SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

In the Matter of the Application of SCLIQUOR, LLC, Petitioner, For an Order, Pursuant to Article 75 of the Civil Practice Law and Rules, to Vacate and Modify the Arbitration Award – against – EMPIRE INVESTMENTS, INC., Respondent.	[As re-filed Nov. 22, 2022 with NYSCEF Numbers] Index No. 653680/2022 Motion Sequence No. 001 Hon. Andrea Masley **MEMORANDUM OF LAW IN SUPPORT OF VERIFIED PETITION TO VACATE IN PART OR MODIFY ARBITRATION AWARD** ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

Page

CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Statutes

Rules

PRELIMINARY STATEMENT

In this case, two members of a three-member commercial arbitration tribunal grossly exceeded their authority when resolving a narrow question. That question was whether a single document (known as "Exhibit C-15") was "responsive" to a third-party appraiser's information requests. But the two-member majority went much farther—ghost-writing a letter containing detailed legal and factual commentary and criticisms about the financial data reflected in Exhibit C-15, and ordering that the letter be falsely represented to the appraiser as having been jointly authored by the parties. That overreach ignored that the parties had committed any such assessments of the weight of financial evidence to the appraiser's professional judgment. Indeed, the third member of the tribunal correctly criticized the compelled letter as exceeding the tribunal's authority and interfering with the appraiser's ongoing duties:

> ***I see this as an intrusion into the appraiser's (and potential expert's) domain that is not needed to answer the question that the Parties tell us [the appraiser] put to them[.]***

The panel majority's award must be vacated in part or modified because, in drafting and passing off as a "joint" party submission a slanted letter whose text was never endorsed by the parties, the two arbitrators answered questions never submitted to them and infringed upon the authority the parties vested in their chosen appraiser. Both outcomes violate New York law.

The ghost-written letter was issued in an arbitration award relating to the appraisal of Petitioner's 50% interest in D'Usse LLC ("D'Usse"), a premium cognac business operated as a joint venture by Petitioner and Respondent. Petitioner SCLiquor, LLC ("SC") is a Delaware LLC majority-owned by the world-renowned artist and entrepreneur Shawn Carter—also known as JAY-Z. Respondent Empire Investments, Inc. ("Bacardi") is a Delaware corporation and wholly owned subsidiary of Bacardi Limited. In October 2021, SC exercised a contractual "Put Option" under D'Usse's operating agreement (the "Operating Agreement"), which obliged Bacardi to

purchase SC's 50% interest in D'Usse. Because the parties advanced substantially different views of the value of that interest, the Operating Agreement called for them to engage an independent investment bank to conduct an appraisal of the interest and "determine the price that Bacardi is required to pay." The parties appointed JPMorgan Chase & Co. ("JPMorgan") to serve as their appraiser and committed the valuation question to the exercise of JPMorgan's "professional judgment."

Three disputes have arisen regarding the valuation date and materials JPMorgan may review, and each dispute was submitted for arbitration before an American Arbitration Association ("AAA") tribunal ("the Tribunal"). Only the third dispute, and the Tribunal's resulting "Third Partial Final Award," is at issue here. It concerned whether a key financial projection Bacardi sent to SC, and SC produced to JPMorgan—Exhibit C-15—was responsive to JPMorgan's due-diligence request for "a 5-year financial forecast provided by [the] JV to Bacardi and SC[.]"

Exhibit C-15 comprises spreadsheets that Bacardi prepared to calculate D'Usse's financials for the 2021-26 five-year period and projects that D'Usse—one of the fastest growing spirits in history—would sell two million cases and earn $142.8 million in net income by fiscal year 2026. SC maintained this was a five-year forecast discussed and agreed between the parties as the projected business case. Bacardi, while admitting it had prepared the document, downplayed its significance as "aspirational." The Tribunal concluded that Exhibit C-15 was not responsive to JPMorgan's request for a "5-year financial forecast provided by [D'Usse] to Bacardi and SC." SC disagrees with that conclusion, but is not challenging it here.

The Tribunal did not, however, stop there. Two of the three arbitrators ordered the parties to send a seven-paragraph letter to JPMorgan that recited the two arbitrators' personal views about the weight JPMorgan should give Bacardi's five-year financial forecast. Worse, the panel majority

directed SC to pretend it had co-authored the letter when, in fact, nothing was further from the truth. The majority letter, presented as if written by both SC and Bacardi, was thus effectively a lie. Paragraphs 2, 3, 4, and 5 labeled Exhibit C-15 as "***not reliable…under Delaware law***," "***not created in the ordinary course***," "***unprecedented***" for D'Usse, and "***inconsistent with the JV's recent performance***"—all of which were judgments that should have been left to JPMorgan's discretion and expertise. Moreover, the majority-concocted letter invited JPMorgan to ***consider a competing consultant's draft PowerPoint presentation submitted by Bacardi during the arbitral hearing***, forcing SC to misrepresent that it thought this competing document (a draft) had any value whatsoever. The letter never mentioned the arbitrators' role in drafting it or directing its dispatch. Over SC's objection, Bacardi unilaterally sent the letter to JPMorgan the very next day.

In forcing the parties to recite to JPMorgan this gratuitous (and, in SC's view, false) commentary about a financial analysis as if it were mutually accepted fact, the Tribunal exceeded its authority, trampled the obligations the parties agreed to in their governing contract, and violated New York law. Under CPLR 7511(b), an arbitral award issued in New York "shall be vacated" when an arbitrator has "exceeded his power[.]" An arbitration tribunal's authority is rooted in the bedrock principle of consent and therefore limited in two key ways. First, "an arbitrator exceeds his or her authority by reaching issues not raised by the parties." *Denson v. Donald J. Trump For President, Inc.*, 180 A.D.3d 446, 451 (1st Dep't 2020). Second, arbitrators exceed their authority when they act in contravention of the parties' underlying arbitration clause or governing contract. *See Brijmohan v. State Farm Ins. Co.*, 699 N.E.2d 414, 414 (N.Y. 1998).

The award at issue here violated both bedrock principles. The question presented was express and clear: "is Exhibit C-15 responsive to JPMorgan's request…'for a 5-year financial forecast provided by [the] JV to Bacardi and SC,'" and, "[i]f not, how shall the parties respond to

the Forecast Request?" No one asked the Tribunal to go further by foisting upon the appraising bank four paragraphs of factual conclusions and legal commentary—all hotly disputed by the parties—on whether Exhibit C-15 was a "reliable…forecast under Delaware law"; whether it was consistent with other aspects of D'Usse's business plan; whether it was "unprecedented"; or whether JPMorgan should look at different competing documents. In deciding these issues and forcing SC to represent to JPMorgan that it jointly agreed with such commentary, the Tribunal stepped outside its authority.

Furthermore, by reaching findings about the provenance, legality, and reliability of Exhibit C-15, and by furtively pointing the appraiser to different evidence to consider, the panel majority put its thumb on the scale and usurped the role of the appraiser—violating the parties' Operating Agreement and their engagement of JPMorgan, both of which delegate plenary authority over the appraisal to the appraiser alone. New York courts are clear that when parties agree to a specific appraisal process to be conducted by an appraiser, such matters fall outside the authority of an arbitral tribunal operating under a general arbitration clause. *JPMorgan Chase Bank v. Reibestein*, 34 A.D.3d 308, 308 (1st Dep't 2006).

Accordingly, the Court should vacate under CPLR 7511(b)(1)(iii), or modify the award under CPLR 7511(c)(2) to remove, the portion of the award that directed the inclusion of Paragraphs 2, 3, 4, and 5 of the purportedly "joint" letter annexed as Exhibit A to the award.

FACTUAL BACKGROUND

A. The Parties and Their Joint Venture

1. The D'Usse Joint Venture

In early 2012, SC and Bacardi entered into a joint business venture for the sale and distribution of a new brand of premium cognac. NYSCEF No. 1 ¶ 15 ("Pet."); NYSCEF No. 5 ¶ 4 (First Partial Final Award ("PFA-1")). The parties formalized the relationship on March 6, 2012

and formed D'Usse LLC to effectuate the joint venture. Pet. ¶ 15; PFA-1 ¶ 4. SC and Bacardi each held a 50% membership interest in the venture. Pet. ¶ 15; *see* NYSCEF No. 6 § 2.7, Sched. A ("Operating Agreement"). The parties generally agreed to submit disputes arising out of the Operating Agreement to binding arbitration before the AAA. Operating Agreement § 12.5.

2. SC's Put Option and the Appraisal Clause

Pursuant to Section 8.1 of the Operating Agreement, SC can exercise a "Put Option" that requires Bacardi to purchase SC's 50% interest in the joint venture. Pet. ¶ 16; Operating Agreement § 8.1(a). Following SC's exercise of its Put Option, SC and Bacardi have 60 days to exchange a "final and binding written statement" reflecting the parties' respective valuations of SC's interest and negotiate in good faith. Operating Agreement § 8.1(a). Should negotiations fail, the parties must value the Put Option according to a specific appraisal clause set forth at Section 8.3. *Id.* In the event that the parties' valuations differ by more than 20%, the Operating Agreement obliges them to "engage a mutually agreed upon investment banking firm of national reputation with experience in the alcoholic beverage industry to conduct an appraisal of SC's Interest and determine the price that Bacardi is required to pay to acquire such Interest." *Id.* § 8.3(b).

B. SC Exercises Its Put Option, Triggering an Appraisal Process

On October 15, 2021, SC exercised its Put Option. Pet. ¶ 17; PFA-1 ¶ 10. By mutual agreement, on December 31, 2021, the parties exchanged the required written valuations, with SC valuing its one-half interest at $2.5 billion and Bacardi valuing it at $460 million: a more-than-five-times difference.[1] Pet. ¶ 17; PFA-1 ¶ 11. Because the Parties' valuations differed by more than 20%, on February 14, 2022, SC and Bacardi engaged JPMorgan to conduct an independent,

[1] Both parties have advanced multibillion-dollar valuations of the entire business. Pet. ¶ 17 n.1.

expert appraisal of the business. Pet. ¶ 17; PFA-1 ¶ 18. Before even turning to JPMorgan, however, on December 28, 2021, SC formally offered to buy Bacardi's 50% interest in D'Usse for $1.5 billion, three times Bacardi's declared valuation of its share (but less than SC believed it was worth). NYSCEF No. 7. Bacardi turned down SC's offer. Pet. ¶ 17.

C. Disputes Over the Valuation Date and Which Documents to Send the Appraiser Are Submitted for Arbitration

Subsequently, the parties disagreed on the correct reference date for JPMorgan's appraisal and what documents JPMorgan may consider to conduct its work. Pet. ¶ 18. The parties agreed to submit these disputes for resolution by an arbitration panel before the AAA in New York, each of which has yielded a "partial final award" issued by the Tribunal. Pet. ¶ 18.

1. The Formulation of the Tribunal, Its Scope of Authority, and Its First Award

The parties' initial dispute concerned the correct *reference date* to value SC's 50% share of D'usse. Pet. ¶ 19. On January 13, 2022, SC filed a demand for arbitration with the AAA. Pet. ¶ 19. In February 2022, a panel of three independent arbitrators—Daniel Schimmel, Marc Goldstein, and George Gluck—was assigned. Pet. ¶ 19. On March 1, 2022, the Tribunal issued Procedural Order No. 1 setting forth the Tribunal's authority to address only such disputes as the parties "present for resolution" and only "to the extent such disputes are within the scope of the arbitration clause of the Operating Agreement[.]" NYSCEF No. 8 ¶ 3.

On May 2, 2022, the Tribunal issued its first "Partial Final Award." The Tribunal ruled unanimously that the valuation shall be as of October 15, 2021 (*i.e.*, the date on which the put was exercised). Pet. ¶ 20; PFA-1 at 25. Recognizing that the parties contractually agreed in JPMorgan's engagement letter to "place significant reliance on J.P. Morgan's professional judgment," the Tribunal observed that JPMorgan "may review any information and documents

that, in its professional judgment, it deems appropriate in order to render an appraisal." Pet. ¶ 20; PFA-1 at 36, 38.

2. The Second Award and the June 15 Letter to JPMorgan

The parties next disputed whether they could provide JPMorgan with information that JPMorgan *had not specifically requested*. Pet. ¶ 21. On February 10, 2022, JPMorgan sent the parties its initial due diligence request list, known as "Exhibit C-37," and the parties disagreed over whether they were authorized to provide JPMorgan with further materials not referenced in Exhibit C-37. Pet. ¶ 21; *see* NYSCEF No. 9. On June 15, 2022, the Tribunal issued its "Second Final Partial Award," unanimously ruling that the parties may not provide to JPMorgan materials that JPMorgan did not specifically request. NYSCEF No. 10 ¶¶ 58-60 (Second Final Partial Award ("PFA-2")). The Tribunal also unanimously found that "J.P. Morgan is in charge of the appraisal process, including determining, in its professional judgment, the nature and scope of J.P. Morgan's investigation," and that its "ability to exercise its professional judgment and determine the nature and scope of its investigation includes the ability to determine which categories of documents [it] wishes to review in order to render an appraisal of SC's Interest in D'Usse as at October 15, 2021." *Id.*

Additionally, JPMorgan requested a joint letter from the parties permitting JPMorgan to begin its appraisal, and the parties submitted to the Tribunal competing drafts of such a letter while stipulating that "the Tribunal shall be authorized, but not required, to propose an alternative form of the joint letter to J.P. Morgan for the Parties' consideration." NYSCEF No. 11 ¶ 1; PFA-2 ¶ 7. In this limited context, the parties thus asked the Tribunal whether a joint letter should be sent, and, if so, what it should say. PFA-2 ¶ 2.

The Tribunal ordered the parties to deliver a joint letter (the "June 15 Letter") to JPMorgan, in a form the Tribunal had edited, setting out the October 15, 2021 valuation reference date and

reaffirming JPMorgan's discretion to review and rely on any documents it saw fit. PFA-2 at 32 & Ex. A. The Tribunal stated that it sought and obtained express confirmation from SC that—in this limited instance—"the Tribunal ha[d] the authority to compel delivery of a joint letter that contains terms different from, or in addition to" the parties' proposed drafts. PFA-2 ¶ 70.

3. Dispute Over JPMorgan's "5-Year Financial Forecast" Request

On June 22, 2022, both parties provided JPMorgan access to their respective data rooms, containing documents responsive to JPMorgan's due diligence request list. NYSCEF No. 12 ¶ 7 (Third Partial Final Award ("PFA-3")). JPMorgan's due diligence list requested "a 5-year financial forecast provided by [the] JV to Bacardi and SC Liquor." NYSCEF No. 9 at 4. In response, SC and Bacardi uploaded into their data rooms two competing documents. SC uploaded a document dated October 5, 2021 that Bacardi had sent to SC comprising spreadsheets that projected D'Usse's profits and losses, expected revenues, advertising and promotional expenses, and other business forecasts from 2021 through the 2026 fiscal year. *See* NYSCEF No. 13. Known as Exhibit C-15 in the arbitration proceedings, Exhibit C-15 forecasted that, by Fiscal Year 2026, D'Usse would sell more than two million cases of cognac that year and earn $142.8 million in annual net income. *Id.* at 2.

Bacardi's data room, on the other hand, contained a "one-page communication prepared by [Bacardi]'s counsel dated June 18, 2022 entitled 'No Forecast,'" contending that "D'Usse does not have a Board-approved financial forecast for the brand." PFA-3 ¶ 7; *see* NYSCEF No. 14.

On June 28, 2022, JPMorgan informed the parties that it would not proceed with the appraisal until the parties identified a single five-year financial forecast that had been agreed by the parties as of October 15, 2021, when SC exercised its Put Option. PFA-3 ¶ 8.

On June 28, 2022, SC informed the Tribunal of the parties' disagreement regarding the five-year financial forecast and requested an award determining whether Exhibit C-15 was the

single D'Usse five-year forecast responsive to JPMorgan's request. Pet. ¶ 28; PFA-3 ¶¶ 7-9. Bacardi denied that Exhibit C-15 responded to JPMorgan's request, arguing it was an "ambitious target that D'Usse hoped to hit," and requested a conference. PFA-3 ¶ 10.

In a Procedural Order dated June 30, 2022, the parties agreed to submit to the Tribunal the following limited question:

> Is Exhibit C-15 responsive to JP Morgan's request, in Exhibit C-37, "for a 5-year financial forecast provided by [the] JV to Bacardi and SC Liquor" ("Forecast Request")? If not, how shall the Parties respond to the Forecast Request?

NYSCEF No. 15 ¶ 1.

In its merits submissions, SC explained that Exhibit C-15 was the only document responsive to JPMorgan's request for a five-year financial forecast, and the parties considered Exhibit C-15 to be the operative plan at the time SC exercised its Put Option. Pet. ¶ 30; NYSCEF No. 16 at 12. Indeed, Bacardi's representative on the D'Usse Board, Mauricio Vergara, confirmed as much just two days before SC exercised its Put Option. Vergara stated that Bacardi "believe[s] this brand is 2 million cases in F26"—the number of cases projected to be sold in 2026 in Exhibit C-15—"[t]here's no debate[,] [w]e believe this brand is that size in that year." Pet. ¶ 30; NYSCEF No. 17 (Exhibit C-45). SC explained that Bacardi confirmed the plan was "realistic and achievable," NYSCEF No. 18 at BACARDI000027, and pointed out that when asked whether the two-million case forecast was the plan for D'Usse, Bacardi representative Vergara had urged the parties not to "get lost in semantics," "[t]here's only one scenario that we're trying to achieve, which is 2 million cases." NYSCEF No. 17.

SC therefore submitted that Exhibit C-15 was "agreed upon by the parties and approved by the D'Usse Board in the ordinary course of business," that it served as "the basis for all of D'Usse's future business planning," and that it was "the only projection that was in existence at the time

D'Usse [sic] exercised its put right." PFA-3 ¶ 20. SC also argued the document was a management projection for valuation purposes and highlighted instances in which Bacardi and D'Usse validated SC's position that the parties considered the document a reliable forecast. PFA-3 ¶¶ 29-33.

In response, Bacardi argued Exhibit C-15 did not comport with the language of JPMorgan's request because Exhibit C-15 was prepared in the first instance by Bacardi itself, at the request of Bacardi's board, to understand the impact of capital investment and cash flow if D'Usse achieved its plan to sell two million cases. PFA-3 ¶ 35. Further, although Bacardi agreed that the plan was "realistic," NYSCEF No. 19 at RX40.007, Bacardi said Exhibit C-15 could not be directly responsive to JPMorgan's request because the two million case goal for 2026 relied on assumptions that certain goals and aspirations are achieved, rather than reflecting actual expected cash flows. PFA-3 ¶ 51.

SC argued that, in all events, Bacardi's evidence regarding Exhibit C-15's reliability was irrelevant because the "reliability of this forecast is not even in front of the tribunal." NYSCEF No. 24 at 50:8-9. SC also argued that if the Tribunal were to consider Bacardi's evidence regarding Exhibit C-15's reliability, "due fairness" required giving SC the opportunity to rebut Bacardi's evidence. *Id.* at 29:24-30:3. But SC was never afforded that opportunity.

D. The Third Award and the Majority-Ordered Letter to JPMorgan

Following briefing, a videoconference hearing, and oral argument, on September 2, 2022, the Tribunal issued its "Third Partial Final Award," concluding that Exhibit C-15 was not responsive to JPMorgan's request for a "5-year financial forecast." PFA-3 at 43.

Two members of the Tribunal further ordered the parties to submit another joint letter to JPMorgan (the "Majority-Ordered Letter"), which the two arbitrators drafted and attached to the award as Exhibit A. PFA-3 ¶ 84. Unlike the June 15 Letter, the Majority-Ordered Letter was not requested and consented to by the Parties, it was not based upon any prior draft submission by any

party, it was not limited in scope to reciting procedural matters, it was not drafted with SC's knowledge or consent, and it was not "joint" in any respect. Pet. ¶ 35.

The beginning of this purported joint letter "advised" JPMorgan "that, as at October 15, 2021, no such 5-year financial forecast existed, and no such 5-year financial forecast was ever provided by the JV to Bacardi and SC." PFA-3, Ex. A ¶ 1. The next four paragraphs went beyond whether Exhibit C-15 was responsive to JPMorgan's request—laying out the two-member majority's opinions about the origin, reliability, and usefulness of the document in conducting an expert valuation of a multibillion-dollar business. Those paragraphs stated in relevant part:

- "In May 2021, SC Liquor and Bacardi aligned on a 'vision,' 'ambition,' or 'goal' to sell two million cases of cognac in FY26," but that the joint venture "***never developed, agreed-upon [sic], or adopted any five-year business case, forecast, or model*** supporting" such goal. Majority-Ordered Letter ¶ 2 (emphasis added).

- as of October 15, 2021, Bacardi and SC ***had not signed off on certain capital expenditures "needed to accommodate [Bacardi]'s and SC Liquor's two million case vision for FY26***." *Id.* ¶ 2 (emphasis added).

- "[t]he two million case 'ambition' or 'vision' was ***a top-down aspirational goal setting***, and not a bottom-up forecast for the future and through October 15, 2021." *Id.* ¶ 3 (emphasis added).

- Exhibit C-15 "***is not a reliable 5-year financial forecast under Delaware law***" because it: (a) "***does not reflect the JV's expected, as opposed to hoped-for, future cash flows***"; (b) constituted an "***unprecedented***" "use of five-year projections for the JV"; (c) was developed using a "top-down," "as opposed to a bottom-up process"; (d) "***was not created in the ordinary course for purposes of operating the JV's business***, but to help the Bacardi Board understand the potential capital requirements and cash flows if the 2 million case 'ambition' or 'vision' was to materialize"; and (e) "***the projections were inconsistent with the JV's recent performance***." *Id.* ¶ 4 (emphases added).

The two-member majority also inserted its view that JPMorgan "is free to consider" "***the report of Ernst & Young Parthenon, dated April 30, 2021***," *id.* ¶ 5 (emphasis added)—an unrelated consultant's draft PowerPoint presentation Bacardi proffered at the hearing, which undisputedly

was *not* a five-year financial forecast and therefore *not* responsive to JPMorgan's Forecast Request and the narrow issue before the Tribunal. *See* Pet. ¶ 36.

E. Arbitrator Goldstein Finds the "Joint" Letter Went Beyond the Tribunal's Authority and Intruded into the Third-Party Expert Appraiser's Domain

Arbitrator Goldstein, the third arbitrator, concluded that the two-member majority's purportedly "joint" party letter went beyond the Tribunal's authority. NYSCEF No. 20 ("Goldstein Concurrence"). In his view, rather than simply addressing the narrow issue of "whether Ex. C-15 is the single agreed five-year forecast of the Parties" as requested by JPMorgan, the two-member majority's draft letter exceeded the Tribunal's role in two important respects. First, Arbitrator Goldstein stated that the two-member majority should not have "share[d] a view on the provenance and predictive value of Ex. C-15." *Id.* at 2. Second, Arbitrator Goldstein stated that, as drafted, the letter was "an intrusion into the appraiser's (and potential expert's) domain that is not needed to answer the question that the Parties tell us JPM put to them in June 2022." *Id.* at 3. As a result, Arbitrator Goldstein warned against "the potential for our Tribunal to overreach and to decide issues that the Operating Agreement leaves to be decided by the appraiser." *Id.* at 1. Arbitrator Goldstein explained:

> I would have preferred that the Letter we direct the Parties to send to JPM be confined to answering JPM's June 2022 question, by having the Parties simply tell JPM that there is no single agreed 5-year forecast. Of course I join my colleagues in the view the JPM should be assured that they may make use of Ex. C-15 as they see fit. However ***I would have preferred that the Letter we direct not share a view on the provenance and predictive value of Ex. C-15*** because this sharing is bound to have an impact on the appraiser's view of that Spreadsheet (and perhaps that of another expert who, it has been suggested, might be brought in to develop a 5 year forecast), and ***I see this as an intrusion into the appraiser's (and potential expert's) domain that is not needed to answer the question that the Parties tell us JPM put to them in June 2022***.

Id. at 2-3 (emphases added). Arbitrator Goldstein also expressed serious concerns about the two-member majority's evaluation of the record that forced SC to agree to something that it had

disputed strongly: "I also have reservations about certain other aspects of the Tribunal's evaluation of the record and its analysis," and accordingly he wished to make clear "the limited scope of [his] concurrence." *Id.* at 3.

F. Bacardi Unilaterally Sends the Majority-Ordered Letter to JPMorgan

On Saturday, September 3, 2022, without conferring with SC, Bacardi sent a copy of the Majority-Ordered Letter to JPMorgan, executing it on behalf of itself ***and SC*** and referring to it as a "joint letter from the parties." Pet. ¶ 38. SC objected in an email that day. Pet. ¶ 38.

G. SC's Request for Interpretation Is Denied on Procedural Grounds

On September 5, 2022, SC moved the Tribunal for an interpretation and/or correction of the award under Rule R-50 of AAA's Commercial Arbitration Rules, contending that Paragraphs 2, 3, 4, and 5 of the Majority-Ordered Letter should be pared back in conformity with the Tribunal's limited jurisdiction. NYSCEF No. 21 ¶ 1-4.

SC's explained that the Majority-Ordered Letter required parties to recite information that would interfere with JPMorgan's appraisal, as well as "facts" that were simply wrong. For example, the Majority-Ordered Letter required the parties to state that "Bacardi…is responsible for the sourcing and financing of the liquid needed for the JV's operations," when testimony and documents plainly showed Bacardi was just the supplier and did not finance liquid acquisition. Pet. ¶ 40. Similarly, the Majority-Ordered Letter said that Bacardi needed to "sign off" on certain projected investments to accommodate Exhibit C-15's forecast, and that SC "is responsible for marketing," both of which misunderstood the roles of the parties in the joint venture. Pet. ¶ 40. Likewise, the Majority-Ordered Letter said that "the use of five-year projections for the JV was unprecedented," when, in fact, SC was in possession of five-year projections (standard for an inventory business for an aged product such as cognac) and the only debate between the parties was whether Exhibit C-15 was developed in the ordinary course of D'Usse's business. Pet. ¶ 40.

SC was uncomfortable being forced to sign onto a letter to a bank, JPMorgan, knowing that it contained false and misleading statements. Pet. ¶ 40.[2]

On September 20, 2022, the Tribunal rejected SC's application on procedural grounds, holding that AAA Rule R-50 is limited to corrections of clerical, typographical, and computational errors. NYSCEF No. 22 at 1. The Tribunal wrote: "[T]here is no basis in that Rule or any other of the 2013 Rules for a Tribunal to modify its award on the basis that the original award exceeded the powers of the Tribunal. ***Any such relief must be sought from a competent court***." *Id.* at 2 (emphasis added).

LEGAL STANDARD

An arbitration award "shall" be vacated if "an arbitrator, or agency or person making the award exceeded his power," CPLR 7511(b)(1)(iii), and New York courts have long ordered the vacatur of arbitral awards *in part* to the extent they exceed the arbitrators' given authority, s*ee, e.g.*, *544 Bloomrest, LLC v. Harding*, 202 A.D.3d 499, 500-01 (1st Dep't 2022); *Kudler v. Truffelman*, 93 A.D.3d 549, 550 (1st Dep't 2012); *Ford v. Civ. Serv. Emps. Ass'n, Inc.*, 94 A.D.2d 262, 266-67 (1st Dep't 1983).[3] Similarly, under CPLR 7511(c)(2), a court "shall" modify an

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[2] During the parties' September 16, 2022 oral argument on Petitioner's request for interpretation and/or correction of the Third Partial Final Award, Respondent's counsel cherry-picked statements made by Petitioner's arbitration counsel at the July 18, 2022 hearing, claiming that Petitioner invited the Tribunal to craft the Majority-Ordered Letter. But Respondent mischaracterized Petitioner's statements and pulled them out of context. Petitioner's counsel repeatedly emphasized the narrow scope of the Tribunal's authority—which was limited to determining whether Exhibit C-15 was "responsive"—"Full stop." NYSCEF No. 24 at 21:5-7; *see also* 21:15-25. Petitioner's counsel suggested that, if necessary, the Tribunal could communicate its determination to JPM in a cover letter that included "facts" about the document (akin to what the Tribunal had done in the June 15 Letter, *see supra* 8). But Petitioner's counsel made clear that the Tribunal should not opine on either the reliability or lack of reliability of Exhibit C-15—which is what the Tribunal ultimately did.

[3] The Federal Arbitration Act also permits vacatur on the grounds that "the arbitrators exceeded their powers[.]" 9 U.S.C. § 10.

arbitral award to the extent "the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted[.]"

ARGUMENT

I. The Tribunal's Third Partial Final Award Must Be Vacated in Part Because It Exceeded the Tribunal's Authority.

New York Courts vacate arbitration awards under CPLR 7511(b)(1)(iii) for "exceeding authority" on two bases. *First*, "[i]t is well established that an arbitrator's authority extends only to those issues that are actually presented by the parties." *Denson*, 180 A.D.3d at 451 (citation omitted). "Even where a claim is otherwise arbitrable, the scope of the arbitration is still limited to the specific issues presented and may not extend to those that are materially different or legally distinct." *Id.* (citation omitted); *accord Slocum v. Madariaga*, 123 A.D.3d 1046, 1046 (2nd Dep't 2014) ("An arbitrator's authority extends to only those issues that are actually presented by the parties, and an arbitrator exceeds his or her authority by reaching issues not raised by the parties." (citations and quotation marks omitted)). *Second*, courts vacate arbitral awards when arbitrators exceed the terms of the governing arbitration clause or otherwise violate the parties' agreement. *See Brijmohan*, 699 N.E.2d at 414; *City of New York v. Loc. 1549 of Dist. Council 37, AFSCME*, 248 A.D.2d 125, 126 (1st Dep't 1998) (affirming vacatur of arbitration award in contravention of governing collective bargaining agreement).

The Third Partial Final Award violated both principles.

A. The Third Partial Final Award Exceeded the Tribunal's Authority by Reaching Issues Not "Presented for Resolution" by the Parties.

The Third Partial Final Award must be vacated under CPLR 7511(b)(1)(iii) because it ordered the inclusion of Paragraphs 2, 3, 4, and 5 of the Majority-Ordered Letter, which decided issues never presented by the parties.

New York courts have long vacated arbitral awards deciding issues not consensually raised to the arbitrator. For example, in *Goldberg v. Nugent*, 2010 WL 9039501 (N.Y. Sup. Ct. N.Y. Cty. Dec. 03, 2010), the respondent filed a statement of claim with the AAA against his former business partners, alleging an array of misconduct and estimating damages between $5 and $9 million. *Id.* An arbitration panel awarded the respondent roughly $9.5 million, *id.*, "liquidat[ed] [his] interests in certain undisputed investments," *Goldberg v. Nugent*, 85 A.D.3d 459, 459 (1st Dep't 2011), and "sever[ed] the parties' business relationship," none of which was requested in the statement of claim submitted to the arbitrator, *id.* The Supreme Court vacated the award, and the First Department affirmed on the ground that the Supreme Court "properly determined that the panel exceeded its authority by granting relief on claims not asserted in respondent's statement of claim." *Id.* Indeed, courts in New York consistently invalidate arbitral awards for reaching beyond the narrow issues raised by the parties. *See, e.g.*, *544 Bloomrest*, 202 A.D.3d at 500 (arbitrator exceeded her power by "granting unrequested relief"); *Slocum*, 123 A.D.3d at 1047 (affirming vacatur on ground that arbitrator exceeded his authority by deciding issue the parties had not raised); *187 Concourse Assocs. v. Fishman*, 399 F.3d 524, 527 (2d Cir. 2005) (same); *Spear, Leeds & Kellogg v. Bullseye Sec., Inc.*, 291 A.D.2d 255, 256 (1st Dep't 2002) (affirming vacatur when arbitration panel "exceeded its authority by granting relief on claims not asserted").

Here, as in *Goldberg*, *Slocum*, and *Bullseye*, the Majority-Ordered Letter's Paragraphs 2, 3, 4, and 5 addressed issues not presented to the Tribunal. The parties presented for resolution a specific question:

> Is Exhibit C-15 responsive to JP Morgan's request, in Exhibit C-37, "for a 5-year financial forecast provided by JV to Bacardi and SC Liquor" ("Forecast Request")? If not, how shall the Parties respond to the Forecast Request?

PFA-3 ¶ 6. This question was narrow and limited. It was keyed to JPMorgan's request for a particular document, and whether Exhibit C-15 was or was not that document. ***Neither party*** asked

the Tribunal to endorse, discredit, and/or pass judgment on any particular forecast in a communication to the appraiser, to volunteer that JPMorgan should consider different information prepared by a consultant and put forth by Bacardi, or to comment on D'Usse's financial state.

Yet the Majority-Ordered Letter did just that. After answering the narrow question presented, it proceeded to force the parties to "jointly" represent to JPMorgan what SC disputed in multiple respects: that no forecast was ever "developed," "agreed-upon," or "adopted" by the parties; that Bacardi and SC had not signed off on capital expenditures "needed to accommodate" the "two million case vision"; that "the two million case 'ambition'" was "a top-down aspiration goal setting, and not a bottom-up forecast for the future"; that Exhibit C-15 is "is not a reliable 5-year financial forecast under Delaware law," "does not reflect the JV's expected, as opposed to hoped-for, future cash flows," constituted an "unprecedented" "use of five-year projections from the JV," "was not created in the ordinary course," and is "inconsistent with the JV's recent performance"; and that JPMorgan may consider an unrelated consultant's draft PowerPoint presentation that undisputedly was not a five-year financial forecast nor part of the Exhibit C-15 matter before the Tribunal. Majority-Ordered Letter ¶¶ 2-5. Each of these statements exceeded the scope of the question presented by "shar[ing] a view on the provenance and predictive value of Ex. C-15" and "intru[ding] into the appraiser's (and potential expert's) domain." Goldstein Concurrence at 2-3. And by failing to provide notice that the parties would be forced to adopt these opinions in a joint letter, the Tribunal also deprived SC of a fair hearing. *See supra* 11; *see also* *Cofinco, Inc. v. Bakrie & Bros., N. V.*, 395 F. Supp. 613, 615 (S.D.N.Y. 1975) (vacating arbitration award and holding that when arbitrators decide matters outside their scope, they both exceed their authority and deprive the parties of their right to a fair hearing).

The two-member majority's draft letter is extraordinarily damaging: it compelled SC to endorse a qualitative criticism of Bacardi's five-year financial forecast that went beyond the Tribunal's authority, and it further compelled SC to co-author a letter to a bank containing false and misleading information. The Appellate Division has repeatedly criticized and vacated analogous arbitral awards whose remedies compelled parties to act in unexpected ways not needed to resolve their dispute. *See, e.g.*, *Kudler v. Truffelman*, 93 A.D.3d 549, 550 (1st Dep't 2012) (holding arbitrator exceeded authority to resolve partnership accounting dispute to the extent she forced reassignment of life insurance policies and payment of loans among the parties); *Fishman v. Roxanne Mgmt.*, 24 A.D.3d 365, 367 (1st Dep't 2005) (holding arbitrator exceeded his authority by ordering party to the arbitration to cause another, nonparty entity to take a certain action).

Indeed, the excesses of the two-member majority's Majority-Ordered Letter contrast sharply with the Tribunal's unanimous decision in issuing the June 15 Letter. In the case of the June 15 Letter, the parties had drafted and submitted proposed joint letters to JPMorgan. Tellingly, a unanimous Tribunal expressly sought and obtained SC's ***consent*** to edit the message to be sent to JPMorgan. And the letter the Tribunal ultimately drafted was non-substantive, simply repeating the terms of JPMorgan's engagement and plenary authority. By comparison, the Majority-Ordered Letter of the two-member majority was prepared without the submission of any drafts and without the knowledge or consent of the parties. Further, the Majority-Ordered Letter substantively weighed evidence before the appraiser rather simply say what was or was not responsive to JPMorgan's request. The "joint" letter contradicts the Tribunal's own prior determination that JPMorgan—not the Tribunal—is "in charge of the appraisal process, including determining, in its professional judgment, the nature and scope of [the] investigation." PFA-2 ¶ 58.

B. The Third Partial Final Award Exceeded the Arbitrators' Authority Because It Breached the Appraisal Clause of the Parties' Agreement and Usurped the Appraiser's Role.

The two-member majority's Third Partial Final Award must also be vacated because it decided areas outside the authority of the Tribunal and within the exclusive authority of the appraiser, violating the parties' Operating Agreement and the JPMorgan engagement.

New York courts will vacate an arbitration award that "clearly exceeds a specifically enumerated limitation on the arbitrator's power," *N.Y.C. Transit Auth. v. IDS Prop. Cas. Ins. Co.*, 2018 WL 1612105, at *1 (N.Y. Sup. Ct. N.Y. Cty. Mar. 29, 2018) (citing cases), or otherwise violates the contract containing the parties' arbitration agreement. *See Brijmohan*, 699 N.E.2d at 414 (arbitrator exceeded his authority by awarding $75,000 in insurance where underlying policy only covered losses up to $10,000); *City of New York v. Loc. 1549 of Dist. Council 37, AFSCME*, 669 N.Y.S.2d 559, 559 (1st Dep't 1998) (affirming vacatur of an arbitration award reimbursing City's employees for leave taken during an ongoing health and safety violation in violation of the governing collective bargaining agreement).

Accordingly, when the parties' contract contains an appraisal clause setting out the specific mechanism by which assets shall be valued, these requirements override a general arbitration clause and place valuation issues within the exclusive authority of the appraiser, not any arbitrator. *See JPMorgan Chase Bank v. Reibestein*, 34 A.D.3d 308, 308 (1st Dep't 2006) (appraiser's valuation was "not an arbitrable issue" where parties' lease provided that appraiser's valuation was binding on the parties); *Katz v. Feinberg*, 290 F.3d 95, 98 (2d Cir. 2002) (affirming vacatur of arbitration panel's valuation decision that exceeded its authority to evaluate accountants' determination of share purchase price, where purchase agreement assigned this "final and binding" determination to company accountants); *Matter of Am. Silk Mills Corp.*, 35 A.D.2d 197, 199-201 (1st Dep't 1970) (holding parties intended to remove inventory valuation from arbitration where

contract expressly provided that such valuation, fixed by accounting firm, would be "final and binding on the parties").

Here, after SC exercised its Put Option, the Operating Agreement required an independent expert appraiser (not two of the three arbitrators) to make the valuation determination. *See, e.g.*, Operating Agreement § 8.1(a) (any disagreement on valuation "shall be submitted for resolution ***in accordance with Section 8.3***" (emphasis added)); *id.* § 8.3(b) (calling for appointment of banker "to conduct an appraisal of SC's Interest and determine the price that Bacardi is required to pay to acquire such Interest"); *id.* § 8.4 ("Once the fair market value of SC's Interest has been determined pursuant to Sections 8.1, 8.2 and/or 8.3 above…, the purchase of SC's Interest by Bacardi shall take place…"); *id.* § 8.6 (providing for specific performance of Article 8 obligations). Moreover, SC and Bacardi jointly retained JPMorgan on terms that conferred upon JPMorgan plenary authority to exercise its professional judgment in developing the valuation. *See* NYSCEF No. 23 § 1. And the Tribunal itself recognized in its prior awards that it was JPMorgan, not the arbitrators, that was "in charge of the appraisal process, including determining, in its professional judgment, the nature and scope of J.P. Morgan's investigation." PFA-2 ¶ 58.

By compelling the parties to submit a letter to JP Morgan that, in Paragraphs 2, 3, 4, and 5, openly discredits a five-year financial forecast issued days before SC exercised its Put Option (*i.e.* Exhibit C-15) and weighs the quantitative evidence—even drawing JPMorgan's attention to a draft document penned by a Bacardi agent—the Tribunal tampered with the sensitive appraisal process at the heart of the parties' dispute, usurped the role of the appraiser, exceeded the limited authority vested in it by the parties, and undermined its own prior awards.

Those infirmities were the concerns animating Arbitrator Goldstein's objection to the award. He observed, correctly, that sharing a view on the provenance and predictive value of C-

15 "is bound to have an impact on the appraiser's view of that Spreadsheet (and perhaps another expert who, it has been suggested, might be brought in to develop a 5 year forecast)," and therefore was "an intrusion into the appraiser's (and potential expert's) domain that is not needed to answer the question that the Parties tell us JPM put to them in June 2022." Goldstein Concurrence at 2-3.

Accordingly, the Third Arbitral Award must be vacated in part.[4]

CONCLUSION

For the foregoing reasons, the Court should vacate in part or modify the award by striking Paragraphs 2, 3, 4, and 5 of Exhibit A to the Award.

[4] This Court also has the authority to modify the award by striking Paragraphs 2, 3, 4, and 5 from the Majority-Ordered Letter, and otherwise confirm it. Under CPLR 7511(c)(2), the Court shall "modify the award if…the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted[.]" For the same reasons the Court should vacate the Third Partial Final Award, the Court may strike paragraphs containing gratuitous comments outside of the issues presented by the parties to the Tribunal and irrelevant to the merits question presented—*i.e.*, whether Exhibit C-15 was or was not responsive to JPMorgan's document request.

Dated: New York, New York
October 3, 2022

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ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, Reed Brodsky, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because it contains 6,944 words, excluding the parts of the Memorandum of Law exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this Memorandum of Law.

Dated: New York, New York
October 3, 2022

/s/ Reed Brodsky
Reed Brodsky