

# **Stock Purchase Agreement**

**by**

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**and**

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**Dated** \_\_\_\_\_

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# Stock Purchase Agreement

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This Stock Purchase Agreement (“Agreement”) is made as of \_\_\_\_\_ by \_\_\_\_\_, a \_\_\_\_\_ corporation (“Buyer”), and those individuals who have executed the signature page to this Agreement (collectively, “Sellers” and individually, a “Seller”).

## 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:



# 1. Definitions and Usage

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## 1.1. DEFINITIONS

For purposes of this Agreement, the following terms have the meanings specified or referred to in this Section 1.1:

“Acquired Companies”—the Company and its Subsidiaries, collectively, and “Acquired Company” means any one of the Acquired Companies.

“Adjoining Property”—as defined in Section 3.19(e).

“Adjustment Amount”—as defined in Section 2.5(a).

“Agreement”—as defined in the first paragraph of this Agreement.

“Applicable Contract”—any Contract (a) under which any Acquired Company has or could acquire any rights, (b) under which any Acquired Company has or could become subject to any obligation or liability, or (c) by which any Acquired Company or any assets owned or used by it is or could become bound.

“Balance Sheet Date”—as defined in Section 3.4.

“Breach”—any breach of, or any inaccuracy in, any representation or warranty or breach of, or failure to perform or comply with, any covenant or obligation in or of the Contract in question, or any event that with the passing of time or the giving of notice, or both, would constitute such a breach, inaccuracy, or failure.

“Business Day”—any day other than (a) Saturday or Sunday or (b) any other day on which national banks in \_\_\_\_\_ are generally permitted or required to be closed.

“Buyer”—as defined in the first paragraph of this Agreement.

“Buyer Group”—as defined in Section 5.1.

“Buyer Indemnified Persons”—as defined in Section 11.2.

“Buyer’s Closing Documents”—the Promissory Notes and the Escrow Agreement.

**“Cleanup”**—all actions to clean up, remove, treat, or in any other way address the presence, Release, or Threat of Release of any Hazardous Material whether or not any expense incurred in connection with such action constitutes a capital expenditure.

**“Closing”**—as defined in Section 2.3.

**“Closing Balance Sheet”**—as defined in Section 2.6(a).

**“Closing Date”**—the date on which the Closing occurs.

**“Closing Date Shareholders’ Equity”**—as defined in Section 2.5(a).

**“Closing Payment”**—as defined in Section 2.2.

**“COBRA”**—as defined in Section 3.13(d).

**“Code”**—the Internal Revenue Code of 1986.

**“Company”**—as defined in the Recitals of this Agreement.

**“Confidential Information”**—as defined in Section 7.3(a).

**“Consent”**—any approval, consent, ratification, waiver, or other authorization.

**“Contemplated Transactions”**—the transactions contemplated by this Agreement.

**“Contract”**—any agreement, contract, lease, consensual obligation, promise, commitment, or undertaking (whether written or oral and whether express or implied), whether or not legally binding.

**“Copyrights”**—as defined in Section 3.22(a)(iii).

**“Disclosure Letter”**—the disclosure letter delivered by Sellers to Buyer concurrently with the execution and delivery of this Agreement.

**“Employee Plan”**—as defined in Section 3.13(a).

**“Encumbrance”**—any charge, claim, community or other marital property interest, condition, equitable interest, lien, option, pledge, security interest, mortgage, right of way, easement, encroachment, servitude, right of first option, right of first refusal, or similar restriction, including any restriction on use, voting, transfer, receipt of income, or exercise of any other attribute of ownership.

**“End Date”**—as defined in Section 10.1(d).

**“Environment”**—soil, land surface and subsurface strata, surface waters (including navigable and nonnavigable inland and ocean waters), groundwaters, drinking water supply, stream sediments, ambient air (indoor air), plant and animal life, and any other environmental medium or natural resource.

**“Environmental, Health, and Safety Liability”**—any Loss, obligation, or other responsibility resulting from or arising under an Environmental Law or an Occupational Safety and Health Law.

**“Environmental Law”**—any Legal Requirement that provides for or relates to:

- (a) advising appropriate authorities, employees, or the public with respect to the use of any Hazardous Material, the Release or Threat of Release of Hazardous Material, violation of discharge or emission limits or other prohibitions, or any Hazardous Activity or any activity, such as resource extraction or construction, that could have a significant effect on the Environment;
- (b) preventing or reducing to acceptable levels the Release of Hazardous Material into the Environment;

- (c) reducing the quantities, or minimizing or controlling the hazardous characteristics, of Hazardous Material that are generated;
- (d) assuring that products are designed, formulated, packaged, and used so that they do not present an unreasonable risk to human health or the Environment when used or disposed of;
- (e) protecting the Environment;
- (f) reducing the risks involved in the transportation of Hazardous Material;
- (g) the cleanup of Hazardous Material that has been Released, preventing its Release, or addressing the Threat of Release, or paying the costs of such actions; or
- (h) making a Person compensate any other Person for damage done to its health or property or the Environment or permitting self-appointed representatives of the public interest to recover for injuries done to public assets or resources.

“Equity Security”—in respect of any Person, (a) any capital stock or similar security, (b) any security convertible into or exchangeable for any security described in clause (a), (c) any option, warrant, or other right to purchase or otherwise acquire any security described in clauses (a), (b), or (c), and (d) any “equity security” within the meaning of the Exchange Act.

“ERISA”—the Employee Retirement Income Security Act of 1974.

“Escrow Agent”—as defined in the Escrow Agreement.

“Escrow Agreement”—as defined in Section 2.4(a)(vii).

“Escrow Funds”—as defined in Section 2.2(c).

“Exchange Act”—the Securities Exchange Act of 1934.

“Facilities”—any real property owned or operated or formerly owned or operated by any Acquired Company and any buildings, plants, structures, or equipment (including motor vehicles, tank cars, and rolling stock) owned or operated or formerly owned or operated by any Acquired Company.

“Financial Statements”—as defined in Section 3.4.

“GAAP”—generally accepted accounting principles in the United States.

“Governmental Authorization”—any (a) Consent, license, registration, or permit issued, granted, given, or otherwise made available by or under the authority of any Governmental Body or pursuant to any Legal Requirement; or (b) right under any Contract with any Governmental Body.

“Governmental Body”—any:

- (a) nation, state, county, city, town, borough, village, district, or other jurisdiction;
- (b) federal, state, local, municipal, foreign, multinational, or other government;
- (c) governmental or quasi-governmental authority of any nature (including any agency, branch, department, board, commission, court, tribunal, or other entity exercising governmental or quasi-governmental powers);
- (d) body exercising, or entitled or purporting to exercise, any administrative, executive, judicial, legislative, police, regulatory, or taxing authority or power, whether local, national, or international; or
- (e) official of any of the foregoing.

**“Hazardous Activity”**—the distribution, generation, handling, importing, management, manufacturing, processing, production, refinement, Release, storage, transfer, transportation, treatment, or use of Hazardous Material and any other act, business, operation, or activity that increases the danger, or poses a risk of harm, to the Environment.

**“Hazardous Material”**—any substance, material, or waste that is or will foreseeably be regulated by any Governmental Body, including any material, substance, or waste that is defined or classified as a “hazardous waste,” “hazardous material,” “hazardous substance,” “extremely hazardous waste,” “pollutant,” “restricted hazardous waste,” “contaminant,” “toxic waste,” “pollutant,” or “toxic substance” under any provision of Environmental Law, including petroleum, petroleum products, asbestos, presumed asbestos-containing material or asbestos-containing material, urea formaldehyde, or polychlorinated biphenyls.

**“HSR Act”**—the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

**“Indemnified Person”**—as defined in Section 11.8(a).

**“Indemnifying Person”**—as defined in Section 11.8(a).

**“Independent Accountants”**—as defined in Section 2.6(d).

**“Intellectual Property Assets”**—as defined in Section 3.22(a).

**“Interim Balance Sheet”**—as defined in Section 3.4.

**“Interim Balance Sheet Date”**—as defined in Section 3.4.

**“Interim Shareholders’ Equity”**—as defined in Section 2.5(a).

**“Invention Disclosures”**—as defined in Section 3.22(c)(i).

**“IRS”**—the United States Internal Revenue Service or any successor agency, and, to the extent relevant, the United States Department of the Treasury.

**“Knowledge”**—

- (a) An individual will be deemed to have Knowledge of a particular fact or other matter if:
- (i) that individual is actually aware of that fact or matter; or
  - (ii) a prudent individual could be expected to discover or otherwise become aware of that fact or matter in the course of conducting a reasonably comprehensive investigation regarding the accuracy of any representation or warranty in this Agreement.
- (b) A Person (other than an individual) will be deemed to have Knowledge of a particular fact or other matter if any individual who is serving, or who has at any time served, as a director, officer, partner, manager, executor, or trustee of that Person (or in any similar capacity) has, or at any time had, Knowledge of that fact or other matter (as set forth in clauses (a)(i) and (ii) above).

**“Knowledge of Sellers”**—Knowledge of any Seller or any Acquired Company.

**“Leased Real Property”**—as defined in Section 3.6(b).

**“Legal Requirement”**—any constitution, law, ordinance, principle of common law, code, rule, regulation, statute, act, treaty, or order of general applicability of any Governmental Body, including rules and regulations promulgated thereunder.

**“Loss”**—any cost, loss, liability, obligation, claim, cause of action, damage, deficiency, expense (including costs of investigation and defense and reasonable attorneys’ fees and expenses), fine, penalty, judgment, award, assessment, or diminution of value.

**“Major Suppliers”**—as defined in Section 3.26.

**“Major Customers”**—as defined in Section 3.26

**“Marks”**—as defined in Section 3.22(a)(i).

**“Material Adverse Change”**—with respect to an Acquired Company, any event, change, development, or occurrence that, individually or together with any other event, change, development, or occurrence, is materially adverse to its business, condition (financial or otherwise), assets, results of operations, or prospects.

**“Material Consents”**—as defined in Section 8.4.

**“Net Names”**—as defined in Section 3.22(a)(vii).

**“Objection Notice”**—as defined in Section 2.6(c).

**“Occupational Safety and Health Law”**—any Legal Requirement designed to promote safe and healthful working conditions and to reduce occupational safety and health hazards, including the Occupational Safety and Health Act, and any program, whether governmental or private (such as those promulgated or sponsored by industry associations and insurance companies), designed to promote safe and healthful working conditions.

**“Order”**—any order, injunction, judgment, decree, ruling, assessment, or arbitration award of any Governmental Body or arbitrator.

**“Ordinary Course of Business”**—an action taken by a Person will be deemed to have been taken in the Ordinary Course of Business only if that action:

- (a) is consistent in nature, scope, and magnitude with the past practices of such Person and is taken in the ordinary course of the normal, day-to-day operations of such Person; and
- (b) does not require authorization by the board of directors of such Person (or by any Person or group of Persons exercising similar authority) and does not require any other separate or special authorization of any nature.

**“Organizational Documents”**—(a) the articles or certificate of incorporation and the bylaws of a corporation; (b) the certificate of formation and limited liability company agreement, operating agreement, or like agreement of a limited liability company; (c) the partnership agreement and any statement of partnership of a general partnership; (d) the limited partnership agreement and the certificate of limited partnership of a limited partnership; (e) any charter or agreement or similar document adopted or filed in connection with the creation, formation, or organization of a Person; and (f) any amendment to or restatement of any of the foregoing.

**“Owned Real Property”**—as defined in Section 3.6(a).

**“Patents”**—as defined in Section 3.22(a)(ii).

**“Permitted Encumbrances”**—(a) Encumbrances for Taxes and other governmental charges and assessments (except assessments for public improvements levied, pending, or deferred against Owned Real Property) that are not yet due and payable, (b) Encumbrances of carriers, warehousemen, mechanics, and materialmen and other like Encumbrances arising in the Ordinary Course of Business (provided lien statements have not been filed or such Encumbrances otherwise perfected), (c) statutory Encumbrances in

favor of lessors arising in connection with any property leased to any Acquired Company, and (d) Encumbrances disclosed in the Financial Statements.

**“Person”**—an individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture, other entity, or a Governmental Body.

**“Plan”**—as defined in Section 3.13.

**“Proceeding”**—any action, arbitration, mediation, audit, hearing, investigation, litigation, or suit (whether civil, criminal, administrative, judicial, or investigative) commenced, brought, conducted, or heard by or before, or otherwise involving, any Governmental Body or arbitrator.

**“Promissory Notes”**—as defined in Section 2.2(b).

**“Purchase Price”**—as defined in Section 2.2.

**“Real Property”**—as defined in Section 3.6(b).

**“Record”**—information that is inscribed on a tangible medium or that is stored in an electronic or other medium.

**“Related Person”**—

(a) With respect to an individual:

- (i) each other member of such individual’s Family;
- (ii) any Person that is directly or indirectly controlled by such individual or any one or more members of such individual’s Family;
- (iii) any Person in which members of such individual’s Family hold (individually or in the aggregate) a Material Interest; and
- (iv) any Person with respect to which one or more members of such individual’s Family serves as a director, officer, partner, manager, executor, or trustee (or in a similar capacity).

(b) With respect to a Person other than an individual:

- (i) any Person that directly or indirectly controls, is directly or indirectly controlled by, or is directly or indirectly under common control with, such specified Person;
- (ii) any Person that holds a Material Interest in such specified Person;
- (iii) each Person that serves as a director, officer, partner, manager, executor, or trustee of such specified Person (or in a similar capacity);
- (iv) any Person in which such specified Person holds a Material Interest; and
- (v) any Person with respect to which such specified Person serves as a general partner, manager, or a trustee (or in a similar capacity).

(c) For purposes of this definition:

(i) “control” (including “controlling,” “controlled by,” and “under common control with”) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract, or otherwise, and shall be construed as such term is used in the rules promulgated under the Exchange Act;

(ii) the “Family” of an individual includes (A) the individual, (B) the individual’s spouse, (C) any other natural person who is related to the individual or the individual’s spouse within the second degree, and (D) any other natural person who resides with such individual; and

(iii) “Material Interest” means direct or indirect beneficial ownership (as defined in Rule 13d-3 under the Exchange Act) of voting securities or other voting interests representing at least 10% of the outstanding voting power of a Person or Equity Securities representing at least 10% of the outstanding equity interests in a Person.

“Release”—any release, spill, emission, leaking, pumping, pouring, dumping, emptying, injection, deposit, disposal, discharge, dispersal, leaching, or migration on or into the Environment, or into or out of any property.

“Representative”—with respect to a particular Person, includes any director, officer, manager, employee, agent, consultant, advisor, accountant, financial advisor, or legal counsel of such Person.

“Securities Act”—the Securities Act of 1933.

“Seller(s)”—as defined in the first paragraph of this Agreement.

“Sellers’ Closing Documents”—the releases specified in Section 2.4(a)(v), the Escrow Agreement, and each other document to be executed or delivered by any Seller at the Closing.

“Sellers’ Releases”—as defined in Section 2.4.

“Sellers’ Representative”—as defined in Section 12.5(a).

“Shares”—as defined in the Recitals of this Agreement.

“Software”—as defined in Section 3.22(a)(v).

“Subsidiary”—with respect to any Person (the “Owner”), any corporation or other Person of which securities or other interests having the power to elect a majority of that corporation’s or other Person’s board of directors or similar governing body, or otherwise having the power to direct the business and policies of that corporation or other Person (other than Equity Securities or other interests having such power only upon the happening of a contingency that has not occurred) are held by the Owner or one or more of its Subsidiaries; when used without reference to a particular Person, “Subsidiary” means a Subsidiary of the Company.

“Tax”—any income, gross receipts, license, payroll, employment, excise, severance, stamp, occupation, premium, property, environmental, windfall profit, customs, vehicle, airplane, boat, vessel or other title or registration, capital stock, franchise, employees’ income withholding, foreign or domestic withholding, Social Security, unemployment, disability, real property, personal property, sales, use, transfer, value added, concession, alternative, add-on minimum and other tax, fee, assessment, levy, tariff, charge, or duty of any kind whatsoever and any interest, penalty, addition, or additional amount thereon imposed, assessed, or collected by or under the authority of any Governmental Body or payable under any tax-sharing agreement or any other Contract.

“Tax Return”—any return (including any information return), report, statement, schedule, notice, form, declaration, claim for refund, or other document or information filed with or submitted to, or required to be filed with or submitted to, any Governmental Body in connection with the determination, assessment, collection, or payment of any Tax or in connection with the administration, implementation, or enforcement of or compliance with any Legal Requirement relating to any Tax.

“Third Party”—a Person that is not an Acquired Company or a party to this Agreement.

“Third-Party Claim”—any claim against any Indemnified Person by a Third Party, whether or not involving a Proceeding.

**“Threat of Release”**—a reasonable possibility of a Release that could require action (including triggering notification or reporting under Environmental Law) in order to prevent or mitigate damage to the Environment that could result from such Release.

**“Trade Secrets”**—as defined in Section 3.22(a)(vi).

## **1.2 USAGE**

**(a) In this Agreement, unless expressly stated otherwise:**

- (i) the singular includes the plural and vice versa;**
- (ii) reference to any Person includes such Person’s successors and assigns, if applicable, but only if such successors and assigns are permitted by this Agreement, and reference to a Person in a particular capacity excludes such Person in any other capacity;**
- (iii) reference to a gender includes the other gender;**
- (iv) reference to any agreement, document, or instrument means such agreement, document, or instrument as amended or modified and in effect from time to time in accordance with its terms;**
- (v) reference to any Legal Requirement means that Legal Requirement as from time to time in effect, including any amendment, modification, codification, replacement, or reenactment of such Legal Requirement;**
- (vi) reference to any section or other provision of any Legal Requirement means that provision of such Legal Requirement as from time to time in effect, including any amendment, modification, codification, replacement, or reenactment of such section or other provision;**
- (vii) “hereunder,” “hereof,” “hereto,” and words of similar import refer to this Agreement as a whole and not to any particular Article, Section, or other provision of this Agreement;**
- (viii) “including” (and with correlative meaning “include”) means including without limiting the generality of any description preceding such term;**
- (ix) “or” is used in the inclusive sense of “and/or”;**
- (x) “any” means “any and all”;**
- (xi) with respect to the determination of any period of time, “from” means “from and including” and “to” means “to but excluding”;**
- (xii) a reference to a document, instrument, or agreement also refers to all addenda, exhibits, or schedules thereto;**
- (xiii) a reference to a “copy” or “copies” of any document, instrument, or agreement means a copy or copies that are complete and correct; and**
- (xiv) a reference to a list, or any like compilation (whether in the Disclosure Letter or elsewhere), means that the item referred to is complete and correct.**

**(b) Unless otherwise specified in this Agreement, all accounting terms used in this Agreement will be interpreted, and all accounting determinations under this Agreement will be made, in accordance with GAAP.**

**(c) This Agreement was negotiated by the parties with the benefit of legal representation, and any rule of construction or interpretation otherwise requiring this Agreement to be construed or interpreted**



**against any party as having been drafted by it will not apply to any construction or interpretation of this Agreement.**

- (d) The headings contained in this Agreement are for convenience of reference only, shall not be deemed to be part of this Agreement, and shall not be referred to in connection with the construction or interpretation of this Agreement.**

## 2. Sale and Transfer of Shares; Closing

Please read this section number 2.

### 2.1 SHARES

Subject to the terms and conditions of this Agreement, and in reliance upon the representations, warranties, and covenants contained in this Agreement, at the Closing, Buyer shall purchase the Shares from Sellers, and Sellers shall sell and transfer the Shares to Buyer, free and clear of any Encumbrance.

### 2.2 PURCHASE PRICE

The purchase price for the Shares (the “Purchase Price”) is \_\_\_\_\_ dollars (\$ \_\_\_\_\_), plus or minus the Adjustment Amount. At the Closing, Buyer shall deliver as payment on account of the Purchase Price: (a) \_\_\_\_\_ dollars (\$ \_\_\_\_\_) (the “Closing Payment”), which will be allocated among Sellers as set forth on Schedule 2.2, and which shall be paid by wire transfer to Sellers’ Representative pursuant to written wire transfer instructions delivered to Buyer by Sellers’ Representative at least three (3) Business Days prior to the Closing; (b) promissory notes executed by Buyer and payable to each Seller, in the principal amounts set forth on Schedule 2.2 (collectively, the “Promissory Notes”), in the form of Exhibit 2.2(b); and (c) \_\_\_\_\_ dollars (\$ \_\_\_\_\_) paid by wire transfer to the Escrow Agent pursuant to the Escrow Agreement (the “Escrow Funds”). The Adjustment Amount shall be paid by Sellers or Buyer, as the case may be, in accordance with Section 2.5.

### 2.3 CLOSING

Subject to Article 10, the purchase and sale (the “Closing”) provided for in this Agreement will take place at the offices of [Insert name of Buyer’s attorneys] at [Insert address] commencing at 10:00 a.m. (local time) on \_\_\_\_\_ or at such other date and time as Buyer and Sellers’ Representative may otherwise agree, provided that on or prior to that date all conditions set forth in Articles 8 and 9 have been satisfied or waived. If all conditions set forth in Articles 8 and 9 are not satisfied or waived by \_\_\_\_\_, subject to Article 10, the Closing will take place upon the earlier of (a) five (5) Business Days following notice given by Buyer stating that all conditions set forth in Articles 8 and 9 have been satisfied or waived (other than conditions to be satisfied on the Closing Date), and (b) the End Date. The Closing will be deemed to be effective as of the close of business on the Closing Date [the Business Day prior to the Closing Date] for tax and accounting purposes.

## 2.4 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) the Organizational Documents of each Acquired Company not filed with a Governmental Body in connection with its organization, certified as of the Closing Date by the Secretary of each Acquired Company;
  - (iv) certificates dated as of a date not more than five (5) days prior to the Closing Date as to the good standing of each Acquired Company [and payment of applicable state Taxes], issued by the appropriate Governmental Body of the jurisdiction of the Acquired Company's organization and each jurisdiction in which the Acquired Company is licensed or qualified to do business as a foreign entity as specified in Part 3.1 of the Disclosure Letter;
  - (v) releases in the form of Exhibit 2.4(a)(v) executed by Sellers;
  - (vi) an employment agreement in the form of Exhibit 2.4(a)(vi), executed by \_\_\_\_\_ and the Company;
  - (vii) an escrow agreement in the form of Exhibit 2.4(a)(vii), executed by Sellers (the "Escrow Agreement"); and
  - (viii) the certificate referred to in Section 8.3.
- (b) Buyer shall deliver to Sellers' Representative (or in the case of the Escrow Funds, to the Escrow Agent):
- (i) the Closing Payment;
  - (ii) the Promissory Notes;
  - (iii) the Escrow Funds;
  - (iv) the Escrow Agreement, executed by Buyer and the Escrow Agent; and
  - (v) the certificate referred to in Section 9.3.

## 2.5 ADJUSTMENT AMOUNT AND PAYMENT

- (a) The "Adjustment Amount" will be the difference, if any, between (i) the consolidated shareholders' equity of the Company and its Subsidiaries as of the Closing Date, as shown on the Closing Balance Sheet (the "Closing Date Shareholders' Equity"), and (ii) \_\_\_\_\_ dollars (\$\_\_\_\_\_) (the consolidated shareholders' equity of the Company and its Subsidiaries as shown on the Interim Balance Sheet) (the "Interim Shareholders' Equity"). If the Closing Date Shareholders' Equity is less than the Interim Shareholders' Equity, the Adjustment Amount shall be paid by Sellers to

**Buyer.** If the Closing Date Shareholders' Equity is greater than the Interim Shareholders' Equity, subject to Section 11.7, the Adjustment Amount shall be paid by Buyer to Sellers.

- (b) If the Adjustment Amount or, after giving effect to Section 11.7, any portion of the Adjustment Amount is to be paid by Buyer to Sellers, the Adjustment Amount or such portion thereof shall be paid by Buyer by wire transfer to Sellers' Representative pursuant to wire transfer instructions provided to Buyer by Sellers' Representative prior to the due date for the payment set forth in Section 2.5(c). If the Adjustment Amount is to be paid by Sellers to Buyer, the Adjustment Amount shall be paid by Sellers by wire transfer to Buyer pursuant to wire transfer instructions provided by Buyer to Sellers' Representative prior to the due date for the payment set forth in Section 2.5(c).
- (c) All payments under this Section 2.5 shall be made together with interest at the rate set forth in the Promissory Notes, which interest will begin accruing on the Closing Date and end on the day before the payment is made. Within three (3) Business Days after the Closing Balance Sheet and Adjustment Amount become binding on the parties pursuant to Section 2.6, Sellers or Buyer, as the case may be, shall make the payment provided for in this Section 2.5.

## 2.6 ADJUSTMENT PROCEDURE

- (a) Buyer shall prepare a consolidated balance sheet of the Acquired Companies as of the close of business on the Closing Date [the Business Day prior to the Closing Date] (the "Closing Balance Sheet"). The Closing Balance Sheet shall be prepared using the accounting principles, policies, and practices set forth on Exhibit 2.6(a). Buyer shall deliver the Closing Balance Sheet and the determination of the Adjustment Amount to Sellers' Representative within ninety (90) days following the Closing Date.
- (b) Upon execution of such access letters as may be reasonably required by Buyer, Sellers' Representative and its Representatives shall, during reasonable business hours, be given reasonable access to (and copies of) all Buyer's and its Representatives' books, records, and other documents, including work papers, worksheets, notes, and schedules, used in preparation of the Closing Balance Sheet and the determination of the Adjustment Amount, for the purpose of reviewing the Closing Balance Sheet and determination of the Adjustment Amount, in each case, other than certain work papers that Buyer considers proprietary, such as internal control documentation, engagement planning, time control and audit sign off, and quality control work papers.
- (c) If within 30 days following delivery of the Closing Balance Sheet and the determination of the Adjustment Amount to Sellers' Representative, Sellers' Representative has not given Buyer notice of an objection as to any amounts set forth on the Closing Balance Sheet or the determination of the Adjustment Amount (which notice shall state in reasonable detail the basis of Sellers' Representative's objections and Sellers' proposed adjustments (the "Objection Notice")), the Closing Balance Sheet and the determination of the Adjustment Amount as prepared by Buyer will be final, binding, and conclusive on the parties.
- (d) If Sellers' Representative timely gives Buyer an Objection Notice and if Sellers' Representative and Buyer fail to resolve the issues raised in the Objection Notice within 30 days after giving the Objection Notice, Sellers' Representative and Buyer shall submit the issues remaining in dispute for resolution to [name of individual] in the [location] office of [name of accounting firm] (or, if [name of individual or name of accounting firm] is providing services to Buyer or a Seller or is otherwise unable or unwilling to serve in such capacity, a recognized national or regional independent accounting firm mutually acceptable to Buyer and Sellers' Representative) (the "Independent Accountants").
- (e) The parties shall negotiate in good faith in order to seek agreement on the procedures to be followed by the Independent Accountants, including procedures with regard to the presentation of evidence. If the parties are unable to agree upon procedures within 10 days of the submission to the Independent Accountants, the Independent Accountants shall establish such procedures giving due regard to the intention of the parties to resolve disputes as promptly, efficiently, and inexpensively as

possible, which procedures may, but need not, be those proposed by either Buyer or Sellers' Representative. The Independent Accountants shall be directed to resolve only those issues in dispute and render a written report on their resolution of disputed issues with respect to the Closing Balance Sheet and the resulting Adjustment Amount as promptly as practicable, but no later than 60 days after the date on which the Independent Accountants are engaged. The determination by the Independent Accountants will be based solely on written submissions of Buyer, on the one hand, and Sellers' Representative, on the other hand, and will not involve independent review. Any determination of the Closing Balance Sheet or the Adjustment Amount by the Independent Accountants will not be outside the range established by the amounts in (i) the Closing Balance Sheet and the determination of the Adjustment Amount proposed by Buyer, and (ii) Sellers' Representative's proposed adjustments thereto. Such determination will be final, binding, and conclusive on the parties as of the date of the determination notice sent by the Independent Accountants.

- (f) **If issues are submitted to the Independent Accountants for resolution:**
- (i) **Sellers' Representative and Buyer shall execute any agreement required by the Independent Accountants to accept their engagement pursuant to Section 2.6(d);**
  - (ii) **Sellers' Representative and Buyer shall promptly furnish or cause to be furnished to the Independent Accountants such work papers and other documents and information relating to the disputed issues as the Independent Accountants may request and are available to that party or its accountants or other Representatives, and shall be afforded the opportunity to present to the Independent Accountants, with a copy to the other party, any other written material relating to the disputed issues;**
  - (iii) **The determination by the Independent Accountants, as set forth in a report to be delivered by the Independent Accountants to both Sellers' Representative and Buyer, will include the revised Closing Balance Sheet and Adjustment Amount, reflecting the changes required as a result of the determination made by the Independent Accountants; and**
  - (iv) **Sellers and Buyer shall each bear one-half of the fees and costs of the Independent Accountants; provided, however, that the engagement agreement referred to in Section 2.6(f)(i) above may require the parties to be bound jointly and severally to the Independent Accountants for those fees and costs, and in the event Sellers or Buyer pay to the Independent Accountants any amount in excess of one-half of the fees and costs of its engagement, the other party(ies) agree(s) to reimburse Sellers or Buyer, as applicable, upon demand, to the extent required to equalize the payments made by Sellers and Buyer with respect to the fees and costs of the Independent Accountants.**

# 3. Representations and Warranties of Sellers

Please read this entire section 3.

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

## 3.1 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.
- (b) Sellers have delivered to Buyer copies of the Organizational Documents of each Acquired Company. No Acquired Company is in default under or in violation of any of its Organizational Documents.
- (c) No Acquired Company has conducted business under or otherwise used, for any purpose or in any jurisdiction, any legal, fictitious, assumed, or trade name other than the names listed in Part 3.1.

## 3.2 ENFORCEABILITY AND AUTHORITY; NO CONFLICT

- (a) This Agreement has been duly executed and delivered by each Seller and constitutes the legal, valid, and binding obligation of each Seller, enforceable against each Seller in accordance with its terms. Upon the execution and delivery of Sellers' Closing Documents by each Seller party thereto, each Sellers' Closing Document will constitute the legal, valid, and binding obligation of such Seller, enforceable against such Seller in accordance with its terms. Each Seller has the absolute and unrestricted right, power, authority, and capacity to execute and deliver, and to perform its obligations under, this Agreement and each Sellers' Closing Document to which it is a party.
- (b) Except as set forth in Part 3.2(b), neither the execution and delivery of this Agreement nor the consummation or performance of any Contemplated Transaction will, directly or indirectly (with or without notice or lapse of time):

- (i) contravene, conflict with, or violate (A) any Organizational Document of any Acquired Company, or (B) any resolution adopted by the board of directors or the shareholders (or Persons exercising similar authority) of any Acquired Company;
  - (ii) contravene, conflict with, or violate, or give any Governmental Body or other Person the right to challenge any Contemplated Transaction, or to exercise any remedy or obtain any relief under, any Legal Requirement or any Order to which any Acquired Company or any Seller, or any assets owned or used by any Acquired Company, could be subject;
  - (iii) contravene, conflict with, violate, result in the loss of any benefit to which any Acquired Company is entitled under, or give any Governmental Body the right to revoke, suspend, cancel, terminate, or modify, any Governmental Authorization held by any Acquired Company or that otherwise relates to the business of, or any assets owned or used by, any Acquired Company;
  - (iv) cause Buyer or any Acquired Company to become subject to, or to become liable for payment of, any Tax;
  - (v) cause any assets owned or used by any Acquired Company to be reassessed or revalued by any Governmental Body;
  - (vi) Breach, or give any Person the right to declare a default or exercise any remedy or to obtain any additional rights under, or to accelerate the maturity or performance of, or payment under, or cancel, terminate, or modify, any Applicable Contract or any Contract to which any Seller or any Acquired Company is a party;
  - (vii) result in the imposition or creation of any Encumbrance upon, or with respect to, any assets owned or used by any Acquired Company; or
  - (viii) result in, or give any other Person the right or option to cause or declare: (A) a loss of any Intellectual Property Asset, (B) the release, disclosure, or delivery of any Intellectual Property Asset by or to any escrow agent or other Person, or (C) the grant, assignment, or transfer to any other Person of any license, Encumbrance, or other right or interest under, to, or in any Intellectual Property Asset.
- (c) Except as set forth in Part 3.2(c), no Seller or Acquired Company is or shall be required to give notice to, or obtain Consent from, any Person in connection with the execution and delivery of this Agreement or the consummation or performance of any Contemplated Transaction.

### 3.3 CAPITALIZATION OF COMPANY 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.

- (c) No Acquired Company owns, or is a party to or bound by any Contract to acquire, any Equity Security or other security of any Person or any direct or indirect equity or ownership interest in any other business. No Acquired Company is obligated to provide funds to or make any investment (whether in the form of a loan, capital contribution, or otherwise) in any other Person.

### 3.4 FINANCIAL STATEMENTS

Sellers have delivered to Buyer: (a) audited consolidated balance sheets of the Company and its Subsidiaries as at \_\_\_\_\_ (the “Balance Sheet Date”) and as at \_\_\_\_\_, and the related audited consolidated statements of income, changes in shareholders’ equity, and cash flows for each of the \_\_\_\_\_ fiscal years ended on such dates, including the notes thereto, together with the report thereon of the Company’s independent public accountants, (collectively, the “Audited Financial Statements”), and (b) an unaudited consolidated balance sheet (the “Interim Balance Sheet”) of the Company and its Subsidiaries as at \_\_\_\_\_ (the “Interim Balance Sheet Date”), and the related unaudited consolidated statements of income, changes in shareholders’ equity, and cash flows for the \_\_\_\_\_ months then ended, certified by the chief financial officer of the Company (collectively, the “Unaudited Financial Statements”, and together with the Audited Financial Statements, the “Financial Statements”). The Financial Statements (i) fairly present the consolidated financial condition and the results of operations, changes in shareholders’ equity, and cash flows of the Company and its Subsidiaries as at the respective dates of, and for the periods referred to in, the Financial Statements, and (ii) were prepared in accordance with GAAP, subject, in the case of the Unaudited Financial Statements, to normal recurring year-end adjustments (the effect of which will not, individually or in the aggregate, be material) and the absence of notes (that, if presented, would not differ materially from those included in the Audited Financial Statements). The Financial Statements reflect the consistent application of GAAP throughout the periods involved, except as disclosed in the notes to the Audited Financial Statements. No financial statements of any Person other than the Acquired Companies are required by GAAP to be included or reflected in the Financial Statements. The Financial Statements were prepared from, and are consistent with, the accounting Records of each Acquired Company. Sellers have also delivered to Buyer copies of all letters from the Company’s auditors to the Company’s board of directors or audit committee thereof during the 36 months prior to the date of this Agreement, together with copies of all responses thereto.

### 3.5 BOOKS AND RECORDS

- (a) The books of account and other Records of each Acquired Company, all of which have been made available to Buyer, are complete and correct, represent actual, bona fide transactions, and have been maintained in accordance with sound business practices and the requirements of Section 13(b)(2) of the Exchange Act (whether or not any Acquired Company is subject to that Section). The Acquired Companies have implemented and maintain a system of internal control over financial reporting (as defined in Rules 13a-15(f) and 15d-15(f) under the Exchange Act) sufficient to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with GAAP, including that (i) transactions are executed in accordance with management’s general or specific authorizations, (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP and to maintain asset accountability, (iii) access to assets is permitted only in accordance with management’s general or specific authorization, and (iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.
- (b) The minute books of each Acquired Company contain complete and correct Records of all meetings held of, and actions taken by written consent of, the holders of voting securities, the board of



directors or Persons exercising similar authority, and committees of the board of directors or such Persons of such Acquired Company, and no meeting of any such holders, board of directors, Persons, or committee has been held, and no other action has been taken, for which minutes or other evidence of action have not been prepared and are not contained in such minute books. Each Acquired Company has at all times maintained complete and correct Records of all issuances and transfers of its Equity Securities. At the Closing, all such minute books and Records will be in the possession of the Company and located at [specify location(s)].

### **3.6 REAL AND PERSONAL PROPERTY**

- (a) Part 3.6(a) lists all real estate owned by each Acquired Company (the “Owned Real Property”), including the legal description, street address, and any tax parcel identification number of each property, and the Acquired Company that owns such property. Sellers have delivered to Buyer copies of the deeds and other instruments by which any Acquired Company acquired the Owned Real Property and copies of all title insurance policies, opinions, abstracts, and surveys in the possession of Sellers or any Acquired Company relating to the Owned Real Property.
- (b) Part 3.6(b) lists all real estate leased by any Acquired Company as a lessee, sub-lessee, or assignee (the “Leased Real Property” and, together with the Owned Real Property, the “Real Property”), including a description of the premises leased and the Acquired Company that leases the same. All Leased Real Property is leased pursuant to valid written leases listed in Part 3.17(a). Such leases contain the entire agreement between the landlord of each of the leased premises and the Acquired Company, and there is no other Contract between the landlord and any Acquired Company affecting such Leased Real Property. No Acquired Company leases Real Property as a lessor or sub-lessor.
- (c) The Owned Real Property and the Acquired Companies’ interests in the Leased Real Property are owned by the respective Acquired Companies free and clear of all Encumbrances, variances, or limitations of any nature, other than Permitted Encumbrances and as set forth in Part 3.6(c). All buildings, plants, and structures owned by any Acquired Company lie wholly within the boundaries of the Real Property in question and do not encroach upon the property of, or otherwise conflict with the property rights of, any other Person. There are no buildings, structures, fixtures, or other improvements primarily situated on adjoining property that encroach on any part of the Real Property. Each parcel of Real Property abuts on, and has direct vehicular access to, a public road or has access to a public road via a permanent, irrevocable, appurtenant easement benefiting such Real Property and constituting a part thereof. Certificates of occupancy are in full force and effect for each location of Real Property, and the uses thereof being made by the Acquired Companies do not violate any applicable zoning, subdivision, land use, or other Legal Requirement. No Third Party has a right to acquire any interest in the Owned Real Property or in the Acquired Companies’ interests in the Leased Real Property. There is no existing or proposed plan to modify or realign any street or highway or any existing or proposed eminent domain Proceeding that would result in the taking of all or any part of any parcel of Real Property or that would prevent or hinder the continued use of any such parcel as used by the Acquired Companies. None of the Real Property is located within a flood plain for flood insurance purposes.
- (d) The Acquired Companies own all tangible personal property reflected as owned in the Interim Balance Sheet (other than inventory sold since the Interim Balance Sheet Date in the Ordinary Course of Business), free and clear of all Encumbrances, other than Permitted Encumbrances and as set forth in Part 3.6(d). All the tangible personal property purchased or otherwise acquired by the Acquired Companies since the Interim Balance Sheet Date (other than inventory acquired and sold since the Interim Balance Sheet Date in the Ordinary Course of Business) is owned by the Acquired Companies free and clear of all Encumbrances, other than Permitted Encumbrances and as set forth in Part 3.6(d). A copy of the fixed asset register of each Acquired Company has been delivered to Buyer. Each such register contains a complete and correct list of the fixed assets of the applicable Acquired Company as of the date specified.

### **3.7 CONDITION AND SUFFICIENCY OF ASSETS**

- (a) The buildings, plants, structures, and equipment owned or leased by the Acquired Companies are structurally sound, in good operating condition and repair, and adequate for the uses to which they are being put, and none of such buildings, plants, structures, or equipment is in need of maintenance or repairs other than ordinary, routine maintenance that is not material in nature or cost.**
- (b) The assets owned and leased by each Acquired Company constitute all the assets used in connection with the business of such Acquired Company. Such assets constitute all the assets necessary for such Acquired Company to continue to conduct its business following the Closing as it is being conducted.**

### **3.8 ACCOUNTS RECEIVABLE**

All accounts receivable of each Acquired Company, whether or not reflected on the Interim Balance Sheet, represent valid obligations arising from sales actually made or services actually performed in the Ordinary Course of Business. The accounts receivable of each Acquired Company are current and collectible net of the reserve shown on the Interim Balance Sheet (which reserve is adequate and calculated consistent with past practice in the preparation of the Financial Statements). Subject to such reserve, each of the accounts receivable either has been or will be collected in full, without any setoff, expense, or other reduction, within 90 days after the day on which it first becomes due and payable. There is no contest, claim, defense, or right of setoff, other than returns in the Ordinary Course of Business, with respect to any account receivable. Part 3.8 lists and sets forth the aging of all accounts receivable as of the Interim Balance Sheet Date.

### **3.9 INVENTORIES**

All inventories of each Acquired Company, whether or not reflected on the Interim Balance Sheet, consist of a quality and quantity usable and, with respect to finished goods, saleable, in the Ordinary Course of Business. No Acquired Company is in possession of any goods not owned by such Acquired Company. Except as set forth in Part 3.9, the inventories (other than goods in transit) of each Acquired Company are located on the premises of an Acquired Company. All inventories are valued at the lower of cost or [market] [net realizable] value on a [first-in, first-out] [last-in, first-out] basis consistent with past practice used in the preparation of the Financial Statements. The reserve for obsolescence with respect to inventories [as adjusted for the passage of time,] is adequate and calculated consistent with past practice. Inventories that were purchased after the Interim Balance Sheet Date were purchased in the Ordinary Course of Business at a cost not exceeding market prices prevailing at the time of purchase for items of similar quality and quantity. The quantities of each item of inventory are not excessive, but are reasonable for the continued operation of each Acquired Company in the Ordinary Course of Business.

### **3.10 NO UNDISCLOSED LIABILITIES**

Except as set forth in Part 3.10, no Acquired Company has any liability or obligation of any nature (whether known or unknown and whether absolute, accrued, contingent, or otherwise) other than liabilities or obligations to the extent shown on the Interim Balance Sheet and current liabilities incurred in the Ordinary Course of Business since the date of the Interim Balance Sheet.

### **3.11 TAXES**

#### **(a) Filed Returns and Tax Payments**

- (i) Each Acquired Company has filed or caused to be filed on a timely basis all Tax Returns that were required to be filed by or with respect to it, either separately or as a member of a group of corporations, pursuant to applicable Legal Requirements.**
- (ii) No Acquired Company has requested any extension of time within which to file any Tax Return, except as to a Tax Return that has since been timely filed.**
- (iii) All Tax Returns filed by (or that include on a consolidated basis) any Acquired Company are complete and correct and comply with applicable Legal Requirements.**

- (iv) Each Acquired Company has paid, or made provision for the payment of, all Taxes that have or could have become due for all periods covered by any Tax Return or otherwise, including pursuant to any assessment received by Sellers or any Acquired Company, except such Taxes, if any, that are listed in Part 3.11(a) and that are being contested in good faith by appropriate Proceedings and for which adequate reserves have been provided in the Interim Balance Sheet.
  - (v) Each Acquired Company has withheld or collected and paid to the proper Governmental Body or other Person all Taxes required to be withheld, collected, or paid by it.
  - (vi) Part 3.11(a) lists each Tax Return filed by any Acquired Company since \_\_\_\_\_, and Sellers have delivered to Buyer copies of all such Tax Returns.
  - (vii) No claim has ever been made by any Governmental Body in a jurisdiction where any Acquired Company does not file Tax Returns that it is or could be subject to taxation by that jurisdiction, nor is there any reasonable basis for such a claim.
- (b) Audited or Closed Tax Years
- (i) Except as set forth in Part 3.11(b), all Tax Returns of each Acquired Company have been audited by the IRS or other Governmental Body or are closed by the applicable statute of limitations for all taxable years through \_\_\_\_\_.
  - (ii) Part 3.11(b) lists all audits of all Tax Returns, including a description of the nature and, if completed, the outcome of each audit since [date]. Sellers have delivered copies of any reports, statements of deficiencies, or similar items with respect to such audits. Part 3.11(b) describes all adjustments to any Tax Return filed by or with respect to any Acquired Company for all taxable years since \_\_\_\_\_, and the resulting deficiencies proposed by the IRS or other Governmental Body. Part 3.11(b) lists all deficiencies proposed as a result of such audits, all of which have been paid or, as set forth in Part 3.11(b), have been settled or are being contested in good faith by appropriate Proceedings. Except as set forth in Part 3.11(b), to the Knowledge of Sellers, no Governmental Body will assess any additional taxes for any period for which Tax Returns have been filed.
  - (iii) Except as set forth in Part 3.11(b), no Tax Return of any Acquired Company is under audit by the IRS or other Governmental Body, and no notice of such an audit has been received by any Acquired Company. To the Knowledge of Sellers, there are no threatened Proceedings for or relating to Taxes, and there are no matters under discussion with the IRS or other Governmental Body with respect to Taxes. Except as set forth in Part 3.11(b), no issues relating to Taxes have been raised in writing by the IRS or other Governmental Body during any pending audit, and no issues relating to Taxes have been raised in writing by the IRS or other Governmental Body in any audit that could recur in a later taxable period. Except as set forth in Part 3.11(b), there is no proposed Tax assessment against any Acquired Company.
  - (iv) Except as set forth in Part 3.11(b), no Proceedings are pending before the IRS or other Governmental Body with respect to the Taxes of any Acquired Company.
  - (v) Except as set forth in Part 3.11(b), no Seller or Acquired Company has given or been requested to give waivers or extensions (or is or would be subject to a waiver or extension given by any other Person) of any statute of limitations relating to the payment of Taxes of any Acquired Company or for which any Acquired Company could be liable.
  - (vi) Except as set forth in Part 3.11(b), no Encumbrance for Taxes exists with respect to any assets of any Acquired Company, except statutory liens for Taxes not yet due.
- (c) Accruals and Reserves

The charges, accruals, and reserves with respect to Taxes on the accounting Records of each Acquired Company are adequate and are at least equal to that Acquired Company's liability for Taxes and to the Acquired Companies' liability for Taxes on a consolidated basis, respectively.

**(d) Status of Acquired Companies**

- (i) No Acquired Company is, or within the five-year period preceding the date of this Agreement has been, an "S corporation" within the meaning of Section 1361(a)(1) of the Code.**
- (ii) No Acquired Company has been a member of any affiliated group of corporations (other than a group of which the Company is the common parent) which has filed a combined, consolidated, or unitary income Tax Return with any Governmental Body. No Acquired Company is liable for the Taxes of any Person (other than another Acquired Company) under Treasury Regulation Section 1.1502-6 or any similar provision of any applicable Legal Requirement, as a transferee or successor, by contract, or otherwise.**

**(e) Miscellaneous**

- (i) There is no tax sharing agreement, tax allocation agreement, tax indemnity obligation, or similar agreement, arrangement, understanding, or practice, oral or written, with respect to Taxes that will require any payment by any Acquired Company.**
- (ii) No Acquired Company is a party to any Contract that could result separately or in the aggregate in any payment (A) of an "excess parachute payment" within the meaning of Section 280G of the Code, or (B) that would not be deductible as a result of the application of Section 404 of the Code.**
- (iii) No Acquired Company is required to include in income any adjustment pursuant to Section 481 of the Code by reason of a voluntary change in accounting method initiated by any Acquired Company, and the IRS has not proposed any such change in accounting method.**
- (iv) No Seller is a foreign person within the meaning of Section 1445(f)(3) of the Code. No Acquired Company has been a United States real property holding corporation within the meaning of Section 897(c)(2) of the Code during the applicable period specified in Section 897(c)(1)(A)(ii).**
- (v) Except as set forth in Part 3.11(e), no Acquired Company has received, been the subject of, or requested a written ruling of a Governmental Body relating to Taxes, and no Acquired Company has entered into a Contract with a Governmental Body relating to Taxes that would have a continuing effect after the Closing Date.**
- (vi) Each Acquired Company has disclosed on its federal income Tax Returns all positions taken by it that could give rise to substantial understatement of federal income Tax within the meaning of Section 6662 of the Code.**
- (vii) No Acquired Company has ever distributed stock of another Person or had its stock distributed by another Person, in a transaction that purported or was intended to be governed in whole or in part by Code Section 355 or Code Section 361.**
- (viii) No Acquired Company has participated in any "reportable transaction" as defined in Treasury Regulation Section 1.6011-4(b).**

**3.12 NO MATERIAL ADVERSE CHANGE**

Since the Balance Sheet Date, no Acquired Company has suffered any Material Adverse Change and no event has occurred, and no circumstance exists, that can reasonably be expected to result in a Material Adverse Change.

### 3.13 EMPLOYEE BENEFITS

- (a) Part 3.13(a) lists each “employee benefit plan” as defined by Section 3(3) of ERISA, all specified fringe benefit plans as defined in Section 6039D of the Code, and all other bonus, incentive-compensation, deferred-compensation, profit-sharing, stock-option, stock-appreciation-right, stock-bonus, stock-purchase, employee-stock-ownership, savings, severance, change-in-control, supplemental-unemployment, layoff, salary-continuation, retirement, pension, health, life-insurance, disability, accident, group-insurance, vacation, holiday, sick-leave, fringe-benefit, or welfare plan, and any other employee compensation or benefit plan, policy, practice, or Contract (whether qualified or nonqualified, effective or terminated, written or unwritten) and any trust, escrow, or other Contract related thereto that (i) is maintained or contributed to by any Acquired Company and (ii) provides benefits to, or describes policies or procedures applicable to, any current or former director, officer, employee, or service provider of any Acquired Company, or the dependents of any thereof, regardless of how (or whether) liabilities for the provision of benefits are accrued or assets are acquired or dedicated with respect to the funding thereof (each, an “Employee Plan”). Part 3.13(a) identifies as such any Employee Plan that is (x) a plan intended to meet the requirements of Section 401(a) of the Code or (y) a plan subject to Title IV of ERISA. Other than the Acquired Companies, no corporation or trade or business has ever been controlled by, controlling, or under common control with any Seller within the meaning of Section 414 of the Code or Section 4001(a)(14) or 4001(b) of ERISA.
- (b) Sellers have delivered to Buyer copies of (i) the documents comprising each Employee Plan (or, with respect to an Employee Plan which is unwritten, a detailed written description of eligibility, participation, benefits, funding arrangements, assets, and any other matters that relate to the obligations of any Acquired Company thereunder); (ii) all trust agreements, insurance contracts, or any other funding instruments related to each Employee Plan; (iii) all rulings, determination letters, no-action letters, or advisory opinions from the IRS, the United States Department of Labor, or any other Governmental Body that pertain to each Employee Plan and any open requests therefor; (iv) the most recent actuarial and financial reports (audited and/or unaudited) and the annual reports filed with any Governmental Body with respect to each Employee Plan during the current year and each of the three preceding years; (v) all Contracts with third-party administrators, actuaries, investment managers, consultants, or other independent contractors that relate to each Employee Plan; and (vi) all summary plan descriptions, summaries of material modifications and memoranda, employee handbooks, and other written communications regarding each Employee Plan.
- (c) Except as set forth in Part 3.13(c), all amounts owed by any Acquired Company under the terms of any Employee Plan have been timely paid in full. Except as set forth in Part 3.13(c), each Employee Plan that provides health or welfare benefits is fully insured, and any incurred but not reported claims under each such Employee Plan that is not fully insured have been properly accrued. Each Acquired Company has paid in full all required insurance premiums, subject only to normal retrospective adjustments in the Ordinary Course of Business, with regard to each Employee Plan.
- (d) Each Acquired Company has complied with the applicable continuation requirements for each Employee Plan, including (i) Section 4980B of the Code (as well as its predecessor provision, Section 162(k) of the Code) and Sections 601 through 608, inclusive, of ERISA (“COBRA”) and (ii) any applicable state Legal Requirements mandating welfare benefit continuation coverage for employees.
- (e) The form of each Employee Plan is in compliance with the applicable terms of ERISA, the Code, and any other applicable Legal Requirement, including the Americans with Disabilities Act of 1990, the Family Medical Leave Act of 1993, and the Health Insurance Portability and Accountability Act of 1996, and each Employee Plan has been operated in compliance with such Legal Requirements and the written Employee Plan documents. No Acquired Company and no fiduciary of an Employee Plan has violated the requirements of Section 404 of ERISA. Each required report and description of an Employee Plan (including IRS Form 5500 Annual Reports, Summary Annual Reports and Summary Plan Descriptions, and Summaries of Material Modifications) have been (to the extent required) timely filed with the IRS, the United States Department of Labor, or other Governmental Body and distributed as required, and all notices required by ERISA or the Code or any other Legal

Requirement with respect to each Employee Plan have been appropriately given. No Acquired Company has any unfunded liability with respect to any deferred compensation, retirement, or other Employee Plan.

- (f) Each Employee Plan that is intended to be qualified under Section 401(a) of the Code has received, or is based on a form of plan that has received, a favorable determination letter from the IRS, which is current, taking into account the Tax laws referred to as “GUST.” To the Knowledge of Sellers, no circumstance exists that could result in revocation of any such favorable determination letter. Each trust created under any such Employee Plan has been determined to be exempt from taxation under Section 501(a) of the Code, and, to the Knowledge of Sellers, no circumstance exists that could result in a revocation of such exemption. No Employee Plan is intended to meet the requirements of Code Section 501(c)(9). No circumstance exists that could give rise to a loss of any intended tax consequence or to any Tax under Section 511 of the Code with respect to any Employee Plan.
- (g) There has never been any Proceeding relating to any Employee Plan and, to the Knowledge of Sellers, no such Proceeding is threatened. To the Knowledge of Sellers, no event has occurred or circumstance exists that could give rise to or serve as a basis for the commencement of any such Proceeding. No Acquired Company and no fiduciary of an Employee Plan has engaged in a transaction with respect to any Employee Plan that could subject any Acquired Company or Buyer to a Tax or penalty imposed by either Section 4975 of the Code or Section 502(l) of ERISA or a violation of Section 406 of ERISA. Neither the execution and delivery of this Agreement nor the consummation or performance of any Contemplated Transaction will, directly or indirectly (with or without notice or lapse of time), result in the assessment of a Tax or penalty under Section 4975 of the Code or Section 502(l) of ERISA or result in a violation of Section 406 of ERISA.
- (h) Neither the execution and delivery of this Agreement nor the consummation or performance of any Contemplated Transaction will, directly or indirectly (with or without notice or lapse of time), obligate any Acquired Company to pay any separation, severance, termination, or similar benefit to, or accelerate the time of vesting for, change the time of payment to, or increase the amount of compensation due to, any director, employee, officer, former employee, or former officer of any Acquired Company. There is no Contract providing for payments that could subject any Person to liability under Section 4999 of the Code.
- (i) Other than the continuation coverage requirements of COBRA, no Acquired Company has any obligation or potential liability for benefits to employees, former employees, or their dependents following termination of employment or retirement under any Employee Plan.
- (j) Neither the execution and delivery of this Agreement nor the consummation or performance of any Contemplated Transaction will, directly or indirectly (with or without notice or lapse of time), result in an amendment, modification, or termination of any Employee Plan. No written or oral representation has been made to any employee or former employee of any Acquired Company promising or guaranteeing any employer payment or funding for the continuation of medical, dental, life, or disability coverage for any period of time beyond the end of the current plan year (except to the extent of coverage required under COBRA). No written or oral representation has been made to any employee or former employee of any Acquired Company concerning the employee benefits of Buyer.
- (k) No Acquired Company contributes to, has any obligation to contribute to, or has any liability with respect to, any “employee pension benefit plan” within the meaning of Section 3(2) of ERISA that is a “defined benefit plan” within the meaning of Section 3(35) of ERISA.
- (l) No Acquired Company contributes to, has any obligation to contribute to, or has any liability with respect to, a “multiemployer plan” within the meaning of Section 3(37) of ERISA or Section 414(f) of the Code or a plan that has two or more contributing sponsors, at least two of whom are not under common control within the meaning of Section 413(c) of the Code.

- (m) Except as set forth in Part 3.13(m), no Employee Plan is subject to Section 409A of the Code. Each Employee Plan subject to Section 409A of the Code (“Deferred Compensation Plan”) complies in all material respects with Section 409A of the Code. No Acquired Company has (i) granted to any Person an interest in any Deferred Compensation Plan that is, or upon the lapse of a substantial risk of forfeiture with respect to such interest will be, subject to the Tax imposed by Section 409A(a)(1)(B) or (b)(4)(A) of the Code, or (ii) materially modified any Deferred Compensation Plan in a manner that could cause an interest previously granted under such plan to become subject to the Tax imposed by Section 409A(a)(1)(B) or (b)(4) of the Code.

### 3.14 COMPLIANCE WITH LEGAL REQUIREMENTS; GOVERNMENTAL AUTHORIZATIONS

- (a) Except as set forth in Part 3.14(a):
- (i) each Acquired Company has at all times been in compliance with each Legal Requirement that is or was applicable to it or the conduct of its business or the ownership or use of any of its assets;
  - (ii) no event has occurred or circumstance exists that (with or without notice or lapse of time) (A) could constitute or result in a violation by any Acquired Company of, or a failure on the part of any Acquired Company to comply with, any Legal Requirement, or (B) could give rise to any obligation on the part of any Acquired Company to undertake, or to bear all or any portion of the cost of, any remedial action;
  - (iii) no Acquired Company has received any notice or other communication (whether oral or written) from any Governmental Body or any other Person regarding (A) any actual, alleged, or potential violation of, or failure to comply with, any Legal Requirement, or (B) any actual, alleged, or potential obligation on the part of any Acquired Company to undertake, or to bear all or any portion of the cost of, any remedial action; and
  - (iv) no proposed Legal Requirement could have an adverse consequence on any Acquired Company or could require an expenditure of \$\_\_\_\_\_ or more by any Acquired Company to comply with such Legal Requirement.
- (b) Part 3.14(b) lists each Governmental Authorization that is held by any Acquired Company or that otherwise relates to the business of, or to any assets owned or used by, any Acquired Company. Each Governmental Authorization listed in Part 3.14(b) is valid and in full force and effect. Except as set forth in Part 3.14(b):
- (i) each Acquired Company has at all times been in compliance with each Governmental Authorization;
  - (ii) no event has occurred or circumstance exists that could (with or without notice or lapse of time) (A) constitute or result, directly or indirectly, in a violation of, or a failure on the part of any Acquired Company to comply with, any Governmental Authorization listed in Part 3.14(b), or (B) result, directly or indirectly, in the revocation, suspension, cancellation, termination, or modification of any Governmental Authorization;
  - (iii) no Acquired Company has received any notice or other communication (whether oral or written) from any Governmental Body or any other Person regarding (A) any actual, alleged, or potential violation of, or failure to comply with, any Governmental Authorization, or (B) any actual, proposed, or potential revocation, suspension, cancellation, termination, or modification of any Governmental Authorization; and
  - (iv) all applications required to have been filed for the renewal or reissuance of the Governmental Authorizations listed in Part 3.14(b) have been duly filed on a timely basis with the appropriate Governmental Bodies, and all other filings required to have been made

with respect to such Governmental Authorizations have been duly made on a timely basis with the appropriate Governmental Bodies.

- (c) The Governmental Authorizations listed in Part 3.14(b) constitute all Governmental Authorizations necessary to permit each Acquired Company lawfully to continue to conduct its business in the manner in which it conducts such business and to own and use its assets in the manner in which it owns and uses such assets.

### 3.15 LEGAL PROCEEDINGS; ORDERS

- (a) Except as set forth in Part 3.15(a), since \_\_\_\_\_ there has not been, and there is not pending or, to the Knowledge of Sellers, threatened, any Proceeding:
- (i) by or against any Acquired Company or that otherwise relates to or could affect the business of, or any assets owned or used by, any Acquired Company; or
  - (ii) by or against any Seller that relates to the Shares; or
  - (iii) that challenges, or that could have the effect of preventing, delaying, making illegal, imposing limitations or conditions on, or otherwise interfering with, any Contemplated Transaction.

To the Knowledge of Sellers, no event has occurred or circumstance exists that could give rise to or serve as a basis for the commencement of any such Proceeding. Sellers have delivered to Buyer copies of all pleadings, correspondence, and other documents relating to each pending or threatened Proceeding listed in Part 3.15(a). None of the pending or threatened Proceedings listed in Part 3.15(a), individually or in the aggregate, will or could reasonably be expected to result in an adverse consequence to any Acquired Company or in any Acquired Company incurring Losses of \$ \_\_\_\_\_ or more or being subjected to any Order.

- (b) Except as set forth in Part 3.15(b):
- (i) there is no Order to which any Acquired Company, or any assets owned or used by any Acquired Company, is subject; and
  - (ii) no Seller is subject to any Order that relates to the business of, or any assets owned or used by, any Acquired Company.
- (c) Except as set forth in Part 3.15(c):
- (i) each Acquired Company has at all times been in compliance with each Order to which it, or any assets owned or used by it, is or has been subject;
  - (ii) no event has occurred or circumstance exists that could constitute or result in (with or without notice or lapse of time) a violation of, or failure to comply with, any Order to which (A) any Acquired Company, or any assets owned or used by any Acquired Company, is subject, or (B) any Seller is subject that relates to the business of, or any assets owned or used by, any Acquired Company; and
  - (iii) no Acquired Company or Seller has, at any time received any notice or other communication (whether oral or written) from any Governmental Body or any other Person regarding any actual, alleged, or potential violation of, or failure to comply with, any Order to which (A) any Acquired Company, or any assets owned or used by any Acquired Company, is subject, or (B) any Seller is subject that relates to the business of, or any assets owned or used by, any Acquired Company.



### **3.16 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;
- (c) other than any payments by an Acquired Company of bonuses, salaries, benefits, or other compensation in the Ordinary Course of Business, payment, increase or decrease by any Acquired Company of any bonus, salary, benefit, or other compensation to any holder of an Equity Security, director, manager, officer, employee, or consultant or entry into or amendment of any employment, severance, bonus, retirement, loan, or other Contract with any holder of any Equity Security, director, manager, officer, employee, or consultant;
- (d) adoption of, amendment to, or material increase or decrease in the payments to or benefits under any Employee Plan;
- (e) damage to or destruction or loss of any asset owned or used by any Acquired Company, whether or not covered by insurance;
- (f) entry into, modification, termination, or expiration of, or receipt of notice of termination of, any Applicable Contract listed in Part 3.17(a);
- (g) sale (other than sales of inventory in the Ordinary Course of Business), lease, other disposition of, or imposition of an Encumbrance on any asset owned or used by any Acquired Company;
- (h) release or waiver of any claim or right of any Acquired Company with a value in excess of \$\_\_\_\_\_;
- (i) change in the accounting methods used by any Acquired Company;
- (j) capital expenditure (or series of related capital expenditures) by any Acquired Company either involving more than \$\_\_\_\_\_ or outside the Ordinary Course of Business;
- (k) capital investment in, loan to, or acquisition of the securities or assets of, any Person (or series of related capital investments, loans, and acquisitions) by any Acquired Company either involving more than \$\_\_\_\_\_ or outside the Ordinary Course of Business or acquisition (by merger, exchange, consolidation, acquisition of Equity Securities or assets, or otherwise) of any Person by any Acquired Company;
- (l) note, bond, debenture, or other indebtedness for borrowed money issued, created, incurred, assumed, or guaranteed (including advances on existing credit facilities) involving more than \$\_\_\_\_\_ individually or \$\_\_\_\_\_ in the aggregate by any Acquired Company;
- (m) Contract by any Acquired Company or any Seller to do any of the foregoing; or
- (n) other material occurrence, event, action, failure to act, or transaction outside the Ordinary Course of Business involving any Acquired Company.

### **3.17 CONTRACTS**

- (a) Part 3.17(a) lists, and Sellers have delivered to Buyer a copy of, each Applicable Contract:

- (i) involving the performance of services, delivery of goods or materials, or payments by one or more Acquired Companies of an amount or value in excess of \$ \_\_\_\_\_;
- (ii) involving the performance of services, delivery of goods or materials, or payments to one or more Acquired Companies of an amount or value in excess of \$ \_\_\_\_\_;
- (iii) that was not entered into in the Ordinary Course of Business;
- (iv) affecting the ownership of, leasing of, title to, use of, or any leasehold or other interest in, any real or personal property (except personal property leases and installment and conditional sales agreements having a value per item or aggregate payments of less than \$ \_\_\_\_\_ and with remaining terms of less than one year);
- (v) with respect to Intellectual Property Assets, including Contracts with current or former employees, consultants, or contractors regarding the ownership, use, protection, or nondisclosure of any of the Intellectual Property Assets;
- (vi) with any labor union or other employee representative of a group of employees relating to wages, hours, or other conditions of employment;
- (vii) involving any joint venture, partnership, or limited liability company agreement involving a sharing of profits, losses, costs, Taxes, or other liabilities by any Acquired Company with any other Person;
- (viii) containing covenants that in any way purport to restrict the right or freedom of any Acquired Company or any other Person for the benefit of any Acquired Company to (A) engage in any business activity, (B) engage in any line of business or compete with any Person, or (C) solicit any Person to enter into a business or employment relationship, or enter into such a relationship with any Person;
- (ix) providing for payments to or by any Person based on sales, purchases, or profits, other than direct payments for goods;
- (x) containing an effective power of attorney granted by any Acquired Company;
- (xi) containing or providing for an express undertaking by any Acquired Company to be responsible for consequential, special, or liquidated damages or penalties or to indemnify any other party;
- (xii) for capital expenditures in excess of \$ \_\_\_\_\_;
- (xiii) involving payments to or from an Acquired Company that are not denominated in U.S. dollars;
- (xiv) involving the settlement, release, compromise, or waiver of any material rights, claims, obligations, duties, or liabilities;
- (xv) relating to indebtedness of any Acquired Company in excess of \$ \_\_\_\_\_;
- (xvi) relating to the employment of any employee of any Acquired Company;
- (xvii) relating to a distributor, reseller, OEM, dealer, manufacturer's representative, broker, finder's, sales agency, advertising agency, manufacturing, assembly, or product design and development relationship with an Acquired Company;
- (xviii) under which any Acquired Company has loaned to, or made an investment in, or guaranteed the obligations of, any Person in excess of \$ \_\_\_\_\_;

- (xix) relating to any bond or letter of credit;
  - (xx) containing any obligation of confidentiality or nondisclosure between any Acquired Company and any other Person for the benefit of any Acquired Company or such other Person; and
  - (xxi) constituting an amendment, supplement, or modification (whether oral or written) in respect of any of the foregoing.
- (b) Except as set forth in Part 3.17(b):
- (i) each Applicable Contract listed in Part 3.17(a) is in full force and effect, and is valid and enforceable in accordance with its terms;
  - (ii) the completion or performance of each Applicable Contract for the sale of goods or services by an Acquired Company listed in Part 3.17(a) will not result in less than normal profit margins to such Acquired Company; and
  - (iii) the completion or performance of each Applicable Contract listed in Part 3.17(a) will not result in an adverse consequence to any Acquired Company.
- (c) Except as set forth in Part 3.17(c):
- (i) each Acquired Company has been in compliance with each Applicable Contract since the effective date of such Applicable Contract;
  - (ii) each other Person that has any obligation or liability under any Applicable Contract has been in compliance with such Applicable Contract since the effective date of such Applicable Contract;
  - (iii) no event has occurred or circumstance exists that (with or without notice or lapse of time) could result in a Breach of, or give any Acquired Company or other Person the right to declare a default or exercise any remedy under, or accelerate the maturity or performance of or payment under, or cancel, terminate, or modify, any Applicable Contract;
  - (iv) no event has occurred or circumstance exists under or by virtue of any Applicable Contract that (with or without notice or lapse of time) would cause the creation of any Encumbrance affecting any assets owned or used by any Acquired Company; and
  - (v) no Acquired Company has given to, or received from, any other Person any notice or other communication (whether oral or written) regarding any actual, alleged, or potential Breach of any Applicable Contract.
- (d) There is no renegotiation of, attempt to renegotiate, or outstanding rights to renegotiate any Applicable Contract with any Person, and no Person has made written demand for such renegotiation.
- (e) Each Applicable Contract relating to the sale, design, manufacture, or provision of products or services by an Acquired Company has been entered into in the Ordinary Course of Business and without the commission of any act alone or in concert with any other Person, or any consideration having been paid or promised, in violation of any Legal Requirement.

### **3.18 INSURANCE**

- (a) Sellers have delivered to Buyer:
- (i) copies of all policies of insurance (and correspondence relating to coverage thereunder) to which any Acquired Company is a party, an insured, or a beneficiary, or under which any

Acquired Company, or any director, officer, or manager of any Acquired Company in his or her capacity as such, is or has been covered at any time since \_\_\_\_\_, a list of which is included in Part 3.18(a);

- (ii) copies of all pending applications for policies of insurance; and
  - (iii) any written statement by the auditor of any Acquired Company or any consultant or risk management advisor provided to or in the possession of an Acquired Company with regard to the adequacy of its coverage or its reserves for actual or potential claims.
- (b) Part 3.18(b) sets forth:
- (i) any self-insurance or retention arrangement by or affecting any Acquired Company, including any reserves established thereunder;
  - (ii) any Contract, other than a policy of insurance, for the transfer or sharing of any risk by any Acquired Company; and
  - (iii) all obligations of any Acquired Company to third parties with respect to insurance coverage (including such obligations under leases and service agreements) and identifying the policy under which such coverage is provided.
- (c) Part 3.18(c) sets forth for each Acquired Company for the current policy year and each of the preceding \_\_\_\_ policy years by year:
- (i) a summary of the loss experience under each policy of insurance;
  - (ii) a statement describing each claim under a policy of insurance for an amount in excess of \$ \_\_\_\_\_, which sets forth:
    - (A) the name of the claimant;
    - (B) a description of the policy by insurer, type of insurance, and period of coverage; and
    - (C) the amount and a brief description of the claim; and
  - (iii) a statement describing the loss experience for all claims that were self-insured, including the number and aggregate cost of such claims.
- (d) Except as set forth in Part 3.18(d):
- (i) all policies of insurance to which any Acquired Company is a party, an insured, or a beneficiary or that provide coverage to any Seller in such Seller's capacity as a shareholder of the Company, any Acquired Company, or any director, officer, or manager of an Acquired Company in such capacity:
    - (A) are valid, outstanding, and enforceable;
    - (B) are issued by an insurer that is financially sound and reputable;
    - (C) taken together, provide adequate insurance coverage for the assets and the operations of each Acquired Company [for all risks normally insured against by a Person carrying on the same business or businesses as such Acquired Company] [for all risks to which such Acquired Company is normally exposed];
    - (D) are sufficient for compliance with applicable Legal Requirements and all Applicable Contracts to which any Acquired Company is a party or by which it is bound;

- (E) will continue in full force and effect following the consummation and performance of the Contemplated Transactions; and
  - (F) do not provide for any retrospective premium adjustment or other experience-based liability on the part of any Acquired Company;
- (ii) since \_\_\_\_\_, no Seller or Acquired Company has received:
- (A) any refusal of insurance coverage or any notice that a defense will be afforded with reservation of rights; or
  - (B) any notice of cancellation or any other indication that any policy of insurance is no longer in full force or effect or will not be renewed or that the issuer of any policy of insurance is not willing or able to perform its obligations thereunder;
- (iii) each Acquired Company has paid all premiums due, and has otherwise performed its obligations, under each policy of insurance to which it is a party or that provides coverage to it or to any of its directors, officers, or managers, in their capacity as such;
- (iv) each Acquired Company has given notice to the insurer of all insured claims; and
- (v) no Acquired Company and no Seller has received any notice of any, and to the Knowledge of Sellers there are no, planned or proposed increases in the premiums or any other adverse change in the terms of any policy of insurance covering any Acquired Company, any Seller in such Seller's capacity as a shareholder of the Company, or any officer, director, or manager of an Acquired Company in his or her capacity as such.
- (e) No Acquired Company has provided any information to any insurer in connection with any application for insurance that could result in (i) cancellation of any insurance policy or bond for the benefit of such Acquired Company or (ii) denial of coverage for a risk otherwise covered by any such insurance policy or bond.
- (f) Part 3.18(f) describes the manner in which the Company insures or self-insures with respect to workers' compensation liability. Part 3.18(f) lists each incident or claim that creates or could create a workers' compensation liability of any Acquired Company since \_\_\_\_\_, and the related disposition and accrual with respect to such incident or claim. No Acquired Company has received any notice that, and no Acquired Company has any reason to believe, based on its incident or claim experience that, its workers' compensation insurance premiums or expenses will increase in the next 12 months, or, if self-insured, that it will not be permitted to continue to self-insure without increase in any related bonds, letters of credit, or other form of financial security.

### 3.19 ENVIRONMENTAL MATTERS

Except as set forth in Part 3.19:

- (a) Each Acquired Company has at all times complied with all Environmental Laws.
- (b) No Seller or Acquired Company or any other Person for whose conduct any of them is or could be held responsible has received any Order, notice, or other communication (written or oral) relating to any actual, alleged, or potential violation of or failure to comply with any Environmental Law, or any actual or potential Environmental, Health, and Safety Liability.
- (c) There are no pending or, to the Knowledge of Sellers, threatened claims or Encumbrances resulting from any Environmental, Health, and Safety Liability or arising under or pursuant to any Environmental Law, with respect to or affecting any of the Facilities or any other asset owned or used by any Acquired Company or in which it has or had an interest.

- (d) No Seller or Acquired Company, or any other Person for whose conduct any of them is or could be held responsible, has any Environmental, Health, and Safety Liability, and no event has occurred or circumstance exists that (with or without notice or lapse of time) could result in any Acquired Company or any other Person for whose conduct any of them is or could be held responsible (i) having any Environmental, Health and Safety Liability or (ii) violating any Environmental Law.
- (e) There is no Hazardous Material present on or under the Facilities or, to the Knowledge of Sellers, any geographically, geologically, hydraulically or hydro-geologically adjoining property (“Adjoining Property”). No Seller, Acquired Company, any other Person for whose conduct any of them is or could be held responsible, or, to the Knowledge of Sellers, any other Person, has permitted or conducted, or is aware of, any Hazardous Activity conducted with respect to the Facilities or any other asset in which any Acquired Company has or had an interest.
- (f) None of the Facilities and, to the Knowledge of Sellers, no Adjoining Property, contains any (i) above-ground or underground storage tanks or (ii) landfills, surface impoundments, or disposal areas.
- (g) Sellers have delivered to Buyer copies of all reports, studies, analyses, or tests initiated by or on behalf of or in the possession of Seller or any Acquired Company pertaining to the environmental condition of, Hazardous Material or Hazardous Activity in, on, or under, the Facilities or any Adjoining Property, or concerning compliance by any Acquired Company or any other Person for whose conduct any of them is or could be held responsible, with Environmental Laws.

### 3.20 EMPLOYEES AND CONSULTANTS

- (a) Part 3.20(a) lists the following information for each employee of each Acquired Company, including each employee on leave of absence or layoff status: employer, name, job title, date of hiring, date of commencement of employment, details of leave of absence or layoff, rate of compensation, bonus arrangement, and any change in compensation or bonus since \_\_\_\_\_, vacation, sick time, and personal leave accrued as of \_\_\_\_\_, and service credited for purposes of vesting and eligibility to participate under any Employee Plan.
- (b) Part 3.20(b) lists the following information for every independent contractor, consultant, or sales agent of each Acquired Company: name, responsibilities, date of engagement, and compensation. Each such independent contractor, consultant, or sales agent qualifies as an independent contractor in relation to such Acquired Company for purposes of all applicable Legal Requirements, including those relating to Taxes, insurance, and employee benefits.
- (c) Except as set forth in Part 3.20(c), to the Knowledge of Sellers, (i) no director, officer, or other key employee of any Acquired Company intends to terminate such Person’s employment with such Acquired Company, and (ii) no independent contractor, consultant, or sales agent intends to terminate such Person’s arrangement with any Acquired Company.
- (d) Part 3.20(d) lists the following information for each retired employee or director of any Acquired Company, or their dependents, receiving benefits or scheduled to receive benefits from any Acquired Company in the future: name, pension benefits, pension option election, retiree medical insurance coverage, retiree life insurance coverage, and other benefits.
- (e) Part 3.20(e) states the number of employees terminated or laid off by any Acquired Company since \_\_\_\_\_, and contains a list of the following information for each employee of an Acquired Company who has been terminated or laid off, or whose hours of work have been reduced by more than 50% by an Acquired Company, in the six months prior to the date of this Agreement: (i) the date of such termination, layoff, or reduction in hours; (ii) the reason for such termination, layoff, or reduction in hours; and (iii) the location to which the employee was assigned.
- (f) No Acquired Company has violated the Worker Adjustment and Retraining Notification Act or any similar state or local Legal Requirement.

- (g) To the Knowledge of Sellers, no director, officer, employee, agent, consultant, or independent contractor of any Acquired Company is bound by any Contract or subject to any Order that purports to limit the ability of such director, officer, employee, agent, consultant, or independent contractor (i) to engage in or continue or perform any conduct, activity, duties, or practice relating to the business of any Acquired Company or (ii) to assign to any Acquired Company any rights to any invention, improvement, or discovery. No former or current employee of any Acquired Company is a party to, or is otherwise bound by, any Contract that in any way adversely affected, affects, or could affect the ability of any Acquired Company to continue to conduct its business as conducted.

### 3.21 LABOR DISPUTES; COMPLIANCE

- (a) Each Acquired Company has at all times complied with all Legal Requirements relating to employment practices, terms, and conditions of employment, equal employment opportunity, nondiscrimination, sexual harassment, immigration, wages, hours, benefits, collective bargaining and similar requirements, the payment of Social Security and similar Taxes, and occupational safety and health. No Acquired Company is liable for the payment of any Taxes, fines, penalties, or other amounts, however designated, for failure to comply with any of the foregoing Legal Requirements.
- (b) Except as set forth in Part 3.21(b):
- (i) no Acquired Company is or has been a party to any collective bargaining agreement or other labor contract;
  - (ii) since \_\_\_\_\_, there has not been, there is not pending or existing, and, to the Knowledge of Sellers, there is not threatened, any strike, slowdown, picketing, work stoppage, employee grievance process, organizational activity, or other labor dispute involving any Acquired Company;
  - (iii) to the Knowledge of Sellers, no event has occurred or circumstance exists that could provide the basis for any work stoppage or other labor dispute;
  - (iv) since \_\_\_\_\_, there has not been, and there is not pending or, to the Knowledge of Sellers, threatened against or affecting any Acquired Company any Proceeding relating to the alleged violation of any Legal Requirement pertaining to labor relations or employment matters, including any charge or complaint filed with the National Labor Relations Board or any comparable Governmental Body;
  - (v) no application or petition for an election or for certification of a collective bargaining agent is pending;
  - (vi) since \_\_\_\_\_, there has not been, and there is not pending or, to Sellers' knowledge, threatened, any lockout of any employees by any Acquired Company; and
  - (vii) since \_\_\_\_\_, there has not been, and there is not pending or, to the Knowledge of Sellers, threatened, against any Acquired Company any charge of discrimination or sexual harassment filed with the Equal Employment Opportunity Commission or similar Governmental Body, and no event has occurred or circumstances exist that could provide the basis for any such charge.

### 3.22 INTELLECTUAL PROPERTY ASSETS

- (a) Definition of Intellectual Property Assets

The term "Intellectual Property Assets" means all intellectual property owned, licensed (as licensor or licensee), or used by an Acquired Company, including:

- (i) the name of each Acquired Company, assumed, fictional, business and trade names, registered and unregistered trademarks, service marks, and logos, and trademark and service mark applications (collectively, “Marks”);
  - (ii) patents, patent applications (collectively, “Patents”), and Invention Disclosures;
  - (iii) registered and unregistered copyrights in both published works and unpublished works (collectively, “Copyrights”);
  - (iv) all rights in mask works (as defined in Section 901 of the Copyright Act of 1976);
  - (v) software (including firmware and other software embedded in hardware devices), software code (including source code and executable or object code), subroutines, interfaces, including APIs, and algorithms (collectively “Software”);
  - (vi) all know-how, trade secrets, confidential or proprietary information, customer lists, technical information, data, process technology, plans, drawings, inventions, and discoveries, whether or not patentable (collectively, “Trade Secrets”); and
  - (vii) all rights in Internet websites, Internet domain names, and keywords held by an Acquired Company (collectively “Net Names”).
- (b) **Nature of Intellectual Property Assets**
- (i) The Intellectual Property Assets owned by each Acquired Company, together with the Intellectual Property Assets licensed by that Acquired Company and listed in Part 3.17(a)(v), are all those used in or necessary for the conduct of the business of such Acquired Company as it is being conducted. One or more Acquired Companies is the owner of each of the owned Intellectual Property Assets, free and clear of any Encumbrance, and has the right to use them without payment to any Person. No Acquired Company is bound by, and none of the owned Intellectual Property Assets is subject to, any Contract that in any way limits or restricts the ability of any Acquired Company to use, exploit, assert, or enforce any such Intellectual Property Asset anywhere in the world.
  - (ii) All former and current employees or independent contractors of each Acquired Company have executed written Contracts with that Acquired Company that assign to that Acquired Company all rights to any inventions, improvements, discoveries or information, and works of authorship of such employee or independent contractor relating to the business of that Acquired Company.
  - (iii) No funding, facilities, or personnel of any Governmental Body, any educational institution, or any other Person (other than an Acquired Company) were used, directly or indirectly, to develop or create, in whole or in part, any owned Intellectual Property Asset.
  - (iv) Since \_\_\_\_\_, no Acquired Company has assigned or otherwise transferred any interest in, or agreed to assign or otherwise transfer any interest in, any Intellectual Property Asset to any other Person, except pursuant to nonexclusive licenses in the Ordinary Course of Business.
  - (v) No Acquired Company is or ever was a member or promoter of, or a contributor to, any industry standards body or other organization that could require or obligate any Acquired Company to grant or offer to any other Person any license or right to any Intellectual Property Asset.
- (c) **Patents**
- (i) Part 3.22(c) lists all Patents and invention disclosures relating to inventions conceived or reduced to practice by one or more officers, employees, independent contractors, or other



parties with whom any Acquired Company may have collaborated in connection with developments on behalf of such Acquired Company's business ("Invention Disclosures"), including the name of the Acquired Company that owns or uses such Patent or Invention Disclosure.

- (ii) All Patents are in compliance with all applicable Legal Requirements (including payment of filing, examination, and maintenance fees, and proofs of working or use), are valid and enforceable, and are not subject to any maintenance fees, taxes, or actions falling due within 90 days after the Closing Date. No Invention Disclosure describes any invention that has been publicly disclosed or offered for sale, creating a bar to filing patent applications within 90 days after the Closing.
  - (iii) No Patent has been or is involved in any interference, reissue, reexamination, or opposition Proceeding, and, to the Knowledge of Sellers, no such Proceeding is threatened. To the Knowledge of Sellers, there is no potentially interfering patent or patent application of any Person with respect to any Patent.
  - (iv) No Patent is or has been infringed or has been challenged or, to the Knowledge of Sellers, no such challenge is threatened. None of the products manufactured or sold, or any process or know-how used, by any Acquired Company infringes or is alleged to infringe any patent or other proprietary right of any other Person.
  - (v) All products made, used, or sold under the Patents have been marked with the proper patent notice.
- (d) **Marks**
- (i) Part 3.22(d) lists all Marks, including the name of the Acquired Company that owns or uses such Mark.
  - (ii) Except as set forth in Part 3.22(d), all Marks have been registered with the United States Patent and Trademark Office and foreign countries where any of the Acquired Companies do substantial business related to the goods or services associated with such Marks, are in compliance with all applicable Legal Requirements (including the timely post-registration filing of affidavits of use and incontestability and renewal applications), are valid and enforceable, and are not subject to any maintenance fees, taxes, or actions falling due within 90 days after the Closing Date.
  - (iii) No Mark has been or is involved in any dispute, opposition, invalidation, or cancellation Proceeding and, to the Knowledge of Sellers, no such Proceeding is threatened.
  - (iv) To the Knowledge of Sellers, there is no potentially interfering trademark or trademark application of any Person with respect to any Mark.
  - (v) No Mark is or has been infringed or has been challenged and, to the Knowledge of Sellers, no such challenge is threatened. None of the Marks used by any Acquired Company infringes or is alleged to infringe any trade name, trademark, or service mark of any Person.
  - (vi) All products and materials containing a registered Mark bear the proper federal registration notice where permitted by law.
- (e) **Copyrights**
- (i) Part 3.22(e) lists all registered Copyrights and all material unregistered Copyrights used in connection with the products or services provided by any Acquired Company, including the name of the Acquired Company that owns or uses such Copyright.

- (ii) All registered Copyrights are in compliance with all applicable Legal Requirements, and all the Copyrights listed in Part 3.22(e) are valid and enforceable, and are not subject to any maintenance fees, taxes, or actions falling due within 90 days after the Closing Date.
  - (iii) No Copyright listed in Part 3.22(e) is or has been infringed or has been challenged, and, to the Knowledge of Sellers, no such challenge is threatened. None of the subject matter of any Copyright infringes or is alleged to infringe any copyright of any Person or is a derivative work based upon the work of any other Person.
  - (iv) All works encompassed by the Copyrights listed in Part 3.22(e) have been marked with the proper copyright notice.
- (f) Trade Secrets
- (i) The documentation relating to each Trade Secret is current, accurate, and sufficient in detail and content to identify and explain it and to allow its full and proper use without reliance on the knowledge or memory of any individual.
  - (ii) Each Acquired Company has taken all reasonable precautions to protect the secrecy, confidentiality, and value of each Trade Secret (including the enforcement by each Acquired Company of a policy requiring each employee or contractor to execute proprietary information and confidentiality agreements substantially in such Acquired Company's standard form, and all current and former employees and independent contractors of each Acquired Company have executed such an agreement).
  - (iii) No Trade Secret is part of the public knowledge or literature or has been used, divulged, or appropriated either for the benefit of any Person (other than an Acquired Company) or to the detriment of any Acquired Company. No Trade Secret is subject to any adverse claim or has been challenged, and, to the Knowledge of Sellers, no such challenge is threatened. No Trade Secret infringes or is alleged to infringe any intellectual property right of any Person.
- (g) Software
- All Software owned, licensed, or used by any Acquired Company (other than commonly available, noncustomized third-party software licensed to an Acquired Company for internal use on a nonexclusive basis) is listed in Parts 3.22(c), (e), or (f) or 3.17(a)(v). Each Acquired Company has all rights necessary to use all copies of all Software used by such Acquired Company.
- (h) Net Names
- (i) Part 3.22(h) lists all Net Names, including the name of the Acquired Company that owns or uses such Net Name.
  - (ii) All Net Names have been registered in the name of an Acquired Company and are in compliance with all applicable Legal Requirements.
  - (iii) No Net Name has been or is involved in any dispute, opposition, invalidation, or cancellation Proceeding and, to the Knowledge of Sellers, no such Proceeding is threatened.
  - (iv) To the Knowledge of Sellers, there is no domain name application pending of any other Person which would or would potentially interfere with or infringe any Net Name.
  - (v) No Net Name is or has been infringed or has been challenged and, to the Knowledge of Sellers, no such challenge is threatened. No Net Name infringes or is alleged to infringe the trademark, copyright, or domain name of any other Person.

### **3.23 COMPLIANCE WITH THE FOREIGN CORRUPT PRACTICES ACT AND EXPORT CONTROL AND ANTIBOYCOTT LAWS**

No Acquired Company and no Representative of any Acquired Company in its capacity as such has violated the Foreign Corrupt Practices Act or the anticorruption laws of any jurisdiction where the Company does business. Each Acquired Company has at all times complied with all Legal Requirements relating to export control and trade sanctions or embargoes. No Acquired Company has violated the antiboycott prohibitions contained in 50 U.S.C. Sections 2401 *et seq.* or taken any action that can be penalized under Section 999 of the Code.

### **3.24 RELATIONSHIPS WITH RELATED PERSONS**

No Seller and no Related Person of any Seller or of any Acquired Company has, or since \_\_\_\_\_ has had, any interest in any asset owned or used by any Acquired Company. No Seller and no Related Person of any Seller or of any Acquired Company is, or since \_\_\_\_\_ has been, a Related Party of or the owner (of record or beneficially) of any Equity Security or any other financial or profit interest in, a Person that has (a) had business dealings or a material financial interest in any transaction with any Acquired Company or (b) engaged in competition with any Acquired Company, other than ownership of less than one percent of the outstanding capital stock of a Person that is listed on any national or regional securities exchange. Except as set forth in Part 3.24, no Seller or any Related Person of any Seller or of any Acquired Company is a party to any Applicable Contract with, or has any claim or right against, any Acquired Company.

### **3.25 SECURITIES LAW MATTERS**

- (a) Each Seller is acquiring its Promissory Note for its own account and not with a view to its distribution within the meaning of Section 2(11) of the Securities Act. Each Seller is an “accredited investor” as such term is defined in Rule 501(a) under the Securities Act.
- (b) Each Seller confirms that Buyer has made available to such Seller and its Representatives the opportunity to ask questions of the officers and management employees of Buyer and to acquire such additional information about the business and financial condition of Buyer as such Seller has requested, and all such information has been received.

### **3.26 CUSTOMERS AND SUPPLIERS**

Part 3.26 lists for each of the \_\_\_ years ending \_\_\_\_\_ the names of the respective customers that were, in the aggregate, the \_\_\_\_\_ largest customers in terms of dollar value of products or services, or both, sold by each Acquired Company (“Major Customers”). Part 3.26 also lists for each such year, the names of the respective suppliers that were, in the aggregate, the \_\_\_\_\_ largest suppliers in terms of dollar value of products or services, or both, to each Acquired Company (“Major Suppliers”). Except as set forth in Part 3.26, no Major Customer or Major Supplier has given any Acquired Company notice (written or oral) terminating, canceling, reducing the volume under, or renegotiating the pricing terms or any other material terms of any Applicable Contract or relationship with any Acquired Company or threatening to take any of such actions, and, to the Knowledge of Sellers, no Major Customer or Major Supplier intends to do so.

### **3.27 PRODUCT LIABILITIES AND WARRANTIES**

- (a) Except as set forth in Part 3.27(a), no Acquired Company has incurred any Loss as a result of any defect or other deficiency (whether of design, materials, workmanship, labeling, instructions, or otherwise) with respect to any product designed, manufactured, sold, leased, licensed, or delivered, or any service provided by any Acquired Company, whether such Loss is incurred by reason of any express or implied warranty (including any warranty of merchantability or fitness), any doctrine of common law (tort, contract, or other), any other Legal Requirement, or otherwise. No Governmental Body has alleged that any product designed, manufactured, sold, leased, licensed, or delivered by any Acquired Company is defective or unsafe or fails to meet any product warranty or any standards promulgated by any such Governmental Body. No product designed, manufactured, sold, leased, licensed, or delivered by any Acquired Company has been recalled, and no Acquired

Company has received any notice of recall (written or oral) of any such product from any Governmental Body. No event has occurred or circumstance exists that (with or without notice or lapse of time) could result in any such liability or recall.

- (b) Except as set forth in Part 3.27(b), no Acquired Company has given to any Person any product or service guaranty or warranty, right of return, or other indemnity relating to the products manufactured, sold, leased, licensed, or delivered, or services performed, by any Acquired Company. Each Acquired Company has legally excluded liability for all special, incidental, punitive, and consequential damages to any customer, dealer, or distributor of any Acquired Company or customer of any such dealer or distributor.

### 3.28 BROKERS OR FINDERS

No Seller or Acquired Company, and none of their respective Representatives, has incurred any obligation or liability, contingent or otherwise, for any brokerage or finder's fee or agent's commission or other similar payment in connection with this Agreement or the Contemplated Transactions.

### 3.29 DISCLOSURE

No representation or warranty or other statement made by any Seller in this Agreement, the Disclosure Letter, any supplement to the Disclosure Letter, the certificate delivered pursuant to Section 8.3, or otherwise in connection with the Contemplated Transactions contains any untrue statement of material fact or omits to state a material fact necessary to make the statements in this Agreement or therein, in light of the circumstances in which they were made, not misleading.

## 4. Representations and Warranties of Buyer

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Buyer represents and warrants to Sellers as follows:

### 4.1 ORGANIZATION AND GOOD STANDING

Buyer is a corporation duly organized, validly existing, and in good standing under the laws of the State of \_\_\_\_\_.

### 4.2 ENFORCEABILITY AND AUTHORITY; NO CONFLICT

- (a) The execution, delivery, and performance by Buyer of this Agreement and Buyer's Closing Documents have been duly authorized by all necessary corporate action. This Agreement has been duly executed and delivered by Buyer and constitutes the legal, valid, and binding obligation of Buyer, enforceable against Buyer in accordance with its terms. Upon execution and delivery of Buyer's Closing Documents by Buyer, each of Buyer's Closing Documents will constitute the legal, valid, and binding obligation of Buyer, enforceable against Buyer in accordance with its terms. Buyer has the absolute and unrestricted right, power, and authority to execute and deliver this Agreement and Buyer's Closing Documents and to perform its obligations under this Agreement and Buyer's Closing Documents.
- (b) Except as set forth in Part 4.2, neither the execution and delivery of this Agreement nor the consummation or performance of any Contemplated Transaction will directly or indirectly (with or without notice or lapse of time):
  - (i) contravene, conflict with, or violate (A) any Organizational Document of Buyer, or (B) any resolution adopted by the board of directors or the shareholders of Buyer;
  - (ii) contravene, conflict with, or violate, or give any Governmental Body or other Person the right to challenge any Contemplated Transaction, or to exercise any remedy or obtain any relief under, any Legal Requirement or any Order to which Buyer, or any assets owned or used by Buyer, is subject; or

- (iii) **Breach, or give any Person the right to declare a default or exercise any remedy or to obtain any additional rights under, or to accelerate the maturity or performance of, or payment under, or to cancel, terminate, or modify, any Contract to which Buyer is a party.**
- (c) **Except as set forth in Part 4.2, Buyer is not required to give notice to or obtain Consent from any Person in connection with the execution and delivery of this Agreement or the consummation or performance of any Contemplated Transaction.**

#### **4.3 INVESTMENT INTENT**

**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.**

#### **4.4 CERTAIN PROCEEDINGS**

**There is no Proceeding pending against Buyer that challenges, or could have the effect of preventing, delaying, making illegal, imposing limitations or conditions on, or otherwise interfering with, any Contemplated Transaction. To Buyer's Knowledge, no such Proceeding has been threatened.**

#### **4.5 BROKERS OR FINDERS**

**Neither Buyer nor any of its Representatives has incurred any obligation or liability, contingent or otherwise, for any brokerage or finder's fee, agent's commission, or other similar payment in connection with this Agreement or the Contemplated Transactions.**

## 5. Covenants of Sellers Prior to Closing Date

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Please read this  
section number 5.

### 5.1 ACCESS AND INVESTIGATION

Prior to the Closing Date, and upon reasonable notice from Buyer, each Seller shall, and shall cause each Acquired Company to, (a) afford Buyer and its Representatives and prospective lenders and their Representatives (collectively, “Buyer Group”) full and free access, during regular business hours, to each Acquired Company’s personnel, assets, Contracts, and Records, (b) furnish Buyer Group with copies of all such Contracts and Records as Buyer may reasonably request, (c) furnish Buyer Group with such additional financial, operating, and other relevant data and information as Buyer may reasonably request, and (d) otherwise cooperate and assist, to the extent reasonably requested by Buyer, with Buyer’s investigation of the business, condition (financial or otherwise), assets, results of operations, or prospects of each Acquired Company. In addition, Buyer shall have the right to have the Real Property and the tangible personal property of each Acquired Company inspected by Buyer Group, at Buyer’s sole cost and expense, including the performance of subsurface or other intrusive testing.

### 5.2 OPERATION OF THE BUSINESSES OF THE ACQUIRED COMPANIES

Prior to the Closing Date, each Seller shall, and shall cause each Acquired Company to:

- (a) conduct the business of such Acquired Company only in the Ordinary Course of Business;
- (b) use its best efforts to preserve intact the current business organization of such Acquired Company, keep available the services of the officers, employees, and agents of such Acquired Company, and maintain its relations and goodwill with suppliers, customers, landlords, creditors, employees, agents, and others having business relationships with such Acquired Company;
- (c) confer with Buyer prior to implementing operational decisions of a material nature;
- (d) report to Buyer at such times as Buyer may reasonably request concerning the status of the business, condition (financial or otherwise), assets, results of operations, or prospects of such Acquired Company;
- (e) make no material changes in management personnel of such Acquired Company;

- (f) maintain the assets owned or used by such Acquired Company in a state of repair and condition that complies with Legal Requirements and Contracts and is consistent with the requirements and normal conduct of the business of such Acquired Company;
- (g) keep in full force and effect, without amendment, all material rights relating to the business of such Acquired Company;
- (h) comply with all Legal Requirements applicable to, and all Applicable Contracts of, such Acquired Company;
- (i) continue in full force and effect the insurance coverage under the policies set forth in Part 3.18 or substantially equivalent policies;
- (j) except as required to comply with ERISA or to maintain qualification under Section 401(a) of the Code, not amend, modify, or terminate any Employee Plan and, except as required under the provisions of any Employee Plan, not make any contributions to or with respect to any Employee Plan;
- (k) maintain all records of such Acquired Company consistent with past practice; and
- (l) take no action, or fail to take any reasonable action within its control, as a result of which any of the changes or events listed in Section 3.16 would be likely to occur.

### 5.3 FILINGS AND NOTIFICATIONS; COOPERATION

As promptly as practicable after the date of this Agreement, and in any event within the applicable time period prescribed by Legal Requirements, each Seller shall, and shall cause each Acquired Company and each of their Related Persons to, make all filings and notifications required by Legal Requirements to be made by them in connection with the Contemplated Transactions (including all filings under the HSR Act). Each Seller shall, and shall cause each Acquired Company and each of their Related Persons to, cooperate with Buyer, its Related Persons, and their respective Representatives (a) with respect to all filings and notifications that Buyer or its Related Persons elect to make or shall be required by Legal Requirements to make in connection with the Contemplated Transactions, (b) in identifying and obtaining the Governmental Authorizations required by Buyer to own and operate each Acquired Company from and after the Closing Date, and (c) in obtaining all Consents identified in Exhibit 9.4 (including taking all actions requested by Buyer to cause early termination of any applicable waiting period under the HSR Act).

### 5.4 NOTICE

(a) Prior to the Closing Date, each Seller shall promptly provide notice to Buyer of any Breach of any representation or warranty of Sellers or any fact or circumstance that would or would reasonably be likely to cause or constitute a Breach of any such representation or warranty had that representation or warranty been made as of the time of the occurrence of such fact or circumstance. Should any such Breach relate to the Disclosure Letter, each Seller shall promptly deliver to Buyer a supplement to the Disclosure Letter. No such notice or delivery will be deemed to have cured any Breach of any representation or warranty or affect any right or remedy of Buyer under this Agreement.

(b) Prior to the Closing Date, each Seller shall promptly provide notice to Buyer of any Breach of any covenant of Sellers in this Article 5 or any fact or circumstance that could make the satisfaction of any condition in Article 8 impossible or unlikely and of all corrective actions undertaken, or to be undertaken, by such Seller with respect thereto. No such notice will be deemed to have cured any Breach of any covenant or affect any right or remedy of Buyer under this Agreement.

### 5.5 PAYMENT OF INDEBTEDNESS BY RELATED PERSONS

Each Seller shall cause all indebtedness owed to an Acquired Company by any Seller or any Related Person of any Seller to be paid in full prior to Closing.



## **5.6 EXCLUSIVE DEALING**

Until this Agreement shall have been terminated pursuant to Section 10.1, no Seller shall, and each Seller shall cause each Acquired Company and each of their respective Representatives not to, directly or indirectly, solicit, initiate, encourage, or entertain any inquiries or proposals from, discuss or negotiate with, provide any nonpublic information to, or consider the merits of any inquiries or proposals from any Person (other than Buyer) relating to any business combination transaction involving any Seller or Acquired Company, however structured, including the sale of the business or assets (other than in the Ordinary Course of Business) of any Acquired Company, or any Equity Security of any Acquired Company, or any merger, consolidation, or similar transaction or arrangement. Each Seller shall notify Buyer of any such inquiry or proposal within 24 hours of receipt thereof by any Seller, Acquired Company, or any of their respective Representatives.

## **5.7 BEST EFFORTS**

Each Seller shall use its best efforts to cause the conditions in Article 8 (other than Section 8.11) to be satisfied.

## **5.8 FINANCIAL INFORMATION**

Sellers shall deliver to Buyer within \_\_\_\_\_ days after the end of each month a copy of each Acquired Company's [describe the nature of the financial information required] for such month prepared in a manner and containing information consistent with such Acquired Company's current practices.

## **5.9 FINANCING COOPERATION**

Each Seller shall, and shall cause each Acquired Company, their Related Persons, and their respective Representatives to, cooperate with Buyer with respect to Buyer's arranging of financing of the Contemplated Transactions, as Buyer may reasonably request.

## 6. Covenants of Buyer Prior to Closing Date

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Please read this  
section number 6.

### 6.1 FILINGS AND NOTIFICATIONS; COOPERATION

As promptly as practicable after the date of this Agreement, and in any event within the applicable time period prescribed by Legal Requirements, Buyer shall, and shall cause each of its Related Persons to, make all filings and notifications required by Legal Requirements to be made by them in connection with the Contemplated Transactions (including all filings under the HSR Act). Buyer shall, and shall cause each of its Related Persons to, cooperate with each Seller, each Acquired Company, their Related Persons and their respective Representatives (a) with respect to all filings and notifications that any Seller, any Acquired Company, or their Related Persons shall be required by Legal Requirements to make in connection with the Contemplated Transactions and (b) in obtaining all Material Consents; provided, however, that Buyer shall not be required to dispose of or make any change to its business, expend any material funds, or incur any other material obligation in order to comply with this Section 6.1.

### 6.2 NOTICE

(a) Prior to the Closing Date, Buyer shall promptly provide notice to Sellers of any Breach of any representation or warranty of Buyer or any fact or circumstance that would or would reasonably be likely to cause or constitute a Breach of any such representation or warranty had that representation or warranty been made as of the time of the occurrence of such fact or circumstance. No such notice will be deemed to have cured any Breach of any representation or warranty or affect any right or remedy of Sellers under this Agreement.

(b) Prior to the Closing Date, Buyer shall provide notice to Sellers of any Breach of any covenant of Buyer in this Article 6 or any fact or circumstance that could make the satisfaction of any condition in Article 9 impossible or unlikely and of all corrective actions undertaken, or to be undertaken, by Buyer with respect thereto. No such notice will be deemed to have cured any Breach of any covenant or affect any right or remedy of Sellers under this Agreement.

### 6.3 BEST EFFORTS

Buyer shall use its best efforts to cause the conditions in Article 9 to be satisfied; provided, however, that Buyer shall not be required to dispose of or make any change to its business, expend any material funds, or incur any other material obligation in order to comply with this Section 6.3.

## 7. Post-Closing Covenants

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### 7.1 COOPERATION AND PROCEEDINGS; ACCESS TO RECORDS

- (a) After the Closing, each Seller shall cooperate with Buyer and its counsel and make itself and its Representatives available to Buyer and the Acquired Companies in connection with the institution or defense of any Proceeding, whether existing, threatened, or anticipated, involving or relating to the Contemplated Transactions, Buyer, any Seller, or any Acquired Company, including providing testimony, Records, and other information.
- (b) Each Seller and Buyer will make available to the other any Records in the nonrequesting party's custody or control for the purpose of preparing any financial statement or Tax Return or preparing for or defending any tax-related examination of the requesting party or any Acquired Company by any Governmental Body. The party requesting such Records will reimburse the nonrequesting party for the reasonable out-of-pocket costs and expenses incurred by the nonrequesting party. The nonrequesting party will afford access to such Records during normal business hours, upon reasonable advance notice given by the requesting party, and subject to such reasonable limitations as the nonrequesting party may impose to delete competitively sensitive or privileged information.

### 7.2 NONCOMPETITION, NONSOLICITATION, AND NONDISPARAGEMENT

- (a) For a period of \_\_\_\_\_ years after the Closing Date:
  - (i) No Seller shall, directly or indirectly, engage, invest in, own, manage, operate, finance, control, advise, render services to, guarantee the obligations of, be employed by, be associated with, or in any manner be connected with any Person engaged in any business that any Acquired Company conducts as of the Closing Date [in any geographic area in which any Acquired Company conducts such business]; provided, however, that any Seller may acquire or otherwise own less than \_\_% of the outstanding capital stock of a Person that is listed on any national securities exchange [or which is registered under Section 12(g) of the Exchange Act ].
  - (ii) No Seller shall, directly or indirectly, (A) cause, induce, or attempt to cause or induce any employee, agent, or independent contractor of any Acquired Company to terminate such relationship; (B) in any way interfere with the relationship between any Acquired Company and any of its employees, agents, or independent contractors; or (C) hire, retain, employ, or otherwise engage or attempt to hire, retain, employ, or otherwise engage as an employee,

independent contractor, or otherwise, any employee, agent, or independent contractor of any Acquired Company.

- (iii) No Seller shall, directly or indirectly, (A) solicit, induce, or otherwise cause, or attempt to solicit, induce, or otherwise cause, any customer, supplier, licensor, licensee, or any prospective customer, supplier, licensor, or licensee that has been contacted or targeted for contact by any Acquired Company on or before the Closing Date, or any other person engaged in a business relationship with any Acquired Company, to (1) terminate, curtail, or otherwise modify its relationship with any Acquired Company or (2) engage in business with a competitor of any Acquired Company, or (B) interfere in any way with the relationship between any Acquired Company, and any of its customers, suppliers, licensors, licensees, or any such prospective customers, suppliers, licensors, or licensees, or any other Person engaged in a business relationship with any Acquired Company.
- (b) No Seller shall make any disparaging statement, either orally or in writing, regarding Buyer, any Acquired Company, the business, products, or services thereof, or any of their respective shareholders, directors, officers, employees, or agents.
- (c) For a period from the date of this Agreement until two years after the Closing Date, within 10 days after any Seller entering into an employment, consulting engagement, independent contractor engagement, partnership, or other business association with any Person, each such Seller shall advise Buyer of the identity and address of such Person. Buyer may notify each such Person that such Seller is bound by this Section 7.2 and may furnish each such Person with a copy of applicable provisions of this Agreement.
- (d) Each Seller agrees that this Section 7.2, including the provisions relating to duration, geographical area, and scope, is reasonable and necessary to protect and preserve Buyer's and the Acquired Companies' legitimate business interests and the value of the Shares and the Acquired Companies, and to prevent an unfair advantage from being conferred on any Seller.
- (e) If any provision of this Section 7.2 would be held to be excessively broad as to duration, geographical area, scope, activity, or subject, for any reason, such provision shall be modified, by limiting and reducing it, so as to be enforceable to the extent allowed by applicable Legal Requirements.
- (f) Each Seller acknowledges that any Breach of this Section 7.2 would result in serious and irreparable injury to Buyer, Buyer could not be adequately compensated by monetary damages alone, and Buyer's remedy at law would not be adequate. Therefore, each Seller acknowledges and agrees that, in the event of a Breach by any such Seller, Buyer shall be entitled, in addition to any other remedy at law or in equity to which Buyer may be entitled, to equitable relief against such Seller, including temporary restraining orders and preliminary and permanent injunctions to restrain such Seller from such Breach and to compel compliance with the obligations of such Seller, and each Seller waives the posting of a bond or undertaking as a condition to such relief.

### 7.3 CONFIDENTIALITY

- (a) As used in this Section 7.3, the term "Confidential Information" includes any of the following information held or used by or relating to any Acquired Company:
  - (i) all information that is a Trade Secret;
  - (ii) all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current, and planned research and development, current and planned manufacturing or distribution methods and processes, computer hardware, Software and computer software, database technologies, systems, structures and architectures; and

- (iii) all information concerning the business and affairs of any Acquired Company, including historical and current financial statements, financial projections and budgets, tax returns and accountants' materials, historical, current, and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications, client and customer and prospect lists and files, current and anticipated customer requirements, price lists, market studies, Contracts, the names and backgrounds of key personnel and personnel training techniques and materials, however documented.
- (b) Each Seller acknowledges the confidential and proprietary nature of the Confidential Information and agrees that such Seller shall, except to the extent required for a Seller who is employed by an Acquired Company to fulfill his or her duties in the course of such employment, from and after the Closing: (i) keep the Confidential Information confidential and deliver promptly to Buyer, or immediately destroy at Buyer's option, all embodiments and copies of the Confidential Information that are in such Seller's possession; (ii) not use the Confidential Information for any reason or purpose; and (iii) without limiting the foregoing, not disclose the Confidential Information to any Person, except with Buyer's Consent.
- (c) Section 7.3(b) does not apply to that part of the Confidential Information that becomes generally available to the public other than as a result of a Breach of this Section 7.3 by any Seller. Confidential Information shall not be deemed "generally available to the public" merely because it is included or incorporated in more general information that is publicly available or because it combines features which individually may be publicly available.
- (d) If any Seller becomes compelled in any Proceeding to make any disclosure that is prohibited by this Section 7.3, such Seller shall, to the extent legally permissible, provide Buyer with prompt notice of such compulsion so that Buyer may seek an appropriate protective order or other appropriate remedy or waive compliance with the provisions of this Section 7.3. In the absence of a protective order or other remedy, such Seller may disclose that portion (and only that portion) of the Confidential Information that, based upon the opinion of such Seller's counsel, such Seller is legally compelled to disclose; provided, however, that such Seller shall use its best efforts to obtain written assurance that any Person to whom any Confidential Information is so disclosed shall accord confidential treatment to such Confidential Information.
- (e) Nothing in this Section 7.3 will diminish the protections and benefits under applicable Legal Requirements to which any Trade Secret of any Acquired Company is entitled. If any information that an Acquired Company asserts to be a Trade Secret under applicable Legal Requirements is found by a court of competent jurisdiction not to be such a Trade Secret, such information will nonetheless be considered Confidential Information of that Acquired Company for purposes of this Section 7.3.

#### **7.4 CUSTOMER AND OTHER BUSINESS RELATIONSHIPS**

- (a) After the Closing, each Seller shall cooperate with Buyer and the Acquired Companies in their efforts to continue and maintain for the benefit of Buyer and the Acquired Companies those business relationships of any Acquired Company and of such Seller relating to the business of any Acquired Company, including relationships with any customers, suppliers, licensors, licensees, lessors, employees, regulatory authorities, and others. Each Seller shall refer to Buyer and the Acquired Companies all inquiries and communications received by such Seller relating to any Acquired Company after the Closing.
- (b) After the Closing, no Seller shall take any action, either directly or indirectly, that could diminish the value of any Acquired Company or interfere with the business of any Acquired Company.

## 8. Conditions Precedent to Buyer's Obligation to Close

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Please read this Section number 8.

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):

### 8.1 ACCURACY OF SELLERS' REPRESENTATIONS

- (a) Subject to Section 8.1(b), each of Sellers' representations and warranties in this Agreement will have been accurate in all material respects as of the date of this Agreement and will be accurate in all material respects as of the Closing Date as if then made, without giving effect to any supplement to the Disclosure Letter.
- (b) Each of Sellers' representations and warranties in Sections 3.2(a), 3.3, 3.4, 3.12, and 3.29, and each of the representations and warranties in this Agreement that contains an express materiality qualification, will have been accurate in all respects as of the date of this Agreement and will be accurate in all respects as of the Closing Date as if then made, without giving effect to any supplement to the Disclosure Letter.

### 8.2 SELLERS' PERFORMANCE

The covenants and obligations that each Seller is required to perform or to comply with pursuant to this Agreement at or prior to the Closing will have been duly performed and complied with in all material respects.

### 8.3 BRING DOWN CERTIFICATE

Buyer will have received a certificate executed by each Seller confirming (a) the accuracy of its representations and warranties as of the date of this Agreement and as of the Closing Date in accordance with Section 8.1 and (b) the performance of and compliance with its covenants and obligations to be performed or complied with at or prior to the Closing in accordance with Section 8.2.

#### **8.4 CONSENTS**

Each of the Consents identified in Exhibit 8.4 (the “Material Consents”) will have been obtained in form and substance satisfactory to Buyer and will be in full force and effect. Copies of the Material Consents will have been delivered to Buyer.

#### **8.5 GOVERNMENTAL AUTHORIZATIONS**

Buyer will have received such Governmental Authorizations as are necessary or which it considers desirable to allow Buyer to acquire and own the Shares and for the Acquired Companies and Buyer to own and operate the business of each Acquired Company from and after the Closing.

#### **8.6 ADDITIONAL DOCUMENTS**

Each of the items to be delivered pursuant to Section 2.4(a) and each of the following documents will have been delivered (or tendered subject only to Closing) to Buyer:

- (a) an opinion of \_\_\_\_\_, dated the Closing Date, in the form of Exhibit 8.6(a);
- (b) estoppel certificates executed on behalf of \_\_\_\_\_ and dated as of a date not more than five days prior to the Closing Date, each in the form of Exhibit 8.6(b);
- (c) an executed copy of each of the agreements listed on Exhibit 8.6(c); and
- (d) such other documents as Buyer may reasonably request, each in form and substance satisfactory to Buyer, and, if necessary, executed by each Seller or the relevant Acquired Company, for the purpose of:
  - (i) evidencing the accuracy of any of Sellers’ representations and warranties;
  - (ii) evidencing the performance by each Seller of, or the compliance by each Seller with, any covenant or obligation required to be performed or complied with by such Seller;
  - (iii) evidencing the satisfaction of any condition referred to in this Article 8; or
  - (iv) otherwise facilitating the consummation or performance of any Contemplated Transaction.

#### **8.7 ENVIRONMENTAL REPORT**

Buyer will have received reports and other information, in form, scope, and substance satisfactory to Buyer, regarding environmental matters relating to the Facilities, which reports shall include, for each Facility, a report that conforms to the ASTM Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, E 1527-05.

#### **8.8 NO PROCEEDINGS**

Since the date of this Agreement, there will not have been commenced or threatened against Buyer, or against any Related Person of Buyer, any Proceeding (a) involving any challenge to, or seeking relief (monetary or otherwise) in connection with, any Contemplated Transaction or (b) that could have the effect of preventing, delaying, making illegal, imposing limitations or conditions on, or otherwise interfering with, any Contemplated Transaction.

#### **8.9 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.

#### **8.10 NO CONFLICT**

Neither the consummation nor the performance of any Contemplated Transaction will, directly or indirectly (with or without notice or lapse of time), contravene, conflict with, or violate, or cause Buyer or any Related Person of Buyer to suffer any adverse consequence under, (a) any applicable Legal Requirement or Order or (b) any Legal Requirement or Order that has been published, introduced, or otherwise proposed by or before any Governmental Body.

#### **8.11 FINANCING**

Buyer will have obtained, on terms and conditions satisfactory to it, the financing it deems necessary in order to close the Contemplated Transactions and to fund the working capital requirements of each Acquired Company.

#### **8.12 NO MATERIAL ADVERSE CHANGE**

Since the date of this Agreement, no Acquired Company will have suffered any Material Adverse Change and no event will have occurred, and no circumstance will exist, that could result in a Material Adverse Change.



## 9. Conditions Precedent to Sellers' Obligations to Close

Please read this  
section number 9.

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Sellers' obligations to sell the Shares and to take the other actions required pursuant to this Agreement to be taken by Sellers 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 Sellers' Representative):

### 9.1 ACCURACY OF BUYER'S REPRESENTATIONS

Each of Buyer's representations and warranties in this Agreement will have been accurate in all material respects as of the date of this Agreement and will be accurate in all material respects as of the Closing Date as if then made.

### 9.2 BUYER'S PERFORMANCE

The covenants and obligations that Buyer is required to perform or to comply with pursuant to this Agreement at or prior to the Closing will have been duly performed and complied with in all material respects.

### 9.3 BRING DOWN CERTIFICATE

Sellers' Representative will have received a certificate executed by Buyer confirming (a) the accuracy of its representations and warranties as of the date of this Agreement and as of the Closing Date in accordance with Section 9.1 and (b) the performance of and compliance with its covenants and obligations to be performed or complied with at or prior to the Closing in accordance with Section 9.2.

### 9.4 CONSENTS

Each of the Consents identified in Exhibit 9.4 will have been obtained in form and substance satisfactory to Sellers' Representative and will be in full force and effect. Copies of such Consents will have been delivered to Sellers' Representative.

## **9.5 ADDITIONAL DOCUMENTS**

Each of the items to be delivered pursuant to Section 2.4(b) and each of the following documents will have been delivered (or tendered subject only to Closing) to Sellers' Representative:

- (a) an opinion of \_\_\_\_\_, dated the Closing Date, in the form of Exhibit 9.5(a); and
- (b) such other documents as Sellers' Representative may reasonably request, each in form and substance satisfactory to Sellers' Representative, and, if necessary, executed by Buyer, for the purpose of:
  - (i) evidencing the accuracy of any of Buyer's representations and warranties;
  - (ii) evidencing the performance by Buyer of, or the compliance by Buyer with, any covenant or obligation required to be performed or complied with by Buyer;
  - (iii) evidencing the satisfaction of any condition referred to in this Article 9; or
  - (iv) otherwise facilitating the consummation or performance of any Contemplated Transaction.

## **9.6 NO LEGAL PROHIBITION**

There will not be in effect any Legal Requirement or Order that prohibits the sale of the Shares by Sellers to Buyer or the consummation of any of the other Contemplated Transactions.

# 10. Termination

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## 10.1 TERMINATION EVENTS

Subject to Section 10.2, by notice given prior to or at the Closing, this Agreement may be terminated as follows:

- (a) by mutual consent of Buyer and Sellers;
- (b) by Buyer if a material Breach of any provision of this Agreement has been committed by any Seller;
- (c) by Sellers if a material Breach of any provision of this Agreement has been committed by Buyer;
- (d) by Buyer if satisfaction of any condition in Article 8 by \_\_\_\_\_ or such later date as the parties may agree upon (the “End Date”) becomes impossible (other than through the failure of Buyer to comply with its obligations under this Agreement);
- (e) by Sellers if satisfaction of any condition in Article 9 by the End Date becomes impossible (other than through the failure of any Seller to comply with its obligations under this Agreement);
- (f) by Buyer if the Closing has not occurred on or before the End Date, unless Buyer is in material Breach of this Agreement; or
- (g) by Sellers if the Closing has not occurred on or before the End Date, unless Sellers are in material Breach of this Agreement.

## 10.2 EFFECT OF TERMINATION

Each party’s right of termination under Section 10.1 is in addition to any other right it may have under this Agreement (including under Section 12.16) or otherwise, and the exercise of a party’s right of termination will not constitute an election of remedies. If this Agreement is terminated pursuant to Section 10.1, this Agreement will be of no further force or effect; provided, however, that (i) this Section 10.2 and Article 12 will survive the termination of this Agreement and will remain in full force and effect, and (ii) the termination of this Agreement will not relieve any party from any liability for any Breach of this Agreement occurring prior to termination.

# 11. Indemnification; Payment; Reimbursement; Remedies

Please read this  
section 11.

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## 11.1 SURVIVAL; REMEDIES

- (a) All representations, warranties, covenants, and obligations in this Agreement, the Disclosure Letter, the supplements to the Disclosure Letter, and any certificate, document, or other writing delivered pursuant to this Agreement will survive the Closing and the consummation and performance of the Contemplated Transactions.
- (b) The right to indemnification, payment, reimbursement, or other remedy based upon any such representation, warranty, covenant, or obligation will not be affected by any investigation (including any environmental investigation or assessment) conducted or any Knowledge acquired at any time, whether before or after the execution and delivery of this Agreement or the Closing Date, with respect to the accuracy or inaccuracy of, or compliance with, such representation, warranty, covenant, or obligation.
- (c) The waiver of any condition relating to any representation, warranty, covenant, or obligation will not affect the right to indemnification, payment, reimbursement, or other remedy based upon such representation, warranty, covenant, or obligation.

## 11.2 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).

### 11.3 INDEMNIFICATION, PAYMENT, AND REIMBURSEMENT BY SELLERS— ENVIRONMENTAL MATTERS

In addition to the provisions of Section 11.2, Sellers, jointly and severally, shall indemnify and hold harmless Buyer Indemnified Persons from, and shall pay to Buyer Indemnified Persons the amount of, or reimburse Buyer Indemnified Persons for, any Loss (including costs of any Cleanup) 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 Environmental, Health, and Safety Liability arising out of or relating to:
  - (i) (A) the ownership, operation, or condition at any time on or prior to the Closing Date of the Facilities, or (B) any Hazardous Material that was present on or at the Facilities at any time on or prior to the Closing Date; or
  - (ii) (A) any Hazardous Material, wherever located, that was generated, transported, stored, treated, Released, or otherwise handled by any Acquired Company at any time on or prior to the Closing Date, or (B) any Hazardous Activity that was conducted by any Acquired Company or by any other Person for whose conduct they are or may be held responsible; or
- (b) any bodily injury (including illness, disability, and death, and regardless of when any such bodily injury occurred or manifested itself), property damage (including trespass, nuisance, wrongful eviction, and deprivation of the use of real property), or other damage of or to any Person, including any employee or former employee of any Acquired Company, in any way arising from or allegedly arising from any Hazardous Activity conducted with respect to the Facilities or the operation of the Acquired Companies on or prior to the Closing Date or from Hazardous Material that was:
  - (i) present on or prior to the Closing Date on or at the Facilities (or present on or at any other property, if such Hazardous Material emanated or allegedly emanated from any of the Facilities on or prior to the Closing Date), or
  - (ii) Released by Sellers or any Acquired Company or any other Person for whose conduct they are or may be held responsible, at any time on or prior to the Closing Date.

Section 11.8 notwithstanding, Buyer shall be entitled (at its election) to control any Cleanup, any related Proceeding, and, except as provided in the following sentence, any other Proceeding with respect to which relief may be sought under this Section 11.3. The procedure described in Section 11.8, however, will apply to any Third-Party Claim solely for monetary damages relating to a matter covered by this Section 11.3.

#### 11.4 INDEMNIFICATION, PAYMENT, AND REIMBURSEMENT BY BUYER

Buyer shall indemnify and hold harmless Sellers from, and shall pay to Sellers the amount of, or reimburse Sellers for, any Loss that Sellers 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 Buyer in (i) this Agreement, (ii) the certificate delivered pursuant to Section 9.3, or (iii) in any other certificate, document, or other writing delivered by Buyer pursuant to this Agreement;
- (b) any Breach of any covenant or obligation of Buyer in this Agreement or in any certificate, document, or other writing delivered by Buyer pursuant to this Agreement; or
- (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 Buyer (or any Person acting on its behalf) in connection with any Contemplated Transaction.

#### 11.5 TIME LIMITATIONS

- (a) If the Closing occurs, Sellers shall have liability under Section 11.2(a) with respect to any Breach of a representation or warranty (other than those in Sections 3.1, 3.2, 3.3, 3.11, 3.13, 3.19, 3.24, or 3.28, as to which a claim may be made at any time), only if on or before the date that is three years after the Closing Date, Buyer notifies Sellers' Representative of a claim, specifying the factual basis of the claim in reasonable detail to the extent known by Buyer.
- (b) If the Closing occurs, Buyer shall have liability under Section 11.4(a) with respect to any Breach of a representation or warranty (other than those in Sections 4.1, 4.2, and 4.5, as to which a claim may be made at any time), only if on or before the date that is three years after the Closing Date, Sellers notify Buyer of a claim specifying the factual basis of the claim in reasonable detail to the extent known by Sellers.

#### 11.6 CERTAIN LIMITATIONS ON AMOUNT

- (a) If the Closing occurs, Sellers shall have no liability with respect to claims under Section 11.2(a) until the aggregate of all Losses suffered by all Buyer Indemnified Persons with respect to such claims exceeds \$\_\_\_\_\_; provided, however, that if the aggregate of all such Losses exceeds \$\_\_\_\_\_, Sellers shall be liable for all such Losses. [If the Closing occurs, the aggregate liability of Sellers with respect to Losses for claims under Section 11.2(a) shall not exceed \$\_\_\_\_\_.] However, this Section 11.6(a) will not apply to any Breach of which a Seller has Knowledge at any time at or prior to the date on which such representation and warranty was made or to any Breach of any representation or warranty in Sections 3.1, 3.2, 3.3, 3.11, 3.13, 3.19, 3.24, or 3.28.
- (b) If the Closing occurs, Buyer shall have no liability with respect to claims under Section 11.4(a) until the aggregate of all Losses suffered by all Seller Indemnified Persons with respect to such claims exceeds \$\_\_\_\_\_; provided, however, that if the total of all such Losses exceeds \$\_\_\_\_\_, Buyer shall be liable for all such Losses. [If the Closing occurs, the aggregate liability of Buyer with respect to Losses for claims under Section 11.4(a) shall not exceed \$\_\_\_\_\_.] However, this Section 11.6(b) will not apply to any Breach of which Buyer has Knowledge at any time at or prior to the date on which such representation and warranty was made or to any Breach of any representation or warranty in Section 4.1, 4.2, or 4.5.

#### 11.7 SETOFF RIGHT

Upon notice to Sellers' Representative specifying in reasonable detail the basis therefor, Buyer may set off any amount to which it claims to be entitled from any Seller, including any amounts that may be owed under this Article 11 or otherwise, against amounts otherwise payable under the Promissory Notes or any provision of this Agreement. The exercise of such right of setoff by Buyer in good faith, whether or not

ultimately determined to be justified, will not constitute a default under this Agreement, the Promissory Notes, or any instrument securing any of the Promissory Notes, regardless of whether any Seller disputes such setoff claim, or whether such setoff claim is for a contingent or an unliquidated amount. Neither the exercise of, nor the failure to exercise, such right of setoff or give notice of a claim under the Escrow Agreement will constitute an election of remedies or limit Buyer in any manner in the enforcement of any other remedies that may be available to it.

## **11.8 THIRD-PARTY CLAIMS**

- (a) A Person benefited by Section 11.2, 11.3 (solely to the extent provided in the last sentence of Section 11.3), or 11.4 (an “Indemnified Person”) shall give notice of the assertion of a Third-Party Claim to Sellers’ Representative or Buyer (an “Indemnifying Person”), as the case may be; provided, however, that no failure or delay on the part of an Indemnified Person in notifying an Indemnifying Person will relieve the Indemnifying Person from any obligation under this Article 11 except to the extent that the failure or delay materially prejudices the defense of the Third-Party Claim by the Indemnifying Person.**
  
- (b) (i) Except as provided in Section 11.8(c), the Indemnifying Person may elect to assume the defense of the Third-Party Claim with counsel satisfactory to the Indemnified Person by (A) giving notice to the Indemnified Person of its election to assume the defense of the Third-Party Claim and (B) giving the Indemnified Person evidence acceptable to the Indemnified Person that the Indemnifying Person has adequate financial resources to defend against the Third-Party Claim and fulfill its obligations under this Article 11, in each case no later than 10 days after the Indemnified Person gives notice of the assertion of a Third-Party Claim under Section 11.8(a).**
  - (ii) If the Indemnifying Person elects to assume the defense of a Third-Party Claim:**
    - (A) it shall diligently conduct the defense and, so long as it diligently conducts the defense, shall not be liable to the Indemnified Person for any Indemnified Person’s fees or expenses subsequently incurred in connection with the defense of the Third-Party Claim other than reasonable costs of investigation;**
    - (B) the election will conclusively establish for purposes of this Agreement that the Indemnified Person is entitled to relief under this Agreement for any Loss arising, directly or indirectly, from or in connection with the Third-Party Claim (subject to the provisions of Section 11.6);**
    - (C) no compromise or settlement of such Third-Party Claim may be effected by the Indemnifying Person without the Indemnified Person’s consent unless (I) there is no finding or admission of any violation by the Indemnified Person of any Legal Requirement or any rights of any Person, (II) the Indemnified Person receives a full release of and from any other claims that may be made against the Indemnified Person by the Third Party bringing the Third-Party Claim, and (III) the sole relief provided is monetary damages that are paid in full by the Indemnifying Person; and**
    - (D) the Indemnifying Person shall have no liability with respect to any compromise or settlement of such claims effected without its consent.**
  - (iii) If the Indemnifying Person does not assume the defense of a Third-Party Claim in the manner and within the period provided in Section 11.8(b)(i), or if the Indemnifying Person does not diligently conduct the defense of a Third-Party Claim, the Indemnified Person may conduct the defense of the Third-Party Claim at the expense of the Indemnifying Person and the Indemnifying Person shall be bound by any determination resulting from such Third-Party Claim or any compromise or settlement effected by the Indemnified Person.**

- (c) Notwithstanding the foregoing, if an Indemnified Person determines in good faith that there is a reasonable probability that a Third-Party Claim may adversely affect it or any Related Party other than as a result of monetary damages for which it would be entitled to relief under this Agreement, the Indemnified Person may, by notice to the Indemnifying Person, assume the exclusive right to defend, compromise, or settle such Third-Party Claim.
- (d) Notwithstanding the provisions of Section 12.13, Sellers consent to the nonexclusive jurisdiction of any court in which a Proceeding is brought against any Indemnified Person for purposes of determining any claim that an Indemnified Person may have under this Agreement with respect to such Proceeding or the matters alleged therein.
- (e) With respect to any Third-Party Claim subject to this Article 11:
  - (i) any Indemnified Person and any Indemnifying Person, as the case may be, shall keep the other Person fully informed of the status of such Third-Party Claim and any related Proceeding at all stages thereof where such Person is not represented by its own counsel; and
  - (ii) both the Indemnified Person and the Indemnifying Person, as the case may be, shall render to each other such assistance as they may reasonably require of each other and shall cooperate in good faith with each other in order to ensure the proper and adequate defense of any Third-Party Claim.
- (f) In addition to Section 7.34, with respect to any Third-Party Claim subject to this Article 11, the parties shall cooperate in a manner to preserve in full (to the extent possible) the confidentiality of all Confidential Information and the attorney-client and work-product privileges. In connection therewith, each party agrees that:
  - (i) it shall use its best efforts, in respect of any Third-Party Claim in which it has assumed or participated in the defense, to avoid production of Confidential Information (consistent with applicable law and rules of procedure); and
  - (ii) all communications between any party and counsel responsible for or participating in the defense of any Third-Party Claim shall, to the extent possible, be made so as to preserve any applicable attorney-client or work-product privilege.
- (g) Any claim under this Article 11 for any matter involving a Third-Party Claim shall be indemnified, paid, or reimbursed promptly. If the Indemnified Person shall for any reason assume the defense of a Third-Party Claim, the Indemnifying Person shall reimburse the Indemnified Person on a monthly basis for the costs of investigation and the reasonable fees and expenses of counsel retained by the Indemnified Person. Buyer may elect in its discretion to have payment or reimbursement made from the Escrow Funds pursuant to the terms of the Escrow Agreement, by setoff against amounts otherwise payable under the Promissory Notes or otherwise pursuant to Section 11.7, or in any other manner.

## **11.9 OTHER CLAIMS**

A claim under this Article 11 for any matter not involving a Third-Party Claim may be made by notice to Sellers' Representative or Buyer, as the case may be, and shall be indemnified, paid, or reimbursed promptly after such notice. Buyer may elect in its discretion to have payment or reimbursement made from the Escrow Funds pursuant to the terms of the Escrow Agreement, by setoff against amounts otherwise payable under the Promissory Notes or otherwise pursuant to Section 11.7, or in any other manner.

## **11.10 STRICT LIABILITY OR INDEMNITEE NEGLIGENCE**

**THE PROVISIONS IN THIS ARTICLE 11 SHALL BE ENFORCEABLE REGARDLESS OF WHETHER THE LIABILITY IS BASED UPON PAST, PRESENT, OR FUTURE ACTS, CLAIMS, OR LEGAL REQUIREMENTS (INCLUDING ANY PAST, PRESENT, OR FUTURE ENVIRONMENTAL**



**LAW, OCCUPATIONAL SAFETY AND HEALTH LAW, OR PRODUCTS LIABILITY, SECURITIES, OR OTHER LEGAL REQUIREMENT) AND REGARDLESS OF WHETHER ANY PERSON (INCLUDING THE PERSON FROM WHOM RELIEF IS SOUGHT) ALLEGES OR PROVES THE SOLE, CONCURRENT, CONTRIBUTORY, OR COMPARATIVE NEGLIGENCE OF THE PERSON SEEKING RELIEF, OR THE SOLE OR CONCURRENT STRICT LIABILITY IMPOSED UPON THE PERSON SEEKING RELIEF.**

## 12. Miscellaneous

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### 12.1 EXPENSES

- (a) Except as otherwise provided in this Agreement or the other documents to be delivered pursuant to this Agreement, each party will bear its respective fees and expenses incurred in connection with the preparation, negotiation, execution, and performance of this Agreement and the consummation and performance of the Contemplated Transactions, including all fees and expenses of its Representatives. Buyer will pay one-half and Sellers will pay one-half of (i) the HSR Act filing fee and (ii) the fees and expenses of the Escrow Agent under the Escrow Agreement. No Acquired Company has incurred, and Sellers will cause the Acquired Companies not to incur, any fees or expenses in connection with this Agreement and the Contemplated Transactions; provided, however, that to the extent such fees and expenses have been incurred by an Acquired Company, Sellers will reimburse the Acquired Company for such fees and expenses prior to the Closing. The obligation of each party to bear its own fees and expenses will be subject to any rights of such party arising from a Breach of this Agreement by another party.
- (b) All stamp, documentary, and other transfer Taxes (including any penalties and interest) incurred in connection with this Agreement, whether pertaining to the Shares or any assets and properties of the Acquired Companies, will be paid by Sellers. Each Seller will, at its own expense, file all necessary Tax Returns and other documentation with respect to all such Taxes.

### 12.2 PUBLIC ANNOUNCEMENTS

Notwithstanding any confidentiality obligation to which Buyer is subject, any public announcement, including any press release, communication to employees, customers, suppliers, or others having dealings with the Acquired Companies, or similar publicity with respect to this Agreement or any Contemplated Transaction, will be issued, at such time, in such manner, and containing such content as Buyer determines.

### 12.3 DISCLOSURE LETTER

- (a) In the event of any inconsistency between the statements in this Agreement and those in the Disclosure Letter (other than an exception expressly set forth as such in the Disclosure Letter with respect to a specifically identified representation or warranty), the statements in this Agreement will control.

- (b) Notwithstanding anything to the contrary contained in the Disclosure Letter or any supplement to the Disclosure Letter, the statements in the Disclosure Letter, and those in any supplement thereto, relate only to the provisions in the Sections of this Agreement to which they expressly relate and not to any other provision in this Agreement.

#### 12.4 NATURE OF SELLERS' OBLIGATIONS

The liabilities of Sellers under this Agreement are joint and several. Sellers, jointly and severally, shall cause each Acquired Company to take, or refrain from taking, all actions as may be necessary or appropriate to implement this Agreement.

#### 12.5 SELLERS' REPRESENTATIVE

- (a) Each Seller constitutes and appoints \_\_\_\_\_ as its representative (the "Sellers' Representative") and its true and lawful attorney in fact, with full power and authority in its name and on its behalf:
- (i) to act on such Seller's behalf in the absolute discretion of Sellers' Representative with respect to all matters relating to this Agreement, including execution and delivery of any amendment, supplement, or modification of this Agreement and any waiver of any claim or right arising out of this Agreement; and
  - (ii) in general, to do all things and to perform all acts, including executing and delivering all agreements, certificates, receipts, instructions, and other instruments contemplated by or deemed advisable to effectuate the provisions of this Section 12.5.

This appointment and grant of power and authority is coupled with an interest and is in consideration of the mutual covenants made in this Agreement and is irrevocable and will not be terminated by any act of any Seller or by operation of law, whether by the death or incapacity of any Seller or by the occurrence of any other event. Each Seller hereby consents to the taking of any and all actions and the making of any decisions required or permitted to be taken or made by Sellers' Representative pursuant to this Section 12.5. Each Seller agrees that Sellers' Representative shall have no obligation or liability to any Person for any action taken or omitted by Sellers' Representative in good faith, and each Seller shall indemnify and hold harmless Sellers' Representative from, and shall pay to Sellers' Representative the amount of, or reimburse Sellers' Representative for, any Loss that Sellers' Representative may suffer, sustain, or become subject to as a result of any such action or omission by Sellers' Representative under this Agreement.

- (b) Buyer shall be entitled to rely upon any document or other paper delivered by Sellers' Representative as being authorized by Sellers, and Buyer shall not be liable to any Seller for any action taken or omitted to be taken by Buyer based on such reliance.
- (c) Until all obligations under this Agreement shall have been discharged (including all indemnification obligations under Article 11), Sellers who, immediately prior to the Closing, are entitled in the aggregate to receive more than 50% of the Purchase Price, may, from time to time upon notice to Buyer, appoint a new Sellers' Representative upon the death, incapacity, or resignation of Sellers' Representative. If, after the death, incapacity, or resignation of Sellers' Representative, a successor Sellers' Representative shall not have been appointed by Sellers within 15 Business Days after a request by Buyer, Buyer may appoint a Sellers' Representative from among the Sellers to fill any vacancy so created by notice of such appointment to Sellers.

#### 12.6 FURTHER ASSURANCES

The parties will (a) execute and deliver to each other such other documents and (b) do such other acts and things as a party may reasonably request for the purpose of carrying out the intent of this Agreement, the Contemplated Transactions, and the documents to be delivered pursuant to this Agreement.

## 12.7 ENTIRE AGREEMENT

This Agreement supersedes all prior agreements, whether written or oral, between the parties with respect to its subject matter (including any letter of intent and, upon the Closing, any confidentiality obligation to which Buyer is subject) and constitutes (along with the Disclosure Letter, the exhibits, and the other documents to be delivered pursuant to this Agreement) a complete and exclusive statement of the terms of the agreement between the parties with respect to the subject matter of this Agreement.

## 12.8 MODIFICATION

This Agreement may only be amended, supplemented, or otherwise modified by a writing executed by the Buyer and the Sellers' Representative.

## 12.9 ASSIGNMENTS AND SUCCESSORS

No party may assign any of its rights or delegate any of its obligations under this Agreement without the prior consent of the other parties, except that Buyer may assign any of its rights and delegate any of its obligations under this Agreement to any Subsidiary of Buyer and, after the Closing, to the purchaser of all or a substantial part of the equity securities or business of the Acquired Companies and may collaterally assign its rights under this Agreement to any financial institution providing financing in connection with the Contemplated Transactions. Any purported assignment of rights or delegation of obligations in violation of this Section 12.9 will be void. Subject to the foregoing, this Agreement will apply to, be binding in all respects upon, and inure to the benefit of the heirs, executors, administrators, legal representatives, successors, and permitted assigns of the parties.

## 12.10 NO THIRD-PARTY RIGHTS

Other than the Indemnified Persons and the parties, no Person will have any legal or equitable right, remedy, or claim under or with respect to this Agreement. This Agreement may be amended or terminated, and any provision of this Agreement may be waived, without the consent of any Person who is not a party to the Agreement.

## 12.11 REMEDIES CUMULATIVE

The rights and remedies of the parties are cumulative and not alternative.

## 12.12 GOVERNING LAW

Please read this section 12.12.

All matters relating to or arising out of this Agreement or any Contemplated Transaction and the rights of the parties (whether sounding in contract, tort, or otherwise) will be governed by and construed and interpreted under the laws of the State of \_\_\_\_\_ without regard to conflicts of laws principles that would require the application of any other law.

## 12.13 JURISDICTION; SERVICE OF PROCESS

Please read this section 12.13

Except as otherwise provided in this Agreement, any Proceeding arising out of or relating to this Agreement or any Contemplated Transaction shall be brought in the courts of the State of \_\_\_\_\_, County of \_\_\_\_\_, or, if it has or can acquire jurisdiction, in the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_, and each of the parties irrevocably submits to the exclusive jurisdiction of each such court in any such Proceeding, waives any objection it may now or hereafter have to venue or to convenience of forum, agrees that all claims in respect of such Proceeding shall be heard and determined only in any such court, and agrees not to bring any Proceeding arising out of or relating to this Agreement or any Contemplated Transaction in any other court. Each party acknowledges and agrees that this Section 12.13 constitutes a voluntary and bargained-for agreement between the parties. Process in any Proceeding referred to in the first sentence of this Section or in Section 11.8(d) may be served on any party anywhere in the world, including by sending or delivering a copy of the process to the party to be served at the address and in the manner provided for the giving of notices in Section 12.18. Nothing in this Section 12.13 will affect the right of any party to serve legal process in any other manner permitted by law or at equity.

#### 12.14 WAIVER OF JURY TRIAL

EACH PARTY, KNOWINGLY, VOLUNTARILY, AND INTENTIONALLY, WAIVES ITS RIGHT TO TRIAL BY JURY IN ANY PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY CONTEMPLATED TRANSACTION, WHETHER SOUNDING IN CONTRACT, TORT, OR OTHERWISE.

#### 12.15 ATTORNEYS' FEES

In the event any Proceeding is brought in respect of this Agreement or any of the documents referred to in this Agreement, the prevailing party will be entitled to recover reasonable attorneys' fees and other costs incurred in such Proceeding, in addition to any relief to which such party may be entitled.

#### 12.16 ENFORCEMENT OF AGREEMENT

Sellers acknowledge and agree that Buyer would be irreparably harmed if any of the provisions of this Agreement are not performed in accordance with their specific terms and that any Breach of this Agreement by Sellers could not be adequately compensated in all cases by monetary damages alone. Accordingly, Sellers agree that, in addition to any other right or remedy to which Buyer may be entitled at law or in equity, Buyer shall be entitled to enforce any provision of this Agreement by a decree of specific performance and to obtain temporary, preliminary, and permanent injunctive relief to prevent Breaches or threatened Breaches, without posting any bond or giving any other undertaking.

#### 12.17 NO WAIVER

Neither any failure nor any delay by any party in exercising any right, power, or privilege under this Agreement or any of the documents referred to in this Agreement will operate as a waiver of such right, power, or privilege, and no single or partial exercise of any such right, power, or privilege will preclude any other or further exercise of such right, power, or privilege or the exercise of any other right, power, or privilege. To the maximum extent permitted by applicable Legal Requirements, (a) no claim or right arising out of this Agreement or any of the documents referred to in this Agreement can be waived by a party, in whole or in part, unless made in a writing signed by such party or Sellers' Representative on behalf of a Seller; (b) a waiver given by a party will only be applicable to the specific instance for which it is given; and (c) no notice to or demand on a party will (i) waive or otherwise affect any obligation of that party or (ii) affect the right of the party giving such notice or demand to take further action without notice or demand as provided in this Agreement or the documents referred to in this Agreement.

#### 12.18 NOTICES

All notices and other communications required or permitted by this Agreement shall be in writing and will be effective, and any applicable time period shall commence, when (a) delivered to the following address by hand or by a nationally recognized overnight courier service (costs prepaid) addressed to the following address or (b) transmitted electronically to the following facsimile numbers or e-mail addresses, in each case marked to the attention of the Person (by name or title) designated below (or to such other address, facsimile number, e-mail address, or Person as a party may designate by notice to the other parties):

Sellers:

[Name of Sellers' Representative]

[Street]

[City, state, and zip code]

Fax no.:

E-mail address:

with a copy to:

---

Attention:  
[Street]  
[City, state, and zip code]  
Fax no.:  
E-mail address:

Buyer:

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Attention:  
[Street]  
[City, state, and zip code]  
Fax no.:  
E-mail address:

with a copy to:

---

Attention:  
[Street]  
[City, state, and zip code]  
Fax no.:  
E-mail address:

#### 12.19 SEVERABILITY

If any provision of this Agreement is held invalid or unenforceable by any court of competent jurisdiction, the other provisions of this Agreement will remain in full force and effect. Any provision of this Agreement held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable.

#### 12.20 TIME OF ESSENCE

With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.

#### 12.21 COUNTERPARTS AND ELECTRONIC SIGNATURES

- (a) This Agreement and other documents to be delivered pursuant to this Agreement may be executed in one or more counterparts, each of which will be deemed to be an original copy and all of which, when taken together, will be deemed to constitute one and the same agreement or document, and will be effective when counterparts have been signed by each of the parties and delivered to the other parties.
- (b) A manual signature on this Agreement or other documents to be delivered pursuant to this Agreement, an image of which shall have been transmitted electronically, will constitute an original signature for all purposes. The delivery of copies of this Agreement or other documents to be delivered pursuant to this Agreement, including executed signature pages where required, by electronic transmission will constitute effective delivery of this Agreement or such other document for all purposes.

IN WITNESS WHEREOF, the parties have executed and delivered this Agreement as of the date first written above.

**BUYER:**

**SELLERS:**

\_\_\_\_\_

\_\_\_\_\_

[1]

**By:** \_\_\_\_\_

**Name:** \_\_\_\_\_

**Title:** \_\_\_\_\_

\_\_\_\_\_

[2]

\_\_\_\_\_

[3]

\_\_\_\_\_

[4]

\_\_\_\_\_

[5]

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\_\_\_\_\_

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\_\_\_\_\_

[8]