EFiled: Jan 23 2017 04:55PM EST
Filing ID 60105370
Case Number 573,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CHICAGO BRIDGE & IRON COMPANY N.V.,	)	
Plaintiff Below-Appellant,	)	No. 573, 2016
v.	)	On Appeal From the Court of Chancery of the State of Delaware
WESTINGHOUSE ELECTRIC COMPANY LLC and WSW ACQUISITION CO., LLC,	)	C.A. No. 12585-VCL
Defendants Below-Appellees.	)	

APPELLEES' ANSWERING BRIEF

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Dated: January 23, 2017

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

Page(s)

Cases

Rules

On December 5, 2016, the Court of Chancery issued a Memorandum Decision and Order (together, the "Order") granting the motion of defendants-appellees Westinghouse Electric Company LLC and WSW Acquisition Co., LLC (together, "WEC") for judgment on the pleadings, and dismissing with prejudice the complaint (the "Complaint," A10-167) of plaintiff-appellant Chicago Bridge & Iron Company, N.V. ("CB&I"). In so ruling, the Court correctly concluded that CB&I must honor its express agreement, in the parties' October 27, 2015 Purchase Agreement (the "Agreement," A276-365), to submit any and all disputes like the one underlying this action for resolution by a designated independent auditor (the "IA"). CB&I – seeking to avoid the IA's scrutiny of these issues – has appealed from the Order.

NATURE OF PROCEEDINGS

This litigation arises out of the Agreement, which, as CB&I concedes (Complaint ¶¶3, 6; A436, A438, A465, A477), is clear, unambiguous, and clearly applicable to this dispute. In the Agreement, the parties set out the fully negotiated terms and conditions pursuant to which they contracted for the transfer of CB&I's nuclear construction business to WEC. The Agreement provides that CB&I was to deliver to WEC a business with a certain "target" amount of net working capital (the "Target Net Working Capital Amount"), and that after the closing, and after WEC had ample time and opportunity to review the business' books and records,

the parties, applying United States generally accepted accounting principles ("GAAP"), would determine whether there was an overage or a shortfall in that working capital account, and would make a payment accordingly. Thus, if WEC had received a business with more than the Target Net Working Capital Amount, it was to remit the surplus to CB&I – but if WEC had received a business with less net working capital than it was promised, CB&I expressly committed to make a payment to WEC to make up the difference.

The Agreement prescribes both a specific procedure for determining this pricing – requiring that CB&I estimate, and WEC finalize, the purchase price calculations – and specific "Agreed Principles" to serve as the accounting standards governing that procedure. The Agreement, further, specifies that *any disagreement relating to these calculations must be submitted to and determined by the IA.*

In accordance with the Agreement, the parties exchanged their purchase price calculations. WEC's calculations ("WEC's Statement") differed in significant respects from CB&I's estimates ("CB&I's Statement"), including, in particular, CB&I's estimate of the "Net Working Capital Amount" (as defined in the Agreement). CB&I objected to WEC's Statement ("CB&I's Objections"). The dispute thus framed implicates issues squarely within the expertise of an auditor –

detailed and complex accounting questions regarding calculations of the Net Working Capital Amount, and whether those calculations are GAAP-compliant.

For a time, CB&I pursued its Agreement-prescribed remedies. Then CB&I changed course and commenced this action, seeking a Court ruling that would side-step the IA's authority, abort the already-begun Agreement-mandated procedure, and effectively strike substantial portions of WEC's Statement without any substantive review.

WEC's motion for judgment on the pleadings followed. The Court of Chancery granted that motion. Since that decision, the parties have continued to proceed before the IA.

The Order should be affirmed. It correctly concludes that a straightforward reading of the Agreement, giving effect to all of its terms in a logical and internally consistent manner, dictates that the dispute underlying CB&I's Complaint – regarding WEC's calculation of the Net Working Capital Amount – must be heard and conclusively resolved by the IA. To the extent CB&I disagrees with WEC's Statement, the Agreement provides CB&I its exclusive recourse: the opportunity to attempt to persuade the IA to accept CB&I's calculations instead.

SUMMARY OF ARGUMENT

I. Denied. As the Order correctly recognizes, the clear, unambiguous terms of the Agreement govern, and they require the parties to engage in the IA process to resolve any and all issues implicated in calculating the Net Working Capital Amount. When asked to intervene in similar contexts (*e.g.*, involving contracts with remedy hierarchies), courts in Delaware and elsewhere – including in the remarkably analogous case of *Alliant Techsystems, Inc. v. MidOcean Bushnell Holdings, L.P.*, 2015 WL 1897659 (Del. Ch. Apr. 27, 2015) – enforce such agreements, ordering the parties to follow the procedures specified therein to resolve their post-closing disputes. The Court of Chancery properly did the same here.

II. Denied. WEC's motion was addressed to the entirety of the Complaint; WEC did not waive any challenge to any part of it. Moreover, the Court of Chancery correctly concluded, applying this Court's teaching in *Nemec v. Shrader*, 991 A.2d 1120, 1127 (Del. 2010), that it could not enforce the implied covenant of good faith and faith dealing (as CB&I sought in Count II), as that would require creating new Agreement terms that contradict the express, agreed-upon provisions directly addressing the issues in dispute. Accordingly, the Order properly dismisses Count II of the Complaint.

STATEMENT OF FACTS

A. The Agreement

Pursuant to the jointly-drafted Agreement (governed by Delaware law), WEC acquired CB&I Stone & Webster, Inc. ("S&W"), a CB&I subsidiary. The parties agreed that WEC was to receive (at closing) a business with a specified Target Net Working Capital Amount. Agreement §§1.2(a)(i), 1.4, 11.1, 12.11, 12.16.

1. The Agreement Prescribes the Formula, Standards and Procedure for Calculating the Purchase Price

The parties agreed that the amount of consideration would be determined after closing, by a process they spelled out in Article I of the Agreement. First, CB&I would deliver CBI's Statement, a pre-closing reflection of CB&I's "good faith estimate[s]" of each of the price components, and of "the resulting calculation of the [estimated purchase price]." Agreement §1.4(a). After closing and having an opportunity to review the relevant books and records (*id.*), WEC would perform its own independent calculations of the components and the purchase price. *Id.* §1.4(b). Unlike CB&I's Statement, which was to reflect *estimates*, WEC's Statement was to set forth the final, definitive *calculations*. *Id.*

The final purchase price will be calculated according to a prescribed formula, with reference to various components, including the Net Working Capital Amount. Agreement §§1.2(a)(i), 1.4(f), 11.1. When the final price ultimately is

fixed, it may require a payment either to or by WEC, dependent in large part on whether the final Net Working Capital Amount exceeds or falls short of the Target Net Working Capital Amount. *Id.* §1.4.

The Agreement also prescribes how to prepare CB&I's and WEC's Statements, requiring the parties to apply GAAP and the contractually-specified Agreed Principles:

> Each of [CB&I's] Statement and [WEC's] Statement shall be (i) in a format substantially similar to the sample calculation with respect to Net Working Capital Amount attached to this Agreement as Schedule 1.4(f), it being understood that in the event of an inconsistency between such illustrative calculation and the Agreed Principles, *the Agreed Principles will prevail*; [and] (ii) prepared and determined from the books and records of [S&W] and its Subsidiaries and *in accordance with [GAAP]* applied on a consistent basis throughout the periods indicated *and with the Agreed Principles* ...

Agreement §1.4(f) (emphases added).

The Agreed Principles, in turn, expressly provide that each of the purchase price components – and consequently, the purchase price itself – are to be estimated and calculated in accordance with GAAP, above all:

> … *Working Capital*, Indebtedness and Company Transaction Expenses *will be determined in a manner consistent with GAAP*, consistently applied by [CB&I] in preparation of the financial statements of the Business, as in effect on the Closing Date. *To the extent not inconsistent with the foregoing*, *Working Capital*, Indebtedness and Company Transaction Expenses, and the line items and components therein, shall be based on the past practices and accounting principles, methodologies and policies applied by [S&W] ...

Agreement Schedule 11.1(a) (emphases added).

Both of these provisions, recognizing that a variety of approaches may be acceptable under GAAP, specify that GAAP, which must be followed, is to be applied consistently – but the methodology must be GAAP-compliant, not just "consistent."

2. The Agreement Requires Submission to the IA of "Any and All" Disputes concerning CB&I's Objections, WEC's Statement, and the Calculations Therein

The Agreement contains a mechanism for resolving any disagreement that CB&I might have with WEC's Statement. The procedure requires CB&I's presentation of specific, reasoned Objections, good faith cooperation and negotiation, and, should the differences be irreconcilable, submission to the IA, for "review and resolution," of "***any and all matters that remain in dispute with respect to [CB&I's Objections], [WEC's] Statement and the calculations set forth therein***." Agreement §1.4(c) (emphasis added).

The IA is to make its determination "in accordance with the [Agreement] terms and provisions," and "based solely on written submissions ... that are *in accordance with the applicable guidelines and procedures set forth [in the Agreement]* … and on the definitions included [t]herein." Agreement §1.4(c) (emphasis added).

Participation in the IA process is mandatory: CB&I and WEC "*shall* use their commercially reasonable efforts to cause the [IA] to resolve *all* such disputes" – without exception or limitation – and "*shall* reasonably cooperate with the [IA]." Agreement §1.4(c) (emphases added). Indeed, under the Agreement, once there is an irreconcilable dispute, the IA process is the *only* mechanism through which the purchase price becomes "final, conclusive and binding." *Id.*

3. The Agreement Provides that the IA Process May Not Be Derailed by Article X

CB&I represents in Article II of the Agreement (which contains no mention of the Agreed Principles) that, prior to closing, it delivered certain S&W financial statements (the "Article II Financials"), and that those Financials "have been prepared in accordance with GAAP, *except* [i] as otherwise indicated and [ii] subject to normal and recurring year-end adjustments ... and [iii] the absence of footnotes." Agreement §2.6(a) (emphasis added). Thus, contrary to CB&I's assertion (CB&I's appellate brief ("Br.") 2), Article II Financials – unlike CB&I's Statement, WEC's Statement, and CB&I's Objections (the "Article I Documents") – were not required to be compliant with GAAP or the Agreed Principles.

Article X relates to indemnification and, in §10.1, provides that certain Article II representations do not survive closing; *i.e.*, as here relevant, that CB&I shall have no liability flowing from the Article II Financials. §10.1 contains no

mention of, and no non-survival language regarding, the Article I Documents. §10.1, thus, does not come into play in this dispute concerning WEC's Statement.

To render this result inescapable, the parties expressly established a remedy hierarchy, agreeing that the scope of Article X indemnification would have no effect on the Article I price determination process. §10.3(a) of the Agreement – a provision avoided by CB&I in the Complaint – specifically, unequivocally, and without limitation or qualification, decrees that *no provision of Article X may be used to circumvent or to nullify §1.4(c)*:

> This Article X shall not ... operate to interfere with or impede the operation of the provisions of Section 1.4(c) providing for the resolution of certain disputes relating to the Final Purchase Price between the parties and/or by an [IA] ...

Agreement §10.3(a)(i).

Thus, the parties expressly agreed that in the event of any perceived conflict between §1.4(c) and §10.1, §1.4(c) prevails, and *the IA process for resolving price-calculation disputes is unimpaired*.

4. The Agreement Recognizes that the §1.4(c) Calculations May Require Payment by CB&I

The Agreement clearly stipulates that the result of the price calculation *might require CB&I to make a payment to WEC.* Agreement §§1.2(b)(i), 1.4(g). Thus, notwithstanding CB&I's purported "quitclaim" intent and certain Agreement releases and indemnities, CB&I was required to deliver to WEC a company with at

least the Target Net Working Capital Amount (to be determined in accordance with GAAP and the Agreed Principles), and to make up the difference if it turned out that the actual Net Working Capital Amount fell short of that mark.

5. The Agreement Bans Consideration of Factors Outside Its Four Corners

§12.7 specifies that the Agreement constitutes "the entire understanding and agreement between the parties" and "supersede[s] all prior and contemporaneous understandings and agreements, both written and oral."

B. CB&I Engaged In The Agreement's Price Calculation Procedure Without Protest – Until It Abruptly Started This Action To Avoid It

The parties exchanged their Article I Statements. WEC's purchase price calculations – specifically, its calculations of the Net Working Capital Amount – differ from CB&I's estimates materially, and dictate that CB&I must make a payment to WEC.

CB&I interposed Objections, including to WEC's application of GAAP in calculating the Net Working Capital Amount.[1] CB&I then, in accordance with the

[1] CB&I's Objections are based in large part on issues relating to the application of GAAP in WEC's Statement. *See* Br. 17-18; Complaint ¶¶30, 60 (alleging that "claim cost" is an element of net working capital, and that whether CB&I's calculation of "claim cost" accords with GAAP is one of the issues that WEC raises); *Id.* ¶¶23, 63-64 and Agreement, Schedules 11.1(a), 1.4(f) (reflecting that "costs and estimated earnings" are factors in computing the Net Working Capital Amount, and alleging that WEC's Statement challenges whether CB&I's estimates of project costs accord with GAAP).

Agreement-mandated procedure, participated in extensive discussions concerning the elements of WEC's Statement.

On July 21, 2016, the deadline to submit unresolved disputes to the IA was fast approaching when – with no advance notice, and mere hours after the parties had been in direct discussions concerning the bases for WEC's calculations – CB&I filed this action, asserting, for the first time, that the disputes relating to Net Working Capital Amount calculations cannot be addressed through the §1.4 process. The subtext of the Complaint is unmistakable: CB&I is tremendously unhappy with WEC's Net Working Capital Amount calculation, including its application of GAAP, and fears that the IA's examination of that calculation will confirm the accuracy of WEC's positions.

Notably, CB&I does not argue that the Agreement should be abandoned, or that it is unclear or ambiguous – to the contrary, it concedes that the parties' "contractual bargain, which is set out in the clear language of the [Agreement]," must be enforced. Complaint ¶3; *supra* 1. CB&I does not question that the calculations under the Agreement properly may result in CB&I owing money to WEC. Br. 1. Nor does CB&I dispute that the parties' disagreement arises out of CB&I's Objections to WEC's calculation of the Net Working Capital Amount – and that the Agreement requires such differences to be resolved by the IA. Complaint ¶¶4, 31, 46, 50, 57-58.

Rather, CB&I's campaign to avoid §1.4 is grounded in its manifestly incorrect theory that the Article I Documents are somehow equivalent to the Article II Financials, and that therefore, §10.1, barring CB&I liability arising from the Article II Financials, also somehow insulates CB&I's Statement from challenge. The relief CB&I seeks entails aborting the IA process, jettisoning WEC's calculation of the Net Working Capital Amount without it ever being evaluated by any accounting expert (or indeed, by anyone), and thereby effectively stripping the IA procedure out of the Agreement, leaving CB&I's unilateral, pre-closing estimates as the standard by which the transaction consideration will be measured.

C. WEC's Motion, The Order And This Appeal

On September 2, 2016, WEC moved under Court of Chancery Rule 12(c) for judgment on the pleadings.[2] In the thoughtful and well-reasoned Order, the Court of Chancery granted WEC's motion, dismissing the Complaint with prejudice, on the ground that the Agreement requires submission of the parties' disputes to the IA. The Court agreed that "the plain language of the Purchase Agreement controls" (1, 16) (thereby rejecting CB&I's reliance on extra-contractual parol

[2] WEC also moved under Rules 12(b)(1) and 12(h)(3), reasoning that the parties' agreement to the §1.4(c) process divested the Court of subject matter jurisdiction. (A229). Because the Court dismissed the Complaint under Rule 12(c), it was not necessary for it to reach this alternative ground.

evidence and attempt to import an implied contractual covenant); recognized that the Agreement prescribes different standards for the Article I and Article II documentation (15) (thereby dismantling CB&I's strained reading of §10.1 to imply a bar on challenges to the CB&I Statement); and confirmed that the IA process is mandatory (6) (thereby proscribing CB&I's attempt to circumvent that process).

The Court based its conclusions on a detailed analysis of the Agreement (1-10). Further, the Court observed that resolution of the motion could be informed by determining whether the Agreement provisions more closely track the contract terms under scrutiny in *Alliant*, or in *OSI Systems, Inc. v. Instrumentarium Corporation*, 892 A.2d 1086 (Del. Ch. 2006) – and properly determined that *Alliant* controls (11-15) in these circumstances, because the Agreement is striking similar to the *Alliant* agreement, but materially different from the agreement in *OSI*, rendering the teaching of *OSI* inapplicable here.

CB&I appealed from the Order. Its motion to expedite the appeal was denied.

ARGUMENT

I. THE ORDER PROPERLY DISMISSES THE COMPLAINT, IN ITS ENTIRETY, AS THE AGREEMENT REQUIRES ALL DISPUTES OVER NET WORKING CAPITAL AMOUNT CALCULATIONS – LIKE THIS ONE – TO BE RESOLVED BY THE IA

A. Question Presented

Did the Order correctly conclude that the Agreement requires the parties to submit their dispute concerning the Net Working Capital Amount to the IA, when its clear and unambiguous provisions specifically and exclusively assign to the IA for resolution "any and all" disagreements arising out of the Article I Documents (§1.4(c)), and expressly bar reliance on §10.1 "to interfere with or impede the ... resolution of [such] disputes ... by an [IA]" (§10.3(a))? A241-74, A498-517, A522-28.

B. Scope Of Review

This Court may review the Order *de novo*. *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993).

C. Merits Of Argument

§1.4 and §10.3 leave no room for CB&I's position that the IA process must be short-circuited due to the GAAP-related nature of the issues raised in WEC's Statement. The Order is correct as a matter of contract interpretation, and correct that analysis of legal precedent supports that conclusion.

1. The Order Correctly Concludes that the Agreement Dictates that the IA Must Resolve Any and All Disputes Arising from the Net Working Capital Amount Calculations in WEC's Statement

The Agreement – with its express, concededly clear and unambiguous provisions directly addressing the issue framed by the Complaint – properly served as the Court's touchstone in determining WEC's motion. *Alliant*, 2015 WL 1897659, at *6 ("'judgment on the pleadings ... is a proper framework for enforcing unambiguous contracts'") (citation omitted).

In §1.4, the parties spelled out a specific procedure for determining whether the Target Net Working Capital Amount had been transferred to WEC, or whether there was an overage or a shortfall. That procedure requires that all price-related calculations – including calculations of the Net Working Capital Amount – be made in accordance with GAAP and the Agreed Principles (which themselves mandate GAAP compliance). *Supra* 5-7. Therefore, although CB&I objects to WEC raising GAAP-based differences in WEC's Statement, the Agreement *requires compliance with GAAP* in the Article I Documents, making GAAP an integral part of the price determination process.

§1.4 further expressly requires that if CB&I takes issue with WEC's Statement, it must prepare detailed, reasoned Objections. And it mandates that, if those Objections cannot be resolved amicably, "any and all" disagreements as to the calculations therein and in WEC's Statement must be submitted to the IA for

determination. *Supra* 7-8. Accordingly, CB&I's Objections to the Net Working Capital Amount calculations in WEC's Statement, from which this action arises, raise exactly the type of dispute that the parties expressly agreed to present to the IA. There is no other reasonable interpretation of the Agreement. *Matria Healthcare, Inc. v. Coral SR LLC*, 2007 WL 763303, at *1, *6 (Del. Ch. Mar. 1, 2007) (court must give contract's express terms "the meaning that would be ascribed to them by a reasonable third party").

CB&I's efforts to flesh out the particulars of its Objections and insistence that it consistently applied accounting principles (Br. 16-19, 29-31) only underscore the fact that the nuts and bolts of the underlying dispute fall squarely within the accounting expertise of the IA, and thus, that the Agreement's delegation of jurisdiction is logical and appropriate. Issues within the IA's area of specialization are perfectly suited for the procedure the Agreement requires.[3] "When it comes to deciding questions of GAAP in [the] context [of purchase price adjustment disputes], accounting firms are particularly well-positioned to do so." *Alliant*, 2015 WL 1897659, at *11. *See also Omni Tech Corp. v. MPC Sols. Sales, LLC*, 432 F.3d 797, 800-01 (7th Cir. 2005) (parties "agreed … that an accountant

[3] In this respect, this case is nothing like *AQSR India Private, Ltd. v. Bureau Veritas Holdings, Inc.*, 2009 WL 1707910, at *8 (Del. Ch. June 16, 2009) (Br. 42), in which the Referee was "not well-positioned to resolve [the disputed] issues. Nor did the parties agree that the Referee would resolve such issues."

would make the decision, so arguments about judicial knowledge and aptitude are beside the point").

Finally, while the Agreement contains a variety of other terms and conditions, including §10.1's non-survival provisions, *the integrity of the §1.4 price determination process is expressly preserved in §10.3*, by the unequivocal proscription on any use of Article X "to interfere with or impede the operation of the provisions of Section 1.4(c) providing for the resolution of certain disputes relating to the Final Purchase Price … by an [IA]." *Supra* 8-9.

2. The Order Correctly Concludes that *Alliant* Applies, Mandating Enforcement of the Agreement-Prescribed IA Dispute Resolution Process

As the Order recognizes, Delaware courts have considered disputes similar to this one – and conclude that provisions like §1.4(c) and §10.3(a) require parties to resolve their disputes through the procedures to which they agreed. The "controlling precedent" (Order 15) is *Alliant*, which involved an agreement and dispute that, in most material respects, echo those here.[4] In *Alliant*, the Court granted judgment on the pleadings in favor of the purchaser, and ordered the parties to submit their disputes to an independent accountant pursuant to the post-

[4] CB&I stresses (Br. 7, 22) that this Court has not previously specifically addressed a case like this one. That is irrelevant. Delaware courts carefully have analyzed these issues, and that case law consistently points to affirmance of the Order.

closing price adjustment process established in their agreement. In so ruling, the Court rejected the seller's argument – tracked in virtually every detail by CB&I – that certain disagreements, relating to calculations of net working capital and their compliance with GAAP, should not be evaluated by the independent accountant. 2015 WL 1897659, at *1-2.

The *Alliant* Court rendered a careful analysis of the contract, revealing it to be just like the Agreement in multiple respects:

- The *Alliant* agreement contained (in §2.4) an agreed-upon procedure for determining the purchase price, which – like Agreement §1.4 here – required calculation of net working capital and its relationship to an "assumed amount" of net working capital. 2015 WL 1897659, at *2.
- Like CB&I, the *Alliant* seller had delivered certain financial statements to the buyer. In Article III of their agreement, the seller made representations concerning those financial statements and their GAAP-compliance. *Id.* *3-4.
- Both parties' §2.4 net working capital figures were required to be calculated in accordance with GAAP, "in a manner consistent with the practices and methodologies used in the preparation of the [Article III] Financial Statements." *Id.* *8. The Court found this standard to mean that "if [seller] was following GAAP when it submitted its good faith

estimate of Net Working Capital, [buyer] could not seek to adjust Net Working Capital when it prepared its Proposed Closing Date Calculations by selecting another *GAAP-compliant* accounting treatment *different from [the company's] historical accounting practices and methodologies*." *Id*. (emphases added). Thus, CB&I's purportedly "key," "critical" distinction of *Alliant* – that the agreement there supposedly "directed that working capital was to be based on 'GAAP' – full stop," in contrast to the Agreement standard of "GAAP as 'consistently applied' by Seller" (Br. 5-7, 24-27) – melts away.[5]

- If the parties were unable to resolve their calculation differences, they were to submit those differences for determination to an independent accounting firm, to act as an "expert, and not as an arbitrator." 2015 WL 1897659, at *3, *10-11.
- The agreement contained indemnification provisions, including for losses, if any, resulting from breach of the representations concerning the Article III financial statements. *Id.* *3-4. The parties expressly agreed –

[5] The Court explained, "GAAP is not a set of prescriptive rules. Instead, GAAP 'tolerate[s] a range of "reasonable" treatments, leaving the choice among alternatives to management.'" 2015 WL 1897659, at *8 (internal citation omitted). This clarifies that the concept in the Agreement of maintaining consistency with CB&I's prior practices cannot be interpreted as trumping the requirement of following GAAP.

> in a clear analogue to §10.3 of the Agreement – that the indemnity provisions would not "operate to interfere with or impede the operation of the provisions of Section 2.4 [establishing the post-closing purchase price determination procedure]." *Id.*

The parties' §2.4 statements revealed a wide gulf between the two calculations of net working capital – and the purchaser's conclusion that payment was owed to it by the seller. 2015 WL 1897659, at *5. Like CB&I, the seller balked when it came time to submit these disputes to the independent accountant, protesting that the purchaser, essentially, was claiming that the seller had breached a representation that it would follow GAAP, and that, therefore, the claim was covered under the agreement's indemnification provisions, and was not a purchase price dispute to be adjudicated by the independent accountant. *Id.* *6. Specifically, the seller argued that the "Accounting Firm dispute resolution process in [§2.4] … was never intended to 'resolve questions over the proper interpretation of GAAP."' *Id.* *7 (citations omitted).

The Court granted the purchaser's Rule 12(c) motion based on the unambiguous agreement provisions, holding:

> [T]he plain terms of the Agreement compel the conclusion that the parties' disagreement over the calculation of Net Working Capital falls within the scope of the Purchase Price Adjustment Procedure in Section 2.4 of the Agreement even though that disagreement implicates issues concerning compliance with GAAP that could form the basis for an indemnification claim ...

Id.

At the heart of the Court's conclusion was the agreement's express §2.4 requirement that the parties' purchase price and net working capital calculations must adhere to GAAP. The Court ruled:

> [I]f [seller] was not following GAAP when it submitted its good faith estimate of Net Working Capital, then in my view Section 2.4 of the Agreement permitted [purchaser] to put forward a calculation of Net Working Capital it believes complies with GAAP when it prepared its Proposed Closing Date Calculations.

Id. *8. In this connection, the Court explained that acceptance of the seller's argument would have carved the GAAP-compliance requirements out of the contractual definition of net working capital and out of the purchase price calculation provisions – "an interpretation [that] would contravene basic principles of contract construction requiring that contracts be read as a whole and that meaning be given to all the provisions of the contract whenever possible." *Id*.

A ruling for the seller also would have ignored – and impermissibly "render[ed] meaningless" (*Id.* *11) – the *Alliant* agreement's §10.3 analogue, "confirm[ing] that the parties contemplated that there could be circumstances in which a claim covered by the indemnification provisions ... also could be the subject of a dispute under the Purchase Price Adjustment Procedure," and, in such circumstances, required "that disputes falling within the ambit of the Purchase Price Adjustment Procedure ... *must be resolved by the Accounting Firm.*" *Id.* *9

(emphasis added). As the Court explained, the remedy hierarchy makes clear that "[the provision] for resolving Disputed Items in the Purchase Price Adjustment Procedure trumps the indemnification provision ... when the two provisions overlap." *Id.* *11.

Alliant is but one of the decisions that compel enforcement of the Agreement's IA provisions. The Court of Chancery again upheld an agreement to resolve post-closing price disputes through a designated accountant in *Shareholder Representative Services, LLC v. Synaptics Inc.*, C.A. No. 11509-VCL (Del. Ch. Mar. 11, 2016) (A367-428). There, the consideration under a merger agreement included earnout payments; the agreement, in "broad" language, directed the parties to submit any dispute arising from earnout calculations to a neutral accountant. A371, A380, A419. The plaintiff objected to the defendant's calculation, and contended that the accountant's authority should not be extended to the objection, which purportedly was a question of technology, not accounting. A380-82, A408, A420. The Court dismissed the plaintiff's claim based on the "plain," "literal language of the [accountant] provision," finding that the expansive scope of the parties' agreement must be enforced as written. A420-22. The same outcome is warranted here, based on the Agreement's comprehensive §1.4(c) requirement that the IA must resolve "any and all" disputes respecting "[CB&I's Objections], [WEC's] Statement and the calculations set forth therein."

Similarly, *Matria* involved a dispute over a post-merger-closing adjustment of a balance sheet and working capital amount. The plaintiff sought to present its revised calculations to the "Settlement Accountant" designated in the merger agreement for resolving disputes relating to balance sheet and working capital computations. The defendant protested that the plaintiff was not seeking an accounting adjustment, but rather was asserting a misrepresentation claim, which could not be heard by the Settlement Accountant. 2007 WL 763303, at *3-4. The Court found that the issue could be characterized as either a misrepresentation claim or an accounting adjustment (given that the item in question "would affect" the working capital calculation), and, holding that it was required under the parties' agreement to treat it as the latter, ordered that the dispute be submitted to the Settlement Accountant. *Id.* *6-7. That conclusion was grounded in a prioritizing provision – just like Agreement §10.3 – in which the parties expressly agreed that, notwithstanding the potential availability of AAA arbitration for certain disputes, all matters relating to balance sheet adjustments of working capital calculations would be determined by the Settlement Accountant. *Id.* *2, *7. The Court held that it was required to enforce the parties' agreement, which "established an arbitration hierarchy" that "assign[ed] the responsibility for the pending dispute to the Settlement Accountant." *Id.* *7. Here, the §10.3 remedy hierarchy likewise

compels referral to the IA of CB&I's Objections to WEC's Net Working Capital Amount calculations.

HBC Solutions, Inc. v. Harris Corp., 2014 WL 6982921 (S.D.N.Y. Dec. 10, 2014), also dictates affirmance of the Order. There, the contractual scheme closely approximated that of the Agreement, including a §10.3 analogue, and there also was a wide divergence in closing working capital calculations stemming from GAAP issues. The seller protested that the purchaser had conducted due diligence prior to the transaction, that the amount in issue was too great, and that "'it makes no sense that the parties would have agreed to give [purchaser] an unlimited right to challenge those methodologies as U.S. GAAP violations under the Purchase Price Adjustment process [arbitration before an accountant], rather than under the exclusive (and limited) indemnification process.'" *Id.* *8. The Court rejected the seller's arguments as "insufficient to override the plain terms of the parties' Agreement," which "bound [it] ... to arbitrate the remaining disputes before [the accountant]" – regardless of the limitations on liability for breach of GAAP-related representations elsewhere in the agreement. *Id.* In so ruling, the Court held that the due diligence was irrelevant because "the purchase price adjustment provisions ... independently required compliance with U.S. GAAP," and that "the amount in dispute, like the ultimate merits, is irrelevant to the threshold question of whether the dispute falls within the scope of the parties' agreement to arbitrate." *Id.*

In *Severstal U.S. Holdings, LLC v. RG Steel, LLC*, 865 F. Supp. 2d 430, 440-41 (S.D.N.Y. 2012), the Court analyzed a contract similar to the Agreement and determined that GAAP-related arbitration before an independent accountant was required where (as here) "the purchase price is ultimately a function of the agreed-upon calculation methodology that neither begins from nor is based upon the financial statements to which [buyer] made representations"; *i.e.*, "[t]he failure to calculate Net Working Capital in accordance with GAAP violates the terms of [the purchase price calculation standards], but does not call into question the representations [seller] made concerning [its pre-closing] financial statements."

And in *Gestetner Holdings, PLC v. Nashua Corp*., 784 F. Supp. 78, 81-83 (S.D.N.Y. 1992), the Court rejected the argument (proffered by the Wachtell firm) that GAAP-compliance questions could not be raised in a post-closing accountant price adjustment procedure because they supposedly were foreclosed by indemnification provisions limiting remedies for breached representations regarding GAAP-compliance of pre-closing balance sheets. The holding relied both on the broad referral to the accountant, because "where claims may be understood to raise an arbitrable issue, arbitration must be compelled, even if the claims can also be characterized another way," and on the seller's pre-litigation conduct complying with the accountant procedure, which "demonstrate[d] that it

shared [buyer's] understanding that this dispute is within the arbitration agreement."[6]

3. The Court Properly Rejected CB&I's Attempts To Avoid the Clear Import of the Agreement

a. CB&I's claim of "intent" to achieve absolute immunity from exposure impermissibly depends on parol evidence and conflicts with Agreement provisions

CB&I insists that the Agreement must be read in furtherance of CB&I's goal of "a *total* release from future liability." Br. 1, 5, 8-13, 33-35, 41, 44-47. Its Complaint, like its brief on appeal, is rife with allegations about intent and negotiations, and the parties' purported hopes and expectations. These allegations are immaterial.

First, the Agreement's express merger and integration clause renders intent an impermissible consideration: §12.7 could not be more clear that appeals to extra-contractual matter, including alleged "prior and contemporaneous understandings and agreements, both written and oral," have no place in any determination of this dispute.

Second, it would run afoul of basic rules of contract interpretation to allow CB&I's allegations of purported extra-contractual intentions and understandings to

[6] *See also Violin Entm't Acquisition Co. v. Virgin Entm't Holdings, Inc.*, 871 N.Y.S.2d 613, 613-14 (N.Y. App. Div. 2009) (accounting arbitration provision properly invoked).

creep into the Court's analysis. The Court must enforce the "words chosen by sophisticated parties who drafted a complex and comprehensive agreement." *Matria*, 2007 WL 763303, at *1, *6. When an agreement is clear on its face, *as CB&I concedes is the case here*, "neither this Court nor the trial court may consider parol evidence 'to interpret it or search for the parties' intent[ions].'" *Pellaton v. Bank of N.Y.*, 592 A.2d 473, 478 (Del. 1991) (internal citation omitted). Indeed, the Courts must enforce the terms of clear and unambiguous agreements even if they "doubt that this is what the parties intended," as they may not "substitute [their] subjective view of what makes sense for the terms accepted by the parties." *Matria*, 2007 WL 763303, at *1, *7. *See also Alliant*, 2015 WL 1897659, at *1 ("counterparties to a transaction are free to contractually order their affairs as they wish").

Third, acceptance of CB&I's worldview would write out of the Agreement the provisions recognizing that CB&I certainly may have post-closing exposure – including because the IA's determination might require CB&I to make a payment to WEC. Even accepting, *arguendo*, CB&I's argument that the Agreement was intended to implement a "quitclaim," that repose was to occur *only after* WEC's receipt of a business with the Target Net Working Capital Amount, determined in accordance with §1.4. Either way, CB&I's insistence that it is not supposed to

have any post-closing exposure, period, directly contradicts, and impermissibly ignores, the mechanism that is hard-wired into the Agreement via the §1.4 terms.

CB&I tries to prop up its argument not only with unacceptable parol evidence, but also by looking outside Article I (to the Agreement's release and indemnity provisions) to improvise reflections of an "intent" drastically to limit §1.4. Br. 2, 6, 10, 12-13, 34-35. This contract construction strategy is impermissible when (as here) it would render meaningless other contractual terms (*i.e.*, §1.4, including its GAAP and Agreed Principles standards and the potential for requiring a CB&I payment to WEC). *Alliant*, 2015 WL 1897659, at *8; *Matria*, 2007 WL 763303, at *6. Moreover, there is no reading of these provisions, as written, that would extricate CB&I from the §1.4 process. To achieve such a result, one would need to excise from the §12.18(a) release the express condition that it be applied "without limiting the rights of [WEC] ... under this Agreement," and to erase the key, express §10.3(a) *caveat* that nothing in the indemnity provisions may operate to undercut the §1.4 price-adjustment mechanism and the role of the IA.

In fact, that WEC would relinquish certain rights pursuant to the release and indemnity provisions, while assuming broad indemnity obligations (Br. 11-13), makes sense *only* when viewed in the context of the remainder of the Agreement, including the §1.4 procedure for ensuring that CB&I delivered a business with the

Target Net Working Capital Amount. In other words, for pre-closing purposes, WEC agreed to accept the Article II Financials with their GAAP variations without recourse, *but only because* for purposes of setting a price, WEC bargained for a more objective standard. Under the Agreement, then, WEC reasonably could proceed to closing regardless of whether CB&I's representations about its financial state were fully GAAP-compliant, precisely because it had assurances that the price ultimately fixed would be rooted not in those representations, but in different, special-purpose, GAAP-compliant calculations.[7] And §10.3 assured WEC, expressly and (contrary to CB&I's claim (Br. 35-37)) without qualification, that no overbroad interpretation of §10.1 would impede that protection.[8]

b. CB&I's essential premise – that the Article I Documents and the Article II Financials are equivalents – is a fallacy

CB&I's appeal relies on its obfuscation of the differences between the documentation prepared under Articles I and II of the Agreement. CB&I's strategy is to insist that the documents are essentially the same, and thereby to stretch §10.1

[7] Given this contractual assurance, it is not puzzling that WEC "chose to close" (Br. 2, 12) even if it may have had issues with the Article II Financials.

[8] CB&I contends that this leaves §10.1 meaningless (Br. 6, 34-35). Not so: CB&I may derive from §10.1 the limited repose it provides when read together with the remainder of the Agreement. That CB&I now deems the scope of that repose too narrow (*id.* 32, 35n.6) does not render §10.1 without impact (*e.g.*, A548-49) or retroactively expandable, nor does it change that CB&I committed to the §10.3 limitation that it now wishes to erase.

(which bars challenges to Article II, *but not to Article I*, documents) so that it is counter-contractually applied to bar WEC's Statement. However, notwithstanding CB&I's repeated attempts at conflating the two categories (*e.g.*, Br. 3, 4, 6, 29-31, 35-37), the Article II Financials are distinct from the Article I Documents. They were prepared at different times, for different purposes, and pursuant to different standards. *Supra* 5-9.[9] Here, it is the Article I Documents that are at issue. §10.1 is irrelevant, as the dispute does not involve a challenge to the Article II Financials.

c. CB&I's assertion that §1.4 establishes a "true-up" is a fiction

Contrary to CB&I's invention (Br. 2, 3, 7, 14-16, 21, 26, 36-37, 47), the §1.4 procedure has nothing to do with any change in circumstance between the time when the Target Net Working Capital Amount purportedly was computed and closing. Nothing in the Agreement suggests otherwise. Rather, the Agreement reflects that the Target Net Working Capital Amount was a designated, agreed-upon number – not necessarily representing the state of the business as of any particular date or computed based on any specific documentation. That the purchase price is determined by comparison to a target – the derivation of which is nowhere referenced, and in no way linked to the Article II Financials – again

[9] CB&I's expression of disbelief that anyone would so structure an agreement (Br. 36) is misplaced. The Agreement governs, and as case law demonstrates, there is nothing remarkable about the Agreement in this respect; in fact, it follows an established line of similar agreements. *See, e.g., infra* 38.

confirms the independence of the Article I process from the Article II documentation.

d. CB&I's claim that the GAAP-consistently-applied terminology exempts its Objections from IA scrutiny impermissibly disregards the language of §1.4 and the Agreed Principles

GAAP in some circumstances tolerates a range of treatments. Accordingly, §1.4 and the Agreed Principles require, for Article I purposes, that in the event of a difference between the parties within such a range, GAAP must be applied in a manner consistent with CB&I's historical mode of *application of GAAP*.[10] *Supra* 6-7.

CB&I seizes upon this "consistently applied" standard to contrive an attempted bypass of the Article I GAAP requirement. Br. 5-6, 36. CB&I reasons that the standard binds the IA to follow past accounting practices (as manifested in the Article II Financials) – and that if those practices were not challenged before closing as non-GAAP-compliant (no matter that they did not purport to be), then (post-closing challenges being precluded by §10.1), they must control for all purposes (disqualifying the calculations in WEC's Statement).

[10] This self-evident explanation, drawn logically from the Agreement provisions, answers CB&I's question about the "purpose for the 'consistently applied' language." Br. 6.

Significantly, CB&I concedes that submission of this dispute to the IA would be proper if the Agreement "first and foremost required that [WEC's Statement] be prepared 'in accordance with U.S. GAAP' and only secondarily called for consistency." Br. 25. *This is exactly what the Agreement requires*. The Agreed Principles establish just such a prioritization, specifying that CB&I's past methodology is to be followed *only* "[t]o the extent not inconsistent with the foregoing" – that is, with the *overriding principles* of GAAP. Agreement Schedule 11.1(a). In contrast, CB&I's argument depends on the unsupportable premise that "the Agreement here does *not* require GAAP-compliance first, above all else" but instead prioritizes "accept[ance of] the methodology consistently used by CB&I." Br. 23.

CB&I's position distills to the baseless contention that WEC, having "chose to close" with the Article II Financials in hand, thereupon forfeited its §1.4 right to the GAAP standard, transforming the Article I standard to whatever accounting methodology CB&I previously used, *regardless of whether that practice adhered to GAAP*. In other words, while the Agreement clearly reflects that the parties agreed that, for §1.4 purposes, GAAP trumps past practice, CB&I deletes the GAAP requirement from the Agreement and declares that past practice should trump GAAP.

This is unjustifiable. As the Court of Chancery held in the squarely-on-point case of *Alliant*, it could not "require [buyer] to calculate Net Working Capital in the same manner [the company] had done historically, *even if that methodology did not comply with GAAP*," because that impermissibly "would be to read the words 'calculated in accordance with GAAP' out of the definition of Net Working Capital":

> Had the parties intended to proscribe [buyer] from challenging whether [seller]'s estimate of Net Working Capital was based on calculations compliant with GAAP as part of the Purchase Price Adjustment Procedure, they logically would have defined the method of calculating Net Working Capital for [such] purposes … to require the application of the same accounting methodologies [the company] had used historically in preparing its financial statements – period – without additionally requiring that those calculations be made in accordance with GAAP. They did not do so and thus left open the possibility that [buyer] could challenge [seller's] proposed Net Working Capital Adjustment based on a failure to comply with GAAP.

2015 WL 1897659, at *8. *See also HBC*, 2014 WL 6982921, at *7 ("the Agreement's purchase price adjustment provisions do not stress (or even demand) consistency with the accounting principles used in the preparation of other financial statements. Instead, they independently – and primarily – require compliance with U.S. GAAP ... To be sure, they also require compliance with 'the accounting principles and methodologies followed by [seller] in its preparation of its financial statements, but they do so only 'to the extent consistent with U.S.

GAAP'"; internal citation omitted). Accordingly, CB&I cannot rely on the "consistently applied" language to exempt this dispute from the scrutiny of the IA.

e. CB&I's argument that WEC's Statement is actually a barred claim for breach of Article II representations impermissibly writes provisions out of the Agreement

According to CB&I's breach-of-representation argument – the cornerstone of its Complaint – CB&I's Article I Documents are essentially the same as the Article II Financials; therefore, §10.1, providing that Article II representations do not survive closing, bars WEC from challenging CB&I's Statement. Thus, CB&I posits that §10.1 takes precedence over other Agreement terms, swallowing §1.4(c) and the Agreed Principles, and dispensing summarily with the issues that otherwise should be resolved by the IA.

CB&I's argument is fundamentally unsound, because GAAP-related issues raised in connection with Net Working Capital Amount calculations are questions respecting the agreed-upon *Article I* methodology – not challenges to CB&I's *Article II* representations. This conclusion follows inexorably from a straightforward reading of the Agreement provisions: CB&I did *not* represent that the Article II Financials were prepared under GAAP; the Agreement does *not* contain, among its Article II-released-by-Article X representations, any representation concerning the Article I Documents; Article I contains its own, separate and independent, GAAP requirements, rendering the Article I Documents

distinct from the Article II Financials; and in §10.3(a) the parties explicitly guarded against the result for which CB&I lobbies.

Moreover, acceptance of CB&I's overenthusiastic application of §10.1 would extinguish material Agreement requirements – an impermissible result under hornbook rules of contract construction (as CB&I would agree; Br. 33, 36). It would whittle §1.4 down to almost nothing, rendering it meaningless with respect to any dispute that does not revolve around the consistency of application of CB&I's accounting practices – and, most importantly, with respect to any dispute concerning whether CB&I's Statement was prepared in accordance with GAAP. And it would negate §1.4(c)'s mandate that the IA must resolve "any and all" disputes regarding "[CB&I's Objections], [WEC's] Statement and the calculations set forth therein."

CB&I's position also would read out of the Agreement §10.3(a)'s express, blanket proscription against using §10.1 "to interfere with or impede the operation of the provisions of Section 1.4(c) providing for the resolution of certain disputes relating to the Final Purchase Price … by an [IA]." CB&I's approach yields the *exact opposite* result, as it would use §10.1 to preclude the §1.4-dictated IA process.[11]

[11] CB&I's argument that §10.3 does not apply (Br. 32-33) is circular and based on a tortured reading of the Agreement that ignores the actual, definitive wording of the critical provisions.

Accordingly, CB&I cannot justify the strained shoe-horning of purchase price accounting issues – squarely within the IA's expertise and authority – into the inapt category of a barred claim of breached representations.

f. CB&I's reliance on *OSI* and other inapposite case law is unavailing

OSI and *Alliant* do not conflict; rather, they flow from different agreements, and simply demonstrate the Court's interpretation of differing contractual provisions. Phrased another way, *Alliant* did not chart a different path from *OSI*; it applied a consistent analysis to different contractual provisions. Because the critical Agreement term of §10.3(a) – a sign-post pointing to the accountant resolution procedure in the event of disputes having a potential indemnity/accounting overlap – is absent from the *OSI* agreement, the Order correctly concludes that this case is like *Alliant*, and not like *OSI*, on which CB&I pins its hopes. Br. 22-24.

Further, in *OSI* – unlike under the Agreement, which permitted CB&I, in its pre-closing financials, to deviate from GAAP (§2.6(a)) but set a different standard for the Article I Documents (§1.4(f)) – the buyer was required to apply the same accounting principles during the purchase price adjustment process that the seller had used in its warranted pre-closing financial statement and estimate of closing working capital, *regardless of whether the seller's methodology complied with GAAP*. 892 A.2d at 1087-89, 1091, 1094.

Moreover, the determination of a purchase price in *OSI* was actually a "true-up" dependent on the change in the company's working capital between the date of the pre-closing financial statement and closing, such that the financial statement "itself played an important role in the final calculation of the Purchase Price." 892 A.2d at 1088, 1092, 1095. This is not the case here, where the Target Net Working Capital Amount is a designated number *untethered to the Article II Financials* and therefore – contrary to CB&I's misrepresentation (Br. 27-29) – not at all analogous to the *OSI* pre-closing financial statement.

The other opinion on which CB&I heavily relies, *Westmoreland Coal Co. v. Entech, Inc.*, 794 N.E.2d 667, 668, 670-71 (N.Y. 2003), suffers from the same infirmities: as in *OSI*, the *Westmoreland* agreement expressly required the price adjustment calculations to be consistent with the pre-closing "baseline" financial statement; the price adjustment depended on the difference in value between the baseline date and closing; and there was no remedy hierarchy as established by Agreement §10.3(a).

The *Alliant* Court explained:

> [*OSI* and *Westmoreland*] are distinguishable for the simple reason that the purchase agreements in those cases operated differently than the Agreement here. In particular, in both *OSI Systems* and *Westmoreland*, the court found that the buyer was required to apply the same accounting principles during the purchase price adjustment process that the seller had used historically ... *OSI Systems* also is distinguishable because the purchase agreement in that case did not contain a remedy hierarchy ... [The *Westmoreland*] agreement did not

> contain an exception like [Agreement §10.3(a)]. Other courts also have distinguished *Westmoreland* on this basis.

2015 WL 1897659, *11-12 (footnotes omitted).[12] *See also HBC*, 2014 WL 6982921, at *6-7 (distinguishing *Westmoreland* for lack of a §10.3 analogue and because in *HBC*, like here, the pre-closing financial statements were not subject to the same standard as, and were not tied to, the purchase price determination, which was to be guided by accounting principles defined "only for the purpose of calculating [the purchase price]"); *Severstal*, 865 F. Supp. 2d at 440-41 ("Here, the purchase price adjustments required by the [agreement] does not begin from audited financial statements which are adjusted to account for subsequent activity as in *Westmoreland*. Rather, the [agreement] adjusts … a contractually specified metric, to the Final Net Working Capital. … Unlike in *Westmoreland*, the purchase price adjustment here does not call for a comparison of net working capital at two different points in time and is not designed to capture changes in net working capital from contract to closing").[13]

[12] The same distinctions apply to CB&I's case of *General Dynamics Corp. v. Orbital Scis. Corp.*, C.A. No. 5759-VCL (Del. Ch. Nov. 10, 2010), Tr. at 15-16, 68-70.

[13] *And see Violin*, 871 N.Y.S.2d at 613-14 (*Westmoreland* confined to specific agreement there); *McGraw-Hill Cos. v. Sch. Specialty, Inc.*, 840 N.Y.S.2d 47, 48 (N.Y. App. Div. 2007) (same).

g. CB&I's attempted narrowing of the IA's jurisdiction must fail

CB&I claims that the Order oversteps the Agreement by empowering the IA to review "any and all" issues raised by WEC's Statement, CB&I's Objections and the calculations therein. The express, unqualified "any and all" language of §1.4(c), it argues, must be read "narrowly." Br. 37-39. This is absurd. *Fillip v. Centerstone Linen Servs., LLC*, 2013 WL 6671663, at *12 (Del. Ch. Dec. 11, 2013) ("difficult to conceive of broader language" than "any and all"). Express, clear and unambiguous contractual terms must be honored *as written*; "'contracts with provisions providing for accounting arbitration of financial statements, such as this one, *should be broadly construed* to cover all disputes but for those which are expressly excluded.'" *Severstal*, 865 F. Supp. 2d at 442 (emphasis added; internal citation omitted). This rule applies equally in Delaware, where the powerful presumption of arbitrability is heightened "in cases involving a broad clause," and can be overcome only by "explicit exclusion of the dispute from the clause." *TMIP Participants LLC v. DSW Grp. Holdings LLC*, 2016 WL 490257, at *8 (Del. Ch. Feb. 4, 2016). Here, of course, there is no "explicit exclusion," and §10.3 decrees that no such exclusion may be implied.

CB&I argues, further, that the Order transgresses the Agreement's stipulation that the IA should function "as an expert and not as an arbitrator" (§1.4(c)), by supposedly submitting to the IA "legal issues of contract

interpretation" and "potentially" (but nowhere pleaded in CB&I's Complaint or otherwise elucidated) a question of "actual fraud." Br. 6, 37-42. This argument fails.

Once a matter is referred to arbitration, all subsidiary issues, including questions such as those described by CB&I, "are left to the arbitrator." *TMIP*, 2016 WL 490257, at *8-9. As this Court explained, "[w]hether an arbitration provision is branded 'narrow' or 'broad,'" once it is found to be enforceable, the arbitrator will decide *all* related issues, including "interpretation of the contract." *Viacom Int'l, Inc. v. Winshall*, 72 A.3d 78, 83-84 (Del. 2013), and 2012 WL 3249620, at *12-14 (Del. Ch. Aug. 9, 2012) (upholding expert-not-arbitrator accountant's contract interpretation). *See also TMIP*, 2016 WL 490257, at *12 ("Delaware courts repeatedly have recognized that arbitrators, even those without legal training, may be called upon to interpret the parties' agreement"); *Advantage Sales & Mktg. LLC v. USG Cos.*, 2016 WL 2588163, at *1-2 (D. Del. May 4, 2016) (same; proper for accountant considering post-closing earn-out disputes to interpret agreement); *Matria*, 2007 WL 763303, at *6-7 (although misrepresentation claims typically are not referred to accounting experts, courts must enforce agreements as written; such a claim sent to "the Settlement Accountant as the forum of express choice").

Thus, the IA has expansive jurisdiction – not limited by the "expert-not-arbitrator" language – to determine the issues described in §1.4. "[T]he phrase 'act as an expert and not as an arbitrator'" is simply a procedural limitation, "'mean[ing] that [the accounting firm] will resolve the dispute as accountants do – *by examining the corporate books and applying normal accounting principles plus any special definitions the parties have adopted* – rather than by entertaining arguments from lawyers and listening to testimony.'" *Alliant*, 2015 WL 1897659, at *10, quoting *Omni Tech*, 432 F.3d at 799. In this role, the accounting expert may preside over "some level of argumentation akin to the type of adversarial process of an arbitration or judicial proceeding," to be able properly "to consider each side's position and to apply genuine expertise to resolve purchase price adjustment disputes properly." *Alliant*, 2015 WL 1897659, at *11. *See also Viacom*, 2012 WL 3249620, at *15 (sophisticated accountants do not have "less authority because they did not go to law school"); *Omni Tech*, 432 F.3d at 800-01 ("The parties agreed that the independent accountant would reach a decision *as an expert does*, not as the umpire in a final-offer arbitration does").

Finally, CB&I's purported concern that the IA will go rogue, violating this Agreement provision by conducting a plenary hearing (Br. 41), is unfounded. The Agreement specifies that "[t]he [IA]'s determinations shall be based solely on written submissions" (§1.4(c)).

II. THE ORDER CORRECTLY INCLUDES DISMISSAL OF COUNT II

A. Question Presented

Did the Order correctly dismiss Count II, alleging breach of the implied covenant of good faith and fair dealing, when WEC moved for that relief, and the Agreement directly addresses the issues raised therein, leaving no room for an implied covenant? A518-22.

B. Scope Of Review

See supra 14.

C. Merits Of Argument

CB&I proclaims that the Order improperly dismisses Count II because WEC's motion purportedly was addressed solely to Count I. Br. 6-7, 43-44. Any review of the Complaint and WEC's motion papers readily exposes this waiver argument as meritless.

CB&I's Complaint, *in its entirety*, is founded on the propositions that (i) the Agreement was intended to protect CB&I from being held accountable after closing for any misstatement of its financial condition; (ii) WEC wrongfully is attempting to undercut that result by way of WEC's Statement's calculations of the Net Working Capital Amount, and the charges therein that the calculations in CB&I's Statement do not adhere to GAAP; and therefore, (iii) the Court should intervene to prevent the IA from resolving issues raised in WEC's Statement. Counts I and II (for breach of express and implied Agreement terms, respectively),

both sounding in contract,[14] are merely variations on this over-arching theme. In fact, Count II opens by "repeat[ing], realleg[ing], and incorporat[ing] by reference" all of the prior allegations of the Complaint, including the allegations of Count I (Complaint ¶76), and it revolves around the allegation that WEC "through the working capital adjustment process, [is attempting] to reopen the issue of CB&I's ability to recover on the claim cost from [WEC] or the project owners" (*id.* ¶80) – an allegation that is central to Count I as well. Br. 17-19. Count II, like Count I, seeks "an injunction barring [WEC] from submitting such claims to the [IA]" (Complaint ¶81), and the Complaint concludes with a request for the same remedies for the two Counts, drawing no distinction between them (A54-55). *See also* A489 (CB&I states that the positions in WEC's Statement "breach [both] the contract and the covenant of good faith and fair dealing").

WEC's motion attacked the common premise underlying both Counts of the Complaint. WEC's brief did not specifically reference either of, and made no distinction between, the two Counts – because, for purposes of WEC's motion, they are essentially the same – and in its conclusion, WEC requested dismissal of the entirety of the Complaint, to allow a proceeding before the IA. A273-74. Accordingly, CB&I cannot truthfully represent that WEC's brief "ignor[ed]"

[14] *NAMA Holdings, LLC v. Related WMC LLC*, 2014 WL 6436647, at *16 (Del. Ch. Nov. 17, 2014).

Count II (Br. 43), and the Order's dismissal of Count II, as part and parcel of its dismissal of the entire Complaint, was proper. *Barker v. Huang*, 610 A.2d 1341, 1348 (Del. 1992) (where defendants' motions "*generally* asserted that plaintiff's complaint failed to plead a claim for relief" and "that the complaint failed to state a cause of action," they "were sufficient notice to plaintiff that *all of her claims* were called into question. Moreover, it is appropriate for a court to act *sua sponte* in the interests of judicial economy"; emphases added).[15]

Furthermore, as the Order recognizes, CB&I's waiver argument wrongfully assumes that the Court would entertain the idea of amending the Agreement by *implied* covenant to limit the *express* §1.4 procedure (Complaint ¶¶79-80; Br. 44-47). That assumption is unsupportable, because "the covenant is a limited and extraordinary" remedy; courts "rare[ly]" inject new implied terms into an agreement, and will not do so absent a contractual "gap" that leaves the subject matter of the proposed implied term uncovered. *Nemec*, 991 A.2d at 1128, 1130. When a negotiated contract expressly and unambiguously addresses a particular subject matter and authorizes certain conduct, counter-contractual obligations will not be implied into that area to undermine – by limiting or carving out exceptions to – that provision. *Id.* 1126-27 ("implied covenant will not infer language that

[15] *See also M3 Healthcare Sols. v. Family Practice Assocs.*, 996 A.2d 1279, 1283-84 (Del. 2010); *Atwell v. Lavan*, 366 F. App'x 393, 396 n.6 (3d Cir. 2010).

contradicts a clear exercise of an express contractual right"). Rather, the appearance of related agreed-upon provisions in the contract evidences that the parties have considered the topic and arrived at a mutually acceptable statement of its treatment.[16]

Here, as the Order (at 16) correctly concludes, there is no gap. The issues framed in Count II – whether CB&I's ability to recover on a "claim cost" should be a factor in calculating the Net Working Capital Amount, and whether the IA should review such a calculation – are covered by the Agreement (§§1.4(b), (c)) permitting WEC to address, in WEC's Statement, all aspects and components of the "calculations of the … the Net Working Capital Amount," and requiring submission to the IA of "any and all" disputes with respect to WEC's Statement and its calculations. CB&I itself conceded that the Count II subject matter also is covered by the Agreement in §1.3 and various Schedules (Br. 45). Therefore, the Order properly found it would be impermissible to alter the Agreement via an implied covenant, as CB&I's Count II demands.

[16] CB&I's cases agree: *NAMA*, 2014 WL 6436647, at *16 (gaps should not be filled when "doing so would grant a contractual protection that the party 'failed to secure … at the bargaining table.' A court must not use the implied covenant to 'rewrite a contract' that a party 'now believes to have been a bad deal'"; internal citations omitted); *Allen v. El Paso Pipeline GP Co.*, 113 A.3d 167, 183-84, 191 (Del. Ch. 2014).

CONCLUSION

This Court should affirm the Order.

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Date: January 23, 2017