such grounds. Moreover, the grounds he advances provide no basis for blaming Viacom. Viacom's Earn-Out Statement properly set forth, as required by the Merger Agreement, its "calculation of the 2008 Earn-Out Payment Amount, together with information necessary to calculate [that

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[1] *See Century Indem. Co.* v. *Certain Underwriters at Lloyd's, London*, 584 F.3d 513, 559 (3d Cir. 2009) (declining to vacate arbitration award based on arbitrators' decision to exclude extrinsic evidence about meaning of contract, where arbitrators held that contract was unambiguous and evidence was "of little or no probative value"); *Newark Stereotypers' Union No. 18* v. *Newark Morning Ledger Co.*, 397 F.2d 594, 599-600 (3d Cir. 1968) (declining to vacate arbitration award where exclusion of evidence did "not affect the fairness of the proceeding as a whole"); *Grynberg* v. *BP Exploration Operating Co.*, 938 N.Y.S.2d 439, 440 (N.Y. App. Div. 2012) (vacating and remanding to consider material issue that arbitrator improperly failed to address, while rejecting argument that arbitrator was required to hear expert evidence on the ground that arbitrator's findings of fact, which were not challenged, "rendered such evidence moot").

amount]." A17. For that calculation, the variable costs of manufacturing the unsold inventory were treated as Direct Variable Costs and deducted from Net Revenue. A122.

Winshall has cited no provision of the Merger Agreement that required Viacom to include alternative calculations in anticipation of disagreements and accounting theories Winshall might subsequently raise in his Summary of Issues. There is no such provision. As for the unsold inventory specifically, it would have been flagrant double-counting for Viacom to have calculated the Earn-Out by deducting the *entire* variable manufacturing cost of the year-end inventory (thereby in effect treating the inventory value as zero) and then taking a *further* deduction by writing down the unrealizable value of the same inventory.

With respect to Viacom's submission to the Resolution Accountants, Winshall's claim that he was "unable to respond" to the Inventory Write-Down is just false. (Appellee's Br. at 16.) H*e did* respond. And on the merits. His reply submission directly addressed the Inventory Write-Down, and lodged no procedural objections, no grievance that the issue was outside the scope of the Summary of Issues, and no complaint that Viacom was "sandbagging" him. *See* A436-37; Appellee's Br. at 16. That is not because Winshall felt inhibited from complaining. In the same reply submission in which he debated the Inventory Write-Down on the merits, he protested that *other* items addressed in Viacom's opening submission -- which he called "Viacom's new deductions" -- were outside the Summary of Issues and not arbitrable. A423-24. Winshall did not include the Inventory Write-Down among those objectionable "new deductions."

Last, Winshall complains that Viacom acted unfairly by arguing that the Resolution Accountants should not decide Winshall's new issues while, at the same time, arguing that they should decide the Inventory Write-Down. Viacom's position was not, however, unfair or inconsistent. Viacom argued that the Inventory Write-Down was raised by Winshall's Summary of Issues, whereas Winshall himself conceded that the new issues he tried to inject were *not* raised by the Summary of Issues. A897. This was not a case of Viacom trying to have it both ways.

The Resolution Accountants' refusal to consider evidence of the Inventory Write-Down resulted in a fundamentally unfair process. Therefore, their determination of the 2008 Earn-Out should be vacated under Section 10(a)(3) of the FAA.

B. The Inventory Write-Down Was an Arbitrable Earn-Out Disagreement Under the Merger Agreement

The arbitrability of the Inventory Write-Down turns on one question -- a question that the Court of Chancery did not address and that Winshall cannot answer convincingly. The question is this: Did Winshall's "Summary of Issues" -- the document by which Winshall commenced this dispute and set forth the "Earn-Out Disagreements" -- put at issue the appropriate method for treating the cost of unsold inventory?

We demonstrated that the answer is yes, and that the Court committed error in failing to even consider, let alone answer, that decisive question. (Opening Br. at 27-34.) Winshall's answer to that question is contradicted by his own statements and unsupported by the terms of the Merger Agreement.

1. The Summary of Issues Put the Inventory Write-Down in Dispute

In his Summary of Issues, Winshall disputed Viacom's inclusion of the cost of unsold goods, pleading as one of the Earn-Out Disagreements that the Earn-Out calculation "should not include the year-end inventory." A111. The Summary of Issues went further, advocating that this disagreement should be resolved by applying what Winshall later called the "fundamental accounting principle of *matching*." A259-260 (emphasis in original).

It is under that accounting principle -- the principle Winshall himself successfully urged the Resolution Accountants to apply -- that the cost of writing-down the unrealizable value of unsold inventory must be deducted in calculating profit. (Opening Br. at 29-30.) The Court of Chancery did not find otherwise. And Winshall does not dispute it.

Nevertheless, Winshall responds by (1) denying that his Summary of Issues raised "matching," or any other accounting method, for resolving the unsold inventory disagreement; and (2) contending that the absence of the Inventory Write-Down in Viacom's Earn-Out Statement prohibited Viacom from presenting any evidence regarding the proper application of the matching principle.

Winshall asserts that it is "utterly false" to say that his Summary of Issues raised the "matching principle." (Appellee's Br. at 31.) The proof of that, he argues, is that the phrases "matching" and "GAAP" do not appear in the Summary of Issues. (*Id.*) This argument is worth pausing on for two reasons: First, Winshall effectively concedes that if the Summary of Issues *had* raised matching as the approach for resolving the unsold inventory dispute (as we main-

tain it did), then the Inventory Write-Down *would* have been arbitrable. Second, Winshall's argument is disingenuous.

Winshall may not have included the word "matching" in the Summary of Issues, but he certainly included the concept, which he himself described as "matching" in his submissions to the Resolution Accountants. A259-60. Here is what Winshall stated in the Summary of Issues in disagreeing with Viacom's treatment of the unsold inventory: "in order to be deductible . . . the Direct Variable Costs ***must relate to the same products that generated the Net Revenue***." A112 (emphasis added). *That* is matching. How can the Court be sure? Because Winshall said so. Here is how Winshall described that same accounting concept in his submission to the Resolution Accountants: the definition of Product Gross Profit "applies the fundamental accounting principle of matching: ***expenses are matched to the sales generating revenues*** during a particular period." A259-60 (emphasis added).

So, according to Winshall himself, the accounting approach he raised in the Summary of Issues *was* the "fundamental accounting principle of matching." That Winshall did not use the word "matching" in the Summary of Issues does not mean that he did not put it at issue.

Winshall's submissions to the Resolution Accountants leave no doubt that *he* was the one to raise matching as the way to resolve the unsold inventory disagreement. For Winshall, matching was not merely required by the Merger Agreement. It was essential for an accurate recalculation of the 2008 Earn-Out: "Without consistent application of the matching principle, profits for a specific time period cannot be measured accurately." A261.

Winshall made the same argument over and over again:

- "Under the language of the [Merger] Agreement, Direct Variable Costs ***must be matched*** to Net Revenues." A259 (emphasis added).

- "[T]here is nothing 'imaginary' about ***matching*** revenues and expenses. To the contrary, the ***matching principle*** is one of the fundamental concepts that underlies the accrual method of accounting and is necessary to make meaningful statements about results for specific time periods on a consistent basis." A260-61 (emphasis added).

- Viacom is wrong in arguing "that the parties to the Agreement rejected ***the familiar matching principle*** when they defined 'Direct Variable Costs' as costs 'which vary based upon the number of units

manufactured or sold.'" A261 (emphasis added and citations omitted).

- "The Agreement's 'Illustrative Example' confirms that Direct Variable Costs are ***matched*** to net revenues." A262 (emphasis added).

- The illustrative example of an Earn-Out Calculation in Exhibit F to the Merger Agreement "embodies the ***matching principle***. . . . [C]osts are matched to revenues." A264 (emphasis added).

- "[T]he Merger Agreement clearly provides that Direct Variable Costs must be ***matched*** to Net Revenues, and therefore the costs of unsold goods in ending inventory are not included in Product Gross Profit for that Fiscal Year." A425 (emphasis in original).

Winshall asks the Court to disregard all of these statements because the submissions "are not the controlling documents." (Appellee's Br. at 31.) What he means is that only the Summary of Issues matters in identifying the arbitrable issues. Viacom agrees, and Winshall's submissions reflect his understanding of what issues were raised by the Summary of Issues. Put another way, if the Summary of Issues had not raised the matching principle, then Winshall could not have advocated it. But Winshall *did* advocate it for the simple reason that the matching principle *was* raised in the Summary of Issues.

Winshall also argues that the disagreements he raised in the Summary of Issues were "based strictly on the language of the contract, not accounting principles." (*Id.* at 32.) But as the above excerpts show, Winshall's argument to the Resolution Accountants was that the language of the contract required them to apply certain "accounting principles" -- namely, matching. In his words, "the Merger Agreement clearly provides that Direct Variable Costs must be *matched* to Net Revenues." A425 (emphasis in original).

Winshall not only argued that matching was required by the contract; he prevailed on that issue. Although they refused to consider Viacom's evidence on matching, the Resolution Accountants decided the unsold inventory disagreement in Winshall's favor by finding that "the matching of revenues and expenses" is "a well-established, basic business concept which has been codified as part of GAAP." A586.[2]

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[2] Winshall argues that he did not put at issue "the *factual* question" of the value of the 2008 unsold inventory, and asserts that "[t]ellingly," the Resolution Accountants were able to resolve Winshall's objection without deciding any such

Finally, Winshall points out that the cost of the Inventory Write-Down is different from the deduction for the cost of manufacturing the unsold inventory that appeared in Viacom's Earn-Out Statement. (Appellee's Br. at 32-33.) That is true, but unresponsive to the issue on appeal. Viacom does not deny that deducting the cost of writing-down the unsold inventory is different from deducting the cost of manufacturing the unsold inventory. Nor does Viacom deny that it was the latter deduction that appeared in Viacom's Earn-Out Statement for 2008. The point, however, is that when Winshall commenced this dispute and invoked "matching" as the contractually-mandated method for resolving it, Viacom was entitled to respond with evidence showing how that method should be applied so that, in Winshall's own words, profits can be "measured accurately." A261.

Since the Resolution Accountants applied that method, but then refused to consider all the evidence properly before them, they did not accurately measure the profit of Harmonix and, as a result, overstated the Earn-Out for 2008 by nearly $200 million.[3] That outcome is fundamentally unfair.

2. Viacom's Earn-Out Statement Did Not Bar Viacom from Submitting Evidence in Response to Winshall's Disagreements

Winshall argues that the Merger Agreement "does not permit Viacom to claim deductions not found in the Earn-Out Statement." (Appellee's Br. at 29.)

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disputed fact issue. (Appellee's Br. at 32 (emphasis in original).) That mischaracterizes what the Resolution Accountants did, which was simply to refuse to consider Viacom's evidence about the Inventory Write-Down and hence not to write-down the inventory by any amount. That the Resolution Accountants adopted Winshall's position without considering Viacom's evidence does not mean there was no factual dispute about that issue.

[3] Winshall suggests that Viacom could have included in its Earn-Out Statement deductions for *both* the manufacturing cost of the unsold inventory and the write-down for the unsold inventory. (Appellee's Br. at 33.) He points to a preliminary calculation of the 2008 Earn-Out which listed both deductions. B11. But what he fails to explain is that the manufacturing costs ("peripheral costs") in that calculation were only for the goods that sold -- *i.e., not* for the unsold inventory. Conversely, the write-down in that calculation was only for the unsold goods. Either the manufacturing cost of unsold inventory can be deducted from Gross Profit (as Viacom did in its Earn-Out Statement), or the unsold inventory can be written down to reflect a loss of realizable value (as is required to properly apply the matching principle advocated by Winshall and adopted by the Resolution Accountants).

This is a straw man. The issue here is not how Viacom computed the Earn-Out *before* Winshall raised his disagreements, but whether Viacom was contractually forbidden from responding to Winshall's arguments *after* he raised his disagreements. The Merger Agreement provides that the scope of the proceedings before the Resolution Accountants is determined by Winshall's Summary of Issues. The Merger Agreement does not preclude Viacom from submitting evidence and arguments to the Resolution Accountants in response to the issues Winshall raised. Nor does it require Viacom to anticipate every accounting argument and theory that Winshall might make and submit a series of "alternative back-up positions" in its Earn-Out Statement on pain of waiving the right to respond to Winshall's disagreements.

As we demonstrated, such a straightjacketed procedure would have left Winshall free to make all kinds of claims -- *e.g.*, $100 million in revenue should be added to the Earn-Out calculation -- while giving Viacom no ability to respond or to present a more accurate calculation. (*See* Opening Br. at 32.) Winshall offers no response to this argument. Nor does he assert that in recalculating the Earn-Out, the Resolution Accountants limited themselves to the deductions in Viacom's Earn-Out Statements or Winshall's Summary of Issues. They did not. In several instances, the Resolution Accountants valued the deductions differently from both parties. (*Id*. at 33.)

Winshall claims that he "would not have agreed" to restrict discovery and forego expert testimony if he had known that the Inventory Write-Down would be part of the case. (Appellee's Br. at 29-30.) While it is easy to state and difficult to refute such hypothetical "if I had only known" scenarios, here Winshall disproves his own hypothesis: he *did* know about Viacom's Inventory Write-Down and he did *not* object to the lack of discovery in his submissions to the Resolution Accountants. Winshall debated the Inventory Write-Down on the merits, without claiming that the issue was beyond the scope of the proceeding or protesting that he had been deprived of discovery. *See* A436-37. That is because Viacom had already provided Winshall with the back-up documentation for the write-down calculation before delivering its final Earn-Out Statement. A1010.

If, as Winshall now contends, he really is unable to address the Inventory Write-Down without additional evidence, the solution is to permit Winshall to request such discovery. The Resolution Accountants already have stated that if they are asked to resolve the Inventory Write-Down issue, discovery may need to be revisited. A705. There is, however, no basis in the parties' contract or the law for failing to remedy a refusal to hear pertinent and material evidence -- resulting in a $190 million error -- because Winshall now speculates that he would have acted differently than he actually did.

C. The Chancery Court Erred by Deferring to a Determination the Resolution Accountants Did Not Make

Although the Resolution Accountants refused to consider highly relevant evidence about the most important dispute raised by Winshall in his Summary of Issues, Winshall argues that Viacom has no judicial recourse because the Resolution Accountants already decided that the Inventory Write-Down is not arbitrable. He further argues that the Court must defer to that purported decision as a matter of "procedural arbitrability," and that Viacom waived its "substantive arbitrability" argument. (Appellee's Br. at 17-27.) Each of those arguments is wrong as a matter of law.

1. The Resolution Accountants Did *Not* Determine that the Inventory Write-Down Is Not Arbitrable

The Court need only read the actual words of the Resolution Accountants' determination to see that they did *not* decide whether the Inventory Write-Down is arbitrable. They wrote, in crystal clear language, that they "are prepared" to make that determination "if" directed to do so. A706. Since that has not happened yet, they have made no such determination.

Winshall's brief deliberately avoids quoting, or even paraphrasing, what the Resolution Accountants actually concluded in the final paragraph of their decision. Almost worse, he quotes *part* of what they said, omitting the dispositive language. (*See* Appellee's Br. at 9, 19.) Here is the *complete* text of what the Resolution Accountants concluded:

> Finally, the Resolution Accountants ***are prepared to make a determination*** whether [the Inventory Write-Down] may be asserted under the terms of the Merger Agreement if either: (1) the Parties subsequently agree to permit the Resolution Accountants to do so, or (2) it is adjudicated by a court that the Resolution Accountants should do so.
>
> In addition, the Resolution Accountants ***are prepared to resolve*** [the Inventory Write-Down] if: (1) the Parties subsequently agree to permit the Resolution Accountants to do so, or (2) it is adjudicated by a court that [the Inventory Write-Down] may be asserted under the Merger Agreement and should be resolved by the Resolution Accountants.

A706 (emphasis added).

The Resolution Accountants stated that they "are prepared" to determine, and thus have not yet determined, two distinct issues: *First*, the arbitrability of the Inventory Write-Down -- *i.e.*, whether it "may be asserted under the terms of the Merger Agreement." *Second*, the merits of the Inventory Write-Down. Winshall, like the Court of Chancery, focuses only on the second part, ignoring the Resolution Accountants' straightforward statement that they also were not deciding whether the issue was properly before them.

Given the parallel construction of the Resolution Accountants' conclusion, if the first part can somehow be twisted to mean that they decided arbitrability, then the second part must mean that they also decided the merits -- and we know that is not true. The truth is that the Resolution Accountants refrained from deciding both arbitrability and the merits.

What they did decide, and all they decided, was that they would only resolve those disagreements that the parties "mutually agreed" should be decided. As the Resolution Accountants stated, their "determination at this time is limited to only those Earn-Out Disagreements for which the Parties agreed that both the issue and the amount at issue are properly before the Resolution Accountants." A705. The Resolution Accountants refused to hear the evidence of the Inventory Write-Down only because Winshall decided, after the fact, to disagree that they could hear it, not because they had made a determination whether it was arbitrable.

2. <u>The Resolution Accountants Did Not Have Authority to Decide Whether the Inventory Write-Down Is Arbitrable</u>

Even if the Resolution Accountants had made a determination of arbitrability, Winshall concedes that they would not be entitled to deference if it was a question of substantive arbitrability. (Appellee's Br. at 28.) Despite the line of cases holding that this is a matter of substantive arbitrability -- which the Court of Chancery found supported Viacom's position and conceded it could not distinguish -- Winshall contends that the Inventory Write-Down dispute is simply a matter of whether Viacom's submission was "timely," and thus a matter of "procedural arbitrability." (*Id.* at 22-27.)

As one court explained in rejecting the same argument, Winshall's "attempt to frame the issue presented here as merely one of timeliness or whether a condition precedent has been met is oversimplified." *Avnet, Inc.* v. *H.I.G. Source, Inc.*, 2010 WL 3787581, at *11 (Del. Ch. Sept. 29, 2010).

The Court of Chancery consistently has held that accounting experts in purchase price adjustment proceedings are not entitled to deference in determina-

tions about the scope of their mandate. *See Avnet*, 2010 WL 3787581, at *1, 3; *HDS Inv. Holding Inc.* v. *Home Depot, Inc*., 2008 WL 4606262, at *4 (Del. Ch. Oct. 17, 2008); *Nash* v. *Dayton Superior Corp.*, 728 A.2d 59, 63 (Del. Ch. 1998). Each of these cases dealt with whether an allegedly "belated," "revised" or "untimely" calculation could be considered by an accounting expert who was narrowly charged with resolving a price adjustment dispute. And in each case, the court held that the issue was a legal question of contract interpretation that only the court could decide because the parties had not agreed to submit such questions to the accountants.[4]

Winshall asserts that "[w]hen Viacom agreed that the Resolution Accountants would decide the Earn-Out Payment amount, it necessarily agreed that they would decide any legal issues that might arise." (Appellee's Br. at 24.) By arguing that Viacom "necessarily" agreed, Winshall admits that Viacom did not "actually" agree to let the accountants decide "any legal issues." *Avnet*, *Nash* and *HDS* hold that absent such an actual agreement, resolution accountants and auditors do *not* have authority to decide legal issues like contract interpretation. Winshall cites no authority in support of his assertion, and none exists.

Winshall's attempt to distinguish these cases, in ways the Chancellor admittedly could not, are unpersuasive.

First, Winshall argues that not allowing the Resolution Accountants to determine the scope of their own jurisdiction would create a "procedural nightmare" with parties ferrying back and forth to the court during the proceeding. (*Id.*) Hyperbole aside, there is no basis to find that deciding this case in accord with precedent would unleash a flood of unmanageable litigation. In the fifteen years since *Nash*, the courts have not been besieged, and Winshall offers no evidence to the contrary. Winshall does not even try to explain what is so nightmarish about seeking judicial guidance about the scope of an accountant's jurisdiction during a proceeding rather than before the proceeding, as was the case in *Nash*, *HDS* and *Avnet*. *See RBC Capital Mkts. Corp.* v. *Thomas Weisel Partners LLC*, 2010 WL 681669, at *6 (Del. Ch. Feb. 25, 2010) ("Parties have routinely

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[4] For that reason, the decision in *Carder* v. *Carl M. Freeman Cmtys., LLC*, 2009 WL 106510 (Del. Ch. Jan. 5, 2009) (cited in Appellee's Br. at 26), in which the court addressed a *hypothetical* involving a decision by an arbitrator under a broad arbitration clause whether a particular notice was timely and determined that question was "procedural" rather than "substantive," has no bearing here. There was no dispute in *Carder* that the question actually before the Court was one of substantive arbitrability. 2009 WL 106510, at *3.

been permitted to adjudicate the question of substantive arbitrability while an arbitration proceeding was pending . . . .").

In any event, as a matter of law, efficiency cannot trump the limited scope of the parties' delegation to the Resolution Accountants. Arbitration "'is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960)). Thus, as this Court has emphasized, "[a] party cannot be forced to arbitrate the merits of a dispute . . . in the absence of a clear expression of such intent in a valid agreement." *DMS Props.-First, Inc.* v. *P.W. Scott Assocs., Inc.*, 748 A.2d 389, 391 (Del. 2000); *see also HDS*, 2008 WL 4606262, at *8 ("[T]he Court should only send to arbitration those issues that the parties expressly agreed to arbitrate.").

The rule is the same for deciding whether the parties "clearly and unmistakably" agreed to submit questions of arbitrability to an arbitrator. *See, e.g.*, *Israel Disc. Bank of N.Y.* v. *First State Depository Co.*, 2012 WL 4459802, at *5 (Del. Ch. Sept. 27, 2012). And that rule underlies the cases holding that where accountants have only the power to decide accounting disputes, "arbitrability is for the Court to decide." *Nash*, 728 A.2d at 63.

The parties here did not consent to a broad delegation of power to an all-purpose arbitrator. They agreed on a specifically delineated procedure to recalculate the Earn-Out Amounts, including resolution by accountants who they agreed would act "as experts and not as arbitrators." A18.

Second, Winshall asserts that, as a matter of institutional competence, "the specific issue raised by Viacom -- whether an Inventory Write-Down is required by the same 'GAAP-related accounting principles' that Winshall supposedly advocated -- is more appropriately decided by accountants than lawyers." (Appellee's Br. at 24 (citation omitted).) We agree, and that is precisely why the Resolution Accountants should have decided the merits of the Inventory Write-Down.

But the Resolution Accountants have no particular expertise in the legal issue whether, as a matter of contract interpretation, the Inventory Write-Down was an arbitrable dispute. And whatever the competence of the Resolution Accountants, the parties did not agree that the accounting experts would have broad authority to decide arbitrability.

Third, although the Chancellor himself confessed that he could not distinguish *Nash*, *HDS* and *Avnet* (Opening Br. Ex. A at 34), Winshall argues that

this case is different because the issue here is merely one of "timeliness." But that is the very argument that was rejected in those cases.

The disputes in those cases involved whether the neutral accounting expert in a post-acquisition purchase price adjustment proceeding could consider "untimely" issues raised after the buyer submitted its adjustment calculation. In those cases, the seller contended that the alleged new issues were outside the scope of the proceeding because they had not been raised by the contractually-mandated deadline. *Nash*, 728 A.2d at 60-61; *HDS*, 2008 WL 4606262, at *2-3; *Avnet*, 2010 WL 3787581, at *7; *see also* Opening Br. at 19-22. And in each of those cases, the court held that the dispute was one of "substantive arbitrability" for the court. *Nash*, 728 A.2d at 63; *HDS*, 2008 WL 4606262, at *7-8; *Avnet*, 2010 WL 3787581, at *1. Winshall raises the identical issue: could the Resolution Accountants consider the Inventory Write-Down when it did not appear in Viacom's Earn-Out Statement?

Winshall's effort to distinguish *HDS* on the ground that both parties there asked the court to decide the issue of arbitrability (Appellee's Br. at 25) ignores what the court held. The court did not simply defer to the parties, but held based on its own analysis that "[w]hether the Revised Closing Statement can be considered by a neutral auditor is a contractual issue that should be decided by the Court." *HDS*, 2008 WL 4606262, at *8.

Winshall also argues that *Nash*, *HDS* and *Avnet* are inconsistent with *SBC Interactive, Inc.* v. *Corporate Media Partners*, 714 A.2d 758 (Del. 1998), and *Howsam*. (Appellee's Br. at 25.) There is no inconsistency. All three Chancery cases post-date *SBC* and two post-date *Howsam*. And the court in *Nash* discussed and relied on *SBC*. *Nash*, 728 A.2d at 62-64. The dispute in *SBC* arose under a partnership agreement that -- unlike the Merger Agreement in this case -- included a "broad and all encompassing" arbitration clause delegating all disputes relating to the Agreement to a general-purpose arbitrator. *SBC*, 714 A.2d at 760 n.3 & 761. This case, like *Nash*, *HDS* and *Avnet*, involves accounting experts with a narrow purpose and limited decision-making authority. "Nothing in the arbitration provision indicates that the parties agreed that the neutral auditor would determine contractual issues regarding whether a revised or delayed Closing Statement could be considered by the neutral auditor." *HDS*, 2008 WL 4606262, at *8.

Likewise, in *Howsam*, the Court held that a broad delegation of arbitral authority to an NASD arbitrator under NASD rules gave the arbitrator authority to apply the NASD's statute of limitations, as the parties would likely expect an NASD arbitrator to interpret NASD's own rules. *Howsam*, 537 U.S. at 83-86.

There is no comparable rule at issue here that would justify deference to the Resolution Accountants.

3. Viacom Did Not Waive Its Substantive Arbitrability Argument

Winshall argues that Viacom waived its position that the Resolution Accountants lacked authority to decide the arbitrability of the Inventory Write-Down, both in the accounting proceeding and in the Court of Chancery. He also argues that Viacom is judicially estopped from disputing the Resolution Accountants' authority to decide arbitrability. (Appellee's Br. at 19-22.)

These arguments presuppose that the Resolution Accountants actually decided the arbitrability issue, which they did not. These arguments also are meritless.

Viacom did not waive its challenge to the Resolution Accountants' power to decide arbitrability because it never clearly and unmistakably consented to their authority to do so. Under settled law, a court should not presume that the parties submitted an issue of arbitrability to the arbitrators "unless there is 'clear and unmistakable evidence that they did so.'" *DMS*, 748 A.2d at 392 (quoting *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995)). If the parties did not clearly agree to submit the question of arbitrability to arbitration, then a reviewing court must decide arbitrability independently and without deference. *Id*.

There is no "clear and unmistakable evidence" that Viacom agreed to submit the arbitrability of the Inventory Write-Down to the Resolution Accountants. Winshall points to Viacom's response to the September 20, 2011 letter from the Resolution Accountants. A491-505; A508-18. In their letter, the Resolution Accountants listed what they called the "Parties' Other Disagreements" (including the Inventory Write-Down). They asked only one question: "Have the parties mutually agreed upon whether the Resolution Accountants may resolve these issues . . . ?" A501. The Resolution Accountants did *not* ask whether they had authority to decide the arbitrability of those disagreements. Nor did they ask the parties to brief the issue of arbitrability.

In response, the parties notified the Resolution Accountants on October 11, 2011 that they did not mutually agree that any of the "Other Disagreements" could be decided. A508-18; A521-26. With respect to the Inventory Write-Down, Viacom took the occasion to re-argue the merits of the unsold inventory dispute, not knowing whether or how the Resolution Accountants would consider the write-down. A512-14. Nothing in Viacom's response is "clear and unmistakable evidence" that Viacom agreed that arbitrability could be decided by

the Resolution Accountants, or intended to waive its right to have that legal question decided by the Court.

It is important to understand that at this point in the proceedings, there was no dispute about the arbitrability of the Inventory Write-Down. Winshall had made no such arguments about arbitrability, and neither had Viacom. On the contrary, the parties had briefed the Inventory Write-Down issue *on the merits*, without raising any question of arbitrability. The arbitrability issue did not come up until Winshall served his response to the Resolution Accountants' letter on October 11, 2011 -- *after* all the submissions and *after* the hearing was over. A521, A523. There, for the first time, and at the 13th hour, Winshall claimed that the Inventory Write-Down was not within the scope of the proceeding.

Viacom disagreed, but did not argue or agree that it was for the Resolution Accountants to decide the arbitrability question. And, as demonstrated above, the Resolution Accountants declined to decide that question. Thus, the first time the parties litigated and briefed the question of arbitrability was in the Court of Chancery.

In any event, a party is not deemed to waive an objection to arbitrability by initially submitting the issue of arbitrability to an arbitrator, much less by responding to a question from an arbitrator about whether the parties agreed to submit an issue for decision. As this Court held in *DMS*, "[t]he fact that [defendant] did not seek to enjoin the arbitration and argued the 'arbitrability issue to the arbitrator[s] does not indicate a clear willingness to arbitrate that issue, *i.e.*, a willingness to be [e]ffectively bound by the arbitrators' decision on that point.'" *DMS*, 748 A.2d at 392 (quoting *First Options*, 514 U.S. at 946); *see also RBC*, 2010 WL 681669, at *6-7 (party to arbitration did not waive objection to arbitrator's determination of substantive arbitrability by first arguing issue to arbitration tribunal and then filing complaint in court after the tribunal's decision).

These cases reflect the broader principle that, without risk of waiver, "[a] party should be encouraged to submit issues to the arbitrator, whose decision might make the matter moot, and should not be compelled to challenge arbitrability in court in the first instance." *Bd. of Educ. of Sussex Cnty. Vocational Technical Sch. Dist.* v. *Sussex Cnty. Vo-Tech Teachers' Ass'n*, 1995 WL 1799135, at *1 (Del. Ch. June 28, 1995).

The cases Winshall cites are unavailing, because they hold only that a party that submits a substantive dispute to arbitration cannot later protest that the dispute was not arbitrable. (Appellee's Br. at 20-21.) *E.g.*, *Howard Univ.* v. *Metro. Campus Police Officer's Union*, 512 F.3d 716, 720 (D.C. Cir. 2008) (party waived objection to arbitrability of entire dispute by not contesting arbitrabil-

ity until after arbitration was over); *United Indus. Workers* v. *Gov't of the V.I.*, 987 F.2d 162, 168 (3d Cir. 1993) (party waived objection to arbitration of dispute by instituting and successfully seeking court order compelling arbitration); *Jones Dairy Farm* v. *Local No. P-1236, United Food & Commercial Workers Int'l Union*, 760 F.2d 173, 175-76 (7th Cir. 1985) (employer waived objection to arbitrability of dispute by consenting to arbitrate).

As for judicial estoppel, that doctrine operates only where (1) a party asserts an argument in litigation that is "clearly" contradictory to an argument previously asserted, and (2) the court was persuaded to accept the previous argument as a basis for its ruling. *Wavedivision Holdings, LLC* v. *Highland Capital Mgmt. L.P.*, 2011 WL 5314507, at *10 (Del. Super. Ct. Nov. 2, 2011); *see also Motorola Inc.* v. *Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008). Neither of those requirements is satisfied here.

Winshall contends that Viacom argued in response to the Resolution Accountants' September 20, 2011 letter that certain of Winshall's "Other Disagreements" were not within the scope of the proceeding, thereby conceding that the Resolution Accountants had the power to decide arbitrability. (Appellee's Br. at 20-21.) But Winshall had conceded that the "Other Disagreements" he sought to raise were not within his Summary of Issues. A522. Thus, there was no dispute that these issues were outside the scope of the proceeding. Viacom's argument that those issues should be excluded was thus consistent with its position that the Resolution Accountants lacked the authority to rule on disputed issues of arbitrability.

Moreover, as discussed above, the Resolution Accountants did *not* determine whether any of the Parties' Other Disagreements (Winshall's or Viacom's) were arbitrable or not arbitrable. All that they decided was that they would resolve only those disagreements that the parties "mutually agreed" should be resolved. A501. The Resolution Accountants made no arbitrability decision with respect to any disagreements. Thus, even if Viacom had taken the position that arbitrability should be decided by the Resolution Accountants, that position did not prevail and, thus, Viacom cannot be judicially estopped. *Motorola Inc.*, 958 A.2d at 859 ("The doctrine [of judicial estoppel] is not appropriate in all situations; parties raise many issues throughout a lengthy litigation . . . , and only those arguments that *persuade the court can form the basis for judicial estoppel*." (emphasis added)).

Lastly, Winshall's argument that Viacom waived the issue of substantive arbitrability in the Court of Chancery by not adequately addressing it in its opening brief is baseless. (Appellee's Br. at 21.) Winshall himself never argued in the Court of Chancery that the issue was waived. That is because Viacom had

addressed this issue in its opening brief. It devoted an entire section to arguing that the Resolution Accountants improperly refused to address the Inventory Write-Down, and argued that "[n]either the Merger Agreement nor the Engagement Letter gave the Resolution Accountants any authority or discretion to revisit the scope of their authority." A940. Viacom cited a decision by the Chancellor addressing the scope of an arbitrator's power to decide arbitrability that specifically discussed substantive arbitrability. A940-41 (citing *Willie Gary LLC* v. *James & Jackson LLC*, 2006 WL 75309, at *6 (Del. Ch. Jan. 10, 2006)).

Viacom also anticipated Winshall's argument that this was solely a question of "procedural arbitrability," and argued that the issue was instead one of substantive arbitrability:

> [T]he Resolution Accountants' determination . . . is plainly, on its face, a decision about what issues the parties did or did not agree to submit to arbitration. [Record citation omitted.] As the cases cited by the Stockholders' Representative show, ***that is an issue of "substantive arbitrability" to be determined by the Court***, because it involves "a disagreement about whether an arbitration clause . . . applies to a particular type of controversy" . . . .

A941 n.11 (emphasis added) (quoting *Howsam*, 537 U.S. at 84).

Consistent with that, Winshall did not argue in his opposition that Viacom had failed to address substantive arbitrability. In fact, he challenged Viacom's argument that the Resolution Accountants lacked the authority to decide whether the Inventory Write-Down was arbitrable, quoting back Viacom's argument that "that is 'an issue of 'substantive arbitrability' to be determined by the Court.'" A957 (quoting A941 n.11). Nothing in Winshall's opposition suggested that Viacom's treatment of the issue was fleeting or confusing, or that Viacom had somehow waived the issue. While it is true that Viacom cited additional arbitrability cases in its reply brief, we are aware of no legal authority (and Winshall cites none) that citing additional authority in a reply brief evidences waiver.

III.

IV. Conclusion

For the foregoing reasons, and in the interests of fundamental fairness, the judgment of the Court of Chancery should be reversed, the Determination of the Resolution Accountants should be vacated, and the Court should direct the Resolution Accountants to resolve the Inventory Write-Down with regard to the 2008 Earn-Out.

Respectfully submitted,

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