CHOCOLATE CASE

Introduction:

Red Corp. ("Red"), based in the country of Negoland, submits this memorandum in support of its position that Blue Inc. ("Blue"), based in the country of Arbitria, owes a remaining $1.5 million for a second shipment of chocolate and an additional $500,000 for the increased cost of air freight. The contract in question is governed by the Unidroit Principles of International Commercial Contracts 2010 ("UPICC").[1] We submit this before the tribunal and pray for the requested relief.

Statement of Facts:

Before St. Valentine's Day 2014, Blue approached department stores in Arbitria to gauge interest in Red's chocolate. After the stores expressed interest, a deal was made, albeit on rather short notice, on December 10, 2013. Blue would import chocolate worth $3 million from Red, which would be distributed to the department stores in Arbitria. Knowing that the goods had to arrive by January 31st, so that the department stores could sell them, Red and Blue agreed, based upon the method of shipping, that the goods would be shipped by January 10th. Terms of the trade were CFR and payment by Letter of Credit ("L/C").[2] Red insisted upon these terms to protect their interests.

After the deal was made, Red went about fulfilling its obligations by making and preparing for shipment of the custom-made, limited production, St. Valentine's Day version of the chocolate that Blue had requested.[3] Red made all the necessary arrangements with a shipping company to make sure the goods were delivered on time.[4] On December 19th, prior to the L/C being issued, Blue informed Red that it had made its request for a L/C to be issued, Red subsequently waited to hear from the advising bank. Because of the holiday season, only a couple of working days had passed before Red noticed that the L/C had not been advised.[5] Red immediately contacted the advising bank, to confirm the terms for the L/C transaction, with sufficient time to still make the delivery as scheduled. Unfortunately, Red was not given the confirmation required to assure its bargained for protection was in place until it was too late to make the shipment.[6]

Red contacted Blue thereafter to ascertain how they wanted to move forward. Blue, for the first time, mentioned the amount of money it would have to pay in penalties if the goods didn't make it in time to the department stores. It was agreed that the contracted for method of shipping would be changed to air freight, made in two shipments, in order to fulfill the ultimate purpose of the contract.[7] Trouble arose after Red had loaded the second shipment of chocolate on the agreed upon vessel of transport. The carrier, having mechanical problems, housed the goods in a warehouse, which subsequently burned down due to a lightning strike.[8] Red, having met its obligations under the contract, awaits payment for both the second shipment of chocolate, $1.5 million, and the additional costs Red incurred when changing the method of shipping to meet Blue's deadlines, $500,000.

1 Exhibit 6, Article 7.
2 Problem ¶ 29, *see also* Exhibit 6.
3 Problem ¶ 30.
4 Problem ¶ 31.
5 Problem ¶ 30.
6 Problem ¶ 31.
7 Problem ¶ 32.
8 Problem ¶ 33.

Summary of Arguments:
Before the tribunal are two issues stemming from a dispute over a contracted for sale of chocolate. Red is asking for performance of payment under the terms of the agreed upon contract. Blue is seeking damages. By establishing Red's right to payment, the question of damages to Blue becomes moot. Therefore, first, Red will prove that it has fully performed under the contract, and second, in the event the tribunal is not convinced, Red will demonstrate why it is not liable to Blue for damages.

Arguments:

I. **Red is entitled to $1.5 million for the chocolate from Blue because it fulfilled its contractual obligations when it loaded the second shipment on the airplane. Also, under the terms of the contract, Red is entitled to reimbursement for the $500,000 it spent on the air cargo.**

A.) It was not a breach of contract, or non-performance, when Red did not meet the shipping deadline due to the failure of the L/C.

i. Red was justified in withholding its performance until the L/C had been advised.

Negoland law clearly supports this position and should be applied in regards to this issue. The law states that: "if the seller and the buyer agree to settle a transaction by a L/C, the seller, in the absence of any special provision, may refuse to perform its obligations thereunder until a L/C is advised."[9] The breakdown in communication occurred in Negoland between a Negoland company and a Negoland bank. Additionally, the law of the site where the documents are to be handed over and payment made should control. In this case, those events would have taken place in Negoland and therefore Negoland law should apply.

If the tribunal is not persuaded by the applicability of Negoland law, it can resort to the principles of Unidroit to come to the same conclusion. According to UPICC Article 7.1.3, in the event that the parties are to perform consecutively, the party that is to perform later may withhold its performance until the first party meets its obligations. As reflected in the comments to this rule, in a L/C transaction the performances of the party are to take place consecutively. Blue was obligated to open a L/C in conformation with its contractual obligations before Red needed to perform. Critically, Red would need to know that the L/C was in conformation with the contract before it could be assured of the protections that the L/C transaction offer. Red was legally justified in waiting to hear from the advising bank.

ii. In any event, Blue is legally prevented from relying on any potential non-performance of Red based upon the failure of the L/C.

According to UPICC Article 7.1.2, a party may not rely on the non-performance of the other when the non-performance was caused by an event for which the first party bears the risk. It was Blue that entered into a contract with Arbitria Bank to open the L/C in Red's favor. Because it was a service that Blue contracted for, Blue, and Blue alone, bore the risk of the L/C transaction

9 Exhibit 9.

up and until Red was informed by the advising bank of the terms of the L/C. Therefore, Blue is unable to rely on any potential non-performance on the part of Red, and Red's decision to not ship without the protection of the L/C cannot legally be described as non-performance.

Either by Negoland law or the Unidroit principles, the tribunal should find that Red was either justified in withholding its performance or that Blue is unable to rely upon any non-performance in regards to the L/C transaction.

B.) The subsequent modifications of the contract affected only the method, manner, and timing of shipping and were allowed because of the conduct of the parties. All other agreements embodied in the provisions of the contract remained in force.

i. The parties are bound by the oral modifications made over the phone.

According to UPICC 2.1.18, oral modification to a contract that contains a clause requiring such modification be in writing, may nonetheless be enforced if a party reasonably acts in reliance on the conduct of the other party. While Article 9 of the contract stated that no provision of the agreement could be waived or amended except by a signed writing, the conduct of the parties precludes either one from invoking this Article in regards to the subsequent modifications made over the phone. It was Blue that asked Red to ship the chocolate by air "right away" in order to meet their deadlines with a third party.[10] Red, reasonably relying upon this request, performed as requested, therefore, the new arrangements made between Red and Blue over the phone should be considered modifications to the original contract.

ii. The only thing modified by the phone conversation was the manner, timing and method of shipment.

Red contacted Blue to inform them of the problem that had arisen with the originally scheduled shipment and Blue asked Red to change the shipping method to air cargo.[11] The shipment would be split between two flights and cost an additional US $500,000.[12] Nothing else relevant to the contract was discussed.

iii. The provisions regarding transfer of risk and increased cost still apply.

Critically, the parties never further discussed any changes to the agreed upon transfer of risk, or who would bear the increased shipping costs. Under the contract, the agreed upon trade term was CFR.[13] This embodies a choice made by the parties as to when the transfer of risk would occur. By putting CFR in the contract, Red and Blue agreed that the risk would transfer once the goods were loaded on the vessel for shipment. It is the only intent of the parties that the tribunal can justifiably rely upon. Additionally, the parties negotiated for and put into the contract an article that contemplates exactly the situation before the tribunal. The language of Article 5 states: "Any new, additional or increased freight rates . . . shall be reimbursed to the Seller by the Buyer." Here we have a freight rate that is new, additional, and increased. This was a negotiated for

10 Problem ¶ 32.
11 *Id*.
12 Problem ¶ 33.
13 Problem ¶ 29, Exhibit 6.

agreement reflected in the agreed upon price for the sale. Any finding, other than what we have suggested, would have the effect of undoing what the parties had already agreed upon.

<u>Conclusion</u>:
Red and Blue entered into an agreement to ship the chocolate by boat that would be paid by an L/C. The L/C was not timely advised, and Red was justified in withholding its performance until it had the protection originally contracted for. Further negotiations to resolve the situation led to an agreement between Red and Blue, which Red justifiably relied upon, in regards to the manner, method and timing of shipment only. The contracted for agreement regarding the transfer of risk and who would bear the additional costs was still in effect. Red performed its obligations once the goods had been loaded onto the airplane. Red is also justified in relying on Article 5 to be reimbursed for the additional $500,000 it had to pay. Therefore, Blue is obligated to pay Red $1.5 million for the chocolate and $500,000 for the air cargo.

II. Red is under no obligation to reimburse to Blue the amount it paid to its department store clients.

A.) Red performed fully under the contract. *See above*.[14]

B.) In the event that it is found that Red still had contractual obligations to perform, the subsequent lightning strike that ruined the second shipment of chocolate would excuse their performance under the force majeure clause of the contract.

The parties included in the contract a force majeure clause, Article 6. While the clause provides examples of what would qualify as a force majeure event, importantly, it acknowledges that the list is by no means exclusive. For further clarification, the tribunal should look to the Unidroit principles governing this contract. According to UPICC 7.1.7, the non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it couldn't have reasonably taken into account at the time of contracting. Lightning strikes classically fall within such a provision. The goods when struck, where housed within a structure that was sufficiently secure.[15] The damage that resulted was beyond Red's ability to control and was something that could not possibly have been foreseen at the time of contracting. Therefore, Red is not be liable to Blue in any event, because Red's performance, given the circumstances, should be excused.

<u>Conclusion</u>:
Under no circumstances should Red be found liable to Blue for damages. Red fully performed under the contract. Even in the regrettable event that the tribunal should find Red had remaining obligations to perform, those were excused, according to Article 6 of the contract, when a lightning strike, an event beyond control, made performance impossible.

14 Chocolate Case, Issue I.
15 Problem ¶ 33.

M&A CASE

Introduction:
Red and Blue concluded a Stock Purchase Agreement ("SPA") in December of 2012. Red purchased Blue Drink (renamed Red Drink everywhere except in Arbitria), a subsidiary of Blue. From this transaction several disputes arose which we now bring before the tribunal. First, Red claims that Blue has breached its obligations in regards to its representations and warranties; second, Red claims that Blue has breached its obligations in regards to the No Competition clause of the SPA; third, Red denies that any additional payments are due under the contingent payment arrangement. The SPA in question is governed by the Unidroit Principles of International Commercial Contracts 2010.[16] We submit this before the tribunal and pray for the requested relief.

Representations and Warranties

Statement of Facts:
On April 30, 2014, Red was informed by the Arbitria Ministry of Health and Welfare ("Ministry") that they were revoking the "Designated Health Food" status of Blue Slim based on its "finding that overconsumption of the product may prevent the correct functioning of the stomach." As a result of the revocation, Blue Slim's sales plummeted, causing a loss of $300 million in sales.[17] Based on the records provided by Blue in the course of due diligence, it is clear that while Red was aware that there had been complaints since 2012 and Ministry concern, Blue claimed it had done testing and found no link between overconsumption and stomach problems.[18]

Summary of Arguments:
When the Ministry revoked the designated health food status of Blue Slim, it became clear that Blue had breached provisions of the SPA in regards to its representations and warranties. They did this in two ways. By signing the SPA as written, they misrepresented the potential for actions and proceedings to be initiated against Blue Slim. Also, by virtue of the information provided, they have breached their obligations for full disclosure.

Arguments:

I. **Under Article 4, provision (xii) Blue breached its obligation when they signed the SPA stating that there was no basis for any action or proceeding against Blue Slim.**

Article 4, provision (xii) states that "there are no . . . administrative . . . proceedings or investigations against TARGET," and critically that "[t]here is no basis for any such action, suit, proceeding or investigation." By virtue of incorporating this provision into the SPA, Blue was guaranteeing to Red that there was no basis for any administrative investigation or proceeding against Blue Slim.

However, at the time of the closing date, January 15, 2013, the Ministry was monitoring the situation in regards to the complaints from consumers over stomach problems related to

16 Exhibit 6, Article 7.
17 Problem ¶ 38.
18 Exhibit 13.

overconsumption of Blue Slim.[19] These complaints later formed the basis for the Ministry to investigate and ultimately revoke the health food status of Blue Slim. Therefore, according to the terms of the SPA, Blue breached its obligation in this regard.

II. **Under Article 4, provision (xiv) Blue breached its obligation when they provided records that claimed no link between the overconsumption of Blue Slim and stomach problems.**

Article 4, provision (xiv) states that "[n]one of the written information or documents . . . furnished . . . to RED . . . is false or misleading . . . or omits any fact necessary to be stated in order to make the statements . . . not misleading." In the course of due diligence, conducted between May 25, 2012 and September 30, 2012[20], Blue provided to Red a record [written information and documents] regarding Blue Drink.[21] It is clear from the record that Blue conducted its own rigorous tests, from April to May of 2012 into the complaints regarding consumption of Blue Slim. Blue claimed that it did not find any phenomenon of overconsumption leading to stomach problems.[22] However, the complaints continued and two years later the Ministry conducted its own tests finding the exact opposite to be true.[23] Based upon their finding, it is clear that the information Blue provided to Red in regards to their tests was false.

In the event, the tribunal should not agree with this assertion, the information provided by Blue was at the very least misleading. Based upon the record provided, Red was led to believe that while the Ministry had expressed concern over consumer complaints in regards to the product, Blue had conducted full tests and concluded that the product was safe. Red subsequently acquired Blue Drink, relying upon the record that had been provided to them. However, as stated above, the Ministry revoked the health food status after conducting its own investigation. Blue should at least have provided more information to correct any potential misperception Red had about the transaction before closing the deal. The failure to do so constitutes, at the very least, an omittance according to the SPA, Article 4 (xiv).

Conclusion:
The two arguments presented above, taken together or considered independently, are sufficient to prove that Blue has breached its obligations under the SPA. It is uncontested that Red would have earned an additional $30 million dollars more if there had not been a loss of $300 million dollars in sales due to the revocation of health food status.[24] Therefore, we ask that the tribunal find that Blue is liable to Red in the amount of $30 million.

No Competition Clause

Statement of Facts:
Under the agreement in the SPA, Blue has agreed to a no competition clause for a period of 5 years, stipulating that Blue will not engage in a similar or competitive business with Red Drink. Later on, towards the end of 2013, Bob Orange, the head of R&D at Red Drink, chose to resign.

19 Problem ¶ 39.
20 Problem ¶ 9.
21 Exhibit 13.
22 *Id*.
23 Problem ¶ 38.
24 Exhibit 14.

Even though he was asked to rethink his decision and continue working, he refused and in January 2014 joined Arbitria Coffee to help with the R&D of a dietary coffee drink. This research got crucial support from Blue in the form of a $5 million investment (without which it would be extremely difficult to continue with the research) and the use of research facilities, in return, Blue gained a non-executive seat on the board of Arbitria Coffee.

Summary of Arguments:
Under Article 9, the no competition clause, Blue is prevented from owning, managing, operating, controlling, participating in, or performing services for a business similar to or competitive with Red Drink for a period of 5 years within Arbitria or Negoland. As the threshold issue of this clause, we will first demonstrate that Arbitria Coffee is exactly the type of business similar to or competitive with one of Red Drink's signature products, as contemplated by the parties. Second, we will demonstrate that Blue's relationship with Arbitria Coffee easily falls within the prohibited scope of relations with such a similar or competitive business. Third, and finally, the terms of the SPA itself, and contract law in general, demand that liquidated damages be paid, as agreed upon, and that Blue's investment be rescinded to prevent ongoing harm as contemplated by the inclusion of the no competition clause.

Arguments:

I. **Blue has breached its obligations pursuant to Article 9.1(i) of the SPA.**

A.) Arbitria Coffee is a business similar to or competitive with Red Drink.

i. Both Arbitria Coffee and Red Drink are beverage makers.

Both Arbitria Coffee and Red Drink are beverage makers whose primary business is developing and manufacturing beverages targeted towards the consumer market. Already by virtue of such similarity, Arbitria Coffee must be considered a business similar to that of Red Drink.

ii. The products of Arbitria Coffee and Red Drink share the same specialized character, and will be priced at the same level.

Blue Slim is a soft drink whose characterizing feature is the fact that the formula limits bodily fat absorption and dissolves and burns already absorbed fat when consumed, thereby giving the drink active dietary features. Arbitria Coffee is currently developing a drink with "weight loss benefits" thereby de facto mimicking the characterizing feature of Blue Slim whilst also falling under the general shared classification of the two products as being soft drinks. Furthermore, the two products are expected by the parties to be competitive within a similar price range.

iii. Both products come from the efforts of the same man, Bob Orange.

Our argument is further supported by the fact that both Blue Slim and the beverage developed by Arbitria Coffee are developed by Bob Orange.

It is clear that by initiating the development of one or more products sharing both general classification and characterizing features of our product, developed by the same expert in dietary beverages, and priced at a competitive level, Arbitria Coffee is exactly the type of business similar to or competitive with Red Drink.

B.) The relationship between Arbitria Coffee and Blue is of such a character as forbidden by the contract.

i. The purchase of $5 million worth of shares in Arbitria Coffee by Blue constitutes direct ownership.

Article 9 forbids direct ownership of a similar or competitive business. With the purchase of the shares in Arbitria Coffee, Blue now owns arguably 20% of the company and is the second largest shareholder.[25] This unquestionably establishes Blue as a direct owner of Arbitria Coffee.

ii. The rental of the Blue Central Research Center to Arbitria Coffee constitutes the performance of a service.

Article 9 forbids the performance of services for a similar or competitive business. Blue allowed Arbitria Coffee to use its research facilities, and collected a reasonable amount of rent in return.[26] By virtue of this arrangement, Blue unquestionably performed a service for Arbitria Coffee.

iii. The appointment of a non-executive board member, as a direct representative of Blue, on the board of directors of Arbitria Coffee constitutes control.

Article 9 forbids the control of a similar or competitive business. By appointing a non-executive member of the board at Arbitria Coffee and by possessing the right to vote as a shareholder at the annual meeting, Blue has gained partial control of a similar or competitive business.

The factual circumstances stated above all constitute participation as stipulated in the contract. The above described relationships are independently capable of establishing a violation. While we have sufficiently proven specific instances of breach under Article 9, the clause implies a much broader view of what is prohibited. The no competition clause also applies to subsidiaries and affiliates; however, Blues actions alone are sufficient to prove our case. Additionally, the clause also implies a much broader view of prohibited behavior, containing a catch-all clause banning any activity implicated in the “carrying on” of a business similar or competitive with Red Drink.

II. **Due to this breach, Red is entitled to liquidated damages as stated in the contract and the revocation of Blue's $5 million investment to Arbitria Coffee.**

A.) Red is entitled to liquidated damages from Blue in accordance with Article 9, paragraph 2 of the SPA.

In the case of a breach of any obligations by Blue under Article 9, paragraph 1, and as described above, Red is entitled to call for liquidated damages amounting to $500,000. Red reserves, to the

25 Problem ¶ 36.
26 *Id*.

widest extent possible, the right to call for further damages in accordance with the liquidated damage provision's non-exclusive regulation of damages.

B.) Blue should immediately withdraw the investment in Arbitria Coffee to rectify the ongoing breach of the SPA.

The investment made in Arbitria Coffee by Blue is still in effect and therefore constitutes a continuous breach of the SPA. In accordance with the enactment of the Unidroit Principles 2010 in Article 12 of the SPA, Red calls for forward-looking specific performance under the contract by virtue of Blue's immediate retraction of the investment in Arbitria Coffee. Specific performance is an available remedy to Red by virtue of UPICC 7.2.2. Liquidated damages does not deprive Red of the option of calling for specific performance as the decided liquidated damages clause in Article 9, paragraph 2 of the SPA is non-exclusive.

Conclusion:
Blue has breached its obligations pursuant to Article 9.1(i) of the SPA. Due to this breach, Red is asking for the agreed upon liquidated damages as stated in the SPA and the revocation of Blue's $5 million investment to Arbitria Coffee.

Contingent Payment

Statement of Facts:
The purchase price for Blue Drink was set at $800 million with the possibility of an additional payment in case the EBIDTA in years 2013 and 2014 would exceed $110 million. Nevertheless, Blue representatives were aware and understood that Red would be heavily investing and advertising to start new business in Negoland, therefore Article 8 contemplated an exemption for reasonable business decisions.[27] With the aim to penetrate Negoland's market and establish our newly purchased product, Red concluded a distribution agreement with Nego Drink, a trusted and reliable distributor in Negoland.[28] Unfortunately, towards the end of 2013, Bob Orange decided to resign, leaving us shorthanded at a time when we needed to boost sagging sales by reworking the flavor of Red Drink.[29] Hurting our sales further, in 2014, the Ministry revoked the health food status of Blue Slim.

Summary of Arguments:
Under the terms of the SPA, Red argues that no contingent payments are due, under Article 2.2, because EBITA never rose beyond the agreed upon benchmark of $110 million in both 2013 and 2014. Any negative impacts upon the sales in the short-term of Red Drink were either not attributable to Red or fell within the business judgment exemption, reflected in Article 8. There are three separate events that had an impact upon the EBITA in 2013 and 2014. We will deal with each separately. First, we will prove that the distribution agreement struck with Nego Drink was a reasonable business decision. Second, the events that led up to Bob Orange's resignation should not be held against Red because again, Red was acting within its business discretion. Third, the revocation of health food status does not fall within Article 8 and cannot be held against Red. By proving the validity of the distribution agreement alone, Blue has no viable claim for any contingent payment in 2013 or 2014. Even though this alone is sufficient to defend against Blue's

27 Exhibit 4.
28 Problem ¶ 25.
29 Problem ¶ 35.

claim, the other events undeniably support no contingent payment for 2014.

Arguments:

I. **Red is persuaded and insists on the fact that there is no obligation to pay contingent payment of additional purchase price according to Article 2.2 of the SPA.**

A.) Red denies that its actions materially harmed Blue's interest in the additional payments.

According to Article 8 of the SPA, Red "shall not operate . . . the TARGET in such manner as may materially harm the interest of BLUE in the additional payment." As we have stated in our Business plan for Red Drink[30] our forecast for EBIDTA in 2013 was $100 million and $110 million for 2014, our actual sales and EBIDTA in 2013 were as planned, and in 2014 sales and EBIDTA declined due to unexpected circumstances, which are explained below. Therefore, there is no possible explanation why Blue would expect better results and claim Red has materially harmed their interest.

B.) By concluding the distribution agreement with Nego Drink, Red has acted in the best business interest of Red Drink in Negoland.

Article 8 contains additional language that allows Red the discretion to operate the business in a reasonable manner stating: "however, RED may make any reasonable business judgment to operate the TARGET." It is commonly acknowledged, that the standard applied in determining the reasonableness of a business judgment is not one that after the fact analyzes whether a better deal could have been made. As demonstrated below, Red at all times was acting reasonably in regards to its business decisions.

Red had been approached by two big Negoland distribution companies with relatively equal sales force/customer reach, both demanding exclusivity in the territory of Negoland. Negoland Bottlers offered its network of retailers and offered a 2 year contract at 50% of the standard retail price and a minimum purchase volume of 400,000 units per year. Whereas, Nego Drink (with its network of vending machines, by far the highest in Negoland) offered a 2 year contract at 40% of the standard retail price and a minimum purchase volume of 500,000 units per year, demanding only exclusivity for vending machines and allowing Red to sell the product directly to the consumers.[31]

While it is possible to find that Negoland Bottlers' offer had the potential to generate more profits in the short-term, Red, from a business perspective, was more interested in introducing the product in order to penetrate Negoland's market. As stated in Red's business forecast,[32] an increase in sales will not translate into higher cash-flow in years 1 and 2 (2013, 2014) given the significant amount of funds needed to launch production and restructure facilities in Negoland, in addition to massive advertising promotions.

Contracting with Nego Drink gave Red the better opportunity at the time of the conclusion of the agreement. Red had certainty that they would be able to sell 100,000 more units per year via the

30 Exhibit 4.
31 Problem ¶ 23-25.
32 Exhibit 4.

distributor alone, and therefore would be better able to penetrate the market and establish their brand. Furthermore, Red was given the ability to build its direct selling channels and sell directly to consumers, providing a great secondary way to establish its brand and achieve its aim of raising its profile in Negoland's market. As we have stated above, Red is committed to the long-term success of Red Drink, and therefore considers higher sales (even despite lower cash-flow) in the first years as essential for the success of the business. This strategy clearly should be considered as a reasonable business judgment.

Furthermore, it was Red's CEO, Pat Red, who made the decision to go with Nego Drink.[33] He had a long and proven track record of concluding very successful deals for Red.[34] Within the business world, reputation is important. Pat Red had his as a successful businessman, and he trusted Nego Drink, believing it was necessary to have a trustworthy distributor to be successful in the long-term.

C.) Red is shielded from any liability resulting from the resignation of Bob Orange because it was acting within its business discretion.

First and foremost, it was Bob Orange who chose to leave Red Drink. Regardless, as noted above, Red is permitted to act within its reasonable business judgment. That includes the managing of its employees and the impositions of the workplace. In the Basic Policy part of Business Planning for Blue Drink[35], Red noted that the flavors would have to be adjusted to suit Negoland's customers. Bob Orange was instructed to adjust the flavors within a deadline, which he did not do, instead, he left the company.[36]

D.) In no event can the decline in sales due to the loss of health food status be attributed to Red, therefore Article 8 in no way applies.

In 2014, it was the radical and unforeseeable decline of sales in Arbitria, due to the revocation of health food status, that caused a loss of $15 million in EBIDTA. Red carries no responsibility for this occurrence, and in fact, Red holds Blue responsible for breaching it representations & warranties in this regard.

Most importantly, Article 8 of the SPA refers to acts of Red operating the TARGET; however, the revocation of health food status was an administrative procedure in which Red took no part, and therefore Article 8 of the SPA is not applicable. The decline of sales and corresponding loss of EBIDTA cannot be claimed as Red operating the Target in order to materially harm Blue.

<u>Conclusion</u>:
From the arguments above, it is clear that Blue has not suffered any material harm as a result of the way Red conducted its business. Furthermore, Red has proven that it acted, at all times, within the reasonable business judgment exception to Article 8, and therefore, Article 2.2 of the SPA is not triggered because EBITDA could never have justifiably risen above $110 million.

33 Problem ¶ 25.
34 Problem ¶ 6.
35 Exhibit 4.
36 Problem ¶ 35.