## SUMMARY OF PLEADINGS

**I.** Red Corp. ('Red') must reimburse US$1 million to Blue Inc. ('Blue') for the department store penalties.

**II.** Blue is under no obligation to pay Red either US$500,000 for the air freight expenses or US$1.5 million for the chocolate.

**III.** Blue is under no obligation to pay Red US$30 million in relation to representations and warranties in Article 4 of the Stock Purchase Agreement.

**IV.** Blue has not violated Article 9 of the Stock Purchase Agreement and is under no obligation to pay Red US$500,000 or revoke its investment in Arbitria Coffee.

**V.** Red must pay an additional Stock Purchase Price of US$200 million to Blue, in accordance with Article 2.2 of the Stock Purchase Agreement.

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# CHOCOLATE CASE

## I. RED MUST REIMBURSE US$1 MILLION TO BLUE FOR THE DEPARTMENT STORE PENALTIES

1. This pleading demonstrates that:
   A. Red failed to perform its obligations under the chocolate contract of 10 December 2013 ('the contract') by failing to ship the Goods by 10 January 2014;
   B. Blue extended the period for performance but Red breached this modified agreement by failing to deliver the second shipment of Goods; and
   C. Blue is entitled to damages in the amount of US$1 million as a result of Red's non-performance.

### A. RED FAILED TO PERFORM ITS CONTRACTUAL OBLIGATIONS BY FAILING TO SHIP THE GOODS BY 10 JANUARY 2014

2. Red agreed to the express obligation to ship the Goods by 10 January 2014 at the Port of Negotown [*Exhibit 6, Art 3.2*]. The contract also stipulated that time of shipment or delivery is of the essence [*Exhibit 6, Art 3.3*]. Despite this, Red failed to meet the shipping deadline of 10 January 2014 [*Record, para 31*]. This failure constituted non-performance of Red's obligations [*UNIDROIT Art 7.1.1*].

3. Red states that since the letter of credit was not yet advised, a seller may refuse to perform its obligations under Negoland law [*Exhibit 9*]. However, Negoland law is not applicable to the contract because the parties have chosen the UNIDROIT Principles as the governing law of the contract [*Exhibit 6, Art 7*] and there is no reference to any other domestic law in the contract. Consequently, the UNIDROIT Principles operate to the exclusion of any particular national law and the Tribunal is not bound to follow the legal precedent of Negoland [*UNIDROIT Preamble, Comment 4(a)*].

4. Alternatively, in the event that the legal precedent of Negoland is applicable to the contract, Red cannot rely on the precedent to excuse their non-performance. Red had previous dealings with Negoland Bank and knew the standard time it would take to advise a letter of credit. Despite receiving advice that Blue had requested the issuance of the letter of credit on 19 December 2013 [*Record, para 30*], Red took no action in contacting Negoland Bank before the upcoming Christmas and New Year holiday period, and did not follow up on the letter of credit until 7 January 2014. Even further, Red did not press Negoland Bank to find the letter of credit until 8 January 2014. Given the contract expressly stated that time was of the essence [*Exhibit 6, Art 3.3*] and Red knew that it would take two full days from receipt of the letter of credit to the completion of loading [*Record, para 31*], Red should have made more expedient endeavours to contact Negoland Bank with regards to the letter of credit. Accordingly, Red did not take reasonable steps to ensure the letter of credit was advised and did not inform Blue of the issues with the letter of credit until after the shipping deadline [*Record, para 32*]. Consequently, Red breached its duty to act in good faith and fair dealing [*UNIDROIT Art 1.7*] as well as the duty of best efforts [*UNIDROIT Art 5.1.4(2)*].

## B. BLUE EXTENDED THE PERIOD FOR PERFORMANCE BUT RED BREACHED THIS MODIFIED AGREEMENT BY FAILING TO DELIVER THE SECOND SHIPMENT OF GOODS

5. Given the failure of Red to meet the initial shipping deadline, Swan telephoned Emerald to renegotiate the shipping arrangements so that the goods would be delivered on time [*Record, para 32*]. Swan stated that the only way for Red to make timely performance was to use air freight [*Record, para 32*]. Blue granted an additional period of time for performance [*UNIDROIT Art 7.1.5*] to allow Red to complete performance via air freight.

6. Red cannot rely on Article 9 to claim the oral agreement did not constitute a valid amendment to the contract [*Exhibit 6, Art 9*]. Blue relied on the representations made by Swan during the phone conversations to cure Red's non-performance and granted an additional period for performance in good faith rather than immediately seeking damages or resorting to any other remedy [*UNIDROIT Art 7.1.5(2)*]. Moreover, since this conduct has led Blue to rely on the validity of the agreement, Red cannot assert that the agreement was not modified because it could not be orally modified [*UNIDROIT Art 2.1.18*].

7. Red did not deliver the second shipment of chocolates in accordance with the amended contract. Red cannot claim that they performed delivery of the Goods by handing over the chocolates to the freighter [*Exhibit 9*]. The oral agreement that Blue will pay for the chocolates by remittance '*after the receipt of the goods*' [*Record, para 32*] implies that delivery is not performed until Blue receives the goods. Thus the chocolates remained under the responsibility of Red when handed over to the air carrier and delivery was not validly performed.

8. Red cannot rely on force majeure to escape liability for non-performance [*Exhibit 6, Art 6*]. In Article 6, the term 'force majeure' is defined as 'such acts, happenings, causes or circumstances as … war, civil disturbance, labor difficulties or direction of a governmental authority which are beyond the reasonable control of the party affected.' Contracts must be interpreted according to the common intention of the parties [*UNIDROIT Art 4.1*]. Here, the common intention of the parties appears to be to limit the scope of force majeure to failure or delay caused by human intervention. A meteorological event such as a lightning strike would

not fall under this definition. Moreover, as in Arbitral Award [*UNILEX Database, 30.11.2006*] the occurrence of the lightning strike may have been foreseeable. Red should also be liable for its non-performance as it failed to give notice to Blue of its inability to perform due to the warehouse fire [*UNIDROIT Art 7.4.1(3); Arbitral Award UNILEX Database, 30.11.2006*].

### C. BLUE IS ENTITLED TO DAMAGES IN THE AMOUNT OF US$1 MILLION AS A RESULT OF RED'S NON-PERFORMANCE

9. Due to Red's failure to deliver the second shipment, Blue was forced to pay US$1 million in penalties to the department stores [*Record, para 33*]. Blue is entitled to full compensation in the amount of US$1 million for the harm sustained as a result of Red's non-performance [*UNIDROIT Arts 7.4.1; 7.2.4*]. The penalty was reasonably foreseeable [*UNIDROIT Art 7.4.4*] and sufficiently certain [*UNIDROIT Art 7.4.3*] as both parties knew of the department store penalty when entering into the contract [*Record, para 32*].

## II. BLUE IS UNDER NO OBLIGATION TO PAY RED US$500,000 IN AIR FREIGHT OR US$1.5 MILLION FOR THE UNDELIVERED CHOCOLATE

10. This pleading demonstrates that Blue is under no obligation to pay Red US$500,000 in air freight expenses because:
    A. The parties amended their contract and agreed on new shipping arrangements on 11 January 2014;
    B. Red cannot rely on Article 9 of the contract to assert there was no oral agreement to modify the shipping arrangements; and
    C. Given the valid amendment of contract, Red cannot rely on Article 5 of the contract.

11. This pleading also demonstrates that Blue is under no obligation to pay Red US$1.5 million for the undelivered chocolate:
    D. Since Red failed to perform, Blue has no obligation to pay for goods not received and is entitled to terminate the contract.

### A. THE PARTIES AGREED TO NEW SHIPPING ARRANGEMENTS IN THE PHONE CALL BETWEEN EMERALD AND SWAN OF 11 JANUARY 2014

#### A.1 The parties amended their contract

12. Due to Red's failure to conform to the original agreement, Blue had no choice but to agree to the new arrangements. Both parties agreed to the new transport arrangements by air freight and agreed that Red would bear the cost of US$500,000 [*supra, para 5*]. In proposing the air freight, Red was attempting to cure its breach for non-performance at its own expense as is consistent with the UNIDROIT Principles [*UNIDROIT Art 7.4.1(1)*]. The agreement reached during the telephone conversation effectively modified the initial agreement in the contract with regards to the transport of the Goods.

#### A.2 The parties intended for Red to cover the costs of air freight

13. The parties intended that Red would bear the cost of the air freight. In construing the parties' intention, regard is to be had to all the relevant circumstances surrounding the contract [*UNIDROIT Art 4.3*]. During the phone conversation, Emerald said to Swan that it

would be preferable to pay the cost of the air freight than to pay the full amount of penalties for which Red would be liable for late delivery [*Record, para 32*]. Swan replied to this, 'You may be right'. Swan's statement clearly evinces an understanding that Red would therefore cover the cost.

14. Any reasonable business person would have the same interpretation from this exchange [*UNIDROIT Art 4.2(2); Arbitral Award 83, International Court of Arbitration of the Chamber of Industry and Commerce of the Russian Federation, 2008*]. If Swan had intended that Blue cover the cost of air freight, commercial prudence and good faith would require that he object to Emerald's suggestion [*ICC Award Case No. 8908, ICC International Court of Arbitration, Milano, 1998*]. Swan's affirmation shows that Red intended to pay for the air freight.

15. The Tribunal is also able to look to the parties' subsequent conduct to determine the common intention of the parties [*UNIDROIT Art 4.3(c); Franklins Pty Ltd v Metcash Trading Ltd [2009] NSWCA 407*]. In the period following the phone conversation between Emerald and Swan, there was no correspondence of any form suggesting that Blue was liable to pay for the air freight or asking for payment. Indeed, it was not until 15 April 2014, in response to a communication from Blue, that Red even suggested that Blue was liable to pay the air freight costs [*Exhibit 9*].

### A.3 Red is acting inconsistently in claiming that Blue must bear the air freight costs

16. Red is acting inconsistently by alleging that Blue must pay the freight costs and should be precluded from doing so [*UNIDROIT Art 1.8*]. During the phone conversation, there was a clear understanding that Red would cover the air freight costs. Red paid the freight charge [*Record, para 33*], and the issue was never raised again until prompted by a letter from Blue [*Exhibit 8*]. It was therefore reasonable for Blue to rely on this behaviour that it would not pay the freight charge. For Red to claim the costs months later, in contradiction to the agreement during the phone call, amounts to inconsistent behaviour and is contrary to the standard of good faith required in international trade [*UNIDROIT Arts 1.7; 1.8; Arbitral Award, Ad hoc Arbitration, 04.03.2004 UNILEX Database*].

## B. RED CANNOT RELY ON ARTICLE 9 OF THE CONTRACT TO ASSERT THERE WAS NO ORAL AGREEMENT TO MODIFY THE SHIPPING TERMS DURING THE PHONE CONVERSATION

### B.1 Red cannot rely on Article 9 of the contract to assert there was no oral agreement to modify the shipping terms during the phone conversation

17. Red might try to assert that any agreement reached between Swan and Emerald during the phone conversation was invalid pursuant to Article 9 of the contract [*Exhibit 6, Art 9*]. While the contract states that no provision can be amended 'except by a writing, signed by the parties hereto', the Tribunal cannot rely on this article to invalidate the parties' subsequent agreement during the phone call because a party cannot assert a no-oral modification clause to invalidate an agreement where its conduct has led the other party to rely on the validity of that agreement [*UNIDROIT Art 2.1.18; GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd & Ors [2003] FCA 50*]. As a result of Red's failure to meet the shipping date, the parties had no choice but to renegotiate the shipping terms. Blue relied on the new agreement reached by the parties in the phone conversation. For Red to assert that the representations made by Swan during the call are not effective because they were not in writing would amount to inconsistent behaviour [*supra, para 16*]. At no stage did Red send

any written document to Blue contradicting, clarifying or amending the agreement reached in the phone conversation. This evinces the parties' intention to be bound by the agreement reached by Emerald and Swan and the Tribunal must give full effect to the parties' intention.

## C. GIVEN THE VALID AMENDMENT OF CONTRACT, RED CANNOT RELY ON ARTICLE 5 OF THE CONTRACT

### C.1 Given that the parties validly amended their contract, Red cannot rely on Article 5 of the contract to assert that Blue must pay for the air freight

18. Article 5 of the contract stipulates that any new freight costs incurred by the seller are to be reimbursed by the buyer. However, as a result of the subsequent agreement during the phone conversation between Emerald and Swan [*Record, para 32*], Article 5 has been validly modified. The agreement as to the new mode of transport and that Red will bear the cost of this, supersedes the original term in the contract.

### C.2 In the alternate, Red cannot rely on Article 5 of the contract to assert that Blue must pay for the air freight because the increased costs are not 'reasonable'

19. Even if the Tribunal were to find that Red could rely on Article 5 of the contract, Red is not entitled to claim US$500,000 because the amount is not reasonable. The original shipping price for the goods was US$100,000 [*Record, para 32*]. Article 5 of the contract was drafted so as to contemplate additional surcharges and customs duties, which often arise when two parties contract for the international sales of Goods. It may be reasonable for a seller to ask for reimbursement for increases in customs excise duties that become payable after the conclusion of the contract or were not accounted for. However, Red is claiming reimbursement for an entirely different mode of shipment that costs five times the amount of the shipping method originally agreed to. Even though transport by air freight may be necessary for Red to perform on time, it is Red's fault that original shipping date was not met. Further, the parties would never have contemplated such a large increase in costs at the time of the conclusion of the contract.

## D. SINCE RED FAILED TO PERFORM, BLUE HAS NO OBLIGATION TO PAY FOR GOODS NOT RECEIVED AND IS ENTITLED TO TERMINATE THE CONTRACT

20. Payment by Blue was dependent on performance by Red [*supra, para 7*].

21. On 18 January 2014, Blue received the first shipment and paid Red US$1.5 million in conformity with the parties' agreement [*Record, para 33*]. However, Blue did not receive the second shipment as Red failed to perform its obligation to deliver [*UNIDROIT Art 7.1.1*]. Failure to deliver the second shipment of goods amounted to fundamental non-performance [*UNIDROIT Art 7.3.1(2)*]. Blue was substantially deprived of what it had expected to receive under the contract [*UNIDROIT Art 7.3.1, Comment 3*]. Blue had contracted with Red for delivery of US$3 million of custom chocolates to on-sell to department stores. By failing to deliver the second shipment, Blue was unable to resell the goods for a profit and instead incurred penalties from the department stores. As such, Blue was entitled to terminate the contract with Red for the remaining shipment [*UNIDROIT Art 7.3.1(1)*]. The agreement for the second batch was validly terminated and timely notice was given [*Record, para 33*]. The Tribunal must not find Blue liable to pay for goods that it never received.

# M&A CASE

## III. BLUE IS UNDER NO OBLIGATION TO PAY RED US$30 MILLION IN RELATION TO ARTICLE 4 OF THE STOCK PURCHASE AGREEMENT

22. This pleading demonstrates that:
    A. Blue is not in violation of its obligations under Article 4 of the Stock Purchase Agreement ('the agreement'); and
    B. In the alternate, the damages of US$30 million should be decreased.

### A. BLUE IS NOT IN VIOLATION OF ITS OBLIGATIONS UNDER ARTICLE 4 OF THE AGREEMENT

#### A.1 There were no outstanding investigations or basis for any investigations

23. On 15 December 2012 [*Exhibit 5, Art 4(1)*], there were no outstanding orders, judgments, injunctions, awards or decrees from any of the relevant bodies or claims, actions, suits or investigations. The Arbitria Ministry of Health and Welfare were not conducting investigations into Blue Drink at that time. The Ministry had merely notified Blue Drink of its receipt of the complaints and its intention to 'keep an eye on any new development' [*Record, para 39*].

24. As at 15 December 2012, there was no scientific or medical basis for any such action as Blue Drink had ran a series of rigorous tests on Blue Slim. These tests were held over a four-week period in response to customer complaints [*Record, para 39*]. They did not confirm any particular stomach problem 'linked to overconsumption, even when substantial amounts of Blue Slim were consumed day after day'. [*Record, para 39*] Thus, Blue Drink thoroughly investigated the complaints and found no basis for further investigation by the Ministry.

25. Blue had disclosed notice to Red of the complaints by consumers and any possible revocation by the Ministry in the process of due diligence in May 2012 [*Record, para 39*]. During the 15 October 2012 meeting, Pat Red (Red's CEO) thanked Kelly Blue (Blue's CEO) for assisting with the due diligence process and said that Red 'did not find any issue' to stand in the way of the acquisition [*Record, para 19*]. In the process of due diligence, led by Red's expert, the disclosure by Blue of the complaints and Ministry's action would have been significant to Red as the buyer of the company. In fact, it was discussed in great detail in the due diligence report [*Exhibit 13*]. Thus, these comments by Pat Red, display that Red both possessed knowledge of the Ministry's scrutiny and did not perceive this to be a problem.

26. The representation in Article 4 must be interpreted by reference to Red and Blue's common intention [*UNIDROIT Art 4.1(1)*]. This may be determined by reference to their preliminary negotiations [*UNIDROIT Art 4.3(a)*]. Here, the common intention of the parties was that Article 4 be read in light of the disclosure by Blue during the due diligence process. Pat Red's statements infer that Red intended to enter into the agreement in spite of the Ministry's monitoring of Blue Slim. Both parties therefore interpreted Blue's representations in Article 4(xiii) [*Exhibit 5*] to refer to any claims and investigations outside of the Ministry's scrutiny.

**A.2 Blue had no undisclosed liabilities**

27. Blue warranted that Blue Drink had no liabilities or obligations, including guaranties for any liability or obligations of third parties [*Exhibit 5, Article 4(1)(ix)*]. Red may argue that 'liability' here should be defined broadly and include anything likely to be a disadvantage to Red. However, there is no clear definition of the term 'liability' in the agreement. Therefore, 'liability' can be defined in light of factors such as the meaning commonly given to the term [*UNIDROIT Art 4.3(e)*] and reasonableness [*UNIDROIT Art 4.8(d)*]. 'Liability' in this context commonly refers to outstanding financial liabilities. Additionally, here it is followed by the terms related to this meaning, such as 'contingent liability' and 'guaranty'. Using this definition, Blue Drink had no liabilities or contingent liabilities as of 15 December 2012. Blue was not in breach of Article 4(1)(ix).

**A.3 There was no adverse change to Blue Drink**

28. There was no adverse actual or threatened change to the condition, financial or otherwise of Blue Drink between 31 December 2011 and 15 January 2013 [*Exhibit 5, Article 4(1)(xiii)*]. Red may argue that this article was breached because the potential revocation of the Designated Health Food Status was a threatened adverse change to Blue Drink. The provisions surrounding this article refer to outstanding legal claims [*Exhibit 5, Article 4(1)(xii)*] and full disclosure [*Exhibit 5, Article 4(1)(xiv)*]. Read in this general context, as required by the UNIDROIT commentary [*UNIDROIT Art 4.4, Comments 1 and 2*], the article refers to quantifiable, empirical and practical change. The possibility of revocation by the Arbitria Ministry of Health and Welfare remained the same during the relevant period and therefore the warranty was correct. Additionally, the Ministry did not mention the possibility of withdrawal of Blue Slim's Designated Health Food Status. In its communication with Blue in 2012, the Ministry merely referred to its receipt of the complaints and that it would monitor developments [*Record, para 39*]. This was not a serious, substantial threat of adverse change to Blue Drink. More importantly, rather than the underlying cause of the threat of revocation, the only change that occurred in the relevant period was Blue's knowledge of the consumer complaints [*Record, para 39*]. Rigorous tests were conducted that produced no scientific evidence that these complaints were substantiated [*Record, para 39*]. As such, the guarantee was not violated because there was no such change to the condition of Blue Drink.

**A.4 Blue fully disclosed all relevant information**

29. Blue warranted that it did not omit any facts in the written information provided to Red in relation to the transaction, and the information Blue provided was not false or misleading [*Exhibit 5, Article 4(1)(xiv)*]. Red argues that in written communication attached to the agreement, Blue did not mention any circumstances surrounding the stomach problem issue [*Exhibit 14*]. However, Blue did not mislead Red with respect to this issue, according to Article 4(1)(xiv) because Blue had disclosed both the existence of consumer complaints and the Ministry's communication with Blue Drink to Red's advisor [*Record, para 39*]. Red's due diligence report contained a section regarding the risks related to the Designated Health Food Status [*Exhibit 13*]. Therefore, the warranty was not violated as Blue did not omit any information or provide any false or misleading information.

**B. THE DAMAGES OF US$30 MILLION SHOULD BE DECREASED**

30. Blue shall bear responsibility for violating any of the representations and warranties outlined in the agreement [*Exhibit 5, Art 4(2)*]. Thus, Red argues that as a result of Blue's misrepresentation, Red is able to claim US$30 million due to loss of sales [*Exhibit 14*].

However, Blue merely misrepresented that the written information did not contain any omissions [*Exhibit 5, Art 4(1)(xiv)*]. As outlined above, Red already knew of both the existence of consumer complaints and the Ministry's communication with Blue Drink [*Record, para 39*]. Blue should not bear the responsibility for this, as its breach of Article 4 did not cause a loss of US$30 million. Rather, the Ministry's revocation and Red's inaction with regards to its knowledge of the stomach issue caused the loss.

## IV. BLUE HAS NOT BREACHED ARTICLE 9 OF THE AGREEMENT AND IS UNDER NO OBLIGATION TO PAY RED US$500,000 OR REVOKE INVESTMENT IN ARBITRIA COFFEE

31. This pleading demonstrates that:
   A. Blue has not breached Article 9.1 of the agreement; and
   B. Blue has not breached Article 9.2 of the agreement.

### A. BLUE HAS NOT BREACHED ARTICLE 9.1 OF THE AGREEMENT

#### A.1 The no competition requirements of Article 9 should be interpreted narrowly

32. The extensive and expansive language of Article 9 unfairly limits the business prospects of Blue unless interpreted narrowly. The parties would not have commonly intended to prevent Blue from participating in all 'similar' businesses [*UNIDROIT Art 4.1(1)*]. A reasonable person in their position would interpret Article 9 to only limit Blue from carrying on a business that is in 'direct competition' with Red.

#### A.2 Alternatively, Arbitria Coffee's products are not 'similar to or competitive with' Red's products

33. The phrase 'competitive with' shall be interpreted in line with the meaning commonly given to it in the trade concerned [*UNIDROIT Art 4.3*]. As such, the term 'competitive with' should be interpreted in the context of mergers & acquisitions ('M&A').

34. The SSNIP test is an international economic standard of market definition commonly applied in M&A [*OECD, Market Definition 2012, 30; European Commission 'Commission's Notice for the Definition of the Relevant Market 1997; ASEAN Competition Policy, 'Guidelines on Market Definition'; United States Merger Guidelines; ACCC Merger Guidelines*]. The SSNIP test assesses the cross-elasticity of demand by assessing whether customers would switch to other available substitute products in response to a hypothetical, small (5-10%) but permanent increase in price of the product in question. It is reasonable to deduce that if Red Drinks increased their prices by 5-10% for one year their consumers would not substitute Red Drinks with Arbitria Coffee's diet coffee, for reasons that are now illustrated.

35. The diet coffee drink produced by Arbitria Coffee and Red Drink are substantially different [*Record, para 36*]. Red Slim is a beverage that helps block fat absorption and dissolve fat in the body [*Record*, *para 9*]. The weight loss benefits of the diet coffee are an auxiliary, rather than a primary, benefit of consuming the beverage. The diet coffee and energy drinks have 'substantial, noticeable differences in physical characteristics' [*Japan - Taxes on Alcoholic Beverages*]. These beverages are not in competition as they do not 'offer alternative ways of satisfying the same consumer demand in the marketplace' [*United States - Transitional Safeguard Measure on Combed Cotton Yarn From Pakistan*, *[96]-[98]*]. In accordance with *Arnotts Limits v TPC,* 'There are many people who sometimes drink tea and,

at other times, coffee… The fact is that tea and coffee are distinct beverages, for each of which there is a distinct demand' [*(1990) 97 ALR 555*]. As an example, Red Drink might be used as a mixer in an alcoholic cocktail. Arbitria's diet coffee drink would not be used in this way [*Korea - Taxes on Alcoholic Beverages*].

### A.3 Alternatively, Arbitria Coffee is not an affiliate of Blue

36. Where a matter is not covered by the UNIDROIT principles that govern the contract of the parties, the law should be interpreted with reference to the intentions of the parties [*UNIDROIT Art 4.1*]. The parties' use of the term 'affiliate' can be interpreted with reference to the Companies Act of Arbitria, as the contract was intended to bind Blue (a company listed in Arbitria). Under that Act, an affiliate is 'a company on which another company may exercise substantial influence over financial and business policy decisions'. This definition may be applied as a 'reasonable usage known and observed by both parties' [*UNIDROIT Art 1.9(2)*].

37. Blue's dealings with Arbitria Coffee do not constitute substantial influence. Blue also does not substantially control the management of Arbitria Coffee – its relationship with Sam Jackson does not constitute substantial control [*Record, para 36*]. Blue's investment of US$5 million grants it a holding of 25% of the company's share; this amount will not allow to exercise substantial influence over the decisions of Arbitria Coffee.

38. Similarly, the agreement for use of the Central Research Centre is limited in time duration and Arbitria Coffee paid a reasonable amount of rent in exchange for such use. This, this does not constitute a 'service' provided by Blue to Arbitria Coffee. Renting a research facility does not entail any exercise of control over what is researched there. In addition, production of the coffee drink would have occurred, albeit at a later time, if Blue had not supplied the research facility: thus the arrangement has not substantially influenced the course of Arbitria Coffee's business (despite the cancellation of the loan with AbuAbu Bank).

### B. BLUE HAS NOT BREACHED ARTICLE 9.2 OF THE AGREEMENT

39. Bob Orange's decision to leave Red Drink was due to internal conflicts. Orange resigned from Red Drink after an altercation with Lee led to the refusal of his reasonable requests for additional time and funding to create a new flavour of Red Drink [*Record, para 35*]. Blue had no involvement with Orange's departure or subsequent hiring by Arbitria Coffee [*Record, para 36*].

## V. RED MUST PAY AN ADDITIONAL STOCK PURCHASE PRICE OF US$200 MILLION, IN ACCORDANCE WITH ARTICLE 2.2 OF THE AGREEMENT

40. This pleading demonstrates that:

A. Red has breached Article 8 of the agreement; and

B. As a result, Red must compensate Blue US$200 million.

## A. RED HAS BREACHED ART 8 OF THE AGREEMENT

### A.1 Red caused material harm to Blue's interest in an additional payment

41. Pursuant to Article 2 of the agreement, if the EBITDA of Red Drink for the 2013 and/or 2014 exceeded a threshold of US$110 million, Red must make an additional purchase price payment to Blue of 8 times the excess.

42. Red Drink contracted with Nego Drink to be the distributor and the contract terms included sale at 40% of the standard price, even though Red was offered to contract at 50% [*Record, para 25*]. As a result, the EBITDA in 2013 was US$20 million less than it would have been if it contracted at 50% [*Exhibit 17*], causing the EBITDA in 2013 to be US$10 million less than the threshold. Therefore Red's business decision materially harmed Blue's interest in an additional payment of US$80 million.

43. For 2014, Red did not meet Bob Orange's condition to withdraw his resignation and consequently did not prevent him from quitting [*Record, para 35*]. Therefore Bob Orange's work in realigning the taste of Red Drink to Nego consumers' taste buds came to a halt and a negative impression of Red Drink's products quickly circulated [*Record, para 35*]. Furthermore, Red did not adopt measures to prevent the revocation of the Designated Health Food Status, despite being aware of the risks of revocation when performing due diligence [*Exhibit 14*]. Consequently, the status was revoked and sales plummeted [*Record, para 38*]. These two business decisions, as well as the decision to contract at 40% rather than 50%, meant that the EBITDA in 2014 was US$45 million less than it would have been [*Exhibit 17*]. Since the EBITDA for 2014 was US$30 million less than the threshold in Article 2, Blue's interest in an additional payment of US$120 million was materially harmed.

### A.2 These acts and omissions are not reasonable business judgments

44. During the contract discussions between Red and Blue on 15 October 2012 regarding the proposal for a contingent payment, Red's sole objection when Blue sought an assurance that Red would not manipulate its operating results was in regards to reasonable investments [*Record, para 19*]. Accordingly, the exemption for a 'reasonable business judgment' was due to Red's fear that its investments would be seen to manipulate operating results to reduce Blue's contingent payments [*UNCITRAL Arts 4.1(1); 4.3(a)*]. A reasonable business judgment under Article 8 therefore refers to reasonable investments, pursuant to the preliminary negotiations between the parties. None of the aforementioned acts and omissions involves investments and therefore this exemption does not apply.

45. Moreover, in accordance with the meaning commonly given to these terms, a 'reasonable business judgment' can be interpreted as a decision that a reasonable business in Red's position would make if it were facing similar circumstances and were acting in good faith and in the best interests of the company [*UNCITRAL Arts 4.1(2); 4.3(e); ICC International Court of Arbitration, Case No 10335; Principles of Corp. Governance § 4.01(c) (1994)*].

46. Red accepted a contract with Nego Drink without negotiating with Negoland Bottlers at all, even though Negoland Bottlers stated that they were willing to compromise about their offer and strongly desired the contract [*Record, para 24*]. A reasonable business in the position of Red would have made Nego Drink and Negoland Bottlers compete to obtain the

distributor contract for Red Drink in Negoland. In doing so, Red would have ensured that it obtained the best deal, in the interests of the company.

47. Red considered Bob Orange's presence as 'extremely critical' to the operations and success of Red Drink and did not wish to pursue the takeover without an agreement that he would continue working with the business [*Record, para 20*]. Red was also aware that the work that Bob Orange was conducting was vital for increased sales [*Record, para 27*] and that he would require a greater budget for his R&D work [*Record, para 20*]. A discussion with other Red Drink employees would have demonstrated the reasonableness of his request for an increase in the budget [*Record, para 35*]. As such, the decision to reject Bob Orange's condition to withdraw his resignation was hastily made [*Record, para 35*] and without proper consideration. This is not a decision that would have been made by a reasonable business in similar situations, as it was reasonably foreseeable that Bob Orange's resignation would significantly detriment the business.

48. Red undertook due diligence [*Exhibit 13*] in May 2012 and received letters of complaint after the takeover [*Record, para 39*]. Therefore, Red had knowledge of the potential for the Ministry to revoke the Designated Health Food Status. Yet, they did not act to counter these issues. This is the very opposite of a reasonable business judgment decision because by not responding to complaints and fixing the issues, the directors opened the business to the threat of this revocation. Although Red had knowledge of tests conducted by Blue from April to May 2012 countered the allegations made by the complaints [*Exhibit 13*], these tests were conducted two years before the Designated Health Status was revoked. Red Drink continued to receive complaints and in this situation, a reasonable business would have conducted its own tests in the interim two years in response to these continuing complaints.

## B. RED MUST PAY US$200 MILLION IN DAMAGES

49. Blue is entitled to damages totalling US$200 million as compensation for the gain that it was deprived of by Red's breach of Article 8 of the agreement [*UNCITRAL Arts 7.4.1; 7.4.2(1)*].