EFiled: Feb 07 2017 06:24PM EST
Filing ID 60178197
Case Number 573,2016

IN THE

Supreme Court of the State of Delaware

CHICAGO BRIDGE & IRON COMPANY N.V., Plaintiff Below-Appellant, v. WESTINGHOUSE ELECTRIC COMPANY LLC and WSW ACQUISITION CO., LLC, Defendants Below-Appellees.	**No. 573, 2016** CASE BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. No. 12585-VCL

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Westinghouse's Answering Brief ("AB") exposes how its reading of the Agreement leads to untenable results, and is contrary to its plain language, structure, and clear intent.

1. According to Westinghouse, the rare "non-survival" provision in §10.1 — by which Westinghouse agreed that, post-Closing, it would have no surviving recourse for CB&I breaches of contractual representations and warranties (absent a showing of "actual fraud") — provides only "limited repose." AB 29 n.8. Indeed, as shown in CB&I's Opening Brief ("OB"), under Westinghouse's reading, §10.1 actually provides *no* "repose" at all. OB 35 & n.6.

2. Central to Westinghouse's position is its pretense that CB&I did not actually provide a GAAP representation. AB 8. Westinghouse's position is contrary to the plain language of §2.6(a), and contrary to the holding of the Court of Chancery and to Westinghouse's own brief below. The Court below found, after quoting §2.6(a): "In other words, the Seller represented that the Company's financial statements complied with GAAP …." Op. 8.

3. According to Westinghouse, the modifier of the Agreed Principles' "GAAP" standard — "GAAP, consistently applied" — has no meaning. Westinghouse repeatedly refers to "GAAP" without any account for the "consistently applied" modifier, or with selective italics to distract from the

"consistently applied" language. That modifier establishes a critical distinction between this case and *Alliant*, which relied on its absence to distinguish *OSI* and *Westmoreland*. That distinction has also been recognized by practitioners who draft these agreements — a point made in CB&I's opening brief (OB 25-26) to which Westinghouse fails to respond.

4. Westinghouse contends that the Net Working Capital exercise is not a "true-up" at all. AB 30-31. This contention is belied by the Agreement's requirement that the calculation be based on "consistent" standards across the periods (OB 14-15), and is contrary to the understanding of courts considering these cases. *See* Point I.B.7, *infra*.

5. In Westinghouse's conception, the purchase price is completely contingent. It is to be set post-Closing without any regard to the financial understandings of the parties when they signed the Agreement because, according to Westinghouse, the "Article I" standards governing the Net Working Capital exercise had nothing at all to do with the "Article II" standards to which CB&I provided representations. AB 29-30.

6. Westinghouse's proposed construction of the Agreement renders it internally inconsistent. Section 1.3 and its accompanying schedules and releases embody the parties' compromise on the disputed cost-overrun issue — CB&I relinquished its claim for $1.16 billion in cost overruns in return for a maximum

payment of $544 million (contingent on the projects' performance). A32-33.[1] But on Westinghouse's position, it is entitled to re-raise that **very same cost-overrun issue** in the working capital exercise by asserting that CB&I's financial statements misstated and had always misstated — to the tune of over a billion dollars — the amount of the overruns that Westinghouse itself owed to the Business it had just purchased.

* * *

Westinghouse is attempting to do indirectly what it agreed it could not do directly — recover for alleged breaches of representations and warranties. The Court of Chancery declined to determine whether Westinghouse could seek recompense for such claims, ruling that the issue is for the Independent Auditor. Op. 15-16. This is a purely legal issue and this Court should make clear that Westinghouse's attempt to pursue these claims — to do indirectly, what it agreed it could not do directly — is improper.

[1] The compromise solution in §1.3, and its accompanying schedules (1.3(b), (d)) and releases (§12.18), implemented the central, quitclaim purpose of the deal. Agreeing upon Closing to stand down from the battle over CB&I's recovery for cost overruns, the parties released one another (and CB&I released the Owners) and CB&I agreed to cap its potential recovery.

ARGUMENT

I. WESTINGHOUSE'S READING OF THE AGREEMENT IS CONTRARY TO BASIC PRINCIPLES OF CONTRACT INTERPRETATION AND CASE LAW.

CB&I is not seeking to eviscerate the Independent Auditor or write §1.4 out of the Agreement, nor is the issue here one of "GAAP-compliance" best resolved by an accountant. AB 25. The issue here is contract interpretation, which the Agreement leaves exclusively to the Delaware courts. Only CB&I's reading of the Agreement gives meaning to *all* its relevant provisions, reads it cohesively as a whole, and comports with case law and common sense.

A. *OSI*: the working capital process cannot be used to recover on claims elsewhere precluded by the contract

Westinghouse's position contravenes the fundamental insight of *OSI Systems, Inc.* v. *Instrumentarium Corp.*, 892 A.2d 1086 (Del. Ch. 2006). In addressing a "buyer's … assertion that the seller premised its financial statements and estimates of working capital on accounting judgments that violated [GAAP]," then-Vice Chancellor Strine held that a "[Purchaser] cannot bypass the contractual[ly mandated remedy] … and then seek a gigantic Closing Adjustment by attempting to convince the Independent Accounting Firm that [the Seller's financial statement] was materially inaccurate and infected by improper accounting." 892 A.2d at 1087, 1095. The contract in *OSI*, like the one here (*see* §1.4(f)), mandated that the buyer's Closing Statement be calculated "in accordance

with the Transaction Accounting Principles [defined as 'GAAP'[2]] applied consistently with their application in connection with the preparation of the [seller's financial statements]." *Id.* at 1091. It also, like here, called for the parties to exchange objections to each other's working capital calculations, negotiate for a set period, and then submit "*all matters* that remain[ed] in dispute" to the Independent Auditor. *Id.* at 1087-89; *OSI* Agreement §2.10(c) (emphasis added).

Considering the agreement as a whole, the court found that it *only* "contemplate[d] the use of an Independent Accounting Firm if there are differences of opinion about the amount of Modified Working Capital as of the Closing Date when applying the same Transaction Accounting Principles used in the Reference Statement in a consistent manner." *OSI*, 892 A.2d at 1091. To the extent the buyer "sought to have different principles applied" than what the seller had historically used, it was precluded from using the working capital process to pursue its claims. *Id.* at 1089.

Critically, the *OSI* court noted that the buyer's choice to "base its claim for a drastic Closing Adjustment on an argument that [the seller] breached its representations and warranties … [had] even more impact when … combine[d] with another reality — the fact that a ruling for [buyer] would undermine the

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[2] Compendium of Selected Authorities Cited in Appellant's Opening Brief, Tab 2 ("*OSI* Agreement"), Ex. A ("Definitions") ("'Transaction Accounting Principles' means U.S. GAAP ….").

limitations on liability and the core dispute resolution mechanism contained in the Purchase Agreement." *Id.* at 1093-94. The court made clear it would not sanction a contract interpretation that allows a party to seek a remedy via one provision that it had explicitly limited (or given up entirely) in another. This is exactly what Westinghouse seeks here.

The insight of *OSI* applies with particular force here where Westinghouse seeks to resurrect claims in an accounting exercise that were completely given up in the Agreement's non-survival provision (§10.1).

This result is also directed by *OSI*'s teaching that what matters is the "method by which [the buyer] came to its conclusion" about the working capital adjustment. *Id.* at 1089. If Westinghouse's Closing Statement employs accounting principles *other than* "GAAP, consistently applied," *OSI* counsels that Westinghouse is impermissibly seeking to enlarge the working capital dispute to include contentions precluded by the non-survival provision. There is no question that CB&I has alleged, and Westinghouse has conceded, that Westinghouse is seeking "to have different principles applied" to the calculation of Net Working Capital. *Id.* at 1089; A43-49. And it is also clear, as CB&I has alleged, that in so doing Westinghouse is seeking recompense for what would amount to a CB&I breach of its representations and warranties — both as to the GAAP compliance of its Financial Statements (§2.6(a)) and whether all material liabilities are included

in those Financial Statements (§2.6(e)). These are consequently claims precluded by §10.1, and thus outside the scope of the Agreed Principles and the Independent Auditor's authority.

Westinghouse's position has no support in *Alliant Techsystems, Inc.* v. *MidOcean Bushnell Holdings, L.P.*, 2015 WL 1897659 (Del. Ch. Apr. 24, 2015). Putting aside whether *Alliant* was correctly decided in finding that the buyer there could pursue claims in the accounting exercise that were limited by the indemnification provisions of the agreement at issue, *OSI* and *Alliant* addressed two distinct types of agreements (and thus represent two lines of holdings): agreements that provide for working capital calculations in accordance with "GAAP, consistently applied"; and those that call for "GAAP" and then, secondarily and only if in accordance with GAAP, consistency. The difference reflects a different intent of the contracting parties and counsels different results.[3] This same key distinction can be found in cases from foreign jurisdictions. *Compare Westmoreland Coal Co.* v. *Entech, Inc.*, 794 N.E.2d 667, 670 (N.Y. 2003) ("GAAP applied on a consistent basis with past practices") *with HBC Solutions, Inc.* v. *Harris Corp.*, 2014 WL 6982921, at *2 (S.D.N.Y. Dec. 10, 2014) ("U.S. GAAP ***and, to the extent consistent with U.S. GAAP***, the accounting

[3] Practitioners recognize the difference. OB 25. Westinghouse does not dispute this.

principles and methodologies followed by [Harris] in its preparation of its financial statements" (emphasis added)).

B. Westinghouse's untenable efforts to avoid *OSI*'s holding

Westinghouse does not challenge the correctness of *OSI* as a statement of Delaware law. Instead, to evade *OSI*, Westinghouse resorts to one meritless argument after another.

1. Westinghouse's contention that the "Article II Financials … *were not required to be compliant with GAAP*" (AB 8)

Critical to Westinghouse's position is its assertion that its claim that CB&I's Closing Payment Statement was not GAAP-compliant could not possibly be a claim for breach of representations — in violation of *OSI*'s teaching — because CB&I never made a representation of GAAP-compliance at all. AB 8. This argument is absurd.

Section 2.6(a) of the Agreement provides:

> The Financial Statements have been prepared in accordance with GAAP, except as otherwise indicated and subject to normal and recurring year-end adjustments (which are not material to the Business) and the absence of footnotes.

The only way to read §2.6(a) is as representing that the Financial Statements were GAAP-compliant. Delaware courts have unflinchingly so interpreted provisions containing similar language. *See, e.g.*, *Alliant*, 2015 WL 1897659, at

*3; *Hudson's Bay Co. Luxembourg, S.A.R.L.* v. *JZ LLC*, 2013 WL 1457019, at *10-11 (Del. Super. Ct. Mar. 11, 2013).[4]

Westinghouse's position here contradicts its opening brief below, where it argued: "CB&I represents in Article II of the Agreement that it delivered GAAP-compliant *financial statements*." A247 (emphasis in original). And it conflicts with the Opinion it seeks to have affirmed. Op. 8 ("In other words, the Seller represented that the Company's financial statements complied with GAAP and that the Company had no undisclosed liabilities."); Op. 15 ("the Seller's representation regarding the Company's financial statements being GAAP compliant").

2. Section 2.6(e) ignored by Westinghouse

Operating on a similar theory (if there is no representation, then Westinghouse cannot be alleging a breach of one), Westinghouse's brief makes no mention of §2.6(e) whereby CB&I represented that there were no material undisclosed Liabilities. This non-surviving CB&I representation also precludes

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[4] The *Alliant* agreement provided at §3.4(a)(ii):

> Except as set forth in Section 3.4 of the Disclosure Letter, the Financial Statements (i) have been prepared in accordance with GAAP applied on a consistent basis throughout the periods covered thereby, except as may be indicated in the notes thereto and subject, in the case of unaudited Financial Statements, to the absence of footnotes and normal and recurring year-end adjustments ….

Compendium of Selected Authorities Cited in Appellant's Opening Brief, Tab 3. The relevant provision in *Hudson's Bay* similarly was qualified by "(subject to usual year-end adjustments in the case of the Unaudited Financial Statements)." 2013 WL 1457019, at *10.

Westinghouse from taking the positions it is taking in its Closing Statement. If a Liability should have been on an "Article II" statement, Westinghouse cannot now add it to its "Article I" statement, lest Liability would "flow[] from" a breached representation in violation of §10.1. AB 8. But as explained in CB&I's Opening Brief, *with no response* by Westinghouse, Westinghouse's Closing Statement depends significantly on assertions that CB&I should have been carrying additional reserve liabilities — in direct conflict with §10.1's mandate that the representation in §2.6(e) does not surviving Closing. OB 29-31.

3. Westinghouse's contention that "the price ultimately fixed would be rooted not in those representations [in the Financial Statements], but in *different, special-purpose, GAAP-compliant calculations*" (AB 29)

According to Westinghouse, instead of the representations in the Financial Statements being central to the parties' valuation of the asset being transferred, they were actually irrelevant and Westinghouse just wasted months diligencing a business upon which the parties didn't actually place any kind of predetermined value. Rather, the idea was that the sale price would be determined for the first time in a "special-purpose" working capital calculation after Closing, with essentially no limits on its value in either direction.[5] Again, this is absurd.

[5] Westinghouse's counsel argued below that "the process outlined in the agreement was designed to calculate a purchase price in the first instance." A535. Westinghouse's reading of the Agreement therefore depends on accepting the view

Westinghouse's position entirely ignores that the Agreed Principles require that working capital be calculated "in a manner consistent with GAAP, consistently applied by Seller Parent *in preparation of the financial statements* of the Business" (Agreement Sch. 11.1(a) (emphasis added)) — the very financial statements Westinghouse finds irrelevant to the "Article I" process. Westinghouse brushes off the absurdity of its position in a footnote, stating: "CB&I's expression of disbelief that anyone would so structure an agreement ([OB] 36) is misplaced." AB 30 n.9. This is not good enough.

CB&I's disbelief is not misplaced. Westinghouse's creation of Article I and Article II silos is an irrational contract construction in the abstract, but even more so here, where large portions of the working capital amount at Closing were *already on the balance sheet in the Financial Statements* as of June 30, 2015. Sch. 1.4(f); A25-26, A46-47. Because the bulk of the working capital amount depended on CB&I's construction cost and claim recovery estimates, the prior balance sheets and representations regarding them were critical in establishing the value of the Business being transferred.

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that the parties agreed they would close this sale without having set the purchase price at all, or agreed to anything relevant to it.

4. Westinghouse's contention that the Agreement and *Alliant* called for the same GAAP standard (AB 18)

In full flight from *OSI*, Westinghouse argues that the Agreement's GAAP consistency requirements are the same as those in *Alliant*. Westinghouse states: "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.'" AB 18 (quoting *Alliant*). While "GAAP, consistently applied" is an accurate quotation of the Agreement here, it is a misleadingly cropped quotation of the agreement in *Alliant*, which actually provided that "Net Working Capital had to be: '[i] calculated in accordance with GAAP ***and [ii] otherwise*** in a manner consistent with the practices and methodologies used in the preparation of the Financial referenced in Section 3.4(a)(i).'" *Alliant*, 2015 WL 1897659, at *8 (bold and italic emphasis added; modifications in original). The *Alliant* court added the bracketed romanettes to emphasize these two separate and distinct requirements. That was not the case in *OSI*, nor is it here.[6] Westinghouse's brief makes no mention of the "and otherwise" modifier and ignores that *Alliant* had no parallel to §10.1.

[6] Westinghouse also misleadingly implies that the Agreement requires consistency only "to the extent" consistent with GAAP. AB 32 ("CB&I's past methodology is to be followed *only* '[t]o the extent not inconsistent with the foregoing'" (quoting Agreement Sch. 11(a))). But the "foregoing" refers to the phrase: "Working Capital … will be determined in a manner consistent with *GAAP, consistently applied* by Seller Parent in preparation of the financial

5. Westinghouse's contention that the Agreement allowed it to close "*even if it may have had issues with the Article II Financials*" (AB 29 n.7)

Westinghouse's position that it could close while believing that the Financial Statements were not GAAP-compliant, and then turn around and so assert in the working capital process, cannot be squared with the Agreement. The parties agreed that following months in which Westinghouse would diligence the Business (beyond what was already years of experience as consortium partner), on Closing CB&I would have *no* ongoing liability to Westinghouse or the project owners for, among other things, any claim that its Financial Statements violate GAAP (§10.1). But according to Westinghouse, the Agreement simultaneously provided that it could nevertheless assert post-Closing that CB&I's Financial Statements were materially inaccurate and thereby recover $2 billion post-Closing from CB&I based on the very same claimed deficiencies in CB&I financials. This is an irrational way to read an agreement between sophisticated parties, not to mention one that would encourage and bless less than forthright behavior.

6. Westinghouse's contention that §10.1 provides "limited repose" (AB 29)

Westinghouse's view of the Agreement renders §10.1 not just irrelevant to Net Working Capital, but bereft of any purpose at all. Westinghouse says: "Not

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statements of the Business, as in effect on the Closing Date." Sch. 11.1(a) (emphasis added). The Agreed Principles do *not* say "to the extent not inconsistent with GAAP."

so: CB&I may derive from §10.1 the limited repose it provides when read together with the remainder of the Agreement." AB 29 n.8. What is "limited repose"? Westinghouse does not say.

An unexplained "limited repose" is an incomprehensible meaning to ascribe to §10.1, an obviously specially-negotiated provision. Only 6% of private deals in 2014 provided for non-survival of representations and warranties post-closing. OB 26. Westinghouse would have this Court believe that the parties included an atypical provision in order to provide only an undefined "limited repose." This is not a throw-away or meaningless provision; it is central to the parties' bargain. Westinghouse's interpretation of the Agreement leaves it with no import at all.

7. Westinghouse's contention that "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" (AB 30)

Westinghouse is wrong, indeed irrational, in asserting that the working capital adjustment has nothing to do with events occurring between target setting and Closing. Courts holding both in favor of CB&I's position and in favor of Westinghouse's position have recognized that these provisions are a "true-up." *See, e.g.*, Compendium of Selected Authorities Cited in Appellant's Opening Brief, Tab 1 ("*Gen. Dyn.* Tr.") 68-69 ("And this is a basic concept of a working capital true-up. You want working capital to reflect real changes in the business ….

between sign and close."); *Matria Healthcare, Inc.* v. *Coral SR LLC*, 2007 WL 763303, at *6 (Del. Ch. Mar. 1, 2007) (calling it a "tru[e]-up").

This position is also belied by the parties' actions between June and December 2015. CB&I spent an additional nearly $1 billion on the nuclear projects during that time. A40. That would have made little or no sense if the working capital true-up had nothing to do with anything between signing and Closing, and thus did not provide CB&I an avenue to recoup such investments. Finally, Westinghouse's position is in direct conflict with CB&I's specific allegations, which should have been viewed in the light most favorable to CB&I on a Rule 12(c) motion. *See* A27.

8. Westinghouse's contention 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" (AB 30)

Westinghouse's assertion that the Target Net Working Capital Amount is unrelated to the state of the Business or past financial statements is, again, necessary to its avoidance of *OSI*. But it was irrelevant to the court below, has been rejected by case law holding both ways, and fights CB&I's pleadings.

In addition to not relying on this position in the Opinion below, Vice Chancellor Laster rejected a similar argument in a 2010 transcript ruling:

> I'm not convinced by the definition of target working capital in terms of [a fixed number], I do believe that even if that was a negotiated

> amount, even if it didn't come directly off a financial statement, it was certainly based on financial statements. And those financial statements were rep'd in connection with the agreement to be prepared in compliance with GAAP.

Gen. Dyn. Tr. 70. The court in *Alliant* similarly noted that "[i]t is reasonably inferable that the amount of Net Working Capital assumed in the Purchase Agreement ($188.1 million) was derived from these financial statements [for which the Seller had provided representations and warranties]." 2015 WL 1897659, at *6 n.51.

And Westinghouse's contention also directly conflicts with CB&I's well-pleaded allegations. A27 ("During the initial negotiations, CB&I and Westinghouse agreed on a $1.174 billion 'peg' of the estimated June 30, 2015 net working capital, which corresponded to the balance sheet CB&I provided to Westinghouse in July 2015.").

C. Section 10.3: "non-interference"

As discussed at Point I.B.6, *supra*, Westinghouse argues that §10.1's non-survival provision is illusory because §10.3's non-interference clause licenses it to breathe life into its non-surviving claims by repackaging them as a working capital dispute. That is manifestly untenable. This extremely rare provision of §10.1 was chosen by sophisticated parties to encapsulate the quitclaim nature of the transaction between CB&I and Westinghouse. OB 2, 34-35. The structure of the

Agreement demonstrates a decision to respect — not eviscerate — the central protection CB&I bargained for in §10.1. OB 33-37.

Section 10.3's non-interference clause operates as a "trumping provision" that comes into play ***only*** when "a dispute could be brought *either* as part of the purchase price adjustment procedure *or* as an indemnification claim." *Alliant*, 2015 WL 1897659, at *2 (emphasis added); *see also Matria*, 2007 WL 763303, at *2 (applying remedy hierarchy when dispute "fit within *both* the arbitration provision for [misrepresentation claims] and the arbitration provision for adjustments to be made by the Settlement Accountant" (emphasis added)). But given the clear elimination of post-Closing liability for breaches of these representations, that is not the case here.

Westinghouse suggests the only way to understand §10.3 is that the parties intended it to reserve a category of non-surviving claims that could later be revived if raised in the post-Closing Net Working Capital provision. Not so. Consistent with the true-up the parties agreed to, if CB&I had operated the Business between signing and Closing such that the Net Working Capital amount fell below the peg, Westinghouse would have been entitled to recover the difference. *See* OB 36-37. But without §10.3, for such a payment owed Westinghouse through the §1.4 true-up process, CB&I could have sought indemnification from Westinghouse for a "Loss" pursuant to §10.4. *See* Agreement §10.4 (after closing "Purchaser shall

indemnify Seller Parent … against any Loss that any Seller Parent Indemnified Party suffers"). Section 10.3 prevents that.[7]

D. Section 1.4(c): "any and all"

The court below did not resolve whether Westinghouse could pursue its claims in the face of §10.1. Rather, the court held this was for the Independent Auditor to decide in light of the "any and all" language in §1.4. Op. 15. Westinghouse embraces that reasoning in an attempt to evade judicial enforcement of §10.1's plain import. But the Order below runs afoul of the clear substantive limitation the parties placed on the Independent Auditor's authority.

Here, as in *OSI*, the buyer and the seller were obliged to provide working capital calculations pursuant to agreed principles. After exchanging specific objections, "all" remaining disputes about those calculations were to be resolved by the Independent Auditor, who is contractually confined to addressing issues that remained to the extent the parties' calculations were submitted in accordance "with the terms," "applicable guidelines and procedures" of the agreement, which necessarily include the Agreed Principles. Agreement §1.4(c). As *OSI* concluded, if the buyer violated the agreed principles, the dispute was *outside* of the Independent Auditor's purview. 892 A.2d at 1091. As in *OSI*, the Court alone —

[7] CB&I's argument thus does not rest on the premise that it could not possibly owe Westinghouse any money through a *proper* Net Working Capital adjustment. *See* AB 28-29.

not the Independent Auditor — has the "broad interpretive powers regarding the Purchase Agreement, to determine the issues that would then remain" for the Independent Auditor. *Id.* at 1095.

That Westinghouse is foreclosed from reviving its non-surviving claims before the Independent Auditor is made all the more clear here by the Agreement's additional limitation that the Independent Auditor is to "function[] solely as an expert and not as an arbitrator." Agreement §1.4(c). This "expert, not arbitrator" language is recognized by courts and practitioners alike as conveying specific intent to adopt a limited expert determination provision where the expert considers only technical issues within his or her realm of expertise. OB 40-42; *see also SRG Glob.* v. *Robert Family Holdings*, 2010 WL 4880654, at *10 (Del. Ch. Nov. 30, 2010); *AQSR India Private, Ltd.* v. *Bureau Veritas Holdings, Inc.*, 2009 WL 1707910, at *2, *7 (Del. Ch. June 16, 2009). Even *Alliant* draws a distinction between the process of resolving disputes "as accountants do" and the judicial requirements of "entertaining arguments from lawyers and listening to testimony." 2015 WL 1897659, at *10.

Under the decision below, the Independent Auditor has been assigned "an entirely different and more ambitious role" than what the contract provided for. *OSI*, 892 A.2d at 1091. Nowhere in the Agreement did the parties consent to the Independent Auditor, chosen for expertise in accounting, adjudicating questions of

contract construction or the nature of what contentions are precluded in the working capital process by the unusual non-survival provision of §10.1.[8] It also contradicts well-established Delaware law requiring arbitration clauses to be read in light of the parties' intent, as arbitration is understood to be a matter of consent. *See James & Jackson, LLC* v. *Willie Gary, LLC*, 906 A.2d 76, 78 (Del. 2006).

CB&I's interpretation of the Agreement does not seek to whittle down the Independent Auditor's role to nothing more than a bean counting exercise. *See* AB 35. CB&I's reading comports with the contract's specification (§ 1.4(c)) that the Independent Auditor determines "items and amounts" still properly in dispute. Even once the Court blocks Westinghouse from reviving its extinguished claims, the Independent Auditor must verify the accounting of the approximately $1 billion CB&I poured into the Business between signing and Closing. A41. Further, the Independent Auditor must assess the GAAP compliance of CB&I's accounting for

[8] The impropriety of leaving the matter to the Independent Auditor, with potentially more narrow legal and fact-finding mechanisms, has been confirmed by developments since the decision below and CB&I's Opening Brief. Westinghouse's parent, Toshiba, has announced massive write-downs related to its nuclear construction business and news articles have suggested that the write-downs result from Westinghouse's own improper accounting. *See* Takashi Mochizuki, *Toshiba Expects Write-Down of as Much as Several Billion Dollars*, WALL ST. J. (Dec. 29, 2016), http://bit.ly/WSJToshiba. This is the second accounting scandal at Toshiba in the past several years. *Id.* This is exactly the kind of evidence concerning the bona fides of Westinghouse's position that would be at issue in a court proceeding if Westinghouse was pursuing a claim for breach of representation or warranty under the required "actual fraud" standard.

any new obligations that may have arose after June 2015 for which CB&I's historical accounting practices do not dictate a particular approach.

II. THE COURT OF CHANCERY ERRED IN GRANTING JUDGMENT ON THE PLEADINGS AS TO COUNT II.

A. Waiver

Westinghouse argues against waiver based on inapposite case law and an erroneous conflation of Counts I and II of the Complaint. AB 42-44.

First, Westinghouse insists that under this Court's precedent it waived nothing by failing to refer to Count II specifically because its motion sought dismissal generally. But Westinghouse misleadingly relies upon *Barker* v. *Huang*, 610 A.2d 1341 (Del. 1992). AB 43-44. That decision nowhere mentions waiver and, in any event, found the defendants' dispositive motions to have given sufficient notice only because they "asserted that plaintiff's complaint failed to plead a claim for relief" and "failed to state a cause of action," *Barker*, 610 A.2d at 1348. *Barker* provides no aid to Westinghouse, which unambiguously admitted in its Reply Brief below that it sought dismissal of Count II "*not for failure to state the elements of a claim*" but rather because the "parties' dispute does not belong before this Court." A520 (emphasis added).

Nor do the other decisions Westinghouse cites furnish it shelter from waiver. AB 44 n.15. In each case, the court found no waiver precisely because the relevant brief had, in fact, contained sufficient, specific references to the matter at issue.

Second, Westinghouse attempts to whitewash its waiver by claiming that for purposes of its motion "the two Counts … are essentially the same." AB 43. But

Westinghouse did not argue below to dismiss Counts I and II on indistinguishable grounds so that they can both be heard by the Independent Auditor. To the contrary, in response to CB&I's argument that the Independent Auditor cannot possibly have jurisdiction to resolve Count II, at oral argument Westinghouse's counsel agreed: "I guess that's right, except it's not going to be presented to [the Independent Auditor]. Count II should be dismissed." A632. This is not surprising, for while Westinghouse contends, incorrectly, that Count I is a fight over GAAP within the Independent Auditor's ambit, Westinghouse never has disputed that Count II is *not* a question of GAAP compliance.

B. CB&I's sufficient claim

Count II states a claim that Westinghouse has breached the implied covenant of good faith and fair dealing by attempting to upend the finality of the parties' global resolution of their disputes over responsibility for cost overruns. The Court of Chancery summarily resolved Count II based on the holding that "[b]ecause the Purchase Agreement addresses the matter, there is no gap for the implied covenant to fill." Op. 16. The Court of Chancery reached this holding without identifying any particular provision in the Agreement that purportedly addresses the terms which Count II pleads must inhere in the contract. Westinghouse now argues that the court below must have concluded that "the issues framed in Count II" actually "are covered by the Agreement (§§1.4(b), (c))." AB 45.

Westinghouse's attempt to buttress the ruling below is unavailing. *First*, the Opinion below nowhere held that §1.4's working capital provisions address the matters at issue in Count II. *Second,* §1.4 says nothing about the compromise payment mechanism that Count II alleges the parties designed to compensate CB&I in global resolution of its cost-overruns claim.

Finally, Westinghouse is unable to challenge Delaware's well-settled law that where parties to a contract had "*understandings or expectations that were so fundamental that they did not need to negotiate about those expectations*," the implied covenant serves as a gap-filling measure to preserve these fundamental expectations. *NAMA Holdings, LLC* v. *Related WMC LLC*, 2014 WL 6436647, at *16 (Del. Ch. Nov. 17, 2014) (emphasis added). As pleaded in detail, and as Westinghouse's parent has recently publicly confirmed,[9] the entire transaction between CB&I and Westinghouse arose from, and was centered on, the parties'

[9] Possibility of Recognition of Goodwill and Loss Related to Westinghouse's Acquisition of CB&I Stone & Webster, Video of the explanation and Q&A sessions (Dec. 27, 2016), *available at* http://bit.ly/ToshibaInvestorSession ("Within the [Westinghouse/CB&I] consortium, there were disagreements among members over the allocation of costs under the legal contract, which diverted the resources of members away from plant construction. … The acquisition was carried out in order to resolve the situation. As a precondition of acquisition, Westinghouse and CB&I agreed that they would resolve all outstanding claims and disputes against each other before the completion of the transaction and the Consortium and customers had agreed that they would also do the same thing before the completion of the transaction. So with this transaction, we have set the environment so that we could solve the situation and all of us can focus on plant construction.").

desire to put an end to their long-standing dispute. OB 45-46. Count II identifies in §1.3 and its associated schedules and releases the specific compromise mechanism that the parties designed to resolve how CB&I would recover on its $1.16 billion cost-overruns claim. As the Complaint makes clear, all that is missing is an explicit statement reflecting the parties' understanding that these payments were negotiated specifically to compensate CB&I on its claim cost as part of a "quitclaim" transaction in which the dispute over recoverability could not be subsequently revisited through any other provision in the Agreement. Notably, Westinghouse does not, and cannot, dispute this.

The implied covenant terms that Count II seeks to supply thus directly embody the parties' fundamental expectations in executing the Agreement.

CONCLUSION

This Court should reverse, and remand for further proceedings in the Court of Chancery.

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February 7, 2017