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Case Number 181,2023

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 SEPTEMBER 8, 2023
Petitioners Below, Appellees.	)	

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

By this appeal, Buyers ask this Court to protect their bargained-for right under the APA's Set-Off Provision to set-off a Purchase Price Adjustment due under Section 2.5 against amounts "due or payable" by Sellers.[1] The Set-Off Provision is a critical element of the parties' agreement. It prevents a party from fast-tracking one post-Closing obligation (here, the Award) while refusing to comply with its other, offsetting post-Closing obligations. By misreading Section 2.5(c) and failing to give effect to all of the terms and overall structure of the APA, the trial court allowed Sellers to advance the Award to judgment, even as Sellers delay their obligation to pay Buyers millions of dollars in AAPP reimbursements.

To be clear, contrary to the suggestion in Sellers' Answering Brief, this is not a case in which Buyers seek to avoid paying the Award. Indeed, Buyers ***already paid the Award plus interest into escrow***. AR13-16. Rather, Buyers seek to enforce the plain language of the parties' agreement. By fast-tracking one obligation subject to the Set-Off Provision, the judgment is fatally inconsistent with the plain language of Sections 2.5 and 8.18 and should be reversed.

The APA expressly provides that any Purchase Price Adjustment due under Section 2.5—including resulting from a Section 2.5(c) arbitration—is to be paid

[1] Capitalized terms not defined herein have the meaning ascribed to them in Appellants' Opening Brief ("Opening Brief" or "OB").

"[s]ubject to each Party's rights set forth in Section 8.18." A106, § 2.5(d). Section 8.18, in turn, expressly provides that Buyers are entitled to offset amounts "due" to Sellers—including any "purchase price adjustment due pursuant to Section 2.5(d)"—against any amounts "due or payable" from Sellers—including Sellers' AAPP Debts. A159-60, § 8.18.

Buyers offer the only interpretation that harmonizes all three provisions. Sellers' interpretation—adopted by the trial court—not only fails to harmonize the provisions, but it ignores their plain meaning, rendering them superfluous.

First, Sellers urge this Court to read Section 2.5(c) as standing separate from the rest of the APA. AB 19-21.[2] But that misreading ignores the plain language of the APA. Section 8.18's set-off provision expressly applies to "the purchase price adjustment" under Section 2.5(d)—language that serves no purpose if the "purchase price adjustment" proceeds directly to a judgment under Section 2.5(c). Further, Section 2.5(c) requires that "***notwithstanding anything to the contrary*** . . . any disputes regarding" the Net Working Capital must "be resolved as set forth in . . . ***Section 2.5***." A106, § 2.5(c) (emphasis added). Section 2.5(c) therefore cannot be divorced from the set-off rights expressly incorporated in Section 2.5(d). Sellers' argument otherwise gives no meaning to this sentence. Nor does it comply with the

[2] "AB" refers to Appellees' Answering Brief.

oft-stated principle of contract interpretation that Delaware courts "construe the agreement as a whole." *Salmone v. Gorman*, 106 A.3d 354, 368 (Del. 2014).

Second, Sellers effectively seek to rewrite the Set-Off Provision by arguing the parties may only offset liquidated, undisputed amounts. AB 24-32. The APA says no such thing (nor would it have needed to do so; offsets for liquidated liabilities are available at common law). To the contrary, Section 8.18 says the opposite—that the parties shall offset any amounts "due ***or*** payable," and a party may claim offsets "***whether or not ultimately determined to be justified***." A159-60, § 8.18 (emphasis added). Sellers seek to rewrite the provision and, in the process, render the set-off rights illusory. Buyers are entitled to AAPP offsets, regardless of whether Sellers dispute the amount of those offsets.

Even if this Court were to conclude that the Set-Off Provision permits only the offsetting of undisputed liabilities (which it should not), Buyers would nonetheless be entitled to offsets. Sellers' assertion that they dispute Buyers' entitlement to ***any*** AAPP reimbursements is without merit. AB 33-35. Sellers did not raise this contention in opposition to Buyers' motion below. In any event, Sellers have admitted that: (1) they do not contest their obligation to reimburse Buyers for any AAPP monies recouped by CMS, A812-13, 97:22-98:1; and (2) they know the total amount of AAPP monies to be recouped by CMS, A817, 102:17-19, contravening their assertion that the amount is not "easily calculable." Their only

contention, it seems, is that they are not confident the money has actually been recouped by CMS from Buyers. But Buyers produced letters from CMS in the Set-Off Litigation that confirm that of the more than $67 million Sellers claim was borrowed from CMS, only a fraction remains outstanding. AR59-88. Sellers cannot in good faith dispute that those monies were recouped from Buyers and are available as offsets.

Third, contrary to Sellers' assertion, the trial court erred in declining to modify the Award. The court's decision was based on erroneous interpretations of the APA. When properly interpreted to harmonize all provisions, the Award is subject to set-off under Section 8.18. In such circumstances, courts have consistently modified arbitration awards. OB 36-38 (collecting cases). Sellers' attempts to distinguish these cases as addressing only "liquidated" amounts are unavailing. In those cases—as here—there was no dispute that the payment ***obligation*** existed. By their own admission, Sellers are obligated to reimburse Buyers for any AAPP monies recouped by CMS. A812-13, 97:22-98:1. The Award therefore must be modified to acknowledge it is subject to set-off against those amounts.

Fourth, in the event this Court concludes modification is not warranted, it should remand the case with instructions to enter a stay pending resolution of the

Set-Off Litigation.[3] That litigation will finally determine all set-off inputs, at which time the parties can determine the net debtor under the Set-Off Provision. Sellers conceded below that they were not opposed to such a stay "so long as the awarded amount is escrowed . . . pending resolution of the Set-Off Litigation." Op.[4] 1; *see also* AR3. That requirement has been met. Buyers escrowed the full amount of the Award plus interest (over $23 million), AR13-16, and are willing to continue to do so until the Set-Off Litigation is resolved.

Accordingly, this Court should reverse the trial court's denial of Buyers' motion to modify or, in the alternative, reverse the judgment and remand the proceedings for entry of a stay pending resolution of the Set-Off Litigation.

[3] On August 18, 2023, the Court of Chancery granted summary judgment regarding one set-off input. *Steward Health Care Sys. LLC v. Tenet Bus. Servs. Corp.*, 2023 WL 5321484 (Del. Ch. Aug. 18, 2023). The other set-off inputs remain pending before the court.

[4] "Op." refers to the trial court's April 4, 2023 Letter Opinion.

ARGUMENT

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

A. The Court of Chancery's Interpretations of the APA Must Be Reviewed *De Novo*

Contrary to Sellers' assertion, AB 17, the question of whether the trial court erred in ruling that "[n]othing in the APA subjects any award under Section 2.5(c) to Section 8.18" is subject to *de novo* review. OB 16 (quoting Op. 5). It is well settled that this Court does "not defer to the trial court on embedded legal conclusions," but instead "reviews them *de novo*." *Hill Int'l Inc. v. Opportunity Partners L.P.*, 119 A.3d 30, 37 (Del. 2015) (quoting *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 380–81 (Del. 2014), *as revised* (Nov. 10, 2014)). Here, the trial court's denial of Buyers' motion depended upon the court's (erroneous) interpretations of the APA. *See* OB 16-23. There can be no dispute on this point. The court expressly stated that its conclusion that the Award should not be modified was based on its "***interpretation of the APA***." Op. 6 (emphasis added). Thus, the trial court's decision was not based on balancing equities; it was construing the APA. This Court reviews *de novo* the court's legal conclusions in doing so.

B. Sellers' Construction Ignores Sections 2.5(d) and 8.18, Failing to Construe the APA as a Whole

Sellers urge this Court to affirm the trial court's conclusion that Section 2.5(c) "stand[s] on [its] own" and "is not subject to Section 8.18." AB 19-21; Op. 5. That

interpretation fails to "constru[e] the agreement as a whole" and interpret the contract in a way that "harmonizes the affected contract provisions." *Salmone*, 106 A.3d at 368; *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1221 & n.52, 1224 (Del. 2012) (citation omitted). As set forth in Buyers' Opening Brief, Section 2.5(c) cannot "stand on [its] own," but must be read together and harmonized with the rest of the APA. OB 16-23.

Other provisions of the APA include the Set-Off Provision (Section 8.18), which refers expressly to the "purchase price adjustment due pursuant to Section 2.5(d)." A159-60, § 8.18. In turn, Section 2.5(d) dictates how any Purchase Price Adjustment resulting from the "final determine[ation]" of the Purchase Price calculated under Section 2.5(c) is to be paid. A106, § 2.5(d). And, importantly, Section 2.5(d) confirms that payment obligation is "[s]ubject to each Party's rights set forth in Section 8.18." *Id.*

These references have no purpose under Sellers' proposed construction. Under that construction, the Purchase Price Adjustment would always be reduced to a judgment—separate from all other post-closing obligations subject to set-off under Section 8.18. That construction fails to "read the agreement as a whole and enforce the plain meaning of clear and unambiguous language" in Sections 8.18 and 2.5(d). *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1208 (Del. 2021).

To be sure, the trial court correctly recognized that "an award under Section 2.5(c) informs a final determination of the Purchase Price, to be paid under Section 2.5(d) subject to Section 8.18." Op. 5. But that exercise has ***no purpose*** under the court's erroneous reading. To the court, it was merely a "practical truth." *Id*. But Section 2.5(d) is not merely a "practical truth"—it is the provision that dictates how the Purchase Price Adjustment is paid and, under Section 8.18, set-off against other amounts. By dismissing Sections 2.5(d) and 8.18 as a mere "practical truth," the court effectively conceded that it failed "'to give each provision and term effect' and not render any terms 'meaningless or illusory.'" *Weinberg v. Waystar, Inc.*, 294 A.3d 1039, 1044 (Del. 2023) (citations omitted).

C. Sellers' Construction Ignores the Last Sentence of Section 2.5(c)

In an attempt to elide the significance of the payment and set-off provisions in Sections 2.5(d) and 8.18, the trial court concluded that "Section 2.5(c)'s provision for obtaining and judicially confirming an Award stand on their own." Op. 5. But the court (relying on Sellers) got that wrong, and never construed the last sentence of Section 2.5(c).

That last sentence of Section 2.5(c) states: "***Notwithstanding*** anything to the contrary in this Agreement, any disputes regarding . . . Net Working Capital . . . ***shall be resolved as set forth in this Section 2.5***." A106, § 2.5(c) (emphasis added). The import of this clause is plain: disputes regarding Net Working Capital under

Section 2.5(c) must be "***resolved*** as set forth in" ***the rest*** of Section 2.5, ***not*** just Section 2.5(c). The rest of Section 2.5 plainly includes ***the very next section, Section 2.5(d)***, which governs how any Purchase Price Adjustment resulting from the "final determin[ation]" of the Purchase Price under Section 2.5(c) is to be calculated and paid, and confirms that any such payment is subject to the Set-Off Provision. *Id.*, § 2.5(d). The trial court erred by ignoring this sentence entirely.

Sellers have no good response, so they attempt to hide their non-response in a footnote. In that footnote, Sellers try to dismiss this language as "deal[ing] with how Net Working Capital disputes 'shall be ***resolved***,'" not "with whether 'judgment may be entered.'" AB 20 n.8. Sellers attempt to create a distinction where none exists.

First, Sellers ignore the plain and broad meaning of the requirement that disputes "shall be resolved" under Section 2.5. Entering judgment on the Award is ***clearly resolving*** the Net Working Capital dispute. "[A] judgment conclusively resolves the case because a judicial power is one to render dispositive judgments." *Evans v. State*, 872 A.2d 539, 548 (Del. 2005) (quotations omitted)); *see also Kroenke Sports & Ent., LLC v. Salomon*, 2021 WL 321470, at *2 (Del. Ch. Feb. 1, 2021) ("A final judgment has yet to be entered resolving the dispute."). Because a judgment would resolve the parties' Net Working Capital dispute, the plain text of Section 2.5(c) requires it be resolved "as set forth in . . . Section 2.5." A106, § 2.5(c).

That includes the requirement that any Purchase Price Adjustment is "[s]ubject to [the offset] rights set forth in Section 8.18." *Id.*, § 2.5(d).

Second, Sellers ignore the "notwithstanding" language. Section 2.5(c)'s plain language requires that the authority to enter judgment must yield to the requirement that "[n]otwithstanding anything to the contrary in this Agreement, any disputes" over Net Working Capital "shall be resolved as set forth in this Section 2.5." *Id.*, § 2.5(c). *See Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993) ("[T]he 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."). Sellers cannot choose to "resolve" the Net Working Capital dispute with a judgment when Section 2.5(c)'s last sentence supersedes that authority.

Third, Sellers never explain the purpose or meaning of the last sentence of Section 2.5(c) under their construction. The rest of Section 2.5(c) already dictates the Arbitrator's process and authority. Under Sellers' construction, the last sentence's reference to requiring dispute resolution "as set forth in this Section 2.5" has no effect because a judgment can be entered notwithstanding the conflict with the rest of Section 2.5. That construction fails "'to give each provision and term effect' and not render any terms 'meaningless or illusory.'" *Weinberg*, 294 A.3d at 1044 (citations omitted).

D. Sellers' Attempt to Harmonize Their Misreading of Section 2.5(c) Fails

Ignoring the last sentence of Section 2.5(c), Sellers attempt to harmonize the parties' set-off rights in Sections 2.5(d) and 8.18 by suggesting that judgment should be entered on the Award and somehow the set-off right applies at payment. AB 4, 20-22. This makes no sense.

Sellers concede that Buyers have a "contractual right to satisfy a final judgment with valid offsets," *id.* at 20, but fail to point to a single authority (much less any language in the APA) that says such offsets are allowed ***only after*** a judgment is entered and not to reduce the judgment itself.

Allowing Sellers to obtain a final, enforceable judgment on the Award without giving effect to Buyers' contractual right to offsets would render that right illusory. Sellers suggest that Buyers should have sought an injunction after final judgment entered on the Award to vindicate their contractual right to claim offsets. *Id.* at 22. But that would be a strange and inefficient collateral attack on the judgment, and Sellers cite no authority to support it.

In defending this inefficient proposal, Sellers misconstrue statements made by Buyers' counsel at argument to suggest that Buyers have "reverse[d] course on appeal." *Id.* at 4, 21-22. That is false. Buyers have always maintained that the issue is whether judgment should enter on the Award. A315, 322. Accordingly, Buyers sought modification of the Award to recognize it is subject to the offsets being

decided in the Set-Off Litigation or a stay pending resolution of that litigation. A315, 327-33. This is precisely the relief Buyers sought during argument below, A531-33, 25:12-27:18, and now seek here.

II. BUYERS HAVE THE CONTRACTUAL RIGHT TO AVAIL THEMSELVES OF OFFSETS

A. The Court of Chancery's Interpretations of the APA Must Be Reviewed *De Novo*

For the reasons set forth above in Section I.A, the trial court's conclusion 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," Op. 6, is subject to *de novo* review. In so holding, the court interpreted the common law and construed the APA. This Court must review those "embedded legal conclusions" *de novo*. *Hill*, 119 A.3d at 37.

B. The Set-Off Provision Modifies the Common Law Rule and Permits Buyers to Offset Unliquidated Amounts

The trial court erred in ruling that the Set-Off Provision does not permit Buyers to offset the Award against unliquidated amounts. Op. 5-6. As set forth in Buyers' Opening Brief, the Set-Off Provision broadly permits a party to claim offsets for amounts "due or payable," not just liquidated amounts. OB 25-31. Sellers' arguments to the contrary fail because they ignore the plain language of the APA and would render the Set-Off Provision superfluous.

***First*,** Sellers' argument that Buyers cannot offset the Award with claimed AAPP amounts ignores the plain language to which the parties agreed. The Set-Off Provision applies to amounts "due or payable." A159, § 8.18. There can be no doubt that Sellers' AAPP Debt is "payable." As detailed in the Opening Brief, the parties

agreed in the APA that each month, Buyers are required to provide Sellers a statement setting forth the amount of AAPP payments for which Sellers must reimburse Buyers. A158, § 8.16(a)(i); OB 11-13. The parties further agreed that Sellers "***shall pay***" the amounts in each monthly statement within 10 days of receipt. A158, § 8.16(a)(ii) (emphasis added). Thus, the AAPP amounts were "***payable***"—in that Sellers "***shall pay***" those amounts—10 days after Sellers received each monthly statement.

Sellers tie themselves in knots to argue that amounts due or payable under a contract are somehow not "payable" until a final judgment is entered and that amount is liquidated. AB 25-27. In other words, Sellers are making the extraordinary argument that amounts are not "payable" if any dispute can be raised. But entry of a final liquidated judgment does not mean the amounts were not "payable" earlier. That is why judgments, like the one Sellers received here, include pre-judgment interest—to compensate the recipient for the delay in receiving an amount that was "payable" earlier. *See, e.g.*, *Level 4 Yoga, LLC v. CorePower Yoga, LLC*, 2022 WL 601862, at *32 (Del. Ch. Mar. 1, 2022) (awarding pre-judgment interest "from the date that each payment was *due and payable* under the APA" (emphasis added)). If "payable" is a "mandatory term," as Sellers insist, AB 26, it is no less "mandatory" because Sellers are compelled to pay by the contractual obligation they took on in the APA; court judgments are not the only "mandatory" form of payment.

Second, Sellers' attempt to evade their obligation to "pay" their AAPP Debt by asserting that only liquidated amounts can be used as offsets also ignores the Set-Off Provision's final sentence, which allows "[t]he exercise of such set-off right . . . ***whether or not ultimately determined to be justified*** . . . ." A160, § 8.18 (emphasis added). This language demonstrates that a party may offset ***claimed*** amounts, which may be later determined to be incorrect. *See V&M Aerospace LLC v. V&M Co.*, 2019 WL 3238920, at *6 (Del. Super. Ct. July 18, 2019) (concluding that language in set-off provision "provid[ing] that [purchaser's] offset of any losses will not constitute a breach of the APA, even if a court or arbitrator later determines the offset is impermissible or unjustified" "would be superfluous if offset only was available once [an obligation] conclusively was resolved"). Sellers try to explain away the final clause of the Set-Off Provision as merely providing that an erroneous offset claim does not constitute an independent breach of the APA. AB 30-31. But Sellers' construction ignores the significance of this clause. Offsetting claimed amounts is not a breach of the APA ***because*** the APA permits such offset.

Third, unable to run from the clear terms of the APA making their AAPP Debt "payable," Sellers assert that "payable" really is only a redundant reference to "due." AB 26 n.11. Sellers essentially ask this Court to strike "or payable" from the Set-Off Provision. But those terms were selected by the parties and must be given meaning. *See Manti Holdings*, 261 A.3d at 1208 ("Contracts will be interpreted to

give each provision and term effect and not render any terms meaningless or illusory." (internal quotations omitted)).

Fourth, Sellers try to argue that Section 8.18 "***limits*** [Buyers] to setting off only 'any amounts ***due***'—without any reference to amounts 'payable.'" AB 31 (first emphasis added). That is wrong. Section 8.18 is a broad authority that applies to "any amounts due ***or*** payable." A159, § 8.18 (emphasis added). It goes on to give examples of what this broad authority includes (e.g., "any amounts due pursuant to Section 8.16"). A160, § 8.18. But even if those examples only used the word "due," they do not limit the broad set-off of "any amounts due ***or*** payable."

Finally, Sellers erroneously assert that the parties "chose not to deviate" from the common law. AB 28. If that were true, then there would be no reason for the parties to have drafted Section 8.18 at all. The parties simply could have omitted a set-off provision and relied upon the default common law rule. They did not do so. Instead, the parties included a provision in the APA permitting each party to claim offsets for amounts "due or payable" by the other party and identifying which liabilities are subject to offset. A159-60, § 8.18. This indicates that Buyers and Sellers intended for each party to have set-off rights ***beyond*** those provided at common law. *See Brace Indus. Contracting, Inc. v. Peterson Enters., Inc.*, 2017 WL 2628440, at *4 (Del. Ch. June 19, 2017) ("While 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." (emphasis omitted)). To hold otherwise and apply the common law rule, would render Section 8.18 superfluous.

Accordingly, the Court of the Chancery erred in ruling that the Set-Off Provision "requires the set-offs to be liquidated." Op. 5. That error must be reversed, and the Award modified to reflect that it is subject to set-off.

C. Sellers' AAPP Debt Is Liquidated

Even if this Court were to determine that Section 8.18 mirrors the common law and only permits offset of liquidated amounts (which it does not), Buyers would nonetheless be entitled to offset the Award because Sellers' AAPP Debt is liquidated.

Sellers seek to avoid Buyers' AAPP offsets by suggesting they dispute Buyers' entitlement to ***any*** AAPP Amounts. AB 33-35. But Sellers ***did not argue this below*** in opposition to Buyers' motion. Sellers only disputed [redacted] of Buyers' claimed AAPP offsets as being "anticipated"—leaving [redacted] undisputed as of November 2022.[5] A385-88. Sellers acknowledged that the disputed amount would reduce "Buyers' purported AAPP offset amount," but did not contest Buyers' ability to claim the remaining amounts as offsets. *Id.* To the contrary, Sellers represented to the trial court that they had "no reason to doubt that

[5] Sellers' AAPP Debt has since increased as CMS continued recouping funds from Buyers each month.

the recoupments occurred, or that the amounts for those months are roughly accurate." A386. It was not until months later that Sellers asserted that the ***entire*** AAPP claim was in dispute and not available for set-off in this action. A598. By that time, the trial court had already issued the Order from which Buyers appeal. This Court therefore should not credit Sellers' belated argument that the entire AAPP amount is in dispute.

Even if this Court were to entertain Sellers' argument, it has no merit. ***First,*** there is no dispute that Sellers are obligated to reimburse Buyers for any AAPP recoupments by CMS. Sellers' counsel specifically told the Court of Chancery that Sellers do not dispute that obligation:

> ATTORNEY KNAPP: 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***.

A812-A813, 97:22-98:1 (emphases added). And the court confirmed as much in the Set-Off Litigation. *Steward*, 2023 WL 5321484, at *13 ("The Buyers are entitled under APA Section 8.16 to recover from the Sellers the funds that were advanced to Sellers but recouped from Buyers."). Sellers therefore are obligated to reimburse Buyers for all AAPP recoupments.

Second, contrary to their assertions, AB 34-35, Sellers' AAPP Debt is easily calculable and thus, liquidated. OB 31-34. Sellers' counsel has admitted that Sellers already "know how much was advanced to the hospitals prior to closing" (i.e., the

amount to be recouped from Buyers by CMS) and represented that amount to be approximately $67 million.[6] A817, 102:17-19.

Third*,** Sellers should not be permitted to eviscerate Buyers' bargained-for set-off right by manufacturing a baseless dispute. Sellers contend that Buyers cannot claim ***any AAPP offsets because Sellers dispute that Buyers have provided sufficient documentation for any amounts. AB 33-35. But Section 8.16 requires only "reasonable supporting documentation," A158, § 8.16, which Buyers have produced. AR108-09, 112-13. Sellers insist this documentation is insufficient because there is "no way to verify if these amounts were actually recouped by CMS." A816, 101:21-23; *see also* AB 33-35. That contention is meritless. Buyers have produced letters from CMS that demonstrate that at the end of each loan's repayment period, only a fraction of the $67 million Sellers assert is owed to CMS remained outstanding. *See* AR59-88. There is only one explanation for this: that the AAPP monies were (and continue to be) recouped from Buyers. Thus, Sellers' assertion that it disputes ***any*** AAPP reimbursements are owed to Buyers cannot be credited. Buyers are entitled to claim substantial AAPP offsets,[7] and the Award must be modified to acknowledge it is subject to such offsets.

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[6] Buyers accept Sellers' representation only for purposes of this appeal and reserve all rights in the Set-Off Litigation.

[7] Sellers contend there are no AAPP offsets available based on Sellers' accounting of amounts Buyers purportedly owe Sellers. AB 35-36. Buyers dispute the accuracy

III. THE AWARD SHOULD BE MODIFIED TO ACKNOWLEDGE THAT IT IS SUBJECT TO OFFSETS

The Court of Chancery erred in denying Buyers' motion to modify the Award based on an erroneous interpretation of the APA. Though Sellers assert that arbitration awards are subject to "one of the narrowest standards of judicial review in all of American jurisprudence," AB 38-39 (quoting *TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Secs., Inc.*, 953 A.2d 726, 732 (Del. Ch. 2009)), that does not mean that modification ***must*** be denied. To the contrary, as set forth in Buyers' Opening Brief, courts have consistently modified arbitration awards where—as here—the award is "imperfect in matter of form not affecting the merits of the controversy" and modification is required to avoid "unjust consequences." OB 36-38 (quoting *UBS Fin. Servs., Inc. v. Riley*, 2012 WL 1831720, at *3 (S.D. Cal. May 18, 2012)).

Sellers assert that modification is improper because the cases on which Buyers rely concern the set-off of liquidated amounts. AB 38. But as previously discussed, the APA allows for set-off of unliquidated amounts and, in any event, Sellers' AAPP Debt is liquidated.

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of that accounting. In any event, the amount of AAPP offsets currently available is irrelevant. This Court need only determine whether the Award is subject to the Set-Off Provision. If this Court answers that question affirmatively (which it should), then the Award must either be modified to reflect that fact or confirmation stayed until the remaining set-off inputs are finally determined in the Set-Off Litigation.

Further, even if this Court determines Sellers' AAPP Debt is not liquidated, the cases cited by Buyers remain instructive. Here, as in those cases, Sellers' payment ***obligation*** is not in dispute. Sellers have admitted as much, A812-A813, 97:22-98:1, and the Court of Chancery recently acknowledged this fact, *Steward*, 2023 WL 5321484, at *13. Thus, as in *UBS*, modifying the Award to require that Buyers "pay just [their] net obligation avoids 'the absurdity of making A pay B when B owes A.'" 2012 WL 1831720, at *3 (citations omitted). The parties agreed to a detailed Set-Off Provision to avoid such a scenario. That Set-Off Provision expressly provides that Buyers may offset the Purchase Price Adjustment and other post-closing obligations they owe against amounts "due or payable" from Sellers, including Sellers' AAPP Debt. A159-60, § 8.18. The purpose of this provision is clear: to prevent the parties from wiring sums back and forth, and instead consolidate all post-closing obligations to allow for a single, global payment by the net debtor. Allowing Sellers to fast-track payment of the Award, while delaying payment of millions owed to Buyers through litigation, would frustrate that purpose. Accordingly, the Award should be modified to acknowledge that it is subject to offsets, the amount of which will be finally determined in the Set-Off Litigation.

IV. IN THE ALTERNATIVE, THE CONFIRMATION PROCEEDINGS SHOULD BE STAYED PENDING RESOLUTION OF THE SET-OFF LITIGATION

If this Court determines that modification is not warranted, it should reverse the judgment and remand for entry of a stay pending resolution of the Set-Off Litigation. Sellers already have acknowledged they are willing to "stand by on collecting [the Award] so long as the awarded amount is escrowed . . . pending resolution of the Set-off Litigation." Op. 1; *see also* AR3. Buyers have done just that. The Award plus interest has been escrowed with the trial court.[8] AR13-16. In light of that fact and for the reasons set forth in Buyers' Opening Brief, OB 40-44, a stay is appropriate.

Sellers' arguments against such a stay are unavailing. Sellers focus primarily on distinguishing *Middleby Corp. v. Hussman Corp.*, 1991 WL 119123 (N.D. Ill. June 26, 1991). AB 40-43. But their attempts to do so fail. In *Middleby*, the court granted a stay where (1) the issue resolved through arbitration was not separate and independent from other issues in the related litigation; and (2) the equites favored postponing entry of judgment on the arbitration award until all related claims were fully resolved. 1991 WL 119123, at *4. Both factors are present here.

[8] For the avoidance of doubt, Buyers are willing to keep the funds in escrow during the pendency of any stay, including after this appeal is decided.

The Award is not separate and independent from the other liabilities subject to the Set-Off Provision. As explained in Buyers' Opening Brief, the language of Sections 2.5 and 8.18 make clear that the Award is but one of several inputs into the parties' global set-off calculation. OB 10, 20. The APA does not provide a mechanism for elevating one set-off input over the others.

Sellers suggest the Award must be treated differently because Buyers purportedly acknowledged that Net Working Capital should be separate from the Set-Off Litigation. AB 42. That is false. Buyers merely acknowledged that Net Working Capital is subject to arbitration, whereas other set-off inputs are pending before the Court of Chancery. B257 n.15. That difference does not affect the analysis under *Middleby*. Indeed, there the court acknowledged: "[t]he fact that the parties agreed to arbitrate the closing date balance sheet issue ***does not*** convert that issue into a separate and independent claim for relief." *Middleby*, 1991 WL 119123, at *3 (emphasis added). Here, the entry of judgment on the Award and the resolution of the other set-off inputs remain closely related. !!!

Sellers' assertion that the equities do not favor Buyers is equally unavailing. Sellers suggest that "staying judgment . . . may ultimately be tantamount to vacating it" because Buyers purportedly pose a "credit risk." AB 43. That argument is baseless—Buyers have ***already escrowed*** (and will continue to escrow) the Award plus interest. AR13-16. Sellers face no risk.

To the contrary, the equities ***favor*** a stay to prevent Sellers' attempts to fast-track payment of the Award over other set-off inputs, namely their AAPP Debt. *See Middleby*, 1991 WL 119123, at *4 ("Because any eventual recovery . . . could offset the arbitration award, it would be unfair for the court to now enter judgment on the arbitration award").

Sellers also fail to rebut Buyers' assertion that the court erred in interpretating the Federal Arbitration Act ("FAA"). OB 43-44. Sellers do not dispute that the FAA is intended to operate consistent with the wishes of the parties, which, in the present case, are evidenced by the terms of the APA that require set-off. Instead, Sellers merely state that courts "must" grant an application for confirmation of an arbitration award. AB 43. But Sellers' argument fails to recognize that confirmation of the Award without recognizing Buyers' set-off rights is inconsistent with Sections 2.5(d) and 8.18, which provide that any Purchase Price Adjustment is subject to set-off. OB 43. Accordingly, the judgment should be reversed, and the proceedings remanded with instructions to enter a stay pending resolution of the Set-Off Litigation.

CONCLUSION

For the foregoing reasons, the judgment should be reversed and a modification of the Award should be ordered. In the alternative, the judgment should be reversed and the case remanded with instructions to enter a stay pending resolution of the Set-Off Litigation.

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2023, a true and correct copy of *Public Version of Appellants' Reply Brief* was served on the following counsel of record via File & Serve*Xpress*:

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