SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

In the Matter of the Application of JOSEPH YAKUEL, AGENCY WITHIN LLC, and GET THINGS DONE LLC, Petitioners, For Judgment Confirming an Appraisal Award -against- ANDREW GLUCK, Respondent.	Index No. 158184/2019 Honorable Joel M. Cohen Motion Seq. No. 010
In the Matter of the Application of AGENCY WITHIN LLC, JOSEPH YAKUEL, and GET THINGS DONE LLC, Petitioners, For Judgment Vacating an Arbitration Award -against- ANDREW GLUCK, Respondent.	Index No. 654245/2020 Honorable Joel M. Cohen Motion Seq. No. 002

PETITIONERS' CONSOLIDATED MEMORANDUM OF LAW IN SUPPORT OF (1) VERIFIED PETITION FOR CONFIRMATION OF APPRAISAL AWARD OR SPECIFIC PERFORMANCE, AND (2) VERIFIED PETITION TO PARTIALLY VACATE ARBITRATION AWARD

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PRELIMINARY STATEMENT

It is black letter law that an arbitrator lacks jurisdiction to make a valuation determination where the parties contract for a final and binding valuation by someone else. In this circumstance, the contract simply does not "allow[] for arbitration of the valuation or a remedy which alters it." *Katz v. Feinberg*, 167 F. Supp. 2d 556, 567-68 (S.D.N.Y. 2001), *aff'd* 290 F.3d 95 (2d Cir. 2002). Nevertheless, this is exactly what the arbitrator did here.

Petitioners Agency Within, Joseph Yakuel, and Get Things Done contracted with Respondent Andrew Gluck for the right to repurchase his company interest for fair market value. That contract provides for a final and binding appraisal of that fair market value by one of five specified accounting firms. It does not provide for any review of the appraisal by an arbitrator. Pursuant to that contract, the repurchase right was exercised and one of those accounting firms, PricewaterhouseCoopers, issued a final and binding appraisal of Gluck's interest in the company.

One year later, an arbitrator awarded an incredible $18.9 million in damages based on his adoption of a dramatically higher appraisal of Gluck's interest. This appraisal was performed – not by PwC or any other neutral and mutually-agreed accounting firm – but rather, by an appraiser selected and paid for by Gluck. The arbitrator also made this award after expressly and repeatedly representing to Petitioners that he would not be reconsidering PwC's appraisal; indeed, for this reason, the arbitrator even expressly declined to hear from PwC at the hearing. And, in reliance on these representations (as well as the parties' agreement), Petitioners did not offer their own independent appraisal. Nevertheless, the arbitrator adopted, wholesale, Gluck's new appraisal, reasoning, in part, that he was left with no alternative.

Such a "damages" award manifestly disregards the limits on the arbitrator's jurisdiction imposed by the parties' contract and is fundamentally unfair as – to the extent the arbitrator could,

somehow, properly consider valuation issues – Petitioners had no fair opportunity to present a competing appraisal. Indeed, in a nearly identical case, *Katz*, the Southern District of New York and the Second Circuit agreed that an arbitrator lacked jurisdiction to award a higher valuation as damages where the parties contracted for a fair market valuation by an appraiser – not an arbitrator.

Moreover, in the first instance, the arbitrator fundamentally erred in concluding that Gluck was not sufficiently involved in the appraisal process. Immediately following the exercise of the repurchase right, the parties' agreement expressly allows Agency Within to engage the appraiser and exclude Gluck from all affairs. And, notwithstanding the latter provision, Agency Within still allowed Gluck to participate in the appraisal, that is, until this Court denied him any further opportunity to do so.

Accordingly, this Court should confirm the appraisal award and partially vacate the arbitration award to the extent it found that Gluck was insufficiently involved in the appraisal. Alternatively, as the parties' agreement requires valuation decisions to be made by one of the accounting firms enumerated therein, the arbitrator lacked jurisdiction to award a higher valuation. Thus, Petitioners alternatively request that the Court vacate the arbitrator's damages award, and in doing so, the Court should enforce the terms of the parties' agreement by referring that determination to PwC so that the parties' designated appraiser can assess what impact, if any, further participation by Gluck would have had on its "final and binding" appraisal.

FACTUAL BACKGROUND

The following facts are based on the verified petitions and documentary evidence submitted in the special proceeding to confirm the appraisal award or for specific performance (Index No. 158184/2019 ("Appraisal Proceeding")), the special proceeding to partially vacate the

arbitration award (Index No. 654245/2020 ("Arbitration Proceeding")), and the accompanying Affirmation of Michael A. Kolcun ("Kolcun Aff.").[1]

The Parties' Agreements

Agency Within was formed pursuant to a Limited Liability Company Agreement. (Appraisal Proceeding, NYSCEF 2 ("LLC Agreement")). The LLC Agreement designates Yakuel as the sole managing member and majority owner, and grants Gluck a 35% minority interest. The LLC Agreement also contains a general arbitration clause that states, "Any controversy or claim arising out of or relating to this Agreement . . . will be settled by arbitration administered by the American Arbitration Association." (*Id*. § 12.12).

On March 23, 2018, the parties amended the LLC Agreement. (Appraisal Proceeding, NYSCEF 3 ("Amendment")). Section 3(a) of the Amendment grants Agency Within the unconditional right to repurchase Gluck's ownership interest. To determine the purchase price, the Amendment provides that Agency Within (not Gluck) shall engage an appraisal firm as follows:

> The Company shall obtain an appraisal . . . by engaging a third party appraisal firm, whose appraisal will be final and binding on all parties and the cost of which shall be borne by Gluck and the Company on a 50-50 basis. . . . The third party appraisal firm shall be one of the following firms: PricewaterhouseCoopers, Deloitte Touche, EY, KPMG, and BDO USA. Each of Yakuel and Gluck shall have the right to veto any one of such firms. . . . With respect to the firms which have not been vetoed, the Company shall engage the firm which has offered to perform the appraisal at the lowest price.

(Amendment § 3(e)). The Amendment also incorporates the LLC Agreement's arbitration clause. (*Id.* § 5(d)).

[1] Petitioners predominantly cite to documents filed in the Appraisal Proceeding, and to allegations in the Verified Petition to Partially Vacate Arbitration Award. (Arbitration Proceeding, NYSCEF 1 "Arbitration Petition")).

After the exercise of the repurchase right, the Amendment provides that Agency Within shall "immediately . . . have the right to exclude Gluck [] from participating in the affairs of the company" and that Gluck's "sole right with respect to the Company and its business operations shall be to receive" payment for his 35% interest. (*Id.* § 3(f)).

On May 11, 2018, the repurchase right was exercised. (Arbitration Petition ¶ 22). Pursuant to the Amendment, both sides struck accounting firms and, ultimately, Agency Within engaged PwC to perform the final and binding appraisal. (*Id.* ¶¶ 23-24). Agency Within did so by signing PwC's standard form engagement letter. (Appraisal Proceeding, NYSCEF 214).

Gluck Attempts to Block the Appraisal

Shortly after PwC began its work, Gluck demanded that the appraisal be halted as he was apparently hiring a financial advisor to conduct his own analysis of fair market value. (Arbitration Petition ¶ 25). Thereafter, on July 25, 2018, Gluck filed a complaint and moved this Court (Sherwood, J.) to enjoin both the appraisal and the repurchase. (*Id*. ¶ 27; *see also Gluck v. Yakuel, et al.*, Index No. 653716/2018). At the hearing, the Court denied Gluck's motion, and the parties entered into a so-ordered stipulation by which Gluck "'agreed to participate in the [PwC] Appraisal in good faith, without delay or obstruction.'" (Appraisal Proceeding, NYSCEF 6).

Petitioners complied with this stipulation in good faith. Shortly after it was signed, Petitioners informed PwC that Gluck would be "participating fully in the appraisal" and asked PwC to ensure that Gluck was "copied on **all** correspondence and invited to **all** meetings," and instructed PwC to give Gluck all of the information provided to-date. (Appraisal Proceeding, NYSCEF 215 (emphasis in original)).

Unfortunately, Gluck became an active – and obstructionist – participant in the appraisal, whose conduct forced PwC to halt its work and, at one point, caused PwC to threaten to quit.

(Arbitration Petition ¶¶ 30-32). For example, on an introductory call with PwC, Gluck's attorneys attempted to dictate how PwC would be conducting its appraisal – asserting that both sides should submit analyses, the appraisal should be adversarial, both sides needed a detailed engagement of PwC, Gluck might contest the company's financials, and Agency Within might need an audit. (Appraisal Proceeding, NYSCEF 96 (Yakuel Statement ¶¶ 53-54)). Gluck also contested PwC's decision to employ the IRS definition of "Fair Market Value" and insisted on an unusual process where the company would constantly provide new data in real-time, which would require endless updates to PwC's models and conclusions (*i.e.*, a never-ending appraisal). (Appraisal Proceeding, NYSCEF 7). Gluck even tried to dictate the valuation methodology that PwC would use. (*Id.*).

Despite the Amendment's provision that "the Company shall engage the [appraisal] firm" (Amendment § 3(e)), Gluck also insisted, for the first time, that he, somehow, has a right to also engage PwC. (Appraisal Proceeding, NYSCEF 8 (Tr. 24:10-18), 96 (Yakuel Statement ¶ 61)). Because of his obstructionist behavior, Petitioners declined his request, but made clear to Gluck that he could nevertheless participate in the appraisal:

> The Company will remain the party responsible for providing information to PWC, and responding to questions/requests from PWC. This exchange of information will be transparent to Mr. Gluck, such that he will attend any telephonic or in-person meetings, and will be copied on all written correspondence. If Mr. Gluck wishes to add any further information or provide his opinions on any information exchanged, he will be able to do so. . . . In the event of any disagreement, PWC will need to make its own determination as to how the respective input should be viewed . . .

(Appraisal Proceeding, NYSCEF 144).

Not satisfied with this good faith offer, Gluck forced the parties back to this Court, where Justice Sherwood rebuked Gluck's conduct and again denied his motions. (Arbitration Petition ¶¶ 33-34; Appraisal Proceeding, NYSCEF 8 (Tr. 23-28)). Gluck discontinued his action without prejudice. (Arbitration Petition ¶ 34).

In the ensuing arbitration, Gluck never sought an order or any interim relief allowing his additional participation in the ongoing appraisal process. (*Id.* ¶ 35).

PwC Issues its "Final and Binding" Appraisal Award

On March 20, 2019, PwC issued its award ("Appraisal Award") appraising Gluck's 35% interest in Agency Within at $4.7 million. (Appraisal Proceeding, NYSCEF 9). PwC did so after sending information requests and making detailed and pointed inquiries about the company. (Appraisal Proceeding, NYSCEF 217-218, 220). Numerous company employees and professional representatives contributed to or were involved in the appraisal, such as Yakuel, bookkeeper Simone Hall, and two outside accounting firms, including Grassi & Co., which was retained to ensure the accuracy of financial statements and to assist with projections. (Appraisal Proceeding, NYSCEF 96 (Yakuel Statement ¶ 78)).

As detailed in its Appraisal Award, PwC considered two separate valuation approaches: (1) the Income Approach, and specifically, the Discounted Cash Flow ("DCF") method of determining fair market value; and, (2) the Market Approach, and specifically, the Guideline Public Company Method ("GPCM") of determining fair market value. (Appraisal Award at 27).

In brief, applying the DCF method, PwC considered Agency Within's projected performance through 2023 and "analyzed [this] projected financial information to understand the reasonableness of [Agency Within's] projected growth rates based on [its] historical performance . . . , industry data, and relevant market data." (*Id.* at 35). PwC then discounted Agency Within's projections to the present to determine its current value. (*Id.* at 35-36). Based on an analysis of "public guideline companies with different levels of maturity operating in the same industry as Agency Within," PwC applied a discount rate of 14% using a weighted average cost of capital ("WACC") analysis. (*Id.* at 28, 32-34).

Applying GPCM, PwC also determined Agency Within's operating value by analyzing comparable publicly traded companies. (*Id.* at 37-38; *see also id.* at 29 (listing the companies)).

Then, PwC determined what weight it should give to each of these two operative values, ultimately deciding to give equal weight to both its DCF and GPCM calculations. (*Id.* at 47).

PwC next analyzed the appropriate discount to apply to Gluck's shares to account for the lack of marketability of his minority interest. (*Id.* at 39-45). After considering a number of studies, numerous option-pricing models, and a variety of factors outlined in a leading U.S. Tax Court case, PwC determined the appropriate discount rate. (*Id.* at 39-45).

Finally, after converting its operating value figure into fair market value and applying the lack of marketability discount, PwC determined that the fair market value of Gluck's repurchased company interest is $4.7 million. (*Id.*).

The Parties Cross-Move to Confirm or Vacate the Appraisal Award

On August 21, 2019, Petitioners moved this Court to confirm PwC's Appraisal Award. (Appraisal Proceeding, Motion 002). Gluck then cross-moved for vacatur. (*Id.*). On May 7, 2020, this Court denied both motions, concluding:

> The core question is whether the facts support Gluck's assertion that he did not have a fair opportunity to present his case [to PwC]. Yakuel argues, with some support, that Gluck was able to present significant evidence to PwC. Gluck argues, with some support, that he was not able to provide evidence that would have been material to PwC's appraisal. The record is not sufficiently clear at this stage to permit a decision on this question one way or the other.

(Appraisal Proceeding, NYSCEF 249 (Order on Motion 002 at 10)).

An evidentiary hearing has not been held.

Gluck Forces the Parties into Arbitration and Seeks to Challenge PwC's Appraisal Award – an Improper Request that the Arbitrator Denies

Meanwhile, prior to the issuance of the Appraisal Award, Gluck's conduct – specifically, his instance that the Amendment, including the repurchase right, was unenforceable – necessitated Petitioners' initiation of arbitration. (Arbitration Petition ¶¶ 40-42). Relevant here, Gluck asserted claims alleging that he was not sufficiently included in the appraisal process and purported to "reserve all available rights and remedies to add additional claims or requests for relief related to the valuation opinion PWC may issue in the future." (Appraisal Proceeding, NYSCEF 39).

Only after PwC issued its Appraisal Award did Gluck attempt to act on this reservation of rights – requesting an equitable accounting of the value of his 35% interest in Agency Within. (Appraisal Proceeding, NYSCEF 48 (Arb. Order 6)). Petitioners objected and the arbitrator denied Gluck's request, reasoning "[t]he Amendment provides a process for establishing this valuation that should be permitted to run its course," and that Gluck's appraisal claim would improperly "circumvent[] that process." (*Id.*). The arbitrator also held that, in light of the parties' pending petitions before this Court relating to the Appraisal Award, "this question" regarding the value of Gluck's shares "is now properly before the [Supreme C]ourt" and not the arbitrator. (*Id.*).

Gluck Discloses a Valuation Expert Who Improperly Challenges PwC's Appraisal Award, and Conducts His Own Appraisal

Undeterred by the arbitrator's determination that he cannot "challenge [] the PWC valuation itself" in arbitration (*id*.), Gluck retained an appraiser, Bruce Bingham, and instructed him to do exactly that – provide his own independent calculation of Gluck's 35% interest in Agency Within. (Arbitration Petition ¶¶ 43-47; Kolcun Aff. at Ex. A ("Bingham Valuation")). There, Bingham unequivocally states that he was "instructed to review and comment on" PwC's appraisal, and that Bingham provided ***his own*** "opinion as to the fair market value" and "the amount payable pursuant to the Repurchase Option for the Gluck Interest." (*Id*. at 1).

Bingham, who works for Berkeley Research Group, LLC, is affiliated neither with PwC nor with any of the other independent appraisal firms listed in the Amendment. (Arbitration Petition ¶ 44; Amendment § 3(e)). Bingham also acknowledges that he was not "acting as a neutral third-party appraiser" as envisioned in the Amendment. (Kolcun Aff. at Ex. B, Arbitration Hearing Transcript from 02/27/2020 ("Arb. Tr.") 875:2-5). This is why, for example, Bingham "at no point sp[oke] with anyone at Agency Within" or with any of Agency Within's accountants "about [his] valuation." (*Id.* 875:6-16). Instead, Bingham "only spoke to Mr. Gluck and his lawyers about [Bingham's] valuation." (*Id.* 875:17-20).

Bingham opined that the fair market value of Gluck's minority interest, adjusted for lack of marketability, is an astounding $23.6 million. (Bingham Valuation at 6). In so concluding, Bingham rejected the company's financial projections and, instead, developed his own projections for the company (again, without ever once speaking to anyone at Agency Within) on which he conducted a DCF analysis. (*Id*. at 36-58). Like PwC, Bingham then applied a discount rate to the DCF – but not the 14% WACC calculated by PwC. (*Id.* at 53-54). Instead, Bingham, acting in his own discretion, applied a lower discount rate than PwC (which, ***alone***, resulted in a ***$14 million*** increase to the valuation). (*Id.* at 54; Arb. Tr. 961:17-962:8).

Also like PwC, Bingham determined Agency Within's operating value through GPCM. However, again, Bingham departed from PwC's analysis by selecting a different set of comparable companies and applying different multipliers (again resulting in a much higher valuation). (Bingham Valuation at 51, 59-60).

Thus, rather than merely imputing whatever meaningful data, if any, which Gluck provided into PwC's valuation model, Bingham instead performed a new valuation of Agency Within. **Bingham testified it is "true that [he] just conducted *[his] own* valuation of Agency Within**

as of the date PWC conducted its own appraisal . . . because that's what [he] [was] engaged to do." (Arb. Tr. 898:25-899:7 (emphasis added)).

The Arbitrator Declines to Preclude Bingham's Valuation and Testimony Because of Gluck's Representation that He is Not Challenging PwC's Valuation

Following receipt of Bingham's Valuation, Petitioners moved to preclude it and Bingham's testimony at the hearing, again objecting that Gluck was improperly attempting to challenge PwC's appraisal, a subject the arbitrator had already determined was outside of his jurisdiction. (Arbitration Petition ¶ 48).

The arbitrator denied Petitioners' motion. (Appraisal Proceeding, NYSCEF 244 (Arb. Order 9)). However, in so holding, the arbitrator emphasized that Gluck, notwithstanding the content of Bingham's Valuation, "states that he is expressly not seeking to challenge the PWC valuation." (*Id.* at 1).[2] The arbitrator also noted his understanding that "Respondent's claims are distinct from a challenge to the PWC valuation itself." (*Id.* at 2). Thus, although the arbitrator found that Petitioners can "argue that the Arbitrator should ignore or discount some or all of the [expert] reports," he declined to exclude Bingham's Valuation and testimony at the hearing. (*Id.*).

This Court, Likewise, Holds that PwC's Appraisal is Not at Issue in the Arbitration

On January 24, 2020, Petitioners moved this Court for an order specifically enforcing the Amendment, and directing Gluck to litigate any challenges to PwC's appraisal in this proceeding. (Appraisal Proceeding, Motion 005). Although the Court denied the request, in doing so, it clarified the claims at issue in this proceeding and the arbitration: before the Court is the question of "whether to confirm or vacate the appraisal award," whereas the arbitrator is to determine Gluck's "state law claims for damages based on Petitioner's conduct during the appraisal process."

[2] Specifically, Gluck represented that he would only seek to challenge PwC's appraisal in the arbitration "if the New York State court dismisses the confirmation proceeding in favor of arbitration." (*Id*. at 1). This Court declined to do so by denying Motion Sequence 003.

(Appraisal Proceeding, NYSCEF 245 (Order on Motion 005 at 2)). In other words, this Court reasoned that PwC's appraisal, itself, was not at issue in the arbitration. (*Id.*).

The Arbitrator Declines to Hear from PwC, Again Concluding its Appraisal is Not at Issue

The arbitration hearing was held from February 24-28, 2020. At the hearing, the arbitrator noted "[t]here was a dispute between the parties [as] to whether a PWC witness could or should be brought and questioned" and determined that a "PWC witness should not be brought." (Arbitration Proceeding, NYSCEF 25 (Tr. 341:5-9)).

In so holding, the arbitrator acknowledged that he had previously issued a subpoena to PwC for testimony concerning "whether and how PWC evaluated the reasonableness of Agency Within's financials and other information [Petitioners] provided it." (*Id.* 341:11-342:7). Nevertheless, the arbitrator affirmed, again, that challenges to PwC's appraisal are outside of his jurisdiction. (*Id.* 342:8-9 ("That sort of testimony is outside of the scope of what I'm going to be looking at.")). Rather than considering valuation issues, the arbitrator stated that "allegations about [Petitioners' conduct]" are "what [he is] going to be looking at here." (*Id.* 342:10-12). Accordingly, in light of the subpoena's focus on PwC's valuation, the arbitrator concluded "there will [not] be any useful information [from PwC] that will assist [the arbitrator] . . . so we don't need to hear from [a] PWC witness." (*Id.* 342:13-16).

The Arbitrator Issues a Final Award Erroneously Adopting Bingham's Valuation

On July 27, 2020, the arbitrator issued his final award ("Arbitration Award"). (Arbitration Petition at Ex. C). Relevant here, the arbitrator held that the Amendment, including the repurchase right, is enforceable. (Arbitration Award ¶¶ 42-54). In order to calculate the purchase price of Gluck's shares in Agency Within, the arbitrator determined that Section 3 of the Amendment requires "an objective and fair valuation of Mr. Gluck's units that did not favor either party." (*Id.* ¶ 78). He further determined that the PwC appraisal did not meet this standard because "PWC did

not consider the information provided by Mr. Gluck in any meaningful way, if at all." (*Id.*). Accordingly, the arbitrator held that Petitioners, by engaging PwC, breached the Amendment by not sufficiently including Gluck in the appraisal and "ensur[ing] that PWC would not consider information from Mr. Gluck." (*Id.*).[3]

As a remedy, the arbitrator held that Gluck "is entitled [to] the difference between the PWC valuation of his units and the amount he would have received had [Petitioners] not breached." (*Id.* ¶ 95). However, to determine this amount, the arbitrator did not order that PwC – or any of the other independent appraisal firms specified in the Amendment – calculate the impact, if any, further participation by Gluck would have had on ***PwC's*** valuation. (Arbitration Petition ¶ 54). Nor did the arbitrator look to any expert opinion as to what impact, if any, further participation by Gluck would have had on ***PwC's*** valuation (in fact, Gluck offered no such opinions).

Instead, the arbitrator – notwithstanding the Amendment's requirement that one of five specified accounting firms (and not the arbitrator) determine the valuation – incredibly decided to perform his own valuation analysis. (*Id*. ¶¶ 96-105). The arbitrator thus purported to exercise his own discretion in weighing the reasonableness of Bingham's Valuation, rejecting Petitioners' criticisms of it, and wholly adopting Bingham's Valuation of Gluck's shares. (*Id.*).

In his valuation analysis, the arbitrator did not reference or address **Bingham's admission that he "did not render an opinion on what the valuation of the purchase price would have been if Mr. Gluck was involved in *PWC's* appraisal."** (Arb. Tr. 897:19-23 (emphasis added); *see also id.* 913:19-22 (Bingham acknowledging that he "didn't just alter the inputs and

[3] The Arbitrator denied Gluck's claims of breach of fiduciary duty and fraud in the appraisal. (*Id*. ¶ 81, *26).

information from the company and then use[] PWC's valuation methods" to determine how additional information from Gluck might have changed PwC's appraisal)).

Likewise, the arbitrator did not address Bingham's testimony that – rather than considering what PwC might have done – "[he] was obviously engaged to provide [his] comments on PWC and to provide [his] own independent calculation of value." (*Id.* 905:10-12; *see also id.* 904:12-22 (Bingham testifying that he "[was] engaged to provide [his] own opinion of the fair market value of Agency Within on the exact same date that PWC rendered its opinion" and to "review and opine on PWC's methodology")).

Nevertheless, the arbitrator concluded, somehow, that Bingham's report evidences "[t]he damages to which Mr. Gluck is entitled [–] the difference between the PWC valuation of his units and the amount he would have received had [Petitioners] not breached." (Arbitration Award ¶ 95; *see also id.* ¶ 108 (**holding Bingham's Valuation is "a sufficiently accurate *proxy* for what PWC might have done in similar circumstances."**) (emphasis added)).

Therefore, adopting Bingham's Valuation of $23.6 million, the arbitrator then subtracted PwC's valuation of $4.7 million, and awarded the remaining $18.9 million to Gluck. (*Id*. ¶ 109). The arbitrator also determined that Gluck was not obligated to pay for half of the cost of PwC's appraisal, despite the unequivocal language in Section 3(e) of the Amendment requiring as much (*id*. ¶ 94), and the fact that the damages portion of his award deems that Gluck is entitled to recover the amount of PwC's valuation.

The Arbitrator Declines to Clarify the Arbitration Award

Petitioners requested that the arbitrator clarify his award to account for the fact that this Court had not yet adjudicated the pending petitions to confirm or vacate PwC's Appraisal Award. (Arbitration Petition ¶ 61). As Petitioners pointed out, the Arbitration Award simply assumes that

this Court will confirm PwC's appraisal, and provides no provision addressing the impact of vacatur of the Appraisal Award on the arbitrator's damages award. This is a significant omission, as Gluck himself represented to the arbitrator that "any damages award would be predicated on the PWC appraisal standing. Should the appraisal be vacated by the Court, damages on [Gluck's] appraisal-related counterclaims would be moot." (Appraisal Proceeding, NYSCEF 269). Petitioners' request for clarification was denied.

ARGUMENT

As both this Court and the arbitrator have repeatedly held, although Gluck could bring "state law claims for damages based on Petitioner's conduct during the appraisal process" in the arbitration, challenges to PwC's valuation belong in this Court – and not before the arbitrator. (Appraisal Proceeding, NYSCEF 245 (Order on Motion 005); *see also* Appraisal Proceeding, NYSCEF 48 (Arb. Order 6), 63 (Order on Motion 003), 244 (Arb. Order 9), 240 (Arb. Order 13); Arbitration Proceeding, NYSCEF 25 (Tr. 341-342)). However, despite this clear direction, Gluck ultimately chose not to seek damages in arbitration based on purported misconduct during the appraisal process. Gluck did not submit, for example, evidence of excessive costs he incurred because of this purported misconduct. Nor did Gluck attempt to establish what effect, if any, this purported misconduct had on ***PwC's*** valuation.

Instead, following the hearing, Gluck requested that the arbitrator perform his own valuation of Agency Within, and in doing so, adopt the appraisal by Bingham (an appraiser hand-selected and paid for by Gluck). Indeed, Bingham unequivocally testified that he "did not render an opinion on what the valuation of the purchase price would have been if Mr. Gluck was involved in PWC's appraisal." (Arb. Tr. 897:19-23; *see also id.* 913:19-22). Rather, Bingham "just

conducted [his] own valuation of Agency Within as of the date PWC conducted its own appraisal." (*Id*. 898:25-899:7).

By adopting the Bingham Valuation wholesale (as Gluck's "damages") the arbitrator committed reversible error for five separate reasons.

First, the arbitrator lacked jurisdiction to make this determination because the parties did not agree to arbitrate valuation issues. As numerous courts have held, a specific valuation provision like Section 3 of the Amendment removes jurisdiction from an arbitrator to evaluate an appraisal. Even the arbitrator acknowledged that he is without jurisdiction to "evaluate PWC's determination of the appraisal value." (Arbitration Award ¶ 61). By nevertheless performing his own valuation analysis, the arbitrator exceeded his jurisdiction and manifestly disregarded the Amendment. Indeed, in a nearly identical case, *Katz*, the Second Circuit affirmed a lower court's vacatur of a damages award of a higher valuation of a company.

Second, in addition to lacking jurisdiction, the arbitrator manifestly disregarded the Amendment by adopting the valuation performed by Bingham – who is not affiliated with one of the accounting firms specified in that agreement. In doing so, the arbitrator also improperly assessed the appropriateness of the professional valuation methods used by PwC and Bingham. His approval of just ***one*** of Bingham's valuation methods added over ***$14 million*** to the valuation.

Third, for similar reasons, the arbitrator also manifestly disregarded this Court's exclusive jurisdiction over PwC's valuation. (Appraisal Proceeding, NYSCEF 245 (Order on Motion 005)).

Fourth, the arbitrator's valuation award is impermissibly indefinite since it assumes that PwC's Appraisal Award will be confirmed.

Finally, the arbitration, itself, lacked due process and was fundamentally unfair because – in reliance on the arbitrator's repeated assurances that he was not going to reconsider PwC's

valuation – Petitioners refrained from submitting their own independent valuation of Agency Within. Additionally, the arbitrator excluded material testimony from PwC concerning its valuation, reasoning that since its valuation was not at issue he need not hear from PwC. (Arbitration Proceeding, NYSCEF 25 (Tr. 341-342)). However, the arbitrator did ultimately reconsider PwC's valuation, and he even criticized Petitioners for not offering valuation evidence: "[Petitioners] offer[] no valuation of [their] own . . . . This means that I am left with no alternative valuation to Mr. Bingham's." (Arbitration Award ¶ 106). This result is fundamentally unfair.

For these reasons, the arbitrator's award to Gluck should be vacated and – if this Court concludes that Gluck was not sufficiently involved in the appraisal – the Court should direct PwC to assess the impact, if any, further participation by Gluck would have on its appraisal.

However, to be clear, the Court need not reach the arbitrator's improper "damages" award because Gluck was more than sufficiently involved in the appraisal. Although the Amendment expressly allows Agency Within to exclude Gluck from all affairs of the company, it nevertheless went out of its way to allow participation by Gluck. That Petitioners denied Gluck's insistence on entirely dominating that process, including his demand to join the PwC engagement agreement in contravention of the plain text of the Amendment, is not evidence of improper exclusion. It was Gluck's own misconduct, this Court's order denying him additional participation, and Gluck's failure to seek relief in the arbitration that resulted in his eventual exclusion from the process.

Accordingly, in the first instance, the Court should confirm PwC's Appraisal Award and vacate the Arbitration Award to the extent it found that Gluck was insufficiently involved in the appraisal.

I. For Numerous Reasons, the Arbitration Award based on Bingham's Valuation Should be Vacated

Arbitration awards are typically entitled to deference under both the Federal Arbitration Act, 9 U.S.C. § 1, et seq., and Article 75 of the CPLR. Thus, arbitration awards are generally subject to vacatur on specified grounds, including when "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." 9 U.S.C. § 10(a)(4); CPLR 7511(b)(1)(iv); *see also Weiss v. Sallie Mae, Inc.*, 939 F.3d 105, 109-10 (2d Cir. 2019) (arbitration award subject to vacatur for "manifest disregard" of the law or the terms of the parties' agreements); *Sawtelle v. Waddell & Reed, Inc.*, 304 A.D.2d 103, 113 (1st Dep't 2003) (same).

However, where "the parties did not agree to arbitrate questions of arbitrability . . . . de novo review of the [arbitrator's] arbitrability findings [is] appropriate." *Katz v. Feinberg*, 290 F.3d 95, 96-97 (2d Cir. 2002) (affirming lower court's vacatur, for lack of jurisdiction, of arbitrator's award of a higher valuation of a company as damages where the parties' agreement required the valuation to be calculated by a nonparty appraiser); *NASDAQ OMX Grp., Inc. v. UBS, Sec., LLC*, 770 F.3d 1010, 1031 (2d Cir. 2014) (applying de novo review of arbitrator's arbitrability finding).

Here, for five separate reasons, the arbitrator's adoption of Bingham's Valuation of Agency Within as "damages" should be vacated: (1) the arbitrator lacked jurisdiction to consider valuation issues; (2) the arbitrator performed a valuation analysis in manifest disregard of the Amendment; (3) the arbitrator improperly infringed on this Court's exclusive jurisdiction to determine whether PwC's Appraisal Award should be confirmed; (4) the damages award, which is contingent on confirmation of PwC's Appraisal Award, is impermissibly vague; and (5) the award of a new valuation is fundamentally unfair and lacked due process.

1. The Arbitrator Lacked Jurisdiction to Reconsider PwC's Valuation, and His Contrary Holding is Subject to De Novo Review

The Amendment, which provides for a final and binding appraisal of fair market value by one of five specified accounting firms, divests the arbitrator of any jurisdiction to reconsider PwC's valuation or award a higher valuation of Agency Within as damages. For this reason alone, the arbitrator's damages award should be vacated.

a. The Arbitrator's Jurisdiction Determination is Subject to De Novo Review

"[T]he existence 'of both appraisal and arbitration clauses gives rise to an issue of arbitrability, an issue which it is for the courts rather than the arbitrators to resolve.'" *Am. Silk Mills Corp. (Delaware) v. Meinhard-Commercial Corp.*, 35 A.D.2d 197, 200 (1st Dep't 1970) (quoting *Dimson v. Elghanayan*, 19 N.Y.2d 316, 324 (1967)); *Katz*, 290 F.3d at 97 ("[A] court should find that the parties agreed to allow an arbitrator to resolve questions of whether an issue is arbitrable only if the agreement so provides in 'clear and unmistakable' language." (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995))); *NASDAQ*, 770 F.3d at 1031 ("The law generally treats arbitrability as an issue for judicial determination 'unless the parties clearly and unmistakably provide otherwise.'" (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002))).

Here, where the Amendment provides for a "final and binding" valuation by one of five specified accounting firms (Amendment § 3(e)), and the general arbitration clause is silent on the arbitrator's ability assess the valuation (*id.* § 5(d); LLC Agreement § 12.12), the parties simply did not agree to arbitrate the issue of whether valuation determinations were arbitrable. Thus, the arbitrator erred in determining that he had jurisdiction to decide whether the "relief that [Gluck] seeks [is] permissible." (Appraisal Proceeding, NYSCEF 240 (Arb. Order 13, reasoning that this

"fall[s] within [the arbitrator's] jurisdiction.")). This is fundamentally a question for the court to decide in the first instance.

Katz is particularly instructive. That case also involved a dispute "over the sale of one[] [partner's] interest in [a] business to the other" partner. 167 F. Supp. 2d 556, 558 (S.D.N.Y. 2001). Like the Amendment, the purchase agreement in *Katz* provided for a "final and binding" valuation conducted by a specified accounting firm. *Id.* at 559. The agreement also contained a broad, general arbitration clause. *Id.* at 560. Following the completion of the valuation, the partners asserted various claims against each other in arbitration, including claims related to the valuation. *Id.* at 560-61. Ultimately, the arbitration panel determined that there had been "material breaches" that prevented the valuation from being "conducted 'in accordance with the procedural requirements' [of] the [p]urchase [a]greement." *Id.* at 561-62. Thus, the panel "chose[] [the] remedy [of] an upward adjustment" to the valuation as damages "to 'compensate [the partner] for the harm that [] resulted from those breaches." *Id.* at 562.

The Southern District of New York reviewed this valuation adjustment de novo and vacated the damages award. *Id.* at 573. The court found the specific provision in the agreement providing for valuation by an accounting firm negated any inference that the parties had agreed "to submit the arbitrability of the valuation dispute to the panel." *Id.* at 564; *see also Katz*, 290 F.3d at 97 (Second Circuit affirming on appeal that "where a single agreement contains both a broadly worded arbitration clause and a specific clause assigning a certain decision to an independent accountant . . . the presence of both these clauses creates an ambiguity" for the court to decide). Thus, "because the parties did not clearly and unmistakably submit the issue of the arbitrability of the accountants' valuation to the panel," the court held that de novo review of the panel's valuation award was required. *Katz*, 167 F. Supp. 2d at 556; *see also Katz*, 290 F.3d at 96

(Second Circuit affirming this holding "for substantially the same reasons stated in [the district court's] thorough and scholarly opinion.").

This case is factually indistinguishable from *Katz*. The Amendment contains a specific valuation clause providing for a "final and binding" appraisal by one of five specified accounting firms. (Amendment § 3(e)). It also incorporates a general arbitration clause that is silent on the arbitrator's ability to review the valuation. (*Id*. § 5(d); LLC Agreement § 12.12). No part of the arbitration clause addresses "whether [the] question[] of arbitrability [is] within the province of the arbitrator[.]" *Katz*, 167 F. Supp. 2d at 564. Here, the record is also "replete with objections [from Petitioners] to the [the arbitrator's] jurisdiction to reconsider the valuation." *Id.* Accordingly, de novo review of the arbitrator's award of Bingham's Valuation is appropriate. *See Katz*, 290 F.3d at 96-97; *see also Am. Silk Mills Corp.*, 35 A.D.2d at 200; *NASDAQ*, 770 F.3d at 1031.

b. The Arbitrator Lacked Jurisdiction to Award a New Valuation as Damages

For substantially the same reasons that the arbitrator lacked jurisdiction to consider whether he could review PwC's valuation, he also lacked jurisdiction to actually reconsider that valuation and adopt Bingham's Valuation as a remedy: the Amendment specifies that PwC's valuation is "final and binding" and does not contemplate review by the arbitrator. (Amendment §§ 3(e), 5(d); LLC Agreement § 12.12).

Under these circumstances, the Amendment does not grant the arbitrator jurisdiction either to reconsider PwC's valuation or award Bingham's Valuation as damages. *Katz*, 290 F.3d at 97 (Second Circuit affirming "vacatur of the panel's valuation decision," reasoning that "when an agreement includes two dispute resolution provisions, one specific (a valuation provision) and one general (a broad arbitration clause), the specific provision will govern those claims that fall within it"); *Cendant Corp. v. Forbes*, 70 F. Supp. 2d 339, 342-43 (S.D.N.Y. 1999) ("When parties enter into an agreement to submit an otherwise arbitrable question to an appraiser, it is logical to

conclude that, by entering into the appraisal agreement, they intend to remove the question from the range of arbitrable matters and to be bound by the appraiser's findings."); *Whirlpool Corp. v. Philips Elecs., N.V.*, 848 F. Supp. 474, 479 (S.D.N.Y. 1994) ("There is a specific provision for resolving this [valuation] dispute . . . [a] 'final and binding' [determination by a specified accountant]. Hence, . . . it would be . . . judicially imprudent to submit this dispute to . . . arbitration under [a general arbitration clause]."); *see also In re We're Assocs. Co.*, 163 A.D.2d 393, 395 (2d Dep't 1990) ("The law does not require the parties to arbitrate a claim which they did not intend to arbitrate. Nor do arbitrators have unfettered discretion in awarding damages. Rather, the damages must be of a nature that relates to the dispute submitted to the arbitrator." (citations omitted).[4]

Katz, again, is instructive. The arbitration panel in that case concluded that "language . . . making [the accounting firm's] determination of value 'final and binding' did not prevent the arbitrators from" assessing whether "procedural requirements" were met. 167 F. Supp. 2d at 561-562. After finding that these requirements were not met, "the panel went on to conclude that it could fashion a remedy notwithstanding the language making the accountants' determination final" and imposed, as damages, a higher valuation. *Id.* at 562. This assessment of a higher valuation as damages was specifically overturned by the district court:

> **[T]he contract [does not] allow[] for arbitration of the methodology of the valuation or a remedy which alters it . . . . [As] the parties did not intend to allow for arbitral review of [the] valuation determination, it follows inexorably that the**

[4] In another examination of the bounds of arbitration and appraisal clauses, the Second Circuit reasoned, "pure accounting issues may remain even after the AAA resolves the [contract and tort] issues before it" and held, "any portion of the dispute currently before the AAA which turns on an objection to the Worksheet rather than an objection to acts that have changed the facts on which the Worksheet is based, must also be referred to [the accounting firm] for resolution." *XL Capital, Ltd. v. Kronenberg*, 145 Fed. Appx. 384, 385-386 (2d Cir. 2005).

> **arbitration panel exceeded the scope of its authority by reviewing and re-fashioning that valuation.**

Id. at 567-568 (emphasis added); *see also Katz*, 290 F.3d at 98 (affirming this holding).

Almost identical facts are present here. After finding a breach of the Amendment, the arbitrator determined – notwithstanding the Amendment's specification that PwC's appraisal is "final and binding" – that he had the authority to calculate and award a new valuation reflecting "the difference between the PWC valuation of [Gluck's] units and the amount he would have received had [Petitioners] not breached." (Arbitration Award ¶ 95). However, in light of Section 3(e) of the Amendment, the parties simply did not contract to give the arbitrator jurisdiction to perform this analysis. Nor did Bingham even purport to calculate the difference. On the contrary, Bingham testified that he "did not render an opinion on what the valuation of the purchase price would have been if Mr. Gluck was involved in PWC's appraisal" and instead he just "conducted [his] own valuation of Agency Within." (Arb. Tr. 897:19-23, 898:25-899:7; *see also id.* 913:19-22 (acknowledging that Bingham "didn't just alter the inputs and information from the company and then use[] PWC's valuation methods" to determine how additional information from Gluck might have changed PwC's appraisal)). The award of Bingham's Valuation should be vacated.

2. The Arbitrator Manifestly Disregarded the Amendment by Awarding Bingham's Valuation

In addition to exceeding his jurisdiction, the arbitrator violated Section 3(e) of the Amendment by awarding an appraisal of Agency Within's value by Bingham – a managing director at Berkeley Research Group. (Bingham's Valuation at 2). Section 3(e) of the Amendment only permits the valuation of Gluck's repurchased company shares to be performed by PwC, Deloitte Touche, EY, KPMG, or BDO USA – not the Berkeley Research Group.

This is a material violation of the Amendment's terms. Although the arbitrator purported to award what Gluck "would have received" from PwC had it considered additional information,

Bingham performed no such analysis. **Bingham expressly admitted that he "did not render an opinion on what the valuation of the purchase price would have been if Mr. Gluck was involved in *PWC's* appraisal."** (Arb. Tr. 897:19-23 (emphasis added)). And, in fact, Bingham employed a number of valuation methods that significantly departed from those employed by PwC. By his own admission, Bingham (1) used a different WACC rate, (2) considered different general public companies, and (3) used a different GPCM multiplier. (*Id*. 898:10-24). None of these departures were required by information from Gluck – rather, they were done by Bingham (who only spoke to, and was being compensated by, Gluck) in Bingham's professional discretion as an appraiser. And, each of these discretionary decisions materially increased Bingham's valuation, resulting in a collective increase of nearly $20 million to the value of Gluck's shares. (Bingham Valuation at 54, 59-60).

Moreover, PwC unilaterally selected the WACC rate, comparable public companies, and GPCM multiplier without any input or suggestion from Agency Within. (Appraisal Proceeding, NYSCEF 157 (Petitioners writing to PwC that "the Company defers to PwC's expertise and analysis" and "the Company is not contesting PwC's analysis/methodology")). Therefore, PwC used its own professional judgment to select those professional valuation methods. This undisputed fact, coupled with the arbitrator's finding that PwC performed a "reasonable valuation" (Arbitration Award ¶ 97) simply cannot be reconciled with the arbitrator's ultimate decision to replace PwC's chosen WACC rate, comparable public companies, and GPCM multiplier with the different valuation methods chosen by Bingham.

Indeed, the arbitrator evaluated the valuation methods used by PWC and Bingham, compared the two side by side, and determined that Bingham's were, in the arbitrator's own judgment, better than those selected by PwC. (Arbitration Award ¶¶ 99-100, 103). However, the

arbitrator's judgment call over ***valuation methods*** has absolutely no nexus to Gluck's breach of contract claim whereby he was allegedly prevented from giving ***factual information*** to PwC. Worse still, it was the arbitrator's very determination regarding valuation methods that improperly caused the value of Gluck's shares to be inflated by nearly $20 million, accounting for the vast majority of the difference between Bingham's Valuation and PwC's Appraisal Award. (Arbitration Award ¶ 103 (admitting Bingham's variation to the WACC rate, ***alone***, added over ***$14 million***)). In substance, the greatest benefit wrought by Gluck from this flawed arbitration was that he (through his hand-picked and highly-compensated expert) was able to select the professional valuation methodology used to value his shares. Incredibly, there is hardly any daylight between the underlying factual data used by Bingham and PwC to determine their respective valuations. (Bingham Valuation at 34 (adjustments to only some financial statements)).

Contrary to the Arbitration Award, the parties did not bargain for one party or an arbitrator to select the valuation methods to be used to determine the fair market value of Gluck's repurchased company shares – the parties bargained for one of five world renowned accounting firms to do so based upon its own professional judgment. *See Perlbinder v. Jakubovitz*, 239 A.D.2d 294, 294 (1st Dep't 1997) ("Appraisers have broad discretion as to their methods and sources of information.") (citing *Rice v. Ritz Assocs., Inc.*, 88 A.D.2d 513 (1st Dep't 1982), *aff'd* 58 NY2d 923 (1983)). Despite explicitly acknowledging this binding rule of law, the arbitrator inexplicably deemed it "inapposite" when weighing the appropriateness of the professional valuation methodologies used by PwC and Bingham. (Arbitration Award ¶ 80). The arbitrator should have recognized that he had strayed into a realm beyond his expertise, not to mention far beyond the plain confines of his contractually limited mandate set forth in the Amendment.

At bottom, the parties did not agree to a valuation done by an accountant hired by Gluck. (Arb. Tr. 875:2-5 (Bingham conceding that he was not "acting as a neutral third-party appraiser" as envisioned in the Amendment)). Nor did the parties agree, contrary to the arbitrator's finding, that an accountant hired by Gluck could conduct a valuation as **"a sufficiently accurate *proxy* for what PWC might have done in similar circumstances."** (Arbitration Award ¶ 108; emphasis added). Rather, the parties agreed to a neutral valuation performed by one of five enumerated, internationally-known accounting firms. Thus, for this reason too, the award of Bingham's Valuation should be vacated. *See, e.g., Weiss*, 939 F.3d at 109 (award subject to vacatur "'where [it] is in manifest disregard of the terms of the [parties' relevant] agreement'" (quoting *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 451 (2d Cir. 2011)).[5]

3. The Arbitrator Manifestly Disregarded the Law and this Court's Exclusive Jurisdiction over PwC's Valuation

Well prior to the arbitration hearing, the parties moved this Court to confirm or vacate PwC's appraisal (Appraisal Proceeding, Motion 002) – petitions that are pending. The arbitrator was well aware of the pendency of these petitions, and even recognized that this Court has exclusive jurisdiction over PwC's valuation. (Arbitration Award ¶ 61 (acknowledging that the "[t]he Tribunal cannot evaluate PwC's determination of the appraisal value")). Likewise, this Court, too, has held that the question of "whether to confirm or vacate the appraisal award" is before the Court. (Appraisal Proceeding, NYSCEF 245 (Order on Motion 005 at 2)). Therefore, by nevertheless awarding a new valuation, the arbitrator acted in manifest disregard of the law. *E.g., In re Port Auth. Police Benevolent Ass'n*, 235 A.D.2d 359, 359 (1st Dep't 1997) ("Since the

[5] The arbitrator's manifest disregard for the Amendment is all the more erroneous considering he expressly held that this agreement, on the whole, is enforceable. (Arbitration Award ¶ 54).

arbitrator's award clearly exceeded several specific limitations on his powers . . . it was properly vacated."); *Weiss*, 939 F.3d at 109.[6]

4. The Arbitration Award is Impermissibly Indefinite

"An arbitration award will be vacated as indefinite or nonfinal if . . . 'it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy.'" *Matter of Rosenberg v. Schwartz*, 176 A.D.3d 1069, 1071 (2d Dep't 2019) (quoting *Matter of Meisels v. Uhr*, 79 NY.2d 526, 536 (1992)). Here, the arbitrator's award of $18.9 million, which is based on the difference between PwC's valuation and Bingham's Valuation, is impermissibly indefinite because PwC's valuation has not been confirmed. The award simply does not address the effect, if any, that vacatur of the PwC valuation would have on its $18.9 million damages calculation. (Arbitration Award ¶¶ 109-110). This is especially problematic considering that even Gluck conceded, "any damages award would be predicated on the PWC appraisal standing. Should the appraisal be vacated by the Court, damages on [Gluck's] appraisal-related counterclaims would be moot." (Appraisal Proceeding, NYSCEF 269).

Accordingly, the arbitrator's blanket assumption that the PwC valuation will be confirmed only invites future controversy between the parties, and for this reason too, the damages award should be vacated. *See, e.g.*, *Papapietro v. Pollack & Kotler*, 9 A.D.3d 419, 420 (2d Dep't 2004) ("panel's decision not to address [prerequisite] issue [to the award] rendered its award not 'final and definite' and subject to vacatur"); *Matter of Rosenberg*, 176 A.D.3d at 1071 (vacating "provision at issue [that] created a new controversy between the parties with respect to the distribution of [awarded] funds").

[6] Referencing the leading decision on participation in an appraisal, the arbitrator even held that Petitioners breached New York law – the very issue that this Court must decide. (Arbitration Award ¶¶ 65 (citing *Olympia & York 2 Broadway Co. v. Produce Exchange Realty Trust*, 93 A.D.2d 465 (1st Dep't 1983)), 67, 78, 95).

5. The Arbitration was Fundamentally Unfair as the Arbitrator and Gluck Repeatedly Represented that PwC's Valuation was Not at Issue

"Although an arbitrator is not required to comport with the strictures of formal court proceedings . . . he or she must nevertheless 'grant the parties a fundamentally fair hearing.'" *Kaplan v. Alfred Dunhill of London*, 1996 U.S. Dist. LEXIS 16455, at *13-14 (S.D.N.Y. Nov. 4, 1996) (quoting *Bell Aerospace Co. Div. Of Textron, Inc. v. Local 516, UAW*, 500 F.2d 921, 923 (2d Cir. 1974)). Fundamental fairness includes a requirement "that the parties be permitted to present evidence . . . . [and] receive notice and an opportunity to be heard." *Kaplan*, 1996 U.S. Dist. LEXIS 16455, at *15.

Here, in advance of the hearing, the arbitrator repeatedly held, in accordance with Gluck's express representations, that the arbitration would not involve a challenge to PwC's valuation. (Appraisal Proceeding, NYSCEF 48 (Arb. Order 6 at 1-2, denying Gluck's request for an equitable accounting and reasoning that PwC's valuation "is now properly before the court"), 244 (Arb. Order 9 at 1, declining to exclude Bingham's testimony as "[Gluck] states that he is expressly not seeking to challenge the PwC valuation"), 240 (Arb. Order 13 at 3, holding that "[t]he Tribunal cannot evaluate the accountants' determination of the appraisal value")). Thus, as the arbitrator repeatedly held that PwC's valuation was not at issue, Petitioners saw no need to offer their own valuation at the hearing.

For similar reasons, no one from PwC testified at the hearing as to the impact, if any, further participation by Gluck would have had on PwC's valuation. Indeed, the arbitrator entirely excluded testimony from PwC, reasoning he need not hear from PwC as its valuation was not at issue. (Arbitration Proceeding, NYSCEF 25 (Tr. 341:5-16, the arbitrator holding he needs not hear "whether and how PWC evaluated the reasonableness of Agency Within's financials and other

information [Petitioners] provided it" as "[t]hat sort of testimony is outside of the scope of what I'm going to be looking at.")).

However, the final award does reevaluate PwC's appraisal. (Arbitration Award ¶¶ 96-105, 108). In doing so, the arbitrator purports to calculate "the difference between the PWC valuation of his units and the amount he would have received had [Petitioners] not breached." (*Id.* ¶ 95). But, the arbitrator prevented testimony from PwC, which could have actually addressed whether any further participation from Gluck would have materially changed its analysis.[7] Accordingly, without any notice that – contrary to all of his prior orders – the arbitrator would be reconsidering PwC's valuation purportedly based on information Gluck could have provided, Petitioners had no opportunity to submit their own valuation to rebut Bingham.[8]

The arbitrator's post-hearing decision to adjust PwC's valuation materially prejudiced Petitioners. As the arbitrator himself reasoned as he was adopting Bingham's Valuation, "[Petitioners] offer[] no valuation of [their] own . . . . This means that I am left with no alternative valuation to Mr. Bingham's." (Arbitration Award ¶ 106). Such an outcome is fundamentally unfair.

Therefore (although for the reasons set forth above – the arbitrator had no jurisdiction and acted in manifest disregard of the Amendment by reconsidering PwC's valuation) the award of Bingham's Valuation should be vacated as it was also fundamentally unfair and issued with no notice that PwC's valuation would actually be considered. *See, e.g.*, *Kaplan*, 1996 U.S. Dist. LEXIS 16455, at *21 ("The deference due an arbitrator does not extend so far as to require a

[7] Despite excluding PwC from the hearing himself, the arbitrator still inexplicably reasoned, "while we may never know for sure, it is possible that PwC would have taken a different approach had it been required to consider information and comments from Mr. Gluck." (*Id*. ¶ 98).

[8] To be clear, however, Bingham conceded that he did not opine on the amount Gluck would have received had he participated further in PwC's appraisal. (Arb. Tr. 897:19-23, 913:19-22).

district court to countenance, much less confirm, an award obtained without the requisites of fairness or due process.") (collecting cases).[9]

II. The Court Should Confirm PwC's Appraisal, and Vacate the Arbitration Award to the Extent it Found that Gluck was Insufficiently Involved in the Appraisal

Without requiring the Court to reach the foregoing damages issues, in the first instance, the Court should confirm the PwC appraisal and vacate the arbitrator's finding that Gluck was insufficiently involved in the appraisal process.

The Amendment plainly provides that following the exercise of the repurchase right, the company shall "immediately . . . have the right to exclude Gluck [] from participating in the affairs of the company." (Amendment § 3(e)). It also provides that "[t]he Company shall obtain [the] appraisal." *Id.* Indeed, the Amendment only contemplates participation by Gluck in the valuation with respect to selecting the appraiser (*id.*) – a process in which he indisputably participated. Following this selection, again, the Amendment provides that "the Company shall engage the [appraisal] firm." (*Id.*). In accordance with this provision, Agency Within engaged PwC to perform the final and binding appraisal. (Arbitration Petition ¶¶ 23-24). Additionally, Agency Within did so by signing PwC's standard form engagement letter. (Appraisal Proceeding, NYSCEF 214). Subsequently, Agency Within responded to numerous requests for information from PwC, including by making a number of company employees and professional representatives available. (Appraisal Proceeding, NYSCEF 217-218, 220). As set forth above, Agency Within also made numerous attempts to involve Gluck in the appraisal (despite no provision requiring his input), and

[9] The damages award should also be vacated to the extent the arbitrator determined that Gluck need not share the cost of PwC's appraisal. The Amendment plainly provides that the cost of the appraisal "be borne by Gluck and the Company on a 50-50 basis." (Amendment § 3(e)). Because the arbitrator's holding is contrary to this plain wording - not to mention the fact that the damages award assumes Gluck will obtain the benefit of PwC's Appraisal Award - this portion of the award, too, should be vacated. *See, e.g.*, *Weiss*, 939 F.3d at 109.

Gluck indisputably participated in conferences and written communications through which he presented his opinions to PwC. (Appraisal Proceeding, NYSCEF 6, 7, 96, 144, 215).

Although the arbitrator found that Gluck should have been a party to the engagement agreement of PwC (Arbitration Award ¶ 78), this finding is expressly contrary to the Amendment. The contract states, **"the Company *shall* engage the [appraisal] firm."** (Amendment § 3(e) (emphasis added)). It makes no mention of an engagement involving Gluck. Quite to the contrary, the Amendment provides that following Agency Within's exercise of the repurchase right, Gluck's "***sole*** right with respect to the Company and its business operations shall be to receive" payment for his shares. (*Id.* § 3(f) (emphasis added)). Accordingly, in reaching the contrary conclusion that Gluck should have been a party to PwC's engagement agreement, the arbitrator manifestly disregarded the plain terms of the Amendment. *See, e.g.*, *Weiss*, 939 F.3d at 109 (vacatur warranted "'when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice.'" (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010)).

Similarly unavailing is the arbitrator's finding that Gluck was insufficiently involved in the appraisal process. To be clear, although the Amendment imposes no requirement that Gluck be involved, Petitioners went out of their way to include him. For example, following the parties' stipulation before Judge Sherwood, Petitioners told PwC that Gluck would be participating fully, instructed PwC to include Gluck on all correspondence and meetings, and asked PwC to give Gluck all initial information provided to-date. (Appraisal Proceeding, NYSCEF 6, 215). Additionally, although Gluck was not a party to PwC's engagement agreement, Petitioners nevertheless offered to convey any information he desired to PwC. (Appraisal Proceeding, NYSCEF 144 (Petitioners writing to PwC that although "[t]he Company will remain the party

responsible for providing information to PWC . . . [Gluck] will attend any telephonic or in-person meetings, and will be copied on all written correspondence. **If Mr. Gluck wishes to add any further information or provide his opinions on any information exchanged, he will be able to do so**. . . ." (emphasis added)). The record shows Gluck indisputably presented his information and opinions to PwC. (Appraisal Proceeding, NYSCEF 7, 96 (Yakuel Statement ¶¶ 52-58)).[10]

For all intents and purposes, however, Gluck excluded himself from the appraisal by his own obstruction. (Arbitration Petition ¶¶ 33-34; Appraisal Proceeding, NYSCEF 8 (Tr. 23-28)). After Justice Sherwood ordered he had no ***further*** right to participate, Gluck voluntarily discontinued his case and sat on his rights by failing to raise the issue or seek interim relief in the arbitration. (Arbitration Petition ¶¶ 34-35). Gluck could have offered his information or opinions to impact the appraisal process, but he never even attempted to do so. Therefore, Gluck had much more than the mere "***opportunity*** to submit his view to the appraiser" required by New York law. *Olympia & York*, 93 A.D.2d at 471 (emphasis added).

These facts are more than sufficient to warrant confirmation of the Appraisal Award. PwC's appraisal followed the procedure set forth in the Amendment. There is no evidence of fraud, bias, or bad faith. The appraisal should be confirmed, and the arbitrator's contrary finding should be vacated. *See Matter of 101 W. 23 Owner I LLC v. 715-723 Sixth Ave. Owners Corp.*, 174 A.D.3d 447, 448 (1st Dep't 2019) ("there is no evidence of 'fraud, bias or bad faith' on the part of the neutral appraiser, and the appraisal followed the procedures as set forth in the lease. Accordingly, there is no basis to disturb the neutral's appraisal in this case.") (quoting *Liberty Fabrics v.*

[10] Since the arbitrator excluded PwC from the hearing, there is no basis for his "conclu[sion] that PwC did not consider the information provided by Mr. Gluck in any meaningfully way, if at all." (Arbitration Award ¶ 78). Indeed, the arbitrator admittedly reached this conclusion ***only*** because Gluck did not sign the PwC engagement agreement. (*Id.*).

Corporate Props. Assocs. 5, 223 A.D.2d 457, 457 (1st Dep't 1996)); *Olympia & York*, 93 A.D.2d at 468 ("Special Term carefully set forth the operative standards and principles applicable to appraisals, noting that appraisal is not an exact science and that the determination of an appraiser is to be upheld as long as the appraiser proceeds in good faith and without bias or fraud.").

CONCLUSION

Petitioners respectfully request that the Court confirm the Appraisal Award and vacate the Arbitration Award to the extent it found Gluck was insufficiently involved in the appraisal. Alternatively, Petitioners request that the Court vacate the arbitrator's damages award and enforce the Amendment by referring the valuation determination on which the damages award hinges (*i.e.,* the impact, if any, further participation by Gluck may have on PwC's appraisal) to PwC.

Respectfully submitted,

Dated: New York, New York
November 9, 2020

ROBINS KAPLAN LLP

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CERTIFICATION UNDER COMMERCIAL DIVISION RULE 17

I CERTIFY this contains 9,922 words in compliance with the word count limit set forth in the Rules of the Commercial Division of the Supreme Court, which this Court enlarged by order.

By: s/ Michael A. Kolcun
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