EFiled: Feb 08 2019 09:14PM EST
Transaction ID 62932447
Case No. 2019-0098-

IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

BODEGA LATINA CORPORATION, Plaintiff, v. FIESTA HOLDINGS INVESTMENTS, L.L.C., Defendant.	)))))))))	C.A. No. ______________

VERIFIED COMPLAINT

Bodega Latina Corporation ("Bodega"), by and through its undersigned attorneys, brings this action against Fiesta Holdings Investments, L.L.C. (the "Fiesta Representative") for declaratory judgment, breach of contract, and specific performance, and alleges as follows:

NATURE OF THE ACTION

1. This is an action to require the Fiesta Representative to comply with the plain terms of the parties' contract.

2. Bodega purchased Fiesta Mart L.L.C. ("Fiesta Mart"), which operates a Texas-based grocery store chain, from the Fiesta Representative pursuant to the terms of a Membership Interest Purchase Agreement (the "Purchase Agreement"). The parties executed the Purchase Agreement on March 23, 2018, and the transaction closed on April 30, 2018 (the "Closing Date").

3. The Purchase Agreement provided that Bodega would pay the Fiesta Representative $265 million (the "Cash Consideration"), subject to adjustment based on changes to Fiesta Mart's financial condition between the date the parties executed the Purchase Agreement and the Closing Date (the "Adjustment Amount"). The parties agreed to consider fifteen different asset and liability items in calculating the Adjustment Amount. The parties also agreed to use Fiesta Mart's past accounting practices to calculate the Adjustment Amount, so long as those past practices were consistent with Generally Accepted Accounting Principles ("GAAP").

4. Under Section 2.3 of the Purchase Agreement, the Fiesta Representative was to submit an estimated Adjustment Amount to Bodega (the "Estimated Adjustment Amount") by April 25, 2018. On the Closing Date, Bodega was to pay the Fiesta Representative the $265 million Cash Consideration plus or minus the Fiesta Representative's Estimated Adjustment Amount. By June 29, 2018, Bodega was to submit its proposed Adjustment Amount to the Fiesta Representative (the "Proposed Adjustment Amount"). By July 29, 2018, the Fiesta Representative was to notify Bodega in a formal written dispute notice (the "Dispute Notice") whether it agreed with Bodega's Proposed Adjustment Amount (and the fifteen different asset and liability accounting items that comprise the Adjustment Amount). If the Fiesta Representative did not agree with Bodega's Proposed

Adjustment Amount, the Fiesta Representative was required to identify in the Dispute Notice (i) which of the specific asset and liability items comprising the Adjustment Amount with which the Fiesta Representative disagreed, and (ii) what it claimed the appropriate Adjustment Amount to be.

5. If the parties could not resolve their dispute over the appropriate Adjustment Amount within thirty days after the Fiesta Representative provided its Dispute Notice, the Purchase Agreement provides that the parties must promptly submit the dispute to an independent accounting firm:

> If the Fiesta Representative and [Bodega] do not agree upon a final resolution with respect to any disputed items set forth in the Dispute Notice within such 30-day period, then the remaining items in dispute shall be submitted promptly by [Bodega] and the Fiesta Representative to an independent accounting firm of national reputation mutually acceptable to [Bodega] and the Fiesta Representative (the 'Accounting Firm') for final determination.

Ex. A, § 2.3(c)(iii).

6. The Purchase Agreement specifically requires the accounting firm to select either Bodega's Proposed Adjustment Amount, or the Fiesta Representative's proposed Adjustment Amount reflected in its Dispute Notice, whichever amount the accounting firm determines to be more accurate. The express language of the Purchase Agreement states:

> the Accounting Firm may select *only* the Adjustment Amount proposed by [Bodega's] Proposed Closing Date Calculations [Bodega's

> Proposed Adjustment Amount] *or* the Adjustment Amount proposed by the Fiesta Representative in the Dispute Notice . . . . .

Id. (emphasis added).

7. The Purchase Agreement does not allow the accounting firm to reach a compromise resolution, or to select any Adjustment Amount other than either Bodega's Proposed Adjustment Amount or the proposed Adjustment Amount reflected in the Fiesta Representative's Dispute Notice.

8. This type of dispute resolution procedure where the independent neutral (here, the Accounting Firm) may only select one party's proposed outcome, and cannot reach any compromise resolution, is commonly referred to as "final-offer arbitration" or "baseball arbitration."

9. There can be no dispute that the Purchase Agreement requires the Accounting Firm to employ "final-offer" arbitration. Courts and commentators alike have recognized that the purpose behind final-offer arbitration provisions is to encourage parties to present their best offers and resolve their disputes informally, by establishing a formal dispute resolution proceeding in which the arbitrator or accounting firm has to select the position of one party or the other, and has no flexibility to issue a compromise decision. As one court explained:

> In final-offer arbitration, the parties are to understand that it is in their best interest to seriously and meaningfully negotiate in good faith and to narrow their differences to a point that reflects their best and final offers before the arbitrator selects one offer over the other[.]

Nat'l Union of Hosp. Emps. v. Bd. of Regents, 149 N.M. 107, 111 (N.M Ct. App. 2010); *see also* Drafting Dispute Resolution Clauses -- A Practical Guide, 1998 WL 1527133, at *18 ("A key aspect of ["final-offer arbitration"] is that there is incentive for a party to submit a highly reasonable number, since this increases the likelihood that the arbitrator(s) will select that number. In some instances, the process of submitting the numbers moves the parties so close together that the dispute is settled without a hearing.").

10. Courts and commentators have further explained that in final-offer arbitration, parties are not allowed to subsequently change their final offers after the settlement period has expired and an arbitrator has been selected, because allowing changes to *final* offers defeats the very purpose of final-offer arbitration:

> If a party is allowed to back-pedal from its position in a final offer instead of defending those positions before an arbitrator, the incentive for a party to develop the most reasonable position prior to arbitration is lost.

La Crosse Prof'l Police Ass'n. v. City of La Crosse, 212 Wis. 2d 90, 102 (Wis. Ct. App. 1997).

11. This action arises out of the Fiesta Representative's clear attempt to circumvent the Purchase Agreement's "final-offer" arbitration provisions and back-pedal from its final-offer in its Dispute Notice. Now that the parties have reached an impasse, selected an independent accounting firm to resolve their dispute, and are set to proceed with a formal dispute resolution procedure, the Fiesta Representative

improperly seeks to change the proposed Adjustment Amount identified in its Dispute Notice, and the accounting methodology it used to calculate its proposed Adjustment Amount. The Fiesta Representative's attempt to circumvent the dispute resolution procedure the parties agreed to plainly violates the Purchase Agreement.

12. On April 25, 2018, the Fiesta Representative proposed an Estimated Adjustment Amount of negative $68,324,941.27, *i.e.,* a reduction to the $265 million Cash Consideration. Bodega then paid to the Fiesta Representative the Cash Consideration of $265 million, less the Estimated Adjustment Amount of $68,324,941.27.

13. On June 29, 2018, Bodega submitted to the Fiesta Representative a Proposed Adjustment Amount of negative $77,361,705.78, *i.e.,* meaning that Bodega should have paid the Fiesta Representative the Cash Consideration of $265 million less $77,361,705.78 (instead of $68,324,941.27). In other words, under the Proposed Adjustment Amount, the Fiesta Representative now owes Bodega a refund of $9,036,764.51

14. After Bodega provided its Proposed Adjustment Amount, it provided to the Fiesta Representative Fiesta Mart's April 29, 2018 trial balance on which Bodega's Proposed Adjustment Amount was based, and hundreds of other documents supporting Bodega's Proposed Adjustment Amount and the individual asset and liability accounting items that comprise that amount.

15. The Fiesta Representative then sent Bodega its Dispute Notice on July 26, 2018. The Fiesta Representative claimed in its Dispute Notice that (i) its original Estimated Adjustment Amount of negative $68,324,941.27 was the correct Adjustment Amount, (ii) its calculations of the fifteen individual asset and liability items that comprise its Estimated Adjustment Amount were correct, and (iii) Bodega's entire Proposed Adjustment Amount of $77,361,705.78 was incorrect and the individual asset and liability calculations that comprise Bodega's Proposed Adjustment Amount were incorrect.

16. The parties negotiated over the next thirty days to attempt to resolve their dispute. During the thirty-day negotiation period, the Fiesta Representative continued to demand documents from Bodega, which documents Bodega provided. However, the parties were not able to agree on the appropriate Adjustment Amount, or the appropriate calculations for the individual asset and liability items that comprise the Adjustment Amount. Because the parties were not able to resolve their dispute, in accordance with the terms of the Purchase Agreement they then worked to select an accounting firm to resolve the dispute.

17. The Purchase Agreement provides for an expedited schedule for the Accounting Firm to resolve a dispute. The Purchase Agreement requires the parties to each submit a supporting brief within ten business days after the parties engage the Accounting Firm, and for oral argument within ten days thereafter. Because the

Purchase Agreement provides for an expedited schedule, as soon as the thirty-day negotiation period expired, Bodega began preparing its submission to the Accounting Firm to support its Proposed Adjustment Amount. Bodega also hired an independent expert to assist it in preparing its submission to the Accounting Firm.

18. On November 27, 2018, the parties selected an accounting firm to resolve the dispute, and the accounting firm agreed to take on the engagement. The Accounting Firm sent the parties a standard draft engagement letter and asked the parties to set forth their respective positions.

19. After the parties selected an Accounting Firm, and after Bodega spent time and money preparing a submission to that Accounting Firm, the Fiesta Representative tried to back away from its Dispute Notice. The Fiesta Representative sought to completely change the proposed Adjustment Amount that it would submit to the Accounting Firm for resolution from what was set forth in its Dispute Notice, and sought to entirely change the accounting methodology that the Fiesta Representative used to calculate its proposed Adjustment Amount set forth in its Dispute Notice—all contrary to the agreed-upon procedure set forth in the Purchase Agreement.

20. Although the Fiesta Representative identified in its Dispute Notice a final proposed Adjustment Amount of negative $68,324,941.27, it now improperly seeks to change its proposed Adjustment Amount by $2,783,864 to negative

$71,108,805. In doing so, the Fiesta Representative proposes to now accept certain of the asset and liability items in Bodega's Proposed Adjustment Amount and proposes to make additional changes to other asset and liability items from those adopted in its Dispute Notice. For instance, the Fiesta Representative now seeks to change its inventory valuation by more than $3 million from its Dispute Notice, and to use a completely different accounting methodology to arrive at its changed inventory valuation than the methodology used in its Dispute Notice.

21. The plain language of the parties' Purchase Agreement does not allow the Fiesta Representative to change its proposed Adjustment Amount, as set forth in its Dispute Notice. The Fiesta Representative's untimely attempt to change its Dispute Notice after the thirty-day negotiation period and after the Accounting Firm has been selected frustrates the very purpose of the Purchase Agreement's purchase price adjustment procedure – which was to encourage the parties to agree on an Adjustment Amount without resorting to a formal dispute resolution process. In an effort to gain a tactical advantage, the Fiesta Representative advanced an extreme and unsupportable proposed Adjustment Amount in its Dispute Notice, based on a flawed accounting methodology that did not comport with the requirements of the Purchase Agreement. The Fiesta Representative then held to that extreme and unsupportable position throughout the negotiation period. The Purchase Agreement does not permit the Fiesta Representative's untimely attempt to abandon its

untenable position after it has submitted its Dispute Notice and after the parties have selected an Accounting Firm—and after Bodega has spent substantial time and money preparing its submission to the Accounting Firm. The Accounting Firm must now determine whether Bodega's Proposed Adjustment Amount, on the one hand, or the Fiesta Representative's Dispute Notice, on the other hand, is the more accurate Adjustment Amount. The Fiesta Representative must now defend before the Accounting Firm the extreme and unsupportable Estimated Adjustment Amount set forth in its Dispute Notice as its "final offer."

22. For these reasons, Bodega requests that the Court hold the Fiesta Representative to the express terms of the Purchase Agreement, and require the Fiesta Representative to submit its Estimated Adjustment Amount of negative $68,324,941.27 as set forth in its Dispute Notice to the Accounting Firm for resolution.

THE PARTIES

23. Plaintiff Bodega is a Delaware corporation with a principal place of business in Paramount, California. Bodega operates retail grocery stores in California, New Mexico, Arizona, Nevada and Texas.

24. Defendant the Fiesta Representative is a Delaware limited liability company.

JURISDICTION AND VENUE

25. Jurisdiction and venue are proper in the Court of Chancery.

26. This Court has jurisdiction over this matter pursuant to 10 *Del. C.* §§ 341 and 6501.

27. Bodega and the Fiesta Representative are incorporated or organized in Delaware.

28. Bodega and the Fiesta Representative are parties to the Purchase Agreement, attached hereto as Exhibit A, which provides in § 12.13 that the parties agree to the exclusive jurisdiction of this Court:

> Each of the Parties . . . irrevocably submits itself to the personal jurisdiction of all state and federal courts sitting in the State of Delaware . . . in any action, suit or proceeding arising out of or relating to this Agreement . . . [and] agrees that all claims in respect of any such action, suit or proceeding must be brought, heard and determined exclusively in the Court of Chancery of the State of Delaware . . . [and] agrees that it will not attempt to deny or defeat such personal jurisdiction by motion or other request for leave from such courts . . . .

Ex. A, § 12.13(a).

29. The Purchase Agreement further provides for the equitable remedy of specific performance "[i]n the event of a breach or threatened breach by any Party of the provisions of this Agreement . . . ." Ex. A § 12.11. Because the Fiesta Representative has breached the provisions of the Purchase Agreement, Bodega is entitled to the equitable remedy of specific performance.

30. The parties further agreed that the independent accounting firm that would resolve any Adjustment Amount dispute (the "Accounting Firm") shall be "acting as an expert and not as an arbitrator[.]" Ex. A, § 2.3(c)(iii). Accordingly, this Court and not the Accounting Firm must resolve this dispute concerning the proper interpretation and requirements of the Purchase Agreement.

FACTUAL BACKGROUND

I. BODEGA'S ACQUISITION OF FIESTA MART FROM THE FIESTA REPRESENTATIVE.

31. Fiesta Mart is a grocery store chain based in Houston, Texas.

32. From April 2015 to April 2018, the Fiesta Representative owned Fiesta Mart.

33. In April 2018, the Fiesta Representative sold Fiesta Mart to Bodega pursuant to the Purchase Agreement. Ex. A.

34. The parties executed the Purchase Agreement on March 23, 2018. *Id.*

35. The transaction closed on April 30, 2018. *See id.* § 3.1.

II. THE PURCHASE AGREEMENT PROVIDED FOR AN ADJUSTMENT TO THE PURCHASE PRICE POST-CLOSING.

36. The Purchase Agreement provides that Bodega would pay the Fiesta Representative the Cash Consideration, subject to adjustment based on changes to the financial condition of Fiesta Mart between the time the parties executed the Purchase Agreement on March 23, 2018 and the Closing Date. *See id.* §§ 2.3(b)(i), 3.2(b).

37. The Purchase Agreement defines the amount by which the Cash Consideration would be adjusted as the "Adjustment Amount." The Purchase Agreement defines Adjustment Amount as follows:

> "Adjustment Amount" means an amount equal to (a) the amount of Cash and Cash Equivalents, plus (b) the Net Working Capital Adjustment (which may be a negative number), less (c) the aggregate outstanding Indebtedness of the Fiesta Group of Companies . . . less (d) the Company Expenses, less (e) the BLC R&W Policy Premium Reimbursement Amount, less (f) the Remaining BLC R&W Policy Premium Amount, less (g) the Representative Expense Fund.

Ex. A at 3 (underlining in original).

38. "Net Working Capital Adjustment," in turn, is defined as the difference between "Net Working Capital" and the "Target Net Working Capital Amount." *Id.* at 14. The parties agreed that the Target Net Working Capital Amount was $49,449,261.00. *Id.* at 17.

39. "Net Working Capital" is defined as:

> (a) the book value of all current assets of the Fiesta Group Companies, including accounts receivable and prepaid expenses (net of reserves and write-downs), that are included in the line item categories of the current assets specifically identified on Exhibit A-2, less (b) the book value of all current liabilities of the Fiesta Group Companies, including accounts payable and other amounts payable and accrued expenses, that are included in the line item categories of current liabilities specifically identified on Exhibit A-2, in each case, calculated as of immediately prior to the Closing in accordance with the Accounting Principles . . . .

Id. at 14 (underlining in original). In other words, and as shown on Exhibit A-2 to the Purchase Agreement, Net Working Capital includes restricted cash, accounts receivable, inventory, other current assets, trade payables, accrued liabilities, self-insurance reserves, definitional adjustments and pro-forma adjustments. *Id.* at Ex. A-2.

40. In total, there are fifteen different individual asset and liability items that comprise the Adjustment Amount.

41. The Purchase Agreement requires the Fiesta Representative to calculate the fifteen accounting items that comprise the Adjustment Amount "immediately prior to the Closing," *Id.* at 3, *i.e.,* as of April 29, 2018 – which is the day before the transaction closed on April 30, 2018.

42. The Purchase Agreement also requires the fifteen accounting items that comprise the Adjustment Amount to be calculated using the "Accounting Principles." *Id.* at 14.

43. "Accounting Principles" is defined in the Purchase Agreement as "GAAP, applied consistently with the past practices of the Fiesta Group Companies; provided, however, that, to the extent the Fiesta Group Companies' past practices are inconsistent with GAAP, GAAP shall control, unless such deviations are explicitly set forth on Exhibit A-1." *Id.* at 2 (underlining in original). The Purchase Agreement defines "GAAP" as "generally accepted accounting principles in the United States in effect from time, applied on a consistent basis." *Id.* at 9.

III. THE PURCHASE AGREEMENT'S REQUIREMENTS FOR EXCHANGING PROPOSED PURCHASE PRICE ADJUSTMENT AMOUNTS.

44. Section 2.3 of the Purchase Agreement specifies the schedule by which the parties would exchange proposed Adjustment Amounts. *Id.* § 2.3.

45. First, the Purchase Agreement requires the Fiesta Representative to provide Bodega with the Fiesta Representative's Estimated Adjustment Amount three business days prior to the Closing Date, *i.e.*, by April 25, 2018. Ex. A § 2.3(a). The Purchase Agreement then requires Bodega to pay the Fiesta Representative on the Closing Date the $265 million Cash Consideration, plus or minus the Fiesta Representative's Estimated Adjustment Amount. *Id.* § 2.3(b)(i).

46. Second, within sixty days of the Closing Date, *i.e.*, by June 29, 2018, Bodega was required to provide its Proposed Adjustment Amount, calculated "in a manner consistent with the applicable definitions contained herein." *Id.* § 2.3(c)(i).

47. Third, the Fiesta Representative then had thirty days after receiving Bodega's Proposed Adjustment Amount to review it. Ex. A § 2.3(c)(ii). If the Fiesta Representative disagreed with Bodega's Proposed Adjustment Amount, the Fiesta Representative was required within the thirty-day review period to provide Bodega with a "written notice of dispute, setting forth [the Fiesta Representative's] objections to [Bodega's Proposed Adjustment Amount] and the Fiesta Representative's proposed calculation of the Adjustment Amount (a 'Dispute

Notice').” *Id*. § 2.3(c)(ii). The Fiesta Representative's Dispute Notice was due by July 29, 2018.

48. Fourth, during the thirty days after Bodega received the Fiesta Representative's Dispute Notice, the Purchase Agreement requires the parties to use “commercially reasonable efforts to resolve the dispute set forth in the Dispute Notice in good faith[.]” *Id*. § 2.3(c)(iii).

49. Fifth, the Purchase Agreement provides that if the Fiesta Representative and Bodega:

> do not agree upon a final resolution with respect to any disputed items set forth in the Dispute Notice within such 30-day period, then the remaining items in dispute shall be submitted promptly by [Bodega] and the Fiesta Representative to an independent accounting firm of national reputation mutually acceptable to [Bodega] and the Fiesta Representative (the “Accounting Firm”) for final determination.

Ex. A, § 2.3(c)(iii).

50. To enable the Accounting Firm to make a final determination, the Purchase Agreement requires the parties to deliver Bodega's Proposed Adjustment Amount, the Fiesta Representative's Dispute Notice, and each party's supporting brief within ten days after engaging the Accounting Firm. *Id*. The Purchase Agreement then allows the parties to make an oral presentation to the Accounting Firm within ten days after the deadline for submitting a supporting brief. *Id.*

51. Within twenty days after oral presentations, the Accounting Firm must select *either* Bodega's Proposed Adjustment Amount *or* the Adjustment Amount the

Fiesta Representative proposed in its Dispute Notice, whichever the Accounting Firm determines is more accurate. *Id*. The Purchase Agreement does not allow the Accounting Firm any discretion to make a compromise resolution, or to select an Adjustment Amount other than the Adjustment Amount identified in either Bodega's Proposed Adjustment Amount or the Fiesta Representative's Dispute Notice.

52. In particular, the Purchase Agreement states that the Accounting Firm must provide the parties with:

> a written determination in reasonable detail . . . [stating] whether the Proposed Closing Date Calculations in [Bodega's] Submission [i.e., Bodega's Proposed Adjustment Amount] or the proposed Adjustment Amount set forth in the Fiesta Representative's Submission [the Dispute Notice] reflects the more accurate calculation of the Adjustment Amount (***i.e., the Accounting Firm may select only the Adjustment Amount proposed by [Bodega's] Proposed Closing Date Calculations [i.e., Bodega's Proposed Adjustment Amount] or the Adjustment Amount proposed by the Fiesta Representative in the Dispute Notice***, as further described by their respective Submissions).

Id. (emphasis added).

53. The Purchase Agreement provides that "the procedures set forth in this <u>Section 2.3(c)</u> for resolving disputes with respect to the Proposed Closing Date Calculations [the Adjustment Amount] shall be the sole and exclusive method for resolving any such disputes," with the exception that any party can bring litigation to "compel the submission of any dispute items to the Accounting Firm in accordance with <u>Section 2.3(c)(iii)</u>," which sets forth the Adjustment Amount dispute resolution procedure. Ex. A, § 2.3(c)(v) (underlining in original).

54. The Purchase Agreement further provides that the parties are entitled to specific performance of the Purchase Agreement "[i]n the event of a breach or threatened breach by any Party of the provisions of this Agreement . . . ." Ex. A, § 12.11.

IV. THE PARTIES PROPOSE ADJUSTMENT AMOUNTS.

55. On April 25, 2018, three business days prior to the Closing Date, the Fiesta Representative provided to Bodega its Estimated Adjustment Amount of negative $68,324,941.27. Ex. B at 3. The Fiesta Representative never explained how it determined the entries in its Estimated Adjustment Amount, and the Fiesta Representative did not provide any of the documents the Fiesta Representative used to calculate its Estimated Adjustment Amount. Because the Fiesta Representative's Estimated Adjustment Amount was a negative number, *i.e.*, negative $68,324,941.27, Bodega paid the Fiesta Representative at Closing the Cash Consideration of $265 million less the Fiesta Representative's Estimated Adjustment Amount of $68,324,941.27, less an additional deduction of $244,452.88 agreed to between the parties to reflect repayment of related party loans, for a final purchase price paid by Bodega to the Fiesta Representative of $196,430,605.85. Ex. A, § 2.3(b)(i).

56. On June 29, 2018, within sixty days of the Closing Date, Bodega provided to the Fiesta Representative its Proposed Adjustment Amount of negative

$77,361,705.78. Ex. C at 4. Compared with the Fiesta Representative's Estimated Adjustment Amount, Bodega's Proposed Adjustment Amount showed that the Fiesta Representative owed Bodega a refund of $9,036,764.51. *Id.*

57. Bodega's Proposed Adjustment Amount is based on accounting entries Fiesta Mart recorded on its April 29, 2018 trial balance – which April 29, 2018 trial balance and other supporting documents Bodega provided to the Fiesta Representative.

V. BODEGA PROVIDED DOCUMENTS AND OTHER INFORMATION SUPPORTING ITS PROPOSED ADJUSTMENT AMOUNT.

58. On Saturday, June 30, 2018, the day after Bodega provided its Proposed Adjustment Amount, the Fiesta Representative requested that Bodega provide documents supporting that amount. On Monday, July 2, 2018, Bodega provided its net working capital calculations spreadsheet, and Fiesta Mart's April 29, 2018 trial balance that Bodega used to determine its Proposed Adjustment Amount.

59. Thereafter, the Fiesta Representative issued four different sets of document requests to Bodega, which included *over 70* different requests for documents and information. Bodega timely responded to each of those requests. In fact, during the thirty-day dispute resolution period in August 2018, the Fiesta Representative continued to request documents from Bodega, and Bodega provided those documents.

60. In total, Bodega produced to the Fiesta Representative over 600 documents that support its Proposed Adjustment Amount. Bodega's Proposed Adjustment Amount contains adjustments relating primarily to the following categories: (1) inventory, (2) accounts receivable, (3) accounts payable, (4) accrued liabilities and (5) self-insurance reserves. Bodega produced documents in response to each of these categories of adjustments, and it did so well before the Fiesta Representative submitted its Dispute Notice. For example, for inventory, Bodega produced the detailed inventory reports from its third-party non-perishable inventory counting firm. Bodega also produced the detailed inventory counting reports for its perishable inventory. As to accounts receivable, accounts payable, accrued liabilities and self-insurance reserves, Bodega produced detailed spreadsheets explaining its adjustments for each of those categories. Bodega also produced actuarial reports supporting its accrued liability calculations.

61. After the Fiesta Representative reviewed all of the materials that Bodega provided to support its Proposed Adjustment Amount, including Fiesta Mart's April 29, 2018 trial balance on which Bodega's Proposed Adjustment Amount is based, the Fiesta Representative's Dispute Notice disputed the entire amount of Bodega's Proposed Adjustment Amount as incorrect, and claimed that its Estimated Adjustment Amount was the correct Adjustment Amount.

62. The Fiesta Representative sent Bodega its Dispute Notice on July 26, 2018. Ex. D.

63. In its Dispute Notice, the Fiesta Representative (i) disputed Bodega's entire Proposed Adjustment Amount and every single calculation that Bodega proposed to support its Proposed Adjustment Amount and (ii) claimed that its original Estimated Adjustment Amount of negative $68,324,941.27 was the correct Adjustment Amount. Ex. D ("[T]he Fiesta Representative submits that the Adjustment Amount is the Estimated Adjustment Amount in its Closing Statement: ($68,324,941.27)."). In making a wholesale and blanket objection to Bodega's entire Proposed Adjustment Amount, the Fiesta Representative claimed that Bodega "did not comply with the terms of the [Purchase Agreement] in preparing its Proposed Closing Date Calculations [Proposed Adjustment Amount]." Ex. D at 2. The Fiesta Representative further objected that Bodega "failed to calculate its Net Working Capital Adjustment consistent with the Accounting Principles as required by the [Purchase Agreement]." *Id.*

64. The difference between Bodega's Proposed Adjustment Amount and the Fiesta Representative's Estimated Adjustment Amount as set forth in its Dispute Notice is approximately $9 million, which the Fiesta Representative owes to Bodega.

65. The different categories of amounts that comprise the proposed Adjustment Amount of the Fiesta Representative and Bodega are reflected in the table in Appendix 1 hereto.

66. As shown in Appendix 1, the parties disagree about the appropriate calculations for eleven of the fifteen individual asset and liability items of Fiesta Mart that comprise the Adjustment Amount, *i.e.*, items 1, 3, and 7.1–7.9 (item 7.10 was negotiated between the parties as part of the Purchase Agreement). As to those eleven disputed calculations, Bodega's Proposed Adjustment Amount includes calculations that are both favorable and unfavorable to the Fiesta Representative. For example, the Fiesta Representative estimated Fiesta Mart's restricted cash as of April 29, 2018 – the day before the Closing Date – at $8,737,000. However, Bodega proposed an increase in Fiesta Mart's restricted cash as of April 29, 2018 in the amount of $10,582,000, which has the impact of increasing the Adjustment Amount by $1,845,000. In its Dispute Notice, the Fiesta Representative disputed *all* the amounts that Bodega calculated in its Proposed Adjustment Amount, including those that were favorable to the Fiesta Representative.

VI. THE PARTIES COULD NOT RESOLVE THE DISPUTE DURING THE 30-DAY SETTLEMENT PERIOD.

67. After Bodega received the Fiesta Representative's Dispute Notice, the parties attempted to resolve this matter over the next thirty days – *i.e.*, between July 26, 2018 when the Fiesta Representative sent its Dispute Notice and August 25, 2018

(the "30-Day Settlement Period"). During the 30-Day Settlement Period, the Fiesta Representative requested and Bodega produced additional documents supporting Bodega's Adjustment Amount.

68. The parties did not reach an agreement on the appropriate Adjustment Amount or resolve their disputes with respect to any of the eleven different individual asset and liability items that comprise the Adjustment Amount during the 30-Day Settlement Period.

VII. AFTER THE 30-DAY SETTLEMENT PERIOD ENDED, BODEGA BEGAN PREPARING ITS SUBMISSION TO THE ACCOUNTING FIRM.

69. The Purchase Agreement provides that if the parties could not resolve their dispute within the 30-Day Settlement Period, the dispute was to be "promptly" submitted to an Accounting Firm for "expeditious" resolution. Ex. A, § 2.3(c)(iii). The Purchase Agreement sets forth an expedited dispute resolution process, which provides for the submission of written statements within ten business days after the retention of the Accounting Firm and oral presentations within ten days thereafter. *See id.*

70. Because the Purchase Agreement requires expedited resolution of a purchase price Adjustment Amount dispute, Bodega began preparing its submission to the Accounting Firm immediately after the 30-Day Settlement Period ended. Bodega also retained an independent accounting expert to assist it in preparing its

submission. Bodega has already spent substantial time and expense preparing its submission to the Accounting Firm, which explains and supports each of the eleven different disputed accounting items that comprise Bodega's Proposed Adjustment Amount.

VIII. THE PARTIES SELECT AN ACCOUNTING FIRM TO RESOLVE THEIR DISPUTE.

71. After the 30-Day Settlement Period ended in August 2018, the parties worked to identify an Accounting Firm to resolve the parties' dispute over the appropriate purchase price Adjustment Amount.

72. Many of the potential Accounting Firms that the parties contacted were unable to accept the engagement because of conflicts of interest. Accordingly, the process of selecting an Accounting Firm took several months.

73. On November 27, 2018, the parties agreed to retain Philip E. Kruse of Alvarez & Marsal.

74. The next day, on November 28, 2018, Mr. Kruse of Alvarez & Marsal agreed to act as the Accounting Firm, and proposed a standard engagement letter. The Accounting Firm requested that the parties identify in the engagement letter the items for the Accounting Firm to resolve.

75. By email dated December 10, 2018, Bodega's counsel provided to the Fiesta Representative's counsel proposed additions to the Accounting Firm's draft engagement letter. Ex. E. Bodega's proposed additions tracked verbatim the

language and requirements of the Purchase Agreement. Bodega's proposed additions stated that the Accounting Firm must determine which of either Bodega's Proposed Adjustment Amount or the Fiesta Representative's Estimated Adjustment Amount as set forth in its Dispute Notice reflects the "more accurate calculation" of the Adjustment Amount. *Compare* Bodega's proposed engagement letter additions, Ex. E at 12 ("The Independent Expert may select only the Adjustment Amount proposed by Buyer's Proposed Closing Date Calculations (Exhibit A hereto) [*i.e.*, Bodega's Proposed Adjustment Amount] or the Adjustment Amount proposed [by] the Seller in the Dispute Notice (Exhibit B hereto) [*i.e.,* the Fiesta Representative's Estimated Adjustment Amount], as further described in their respective written submissions to the Independent Expert") *with* Purchase Agreement, Ex. A, § 2.3(c)(iii) ("the Accounting Firm may select only the Adjustment Amount proposed by [Bodega's] Proposed Closing Date Calculations [Bodega's Proposed Adjustment Amount] or the Adjustment Amount proposed by the Fiesta Representative in the Dispute Notice, as further described by their respective Submissions.").

76. Consistent with the express language of the Purchase Agreement, Bodega also proposed additions to reflect that the parties would simultaneously submit supporting briefs, compare Ex. E at 11, *with* Ex. A, § 2.3(c)(iii), make an oral presentation, *compare* Ex. E at 11 *with* Ex. A, § 2.3(c)(iii), that the Accounting Firm

would render its decision in writing and in reasonable detail, *compare* Ex. E at 12 *with* Ex. A, § 2.3(c)(iii), and that the Accounting Firm's fees would ultimately be borne by the losing party, *compare* Ex. E at 13 *with* Ex. A § 2.3(c)(iii).

IX. THE FIESTA REPRESENTATIVE REFUSES TO SUBMIT ITS ESTIMATED ADJUSTMENT AMOUNT AS REFLECTED IN THE DISPUTE NOTICE TO THE ACCOUNTING FIRM IN VIOLATION OF THE PURCHASE AGREEMENT.

77. By email dated December 18, 2018, the Fiesta Representative sought for the first time to change its proposed Adjustment Amount set forth in its Dispute Notice. Ex. F. The Fiesta Representative sought for the first time to accept all of Bodega's calculations comprising its Proposed Adjustment Amount except for Bodega's inventory valuation. Ex. F ("In essence, it reflects [the Fiesta Representative's] agreement to accept all of [Bodega's] proposed closing calculations excluding closing inventory."). And rather than stick with the inventory valuation that the Fiesta Representative originally proposed in its Estimated Adjustment Amount and subsequently set forth in its Dispute Notice, the Fiesta Representative sought to change its inventory valuation calculation by more than $3 million, using a completely different accounting methodology than it used in its Dispute Notice to arrive at its changed inventory valuation.

78. Bodega objected to the Fiesta Representative's untimely attempt to change the proposed Adjustment Amount set forth in its Dispute Notice, because such changes are not permitted by the Purchase Agreement. Ex. A.

79. Nevertheless, the Fiesta Representative insisted on retracting its Dispute Notice and submitting its changed adjustment amount to the Accounting Firm. *See* Ex. G; Ex. H.

80. Because the Fiesta Representative refuses to submit to the Accounting Firm its proposed Adjustment Amount set forth in its Dispute Notice, and insists on submitting to the Accounting Firm a brand new purchase price Adjustment Amount, Bodega was forced to initiate this proceeding.

X. THE FIESTA REPRESENTATIVE'S UNTIMELY ATTEMPT TO CHANGE ITS DISPUTE NOTICE IS CONTRARY TO THE PLAIN LANGUAGE OF THE PURCHASE AGREEMENT.

81. The Purchase Agreement required the Fiesta Representative to submit an initial Estimated Adjustment Amount, Bodega to then submit a Proposed Adjustment Amount, and then the Fiesta Representative to submit a Dispute Notice identifying what it believed to be the appropriate Adjustment Amount. If after the Fiesta Representative submitted its Dispute Notice the parties could not agree during the 30-Day Settlement Period on the appropriate Adjustment Amount, the Purchase Agreement requires the Accounting Firm to determine whether the "Adjustment Amount proposed by Bodega's Proposed [Adjustment Amount] or the Adjustment Amount proposed by the Fiesta Representative in the Dispute Notice" is the "more accurate calculation of the Adjustment Amount." Ex. A, § 2.3(c)(iii).

82. Because the Fiesta Representative stood by its original Estimated Adjustment Amount in its Dispute Notice and the parties could not agree during the 30-Day Settlement Period on an Adjustment Amount or agree on the disputed items that comprise the Adjustment Amount, the Accounting Firm must now decide whether Bodega's Proposed Adjustment Amount or the Fiesta Representative's Estimated Adjustment Amount, as set forth in its Dispute Notice, is the "more accurate" calculation of the Adjustment Amount to be used to adjust the Purchase Price.

83. The parties drafted the terms of the Purchase Agreement to encourage resolution of a purchase price Adjustment Amount dispute without resort to the independent accounting firm. Consequently, the Purchase Agreement does not give the Accounting Firm any discretion to deviate from the purchase price Adjustment Amount the parties proposed before the matter was to be submitted to the Accounting Firm. Rather, the Purchase Agreement requires the Accounting Firm to select, in full, either Bodega's Proposed Adjustment Amount or the adjustment amount proposed in the Fiesta Representative's Dispute Notice.

84. Contractual provisions that require an independent neutral to choose one party's proposed outcome are designed to encourage parties to advance a reasonable and good faith position before resorting to a dispute resolution process to resolve the parties' dispute. Parties have an incentive to propose their best and most

reasonable final offer prior to the formal dispute resolution proceeding, because if the parties cannot reach a settlement the parties know that an independent neutral may not adopt a party's extreme position.

85. Rather than advance a reasonable and good faith position, the Fiesta Representative advanced an aggressive and unsupportable proposed Adjustment Amount in its Dispute Notice, which required Bodega to resort to a dispute resolution process to resolve this dispute. The Fiesta Representative's unreasonable position also caused Bodega to spend time and incur substantial expense preparing a submission to the Accounting Firm to support each of the eleven different accounting items that comprise the Adjustment Amount that are in dispute between the parties.

86. In particular, Bodega is prepared to establish that its inventory valuation – which is based on actual physical counting of inventory within three weeks of the Closing Date by an independent third party – is more accurate than the inventory valuation the Fiesta Representative set forth in its Dispute Notice. In fact, it appears that the inventory valuation the Fiesta Representative set forth in its Dispute Notice is completely unsupportable. Of course, it is for that reason that the Fiesta Representative now wants to change its inventory valuation reflected in its Dispute Notice by more than $3 million and wants to change the accounting methodology that it used to arrive at its inventory valuation.

87. The Fiesta Representative now seeks to adopt the inventory valuation in Fiesta Mart's April 22, 2018 trial balance in place of the previous estimate it set forth in its Dispute Notice. Ex. F ("[the Fiesta Representative] would advocate the inventory figure reported by Fiesta Mart as of the April 22, 2018 period close.").

88. However, it is now far too late for the Fiesta Representative to change its inventory valuation or its other asset and liability calculations that the Fiesta Representative set forth in its Dispute Notice.

COUNT I: (BREACH OF CONTRACT)

89. Bodega restates and re-alleges paragraphs 1-88 as if fully set forth herein.

90. The Purchase Agreement is a valid, binding contract between Bodega and the Fiesta Representative concerning Bodega's purchase of Fiesta Mart from the Fiesta Representative.

91. The Purchase Agreement provides the exclusive method for resolving disputes over the appropriate Adjustment Amount to the Purchase Price.

92. The Purchase Agreement does not allow Bodega to change its Proposed Adjustment Amount.

93. The Purchase Agreement does not allow the Fiesta Representative to change the Adjustment Amount that it proposed in its Dispute Notice.

94. Because the parties were not able to agree on the Adjustment Amount to the purchase price during the 30-Day Settlement Period, the Purchase Agreement requires the parties to promptly submit to the Accounting Firm Bodega's Proposed Adjustment Amount and the Fiesta Representative's Estimated Adjustment Amount as set forth in the Dispute Notice so that the Accounting Firm can reach a binding determination of which of those proposed Adjustment Amounts is the more accurate Adjustment Amount.

95. Bodega stands ready to fully perform its obligations under the Purchase Agreement by submitting its Proposed Adjustment Amount to the Accounting Firm.

96. The Fiesta Representative is in material breach of the Purchase Agreement because the Fiesta Representative is now, on the eve of the proceeding with the Accounting Firm, attempting to abandon its Dispute Notice, and instead, seeks to submit a brand new proposed Adjustment Amount to the Accounting Firm.

97. The Purchase Agreement provides for the equitable remedy of specific performance "[i]n the event of a breach or threatened breach by any Party of the provisions of this Agreement . . . ." Ex. A, § 12.11.

COUNT II: (DECLARATORY JUDGMENT)

98. Bodega restates and re-alleges paragraphs 1-88 as if fully set forth herein.

99. There is a direct and immediate controversy between the parties concerning the proper interpretation of the Purchase Agreement.

100. The parties' interests in this dispute are real, immediate, and adverse.

101. An actual, justiciable, and ripe controversy exists between the parties because Bodega contends that the Purchase Agreement requires the Accounting Firm to select either the Fiesta Representative's Estimated Adjustment Amount as set forth in its Dispute Notice or Bodega's Proposed Adjustment Amount, and the Fiesta Representative refuses to submit its Estimated Adjustment Amount as set forth in its Dispute Notice to the Accounting Firm for determination. Unless and until this dispute is resolved, Bodega will not be able to avail itself of the Purchase Agreement's process for having the Accounting Firm promptly and expeditiously determine the Adjustment Amount to the Purchase Price.

102. Bodega lacks an adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Bodega requests that the Court enter judgment in its favor and against the Fiesta Representative as follows:

A. Declaring that the Purchase Agreement requires the Fiesta Representative to submit to the Accounting Firm its Estimated Adjustment Amount as set forth in the Dispute Notice, and Bodega to submit to the Accounting Firm its Proposed Adjustment Amount;

B. Declaring that the Purchase Agreement does not permit the Fiesta Representative to revise, amend, substitute, or otherwise change the accounting items or methodology in the Fiesta Representative's Estimated Adjustment Amount as set forth in its Dispute Notice;

C. Granting Bodega specific performance of the Purchase Agreement by requiring the Fiesta Representative to promptly submit to the Accounting Firm its Estimated Adjustment Amount as set forth in the Dispute Notice;

D. Awarding Bodega its attorneys' fees and costs;

E. Retaining jurisdiction to resolve any disputes that may arise concerning the parties' engagement of the Accounting Firm; and

F. Awarding any such other relief as the Court may deem appropriate.

<u>/s/ A. Thompson Bayliss</u>
A. Thompson Bayliss (#4379)
April M. Kirby (#6152)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000
bayliss@abramsbayliss.com

Attorneys for Plaintiff Bodega Latina Corporation

OF COUNSEL:

Thomas K. Cauley Jr.
Steven E. Sexton
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000
(312) 853-7036 (fax)
tcauley@sidley.com
ssexton@sidley.com

Dated: February 8, 2019