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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEWARD HEALTH CARE SYSTEM LLC, STEWARD MEDICAL GROUP, INC., STEWARD PGH, INC., STEWARD NSMC, INC., STEWARD CGH, INC., and STEWARD HH, INC.,	)	
Respondents Below, Appellants,	)	
v.	)	No. 181, 2023
TENET HEALTHCARE CORPORATION, CGH HOSPITAL, LTD., CORAL GABLES HOSPITAL, INC., HIALEAH HOSPITAL, INC., HIALEAH REAL PROPERTIES, INC., LIFEMARK HOSPITALS OF FLORIDA, INC., LIFEMARK HOSPITALS, INC., NORTH SHORE MEDICAL CENTER, INC., SUNRISE MEDICAL GROUP I, LLC, TENET FLORIDA PHYSICIAN SERVICES, LLC, TFPS IV, LLC, and SHARILEE SMITH, as Trustee for Coral Gables Hospital Land Trust Agreement Number 1001, and as Successor Trustee pursuant to the FMC Land Trust Agreement Number 1001,	)	Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-0774-SG PUBLIC VERSION FILED JULY 26, 2023
Petitioners Below, Appellees.	)	

APPELLANTS' OPENING BRIEF

OF COUNSEL:

Anthony Bongiorno
Jessica Reese
QUINN EMANUEL URQUHART & SULLIVAN, LLP
111 Huntington Avenue, Suite 520
Boston, Massachusetts 02199
(617) 712-7100

Rollo C. Baker IV
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000

Dated: July 11, 2023

Michael A. Barlow (#3928)
Adam K. Schulman (#5700)
Florentina D. Field (#7146)
ABRAMS & BAYLISS LLP
20 Montchanin Drive, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Attorneys for Appellants Steward Health Care System LLC, Steward Medical Group, Inc., Steward PGH, Inc., Steward NSMC, Inc., Steward CGH, Inc., and Steward HH, Inc.

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NATURE OF PROCEEDINGS

This appeal involves a dispute regarding the ability of Appellants ("Buyers") to offset a purchase price adjustment owed by Buyers against amounts "due or payable" from Appellees ("Sellers") under the parties' Asset Purchase Agreement, dated June 16, 2021 (the "APA"). A159, § 8.18. The parties—two hospital systems—negotiated the APA to provide for the offset of various amounts "due or payable" under the APA and related agreements. They expressly negotiated a set-off provision that applied to, *inter alia*, a net working capital purchase price adjustment and [redacted] of Medicare and Medicaid-related remittance obligations. Notwithstanding that language, and notwithstanding the existence of set-offs that well exceed the purchase price adjustment, the Court of Chancery required Buyers to pay the purchase price adjustment separately. Ex. A at 5, 7. In doing so, the court read provisions out of the APA, rendering meaningless the relevant terms of the parties' agreement and overstepping established Delaware law.

Buyers purchased five Miami-area hospitals (the "Acquired Hospitals") and related assets from Sellers under the APA. A86; A282. At the time of closing, Buyers paid Sellers approximately $1.1 billion, representing the "Estimated Purchase Price." A89. The APA provides for the final "Purchase Price" to be determined after closing, according to procedures set forth in Section 2.5(c) and paid pursuant to Section 2.5(d). A104-A106, §§ 2.5(c), 2.5(d). Section 2.5(d) expressly

provides that payment of the remainder of the Purchase Price, once "finally determined pursuant to Section 2.5," was "[s]ubject to each Party's rights set forth in Section 8.18." A106, § 2.5(d).

Section 8.18, in turn, provides that each party is entitled to offset amounts owed under the APA—including purchase price adjustments under Section 2.5(c)—against "any amount due or payable" by the other party under the APA and certain related agreements (the "Set-Off Provision"). A159-A160, § 8.18. This Set-Off Provision is an important part of the parties' agreement. The APA addresses numerous obligations to be paid by the parties after closing—including Sellers' obligation to reimburse Buyers for [redacted] of dollars of advanced Medicare payments that Sellers received from the Centers for Medicare & Medicaid Services ("CMS") through a COVID-19 era loan program and that CMS has since recouped from Buyers (the "AAPP Payments" or Sellers' "AAPP Debt"). A158, § 8.16. In the context of such a complex transaction, the Set-Off Provision minimizes cash payments between the parties and allows offsetting of amounts "due or payable" "whether or not ultimately determined to be justified," without such set-off "constitut[ing] a breach of th[e APA]." A160, § 8.18.

Following closing, the parties engaged in the procedures outlined in Section 2.5(c) to finally determine the Purchase Price, including submitting certain disputes to an arbitrator for accounting. A57-A58. On August 6, 2022, the arbitrator

issued an award (the "Award") that "final[ly] determined" the Purchase Price. A80. Once the Award was issued, payment was due under Section 2.5(d) (the "Purchase Price Adjustment"), subject to the set-offs available under the Set-Off Provision. A106.

Though the Set-Off Provision identifies numerous obligations subject to set-off, Sellers sought to fast-track payment of the Award by filing this action, while evading their obligation to reimburse Buyers [redacted] of dollars in AAPP Payments. A38. In response, Buyers filed a motion to modify the Award to account for set-offs available to Buyers under the Set-Off Provision—which exceed the Award. A306. In the alternative, Buyers asked the court to stay enforcement of the Award pending a final accounting of all obligations identified in the Set-Off Provision, which the parties are separately litigating in the Court of Chancery.[1] *Id.*

On April 4, 2023, the Court of Chancery denied Buyers' motion and ruled that the Award should be confirmed without regard to the parties' other set-off obligations. Ex. A at 5-7.

The court's ruling is erroneous in multiple respects. *First*, the court failed to read the APA as a whole and harmonize its provisions, in contravention of Delaware law. The court's narrow reading renders meaningless the set-off rights the parties

[1] *Steward Health Care Sys. LLC v. Tenet Bus. Servs. Corp.*, C.A. No. 2022-0289-SG (the "Set-Off Litigation"). A832.

negotiated, providing Buyers nothing more than the set-off rights that common law already accords.

Second, the court misconstrued the Set-Off Provision, which is available for—and specifically negotiated to cover—both liquidated and unliquidated claims. And even if it was not, there are sufficient liquidated claims to fully offset the Award.

Third, the court erred in denying Buyers' motion to modify the Award to account for the set-offs and in denying Buyers' motion to stay confirmation of the Award pending the outcome of the Set-Off Litigation.

The court's erroneous ruling is significant. By elevating one amount over others, it not only violates the APA's terms, but it also allows Sellers to use litigation to delay paying [redacted] to Buyers, while expediting payment of a smaller amount owed to them. Buyers respectfully request that the Court of Chancery's judgments be reversed.

SUMMARY OF ARGUMENT

(1) The APA mandates that the Award be subject to the Set-Off Provision. Section 2.5(d) requires that all Purchase Price Adjustments be paid subject to each Party's rights in the Set-Off Provision. Similarly, the Set-Off Provision expressly provides that Purchase Price Adjustments be included in the parties' set-off calculation. The Award is a Purchase Price Adjustment, and thus it can be paid only subject to applicable set-offs.

The court erred in ruling that the Award was not subject to the set-off in Section 2.5(d) and the Set-Off Provision because it was issued under the arbitration provision of Section 2.5(c). That ruling failed to read the APA as a whole and harmonize the implicated provisions, rendering language in Section 2.5(d) and the Set-Off Provision superfluous.

(2) The set-offs available to Buyers under the APA exceed the Award.

(a) The parties expressly agreed to a Set-Off Provision that is not limited to "liquidated" amounts. The provision applies to any amount "due or payable" under the APA. A159-A160, § 8.18. Indeed, the parties specifically contracted to allow each other to exercise set-off rights before it can be determined "whether or not" such exercise is "ultimately . . . justified." *Id.* There are ample set-offs "due or payable" under the plain meaning of the APA, and the court erred by

not giving them effect. *See Brace Indus. Contracting, Inc. v. Peterson Enters., Inc.*, 2017 WL 2628440, at *3 (Del. Ch. June 19, 2017).

(b) Even if the Set-Off Provision applies only to "liquidated" amounts, Sellers' AAPP Debt is "liquidated" because it is "easily calculable." Sellers' AAPP Debts therefore must be set-off against the Award.

(3) The court erred in denying the motion to modify the Award to account for set-offs. The court denied the motion based solely on its erroneous interpretation of the APA.

(4) The court erred in denying the motion to stay the confirmation proceeding, pending the outcome of the Set-Off Litigation. While the court acknowledged that "common sense and efficiency concerns" counseled in favor of granting the motion to stay, Ex. A at 6-7, the court denied the motion based on its failure to read the APA in whole and an improper application of the principles underlying the Federal Arbitration Act ("FAA").

STATEMENT OF FACTS

A. The Purchase and Sale of the Acquired Hospitals

On June 16, 2021, Buyers and Sellers executed the APA. A86. The transaction closed on August 1, 2021. A282. Buyers paid Sellers an Estimated Purchase Price of roughly $1.1 billion at closing, A89, but the APA provided that the final Purchase Price would be calculated after closing through the exchange of closing statements. A104-A106, §§ 2.5(c), 2.5(d).

B. The Purchase Price Adjustment Dispute

1. The Purchase Price Adjustment and Payment Provisions

Section 2.5 of the APA sets forth a detailed process for determining and paying the transaction's Estimated Purchase Price and its final Purchase Price. Each subsection of Section 2.5 serves a specific purpose:

- **Section 2.5(a)** requires Sellers to provide Buyers with a pre-closing statement of estimated net working capital and capital lease amounts, which informs the calculation of the "Estimated Purchase Price," A104, § 2.5(a);
- **Section 2.5(b)** requires Buyers to pay Sellers the "Estimated Purchase Price" at closing, A104, § 2.5(b);
- **Section 2.5(c)** articulates the procedure for exchanging and reconciling the parties' closing statements, which inform the calculation of the final "Purchase Price," A104-A106, § 2.5(c);

- **Section 2.5(d)** provides the process by which the parties must settle the difference between the final "Purchase Price" and the previously paid "Estimated Purchase Price" (i.e., the Purchase Price Adjustment), A106, § 2.5(d); and
- **Section 2.5(e)** provides the parties' tax allocation agreement with respect to the Purchase Price, A106, § 2.5(e).

Accordingly, the Purchase Price Adjustment is calculated under Section 2.5(c) and paid under Section 2.5(d). Section 2.5(c) requires the parties to exchange closing statements within 90 days of closing, "setting forth [each party's] calculation of Net Working Capital as of the Effective Time . . . and Capital Lease Amount as of the Effective Time . . . and the resulting Purchase Price." A104, § 2.5(c). Any disputes must be raised within 45 days thereafter. A105, § 2.5(c).

In the event the parties cannot resolve any disputes regarding the closing statements and the final Purchase Price, Section 2.5(c) requires that the parties submit "all unresolved disputes . . . to BKD, LLP . . . (the 'Arbitrator'), who shall be engaged to provide a final, binding and conclusive resolution of all such unresolved disputes." *Id.* BKD, LLP, n/k/a FORVIS, LLP, is an independent accounting firm responsible only for performing a limited accounting of any disputes regarding the inputs for the final Purchase Price, i.e. "Net Working Capital" or the "Capital Lease Amount." *See id.* Section 2.5(c) arbitrations are limited to an

accounting exercise—hence the parties' agreement that the arbitrator would be an accounting firm. *See id.*

Once the Purchase Price is finally determined—either through agreement or arbitration—Section 2.5(d) provides that:

> ***Subject to each Party's rights set forth in Section 8.18 [the Set-Off Provision]***, if the Purchase Price, as finally determined pursuant to Section 2.5, is (i) greater than the Estimated Purchase Price, Buyers will promptly pay to Sellers an amount equal to the difference between the Purchase Price and the Estimated Purchase Price in immediately available funds, or (ii) is less than the Estimated Purchase Price, Sellers will promptly pay to Buyers an amount equal to the difference between the Purchase Price and the Estimated Purchase Price in immediately available funds.

A106, § 2.5(d) (emphasis added). Accordingly, the parties expressly agreed in Section 2.5(d) that any Purchase Price Adjustment—including any Section 2.5(c) arbitration award—should be paid "***subject to each Party's rights set forth in Section 8.18 [the Set-Off Provision]***." *Id.* (emphasis added).

2. <u>The Set-Off Provision</u>

Section 8.18 gives each party the right to offset its debts against amounts that are due or payable by the other party under the APA and certain related agreements. It provides that each party:

> ***shall be entitled to set-off or recoup against amounts due by such Party*** pursuant to this Agreement ***any amounts due or payable [by the opposing party]*** pursuant to this Agreement, including [among other things] . . . any amounts due by either Party pursuant to the purchase ***price adjustment due pursuant to Section 2.5(d)*** [and] any amounts due ***pursuant to Section 8.16 [governing AAPP Payments]*** . . . . The

> exercise of such set-off right by a Party, whether or not ultimately determined to be justified, shall not constitute a breach of this Agreement.

A159-A160, § 8.18 (emphasis added).

Thus, the parties agreed that any Purchase Price Adjustment due under Section 2.5(d)—including any adjustment resulting from an arbitration under Section 2.5(c)—is subject to the Set-Off Provision. *Id.* Put differently, any arbitration award issued under Section 2.5(c) should be input into the parties' global set-off calculation, along with the other liabilities identified in the Set-Off Provision.

Importantly, where a party exercises its set-off rights, the Set-Off Provision does ***not*** allow the other party to sever and pay separately any of the identified liabilities. *Id.* Rather, the Set-Off Provision makes clear that the parties "shall be entitled" to the full offset of all listed liabilities and may exercise their set-off rights even before such exercise is determined to be "justified." *Id.* Once all identified liabilities due to each party are accounted for and offset, the parties can determine which party is the net debtor required to remit payment.

3. The Arbitration

After closing, the parties exchanged closing statements in accordance with Section 2.5(c) and raised certain disputes regarding each other's calculations. A283-A284. The parties submitted their disputes to the Arbitrator pursuant to Section 2.5(c), and the Arbitrator issued an award of $20,325,075 in Sellers' favor,

representing the difference between Estimated Purchase Price and final Purchase Price (i.e., the Purchase Price Adjustment). A80, A283-A284. Buyers were responsible for paying that amount pursuant to Section 2.5(d). *See* A106, § 2.5(d). However, as Section 2.5(d) makes clear, such a payment is "***[s]ubject to each Party's rights set forth in Section 8.18 [the Set-Off Provision]***." *Id.* (emphasis added).

C. The Set-Off Litigation

While the Arbitration was ongoing, the parties also disputed several other post-closing payment obligations, the most notable of which are the disputes regarding AAPP Payments and distributions from the Florida Directed Payment Program ("DPP"). *See* A532. These disputes are currently the subject of a separate action before the Court of Chancery: the Set-Off Litigation. A832.

Critically, like the Award, both the AAPP and the DPP obligations are subject to the Set-Off Provision, and thus must be included as set-offs to the Award. A158-A162, §§ 8.16, 8.18, 8.22.

1. The AAPP Dispute

Prior to the sale of the Acquired Hospitals, Sellers received millions of dollars in advanced Medicare payments from CMS through the Accelerated and Advanced Payment Program ("AAPP"). A576, A580, A691. AAPP effectively provides short-term loans by advancing Medicare payments to hospitals, which CMS later recoups

by withholding a percentage of the recipient's monthly Medicare reimbursements. *See* A404-A405. During the COVID-19 pandemic, CMS greatly utilized and Congress expanded AAPP to assist hospitals, and Sellers received millions of dollars in advanced payments. *See id*, A319. After closing, CMS began recouping the advanced payments from Buyers as the owners of the Acquired Hospitals. A319. Because the parties were aware that the transaction would result in Buyers having to repay the AAPP monies advanced to Sellers, the parties drafted Section 8.16. *See id.*

Section 8.16 provides that, each month, Sellers must provide Buyers with all the funds necessary to satisfy the recoupments due to CMS that month ***in advance*** of those recoupments coming due. *Id.* Under Section 8.16(a)(i), Buyers are required to provide Sellers a monthly statement setting forth the amount of AAPP Payments that Sellers owe Buyers that month. A158, § 8.16(a)(i). This AAPP Payment amount includes "the actual or anticipated AAPP [recoupments] to be paid by Buyers or recouped by CMS from [Buyers] . . . in that month, in the immediately following month, and/or as a result of identified corrections regarding past months." *Id.* The APA further provides that Sellers "***shall pay***" the amounts identified on the monthly statement within 10 days of receipt. A158, § 8.16(a)(ii) (emphasis added).

Under these provisions, Buyers have invoiced Sellers at least [redacted] in AAPP Payments, which are currently due and payable. A577, *see also* A339-A368, A478-479. But Sellers have failed to pay a cent. A483.

Rather than honoring their contractual obligation to "pay" their AAPP Debt, Sellers have raised a baseless objection that is not supported by the APA. Sellers contend they are not obligated to pay anticipated amounts, A480, notwithstanding plain language in Section 8.16 requiring Buyers to invoice and Sellers to pay "the actual or ***anticipated*** AAPP [recoupments]" due to CMS each month. A158, § 8.16(a)(i) (emphasis added). But this objection does not relieve Sellers of their obligation to reimburse Buyers for the vast majority of the AAPP Payments due and payable. Even putting aside "anticipated" amounts, Sellers owe Buyers approximately [redacted]. A574, A691. Accordingly, a minimum of [redacted]—almost double the amount of the Award—is currently available under the Set-Off Provision. *Id.*

2. <u>The DPP Dispute</u>

As the parties were negotiating the APA, the State of Florida was implementing the DPP, a government program that provides supplemental Medicaid funds to participating hospitals. A749; *see also* A161, § 8.22. The parties negotiated a provision in the APA, Section 8.22, which allocates DPP distributions based on when DPP assessments and distributions are paid relative to the close of the

transaction. *Id.* Sellers and Buyers both claim entitlement to certain DPP distributions paid to the Acquired Hospitals after closing. A411. That dispute is currently pending before the Court of Chancery in the Set-Off Litigation.

The parties cross-moved for summary judgment on the DPP and AAPP disputes, and the court heard oral argument on July 12, 2022. A861, A868 A877. Supplemental briefing was completed on March 31, 2023, A918-A923, and the court heard oral argument on May 9, 2023. A925. Thus, the disputes are ripe for resolution by the court.

D. Procedural History

The parties submitted the Purchase Price Adjustment dispute to arbitration in June 2022. A284. On August 26, 2022, the Arbitrator issued the Award. A285. Sellers filed this action to confirm the Award in the Court of Chancery on August 30, 2022. A1.

Buyers do not contest the amount of the Award, but assert that the Award is subject to the Set-Off Provision and is fully offset by amounts owed by Sellers under the APA. A512. As a result, on October 21, 2022, Buyers moved to modify the Award to reflect the Set-Off Provision. A306. In the alternative, Buyers moved to stay the action pending the outcome of the Set-Off Litigation. *Id.* Vice Chancellor Glasscock held argument on Buyers' motion on December 20, 2022. A507. In February 2023, the action was reassigned to Vice Chancellor Zurn. A26, Ex. A at

1. On April 4, 2023, Vice Chancellor Zurn issued the letter opinion from which this appeal arises ("Opinion"). Ex. A. Thereafter, the court transferred the matter back to Vice Chancellor Glasscock, Ex. A at 7, and final judgment was entered on May 15, 2023. Ex. B.

In the Opinion, the Court determined that the Award should be confirmed, holding that (1) "[n]othing in the APA subjects any award under Section 2.5(c) to Section 8.18," Ex. A at 5; (2) "the common law and language of Section 8.18 makes . . . set-off available only once the claims in the Set-Off Litigation are liquidated," *id.* at 6; (3) the motion to modify should be denied because the APA does not provide any grounds for modification, *id.* at 6-7; and (4) the motion to stay should be denied because the APA and the FAA support the "prompt" payment of the Award, *id.* at 4, 7.

Each of these holdings is erroneous for the reasons set forth herein. The Award should be offset prior to payment. And when considering the available offsets, the Award is fully offset. Thus, the Court of Chancery erred when denying the motion to modify and the motion to stay, and the court's decision and judgment should be reversed.

ARGUMENT

I. THE APA REQUIRES THAT PAYMENT OF THE AWARD BE SUBJECT TO OFFSETS UNDER THE SET-OFF PROVISION

A. Question Presented

Whether the Court of Chancery erred in ruling that "[n]othing in the APA subjects any award under Section 2.5(c) to Section 8.18." Ex. A at 5. The question was raised below, A318, A323-A324, A452, and considered by the Court of Chancery, Ex. A at 5.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's legal conclusions in interpreting the APA. *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012).

C. Merits of Argument

The Court of Chancery erroneously held that the Award should be paid without regard to the set-offs available under the Set-Off Provision. Ex. A at 5. In so holding, the court failed to construe the APA as a whole, harmonize the implicated provisions, and give effect to the plain text of Sections 2.5(c), 2.5(d), and 8.18, improperly rendering language within these provisions superfluous.

When interpreting a contract, Delaware courts must "construe the agreement as a whole and give effect to all its provisions." *Salamone v. Gorman*, 106 A.3d 354, 368 (Del. 2014). This mandate requires that Delaware courts "read [provisions]

together" and interpret the contract in a way that "harmonizes the affected contract provisions." *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1221, 1221 n.52, 1224 (Del. 2012), *as corrected* (July 12, 2012) (citation omitted). The Court must not "render any part of the contract mere surplusage" or otherwise "render a provision or term 'meaningless or illusory.'" *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (citation omitted).

When reading the APA as a whole and harmonizing its provisions, the Award is subject to the Set-Off Provision, and thus the Award is not required to be paid without offsetting the other liabilities identified in the Set-Off Provision. Section 2.5 sets forth a detailed process for determining and paying the transaction's Estimated Purchase Price and its final Purchase Price. *See* A104-A106, § 2.5. Each subsection of Section 2.5 serves a specific purpose. *See supra*, 7-8.

As relevant here, Section 2.5(c)—the provision governing the final determination of the Purchase Price—requires that the parties exchange closing statements within 90 days of closing and raise any disputes within 45 days thereafter. A104-A105, § 2.5(c). It further provides that "[n]otwithstanding anything to the contrary in [the APA], any disputes regarding amounts shown in the Closing Statement . . . shall be resolved as set forth in this Section 2.5." A106, § 2.5(c).

Section 2.5(d), in turn, governs payment of the Purchase Price Adjustment once the Purchase Price has been "finally determined pursuant to Section 2.5."

A106, § 2.5(d). It states expressly that any Purchase Price Adjustment is to be made "***[s]ubject to each Party's rights set forth in [the Set-Off Provision]***." *Id. (emphasis added).*

The Set-Off Provision, in turn, permits each party to "set-off . . . amounts due by such Party" against "amounts due or payable" by the opposing party. A159-A160, § 8.18. There can be no doubt that this provision applies to the Purchase Price Adjustment set forth in the Award. The Set-Off Provision expressly provides that the parties are entitled to offset "any amounts due by either Party pursuant to the purchase price adjustment due pursuant to Section 2.5(d)." A160, § 8.18.

In considering these three provisions, the Court of Chancery found that Section 2.5(c)'s statement that "judgment may be entered" after arbitration "stand[s] on [its] own." Ex. A at 5, 7. The court therefore concluded that "[n]othing in the APA subjects any award under Section 2.5(c) to Section 8.18," Ex. A at 5, writing into the APA a separate treatment of Purchase Price Adjustments "finally determined pursuant to Section 2.5" through the arbitration mechanism rather than by the parties' mutual agreement. This was error.

Section 2.5(c) explicitly provides that, "[n]otwithstanding anything to the contrary in this Agreement," disputes relating to the Purchase Price "shall be resolved as set forth in this Section 2.5." A106, § 2.5(c). That is, contrary to the court's ruling, Section 2.5(c) itself makes clear that it does ***not*** "stand on [its] own."

Ex. A at 5. Instead, the parties chose that, "notwithstanding anything" else, "any disputes regarding" the Purchase Price are subject to all procedures set out in Section 2.5, including Section 2.5(d).[2] A106, § 2.5(c).

Section 2.5(d) specifically mandates that when the Purchase Price is "finally determined pursuant to Section 2.5," it must be paid "[s]ubject to each Party's rights set forth in Section 8.18." A106, § 2.5(d). Section 2.5(d)'s reference to a "final[] determin[ation] [of the Purchase Price] pursuant to Section 2.5" is an explicit reference to Section 2.5(c). *Id.* Indeed, Section 2.5(c) is the ***only provision*** that "finally determine[s]" the Purchase Price. *Id.* The other subsections of Section 2.5 are irrelevant to this inquiry: Sections 2.5(a) and 2.5(b) relate only to the Estimated Purchase Price, and Section 2.5(e) relates only to the parties' tax allocation. A104, A106, § 2.5(a), (b), (e). Moreover, Section 2.5(d) articulates no qualifications or carve-outs that would except Section 2.5(c) arbitrations from the rule that Purchase Price Adjustment payments are subject to the Set-Off Provision. A106, § 2.5(d). Said differently, Section 2.5(d)'s reference to a "final[] determin[ation] [of the Purchase Price] pursuant to Section 2.5" refers to ***all of the procedures in Section 2.5(c), including the arbitration at issue here***. *Id.*

[2] *See Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) ("the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section").

Section 2.5(d) further provides that when the Purchase Price is "finally determined" through the procedures in Section 2.5(c), the any Purchase Price Adjustment must be paid "[s]ubject to each Party's rights set forth in Section 8.18." *Id.* Section 8.18 permits a party to "set-off . . . amounts due by such Party" against "amounts due or payable" by the opposing party, and Section 8.18 provides a list of payables that are subject to this set-off right, including and especially "any amounts due by either Party pursuant to the purchase price adjustment due pursuant to Section 2.5(d)." A160, § 8.18.

Accordingly, when these provisions are read together and harmonized, the only reasonable interpretation is that any arbitration award issued under Section 2.5(c)—which is a Purchase Price Adjustment—is subject to the parties' set-off rights under Section 8.18. Thus, the Court of Chancery erred when finding that "[n]othing in the APA subjects any award under Section 2.5(c) to Section 8.18." Ex. A at 5. The court's interpretation of the APA improperly writes a carve-out into Section 2.5(d) that would except Section 2.5(c) arbitrations from the payment mandate. In doing so, it renders the language of Section 2.5(d) and Section 8.18 superfluous. Indeed, the court's construction results in the set-off language having zero meaning in the context of a Purchase Price Adjustment, even though Section 2.5(d) expressly subjects those disputes to the Set-Off Provision. That is contrary to Delaware law. *See Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990

A.2d 393, 396–97 (Del. 2010) ("We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage.").

The Court of Chancery tried to address the inconsistency between its narrow reading of the "may" language in Section 2.5(c) and the obviously contrary text in Sections 2.5(d) and 8.18 (both of which subject all Purchase Price Adjustments to the Set-Off Provision), by dismissing as a "practical truth" that the Purchase Price would be informed by the Arbitrator's award. Ex. A at 5. But that is a misreading of the APA. The parties did ***not*** contract solely for the various pieces of amounts owed to "inform[] a final determination of the Purchase Price." *Id*. Rather, they made payment of ***any*** Purchase Price Adjustment under Section 2.5 expressly "[s]ubject to" the set-off right in Section 8.18. A106, § 2.5(d).

The court was required to read the agreement as a whole, harmonizing and giving effect to both provisions. *See N. Am. Leasing, Inc. v. NASDI Hldgs., LLC*, 276 A.3d 463, 467 (Del. 2022) ("When interpreting a contract, this Court 'will give priority to the parties' intentions as reflected in the four corners of the agreement,' construing the agreement as a whole and giving effect to all its provisions." (citation omitted)); *Land-Lock, LLC v. Paradise Prop., LLC*, 2008 WL 5344062, at *3 (Del. Dec. 23, 2008) ("[W]e should look to harmonize the entire agreement and remain consistent with the objective intent of the parties that drafted the contract.").

Section 2.5(c) is readily harmonized with Sections 2.5(d) and 8.18, and the court erred in failing to do so. Section 2.5(c) provides that the Arbitrator's award is "final, binding, and conclusive," and that judgment "may be entered upon the written determination of the Arbitrator." A105, § 2.5(c). Importantly, this text does not ***require*** the entry of judgment; rather, it provides only that judgment ***may*** be entered. *See Kirby v. Kirby*, 1987 WL 14862, at *4 (Del. Ch. July 29, 1987) (construing "may" as "permissive," in contrast to "shall" for "required" conduct). By contrast, Section 2.5(d) ***mandates*** that Purchase Price Adjustments—including those resulting from an arbitration under Section 2.5(c)—be paid "[s]ubject to each Party's rights set forth in Section 8.18." A106, § 2.5(d). In addition, Section 8.18 provides each party the ***right*** to set-off certain payables and receivables, including Purchase Price Adjustments. A159-A160, § 8.18.

When the ***non-mandatory*** judgment-entry language of Section 2.5(c) is considered in conjunction with the ***mandatory*** language of Sections 2.5(d) and 8.18, the provisions must be harmonized as follows: if there are set-offs available under Section 8.18, judgment should not be entered on a Section 2.5(c) award (i.e. the award should not be confirmed) unless or until such set-offs are accounted for; if there are no set-offs available under Section 8.18, judgment should enter on a Section 2.5(c) award (i.e. the award should be confirmed). This is the only reading of the provision that properly preserves the mandate that Purchase Price

Adjustments—be they agreed upon or resulting from the arbitration process outlined therein—must be paid subject to the set-off rights in Section 8.18. Moreover, this reading gives effect to the non-mandatory judgment-entry language in Section 2.5(c).

Considering the proper interpretation of Sections 2.5 and 8.18, the Award should have been modified to account for set-offs prior to confirmation.

II. SET-OFFS ARE AVAILABLE UNDER THE APA.

A. Question Presented

Whether the Court of Chancery erred in ruling that "the common law and language of Section 8.18 makes . . . set-off available only once the claims in the Set-Off Litigation are liquidated." Ex. A at 6. The question was raised below, A323-A331, A455-A460, and considered by the Court of Chancery, Ex. A at 6.

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's interpretation of the common law and its legal conclusions in interpreting the APA. *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012).

C. Merits of Argument

The Court of Chancery erroneously ruled that "the common law and language of Section 8.18 makes . . . set-off available only once the claims in the Set-Off Litigation are liquidated." Ex. A at 6. Section 8.18 makes no reference to this liquidation requirement, and courts have interpreted analogous provisions to apply to non-liquidated amounts. Moreover, even if Section 8.18 applies only to liquidated amounts, Sellers' AAPP Debt is liquidated and must be offset against the Award. Accordingly, in either event, payment of the Award cannot occur until AAPP set-offs are accounted for. Thus, the court erred in mandating immediate payment of the Award.

1. The Set-Off Provision Applies to "Unliquidated" Amounts

The language of the Set-Off Provision permits the parties to offset unliquidated amounts because it applies to any amounts "***due or payable***." A159, § 8.18. The terms "due" and "payable" are not interchangeable: "[a]n amount may be ***payable without being due***. ***Debts are commonly payable long before they fall due***." PAYABLE, Black's Law Dictionary (11th ed. 2019) (emphasis added). Accordingly, the Set-Off Provision's use of the word "payable" permits the parties to offset their debts against amounts that are not yet liquidated. Further, the Set-Off Provision expressly provides that a party is permitted to exercise the right to offset payables and receivables ***before*** such amounts are "ultimately determined to be justified." A160, § 8.18. This language demonstrates that a party's set-off right applies to ***claimed*** amounts, and even if the claimed amount is later shown to be incorrect, the party ***cannot be found in breach of the APA***. The parties selected the language in the Set-Off Provision for this reason. But the court's opinion disregards this specific language, rendering these terms entirely superfluous.

In disregarding the explicit language of Section 8.18, the court relied on *CanCan Development LLC v. Manno*, 2011 WL 4379064 (Del. Ch. Sept. 21, 2011), and *Post Holdings, Inc. v. NPE Seller Rep LLC*, 2018 WL 5429833 (Del. Ch. Oct. 29, 2018), to find that "the common law and language of Section 8.18 makes . . . set-

off [against the Award] available only once the claims in the Set-Off Litigation are liquidated." Ex. A at 6. These authorities are inapposite.

CanCan is plainly inapplicable. *CanCan* deals only with a set-off argument under the common law, not one based in contract. 2011 WL 4379064, at *5. As recognized by both *Post Holdings*, 2018 WL 5429833, at *4, and *Brace Industries Contracting, Inc. v. Peterson Enterprises, Inc.*, 2017 WL 2628440, at *3 (Del. Ch. June 19, 2017), the common law set-off standard is displaced when parties create their own contractual set-off standard. *See also Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010) (holding that "parties to the litigation are free to displace a default rule of common law by a valid contractual agreement" (cleaned up)). Indeed, the court in *Brace* clearly explained that "[w]hile no right to set-off unliquidated sums may exist at common law or in equity, our law encourages parties to contract freely to create those contractual rights they see fit." 2017 WL 2628440, at *4. The parties here created a contractual right that permits the set-off of any sums "due or payable," and accordingly, the common law standard utilized in *CanCan* is inapposite.

The Court of Chancery also erroneously relied on *Post Holdings*, which held that a set-off provision did not permit the set-off of unliquidated amounts where (1) the set-off provision expressly applied only to "owed" amounts, and (2) permitting the set-off of unliquidated amounts would be inconsistent with the "temporal

requirement" that the payments at issue be remitted within fifteen days. 2018 WL 5429833, at *6–7. The Court of Chancery also attempted to distinguish *Brace*, a case where the parties were permitted to offset unliquidated amounts under a provision that applied to amounts "claimed" by the parties. 2017 WL 2628440, at *4. Contrary to the Court of Chancery's findings, the Set-Off Provision at issue here is distinguishable from the provision in *Post Holdings* and is analogous to the one in *Brace.*

In *Post Holdings*, a packaged-foods company ("Michael Foods") and an egg producer ("NPE") each filed claims for breach of the parties' Stock Purchase Agreement. 2018 WL 5429833, at *2. NPE claimed that Michael Foods owed approximately $974,000 in tax refunds relating to pre-closing periods, and NPE moved for judgment on the pleadings for this claim. *Id.* at *3. Michael Foods argued that its affirmative claim for indemnification against NPE exceeded the tax refunds allegedly owed, and thus its tax refund debt was fully offset and did not need to be paid. *Id.* at *6.

The court disagreed. The Stock Purchase Agreement provision that governed the tax refund and indemnification claim provided that:

> If [NPE] . . . actually receives a credit with respect to . . . any Tax paid by . . . [NPE] . . . with respect to any Pre-Closing Period . . . , [Michael Foods] ***shall pay . . . the amount of such refund*** or credit within fifteen (15) days of receipt or entitlement thereto . . . provided, that . . . [Michael Foods] shall only be required to pay the amount of any such

> refund net of (A) the amount of ***any indemnification payment owed*** by Securityholders to [Michael Foods] or [NPE] . . . .

Id. (emphasis added). The court held that this provision did not permit Michael Foods' offset for two reasons. *First*, the court held that "the plain language of Section 6.7(e) expressly limits what Buyers can net against tax refunds to the amount of an indemnification payment that is '*owed*,' which implies that the 'indemnification payment' in question is for a presently payable amount and not some uncertain amount that is contingent in nature." *Id. Second* the court explained that "this interpretation is the only one that can be squared with the requirement in Section 6.7(e) . . . that the amount of a tax refund must be remitted 'within fifteen (15) days of receipt or entitlement thereto.'" *Id.* at *7. Citing the "fundamental principles of contract construction that a contract be read as a whole and that meaning be given to all provisions," the court reasoned that "[t]his temporal requirement would be rendered meaningless . . . if Buyers could use unliquidated indemnification claims to offset a tax refund they received." *Id.*

Neither of the rationales underlying the *Post Holdings* decision applies here. The provision in *Post Holdings* contained different language than the Set-Off Provision, using the word "owed" instead of the phrase "due or payable." An amount "owed" is an amount that is "due" or "yet to be paid." *See* OWING, Black's Law Dictionary (11th ed. 2019). If the Set-Off Provision used the word "owed"—or even the words "due ***and*** payable" instead of "due ***or*** payable"—then the

reasoning of *Post Holdings* may have force. However, because the Set-Off Provision specifically permits the set-off of "payable" amounts, *Post Holdings* is inapposite.

The Set-Off Provision also does not contain the "temporal requirement" present in the provision in *Post Holdings*. To the contrary, the final line in the Set-Off Provision states that "[t]he exercise of such set-off right by a Party, whether or not ultimately determined to be justified, shall not constitute a breach of this Agreement." A160, § 8.18. Accordingly, the Set-Off Provision expressly permits a party to exercise the right to set-off payables and receivables ***before*** such amounts are "ultimately determined to be justified." *Id.* The party utilizing the set-off right is not required to delay its set-off calculation until the set-off inputs are finalized (like the "owed" indemnification payment in *Post Holdings*). Rather, the party is entitled to set-off the amounts it currently ***claims*** are payable under the Set-Off Provision. And if these ***claimed*** payables are later determined to be incorrect, the party did not breach the APA. This makes abundantly clear that the Set-Off Provision is not limited only to amounts "owed" or "liquidated." Instead, the Set-Off Provision clearly applies to amounts that a party ***claims*** are payable.

Therefore, the Set-Off Provision parallels the provision at issue in *Brace*. In *Brace*, an industrial services company purchased a scaffolding company under the terms of a Stock Purchase Agreement. 2017 WL 2628440, at *2. After closing, the

seller received certain customer payments, and there was no dispute that the seller owed such money to the buyer (akin to the Award here). *Id.* In the litigation that followed, the buyer sued the seller for the customer payments, and the seller sued the buyer for other amounts under the parties' Stock Purchase Agreement. *Id.* The seller attempted to offset the customer payments against the amounts it claimed were due from the buyer in the litigation. *Id.*

The buyer objected, relying on *CanCan*, and argued that the seller was not permitted to offset an amount certain (the customer payments) against a "contingent unliquidated sum" (the amounts the seller claimed were due in the litigation). *Id.* at *3. However, the *Brace* court rejected the buyer's argument. *Id.* The set-off provision provided that each party was permitted to "set off all or any portion of the claimed amount of any . . . Direct Claim against any amount otherwise payable under [the Stock Purchase Agreement]." *Id.* The court held that because the parties created a "contractual right to a set-off, . . . the rationale of *CanCan* does not apply." *Id.* at *4. Accordingly, the *Brace* court held that the set-off provision permitted the seller to offset a "contingent, unliquidated claim" against the customer payments. *Id.*

The language in the set-off provision in *Brace* parallels the language in the APA's Set-Off Provision. In *Brace*, the provision permitted a party to offset a "claimed" amount against other Stock Purchase Agreement debts. *Id.* Likewise, as

explained in Section II(C)(1), *supra*, the Set-Off Provision applies to claimed amounts—even before it is determined that a party is justified in claiming the set-off. And as in *Brace*, the Set-Off Provision provides that amounts "payable" (i.e., not yet due or owed) are permitted to be offset against a party's debts. A159, § 8.18. Because the Set-Off Provision and the provision in *Brace* are analogous, *Brace's* reasoning should apply here. Thus, the Set-Off Provision permits Buyers to offset the Award against "contingent, unliquidated claims." *Brace*, 2017 WL 2628440, at *4.

Accordingly, the Court of Chancery erred in finding that "unliquidated" sums cannot be set-off, and thus the court erred when it confirmed the Award.

2. <u>In any Event, Sellers' AAPP Debts Are "Liquidated"</u>

Even if the Set-Off Provision permitted Buyers to offset the Award only against liquidated amounts, Buyers would still have the right to offset the Award against Sellers' AAPP Debts. The quantum of Sellers' full AAPP Debt is easily calculable by reference to the APA and Buyers' AAPP invoices. *See* A339-A368. Thus, such debt is "liquidated." Even excluding amounts Sellers dispute as "anticipated," Sellers owe approximately [redacted] in AAPP Payments to Buyers. Thus, at minimum, [redacted] is liquidated for use in set-off calculations. This amount substantially exceeds the value of the Award.

A liquidated amount need only be "easily calculable" or an amount that has been "settled or determined." *In re Myers*, 334 B.R. 136, 144 (E.D. Pa. 2005) (endorsing Bankruptcy Court's definition of "liquidated" as "easily calculable"), *aff'd,* 491 F.3d 120 (3d Cir. 2007); LIQUIDATED, Black's Law Dictionary (11th ed. 2019) ("(Of an amount or debt) settled or determined, esp. by agreement.").[3] And "a dispute over the claim, in whole or in part, does not change the character of a liquidated claim to unliquidated." *See* 22 Am. Jur. 2d Damages § 478 (defining "liquidated claim" in the context of determining whether interest is payable in connection with an award of damages); *Knop v. McMahan*, 872 F.2d 1132, 1144 (3d Cir. 1989) ("[A] dispute between two amounts so ascertained does not alter its liquidated character.").[4]

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[3] *See also Jack Henry & Assocs., Inc. v. BSC, Inc.*, 487 Fed. Appx. 246, 258 (6th Cir. 2012) ("liquidated" means "fixed and determined or readily ascertainable by computation or a recognized standard"); *Manning & Smith Ins., Inc. v. Hawk-Moran Ins. Agency, Inc.*, 2000 WL 227901, at *5 (10th Cir. Feb. 3, 2000) ("The word 'liquidated' . . . means made certain as to what and how much is due, either by agreement of the parties, or by operation of law." (citation omitted)); *In re Mazzeo*, 131 F.3d 295, 304 (2d Cir. 1997) ("If 'the value of the claim is easily ascertainable,' it is generally viewed as liquidated." (citation omitted)); *Blustein v. Eugene Sobel Co.*, 263 F.2d 478, 482 (D.C. Cir. 1959) ("[T]he debt is regarded as liquidated if the amount due can be determined by mere mathematical computation." (citation omitted)).

[4] *See also Jacobson Warehouse Co., Inc. v. Schnuck Mkts., Inc.*, 13 F.4th 659, 678 (8th Cir. 2021) ("[A] dispute over the actual amount owed does not render a claim unliquidated." (citation omitted)); *Monsour's, Inc. v. Menu Maker Foods, Inc.*, 381 Fed. Appx. 796, 802 (10th Cir. 2010) ("A claim may be liquidated even if the parties dispute liability and damages, and even if a court awards fewer damages than a claimant requests."); *In re Slack*, 187 F.3d 1070, 1071–72 (9th Cir. 1999), *as*

Sellers' full AAPP Debt is "easily calculable," "settled," and "determined," and thus, Sellers' full AAPP Debt is "liquidated" for purposes of the Set-Off Provision. CMS advanced Sellers certain Medicare payments through the AAPP program when Sellers owned the Acquired Hospitals. A319. There is no dispute that CMS is now recouping that same amount back from Buyers. *Id.* Under the APA, Sellers are responsible for providing Buyers with these AAPP funds in advance of CMS' monthly recoupments. *See* A158, § 8.16(a). In short, the ***total*** amount of AAPP Payments that Sellers ultimately must make to Buyers is not in dispute: the ***total*** is equal to the amount of Medicare monies that Sellers received in advance payments from CMS. No party disputes this. A817, 102:15 – 102:19 ("Your Honor, what these AAPP payments are is it's reimbursements of amounts that were advanced to the hospitals prior to closing. We know how much was advanced to the hospitals prior to closing . . . .").[5] Sellers dispute only when they

amended (Sept. 9, 1999) ("[W]e conclude that a debt can be liquidated even though liability is in dispute."); *Mazzeo*, 131 F.3d at 305 ("[T]he vast majority of courts have held that the existence of a dispute over either the underlying liability or the amount of a debt does not automatically render the debt either contingent or unliquidated.").

[5] *See Evans v. State*, 150 A.3d 286, 286 n.2 (Del. 2016) (taking judicial notice of docket, filings, and transcript in other action); *Hayward v. King*, 127 A.3d 1171, 1171 n.1. (Del. 2015) (same); *Cooke v. State*, 97 A.3d 513, 545 n.191 (Del. 2014) (taking judicial notice of fact "not subject to reasonable dispute"). ‼
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are obligated to reimburse Buyers. A386-A387. Accordingly, the entirety of Sellers' AAPP Debt is "liquidated" because it is already settled and easily calculable.

Even assuming that the Court would be required to reduce Sellers' AAPP Debt by the amount that Sellers claim is not yet due, Sellers' AAPP Debt still exceeds the Award. Indeed, Sellers' only argument is that of the [redacted] of dollars they will ultimately owe Buyers, a fraction of that amount is not yet due because it has not yet been recouped by CMS from Buyers. A812-A813, 97:22 – 98:1 ("My client does not dispute that to the extent that there were amounts that were required to be repaid or that were otherwise recouped by CMS, that we have to make those payments"); A386-A387. While Sellers' argument is based on an erroneous interpretation of the APA, *see* A158, § 8.16(a) (requiring Sellers to make payments in advance), it does not change the result. Even removing the "anticipated" amounts, Sellers still owe Buyers approximately [redacted]. Thus, at minimum, [redacted] is "liquidated." Because the Award is only for $20,325,075, the Award is fully offset even by this reduced, liquidated AAPP Debt from Sellers.

In sum, [redacted] of Sellers' AAPP Debt, at minimum, must be applied in set-offs against the Award before the Award can be paid. And because this AAPP Debt is significantly larger than the Award, Buyers' debt is fully offset.

III. THE AWARD MUST BE MODIFIED

A. Question Presented

Whether the Court of Chancery erred in denying the motion to modify and ruling that "the Motion offers no grounds to modify the Award." Ex. A at 6. The question was raised below, A327-A331, A455-A460, and considered by the Court of Chancery, Ex. A at 6.

B. Scope of Review

This Court reviews the Court of Chancery's denial of a motion to modify an arbitration award for abuse of discretion. *M3 Healthcare Sols. v. Fam. Prac. Assocs., P.A.*, 996 A.2d 1279, 1285 (Del. 2010). "An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice." *Stillwater Mining Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa*, 289 A.3d 1274, 1282 (Del. 2023). Where the court's abuse of discretion relies on "embedded legal conclusions," like here, the court's judgment is reviewed "*de novo*." *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 380–81 (Del. 2014); *see also Hill Int'l, Inc. v. Opportunity P'rs L.P.*, 119 A.3d 30, 37–38 (Del. 2015) (evaluating *de novo* the construction of a corporate bylaw in reviewing the grant of injunctive relief).

C. Merits of Argument

The Court of Chancery erred when it denied Buyers' motion to modify the Award. The court's denial of the motion was based solely on the court's erroneous interpretation of the APA. Accordingly, the court's ruling must be reversed.

Considering the law and facts, the Court of Chancery could not have reasonably denied the motion to modify. Delaware law provides that arbitration-related disputes are to be decided in conformity with the FAA. 10 Del. C. § 5702(c). Under the FAA, the court is permitted to modify an arbitration award: (1) "[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award"; (2) "[w]here the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted"; and (3) "[w]here the award is imperfect in matter of form not affecting the merits of the controversy." *TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Secs., Inc.*, 953 A.2d 726, 731 (Del. Ch. 2008).

Courts consistently recognize that where an arbitration award should be included in a greater set-off calculation, the award must be modified because it is "imperfect in matter of form not affecting the merits of the controversy" and modification is required to avoid "unjust consequences." *UBS Fin. Servs., Inc. v.*

Riley, 2012 WL 1831720, at *3 (S.D. Cal. May 18, 2012). For example, in *UBS*, a federal court granted "petitioners' request to modify the award to allow for a setoff" where "[a]llowing for a setoff would not require the court to reconsider the merits [of the arbitration]" but rather "would simply modify the form of the award to avoid unjust consequences." *Id.* The "unjust consequences" at issue in *UBS*, just as here, stemmed from the fact that the petitioners in that case would have been required to pay the respondent the full award "even though he owe[d] a greater amount to" the petitioners. *Id.* The *UBS* court noted the "absurdity of making A pay B when B owes A" and its power to avoid such an absurd result by modifying the award as permitted under the FAA because the modification would not affect the award's substance, but only its "form." *Id.*

Another court reached the same result in *Pochat v. Lynch*, and granted a motion to modify an arbitration award to include offset, noting that "[i]f the Court did not permit offset, Merrill Lynch would be faced with the 'absurdity' of having to pay Pochat when Pochat owes Merrill Lynch a far greater amount . . . . Put simply, absent offset, Merrill Lynch would have no choice but to pay Pochat $200,000, only to seek immediately to recoup that sum." 2013 WL 4496548, at *20 (S.D. Fl. Aug. 22, 2013). In *Pochat*, as here, the issue of offset was not before the arbitration panel. *Id.* Because the Arbitration and Award under Section 2.5 were designed solely to determine the proper Purchase Price Adjustment, and not to interpret the parties'

rights under the APA, it is "hard . . . to imagine that the Arbitrator[] would have specifically desired the circuitous result that would arise from precluding setoff, especially given that 'the basic policy of conducting arbitrations is to offer a means of deciding disputes expeditiously and with lower costs than in ordinary litigation.'" *Id.* (quoting *Schmidt v. Finberg*, 942 F.2d 1571, 1573 (11th Cir. 1991)).

Other courts have found the same. *See Sullivan v. Lumber Liquidators, Inc.*, 2013 WL 4049102, at *5 (D. Nev. Aug. 9, 2013) (modifying award to account for set-off); *Rossel v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 2011 WL 13190124, at *5 (C.D. Cal. Mar. 3, 2011) (same); *see also Am. Life Ins. Co. v. Parra*, 269 F. Supp. 2d 519, 527 (D. Del. 2003) (holding that because "the arbitration panel did not address the [set-off]," "the Court can and will order that the amount in question be set-off against the amount awarded Parra at arbitration").

As explained in Section II(C)(2), *supra*, Sellers' AAPP Debts are ripe for offset and fully exhaust the amount of the Award. Accordingly, the Award should have been modified to account for such offsets. However, the court did not grapple with the above authorities other than by attempting to distinguish them in a footnote because they "addressed liquidated amounts." Ex. A at 5 n.18. Instead, the court only briefly explained: "Under my interpretation of the APA, the Motion offers no grounds to modify the Award." Ex. A at 6. The court's decision therefore rested

entirely on the "embedded legal conclusion," which was decided in error. *Hill Int'l*, 119 A.3d at 37–38.

IV. IF MODIFICATION IS INAPPROPRIATE, PAYMENT OF THE AWARD MUST BE STAYED

A. Question Presented

Whether the Court of Chancery erred in denying the motion to stay and ruling that "[a] strict reading of the APA, and the FAA, supports entry of judgment that would permit prompt collection." Ex. A at 7. The question was raised below, A331-A333, A460-A464, and considered by the Court of Chancery, Ex. A at 7.

B. Scope of Review

This Court reviews the Court of Chancery's denial of a motion to stay for abuse of discretion. *Stillwater Mining Co. v. Natl. Union Fire Ins. Co. of Pittsburgh, Pa*, 289 A.3d 1274, 1282 (Del. 2023). "An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice." *Id.* Where the trial court's abuse of discretion relies on "embedded legal conclusions," like here, the court's judgment is reviewed "*de novo*." *N. River Ins. Co. v. Mine Safety Appliances Co*., 105 A.3d 369, 380–81 (Del. 2014); *see also Hill Int'l, Inc. v. Opportunity Partners L.P.*, 119 A.3d 30, 37–38 (Del. 2015)

C. Merits of Argument

Although the court initially recognized that "[b]oth common sense and efficiency concerns support staying this action and reducing the parties' disputes to a single judgment," Ex. A at 6-7, it nevertheless denied the motion to stay based only

on its erroneous interpretation of Sections 2.5 and 8.18 of the APA and improper interpretation of the FAA. Ex. A at 8.

Here, in view of the law, the Court of Chancery could not have reasonably denied the motion to stay. In nearly identical circumstances, one court found that a stay was appropriate. In *Middleby Corp. v. Hussmann Corp.*, a buyer and seller entered into an asset purchase agreement for the purchase of a business. 1991 WL 119123, at *1 (N.D. Ill. June 26, 1991). After the acquisition, the parties disputed various obligations in the agreement, including the purchase price adjustment. *Id.* The buyer sued the seller regarding most of these issues, but the parties separately submitted their purchase price adjustment dispute to an accounting arbitrator pursuant to their agreement. *Id.* The arbitration resulted in an award to the seller, and the seller separately moved for confirmation of the award, even though the parties' remaining disputes were still pending before the court. *Id.* In response, the buyer did not dispute the amount of the award, but instead argued that entry of judgment on the award should be stayed until the resolution of all pending disputes before the court because "any eventual recovery by [the buyer] could offset the arbitration award." *Id.* at *3–4. The court agreed with the buyer and denied the seller's petition for entry of judgement on the arbitration award, pending resolution of the parallel litigation in court. *Id.* at *4.

The circumstances in *Middleby* are nearly identical to those here. In *Middleby*, as here, there was a pending breach of contract action in court. *Id.* at *1-2. And in *Middleby*, as here, a purchase price adjustment dispute was submitted to an accounting arbitrator, and that arbitration was resolved prior to the resolution of the disputes in court. *Id.* Also, in *Middleby*, the buyer did not contest the amount of the award, but instead argued against the entry of judgment on the award because it could be offset against an "eventual recovery" by the buyer. *Id.* at *4. That is exactly what Buyers argued here. Accordingly, the Court should have stayed this proceeding, pending the outcome of the Set-Off Litigation.

In analyzing the motion to stay, the Court of Chancery did not even grapple with *Middleby*. Although the court initially acknowledged that it possessed the "inherent authority" to grant the motion to stay pending the Set-Off Litigation and explained that "***[b]oth common sense and efficiency concerns support staying this action*** and reducing the parties' disputes to a single judgment," Ex. A at 6-7 (emphasis added), it ultimately denied the motion, finding that "Section 2.5(c) of the APA specifically provides that judgment may be entered on the Award." *Id.* at 7. The court thus found that payment of the Award without regard to other set-offs was proper under the APA. *See id.* And the court explained that this interpretation was buttressed by a "strict reading of the [FAA]," which "mandates that courts . . . confirm arbitration awards by converting them into enforceable judgments through

a summary proceeding." *Id.* However, the court's interpretations of the APA and the FAA were in error.

First, the court's interpretation of the APA is incorrect. As explained in Section I(C), *supra*, the court erred when finding that Section 2.5(c) arbitration awards are not subject to the Set-Off Provision. The parties agreed that Section 2.5(c) arbitration awards should not be enforced in isolation.

Second, the FAA does not support ignoring the plain text of the APA to summarily confirm an arbitration award in advance of all other set-offs. The U.S. Supreme Court has made clear that "the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). And the Delaware Supreme Court has recognized that "[t]he principal purpose of the FAA is to 'ensur[e] that private arbitration agreements are enforced ***according to their terms***.'" *Gulf LNG Energy, LLC v. Eni USA Gas Mktg. LLC*, 242 A.3d 575, 583 (Del. 2020) (emphasis added). Here, the parties agreed that Section 2.5(c) arbitration awards must be confirmed only "[s]ubject to each Party's rights set forth in [the Set-Off Provision]." A106, § 2.5(d); Section I(C), *supra*. Accordingly, this matter must be stayed pending resolution of the Set-Off Litigation. Such a position is not inconsistent with the "mandate" in the FAA "that courts . . . confirm arbitration awards by converting them into enforceable judgments through a summary proceeding." Ex. A at 7.

Indeed, the Court of Chancery should ultimately confirm the Award, but only after the applicable set-offs have been applied. That was the agreement of the parties, and it should be enforced. *See* Section I(C), *supra*.

Therefore, when correcting for the court's misinterpretation of the APA and misapplication of the FAA, all factors support granting a stay pending the outcome of the Set-Off Litigation. Because the court's decision rested entirely on the "embedded legal conclusion" that was in error, it should be reversed. *Hill Int'l*, 119 A.3d at 37–38.

CONCLUSION

For the foregoing reasons, the Court of Chancery erred when it mandated payment of the Award without regard to set-offs available under the Set-Off Provision. The Court of Chancery should be reversed, and a modification of the Award should be ordered. If this Court finds modification to be inappropriate, a stay of the Award should issue pending resolution of the Set-Off Litigation.

/s/ Michael A. Barlow
Michael A. Barlow (#3928)
Adam K. Schulman (#5700)
ABRAMS & BAYLISS LLP
20 Montchanin Drive, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Attorneys for Appellants Steward Health Care System LLC, Steward Medical Group, Inc., Steward PGH, Inc., Steward NSMC, Inc., Steward CGH, Inc., and Steward HH, Inc.

OF COUNSEL:

Anthony Bongiorno
Jessica Reese
QUINN EMANUEL URQUHART & SULLIVAN, LLP
111 Huntington Avenue, Suite 520
Boston, Massachusetts 02199
(617) 712-7100

Rollo C. Baker IV
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2023, a true and correct copy of the *Public Version of Appellants' Opening Brief* was served on the following counsel of record via File & Serve*Xpress*:

Lewis H. Lazarus, Esq.
Albert J. Carroll, Esq.
Barnaby Grzaslewicz, Esq.
MORRIS JAMES LLP
500 Delaware Avenue, Suite 1500
Wilmington, Delaware 19801

/s/ Florentina D. Field
Florentina D. Field (#7146)