

IN THE MATTER OF AN ARBITRATION

UNDER THE ■ ARBITRATION RULES OF THE ■

BETWEEN:

CLAIMANT (U.S.A.)

Claimant/Counter-Respondent

- and -

RESPONDENT I (S---)

RESPONDENT II (S---)

Respondents/Counter-Claimants

PARTIAL AWARD

Co-Abitrator I

Co-Abitrator II

Professor Janet Walker (President)

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ABBREVIATIONS

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1 - THE ARBITRATION

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2 - HISTORY OF THE PROCEEDINGS

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3 - JURISDICTION OF THE ARBITRAL TRIBUNAL

90. The Parties' Agreement for the purchase of the stock of the Companies provided for a process by which Respondent I would deliver a Working Capital Statement (WCS) based on a good faith estimate of the Companies Working Capital and Net Financial Indebtedness three days before Closing; Claimant would provide a Final Working Capital Statement (FWCS) within sixty days of Closing; and the requisite Party would either pay the difference, or Respondent I would provide its objections to the FWCS. The SPA further provided for a dispute resolution mechanism in Section 2.3, pursuant to which, upon failure to reach a negotiated resolution, the matter would be submitted to an Accounting Firm.

91. The FWCS showed Respondent I as owing some \$X million for understated working capital. However, following an effort by the Parties to reach a negotiated resolution, Respondent I declined to participate in the nomination of an Accounting Firm as provided for in Section 2.3 of the SPA.

92. In its request for arbitration, Claimant sought, among other things, a partial award declaring that the Purchase Price Adjustment was subject to the jurisdiction of an Accounting Firm under Section 2.3 of the SPA; an order and directing Respondents to agree upon the

Accounting Firm with CLAIMANT and to submit the Purchase Price Adjustment, including the disputes set forth in Respondents' Counterclaim, to the Accounting Firm.¹

93. Claimant argued that the arbitration agreement found in Section 7 of the SPA should be interpreted as subject to the Accounting Determination process set out in Sections 2.3(b) (iii) and (iv) of the SPA, and accordingly, the Purchase Price Adjustment was beyond the jurisdiction of the Tribunal.² Claimant further argued that although the Purchase Price Adjustments had been described as raising "accounting" issues and "legal" issues, the Accounting Determination process was meant to grant exclusive authority to an Accounting Firm to determine both accounting issues and legal issues; and, if this was not the case, the issues were accounting issues.³

94. It was Respondents' position that the Purchase Price Adjustment dispute between the Parties should be determined by the Arbitral Tribunal because Section 2.3(iii) of the SPA was intended to be confined to the resolution of accounting disputes, and the disputes arising from the FWCS related to the interpretation of the contract and were not accounting disputes as contemplated by the provision for an Accounting Determination.⁴

95. Following the 30 March 2016 hearing on Jurisdiction, the Tribunal declined Claimant's application to declare that the Tribunal lacked jurisdiction to determine the

¹ Request for Arbitration, dated 19 May 2015.

² Terms of Reference, dated 13 December 2015, ¶ 16.

³ Terms of Reference, dated 13 December 2015, ¶ 16.

⁴ Terms of Reference, dated 13 December 2015, ¶ 16.

Purchase Price Adjustment and to direct Respondents' to agree on an Accounting Firm and submit to the process described in Sections 2.3(b)(iii) and (iv) of the SPA.⁵

96. On 6 April 2016, the Tribunal issued an Order on the Jurisdictional Challenge, declaring that it had jurisdiction to determine the Purchase Price Adjustment, setting the date for the Main Evidentiary Hearing and reserving costs for the Final Award.⁶ In explaining its ruling, the Tribunal observed that the arbitration agreement in Section 7 of the SPA was drafted very broadly, providing explicitly for the Tribunal's jurisdiction to resolve "...any dispute, controversy or claim arising out of, relating to or in connection with this Agreement ... or the breach, termination, interpretation, construction, rescission or validity thereof, whether based on contract, tort, statute, misrepresentation or any other legal theory...."⁷ Furthermore, the arbitration agreement contained no "carve-out" under which an arbitral tribunal would be obliged to defer certain disputes to the Accounting Determination process.⁸

97. The Tribunal noted the requirement of Sections 2.3(b)(iii) and (iv) that the Parties agree on an Accounting Firm, and that they agree on the terms of the engagement letter. This indicated that the Accounting Determination process had been designed for disputes that, when they arose, would evidently be of a kind most suitably directed to the procedurally streamlined assessment of an independent expert in the field of accounting, and it was not

⁵ Ruling on Jurisdiction, dated 6 April 2016.

⁶ Ruling on Jurisdiction, dated 6 April 2016.

⁷ Ruling on Jurisdiction, dated 6 April 2016.

⁸ Ruling on Jurisdiction, dated 6 April 2016.

designed for disputes that would require the legal expertise and procedural safeguards available in an ■ arbitration.⁹

98. The Tribunal acknowledged that had the Parties submitted the Purchase Price Adjustment to the Accounting Determination process, the determination of the Accounting Firm would have been final and binding as provided for in Section 2.3(iv). However, the finality of the ruling of such a body was not to be confused with an exclusive grant of authority to that body to decide such disputes.¹⁰

99. Moreover, while the finality of a ruling under the Accounting Determination process would have applied equally to “legal disputes” as it would have to “accounting disputes” indicating that an Accounting Firm would have jurisdiction to determine both legal and accounting disputes, this was not to be confused with an obligation to submit accounting disputes and, with those disputes, ancillary legal disputes to the Accounting Determination process.¹¹

100. In this regard, neither Party had asked the Tribunal to segregate the “accounting issues” from among the various Purchase Price Adjustment issues and to submit those issues to the Accounting Determination on the basis that the Accounting Determination process alone was a suitable process for determining those issues. Neither Party had suggested that, with the assistance of expert witnesses, the Tribunal would be unable to determine such issues. What remained clear, though, was that the Accounting Determination process

⁹ Ruling on Jurisdiction, dated 6 April 2016

¹⁰ Ruling on Jurisdiction, dated 6 April 2016

¹¹ Ruling on Jurisdiction, dated 6 April 2016

contemplated by Section 2.3(iii) and (iv) would lack the legal expertise and the procedural fairness of an ■ arbitration; and that at least some of the issues comprising the Purchase Price Adjustment dispute were of a kind that the SPA did not intend to exclude from the arbitral process.¹²

101. In its Order, the Tribunal:

- declared that it has jurisdiction over the Parties' dispute relating to the Purchase Price Adjustment and that it would determine all issues relating to those claims;
- denied all other claims for relief in connection with the jurisdictional application; and
- reserved its determination of costs for the Final Award.

102. Pursuant to the ruling of the Tribunal the Parties proceeded on the basis of the Procedural Timetable that included the Purchase Price Adjustment.

4 - THE PARTIES' CLAIMS

4.1 Overview

103. At the time of the Main Evidentiary Hearing, Claimant asserted three claims:

1. **[Regulatory] Claim**

A claim that Respondents indemnify Claimant from all damages, including all legal fees, monetary fines and penalties, arising from and in connection with the investigation by the [Government Agencies] into certain pre-Closing Regulatory Liabilities at the PURCHASED COMPANY I Facility (the “[**Regulatory** Claim”);

2. **Purchase Price Adjustment**

¹² Ruling on Jurisdiction, dated 6 April 2016.

A claim for a purchase price adjustment in connection with Respondents' Objections to the FWCS (the "**Purchase Price Adjustment**"); and

3. "**A**" State Tax Claim

A claim that Respondents perform the obligations under Section 5.2 of the SPA with respect to a pre-Closing tax assessment issued by the State of "**A**" State, including defending against the assessment and paying the resulting taxes (the "**A**" State Tax Claim").

104. At the time of the Main Evidentiary Hearing, Respondents asserted two Counterclaims:

1. **FWCS Counterclaim**

A claim for a declaration that CLAIMANT breached Section 2.3 of the SPA by failing to follow its contractual obligations in its preparation of the Final Working Capital Statement ("**FWCS Counterclaim**"); and

2. **[X INSURANCE POLICY] Counterclaim**

A claim for the proceeds of the refund of the remaining premiums for three insurance policies that had paid prior to Closing ("**[X INSURANCE POLICY] Counterclaim**").

105. The following sections (Sections 4.2 – 4.6) address each of these claims in turn, with an explanation of the manner in which the Parties' submissions, the Tribunal's analysis and the conclusions are presented.

4.2 **[Regulatory] Claim**

106. The **[Regulatory] Claim** is addressed in the Procedural Ruling on the **[Regulatory] Claim**, dated 14 December 2016, and for the reasons set out in the Procedural Ruling will be the subject of a separate award.

4.3 Purchase Price Adjustment

4.3.1 Overview and Facts

107. Section 2.3 of the SPA provided for a purchase price adjustment upon closing for the Working Capital of the Companies. Claimant made a claim based on the Final Working Capital Statement for a purchase price adjustment \$X,XXX,063. Following a brief recitation of the facts in section 4.3.2, the Tribunal addresses in section 4.3.3 the Parties' submissions on what were described as "General considerations" affecting the Parties' respective approaches to the principles governing the Purchase Price Adjustment Dispute, and in sections 4.3.4 – 4.3.10, the Tribunal addresses each of the categories of the FWCS on which claims were made. In each section, the Tribunal notes the Parties' submissions on the claim under consideration and provides its analysis and conclusions on the entitlement to the purchase price adjustment indicated in the FWCS. In section 4.3.11, the Tribunal provides a summary of its determinations of the price adjustment indicated in respect of each category of the FWCS.

108. Pursuant to SPA Section 2.2, Claimant agreed to pay Respondents a purchase price for the Companies in the amount of \$XX million as adjusted pursuant to Section 2.3.¹³

109. Pursuant to Section 2.3(i), Respondent I provided CLAIMANT with a "Working Capital Statement" ("WCS") three days prior to the Closing¹⁴ consisting of Respondents' good faith estimate of the amount by which the \$XX million purchase price should be adjusted to account for variations in the various categories of the Companies' Working

¹³ Exhibit C-1 at § 2.2.

¹⁴ Exhibit C-1 at § 2.3(b)(i).

Capital from the amounts indicated in the Targeted Net Working Capital. The WCS constituted Respondents' good faith estimate of: (i) [Closing Date] Working Capital and (ii) Net Financial Indebtedness as of the [Closing Date] and, with it, the calculation of the "Estimated Purchase Price" for the Companies.¹⁵ Respondents' WCS indicated a \$X.XXX million purchase price adjustment in CLAIMANT's favor, resulting in a corresponding reduction in the purchase price paid by CLAIMANT for the Companies.¹⁶

110. Following the [date] closing, pursuant to the procedure established in Section 2.3 of the SPA, CLAIMANT engaged [Accounting Firm] ("█") to prepare its Final Working Capital Statement ("FWCS"). On 12 December 2014, [Accounting Firm] issued a report (the "Post-Closing Accounting Report") concluding that Respondents owed a \$XX,XXX,183 purchase price adjustment to Claimant for understated working capital.¹⁷

111. Respondents objected to the FWCS and declined to pay the amount indicated by the FWCS. Respondents also declined to proceed to the Accounting Determination process outlined in Section 2.3 of the SPA for resolving such disputes. Following the Tribunal's ruling on jurisdiction in this arbitration,¹⁸ it is for this Tribunal to determine Claimant's entitlement to the purchase price adjustment indicated in the FWCS.

¹⁵ Exhibit C-1; Exhibit R-12.

¹⁶ Exhibit C-1, SPA, Exhibit A.

¹⁷ Exhibit C-1 at 6 (showing [Accounting Firm]'s final calculation to be \$XX.XXX million, which, when subtracting Respondent I's estimated calculation of \$X.XXX million, totals \$XX.XXX million).

¹⁸ Ruling on Jurisdiction, dated 6 April 2016.

4.3.2 General Interpretive Considerations and Categories of Claims

112. The Parties made submissions in their Briefs and at the Hearing on the burden and the standard for determining the Price Adjustment claims.

4.3.2.1 Claimant's Submissions on Burden and Standard

113. Claimant submitted that pursuant to SPA Section 2.3, Claimant was presumptively entitled to the purchase price adjustment reflected in FWCS, subject to responding to particular objections that Respondents made to the FWCS calculations. Under the process set out in Section 2.3(iii) for resolving disputes over the Working Capital and Net Financial Indebtedness Adjustment, Respondents bears the burden of identifying their objections and stating them in reasonable detail, as follows:

2.3(b)(iii) In the event that Seller wishes to dispute Buyer's determination of the Final Working Capital Statement, Seller shall give Buyer written notice (the "Objection Notice"), stating in reasonable detail Seller's objections to the Final Working Capital Statement.

114. Accordingly, the burden was on Respondents to demonstrate the validity of their calculations because the procedure set out in the SPA for resolving any differences over the purchase price adjustment required Respondents to make objections to the FWCS, despite the fact that price adjustment would occur at a time when Respondents were in possession of the funds in dispute and Claimant was seeking repayment of a portion of the purchase price that it had paid.

115. Furthermore, Claimant submitted that the calculations that it made on the basis of data as of Closing in respect of several of the categories of the FWCS were inherently more

reliable than those of Respondents, which were based on the trial balance of [2 weeks before Closing].¹⁹

4.3.2.2 Respondents' Submissions on Burden and Standard

116. Respondents submitted that Claimant was required to provide affirmative support for each of the adjustments to the WCS contained in the FWCS on which it sought a price adjustment because Claimant was seeking repayment of part of the purchase price based on the differences between the WCS and the FWCS.

117. In support of this, Respondents submitted, initially, that the WCS should be accepted because the WCS had been prepared on the basis of a "hard financial close" on [3 days before Closing]. Respondents subsequently revised this submission to state that the WCS had been prepared on the basis of the [two weeks before Closing] trial balance with projections through to [day of Closing].

118. Furthermore, the difference between the FWCS and WCS was too large to be plausible; and, during the course of the development of the case, Claimant had been persuaded upon reviewing the FWCS more closely, to make some adjustments to its claims, casting doubt on the price adjustment claim and Claimant's calculations.

119. Finally, Respondents submitted that the underlying explanation for this large difference was a change in the market for ■, and with this change in the market, increased challenges for Claimant in maintaining profitability and the motivation for Claimant to seek

¹⁹ Claimant's Reply at ¶¶ 233-244.

to share its losses with Respondents.²⁰ Respondents supported this allegation with various market data and charts, showing changes in the price of ■.

4.3.2.3 Tribunal Analysis and Conclusions on Burden and Standard

120. First, the process for resolving a purchase price adjustment provided for in the ordinary course under Section 2.3 of the SPA did not require a formal arbitration proceeding with an evidentiary hearing and witness testimony culminating in a detailed reasoned award. Rather, it provided that Respondents make objections to the FWCS for review and resolution by an Accounting Firm. The determination of the purchase price adjustment as provided in the SPA focused on verifying the calculations of the FWCS to which Respondents had objected, not on opening up all accounting issues to *de novo* review.

121. Second, the main basis on which Respondents sought to cast doubt on the FWCS as a whole was that the WCS had been prepared on the basis of a “hard financial close” on [3 days before Closing], or in the alternative on the basis of the [2 weeks before Closing] trial balance with projections through to [date] and, therefore, should be regarded as fundamentally reliable. However, Claimant’s Expert testified that the WCS was prepared on the basis of the [2 weeks before Closing] trial balance, and a comparison of the WCS figures with the Companies’ general ledger, and the requirements of basic accounting principles confirmed this and precluded the possibility that it could have incorporated projections for the period [of 2 weeks before Closing].²¹

²⁰ Respondents’ Reply at ¶¶ 209-214.

²¹ Main Hearing Transcript at 324-332.

122. Respondents' Expert accepted that the WCS had been prepared on the basis of data as of [2 weeks before Closing] and not [3 days before Closing].²²

123. Claimant's Expert explained that this it not unusual for large differences in working capital occur simply on the basis of the ordinary fluctuation of working capital through the course of an accounting period, in this case, the month of [Closing]. At any given point in the month, one or more large payments may just have been made or received so as to shrink or swell considerably the working capital or the financial indebtedness that was fixed in the Target Net Working Capital Statement (TNWCS).²³

124. Accordingly, the Tribunal concludes that the Purchase Price Adjustment Claims should be assessed on the basis of the particular objections raised by Respondents to the FWCS and that it would not be reasonable to require affirmative proof for balances in the FWCS to which no objections had been made. Furthermore, the Tribunal concludes that the WCS was calculated on the basis of the [2 weeks before Closing] trial balance with no projections for the period [2 weeks before Closing] and the FWCS was calculated on the balances as at Closing.

125. Second, as will be seen in certain of the categories, the Parties made submissions variously that the WCS or the FWCS calculations should prevail because a particular accounting approach was or was not consistent with IFRS or with the Companies' historical practices, and that the SPA should be read in light of these standards. However, as was ultimately agreed by the Parties, the SPA created a clear hierarchy of standards.

²² Main Hearing Transcript at 315:15-316:17.

²³ Main Hearing Transcript at 329:10-329:20; 481:10-483:09.

126. Article 1 of the SPA provides the following definition of [Closing Date] Working Capital:

“[Closing Date] Working Capital” shall be defined as set forth in Exhibit A and shall be calculated in accordance with the Companies’ historical Financial Statements and practices for preparing combined financial statements and be in accordance with IFRS consistently applied. Exhibit A contains an example of the calculation of the [Closing Date] Working Capital as if the Closing occurred on [at the time of negotiation] and as of the [Closing Date]. For the avoidance of doubt, Buyer reserves its right to comment and challenge the amounts included in the [[Closing Date]] Working Capital and the Net Financial Indebtedness Calculations in accordance with Section 2.3.

127. The definition of [Closing Date] Working Capital thus provides three sources of guidance on the calculation of the Working Capital:

- Exhibit A;
- the Companies’ historical Financial Statements and practices; and
- IFRS.

128. Section 2.3(i) and (ii) of the SPA provide in part:

2.3(b)(i) The Working Capital Statement shall be calculated in accordance with IFRS, consistently applied, and on a basis consistent with the Companies’ past practices (to the extent in accordance with IFRS).

2.3(b)(ii) The Final Working Capital Statement shall be calculated in accordance with IFRS, consistently applied, and on a basis consistent with the Companies’ past practices (to the extent in accordance with IFRS).

129. Accordingly, the respective weight to be given to the Companies' past practices and to IFRS is clear. Where the Companies' past practices are inconsistent with IFRS, the Companies' past practices must give way to IFRS.

130. Furthermore, both of these reference points are subordinate to the terms of the SPA. In this respect, both Parties made frequent reference to the principle that "Under New York law, written agreements are construed in accordance with the parties' intent and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing.'"²⁴ Accordingly, under the SPA as governed by New York Law, the provisions of the SPA, including its Exhibits, must be given precedence over both IFRS and the Companies' past practices.

131. In sum, the Tribunal accepts that in assessing objections to the FWCS, it should apply in sequence (i) the SPA, (ii) IFRS and (iii) the Companies' past practices (to the extent such practices are consistent with IFRS).

132. Claimant's Expert's instructions were to review and consider the objections made by Respondents to the FWCS. Further, in his report, he identified the legal objections, which were for the Tribunal to decide and commented on issues relating to the legal objections only where accountancy expertise was required. He reviewed only the parts of the FWCS to which Respondents had made objections and, accordingly, did not consider matters such as (i) Prepaid deposits (cash equivalents) or (ii) Letters of Credit. Moreover, he based his analysis on the information provided, relying on the factual content of the Post Closing Accounting Report without undertaking an audit (in accordance with generally accepted auditing

²⁴ *Schron v. Troutman Saunders LLP*, 986 N.E.2d 430 (N.Y. 2013).

standards) of the information provided except as he considered necessary to form a conclusion.²⁵

133. Respondents' Expert similarly reviewed and considered the objections made by Respondents to the FWCS and noted that insofar as his report referred to legal principles, it did not represent a legal opinion or the position of the Parties. Respondents' Expert also based his analysis on the information provided to him. He did not undertake any audit, review or other procedures to verify the accuracy or completeness of the information provided, except as indicated in his report.²⁶

134. Because the Procedural Timetable agreed between the Parties provided for the exchange of documents following the delivery of the Experts' Reports, information became available to the Experts that prompted them to make some adjustments to their Reports. Furthermore, in the course of conferring with one another and receiving further documents the Experts made further adjustments to their Reports. The Tribunal regards these adjustments as improving the quality of the evidence before it and not in any way as detracting from the credibility as a whole of the testimony of either witness.

135. In the Parties' written and oral submissions they noted some apparent gaps and inconsistencies in the accounts. Where these gave rise to differences between the Parties positions, the Tribunal sought explanations and made its determinations based on the responses provided. This principle applied both to the methodology applied to certain

²⁵ Claimant's Expert Report 1.1.15-1.2.5.

²⁶ Respondents' Expert's Report 1.1.3,1.3.6.

categories of accounts in the WCS and the FWCS and to specific objections made to the FWCS.

136. In this regard, consistent with the process described above for Respondents to prepare an estimated Working Capital Statement in advance of closing, Claimant to prepare a Final Working Capital Statement upon closing, and Respondents to make any objections that they had to the Final Working Capital Statement, the Tribunal has addressed the specific objections made on the basis of the record as a whole, including the fact and opinion evidence and the submissions made by counsel.

4.3.2.4 Categories of Claims

137. The Purchase Price Adjustment Dispute was reviewed by the Parties' Experts in their reports on the basis of the following categories in which the FWCS indicated adjustments from the WCS:

- Inventory
- Accounts Receivable
- Accounts Payable
- Accrued Expenses
- Cash
- Other Pre-paid Expenses
- Current and Non-Current Liabilities
- Sales Tax Claim

138. The next eight sections (sections 4.3 – 4.11) review the Parties' submissions, and the Experts' analysis in respect of each of these categories. Each section will also include the

Tribunal's analysis and conclusions on that category of accounts. Following these sections the Tribunal summarizes its conclusions on the Purchase Price Adjustment Claim.

4.3.3 Inventory

4.3.3.1 Overview and Facts

139. The first category to be considered was Inventory. The Companies' Inventory balance reflects the Used ■ and other products, such as antifreeze and solvents, contained in tanks in facilities at the Companies' locations. Following the adjustment agreed by the Parties' experts, the remaining difference between the FWCS and the WCS was \$X,XXX,214.²⁷ Claimant claims this amount in respect of the Inventory portion of the Purchase Price Adjustment Claim.

140. The Respondents' objections to the FWCS statement of the Inventory relate to:

- a. the *volume* of the inventory;
- b. the quality of the inventory based on the *accuracy of the test results*;
- c. the valuation of the inventory based on the *classification of the contents* of the tanks;
- d. the valuation of the inventory based on the accounting treatment of the *liabilities for Contaminant I, Contaminant II, and Other Off-Spec ■*

141. The first three objections affect the Inventory calculation and, accordingly, are considered in this section. The third of these objections also relates to the Accounts Payable of the Purchase Price Adjustment Claims and so will also be considered there. The fourth objection (based on the accounting treatment of the liabilities for ■y Water, Contaminant I,

²⁷ Joint Expert FWCS, Sheet 1.

Contaminant II, and Other Off-Spec ■) affected only the Accounts Payable and, accordingly, is considered in that section.

142. Upon Closing, Claimant undertook a physical stocktake of the inventory pursuant to Section 2.8 of the SPA as follows:

Section 2.8. Used ■ Inventory. On the [Closing Date], Seller and Buyer shall (and Buyer shall cause the Companies to) undertake the sampling and inventory procedures set forth on Schedule 2.8 hereto. The costs of materials and equipment necessary to undertake the sampling and inventory described in Schedule 2.8 will be borne by the Buyer. The used ■ inventory shall be valued as set forth in Exhibit E for purposes of the estimated Working Capital and the Final Working Capital Statement.

143. This stocktake entailed identifying the Companies' tanks, railcars, tankers, drums and in-transit vehicles, and taking samples at three different depths of each of the tanks, and providing the samples to the Parties for testing.²⁸

²⁸ Exhibit C-58 - SPA Schedule 2.8 – Used ■ Inventory and Sampling Procedures.

4.3.3.2 *Volume – Claimant’s Submissions*

144. Claimant submitted²⁹ that the Inventory should be based on the physical stocktake that was conducted in the first three days following Closing (Dates) and audited by [Auditor],³⁰ rather than the Companies’ trial balances of [2 weeks before Closing]. A physical stocktake was the method of determining Inventory specified in the SPA³¹ and it was inherently more accurate than two-week old accounting records,³² even taking into account the human error naturally occurring in every physical stocktake. That human error was minimized by the review of the Count Sheets by Claimant’s Expert and Respondents’ Expert, leaving only three discrete points with which Respondents’ Expert still took issue. Claimant submitted that these discrete objections are an insufficient basis for the Tribunal to override the parties’ agreement that the FWCS be calculated as of Closing.

²⁹ Amended Statement of Claim ¶¶ 21, 72-73, 76, 79, 83-90; Claimant’s Expert Report ¶¶ 1.1.10, 2.1.1-2.2.9, 2.4.2-2.4.3, Appendix 1.3; Reply ¶¶ 232-242, 246-249, 251, 254; Second Claimant’s Expert Report ¶¶ 1.1.10, 1.2.7, 2.2.1-2.2.9, 2.3.1-2.3.4, 3.1.1-3.1.3, 3.2.2-3.2.3, 3.3.4, 3.4.1-3.4.5, Appendix 3.1, Appendix 3.2 (errata); Respondents’ Expert’s Report ¶¶ 2.1.1, 3.4.16, 4.1.2, 5.1.2, 6.1.2; Claimant’s Expert Overall Presentation pp. 7-12, 15-16; Claimant’s Expert Detailed Issue Presentation pp. 3-11; Exhibits C-1 at 2.8, C-9 at 4, C-6A at 14a-14b, C-8 at Appendix A, C-36, C-58, C-130-172, C-174, C-194, C-202-206, C-211-217, C-222, C-224, R-23; Main Hearing Transcript 532:15-533:20, 536:4-538:16, 93:4-100:7, 101:8-19; 315:15-25, 323:3-345:15, 355:4-358:14, 410:17-21, 435:16-439:18, 449:3-452:6, 477:4-486:4, 492:24-494:13, 506:10-507:9, 508:23-509:20, 513:3-18, 519:8-520:8, 526:9-528:10, 553:6-556:11, 567:12-569:15, 680:22-682:16. Claimant’s Post Hearing Brief, ¶¶ 50-52.

³⁰ Exhibits C-130 at p. 1, C-145 at tab 1, C-146 at tab 1, C-174 at tab 1.

³¹ Exhibit C-1 §§ 2.3(b)(ii), 2.8.

³² Main Hearing Transcript 532:15-533:20; 536:4-538:16; 534:22-535:5 (“Yes, in terms of the physical stocktake, I would agree that it’s an essential exercise as long as it’s [done] properly.”).

4.3.3.3 Volume – Respondents’ Submissions

145. Respondents submitted³³ that Claimant’s valuation of Inventory failed to provide reliable support for the quantity of Inventory claimed because Claimant’s expert, Claimant’s Expert, identified over 125 out of 740 tanks in which the Inventory Spreadsheet volumes³⁴ were different from the Inventory sampling worksheets,³⁵ and the Spreadsheet used for the Post Closing Accounting Report to review the Inventory contained a “Comment” column and a “Pending Issues” tab.³⁶ Further, the “corrected” Inventory volumes in the Errata to Claimant’s Expert’s Second Report’s Appendix 3.2 were based on supporting documents some of which were not clearly written³⁷ or which reported volumes in different tanks,³⁸ or

³³ Respondents’ Reply, ¶¶ 242-243; Respondents’ Expert’s Report, ¶¶ 4.1.4-4.1.6, 4.3.2; Second Respondents’ Expert’s Report, ¶¶ 4.1.3-4.1.5, 4.3.1-4.3.2, 4.3.10-4.3.11, 6.3.3, FN 67, Appendix 3, Appendix 4 (Errata), Appendix 5; Exhibits NAV-03, NAV-04, NAV-05, NAV-12 (CLAIMANT_00690), NAV-29, C-2 (p. 2), C-6A (tabs 14a-14b), C-8, R-14; Respondents’ Expert Direct Presentation, pp.14-21; Main Hearing Transcript 231:7-232:16; 377:16-378:4, 553:11-556:11; 556:12-557:2; 565:15-567:9; Amended Statement of Defense, ¶¶ 96-137; Respondents’ Reply, ¶¶ 213, 242-275; Respondents’ Opening Presentation pp. 87-90; Claimant’s Expert Report ¶¶ 2.4.2-2.4.3; Second Claimant’s Expert Report ¶¶ 3.1.3, 3.4.2, 3.4.3, 3.4.9; Experts’ Communication No. 2; Respondents’ Post Hearing Brief, ¶¶ 58-59.

³⁴ Exhibit C-6A, Tab 14; NAV-29 (inventory document cited in Post-Closing Accounting Report).

³⁵ Respondents’ Expert’s Second Report § 6.3.3 (citing Claimant’s Expert Second Report § 3.4.3, & App’x 3.2).

³⁶ NAV-20, at 10; NAV-29; Respondents’ Expert’s Second Report § 4.3.2; Main Hearing Transcript 231:19-232:23.

³⁷ *E.g.*, Exhibit C-157.

³⁸ As an example, CLAIMANT’s expert assumes that City, State Frac #45 on p. 6 of Exhibit C-214 is the same as City, State Tank 998954 in Exhibit C-6A.

did not include all the inventory in some supporting documents³⁹ or were not demonstrated to be reliable.⁴⁰

4.3.3.4 Volume – Tribunal Analysis and Conclusions

146. The Experts agreed that a physical stocktake was generally a more reliable means of determining the inventory than the Companies' previously existing records.⁴¹ Claimant's Expert acknowledged that physical stocktakes are subject to human error in that they are recorded on handwritten log sheets containing questions and comments, and the data are then inputted into the books and records.⁴² The Tribunal does not accept that these concerns undermine the overall reliance that may be placed on physical stocktakes in general or the reliance that should be placed on this physical stocktake. Furthermore, the process by which the inventory was to be determined was the subject of negotiations between the Parties. Section 2.8 of the SPA, provided for a physical stocktake in which "Seller and Buyer shall (and Buyer shall cause the Companies to) undertake the sampling and inventory procedures...". Accordingly, for these reasons, the Tribunal accepts the general reliability of the results of the physical stocktake.

147. Respondents declined to participate in the stocktake. Respondents are not thereby precluded from making specific objections to the accuracy of the process in terms of the determination of the quantity of used ■ in inventory and the testing of samples; and the

³⁹ *E.g.*, Exhibits C-138, C-141.

⁴⁰ Experts' Communication No. 2 (citing Claimant Communication. No. 95, Claimant's Expert Errata 3.2); Main Hearing Transcript 553:11-557:2.

⁴¹ Main Hearing Transcript 532:15-533:20; 536:4-538:16; 534:22-535:5.

⁴² Main Hearing Transcript 535-538.

Tribunal takes the view that it must consider the objections that Respondents have noted. However, the Tribunal does not conclude from the objections raised that Claimant's calculations of the volume of inventory should be rejected in their entirety.

148. Turning to the specific objections, Respondents objected that 24 of the Companies' tanks appeared to have been reported as having a larger volume on Buyer's inventory analysis than the listed capacity.⁴³

149. Claimant's Expert reported that he understood the stated capacity to be an approximation provided in the WCS by Seller, and the listed capacity was not a factor in Buyer's calculation of the inventory volumes. Further, having reviewed the records for the tanks in question, the inventory volumes matched Buyer's spreadsheet and inventory logs with four exceptions, three of which were due to the spreadsheet recording a "G" for "gallons" as a "O" and the fourth was due to the addition of a digit to "2232" to make it "22,332". Corrections of these four changes would have the effect of reducing the inventory balance and, thereby increasing the amount due to Claimant.⁴⁴ In other words, these errors would have favored Respondents, but have now been corrected, increasing Claimant's claim.

150. Further, due to the allegations of discrepancies in the 24 tanks, Claimant's Expert went on to review the log sheets and compare them with the Buyer's spreadsheet in respect of the other tanks. Claimant's Expert noted variances, some favouring Buyer (a reduction in Inventory of \$XX,132) and some favouring Seller (a reduction in liability for ■y Water of

⁴³ Respondents' Post-Hearing Brief ¶ 58.

⁴⁴ Second Claimant's Expert Report section 3 and Appendix 3.1.

\$XXX and for Contaminant I Cleaning of \$XXXX) for an overall increase in the amount due to Claimant of \$XXXXX.⁴⁵

151. Finally, following the observation by Respondents' Expert that the inventory log sheets for some of the tanks could not be located, Claimant's Expert reviewed every log sheet, identifying the differences involved, some in favor of Claimant, others in favor of Respondents.⁴⁶

152. Accordingly, the Tribunal is of the view that, on all the evidence, the Inventory analysis presented by Claimant, subject to the adjustments made by the Experts in the course of their review, is reliable in relation to the quantity of Used-█ and other contents of the containers on hand at Closing.

4.3.3.5 Accuracy of the Test Results – Claimant's Submissions

153. Claimant submitted⁴⁷ that Respondent's objection to the reliability of the test results should be rejected because as noted above, pursuant to the procedures agreed between the

⁴⁵ Second Claimant's Expert Report at 20; Main Hearing Transcript 506-513.

⁴⁶ Main Hearing Transcript 506:10-506:21

⁴⁷ Claimant's Reply ¶¶ 248-252; Amended Statement of Claim ¶¶ 21, 72-73, 76, 79, 83-90; Claimant's Expert Report ¶¶ 1.1.10, 2.1.1-2.2.9, 2.4.2-2.4.3, Appendix 1.3; Claimant's Reply ¶¶ 232-242, 246-249, 251, 254; Second Claimant's Expert Report ¶¶ 1.1.10, 1.2.7, 2.2.1-2.2.9, 2.3.1-2.3.4, 3.1.1-3.1.3, 3.2.2-3.2.3, 3.3.4, 3.4.1-3.4.5, Appendix 3.1, Appendix 3.2 (errata); Respondents' Expert's Report ¶¶ 2.1.1, 3.4.16, 4.1.2, 5.1.2, 6.1.2; Claimant's Expert Overall Presentation pp. 7-12, 15-16; Claimant's Expert Detailed Issue Presentation pp. 3-11; Exhibits C-1 at 2.8, C-9 at 4, C-6A at 14a-14b, C-8 at Appendix A, C-36, C-58, C-130-172, C-174, C-194, C-202-206, C-211-217, C-222, C-224, R-23; Main Hearing Transcript 532:15-533:20, 536:4-538:16, 93:4-100:7, 101:8-19; 315:15-25, 323:3-345:15, 355:4-358:14, 410:17-21, 435:16-439:18, 449:3-452:6, 477:4-486:4, 492:24-494:13, 506:10-507:9, 508:23-509:20, 513:3-18, 519:8-520:8, 526:9-528:10, 553:6-556:11, 567:12-569:15, 680:22-682:16; Claimant's Post-Hearing Brief ¶¶ 51.

Parties for determining the Inventory,⁴⁸ Claimant's physical stocktake involved taking samples from every container in the presence of [Auditor], an independent auditor, and providing these samples to both Parties for testing.⁴⁹ The procedure for determining the inventory that was negotiated between the Parties provided for Respondent to participate in the stocktake, but Respondent declined to do so. Claimant performed various tests on the samples⁵⁰ to determine the inventory valuation, which was then approved in the Post-Closing Accounting Report.⁵¹ Claimant provided copies of the original records of the samples taken during the Closing Inventory,⁵² the original records of the results of all laboratory tests performed on the Inventory,⁵³ and its analytical log of those tests.⁵⁴ The SPA did not give Respondents the right to replace Claimant's test results with Respondents' test results⁵⁵ nor did Respondents provide any other basis for such a right, which it now asserts.⁵⁶ Furthermore, Respondents offered no explanation for the discrepancies between their test results and those of Claimant, or why Respondents' sample test results should prevail.

⁴⁸ Exhibit C-58 at 2-3; Exhibits C-130-C-173, C-194 (listing the dates inventory was taken).

⁴⁹ Exhibits C-183 – C-192. Exhibit C-58 at 5.

⁵⁰ Exhibits C-182 – C-192.

⁵¹ Exhibit C-108 at 2.

⁵² Exhibits C-130 – C-172, C-194.

⁵³ Exhibits C-182 – C-192.

⁵⁴ Exhibit C-182.

⁵⁵ See CLAIMANT Reply ¶¶ at 251-52; Main Hearing Transcript 103:8-21; Exhibit R-21 at p. 67 (Section 5.5 of the draft SPA).

⁵⁶ Respondents' Reply ¶ 244.

4.3.3.6 Accuracy of the Test Results – Respondents’ Submissions

154. Respondents’ submitted⁵⁷ that Claimant did not produce the lab results that it relied upon to prepare the Inventory Spreadsheet and or internal or independent third-party testing of the samples⁵⁸ and Claimant’s documents are unreliable.⁵⁹ Respondents’ tests, which were independent, produced results indicating more valuable classification of ■ in 124 tanks than Claimant’s tests⁶⁰ and valuable classifications, rather than “off-spec ■” in 21 further tanks.⁶¹

4.3.3.7 Accuracy of the Test Results – Tribunal Analysis and Conclusions

155. Section 2. 8 of the SPA provided that

On the [Closing Date], Seller and Buyer shall (and Buyer shall cause the Companies to) undertake the sampling and inventory procedures set forth on Schedule 2.8 hereto. The costs of materials and equipment necessary to undertake the sampling and inventory described in Schedule 2.8 will be borne by the Buyer. The used ■ inventory shall be valued as set forth in Exhibit E for purposes of

⁵⁷ Respondents’ Reply, ¶¶ 242-245; Respondents’ Expert’s Report, ¶¶ 4.1.4-4.1.5, 4.3.3-4.3.5; Second Respondents’ Expert’s Report, ¶¶ 4.1.3-4.1.4, 4.3.1-4.3.6, 4.3.10, FN 67, Appendix 3, Appendix 4 (Errata), Appendix 5; Exhibits NAV-03, NAV-04, NAV-05, NAV-12 (CLAIMANT_00690), NAV-29, C-2 (p. 2), R-14, R-33, R-34, R-71, R-72, C-6A (tabs 14a-14b), C-8, C-58, C-183, C-184, C-185, C-186, C-187, C-188, C-189, C-190, C-191; Respondents’ Expert Direct Presentation pp. 14-21; Main Hearing Transcript 234:5-235:19; 236:2-22; 378:5-380:11, 231:7-232:16; 377:16-378:4, 557:12-564:2, 566:9-567:9; Amended Statement of Defense, ¶¶ 96-137; Respondents’ Reply, ¶¶ 213, 242-275; Respondents’ Opening Presentation pp. 87-89, 91-93; Claimant’s Expert Report ¶¶ 2.4.2-2.4.3; Second Claimant’s Expert Report ¶¶ 3.1.3, 3.4.1-3.4.10; Respondents’ Communication Nos. 55, 71-72; Respondents’ Post-Hearing Brief ¶ 60.

⁵⁸ Respondents’ Reply ¶¶ 242-44; Respondents’ Comm. Nos. 71-72.

⁵⁹ Respondents’ Reply ¶¶ 242-45; Respondents’ Expert’s Second Report §§ 4.3.1-4.3.6, 4.3.10, 6.3.3; Respondents’ Opening Statement, 87-93.

⁶⁰ Exhibit R-34; Amended Statement of Defense ¶ 98; Respondents’ Reply ¶¶ 242-44; Respondents’ Expert’s First Report App’x 4.1; Respondents’ Expert’s Second Report § 4.1.4; Main Hearing Transcript 376:23-377:15, 378:7-25.

⁶¹ Exhibit R-33; Respondents’ Expert’s First Report § 4.3.5; Respondents’ Expert’s Second Report §§ 4.1.4, 4.3.3, 6.3.3.

the estimated Working Capital and the Final Working Capital Statement.

156. Although Schedule 2.8 of the SPA provided that representatives of both Parties would be present when samples were taken, Respondents did not send a representative to many of the facilities to participate in the [Closing Date] Inventory,⁶² and the Parties did not conclude any agreement by which Respondents would have the right to observe and challenge the testing of the Inventory.⁶³ The procedures agreed by the Parties did not provide for a basis for Respondent to challenge the results of Claimant's contemporaneous tests or to replace those results with the results of tests of a small number of samples that it conducted several months later.

157. As with the quantification of the Inventory, the Tribunal does not regard Respondents as thereby precluded from making objections to the accuracy of the testing process,⁶⁴ but the Tribunal is not persuaded by the existence of a few objections, or by the nature and basis for those objections that Claimant's testing was unreliable either in general or in respect of the specific objections raised.

158. Accordingly, the Tribunal is of the view that the Inventory analysis presented by Claimant subject to the adjustments made by the Experts in the course of their review is reliable in relation to the quality of Used-■.

⁶² Exhibits C-130 - C-173, C-194 (listing the individuals present during the inventory process).

⁶³ Ex. R-21.

⁶⁴ Claimant's Reply ¶¶ 249-250, 252; Second Claimant's Expert Report ¶¶ 3.4.6-3.4.7, Appendix 3.3; Claimant's Expert Detailed Issue Presentation p. 6; Exhibits C-1 at 2.8, C-6A at 14a-14b, C-8 at 4, C-58, C-108, C-179, C-182-192; Main Hearing Transcript 507:10-508:7, 569:18-571:21; Claimant's Post-Hearing Brief ¶ 51; Respondents' Reply, ¶¶ 242-245; Respondents' Expert's Report, ¶¶ 4.3.3-4.3.8; Second Respondents' Expert's Report, ¶¶ 4.3.3-4.3.6; Main Hearing Transcript: 388:17-23; Respondents' Post-Hearing Brief ¶ 60.

4.3.3.8 **Wet Water**

4.3.3.9 **Overview**

159. The third issue arising in respect of the inventory concerned the treatment of the contents of tanks containing “Wet Water” and, in particular, *first*, whether the Wet in the Wet Water should be valued in inventory with only the water valued as a liability; and, *second*, how the tanks containing 30% water should be categorized.

160. Section 2.8 of the SPA provides that following the stocktake, “The used Wet inventory shall be valued as set forth in Exhibit E for purposes of the estimated Working Capital and the Final Working Capital Statement.” Many of the tanks containing Wet, also contained water. Article 1 of the SPA included the following definitions.

“Wet Water” shall mean used Wet included as part of a Company’s inventory which meets all of the Used Wet Specifications, except that the water content of such used Wet is greater than 30%

“Wet Wet” shall mean used Wet included as part of a Company’s inventory which meets all of the Used Wet Specifications, except that the water content of such used Wet is greater than 10% but less than 30%.

161. Exhibit E of the SPA sets out the following specifications for valuing inventory:⁶⁵

6. The value of **On-Spec Used Wet** shall be equal to (i) the number of gallons of Dry Basis Used Wet constituting such On-Spec Used Wet (as measured on the [Closing Date]); multiplied by (ii) the Wet Price Index.

7. The value of **Processed Used Wet** shall be equal to (i) the number of gallons of Dry Basis Used Wet constituting such Processed Used Wet (as measured on the [Closing Date]); multiplied by (ii) the Processed Wet Price Index.

⁶⁵ Exhibit E to the Stock Purchase Agreement, [date] Definitions, “Wet Price Index” and “Processed Wet Index.

8. The value of **Wet** ■ shall be equal to (i) the number of gallons of Dry Basis Used ■ constituting such Wet ■ (as measured on the [Closing Date]); multiplied by (ii) the ■ Price Index; multiplied by (iii) 80%.

9. **■y Water** shall be considered a liability and the amount of such liability shall be equal to (i) the number of gallons of such ■y Water (as measured on the [Closing Date]); multiplied by (ii) \$0.25.

10. The value of **Off-Spec** ■ shall be equal to (i) the number of gallons of Dry Basis Used ■ constituting such Off-Spec ■ (as measured on the [Closing Date]); multiplied by (ii) the ■ Price Index; multiplied by (iii) 80%.

11. **Other Off-Spec** ■ shall be considered a liability and the amount of such liability shall be equal to Buyer's actual costs to transport such Other Off-Spec ■ to an appropriate recycling or disposal outlet and to have such Other Off-Spec ■ recycled or disposed of in accordance with applicable Law and to clean out all tanks, trucks and containers as appropriate to remove any residual contamination by such Other Off-Spec ■ in accordance with Buyer's normal practices for handling similarly contaminated materials. (emphasis added)

4.3.3.10 Claimant's Submissions

162. Claimant submitted⁶⁶ that it was entitled to treat the entire volume of the tanks containing ■y Water as a liability because that was the valuation assigned in Exhibit E of the SPA.⁶⁷ Further, it was consistent with the Companies' historical practice to assign no value

⁶⁶ Amended Statement of Claim ¶¶ 21, 83-92; Claimant's Expert Report ¶¶ 2.2.1-2.3.9, 2.4.2-2.4.3; Reply ¶¶ 263-273; Second Claimant's Expert Report ¶¶ 2.4.4-2.4.5, 5.2.1-5.2.5; Claimant's Expert Overall Presentation p. 14; Exhibit C-1 at Art. I, § 2.8, Exhibit E; Main Hearing Transcript 538:17-543:19, 99:21-103:7, 349:3-20, 509:21-511:15, 543:20-544:6, 679:13-24. Claimant's Post-Hearing Brief ¶¶ 60-61.

⁶⁷ Exhibit C-1, SPA, Exhibit E.

to the contents of tanks containing greater than a specified water content, and there was evidence, historically, of Respondent specifying a limit of 35% for this.⁶⁸

163. In regard to the SPA treatment of tanks containing precisely 30% water, at the hearing Claimant acknowledged that this was an ambiguity in the SPA and offered to divide the effect of this equally between the Parties.⁶⁹

4.3.3.11 Respondents' Submissions

164. Respondents' first objection was that the FWCS treated the entire volume of the tanks containing ■y Water as a liability rather than treating only the water content as a liability and ascribing a positive value to the ■ content. Respondents' expert estimated that this understated the value of the inventory by \$X,XXX,186.⁷⁰

165. Respondents submitted that section 9 of Exhibit E, which provides for the valuation of ■y Water, is ambiguous unless it is read in conjunction with section 6, which provides that used ■ in the Companies' Inventory should be valued as Dry Basis Used ■, or net of all

⁶⁸ Claimant's Expert Detailed Issue Presentation pp. 9-11; Exhibit 36; Main Hearing Transcript 511:16-23, 538:17-543:19, 545:6-549:8, 679: 13-680:6; Respondents' Expert's First Report § 4.3.9-4.3.11; Respondents' Expert Presentation, 16; Main Hearing Transcript 372:16-374:9 (citing Exhibit 36); Main Hearing Transcript, 664:25-665:25.

⁶⁹ Claimant's Reply ¶ 253; Exhibits C-1 at Art. 1, § 2.8, Exhibit E, C-6A at 14a-14b, C-8 at 2, 4, Appendix A, C-11, C-36; Claimant's Expert Report ¶¶ 2.2.1-2.3.9, 2.4.2-2.4.3, Appendix 3.4; Second Claimant's Expert Report ¶¶ 3.4.9-3.4.10; Claimant's Expert Detailed Issue Presentation p. 7; Main Hearing Transcript 508:8-22; 629:2-10, 679:13-24; Claimant's Post Hearing Brief ¶ 61.

⁷⁰ Respondents' Expert's Report, ¶¶ 4.3.9-4.3.11, 6.2.9; Second Respondents' Expert's Report, ¶¶ 4.3.9, 6.3.2; Main Hearing Transcript 372:16-374:9; Respondents' Post-Hearing Brief ¶ 77; Respondents' Expert's Second Report § 4.3.9 & tbl. 7.

water, and in light of an earlier draft of the SPA that evidenced the parties' intent to record the used ■ component within ■y Water as an asset.⁷¹

166. Respondents further submitted that the used ■ in tanks classified as ■y Water has value, and Claimant and the Companies have historically earned revenue by selling the used ■ extracted from such tanks.⁷² Although Claimant had submitted that Respondents' historical practice was to assign no value to the ■ in tanks containing more than 35% water,⁷³ this is inconsistent with Claimant's own historical practice of assigning value to ■ in tanks containing 75% recoverable ■.⁷⁴

167. Respondents further objected to Claimant's treatment of the contents of tanks containing precisely 30% water as ■y Water rather than Wet when such a categorization was not clearly provided for in the SPA. The definition of ■y Water provides for a water content greater than 30% and the definition of Wet ■ provides for a water content less than 30%. There is no definition in the SPA of ■ with precisely 30% water content.

⁷¹ Respondents' Post-Hearing Brief ¶¶ 76; Amended Statement of Defense ¶¶ 120-137; Respondents' Reply ¶¶ 265-71; Exhibit R-21; Exhibit C-1, SPA, Art. 1; Exhibit R-23.

⁷² Respondents' Post-Hearing Brief ¶¶ 76; Respondents' Amended Statement of Defense, ¶¶ 120-137; Respondents' Reply ¶¶ 266, 269 (citing CLAIMANT Reply ¶¶ 263-73); Main Hearing Transcript, 664:25-666:4; Exhibit C-155; Respondents' Post-Hearing Brief ¶¶ 70-79; Exhibit R-16, at 20 ("In FY 2012, [Purchased Company II] treated approximately . . . 54.5 million gallons of ■y water, selling nearly 58.8 million gallons of [recycled ■]."); *id.* at 24 ("[FCCE] treats and recycles the used ■ and ■y water it collects and converts it into saleable products").

⁷³ Respondents' Expert's First Report § 4.3.9-4.3.11; Respondents' Expert Presentation, 16; Main Hearing Transcript 372:16-374:9 (citing Exhibit 36).

⁷⁴ Exhibit C-155; Main Hearing Transcript, 664:25-666:4.

168. Respondents submitted⁷⁵ that Wet ■ was defined as ■ with a greater than 10% water content and, therefore, by implication, ■ that had less than *or equal to* 10% water content should not fall within the category of Wet ■. Respondents argued that the same approach should be taken to the definition of ■y Water: that ■y Water was a category of used ■ that had a greater than 30% water content and that, by implication, ■ that had less than *or equal to* 30% water should not fall within that category.

169. Respondents declined the Tribunal's invitation to provide a view on the possibility suggested by Claimant's that the implications of this ambiguity be divided equally between the Parties'.⁷⁶

4.3.3.12 Tribunal Analysis and Conclusions

170. The Tribunal is of the view that, read as a whole, Exhibit E is unambiguous in respect of its treatment of ■y Water.

171. In particular, the provision for valuing ■y Water (section 9) is clear when read together with the provision for valuing Wet ■ (section 8). The difference between Wet ■ and ■y Water is the relative water content. In Exhibit E, the provision for valuing Wet ■ ascribes a positive value to the ■ content, with a discount from the value of On-Spec Used ■ or Processed Used ■ to recognize the cost of extracting the ■. In contrast, the provision for valuing Wet ■ treats it as a liability on the basis that the cost of extraction beyond a certain water content makes extraction commercially unreasonable. While the commercial basis for

⁷⁵ Respondents' Expert's Report, ¶¶ 4.3.6, 6.2.9; Second Respondents' Expert's Report, ¶¶ 4.3.7 - 4.3.8; Main Hearing Transcript 371:15-25, 629:15-16.

⁷⁶ Main Hearing Transcript at 629: 2-16.

the distinction is obvious, it is unnecessary to consider it because the provision in Exhibit E is clear as to the value to be given to ■y Water as distinct from Wet ■.

172. Accordingly, it is not relevant whether it might, in fact, be cost effective to extract the ■ from ■y Water with a water component greater than 30% or whether this was the historical practice of the Companies. This is because Exhibit E unambiguously provides that ■ with a water content below 30% was to be valued as ■ with a discount for the cost of extraction, and ■ with a water content above 30% was to be given a negative value. The inventory procedures set out in Schedule 2.8 provided for the contents of each tank to be ascertained and for the contents of each tank to be categorized with the volume of all the tanks falling into each category then to be added to one another to determine the total volume of ■ in each category.

173. The Tribunal concludes, therefore, that Claimant was correct in the entire contents of the tanks containing ■y Water into the requisite category and, thereby, excluding the ■ that they contained from inventory and treating the contents of these tanks as a liability in the amount of .25/gallon as this is the valuation specified in Exhibit E for tanks classified as containing ■y Water.

174. Turning to the tanks containing precisely 30% water, there is a lacuna in the definitions for the treatment of these tanks. New York law recognizes that an omission in an agreement “does not, of itself, create an ambiguity.”⁷⁷

175. The Tribunal cannot solve this omission by accepting Respondents’ submission that the Tribunal should read into the definition the phrase “or equal to” so as to include the tanks

⁷⁷ *Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195, 199 (2001).

containing 30% water in the category of Wet ■. This phrase does not appear in in any of the other categories. Moreover, the definition of Wet ■ is explicitly provided to be ■ with a water content “*of less than*” 30%. Implying such words would essentially make a new contract for the parties which we cannot do.⁷⁸

176. Rather, New York law requires that we seek the “parties’ intent,” which is best evidenced by their written agreement.⁷⁹ In searching for that intent, we must keep in mind that the “goal must be to accord the words of the contract their ‘fair and reasonable meaning.’ ... Put another way, ‘the aim is a practical interpretation of the expressions of the parties to the end that there be a ‘realization of [their] reasonable expectations.’”⁸⁰ That practical interpretation leads us to conclude that half of the total volume of the 12 tanks containing 30% water is to be valued in accordance with the formula for Wet ■ and the other half of the total volume of the 12 tanks containing 30% water are to be valued in accordance with the formula for ■y Water. That interpretation accords with the words of the Parties’ contract and with what we believe are the reasonable expectations of the Parties.

4.3.3.13 Summary of Inventory

177. For the reasons stated above, the Tribunal grants Claimant’s claims for Inventory in the amount of \$X,XXX,629.

⁷⁸ *Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195, 199 (2001).

⁷⁹ *Schron v. Troutman Sanders LLP*, 20 N.Y.3d 430, 436 (2013).

⁸⁰ *Sutton v. East River Savings Bank*, 55 N.Y.2d, 550, 555 (1982) (internal citations omitted)

4.3.4 Accounts Receivable

178. Claimant claims \$X,XXX,300 in respect of Accounts Receivable. The Working Capital Statement reflected an Accounts Receivable balance of \$XX,XXX,462 on the [Closing Date],⁸¹ and the FWCS reflected an Accounts Receivable balance of \$XX,XXX,425⁸² on the [Closing Date], for a difference of \$X,XXX,037,⁸³ including the “O” Account Receivable of \$XXX,737, which is no longer in dispute.⁸⁴ The difference in Accounts Receivable reflected differences in four accounts: 43000 (Accounts Receivable Trade, Third Party), 43400 Accounts Receivables Trade Unbilled Third Party, 43500 Doubtful Trade Receivables, Third Parties), 43800 (Prepaid Business Licenses), 44000 (Other Receivables, Third Party) and 49000 (Allowance for Doubtful Accounts).

4.3.4.1 Claimant’s Submissions

179. Claimant submits⁸⁵ that its claims for Accounts Receivable should be accepted because Claimant’s Expert checked that the FWCS Accounts Receivable balances against the general ledger, confirmed significant transactions, and concluded that the activity

⁸¹ Exhibit C-7, Email from CLAIMANT to Respondent I, 2 February 2015, pp. 13-16, 27-31.

⁸² Exhibit C-3, Letter from CLAIMANT to Respondent I: Final Working Capital Statement.

⁸³ Respondents’ Amended Statement of Defense, ¶¶ 144-149.

⁸⁴ Claimant’s Communication No. 28, 1 April 2016.

⁸⁵ Claimant’s Post-Hearing Brief, ¶¶ 53-54; Amended Statement of Claim ¶¶ 22-29, 105-106; Claimant’s Expert Report ¶¶ 3.1.1-3.4.2; Reply ¶¶ 232-242, 285-290; Second Claimant’s Expert Report ¶¶ 4.1.1-4.1.7, 4.4.1-4.4.7; Respondents’ Expert’s Report ¶¶ 2.1.1, 3.4.16, 4.1.2, 5.1.2, 6.1.2; Second Respondents’ Expert’s Report ¶¶ 5.3.3-5.3.4; Exhibits C-1 at § 2.5, C-2, C-3, C-7, C-8 at Appendix A, C-7, C-9 at 2, C-11, C-38, C-106, C-112, C-113; Claimant’s Expert Overall Presentation pp. 7-12, 15-16; Claimant’s Expert Detailed Issue Presentation pp. 12-15; Main Hearing Transcript 573:17-574:16, 580:24-582:4, 585:13-589:8, 93:4-99:20, 312:20-316:7, 323:3-345:15, 355:4-358:14, 410:17-21, 435:16-439:18, 345:16-349:2, 449:3-452:6, 455:18-456:12, 459:21-25, 471:11-472:9, 477:4-494:13; 519:8-520:8; 527:19-528:10.

between September 30 and October 16, 2014 appeared to be the result of normal trading activity – particularly so given that the same individuals were inputting journal entries pre- and post-Closing.⁸⁶ Respondents’ Expert’s limited review of Unbilled Accounts Receivable established the balance of that account to be “reasonable”;⁸⁷ and bank statements, which tie out to Accounts Receivable, confirm half the movement.⁸⁸ Absent an indication of inaccuracies, Claimant’s Expert’s confirmation of the Accounts Receivable balance justified the adjustment in Claimant’s favor.⁸⁹

180. In response to Respondents’ specific objections to three journal entries out of five thousand comprising the Accounts Receivable line item, Claimant explains as follows:

- *First*, Claimant wrote-off of a \$XXX,000 unbilled receivable related to the “T” project in accordance with Respondents’ historic practice pre-Closing to “automatically reverse” unbilled accounts receivable at the end of each accounting period.⁹⁰ In this particular case, writing off the unbilled receivable was particularly appropriate because the receivable had never been invoiced even though it was more than nine months old, and related to a dissolved joint venture.⁹¹
- *Second*, Respondents conceded during the hearing that Respondents’ Employee’s reclassification of \$X,XXX,021 regarding “O” Account just prior to the Closing was in part an error,⁹² and agreed, *after the hearing*, that Claimant is

⁸⁶ Main Hearing Transcript 333:17-344:16; 478:16-480:15; 587-589:8.

⁸⁷ Second Respondents’ Expert’s Report at ¶ 5.3.3.

⁸⁸ Main Hearing Transcript 585:21-587:5.

⁸⁹ Main Hearing Transcript 581:13-582:4; 585:13-25.

⁹⁰ Main Hearing Transcript 582:19-25.

⁹¹ Amended Statement of Claim ¶ 105-106; Claimant’s Expert Report ¶ 3.1.7; Reply ¶ n. 331; Second Claimant’s Expert Report ¶¶ 4.4.8-4.4.9; Exhibit C-38; Claimant’s Expert Detailed Issue Presentation p. 14; Main Hearing Transcript 575:11-576:24, 582:5-585:12, 589:11-593:18; Claimant’s Post-Hearing Brief ¶ 53.

⁹² Main Hearing Transcript 382:11-383:25.

entitled to a \$XXX,737 purchase adjustment for that error.⁹³ However, [Respondents' Employee] reclassified \$2,195,021 rather than the \$X,XXX,512.66 owed by "O" Account, resulting in an error of \$595,509 directly related to "O" Account (not the \$XXX,737 Respondents' Expert concluded in error). The remaining \$XX,228 of Respondents' objection is related to "Texas Energy" journal entries, among others, and was therefore properly reclassified.⁹⁴

- *Third*, Claimant's \$XXX,000 increase in the allowance for doubtful accounts was appropriate because the write-off of additional reserves was due to specific evidence that the underlying receivables were impaired, which is consistent with IFRS and a "reasonable approach."⁹⁵

4.3.4.2 Respondents' Submissions

181. Respondents challenged⁹⁶ the general reliability of the FWCS calculations of accounts receivable because Claimant's Expert did not conduct independent sampling analysis of the accruals; he reviewed the supporting information only for those accounts to which Respondents specifically objected; and he did not discuss the accounts with the Companies' accounting personnel.¹⁵⁹

182. In the absence of a hard financial close on [Closing Day] or detailed support for the Accounts Receivable balance, Respondents' Expert could not independently validate the

⁹³ Joint Expert FWCS, Summary Tab, Note 2.

⁹⁴ Amended Statement of Claim ¶¶ 105-106; Claimant's Expert Report ¶ 3.1.7; First Claimant's General Counsel Statement at ¶ 13; Reply ¶¶ 291-307; Second Claimant's Expert Report ¶¶ 4.4.10-4.4.15; Third Claimant's General Counsel Statement at ¶ 34; Exhibits C-1 at § 6.2, C-13, C-14, C-109, C-129, C-193, R-3; Claimant Communication No. 28; Claimant's Expert Detailed Issue Presentation p. 15; Main Hearing Transcript 382:11-385:6, 434:15-435:15, 575:11-577:9; Claimant's Post-Hearing Brief ¶ 53.

⁹⁵ Amended Statement of Claim ¶¶ 105-106; Claimant's Expert Report ¶¶ 3.3.1-3.4.2; Second Claimant's Expert Report ¶ 4.2.3; Exhibits C-1 Exhibit A, C-2, C-8, C-9, C-11, C-35, C-38, C-61, C-63; Claimant's Expert Detailed Issue Presentation p. 14; Claimant's Post-Hearing Brief ¶ 53.

⁹⁶ Respondents' Post-Hearing Brief, ¶¶ 62-64; Respondents' Expert's Report, ¶¶ 5.1.1-5.1.3, 5.2.3-5.2.4, 5.3.1-5.3.2, 5.3.5-5.3.6; Second Respondents' Expert's Report, ¶¶ 5.1.1-5.1.7, 5.3.1-5.3.6, 5.3.15-5.3.16; Main Hearing Transcript 443:10-444:12, 449:3-450:6, 456:24-459:17, 579:14-23.

balance as of [Closing Day].⁹⁷ However, he identified among “Unbilled Accounts Receivable” accruals that reflected estimates of activity through October 16, 2014, despite the fact that the actual accruals would have been available by the time the FWCS was submitted.¹⁶²

183. In respect of three specific objections, first, Respondents questioned the write-off of the “T” receivable of \$XX,452, challenging the determination that the invoices were uncollectible,⁹⁸ and querying the lack of corresponding decrease to the Companies’ Allowance for Doubtful Accounts, netting out the Accounts Receivable.⁹⁹ Second, Respondents submitted that Claimant’s reclassification of the “O” Account Receivable understated the Accounts Receivable balance by \$XXX,XXX.26.¹⁰⁰ Third, Respondents challenged the \$XXX,000 Allowance for Doubtful Accounts for certain receivables based on an aging report despite the Companies’ historical accounting practices of only including receivables aged over 180 days in that account.¹⁰¹

⁹⁷ Respondents’ Expert’s Second Report §§ 5.1.1-5.1.7, 5.3.1-5.3.6, 5.3.15-5.3.16; Amended Statement of Defense ¶¶ 144-49; Respondents’ Reply ¶¶ 215-20, 276-85; Respondents’ Opening Statement, 94.

⁹⁸ Respondents’ Reply ¶¶ 274, 279, 282; Main Hearing Transcript 385:7-19, 589:11-593:18; Respondents’ Expert’s Report, ¶ 5.3.3; Second Respondents’ Expert’s Report, ¶¶ 5.1.5, 5.3.6-5.3.8; Main Hearing Transcript 385:7-19.

⁹⁹ Respondents’ Reply ¶ 282; Respondents’ Expert’s Second Report § 5.3.13; Respondents’ Expert Presentation, 26; Main Hearing Transcript 386:10-24.

¹⁰⁰ Respondents’ Expert Presentation, 25; Main Hearing Transcript 382:11-385:6, 385:20-386:9; Respondents’ Expert’s Report, ¶¶ 5.3.4-5.3.5; Second Respondents’ Expert’s Report, ¶¶ 5.3.9-5.3.11; Respondents’ Expert Direct Presentation, p. 25.

¹⁰¹ Respondents’ Expert’s Second Report § 5.3.14; Main Hearing Transcript 109:25-111:3, 350:17-353:3. Amended Statement of Defense ¶¶ 61-62; Respondents’ Reply ¶¶ 217-19, 283; *compare* Exhibit C-6A, tab 2, *with* NAV-20, at 11; Respondents’ Reply ¶¶ 217-19, 283; Respondents’ Expert’s Second Report § 5.3.14; Main Hearing Transcript 109:25-111:3, 350:17-353:3; Main

4.3.4.3 *Tribunal Analysis and Conclusions*

184. Apart from the specific objections to the classification of particular items in the FWCS, the Tribunal is of the view that the explanations provided by the experts render the FWCS, in principle, more likely to provide an accurate account of the Accounts Receivable at Closing than the WCS.

185. Turning to the specific objections, the write-off of the \$336k unbilled “T” receivable from December 2013 was supported by the fact that it either had not been billed in the more than nine months since it accrued or had been billed and paid in cash. This treatment of the “T” receivable was consistent with the Companies’ historical practices, and with IFRS.

186. The need to correct the “O” Account receivable was agreed by the Parties and the miscalculation of the correction was explained by Claimant’s Expert.

187. Finally, in support of the \$226k in doubtful accounts, it was noted in respect of one of these accounts, a receivable of \$124K [Customer], that the collection of this debt was “with an outside attorney”.

188. The Tribunal is satisfied with the overall soundness of the Accounts Receivable and the responses to the specific objections raised by Respondents. The Tribunal hereby grants the Claimant’s claim in respect of the FWCS adjustment to Accounts Receivable.

Hearing Transcript 351:8-352:16 (CLAIMANT’s expert stated that IFRS is flexible and allows the company to “determine the best way of ascertaining what its bad [debt] provision would be” and then acknowledged that the Companies’ historical practice was to provision receivables aged over 180 days); Respondents’ Reply ¶¶ 217-19, 283; Respondents’ Expert’s Second Report § 5.3.14; Main Hearing Transcript 109:25-111:3, 350:17-353:3; Main Hearing Transcript 351:8-352:16. Respondents’ Expert’s Report, ¶ 5.2.4; Second Respondents’ Expert’s Report, ¶ 5.3.14.

4.3.4.4 Summary of Accounts Receivable

189. For the reasons stated above, the Tribunal grants Claimant's claims for adjustments to the Accounts Receivable in the amount of \$X,XXX,300.

4.3.5 Accounts Payable

4.3.5.1 Overview of Accounts Payable

190. Claimant sought adjustments to the Accounts Payable for the estimated costs of disposal and cleaning of tanks containing Contaminant I (\$XXX,724), Contaminant II (\$XXX,000), ■y Water (\$XXX,055) and other Off-Spec ■ (\$XXX,265); and for Trade and Trade and Non-Trade Payables (\$XXX,986).

4.3.5.2 Disposal and Cleaning Costs - Overview

191. Claimant claimed \$XXX,724¹⁰² for the estimated costs for the disposal of Contaminant I and cleaning of the tanks containing it, \$XXX,000 for the estimated costs for the disposal of Contaminant II and cleaning of the tanks containing it; and \$XXX,055 for ■y Water, including \$XXX,265 for the estimated costs of transporting and disposing of Other Off-Spec ■. Respondents challenged the entitlement of Claimant to value the costs of disposal and clean-up of PCB's and on the basis of estimated accruals rather than actual costs; and in respect of the accrual for Contaminant II Respondents also challenged the test results warranting the Tank 8 disposal and clean-up.

¹⁰² This figure was reduced following the Main Evidentiary Hearing from \$1XXX,082.

4.3.5.3 *Claimant's Submissions on Disposal and Cleaning Costs*

192. Claimant submitted that it is entitled to recover its estimated costs of disposal of Contaminant I,¹⁰³ Contaminant II,¹⁰⁴ and other Off-Spec ■, and cleaning of the tanks pursuant to Exhibit E of the SPA, which reads as follows:

Other Off-Spec ■ shall be considered a liability and the amount of such liability shall be equal to *Buyer's actual costs* to transport such Other Off-Spec ■ to an appropriate recycling or disposal outlet and to have such Other Off-Spec ■ recycled or disposed of in accordance with applicable Law and to clean out all tanks, trucks and containers as appropriate to remove any residual contamination by such Other Off-Spec ■ *in accordance with Buyer's normal practices* for handling similarly contaminated materials.”¹⁰⁵
(emphasis added)

193. Claimant submitted that it was entitled to accrue an estimated cost for disposing and cleaning the tanks because this is a method of valuation and not a mechanism for the reimbursement of Claimant's costs.¹⁰⁶ Claimant was entitled to accrue these estimated costs in the FWCS, despite not having incurred them because, this was “in accordance with Buyer's normal practices”, and the cleaning of, for example, Contaminant I from a tank was a discrete

¹⁰³ Amended Statement of Claim ¶¶ 83-87, 93-96; Claimant's Expert Report ¶¶ 2.2.1-2.2.9, 2.3.10-2.3.23, 2.4.4-2.4.6; Claimant's Reply ¶¶ 243-244, 260-262; Second Claimant's Expert Report ¶¶ 5.3.1-5.3.9; Exhibit C-1 at § 2.8, Exhibit E, C-6A; Claimant's Expert Detailed Issue Presentation p. 19; Main Hearing Transcript 99:21-101:7, 349:3-20, 626:19-25, 633:18-634:6; Claimant's Post-Hearing Brief ¶¶ 52, 55-56.

¹⁰⁴ Amended Statement of Claim ¶¶ 97-103; Claimant's Expert Report ¶¶ 2.3.24-2.3.28, 2.4.4, 2.4.7; Claimant's Reply ¶¶ 274-280; Second Claimant's Expert Report ¶¶ 5.4.1-5.4.6; Claimant's Employee I Statement ¶ 21; Exhibits C-1 at Art. 1, Exhibit E, C-4 at 1-2, C-8 at 4, C-58 at 8, 11, C-11, C-43 at 1, 4, C-44 at 1, C-45 at 1-2, C-173, C-182; Claimant's Expert Detailed Issue Presentation p. 19; Main Hearing Transcript 571:9-15, 627:2-11.

¹⁰⁵ Exhibit C-1 at Exhibit E ¶ 11.

¹⁰⁶ Exhibit C-1 at Exhibit E.

event¹⁰⁷ unrelated to the turnover of inventory.¹⁰⁸ Furthermore, Claimant's Employee I's evidence was that, in the case of the tank containing the Contaminant I, it had been locked down from Closing to cleanup, thereby confirming that these expenses accrued before Closing.¹⁰⁹

194. Furthermore, in respect of the specific challenge to the accuracy of the testing for Contaminant II, Claimant submitted¹¹⁰ that its testing, which revealed Contaminant II in Tank 8, should be accepted because the record shows that: Claimant has now submitted five tests all finding Contaminant II;¹¹¹ the tank was locked down during the physical stocktake;¹¹² a sample was taken on Closing Day and the original laboratory result shows a positive test for Contaminant II;¹¹³ unchallenged testimony establishes that, as a result of this test, Tank 8 remained locked down, with nothing added or removed from the tank except for additional samples;¹¹⁴ a second test on the sample again found Contaminant II;¹¹⁵ on October 21, 2014,

¹⁰⁷ Claimant's Employee I Statement at ¶ 19.

¹⁰⁸ Claimant's Employee I Statement at ¶ 19.

¹⁰⁹ Claimant's Employee I Statement at ¶¶ 21-22; cf. Main Hearing Transcript 390:17-25.

¹¹⁰ Amended Statement of Claim ¶ 104; Claimant's Expert Report ¶ 2.3.29; Claimant's Reply ¶¶ 281-283; Second Claimant's Expert Report ¶ 5.4.7; Exhibits C-1 at Exhibit E, C-2 at 15, C-37, C-65; Claimant's Expert Detailed Issue Presentation at 19; Main Hearing Transcript 631:2-23; Claimant's Post-Hearing Brief ¶¶ 57-59; Amended Statement of Claim ¶ 104; Claimant's Expert Report ¶ 2.3.29; Reply ¶¶ 281-283; Second Claimant's Expert Report ¶ 5.4.7; Exhibits C-1 at Exhibit E, C-2 at 15, C-37, C-65; Claimant's Expert Detailed Issue Presentation at 19; Main Hearing Transcript 631:2-23; Claimant's Post-Hearing Brief ¶¶ 57-59.

¹¹¹ Exhibit C-191 at p. 2, Line FC-70 (finding Contaminant II in sample F-188), C-43, C-44.

¹¹² Claimant's Employee I Statement at ¶ 22.

¹¹³ Exhibit C-182, "Springtown" worksheet at row 12 (noting a Lab ID of F-188); Exhibit C-191 at p. 2, Line FC-70 (finding Contaminant II in sample F-188).

¹¹⁴ Claimant's Employee I Statement at ¶ 22.

¹¹⁵ Exhibit C-43 at p. 13.

CLAIMANT took another sample from Tank 8 and an independent lab ran a third test on that sample, confirming CLAIMANT's results;¹¹⁶ on October 28, 2014, to avoid any doubt, a different independent lab ran a fourth test on yet another sample, again finding Contaminant II;¹¹⁷ a fifth test performed after CLAIMANT received Respondents' objection confirmed Contaminant II for a fifth time.¹¹⁸

195. Finally, the FWCS included in the liability for ■y Water,¹¹⁹ the liability for the disposal of Other Off-Spec ■.¹²⁰

4.3.5.4 Respondents' Submissions on Disposal and Cleaning Costs

196. In respect of the tanks containing Contaminant II¹²¹ and Contaminant I,¹²² Respondents submitted that Exhibit E of the SPA entitled Claimant to value all Other Off-

¹¹⁶ Exhibit C-43 at p. 12.

¹¹⁷ *Id.* at p. 13-14.

¹¹⁸ Exhibit C-44.

¹¹⁹ Respondents' Expert's Report ¶ n. 48; Second Respondents' Expert's Report Appendix 3, Appendix 4 (errata); Amended Statement of Claim ¶¶ 83-87, 91-92; Claimant's Expert Report ¶¶ 2.1.1-2.3.9, 2.4.2-2.4.3; Claimant's Reply ¶¶ 263-273; Second Claimant's Expert Report ¶¶ 5.2.1-5.2.5; Exhibits C-1 at Art. 1, § 2.8, Exhibit E, C-6A at 14a, C-8; Claimant's Expert Detailed Issue Presentation pp. 9-11, 18; Main Hearing Transcript 543:20-544:6.

¹²⁰ Claimant's Expert Report ¶¶ 2.2.1-2.3.9, 2.4.2-2.4.3; Reply ¶ 284; Claimant's Expert Detailed Issue Presentation p. 18; Exhibit C-6A at 14a-14b; Main Hearing Transcript 511:24-513:2, 634:15-635:10, 655:21-657:3, 676:8-21, 683:23-684:12; Amended Statement of Claim ¶¶ 83-87, 94-95, 104; Claimant's Expert Report ¶¶ 2.2.1-2.2.9, 2.4.2-2.4.3; Reply ¶¶ 284, 256-259, 281-283; Claimant's Expert Detailed Issue Presentation p. 18; Exhibit C-6A at 14a-14b; Main Hearing Transcript 511:24-513:2; 631:2-23, 637:10-20.

¹²¹ Second Respondents' Expert's Report, ¶¶ 6.3.12-6.3.13; Main Hearing Transcript 391:18-392:2, 633:4-17, 638:11-18

¹²² Respondents' Expert's Report ¶¶ 6.3.7-6.3.10; Second Respondents' Expert's Report, ¶¶ 6.2.4-6.2.5, 6.3.5-6.3.11; Exhibits C-1 (Exhibit E), C-2 (p. 15), C-8; Respondents' Expert Direct Presentation, pp.29, 32; Main Hearing Transcript 242:11-243:23; 389:23-391:4, 636:8-639:8; Amended Statement of Defense, ¶¶ 9, 102-108; Respondents' Reply, ¶¶ 203, 247-253;

Spec ■ as a liability “equal to Buyer’s *actual* costs” and Claimant did not incur any actual costs for Contaminant I cleaning until six months after the FWCS was submitted. Furthermore, the approach of accounting for Contaminant I cleaning as the costs were actually incurred was consistent with Claimant’s and Respondents’ episodic pattern of Contaminant I and Contaminant II cleaning, which would militate against regular accruals for the estimated cost of Contaminant I cleaning.

197. In respect of the tank containing Contaminant II, Respondent also challenged Claimant’s test results on the basis of an independent analysis for Contaminant II that it had commissioned of a sample received from Claimant.¹²³

198. In respect of the tanks containing ■y Water, Respondent challenged Claimant’s decision to treat the entire volume of the contents of the tanks as a liability rather than merely the water content.

199. Also in respect of the tanks that were categorized as containing ■y Water, but that ought to have been categorized as containing Off-Spec ■, Respondent challenged Claimant’s entitlement to accrue the estimated costs of disposal and cleaning for the same reasons that

Respondents' Opening Presentation, pp. 102-105; Claimant’s Expert Report, ¶¶ 2.3.22-2.3.23; Respondents’ Post-Hearing Brief ¶¶ 66-70.

¹²³ Second Respondents’ Expert’s Report, ¶¶ 6.3.12-6.3.13; Exhibit C-1 (Exhibit E); Respondents’ Expert Direct Presentation, pp.29, 33; Main Hearing Transcript 242:11-243:5; 243:24-244:18; 391:18-392:2, 633:4-17, 636:8-638:1 8; Amended Statement of Defense, ¶¶ 9, 109-117; Respondents’ Reply, ¶¶ 203, 254-261; Respondents’ Opening Presentation, pp. 102-103, 106-109; Claimant’s Expert Report ¶¶ 2.3.28-2.3.29; Second Claimant’s Expert Report ¶ 5.4.7; Respondents’ Post-Hearing Brief ¶¶ 71-74. Respondents’ Expert’s Report, ¶¶ 6.4.5-6.4.7; Second Respondents’ Expert’s Report, ¶¶ 6.2.6-6.2.7

Respondents challenged the accruals for tanks containing Contaminant I and Contaminant II.¹²⁴

4.3.5.5 Tribunal Analysis and Conclusions on Disposal and Cleaning Costs

200. Claimant's justification for its approach to the valuation of Contaminant I and PCB disposal and cleaning costs must fail in the face of the plain language of Exhibit E, which provided for the valuation to be based on *actual* costs not *estimated* costs. The reference in Exhibit E to *Buyer's normal practices* is a reference to the method of cleaning the tanks not the method of valuing the inventory. If the Parties had intended to provide for the *estimated* costs they would not have specified *actual* costs; and there was ample time between the stocktake and the submission of the FWCS for Claimant to dispose of Contaminant I, Contaminant II and Other Off-Spec ■ and clean the tanks, thereby rendering the costs actual for the purposes of a price adjustment.

201. Accordingly, although the Tribunal accepts the accuracy of Claimant's test results, in light of the Tribunal's determination above that Claimant was not entitled to recover its estimated costs for disposal and cleanup of Contaminant II, this claim fails.

202. In the case of the tanks containing ■y Water, section 9 of Exhibit E does not provide for a valuation based on actual costs, but merely, ascribes a liability of 0.25/gallon to ■y water. Accordingly, having determined that Claimant was entitled to value the entire volume of the tanks containing ■y Water as a liability, the Tribunal accepts Claimant's claim for the liability associated with the tanks containing ■y Water.

¹²⁴ Respondents' Expert's Report, ¶¶ 6.2.10-6.2.12; Second Respondents' Expert's Report, ¶¶ 6.2.2, 6.3.3-6.3.4; Main Hearing Transcript 389:18-22, 626:9-18, 655:21-656:9; Second Respondents' Expert's Report, ¶¶ 6.3.8-6.3.9, 6.3.11; Main Hearing Transcript 390:17-21.

203. However, Respondent's objection to the inclusion of the tanks containing Other Off-Spec ■ in the category of ■y Water is clearly supported by section 11 of Exhibit E, which provides for the disposal and cleaning of tanks containing other Off-Spec ■ to be based on actual costs. Accordingly, the \$154,265 of the ■y Water liability claimed for transporting and disposing of Other Off-Spec ■ must fail.

204. Finally, as a result of the Tribunal's previous determination that the implications of categorization of the tanks containing 30% water should be divided equally between the Parties (and thereby reducing the inventory adjustment claimed), the Claimant's claim for disposal costs for ■y water should be increased by \$XX,564, reflecting half the liability for the costs of disposal of the volume in the tanks containing 30% water.

205. Accordingly, the Tribunal denies Claimant's claims for \$176,724 for Contaminant I disposal and cleaning and for \$XXX,000 for PCB disposal and cleaning. The Tribunal grants the claim for \$XXX,055 for ■y Water, but reduces it by \$XXX,265 for the tanks containing Other Off-Spec ■, and increases it by \$XX,564 for half the volume of the tanks with a water content of 30% ■.

206. Accordingly, the Tribunal grants Claimant \$XXX,354 in respect of its claims for disposal and cleanup of Contaminant I, Contaminant II, ■y Water, and Other Off-Spec ■.

4.3.5.6 Trade and Non-Trade Payables

207. Claimant claims an adjustment to the Trade and Non-Trade Payables in the amount of \$XXX,986 based on difference between the FWCS calculation and the WCS calculation.

4.3.5.7 Respondents' Submissions

208. Respondents submitted¹²⁵ that Claimant is not entitled to the adjustment it seeks in the absence of affirmative support for the difference between the FWCS and the WCS, which could only have been gained through testing of the reliability and completeness of the underlying financial data and independent analysis of samples within the general ledger by Claimant's expert. Furthermore, in the absence of a hard financial close at Closing, Respondents' expert could not verify the accuracy of the accruals for goods and services received prior to Closing for invoices that had yet to be received. However, Respondents' expert identified two instances of unsupported accruals—a refund of \$XXX,000 from Hewlett Packard that does not appear to have been recorded and an IT accrual of \$XXX,000. Finally, reliance on estimates in this calculation was unreasonable when final data should have been available by the date of the FWCS submission.

4.3.5.8 Claimant's Submissions

209. After reviewing the journal entries between the trial balance used to prepare the WCS and the Closing, Claimant's Expert opined that the Accounts Payable balance movement resulted from normal-course trading activity.¹²⁶ Claimant's Expert determined that the accounts tied out with the actual cash in the Companies' bank accounts,¹²⁷ which, he explained was the "ultimate control and check." He reviewed and verified the amount of the

¹²⁵ Respondents' Expert's Report, ¶¶6.5.5-6.5.9; Second Respondents' Expert's Report, ¶¶ 6.3.14-6.3.18; Main Hearing Transcript 673:23-675:6.

¹²⁶ Main Hearing Transcript 629:25-630:25; Claimant's Expert Report at ¶ 4.3.1.

¹²⁷ Main Hearing Transcript 585:21-587:5; 672:22-673-15.

underlying support of the accruals that were specifically challenged noting that they had reversing entries that were later accrued again, giving them a net effect of zero.¹²⁸ Beyond these, in the absence of a reason to doubt that a particular entry was the result of normal course trading, Claimant's Expert explained that there was no commercially sound reason to review individually for accuracy 22,000 journal entries, particularly in view of the expedited expert determination schedule agreed to by the parties.¹²⁹

4.3.5.9 Tribunal Analysis and Conclusions

210. Respondents' expert accepted¹³⁰ that the review conducted by Claimant's expert of the Accounts Payable was sound in that he confirmed that the figures relied upon for Trade Payables agreed with the General Ledger and that all allegations of double counting had been subsequently reversed in the normal course.¹³¹ The Tribunal notes that the issues of ■y water, Contaminant I and Contaminant II, are addressed separately in this Partial Award. The Tribunal notes the support found in the tally with the cash in the Companies' bank accounts and the responses to the specific queries raised, and observes that the nature of the review

¹²⁸ *Id.* at ¶¶ 5.5.14-5.5.15.

¹²⁹ Amended Statement of Claim ¶¶ 21-29, 107-109; Claimant's Expert Report ¶¶ 4.1.1-4.3.1; Claimant's Reply ¶¶ 232-242, 308-311; Second Claimant's Expert Report ¶¶ 5.5.1-5.5.16; Respondents' Expert's Report ¶¶ 2.1.1, 3.4.16, 4.1.2, 5.1.2, 6.1.2; Exhibits C-8, C-9 C-38, C-176, C-177, C-208, C-209, C-210; Claimant's Expert Overall Presentation pp. 7-12, 15-16; Claimant's Expert Detailed Issue Presentation p. 17; Main Hearing Transcript 621:14-625:3, 630:5-25, 666:17-667:8, 676:22-678:15, 93:4-99:20, 312:20-316:7, 323:3-345:15, 355:4-358:14, 410:17-21, 435:16-439:18, 345:16-349:2, 449:3-452:6, 455:18-456:12, 459:21-25, 471:11-472:9, 477:4-494:13; 519:8-520:8; 526:9-528:10.

¹³⁰ Main Hearing Transcript 627:14.

¹³¹ Main Hearing Transcript 621:13-627:13.

was appropriate in view of the expedited expert determination to which the Parties had agreed in the SPA.

211. Accordingly, the Tribunal grants Claimant's claim for \$482,986 in respect of Trade and Non-Trade Payables.

4.3.5.10 Summary of Accounts Payable

212. For the reasons stated above, the Tribunal grants Claimant's claims for Accounts Payable in the amount of \$X,XXX,340: which includes \$XXX,354 in respect of its claims for disposal and cleanup of Contaminant I, Contaminant II, ■y Water, and Other Off-Spec ■; and \$XXX,986 in respect of Trade and Non-Trade Payables.

4.3.6 Accrued Expenses

4.3.6.1 Overview

213. Claimant seeks Adjusted "Accrued Expenses" of \$X,XXX,371 as part of FWCS adjustment to the WCS; or, in the alternative, to include Sales Tax Payable and Property Tax Payable in Net Financial Indebtedness; or, in the alternative, to recover \$XXX,134 for Pre-Closing Taxes under Section 5.2(a) of the SPA, which claim is considered in a subsequent section.

214. Claimant initially sought Accrued Expenses as of the [Closing Date] of \$X,XXX,237,¹³² but the Parties later agreed to a withdrawal of a portion of the claim – for \$X,XXX,509 – for Accrued Vacation, and to a reconciliation to the General Ledger that would increase the amounts in the category of Accrued Expenses by \$XX,643, This resulted

¹³² Exhibit C-3, Letter from CLAIMANT to Respondent I: Final Working Capital Statement.

in a claim for “Adjusted Accrued Expenses” of \$X,XXX,371.¹³³ These expenses included “(ii) \$XXX,000 in “accrued wages,” “accrued commissions” and “accrued benefits”; (iii) \$X.XXX million in “sales tax payable;” and (iv) a property tax payable of *negative* \$XXX,000 (constituting a credit to Respondent I for property taxes already paid).¹³⁴

215. Claimant sought to have these amounts recognized as implicit components of either the Working Capital or the Net Financial Indebtedness in the FWCS. In the event that the Tribunal determined that Claimant did not accept that Accrued Expenses should be included in the FWCS, Claimant had sought in its Amended Statement of Claim, in the alternative, \$XXX,134 in sales tax that would be payable under Section 5.2 of the SPA. This claim will be addressed below in section 4.3.10.

216. The definition of “[Closing Date] Working Capital” in Article 1 of the SPA reads as follows:

“[Closing Date] Working Capital” *shall be defined as set forth in Exhibit A* and shall be calculated in accordance with the Companies’ historical Financial Statements and practices for preparing combined financial statements and be in accordance with IFRS consistently applied. *Exhibit A contains an example of the calculation* of the [Closing Date] Working Capital as if the Closing occurred [at the time of the contract] and as of the [Closing Date]. *For the avoidance of doubt, Buyer reserves its right to comment and challenge the amounts* included in the [Closing Date] Working Capital and the Net Financial Indebtedness Calculations in accordance with Section 2.3.¹³⁵
(emphasis added)

¹³³ Claimant’s Expert Report, Table 5-2.

¹³⁴ Exhibit C-2 at 16.

¹³⁵ Exhibit C-1, SPA, Article 1.

217. The definition of “Financial Indebtedness” in Article 1 of the SPA reads as follows:

“Financial Indebtedness” shall mean, as of any date, without duplication, the aggregate amount of any indebtedness (without duplication) for or in respect of (a) moneys borrowed; (b) any amount raised by acceptance under any acceptance credit facility; (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument; (d) the amount of any liability in respect of any lease or hire purchase contract which would, in accordance with IFRS, be treated as a finance or capital lease; (e) receivables sold, assigned or discounted (other than any receivables to the extent they are sold on a non-recourse basis); (f) any amount raised under any other transaction (including any forward sale or purchase agreement) having the commercial effect of a borrowing; (g) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, standby or documentary letter of credit or any other instrument issued by a bank or financial institution (including, without limitation, the letters of credit set forth on Schedule 1.1(b) hereto); and (i) the amount of any liability in respect of any guarantee or indemnity for any of the items referred to in paragraphs (a) to (g) above. **“Financial Indebtedness” shall not include:** (a) insurance deductibles, (b) payables relating to capital expenditures of the business, (c) accrued vacation, (d) commercial guarantees, surety bonds or similar commitments relating to permits or other contractual obligation of the Companies or its Subsidiaries listed on Schedule 1.1(d) hereto or (e) any other obligation of the Company where there is no interest accrual or other financial costs. For illustrative purposes, Exhibit A sets forth an example of how Financial Indebtedness is calculated. For clarity, items included in calculating the Financial Indebtedness or the Net Financial Indebtedness shall not be taken into account when calculating the [Closing Date] Working Capital.

218. Exhibit A, reproduced next, includes Working Capital and Net Financial Indebtedness and it does not include in either of these sections, a line for Accrued Expenses.¹³⁶

Estimated Working Capital Components

| TB | Account name |
|-----------|--|
| 300 | Inventory Finished Goods |
| 310 | Inventory Raw Materials |
| 320 | Inventory Chemical and Additives |
| 321 | Inventory Fuels |
| 350 | Inventory Other Finished Goods |
| 430 | Accounts Receivable Trade, Third Party |
| 434 | Accounts Receivable Trade Unbilled Third Party |
| 435 | Doubtful trade receivables, third parties |
| 438 | Prepaid Business Licenses |
| 490 | Allowance for Doubtful Accounts |
| 400 | Accounts Payable - Trade |
| 410 | Accounts Payable Third Parties - Non-Trade) |

Estimated Net Financial Indebtedness Components

| TB | Account name |
|-----------|--|
| 570 | Petty Cash |
| 572 | Banks |
| 548 | Prepaid Deposits |
| 480 | Other prepaid expenses |
| 174 | Non-current bills payable on leases, third parties |
| 524 | Current lease payables, third parties |
| 520 | Loans and other current transitory bank borrowings, euros |

4.3.6.2 Claimant's Submissions

219. Claimant submitted¹³⁷ that while the definition of “[Closing Date] Working Capital” begins with “[Closing Date] Working Capital’ *shall be defined as* set forth in Exhibit A” it

¹³⁶ Exhibit C-8, Letter from Respondent I to CLAIMANT: Objection Notice, 6 February 2015, page 1 and 2.

¹³⁷ Claimant’s Reply ¶¶ 312-14 Amended Statement of Claim ¶¶ 14-19, 76-81, 110-116; Second Claimant’s Expert Report ¶ 6.4.1; Exhibits C-1 at Art. 1, C-2 at 16, C-3, C-41, R-3; Main Hearing Transcript 91:3-20; Claimant’s Post-Hearing Brief ¶ 63.

describes Exhibit A as just an *example* of the calculation of the [Closing Date] Working Capital,¹³⁸ and it goes on to provide that “For the avoidance of doubt, Buyer reserves its right to comment and challenge the amounts included in the October 16, 2014 Working Capital and the Net Financial Indebtedness Calculations in accordance with Section 2.3.”¹³⁹

220. Claimant submitted that the inherent ambiguity created by describing Exhibit A as both a definition and an example of [Closing Date] Working Capital justified reference to evidence of the negotiations. Claimant submitted that in negotiating the method of calculating the [Closing Date] Working Capital, Respondents provided only the names of the accounts and not the contents of the accounts or the basis for calculating the Targeted Net Working Capital, and this prompted Claimant to negotiate the inclusion of a reservation of the right to challenge the amounts included in the Working Capital and the Net Financial Indebtedness Calculations.

221. Claimant further submitted¹⁴⁰ that since Accrued Expenses should be accounted for in the WCS, if they are not held to be part of the Working Capital portion of the WCS, they should be included in the Net Financial Indebtedness portion of the WCS. “Net Financial Indebtedness” is defined in part by specifically excluding certain types of expenses (“*Financial Indebtedness*” shall not include:...). On the basis of the *expressio unius est*

¹³⁸ Claimant’s Reply ¶314.

¹³⁹ Exhibit C-1 at Art. 1 (defining “[Closing Date] Working Capital”); Exhibit C-41.

¹⁴⁰ Amended Statement of Claim ¶ 14-19, 110-115; Claimant’s Expert Report ¶¶ 5.2.1-5.2.2; Claimant’s Reply ¶¶ 312-316; Second Claimant’s Expert Report ¶ 6.4.2; Exhibits C-1, C-38-40; Amended Statement of Claim ¶ 14-19, 110-112, 116; Claimant’s Expert Report ¶¶ 5.2.1-5.2.2; Claimant’s Reply ¶¶ 312-317; Second Claimant’s Expert Report ¶ 6.4.2-6.4.4; Exhibits C-2 at 16, C-32 at 22; Claimant’s Post-Hearing Brief ¶ 64-65.

exclusio alterius principle, Claimant submitted that accrued wages, commissions and benefits must be presumed to be included. It is for this reason that Claimant withdrew its claim for \$XXX,000 in accrued wages, commissions and benefits, as these were specifically excluded in the definition above of Net Financial Indebtedness.

4.3.6.3 Respondents' Submissions

222. Respondent I objected that the SPA provided that [Closing Date] Working Capital “shall be defined as set forth in Exhibit A” (of the SPA), and Exhibit A contains no reference to Accrued Expenses.

223. Respondent further submitted that Claimant’s reservation of the right “to comment and challenge the amounts included in the [Closing Date] Working Capital and the Net Financial Indebtedness Calculations in accordance with Section 2.3” could not reasonably be understood as a result of a lack of opportunity our resources to learn the basis on which the WCS would be calculated. According to its public filings, Claimant spent \$X.5 million in “due diligence, legal and other expenses related to the acquisition.”¹⁴¹

224. To the extent that extrinsic evidence of the negotiations is warranted to explain an ambiguity, the Experts agreed that a useful reference point might be the contents of the Targeted Net Working Capital Statement, which might reasonably have formed the basis for the contents of the WCS. The SPA does not set out the components of the Targeted Net

¹⁴¹ Respondents’ Reply ¶ 233, citing CLAIMANT 2014 Annual Report (Form 10-K), available at: <https://www.sec.gov/Archives/edgar/data/1403431/000140343115000003/a201410-k.htm>

Working Capital statement that Respondents prepared for negotiating the Purchase Price,¹⁴² but provides merely “Targeted Net Working Capital” shall mean \$XX,XXX,749.”¹⁴³ Claimant’s expert noted that although the Targeted Net Working Capital Statement was not in the record, “With the benefit of hindsight and having spent however long pouring over the accounts, you look at what was provided and you can now work out that it's [Accrued Expenses] not in there.”¹⁴⁴

225. Turning to the submission that Accrued Expenses should be included in Net Financial Indebtedness, the *expressio unius* argument is unavailing where, as here, the definition of Net Financial Indebtedness lists both what is included and what is not included.

4.3.6.4 Tribunal Analysis and Conclusions

226. The inconsistent descriptions in Article 1 of the function of Exhibit A in the definition of [Closing Date] Working Capital – alternatively as a definition and as a mere example – are unhelpful. However, should the Tribunal be persuaded that this gave rise to an ambiguity that justified resort to evidence of the negotiations, the question would then arise as to whether the evidence of the negotiations would support the submission that Claimant’s express reservation of rights militated in favour of a finding that Exhibit A was merely an example that could later be amended as requested by Claimant.

227. In the context of the months’ long and \$4.5 million dollar negotiation of the SPA, the Tribunal is not persuaded that it would be reasonable for the Parties to agree to a reservation

¹⁴² Exhibit C-9, Letter from CLAIMANT to Respondent I, 10 March 2015, page 4. Claimant’s Expert Report, paragraph 5.1.2.

¹⁴³ Ex C-1, Article I – Definitions.

¹⁴⁴ Main Hearing Transcript at 697-698.

of rights to revise the component elements of the WCS on the basis of a difficulty in understanding the terms of the WCS. Moreover, the rights that Claimant reserved are to comment and challenge *the amounts* included in the October 16, 2014 Working Capital and the Net Financial Indebtedness *Calculations in accordance with Section 2.3*, not the component elements.

228. Commenting or challenging the WCS as lacking a category of expenses in the WCS or Net Financial Indebtedness Statement that was not specified in Exhibit A is more than a comment on or challenge to *amounts* in the *calculation* of the WCS. Moreover, the requirement that this comment or challenge be made *in accordance with Section 2.3* does not clarify the matter. While it is awkward to interpret this reservation of rights in a way that does not give it independent meaning, it is unclear how this reservation of rights could, in the context of the SPA as a whole, give Claimant any further rights beyond those it had in the ordinary course of Section 2.3. Under that section, Claimant had the right to present a FWCS and, if Seller objected, to proceed to resolution of the price adjustment dispute mechanism.

229. However, even if the Tribunal accepted that Claimant did have the right to challenge the WCS as lacking a category of expenses, the Parties agreed that the support for such a challenge to the contents of the WCS would have to come from an inconsistency with the contents of the Targeted Net Working Capital Statement. The contents of the Targeted Net Working Capital Statement, was a matter of speculation until the Main Evidentiary Hearing when Claimant's Expert testified that, in his opinion, it did not contain Accrued Expenses.

230. On the claim in the alternative that sales tax payable and property tax payable could be included in the Net Financial Indebtedness, the Tribunal accepts Respondents' submission

that the two lists—of what is and is not included in Net Financial Indebtedness—leaves no room for the addition of expenses that are not listed as excluded. Accordingly, the question as to whether these Accrued Expenses were or were not part of a Net Financial Indebtedness portion of the Targeted Net Working Capital Statement does not arise.

231. Accordingly, the Tribunal concludes that Respondents' objection to the inclusion of accrued wages, commissions and benefits in the price adjustment was well-founded. Claimant's claim for these amounts is hereby denied. Claimant's submission in the alternative that the sales tax portion of Accrued Expenses is recoverable pursuant to Section 5.2 of the SPA under Respondents' obligation to pay pre-Closing Taxes is addressed below at 4.3.10.

4.3.6.5 Summary of Accrued Expenses

232. For the reasons stated above, the Tribunal denies Claimant's claims for Accrued Expenses.

4.3.7 Cash

233. The FCWS calculation of cash differed from the WCS estimate by \$XXX,736.

234. Respondents objected to this difference as unsupported. In response, Claimant initially provided facsimiles of bank statements.¹⁴⁵

¹⁴⁵ Exhibit C-4; Exhibit C-6A, Tab 6a1.

235. Respondents submitted that this was not sufficient.¹⁴⁶ Claimant provided the bank statements¹⁴⁷ and these confirmed the amounts listed in the bank reconciliations.¹⁴⁸

236. Respondents withdrew their objection to this claim in the Purchase Price Adjustment.¹⁴⁹

4.3.7.1 Summary of Cash

237. Accordingly, with the objection withdrawn, Claimant is granted its claim for cash for \$XXX,736.

4.3.8 Other Pre-paid Expenses

238. Claimant claimed a previously existing credit in Account 480 of \$XXX,462 that was obscured by the incorrect posting to that Account of a \$XXX,000 audit fee and subsequent correction.

4.3.8.1 Claimant's Submissions

239. Claimant submitted¹⁵⁰ that Respondents originally estimated the Companies' Other Prepaid Expenses balance was \$X,XXX,470.151, but the Parties agreed that these expenses

¹⁴⁶ Respondents' Expert's Report, at 56-57.

¹⁴⁷ Exhibits C-194; Exhibit C-196.

¹⁴⁸ Claimant's Expert Report, at 47-48.

¹⁴⁹ Respondent's Reply, ¶¶ 286-87.

¹⁵⁰ Claimant's Reply, ¶¶ 327-328; Amended Statement of Claim ¶¶ 80-81, 129-131; Claimant's Expert Report ¶¶ 7.1.1-7.3.1; Reply ¶ 327-328; Second Claimant's Expert Report ¶¶ 8.4.1-8.4.7; Exhibits C-1 at § 2.3(b)(iii), C-2 at 13, C-3 at Appendix A, C-8 at 4, C-9 at 4, C-11, C-38, C-178; Claimant's Expert Overall Presentation pp. 7-12; Claimant's Expert Detailed Issue Presentation pp. 20-21; Main Hearing Transcript 93:4-99:20, 519:8-520:8, 702:18-709:2, 713:7-716:4, 718:23-719:9, 719:25-727:2, 323:3-345:15, 410:17-21, 435:16-439:18; Claimant's Post-Hearing Brief ¶¶ 66-67.

¹⁵¹ Exhibit C-1, SPA, Exhibit A.

should have been reported as \$X,XXX,497.152. Claimant's Expert¹⁵³ reviewed the general ledger and concluded that the amount in the Companies' Other Prepaid Expenses account was \$X,XXX,036.154 at Closing. This was \$XXX,462 less than would result from this agreed correction. Claimant's purchase price should be reduced accordingly.

240. Claimant's Expert observed that while there was no immediate explanation for this amount, this was a previously existing balance, which ought not to be excluded or written off.

4.3.8.2 Respondents' Submissions

241. Respondents submitted¹⁵⁵ that the value of the prepaid insurance as of the Closing was \$X,XXX,496 and that there was no reason why the value of the account, which contained only prepaid insurance should be lower than this amount. Therefore, the amount was not payable.

¹⁵² Exhibit C-3, Letter from CLAIMANT to Respondent I: FWCS; Exhibit C-8, Letter from Respondent I to CLAIMANT: Objection Notice, 6 February 2015; Exhibit C-11, Letter from Respondent I to CLAIMANT, 26 March 2015.

¹⁵³ Amended Statement of Claim ¶¶ 80-81, 129-131; Claimant's Expert Report ¶¶ 7.1.1-7.3.1; Claimant's Reply ¶ 327-328; Second Claimant's Expert Report ¶¶ 8.4.1-8.4.7; Exhibits C-1 at § 2.3(b)(iii), C-2 at 13, C-3 at Appendix A, C-8 at 4, C-9 at 4, C-11, C-38, C-178; Claimant's Expert Overall Presentation pp. 7-12; Claimant's Expert Detailed Issue Presentation pp. 20-21.

¹⁵⁴ Exhibit C-3, Letter from CLAIMANT to Respondent I: FWCS.

¹⁵⁵ Respondents' Reply, ¶¶ 293-297; Respondents' Expert's Report, ¶¶ 9.1.1-9.1.3, 9.3.1-9.3.2; Second Respondents' Expert's Report, ¶¶ 9.1.-9.1.3, 9.3.1-9.3.6; Exhibits NAV-12 (CLAIMANT_00690), C-2 (p. 13), C-8, R-14, R-70; Respondents' Expert Direct Presentation, pp. 39-40; Main Hearing Transcript 249:20-249:24, 396:14-397:22, 707:16-708:25, 709:3-711:15, 711:25-712:7, 712:10-713:13, 713:14-22, 713:14-22, 714:14-22, 716:5-718:22; Amended Statement of Defense, ¶¶ 12, 153-155; Respondents' Reply, ¶¶ 206, 288-292; Respondents' Opening Presentation, p. 119; Claimant's Expert Report, ¶¶ 7.2.5-7.3.1, Table 7-1; Respondents' Post-Hearing Brief, ¶ 86.

4.3.8.3 Tribunal Analysis and Conclusions

242. During the hearing, through reference to the entries in this category in the general ledger in September and October,¹⁵⁶ Claimant's Expert provided a reasonable explanation for his analysis and his conclusions. These conclusions, which corresponded with the Post-Closing Accounting Report, were that the \$XXX,462 was in the balance sheet as of [2 weeks before Closing] as prepared by the Seller and, although the initial source of it would require extensive investigation to identify, it remained in the balance sheet at the Closing and was, therefore, recoverable by Buyer.

243. Following extensive discussion of this issue at the Hearing,¹⁵⁷ the Tribunal is satisfied with the explanation provided by Claimant's Expert and is not persuaded that Respondents' objections to the FWCS in this category are valid.¹⁵⁸ Accordingly, Claimant's claim for adjustments to Other Pre-paid Expenses is hereby granted.

4.3.8.4 Summary of Other Pre-paid Expenses

244. Accordingly, for the reasons stated above, Claimant is granted its claim for Other Pre-paid Expenses for \$XXX,462.

¹⁵⁶ Exhibits C-8, C-11 and C-129; Second Claimant's Expert Report, section 8 and Second Respondents' Expert's Report, Section 9.3.

¹⁵⁷ Main Hearing Transcript 93:4-99:20, 519:8-520:8, 702:18-709:2, 713:7-716:4, 718:23-719:9, 719:25-727:2, 323:3-345:15, 410:17-21, 435:16-439:18. Main Hearing Transcript 396:14-397:22, 707:16-708:25, 709:3-14, 713:14-22, 714:14-22, 716:5-718:22.

¹⁵⁸ Main Hearing Transcript at 702-27.

4.3.9 Current and Non-Current Liabilities

4.3.9.1 Overview and Facts

245. Claimant claimed an entitlement to an adjustment for Current and Non-Current Financial Liabilities in the amount of \$XXX,100. Respondent agreed that Claimant is entitled to an adjustment for Current and Non-Current Financial Liabilities, but submitted that the correct amount was \$XXX,149.

4.3.9.2 Claimant's Submissions

246. Claimant submitted,¹⁵⁹ first, that the Companies' past practice of using book value, rather than present value, for the ARI leases did not comply with IFRS;¹⁶⁰ and that this is relevant in that there is no materiality threshold in purchase price adjustment disputes, nor is there an undue burden of compliance with IFRS to justify deviating from IFRS.¹⁶¹ Claimant submitted, secondly, that the Companies' own employee responsible for the relevant account instructed Claimant to use the invoices *paid* in [Closing month] rather than the invoices *received* in [Closing month] as the basis for the FWCS.¹⁶² The only source of justification for

¹⁵⁹ Claimant's Reply ¶¶ 329-344.

¹⁶⁰ Amended Statement of Claim ¶¶ 20, 72-75, 134; Claimant's Expert Report ¶¶ 8.2.1-8.2.5; Claimant's Reply ¶¶ 243-244, 329-337; Second Claimant's Expert Report ¶¶ 9.2.1-9.2.6 Respondents' Expert's Report ¶ 10.2.5; Exhibits C-1 at § 2.3(b)(ii), C-8 at Appendix A, C-8 at 4-6, C-9 at 2-4, C-11 at 2, C-60; Claimant's Expert Overall Presentation pp. 13-14; Claimant's Expert Detailed Issue Presentation p. 22; Main Hearing Transcript 728:9-730:6, 732:16-733:15, 99:21-101:7, 323:3-349:2, 350:17-355:3, 477:4-483:9.

¹⁶¹ Claimant's Reply ¶¶ 334.

¹⁶² Amended Statement of Claim ¶¶ 20, 72-73, 80-81, 137; Claimant's Expert Report ¶¶ 8.5.1-8.5.4; Claimant's Reply ¶¶ 340-341; Second Claimant's Expert Report ¶¶ 9.5.1-9.5.5; Exhibit C-9 at 4; Claimant's Expert Overall Presentation pp. 13-14; Claimant's Expert Detailed Issue Presentation p. 22; Main Hearing Transcript 99:21-101:7, 728:9-730:6, 732:16-733:15, 734:23-735:19.

using the invoices *received* in October appears to have been a comment made by [Respondents' Employee] to Respondents' Expert, when he was examining the issue.

4.3.9.3 Respondents' Submissions

247. Respondents submitted that Claimant's Expert had acknowledged that it would be reasonable to rely on the Companies' historical practices invoices of using received in October rather than invoices paid in calculating the Financial Liabilities as such treatment would not violate IFRS due to the immaterial nature of its impact.¹⁶³ For the same reason, the Tribunal should accept the use in the WCS of book value instead of discounted present value for capital lease obligations as this does not violate IFRS due to its immaterial impact.¹⁶⁴

4.3.9.4 Tribunal Analysis and Conclusions

248. The SPA provided for IFRS to be applied when the Seller's historical practices were at odds with it. Moreover, in light of the lack of a materiality threshold and the lack of a burden in calculating the adjustments, the Tribunal regards the objections by Respondents to be unfounded.

249. Therefore, the Tribunal allows the adjusted claim for Current and Non-Current Financial Liabilities.

¹⁶³ Respondents' Expert's Report, ¶¶10.2.5-10.2.6; Second Respondents' Expert's Report, ¶¶10.1.6, 10.3.3, Appendix 6, Appendix 7; Exhibits NAV-8 (¶ 44), C-8, R-14, R-40; Main Hearing Transcript 249:25-250:12, 730:25-731:24; Amended Statement of Defense, ¶¶ 13, 156-157; Respondents' Reply, ¶¶ 207, 293-297; Respondents' Opening Presentation, p. 120.

¹⁶⁴ Respondents' Expert's Report, ¶¶10.5.4-10.5.6; Second Respondents' Expert's Report, ¶¶10.1.7, 10.3.4-10.3.5, Appendix 6, Appendix 7; Exhibits C-8, R-14; Respondents' Expert Direct Presentation, pp. 42-43; Second Claimant's Expert Report, ¶ 9.5.3; Main Hearing Transcript 249:25-250:12, 399:13-400:5, 731:25-732:10, 732:17-733:15; 733:16-734:17; Amended Statement of Defense, ¶¶ 13, 163-164; Respondents' Reply, ¶¶ 207, 293-297; Respondents' Opening Presentation, p. 120.

4.3.9.5 Summary of Current and Non-Current Liabilities

250. Accordingly, for the reasons stated above, Claimant is granted its claim for Current and Non-Current Liabilities for \$XXX,100.

4.3.10 Sales Tax

4.3.10.1 Overview and Facts

251. In its claim for Accrued Expenses, Claimant included an alternative claim for Pre-Closing Sales Tax. The Tribunal has denied Claimant's claim for the various items included among "Accrued Expenses." Claimant seeks in the alternative, to recover \$XXX,133.55 of the sales tax payable pursuant to Section 5.2 of the SPA under Respondents' obligation to pay pre-Closing Taxes for taxes that have been paid, (including \$XXX,252.25, for the preliminary balance for the audit period July 2008 through February 2012¹⁶⁵ and \$XXX,881.30 for the final balance).¹⁶⁶ Claimant further seeks a declaration that Respondents are obligated to pay the remaining portion of the sales tax payable, which is currently estimated at \$XXX,866.45 when it falls due.

252. Taxes are defined by the SPA broadly to include "any federal, state, county, local or foreign taxes, charges, levies, imposts, duties, other assessments or similar charges of any kind whatsoever, including interest and penalties imposed thereon, whether disputed or not."¹⁶⁷ Section 5.2(a) of the SPA provides that Respondents' have an obligation to pay these taxes where they are: (i) "Taxes included as liabilities on the Latest Balance Sheet" and (ii)

¹⁶⁵ Exhibits C-198, 199.

¹⁶⁶ Exhibits C-200.

¹⁶⁷ Exhibit C-1 at Art. I (defining "Taxes").

“such Taxes that are incurred in the ordinary course after the date of the Latest Balance Sheet and on or before the [Closing Date].” The Latest Balance Sheet is defined in Section 3.10 of the SPA as “the reviewed and consolidated balance sheet of the Companies as of June 30, 2014.” The Latest Balance Sheet includes \$X.XX million of the \$X.XXX million sales tax payable as liabilities.¹⁶⁸

4.3.10.2 Claimant’s Submissions

253. Claimant submitted¹⁶⁹ that Respondents have an obligation under the SPA to pay the pre-Closing Taxes pursuant to the SPA. Claimant’s Expert verified that only \$X.XXX million (\$X.XXX million minus \$X.XX million) of the sales tax payable are covered by Section 5.2(a),¹⁷⁰ and that of the \$X.XXX million that was not included on the Latest Balance Sheet, \$XX,000 relates to tax periods after June 30, 2014, as calculated in the Claimant’s Expert Report.¹⁷¹ Claimant submits that this leaves a net amount due from Respondents under Section 5.2(a) of \$X.XXX million (\$X.XXX million minus \$XX,000).¹⁷²

254. Of this \$X.XXX million, Claimant has paid \$XXX,133.55, including \$XXX,252.25, for the preliminary balance for the audit period July 2008 through February 2012¹⁷³ and

¹⁶⁸ Exhibit C-32 at 22.

¹⁶⁹ Amended Statement of Claim ¶¶ 72, 76-81, 117-121; Claimant’s Expert Report ¶¶ 5.2.3-5.2.5; Claimant’s Reply ¶¶ 318-323; Second Claimant’s Expert Report ¶ 6.4.5; Exhibits C-1 at Art. 1, §5.2(a), C-2 at 16, C-32 at 22, C-198-200.

¹⁷⁰ Claimant’s Expert Report at ¶ 5.2.4.

¹⁷¹ Id.

¹⁷² Id.

¹⁷³ Exhibits C-198, 199.

\$XXX,881.30 for the final balance.¹⁷⁴ The Experts agreed that the assessment on which the claim is based was corroborated by supporting documentation in the sum of approximately US\$ XXX,000.¹⁷⁵

255. These payments relate to the time period July 2008 through February 2012 and are unrelated to any audit for which Respondents assumed liability: the audit by the State of Texas for which Respondents have assumed liability is the next audit period, March 1, 2012 through March 31, 2016. Claimant seeks recovery of this payment and a declaration that Respondents are obligated to pay the remaining portion of the sales tax that is payable, which is currently estimated at \$XXX,866.45 when it falls due.¹⁷⁶

4.3.10.3 Respondents' Submissions

256. Respondents¹⁷⁷ submitted that the existing provisions in Account 475 for sales tax payable (\$X.XX million)¹⁷⁸ would have covered the entire amount of the payments apparently made by Claimant for the Texas sales tax audit.¹⁷⁹ Respondents' Expert reported that "I have not reviewed this correspondence, but I note that my review of Seller's US\$ X,XXX,725 accruals of Sales Taxes Payable (Account 475000) in its trial balance appears to

¹⁷⁴ Exhibits C-200.

¹⁷⁵ Joint FWCS.

¹⁷⁶ Claimant's Reply ¶¶ 318-333.

¹⁷⁷ Respondents' Expert's Report, ¶¶ 7.3.10-7.3.11; Second Respondents' Expert's Report, ¶¶ 7.3.6-7.3.7; Exhibit R-22, C-8 (p. 6); Respondents' Expert Direct Presentation, p. 37; Main Hearing Transcript 248:11-24; 394:18-395:24, 686:17-687:10; Amended Statement of Defense, ¶¶ 7, 93-95; Respondents' Reply, ¶¶ 201, 237-241; Respondents' Opening Presentation, p. 117.

¹⁷⁸ NAV-26, Account 475 Rollforward; Respondents' Expert's Reply Report § 7.3.7.

¹⁷⁹ Exhibit C-8, Letter from Respondent I to CLAIMANT: Objection Notice, 6 February 2015 at 6; Exhibit R-22, Email from ■(BBVA) to ■, Oct. 10, 2014.

be sufficient to cover the amount concerned.¹⁸⁰ However, whether or not Sales Tax Payable is determined to be payable by Seller to Buyer is a matter for the Tribunal.”¹⁸¹

4.3.10.4 Tribunal Analysis and Conclusions

257. The evidence provided in respect of this claim is sparse. Respondents’ Objection Notice, observed as follows:

On January 29, 2015, Buyer emailed Seller alleging that a liability of \$XXX,000 for unpaid sales taxes in the State of Texas was not properly provisioned. This is not the case and Buyer was informed on several other occasions, including in an email exchange on October 10, 2014, that such tax liability would be provisioned in Account No. 475.

258. This is consistent with Respondents’ internal email thread in which [Respondents’ Employee] reported to Respondents’ other Employee on 10 October as follows:

TX: the audit in in course, we hired ■ in june to assist us and even though the bulk of their job has been completed, we asked for an extension for Jan-15 in order to properly complete the job. We don’t have an accurate estimate of outcome yet, although *any liability arising would be covered with balances in acc 475*. Attached copies of ■ sow and extension
(emphasis added)

259. While there is evidence that Buyer made payment on a pre-Closing Sales Tax liability of Respondents’ pursuant to section 5.2(a) of the SPA, there has been no explanation offered as to why this was not, as Respondents consistently stated, provisioned for in Account No. 475.

¹⁸⁰ Rollforward of Account 475 (NAV-26).

¹⁸¹ Respondents’ Expert Second Report at 53.

260. Accordingly, in view of all the circumstances, including that Claimant has been in possession of the books and records of the Companies since the Closing, the Tribunal is unable to find in Claimant's favour in respect of this claim.

261. It follows from this that Respondents are not obliged to reimburse Claimant for the amount paid or for the remaining portion of this expense when it falls due.

4.3.10.5 Summary of Sales Tax

262. Accordingly, for the reasons stated above, Claimant is denied its claim for Sales Tax of \$XXX,133.55, and denied its request for a declaration that Respondents must pay the balance currently estimated at \$XXX,866.45 when it falls due.

4.3.11 Summary of Purchase Price Adjustment and Sales Tax Claims

263. The following is a summary of the results of the Purchase Price Adjustment Claims.

The Tribunal grants Claimant's claim for adjustments to *Inventory* in the amount of ■

The Tribunal grants Claimant's claim for adjustments to *Accounts Receivable* in the amount of ■

The Tribunal grants Claimant's claim for adjustments to *Accounts Payable* in the amount of ■

The Tribunal denies Claimant's Claim for *Accrued Expenses* ■

The Tribunal grants Claimant's claim for adjustments to *Cash* in the amount of ■

The Tribunal grants Claimant's claim for adjustments to *Other Pre-paid Expenses* in the amount of for ■

The Tribunal grants Claimant's claim for adjustments to *Current and Non-Current Liabilities* in the amount of ■

The Tribunal denies Claimant’s claims for **Sales Tax paid** and for a declaration of entitlement to the balance when it falls due

■

_____ \$■

264. Accordingly, in sum, the Tribunal grants the Claimant’s Purchase Price Adjustment claim in the amount of \$X, XXX,567, and denies its claim for the ■ Sales Tax Claim.

4.4 “A” State Tax Assessment

* * * * *

4.5 FWCS Counterclaim

* * * * *

4.6 [X INSURANCE POLICY] Counterclaim

* * * * *

4.7 Interest

* * * * *

5 - COSTS

* * * * *

6 - AWARD

265. Accordingly, for the foregoing reasons, and rejecting all submissions and contentions to the contrary, the Tribunal:

266. **Awards** Claimant **\$X,XXX,567** in respect of its Price Adjustment claim together with pre-judgment interest in the amount of 9% simple interest per annum from 6 April 2016.

267. **Declares** Claimant and Respondents respectively each liable for the half of the amount of the “A” State Tax Assessment, when it is ultimately determined;

- 268. Reserves for later decision the [Regulatory] Claim;
- 269. **Reserves for later decision** the fixing and allocation of the costs of the Arbitration;
- 270. **Dismisses** all other claims made by the Parties in the Arbitration.

This Partial Award is made on the day of February 2017

Place of Arbitration: New York, NY, USA.

Signed by Co-Arbitrator
MR. CO-ABITRATOR I

Signature

Signed by Co-Arbitrator
MR. CO-ABITRATOR II

Signature

Signed by the President
PROFESSOR JANET WALKER

Signature
Date