SIGNED this 12 day of July, 2005.

LEIF M. CLARK
UNITED STATES BANKRUPTCY JUDGE

United States Bankruptcy Court

Western District of Texas
San Antonio Division

IN RE AMERICAN PLUMBING & MECHANICAL, INC., ET AL. *DEBTORS*	BANKR. CASE NO. 03-55789 THROUGH 03-55814 PROCEDURALLY CONSOLIDATED UNDER CASE NO. 03-55789 CHAPTER 11

MEMORANDUM DECISION ON DEBTORS' MOTION FOR RESOLUTION OF PURCHASE-PRICE ADJUSTMENT UNDER THE TERMS OF THE ASSET-SALE-AND-PURCHASE AGREEMENT BETWEEN AMPAM ATLAS PLUMBING, LLC AND BEN LEWIS INC.

Factual Background

AMPAM Atlas Plumbing, LLC ("Seller") and Ben Lewis Inc. ("Buyer") executed an Asset Sale and Purchase Agreement ("Agreement"). The Agreement contains a purchase-price adjustment provision. Seller and Buyer dispute the correct amount owed under that provision. It states:

> (a) Promptly following the Closing Date [March 15, 2004], Buyer shall deliver to Seller an *unaudited balance sheet* [*"Closing Balance Sheet"*] . . . dated the Closing Date and prepared (i) on a basis consistent with Seller's balance sheet at September 30, 2003 and (ii) otherwise in accordance with the policies, as historically applied, of [AMPAM, parent of Seller], with respect to the financial statements of Seller . . . . If within five days

> following delivery to Seller of the Closing Balance Sheet, Seller raises any objection to the Closing Balance Sheet in writing and Seller and Buyer are unable to resolve such objection within ten days following delivery of the Closing Balance Sheet, either Seller or Buyer may request that the balance sheet of the Closing Financial Statements be audited by an independent accounting firm selected by Seller, such audit to be conducted expeditiously, but in any event to be completed within thirty days following the making of the request. Each of Seller and Buyer shall pay one half of the expense of such audit; provided, however, that if Buyer's share of the expense of such audit exceeds $10,000.00, then Seller shall pay the excess. If Seller fails to object to the Closing Balance Sheet in writing within such five day period, the Seller shall be deemed irrevocably to have accepted the Closing Balance Sheet. The Closing Balance Sheet as agreed to by the parties or the *audited Closing Balance Sheet*, as the case may be, shall be the "*Final Closing Balance Sheet*" for purposes of this Agreement.
>
> (i) If . . . "*Net Liability*" [as determined by the Final Closing Balance Sheet] . . . exceeds $3,065,000, Buyer shall, within five days following the determination of the Purchase Price adjustment, deliver the amount by which the Net Liability exceeds $3,065,000 to Seller . . . .
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> (ii) If Net Liability is less than $3,065,000, Seller shall, within five days following the determination of the Purchase Price adjustment, deliver the amount, if any, by which Net Liability is less than $3,065,000 to Buyer . . . .

EXH. 1, AGREEMENT § 1.4 (emphasis added). Section 1.4 contemplates the existence of at most two balance sheets: the *unaudited* balance sheet (referred to in § 1.4 as the "Closing Balance Sheet"), and the *audited* balance sheet (referred to in § 1.4 as the "audited Closing Balance Sheet").

Buyer and Seller dispute the amount of Net Liability because they do not agree which balance sheet is the Final Closing Balance Sheet. Buyer initially took the position that the Final Closing Balance Sheet is the *unaudited* balance sheet, under which Buyer owes Seller $49,862.56. EXH. 12, 13. Seller contends the Final Closing Balance Sheet is the *audited* closing balance, under which Buyer owes Seller $241,067.00. Neither party claims that the Agreement was terminated under § 9.1 ("Termination").

The Closing Date was March 15, 2004. Six months later, Buyer still had not delivered the unaudited balance sheet. *See* AGREEMENT § 1.4 ("*Promptly following the Closing Date*, Buyer shall

deliver to Seller an unaudited balance sheet . . . .") (emphasis added). Seller filed a motion to compel Buyer to perform under the Agreement. DOC. # 1880. At the hearing to consider that motion, the parties reached an agreement. DOC. # 2001 ("Agreed Order"). Under the Agreed Order, Buyer had until December 17, 2004 to deliver the unaudited balance sheet. Buyer also agreed to not challenge the independence of Deloitte & Touche LLP ("Deloitte") if Seller objects to the unaudited balance sheet.

Buyer delivered the unaudited balance sheet on December 17, 2004. *See* EXH. 4. Seller timely objected to the unaudited balance sheet. EXH. 6. On January 10, 2005, Seller informed Buyer that it selected Deloitte as the independent accounting firm to perform an audit of the balance sheet. EXH. 7. Deloitte did not perform its audit within thirty days of Seller requesting an independent audit.[1] On March 21, 2005, Seller informed Buyer that it selected Brown & Graham (B&G) to replace Deloitte. EXH. 11. According to B&G's audit, Buyer owes Seller $241,067.00. *See* EXH. 15. Buyer insisted that the Final Closing Balance Sheet is the unaudited balance sheet because Seller missed the thirty-day deadline. EXH 12. Buyer sent a check for $49,862.56 to Seller, which Seller rejected and sent back. EXHS. 13 and 14. Seller filed a motion to compel Buyer to pay Seller $241,067.00. DOC. # 2300. In response, Buyer claimed for the first time that it owes Seller nothing under § 1.4. DOC. # 2326 ¶ 39.

Testimony and arguments were presented on Seller's second motion to compel (DOC. # 2300) on May 5, 2005. This dispute requires the court to interpret the Agreement. Texas law applies. AGREEMENT § 11.6 (" . . . this Agreement . . . shall be governed by the laws of the State of Texas . . . .").

Contract interpretation under Texas law

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[1] *See* AGREEMENT § 1.4 (". . . either Seller or Buyer may request that the balance sheet of the Closing Financial Statements be audited by an independent accounting firm . . . such audit to be conducted expeditiously, but in any event *to be completed within thirty days following the making of the request.*") (emphasis added).

Contract interpretation is a question of law. *Instone Travel Tech Marine & Offshore v. Int'l Shipping Partners, Inc.*, 334 F.3d 423, 428 (5th Cir. 2003). "The court's primary concern is to give effect to the written expression of the parties' intent. In doing so, the court should read all parts of the contract together to ascertain the agreement of the parties, ensuring that each provision of the contract is given effect and none are rendered meaningless. Texas law requires us to peruse the complete document to understand, harmonize, and effectuate all its provisions." *Id*. (internal citations and quotation marks omitted). "The failure to include more express language of the parties' intent does not create an ambiguity when only one reasonable interpretation exists." *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 591 (Tex.1996).

Is the thirty-day deadline a condition precedent or a covenant?

Buyer claims that "no audit was requested on the [unaudited] balance sheet within ten (10) days [its] submission . . . nor was any audit completed within thirty (30) days from the 'formal request' for [Deloitte] to conduct the audit . . . ." DOC. 2326 at ¶ 17. Pointing to the Agreement's time-is-of-the-essence clause, Buyer argues that Seller's "failure to timely request or complete the audit required by Section 1.4 of the Asset Purchase Agreement, means that *there is no purchase price adjustment applicable to this transaction*." *Id*. at ¶ 25 (emphasis added); *see also* AGREEMENT § 11.12 ("Time shall be of the essence in all provisions wherein a time is specified."). In essence, Buyer is arguing that the ten- and thirty-day deadlines in § 1.4 are condition precedents to the obligation to pay the purchase-price adjustment.[2] "Conditions precedent to an obligation to perform are those acts or events, which occur

[2] As it turns out, under both the audited and unaudited balance sheets, Buyer has the obligation to pay the purchase-price adjustment. The obligation could just as well have been the Seller's. *See* AGREEMENT § 1.4(a)(ii) ("If Net Liability is less than $3,065,000, Seller shall . . . deliver the amount, if any, by which Net Liability is less than $3,065,000

subsequently to the making of a contract, that must occur before there is a right to immediate performance . . . ." *T.F.W. Mgmt., Inc. v. Westwood Shores Prop. Owners Ass'n*, 162 S.W.3d 564, 570 (Tex. App.–Houston [14th Dist.] 2004, no pet.), *citing Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976).

Buyer incorrectly characterizes the deadlines as conditions precedent, and its reliance on the time-is-of-the-essence clause is misplaced. The portion of § 1.4 that contains the ten- and thirty-day deadlines states:

> If within five days following delivery to Seller of the Closing Balance Sheet, Seller raises any objection to the Closing Balance Sheet in writing and *Seller and Buyer are unable to resolve such objection within ten days following delivery of the Closing Balance Sheet*, either Seller or Buyer may request that the balance sheet of the Closing Financial Statements be audited by an independent accounting firm selected by Seller, such audit to be conducted expeditiously, but in any event to be completed within *thirty days* following the making of the request.

AGREEMENT § 1.4 (emphasis added). As a preliminary matter, the court notes that the ten-day deadline in § 1.4 does not apply a timely request for an audit. Rather, it sets a time limit for Seller and Buyer to resolve Seller's objection to the unaudited balance sheet. If the objection is not resolved within ten days after the delivery of the unaudited balance sheet (and if Seller's objection is timely, which it was), then either Seller or Buyer may request an audit. Section 1.4 sets no deadline for when the audit request must be made. Buyer's assertion that the ten-day deadline applies to the request for an audit would require the court to read § 1.4 as if it says "either Seller or Buyer may request that the balance sheet . . . be audited *but no later than ten days following delivery of the unaudited balance sheet*." The court cannot

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to Buyer . . . .").

rewrite a contract "merely because . . . one of the parties comes to dislike its provisions or thinks that something else is needed in it." *Cross Timbers Oil Co. v. Exxon Corp.*, 22 S.W.2d 24, 26 (Tex. App.–Amarillo 2000, no pet.), *citing HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 888-889 (Tex. 1998).

Buyer is correct that the thirty-day deadline applies to the completion of the audit. *See* AGREEMENT § 1.4 (". . . such audit to be conducted expeditiously, but in any event to be completed within *thirty days* following the making of the request.") (emphasis added). However, the court does not agree with Buyer that the thirty-day deadline is a condition precedent to its obligation to pay the purchase-price adjustment. The Texas Supreme Court says:

> [i]n order to determine whether a condition precedent exists, the intention of the parties must be ascertained; and *that can be done only be looking at the entire contract*. In order to make performance specifically conditional, a term such as "if", "provided that", "on condition that", or some similar phrase of conditional language must normally be included. *If no such language used, the terms will be construed as a covenant in order to prevent a forfeiture*. While there is no requirement that such phrases be utilized, their absence is probative of the parties intention that a promise be made, rather than a condition imposed. In construing a contract, forfeiture by finding a condition precedent is to be avoided when another reasonable reading of the contract is possible. . . . Because of their harshness in operation, conditions are not favorites of the law.

Criswell v. European Crossroads S. Ctr., 792 S.W.2d 945, 948 (Tex. 1990) (internal citations omitted; emphasis added).

The parties clearly knew how to use conditional language. *See* AGREEMENT § 5.1 ("The obligations of Buyer hereunder *are subject to the fulfillment* . . . of each of *the following conditions* . . . .") (emphasis added). But no conditional language exists in the clause containing the thirty-day deadline. In addition, the thirty-day deadline is found in Article 1 of the Agreement ("Sale and Purchase"), not in

Article 5 ("Conditions to Closing"); *see also RHS Interests, Inc. v. 2727 Kirby Ltd.*, 994 S.W.2d 895, 900 n.1 (Tex. App.–Houston [1st Dist.] 1999, no pet.) ("the earnest money there was not a 'condition precedent' because it was not in article IV listing 'conditions,' but was merely a 'covenant' because it was in articles VII and IX.").

Time-is-of-the-essence clause

Buyer argues that Seller's failure to timely obtain an audit excuses Buyer's obligation to pay the purchase-price adjustment because the Agreement contains a time-is-of-the-essence clause. DOC. # 2326 at ¶ 20, *citing Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195 (Tex. 2004); *see also* AGREEMENT § 11.12. Buyer's reliance on the Agreement's time-is-of-the-essence clause is misplaced for three reasons. First, the Texas Supreme Court in *Mustang* stated that "a party is released from further obligation under the contract *only if the other party materially breached*." *Mustang*, 134 S.W.3d at 198 (emphasis added).[3] Buyer did not satisfy its burden of proof to show that Seller materially breached the Agreement by failing to timely obtain an audit. *See Bank One, Texas, N.A. v. F.D.I.C.*, 16 F.Supp.2d 698, 713 (N.D. Tex. 1998) (stating that plaintiff has burden of proof to show breach was material under Texas law).

Mustang lists five factors to consider in determining whether a failure to perform is material:

> [1] the extent to which the injured party will be deprived of the benefit which he reasonably expected;
> [2] the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
> [3] the extent to which the party failing to perform or to offer to perform will suffer

[3] It logically follows, by contrapositive, that if breach is not material, then the non-breaching party is not released from its obligation to perform. Almost all Texas courts, however, prefer to phrase it as "*p* only if *q*" instead of "if *not q*, then *not p*", where *p* = "non-breaching party is released from further obligation" and *q* = "breach is material".

> forfeiture;
> [4] the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of the circumstances including any reasonable assurances;
> [5] the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Mustang, 134 S.W.3d at 199.

All five factors weigh in favor of finding the breach to be non-material. Buyer will not be deprived of any benefit. In fact, as established by testimony during the hearing, Buyer received over a year ago all that it bargained to receive (that is, substantially all the assets used by Seller in the Maryland Business). Factor two therefore does not apply because Buyer actually is benefitting from the delay in paying the purchase-price adjustment. Under both the unaudited and audited balance sheets, Buyer owes Seller some purchase-price adjustment. Buyer's delay in paying that adjustment amount is tantamount to Seller loaning that amount to Buyer at 0% interest. More importantly, Buyer failed to prove up any damages that it allegedly suffered from the delay. Under factor three, Seller will suffer the forfeiture of the purchase-price adjustment, which Seller claims is $241,067.00. Factor four is not directly applicable because Seller already cured the failure to obtain an audit by promptly seeking an audit from another accounting firm. As soon as Deloitte confirmed that it would not perform the audit,[4] Seller informed Buyer of the situation and selected B&G to perform the audit.[5] Finally, the court finds that Seller acted in good faith. Seller was not responsible for Deloitte's delay and ultimate failure to conduct the audit, and Seller was diligently found a replacement auditor.

The second reason why Buyer's reliance on the time-is-of-the-essence clause is misplaced is

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[4] *See* EXH. 10 (March 18, 2005 (Friday) email from Deloitte to Seller and its counsel).

[5] EXH. 11 (March 21, 2005 (Monday) letter from Seller's counsel to Buyer's counsel).

explained by the Texas Supreme Court in *Hanks*: even assuming for the sake of argument that Seller's breach was material, a "party who elects to treat a contract as continuing deprives himself of any excuse for ceasing performance on his own part." *Hanks v. GAB Business Servs., Inc.*, 644 S.W.2d 707, 708 (Tex. 1982). Buyer treated the Agreement, and specifically the purchase-price adjustment provision, as continuing when it offered to pay the purchase-price adjustment of $49,862.56 (according to the unaudited balance sheet), *after* the thirty-day deadline had passed. *See* EXHS. 12 and 13. In doing so, Buyer deprived itself of any excuse for ceasing performance on its part.

Finally, the evidence establishes that Buyer waived Seller's duty to obtain an audit within thirty days. Even if the contract expressly states that time is of the essence, "strict performance may be waived by the party entitled to insist on it. Such waiver may be written or oral, and it may be shown by circumstances or course of dealing. . . . Waiver of timely performance may result from one party's express or implied assent to the continued performance of the other party without objection to the delay." *Carpet Servs., Inc. v. George A. Fuller Co.*, 802 S.W.2d 343, 346 (Tex. App.–Dallas 1990), *aff'd*, 823 S.W.2d 603 (Tex. 1992).[6]

The relevant portion of § 1.4 states that "either Seller or Buyer may request that the balance sheet of the Closing Financial Statements be audited by an independent accounting firm . . . such audit to be conducted expeditiously, but in any event to be completed within thirty days following the making of the request." AGREEMENT § 1.4. Seller made the request on January 10, 2005. EXH. 7 (letter indicating that Seller selected Deloitte). That gave Deloitte thirty days from January 10, 2005 – *i.e.*, February 9, 2005

[6] *See also Laredo Hides Co. v. H&H Meat Prods. Co.*, 513 S.W.2d 210, 218 (Tex. Civ. App.–Corpus Christi 1974, writ ref'd n.r.e.) (waiver of timely performance "will result from any act that induces the opposite party to believe that exact performance within the time designated in the contract will not be insisted upon.").

– to perform its audit. On March 21, 2005, almost six weeks after the February 9 deadline, Seller informed Buyer that it selected B&G to replace Deloitte. EXH. 11. At no time during those six weeks did Buyer object to the failure to complete an audit by February 9. Buyer objected for the first time on March 25, 2005 (EXH. 12) and only because Buyer was responding to Seller's March 21, 2005 letter (EXH. 11). In failing to promptly insist on timely performance, Buyer impliedly assented to Seller's delay in obtaining the audit. *See Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996) (lengthy period of inaction is enough to prove waiver).

The court's finding of waiver is not inconsistent with the Agreement. The parties themselves contemplated the possibility of waiver. *See* AGREEMENT § 11.2.[7] Other circumstances indicate Buyer's willingness to tolerate delay under § 1.4. For example, § 1.4 required Buyer to deliver to Seller "[*p*]*romptly* following the Closing Date . . . an unaudited balance sheet . . . ." (emphasis added). Buyer did not deliver the unaudited balance sheet until about nine months later, and only after Seller filed a motion to compel.

Buyer argues the court should not consider any extrinsic evidence when examining the time-is-of-the-essence clause, citing *Enclave v. Resolution Trust Corp.*, 986 F.2d 131, 133 (5th Cir. 1993) (citing cases from the Waco and Tyler courts of appeal). Buyer's argument goes too far. *Siderius*, one of the cases *Enclave* cites, recognized that time-is-of-the-essence clauses may be waived. *See Siderius, Inc.*

[7] Section 11.2 states that "[a]ny term or condition of this Agreement may be waived at anytime by the party which is entitled to the benefit thereof; such waiver shall be in writing and shall be executed by the chairman, president or a Vice president of each of the parties . . . ." Section 11.2's requirement that a waiver be in writing is consistent with the court's finding of waiver because the court found implied waiver. Section 11.2 addresses only express waiver. *See Segal v. Emmes Capital, L.L.C.*, 155 S.W.3d 267, 281 (Tex. App.–Houston [1st Dist.] 2004, no pet. h.) (discussing express and implied waiver).

v. *Wallace Co.*, 583 S.W.2d 852, 864 (Tex. Civ. App.–Tyler 1979, no writ) ("The evidence fails to conclusively establish that Wallace waived time is of the essence, and Siderius has therefore waived this claim."). The Tyler appellate court also acknowledges that time-is-of-the-essence clauses may be waived.[8] Waiver is ordinarily a question of fact but "[w]here the facts and circumstances are admitted or clearly established . . . the question becomes one of law." *Tenneco*, 925 S.W.2d at 643. *Enclave* itself recognized this: "[w]hen time is of the essence is expressed, *as in this case* [where the facts indicated that the parties always intended for time to be of the essence], there remains no question of fact for the jury but is determined by the court as a finding of law." 986 F.2d at 133.

In conclusion, the court finds that Buyer waived the requirement that the audit be completed within thirty days of the request for an independent audit. Having waived timely performance, Buyer remains obligated to perform under the purchase-price adjustment provision, and Buyer cannot complain of Seller's failure to obtain an audit within thirty days. Buyer must still perform even if Buyer were in a position to assert breach of contract because the court finds no material breach. *See Mustang*, 134 S.W.3d at 198. Buyer performs under § 1.4 by paying the purchase-price adjustment. How much that is requires interpretation of what constitutes the Final Closing Balance Sheet.

Which balance sheet is the Final Closing Balance Sheet?

Section 1.4 defines "Final Closing Balance Sheet" in the last sentence of subsection (a): "The Closing Balance Sheet [the unaudited balance sheet] *as agreed to by the parties* or the audited Closing Balance Sheet, as the case may be, shall be the "Final Closing Balance Sheet" for purposes of this

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[8] *See Hage v. Westgate Square Commercial*, 598 S.W.2d 709, 711 (Tex. Civ. App.–Waco 1980, writ ref'd n.r.e.), *citing Puckett v. Hoover*, 202 S.W.2d 209, 212 (Tex. 1947).

Agreement." EXH. 1, AGREEMENT § 1.4 (emphasis added). Because the parties did not agree to the unaudited balance sheet, it cannot be the Final Closing Balance Sheet. That leaves the only other alternative to be the Final Closing Balance Sheet – the audited balance sheet.

Buyer argues that B&G's audit was not an audit under § 1.4 because B&G made no effort "to prove up or confirm independently any of the line items of the balance sheet through third parties." DOC. # 2326 at ¶ 24. Buyer presented no evidence to support its assertion, and B&G's audit report says otherwise. *See* EXH. 15.[9]

At the hearing, Buyer reiterated its argument that B&G should have conducted a full-blown audit. Buyer's argument requires the court to determine what § 1.4 meant by "audit". In interpreting a contract, courts "give terms their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 119, 121 (Tex. 1996). The generally accepted meaning of "audit" does not dictate the scope of an audit.[10] Instead, the scope of an audit is determined by agreement among the relevant parties.[11]

The Agreement does not contemplate a full-scale audit. Section 1.4 expressly restricts the scope

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[9] "We conducted our audit in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the schedule is free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the Schedule of Objections to the Purchase Price Adjustment."

[10] The generally accepted meaning of "audit" is a "process whereby [an independent auditor] conducts an examination of management's financial statements to determine whether the statements present fairly the financial information which they purport to convey." *S.E.C. v. Arthur Young & Co.*, 590 F.2d 785, 788 n.2 (9th Cir. 1979) (also discussing GAAS, generally accepted accounting principles).

[11] *Cumis Ins. Soc'y Inc. v. Tooke*, 293 A.D.2d 794, 798 (N.Y. App. Div. 2002); *see also Akin v. Q-L Invs., Inc.*, 959 F.2d 521, 528 (5th Cir. 1992) (only the balance sheets were audited) *and* Vincent J. Love, UNDERSTANDING AND USING FINANCIAL DATA: AN ERNST & YOUNG GUIDE FOR ATTORNEYS 21-25 (1992) (discussing the different types of financial statements, including balance sheets).

of the audit to "the balance sheet of the Closing Financial Statements." Buyer could have negotiated for the Agreement to define "audit" to mean a full-blown audit.[12] Buyer chose not to, and the court cannot rewrite the contract by replacing words the parties agreed upon with words Buyer wishes it had negotiated for. *See Cross Timbers*, 22 S.W.2d at 26. Also, a full-blown audit would be inconsistent with the purpose of the audit, which is to give Seller the opportunity to challenge specific items in Buyer's unaudited balance sheet (or for Buyer to justify the items in its unaudited balance sheet to which Seller objects). An audit is triggered under § 1.4 only upon Seller's objection to the unaudited balance sheet. It would make no sense for Seller to challenge and request an audit on items with which Seller agrees. *See Frost Nat'l Bank v. L&F Distribs., Ltd.*, – S.W.3d –, 2005 WL 1252269 at *2 (Tex. May 27, 2005, no pet. h.) (courts should "avoid when possible and proper a construction which is unreasonable . . . ."). The court rejects Buyer's argument that B&G should have conducted a full-blown audit, and finds that B&G's audit qualifies as an "audit" under § 1.4.

Conclusion

For the reasons stated above, Buyer remains obligated to perform under the purchase-price adjustment provision. To the extent that Buyer has not paid its share of the audit expense, the court orders it to do so. Seller shall prepare a form of order consistent with this opinion.

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[12] Buyer also could have negotiated for the Agreement to require the entire "Closing Balance Sheet" to be audited.