

# **ASSET PURCHASE AGREEMENT**

by and among

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and

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Dated 

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## EXHIBITS

# ASSET PURCHASE AGREEMENT

This Asset Purchase Agreement (this “**Agreement**”), dated as of \_\_\_\_\_, is entered into by and between \_\_\_\_\_, a \_\_\_\_\_ (“**Buyer**”) and \_\_\_\_\_, a \_\_\_\_\_ (“**Seller**”).

## RECITALS

Seller desires to sell, and Buyer desires to purchase, the Assets (as defined herein) 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

### 1.1 DEFINITIONS

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

“**Accounts Receivable**” – in each case, primarily related to the Business, (a) all trade accounts or notes receivable and other rights to payment from customers of Seller and the full benefit of all security for such accounts or rights to payment, including all trade accounts or notes receivable representing amounts receivable in respect of goods shipped or products sold or services rendered to customers of Seller, (b) all other accounts or notes receivable of Seller and the full benefit of all security for such accounts or notes, and (c) any claim, remedy or other right of Seller related to any of the foregoing.

“**Active Employees**” – as defined in **Section 7.1**.

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

“**Appurtenances**” – all privileges, rights, easements, hereditaments, and appurtenances belonging to or for the benefit of the Land and all rights existing in and to any streets, alleys, passages, and other rights-of-way included thereon or adjacent thereto (before or after vacation thereof), and vaults beneath any such streets.

“**Assets**” – as defined in **Section 2.1**.

“**Assigned Contract**” – as defined in **Section 3.20(c)**.

“**Assignment and Assumption Agreement**” – an assignment of all of the Assets that are intangible personal property in the form of **Exhibit A**, which assignment shall also contain Buyer’s undertaking and assumption of the Assumed Liabilities.

“**Assumed Liabilities**” – as defined in **Section 2.4(a)**.

**“Balance Sheet”** – the unaudited balance sheet of the Business as at \_\_\_\_\_ (including the notes thereto).

**“Bill of Sale”** – a bill of sale for all of the Assets that are Tangible Personal Property, in the form of **Exhibit B**.

**“Business”** – as defined in **Section 2.1**.

**“Bulk Sales Laws”** – the bulk-transfer provisions of the Uniform Commercial Code (or any similar law) in effect in any applicable jurisdiction.

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

**“Buyer’s Closing Documents”** – as defined in **Section 4.2(a)**.

**“CERCLA”** – as defined within the definition of **Environmental, Health and Safety Liabilities**.

**“Cleanup”** – as defined within the definition of **Environmental, Health and Safety Liabilities**.

**“Closing”** – the closing of the purchase and sale provided for in this Agreement.

**“Closing Balance Sheet”** – the balance sheet of the Business as of the Effective Date.

**“Closing Working Capital”** – the Working Capital as of the Effective Date.

**“COBRA”** – the continuation coverage requirements for “group health plans” under Title X of the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended, and as codified in Code Section 4980B and ERISA Sections 601 through 608.

**“Code”** – the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

**“Commercially Reasonable Efforts”** – the efforts that a prudent Person desirous of achieving a result would use in similar circumstances to achieve that result as expeditiously as possible.

**“Competing Business”** – as defined in **Section 3.27**.

**“Confidential Information”** – all confidential or proprietary information regarding the Business or the Assets, including (a) this Agreement, (b) the terms of any contracts and prospective contracts; (c) pricing and bidding strategies; (d) marketing methods; (e) financial forecasts and results; (f) lists of, and information about, suppliers, customers, and prospective suppliers and customers; (g) strategic plans; (h) proprietary computer and systems software; (i) production methods; (j) product and systems technology; (k) analyses, compilations, reports, and studies; and (l) technical, economic, and business information, ideas, concepts, strategies, products, technology, designs, processes, know-how, and other Trade Secrets.

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

**“Contemplated Transactions”** – all of the transactions contemplated by this Agreement.

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

**“Copyrights”** – all registered and unregistered copyrights in both published works and unpublished works and works of authorship.

**“Damages”** – any loss, Liability, obligation, claim, damage, Tax, cost, expense (including costs of investigation and defense and reasonable attorneys’ fees and expenses), or diminution of value, whether or not involving a Third-Party Claim.

**“Disclosure Schedule”** – the Disclosure Schedule delivered by Seller to Buyer concurrently with the execution and delivery of this Agreement.

**“Dollars”** or **“\$”** – United States dollars.

**“Effective Date”** – 12:01 a.m. on \_\_\_\_\_.

**“Employee Plans”** – as defined in **Section 3.16(a)**.

**“Employment Agreements”** – employment agreements in the form of **Exhibit C** executed by [\_\_\_\_\_] and [\_\_\_\_\_].

**“Encumbrance”** – any charge, claim, community or other marital property interest, condition, equitable interest, lien (whether voluntary, involuntary, statutory or other), option, pledge, security interest, mortgage, conditional sale, title retention agreement, right of way, easement, encroachment, servitude, right of first option, right of first refusal, or similar restriction of any kind, including any restriction on use, voting (in the case of any security or equity interest), transfer, receipt of income, or exercise of any other attribute of ownership.

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

**“Environmental, Health and Safety Liabilities”** – any Damages or other responsibility arising from or under any (i) Environmental Law, (ii) Occupational Safety and Health Law, or (iii) common law, including those consisting of or relating to:

- (a) any environmental, health, or safety matter or condition (including on-site or off-site contamination, occupational safety and health, and regulation of any chemical substance or product);

- (b) any fine, penalty, judgment, award, settlement, legal, or administrative proceeding, damage, loss, claim, demand or response, or remedial or inspection cost or expense arising under any Environmental Law or Occupational Safety and Health Law;
- (c) financial responsibility under any Environmental Law, Occupational Safety and Health Law or common law for investigation costs, monitoring costs, cleanup costs, or corrective action, including any cleanup, removal, containment, or other remediation or response actions (“**Cleanup**”) required by any Environmental Law or Occupational Safety and Health Law (whether or not such Cleanup has been required or requested by any Governmental Body or any other Person) and for any natural resource damages or any other compliance, corrective, or remedial measure required under any Environmental Law or Occupational Safety and Health Law; or
- (d) personal injury, bodily injury, property damage, environmental damage, natural resource damage, or harm to humans resulting from or arising out of any matter covered by this definition.

The terms “removal,” “remedial” and “response action” include the types of activities covered by the United States Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (“**CERCLA**”).

**“Environmental Law”** – any Legal Requirement that requires or relates to:

- (a) advising appropriate authorities, employees, or the public of intended, threatened, or actual Releases of Hazardous Materials, violations of discharge limits, or other prohibitions and the commencement of activities, such as resource extraction or construction, that could have an impact on the Environment;
- (b) preventing or reducing to acceptable levels the Release of Hazardous Materials into the Environment;
- (c) reducing the quantities, preventing the Release, or minimizing the hazardous characteristics of wastes or Hazardous Materials that are generated or possessed;
- (d) assuring that products are designed, formulated, packaged, and used so that they do not present risks to human health or the Environment when handled, used, or disposed of;
- (e) protecting resources, species, or ecological amenities;
- (f) reducing to acceptable levels the risks inherent in the handling or transportation of Hazardous Materials or other potentially harmful substances;
- (g) cleaning up Hazardous Materials that have been Released, preventing the Threat of Release, or paying the costs of such clean up or prevention; or
- (h) making responsible parties pay private parties, or groups of them, for damages done to their health or the Environment or permitting self-appointed representatives of the public interest to recover for injuries done to public assets.



**“ERISA”** – the Employee Retirement Income Security Act of 1974, as amended, and the regulations promulgated thereunder.

**“ERISA Affiliate”** – as defined in **Section 3.16(a)**.

**“Escrow Agent”** – \_\_\_\_\_.

**“Escrow Agreement”** – an escrow agreement in the form of **Exhibit D**, executed by Seller, Buyer, and the Escrow Agent.

**“Escrow Amount”** – \$\_\_\_\_\_, which shall be held and disbursed in accordance with the terms of the Escrow Agreement.

**“Estimated Adjustment Amount”** – as defined in **Section 2.9(b)**.

**“Estimated Working Capital”** – as defined in **Section 29(b)**.

**“Exchange Act”** – the Securities Exchange Act of 1934.

**“Excluded Assets”** – as defined in **Section 2.2**.

**“Facilities”** – any real property, leasehold, or other interest in real property currently owned or operated by Seller, including the Tangible Personal Property used or operated by Seller at the Leased Real Property. Notwithstanding the foregoing, for purposes of the definitions of **“Hazardous Activity”** and **“Remedial Action”** and **Sections 3.22** and **8.2**, **“Facilities”** shall mean any real property, leasehold, or other interest in real property currently or formerly owned or operated by Seller, including the Tangible Personal Property used or operated by Seller at the Leased Real Property.

**“Final Adjustment Amount”** – (which may be a positive or negative number) will be equal to the amount determined by subtracting the Closing Working Capital from the Estimated Working Capital.

**“GAAP”** – generally accepted accounting principles for financial reporting in the United States.

**“Governing Documents”** – with respect to any particular entity, (a) if a corporation, the articles or certificate of incorporation and the bylaws or code of regulations; (b) if a general partnership, the partnership agreement and any statement of partnership; (c) if a limited partnership, the limited partnership agreement and the certificate of limited partnership; (d) if a limited liability company, the articles of organization or certificate of formation and operating agreement or limited liability company agreement; (e) if another type of Person, any other charter or similar document adopted or filed in connection with the creation, formation, or organization of the Person; and (f) any amendment or supplement to any of the foregoing.

**“Governmental Authorization”** – any Consent, license, registration, exemption, abatement, accreditation, certification, or permit issued, granted, given, or otherwise made

available by or under the authority of any Governmental Body or pursuant to any Legal Requirement.

**“Governmental Body”** – any:

- (a) nation, state, county, city, town, borough, village, district, or other jurisdiction;
- (b) federal, state, local, municipal, foreign, or other government or political subdivision thereof;
- (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) multinational organization or body;
- (e) body exercising, or entitled or purporting to exercise, any administrative, executive, judicial, legislative, police, regulatory, or taxing authority or power; or
- (f) 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 (including any withdrawal or other use of groundwater) of Hazardous Material in, on, under, about, or from any of the Facilities or any part thereof into the Environment and any other act, business, operation, or thing that increases the danger, or risk of danger, or poses an unreasonable risk of harm, to persons or property on or off the Facilities.

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

**“Hired Active Employees”** – as defined in **Section 7.1**.

**“Improvements”** – all buildings, structures, fixtures, and improvements located on the Land or included in the Assets, including those under construction.

**“Indebtedness”** – of any Person means mean (i) all obligations of such Person for borrowed money and any accrued interest or prepayment premiums related thereto, (ii) all obligations of such Person evidenced by bonds, debentures, notes, or similar instruments, (iii) all obligations of such Person under conditional sale or title retention agreements relating to any property or assets purchased by such Person, (iv) all obligations of such Person issued or assumed as the deferred purchase price for property or services (other than trade accounts

payable), (v) all obligations of such Person as lessee under any capital leases, (vi) all obligations of such Person under any interest rate swap agreements or interest rate hedge agreements, (vii) obligations, whether contingent or liquidated, in respect of letters of credit (including standby and commercial), bankers' and similar instruments, (viii) all negative cash or overdraft balances, (ix) any interest, principal, prepayment penalty, fees, or expenses of such Person relating to any of the foregoing, and (x) any obligation of such Person, contingent or otherwise, guaranteeing or having the economic effect of guaranteeing any of the foregoing.

**"Indemnified Person"** – a Person entitled to indemnity under **Section 8.2** or **8.3**.

**"Indemnifying Person"** – a Person obligated to indemnify an Indemnified Person.

**"Intellectual Property Assets"** – all intellectual property owned or licensed (as licensor or licensee) by Seller that are primarily related to or used in the Business and in which Seller has a right or proprietary interest, including Marks, Patents, Copyrights, all rights in mask works, Trade Secrets, and Net Names.

**"Interim Balance Sheet"** – an unaudited balance sheet of the Business as at \_\_\_\_\_.

**"Inventories"** – all inventories of Seller primarily related to or used in the Business, wherever located, including all finished goods, work in process, raw materials, spare parts, supplies and all other materials to be used or consumed by Seller in the production of finished goods for the Business.

**"IRS"** – the United States Internal Revenue Service and, to the extent relevant, the United States Department of the Treasury.

**"Knowledge"** – an individual will be deemed to have Knowledge of a particular fact or other matter if:

- (a) that individual is actually aware of that fact or matter; or
- (b) a prudent individual would reasonably be expected to discover or otherwise become aware of that fact or matter in the course of conducting a reasonably comprehensive investigation.

A Person (other than an individual) will be deemed to have Knowledge of a particular fact or other matter if any employee (taking into account the employee's area of responsibility), director or officer of that Person has Knowledge of that fact or other matter (as set forth in **(a)** and **(b)** above).

**"Land"** – all parcels and tracts of land in which Seller has an ownership interest and which are used primarily in the Business.

**"Lease Agreement"** – the lease agreement of even date herewith between [Seller] and Buyer regarding the Leased Real Property located at \_\_\_\_\_.

**“Leased Real Property”** – all leasehold or subleasehold estates and other similar rights (other than fee interests and easement rights) to use or occupy any real property held by Seller that are primarily used in or necessary for the conduct of the Business as currently conducted .

**“Legal Requirement”** – any federal, state, local, municipal, foreign, international, multinational, or other constitution, law, ordinance, principle of common law, code, regulation, statute, treaty, or other requirement or rule of law of any Governmental Body.

**“Liability”** – with respect to any Person, any liability, obligation, or commitment of such Person of any kind, character, or description whatsoever, whether known or unknown, absolute or contingent, accrued or unaccrued, asserted or unasserted, disputed or undisputed, liquidated or unliquidated, secured or unsecured, joint or several, due or to become due, matured or unmatured, vested or unvested, executory, determined, determinable, or otherwise, and whether or not the same is required to be accrued on the financial statements of such Person.

**“Marks”** – Seller’s name, all assumed fictional business names, trade names, registered and unregistered trademarks, service marks, trade dress, logos, and applications for any of the foregoing, together with all translations, adaptations, derivatives and combinations thereof, including all goodwill associated therewith, in each case primarily related to or used in the Business.

**“Material Adverse Change”** – (a) a material adverse change in the business, prospects, operations, results of operations, assets, liabilities, or condition (financial or otherwise) of the referenced Person and its Subsidiaries, taken as a whole, (b) a change that results in a material impairment of the referenced Person’s ability to perform its obligations under this Agreement or the other documents and agreements to which it is a party that have been entered into in connection with this Agreement or the transactions contemplated hereby, or (c) a change that materially and negatively impacts the rights and remedies of any of the other parties hereunder or thereunder.

**“Material Adverse Effect”** – any effect that results in, or has a reasonable likelihood of resulting in, a Material Adverse Change.

**“Net Names”** – all rights in Internet web sites and internet domain names used by Seller primarily in connection with the Business, including public and non-public websites, intranet and FTP sites.

**“Occupational Safety and Health Law”** – any Legal Requirement designed to provide 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 provide safe and healthful working conditions.

**“Order”** – any order, writ, injunction, judgment, decree, ruling, assessment, stipulation, determination, arbitration or other award, entered by or with 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 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.

**“Patents”** – all patents, patent applications, industrial designs, inventions and discoveries (whether or not patentable and whether or not reduced to practice) and any reissue, continuation, continuation-in-part, division, revision, extension or reexamination thereof, in each case primarily related to or used in the Business.

**“Permitted Encumbrances”** – as defined in **Section 3.9**.

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

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

**“Purchase Price”** – as defined in **Section 2.3**.

**“Real Property”** – the Land and Improvements and all Appurtenances thereto.

**“Real Property Lease”** – any lease or rental agreement pertaining to the occupancy of any improved space on any Leased Real Property.

**“Record”** – information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

**“Related Person”** –

- (a) 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;
- (b) each Person that serves as a director, officer, partner, manager, executor, or trustee (or in a similar capacity) of such specified Person; and
- (c) any Person with respect to which such specified Person serves as a general partner or a trustee (or in a similar capacity).

For purposes of this definition, **“control”** (including **“controlling,” “controlled by,”** and **“under common control with”**) means the ownership of a majority of the voting securities of a Person or 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 Securities Act.

**“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.

**“Remedial Action”** – all actions, including any capital expenditures, required or voluntarily undertaken (a) to clean up, remove, treat, or in any other way address any Hazardous Material or other substance; (b) to prevent the Release or Threat of Release or to minimize the further Release of any Hazardous Material or other substance so it does not migrate or endanger or threaten to endanger public health or welfare or the Environment; (c) to perform pre-remedial studies and investigations or post-remedial monitoring and care; or (d) to bring all Facilities and the operations conducted thereon into compliance with Environmental Laws and environmental Governmental Authorizations.

**“Representative”** – with respect to a particular Person, any director, officer, manager, general partner, employee, agent, consultant, advisor, accountant, financial advisor, legal counsel, or other representative of that Person.

**“Retained Liabilities”** – as defined in **Section 2.4(b)**.

**“Schedule”** – a part or section of the Disclosure Schedule.

**“SEC”** – the United States Securities and Exchange Commission.

**“Securities Act”** – the Securities Act of 1933, as amended, and the regulations promulgated thereunder.

**“Seller”** – as defined in the first paragraph of this Agreement.

**“Seller Contract”** – any Contract and all rights thereunder primarily related to or used in the Business: (a) under which Seller has or may acquire any rights or benefits; (b) under which Seller has or may become subject to any Liability; or (c) by which Seller or any of the assets owned or used by Seller is or may become bound.

**“Seller’s Closing Documents”** – as defined in **Section 3.2(a)**.

**“Software”** – all computer software and subsequent versions thereof, including source code, object, executable or binary code, objects, comments, screens, user interfaces, report formats, templates, menus, buttons, and icons, and all electronic files, electronic data, data compilations, annotations, databases, materials, manuals, design notes, and other items and documentation related thereto or associated therewith.

**“Subsidiary”** – as to any Person, (a) any corporation more than fifty percent (50%) of whose capital stock of any class or classes having by the terms thereof ordinary voting power to elect a majority of the directors of such corporation (irrespective of whether or not at the time, any class or classes of such corporation shall have or might have voting power by reason of the happening of any contingency) is at the time owned by such Person directly or indirectly through one or more Subsidiaries, (b) any partnership, association, joint venture, or other entity in which such Person directly or indirectly through one or more Subsidiaries has more than a fifty percent

(50%) interest in the total capital, total income, or total ownership interests of such entity at any time, and (c) any partnership in which such Person is a general partner.

**“Tangible Personal Property”** – all machinery, equipment, tools, dies, jigs, molds, patterns, furniture, office equipment, computers, telecommunications and other electronic equipment or hardware, supplies, materials, vehicles, leasehold improvements, trade fixtures, and other items of tangible personal property (other than Inventories) of every kind owned or leased by Seller (wherever located and whether or not carried on Seller’s books) and primarily related to or used in the Business or located at the Leased Real Property, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.

**“Target Working Capital”** – as defined in **Section 2.9(a)**.

**“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, 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 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 likelihood of a Release that may require action in order to prevent or mitigate damage to property, humans, or the Environment that may result from such Release.

**“Trade Secrets”** – all know-how, trade secrets, confidential or proprietary information, customer lists, Software, technical information, data, process technology, plans, drawings, and blue prints, in each case primarily related to or used in the Business.

**“WARN Act”** – the Worker Adjustment and Retraining Notification Act.

**“Working Capital”** – means, as of any date of determination, (A) the sum of the following current assets of the Business included in the Assets: trade receivables, inventory,

prepaid expenses [and other current assets] (but excluding (i) the portion of any prepaid expense of which Buyer will not receive the benefit following the Closing; (ii) any deferred Tax assets; and (iii) receivables from any of Sellers' Related Persons, employees, or stockholders and any of their respective Related Persons), as of such date, as determined in accordance with GAAP and in each case net of any applicable deductions, allowances or reserves), minus (B) the sum of the following current liabilities of the Business included in the Assumed Liabilities: trade accounts payable, deferred revenue, accrued [and other current] liabilities (including, without limitation, payroll, benefits, compensation, and other accrued liabilities (excluding accrued interest)), as of such date, as determined in accordance with GAAP.

## **1.2 USAGE**

(a) Interpretation. In this Agreement, unless a clear contrary intention appears:

- (i) the singular number includes the plural number and vice versa;
- (ii) reference to any Person includes such Person's successors and assigns but, if applicable, only if such successors and assigns are not prohibited by this Agreement, and reference to a Person in a particular capacity excludes such Person in any other capacity or individually;
- (iii) reference to any gender includes each 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 the terms thereof;
- (v) reference to any Legal Requirement means such Legal Requirement as amended, modified, codified, replaced, or reenacted, in whole or in part, and in effect from time to time, including rules and regulations promulgated thereunder, and reference to any section or other provision of any Legal Requirement means that provision of such Legal Requirement from time to time in effect and constituting the substantive amendment, modification, codification, replacement, or reenactment of such section or other provision;
- (vi) "hereunder," "hereof," "hereto," and words of similar import shall be deemed references to this Agreement as a whole and not to any particular Article, Section, or other provision hereof;
- (vii) "including" (and with correlative meaning "include") means including without limiting the generality of any description preceding such term;
- (viii) "or" is used in the inclusive sense of "and/or";
- (ix) with respect to the determination of any period of time, "from" means "from and including" and "to" means "to but excluding"; and



- (x) references to documents, instruments, or agreements shall be deemed to refer as well to all addenda, exhibits, schedules, or amendments thereto.
- (b) Accounting Terms and Determinations. Unless otherwise specified herein, all accounting terms used herein shall be interpreted and all accounting determinations hereunder shall be made in accordance with GAAP.
- (c) Legal Representation of the Parties. 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 shall not apply to any construction or interpretation hereof.

## 2. Sale and Transfer of Assets; Closing

### 2.1 ASSETS TO BE SOLD

Upon the terms and subject to the conditions set forth in this Agreement, at the Closing, but effective as of the Effective Date, Seller shall sell, convey, assign, transfer and deliver to Buyer, and Buyer shall purchase and acquire from Seller, free and clear of any Encumbrances other than Permitted Encumbrances, all of Seller's right, title, and interest in and to all properties, assets, and rights, whether real, personal, or mixed, tangible or intangible, of every kind and description, wherever located, that primarily relate to or are used in the \_\_\_\_\_ business of Seller (the "**Business**"), including the following (but excluding the Excluded Assets):

- (a) all Tangible Personal Property, including those items described in **Schedule 2.1(a)**;
- (b) all Inventories;
- (c) all Accounts Receivable;
- (d) the Seller Contracts listed in **Schedule 3.20(a)**, and all outstanding offers or solicitations made by or to Seller to enter into any Contract as listed on **Schedule 3.20(a)**;
- (e) all Governmental Authorizations and all pending applications therefor or renewals thereof, in each case to the extent transferable to Buyer, including those listed in **Schedule 3.17(b)**;
- (f) all data and Records related to the Business, including client and customer lists and Records, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, correspondence, and other similar documents and Records and, subject to Legal Requirements, certified copies of all personnel Records and other Records described in **Section 2.2(e)**;

- (g) all of the intangible rights and property of Seller, including the Intellectual Property Assets, going concern value, goodwill, telephone, fax and e-mail addresses and listings, and those items listed in **Schedules 3.25(c), (d), (e) and (g)**;
- (h) all insurance and warranty benefits, including rights and proceeds, arising from or relating to the Assets or the Assumed Liabilities;
- (i) all claims, causes of action, choices in action, rights of recovery and rights of set-off or recoupment of any kind of Seller relating to the Assets or the Business, whether choate or inchoate, known or unknown, contingent or noncontingent, including all such claims listed in **Schedule 2.1(i)**;
- (j) all rights of Seller relating to deposits (including security and customer deposits), prepayments, advances, warranties, guarantees, prepaid expenses, claims for refunds and rights to offset in respect thereof related primarily to the Business that are not excluded under **Section 2.2(f)**;
- (k) the right to receive and retain mail, email, and other communications relating to the Business;
- (l) all advertising, marketing, promotional and trade show materials and all other printed or written materials relating to the Business; and
- (m) all goodwill as a going concern associated with the items listed above.

All of the property and assets to be transferred to Buyer hereunder are herein referred to collectively as the “**Assets**.”

Notwithstanding the foregoing, the transfer of the Assets pursuant to this Agreement shall not include the assumption of any Liability related to the Assets unless Buyer expressly assumes that Liability pursuant to **Section 2.4(a)**.

## **2.2 EXCLUDED ASSETS**

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

- (a) all cash and cash equivalents;
- (b) all minute books, stock Records, and corporate seals;
- (c) the shares of capital stock of Seller held in treasury;
- (d) all insurance policies and rights thereunder (except to the extent specified in **Section 2.1(h)** or **(i)**);

- (e) all personnel Records and other Records that Seller is required by law to retain in its possession;
- (f) all claims for refund of Taxes and other governmental charges of whatever nature (other than any refunds that are included as Tax assets in the Working Capital); provided, that if any such refunds relate to Taxes that are prorated at Closing or otherwise paid by Buyer, then only that portion of the refund relating to the Tax period ending prior to the Closing Date or the portion of Taxes paid (and unreimbursed) by Seller, as the case may be, will be an Excluded Asset;
- (g) all Employee Plans or other employee benefit plans of Seller and any rights in connection with and assets of such plans; and
- (h) all rights of Seller under this Agreement, the Bill of Sale, the Assignment and Assumption Agreement, and the Escrow Agreement.

## 2.3 CONSIDERATION

The consideration for the Assets (the “**Purchase Price**”) will be equal to the sum of (a) (i) \_\_\_\_\_ Dollars (\$) \_\_\_\_\_) plus or minus (ii) the Final Adjustment Amount, and (b) Buyer’s assumption of the Assumed Liabilities. In accordance with **Section 2.7(b)**, at the Closing, the Purchase Price shall be delivered by Buyer to Seller as follows: (i) the payment of \$ \_\_\_\_\_, as adjusted pursuant to **Section 2.9** by the Estimated Adjustment Amount, by wire transfer to an account designated by Seller; (ii) the payment of the Escrow Amount by wire transfer to an account established with the Escrow Agent pursuant to the Escrow Agreement; and (iii) the execution and delivery of the Assignment and Assumption Agreement. The Final Adjustment Amount shall be paid in accordance with **Section 2.8**. All wire transfers made under or in connection with this Agreement shall be in immediately available funds.

## 2.4 LIABILITIES

- (a) Assumed Liabilities. On the Closing Date, but effective as of the Effective Date, Buyer shall assume and agree to discharge when due only the following specified Liabilities of Seller related primarily to the Business and the Assets (the “**Assumed Liabilities**”):
  - (i) any trade account payable reflected on the Interim Balance Sheet (other than a trade account payable to any Related Person or stockholder of Seller) that remains unpaid as of the Effective Date;
  - (ii) any trade account payable of the Business (other than a trade account payable to a Related Person or stockholder of Seller) incurred by Seller in the Ordinary Course of Business between the date of the Interim Balance Sheet and the Effective Date that remains unpaid as of the Effective Date;
  - (iii) any Liability to the Business’ customers incurred by Seller in the Ordinary Course of Business for orders outstanding as of the Effective Date reflected on the

Business' books (other than any Liability arising out of or relating to a breach that occurred prior to the Effective Date);

- (iv) any Liability to the Business' customers under written warranty agreements in the forms disclosed in **Schedule 2.4(a)(iv)** given by Seller to customers of the Business in the Ordinary Course of Business prior to the Effective Date (other than any Liability arising out of or relating to a breach that occurred prior to the Effective Date); and
  - (v) any Liability first arising after the Effective Date under the Assigned Contracts (other than any Liability arising out of or relating to a breach that occurred prior to the Effective Date).
- (b) **Retained Liabilities.** The Retained Liabilities shall remain the sole responsibility of and shall be retained, paid, performed, and discharged solely by Seller. "**Retained Liabilities**" shall mean every Liability of Seller other than the Assumed Liabilities, including:
- (i) any Liability arising out of or relating to products of Seller to the extent manufactured or sold prior to the Effective Date other than to the extent assumed under **Section 2.4(a)(iii)**, **(iv)** or **(v)**;
  - (ii) any Liability under any Contract assumed by Buyer pursuant to **Section 2.4(a)** that arises after the Effective Date but that arises out of or relates to any breach that occurred prior to the Effective Date;
  - (iii) any Liability for Taxes, including (A) any Taxes arising as a result of Seller's operation of the Business or ownership of the Assets prior to the Effective Date, (B) any Taxes that will arise as a result of the sale of the Assets pursuant to this Agreement, and (C) any deferred Taxes of any nature;
  - (iv) any Liability under any Contract not assumed by Buyer under **Section 2.4(a)**, including any Liability arising out of or relating to any Indebtedness of Seller;
  - (v) any Environmental, Health and Safety Liabilities arising out of or relating to the operation of the Business or Seller's leasing, ownership or operation of real property;
  - (vi) any Liability arising out of or relating to any of the Employee Plans or relating to payroll, vacation, sick leave, workers' compensation, unemployment benefits, pension benefits, employee stock option or profit-sharing plans, health care plans or benefits, or any other employee plans or benefits of any kind for Seller's current or former directors, officers, employees, or service providers, or the dependents of any thereof, whether prior to, or after the Effective Date, including all Liabilities arising under COBRA for health care continuation coverage required to be provided to employees, former employees and any other COBRA qualified beneficiaries of Seller, including those who incur a COBRA qualifying event in connection with the Contemplated Transactions;

- (vii) any Liability under any employment, severance, retention, or termination agreement with any employee or former employee of Seller or any of its Related Persons;
- (viii) any Liability arising out of or relating to any employee grievance, whether or not the affected employees are hired by Buyer;
- (ix) any Liability to any Related Person or stockholder of Seller;
- (x) any Liability to indemnify, reimburse, or advance amounts to any officer, director, employee, or agent of Seller;
- (xi) any Liability under the WARN Act, including in connection with the Contemplated Transactions;
- (xii) any Liability arising out of or relating to any Proceeding pending as of the Effective Date;
- (xiii) any Liability arising out of or relating to any Proceeding arising out of or relating to any occurrence or event happening prior to the Effective Date;
- (xiv) any Liability arising out of or resulting from Seller's compliance or noncompliance with any Legal Requirement or Order;
- (xv) any of Seller's Liabilities for expenses or fees incident to or arising out of the negotiation, preparation, approval or authorization of this Agreement or the consummation (or preparation for the consummation) of the Contemplated Transaction (including all attorneys' and accountants' fees and expenses and brokerage commissions);
- (xvi) any Liability relating to bonuses or other similar compensation (including "retention bonuses", "transaction bonuses", or "success fees") payable to any of Seller's employees in connection with (A) any period ending on or prior to the Closing Date, or (B) the Contemplated Transactions;
- (xvii) any Liability in respect of any of the Excluded Assets (including under any Contracts related thereto);
- (xviii) any Liability relating to the Active Employees who are offered employment by Buyer in accordance with **Section 7.1(b)** but who do not become Hired Active Employees;
- (xix) any Liability of Seller under this Agreement or any other document executed by Seller in connection with the Contemplated Transactions; and
- (xx) any Liability based upon Seller's acts or omissions occurring after the Effective Date.

For purposes of this **Section 2.4(b)**, “**Seller**” shall be deemed to include all Related Persons of Seller and any predecessors to Seller and any Person with respect to which Seller is a successor-in-interest (including by operation of law, merger, liquidation, consolidation, assignment, assumption or otherwise).

## **2.5 ALLOCATION**

The Purchase Price shall be allocated to the Assets in accordance with **Exhibit E**. After the Closing, the parties shall make consistent use of the allocation, fair market value, and useful lives specified in **Exhibit E** for all Tax purposes and in all filings, declarations, and reports with the IRS in respect thereof, including the reports required to be filed under Section 1060 of the Code. Buyer and Seller shall prepare and deliver to each other IRS Form 8594 within forty-five (45) days after the Closing Balance Sheet is final pursuant to **Section 2.9**, Date to be filed with the IRS. In any Proceeding related to the determination of any Tax, neither Buyer nor Seller shall contend or represent that such allocation is not a correct allocation.

## **2.6 CLOSING**

The purchase and sale provided for in this Agreement (the “**Closing**”) will take place on the date of this Agreement at a mutually agreed-upon place after all of the conditions to the Closing have been satisfied or waived by the parties in writing, or if agreed by the parties, at a later date. The date and time of the Closing will be the Effective Date.

## **2.7 CLOSING OBLIGATIONS**

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

- (a) Seller shall deliver to Buyer:
  - (i) the Bill of Sale executed by Seller;
  - (ii) the Assignment and Assumption Agreement executed by Seller;
  - (iii) assignments of all Intellectual Property Assets and separate assignments of all registered Marks, Patents and Copyrights in the form of **Exhibit F** executed by Seller;
  - (iv) such other deeds, bills of sale, assignments, certificates of title (including endorsed certificates of title for motor vehicles), documents, and other instruments of transfer and conveyance as may reasonably be requested by Buyer, each in form and substance satisfactory to Buyer and its legal counsel and executed by Seller;
  - (v) the Employment Agreements executed by the appropriate employees;
  - (vi) the Escrow Agreement executed by Seller;

- (vii) the Lease Agreement executed by \_\_\_\_\_;
- (viii) payoff letters and releases of all Encumbrances (other than Permitted Encumbrances) on all of the Assets, including, all required UCC-3 termination statements, [mortgage discharges], or other evidences of discharge satisfactory to Buyer;
- (ix) all (x) Third Party Consents that are required in order to prevent a breach of or default under, a termination or modification of, or acceleration of the terms of, any Seller Contract on **Schedule 3.20(b)** and/or **3.20(c)**, and (y) all governmental and regulatory Consents and approvals that are necessary for the consummation of the Contemplated Transactions and Buyer's operation of the Business following the Closing, in each case on terms satisfactory to Buyer, in each case without conditions or modifications adverse to Buyer;
- (x) a certificate executed by Seller as to the accuracy of its representations and warranties as of the date of this Agreement and as of the Closing in accordance with **Section 5.1** and as to its compliance with and performance of its covenants and obligations to be performed or complied with at or before the Closing in accordance with **Section 5.2**;
- (xi) a certification which is, to Buyer's reasonable satisfaction, compliant with Section 1.1445-2(b) of the Treasury Regulations, that Seller is not a "foreign person" within the meaning of the Code;
- (xii) a certificate of the Secretary of Seller certifying, as true, complete and accurate as of the Closing, attached copies of the Governing Documents of Seller, certifying and attaching all requisite resolutions or actions of Seller's board of directors approving the execution and delivery of this Agreement and the consummation of the Contemplated Transactions, and certifying to the incumbency and signatures of the officers of Seller executing this Agreement and any other document relating to the Contemplated Transactions;
- (xiii) Seller's articles of incorporation and all amendments thereto, duly certified as of a recent date by the Secretary of State of the jurisdiction of Seller's incorporation; and
- (xiv) Certificates dated as of a date not earlier than the fifth business day prior to the Closing as to the good standing of Seller and payment of all applicable state Taxes by Seller, issued by the appropriate officials of the State of \_\_\_\_\_ and each jurisdiction in which Seller is licensed or qualified to do business as a foreign corporation as specified in **Schedule 3.1(a)**.

(b) Buyer shall deliver to Seller:

- (i) \_\_\_\_\_ Dollars (\$\_\_\_\_\_), as adjusted pursuant to **Section 2.9(b)** by the Estimated Adjustment Amount, by wire transfer to an account specified by Seller;
- (ii) the Escrow Agreement executed by Buyer and the Escrow Agent, together with the delivery of the Escrow Amount to the Escrow Agent, by wire transfer to an account specified by the Escrow Agent;
- (iii) the Assignment and Assumption Agreement executed by Buyer;
- (iv) the Employment Agreements executed by Buyer;
- (v) the Lease Agreement executed by Buyer;
- (vi) a certificate executed by Buyer as to the accuracy of its representations and warranties as of the date of this Agreement and as of the Closing in accordance with **Section 6.1** and as to its compliance with and performance of its covenants and obligations to be performed or complied with at or before the Closing in accordance with **Section 6.2**;
- (vii) a certificate of the Secretary of Buyer certifying, as true, complete and accurate as of the Closing, attached copies of the Governing Documents of Buyer, certifying and attaching all requisite resolutions or actions of Buyer's board of directors approving the execution and delivery of this Agreement and the consummation of the Contemplated Transactions, and certifying to the incumbency and signatures of the officers of Buyer executing this Agreement and any other document relating to the Contemplated Transactions; and
- (viii) a certificate dated as of a date not earlier than the fifth business day prior to the Closing as to the good standing of Buyer issued by the appropriate officials of the State of \_\_\_\_\_.

## 2.8 ADJUSTMENTS

- (a) **Adjustment Amount.** At the Closing, the Purchase Price shall be adjusted as contemplated by **Section 2.9(b)** by the Estimated Adjustment Amount. Within three (3) business days after the calculation of the Closing Working Capital becomes binding and conclusive on the parties pursuant to **Section 2.9**, Seller or Buyer, as the case may be, shall make the wire transfer payment provided for in this **Section 2.8(a)** as follows. If the Final Adjustment Amount is positive, the Final Adjustment Amount shall be paid by wire transfer by Seller to an account specified by Buyer. If the Final Adjustment Amount is negative, the Final Adjustment Amount shall be paid by wire transfer by Buyer to an account specified by Seller. All payments shall be made together with interest at the rate of \_\_\_\_ percent (\_\_\_\_%) per annum, which interest shall begin accruing on the Closing Date and end on the date that the payment is made.



- (b) Prorations. Any rents, prepaid items, and other applicable items with respect to the Assumed Liabilities shall be prorated as of the Closing Date. Seller shall assign to Buyer all unused deposits with respect to the Assumed Liabilities and shall receive a credit in the amount thereof with respect to the Purchase Price.

## **2.9 ADJUSTMENT PROCEDURE**

- (a) The “**Target Working Capital**” shall be [\$\_\_\_\_\_] [calculated as follows]:
- (b) Not less than three (3) business days prior to the Closing Date, Seller shall deliver to Buyer a written statement setting forth, in good faith and in reasonably specific detail, an estimate of the Working Capital as of the Effective Date (the “**Estimated Working Capital**”), calculated in accordance with **Section 2.9(c)** below. Prior to delivery of the Estimated Working Capital, Seller shall seek and consider Buyer’s input in good faith. If the Estimated Working Capital is (i) less than the Target Working Capital, then the payment due to Seller at Closing under **Section 2.7(b)(i)** shall be decreased one dollar for every dollar by which the Estimated Working Capital is less than the Target Working Capital, or (ii) more than the Target Working Capital, then the payment due to Seller at Closing under **Section 2.7(b)(i)** shall be increased one dollar for every dollar by which the Estimated Working Capital exceeds the Target Working Capital (the amount of such adjustment, the “**Estimated Adjustment Amount**”). Seller shall furnish or cause to be furnished to Buyer such work papers, records, and other documents relating to the calculation of Estimated Working Capital, and access thereto, as may be necessary or reasonably appropriate for evaluation of such calculation.
- (c) Following Closing, Buyer shall prepare the Closing Balance Sheet on the same basis and applying the same accounting principles, policies, and practices that were used in preparing the Balance Sheet. Buyer shall then determine the Closing Working Capital based upon the Closing Balance Sheet and using the same methodology as was used to calculate the Target Working Capital. Buyer shall deliver the Closing Balance Sheet and its determination of the Closing Working Capital to Seller within ninety (90) days following the Closing Date. Buyer shall furnish or cause to be furnished to Seller such work papers, records, and other documents relating to the calculation of Closing Working Capital, and access thereto, as may be necessary or reasonably appropriate for evaluation of such calculation. Seller shall cooperate as reasonably requested by Buyer in connection with Buyer’s preparation of the Closing Balance Sheet.
- (d) If within fifteen (15) days following delivery of the Closing Balance Sheet and the Closing Working Capital calculation, Seller has not given Buyer written notice of its objection as to the Closing Working Capital calculation (which notice shall state the basis of Seller’s objection and shall specify in reasonable detail the nature and dollar amount of any disagreement so asserted), then the Closing Working Capital calculated by Buyer shall be binding and conclusive on the parties and be used in computing the Final Adjustment Amount.

- (e) If Seller duly gives Buyer such notice of objection, Buyer and Seller shall seek in good faith to resolve any differences that they may have with respect to the matters specified in the notice of objection.
- (f) If Seller and Buyer fail to resolve the issues outstanding with respect to the Closing Balance Sheet and the calculation of the Closing Working Capital within fifteen (15) days of Buyer's receipt of Seller's objection notice, Seller and Buyer shall submit the issues remaining in dispute to an independent public accounting firm (the "**Independent Accountants**") satisfactory to Buyer and Seller for resolution of all matters (but only such matters) which remain in dispute and which were properly included in the notice of objection, applying the principles, policies, practices and methodology referred to in **Section 2.9(c)**. If issues are submitted to the Independent Accountants for resolution, (i) Seller and Buyer shall 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 agents and shall be afforded the opportunity to present to the Independent Accountants any material relating to the disputed issues and to discuss the issues with the Independent Accountants; (ii) the determination by the Independent Accountants, as set forth in a notice to be delivered to both Seller and Buyer within thirty (30) days of the submission to the Independent Accountants of the issues remaining in dispute, shall be final, binding, and conclusive on the parties and shall be used in the calculation of the Closing Working Capital; and (iii) Seller and Buyer will each bear fifty percent (50%) of the fees and costs of the Independent Accountants for such determination.

### **3. Representations and Warranties of Seller**

Seller represents and warrants to Buyer as follows, as of the date hereof and as of the Effective Date:

#### **3.1 ORGANIZATION AND GOOD STANDING**

- (a) **Schedule 3.1(a)** contains a complete and accurate list of Seller's jurisdiction of incorporation and any other jurisdictions in which it is qualified to do business as a foreign corporation. Seller is a corporation duly organized, validly existing, and in good standing under the laws of its jurisdiction of incorporation, with full corporate power and authority to conduct its business as it is now being conducted, to own or use the properties and assets that it purports to own or use, and to perform all its obligations under the Seller Contracts. Seller is duly qualified to do business as a foreign corporation and is in good standing under the laws of each state or other jurisdiction where the failure to so qualify could reasonably be expected to have or result in a Material Adverse Effect on Seller or the Business.
- (b) Complete and accurate copies of the Governing Documents of Seller, as currently in effect, have been provided to Buyer.
- (c) Seller has no Subsidiary engaged in the Business.

### 3.2 ENFORCEABILITY; AUTHORITY; NO CONFLICT

- (a) This Agreement constitutes the legal, valid, and binding obligation of Seller, enforceable against it in accordance with its terms, except as the enforcement thereof may be limited by equitable principles or by bankruptcy, insolvency, reorganization, moratorium, or similar laws relating to or limiting creditors' rights generally. Upon the execution and delivery by Seller of the Bill of Sale, Assignment and Assumption Agreement, the Escrow Agreement, and each other agreement to be executed or delivered by Seller at the Closing (collectively, the "**Seller's Closing Documents**"), each of Seller's Closing Documents will constitute the legal, valid and binding obligation of Seller, enforceable against it in accordance with its terms, except as the enforcement thereof may be limited by equitable principles or by bankruptcy, insolvency, reorganization, moratorium, or similar laws relating to or limiting creditors' rights generally. Seller has the absolute and unrestricted right, power, and authority to execute and deliver this Agreement and the Seller's Closing Documents and to perform its obligations under this Agreement and the Seller's Closing Documents, and such action has been duly authorized by all necessary corporate action.
- (b) Except as set forth in **Schedule 3.2(b)**, neither the execution and delivery of this Agreement nor the consummation or performance of any of the Contemplated Transactions does, directly or indirectly (with or without notice or lapse of time):
  - (i) breach (A) any provision of any of the Governing Documents of Seller or (B) any resolution adopted by the board of directors or the shareholders of Seller;
  - (ii) breach or give any Governmental Body or other Person the right to challenge any of the Contemplated Transactions or to exercise any remedy or obtain any relief under any Legal Requirement or any Order to which Seller or any of the Assets may be subject;
  - (iii) contravene conflict with, or result in a violation or breach of any of the terms or requirements of, or give any Governmental Body the right to revoke, withdraw, suspend, cancel, terminate, or modify, any Governmental Authorization that is held by Seller or that otherwise relates to the Assets or to the Business;
  - (iv) cause Buyer to become subject to, or to become liable for the payment of, any Tax;
  - (v) breach any provision of, or give any Person the right to declare a default or exercise any remedy under, or to accelerate the maturity or performance of, or payment under, or to cancel, terminate, or modify, any Seller Contract; or
  - (vi) result in the imposition or creation of any Encumbrance upon or with respect to any of the Assets.
- (c) Except as set forth in **Schedule 3.2(c)**, Seller is not required to give any notice to or obtain any Consent from any Person in connection with the execution and delivery of this

Agreement or the consummation or performance of any of the Contemplated Transactions.

### **3.3 CAPITALIZATION**

The authorized equity securities of Seller consist of (a) \_\_\_\_\_ shares of Class A Common Stock, no par value, of which \_\_\_\_\_ (\_\_\_\_\_) shares are issued and outstanding; (b) \_\_\_\_\_ shares of Class B Common Stock, no par value, of which \_\_\_\_\_ (\_\_\_\_\_) shares are issued and outstanding; and \_\_\_\_\_ shares of Class #1 Preferred Stock, no par value, of which \_\_\_\_\_ (\_\_\_\_\_) shares are issued and outstanding. All outstanding equity securities of Seller are owned of record and beneficially by \_\_\_\_\_, a \_\_\_\_\_.

### **3.4 FINANCIAL STATEMENTS**

Seller has delivered to Buyer: (a) the Balance Sheet, and the related unaudited statements of income, changes in shareholders' equity, and cash flows for the fiscal year then ended; (b) unaudited balance sheets of the Business as at \_\_\_\_\_ in each of the fiscal years \_\_\_\_\_ through \_\_\_\_\_, and the related audited statements of income, changes in shareholders' equity, and cash flows for each of the fiscal years then ended; and (c) the Interim Balance Sheet and the related unaudited statements of income, changes in shareholders' equity, and cash flows for the \_\_\_\_\_ (\_\_\_\_\_) months then ended. Such financial statements fairly present the financial condition and the results of operations, changes in shareholders' equity, and cash flows of the Business as at the respective dates of and for the periods referred to in such financial statements, all in accordance with GAAP (except that in the case of the Interim Balance Sheet and other interim financial statements referred to in (c) above, such statements will not contain footnotes or year-end adjustments). The financial statements referred to in this **Section 3.4** reflect the consistent application of such accounting principles throughout the periods involved, except as disclosed in the notes to such financial statements. The financial statements have been prepared from and are in accordance with the accounting Records of Seller.

### **3.5 BOOKS AND RECORDS**

The books of account and other financial Records of Seller, all of which have been made available to Buyer, are true, complete and correct and represent actual, bona fide transactions and have been maintained in accordance with sound business practices including the maintenance of an adequate system of internal controls.

### **3.6 SUFFICIENCY OF ASSETS**

Except as set forth in **Schedule 3.6**, the Assets (a) constitute all of the assets, tangible and intangible, of any nature whatsoever, that are necessary or useful to the conduct of the Business in the manner presently operated by Seller, and (b) include all of the operating assets of the Business.

### 3.7 OWNED REAL PROPERTY

(a) **Schedule 3.7** contains a true, correct and complete list of all Real Property. The Real Property comprises all of the real property used in connection with the Business.

(b) There are no parties in possession of any parcel of Real Property or any portion thereof other than Seller, and there are no Contracts, concessions or other agreements, written or oral, granting to any party or parties the right of use or occupancy of any of the Real Property or any portion thereof. There are no outstanding options or rights of refusal to purchase or lease the Real Property or any portion thereof or interest therein.

(c) There are no proceedings in eminent domain or other Proceedings pending or, to Seller's Knowledge, threatened, affecting any portion of the Real Property.

(d) Each parcel of Real Property has its own separate and distinct tax identification number that includes no other land than the Real Property. The Improvements on the Real Property are located within the boundary lines of such Real Property, are not encroached upon, are not in violation of any applicable setback requirement or Legal Requirements and do not encroach in any material way on any other property or any easement which may burden the property on which they exist. No portion of any Real Property serves any adjoining property for any purpose which may be inconsistent with the use of such property and no improvements from adjoining property encroaches into the Real Property. The Real Property has complete, unimpeded vehicular and pedestrian access point to at least one public roadway which access is in compliance with all Legal Requirements. The Real Property is supplied with public or quasi-public utilities and other services appropriate for the operation of the Facilities located thereon and is not located within any flood plain or area subject to wetlands regulation or any similar restriction.

(e) With respect to the operation of the Business at the Real Property, Seller has received or applied for all Governmental Authorizations and other approvals which are required to operate the Business and has obtained and maintained same in compliance with all Legal Requirements, all of which are transferrable to Buyer and shall be so transferred at Closing.

### 3.8 LEASED REAL PROPERTY

(a) **Schedule 3.8** contains a true, correct and complete list of all Real Property Leases, including all amendments, modifications and agreements relating thereto. **Schedule 3.8** also sets forth, as of the date hereof, the street address, city, county and state of each parcel of Leased Real Property, together with the identity of the lessor or sublessor of such Leased Real Property.

(b) Seller has a valid and enforceable leasehold interest under the Real Property Lease for each Leased Real Property that it is the lessee (or sublessee) of and Seller has not received any written notice of, and Seller has no Knowledge of, any default or event that, with notice or lapse of time, or both, would constitute a default under any of the Real Property Leases.

(c) The title, dates, parties and all amendments, modifications or agreements affecting the Leased Real Property are specifically listed on **Schedule 3.8**, and there are no other

leases, amendments, modification or agreements relating to the Leased Real Property and no other real property is used by or part of the Seller's operations other than the Leased Real Property and the Real Property.

(d) No other real property is used primarily in the operation of the Business other than the Leased Real Property and the Real Property.

(e) The Contemplated Transactions and the documents to be delivered at or before Closing do not require the Consent of any other party relating to the Leased Real Property, will not result in a breach of or default under any Real Property Lease, will not give rise to any termination or recapture rights, and will not otherwise cause such lease to cease to be legal, valid, binding, enforceable and in full force and effect on identical terms following the Closing.

(f) Seller's possession and quiet enjoyment of the Leased Real Property under the Real Property Leases has not been disturbed, and there are no disputes with respect to Leased Real Property.

(g) Neither Seller nor any other party to any lease is in breach or default under such lease, and no event has occurred or circumstance exists which, with the delivery of notice, the passage of time or both, would constitute such a breach or default, or permit the termination, modification or acceleration of rent under such lease. No security deposit or portion thereof deposited with respect to such lease has been applied which has not been re-deposited in full.

(h) The lessors under the Real Property Leases are not Related Persons of, and otherwise does not have any economic interest in, Seller.

### **3.9 TITLE TO ASSETS; ENCUMBRANCES**

(a) Seller owns good and marketable title to its respective estates in the Real Property, free and clear of any Encumbrances, other than the following:

- (i) liens for Taxes for the current tax year which are not yet due and payable;
- (ii) recorded easements, covenants, and restrictions which do not impair the current use, occupancy, or value, or the marketability of title, of the Real Property; and
- (iii) those described in **Schedule 3.9(a)**.

True and complete copies of (A) all deeds, existing title insurance policies, and surveys of or pertaining to the Real Property and (B) all instruments, agreements, and other documents evidencing, creating, or constituting any Encumbrance on the Real Property have been delivered to Buyer.

(b) Seller owns good and transferable title to all of the Assets free and clear of any Encumbrances other than those described in **Schedule 3.9(b)**. On the Effective Date, all Assets shall be free and clear of all Encumbrances other than those identified as acceptable to Buyer ("**Permitted Encumbrances**").

### **3.10 CONDITION OF FACILITIES**

(a) Use of the Real Property for the various purposes for which it is presently being used is permitted as of right under all applicable zoning legal requirements and is not subject to “permitted nonconforming” use or structure classifications. All Improvements are in compliance with all applicable Legal Requirements, including those pertaining to zoning, building, and the disabled, are in good repair and in good condition, ordinary wear and tear excepted, and are free from latent and patent defects.

(b) Except as disclosed in **Schedule 3.10**, each item of Tangible Personal Property is in good repair and good operating condition, ordinary wear and tear excepted, is suitable for immediate use in the Ordinary Course of Business and is free from latent and patent defects. Except as disclosed in **Schedule 3.10**, no item of Tangible Personal Property is in need of repair or replacement other than as part of routine maintenance in the Ordinary Course of Business. Except as disclosed in **Schedule 3.10**, all Tangible Personal Property used in the Business is in the possession of Seller and located at the Leased Real Property.

### **3.11 ACCOUNTS RECEIVABLE**

All Accounts Receivable, including those that are reflected on the Balance Sheet or the Interim Balance Sheet or on the accounting Records of Seller as of the Effective Date, represent valid obligations arising from sales actually made or services actually performed by Seller in the Ordinary Course of Business of the Business. Such Accounts Receivable are current and collectible net of the respective reserves shown on the Balance Sheet or the Interim Balance Sheet or on the Closing Balance Sheet (which reserves are adequate and calculated consistent with past practice and, in the case of the reserve on the Closing Balance Sheet, will not represent a greater percentage of the Accounts Receivable reflected on the Closing Balance Sheet than the reserve reflected on the Interim Balance Sheet represented of the Accounts Receivable reflected thereon and will not represent a material adverse change in the composition of such Accounts Receivable in terms of aging). Subject to such reserves, each of such Accounts Receivable either has been or will be collected in full, without any setoff, within ninety (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 of the Business, under any Contract with any account debtor of an Account Receivable relating to the amount or validity of such Account Receivable. **Schedule 3.11** contains a true, complete and accurate list of all Accounts Receivable as of the date of the Interim Balance Sheet, which list sets forth the aging of each such Account Receivable.

### **3.12 INVENTORIES**

All items included in the Inventories consist of a quality and quantity usable and, with respect to finished goods, saleable, in the Ordinary Course of Business of the Business except for obsolete items and items of below-standard quality disclosed in **Schedule 3.12**, all of which have been written off or written down to net realizable value in the Balance Sheet or the Interim Balance Sheet or on the accounting Records of Seller as of the Effective Date, as the case may be. Except as disclosed in **Schedule 3.12**, Seller is not in possession of any inventory not owned by Seller, including goods already sold. All of the Inventories have been valued at the lower of

cost or [market] [net realizable] value on a [last in, first out] [first in, first out] basis. Inventories now on hand that were purchased after the date of the Balance Sheet or the Interim Balance Sheet were purchased in the Ordinary Course of Business of the Business at a cost not exceeding market prices prevailing at the time of purchase. The quantities of each item of Inventories (whether raw materials, work-in-process, or finished goods) are not excessive but are reasonable in the present circumstances of the Business. Work-in-process Inventories are valued according to GAAP.

### **3.13 NO UNDISCLOSED LIABILITIES**

Except as set forth in **Schedule 3.13**, Seller has no Liability except for (a) Liabilities reflected or reserved against in the Balance Sheet or the Interim Balance Sheet, and (b) current liabilities incurred in the Ordinary Course of Business of the Business since the date of the Interim Balance Sheet.

### **3.14 TAXES**

- (a) Tax Returns Filed and Taxes Paid. Seller has filed or caused to be filed on a timely basis all Tax Returns and all reports with respect to Taxes that are or were required to be filed pursuant to applicable Legal Requirements for the Business. All such Tax Returns and reports filed by Seller are true, correct, and complete. Seller has paid, or made provision for the payment of, all Taxes that have or may have become due for all periods covered by the Tax Returns or otherwise, or pursuant to any assessment received by Seller, except such Taxes, if any, as are listed in **Schedule 3.14(a)** and are being contested in good faith and as to which adequate reserves (determined in accordance with GAAP) have been provided in the Balance Sheet and the Interim Balance Sheet. Except as provided in **Schedule 3.14(a)**, Seller currently is not the beneficiary of any extension of time within which to file any Tax Return. No claim has ever been made or is expected to be made by any Governmental Body in a jurisdiction where Seller does not file Tax Returns that it is or may be subject to taxation by that jurisdiction. There are no Encumbrances on any of the Assets that arose in connection with any failure (or alleged failure) to pay any Tax, and Seller has no Knowledge of any basis for assertion of any claims attributable to Taxes which, if adversely determined, would result in any such Encumbrance.
- (b) Delivery of Tax Returns and Information Regarding Audits and Potential Audits. Seller has delivered or made available to Buyer copies of, and **Schedule 3.14(b)** contains a true, complete and accurate list of, all Tax Returns filed since \_\_\_\_\_. **Schedule 3.14(b)** contains a true, complete and accurate list of all Tax Returns of Seller with respect to the Business that have been audited or are currently under audit and accurately describe any deficiencies or other amounts that were paid or are currently being contested. To the Knowledge of Seller, no undisclosed deficiencies are expected to be asserted with respect to any such audit. All deficiencies proposed as a result of such audits have been paid, reserved against, settled, or are being contested in good faith by appropriate proceedings as described in **Schedule 3.14(b)**. Seller has delivered, or made available to Buyer, copies of any examination reports, statements, or deficiencies or similar items with respect to such audits. Except as provided in **Schedule 3.14(b)**, Seller has no Knowledge that any Governmental Body is likely to assess any additional taxes for any period for



which Tax Returns have been filed. There is no dispute or claim concerning any Taxes of Seller either (i) claimed or raised by any Governmental Body in writing or (ii) as to which Seller has Knowledge. **Schedule 3.14(b)** contains a list of all Tax Returns for which the applicable statute of limitations has not run. Except as described in **Schedule 3.14(b)**, Seller has not 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 Seller or for which Seller may be liable.

- (c) **Proper Accrual.** The charges, accruals, and reserves with respect to Taxes on the Records of Seller are adequate (determined in accordance with GAAP) and are at least equal to Seller's liability for Taxes. There exists no proposed tax assessment or deficiency against Seller except as disclosed in the Interim Balance Sheet or in **Schedule 3.14(c)**.
- (d) **Specific Potential Tax Liabilities and Tax Situations.**
  - (i) **Withholding.** All Taxes that Seller is or was required by Legal Requirements to withhold, deduct, or collect have been duly withheld, deducted, and collected and, to the extent required, have been paid to the proper Governmental Body or other Person.
  - (ii) **Tax Sharing or Similar Agreements.** There is no tax sharing agreement, tax allocation agreement, tax indemnity obligation, or similar written or unwritten agreement, arrangement, understanding, or practice with respect to Taxes (including any advance pricing agreement, closing agreement, or other arrangement relating to Taxes) that will require any payment by Seller.
  - (iii) **Consolidated Group.** Seller (A) has not been a member of an affiliated group within the meaning of Code Section 1504(a) (or any similar group defined under a similar provision of state, local, or foreign law) and (B) has no liability for Taxes of any person (other than Seller and its Subsidiaries) under Treas. Reg. Sect. 1.1502-6 (or any similar provision of state, local, or foreign law), as a transferee or successor by contract or otherwise.
  - (iv) **S Corporation.** Seller is not an S corporation as defined in Code Section 1361.
  - (v) **State and Local Taxes.** **Schedule 3.14(d)(v)** lists all the states and localities with respect to which Seller is required to file any corporate, income, or franchise tax returns for the Business. Seller has properly filed Tax Returns with and paid and discharged any liabilities for taxes in any states or localities in which it is subject to Tax.
  - (vi) **Substantial Understatement Penalty.** Seller has disclosed on its federal income Tax Returns all positions taken therein that could give rise to a substantial understatement of federal income Tax within the meaning of Code Section 6662.
  - (vii) **Excessive Employee Remuneration.** The disallowance of a deduction under Code Section 162(m) for employee remuneration will not apply to any amount paid or payable by Seller under any contractual arrangement currently in effect.

- (viii) Golden Parachute Payments. Seller has not made any payments, is not obligated to make any payments, and is not a party to any agreement that, under certain circumstances, could obligate it to make any payments that will not be deductible under Code Section 280G.

### **3.15 NO MATERIAL ADVERSE CHANGE**

Since the date of the Balance Sheet, there has not been any Material Adverse Change in the Business, and no event has occurred or circumstance exists that may result in such a Material Adverse Change.

### **3.16 EMPLOYEE BENEFITS**

- (a) With respect to the Business, set forth in Schedule 3.16(a) is a true, complete and correct list of all “employee benefit plans” 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, death, disability, accident, group-insurance, vacation, holiday, sick-leave, fringe-benefit, or welfare plan, and any other employee compensation or benefit plan, agreement, policy, practice, commitment, contract, or understanding (whether qualified or nonqualified, currently effective or terminated, written or unwritten) and any trust, escrow, or other agreement related thereto that (i) is maintained or contributed to by Seller or any other corporation or trade or business controlled by, controlling, or under common control with Seller (within the meaning of Section 414 of the Code or Section 4001(a)(14) or 4001(b) of ERISA) (“ERISA Affiliate”) or has been maintained or contributed to in the last six (6) years by Seller or any ERISA Affiliate, or with respect to which Seller or any ERISA Affiliate has or may have any liability, and (ii) provides benefits, or describes policies or procedures applicable to any current or former director, officer, employee, or service provider of Seller or any ERISA Affiliate, 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 (collectively the “Employee Plans”). Schedule 3.16(a) identifies as such any Employee Plan that is a plan intended to meet the requirements of Section 401(a) of the Code. Also set forth on Schedule 3.16(a) is a complete and correct list of all ERISA Affiliates of Seller during the last six (6) years. Neither Seller, nor any ERISA Affiliate has ever maintained, sponsored, contributed to or has any liability with respect to any Employee Plan that is: (i) subject to the minimum funding standards of Section 302 of ERISA or Section 412 of the Code; or (ii) a “multiemployer plan” (as defined in Section 3(37) of ERISA).
- (b) Seller has delivered to Buyer true, accurate, and complete copies of (i) the documents comprising each Employee Plan (or, with respect to any Employee Plan that is unwritten, a detailed written description of eligibility, participation, benefits, funding arrangements, assets, and any other matters that relate to the obligations of Seller or any ERISA Affiliate); (ii) all trust agreements, insurance contracts, or any other funding instruments

related to the Employee Plans; (iii) all rulings, determination letters, no-action letters, or advisory opinions from the IRS, the U.S. 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 the Employee Plans during the current year and each of the three preceding years; (v) all securities registration statements filed with respect to any Employee Plan; (vi) all contracts with third-party administrators, actuaries, investment managers, consultants, and other independent contractors that relate to any Employee Plan, and (vii) all summary plan descriptions, summaries of material modifications and memoranda, employee handbooks, and other written communications regarding the Employee Plans.

- (c) Full payment has been made of all contributions that are required under applicable law or regulation or the terms of each Employee Plan and all premiums due or payable with respect to insurance policies funding any Employee Plan with respect to all periods prior to the Effective Date. Seller is not required to provide security to an Employee Plan under Section 430(k) of the Code or Section 303(k) of ERISA.
- (d) The provisions of all Employee Plans are in compliance with the applicable provisions of ERISA, the Code, and any other applicable laws, including the Americans with Disabilities Act of 1990, the Family Medical Leave Act of 1993, the Health Insurance Portability and Accountability Act of 1996, COBRA and any applicable state statutes mandating health insurance continuation coverage for employees, and such plans have been operated in compliance with such laws and the provisions of such Employee Plan documents. Neither Seller nor any fiduciary of an Employee Plan has violated the requirements of Section 404 of ERISA. All required reports and descriptions of the Employee Plans (including Internal Revenue Service Form 5500 Annual Reports, Summary Annual Reports and Summary Plan Descriptions, and Summaries of Material Modifications) have been (when required) timely filed with the IRS, the U.S. 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 the Employee Plans have been appropriately given. No events have occurred with respect to any Employee Plan that could result in payment or assessment by or against the Seller of any excise taxes under Sections 4972, 4976, 4977, 4979, 4980B, 4980D, 4980E or 5000 of the Code.
- (e) Each Employee Plan that is intended to be qualified under Section 401(a) of the Code has received from the IRS a favorable determination or operates as a prototype or volume submitter plan with respect to which the IRS has issued a favorable opinion letter to the prototype or volume submitter sponsor, or has pending or has time remaining in which to file, an application for such determination, and Seller has no Knowledge of any circumstances that will or could result in revocation of any such favorable determination letter. Each trust created under any Employee Plan has been determined to be exempt from taxation under Section 501(a) of the Code, and Seller is not aware of any circumstance that will or could result in a revocation of such exemption. Each employee welfare benefit plan (as defined in Section 3(1) of ERISA) that utilizes a funding vehicle described in Section 501(c)(9) of the Code or is subject to the provisions of Section 505

of the Code has been the subject of a notification by the IRS that such funding vehicle qualifies for tax-exempt status under Section 501(c)(9) of the Code or that the plan complies with Section 505 of the Code, unless the IRS does not, as a matter of policy, issue such notification with respect to the particular type of plan. With respect to each Employee Plan, no event has occurred or condition exists that will or could give rise to a loss of any intended tax consequence or to any Tax under Section 511 of the Code.

- (f) There is no pending or threatened Proceeding relating to any Employee Plan, nor is there any basis for any such Proceeding. Neither Seller nor any fiduciary of an Employee Plan has engaged in a transaction with respect to any Employee Plan that, assuming the taxable period of such transaction expired as of the date hereof or the Effective Date hereof, could subject Seller 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.
- (g) Seller has maintained workers' compensation coverage as required by applicable state law through purchase of insurance and not by self-insurance or otherwise.
- (h) Except as required by Legal Requirements and as provided in **Section 7.1(d)**, neither the entering into of this Agreement nor the consummation of the Contemplated Transactions will accelerate the time of vesting or the time of payment, or increase the amount, of compensation due to any current or former director, employee, officer or service provider of Seller. There are no contracts or arrangements providing for payments that could subject any person to liability for tax under Section 4999 of the Code.
- (i) Except for the continuation coverage requirements of COBRA, Seller has no obligations or potential liability for benefits to employees, former employees, or their respective dependents following termination of employment or retirement under any of the Employee Plans that are employee welfare benefit plans (as defined in Section 3(1) of ERISA).
- (j) Except as provided in **Section 7.1(d)**, neither the entering into of this Agreement nor the occurrence of any of the Contemplated Transactions will result in an amendment, modification, or termination of any of the Employee Plans. No written or oral representations have been made to any employee or former employee of Seller 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 representations have been made to any employee or former employee of Seller concerning the employee benefits of Buyer.

### **3.17 COMPLIANCE WITH LEGAL REQUIREMENTS; GOVERNMENTAL AUTHORIZATIONS**

- (a) Except as set forth in **Schedule 3.17(a)**, with respect to the Business:
  - (i) Seller has complied and is in full compliance with each Legal Requirement that is or was applicable to it or to the conduct or operation of the Business or the ownership or use of any of the Assets;

- (ii) no event has occurred or circumstance exists that (with or without notice or lapse of time) (A) may constitute or result in a violation by Seller of, or a failure on the part of Seller to with, any Legal Requirement or (B) may give rise to any obligation on the part of Seller to undertake, or to bear all or any portion of the cost of, any remedial action of any nature; and
  - (iii) Seller has not received, at any time since \_\_\_\_\_, any notice or other communication (whether oral or written) from any Governmental Body or any other Person regarding (A) any actual, alleged, possible, or potential violation of, or failure to comply with, any Legal Requirement or (B) any actual, alleged, possible, or potential obligation on the part of Seller to undertake, or to bear all or any portion of the cost of, any remedial action of any nature.
- (b) **Schedule 3.17(b)** contains a true, complete and accurate list of each Governmental Authorization that is held by Seller and relates to the Business or the Assets. Each Governmental Authorization listed or required to be listed in **Schedule 3.17(b)** is valid and in full force and effect. Except as set forth in **Schedule 3.17(b)**:
- (i) Seller is, and at all times since \_\_\_\_\_, has been, in full compliance with all of the terms and requirements of each Governmental Authorization identified or required to be identified in **Schedule 3.17(b)**;
  - (ii) no event has occurred or circumstance exists that may (with or without notice or lapse of time) (A) constitute or result directly or indirectly in a violation of or a failure to comply with any term or requirement of any Governmental Authorization listed or required to be listed in **Schedule 3.17(b)** or (B) may result directly or indirectly in the revocation, withdrawal, suspension, cancellation, or termination of, or any modification to, any Governmental Authorization listed or required to be listed in **Schedule 3.17(b)**;
  - (iii) Seller has not received, at any time since \_\_\_\_\_, any notice or other communication (whether oral or written) from any Governmental Body or any other Person regarding (A) any actual, alleged, possible, or potential violation of or failure to comply with any term or requirement of any Governmental Authorization or (B) any actual, proposed, possible, or potential revocation, withdrawal, suspension, cancellation, termination of, or modification to any Governmental Authorization; and
  - (iv) all applications required to be filed for the renewal of the Governmental Authorizations listed or required to be listed in **Schedule 3.17(b)** have been duly filed on a timely basis with the appropriate Governmental Bodies, and all other filings required to be made with respect to such Governmental Authorizations have been duly made on a timely basis with the appropriate Governmental Bodies.

The Governmental Authorizations listed in **Schedule 3.17(b)** collectively constitute all of the Governmental Authorizations necessary to permit Seller to lawfully conduct and

operate the Business in the manner in which it currently conducts and operates such business and to permit Seller to own and use the Assets in the manner in which it currently owns and uses the Assets.

### **3.18 LEGAL PROCEEDINGS; ORDERS**

(a) Except as set forth in **Schedule 3.18(a)**, there is no pending or, to Seller's Knowledge, threatened Proceeding:

- (i) by or against Seller that relates to the Business or any of the Assets; or
- (ii) that challenges, or that may have the effect of preventing, delaying, making illegal, or otherwise interfering with, any of the Contemplated Transactions.

To the Knowledge of Seller, no event has occurred or circumstance exists that is reasonably likely to give rise to or serve as a basis for the commencement of any such Proceeding. Seller has made available to Buyer copies of all pleadings, correspondence, and other documents relating to each Proceeding listed in **Schedule 3.18(a)**. Except as set forth in **Schedule 3.18(a)**, there are no Proceedings listed or required to be listed in **Schedule 3.18(a)** that could have a Material Adverse Effect on the Business or the Assets.

(b) Except as set forth in **Schedule 3.18(b)**:

- (i) there is no Order to which Seller with respect to the Business, or any of the Assets, is subject; and
- (ii) to the Knowledge of Seller, no officer, director, agent, or employee of Seller is subject to any Order that prohibits such officer, director, agent, or employee from engaging in or continuing any conduct, activity, or practice relating to the Business.

(c) Except as set forth in **Schedule 3.18(c)**, with respect to the Business:

- (i) Seller is, and, at all times since \_\_\_\_\_, has been in compliance with all of the terms and requirements of each Order to which it or any of the Assets is or has been subject;
- (ii) no event has occurred or circumstance exists that is reasonably likely to constitute or result in (with or without notice or lapse of time) a violation of or failure to comply with any term or requirement of any Order to which Seller or any of the Assets is subject; and
- (iii) Seller has not received, at any time since \_\_\_\_\_, any notice or other communication (whether oral or written) from any Governmental Body or any other Person regarding any actual, alleged, possible, or potential violation of, or failure to comply with, any term or requirement of any Order to which Seller or any of the Assets is or has been subject.

### **3.19 ABSENCE OF CERTAIN CHANGES AND EVENTS**

Except as set forth in **Schedule 3.19**, since the date of the Balance Sheet, Seller has conducted the Business only in the Ordinary Course of Business and, with respect to the Business, there has not been any:

- (a) amendment to the Governing Documents of Seller;
- (b) payment or increase by Seller of any bonuses, salaries, or other compensation to any shareholder, director, or officer, nor any payment (except in the Ordinary Course of Business) or increase by Seller of any bonuses, salaries, or other compensation to any employee, nor entry into any employment, severance, or similar Contract with any director, officer, or employee;
- (c) adoption or termination of, amendment to, or increase in the payments to or benefits under, any Employee Plan;
- (d) damage to or destruction or loss of any Asset, whether or not covered by insurance;
- (e) entry into, termination of, or receipt of notice of termination of (i) any license, distributorship, dealer, sales representative, joint venture, credit, or similar Contract to which Seller is a party, or (ii) any Contract or transaction involving a total commitment by Seller of at least \$\_\_\_\_\_;
- (f) sale (other than sales of Inventories in the Ordinary Course of Business), lease or other disposition of any Asset or property of Seller (including the Intellectual Property Assets) or the creation of any Encumbrance on any Asset;
- (g) cancellation or waiver of any claims or rights with a value to Seller in excess of \$\_\_\_\_\_;
- (h) indication by any customer or supplier of an intention to discontinue or change the terms of its relationship with Seller;
- (i) material change in the accounting methods used by Seller; or
- (j) Contract entered into by Seller to do any of the foregoing.

### **3.20 CONTRACTS; NO DEFAULTS**

- (a) **Schedule 3.20(a)** contains an accurate and complete list, and Seller has delivered to Buyer true, accurate and complete copies, of each Seller Contract:
  - (i) that involves performance of services or delivery of goods or materials by Seller of an amount or value in excess of \_\_\_\_\_ Dollars (\$\_\_\_\_\_);
  - (ii) that involves performance of services or delivery of goods or materials to Seller of an amount or value in excess of \_\_\_\_\_ Dollars (\$\_\_\_\_\_);

- (iii) that was not entered into in the Ordinary Course of Business and that involves expenditures or receipts of Seller in excess of \_\_\_\_\_ Dollars (\$\_\_\_\_\_);
- (iv) affecting the ownership of, leasing of, title to, use of, or any leasehold or other interest in any real property;
- (v) with any labor union or other employee representative of a group of employees relating to wages, hours, and other conditions of employment;
- (vi) relating to bonus, pension, profit sharing, retirement or any other form of deferred compensation plan or any stock purchase, stock option or similar plan or practice, whether formal or informal, or any severance agreement or arrangement;
- (vii) involving a sharing of profits, losses, costs, or liabilities by Seller with any other Person;
- (viii) containing covenants that in any way purport to restrict Seller's business activity or limit the freedom of Seller to engage in any line of business or to compete 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) constituting a power of attorney of Seller that is currently (or could become in the future) effective and outstanding;
- (xi) for capital expenditures in excess of \_\_\_\_\_ Dollars (\$\_\_\_\_\_);
- (xii) for the employment of any officer, individual employee or other person on a full time, part time or consulting basis or providing for the payment of any cash or other compensation or benefits upon the sale of the Business;
- (xiii) pursuant to which any current or former employee is entitled to payment for a covenant not to compete with Seller;
- (xiv) relating to any Indebtedness of Seller or relating to the borrowing of money or to mortgaging, pledging or otherwise placing an Encumbrance on any of the Assets or any letter of credit arrangements;
- (xv) relating to any license or royalty agreements;
- (xvi) relating to any nondisclosure or confidentiality agreements;
- (xvii) relating to any guaranty of any material obligation for borrowed money or otherwise, other than endorsements made for collection;
- (xviii) relating to any distribution arrangement;



- (xix) with the same party continuing over a period of more than six (6) months from the date or dates thereof, not terminable by Seller upon thirty (30) days' or less notice without penalty;
- (xx) for the marketing, sale, advertising or promotion of the Business' products or services, if such Seller Contract is material to the Business;
- (xxi) with any officer, director, partner or other Related Person;
- (xxii) for any warranty agreement with respect to products delivered or services rendered or any indemnity agreement with any supplier or customer under which Seller is obligated to indemnify such supplier or customer against liability claims;
- (xxiii) relating to ownership of or investments in any business or enterprise, including investments in partnerships, joint ventures and minority equity investments;
- (xxiv) relating to any settlement, conciliation or similar agreement;
- (xxv) in the form of Seller's standard warranty terms for the Business;
- (xxvi) that is otherwise material to the Business, whether or not entered into in the Ordinary Course of Business; and
- (xxvii) each amendment, supplement, and modification (whether oral or written) in respect of any of the foregoing.

**Schedule 3.20(a)** sets forth reasonably complete details concerning such Contracts, including the parties to, and dates and titles of, the Contracts and, with regard to oral Contracts, a description of the obligations under and the subject matter of such Contracts.

- (b) Except as set forth in **Schedule 3.20(b)**, no Related Person or stockholder of Seller has or may acquire any rights under, and no Related Person or stockholder of Seller has or may become subject to any Liability under, any Seller Contract.
- (c) Except as set forth in **Schedule 3.20(c)**:
  - (i) each Contract identified or required to be identified in **Schedule 3.20(a)** and that is to be assigned to or assumed by Buyer under this Agreement (each an "**Assigned Contract**") is identified as such on **Schedule 3.20(a)** with an asterisk, in full force and effect and is valid and enforceable in accordance with its terms except as the enforcement thereof may be limited by equitable principles or by bankruptcy, insolvency, reorganization, moratorium, or similar laws relating to or limiting creditors' rights generally;
  - (ii) each Assigned Contract is assignable by Seller to Buyer without the consent of any other Person; and

- (iii) to the Knowledge of Seller, no Assigned Contract will upon completion or performance thereof have a Material Adverse Effect on Seller.
- (d) Except as set forth in **Schedule 3.20(d)**:
  - (i) Seller is, and at all times since \_\_\_\_\_, has been, in compliance with all applicable terms and requirements of each Assigned Contract;
  - (ii) each other Person that has or had any Liability under any Assigned Contract is, and at all times since \_\_\_\_\_, has been in full compliance with all applicable terms and requirements of such Contract;
  - (iii) no event has occurred or circumstance exists that (with or without notice or lapse of time) may contravene, conflict with, or result in a breach of, or give Seller or any other Person the right to declare a default or exercise any remedy under, or to accelerate the maturity or performance of, or payment under, or to cancel, terminate, or modify any Assigned Contract;
  - (iv) no event has occurred or circumstance exists under or by virtue of any Seller Contract that (with or without notice or lapse of time) would cause the creation of any Encumbrance affecting any of the Assets; and
  - (v) Seller has not given to or received from any other Person, at any time since \_\_\_\_\_, any notice or other communication (whether oral or written) regarding any actual, alleged, possible, or potential violation or breach of, or default under, any Assigned Contract.
- (e) There are no renegotiations of, attempts to renegotiate, or outstanding rights to renegotiate any material amounts paid or payable to Seller under current or completed Seller Contracts with any Person having the contractual or statutory right to demand or require such renegotiation, and no such Person has made written demand for such renegotiation.

### **3.21 INSURANCE**

- (a) Seller has delivered to Buyer, with respect to the Business:
  - (i) accurate and complete copies of all policies of insurance to which Seller is a party or under which Seller is or has been covered at any time since \_\_\_\_\_5, a list of which is included in **Schedule 3.21(a)**; and
  - (ii) accurate and complete copies of all pending applications by Seller for policies of insurance.
- (b) **Schedule 3.21(b)** describes, with respect to the Business:
  - (i) any self-insurance arrangement by Seller, including any reserves established thereunder;

- (ii) any Contract or arrangement, other than a policy of insurance, for the transfer or sharing of any risk to which Seller is a party or by which Seller is bound or that involves the business of Seller; and
  - (iii) all obligations of Seller to provide insurance coverage to Third Parties (for example, under leases or service agreements) and identifies the policy under which such coverage is provided.
- (c) **Schedule 3.21(c)** sets forth, by year, the following information with respect to the Business for the current policy year and each of the three (3) preceding policy years:
  - (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 \_\_\_\_\_ Dollars (\$\_\_\_\_\_), 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 **Schedule 3.21(d)**, with respect to the Business:
  - (i) all policies of insurance to which Seller is a party or that provide coverage to Seller:
    - (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 the Business; and
    - (D) are sufficient for compliance with all Legal Requirements and Seller Contracts;
  - (ii) Seller has not received (A) any refusal of insurance coverage or any notice that a defense will be afforded with reservation of rights to any insurance claim or (B) within the past three (3) years any notice of cancellation or any other indication that any policy of insurance is no longer in full force or effect or that the issuer of any policy of insurance is not willing or able to perform its obligations thereunder;

- (iii) Seller (or any other party liable therefor) has paid all premiums due, and has otherwise performed all of its obligations, under each policy of insurance to which Seller is a party or that provides coverage to Seller; and
- (iv) Seller has given notice to the insurer of all claims that may be insured thereby.

### **3.22 ENVIRONMENTAL MATTERS**

Except as disclosed in **Schedule 3.22**, with respect to the Business:

- (a) Seller is, and at all times has been, in full compliance with, and has not been and is not in violation of or liable under, any Environmental Law. Seller has no basis to expect, nor has it or any other Person for whose conduct it may be held to be responsible received, any actual or threatened order, notice, or other communication from (i) any Governmental Body or private citizen or (ii) the current or prior owner or operator of any Facilities, of any actual or potential violation or failure to comply with any Environmental Law, or of any actual or threatened obligation to undertake or bear the cost of any Environmental, Health and Safety Liabilities with respect to any Facility or other property or asset (whether real, personal or mixed) in which Seller has or had an interest, or with respect to any property or Facility at or to which Hazardous Materials were generated, manufactured, refined, transferred, imported, used, handled, or processed by Seller or any other Person for whose conduct it is or may be held responsible, or from which Hazardous Materials have been transported, treated, stored, handled, transferred, disposed, recycled, or received.
- (b) There are no pending or, to the Knowledge of Seller, threatened claims, Encumbrances, or other restrictions of any nature resulting from any Environmental, Health and Safety Liabilities or arising under or pursuant to any Environmental Law with respect to or affecting any Facility or any other property or asset (whether real, personal, or mixed) in which Seller has or had an interest.
- (c) Seller has no Knowledge of or any basis to expect, nor has it or any other Person for whose conduct it may be held responsible, received, any citation, directive, inquiry, notice, Order, summons, warning, or other communication that relates to Hazardous Activity, Hazardous Materials, or any alleged, actual, or potential violation or failure to comply with any Environmental Law, or of any alleged, actual, or potential obligation to undertake or bear the cost of any Environmental, Health and Safety Liabilities with respect to any Facility or property or asset (whether real, personal, or mixed) in which Seller has or had an interest, or with respect to any property or facility to which Hazardous Materials generated, manufactured, refined, transferred, imported, used, handled, or processed by Seller or any other Person for whose conduct it is or may be held responsible, have been transported, treated, stored, handled, transferred, disposed, recycled, or received.
- (d) Neither Seller nor any other Person for whose conduct it is or may be held responsible has any Environmental, Health and Safety Liabilities with respect to any Facility or, to the Knowledge of Seller, with respect to any other property or asset (whether real,

personal, or mixed) in which Seller (or any predecessor) has or had an interest or at any property geologically or hydrologically adjoining any Facility or any such other property or asset.

- (e) There are no Hazardous Materials present on or in the Environment at any Facility or at any geologically or hydrologically adjoining property, including any Hazardous Materials contained in barrels, aboveground or underground storage tanks, landfills, land deposits, dumps, equipment (whether movable or fixed), or other containers, either temporary or permanent, and deposited or located in land, water, sumps, or any other part of the Facility or such adjoining property, or incorporated into any structure therein or thereon. Neither Seller nor any Person for whose conduct it is or may be held responsible, or to the Knowledge of Seller, any other Person, has permitted or conducted, or is aware of, any Hazardous Activity conducted with respect to any Facility or any other property or assets (whether real, personal, or mixed) in which Seller has or had an interest except in full compliance with all applicable Environmental Laws.
- (f) There has been no Release or, to the Knowledge of Seller, Threat of Release, of any Hazardous Materials at or from any Facility or at any other location where any Hazardous Materials were generated, manufactured, refined, transferred, produced, imported, used, handled, or processed from or by any Facility, or from any other property or asset (whether real, personal, or mixed) in which Seller has or had an interest, or to the Knowledge of Seller any geologically or hydrologically adjoining property, whether by Seller or any other Person.
- (g) Seller has delivered to Buyer true and complete copies and results of any reports, studies, analyses, tests, or monitoring possessed or initiated by Seller pertaining to Hazardous Materials or Hazardous Activities in, on, or under the Facilities, or concerning compliance, by Seller or any other Person for whose conduct it is or may be held responsible, with Environmental Laws.
- (h) The Facilities do not contain any wetlands, as defined in the Clean Water Act and regulations promulgated thereunder, or similar Legal Requirements, or other sensitive or protected areas or species of flora or fauna.

### **3.23 EMPLOYEES**

- (a) **Schedule 3.23(a)** contains a complete and accurate list of the following information for each employee, director, independent contractor, consultant, and agent of the Business, including each employee on leave of absence or layoff status: employer; name; job title; date of hiring or engagement; date of commencement of employment or engagement; current compensation paid or payable and any change in compensation since \_\_\_\_\_; frequency of payment (i.e., weekly, semi-monthly, etc.); whether the employee is exempt or non-exempt for overtime purposes; sick and vacation leave that is accrued but unused; and service credited under any Employee Plan, or any other employee or director benefit plan.

- (b) **Schedule 3.23(b)** contains a complete and accurate list of the following information for each retired employee or director of the Business, or their dependents, receiving benefits or scheduled to receive benefits in the future: name; pension benefits; pension option election; retiree medical insurance coverage; retiree life insurance coverage; and other benefits.
- (c) **Schedule 3.23(c)** states the number of employees terminated or laid off by Seller from the Business in the six (6) months prior to the date of this Agreement, and contains a complete and accurate list of the following information for each employee of Seller who has been terminated or laid off, or whose hours of work have been reduced by more than fifty percent (50%) by Seller, in the six (6) 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.
- (d) Seller has not violated the WARN Act or any similar state or local Legal Requirement. During the ninety (90) day period prior to the date of this Agreement, Seller has terminated or laid off \_\_\_\_\_ (\_\_\_\_\_) employees of the Business.
- (e) To the Knowledge of Seller, no officer, director, agent, employee, consultant, or contractor of Seller is bound by any Contract that purports to limit the ability of such officer, director, agent, employee, consultant, or contractor (i) to engage in or continue or perform any conduct, activity, duties, or practice relating to the Business, or (ii) to assign to Seller or to any other Person any rights to any invention, improvement, or discovery. No former or current employee of Seller in the Business is a party to, or is otherwise bound by, any Contract that in any way adversely affected, affects, or will affect the ability of Seller or Buyer to conduct the Business as heretofore carried on by Seller.

### **3.24 LABOR DISPUTES; COMPLIANCE**

- (a) With respect to the Business, Seller has complied in all respects with all Legal Requirements relating to employment practices, terms and conditions of employment, equal employment opportunity, nondiscrimination, immigration, wages, hours, benefits, collective bargaining, the payment of social security and similar Taxes, and occupational safety and health. Seller is not 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) With respect to the Business, except as disclosed in **Schedule 3.24(b)**, (i) Seller has not been, and is not now, a party to any collective bargaining agreement or other labor contract; (ii) since \_\_\_\_\_, there has not been, there is not presently pending or existing, and to Seller's Knowledge there is not threatened, any strike, slowdown, picketing, work stoppage, or employee grievance process involving Seller; (iii) to Seller's Knowledge no event has occurred or circumstance exists that could provide the basis for any work stoppage or other labor dispute; (iv) there is not pending or, to Seller's Knowledge, threatened against or affecting Seller 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, and there is no organizational activity or other labor dispute against or affecting Seller or the Business; (v) no application or petition for an election of or for certification of a collective bargaining agent is pending; (vi) no grievance or arbitration Proceeding exists against Seller or in connection with the conduct of its business; (vii) there is no lockout of any employees by Seller, and no such action is contemplated by Seller; and (viii) to Seller's Knowledge there has been no charge of discrimination filed or threatened against Seller with the Equal Employment Opportunity Commission or similar Governmental Body.

### **3.25 INTELLECTUAL PROPERTY ASSETS**

- (a) **Schedule 3.25(a)** contains a complete and accurate list and summary description, including any royalties paid or received by Seller, and Seller has delivered to Buyer accurate and complete copies, of all Seller Contracts relating to the Intellectual Property Assets, except for any license or warranty implied by the sale or lease of a product and perpetual, paid-up licenses for commercially available Software programs under which Seller is the licensee. There are no outstanding and, to Seller's Knowledge, no threatened disputes or disagreements with respect to any such Contract.
- (b)
  - (i) Except as set forth in **Schedule 3.25(b)**, the Intellectual Property Assets are all those necessary for the operation of the Business as it is currently conducted. Seller is the owner or licensee of all right, title, and interest in and to each of the Intellectual Property Assets, free and clear of all Encumbrances, and has the right to exercise its rights in all the Intellectual Property Assets without payment to a Third Party, other than obligations arising from licenses listed in **Schedule 3.25(b)**.
  - (ii) Except as set forth in **Schedule 3.25(b)**, all former and current employees of Seller in the Business have executed written Contracts with Seller that assign to Seller all rights to any inventions, improvements, discoveries, or information relating to the Business.
- (c)
  - (i) **Schedule 3.25(c)** contains a complete and accurate list and summary description of all Patents.
  - (ii) All of the issued Patents are currently in compliance with formal and substantive 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 or taxes or actions falling due within ninety (90) days after the Closing.
  - (iii) No Patent has been or is now involved in any interference, reissue, reexamination, or opposition Proceeding and, to Seller's Knowledge, no such action is threatened with respect to any of the Patents. To Seller's Knowledge, there is no potentially interfering patent or patent application of any Third Party.

- (iv) (A) No Patent is infringed or, to Seller's Knowledge, has been challenged or threatened in any way and (B) none of the products manufactured or sold, nor any process or know-how used, by Seller in the Business infringes or is alleged to infringe any patent or other proprietary right of any Third Party.
- (v) All products made, used, or sold under the Patents have been marked with the proper patent notice.
- (d)
  - (i) **Schedule 3.25(d)** contains a complete and accurate list and summary description of all Marks.
  - (ii) All Marks that have been registered or are in the process of being registered are in use, are currently in compliance with all formal 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 fees or taxes or actions falling due within ninety (90) days after the Closing.
  - (iii) No Mark has been or is now involved in any opposition, invalidation, or cancellation Proceeding and, to Seller's Knowledge, no such action is threatened with respect to any of the Marks.
  - (iv) To the best of Seller's Knowledge, there is no potentially interfering trademark or trademark application of any Third Party.
  - (v) No Mark is infringed or, to Seller's Knowledge, has been challenged or threatened in any way. None of the Marks infringes or is alleged to infringe any trade name, trademark, or service mark of any Third Party.
  - (vi) All products and materials containing a Mark bear the proper registration notice where permitted by law.
- (e)
  - (i) **Schedule 3.25(e)** contains a complete and accurate list and summary description of all registered and material unregistered Copyrights.
  - (ii) All of the registered Copyrights are currently in compliance with formal Legal Requirements, are valid and enforceable, and are not subject to any fees or taxes or actions falling due within ninety (90) days after the Closing.
  - (iii) No Copyright is infringed or, to Seller's Knowledge, has been challenged or threatened in any way. None of the subject matter of any of the Copyrights infringes or is alleged to infringe any copyright of any Third Party or is a derivative work based upon the work of any Third Party.
  - (iv) All works encompassed by the Copyrights have been marked with the proper copyright notice.
- (f)
  - (i) With respect to each Trade Secret, the documentation relating to such 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 specialized knowledge or memory of any individual.

- (ii) Seller has taken all reasonable precautions to protect the secrecy, confidentiality, and value of all Trade Secrets (including the enforcement by Seller of a policy requiring each employee or contractor to execute proprietary information and confidentiality agreements in favor of Seller substantially in Seller's standard form, and all current and former employees and contractors of Seller have executed such an agreement).
  - (iii) Seller has good title to and an absolute right to use the Trade Secrets. The Trade Secrets are not part of the public knowledge or literature and, to Seller's Knowledge, have not been used, divulged, or appropriated either for the benefit of any Third Party or to the detriment of Seller. No Trade Secret is subject to any pending adverse claim or, to Seller's Knowledge, has been challenged or threatened in any way or infringes any intellectual property right of any other Person.
- (g)
- (i) **Schedule 3.25(g)** contains a complete and accurate list and summary description of all Net Names.
  - (ii) All Net Names have been registered in the name of Seller and are in compliance with all formal Legal Requirements.
  - (iii) No Net Name has been or is now involved in any dispute, opposition, invalidation, or cancellation Proceeding and, to Seller's Knowledge, no such action is threatened with respect to any Net Name.
  - (iv) To Seller's Knowledge, there is no domain name application pending of any Third Party that would, or would potentially, interfere with or infringe any Net Name.
  - (v) No Net Name is infringed or, to Seller's Knowledge, has been challenged, interfered with, or threatened in any way. No Net Name infringes, interferes with, or is alleged to interfere with or infringe the trademark, copyright, or domain name of any other Third Party.
- (h)
- (i) All Software used or held for use by Seller that is not owned by Seller (including any commonly available "shrink wrap" Software copyrighted by third parties) (collectively, the "**Third Party Software**") is used pursuant to an agreement or license, each such agreement or license is valid and enforceable and in full force and effect, and neither Seller nor, to the Knowledge of Seller, any licensor is in material default under or in breach of any such license or agreement.
  - (ii) The Software, the Third Party Software and Seller's rights therein are sufficient and adequate to conduct the Business to the full extent the Business is conducted

as of the date hereof. All Software and any Third Party Software that is incorporated into the Software perform in material accordance with the documentation and other written material used in connection with the Software and Third Party Software. The Software and, to the Knowledge of Seller, the Third Party Software, contains no disabling devices. The source code for all Software shall compile into object code or otherwise be capable of performing the functions described in the documentation pertaining to the Software.

- (iii) None of the Software, other than “shrink wrap” Software, has been developed with, or incorporates, any “open-source” code. No product or service marketed, licensed, sold or distributed by Seller (or any portion thereof) is, nor upon consummation of the transactions contemplated by this Agreement shall be, in whole or in part governed by an “Excluded License.” An “**Excluded License**” means any license that requires, as a condition of modification and/or distribution of software subject to the Excluded License, that (i) such software and/or other software combined and/or distributed with such software be disclosed or distributed in source code form, (ii) such software and/or other software combined and/or distributed with such software and any associated intellectual property be licensed on a royalty free basis (including for the purpose of making additional copies or derivative works), or (iii) requires that Seller give attribution for its use of such code, modules, utilities, or libraries.

### **3.26 NO ILLEGAL PAYMENTS; COMPLIANCE WITH THE FOREIGN CORRUPT PRACTICES ACT AND EXPORT CONTROL AND ANTIBOYCOTT LAWS**

- (a) None of Seller or any of its Representatives has ever directly or indirectly made any illegal payment or contribution of any kind to any United States or foreign national, state, local, or other government official, employee, agent, or candidate therefor, and none of Seller or any of its Representatives, to obtain or retain business, has ever directly or indirectly offered, paid, or promised to pay, or authorized the payment of, any money or other thing of value (including any fee, gift, sample, travel expense, or entertainment with a value in excess of One Hundred Dollars (\$100.00) in the aggregate to any one individual in any year) or any commission payment to:
  - (i) any person who is an official, officer, agent, employee, or representative of any Governmental Body or of any existing or prospective customer (whether government owned or nongovernment owned);
  - (ii) any political party or official thereof;
  - (iii) any candidate for political or political party office; or
  - (iv) any other individual or entity;

while knowing or having reason to believe that all or any portion of such money or thing of value would be offered, given, or promised, directly or indirectly, to any such official, officer, agent, employee, representative, political party, political party official, candidate,

individual, or any entity affiliated with such customer, political party or official, or political office.

- (b) Except as set forth in **Schedule 3.26(b)**, Seller has made all payments to Third Parties by check mailed to such Third Parties' principal place of business or by wire transfer to a bank located in the same jurisdiction as such party's principal place of business.
- (c) Each such transaction is properly and accurately recorded on the books and Records of Seller, and each document upon which entries in Seller's books and Records are based is complete and accurate in all respects. Seller maintains a system of internal accounting controls adequate to ensure that Seller maintains no off-the-books accounts and that Seller's assets are used only in accordance with Seller's management directives.
- (d) Seller has at all times been in compliance with all Legal Requirements relating to export control and trade embargoes. No product of the Business sold or service provided by Seller during the last five (5) years has been, directly or indirectly, sold to, or performed on behalf of any country that is restricted under applicable United States or state law.
- (e) Except as set forth in **Schedule 3.26(e)**, Seller has not violated the antiboycott prohibitions contained in 50 U.S.C. sect. 2401 et seq. or taken any action that can be penalized under Section 999 of the Code. Except as set forth in **Schedule 3.26(e)**, during the last five (5) years, Seller has not been a party to, is not a beneficiary under and has not performed any service or sold any product under any Seller Contract under which a product has been sold to customers in any country that is restricted under applicable United States or state law.

### **3.27 RELATED PERSONS**

Except as disclosed in **Schedule 3.27**, neither Seller nor any Related Person or stockholder of Seller has, or since \_\_\_\_\_, has had, any interest in any property (whether real, personal or mixed and whether tangible or intangible) used in or pertaining to the Business. Neither Seller nor any Related Person or stockholder of Seller owns, or since \_\_\_\_\_, has owned, of record or as a beneficial owner, an equity interest or any other financial or profit interest in any Person that has (a) had business dealings or a material financial interest in any transaction with the Business other than business dealings or transactions disclosed in **Schedule 3.27**, each of which has been conducted in the Ordinary Course of Business with Seller at substantially prevailing market prices and on substantially prevailing market terms, or (b) engaged in competition with the Business with respect to any line of the products or services of the Business (a "**Competing Business**") in any market presently served by the Business, except for ownership of less than one percent (1%) of the outstanding capital stock of any Competing Business that is publicly traded on any recognized exchange or in the over-the-counter market. Except as set forth in **Schedule 3.27**, neither Seller nor any Related Person or stockholder of Seller is a party to any Contract with, or has any claim or right against, Seller in the Business, except pursuant to Contracts entered into in the Ordinary Course of Business at substantially prevailing market prices and on substantially prevailing market terms.

### **3.28 BROKERS OR FINDERS**

Neither Seller nor any of its Representatives has incurred any Liability, contingent or otherwise, for brokerage or finders' fees or agents' commissions or other similar payments in connection with the sale of the Business or the Assets or the Contemplated Transactions.

### **3.29 CUSTOMERS AND SUPPLIERS**

(a) **Schedule 3.29(a)** lists each of (a) the customers of the Business whose purchases of goods or services in the past year have exceeded five percent (5%) of the total revenues of Business for that period and (b) the suppliers to the Business whose goods and/or services supplied in the past year have exceeded five percent (5%) of the total cost of goods or services of the Business for that period.

(b) Except as set forth on **Schedule 3.29(b)**, (A) no supplier listed in **Schedule 3.29(a)** (i) has stopped or decreased the rate of, (ii) has threatened to stop or decrease the rate of, or (iii) as a result of the transactions contemplated by this Agreement, is reasonably likely to stop or decrease the rate of, supplying materials, products or services to the Business, and (B) no customer listed on **Schedule 3.29(a)** (x) has stopped or decreased the rate of, (y) has threatened to stop, or decrease the rate of, or (z) as a result of the transactions contemplated by this Agreement, is reasonably likely to stop or decrease the rate of, purchasing materials, products or services from Business.

### **3.30 NAMES AND LOCATIONS**

Except as set forth on **Schedule 3.30**, (a) during the five (5) year period prior to the execution and delivery of this Agreement, Seller has not used any name or names under which it has invoiced account debtors, maintained records concerning its assets or otherwise conducted the Business, other than the exact name under which it has executed this Agreement, and (b) all of the Assets are located at the locations set forth on **Schedule 3.30**.

### **3.31 PRODUCT AND SERVICE WARRANTY**

All products delivered and services rendered by the Business have been in conformity in all material respects with all contractual commitments and all express and implied warranties, and Seller does not have any material Liability (and, to Seller's Knowledge, there is no reasonable basis for any present or future action, suit, proceeding, hearing, investigation, charge, complaint, claim or demand against it giving rise to any such Liability) for curing or providing additional products or services or other damages in connection therewith. No products delivered or services rendered by Seller are subject to any guaranty, warranty or other indemnity beyond the applicable standard terms and conditions of such sale (including as a result of any course of conduct between Seller and any Person or as a result of any statements in any of Seller's service or promotional literature). **Schedule 3.20(a)** contains copies of the standard terms and conditions of sale for products sold and services rendered by Seller.

### 3.32 DISCLOSURE

No representation or warranty or other statement made by Seller in this Agreement, the Disclosure Schedule, any supplement to the Disclosure Schedule, the certificates delivered pursuant to **Section 2.7(a)**, or otherwise in connection with the Contemplated Transactions contains any untrue statement or omits to state a material fact necessary to make any of them, in light of the circumstances in which it was made, not misleading.

## 4. Representations and Warranties of Buyer

Buyer represents and warrants to Seller as follows, as of the date hereof and as of the Effective Date:

### 4.1 ORGANIZATION AND GOOD STANDING

Buyer is a corporation duly organized, validly existing, and in good standing under the laws of its jurisdiction of incorporation, with full corporate power and authority to conduct its business as it is now conducted.

### 4.2 AUTHORITY; NO CONFLICT

- (a) This Agreement constitutes the legal, valid, and binding obligation of Buyer, enforceable against Buyer in accordance with its terms, except as the enforcement thereof may be limited by equitable principles or by bankruptcy, insolvency, reorganization, moratorium, or similar laws relating to or limiting creditors' rights generally. Upon the execution and delivery by Buyer of the Assignment and Assumption Agreement, the Escrow Agreement, the Employment Agreements, and each other agreement to be executed or delivered by Buyer at Closing (collectively, the "**Buyer's Closing Documents**"), each of the Buyer's Closing Documents will constitute the legal, valid and binding obligation of Buyer, enforceable against Buyer in accordance with its respective terms, except as the enforcement thereof may be limited by equitable principles or by bankruptcy, insolvency, reorganization, moratorium, or similar laws relating to or limiting creditors' rights generally. Buyer has the absolute and unrestricted right, power, and authority to execute and deliver this Agreement and the Buyer's Closing Documents and to perform its obligations under this Agreement and the Buyer's Closing Documents, and such action has been duly authorized by all necessary corporate action.
- (b) Neither the execution and delivery of this Agreement by Buyer nor the consummation or performance of any of the Contemplated Transactions by Buyer will give any Person the right to prevent, delay or otherwise interfere with any of the Contemplated Transactions pursuant to:
  - (i) any provision of Buyer's Governing Documents;
  - (ii) any resolution adopted by the board of directors or the shareholders of Buyer;
  - (iii) any Legal Requirement or Order to which Buyer may be subject; or

- (iv) any Contract to which Buyer is a party or by which Buyer may be bound.

Buyer is not and will not be required to obtain any Consent from any Person in connection with the execution and delivery of this Agreement or the consummation or performance of any of the Contemplated Transactions.

#### **4.3 CERTAIN PROCEEDINGS**

There is no pending Proceeding that has been commenced against Buyer and that challenges, or may have the effect of preventing, delaying, making illegal, or otherwise interfering with, any of the Contemplated Transactions. To Buyer's Knowledge, no such Proceeding has been threatened.

#### **4.4 BROKERS OR FINDERS**

Neither Buyer nor any of its Representatives has incurred any Liability, contingent or otherwise, for brokerage or finders' fees or agents' commissions or other similar payment in connection with the Contemplated Transactions.

### **5. Conditions Precedent to Buyer's Obligation to Close**

Buyer's obligations to purchase the Assets and to take the other actions required 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 writing by Buyer, in whole or in part):

#### **5.1 ACCURACY OF REPRESENTATIONS**

- (a) Except as provided in **Section 5.1(b)**, all of Seller's representations and warranties in this Agreement (considered collectively), and each of these representations and warranties (considered individually), shall have been accurate in all material respects as of the date of this Agreement, and shall be accurate in all material respects as of the time of the Closing as if then made.
- (b) Each of Seller's representations and warranties in this Agreement that contains an express materiality qualification, shall have been accurate in all respects as of the date of this Agreement, and shall be accurate in all respects as of the time of the Closing as if then made.

#### **5.2 SELLER'S PERFORMANCE**

All of the covenants and obligations that Seller is required to perform or to comply with pursuant to this Agreement at or prior to the Closing (considered collectively), and each of these covenants and obligations (considered individually), shall have been duly performed and complied with.

### **5.3 CONSENTS**

Each of the Consents required for consummation of the Contemplated Transactions shall have been obtained and shall be in full force and effect.

### **5.4 ADDITIONAL DOCUMENTS**

Seller shall have caused the documents and instruments required by **Section 2.7(a)**, and such other documents and instruments reasonably requested by Buyer, to be executed and delivered (or tendered subject only to Closing) to Buyer.

### **5.5 GOVERNMENTAL AUTHORIZATIONS**

Buyer shall have received such Governmental Authorizations as are necessary or desirable to allow Buyer to operate the Assets from and after the Closing.

### **5.6 ENVIRONMENTAL REPORT**

Buyer shall have received an environmental site assessment report with respect to the Leased Real Property subject to the Lease Agreement, which report shall be acceptable in form and substance to Buyer in its sole discretion.

### **5.7 WARN ACT NOTICE PERIODS AND EMPLOYEES**

- (a) All requisite notice periods under the WARN Act shall have expired.
- (b) Those key employees of Seller identified on **Exhibit H** shall have accepted employment with Buyer with such employment to commence on and as of the Effective Date.
- (c) Substantially all other employees of Seller shall be available for hiring by Buyer, in its sole discretion, on and as of the Closing Date.

### **5.8 DUE DILIGENCE**

Buyer shall have completed its due diligence investigation of Seller, the Business, and the Assets with results satisfactory to Buyer.

## **6. Conditions Precedent to Seller's Obligation to Close**

Seller's obligation to sell the Assets and to take the other actions required to be taken by Seller at the Closing is subject to the satisfaction, at or prior to the Closing, of each of the following conditions (any of which may be waived in writing by Seller in whole or in part):

### **6.1 ACCURACY OF REPRESENTATIONS**

- (a) Except as provided in **Section 6.1(b)**, all of Buyer's representations and warranties in this Agreement (considered collectively), and each of these representations and warranties (considered individually), shall have been accurate in all material respects as of the date

of this Agreement, and shall be accurate in all material respects as of the time of the Closing as if then made.

- (b) Each of Buyer's representations and warranties in this Agreement that contains an express materiality qualification, shall have been accurate in all respects as of the date of this Agreement, and shall be accurate in all respects as of the time of Closing as if then made.

## **6.2 BUYER'S PERFORMANCE**

All of the covenants and obligations that Buyer is required to perform or to comply with pursuant to this Agreement at or prior to the Closing (considered collectively), and each of these covenants and obligations (considered individually), shall have been performed and complied with.

## **6.3 ADDITIONAL DOCUMENTS**

Buyer shall have caused the documents and instruments required by Section 2.7(b), and such other documents and instruments reasonably requested by Seller, to be executed and delivered (or tendered subject only to Closing) to Seller.

# **7. Additional Covenants**

## **7.1 EMPLOYEES AND EMPLOYEE BENEFITS**

- (a) Information on Active Employees. For the purpose of this Agreement, the term "**Active Employees**" shall mean all current employees employed on the Effective Date by Seller in the Business who are:
  - (i) bargaining unit employees currently covered by a collective bargaining agreement or
  - (ii) employed exclusively in the Business or whose primary responsibilities relate to the Business as currently conducted, including employees on temporary leave of absence as of the Effective Date on account of family medical leave, military leave, temporary disability or sick leave or other authorized absence, but excluding employees on long-term disability leave.
- (b) Employment of Active Employees by Buyer.
  - (i) Buyer is not obligated to hire any Active Employee but may interview all Active Employees. Buyer will provide Seller with a list of Active Employees to whom Buyer has made an offer of employment that has been accepted to be effective on the Effective Date (the "**Hired Active Employees**"). Subject to Legal Requirements, Buyer will have reasonable access to the Facilities and personnel Records (including performance appraisals, disciplinary actions, grievances and medical Records) of Seller for the purpose of preparing for and conducting employment interviews with all Active Employees and will conduct the



interviews as expeditiously as possible prior to the Effective Date. Access will be provided by Seller upon reasonable prior notice during normal business hours. Effective immediately before the Closing, Seller will terminate the employment of all of its Hired Active Employees.

- (ii) Neither Seller nor any of Seller's Related Persons shall solicit the continued employment of any Active Employee (unless and until Buyer has informed Seller in writing that the particular Active Employee will not receive any employment offer from Buyer) or the employment of any Hired Active Employee after the Closing. Buyer shall inform Seller promptly of the identities of those Active Employees to whom it will not make employment offers, and Buyer shall assist Seller in complying with any WARN Act requirements applicable as to those Active Employees.
- (iii) It is understood and agreed that (A) Buyer's express intention to extend offers of employment as set forth in this section shall not constitute any commitment, Contract, or understanding (express or implied) of any obligation on the part of Buyer to a post-Closing employment relationship of any fixed term or duration or upon any terms or conditions other than those that Buyer may establish pursuant to individual offers of employment, and (B) employment offered by Buyer is "at will" and may be terminated by Buyer or by an employee at any time for any reason (subject to any written commitments to the contrary made by Buyer or an employee and Legal Requirements). Nothing in this Agreement shall be deemed to prevent or restrict in any way the right of Buyer to terminate, reassign, promote, or demote any of the Hired Active Employees after the Closing or to change adversely or favorably the title, powers, duties, responsibilities, functions, locations, salaries, other compensation, or terms or conditions of employment of such employees.

(c) Salaries and Benefits.

- (i) Seller shall be responsible for: (A) the payment of all wages and other remuneration due to Active Employees with respect to their services as employees of Seller through the close of business on the day prior to the Effective Date, including pro rata bonus payments and all sick and vacation pay accrued but unpaid prior to the Closing Date; (B) the payment of any termination or severance payments; (C) the provision of health plan continuation coverage in accordance with the requirements of COBRA; and (D) any and all payments to employees required under the WARN Act. Seller agrees that, if any insurance policy or other funding arrangement that forms a part of an Employee Plan that is subject to COBRA terminates or is cancelled during any period that continuation coverage is required to be provided to employees, former employees or any other COBRA qualified beneficiaries of Seller, including those who incur a COBRA qualifying event in connection with the Contemplated Transactions, Seller shall establish effective as of the date of such termination or cancellation a group health plan, which may be self-insured, with such terms and conditions that are sufficient to prevent the Buyer from becoming a successor employer for purposes of COBRA.

- (ii) Seller shall be liable for the Employee Plans and any claims made or incurred by Active Employees and their beneficiaries thereunder.
- (d) Seller's Retirement Plans. All Hired Active Employees who are participants in Seller's retirement plans shall retain their accrued benefits under Seller's retirement plans as of the Effective Date, and Seller (or Seller's retirement plans) shall retain sole liability for the payment of such benefits as and when such Hired Active Employees become eligible therefor under such plans. All Hired Active Employees shall become fully vested in their accrued benefits or accounts under Seller's retirement plans as of the Effective Date. Seller will amend such plans if necessary to achieve this result.
- (e) No Transfer of Assets. Neither Seller nor any Related Person or stockholder of Seller will make any transfer of pension or other employee benefit plan assets to Buyer.
- (f) Collective Bargaining Matters. Buyer will set its own initial terms and conditions of employment for the Hired Active Employees and others it may hire, including work rules, benefits, and salary and wage structure, all as permitted by law. Buyer is not obligated to assume any collective bargaining agreements under this Agreement.
- (g) [Payroll Taxes. For purposes of payroll taxes with respect to Hired Active Employees, Seller shall treat the Contemplated Transactions under this Agreement as a transaction described in Treas. Reg. Sections 31.3121(a)(1)-1(b)(2) and 31.3306(b)(1)-1(b)(2).]
- (h) General Employee Provisions.
  - (i) Seller and Buyer shall give any notices required by Legal Requirements and take whatever other actions with respect to the plans, programs and policies described in this **Section 7.1** as may be necessary to carry out the arrangements described in this **Section 7.1**.
  - (ii) Seller and Buyer shall provide each other with such documents and information as may be reasonably required to carry out the arrangements described in this **Section 7.1**.
  - (iii) If any of the arrangements described in this **Section 7.1** is determined by the IRS or other Governmental Body to be prohibited by law, Seller and Buyer shall modify such arrangements to as closely as possible reflect their expressed intent and retain the allocation of economic benefits and burdens to the parties contemplated herein in a manner that is not prohibited by law.
  - (iv) Seller shall provide Buyer with completed I-9 forms and attachments with respect to all Hired Active Employees, except for such employees as Seller certifies in writing to Buyer are exempt from such requirement.

## **7.2 PAYMENT OF ALL TAXES RESULTING FROM SALE OF ASSETS BY SELLER**

Seller shall pay in a timely manner all Taxes resulting from or payable in connection with the sale of the Assets pursuant to this Agreement, regardless of the Person on whom such Taxes are imposed by Legal Requirements.

## **7.3 PAYMENT OF OTHER RETAINED LIABILITIES**

In addition to payment of Taxes pursuant to **Section 7.2**, Seller shall pay, or make adequate provision for the payment, in full all of the Retained Liabilities and other Liabilities of Seller under this Agreement. If any such Liabilities are not so paid or provided for, or if Buyer reasonably determines that failure to make any payments will impair Buyer's use or enjoyment of the Assets or conduct of the business previously conducted by Seller with the Assets, Buyer may, at any time after the Closing Date, elect to make all such payments directly (but shall have no obligation to do so) and set off and deduct the full amount of all such payments from any obligations of Buyer to Seller.

## **7.4 REMOVING EXCLUDED ASSETS**

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

## **7.5 REPORTS AND RETURNS**

Promptly after Closing, Seller shall prepare and file all reports and returns required by Legal Requirements relating to the Business, up to and including the Effective Date.

## **7.6 ASSISTANCE IN PROCEEDINGS**

Seller will cooperate with Buyer and its counsel in the contest or defense of, and make available its personnel and provide any testimony and access to its books and Records in connection with, any Proceeding involving or relating to (a) any Contemplated Transaction or (b) any action, activity, circumstance, condition, conduct, event, fact, failure to act, incident, occurrence, plan, practice, situation, status, or transaction on or before the Closing Date involving Seller or the Business.

## 7.7 NONCOMPETITION, NONSOLICITATION, AND NONDISPARAGEMENT

- (a) Noncompetition. For a period of five (5) years after the Closing Date, Seller shall not, anywhere in the world, directly or indirectly invest in, own, manage, operate, finance, control, advise, render services to, or guarantee the obligations of any Person engaged in or planning to become engaged in a Competing Business; provided, however, that Seller may own, purchase, or otherwise acquire up to (but not more than) one percent (1%) of any class of the securities of any Person (but may not otherwise participate in the activities of such Person) if such securities are listed on any national or regional securities exchange or have been registered under Section 12(g) of the Exchange Act.
- (b) Nonsolicitation. For a period of five (5) years after the Closing Date, Seller shall not, directly or indirectly:
- (i) solicit the business of any Person who is or hereafter becomes a customer of Buyer;
  - (ii) cause, induce, or attempt to cause or induce any customer, supplier, licensee, licensor, franchisee, employee, or consultant of Buyer or other Person having a business relationship with Buyer to cease doing business with Buyer, to deal with any competitor of Buyer, or in any way interfere with its relationship with Buyer;
  - (iii) cause, induce, or attempt to cause or induce any customer, supplier, licensee, licensor, franchisee, employee, consultant of Seller, or other Person having a business relationship with Seller on the Closing Date or within the year preceding the Closing Date to cease doing business with Buyer, to deal with any competitor of Buyer, or in any way interfere with its relationship with Buyer; or
  - (iv) hire, retain, or attempt to hire or retain any employee or independent contractor of Buyer or in any way interfere with the relationship between Buyer and any of its employees or independent contractors.
- (c) Nondisparagement. After the Closing Date, Seller will not disparage Buyer or any of Buyer's shareholders, directors, officers, employees, or agents.
- (d) Modification of Covenant. If a final judgment of a court or tribunal of competent jurisdiction determines that any term or provision contained in **Section 7.7(a)** through **(c)** is invalid or unenforceable, then the parties agree that the court or tribunal will have the power to reduce the scope, duration, or geographic area of the term or provision, to delete specific words or phrases, or to replace any invalid or unenforceable term or provision with a term or provision that is valid and enforceable and that comes closest to expressing the intention of the invalid or unenforceable term or provision. This **Section 7.7** will be enforceable as so modified after the expiration of the time within which the judgment may be appealed. This **Section 7.7** is reasonable and necessary to protect and preserve Buyer's legitimate business interests and the value of the Assets and to prevent any unfair advantage conferred on Seller.

## **7.8 CUSTOMER AND OTHER BUSINESS RELATIONSHIPS**

After the Closing, Seller will cooperate with Buyer in its efforts to continue and maintain for the benefit of Buyer those business relationships of Seller existing prior to the Closing and relating to the Business, including relationships with lessors, employees, regulatory authorities, licensors, customers, suppliers, and others, and Seller will satisfy the Retained Liabilities in a manner that is not detrimental to any of such relationships. Seller will refer to Buyer all inquiries relating to the Business. Neither Seller nor any of its officers, employees, agents, or shareholders shall take any action that would tend to diminish the value of the Assets after the Closing or that would interfere with the business of Buyer to be engaged in after the Closing, including disparaging the name or business of Buyer.

## **7.9 RETENTION OF AND ACCESS TO RECORDS**

After the Closing Date, Buyer shall retain for a period consistent with Buyer's record-retention policies and practices those Records of Seller delivered to Buyer. Buyer also shall provide Seller and its Representatives reasonable access thereto, during normal business hours and on at least three days' prior written notice, to enable them to prepare financial statements or Tax returns or deal with Tax audits. After the Closing Date, Seller shall provide Buyer and its Representatives reasonable access to Records that are Excluded Assets, during normal business hours and on at least three days' prior written notice, for any reasonable business purpose specified by Buyer in such notice.

## **7.10 CONFIDENTIALITY.**

From and after the Closing, Seller shall maintain in confidence all Confidential Information and shall not use any Confidential Information for any purpose or to the detriment of Buyer or the Business.

## **7.11 NON-ASSIGNABLE CONTRACTS**

To the extent that the assignment hereunder by Seller to Buyer of any Assigned Contract is not permitted or is not permitted without the Consent of any other party to such Assigned Contract, this Agreement shall not be deemed to constitute an assignment of any such Assigned Contract if such consent is not given or if such assignment otherwise would constitute a breach of, or cause a loss of contractual benefits under, any such Assigned Contract, and Buyer shall assume no obligations or liabilities under any such Assigned Contract. Seller shall use its best efforts to advise Buyer promptly in writing with respect to any Assigned Contract which Seller knows or has substantial reason to believe will or may not be subject to assignment to Buyer hereunder. Without in any way limiting Seller's obligation to obtain all consents and waivers necessary for the sale, transfer, assignment and delivery of the Assets to Buyer hereunder, if any such consent is not obtained or if such assignment is not permitted irrespective of consent and the Closing hereunder is consummated, Seller shall cooperate with Buyer following the Closing Date in any reasonable arrangement designed to provide Buyer with the rights and benefits under any such Assigned Contract, including enforcement for the benefit of Buyer of any and all rights of Seller against any other party arising out of any breach or cancellation of any such Assigned

Contract by such other party and, if requested by Buyer, acting as an agent on behalf of Buyer or as Buyer shall otherwise reasonably require.

## **7.12 TAX MATTERS**

Seller shall be responsible for, and shall indemnify Buyer from and against, any sales, use, transfer, documentary, stamp, withholding or similar Tax applicable to the transactions contemplated by this Agreement (collectively, “**Transfer Taxes**”). Buyer shall reasonably cooperate with Seller to establish any lawful exemption(s) from any such Transfer Taxes that would otherwise apply, including by providing appropriate certifications to establish any “sale for resale” or other lawful exemption. If (i) in any jurisdiction in which Seller files income, franchise, employment, sales and use or property Tax Returns, any tax clearance or other procedure is available for obtaining certification that all of such Taxes have been paid, and (ii) Seller cannot establish to Buyer’s reasonable satisfaction that, in the absence of such certification, Buyer will not succeed, by reason of the purchase of the Assets pursuant to this Agreement, to any liability of the Seller for any such Taxes, then Seller shall apply for such tax clearance certificates. Seller shall, prior to Closing, provide Buyer with a copy of all such filings and certificates.

## **7.13 FURTHER ASSURANCES**

The parties shall cooperate reasonably with each other and with their respective Representatives in connection with any steps required to be taken as part of their respective obligations under this Agreement, and shall: (a) furnish upon request to each other such further information; (b) execute and deliver to each other such other documents; and (c) do such other acts and things, all as the other party may reasonably request for the purpose of carrying out the intent of this Agreement and the Contemplated Transactions.

# **8. Indemnification; Remedies**

## **8.1 SURVIVAL**

All representations, warranties, covenants, and obligations in this Agreement, the Disclosure Schedule, the supplements to the Disclosure Schedule, the certificates delivered pursuant to **Section 2.7**, and any other certificate or document delivered pursuant to this Agreement shall survive the Closing and the consummation of the Contemplated Transactions, subject to **Section 8.4**. The right to indemnification, reimbursement, or other remedy based upon such representations, warranties, covenants, and obligations shall not be affected by any investigation (including any environmental investigation or assessment) conducted with respect to, or any Knowledge acquired (or capable of being 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 any such representation, warranty, covenant, or obligation. The waiver of any condition based upon the accuracy of any representation or warranty, or on the performance of or compliance with any covenant or obligation, will not affect the right to indemnification, reimbursement, or other remedy based upon such representations, warranties, covenants, and obligations.

## 8.2 INDEMNIFICATION AND REIMBURSEMENT BY SELLER

Seller will defend, indemnify and hold harmless Buyer and its Representatives, shareholders, subsidiaries, and Related Persons, and will reimburse them for Damages, arising from or in connection with:

- (a) any breach of any representation or warranty made by Seller in (i) this Agreement, (ii) the Disclosure Schedule, (iii) the certificates delivered pursuant to **Section 2.7**, (iv) any transfer instrument, or (v) any other certificate, document, writing, or instrument delivered by Seller pursuant to this Agreement;
- (b) any breach of any covenant or obligation of Seller in this Agreement or in any other certificate, document, writing, or instrument delivered by Seller pursuant to this Agreement;
- (c) any Liability arising out of the ownership or operation of the Assets prior to the Effective Date other than the Assumed Liabilities;
- (d) 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 such Person with Seller (or any Person acting on Seller's behalf) in connection with any of the Contemplated Transactions;
- (e) any product or component thereof manufactured or shipped by, or any services provided by, Seller, in whole or in part, prior to the Closing Date;
- (f) any matter disclosed in **Schedules**\_\_\_\_\_ of the Disclosure Schedule;
- (g) any noncompliance with any Bulk Sales Laws or fraudulent transfer laws in respect of the Contemplated Transactions;
- (h) any liability under the WARN Act or any similar state or local Legal Requirement that may result from an "Employment Loss," as defined by 29 U.S.C. Sect. 2101(a)(6), caused by any action of Seller prior to the Closing or by Buyer's decision not to hire previous employees of Seller;
- (i) any Environmental, Health and Safety Liabilities arising out of or relating to: (i) the ownership or operation by any Person at any time on or prior to the Closing Date of any of the Facilities, Assets, or the Business, or (ii) any Hazardous Materials or other contaminants that were present on the Facilities or the Assets at any time on or prior to the Closing Date;
- (j) any of the Employee Plans; or
- (k) any Retained Liabilities.

### **8.3 INDEMNIFICATION AND REIMBURSEMENT BY BUYER**

Buyer will indemnify and hold harmless Seller, and will reimburse Seller for any Damages, arising from or in connection with:

- (a) any breach of any representation or warranty made by Buyer in this Agreement or in any certificate, document, writing, or instrument delivered by Buyer pursuant to this Agreement;
- (b) any breach of any covenant or obligation of Buyer in this Agreement or in any other certificate, document, writing, or instrument delivered by Buyer 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 such Person with Buyer (or any Person acting on Buyer's behalf) in connection with any of the Contemplated Transactions; or
- (d) any Assumed Liabilities.

### **8.4 LIMITATIONS**

- (a) Seller will have liability (for indemnification or otherwise) with respect to any breach of a representation or warranty (other than those in **Sections 3.2(a), 3.9, 3.14, 3.16, 3.22, 3.27, and 3.28**, as to which a claim may be made at any time), only if on or before the \_\_\_\_\_ anniversary of the Effective Date, Buyer notifies Seller of a claim specifying the factual basis of the claim in reasonable detail to the extent then known by Buyer.
- (b) Buyer will have liability (for indemnification or otherwise) with respect to any breach of a representation or warranty (other than that set forth in **Sections 4.2(a) and 4.4**, as to which a claim may be made at any time), only if on or before the \_\_\_\_\_ anniversary of the Effective Date, Seller notifies Buyer of a claim specifying the factual basis of the claim in reasonable detail to the extent then known by Seller.
- (c) Solely for purposes of determining the amount of Damages resulting from any breach of a representation or warranty, all qualifications or exceptions in any representation or warranty relating to or referring to the terms "material", "materiality", "in all material respects", "Material Adverse Effect" or any similar term or phrase shall be disregarded, it being the understanding of the parties that for determining the amount of Damages indemnifiable under this **Article 8**, the representations and warranties of the parties contained in this Agreement shall be read as if such terms and phrases were not included in them.

### **8.5 THIRD-PARTY CLAIMS**

- (a) Promptly after receipt by an Indemnified Person of notice of the assertion of a Third-Party Claim against it, such Indemnified Person shall give notice to each Indemnifying



Person of the assertion of such Third-Party Claim, provided that the failure to notify the Indemnifying Person will not relieve the Indemnifying Person of any liability that it may have to any Indemnified Person, except to the extent that the Indemnifying Person demonstrates that the defense of such Third-Party Claim is prejudiced by the Indemnified Person's failure to give such notice.

- (b) If an Indemnified Person gives notice to the Indemnifying Person pursuant to **Section 8.5(a)** of the assertion of a Third-Party Claim, the Indemnifying Person shall be entitled to participate in the defense of such Third-Party Claim and, to the extent that it wishes (unless (i) the Indemnifying Person is also a Person against whom the Third-Party Claim is made and the Indemnified Person determines in good faith that joint representation would be inappropriate or (ii) the Indemnifying Person fails to provide reasonable assurance to the Indemnified Person of its financial capacity to defend such Third-Party Claim and provide indemnification with respect to such Third-Party Claim), to assume the defense of such Third-Party Claim with counsel satisfactory to the Indemnified Person. After notice from the Indemnifying Person to the Indemnified Person of its election to assume the defense of such Third-Party Claim, the Indemnifying Person shall not, so long as it diligently conducts such defense, be liable to the Indemnified Person under this **Article 8** for any fees of other counsel or any other expenses with respect to the defense of such Third-Party Claim, in each case subsequently incurred by the Indemnified Person in connection with the defense of such Third-Party Claim, other than reasonable costs of investigation. If the Indemnifying Person assumes the defense of a Third-Party Claim, (i) such assumption will conclusively establish for purposes of this Agreement that the claims made in that Third-Party Claim are within the scope of and subject to indemnification, and (ii) no compromise or settlement of such Third-Party Claims may be effected by the Indemnifying Person without the Indemnified Person's Consent unless: (A) there is no finding or admission of any violation of Legal Requirement or any violation of the rights of any Person; (B) the sole relief provided is monetary damages that are paid in full by the Indemnifying Person; and (C) the Indemnified Person shall have no liability with respect to any compromise or settlement of such Third-Party Claims effected without its Consent. If notice is given to an Indemnifying Person of the assertion of any Third-Party Claim and the Indemnifying Person does not, within ten (10) days after the Indemnified Person's notice is given, give notice to the Indemnified Person of its election to assume the defense of such Third-Party Claim, the Indemnifying Person will be bound by any determination made in 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 its Related Persons other than as a result of monetary damages for which it would be entitled to indemnification 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, but the Indemnifying Person will not be bound by any determination of any Third-Party Claim so defended for the purposes of this Agreement or any compromise or settlement effected without its Consent (which may not be unreasonably withheld).

- (d) Notwithstanding the provisions of **Section 9.4**, each party to this Agreement hereby consents to the nonexclusive jurisdiction of any court in which a Proceeding in respect of a Third-Party Claim is brought against any Indemnified Person for purposes of any claim that an Indemnified Person may have under this Agreement with respect to such Proceeding or the matters alleged therein and agrees that process may be served on such party with respect to such a claim anywhere in the world.
- (e) With respect to any Third-Party Claim subject to indemnification under this **Article 8**: (i) both the Indemnified Person and the 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 Proceedings at all stages thereof where such Person is not represented by its own counsel; and (ii) the parties agree (each at its own expense) to render to each other such assistance as they may reasonably require of each other and to cooperate in good faith with each other in order to ensure the proper and adequate defense of any Third-Party Claim.
- (f) With respect to any Third-Party Claim subject to indemnification under this **Article 8**, the parties agree to cooperate in such a manner as 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 will use Commercially Reasonable 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 hereto 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.

## **8.6 OTHER CLAIMS**

A claim for indemnification for any matter not involving a Third-Party Claim may be asserted by notice to the party from whom indemnification is sought and shall be paid promptly after such notice.

## **8.7 INDEMNIFICATION IN CASE OF STRICT LIABILITY OR INDEMNITEE NEGLIGENCE**

THE INDEMNIFICATION PROVISIONS IN THIS **ARTICLE 8** 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 BULK SALES LAW, ENVIRONMENTAL LAW, FRAUDULENT TRANSFER ACT, OCCUPATIONAL SAFETY AND HEALTH LAW, OR PRODUCTS LIABILITY, SECURITIES, OR OTHER LEGAL REQUIREMENT) AND REGARDLESS OF WHETHER ANY PERSON (INCLUDING THE PERSON FROM WHOM INDEMNIFICATION IS SOUGHT) ALLEGES OR PROVES THE SOLE, CONCURRENT, CONTRIBUTORY, OR COMPARATIVE NEGLIGENCE OF THE PERSON SEEKING INDEMNIFICATION OR THE SOLE OR CONCURRENT STRICT LIABILITY IMPOSED UPON THE PERSON SEEKING INDEMNIFICATION.

## 9. General Provisions

### 9.1 EXPENSES

Except as otherwise provided in this Agreement, each party to this Agreement will bear its respective fees and expenses incurred in connection with the preparation, negotiation, execution, and performance of this Agreement and the Contemplated Transactions, including all fees and expense of its Representatives.

### 9.2 PUBLIC ANNOUNCEMENTS

Seller and Buyer will consult with each other concerning the means by which Seller's employees, customers, suppliers, and others having dealings with Seller will be informed of the Contemplated Transactions, and Buyer will have the right to be present for any such communication.

### 9.3 NOTICES

All notices, Consents, and other communications required or permitted by this Agreement shall be in writing and shall be deemed given to a party: (a) when delivered to the appropriate address by hand; (b) on the first business day after sent by nationally recognized overnight courier service (costs prepaid); (c) when sent by facsimile with telephonic confirmation or electronic mail with confirmation of transmission by the transmitting equipment; or (d) three (3) business days after deposit if sent by certified mail, return receipt requested, when received or rejected by the addressee, in each case to the following addresses, facsimile numbers, or electronic mail addresses and marked to the attention of the person (by name or title) designated below (or to such other address, facsimile number, electronic mail address, or person as a party may designate by notice to the other parties):

Seller:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

Fax no.: \_\_\_\_\_

Electronic mail address: \_\_\_\_\_

with a mandatory copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

Fax no.: \_\_\_\_\_

Electronic mail address: \_\_\_\_\_

Buyer:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

Fax no.: \_\_\_\_\_

Electronic mail address: \_\_\_\_\_

with a mandatory copy to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

Fax no.: \_\_\_\_\_

Electronic mail address: \_\_\_\_\_

#### **9.4 JURISDICTION; SERVICE OF PROCESS; WAIVER OF JURY TRIAL**

- (a) Any Proceeding (other than an arbitration) arising out of or relating to this Agreement or any Contemplated Transaction shall be brought in the courts of Hamilton County, Ohio or, if it has or can acquire jurisdiction, in the United States District Court for the Southern District of Ohio, 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. The parties agree that either or both of them may file a copy of this paragraph with any court as written evidence of the knowing, voluntary, and bargained agreement between the parties irrevocably to waive any objections to venue or to convenience of forum. Process in any such Proceeding referred to in the first sentence of this section may be served on any party anywhere in the world.
- (b) THE PARTIES HEREBY WAIVE ANY RIGHT TO TRIAL BY JURY IN ANY PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OF THE CONTEMPLATED TRANSACTIONS, WHETHER NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT, TORT, OR OTHERWISE. THE PARTIES AGREE THAT ANY OF THEM MAY FILE A COPY OF THIS PARAGRAPH WITH ANY COURT AS WRITTEN EVIDENCE OF THE KNOWING, VOLUNTARY, AND BARGAINED-FOR AGREEMENT AMONG THE PARTIES IRREVOCABLY TO WAIVE TRIAL BY JURY AND THAT ANY PROCEEDING WHATSOEVER BETWEEN THEM RELATING TO THIS AGREEMENT OR ANY OF THE CONTEMPLATED TRANSACTIONS SHALL INSTEAD BE TRIED IN A COURT OF COMPETENT JURISDICTION BY A JUDGE SITTING WITHOUT A JURY.

## **9.5 ENFORCEMENT OF AGREEMENT**

Seller acknowledges and agrees that Buyer would be irreparably damaged 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 Seller could not be adequately compensated in all cases by monetary damages alone. Accordingly, in addition to any other right or remedy to which Buyer may be entitled, at law or in equity, it shall be entitled to enforce any provision of this Agreement by a decree of specific performance and to temporary, preliminary, and permanent injunctive relief to prevent breaches or threatened breaches of any of the provisions of this Agreement, without posting any bond or other undertaking.

## **9.6 WAIVER; REMEDIES CUMULATIVE**

The rights and remedies of the parties to this Agreement are cumulative and not alternative. No failure, delay, or single or partial exercise of any right, power, or privilege by any party under this Agreement or any of the documents referred to in this Agreement will operate as a waiver of such right, power, or privilege or 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 law: (a) no claim or right arising out of this Agreement or any of the documents referred to in this Agreement can be discharged by one party, in whole or in part, by a waiver or renunciation of the claim or right unless in writing signed by the other party; (b) no waiver that may be given by a party will be applicable except in the specific instance for which it is given; and (c) no notice to or demand on one party will be deemed to be a waiver of any obligation of that party or of 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.

## **9.7 ENTIRE AGREEMENT AND MODIFICATION**

This Agreement supersedes all prior agreements, whether written or oral, between or among the parties with respect to its subject matter (including any letter of intent and any confidentiality agreement between Buyer and Seller) and constitutes (along with the Disclosure Schedule, Exhibits, and other documents delivered pursuant to this Agreement) a complete and exclusive statement of the terms of the agreement between the parties with respect to its subject matter. This Agreement may not be amended, supplemented, or otherwise modified except by a written agreement executed by the party to be charged with the amendment.

## **9.8 DISCLOSURE SCHEDULE**

- (a) The information in the Disclosure Schedule constitutes (i) exceptions to particular representations, warranties, covenants, and obligations of Seller as set forth in this Agreement or (ii) descriptions or lists of assets and liabilities and other items referred to in this Agreement. If there is any inconsistency between the statements in this Agreement and those in the Disclosure Schedule (other than an exception expressly set forth as such in the Disclosure Schedule with respect to a specifically identified representation or warranty), the statements in this Agreement will control.

- (b) The statements in the Disclosure Schedule, and those in any supplement thereto, relate only to the provisions in the Section of this Agreement to which they expressly relate and not to any other provision in this Agreement.

## **9.9 ASSIGNMENTS, SUCCESSORS, AND NO THIRD-PARTY RIGHTS**

No party may assign any of its rights or delegate any of its obligations under this Agreement without the prior written 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 may collaterally assign its rights hereunder to any financial institution providing financing to Buyer. Subject to the preceding sentence, this Agreement will apply to, be binding in all respects upon and inure to the benefit of the heirs, successors, and permitted assigns of the parties. Nothing expressed or referred to in this Agreement will be construed to give any Person other than the parties to this Agreement any legal or equitable right, remedy, or claim under or with respect to this Agreement or any provision of this Agreement, except such rights as shall inure to an heir, successor, or permitted assignee pursuant to this **Section 9.9**.

## **9.10 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.

## **9.11 CONSTRUCTION**

The headings of Articles and Sections in this Agreement are provided for convenience only and will not affect its construction or interpretation. All references to “Articles,” “Sections,” and “Schedules” refer to the corresponding Articles, Sections, and Schedules of this Agreement and the Disclosure Schedule.

## **9.12 TIME OF ESSENCE**

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

## **9.13 GOVERNING LAW**

This Agreement will be governed by and construed under the laws of the State of Ohio without regard to conflicts-of-laws principles that would require the application of any other law.

## **9.14 EXECUTION OF AGREEMENT**

This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original copy of this Agreement and all of which, when taken together, will be deemed to constitute one and the same agreement. The exchange of copies of this Agreement and of signature pages by facsimile or electronic mail transmission shall constitute effective execution and delivery of this Agreement as to the parties and may be used in lieu of the original

Agreement for all purposes. Signatures of the parties transmitted by facsimile or electronic mail shall be deemed to be their original signatures for all purposes.

[Signature Page Follows]

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

SELLER:

\_\_\_\_\_

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

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

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

BUYER:

\_\_\_\_\_

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

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

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