

Examples of differences in Key Provisions

Asset x Stock Purchase Agreements (out of the ABA Models)

A. STOCK PURCHASE AGREEMENT.

I. Recitals.

Sellers desire to sell, and Buyer desires to purchase, all issued and outstanding shares (the “Shares”) of capital stock of _____, a _____ corporation (the “Company”), for the consideration and on the terms set forth in this Agreement. The parties, intending to be legally bound, agree as follows:

II. Closing Obligations.

At the Closing:

(a) Sellers shall deliver to Buyer: (i) certificates representing the Shares, endorsed in blank (or accompanied by stock powers executed in blank) and otherwise in proper form for transfer; (ii) the Organizational Documents of each Acquired Company filed with any Governmental Body in connection with its organization, duly certified as of a recent date by the Secretary of State or other appropriate authority of the jurisdiction of its incorporation or organization, together with a certificate dated as of the Closing Date from the Secretary of each Acquired Company to the effect that no amendments to such Organizational Documents have been filed since the date referred to above;

III. Representations and Warranties of the Seller.

Sellers, jointly and severally, represent and warrant to Buyer as follows:

Organization and Good Standing:

(a) Part 3.1 lists, for each Acquired Company, its legal name, its type of legal entity, its jurisdiction of organization, and each jurisdiction in which it is qualified to do business as a foreign entity. Each Acquired Company is duly organized, validly existing, and in good standing under the laws of its jurisdiction of organization, with full power and authority to conduct its business as it is being conducted, to own or use its assets, and to perform all its obligations under Applicable Contracts. Each Acquired Company is duly qualified to do business as a foreign entity and is in good standing under the laws of each jurisdiction that requires such qualification.

Capitalization of Companies and Subsidiaries:

(a) The authorized Equity Securities of the Company consist of _____ shares of common stock, par value \$_____ per share, of which _____ shares, constituting the Shares, are issued and outstanding. Sellers are the owners (of record and

beneficially) of all of the Shares, free and clear of all Encumbrances, including any restriction on the right of any Seller to transfer the Shares to Buyer pursuant to this Agreement. The assignments, endorsements, stock powers, or other instruments of transfer to be delivered by each Seller to Buyer at the Closing will be sufficient to transfer such Seller's entire interest in the Shares (of record and beneficially) owned by such Seller. Upon transfer to Buyer of the certificates representing the Shares, Buyer will receive good title to the Shares, free and clear of all Encumbrances. Part 3.3(a) lists Sellers and the number of Shares held by each Seller.

(b) Part 3.3(b) lists for each Subsidiary its authorized Equity Securities, the number and type of Equity Securities issued and outstanding, and the identity of each owner (of record and beneficially) of such Equity Securities and number of shares held by each holder. All outstanding Equity Securities of each Subsidiary are owned of record and beneficially by one or more of the Acquired Companies, free and clear of all Encumbrances. All the outstanding Equity Securities of each Acquired Company have been duly authorized and validly issued, and are fully paid and nonassessable.

Except as set forth in Part 3.3(b), there are no shareholder or other Contracts relating to any Equity Security of any Acquired Company, including the sale, voting, or transfer thereof. No outstanding Equity Security or other security of any Acquired Company was issued in violation of the Securities Act or any other Legal Requirement. No Acquired Company has any outstanding subscription, option, warrant, call or exchange right, convertible security, or other Contract or other obligations in effect giving any Person (other than another Acquired Company) the right to acquire (whether by preemptive rights or otherwise) any Equity Security of any Acquired Company.

Absence of Certain Changes and Events:

Except as set forth in Part 3.16, since the Balance Sheet Date, each Acquired Company has conducted its business only in the Ordinary Course of Business, and there has not been any: (a) issuance of or change in the authorized or issued Equity Securities of any Acquired Company; purchase, redemption, retirement, or other acquisition by any Acquired Company of any Equity Security of any Acquired Company; or declaration or payment of any dividend or other distribution or payment in respect of the Equity Securities of any Acquired Company; (b) amendment to the Organizational Documents of any Acquired Company;

IV. Representations and Warranties of the Buyer.

Buyer is acquiring the Shares for its own account and not with a view to their distribution within the meaning of Section 2(11) of the Securities Act. Buyer's obligations to purchase the Shares and to take the other actions required pursuant to this Agreement to be taken by Buyer at the Closing are subject to the satisfaction, at or prior to the Closing,

of each of the following conditions (any of which may be waived in whole or in part by Buyer):

No Claim Regarding Stock Ownership or Sale Proceeds:

There will not have been made or threatened by any Third Party any claim asserting that such Third Party (a) is the holder or the beneficial owner of any Equity Security of any Acquired Company or (b) is entitled to all or any portion of the Purchase Price.

V. Indemnification, Payment, and Reimbursement by Sellers.

Sellers, jointly and severally, shall indemnify and hold harmless Buyer, the Acquired Companies, and their respective Representatives, shareholders, Subsidiaries, and Related Persons (collectively, the “Buyer Indemnified Persons”) from, and shall pay to Buyer Indemnified Persons the amount of, or reimburse Buyer Indemnified Persons for, any Loss that Buyer Indemnified Persons or any of them may suffer, sustain, or become subject to, as a result of, in connection with, or relating to:

(a) any Breach of any representation or warranty made by Sellers in (i) this Agreement or the Disclosure Letter (without giving effect to any supplement to the Disclosure Letter), (ii) any supplement to the Disclosure Letter, (iii) the certificate delivered pursuant to Section 8.3 (without giving effect to the words “in all material respects” in Section 8.1(a)), or (iv) any other certificate, document, or other writing delivered by Sellers pursuant to this Agreement; (b) any Breach of any covenant or obligation of any Seller in this Agreement or in any certificate, document, or other writing delivered by any Seller pursuant to this Agreement; (c) any claim by any Person for brokerage or finder’s fees or commissions or similar payments based upon any agreement or understanding made, or alleged to have been made, by any such Person with any Seller or any Acquired Company (or any Person acting on their behalf) in connection with any Contemplated Transaction; (d) (i) any Taxes of any Acquired Company not reflected on the Closing Date Balance Sheet relating to periods on or prior to the Closing Date, and (ii) any liability of any Acquired Company for Taxes of any other Person, as a transferee or successor, by Contract or otherwise; (e) any product shipped or manufactured by, or any services provided by, any Acquired Company, in whole or in part, prior to the Closing Date; or (f) any matter disclosed in Part 11.2(f).

B. ASSET PURCHASE AGREEMENT.

I. Recitals.

Shareholders owns _____ (_____) shares of the common stock, par value _____ dollars (\$_____) per share, of Seller, which constitute _____ percent (_____%) of the issued and outstanding shares of capital stock of Seller. Seller desires to sell, and Buyer desires to purchase, the Assets of Seller for the consideration and on the terms set forth in this Agreement.

II. Sale and Transfer of Assets; Closing

Assets to be Sold:

Upon the terms and subject to the conditions set forth in this Agreement, at the Closing, but effective as of the Effective Time, Seller shall sell, convey, assign, transfer and deliver to Buyer, and Buyer shall purchase and acquire from Seller, free and clear of any Encumbrances other than Permitted Encumbrances, all of Seller's right, title and interest in and to all of Seller's property and assets, real, personal or mixed, tangible and intangible, of every kind and description, wherever located, including the following (but excluding the Excluded Assets):

- (a) all Real Property, including the Real Property described in Parts 3.7 and 3.8;
- (b) all Tangible Personal Property, including those items described in Part 2.1(b);
- (c) all Inventories;
- (d) all Accounts Receivable;
- (e) all Seller Contracts, including those listed in Part 3.20(a), and all outstanding offers or solicitations made by or to Seller to enter into any Contract;
- (f) all Governmental Authorizations and all pending applications therefor or renewals thereof, in each case to the extent transferable to Buyer, including those listed in Part 3.17(b);
- (g) all data and Records related to the operations of Seller, including client and customer lists and Records, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, correspondence and other similar documents and Records and, subject to Legal Requirements, copies of all personnel Records and other Records described in Section 2.2(g);
- (h) all of the intangible rights and property of Seller, including Intellectual Property Assets, going concern value, goodwill, telephone, telecopy and e-mail addresses and listings and those items listed in Parts 3.25(d), (e), (f) and (h);

- (i) all insurance benefits, including rights and proceeds, arising from or relating to the Assets or the Assumed Liabilities prior to the Effective Time, unless expended in accordance with this Agreement;
- (j) all claims of Seller against third parties relating to the Assets, whether choate or inchoate, known or unknown, contingent or noncontingent, including all such claims listed in Part 2.1(j); and
- (k) all rights of Seller relating to deposits and prepaid expenses, claims for refunds and rights to offset in respect thereof that are not listed in Part 2.2(d) and that are not excluded under Section 2.2(h).

All of the property and assets to be transferred to Buyer hereunder are herein referred to collectively as the "Assets." Notwithstanding the foregoing, the transfer of the Assets pursuant to this Agreement shall not include the assumption of any Liability related to the Assets unless Buyer expressly assumes that Liability pursuant to Section 2.4(a)

III. Excluded Assets.

Notwithstanding anything to the contrary contained in Section 2.1 or elsewhere in this Agreement, the following assets of Seller (collectively, the "Excluded Assets") are not part of the sale and purchase contemplated hereunder, are excluded from the Assets and shall remain the property of Seller after the Closing:

- (a) all cash, cash equivalents and short-term investments;
- (b) all minute books, stock Records and corporate seals;
- (c) the shares of capital stock of Seller held in treasury;
- (d) those rights relating to deposits and prepaid expenses and claims for refunds and rights to offset in respect thereof listed in Part 2.2(d);
- (e) all insurance policies and rights thereunder (except to the extent specified in Section 2.1(i) and (j));
- (f) all of the Seller Contracts listed in Part 2.2(f);
- (g) all personnel Records and other Records that Seller is required by law to retain in its possession;
- (h) all claims for refund of Taxes and other governmental charges of whatever nature;
- (i) all rights in connection with and assets of the Employee Plans; and
- (j) all rights of Seller under this Agreement, the Bill of Sale, the Assignment and Assumption Agreement, the Promissory Note and the Escrow Agreement;

IV. Liabilities.

(a) Assumed Liabilities. On the Closing Date, but effective as of the Effective Time, Buyer shall assume and agree to discharge only the following Liabilities of Seller (the "Assumed Liabilities"):

- (i) any trade account payable reflected on the Interim Balance Sheet (other than a trade account payable to any Shareholder or a Related Person of Seller or any Shareholder) that remains unpaid at and is not delinquent as of the Effective Time;
- (ii) any trade account payable (other than a trade account payable to any Shareholder or a Related Person of Seller or any Shareholder) incurred by Seller in the Ordinary Course of Business between the date of the Interim Balance Sheet and the Effective Time that remains unpaid at and is not delinquent as of the Effective Time;
- (iii) any Liability to Seller's customers incurred by Seller in the Ordinary Course of Business for nondelinquent orders outstanding as of the Effective Time reflected on Seller's books (other than any Liability arising out of or relating to a Breach that occurred prior to the Effective Time);
- (iv) any Liability to Seller's customers under written warranty agreements in the forms disclosed in Part 2.4(a)(iv) given by Seller to its customers in the Ordinary Course of Business prior to the Effective Time (other than any Liability arising out of or relating to a Breach that occurred prior to the Effective Time);
- (v) any Liability arising after the Effective Time under the Seller Contracts described in Part 3.20(a) (other than any Liability arising under the Seller Contracts described on Exhibit 2.4(a)(v) or arising out of or relating to a Breach that occurred prior to the Effective Time);
- (vi) any Liability of Seller arising after the Effective Time under any Seller Contract included in the Assets that is entered into by Seller after the date hereof in accordance with the provisions of this Agreement (other than any Liability arising out of or relating to a Breach that occurred prior to the Effective Time); and
- (vii) any Liability of Seller described in Part 2.4(a)(vii).

(b) Retained Liabilities. The Retained Liabilities shall remain the sole responsibility of and shall be retained, paid, performed and discharged solely by Seller. "Retained Liabilities" shall mean every Liability of Seller other than the Assumed Liabilities, including:

- (i) any Liability arising out of or relating to products of Seller to the extent manufactured or sold prior to the Effective Time other than to the extent assumed under Section 2.4(a)(iii), (iv) or (v);
- (ii) any Liability under any Contract assumed by Buyer pursuant to Section 2.4(a) that arises after the Effective Time but that arises out of or relates to any Breach that occurred prior to the Effective Time;
- (iii) any Liability for Taxes, including (A) any Taxes arising as a result of Seller's operation of its business or ownership of the Assets prior to the Effective Time, (B) any

Taxes that will arise as a result of the sale of the Assets pursuant to this Agreement and (C) any deferred Taxes of any nature;

(iv) any Liability under any Contract not assumed by Buyer under Section 2.4(a), including any Liability arising out of or relating to Seller's credit facilities or any security interest related thereto;

(v) any Environmental, Health and Safety Liabilities arising out of or relating to the operation of Seller's business or Seller's leasing, ownership or operation of real property;

(vi) any Liability under the Employee Plans or relating to payroll, vacation, sick leave, workers' compensation, unemployment benefits, pension benefits, employee stock option or profit-sharing plans, health care plans or benefits or any other employee plans or benefits of any kind for Seller's employees or former employees or both;

(vii) any Liability under any employment, severance, retention or termination agreement with any employee of Seller or any of its Related Persons;

(viii) any Liability arising out of or relating to any employee grievance whether or not the affected employees are hired by Buyer;

(ix) any Liability of Seller to any Shareholder or Related Person of Seller or any Shareholder;

(x) any Liability to indemnify, reimburse or advance amounts to any officer, director, employee or agent of Seller;

(xi) any Liability to distribute to any of Seller's shareholders or otherwise apply all or any part of the consideration received hereunder;

(xii) any Liability arising out of any Proceeding pending as of the Effective Time;

(xiii) any Liability arising out of any Proceeding commenced after the Effective Time and arising out of or relating to any occurrence or event happening prior to the Effective Time;

(xiv) any Liability arising out of or resulting from Seller's compliance or noncompliance with any Legal Requirement or Order of any Governmental Body;

(xv) any Liability of Seller under this Agreement or any other document executed in connection with the Contemplated Transactions; and

(xvi) any Liability of Seller based upon Seller's acts or omissions occurring

V. Closing Obligations.

In addition to any other documents to be delivered under other provisions of this Agreement, at the Closing:

(a) Seller and Shareholders, as the case may be, shall deliver to Buyer, together with funds sufficient to pay all Taxes necessary for the transfer, filing or recording thereof:

(i) a bill of sale for all of the Assets that are Tangible Personal Property in the form of Exhibit 2.7(a)(i) (the "Bill of Sale") executed by Seller;

(ii) an assignment of all of the Assets that are intangible personal property in the form of Exhibit 2.7(a)(ii), which assignment shall also contain Buyer's undertaking and

assumption of the Assumed Liabilities (the "Assignment and Assumption Agreement") executed by Seller;

(iii) for each interest in Real Property identified on Part 3.7(a) and (b), a recordable warranty deed, an Assignment and Assumption of Lease in the form of Exhibit 2.7(a)(iii) or such other appropriate document or instrument of transfer, as the case may require, each in form and substance satisfactory to Buyer and its counsel and executed by Seller;

(iv) assignments of all Intellectual Property Assets and separate assignments of all registered Marks, Patents and Copyrights in the form of Exhibit 2.7(a)(iv) executed by Seller;

(v) such other deeds, bills of sale, assignments, certificates of title, documents and other instruments of transfer and conveyance as may reasonably be requested by Buyer, each in form and substance satisfactory to Buyer and its legal counsel and executed by Seller;

(vi) an employment agreement in the form of Exhibit 2.7(a)(vi), executed by [] (the "Employment Agreement");

(vii) noncompetition agreements in the form of Exhibit 2.7(a)(vii), executed by each Shareholder (the "Noncompetition Agreements");

(viii) an escrow agreement in the form of Exhibit 2.7(a)(viii), executed by Seller and each Shareholder and the escrow agent (the "Escrow Agreement");

(ix) a certificate executed by Seller and each Shareholder as to the accuracy of their representations and warranties as of the date of this Agreement and as of the Closing in accordance with Section 7.1 and as to their compliance with and performance of their covenants and obligations to be performed or complied with at or before the Closing in accordance with Section 7.2; and

(x) a certificate of the Secretary of Seller certifying, as complete and accurate as of the Closing, attached copies of the Governing Documents of Seller, certifying and attaching all requisite resolutions or actions of Seller's board of directors and shareholders approving the execution and delivery of this Agreement and the consummation of the Contemplated Transactions and the change of name contemplated by Section 5.9 and certifying to the incumbency and signatures of the officers of Seller executing this Agreement and any other document relating to the Contemplated Transactions and accompanied by the requisite documents for amending the relevant Governing Documents of Seller required to effect such change of name in form sufficient for filing with the appropriate Governmental Body.

VI. Representations and Warranties.

Organization and Good Standing:

(a) Part 3.1(a) contains a complete and accurate list of Seller's jurisdiction of incorporation and any other jurisdictions in which it is qualified to do business as a foreign corporation. Seller is a corporation duly organized, validly existing and in good standing under the laws of its jurisdiction of incorporation, with full corporate power and authority to conduct its business as it is now being conducted, to own or use the

properties and assets that it purports to own or use, and to perform all its obligations under the Seller Contracts. Seller is duly qualified to do business as a foreign corporation and is in good standing under the laws of each state or other jurisdiction in which either the ownership or use of the properties owned or used by it, or the nature of the activities conducted by it, requires such qualification.

(b) Complete and accurate copies of the Governing Documents of Seller, as currently in effect, are attached to Part 3.1(b).

(c) Seller has no Subsidiary and, except as disclosed in Part 3.1(c), does not own any shares of capital stock or other securities of any other Person.

Sufficiency of Assets:

Except as set forth in Part 3.6, the Assets (a) constitute all of the assets, tangible and intangible, of any nature whatsoever, necessary to operate Seller's business in the manner presently operated by Seller and (b) include all of the operating assets of Seller.

Title of Assets:

(a) Seller owns good and marketable title to its respective estates in the Real Property, free and clear of any Encumbrances, other than: (i) liens for Taxes for the current tax year which are not yet due and payable; And (ii) those described in Part 3.9(a) ("Real Estate Encumbrances"). True and complete copies of (A) all deeds, existing title insurance policies and surveys of or pertaining to the Real Property and (B) all instruments, agreements and other documents evidencing, creating or constituting any Real Estate Encumbrances have been delivered to Buyer. Seller warrants to Buyer that, at the time of Closing, the Real Estate shall be free and clear of all Real Estate Encumbrances other than those identified on Part 3.9(a) as acceptable to Buyer ("Permitted Real Estate Encumbrances").

(b) Seller owns good and transferable title to all of the other Assets free and clear of any Encumbrances other than those described in Part 3.9(b) ("Non-Real Estate Encumbrances"). Seller warrants to Buyer that, at the time of Closing, all other Assets shall be free and clear of all Non-Real Estate Encumbrances other than those identified on Part 3.9(b) as acceptable to Buyer ("Permitted Non-Real Estate Encumbrances" and, together with the Permitted Real Estate Encumbrances, "Permitted Encumbrances").

Insurance:

(a) Seller has delivered to Buyer: (i) accurate and complete copies of all policies of insurance (and correspondence relating to coverage thereunder) to which Seller is a party or under which Seller is or has been covered at any time since _____, 19/20 _____, a

list of which is included in Part 3.21(a); (ii) accurate and complete copies of all pending applications by Seller for policies of insurance; and (iii) any statement by the auditor of Seller's financial statements or any consultant or risk management advisor with regard to the adequacy of Seller's coverage or of the reserves for claims.

VII. Removing Excluded Assets.

On or before the Closing Date, Seller shall remove all Excluded Assets from all Facilities and other Real Property to be occupied by Buyer. Such removal shall be done in such manner as to avoid any damage to the Facilities and other properties to be occupied by Buyer and any disruption of the business operations to be conducted by Buyer after the Closing. Any damage to the Assets or to the Facilities resulting from such removal shall be paid by Seller at the Closing. Should Seller fail to remove the Excluded Assets as required by this Section, Buyer shall have the right, but not the obligation, (a) to remove the Excluded Assets at Seller's sole cost and expense; (b) to store the Excluded Assets and to charge Seller all storage costs associated therewith; (c) to treat the Excluded Assets as unclaimed and to proceed to dispose of the same under the laws governing unclaimed property; or (d) to exercise any other right or remedy conferred by this Agreement or otherwise available at law or in equity. Seller shall promptly reimburse Buyer for all costs and expenses incurred by Buyer in connection with any Excluded Assets not removed by Seller on or before the Closing Date.