AVOIDING COSTLY POST-CLOSING ACCOUNTING DISPUTES: PERSPECTIVES FROM A FORENSIC ACCOUNTANT AND A LITIGATOR

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"On the other hand, Energy, Mining & Utilities, the usual sector lead, only has a 9.8% market share thus far with US$29.4bn in deals, a 33% decrease in value from Q1 2013 (US$43.9bn). However, reports are indicating that the oil and gas industry is showing signs of a potential rebound this year. Canadian Energy, Mining & Utilities deals are already up 53.3% by value for this quarter at US$11.7m from 2013's US$7.7bn, with a 63.5% market share and five more deals. Last year, the focus seemed to be on development of existing resources instead of acquiring new ones but this year, dealmaking should be on the rise."
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An important goal for every legal department is cost avoidance and in the context of business acquisitions a key element in achieving that goal is avoiding misunderstanding. Planning and executing an acquisition properly is an important component in avoiding misunderstanding. This is especially true when dealing with accounting issues.

Almost every purchase and sale of a business or assets involving a non-publicly traded target or seller requires a final settlement between the buyer and seller following the closing of the transaction. This is due to variances between the values of various accounts as estimated by the seller at the time of closing and reflected in the preliminary settlement statement versus those experienced by the buyer after closing. Some practical accounting and legal guidance can help in-house counsel in drafting purchase and sale agreements and throughout the execution of the closing in a way that minimizes costs and delivers the bargained-for value.

This paper presents the perspectives of an accountant and a litigation attorney experienced with post-closing disputes, providing background on the key provisions and additional insights for in-house counsel regarding the practical considerations of accounting due diligence both during and after a transaction. These perspectives provide insight to avoid costly claims related to accounting and financial statement disputes.

Avoiding Cost and Receiving Expected Value – Due Diligence

With respect to a purchase and sale agreement, the purchase and sale agreement exhibits reflecting the most recent financial results, such as the balance sheet and statement of operations, and the estimated working capital are the source of most disputes post closing. Understandably, in the rush of activity leading up to closing, estimates are made and changes occur, but proper communication between the parties describing the changes may not occur. This leads to an

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expectation gap after closing when the results do not match estimates provided to the buyer, particularly when the basis for such estimates were not known to the buyer. Consequently, internal and external resources are needed to reconcile expectations with concomitant costs.

Our discussion here goes beyond the typical adjustments made to working capital, which occur strictly between the parties with little or no controversy. Instead, we offer suggestions to reduce the cost of disputed adjustments requiring arbitration, which can require outside litigation counsel. Moreover, we offer practical advice to help avoid claims for breaches of representations and warranties, which can lead to far more serious and costly disputes, especially those rising to the use of the "F" word – Fraud.

Before discussing specific examples, potential buyers and sellers should consider the nature of Generally Accepted Accounting Principles ("GAAP"). Most of us know to focus on the noun – the word "principles."

GAAP always remain subject to interpretation. Equally correct answers can exist, based upon different reasoning applied to the same principles and facts. Most experienced sellers limit the potential disagreement over the application of GAAP by specifying that the seller's GAAP, as applied by the seller's auditors in the seller's historical financial statements, will control. If the seller's auditors performed an audit immediately after the closing, there would be less potential for misunderstanding, but that is not the reality.

In practice, the buyer will take exception to the seller's treatment of transactions during the period since the last audit and through closing. Accordingly, the buyer's corporate accounting staff, at times supplemented by outside accountants, should perform careful due diligence on all of the seller's accounts before and after the closing to understand just how the seller's accountants interpreted and applied GAAP.

When considering GAAP, one must understand the fundamental use of estimates. Transactions are recorded not when the cash changes hands but when the rights and obligations arise, which in turn necessitates estimates. Estimates can be changed as better information becomes available. More importantly, the *method* of estimation can change, particularly when the buyer imposes their accounting methods on the newly acquired seller. Although changes to estimates create potential adjustments to the purchase price, changes from one GAAP method to another generally should not create purchase price adjustments. For example, the seller may have estimated its bad debts using a historical percentage, but then revise such estimation method to an equally acceptable direct write off method where specific customers are written off. Such change should not generally create a claim for working capital or purchase price adjustment.

Limits exist as to the retroactive adjustment of accounts as better information regarding prior estimates becomes available:

"Subsequent events affecting the realization of assets, such as receivables and inventories or the settlement of estimated liabilities, should be recognized in the financial statements when those events represent the culmination of conditions that existed over a relatively long period of time. For example, a loss on an uncollectible trade account receivable as a result of a customer's

deteriorating financial condition leading to bankruptcy after the balance sheet date but before the financial statements are issued or are available to be issued ordinarily will be indicative of conditions existing at the balance sheet date. Thus, the effects of the customer's bankruptcy filing shall be considered in determining the amount of uncollectible trade accounts receivable recognized in the financial statements at balance sheet date." **Accounting Standards Codification §855-10-55-1b**

Thus, existing conditions must be distinguished from new conditions affecting asset and liability values.

In addition to learning the current business conditions, the buyer's due diligence should include detailed inquiries and documentation requests as to how the seller estimated key components of the current assets and liabilities and how the seller has tested estimates historically. For example, oil and gas revenues must be estimated each month because the actual figure will not be known until a subsequent month. Therefore, the buyer should understand how the estimate of revenue before closing is made so the buyer can assess the reliability of the estimate and avoid disappointment when the actual figures become known. Moreover, since the estimate affects the cash changing hands at closing, a materially incorrect estimate will create problems post-closing when the buyer attempts to recover the overpayment.

Given the realities of day-to-day operations, the current asset and liability accounts change constantly, and it is difficult for a buyer to fully verify these accounts prior to the closing. However, careful due diligence as to working capital and the seller's estimate of closing date balances helps to (1) establish accurate escrows, (2) minimize misunderstanding and (3) allow for accurate estimation of potential adjustments and the provision of appropriate reserves to handle those adjustments.[2]

Standard Accounting Provisions in Purchase and Sale Agreements

To help manage and minimize post-closing accounting issues, purchase and sale agreements involving a non-publicly traded seller should contain financial representations and warranties and a purchase price adjustment mechanism that ensure the buyer and seller each receive the benefit of the intended bargain. The agreement should also ensure there is an effective way to resolve any accounting related disputes. These provisions are intended to provide both protection and cost efficient avenues to resolve disputes.

1. Purchase Price Adjustments. In a typical transaction, the seller will provide a preliminary settlement statement prior to the closing (to be used for purposes of the closing payments) and a final settlement statement within a certain timeframe after the closing (to true up any inaccuracies or estimated amounts in the preliminary settlement statement). As discussed above, both of these statements involve estimates which can create misunderstandings. To help protect against these misunderstandings, Buyers and sellers must consider (1) the scope of the statements,

[2] For a sample accounting due diligence checklist *see* SCOTT D. MILLER, NAVIGATING MERGERS & ACQUISITIONS: GUIDANCE FOR SMALL AND MID-SIZED ORGANIZATIONS (AICPA ed. 2013).

including the information that will be provided with each statement, (2) the scope of the purchase price adjustments and (3) the dispute mechanism that will govern in the event a dispute arises. Consideration of these issues can help the parties avoid misunderstandings regarding a seller's financial information, allocate risk regarding misunderstandings and outline how the parties will handle disputes.

Preliminary Settlement Statement. Under a typical preliminary settlement statement provision, the seller, potentially subject to consultation with the buyer, will be required to deliver a preliminary settlement statement a certain number of days prior to the closing. The preliminary settlement statement will generally include each component used in the calculation of the purchase price paid at closing, such as (i) an estimated balance sheet as of the effective time of the transaction, (ii) worksheets showing the estimate of the net working capital and (iii) an estimate of the purchase price adjustment amount.

The buyer will then have a set number of days to review the preliminary settlement statement and provide any comments or revisions before closing. The buyer's review of the preliminary settlement statement will need to rely heavily on the important accounting due diligence work it has completed prior to the closing. Buyers should ensure that the seller has provided appropriate access to its records, and that the buyer has asked the seller appropriate questions to clarify or follow up regarding such information. The buyer and seller typically attempt to agree on a preliminary settlement statement prior to the closing date; however, if the buyer and seller are unable to agree, the parties will often agree to use the seller's proposed preliminary settlement statement.[3]

Purchase Price Adjustment. The upward and downward adjustments to the purchase price will vary based on the structure of the transaction and nature of the assets/business being acquired. In an acquisition of oil and gas assets, purchase price adjustments vary based on whether a transaction is a downstream, midstream or upstream transaction, and may vary further based on the specifics of such transaction (for example, whether an upstream transaction includes producing properties). For example, buyers and sellers may expect to see the following purchase price adjustments in upstream oil and gas transactions:

1. Downward by the amount of any title defects, environmental defects and properties excluded due to preferential purchase rights;

2. Upward by the amount of revenues received by the buyer, but attributable to production occurring prior to the effective time of the transaction, and downward by the amount of revenues received by the seller, but attributable to production occurring after the effective time of the transaction;

3. Upward or downward, as applicable, by the amount of any imbalances;

[3] Example provisions are included in Attachment A.

4. Upward by the amount of any capital expenditures incurred by the seller after the effective time of the transaction that have been approved by the buyer;

5. Upward and/or downward by the amount of positive/negative net working capital;

6. Upward and/or downward by the amount of certain taxes and property costs, such as property taxes; and

7. Upward by the amount of any capital contributions and downward by the amount of any distributions in the context of an equity transaction.

Buyers and sellers should make sure they review the description of each such adjustment to understand what items will and will not cause adjustment of the purchase price. In midstream and downstream oil and gas transactions, there is typically a general provision designed to adjust the purchase price based on the timing of revenues and expenses relative to the effective time of the transaction. The parties should fully understand the impact of these provisions.

Final Settlement Statement. Following the closing, the party that prepared the preliminary settlement statement for closing will generally have 90 – 120 days to prepare a proposed final settlement statement. The final settlement statement will provide the final adjusted purchase price, along with details regarding the calculation of the various purchase price adjustments. This draft of the final settlement statement will become final unless the other party, typically the buyer, objects to the statement within a prescribed period. A purchase and sale agreement should include language that clearly provides how a buyer can object to a seller's proposed final settlement statement, including the timeframe within which a buyer has to object and whether the buyer must provide an explanation or supporting documentation of its objections to the proposed final settlement statement.

The parties will often agree to first use good faith efforts to resolve any disputes related to the final settlement statement. However, if the buyer and seller cannot agree on the final settlement statement, the purchase and sale agreement should provide a clear dispute resolution mechanism. Generally, the parties will submit such disputes to an accounting arbitrator for final resolution. In drafting this dispute resolution mechanism, buyers and sellers should consider (i) how the accounting arbitrator will be selected, including whether there will be one arbitrator or a panel of arbitrators and whether any such arbitrators will be required to hold certain accounting qualifications or have a minimum level of experience, (ii) whether the arbitrator must select one party's proposed version of the final settlement statement or can determine a compromise version of the final settlement statement based on supporting documentation presented by each party and (iii) how the parties will bear costs related to any such arbitration. In drafting these provisions, buyers and sellers should consider the practical implications of such dispute resolution, including the practicality of selecting an arbitrator with any imposed

qualifications and the potential costs associated with, and the length of, such arbitration procedures.

2. Representations and Warranties Related to Financial Matters. A seller will often provide limited representations and warranties related to any financial statements it has disclosed to the buyer. These representations are meant to provide the buyer with protection in the event that the seller has misrepresented its financial information. Typically, if these representations and warranties are untrue in any material respect, a buyer will be entitled to indemnification for losses it suffers as a result, so long as the claim is brought within a certain time period after the closing. The period of a buyer's right to indemnification will vary based on the transaction, but generally ranges between six to twelve months. Buyers should make sure that the survival period for such representations and warranties provides the buyer with enough time to complete its post-closing accounting due diligence, while sellers' concerns are that the timeframe not subject the seller to an unnecessarily lengthy period after completion of the sale during which the buyer may bring claims. Certain fraudulent representations, however, will not be subject to the time limit period. It is important to note that these representations and warranties often overlap the accounting items that are included the purchase price adjustments discussed above. Disputes over indemnity claims for breaches of the representations and warranties are typically subject to a dispute resolution procedure that requires either a legal arbitration or court proceedings, and such disputes are not generally subject to the accounting arbitration procedure described above.

Financial Statements. A seller or target that is not publicly traded may provide a representation and warranty that the financial statements provided to the buyer fairly represent, in all material respects, the financial conditions and results of operations. This representation may also provide that financial statements have been prepared in accordance with GAAP as historically applied by the seller in its audited financial statements.

No Undisclosed Liabilities. A seller will often also provide a representation that, except as set forth in the financial statements (or incurred in the ordinary course of business since the date of such financial statements), the business or assets have no other liabilities. This representation may be knowledge qualified, or may be limited to material liabilities or liabilities that have a material adverse effect.

Practical Considerations After the Closing

At closing the clock starts running to identify and resolve accounting issues. After the closing of a transaction, the buyer will need to begin its post-closing accounting due diligence immediately, which should include a close evaluation of the acquired assets by the buyer's accountants. As discussed above, the seller will typically be required to deliver the proposed final settlement statement within 90 – 120 days following the closing, and the buyer will then have several days to review and provide comments to the final settlement statement. However, these several days will not be enough time to uncover all potential accounting issues, which is why the buyer should begin its post-closing financial diligence process immediately upon closing.

Careful consideration should be given to requests for extension of the due date for the proposed final statement. The reason for the extension should be compelling because, as time passes, intervening events can become confused with the conditions existing on the date of the closing *e.g.* the market can go down and asset values along with profitability may be viewed differently in retrospect than they are contemporaneously.

Once the final settlement statement is received from the seller, the buyer should immediately review the statement and pay close attention to any discrepancies between the proposed statement and what the buyer has discovered during its own post-closing review. Generally, a buyer will be required to provide notice to the seller regarding any changes that it proposes be made to the final settlement statement. As a buyer will likely be required to provide supporting documentation with respect to its proposed changes, the buyer should keep records of all of its accounting due diligence, including that conducted prior to the closing, and should be prepared to support any changes it proposes with documentation. As this process has the potential to become adversarial, careful consideration should be given to how the claim and support is prepared. If it is clear that there will likely be a dispute, early as opposed to emergency consultation with outside forensic accountants and litigation attorneys provides the party the ability to prepare a more persuasive claim.

In the event of a dispute, the purchase and sale agreement will often provide that the parties must first attempt in good faith to resolve such dispute among themselves. If a dispute cannot be resolved informally between the parties, the purchase and sale agreement will often require that the parties engage an accounting arbitrator. As discussed above, the purchase and sale agreement should specify the dispute resolution mechanism, including the overall process and any qualifications required of the accounting arbitrator (or panel of arbitrators) understanding the cost associated with such an arbitration.

In addition to the purchase price dispute procedures, the buyer will also have recourse against the seller through the indemnification provision tied to the representations and warranties. Thus, if a buyer uncovers inaccurate information, it should be provided protection through both forms of remedies. Buyers and sellers should understand the timeframe for bringing indemnification claims and the process required to bring such claims. As stated above, the representation and warranty claims are typically resolved through either a legal arbitration or a court. The process and cost associated with representation and warranty dispute resolution can require substantially more time and carries a much greater expense than the accounting arbitration tied to the purchase price adjustment. Just as with the purchase price adjustment, a buyer is well advised to schedule completion of its post-closing accounting relating to representations and warranties well in advance of the deadline to bring indemnification claims, particularly so that it may bring claims in a timely manner and compile any required supporting documentation. Assembling appropriate outside advisors to work with the internal team improves the efficiency and persuasiveness of the claim preparation by incorporating experience from other resolutions.

If possible, and particularly from the seller's perspective, prudence dictates that any financial representation and warranty claims be resolved as part of the purchase price adjustment resolution to avoid the potential for "double dipping." For example, when the accounting arbitrator determines an accounts receivable adjustment, effort should be made to clearly cover

and resolve the consequences of the adjustment. If not, the buyer may further bring a breach of warranty claim after the arbitration, alleging the account receivable overstatement for which the buyer has been compensated was only part of larger issues with profitability and the entire purchase price must be adjusted. Consultation with litigation counsel and outside accountants to achieve this goal can pay off with substantial avoided costs.

Hypothetical Examples and Factors That Could Resolve Them

1. A physical inventory is not performed of the seller's largest raw material storage location before closing. After closing but prior to the post-closing adjustment process being completed, buyer realizes that sales and profitability results are disappointing and now suspects that the inventory values and or quantities pre-closing were misrepresented. How can the buyer obtain the evidence necessary for the post-closing dispute?

    a. Calculate the volumes purchased and sold from the purchase and sale invoices post closing, thereby backing into the closing inventory amount.
    b. Look at the seller's historical financial statements to determine expected profitability.
    c. Ask the legacy employees how much inventory existed at closing.
    d. All of the above.

The answer is d, but the real protection here should be to take physical inventories of material stores of goods before closing and before preparation of the estimated working capital items. If not, prompt analyses and inquiries should at least be conducted immediately after closing to avoid the unnecessary surprise and likely resulting dispute.

2. A large sales return occurs shortly before closing. During the working capital adjustments, seller agrees to adjust accounts receivable which did not reflect the return and believes the post-closing process is complete. Months later the buyer claims that seller breached its representations and warranties because its sales and therefore EBITDA were overstated. Seller believes that buyer already recovered under the working capital adjustment for the larges sales return with the increase to the accounts receivable and refutes buyers claim that the multiple applied to the EBITDA creates a 7:1 dollar effect on the purchase price. What evidence should seller evaluate and use to refute the representation and warranty claim?

    a. Analyze historical returns in relation to the disputed return.
    b. Evaluate how the seller's auditor handled sales return allowances.
    c. Review the correspondence relating to the sales return.
    d. All of the above.

Again, the answer is d. Understanding how sales returns occurred historically and what accounting method has been used will avoid misunderstanding after closing. As with the above example, inventory disputes can lead to larger misrepresentation claims when the buyer alleges the profitability of the business was not as promised and consequently the entire transaction price needs to be adjusted by the earnings multiple used in the transaction.

3. A large, specialized capital asset is ordered on a non-cancellable contract by the buyer before closing. No account payable or asset is recorded and the item does not appear on the schedule of pending capital expenditures. Capital expenditures obligations are assumed by the buyer only up to a certain amount. This obligation exceeds that amount. Once the asset is delivered, buyer refuses responsibility for the invoice claiming it is the seller's responsibility. Whose responsibility is this invoice?

   a. It doesn't matter – the asset offsets the liability.
   b. It does matter, the capital expenditures over the agreed amount reduce proceeds to the seller.
   c. The obligation was not incurred as of closing because the goods were not delivered as of closing.
   d. The obligation was incurred because the contract did not afford the ability to cancel or return the goods.

The correct answers are b. and d. under GAAP. Having a clear schedule as to capital expenditure obligations which are known or knowable at closing and a clear provision in the purchase agreement on how the cost of the obligations will be allocated between the buyer and seller will avoid the surprise and dispute arising from a large invoice arriving soon after closing.

4. Seller has a large payroll. After closing, buyer discovers no vacation accruals have been made. Seller responds it does not record vacation expense until it is taken. Buyer seeks refund of the vacation pay liability from the seller. Which of the following determines the liability of the seller to the buyer?

   a. The employer's obligation relating to employees' rights to receive compensation for future absences is attributable to employees' services that were not already rendered. Therefore the vacation expense is not accrued.
   b. The obligation does not relate to rights that vest or accumulate but instead are contingent on an employee's future service. Therefore the vacation expense is not accrued.
   c. Payment of the compensation is probable but cannot be reasonably estimated. Therefore, the vacation expense is not accrued.
   d. All of the above.

According to GAAP, the answer is d. All of these conditions must be met to accrue vacation liability. Payroll often represents a large expense and vacation liability consequently becomes a material item among the closing adjustments. This point can be easily overlooked.

5. Buyer and seller complete their post closing adjustments of working capital. Months later, buyer claims that a manufacturing certification could not be obtained as quickly as seller represented. Through a representation and warranty claim buyer requests return of most of the purchase price because the certification was critical to the value of the business. No purchase agreement schedule mentioned the certification. How does the seller respond to the buyer's claim?

   a. If the buyer took no impairment to goodwill then their claim lacks substance.
   b. The buyer reported multiple impediments to sales in its monthly management reports (*e.g.,* high employee turnover).
   c. The buyer did not claim the lack of certification, although known at the time, as a valuation issue with regard to inventory marked as if certified.
   d. All of the above.

The answer is d. Large claims for purchase price adjustments arising from a breach of warranty should be vetted against the buyer's post-closing audited financial statements to see if the buyer's auditors have actually recorded a decline in the company's value. Such decline, if true, must also be recognized under GAAP. There should also be an evaluation of the prospective importance of this and any other material items during the negotiation period. The lack of discussion during that period is strong evidence that the item was not considered to be important to the deal.

Summary

Accounting due diligence during a purchase and sale involving a non-publicly traded target or seller sets expectations of the seller's financial status before—and more importantly after—the closing. The diligence process minimizes misunderstandings. The lessons learned from past deals gone wrong should be incorporated into your future deals. Careful drafting of purchase agreement provisions relating to purchase price adjustments, final settlement statement disputes and representations and warranties pays off with avoided disputes and avoided costs should such disputes arise.

ATTACHMENT A

Sample Purchase Price Adjustment Provisions

The below provisions are illustrative of the types of provisions often found in purchase and sale agreements. Each such agreement would define the capitalized terms and provide other embellishments on the below provisions specific to the relevant transaction. The below provisions are meant to be illustrative only.

Preliminary Settlement Statement. No later than five (5) Business Days prior to the Closing Date, Seller shall submit a preliminary settlement statement (the "Preliminary Settlement Statement") setting forth a good faith estimate of the adjusted Purchase Price, together with Seller's calculation thereof in reasonable detail. Buyer shall have two (2) Business Days to review the Preliminary Settlement Statement. On the day following expiration of such two (2) Business Day review period, Buyer shall submit a written report containing any changes Buyer proposes to be made to the Preliminary Settlement Statement. The Parties shall attempt to agree on a final Preliminary Settlement Statement no later than one (1) Business Day prior to Closing. If the Parties are unable to agree by such date, Seller's Preliminary Settlement Statement shall be used at the Closing.

Purchase Price Adjustments. The Purchase Price shall be adjusted as follows:

1. Downward by the amount of any Title Defects;

2. Downward by the amount of any Environmental Defects;

3. Downward by the amount of any Assets excluded from the transaction due to Preferential Rights;

4. Upward by the amount of Capital Expenses approved by Buyer after the date hereof and incurred by Seller after the Effective Time;

5. Upward by the amount of revenues received by Buyer, but attributable to Production occurring prior to the Effective Time, and downward by the amount of revenues received by Seller, but attributable to Production occurring after the Effective Time;

6. Upward or downward, as applicable, by the amount of any Imbalances;

7. Upward by the amount of Taxes and Property Costs paid by Seller but attributable to Buyer in accordance with this Agreement, and downward by the amount of Taxes and Property Costs paid by Buyer but attributable to Seller in accordance with this Agreement;

8. Upward by the amount of any Capital Expenditures approved by Buyer in accordance with this Agreement and incurred by Seller after the Effective Time; and

9. Upward and/or downward, as applicable, by the amount of positive/negative Net Working Capital.

Revenues and Expenses. To the extent not already reflected in the adjustments set forth in Section X, the Purchase Price shall be adjusted such that (a) Buyer shall (i) bear all expenses attributable to Seller in connection with the operation of the [Conveyed Interests/Company] on or after the Effective Time and (ii) receive all revenues attributable to Seller in connection with the operation of the Conveyed Interests on or after the Effective Time; and (b) Seller shall (i) bear all expenses incurred by Buyer in connection with the operation of the [Conveyed Interests/Company] before the Effective Time and (ii) receive all revenues attributable to Seller in connection with the operation of the Conveyed Interests before the Effective Time.

Final Settlement Statement. No later than one-hundred twenty (120) Days after the Closing Date, Seller will deliver to Buyer a final settlement statement (the "Final Settlement Statement") setting forth the actual amounts of adjustments to the Purchase Price, together with Seller's calculation of such items in reasonable detail. The Final Settlement Statement shall become final and binding on the Parties on the 30th day following the date the Final Settlement Statement is received by Buyer, unless prior to such date Buyer delivers to Seller a written report containing any items that Buyer disputes in such statement (the "Dispute Notice"). The Dispute Notice shall include Buyer's proposed changes to the Final Settlement Statement, along with an explanation in reasonable detail of such proposed changes. As soon as reasonably practicable, but not later than fifteen (15) days after Seller receives the Dispute Notice, the Parties shall meet and use good faith efforts to agree on the final adjustments to the Final Settlement Statement. If the Parties fail to agree on the final adjustments within such fifteen (15) day period, either Party may submit the disputed items to the Accounting Arbitrator for resolution. The Accounting Arbitrator shall resolve the disputes within ten (10) days after having the relevant materials submitted for review. The decision of the Accounting Arbitrator will be binding on and non-appealable by the Parties. The fees and expenses associated with the Accounting Arbitrator will be borne equally by the Parties. Any amounts owed by one Party to the other Party as a result of the Final Settlement Statement shall be paid within five (5) Business Days after the date on which the amounts are agreed upon by the Parties, or the date on which the Parties receive a decision of the Accounting Arbitrator. The adjustments included in the Final Settlement Statement as finally determined pursuant to this paragraph will be final and binding on the Parties and not subject to further audit or arbitration.

Representation and Warranty Provisions

Financial Statements. True and complete copies of the following financial statements have been provided to Buyer (collectively, the "Financial Statements"): (i) the audited consolidated balance sheets of Seller as of, and for the years ended on, December 31, 2012 and 2013 and (ii) the unaudited consolidated balance sheet of Seller for the three (3) month period ended on March 31, 2014. The Financial Statements have been prepared in accordance with GAAP as historically applied by Seller in its audited financial statements, (except as otherwise stated in the footnotes or the audit opinion related thereto) and present fairly in all material respects the consolidated

financial position and the consolidated results of the operations of Seller as of, and for the periods ended on, such dates.

Undisclosed Liabilities. [To Seller's Knowledge,] there are no [material] liabilities of the Company of any kind, other than: (i) as set forth on Schedule X, (ii) liabilities disclosed in the Financial Statements, (iii) liabilities incurred in the ordinary course of business consistent with past practice since the dates of the Financial Statements [and (iv) other undisclosed liabilities which, individually or in the aggregate, do not have a Material Adverse Effect.]