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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RMP SELLER HOLDINGS, LLC, f/k/a NEW SAVE MART CORP.,	No. 117, 2024
Respondent/Counterclaim-Petitioner Below, Appellant,	Court Below: Court of Chancery of the State of Delaware
v.	C.A. No. 2023-0957-JTL
SM BUYER LLC and SM TOPCO LLC,	
Petitioners-/Counterclaim-Respondents Below, Appellees.	

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Court should take this opportunity to correct a manifest disregard of the law, and in doing so confirm what its precedent already establishes: review of arbitration awards is not a rubber stamp, and courts are empowered to and should vacate an award that ignores the plain terms of a contract.

This is a rare case in which the law provides for vacating an arbitration award. In addition to concluding that the Arbitrator's Award was irrational and wrong, the Court of Chancery made this crucial finding:

> I think the agreed-upon accounting principles and the mandate to prepare the reference statement and final statement consistently meant that the Buyer's adjustment ***was contrary to the plain meaning of the Agreement***.

Ex. A, 9 (emphasis added). The court's unassailable assessment on this key point resonated with journalists and the legal community at large, who widely rejected the Award as absurd.[1] Given that the Award *cannot be reconciled to the plain meaning of the EPA*, the Award should be vacated, thus reversing an irrational, unjust, and cynical result that will discourage parties from using arbitration while encouraging gamesmanship at the expense of fairness and predictability in transactions.

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[1] Sujeet Indap, *The Inequity Method of Accounting*, FINANCIAL TIMES (Apr. 11, 2024), https://www.ft.com/content/7ef1559a-0b7c-48cd-80dc-084081bea8ad; Glenn D. West, *Post-Closing Purchase Price Adjustments Gone Wrong: The Save Mart/Kingswood Capital Dispute*, ABA BUSINESS LAW TODAY (May 13, 2024), https://businesslawtoday.org/2024/05/post-closing-purchase-price-adjustments-gone-wrong-the-save-mart-kingswood-capital-dispute/.

Contrary to Buyer's position, review of an arbitration award for "manifest disregard" is meaningful; it is not just a procedural, check-the-box exercise. *Monongahela Valley Hospital v. U.S. Steel Paper & Forestry Mfg. Allied Indus. & Serv. Workers Int'l Union AFL-CLC*, 946 F.3d 195 (3d. Cir 2019) (affirming district court order vacating arbitration award because an arbitrator "may not ignore the plain language of the contract," citing *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987)); *SPX Corp. v. Garda USA, Inc.*, 94 A.3d 745 (Del. 2014) (concluding award should not have been vacated for manifest disregard because arbitrator's interpretation was a plausible interpretation "not without a basis in the contract"). To pass manifest disregard review, an arbitrator's analysis cannot be directly contrary to the clear terms of the agreement.

Buyer seeks to sow confusion on other important matters too.

First, Buyer fails to identify section 1.4(d) as the operative provision governing the Closing Statement. Buyer insists that the general definition of Indebtedness controls everything. AB, 31. The definition of Indebtedness by itself, however, grants no adjustment rights. Rather, section 1.4(d) ("Closing Statement") is the provision that both gave Buyer the right to present adjustments and, crucially, as in *Chicago Bridge*, *OSI*, and *Westmoreland*, *expressly constrained that right* by the Accounting Rules.

Buyer further declines to review the entirety of section 1.4(d), reprising the same *incomplete analysis* it offered to the Arbitrator. AB, 13-14; AR94, AR147. While Buyer discusses the first reference to Accounting Rules in section 1.4(d) (including the "as applicable" language (which Buyer considers critical) at the end of that clause), Buyer fails to engage the second, clarifying reference to the Accounting Rules (which does not include the "as applicable" language). When section 1.4(d) is read *as a whole*, the *only* possible interpretation is that the Accounting Rules apply to preparation of the Closing Statement *generally*, including Closing Date Indebtedness.

When the Accounting Rules are applied, it is readily apparent that SSI Debt cannot be Closing Date Indebtedness because to classify it as such would both double count that debt (which was already included in the SSI Purchase Price and scheduled under section 3.6 (OB, 13-14)) and would introduce "accounting methods, policies, practices, procedures, classifications" that are "different than" the Historical Principles, namely prior treatment of SSI Debt as part of an SSI joint venture equity line item.

To avoid this reality, Buyer mischaracterizes the transaction, suggesting that in the context of a prior sale of real estate to a third party, or a permitted (not mandated) cash sweep, the result in this case is not as irrational or unfair as it seems. But the Court of Chancery saw through this ruse, recognizing the result as wholly

irrational, fully inverting a *fixed* $90 million dollar purchase price for the SSI interest and fully inverting the net flow of consideration at Closing. This Court should do the same, as no one could possibly believe that a private equity Buyer would fund an excess $109 million at Closing in hopes of recovering a massive but undisclosed overpayment through a wild and hotly contested post-closing adjustment. As in *Chicago Bridge*, *OSI*, and *Westmoreland*, the courts are here again confronted with cynical conduct that should be condemned, not blessed through ineffectual judicial review.

Nor can Buyer prop up the Arbitrator's one-sided reliance on extrinsic evidence to support a construction of the governing provisions that violates their plain terms. When the Arbitrator's conclusion that the parties intended the transaction to be "cash free, debt free" is scrutinized, the Court will see that phrase ("cash free, debt free") *does not appear* in the EPA and is not even supported by the express terms of the EPA. Instead, this phrase comes directly and only from *extrinsic evidence* in the form of the parties Letter of Intent (and testimony by Buyer representatives). Ironically, this LOI also includes an express list of agreed Indebtedness, which does not include SSI Debt (a more germane and telling fact the Arbitrator ignored). The Arbitrator found it expedient to rely on extrinsic evidence when it supported his Award, while disregarding a wealth of other uncontroverted extrinsic evidence, in his own words, "at odds with" his finding. A357.

While the Court of Chancery appreciated these problems, and the harsh and absurd outcome they produced, it reluctantly affirmed on the ground that the Arbitrator had said enough in his Award to meet the applicable standard of review. But, as noted above, the Court of Chancery also found the Award rested fundamentally on a contract interpretation that was contrary to the plain meaning of the Agreement, which should have resulted in an order vacating the Award. That is because the Award does not reflect proper Delaware contract interpretation, but rather exemplifies slavish elevation of one general definition while disregarding other terms, a practice that Delaware courts have repeatedly rebuked. Under Delaware law, contracts are to be construed as a whole, to give rational meaning to the entire document, to preserve and not upset rational expectations. The Award does just the opposite, as the Court of Chancery recognized, and should therefore be vacated.

II. ARGUMENT

A. The Manifest Disregard Standard Is Not a Rubber Stamp

Buyer argues that the mere fact that an arbitrator noted the relevant legal issues in his Award is, by itself and without reference to the merits, enough to pass review for manifest disregard. This is incorrect and belied by on-point precedent.

In *Monongahela*, the award was vacated for manifest disregard of the agreement, and not the arbitrator's mere failure to consider all the issues. 946 F.3d at 198-200. There, the arbitrator identified and analyzed the key clause at issue. *Id.* at 200 (discussing the arbitrator's analysis of the provision at issue). But the award was nevertheless vacated, because "[t]he arbitrator ignored the plain language" of the agreement. *Id.* at 198-99. An award that violated the agreement's text was not saved merely because the arbitrator acknowledged the relevant provision.

On the other side of the same coin, in *SPX*, this Court reversed an order vacating an award, but not merely because the arbitrator had considered the material provisions. Instead, this Court held that the arbitrator's analysis was "not without a basis in the contract," and that both parties had presented "colorable interpretations." *SPX*, 94 A.3d at 751. In other words, the arbitrator in *SPX* had given a plausible analysis rooted in the contract, not one that conflicted with the contract's plain language.

Buyer repeatedly cites the number of pages the Award devotes to different topics, but length is not the measure of whether an arbitrator disregarded the agreement. No amount of words or "analysis" can save an interpretation that reads plain language out of the contract. As held in *Monongahela*, an award must be vacated if it "reflects a manifest disregard of the agreement" and therefore constitutes its "own brand of industrial justice." *Monongahela*, 946 F.3d at 199 (citing *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)); *see also McCarthy v. Citigroup Glob. Mkts, Inc.*, 463 F.3d 87, 91 (1st Cir. 2006) (holding manifest disregard exists where the decision is unfounded in reason, based on "reasoning so faulty that no judge, or group of judges, ever could conceivably have made such a ruling," or based on a "crucial assumption that is concededly a non-fact").

Accordingly, while manifest disregard review is limited, when, as here, an arbitrator disregards a clear contract term, the award is properly vacated.

B. The Operative Provision – Section 1.4(d) (Buyer's Closing Statement) – Requires Adherence to the Accounting Rules

For purposes of this dispute, the operative EPA provision is section 1.4(d), Buyer's Closing Statement. Section 1.4(d) allowed Buyer, post-Closing, to present an adjusted Closing Statement, subject to the Accounting Rules:

> Closing Statement. No later than ninety (90) days after the Closing Date, Buyer shall cause to be prepared in good faith and delivered to Seller a statement (the "Closing Statement") setting forth Buyer's

> calculation of the Purchase Price (the "Closing Date Purchase Price"). *The Closing Statement shall be prepared in a manner consistent with the definitions of the terms Working Capital, Closing Cash, Closing Date Indebtedness, Transaction Expenses, including, as applicable, the Accounting Rules (including as reflected on Exhibit A).* **The Parties agree that the purpose of preparing the Closing Statement and determining the Working Capital, Closing Cash, Closing Date Indebtedness, and Transaction Expenses is to measure the amount of the Working Capital, Closing Cash, Closing Date Indebtedness, and Transaction Expenses and such processes are not intended to (x) permit the introduction of accounting methods, policies, principles, practices, procedures, classifications or estimation methodologies for the purpose of determining the Working Capital, Closing Cash, Closing Date Indebtedness, or Transaction Expenses that are different than the Accounting Rules** ….

A374 (emphasis added). As discussed at length in the opening brief, Section 1.4(d) requires Buyer's Closing Statement to be presented in a manner consistent with the Accounting Rules. A374. Buyer's Closing Statement is permitted to address adjustable components of the Purchase Price, specifically Working Capital, Closing Cash (of which Buyer suggests there should be none), Transaction Expenses, and Closing Date Indebtedness. A374. Of note, although the SSI Purchase Price (fixed at $90 million) was made an express component of the Purchase Price under section 1.2 (as amended) (A502), the SSI Purchase Price was *not subject to any adjustment* under section 1.4(d). A374.

Although it is readily apparent that section 1.4(d) is the operative provision governing the Closing Statement, Buyer instead focuses on the definition of Indebtedness. AB, 31. While the definition of Indebtedness is relevant to preparing

the Closing Statement, it is section 1.4(d) that provides for Buyer's right to submit a Closing Statement and that also expressly subordinates the general definitions to the Accounting Rules, twice.[2]

Buyer defends the Arbitrator's decision to ignore the Accounting Rules, relying on the first of two sentences in section 1.4(d) that refer to the Accounting Rules. AB, 27-31. Placing inordinate weight on the phrase "as applicable," found at the end of the first reference to Accounting Rules (and remote in placement from Working Capital), Buyer contends that the Accounting Rules must be read to apply only to Working Capital. AB, 6, 28-29. That is not a plausible construction of even the first sentence. OB, 30-31. And it utterly fails to account for the second reference to Accounting Rules in section 1.4(d) where, for emphasis and clarification, the parties repeated the injunction that the Closing Statement and any components thereof, including Indebtedness, could not be prepared in a manner "different from the Accounting Rules."[3] A374.

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[2] The Dispute Resolution Agreement between the parties confirms that 1.4(d) is the operative provision: "On June 27, 2022, pursuant to section 1.4(d) of the EPA, Buyer delivered to Seller the Closing Statement, which set forth Buyer's calculation of the Purchase Price, including Buyer's calculation of Working Capital, Closing Cash, Closing Date Indebtedness, and Transaction Expenses ('Buyer Calculations'). Buyer included within its calculation of Closing Date Indebtedness certain debt of SSI ("SSI Debt" and the inclusion thereof in Closing Date Indebtedness, the "Buyer SSI Debt Claim")." A507.

[3] Buyer claims that Seller did not present this argument to the Arbitrator. AB 29, n.7. Buyer is wrong. Seller's position is unchanged, even if worded slightly

A review of the Accounting Rules themselves, and specifically the Agreed Principles incorporated therein, confirms that they apply to each adjustable component of the Statements. OB, 31-33.

C. The Accounting Rules Preclude Classification of SSI Debt as Closing Date Indebtedness

Buyer suggests that, even if the Arbitrator wrongly refused to apply the Accounting Rules, it does not matter because the Accounting Rules do not preclude the SSI Debt adjustment. AB, 32-36. That is not so. As the Court of Chancery explained in rejecting that argument, "the adjustment disregarded the need to prepare the Pre-Closing Balance Sheet and Post-Closing Balance Sheet on a consistent basis," Buyer should have "treated the GP interest as an equity investment" (i.e., net value above debt, as shown in the audited financial statements), and "Buyer's adjustment was contrary to the plain meaning of the Agreement." Ex. A, 4, 9.

Buyer's SSI Debt adjustment constituted double counting (precluded by the Accounting Rules[4]) because the SSI interest, inclusive of its debt, was sold separately for the aggregate price of $90 million.[5] A502, § 1.2 (as amended). The

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differently. *Compare* B163 *with* OB, 30-32. A party is not required to copy its prior briefing verbatim in order to avoid an allegation of waiver.

[4] A472 (Under Rule 3, Agreed Principles "shall be interpreted so as to avoid double counting (whether positive or negative) of any item to be included in the Statements.").

[5] Buyer's claim that the word "aggregate" somehow should be construed to mean precisely the opposite, namely assets only *not* inclusive of debt, is economic gaslighting. AB 32-33.

SSI Purchase Price was defined as a distinct and equal component of the Purchase Price, right *alongside* Closing Date Indebtedness. A502. Both intrinsic evidence (the audited financial statements valuing the SSI interest at $22 million net of a pro-rata share of debt (A1255, A1269)) and extrinsic evidence (in the form of both Buyer's own instructions to its accountants directing them to "$90 to $101 million of net value" in its internal analysis (A1757 (referring to A1765)) and Buyer's accountants' resulting purchase price accounting showing expressly that the $90 million figure was net of the pro rata debt obligation (A2631)) establish unequivocally that the $90 million figure was a net figure.

In addition, the SSI Debt itself was separately scheduled under section 3.6, and therefore could not also be Closing Date Indebtedness.[6] A384, A646; OB, 13-14.

The SSI Debt adjustment also violated the Accounting Rules by using a different method to account for SSI Debt than used in Save Mart's audited financial statements. A450 (Accounting Rules definition). Save Mart's audited financial statements, attached to and incorporated into the EPA, treated the SSI interest, inclusive of its debt, as a net equity investment. A1255 (balance sheet, showing

[6] Buyer argues Seller waived this argument by not couching it as an independent claim of error. OB, 26-27 n.6. There is no waiver. This argument supports Seller's position that the Court of Chancery erred by declining to vacate the Award, which manifestly disregarded the plain terms of the EPA.

Investment in Joint Venture at $22.45 million); A1269-A1270 (note 6, explaining SSI valuation, including debt).

In the face of this reality, Buyer suggests that specifying SSI Debt as Indebtedness was not a change in classification "[b]ecause no 'accounting' was required" to calculate Indebtedness. AB, 34. That is nonsense. Buyer took an asset classified as a net equity item, and separately accounted for that debt a second time in a way not done historically, violating the Historical Principles and, therefore, the Accounting Rules. Buyer concedes that classification changes are "explicitly barred by the EPA" and that classification, as used in section 1.4(d), "refers to how certain items are identified on the balance sheet—in particular, as either assets or liabilities." AB, 34. As the Court of Chancery held, Buyer should have "treated the GP interest as an equity investment." Ex A, 4.

It is true that if the definitions are read in *isolation*, as Buyer prefers, then SSI Debt can be made to fit in any number of places, including both Working Capital (given that a component of SSI Debt is a short term revolving line of credit) and Indebtedness.[7] To acknowledge this is not to admit that the EPA permits SSI Debt to be included in Buyer's Closing Statement as either Working Capital or

[7] This circumstance leads Buyer to argue that Seller "agreed" SSI Debt may be included within Indebtedness for purposes of Buyer's Closing Statement. AB, 17. This reflects a cynical attempt to reduce a $109 million cash grab to a semantic gotcha.

Indebtedness because the general definitions are subordinated to the Accounting Rules. Delaware courts have repeatedly rejected analyses dependent upon isolated provisions. *OSI Systems, Inc. v. Instrumentarium Corp.*, 892 A.2d 1086, 1092 (Del. Ch. 2006) (clarifying and rejecting "isolated reading" of one section in light of review of the purchase agreement, generally); *In re IAC/Interactive Corp.*, 948 A.2d 471, 507 (Del. Ch. 2008) (rejecting construction of durable proxy dependent on narrow construction of one provision after review of broader agreement).

D. Buyer Mischaracterizes the Record

1. The Award Inverts Deal Economics

Buyer devotes substantial time trying to upend the Court of Chancery's string of findings that the SSI Debt adjustment "made no sense," "radically changed the economics," and, apart from a myopic reading of the definition of Indebtedness, had "nothing else to commend it." Ex. A, 4-5. In an attempt to soften the blow, Buyer points out that Seller made money earlier on a sale/leaseback of the real estate to a third party and also swept cash from the operating business before Closing. AB, 9, 14.

As to the prior sale/leaseback, it should be noted that even the Arbitrator declined to associate that prior transaction with the sale of the operating business. A90, n.129 (declining to apply step-transaction doctrine, as parties "did not present evidence or argument on whether the sale-leaseback transaction and the [sale to

Buyer] were sufficiently related"). Buyer takes further liberties with the record, suggesting that this prior deal left the business "responsible for tens of millions of dollars in annual cash rent payments where it previously had none." AB, 10. No evidence supports this assertion.[8] Similarly, Buyer cites nothing to support its assertion that the business was "struggling." AB, 39.

In terms of the cash sweep, while Seller distributed some cash from the operating business before Closing, as permitted, that was *not required* under the EPA.[9] In no sense did that cash sweep offset or justify charging Seller the full value of debt held by SSI—Seller's partially owned joint venture—debt that was performing and covered by more than sufficient assets within SSI itself, according to Buyer's own analyses. A1168-A1169, A1204-A1205.

The Court of Chancery correctly condemned the SSI adjustment as nonsensical. Ex. A, 4-5. And, if affirmed by this Court, the SSI adjustment will fully invert the agreed-upon $90 million net value for SSI, the $90 million SSI Purchase Price defined in two distinct places in the EPA. A502 (§ 1.2 as amended,

[8] In support, Buyer cites B85, it's own summary judgment brief. AB, 10 (citing B85). In turn that brief cited deposition testimony from Scott Moses and Nicole Pesco. B85. The Moses testimony (Save Mart's investment banker) merely covers bankers fees charged to Save Mart (A2538 (108:13-20)); and the Pesco testimony (not offered by Buyer) does not establish that rents were burdensome either.

[9] Had Seller opted not to sweep the cash before Closing, it simply would have been an addition to the Purchase Price. (A502, § 1.2 (any Closing Cash deemed an addition to the Purchase Price).)

specifying $90 million as the "aggregate consideration" payable by Buyer nominee Topco to Seller for the SSI interest); A432-A433 (§ 6.14 also specifying $90 million as the SSI Purchase Price).) Instead of receiving the agreed, $90 million for the SSI interest, Seller will end up *paying Buyer a net $19 million* to take the valuable[10] SSI interest off its hands. *See* A821 (showing $109 million deduction from Indebtedness).

Beyond the full inversion of the *fixed* SSI Purchase Price, had the $109 million SSI Debt adjustment been raised before closing, then to close, Seller would have had to contribute approximately $70 million, rather than having received $32.6 million plus a beneficial interest in the $7 million escrow. A821 (Closing Payment variance). One can readily see why (presuming for the sake of argument that Buyer was then contemplating this cynical position) Buyer made the "strategic" and disingenuous decision not to raise the issue at closing. A2468 (79:2-9). Instead, Buyer asks this Court to believe that it willingly funded an extra $109 million (*see* A1886, S&U Backup, Rows 29-36 (showing Buyer or its lenders funding $217

[10] SSI was arguably the crown-jewel of the sale. Seller held a slight majority interest in the SSI joint venture, which in turn held extremely valuable real estate not marked to market in the financial statements. A1269-A1270. For this reason, Buyer specified the price of $90 million (A1299-A1302), a substantial *increase* over the $22 million equity investment carrying value on Seller's audited financial statements. A1259. Buyer's claims that SSI Debt posed risk to Buyer are not justified by its own analysis. A1168-A1169, A1204-A1205, A1299-A1302.

million to close the Acquisition)), only hoping later to recover those funds through an irrational and contested massive post-Closing adjustment. To say that these facts match reasonable expectations of an objective seller and buyer is absurd.

In the plainest possible terms, as the Court of Chancery held, the SSI Debt adjustment made no sense and completely upset the economics of the transaction, contrary to the plain text of the agreement and teachings of fundamental Delaware authorities like *Chicago Bridge*. Ex. A, 4-5.

2. The Transaction Was Not "Cash Free/Debt Free," and the Arbitrator Must Have Impermissibly Relied on Extrinsic Evidence to Reach That Conclusion

Buyer emphasizes the Arbitrator's finding that the transaction was to be "cash free, debt free." AB, 2-3. Indeed, the Arbitrator relied heavily on this characterization to justify his decision to allow the SSI Debt adjustment. A353-A356.

But this terminology, on which the Arbitrator hung so much,[11] is *not found* in the EPA itself. The Award instead cites sections 1.2, 1.4, and 6.1(b)(iii) of the EPA, testimony of Buyer representative Niegsch, and the Hearing Transcript, asserting

[11] The Arbitrator expressly relied on this extrinsic language to reject Seller's analogy to *Chicago Bridge*, and it is the primary justification offered for why the interpretation of the EPA adopted by the Award is commercially reasonable. A353-A356.

that the "cash free, debt free" characterization was undisputed. A318, n.11; A354, n.122. These citations do not support this finding.

The EPA does not provide that the transaction will be cash or debt free. Section 1.2 (as amended before Closing) identifies Closing Cash on hand (if any) as an addition to the Purchase Price (not presuming it will be zero). A502. Section 1.4 provides for reporting and adjustment of Closing Cash (rather than presuming none). A373. And section 6.1(b)(iii) merely permits, but *does not obligate*, Seller to dividend out certain cash (excepting store cash) ahead of Closing. A414-A415. Niegsch testified as Buyer's representative, peddling Buyer's preferred narrative (another form of extrinsic evidence). A2310-A2311. And, in fact, the reference to the Hearing Transcript points to examination by Seller's counsel establishing that the words "cash free, debt free" are *not found* in the EPA. A2155 (25:15-18).

Instead, and ironically, the words "cash free, debt free" are found in Buyer's Letter of Intent, a piece of *extrinsic evidence* otherwise excluded by the Arbitrator. A516. The LOI is most notable for the fact that it separately states Buyer "is also amenable to a definition of 'Indebtedness' in the equity purchase agreement that reflects the items set forth in the schedule … on Appendix B…." A516. Appendix B to the LOI lists certain debt items, including Save Mart's own operating line of credit ($75 million), but not including the disputed SSI Debt; so, by the terms of the

LOI, SSI Debt was not understood to be Indebtedness. A522. Yet, the Arbitrator refused to consider the LOI for its insight on this more specific point. A361.

The Arbitrator's "cash free, debt free" finding is a false basis for the award. It is also an example of the Arbitrator's willingness to admit extrinsic evidence (the "cash free, debt free" statement in the LOI) supporting the Award while excluding extrinsic evidence inimical to the result. *See McCarthy*, 463 F.3d at 91 (manifest disregard where a crucial assumption turns out be a non-fact).

3. Buyer Did Not Include the SSI Debt in Its Pre-Closing Statement

Buyer also misrepresents the exchange of Pre-Closing Statements, suggesting that the Pre-Closing Statement was prepared exclusively by Seller, with no input from Buyer. AB, 13-14. The record instead shows not only that Buyer requested and received certain changes to Seller's draft Pre-Closing Statement, but also in fact took over control of the Pre-Closing statement as of about 6:00 p.m. on March 25, 2022, and later circulated the proposed final version and final version of the Purchase Price calculation on *its own spreadsheet*. A1416-1421 (3/25 Buyer version, at 6:01 p.m. (calling its version "essentially final"; including at S&U Backup tab a "Determination of Estimated Purchase Price")); A1881-1886 (3/27 Buyer final version, at 6:25 p.m., including same tab and Purchase Price calculation). A comparison of Seller's last version, delivered at 4:51 p.m. on March 25 (before the two versions discussed above) (B57-65) with Buyer's later version (A1417-1421)

shows Buyer changed the calculation of Closing Date Indebtedness by adding Save Mart's own $75 million line of credit into Closing Date Indebtedness, but did not, of course, attempt to assert the $109 million SSI Debt at that time.

In other words, twice before Closing, Buyer circulated its own version of the Purchase Price Calculation, including the version that was deemed final (A1881-1886), neither of which included SSI Debt within Closing Date Indebtedness. Arguably, as these documents were called for under the EPA, they constituted intrinsic evidence. And yet, both the Arbitrator and Buyer (then and now before this Court) act as if this evidence does not exist.

E. Delaware Contract Interpretation Rules Do Not Support This Absurd Result

Buyer defends the Award, claiming that it faithfully applied Delaware's "highly contractarian" jurisprudence. AB, 8. But, in fact, Delaware contract interpretation jurisprudence does not support the Arbitrator's analysis. Succinctly put:

> Delaware adheres to the 'objective' theory of contracts, i.e. a contract's construction should be that which would be understood by an objective, reasonable third party. We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage.
>
> * * * *

> An unreasonable interpretation produces an absurd result or one that no reasonable person would have accepted when entering the contract.

Osborn v. Kemp, 991 A.2d 1153, 1159-60 (Del. 2010) (footnotes and internal quotation marks omitted); *see also DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005) (stating that specific provisions are to be given more weight than general ones); *Monongahela*, *supra*, 946 F.3d at 200 (criticizing arbitrator for reading "so far as possible" qualifier in isolation from rest of the agreement); *Chicago Bridge & Iron Co. N.V. v. Westinghouse Elec. Co. LLC*, 166 A.3d 912, 930 (Del. 2017) (explaining that the preferred interpretation will "maintain[] the underlying economics of the parties' bargain").[12]

The construction advanced in the Award violates these principles by, variously, elevating the general (definition of Indebtedness) above multiple specific references to SSI and its debt (including the fixed SSI Purchase Price (A330-A333) and the separate specification of SSI Debt in section 3.6 of the Disclosure Schedule (A346-A352)); reading the definition of Indebtedness in almost complete isolation

[12] Buyer penuriously dismisses *Chicago Bridge*, as "idiosyncratic," and suggests that it and its forebearers *OSI* and *Westmoreland*, cited repeatedly therein, have little to do with the Accounting Rules at issue here. AB, 7. To the contrary, regardless of procedural context, each of those cases and the instant case share a notable feature: a buyer using the post-closing adjustment process (sometimes called true-up) to raise issues it "knew about before closing, and which it did not use as a basis not to close," upending historical accounting and the basic economics of the transaction. *Chicago Bridge*, 166 A.3d at 924. *Chicago Bridge*, *OSI*, *Westmoreland*, and now this case share this DNA.

from the balance of the EPA (*see*, *e.g.*, A324-A327), including the constraints of the Accounting Rules (A334-A345); and leading to an absurd and economically irrational result. In these senses, the Award is a model of how *not* to undertake Delaware contract interpretation.

III. CONCLUSION

Affirming this Award would serve as a cautionary tale that those who choose arbitration do so at their peril and without any judicial review safety net. Affirming this Award would also greenlight the most cynical conduct by buyers and their counsel, the same conduct that courts have, to date, not hesitated to criticize in *Chicago Bridge*, *OSI*, and *Westmoreland*.

By vacating this Award, this Court can signal that parties can choose arbitration and rely on a very basic level of substantive review to confirm that the award issued is not contrary to the plain meaning of an agreement. By vacating this Award, this Court can again signal, as it has already done in *Chicago Bridge* and *OSI*, that in Delaware, litigants can expect rational results.

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