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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. 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, Petitioners-Below, Appellees.	No. 181, 2023 Case Below: Chancery Court of the State of Delaware C.A. No. 2022-0774-SG **PUBLIC VERSION** **FILED AUGUST 22, 2023**

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

This appeal relates to the Court of Chancery's confirmation of an arbitration award (the "Award") and rejection of Appellants' (referred to as "Steward" in this brief) attempt to modify or stay the Award based on a disputed, unliquidated claim Steward asserted against Appellees (referred to as "Sellers" in this brief) that is pending in a separate litigation in the Court of Chancery. The Award relates to over $20 million of Net Working Capital that Sellers delivered to Steward on August 1, 2021, when Steward closed its purchase of five hospitals from Sellers. A282. Through meritless litigation, Steward has delayed paying for Net Working Capital for over two years.

Steward's appeal of the Court of Chancery's refusal to modify the Award is reviewed under "one of the narrowest standards of judicial review in all of American jurisprudence," *TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Sec., Inc.*, 953 A.2d 726, 732 (Del. Ch. 2008), and fails under any standard.

First, Section 2.5(c) of the June 16, 2021 Asset Purchase Agreement[1] (the "APA") is the only provision of the parties' agreement that addresses confirmation of the Award and it unambiguously provides that "[t]he determination of the

[1] Capitalized terms used herein that are not defined have the meanings provided in the APA.

Arbitrator shall be final, binding and conclusive on the Parties, and judgment may be entered upon the written determination of the Arbitrator in accordance with Section 10.4." A105, § 2.5(c). Neither of the provisions Steward relies on (the Net Working Capital payment provision, Section 2.5(d), and the set-off provision, Section 8.18) addresses or affects Section 2.5(c)'s procedural mechanism for entering judgment. Thus, the Court properly confirmed the Award without modification under Section 2.5(c) of the APA.

Second, even assuming Section 2.5(c) subjected final judgment on the Award to Section 8.18 (it does not), the alleged, disputed claim that Steward attempts to leverage to offset the award (the "AAPP" claim) is not a "due or payable" amount available for set-off under Section 8.18 of the APA because it is an unliquidated claim currently being litigated in *Steward Health Care System LLC v. Tenet Business Services Corp.*, Case No. 2022-0289-SG (Del. Ch.) (the "Set-Off Litigation"). Even assuming Steward's AAPP claim was "due or payable" (and it is not), it is still unavailable to offset the Award because Steward's total undisputed debts to Sellers (including the Award) far exceed the amount of Steward's AAPP claim.

Third, Steward does not identify anything in the APA or the Federal Arbitration Act ("FAA") that ***required*** the Court to modify the Award before confirmation. Steward relies on 9 U.S.C. § 11, but that statute provides grounds on

which a court "***may*** make an order modifying or correcting the award upon the application of any party to the arbitration."[2] Thus, even assuming Steward had a valid set-off that exceeded its undisputed debts to Sellers (it does not), Steward still cannot show the Court of Chancery erred in entering final judgment on the Award.

Finally, recognizing the insurmountable hurdles on its modification claim, Steward falls back on arguing the Court of Chancery should have equitably stayed final judgment. But this Court does not overturn such discretionary decisions absent some evidence the decision was arbitrary or unreasonable, a standard that Steward has not even tried to satisfy. Nor could it, given that the equities strongly favor Sellers who have waited over two years for payment on assets they delivered to Steward in 2021.

For these reasons, and the reasons set forth below, this Court should affirm the Court of Chancery's confirmation of the Award.

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[2] All emphases added unless otherwise provided.

SUMMARY OF ARGUMENT

1. **Denied**. The Court of Chancery correctly confirmed the Award without modification. While Steward focuses entirely on the set-off provisions in Sections 2.5(d) and 8.18, neither provision addresses the procedural mechanism for reducing the Award to final judgment. Only Section 2.5(c) does, and it plainly provides that "judgment may be entered" on the Award the parties agreed would be "final, binding[,] and conclusive." A105, § 2.5(c). Steward conceded this point during argument, agreeing that the Court of Chancery should "***confirm*** the award ***and then***" deal with any purported set-off "if [it] needed to." A532–33, at 26:15–27:5. Steward was correct then—Section 2.5(c) provides the mechanism for ***entering*** final judgment and it is not subject to Section 8.18.

Steward reverses course on appeal and urges this Court to read the Section 8.18 set-off provision to trump the final judgment directive in Section 2.5(c). Ultimately, Steward confuses the nature of the relief the Court awarded and the separate, independent provisions of the APA that address (1) entry of final judgment on the Award (Section 2.5(c)) and (2) Steward's right to use any undisputed "due or payable" set-offs (Steward has none) to pay its debts (Sections 2.5(d) and 8.18).

2. **Denied**. The Court of Chancery properly ruled that Steward's unliquidated AAPP claim is not available to offset the Award. Even putting aside

Steward's attempt to read Section 2.5(c)'s final judgment directive out of the Agreement, Steward's appeal still fails given the Agreement only permits set-offs for "amounts due or payable." A159, § 8.18. The only amounts Steward claims are available for set-off are unliquidated and disputed AAPP claims currently being litigated in the Set-Off Litigation. Steward does not identify a single case holding that claims subject to active litigation are "amounts due or payable" because they plainly are not under overwhelming authority discussed in detail below. Moreover, even if Steward succeeds on its AAPP claim in the Set-Off Litigation, that claim is insufficient to cover the Award because it is needed to cover Steward's other undisputed debts to Sellers.

3. **Denied**. The Court of Chancery properly denied Steward's motion to modify the Award. Steward's opening brief ("Br.") misrepresents caselaw in arguing that "[c]ourts consistently recognize" an "award ***must*** be modified" in light of alleged set-offs. Br. at 36. None of the cases Steward cites includes such mandatory language, and the statute Steward relies on is discretionary. 9 U.S.C. § 11. Moreover, Steward's cases only illustrate Sellers' point: they all involve set-off of "amounts due or payable," like two arbitration awards.

4. **Denied**. The Court of Chancery properly denied Steward's motion to stay. The Court of Chancery's carefully reasoned rejection of Steward's stay request should be affirmed.

STATEMENT OF FACTS

A. The APA.

On June 16, 2021, Sellers and Steward executed the APA for the sale of five Miami-based hospitals (the "Purchased Hospitals"). A86. The transaction closed on August 1, 2021 and Steward paid Sellers an Estimated Purchase Price of $1.1 billion subject to a customary post-closing true-up, including for Net Working Capital. A104–06, § 2.5.

B. The Parties Agree Any Net Working Capital Arbitration Award Is "Final, Binding and Conclusive" And May Be Enforced By "Judgment."

The APA included the following steps for truing-up the Net Working Capital payment post-Closing:

- ***First***, the APA required Sellers to prepare an Estimated Net Working Capital calculation within 10 days of Closing. A104, § 2.5(a).
- ***Second***, within 90 days of Closing (October 29, 2021), both parties were required to prepare an Actual Net Working Capital calculation. Both parties had the right to submit written objections to the other's calculation. *Id.* § 2.5(c).
- ***Third***, if the parties could not agree on an Actual Net Working Capital amount by December 13, 2021, the parties agreed to arbitrate. *Id.*

The APA also outlined the procedural mechanism for arbitrating the Net Working Capital dispute. Section 2.5(c) provides, in relevant part:

> [The Arbitrator] shall be engaged to provide a final, binding and conclusive resolution of all such unresolved disputes ***within sixty (60)***

> ***days*** after such engagement . . . . Upon final resolution of all Disputed Items, the Arbitrator shall issue a report showing its final calculation of such Disputed Items, including its reasoning for each Disputed Item. The determination of the Arbitrator shall be ***final, binding and conclusive*** on the Parties, and ***judgment may be entered upon the written determination of the Arbitrator*** in accordance with Section 10.4.

A105, § 2.5(c). Section 2.5(d), in turn, provides the mechanism for collecting any true-up to the Purchase Price.

> Subject to each Party's rights set forth in Section 8.18, if the Purchase Price as finally determined pursuant to Section 2.5, is [] 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*** . . . .

A106, § 2.5(d). Importantly, despite the APA calling for other potential post-Closing payment obligations—*see, e.g.*, A158, § 8.16; A161, § 8.22—the ***only*** dispute singled out for expedited arbitration and judgment was Net Working Capital.

C. The Arbitrator Enters the Award for Sellers.

After exchanging Net Working Capital statements, the parties could not reach agreement on the appropriate calculation. On April 7, 2022, the parties engaged BKD n/k/a FORVIS as the Arbitrator to resolve their dispute. A58. On August 25, 2022, the Arbitrator issued an opinion overwhelmingly in Sellers' favor (the "Award"). A57–80.

Of the amounts in dispute, the Arbitrator resolved 95.55% in Sellers' favor, reflecting an award of $20,325,075, excluding interest, for Sellers.[3] The Arbitrator observed that Steward's arbitration position was predicated on methodologies "inconsistent" with the APA (A69) that were in turn modified with self-serving and opaque "Steward[-]proposed specific adjustments" (*id.* at 5). However, by submitting its meritless Net Working Capital calculation, delaying arbitration beyond the time frame the parties contemplated in the APA, and now disputing the final judgment on the Award, Steward has avoided paying for over $20 million in Net Working Capital it received at Closing for nearly two years.

On August 30, 2022, Sellers filed a petition to confirm the Award. A38.

D. Steward Also Owes Sellers [redacted] For TSA and MSA Fees.

In addition to the Award, Steward also owes Sellers and their affiliates [redacted] for IT services (*i.e.*, the "TSA Fees") and revenue cycle

[3] The Arbitrator also ruled that Sellers are entitled to amounts Steward collected on certain "Excluded Patient Accounts Receivable" after Closing. A80. Because Steward has refused to reveal how much it collected on these accounts, the Arbitrator was unable to quantify the precise award due to Sellers on these accounts. A78. These additional amounts Steward owes Sellers but refuses to pay (amongst other amounts) are now being litigated in the Set-Off Litigation. B381–84 (*Am. & Suppl. Verified Countercls.*, Set-Off Litigation, at Count IV (Jun. 21, 2023)).

management services (*i.e.*, the "MSA Fees") Sellers or their affiliates provided in connection with the transition of the Purchased Hospitals to Steward. Steward concedes that [redacted] of TSA Fees and [redacted] of MSA Fees are "***undisputed***." A326 (emphasis original).

E. The Unliquidated and Disputed Claims.

As the parties were truing up Net Working Capital, on March 25, 2022, Steward initiated the Set-Off Litigation. B30 (*Verified Compl.*, Set-Off Litigation (Mar. 25, 2022)). The Set-Off Litigation was prompted by Sellers' notice to Steward that Sellers had the right to terminate the TSA based on Steward's failure to pay the TSA Fees. On April 22, 2022, Sellers filed their Counterclaims seeking payment for, among other things, the TSA fees. B79 (*Answer & Countercls. to the Verified Compl.*, Set-Off Litigation (Apr. 22, 2022)).

The Set-Off Litigation also involves "several [other] payment provisions," *Steward Health Care System LLC v. Tenet Business Services Corp.*, 2022 WL 3025587, at *3 (Del. Ch. Aug. 1, 2022), including but not limited to the two that Steward identified in its brief: payments related to the Florida Directed Payment Program ("DPP") and the Centers for Medicare & Medicaid Services ("CMS") Accelerated and Advance Payment Program ("AAPP"). The Set-Off Litigation also encompasses other liabilities, omitted from Steward's brief, each of which involves

a sum that Steward owes Sellers. *E.g.*, B380–81 (*Am. & Suppl. Verified Countercls.*, Set-Off Litigation, at Count III (Jun. 21, 2023) (payment for IT services provided)); B381–85 (*id.* at Counts IV–V (payment for medical equipment provided)); B386–87 (*id.* at Count VI (payment for collections on "Excluded Patient Accounts Receivable")).

The parties cross-moved for summary judgment in the Set-Off Litigation. On August 1, 2022, the Court of Chancery issued an opinion stating that, *inter alia*, Steward's refusal to pay Sellers over [redacted] in DPP payments was based on an "unworkable" interpretation of the APA. *Steward*, 2022 WL 3025587, at *10. Nonetheless, the Court of Chancery withheld ruling on the cross-motions pending limited fact discovery. The limited discovery window has closed, and both parties renewed their cross-motions. A decision on the cross-motions is pending.

1. *The DPP Dispute.*

The "DPP is a state-sponsored, and federally approved, program designed to address uncompensated Medicaid costs borne by" Florida's hospitals. *Id.* at *3. Florida approved the DPP during the parties' negotiations over the APA. As a result, the parties added to the APA Section 8.22, a provision that allocates DPP Distributions based on which party provided the uncompensated care to Medicaid patients during the DPP program year. A161, § 8.22.

Steward claims it is entitled to all DPP distributions from the DPP's first program year, despite having operated the hospitals for only two months of that year. Sellers argue that they are entitled to the DPP distributions reflecting their pro-rata share (10/12ths) from the 10 months of the year that they operated the hospitals during the first DPP program year—as outlined in the APA. Specifically, Sellers contend that Steward owes over [redacted] in DPP payments. *See e.g.*, B365–66 (*Am. & Suppl. Verified Countercls.*, Set-Off Litigation ¶ 61 (Jun. 21, 2023)); A327.

Following the first round of summary judgment briefing and argument, the Court of Chancery observed that Steward's interpretation of the DPP provision "***breaks down*** when viewed in the context of the broader APA" and is "***unworkable***" whereas Sellers' interpretation "is ***the*** interpretation that is ***workable in the context of the broader APA***" and "consistent." *Steward*, 2022 WL 3025587, at *9–10. Through subsequent discovery, Sellers learned that Steward repeatedly admitted internally after signing and Closing that it owed Sellers their pro-rata share of the DPP Distributions "[p]er the APA." *See* B299–306 (*Defs.' Suppl. Br. in Supp. of Defs.' Cross-Mot. for Summ. J. & In Opp'n to Pls.' Mot. for Summ. J.*, Set-Off Litigation, at 18–25 (Mar. 20, 2023)). Steward changed its position approximately six months after Closing, during [redacted], when it determined that paying

Sellers their pro-rata share of the DPP would [redacted] B306–10 (*id.* at 25–29); A798, at 83:5–6.

2. *The AAPP Dispute.*

Under the AAPP, which was instituted as part of CMS's response to the COVID-19 pandemic, the Purchased Hospitals received Medicare advance payments in 2020. The AAPP requires that hospitals pay back those advances over time, and CMS recoups those advances by withholding funds from its Medicare payments to hospitals, subject to potential repayment relief—which Steward has received based on its filing an extreme "financial hardship" application with CMS. B320–21 (*Defs.' Suppl. Br. in Supp. of Defs.' Cross-Mot. for Summ. J. & In Opp'n to Pls.' Mot. for Summ. J.*, Set-Off Litigation, at 39–40 (Mar. 20, 2023)). The APA requires Sellers to ***"reimburse"*** Steward for the recoupments, provided that (1) they reflect amounts actually "paid by Buyers or recouped by CMS" in any given month or "in the immediately following month" and (2) Steward provides "reasonable supporting documentation" of the recoupments such as with "remittance advices." A158, § 8.16. Steward's brief incorrectly suggests that Sellers dispute only "anticipated" amounts. In the Set-Off Litigation, Sellers dispute Steward's entitlement to ***any*** AAPP amounts because, among other things, Steward has never submitted "reasonable supporting documentation" evidencing its claimed amounts.

B323 (*Defs.' Suppl. Br. in Supp. of Defs.' Cross-Mot. for Summ. J. & In Opp'n to Pls.' Mot. for Summ. J.*, Set-Off Litigation, at 42 (Mar. 20, 2023)); *see also* A158, § 8.16.

F. The Court Rejects Steward's Request to Modify or Stay the Award Based on Alleged, Disputed Set-Offs.

On October 21, 2022, Steward moved to modify or stay judgment on the Award "pending the outcome of the Set-Off Litigation." Br. at 14. Steward's counsel repeatedly admitted Steward was not challenging the amount of the Award "in any way, shape, or form." A512 at 6:7–8; *id.* at 6:9–12 ("The underlying arbitration happened exactly as it was supposed to under the contract."); B9–10 at 9:14–10:1; *see also* Br. at 14 ("Buyers do not contest the amount of the Award . . . .").

Instead, Steward argued that the "Award is subject to the set-off provision," the "Award must be modified to account for the set-off provision," or, "in the alternative," enforcement of the award "should be stayed pending resolution of the set-off litigation." A323–31.

On April 4, 2023, the Chancery Court issued a letter decision confirming the Award (the "Opinion" or "Op.").[4] The Court relied on Section 2.5(c), which

[4] The April 4, 2023 Opinion is attached as Exhibit A to Steward's opening brief.

provides that the Award will be "final, binding[,] and conclusive" and that "judgment may be entered upon" the Award. Op. at 3. The Court rejected Steward's argument that the Award may not be confirmed until the Set-Off Litigation is resolved. The Court provided two independent reasons for doing so.

First, the Court determined that the only APA provision discussing the procedure for confirming the Award—Section 2.5(c)—plainly states that the Award may be "reduced to a judgment." *Id.* "Nothing" else in the APA, Section 8.18 included, addresses or affects the procedural mechanism for reducing the Award to judgment, much less states that a stay is required in light of pending Set-Off Litigation. *Id.* ***Second***, even if Steward could use a set-off to avoid a final judgment (as opposed to simply reducing its payment on the final judgment), the only set-offs permitted under the APA are those that are "due or payable." *Id.* (citing APA § 8.18). Section 8.18 provides:

> Buyers, on the one hand, and Sellers, on the other, 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 other Party] . . . .

A159, § 8.18.

On April 10, 2023, Steward filed a "motion for clarification," again asking the Court of Chancery to stay entry of final judgment. A569. On May 9, 2023, Vice Chancellor Glasscock, who is also presiding over the Set-Off Litigation, denied

Steward's motion. A718 at 3:7–15. The Court entered final judgment on May 15, 2023.[5]

[5] The May 15, 2023 Order is attached as Exhibit B to Steward's opening brief.

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY ENTERED FINAL JUDGMENT ON THE AWARD.

A. Question Presented

Whether the Court of Chancery properly entered judgment on the Award because "[u]nder the plain meaning of Section 2.5(c), the Award is final, binding, conclusive, and susceptible to being reduced to a judgment" regardless of any claimed set-offs. The question of whether the Award is "final, binding, conclusive, and susceptible to being reduced to a judgment" was raised below, A323–25, A382–99, and the Court of Chancery addressed it in the Opinion. Op. at 5.

B. Scope of Review

This Court reviews a trial court's denial of a motion to modify an arbitration award for abuse of discretion. Br. at 35 (citing *M3 Healthcare Sols. v. Fam. Prac. Assocs., P.A.*, 996 A.2d 1279, 1285 (Del. 2010)).

C. Merits of Argument

The Court of Chancery did not abuse its discretion in refusing to modify or stay final judgment on the Award based on Steward's alleged, disputed set-off rights. The Court did ***not***, as Steward claims, hold "that the Award should be ***paid*** without regard to the set-offs available under the Set-Off Provision." Br. at 16. That is a strawman. The gating procedural question presented to the Court of Chancery was

whether Steward had any basis to modify or stay the Award ***before*** final judgment. That is a different question than Steward presents on appeal.[6]

Steward presented no valid basis to modify or stay final judgment on the Award. "Arbitration awards . . . are not lightly disturbed, and Courts must accord substantial deference to the decisions of arbitrators. . . . [A] court's review of an arbitration award is one of the narrowest standards of judicial review in all of American jurisprudence." *TD Ameritrade*, 953 A.2d at 732 (internal quotations and citations omitted). Applying this standard, the Court properly relied on Section 2.5(c) of the APA, which provides that the recipient of an arbitration award has a right to have "judgment . . . be entered" since the Award "shall be final, binding and conclusive." A105, § 2.5(c).[7]

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[6] To be sure, the Court also ruled that Steward does not have any valid set-offs to pay the Award (*see* Section II *infra*), but that is a separate issue from whether the Court properly entered final judgment on the Award.

[7] Courts "have uniformly held" an "agreement for '***final and binding***' arbitration" (as here) "***articulate[s] the parties' intention to have a court enter judgment on the award.***" *Indep. Lab'y Emps.' Union, Inc. v. ExxonMobil Rsch. & Eng'g Co.*, 2019 WL 3416897, at *16 (D.N.J. July 29, 2019), *aff'd*, 11 F.4th 210 (3d Cir. 2021) (collecting cases); *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386, 389–90 (7th Cir. 1981) (holding that "[s]everal courts" have interpreted language that an award "shall be final and binding" as "consent to the entry of judgment on an arbitration award") (citing *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 276 (1932)).

The Court of Chancery properly recognized that Section 2.5(c) addresses the "procedural mechanism[]" for entry of final judgment (Op. at 5), which is a separate question from whether Steward had to pay that final judgment in cash or could try to satisfy some or all of it with offsets under Section 8.18. The Court of Chancery recognized that Section 2.5(c)'s grant of a right to a final judgment on the Award is not qualified in any way, including by Section 8.18. "[B]y its plain terms, Section 2.5(c) is not subject to Section 8.18. The plain terms of Sections 2.5(d) and 8.18 subject only Section 2.5(d) to Section 8.18." *Id.* Yet, that Section 8.18 offset argument was the only argument Steward made in its motion to modify or stay. Thus, because "Section 2.5(c)'s provisions for obtaining and judicially confirming an Award stand on their own," Steward presented no basis to modify or stay the Award. *Id.*

Steward misconstrues the Court's ruling by reducing it to the line: "Nothing in the APA subjects any award under Section 2.5(c) to Section 8.18." Br. at 19–20. Based on this, Steward wastes considerable ink pointing out obvious language in Section 8.18 that allows the parties to set-off "any amounts due by either Party pursuant to the purchase price adjustment due pursuant to Section 2.5(d)." *Id.* at 18–19. Steward's myopic read of the Court's ruling misses the point. Section 2.5(c) is ***the only*** provision that addresses whether a "judgment may be entered upon" the

Award and nothing in Section 2.5(c) subjects the entry of final judgment to the set-off provisions in Section 8.18.[8]

To support its mischaracterization of the Court's ruling, Steward argues that the only way to harmonize Sections 2.5(c), 2.5(d), and 8.18 is to conclude "the Award is not required to be ***paid*** without offsetting the other liabilities identified in the Set-Off Provision." Br. at 17. Again, Steward conflates the procedural mechanism of entering final judgment on an arbitration award with Steward's contractual right to satisfy a final judgment with valid offsets (if they existed). They are not the same thing. The Court of Chancery easily harmonized each of these provisions, concluding (1) Section 2.5(c) permits entry of final judgment and (2) Sections 2.5(d) and 8.18 permit Steward to use any valid set-offs to reduce what it must "promptly" and "immediately" pay in cash on the final purchase price (but Steward has no such valid offsets). A106 § 2.5(d); A159–60 § 8.18. In other words,

[8] Steward suggests that the final judgment provision in Section 2.5(c) "does ***not*** 'stand on [its] own,'" Br. at 18 (emphasis original), because the clause "notwithstanding anything to the contrary in this Agreement" also appears in Section 2.5(c). A106. That clause, however, deals with how Net Working Capital disputes "shall be ***resolved***": "Notwithstanding anything to the contrary in this Agreement, any disputes regarding amounts shown in the Closing Statement and the Actual Net Working Capital and the Actual Capital Lease Amount shall be resolved as set forth in this Section 2.5." *Id*. That clause has nothing to do with whether "judgment may be entered." A105, § 2.5(c).

the "plain meaning of Section 2.5(c) [is that] the Award is . . . susceptible to being reduced to a judgment." Op. at 5. Separately, that judgment informs what Steward must promptly "pa[y] under Section 2.5(d) subject to Section 8.18." *Id.* However, that "practical truth"—referring to the amount Steward must promptly pay—"does not bear on the procedural mechanisms of Section 2.5(c)" for reducing the Award to final judgment.[9] *Id.*

At oral argument, Steward's own counsel recognized the difference between the procedural mechanism of ***entering*** final judgment and the ***payment*** of that final judgment, which Steward conflates on appeal:

> THE COURT: [A]s a matter of procedure, I would be more likely to confirm the award and then issue an injunction preventing the collection, separate from the offset, rather than finding an imperfection in the award which, after all, is not inherent in the award. What you're saying is that the parties contractually agreed that these sums would not be payable until a resolution of the offset. That doesn't strike me as a

[9] Steward's focus on the supposedly permissive language in Section 2.5(c) and the supposedly mandatory language in Section 2.5(d) and 8.18 is both incorrect and misses the point. While Section 2.5(c) uses the verb "may," that permissive language recognizes that final judgment may not be necessary because parties usually pay arbitration awards rather than challenge them in court. Nothing in Section 2.5(c) provides any basis ***not*** to enter final judgment on an arbitration award. Moreover, the only mandatory part of Section 2.5(d) is Steward's obligation to make payment. Nothing is mandatory in Section 8.18. It simply provides that Steward "shall be entitled" (not required) to use any valid offsets (it has none) to pay certain amounts that are due.

> flaw in the arbitration award. It strikes me as a contractual promise that I could enforce through equity if I needed to.
>
> ATTORNEY BONGIORNO: I agree with that, Your Honor. It's almost as if you were listening to us on the car ride down.

A532–33, at 26:15–27:5. Yet Steward did not seek an injunction following entry of final judgment on the Award. Instead, Steward skipped that step and came right to this Court effectively asking for the injunction they failed to seek in the Court of Chancery.

Considering how Steward's own counsel viewed the issue (at least in December 2022), it is Steward's interpretation that fails to "construe the agreement as a whole and give effect to all its provisions." Br. at 16 (alterations original) (collecting cases). For example, Steward ignores that the parties specifically singled out only one post-Closing payment obligation for expedited arbitration: Net Working Capital. By agreeing to arbitrate the Net Working Capital dispute, the parties sought to avail themselves of "arbitration's essential virtue of resolving disputes straightaway." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568–69 (2013) (internal quotation omitted).

The outcome Steward urges makes hash of this structure by forcing Net Working Capital back into every other dispute in the Delaware courts. If the parties intended for all their disputes to be resolved simultaneously through litigation, they

would have contracted for such a process. They did not. *See FdG Logistics LLC v. A&R Logistics Holdings, Inc*., 131 A.3d 842, 866 (Del. Ch. 2016), *aff'd*, 148 A.3d 1171 (Del. 2016) (rejecting an offset argument where "a sophisticated contracting party, could have bargained for the right to delay payment of the tax refunds pending the resolution of its . . . other claims arising out of Merger Agreement" but "did not do so").[10] The Court of Chancery's final judgment should be affirmed.

[10] Moreover, Steward's own case law establishes that the "'final and binding' language of an arbitration clause" would be "meaningless" if the Award must wait for the Set-Off Litigation. *Gulf LNG Energy, LLC v. Eni USA Gas Mktg. LLC*, 242 A.3d 575, 587 (Del. 2020) (internal quotation omitted) (cited by Steward). If Steward wanted the right to stay enforcement of any Award in light of alleged, disputed set-offs, Steward should have negotiated to strike the provision that the Award would be "final and binding" and subject to judgment. *See Middleby Corp. v. Hussman Corp.*, 1991 WL 119123, at *1 (N.D. Ill. Jun. 26, 1991) (granting stay where parties had simply agreed the arbitrator would "set forth the dollar amount" and that the "buyer or seller, as the case may be, shall pay said amount").

II. THE COURT OF CHANCERY PROPERLY RULED THAT THE APA DOES NOT PROVIDE A BASIS TO MODIFY THE AWARD TO ACCOUNT FOR ALLEGED, DISPUTED SET-OFF CLAIMS.

A. Question Presented

Whether the Court of Chancery properly ruled that Steward cannot offset its payment of the Award based on alleged, disputed set-off claims still pending in the Set-Off Litigation. This question was raised below, A323–31, A382–99, and considered by the Court of Chancery. Op. at 6.

B. Scope of Review

This Court reviews a trial court's denial of a motion to modify an arbitration award for abuse of discretion. Br. at 35 (citing *M3 Healthcare*, 996 A.2d at 1285).

C. Merits of Argument

Steward next argues that, even if entry of final judgment was procedurally proper, under Section 8.18 of the APA, it can offset the final judgment with the disputed amount of its AAPP claim that is actively being litigated in the Set-Off Litigation. Steward's argument fails for two different reasons.

1. *The APA's Set-Off Provision Does Not Allow Set-Off Against Alleged, Disputed Amounts.*

Section 8.18 of the APA provides the parties "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 other party. A159–60, § 8.18. On appeal, Steward claims

the Court of Chancery erred because it did not interpret the phrase "amounts due or payable" to allow offset with any amount that either party "***claim***[s]" it is owed. Br. at 25–31. Steward cannot point to anything—neither the APA, nor the dictionary, nor any case—that supports the notion that "due or payable" amounts include any amounts that any "party ***claims*** are payable," even if such claims are actively being litigated. *Id.* at 29 (emphasis original).

The Court of Chancery properly recognized that under the common law set-off rules, disputed, unliquidated amounts cannot be used as set-offs. If the parties intended to deviate from that common law rule here, they would have used clear language. They did not. While Steward argues that "courts have interpreted analogous provisions to apply to non-liquidated amounts" (*id.* at 24), it cites only one case—*Brace Industrial Contracting, Inc. v. Peterson Enterprises, Inc.*, 2017 WL 2628440 (Del. Ch. Jun. 19, 2017)—where the agreement at issue expressly allowed set-off of any "***claimed*** amount." Op. at 6 n.19. There is nothing "analogous" about the offset provision here and the one in *Brace*.

First, the phrase "amounts due or payable" in Section 8.18 does not allow offsets using unliquidated and disputed amounts. To support its argument to the contrary, Steward cites a Black's Law Dictionary definition for "payable," which provides (unremarkably) that debts may be "payable long before they fall due." Br.

at 25 (emphasis omitted). Such a circumstance occurs when an obligation to make a payment accrues—making the debt "payable"—before the date on which the debt must be paid— making it "due." But this definition of "payable" does not suggest that the phrase "due or payable" includes unliquidated amounts being contested in a separate proceeding. Steward cites ***no*** authority equating a disputed, unliquidated amount with an "amount payable."

Indeed, the Black's Law definition Steward relies on provides that a payable is "([o]f a sum of money or a negotiable instrument) that ***is*** to be paid." *Payable*, BLACK'S LAW DICTIONARY (11th ed. 2019).[11] Numerous other authorities affirm that "payable" is a mandatory term. *See Payable*, THE LAW DICTIONARY, https://thelawdictionary.org/payable/ (last visited Aug. 9, 2023) ("A sum of money is said to be payable when a person is under an ***obligation*** to pay it."); *Furrow v. Comm'r of Internal Revenue*, 292 F.2d 604, 607 (10th Cir. 1961) ("The word payable, when used in connection with commercial transactions, means that which

[11] Steward argues "the terms 'due' and 'payable' are not interchangeable." Br. at 25. However, the definition of "due" expressly includes the word "payable": "Owing or payable; constituting a debt." *Due*, BLACK'S LAW DICTIONARY (11th ed. 2019). Thus, if anything, the phrase "due or payable" in Section 8.18 can be seen as "belt-and-suspenders" language. *See SeaWorld Ent., Inc. v. Andrews*, 2023 WL 3563047, at *8 (Del. Ch. May 19, 2023) ("Delaware courts have recognized that contract parties occasionally use redundancy as a 'belt-and-suspenders' device to ensure their intent is fully understood.") (collecting cases).

is to be paid rather than that which ***may*** be paid."); BALLENTINE'S LAW DICTIONARY (3d ed. 2010) (defining "payable" as "[d]ue or to be paid" and "[t]o be paid, rather than may be paid" and "[a] word which in itself leaves no option or privilege as to time or manner of payment"); *Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107, 113 (3d Cir. 1994) (citing definition of "payable" that includes "justly due; legally enforceable"). Thus, even Steward's own authority recognizes that an amount "payable" is an amount that a party ***must*** pay, which does not encompass the disputed, unliquidated AAPP claim at issue here that is still being litigated in the Set-Off Litigation. The Court properly held that "[u]ntil the Set-Off Litigation is resolved, the disputed set-offs are not 'due,' or 'due or payable,' under Section 8.18." Op. at 6.

Second, the Court properly found that "the common law and language of Section 8.18 makes [any] set-off available only once the claims in the Set-Off Litigation are liquidated." *Id.* It is well established that "[a]t common law, a contingent or unmatured obligation which is not presently enforceable cannot be the subject of set-off." *Post Holdings, Inc. v. NPE Seller Rep LLC*, 2018 WL 5429833, at *6 (Del. Ch. Oct. 29, 2018) (internal cite omitted); *CanCan Dev., LLC v. Manno*, 2011 WL 4379064, at *5 (Del. Ch. Sept. 21, 2011) (similar). While "the parties certainly could have created a contractual right to permit [respondent] to net against

a[n arbitration award] to be remitted . . . the amount of a[] claim [pursuant to Section 8.16]," the Court of Chancery correctly held that the parties did not do so. Op. at 5–6 (citing *Post Holdings*, 2018 WL 5429833, at *6) (alterations original).

Steward argues that the authorities the Court relied on to support its ruling are distinguishable, arguing for example that *CanCan* is inapplicable because it "deals only with a set-off argument under the common law, not one based in contract." Br. at 26. But the Court simply cited *CanCan* in a footnote to support the common law rule from which the parties chose not to deviate in the APA. Op. at 5 n.18.

Steward's attempt to distinguish *Post Holdings* also falls flat. There, the court rejected the buyers' attempt to offset undisputed tax refunds owed to the sellers against unliquidated indemnification claims. *Post Holdings*, 2018 WL 5429833, at *6–7. Specifically, the court found that the set-off provision at issue "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*. at *6. Like Section 8.18 here, the court found that "[w]hat this provision does not say is that Buyers may net from such [undisputed amounts owed] the amount of their ***unliquidated claims for indemnification***." *Id.*

Steward attempts to distinguish *Post Holdings* because (1) the set-off provision there "expressly applied only to 'owed' amounts," and (2) the court referenced a "temporal requirement" on the tax refund payment. Br. at 26–27. Neither reason negates *Post Holdings'* application here. As an initial matter, there is no meaningful difference between the word "owed" in *Post Holdings* and the phrase "due or payable" in the APA. *Post Holdings* itself expressly equated amounts "owed" with amounts "payable": "'owed' . . . implies that the 'indemnification payment' in question is for a presently ***payable*** amount[.]" 2018 WL 5429833, at *6. Likewise, Merriam-Webster lists "owed" and "payable" as synonyms.[12] Thus, resort to dictionary definitions only strengthens the Court's reliance on *Post Holdings* here. In any event, any difference between the word "owed" and the phrase "due or payable" certainly does not transform the term "due or payable" into disputed and unliquidated "claimed amounts" as Steward argues.

Steward's attempt to distinguish *Post Holdings* based on the court's reference to a "temporal requirement" is equally misplaced. *Post Holdings* cited the temporal limit as additional support for application of the common law set-off rule. 2018 WL

[12] *Payable*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/thesaurus/payable (last visited Aug. 9, 2023).

5429833, at *7. *Post Holdings* does not say, as Steward suggests, that the temporal limit was determinative. *See id.*

The only case Steward identifies where a contractual set-off provision deviated from the common law set-off rule is *Brace*, but that case only highlights how the APA at issue here does not deviate from the common law rule. Br. at 26–31. In *Brace*, the contract at issue allowed any party to "set off all or any portion of the ***claimed amount*** of any . . . Direct Claim against any amount otherwise payable under this Agreement." 2017 WL 2628440, at *4 (citation omitted). Relying on the explicit use of the term "claimed amount," the Court of Chancery found that the parties' agreement allowed offsetting of contingent, unliquidated claims. *Id.* Steward argues that "the Set-Off Provision parallels the provision at issue in *Brace*" because they both contain the word "payable." Br. at 29–31. This is the same misreading of *Brace* that Steward raised below:

> [Steward] misparses *Brace*: the operative language permitted setting off a "claimed amount of any . . . Direct Claim against any amount otherwise payable." *Brace*, 2017 WL 2628440, at *3, *4. The set-off of an unliquidated amount was accomplished by the language permitting the set-off of a "claimed amount of any Direct Claim" – ***not the "payable" language [Steward] relies on***.

Op. at 6 n.19; *see also Post Holdings*, 2018 WL 5429833, at *6 (pointing to "set off all or any portion of the claimed amount of any . . . Direct Claim" as the key language in *Brace*). Indeed, if anything, the use of the separate terms "claimed amount" and

"amount otherwise payable" in *Brace* only confirms that the "due or payable" language in the APA should not be read as "claimed amount" was in *Brace*.

Third, with respect to the disputed AAPP amounts under Section 8.16 that Steward seeks to use as offsets, Section 8.18 explicitly limits Steward to setting off only "any amounts ***due***"—without any reference to amounts "payable." A159, § 8.18. And as Steward conceded in its own briefing, "amounts ***due***," *id.,* plainly means amounts "owed" which "implies that the [set-off] is for a ***presently payable amount***." Br. at 28; *id.* at 28–29 ("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* [rejecting set-off] may have force."). Thus, even if Steward could rewrite "amount payable" to "claimed amount," that would not apply to the Section 8.16 amounts it seeks to use as set-offs here.

Finally, Steward relies on the last sentence of Section 8.18, which states: "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." Br. at 29. That language also does not transform the right to set-off amounts "due or payable" into the right to use "claimed amounts" as set-offs. It simply provides that if a party attempts to offset an amount that is not "justified"—as here where Steward tried to use a

disputed, unliquidated amount—the application of the offset itself is not an independent breach of the APA. A541–42, at 35:6–36:10.

At bottom, Steward asks this Court to rewrite the APA to obtain a set-off right it did not obtain at the negotiating table. But "Delaware law does not invest judicial officers with the power to creatively rewrite unambiguous contracts . . . [to suit the aggrieved party's] business interests." *BASF Corp v. POSM II Props. P'ship, L.P.*, 2009 WL 522721, at *6 (Del. Ch. Mar. 3, 2009); *see also Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 746 (Del. 1997) ("Contract interpretation that adds a limitation not found in the plain language of the contract is untenable.").

2. *Steward's Alleged, Disputed "AAPP Amounts" Are Not "Liquidated."*

As a last-ditch attempt to avoid paying the Award, Steward argues that the amounts it claims to be owed under Section 8.16 of the APA are "liquidated" and available to "fully offset" the Award. Br. at 31–34. This argument also fails for two separate and independent reasons.

First, Steward's argument that the alleged, disputed AAPP amounts are available for set-off under Section 8.18 because they are "easily calculable" and thus "liquidated" is both meritless and factually incorrect. *Id*. at 31–33. "A liquidated claim is one which has been fixed by agreement or can be exactly determined by the application of rules of arithmetic or of law." *Trader v. Wilson*, 2002 WL 499888, at

*3 (Del. Super. Ct. Feb. 1, 2002), *aff'd*, 804 A.2d 1067 (Del. 2002) (finding claim to be liquidated where there was "[s]ubstantial evidence" supporting the amount alleged to be owed under the notes at issue and the opposing party "[did] not challenge [the notes'] authenticity or accuracy"). On the flip side, an unliquidated claim is one that is "[n]ot previously specified or determined." *Unliquidated*, BLACK'S LAW DICTIONARY (11th ed. 2019). Delaware courts frequently equate unliquidated claims with disputed claims. *See*, e.g., *Wilmington Stevedores, Inc. v. Steel Suppliers, Inc.*, 511 A.2d 2 (Del. 1986) ("Where there is an unliquidated or disputed claim . . . ."); *Lake Treasure Holdings, Ltd. v. Foundry Hill GP LLC*, 2014 WL 5192179, at *13 (Del. Ch. Oct. 10, 2014) ("Claims include the 'unliquidated, contingent, disputed, unsecured right to payment' in lawsuits such as this one."); *see also* 1 C.J.S. *Accord and Satisfaction* § 47 ("If the debtor and creditor concur that one or the other of two specific sums is due on the creditor's claim or demand, but dispute over which is the correct amount to be paid, the demand is to be regarded as disputed or unliquidated within the meaning of the rule relating to accord and satisfaction by payment of a lesser amount than that claimed.").

Here, Sellers dispute Steward's entitlement to ***any*** of the alleged AAPP amounts and the parties are actively litigating that issue. *See* B319–23 (*Defs.' Suppl. Br. in Supp. of Defs.' Cross-Mot. for Summ. J. & In Opp'n to Pls.' Mot. for Summ.*

J., Set-Off Litigation, at 38–42 (Mar. 20, 2023)) ("Steward has failed to provide any actual evidence of ***any*** amounts that have actually been repaid or recouped to CMS[.]"); B344–47 (*Defs.' Suppl. Reply Br. in Supp. of Defs.' Cross-Mot. for Summ. J. & in Opp'n to Pls.' Mot. for Summ. J.*, Set-Off Litigation, at 15–18 (Mar. 31, 2023)) ("Steward also has provided no evidence that it paid any of the AAPP amounts it claims, precluding any ruling in Steward's favor under the APA as to Sellers' AAPP obligations."). Thus, the alleged, disputed AAPP amounts plainly qualify as unliquidated claims.

Moreover, while Steward claims the AAPP amounts are "easily calculable" and even suggests that Sellers have conceded certain amounts, those arguments are objectively false. Whether and to what extent Sellers owe Steward for ***any*** AAPP amounts is being litigated in the Set-Off Litigation. In its response to Steward's motion for clarification in this case, Sellers already addressed Steward's contention that Sellers conceded some AAPP amounts:

> Steward's assertion that Sellers concede they owe the AAPP amounts is false, no matter how many times Steward repeats it. In summary judgment briefing in the Set-Off Litigation, Sellers specifically contested Steward's entitlement to *any* AAPP amounts because Steward has never supported *any* of its claimed amounts with "remittance advices" from CMS, as required both by the APA and the Court's order. (Sellers' Suppl. Br. at 38-42). To this day, Sellers cannot determine how Steward is calculating the [redacted] amount that Steward falsely claims "Sellers concede they owe" or the alleged

[redacted] in AAPP Payments. The documents Steward cites do not support either amount.

A598 ¶ 30. The alleged AAPP amounts are neither conceded nor "easily calculable" because the documents Steward has submitted (all of which are internal spreadsheets that Sellers cannot verify and do ***not*** satisfy Section 8.16) do not support Steward's claim.

Second, whether Steward's AAPP claim is meritorious, and in what amount (if any), will be answered by the Court of Chancery in the Set-Off Litigation, not this case. By effectively asking this Court to rule on the supposedly "liquidated" amount of the disputed AAPP claim, Steward is asking this Court to invade the province of the Court of Chancery in the Set-Off Litigation.

Third, even assuming the AAPP amounts were liquidated (they are not), they do not remotely cover all of Steward's obligations to Sellers. Steward alleges that its "debt is fully offset" "because [Sellers'] AAPP Debt is significantly larger than the Award." Br. at 34. But Steward disregards its other debts to Sellers, including nearly [redacted] in ***undisputed*** MSA and TSA obligations:

Subset of Amounts Steward Owes Sellers	
TSA Fees (Undisputed)	[redacted][13]
MSA Fees (Undisputed)	[redacted][14]
NWC Award (Undisputed)	[redacted]
DPP	[redacted][15]
(Alleged Cash Payments by Buyers)	[redacted][16]
Subtotal	[redacted]

The Court of Chancery did not need to, and did not, address whether Steward's alleged AAPP claim is sufficient to cover the Award or whether any AAPP amounts need to be applied to Steward's other unpaid debts. Thus, at the very least, if this Court reverses the final judgment (and it should not), Sellers request that the proceedings be remanded for a full accounting of all currently available set-offs.

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[13] Steward concedes this is an "undisputed" amount. A326. Sellers have invoiced and are owed more than Steward attributes to the TSA and MSA, plus interest on past-due amounts. However, the difference is not determinative of issues here and Sellers utilize this figure only to illustrate that Steward's claimed AAPP set-off cannot cover the Award given Steward's other undisputed debts.

[14] *See supra* n.13.

[15] B365–66 (*Am. & Suppl. Verified Countercls.*, Set-Off Litigation, ¶ 61 (Jun. 21, 2023)); *see generally* A392 (providing an initial DPP calculation of [redacted]). This figure does not include interest.

[16] A326. This is the amount Steward claims to have paid on its post-Closing obligations to Sellers. While Sellers dispute this figure, and reserve all rights to challenge it in future litigation, Sellers utilize this figure here only to illustrate that Steward's claimed AAPP set-off cannot cover the Award.

III. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN RULING THAT STEWARD FAILED TO MEET THE HIGH BURDEN FOR MODIFYING AN ARBITRATION AWARD.

A. Question Presented

Whether the Court of Chancery abused its discretion in denying Steward's motion to modify the Award. This question was raised below, A327–31, A393–99, and considered by the Court of Chancery. Op. at 6.

B. Scope of Review

Steward admits the standard of review for the denial of a motion to modify an arbitration award is abuse of discretion. Br. at 35 (citing *M3 Healthcare*, 996 A.2d at 1285).

C. Merits of Argument

For all the reasons discussed above, Steward has not identified any reason to modify the Award. What's more, even if Steward did have a valid set-off claim, Steward cannot show that the Court abused its discretion by declining to modify the Award before entering final judgment.

Steward argues, "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." Br. at 36 (quotation omitted). That is not true. Steward cites no authority—and Sellers have found none—suggesting a court "***must***" modify an arbitration award based on a pending, disputed set-off claim like

those at issue here. Indeed, the statute on which Steward relies—9 U.S.C. § 11—provides grounds on which a court "***may*** make an order modifying or correcting the award upon the application of any party to the arbitration." Nothing about the statute is mandatory.

And Steward does not identify any basis to conclude that the Court of Chancery improperly exercised its discretion not to modify the Award under "one of the narrowest standards of judicial review in all of American jurisprudence." *TD Ameritrade*, 953 A.2d at 732 (citation omitted). Each of the cases Steward relies on is easily distinguishable. *See* Op. at 5 n.18 ("The cases cited in the Motion favoring a set-off addressed liquidated amounts.").

For example, in *UBS Financial Services, Inc. v. Riley*, the arbitration panel issued competing arbitration awards readily available for offset. 2012 WL 1831720, at *1 (S.D. Cal. May 18, 2012). After the court recognized there was "not much law" addressing the issue, it exercised its discretion to modify the Award to avoid "the absurdity of making A pay B when B owes A." *Id*. at *3 (citation omitted). Steward's other cases also involve an exercise of discretion and competing liquidated offset claims. *Pochat v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 2013 WL 4496548 (S.D. Fla. Aug. 22, 2013) (offsetting two final arbitration awards in a confirmation proceeding); *Rossel v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,

2011 WL 13190124 (C.D. Cal. Mar. 3, 2011) (same); *Sullivan v. Lumber Liquidators, Inc.*, 2013 WL 4049102, at *2 (D. Nev. Aug. 9, 2013) (offsetting prior confirmed arbitration award against subsequent final arbitration award); *Am. Life Ins. Co. v. Parra,* 269 F. Supp. 2d 519, 527–28 (D. Del. 2003) (offsetting final arbitration award against final damages award where, unlike here, the question of offset was actually raised in the arbitration).

This case is a far cry from *UBS Financial Services* because it does not involve competing arbitration awards readily available for offset. In fact, Steward does not identify a single case in which a court modified an arbitration award based on a speculative, unliquidated claim. The reason for that is simple: the relief Steward requested was contrary to established law.

IV. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN DECLINING TO STAY CONFIRMATION OF THE AWARD PENDING RESOLUTION OF THE SET-OFF LITIGATION.

A. Question Presented

Whether the Court of Chancery properly denied Steward's motion to stay confirmation of the Award. This question was raised below, A331–33, A397–A402, and the Court of Chancery addressed it. Op. at 6–7.

B. Scope of Review

Steward admits "[t]his Court reviews the Court of Chancery's denial of a motion to stay for abuse of discretion." Br. at 40 (citing *Stillwater Mining Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 289 A.3d 1274, 1282 (Del. 2023)). As the denial of a stay is "within the exclusive discretion of the Court," and involves balancing the "equities" (at Steward's urging no less, *see* A332), the appropriate standard of review is for an abuse of discretion—and is not *de novo*. *N. River Ins. Co. v. Mine Safety Appliances Co*., 105 A.3d 369, 382 (Del. 2014) (cited by Steward) (affirming Court of Chancery decision on an abuse of discretion standard because the "overall balancing of the equities presented here is subject to an abuse of discretion standard").

C. Merits of Argument

Steward's efforts to stay confirmation of the Award are based entirely on one case, *Middleby Corp. v. Hussman Corp.*, 1991 WL 119123 (N.D. Ill. Jun. 26, 1991),

and a rehashing of the same ineffectual arguments to modify the Award. Br. at 40–44. Neither remotely suggests the Court of Chancery's decision was unreasonable or arbitrary. *Norwood v. State*, 877 A.2d 52 (Del. 2005) ("This Court will overturn a trial court's discretionary ruling on appeal only if the decision is based on unreasonable or arbitrary grounds.").

The Illinois federal case that Steward principally relies on, *Middleby*, is a poor analogy for this case and nowhere close to being "nearly identical to [the circumstances] here." Br. at 41–43. None of the facts relied on by the *Middleby* court in granting a stay apply here—in fact, the opposite is true.

First, the *Middleby* court permitted a stay out of concern that the arbitration and attendant litigation were so "inextricably intertwined" that they presented a real risk of "inconsistent results" if they were decided separately. 1991 WL 119123, at *1–2; *id.* at *3 (raising concern that deciding the issues separately would "present[] the possibility that the court of appeals would have to decide the same issues in two subsequent appeals"). In *Middleby*, overlapping claims even warranted case consolidation. *Id.* Had the arbitration "'wrap[ped] up' a discrete claim between" the parties, as the *Middleby* court took care to distinguish, *id.*, the outcome would have been different. Here, the latter is true. The Net Working Capital arbitration "wrapped up" a discrete dispute between the parties. There is no overlap between

the substantive issues in the Net Working Capital arbitration and the issues in the Set-Off Litigation. Indeed, Steward has repeatedly stated that the Net Working Capital arbitration should be a "***separate*** dispute" from the Set-Off Litigation. B257 (*Pls.' Br. in Further Supp. of Their Mot. for Summ. J., in Opp'n to Defs.' Cross-Mot. for Summ. J., & in Supp. of Mot. for Prelim. Inj.,* Set-Off Litigation, at 58 n.15 (Jun. 14, 2022)); *id.* (arguing, in the context of the Set-Off Litigation, that the Chancery Court should not consider the "***separate*** net working capital dispute").

Second, the *Middleby* court found the "equities favor[ed]" a stay because it would have been "unfair" to allow a party to collect on the arbitration award first when it had previously sought a ***year-long stay in the other litigation*** pending the arbitration award "by characterizing the two proceedings as inextricably entwined." 1991 WL 119123, at *4. That is a far cry from this case and the equities run the other way here. Sellers have never sought to stay the Set-Off Litigation by arguing that it was intertwined with the Net Working Capital arbitration. Sellers have steadfastly pressed for resolution of the Set-Off Litigation irrespective of when the Net Working Capital arbitration would be resolved.

The equities weigh strongly against a stay here for another reason. In *Middleby*, the court found there were "no[] convinc[ing]" concerns regarding insolvency so there was no risk that one party would not "be able to recover a

judgment." *Id.* at *4 n.2. Here, the Court of Chancery has already recognized in connection with the Set-Off Litigation that Steward presents a "credit risk" because Steward has "fail[ed] to pay" Sellers' invoices and "have failed to timely pay other debts to third parties." *Steward*, 2022 WL 3025587, at *7. Under such circumstances, staying judgment (and thereby precluding Sellers' efforts to collect on the Award) may ultimately be tantamount to vacating it.

By contrast, Steward faces no hardship if the Award is confirmed. Enforcing the Award simply places Steward in the exact same position Steward would have been in had it not raised its meritless Net Working Capital dispute. There is no equity in delaying payment any longer. Steward's motives for the stay are "suspect . . . intended chiefly to provide an excuse for an attempt to prevent enforcement of the arbitration award." *Anderson v. Nyack Hosp.*, 2002 WL 1149443, at *2 (S.D.N.Y. May 30, 2002).

Steward is also wrong to suggest that the Court "misappli[ed]" the FAA. Br. at 44. Nothing in the FAA mandates staying confirmation of an arbitration award pending resolution of a separate litigation. *Id.* at 43–44. To the contrary, the FAA plainly states that where, as here, there is no basis to vacate or modify the Award, the "court ***must*** grant" an application to confirm it. 9 U.S.C. § 9; *see, e.g.*, *TD Ameritrade*, 953 A.2d at 731 ("The Federal Arbitration Act provides that ***a court***

must confirm an arbitration award 'unless the award is vacated, modified, or corrected as prescribed' by other provisions of the Act.") (denying motion to vacate an award); *Wolfe v. Holman*, 2012 WL 863805, at *1 (Del. Ch. Mar. 13, 2012) (similar) (confirming award). This is in accord with the FAA's "mandate[]" "that . . . courts confirm arbitration awards by converting them into enforceable judgments through a summary proceeding." Op. at 7 (citing *Teamsters Local 177 v. United Parcel Serv.*, 966 F.3d 245, 248 (3d Cir. 2020)).

Staying confirmation would not only deprive Sellers the benefit of their bargained-for protections under the APA (and the FAA), it would also create an incentive for others to follow suit in Delaware. Under Steward's theory, parties to a contract containing a set-off provision could nullify a "final and binding" arbitration award—potentially for years—by asserting baseless claims in a different proceeding. This Court should decline Steward's invitation to set such a precedent.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Court of Chancery opinion, Sellers respectfully request that this Court affirm the lower court's ruling and deny Steward's appeal.

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Attorneys for Petitioners-Below, Appellees 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

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