IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

VIACOM INTERNATIONAL, INC., Plaintiff and Counter-Defendant, v. WALTER A. WINSHALL, in his capacity as the Stockholders' Representative, Defendant and Counter-Plaintiff.	)	Civil Action No. 7149-CS

MEMORANDUM OPINION

Date Submitted: June 20, 2012
Date Decided: August 9, 2012

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STRINE, Chancellor.

I. Introduction

As is often the case when sophisticated parties use the technique of an earn-out procedure to paper over a value gap, the technique has resulted in litigation. As is often the case, that is so even though the parties agreed in a merger agreement that the amount of the earn-out would be determined in alternative dispute resolution by "Resolution Accountants," rather than in litigation. Here, an acquirer who has been ordered by the Resolution Accountants to pay an earn-out to the target company's selling stockholders has filed suit seeking to vacate the order of the Resolution Accountants setting the amount of the earn-out that must be paid. The acquirer has advanced a number of differing linguistic formulations for its protestation that the Resolution Accountants' decision should be vacated, but all of its formulations come down to the notion that the Resolution Accountants erred by refusing to consider an alternative approach to determining the earn-out that the acquirer originally raised in a preliminary calculation of the earn-out, but ultimately did not include in its contractually-mandated calculation of the earn-out (the "Earn-Out Statement") or the "work papers and supporting documentation" required to accompany that Earn-Out Statement.[1] Although the acquirer successfully urged the Resolution Accountants to refuse to consider any arguments that the selling stockholders' representative did not include in the "Summary of Issues" he was required to submit within 20 days of receiving the Earn-Out Statement on the grounds that the stockholders' representative was required to timely make all his arguments in that Summary of Issues, the acquirer says that the Resolution Accountants

[1] Compl. Ex. A ("Merger Agreement") § 2.4(b).

were out of bounds in refusing to consider an argument and facts that the acquirer could have, but chose not to, include in its Earn-Out Statement and the information backing up that Earn-Out Statement.

In this decision, I dismiss the acquirer's challenge to the Resolution Accountants' order and grant the selling stockholders' cross-motion to enforce the order under the Federal Arbitration Act ("FAA"), which applies to this dispute. By the clear terms of the merger agreement entered into by the parties (the "Merger Agreement"), the Resolution Accountants were charged with determining the earn-out. Thus, there is no question of "substantive arbitrability," as the core issue determined by the Resolution Accountants – the amount of the earn-out – was clearly a matter for them to decide. Being empowered to decide that core question, the Resolution Accountants were also empowered to make the usual discretionary decisions that any adjudicator must make, including whether the acquirer was entitled to present arguments not included in its Earn-Out Statement. This is precisely the kind of procedural question that the adjudicator makes in the first instance, and that is not subject to challenge in the limited context of review under the FAA. Here, the Resolution Accountants interpreted the Merger Agreement as limiting both the acquirer and the selling stockholders to the arguments raised in their Earn-Out Statement and Summary of Issues: key, contractually-mandated documents that then shaped the parties' agreement on pre-hearing discovery. That interpretation was a matter for the Resolution Accountants in the first instance, as the acquirer itself acknowledged in asking the Resolution Accountants to exclude arguments that the selling stockholders' representative did not put in the Summary of Issues. Under the FAA, that interpretation cannot be set aside as "misconduct" or "exceed[ing] [the arbitrators'] powers."[2] Moreover, even if the acquirer were entitled to a judicial determination of the question, which it is not, it would still not have a basis to vacate the ruling, because the Resolution Accountants' determination that the acquirer was bound by its Earn-Out Statement and the documentation it offered in support of that Statement was a correct reading of the Merger Agreement.

II. Background

A. The Parties Enter Into The Merger Agreement And The Selling Stockholders Are Promised The Possibility Of Earn-Outs

The acquirer in this case is plaintiff Viacom International, Inc., a well-known media conglomerate. The target was Harmonix Music Systems, Inc., a developer of music-oriented video games. On September 20, 2006, when Harmonix was enjoying the success of its popular video game *Guitar Hero* and was developing a new game, *Rock Band*, Viacom and Harmonix entered into the Merger Agreement, in which Viacom agreed to cash out Harmonix's stockholders. The parties appointed defendant Walter A. Winshall as the "Stockholders' Representative," with the authority to enforce the selling stockholders' rights to receive any payment under the Merger Agreement and to represent the selling stockholders in any post-merger disputes.[3]

Viacom agreed in the Merger Agreement to pay Harmonix's stockholders $175 million in cash at closing and also promised the selling stockholders the contingent right to receive earn-out payments based on Harmonix's financial performance in 2007 and

[2] 9 U.S.C. §§ 10(a)(3), (4).
[3] Merger Agreement §§ 10.8(a), (d).

2008 (the "Earn-Outs"). The 2008 Earn-Out, which is the only Earn-Out currently in dispute, was defined as "the positive amount, if any, … equal to the product of (x) [Harmonix's] Gross Profit for Fiscal Year 2008 minus $45,000,000 and (y) 3.5."[4] In other words, if Harmonix's "Gross Profit" in 2008 was $145 million, Viacom would owe Harmonix's former stockholders $350 million, on this basis: ($145 million - $45 million) * 3.5 = $350 million. The Merger Agreement defined "Gross Profit" as the sum of "Product Gross Profit" for all of Harmonix's products, meaning "the positive or negative difference, between (i) Net Revenue attributable to such product and (ii) the sum of all Direct Variable Costs attributable to such product."[5] The "Direct Variable Costs" were in turn defined as "all costs and expenses attributable to, related to or associated with the business and products of [Harmonix], which vary based on the number of units manufactured or sold."[6] Examples of Direct Variable Costs given by the Merger Agreement include manufacturing costs, distribution fees, marketing costs, and royalties payable to third parties.[7]

B. The Process For Settling Earn-Out Disputes

The Merger Agreement set forth a process for determining the amount of the 2008 Earn-Out, as well as a resolution process in case the parties could not agree on the amount to be paid.[8] As a first step, Viacom had to prepare the Earn-Out Statement,

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[4] *Id.* § 2.1(c)(ii)(B).
[5] *Id.* §§ 2.1(c)(ii)(I), (N).
[6] *Id.* § 2.1(c)(ii)(E).
[7] *Id.*
[8] The Merger Agreement established an identical process for resolving disputes relating to the 2007 Earn-Out. Because the 2007 Earn-Out is not in dispute, I do not focus on it in this opinion.

deliver it to Winshall, and provide Winshall with "reasonable access to all work papers and supporting documentation relating to the [] Earn-Out Statement."[9] If Winshall then "disagrees with [Viacom's] calculation of the … [Earn-Out], [he] must deliver to [Viacom] … a written description of each such disagreement," *i.e.*, the Summary of Issues, within 20 days.[10] The Merger Agreement specifies that "in connection with any dispute resolution regarding the [Earn-Out], the Stockholders' Representative will not dispute any additional issues or amounts other than the [ones described in the Summary of Issues]."[11] In the event that Viacom and Winshall cannot resolve the identified disagreements in the Summary of Issues (the "Earn-Out Disagreements"), then either party may submit these unresolved Earn-Out Disagreements to the Resolution Accountants.[12] The Merger Agreement provides that "[t]he scope of the Resolution Accountants['] engagement (which shall not be an audit) shall be limited to the resolution of the Earn-Out Disagreements, and the recalculation of the [Earn-Out] … in light of such resolution, and [the Resolution Accountants] shall be deemed to be acting as experts and not as arbitrators."[13]

Having said that the Resolution Accountants are "experts and not [] arbitrators," the Merger Agreement goes on to say that "[t]he resolution of the dispute by the Resolution Accountants will be a final, binding and conclusive resolution of the parties'

[9] Merger Agreement § 2.4(b).
[10] *Id.*
[11] *Id.*
[12] *Id.* § 2.4(c).
[13] *Id.*

dispute, *shall be non-appealable, and shall not be subject to further review*."[14] If one just read this sentence, one would perhaps view the parties as having waived any judicial review altogether. But not content with having deemed the Resolution Accountants as experts and not arbitrators and thus caused one eyebrow-knitting moment, the drafters forged on to state in a later subsection that "[t]he determination of the [2008 Earn-Out] … shall be final and binding on all parties, and no such party shall have the right to bring any claim disputing such final determination, *in the absence of fraud or manifest error*."[15] This formulation matches to some extent the grounds for review under §§ 10 and 11 of the FAA, in that § 10(a)(1) of the FAA allows a court to vacate an arbitration award that "was procured by [] fraud"[16] and in that "manifest error" can be read as covering the same ground as § 11(a) of the FAA, which allows modification "[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award,"[17] but the linguistic overlap is not exact.

C. The Parties Disagree Over The Earn-Outs And Submit Their Disputes To The Resolution Accountants

The relationship between Viacom and the former Harmonix stockholders began on a positive note. On May 23, 2008, Viacom sent Winshall a "preliminary" Earn-Out

[14] *Id.* (emphasis added).
[15] *Id.* § 2.4(e) (emphasis added).
[16] 9 U.S.C. § 10(a)(1).
[17] 9 U.S.C. § 11(a).

Statement for 2007, which indicated that the 2007 Earn-Out was $150 million.[18] In arriving at this amount, Viacom deducted from Net Revenue (*i.e.*, included in Direct Variable Costs) only the costs attributable to Harmonix products that were sold during 2007; it did not deduct the costs of unsold Harmonix products in inventory at year-end 2007. Although Viacom made clear that its determination of the 2007 Earn-Out was only based on a "preliminary calculation," and would be paid "'on account' … and without prejudice to any of Viacom's rights under the Merger Agreement,"[19] Viacom paid the former Harmonix stockholders $150 million in September 2008, telling them that "Viacom [was] delighted to have Harmonix 'in the family' and thrilled with the progress of the Rock Band franchise."[20] In its 10-Q filed on November 3, 2008, Viacom told its shareholders that the 2008 Earn-Out was "expected to exceed this year's payment [*i.e.*, the Earn-Out payment for 2007]."[21]

But after eggnog season passed, Viacom changed its view. In its 10-K for 2008, which was filed on February 12, 2009, Viacom disclosed that "[t]he [2008 Earn-Out] … will depend on the final assessment of performance and is expected to be less than the [2007 Earn-Out]."[22] Although the record is limited on this, one surmises that as the recession kicked in in 2009, the appetite of the buying public to purchase *Rock Band*

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[18] Holt Aff. Ex. 6. The 2007 Earn-Out, like the 2008 Earn-Out, was determined by contractual formula. But, the minimum Gross Profit that Harmonix had to make in 2007 in order to receive an Earn-Out was lower than the 2008 Earn-Out threshold: $32 million instead of $45 million. *See* Merger Agreement § 2.1(c)(ii)(A) (defining the "2007 Earn-Out Payment Amount"); *id* § 2.1(c)(ii)(B) (defining the "2008 Earn-Out Payment Amount").

[19] Holt Aff. Ex. 6.

[20] Holt Aff. Ex. 8.

[21] Holt Aff. Ex. 9 at 15.

[22] Holt Aff. Ex. 10 at 97.

abated, lowering Harmonix's sales and leaving Viacom less optimistic about the product's future and less happy about its decision to buy Harmonix in the first place. And of course, the asymmetry between a buyer and sellers with whom it has no continuing relationship other than as potential recipients of contractual payments that deepens from the day of closing and helps fuel many earn-out disputes was at work here. Thus, as time went on, Viacom became more reticent to pay the Earn-Outs and it took an increasingly assertive position in interacting with Winshall over that issue.

On June 22, 2009, Viacom delivered a "preliminary" 2008 Earn-Out Statement and a "revised preliminary" 2007 Earn-Out Statement to Winshall, again advising Winshall that the "preliminary calculations [were] without prejudice to [Viacom's] rights under the Merger Agreement …."[23] These Earn-Out Statements evidenced Viacom's deflated post-Christmas spirit. Viacom's preliminary 2008 Earn-Out Statement indicated that there would be no 2008 Earn-Out at all, and Viacom advised Winshall "to let the former stockholders of Harmonix know that it is possible that a portion of already paid [2007] earn-out amounts may be required to be returned so that they can plan accordingly."[24]

Viacom's preliminary 2008 Earn-Out Statement included a $54.6 million write-down for Harmonix products that remained in inventory at year-end 2008 (the "Inventory Write-Down").[25] Thus, even though Harmonix made $768.4 million off of its products in 2008, Viacom took the position that $54.6 million had to be deducted from that Net

[23] Holt Aff. Ex. 11.
[24] *Id.*
[25] *Id.*

Revenue, in addition to other Direct Variable Costs.[26] The deduction accounted for the alleged fact that the market value of certain Harmonix products had dropped below the costs of making those products.[27] The Inventory Write-Down was identical, the parties suggest, to one that Harmonix booked on its June 30, 2009 financial statements to reflect that its ability to sell inventory left over from 2008 at its retail price was deteriorating. The record on the nature of this write-down and its basis is sparse, a factor that does not aid Viacom for reasons that will become clear later. That determination was one made as of June 2009 and was based on market developments in 2009. According to Viacom's litigation counsel at oral argument:

> In the course of 2009, [Viacom] came to learn that the situation with the [Harmonix] business generally and the ability to sell [Harmonix's] unsold inventory left over from '08 and the ability to sell it at what originally was its retail price was rapidly deteriorating. As a consequence of that, [Viacom] in 2009, not for purposes of the [2008 Earn-Out], although it used it for the [preliminary 2008 Earn-Out Statement], but in the course of doing business and keeping the books and records of Harmonix[,] … [wrote down the 2008 year-end inventory] …. And that calculation was done in '09 for the '08 inventory ….[28]

But despite conceding that Harmonix had written down the value of its inventory in mid-2009 – which was after its financial statements for 2008 had been prepared – based on information it learned from market developments in 2009, counsel insisted that Harmonix had restated the value of its inventory as of December 31, 2008, because the "[e]conomic

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[26] *Id.*

[27] Writing down inventory to the lower of cost or market value is a non-routine accounting event contemplated by GAAP. *See* FASB Accounting Standards Codification 330-10-35-1 ("Where there is evidence that the utility of goods, in their disposal in the ordinary course of business, will be less than cost, whether due to physical deterioration, obsolescence, changes in price levels, or other causes, the difference shall be recognized as a loss of the current period ….").

[28] Tr. at 56-57.

developments [Viacom learned of in 2009] … reflect[ed] the condition in ’08 that Harmonix and Viacom did not have full visibility to. So they corrected and increased the reserves as of ’08.”[29]

Quite obviously, such a method raises many questions of reliability and integrity. On that sort of reasoning, the books and records of every company with material real estate exposure would have had to be restated for most of the first decade of this century, as the crash in the late years of the aught years decade 2008 and after undermined the previous valuations on the books. Although I do not purport to be an accounting expert, there are rather substantial questions regarding whether weak economic and sales conditions *in 2009* can justify retroactively impairing the value of unsold *Rock Band* products in inventory *as of the end of 2008*, rather than basing the accounting treatment of inventory on information knowable as of December 31, 2008.[30] Harmonix, which was under Viacom’s control, had a duty to account for that inventory in a sound way when it closed the books on 2008, and as of that time, and having all the wealth of information available to a major seller of retail products, it did not make the judgment that the Harmonix products could not be sold in a timely way. Only after 2009 events –

[29] *Id.* at 57.

[30] Under GAAP, a write-down of inventory to its net realizable value should be booked in the period when the market deterioration occurs, not before. *See* FASB Accounting Standards Codification 330-10-35-2 (“[A] loss of utility shall be reflected as a charge against the revenues of the period in which it occurs. Thus, in accounting for inventories, a loss shall be recognized whenever the utility of goods is impaired by damage, deterioration, obsolescence, changes in price levels, or other causes.”); *see also* FASB, Statement of Financial Accounting Concepts No. 5, ¶ 85 (1984) (“Expenses and losses are generally recognized when an entity’s economic benefits are used up in delivering or producing goods, rendering services, or other activities that constitute its ongoing major or central operations or when previously recognized assets are expected to provide reduced or no further benefits.”).

presumably including slowing sales during that year – did Viacom and Harmonix then look back and question the past. All said, for present purposes, what is important is that the preliminary 2008 Earn-Out Statement clearly put in play the notion that the 2008 Earn-Out should turn on whether the value of Harmonix inventory was impaired as of December 31, 2008.

This was consistent with Viacom's theme that it would overstate Harmonix's Gross Profit for 2007 and 2008 if the costs of producing a bunch of Harmonix products in those years that would never be later sold were not included in the Gross Profit calculus. This theme became more urgent apparently as events post-dating the Earn-Out years diminished the likelihood of selling the unsold products. As indicated, however, the preliminary Earn-Out Statement tabled the issue of whether Viacom could show that the unsold Harmonix products had an impaired value on December 31, 2008.

But, importantly, by the time Viacom delivered its final 2008 Earn-Out Statement to Winshall on March 9, 2010, it had abandoned the Inventory Write-Down as its method for reaching its goal of paying no Earn-Out for 2008. Viacom *did not include* the Inventory Write-Down as a Direct Variable Cost in its final 2008 Earn-Out Statement,[31] and admits in its briefs that it "never contended that it put the [Inventory Write-Down] in dispute by including a write-down in the [final] Earn-Out Statement."[32] Instead, Viacom

[31] *Compare* Holt Aff. Ex. 11 ("Variable Cost Detail" provided with preliminary 2008 Earn-Out Statement includes $54.6 million in "Inventory Write-Downs" under category of "Harmonix Costs"), *with* Holt Aff. Ex. 2 ("Variable Cost Detail" provided with final 2008 Earn-Out Statement does not contain a line item for Inventory Write-Downs).
[32] P. Reply Br. at 14. *See also* Tr. at 62 ("Q. So in none of the papers given at the time of the final [2008 Earn-Out Statement] … would any person conclude that the value of the inventory

took the position that the costs of manufacturing both the Harmonix products sold during 2008 and the unsold products remaining in inventory at year-end 2008 were Direct Variable Costs and should be deducted from Net Revenue.[33] Using this approach, Viacom concluded that Harmonix's 2008 Gross Profit was *negative* $29 million.[34] Viacom also accounted for unsold inventory in this way in the final 2007 Earn-Out Statement, which it delivered on January 4, 2010, and concluded that the $150 million payment made to the former Harmonix stockholders in September 2008 should be repaid.[35]

Viacom made no suggestion in the final 2008 Earn-Out Statement or in any of the documents it offered in support of the final Earn-Out Statement that the Inventory Write-Down could be an alternative approach to deducting the costs of unsold products from Net Revenue. In fact, Viacom admitted at oral argument that no documents supporting the Inventory Write-Down were delivered with the final 2008 Earn-Out Statement.[36] What's more, the supporting documents that Viacom provided with the Earn-Out Statement as required by the Merger Agreement were inconsistent with a write-down. An inventory schedule that Viacom provided to Winshall along with the final Earn-Out Statement clearly shows lower of cost or market, or "LCM," reserves of $0.[37] If the

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was anything other than on the summary page that Viacom itself prepared. A. [N]ot from the documents.").

[33] Holt Aff. Ex. 2.

[34] *Id.*

[35] Holt Aff. Ex. 1.

[36] Tr. at 80 ("Nothing was given to [Winshall] with the final [2008 Earn-Out Statement] about the [Inventory Write-Down].").

[37] Holt Aff. Ex. 13.

inventory was impaired, then reserves equal to the difference between the inventory's cost and market value should have been shown on that schedule.

On March 26, 2010, Winshall responded to the final 2008 Earn-Out Statement by delivering his 2008 Summary of Issues to Viacom. Winshall's position on the 2008 Earn-Out was starkly different from Viacom's; he claimed that Viacom owed the former Harmonix stockholders $577.5 million. Winshall put in dispute, as one of the Earn-Out Disagreements identified in his Summaries of Issues, Viacom's contention that the cost of making products that were not sold by year-end 2008 should be deducted in calculating the 2008 Earn-Out. Specifically, he asserted that "the Merger Agreement does not allow Viacom to deduct inventory remaining unsold at the end of the year when calculating Gross Profit for the year."[38] Winshall did not address writing down the inventory, presumably because Viacom had not included LCM reserves as part of its final Earn-Out Statement and thus there was no Inventory Write-Down for him to challenge.

Viacom and Winshall were unable to resolve their differences over the Earn-Out calculations on their own, and so they followed the resolution process set forth in the Merger Agreement. They agreed to retain BDO USA LLP as the Resolution Accountants, and entered into an "Engagement Letter" with BDO on December 8, 2010. Building on the resolution process provided for in the Merger Agreement, the Engagement Letter established additional ground rules, which included the following:

- Viacom and Winshall would submit initial and reply submissions to the Resolution Accountants, which would be followed by a hearing. After the Resolution Accountants' review of the submissions, but before the hearing,

[38] Holt Aff. Ex. 4 at 2.

the Resolution Accountants could "submit one set of substantive questions to the [p]arties in writing;"[39]

- The Earn-Out Disagreements were to be resolved "solely on the basis of the Merger Agreement, the [p]arties' initial and reply submissions, … the [p]arties' written responses to [the Resolution Accountants'] written questions, and the argument made during the hearing;"[40]

- The universe of documents on which the parties could base their arguments in the resolution proceeding would be limited to documents produced by Viacom and publicly-available information;[41]

- There would be "no affidavits" and "no interviews, depositions, … or [live testimony], including during the hearing;"[42] and

- Any disputes other than the Earn-Out Disagreements described in the 2007 or 2008 Summary of Issues were not being submitted to the Resolution Accountants "unless the Parties so agree, or it is adjudicated by a court that such additional Earn-Out Disagreements may be asserted" or "should [be] decide[d]" by the Resolution Accountants under the Merger Agreement.[43]

In the summer of 2011, Viacom and Winshall simultaneously filed their initial submissions, followed by their reply submissions. They acknowledged in these submissions that the most important Earn-Out Disagreements submitted to the Resolution Accountants were those related to whether Viacom could deduct the costs of making unsold inventory. In its initial submission, Viacom explained its approach to accounting for unsold inventory as follows: "[i]n calculating the Gross Profit [for 2007 and 2008] … Viacom deducted the manufacturing-related Direct Variable Costs incurred by Viacom … and those incurred by [the video game distributor] and charged-back to

[39] Compl. Ex. B ("Engagement Letter") at 3.
[40] *Id.* at 4.
[41] *See id.* at 3-4.
[42] *Id.* at 4.
[43] *Id.* at 2.

Viacom … for all the units of *Rock Band* that were produced, whether sold or not [by the end of the relevant year]."[44] For his part, Winshall continued to argue that Direct Variable Costs attributable to products that were not sold during 2008 should not be deducted from Net Revenue for that year.

Although Viacom had chosen not to include the Inventory Write-Down in the final 2008 Earn-Out Statement, as required to properly raise the issue under the strictures of the resolution process, and Winshall thus did not address the issue in his 2008 Summary of Issues, the Inventory Write-Down re-emerged in the parties' submissions to the Resolution Accountants. In its initial submission, Viacom briefly noted that, "[w]hether the Earn-Out is determined by including the full variable cost of the unsold inventory as the [Merger] Agreement provides, or by deducting the cost of writing-down the inventory to its net realizable value, the Earn-Out for 2008 would still be zero,"[45] and referenced its decision to include the Inventory Write-Down in the preliminary 2008 Earn-Out Statement in a footnote.[46] These cursory references were the whole of its comment about this issue.

Winshall took the references as a "hint[] that Viacom intend[ed] to offer a back-up position" regarding the treatment of unsold inventory, and argued in his reply submission that this "back-up position should be rejected."[47] Among other objections, Winshall pointed out that, "even if [the Inventory Write-Down] were a permissible deduction

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[44] Holt Aff. Ex. 15 at 17.
[45] *Id.* at 27.
[46] *Id.* at 27 n.16.
[47] Christensen Aff. Ex. 2 at 19.

under the [Merger] Agreement, Viacom has not substantiated the amount."[48] In other words, Winshall argued there was no back-up in the Earn-Out Statement record to support deducting $54.6 million as a Direct Variable Cost. In its own reply submission, Viacom for the first time began to make substantial arguments about the Inventory Write-Down. Instead of the tossed-in side statement approach it took in its initial submission, Viacom devoted several pages *of its reply* to the issue of the Inventory Write-Down, this time clearly asserting that if the Resolution Accountants accepted that only Direct Variable Costs attributable to goods sold during the year could be deducted from Net Revenue, the Inventory Write-Down should be used as an alternative way to account for Harmonix's 2008 year-end inventory.[49]

Recognizing that the parties had contracted in the Merger Agreement and in the Engagement Letter to limit their Earn-Out disputes, the Resolution Accountants wrote to Viacom and Winshall on the eve of the hearing to ask whether the parties had "mutually agreed" that the Resolution Accountants could resolve certain disagreements that the parties had not identified as Earn-Out Disagreements (*i.e.*, were not in the final Earn-Out Statement or Summary of Issues), but had emerged in their submissions.[50] Specifically, Viacom had argued in its submissions for six additional or alternative deductions not found in the final Earn-Out Statements (including the Inventory Write-Down), and Winshall had increased the amounts he disputed in three areas.[51] Both parties refused to

[48] *Id.* at 20.
[49] *See* Holt Aff. Ex. 16 at 46-50.
[50] Holt Aff. Ex. 18 at 2.
[51] *See id.* at 9-14.

consent to the Resolution Accountants' consideration of these new disagreements, on the basis that the disagreements could not be found in the Earn-Out Statement or Summary of Issues and were therefore untimely.[52] In its response letter, Viacom cited to the Merger Agreement, stressing that in the Merger Agreement Winshall had "agreed that he 'will *not* dispute any *additional issues or amounts* other than the … Summar[ies] of Issues submitted to [Viacom],'"[53] and that therefore Winshall could not modify any amounts put in dispute by his Summary of Issues.[54] Thus, the Resolution Accountants did not address the merits of the new increases or reductions to Gross Profit proposed by Winshall or Viacom.

D. The Resolution Accountants Issue The Determination

The hearing was held on September 21, 2011, and on December 19, 2011, the Resolution Accountants issued a 176-page decision on the amount of the Earn-Outs (the "Determination"), in which they calculated a 2008 Earn-Out of $239 million, and also determined that Viacom owed Winshall $84.4 million above and beyond the already-paid $150 million for the 2007 Earn-Out.[55] In the Determination, the Resolution Accountants sided with Winshall and concluded that, under the terms of the Merger Agreement, the cost of making products not sold in 2008 should not be deducted from Net Revenue in

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[52] *See* Holt Aff. Exs. 19, 20.
[53] Holt Aff. Ex. 19 at 4 (emphasis in original).
[54] *E.g.*, *id.* at 9 ("The [Stockholders' Representative] has no excuse for his untimely modification of the 2008 music advances disagreement. As such, the amount in dispute for this issue should be limited to the amount provided in the [] 2008 Summary of Issues ….").
[55] Compl. Ex. C ("Determination") at 2.

calculating the Earn-Out for 2008.[56] As mentioned, they did not address the merits of the Inventory Write-Down, because they found that Viacom had not properly put the issue in play.

The Resolution Accountants devoted nearly ten pages of the Determination to explaining why they did not decide any issues outside of the identified Earn-Out Disagreements, including the issue of the Inventory Write-Down. They explained that, under the terms of the Merger Agreement, "there is no mechanism … for Viacom to submit additional or alternative reductions to Gross Profit once the Parties have identified the Earn-Out Disagreements."[57] Thus, they concluded that, absent an agreement between the parties, they could not resolve "[a]ny issue or amount which differed from the 2007 or 2008 Summary of Issues (in the case of the Stockholders' Representative) and any additional or alternative reduction of Gross Profit in the 2007 or 2008 Earn-Out Statement (in the case of Viacom)."[58] The Resolution Accountants pointed out that, because "the Stockholder Representative is permitted only one opportunity to submit the 2007 and 2008 Summary of Issues, it follows that there can be only one Earn-Out Statement for each year on which those Summaries of Issues can be based."[59] In other words, the Resolution Accountants took a goose and gander approach in accepting Viacom's argument that Winshall was restricted to the arguments he made in his Summary of Issues, but also accepting the related proposition that Viacom was stuck with

[56] *Id.* at 52.
[57] *Id.* at 172.
[58] *Id.* at 170.
[59] *Id.* at 172.

its own Earn-Out Statement and the documentation it proffered in support of the Earn-Out Statement.

In so ruling, the Resolution Accountants also noted that, "[a]lthough Viacom transmitted earn-out statements previously …, the 2007 and 2008 Earn-Out Statements provided on January 4, 2010 and March 9, 2010 were clearly understood by Viacom to be the expected basis for the Earn-Out Disagreements."[60] They based this sound conclusion in part on statements Viacom itself made in a January 26, 2011 letter to the Resolution Accountants regarding a discovery dispute between the parties.[61] In that letter, Viacom objected to Winshall's requests for back-up documentation relating to the preliminary 2007 Earn-Out Statement that led to payment of $150 million to the former Harmonix stockholders. Viacom emphasized that these documents did not relate to the *final* 2007 Earn-Out Statement, arguing that "[t]he final 2007 Earn-Out Statement differs from [prior] SEC filings because the latter made reference to the preliminary 2007 Earn-Out Statement. The SEC filings did not make reference to the final 2007 Earn-Out Statement because it did not yet exist at the time of the filings."[62] The Resolution Accountants resolved this dispute in favor of Viacom, agreeing that final was final, and therefore finding that the Merger Agreement did not obligate Viacom "to produce documents which support calculations of preliminary versions of [the 2007 or 2008] Earn-Out Statements."[63]

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[60] *Id.*
[61] *Id.* at 173.
[62] *Id.* Ex. 4 at 9-10.
[63] *Id.* Ex. 5 at 7.

At the end of their well-reasoned discussion of why they could not consider improperly-raised additional or alternative reductions such as the Inventory Write-Down, the Resolution Accountants offered to revisit these disagreements if necessary or if the parties so desired. Specifically, the Resolution Accountants stated that they were prepared to decide whether any or all of the parties' "Other Earn-Out Disagreements" – including the Inventory Write-Down issue – could be asserted under the terms of the Merger Agreement and were also prepared to resolve any or all of these disagreements, provided that, in each case, either: (i) Viacom and Winshall agreed to let the Resolution Accounts do so, or (ii) a court ordered the Resolution Accountants to do so.[64]

E. Viacom Sues To Vacate The Determination And Winshall Countersues

On December 27, 2011, Viacom filed its complaint in this action. Viacom objects to the Determination on the grounds that the Resolution Accountants "refused to even consider, much less resolve," Viacom's request for the Inventory Write-Down.[65] Viacom's complaint pleads five causes of action, four of which are remaining.[66]

The first three causes of action are premised on the fact that § 2.4(c) of the Merger Agreement provides that the Resolution Accountants "shall be deemed to be acting as experts and not as arbitrators," and § 2.4(e) of the Merger Agreement provides that the parties may challenge the Determination to the extent it constitutes fraud or manifest

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[64] *Id.* at 175.
[65] Compl. ¶ 45.
[66] The parties stipulated to dismissal of the fifth cause of action, in which Viacom sought a declaratory judgment that it is entitled to indemnification with respect to certain post-merger litigation and arbitration, in an order entered on February 28, 2012.

error.[67] Viacom alleges in its first cause of action that the Resolution Accountants' failure to include "the sum of all Direct Variable Costs … in the calculation of the [Earn-Outs]" violated the plain and unambiguous terms of the Merger Agreement and thus constitutes "manifest error."[68] In its second cause of action, Viacom asks the court to order a new proceeding before the Resolution Accountants, claiming that because the Resolution Accountants decided not to consider or resolve the issue of the inventory write-down, they "conducted the proceeding in violation of the Merger Agreement, committed manifest error, and reached a determination that is incompatible with the law and the Merger Agreement."[69] In its third cause of action, Viacom alleges that Winshall breached the Merger Agreement by "refusing to consent to the Resolution Accountants' consideration and resolution of Viacom's arguments and evidence [with respect to the Inventory Write-Down], and interfering with the ability of the Resolution Accountants to properly resolve the Earn-Out [d]isputes in compliance and conformity with the Merger Agreement."[70]

Viacom's fourth cause of action is plead "[i]n the alternative, if – despite Section 2.4(c) of the Merger Agreement's language that the Resolution Accountants are 'acting as experts and not as arbitrators' – the Resolution Accounting proceeding is treated as an

[67] *Id.* ¶¶ 51, 52.
[68] *Id.* ¶¶ 53, 54.
[69] *Id.* ¶ 58.
[70] *Id.* ¶ 64.

arbitration for enforcement purposes."[71] In that cause of action, Viacom claims that the Determination should be vacated under the grounds set forth in the FAA.

On January 17, 2012, Winshall countersued for (i) confirmation of the Determination under the FAA, and (ii) breach of contract based on Viacom's failure to pay the amounts of the 2007 and 2008 Earn-Outs to the former Harmonix stockholders after the Determination was issued.[72]

Viacom originally challenged and sought to vacate the Determination as to the amount of both the 2008 Earn-Out and the 2007 Earn-Out, but dropped its challenge to the latter because the Inventory Write-Down issue pertains only to the 2008 Earn-Out. Viacom never claimed that Harmonix's 2007 year-end inventory should be written down. Thus, on June 15, 2012, the court entered a judgment confirming the Determination as to the 2007 Earn-Out, and ordering Viacom to pay the remainder of the 2007 Earn-Out to the former Harmonix stockholders, along with prejudgment interest at the statutory rate.

III. Standard of Review

On cross-motions for summary judgment, Winshall and Viacom ask me to decide whether the Determination as to the amount of the 2008 Earn-Out should be confirmed or vacated. Under Court of Chancery Rule 56(c), this court will grant a party's motion for summary judgment where the record reflects that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[73] When opposing parties make cross-motions for summary judgment, neither party's

[71] *Id.* ¶ 70.
[72] Countercl. ¶¶ 23-24, 28-32.
[73] Ct. Ch. R. 56(c).

motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law.[74]

The FAA applies to any arbitration provision in a contract involving interstate commerce.[75] Although Viacom alleges in its complaint that the resolution process set forth in the Merger Agreement is not an arbitration because the Resolution Accountants "shall be deemed to be acting as experts and not as arbitrators,"[76] Viacom concedes in its briefs that "for purposes of the pending motions, … the Resolution Accountants' Determination may be reviewed under [FAA] standards."[77] Viacom has thus abandoned for purposes of these cross-motions its first three causes of action, including its claim that the Determination should be vacated because it is a product of Winshall's breach of the Merger Agreement, because these causes of action are all premised on the inapplicability of the FAA. In other words, this case turns on whether, under the FAA, there is a basis to vacate or deny enforcement of the Resolution Accountants' Determination as to the 2008 Earn-Out. If there is not, Viacom's complaint must be dismissed, and a judgment enforcing the Determination in Winshall's favor entered.

Viacom's concession that the FAA governs this case was not a charitable one; it was a recognition of two realities. The first is that the FAA limits intrusive judicial review of any dispute resolution proceeding within the FAA's definition of arbitration,

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[74] *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997).
[75] 9 U.S.C. § 2.
[76] Merger Agreement § 2.4(c).
[77] P. Op. Br. at 17.

regardless of nomenclature such as in the Merger Agreement.[78] The other was that the Merger Agreement, if anything, limited judicial review to an even greater extent than the FAA by limiting judicial review to review for "fraud" or "manifest error."[79] Given the parties' agreement to apply the FAA, I apply it, and do not apply the Merger Agreement's even more restrictive judicial review.[80]

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[78] *See OmniTech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797, 799 (7th Cir. 2005) ("The statement that PricewaterhouseCoopers will act as an expert and not as an arbitrator means that it will resolve the dispute as accountants do …. It does not imply that the whole section of the contract committing resolution to an independent private party is hortatory. Thus the provision for the 'final, conclusive and binding' resolution of this dispute by someone other than a federal judge must be honored."); *see also Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 693-94 (6th Cir. 2012) (an appraisal provision was not an "arbitration" under the FAA because it did not provide for "a final and binding remedy by a neutral third party"); *Fit Tech, Inc. v. Bally Total Fitness Hldg Corp.*, 347 F.3d 1, 7 (1st Cir. 2004) (an accounting remedy whereby independent accountants would provide a "final" resolution of earn-out disputes was "arbitration in everything but name"); *Salt Lake Tribune Publ'g Co. v. Mgmt. Planning, Inc.*, 390 F.3d 684, 688-89 (10th Cir. 2004) (noting that whether an agreement empowers a third party to render a binding decision is "[c]entral to any conception of classic arbitration"); *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 350 (3d Cir. 1997) (stating that "the essence of arbitration, we think, is that, when the parties agree to submit their disputes to it, they have agreed to arbitrate these disputes through to completion, i.e. to an award made by a third-party arbitrator"); *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 830-31 (2d Cir. 1988) (appointment of independent tax counsel was an agreement to "arbitrate" where the tax counsel's decision binds the parties); *SRG Global, Inc. v. Robert Family Hldgs., Inc.*, 2010 WL 48880654, at *5 (Del. Ch. Nov. 30, 2010) (a resolution procedure for disputes related to environmental costs was an arbitration, regardless of the fact that the decision-maker was referred to as an "expert" and not as an "arbitrator" in the applicable agreement); *Avnet, Inc. v. H.I.G. Source, Inc.*, 2010 WL 3787581, at *2 (Del. Ch. Sept. 29, 2010) (resolution procedure calling for an accountant to resolve disputes relating to post-closing adjustments of merger consideration treated as arbitration).

[79] Merger Agreement § 2.4(e).

[80] The scope of judicial review of an arbitration award under the FAA cannot be expanded by contract. *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 583 (2008). Federal courts have recognized, however, that it can be narrowed, so long as the contractual language to that effect is sufficiently clear. *See Commc'ns Consultant, Inc. v. Nextel Commc'ns of the Mid-Atl., Inc.*, 146 Fed. Appx. 550, 552-53 (3d Cir. 2005); *Bowen v. Amoco Pipeline Co*., 254 F.3d 925, 931 (10th Cir. 2001); *Swenson v. Bushman Inv. Props., Ltd.*, – F. Supp. 2d –, 2012 WL 1488346, at *4 (D. Idaho 2012); *Kim-C1, LLC v. Valent Biosciences Corp.*, 756 F. Supp. 2d 1258, 1266 (E.D. Cal. 2010); *but see Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 66 (2d Cir. 2003), *overruled on other grounds by Hall St. Assocs., LLC*, 552 U.S. 576. And the Merger Agreement, which oddly

As a general principle, arbitration awards are not lightly disturbed under the FAA, and "[c]ourts must accord substantial deference to the decisions of arbitrators."[81] Indeed, a "court's review of an arbitration award is one of the narrowest standards of review in all of American jurisprudence."[82] The FAA does not prescribe a "general review for an arbitrator's legal errors."[83] Rather, the Act sets forth specific grounds for vacating an arbitration award, such as where the award was procured by fraud, where the arbitrators were clearly guilty of misconduct, or where the arbitrators exceeded their powers in granting the award or so imperfectly executed their powers that a definite award was not made.[84] The reviewing court is required to enforce the award unless one of those specific grounds is shown to exist.[85] A court's role in reviewing the outcome of the arbitration proceedings "is not to correct factual or legal errors made by an arbitrator."[86] Likewise,

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provides both that the Determination "shall not be subject to further review," Merger Agreement § 2.4(c), and that the Determination can be reviewed for "fraud or manifest error," *id.* § 2.4(e), does provide even narrower grounds for vacation of the Determination than the grounds prescribed by the FAA. "Fraud" is only one of four grounds for vacation provided by the FAA, *see* 9 U.S.C. § 10(a), and "manifest error" is most sensibly understood as a corollary to "evident material mistake," which provides a ground for modification – but not vacation – of an award under the FAA. *See* 9 U.S.C. § 11(a) (providing that the court may order modification or correction of an award "[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award."). Viacom has alleged no fraud on the part of the Resolution Accountants; nor has it alleged that the Resolution Accountants got their numbers wrong. Thus, any reliance on the contractual language as opposed to the FAA's standard of review is to Viacom's detriment.

[81] *Kashner Davidson Sec. Corp. v. Mscisz*, 531 F.3d 68, 70 (1st Cir. 2008).

[82] *Way Bakery v. Truck Drivers, Local No. 164*, 363 F.3d 590, 593 (6th Cir. 2004) (citing *Tenn. Valley Auth. v. Tenn. Valley Trades & Labor Council*, 184 F.3d 510, 514 (6th Cir.1999)).

[83] *Hall St. Assocs.*, 552 U.S. at 585.

[84] 9 U.S.C. § 10(a).

[85] *See Hall St. Assocs.*, 552 U.S. at 583; *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121 (2d Cir. 2011).

[86] *Major League Umpires Ass'n v. Am. League of Prof'l Baseball Clubs*, 357 F.3d 272, 279 (3d Cir. 2004); *see also W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plaster Workers of Am.*, 461 U.S. 757, 764 (1983) (noting that a court may

courts do not inquire into whether arbitrators read a contract they are interpreting correctly. So long as the arbitrator has attempted in good faith to discharge her adjudicative duty to apply the contract as she reads it, her judgment must be respected, because the parties bargained for her judgment, not that of a court.[87] In other words, to vacate the award the court "must find something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law."[88]

IV. Analysis

Conceding that the FAA and its strict limitations on judicial review apply to the Determination, Viacom does not contest the key decision by the Resolution Accountants adverse to it. Viacom does not seek to reopen the dispute over whether the cost of unsold inventory should be deducted as a Direct Variable Cost from Net Revenue in calculating the Earn-Out for 2008. Rather, Viacom seeks to vacate the Determination on the basis that the Resolution Accountants should have, but did not, consider the Inventory Write-Down as an alternative way to deal with Harmonix's leftover products.

At first, Viacom focused on an argument that the Resolution Accountants' refusal to consider the Inventory Write-Down was conduct so outrageous that it warranted vacation under the FAA. Viacom argued that "[t]he FAA permits a court to vacate an

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not overrule an arbitrator's decision simply because it believes its own interpretation would be better); *Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*, 849 F.2d 264, 267-78 (7th Cir. 1988) (discussing grounds for a court's modification of an arbitration award); *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892 (2d Cir. 1985) (noting that an arbitral award is "subject to limited judicial scrutiny").

[87] *E.I. DuPont de Nemours & Co. v. Grasselli Emps. Indep. Ass'n of E. Chi., Inc.*, 790 F.2d 611, 614 (7th Cir. 1986); *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986).

[88] *Westerbeke Corp. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 208 (2d Cir. 2002) (citing *Saxis S.S. Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967)).

[arbitration] award in circumstances, such as these, where the arbitrators are 'guilty of misconduct … in refusing to hear evidence pertinent and material to the controversy,' … and where they 'exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.'"[89]

Then, in its reply brief, Viacom made central an alternative argument to which it had only given cursory attention in its opening brief; Viacom argues that a court, rather than the Resolution Accountants, must decide whether the Inventory Write-Down was outside the scope of the Earn-Out disputes. Specifically, Viacom asserts that this decision was a matter of "substantive arbitrability" that must be handled by a court unless there is "clear and unmistakable evidence" that the parties intended otherwise.[90] According to Viacom, because the Resolution Accountants addressed a question of substantive arbitrability, they exceeded their authority under the FAA.

Put simply, Viacom's theory is that the Resolution Accountants erred by (i) making a decision that was not within their power to make; and (ii) making a wrong decision that denied Viacom a fair resolution process. I first address the issue of whether the Resolution Accountants had the authority to determine the scope of issues for resolution, because that is a threshold matter. I then turn to Viacom's argument that the Determination should be vacated under § 10(a)(3) or § 10(a)(4) of the FAA. Finally, I note that even if the Resolution Accountants' decision to exclude the Inventory Write-

[89] P. Op. Br. at 21 (citing 9 U.S.C. §§ 10(a)(3), (4)).
[90] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002); *accord James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 78 (Del. 2006).

Down from consideration was a matter of substantive arbitrability, their decision was correct and grounded in the language of the Merger Agreement and the Engagement Letter.

A. The Resolution Accountants Had The Authority To Determine What Issues Were Properly Before Them

In determining whether a claim is subject to arbitration, the court must distinguish between issues of "substantive arbitrability" and "procedural arbitrability."[91] Issues of substantive arbitrability are gateway questions relating to the scope of an arbitration provision and its applicability to a given dispute, and are presumptively decided by the court.[92] Procedural arbitrability issues concern whether the parties have complied with the terms of an arbitration provision, and are presumptively handled by arbitrators.[93] These issues include whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, as well as allegations of waiver, delay, or a like defense to arbitrability.[94]

The U.S. Supreme Court has explained that questions of substantive arbitrability arise "where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an

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[91] *Howsam*, 537 U.S. at 85 (citation omitted).
[92] *Id.* at 84; *see also Rent-A-Center. Inc. v. Jackson*, 130 S. Ct. 2772, 2777 (2010).
[93] *See, e.g.*, *Kristian v. Comcast Corp.*, 446 F.3d 25, 39 (1st Cir. 2006) ("[P]rocedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator to decide.") (citation and internal quotation marks omitted); *see also Nat'l Cas. Co. v. First State Ins. Grp.*, 430 F.2d 492, 499 (1st Cir. 2000) ("The default rule, in the absence of express contractual terms to the contrary, is that it is for the court to decide the validity and scope of an arbitration clause, and for the arbitrator to decide all matters within the scope of a valid clause.").
[94] *Howsam*, 537 U.S. at 85.

arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate."[95] On the other hand, "*[o]nce it is determined ... that the parties are obligated to submit the subject matter of a dispute to arbitration*, 'procedural' questions that grow out of the dispute and bear on its final disposition should be left to the arbitrator."[96] This means that when a substantive question falls within the scope of an arbitration provision, procedural questions that are ancillary to the substantive one should be decided by the arbitrator, not by the court.[97]

Whether the Inventory Write-Down was properly presented by Viacom in accordance with the Merger Agreement (and the Engagement Letter) such that the Resolution Accountants could consider it in determining the core subject matter entrusted to them – the determination of the Earn-Outs for 2007 and 2008 – is plainly the type of procedural determination that arbitrators must commonly make, and is thus a question of procedural, not substantive, arbitrability. Under the Merger Agreement, the Resolution Accountants are tasked with providing a "final, binding and conclusive resolution" of the Earn-Out Disagreements and a recalculation of the Earn-Outs.[98] Viacom does not argue that this court is the appropriate forum to decide whether Harmonix's 2008 Gross Profit should be reduced by writing down Harmonix's inventory. Rather, Viacom wants this court to tell the Resolution Accountants how to go about making their Determination,

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[95] *Id*. at 83-84 (citations omitted).
[96] *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (emphasis added).
[97] *Nat'l Cas. Co.*, 430 F.3d at 499.
[98] Merger Agreement § 2.4(c).

which is something that a court applying the FAA does not do.[99] Determining whether or not the Inventory Write-Down was properly submitted, *i.e.* was included with the final 2008 Earn-Out Statement and the "work papers and supporting documentation"[100] accompanying that Earn-Out Statement, in accordance with the Merger Agreement resolution clause governing the dispute, was obviously a matter within the normal competence of arbitrators charged with resolving a contractual earn-out dispute.[101] Because the amount of the 2008 Earn-Out was to be decided by the Resolution Accountants, the Resolution Accountants and not the court were entrusted to determine issues relevant to determining this core question, such as whether the Inventory Write-Down was properly put in play by the parties.

In any adjudication, the adjudicator charged with making the core determination will have to confront myriad procedural and evidentiary questions emerging from the parties' jockeying for position.[102] Viacom's belated argument that the Resolution

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[99] *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001).

[100] Merger Agreement § 2.4(b).

[101] *See Gay v. CreditInform*, 511 F.3d 369, 387 (3d Cir. 2007) (noting that "this allocation of roles between courts and arbitrators promotes efficiency because 'an expectation that aligns (1) decisionmaker with (2) comparative expertise will help better to secure a fair and expeditious resolution of the underlying controversy – a goal of arbitration systems and judicial systems alike.'") (citing *Howsam*, 537 U.S. at 85); *see also Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003) (stating that "[a]rbitrators are well situated to answer" questions related to "*what kind of arbitration proceeding* the parties agreed to") (emphasis in original).

[102] *See PaineWebber Inc. v. Elahi*, 87 F.3d 589, 599 (1st Cir. 1996) ("[I]f the parties have [] entered into a valid arbitration agreement … and [] the arbitration agreement covers the subject matter of the underlying dispute …, then we will presume that the parties have made a commitment to have an arbitrator decide all the remaining issues necessary to make a decision on the merits of the dispute …. We believe that parties who have agreed to arbitrate a given subject most likely intend and expect that the arbitrator should resolve all issues that arise concerning that subject ….''); *see also Emp'rs Ins. Co. of Wausau v. Century Indem. Co.*, 443 F.3d 573, 577 (7th Cir. 2006) ("[T]he question of whether an arbitration agreement forbids

Accountants could not determine whether Viacom presented an issue in accordance with the Merger Agreement's terms and the terms of the Engagement Letter between the Resolution Accountants and the parties setting forth the ground rules for the resolution process is telling both in its tardiness and in its inconsistency with Viacom's position when it was before the Resolution Accountants. The belatedness is telling because Viacom, although making only a passing and confusing reference to this argument in its opening brief,[103] made the power of the Resolution Accountants the centerpiece of its reply. The very fact that a party as sophisticated as Viacom only came to the recognition that the Resolution Accountants fundamentally lacked the authority to exclude the Inventory Write-Down in its reply brief suggests that Viacom is stretching to turn a procedural issue that any arbitrator charged with addressing a dispute must be able to make into a foundational, gateway issue of substantive arbitrability.

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consolidated arbitration is a procedural one, which the arbitrator should resolve."); *Dockser v. Schwartzberg,* 433 F.3d 421, 426 (4th Cir.2006) (the arbitrator, rather than the court, should determine whether one arbitrator, rather than three, should preside over the arbitration); *Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers, Shopman's Local 493 v. EFCO Corp. & Const. Prods., Inc.*, 359 F.3d 954, 956-57 (8th Cir. 2004) (finding that, where collective bargaining agreement made clear that any grievance or dispute could be brought before the arbitrator if certain procedural steps were followed, "the question of whether the procedural prerequisites have been complied with or, as the Union alleges, waived because of CPI's prior practice [was] a matter for the arbitrator and not for the court.").

[103] Viacom raised this argument in connection with contending that the Resolution Accountants had failed to hear material evidence by refusing to consider the Inventory Write-Down, which was not contained in the Earn-Out Statement and contradicted the supporting documentation indicating that there was no impairment of Harmonix's inventory, claiming that the Resolution Accountants did not have the power to "revisit the scope of their authority." P. Op. Br. at 30. It then made a substantive argument in a footnote about substantive versus procedural arbitrability. This oblique approach mischaracterized what the Resolution Accountants did, which was follow as they read it the contractually agreed-upon resolution process and hold the parties to it.

The inconsistency of Viacom's position is even more telling. Before the Resolution Accountants, Viacom argued that Winshall was stuck with the arguments he raised in his Summary of Issues, and that the Resolution Accountants could not consider arguments that Winshall made that were not within that Summary of Issues. Why? Because the Merger Agreement said that the Resolution Accountants were supposed to decide the Earn-Outs on the basis of the procedures in the Merger Agreement, and specifically on the basis of the dispute as framed by Viacom's Earn-Out Statement and Winshall's Summary of Issues in response to it. Viacom won before the Resolution Accountants on that argument. But now Viacom says that the Resolution Accountants were somehow not empowered to determine that Viacom, by parity of reasoning, was restricted to the arguments and facts fairly made in its final Earn-Out Statements and the work papers and documentation supporting that Earn-Out Statement.

Accepting Viacom's argument that the question of what subsidiary issues were properly presented to the Resolution Accountants in order for them to make the ultimate decision about the Earn-Outs was one of substantive arbitrability would be entirely inconsistent with the efficiency purpose behind arbitration,[104] and the policies of the FAA in supporting the use of arbitration.[105] Instead of having the authority of a typical adjudicator to make procedural judgments about what is fairly in play in accordance with the procedural rules that apply (and in the case of contractual arbitration, those rules

[104] *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 589 (2008) (describing the "essential virtue" of arbitrations as "resolving disputes straightaway").
[105] *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.").

include the grounds rules for the arbitration itself), the arbitrator would have to wait to have all the preliminary decisions made by a court, on some sort of unpredictable, rolling basis, as those issues emerged during the course of the litigation. Instead of avoiding the costs of litigation through a streamlined alternative dispute resolution proceeding, the parties would incur the costs of running back and forth between the courts and the arbitrator. And instead of society benefiting from the economic efficiency of arbitration and from the relief to the courts on dockets and budget growth, we would add a drag on the economy and burden courts and other litigants with cases where judges would act as schoolmarms over arbitrating parties' procedural squabbles.[106]

To my mind, the issue here is rather stark. The Resolution Accountants were plainly entrusted to determine the Earn-Outs. The parties then put in submissions to the Resolution Accountants in which both sides raised arguments that were arguably not presented in accordance with the contractual requirements for determining the Earn-Outs. The Resolution Accountants carefully examined which of the arguments were presented properly and which were not, and refused to consider any that they concluded were not presented consistent with the contractual procedures. I can find no rational argument why a court, rather than the Resolution Accountants, was required to address these issues. Apparently, Viacom could not conceive of one during the arbitration process itself, and

[106] The division of labor is also inefficient and strange. Sitting judges would act as "on call" discovery or procedural masters to handle all the preliminaries or procedural issues that are during the hearing, with the arbitrators restricted to making only the "big final call," but lacking the power to decide any subsidiary procedural issues, such as whether arguments were fairly or timely presented. This would be odd, slow, costly, nonsensical, and entirely inconsistent with the policy objectives served by arbitration.

its belated argument that it now recognizes that the Resolution Accountants were acting outside their domain of authority is unconvincing.

I confess in so finding that Viacom has cited to cases from this court that support its arguments. These cases, based on various complex factual situations, can be read as finding that any time that a determination of whether a party has properly presented an argument relevant to the core determination clearly entrusted to the arbitrator must be made, it must be made by the court, absent a provision in the arbitration agreement saying that the arbitrator gets to make not only the core determination, but also rule on the procedural and preliminary issues that necessarily arise in any adjudicative proceeding.[107] Another set of cases from this court take a different view.[108] Candor requires me to acknowledge that I cannot reconcile them all.

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[107] *See Avnet v. H.I.G. Source, Inc.*, 2010 WL 3787581, at *7-9 (Del. Ch. Sept. 20, 2010) (question of whether the buyer's claim for adjustments to purchase price that were raised well past contractual deadline could be considered by accountant-arbitrators was a matter of substantive arbitrability); *HDS Inv. Hldg. Inc. v. Home Depot, Inc.*, 2008 WL 4606262, at *7 (Del. Ch. Oct. 17, 2008) (whether a "Revised Closing Statement" had been timely submitted and could be considered by a neutral auditor was "a contractual issue that should be decided by the Court"); *Nash v. Dayton Superior Corp.*, 728 A.2d 59, 64 (Del. Ch. 1998) (whether a party could interject supposedly improper "New Items" into a resolution accounting was not "clearly arbitrable").

[108] *See Aveta v. Bengoa*, 2008 WL 5255818, at *3-4 (Del. Ch. Dec. 11, 2008) (finding that "any dispute about the adequacy of the documentation [submitted to a reviewing accountant] [was] [] facially within the ambit of the [] arbitration clauses," and the issue "clearly" fell "within the bounds of procedural arbitrability and [was] a matter for the arbitrator to determine."); *Mehiel v. Solo Cup Co.*, 2005 WL 1252348, at *6 (Del. Ch. May 13, 2008) (holding that, where a neutral auditor was designated to act as an arbitrator to resolve disputes over a working capital estimate, "the scope of the arbitrator's authority to compel discovery [was] a procedural question and … must be addressed by the arbitrator.").

But my duty here is to apply the FAA faithfully, as that is the governing law.[109] Viacom is attempting to have me undercut the U.S. Supreme Court's determination that questions of substantive arbitrability are limited to the "narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter," and to ignore its holding that "[o]nce it is determined … that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions that grow out of the dispute and bear on its final disposition should be left to the arbitrator."[110] I refuse to do that.

Viacom also contends that there is a "crucial distinction between general-purpose arbitrators, with wide, if not plenary, authority, and accounting experts, with narrowly tailored and limited decision-making authority."[111] I do not accept Viacom's argument that I should conclude that the Resolution Accountants had less authority because they did not go to law school. Sophisticated parties such as Viacom can choose a law-trained arbitrator if they want to insist on one. Sophisticated accounting firms like BDO – the

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[109] Our state's policy in favor of arbitration was strengthened by the General Assembly and Executive Branch recently when the Delaware Uniform Arbitration Act ("DUAA") was revised to provide that FAA review would apply to arbitration agreements that do not specifically state that the parties desire that the DUAA should govern the agreement. 10 *Del. C.* §§ 5702 (a), (c) (2009). This amendment reflected the state's desire to promote certainty and efficiency for parties choosing arbitration. The game of arbitrator-judicial badminton that Viacom's argument would promote is, in practical effect, inconsistent with the pro-efficiency objective of Delaware statutory law. *See Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396 (Del. 2010) ("The public policy of Delaware favors arbitration.").

[110] *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964); *see also Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580, 585 (3d Cir. 2007) ("'[O]nly when there is a question regarding whether the parties should be arbitrating at all' is a question of arbitrability raised for the court to resolve. 'In other circumstances, resolution by the arbitrator remains the presumptive rule.'") (citing *Dockser v. Schwartzberg*, 433 F.3d 421, 426 (4th Cir. 2006)).

[111] P. Reply Br. at 5-6.

Resolution Accountants here – have access to lawyers. The 176-page Determination here reflects no want of reading skill or any absence of ability to read a Merger Agreement. Having agreed to give the Resolution Accountants the power to decide the core issue of the Earn-Out amounts for 2007 and 2008, the parties also necessarily agreed that the Resolution Accountants would apply and require the parties to adhere to the procedures relevant to their charge. Viacom recognized that itself when it asked the Resolution Accountants to enforce the terms of those procedures against Winshall and in its favor. Its prior recognition reflected the reality that the Resolution Accountants were the appropriate authority to determine procedural issues that arose as the parties jousted over the core issue that they entrusted to the Resolution Accountants. For these reasons, I reject Viacom's argument that the Resolution Accountants had no authority to determine what arguments and issues the parties had properly raised in accordance with the Merger Agreement's terms.

B. There Is No Reason To Vacate The Determination Under The FAA

Having concluded that the Resolution Accountants' exclusion of the Inventory Write-Down from consideration was a procedural matter within their scope of authority, I address Viacom's assertion that "Sections 10(a)(3) and (4) [of the FAA] both require that the [] Determination be vacated."[112] Keeping in mind that my role is not to pass

[112] P. Op. Br. at 18.

independent judgment on the Determination,[113] I find no basis to vacate the award under § 10(a)(3) or § 10(a)(4), for the following reasons.

A court may vacate an arbitration award under § 10(a)(3) of the FAA "where the arbitrators were guilty of misconduct in … refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced."[114] "Courts have interpreted [§] 10(a)(3) to mean that except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review."[115] Viacom argues that it was denied a fair hearing because the Resolution Accountants did not consider the Inventory Write-Down.

Viacom's argument is undermined by the inescapable fact that it had the opportunity to propose the Inventory Write-Down, but chose not to include it as a reduction to Gross Profit in its final 2008 Earn-Out Statement. Viacom clearly was afforded a fair opportunity to present the arguments it timely raised to the Resolution Accountants.[116] But as Viacom itself stressed to the Resolution Accountants, the parties agreed in the Merger Agreement to a carefully circumscribed resolution process for the Earn-Out disputes. The Merger Agreement specified that the task of the Resolution Accountants was not to conduct an "audit," but only to resolve the Earn-Out Disagreements that the parties teed up for them in the Earn-Out Statement and the

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[113] *See, e.g.*, *Major League Umpires Ass'n v. Am. League of Prof'l Baseball Clubs*, 357 F.3d 272, 279 (3d Cir. 2004).
[114] 9 U.S.C. § 10(a)(3).
[115] *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997).
[116] *Cf. Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 995 (3d Cir. 1997) ("It has become axiomatic that a district court may vacate an award if a party to an arbitration proceeding has not been given notice and opportunity to present arguments and evidence on the merits of the dispute.") (citing *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992)).

Summary of Issues.[117] The Earn-Out Statement and the Summary of Issues in reaction to it also formed the basis for the parties' agreement in the Engagement Letter. Given the factually intensive nature of the Inventory Write-Down issue and the fact that Viacom made a *retroactive* impairment decision in mid-2009 and did not write down the inventory when it first prepared financial statements for 2008, if the final Earn-Out Statement had put the Inventory Write-Down issue in play, Winshall's assertive and sophisticated advocates would almost certainly have sought discovery into the factual basis for that determination, and whether it was sound accounting or motivated by a self-interested desire to eliminate any Earn-Out. Notably, in the Engagement Letter, the parties agreed that there would be limited discovery, no depositions or live testimony, and no documents received into evidence other than those produced by Viacom or publicly available.[118] This agreement was reached as a result of the parties' focus on the issues fairly put in play by the Earn-Out Statement and the Summary of Issues. In the final 2008 Earn-Out Statement, Viacom said that there was no impaired inventory. At the same time, the Engagement Letter also reaffirmed that the Resolution Accountants would not consider any disputes outside of the identified Earn-Out Disagreements unless both Winshall and Viacom gave their consent.[119] Viacom admits that the final 2008 Earn-Out Statement did not include the $54.6 million Inventory Write-Down. When an entire resolution process is limited to accounting disputes clearly identified by the parties, how can it then be said that failing to consider a dispute that was not properly raised was an

[117] *See* Merger Agreement § 2.4(c).
[118] Engagement Letter at 3-4.
[119] *Id.* at 2.

exclusion of "material" or "pertinent" evidence that violated the fundamental fairness of the proceeding? The Resolution Accountants' exclusion of the Inventory-Write Down was not the kind of "misconduct" against which § 10(a)(3) is intended to protect.[120]

Viacom's argument that the Determination should be vacated under § 10(a)(4) of the FAA is equally unconvincing. Section 10(a)(4) permits vacatur "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[121] When considering whether to vacate an arbitration award under § 10(a)(4), courts have "consistently accorded the narrowest of readings" to this section. So long as an "arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision."[122] Here, Viacom has not shown that the Resolution Accountants exceeded their authority by deciding to exclude the Inventory Write-Down. Arbitrators may exceed their powers under § 10(a)(4) "by engaging in an inquiry that was not properly arbitrable,"[123] but for the reasons discussed earlier in this opinion, under the Merger Agreement it was up to the Resolution Accountants to make the procedural decision of

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[120] *Cf. Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co.*, 232 F.3d 383, 390 (4th Cir. 2000) (affirming district court's vacatur of arbitration award where "the arbitrator told the Union to meet with Marrowbone, gather information, negotiate further, and if the dispute was still not resolved, present evidence and argument at a[n] [] arbitration hearing," but then "issued his award without ever holding that hearing."); *Gulf Coast Indus. Workers Union v. Exxon Co.*, 70 F.3d 847, 849-50 (5th Cir. 1995) (affirming district court's vacatur of arbitration award where the arbitrator told Exxon that certain evidence did not have to be established as a business record because it was already in evidence, and then excluded that evidence as hearsay).
[121] 9 U.S.C. § 10(a)(4).
[122] *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (citation and internal quotation marks omitted).
[123] *Solvay Pharms., Inc. v. Duramed Pharms., Inc.*, 442 F.3d 471, 477 (6th Cir. 2006).

whether the Inventory Write-Down was an issue they could consider. In fact, by not reaching the merits of the Inventory Write-Down (or other issues not raised in the final Earn-Out Statement by Viacom, or the Summary of Issues by Winshall) the Resolution Accountants were careful *not* to overstep the scope of their authority as delineated by the Merger Agreement and the Engagement Letter, which was limited to identified Earn-Out Disagreements.

Viacom also makes the argument that the Resolution Accountants did not provide a final resolution of the Earn-Out Disagreements, because they indicated at the end of the Determination that they would be willing to consider additional or alternative issues, including the Inventory Write-Down, if a court ordered them to do so or if the parties agreed that they could do so.[124] Despite this language, I find that the Determination was a "mutual, final, and definite award upon the subject matter submitted."[125] It is clear from reading the Determination that the Resolution Accountants issued a decision on the fundamental matter entrusted to them, which was the amount of the 2007 and 2008 Earn-Outs. The Resolution Accountants' offer to revisit these issues is merely an echo of their agreement in the Engagement Letter that they would only consider issues other than the Earn-Out Disagreement if the parties agreed to it or a court ordered them to do it. The fact that the Resolution Accountants included this language does not change the fact that they addressed the procedural question of what was properly before them, and decided that the Inventory Write-Down was outside the scope of those issues.

[124] P. Op. Br. at 32.
[125] 9 U.S.C. § 10(a)(4).

C. The Resolution Accountants Made The Right Decision

Even if the question of whether the Inventory Write-Down could be considered were a matter of substantive arbitrability, *which it is not*, I would, like the Resolution Accountants, exclude the Inventory Write-Down. The Resolution Accountants' decision was based on a correct reading of the terms of the Merger Agreement, under which (i) Viacom was required to provide Winshall with an Earn-Out Statement and supporting documentation; (ii) Winshall was required to respond to Viacom's Earn-Out Statement in the Summary of Issues, and could "not dispute any additional issues or amounts other than the [ones described in the Summary of Issues];"[126] and (iii) if the parties could not resolve those disputes, the disputes could be submitted to the Resolution Accountants, whose role is "limited to the resolution of the Earn-Out Disagreements [described in the Summary of Issues], and the recalculation of the [Earn-Out]."[127]

Thus, the entire contractual resolution process was triggered by Viacom's final Earn-Out Statement and supporting documentation. The parties recognized this in the Engagement Letter, where they agreed that no disputes other than the Earn-Out Disagreements identified in Winshall's 2007 or 2008 Summary of Issues would be submitted to the Resolution Accountants.[128] Given that the Summary of Issues was Winshall's response to the Earn-Out Statement, there could be no Earn-Out Disagreements over issues that were not teed up by the Earn-Out Statement. Because

[126] Merger Agreement § 2.4(b).
[127] *Id.* § 2.4(c).
[128] Engagement Letter at 2.

Viacom was the master of its own Earn-Out Statement, it was also the master of framing the dispute.

Despite having this power, Viacom clearly did not put the issue of the Inventory Write-Down in play. Viacom admits that it did not include the Inventory Write-Down in its final Earn-Out Statement, and submitted an inventory schedule in support of its final Earn-Out Statement that was inconsistent with a write-down of inventory because it listed "LCM Reserves" as $0. The fact that the Inventory Write-Down was part of Viacom's preliminary 2008 Earn-Out Statement is irrelevant – Viacom was clear throughout the resolution process that the final was the final, and even won a discovery dispute limiting discovery into the basis for the preliminary Earn-Out Statements before the Resolution Accountants on that basis.[129] The Resolution Accountants made no mistake in finding that the Merger Agreement required Viacom to be held to the Earn-Out Disagreements that it chose to frame when it delivered its final 2008 Earn-Out Statement to Winshall, and that Viacom could not advance an argument that was factually inconsistent with the LCM reserves of $0 stated in the final 2008 Earn-Out Statement's supporting documentation.

Also important is a factor I noted previously. The parties agreed to the ground rules of the resolution process under the assumption that the issue of the Inventory Write-Down had not been put in play. The parties agreed in the Engagement Letter that there would be limited discovery with no depositions or live testimony, and no third-party

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[129] *See* Determination Ex. 5 at 7.

document production.[130] If the Inventory Write-Down had been at issue, Winshall would probably have insisted on different rules and sought discovery into Viacom's decision to retroactively write-down Harmonix's unsold inventory as of 2009 based, it appears, on market information acquired in 2009.

In sum, by excluding arguments that Viacom and Winshall made that were not fairly raised in the Earn-Out Statement or the Summary of Issues, the Resolution Accountants read the Merger Agreement as I read it. Thus, even if Viacom were entitled to de novo judicial review, which it is not, there would be no basis to deny enforcement of the Resolution Accountants' award.

V. Conclusion

For the foregoing reasons, Winshall's motion for summary judgment is GRANTED and Viacom's cross-motion for summary judgment is DENIED in accordance with this opinion. I confirm the Resolution Accountants' Determination that the 2008 Earn-Out due is $298,813,095. The parties will confer and submit a final judgment in that amount, plus interest at the statutory rate, on or before August 14, 2012.[131]

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[130] Engagement Letter at 3-4.

[131] I deny Viacom's request that the court deduct approximately $13 million from this judgment, representing the value of indemnification claims that Viacom is currently pursuing against Winshall in a separate action. The Merger Agreement provides that Viacom's indemnification claims against Winshall are capped at the sum of the "Escrow Amount" (a portion of the $175 million purchase price that has remained in escrow), the 2007 Earn-Out, and the 2008 Earn-Out. Merger Agreement § 8.2(c)(ii). The Agreement further provides that Viacom's "sole remedy" shall be to recover indemnifiable losses from the Escrow amount or by offsetting such losses against the Earn-Outs. *Id.* For this reason, Viacom contends that if the 2008 Earn-Out is not reduced by its allegedly indemnifiable losses, it will lose its ability to offset the losses against the Earn-Out, "and any success on the indemnification claims beyond the amount [in escrow] would

be meaningless." P. Letter to the Court (June 20, 2012). There is nothing in the Merger Agreement, however, that suggests that indemnifiable losses must be offset against the Earn-Out before the Earn-Out is paid, and allowing Viacom to set off these amounts would be contrary to settled law. *See, e.g.*, *CanCan Dev., LLC v. Manno*, 2011 WL 4379064, at *5 (Del. Ch. Sept. 21, 2011) ("'[T]here is no right to set-off of a possible unliquidated liability against a liquidated claim that is due and payable.'") (citing 80 C.J.S. *Set–Off and Counterclaim* § 58 (2011)). For these reasons, I decline to offset the judgment by the amount of any speculative indemnification claims.