

# BUYING ASSETS IN TENNESSEE: AN ANNOTATED MODEL TENNESSEE ASSET PURCHASE AGREEMENT

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## PRELIMINARY NOTE

This form of annotated Tennessee asset purchase agreement (“Model Tennessee APA”) is styled similarly to the *Model Asset Purchase Agreement with Commentary*<sup>2</sup> recently published by the American Bar Association (“ABA”). Like the ABA’s model agreement, this Model Tennessee APA is annotated with explanatory footnotes. Unlike the ABA’s model agreement, however, this Model Tennessee APA, a relatively short-form agreement, is intended to serve more as a reference tool rather than as a form agreement. Also, it is written and annotated with a focus on Tennessee law and practice.

This Model Tennessee APA is a buyer’s form of agreement; it was originally drafted by buyer’s counsel and has been fully negotiated. Because this is a buyer’s form of agreement, the representations and warranties in the model generally favor the buyer in their breadth and allocate much of the risk of a failed closing to the seller. The Model Tennessee APA’s provisions and the related annotations nonetheless are meant to benefit all drafters—those representing buyers, sellers, and interested third parties. Blank lines are inserted where deal-specific information (e.g., party names, dollar amounts that vary with the size of the transaction, disclosures about a party’s business or financial condition, or time frames) is required. The styles and “practice points” of the authors are reflected in this Model Tennessee

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<sup>2</sup> COMMITTEE ON NEGOTIATED AGREEMENTS, MODEL ASSET PURCHASE AGREEMENT WITH COMMENTARY (American Bar Association) (2001) [hereinafter ABA MODEL AGREEMENT].

APA, and the ABA's model agreement and other sources of general application also are cited in support of these as applicable.

The Model Tennessee APA is based on a number of general premises. First, the Model Tennessee APA assumes that the buyer is a privately held Tennessee corporation with over \$100,000,000 in annual net sales and that Tennessee law will apply to both the document and the subject asset purchase transaction. The seller, a closely held Tennessee corporation, is a manufacturer of computer hardware and a publisher of computer software that employs approximately 108 full-time employees and is selling its business as a going concern.<sup>3</sup> As a result, the seller is selling all of the assets used in its business, constituting substantially all of its assets, including any attendant intellectual property<sup>4</sup> rights but excluding any real property. The specific set of assets to be purchased and the set of assets not to be purchased are described in Article 1 (Definitions),<sup>5</sup> and the total value of assets to be purchased is \$75,000,000.<sup>6</sup> The buyer is purchasing the seller's assets with cash only; no securities or other elements of consideration are being transferred to the seller. As a result of this and because the buyer and the seller both are privately held corporations, registration statements and other public filings under the Securities Act of 1933,<sup>7</sup> as amended, the Securities Exchange Act of 1934,<sup>8</sup> as amended, and state securities laws are unnecessary.

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<sup>3</sup> Because the seller is selling its business as a going concern, it is plausible that one or more of the seller's manufacturing or development facilities will be shut down. As a result of this and because the seller employs over 100 full-time employees, the seller will be required to notify its employees of a lay-off under the Worker Adjustment and Retraining Notification Act. *See* 29 U.S.C. 2101(a) (2003); *see also infra* note 27.

<sup>4</sup> The seller's intellectual property is particularly important in the context of this transaction because of the nature of its business. This aspect of the transaction is highlighted in various parts of the Model Tennessee APA.

<sup>5</sup> In the ABA's model agreement, the "assets to be sold" and "excluded assets" are presented in Article 2, delineated as "Sale and Transfer of Assets; Closing." *See* ABA MODEL AGREEMENT, *supra* note 2, at 41-6. The choice is the drafter's preference.

<sup>6</sup> The fact that the total value of Seller's assets to be acquired is \$75,000,000, coupled with the fact that Buyer has annual net sales in excess of \$100,000,000, qualifies this transaction for certain notice and waiting period requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended. *See* 15 U.S.C. 18a (2003); *see also infra* note 20.

<sup>7</sup> 15 U.S.C. §§ 77a-77aa.

<sup>8</sup> 15 U.S.C. §§ 78a-78mm.

## ASSET PURCHASE AGREEMENT<sup>9</sup>

ASSET PURCHASE AGREEMENT (the “Agreement”) entered into this \_\_\_\_ day of \_\_\_\_\_, by and between \_\_\_\_\_, a Tennessee corporation (“Buyer”), and \_\_\_\_\_, a Tennessee corporation (“Seller”). Capitalized terms used and not defined have the meanings set forth in Article 1.

### RECITALS<sup>10</sup>

Seller is engaged, among other things, in the business of developing, manufacturing, publishing, marketing, and distributing \_\_\_\_\_ (the “Business”).

Buyer desires to purchase from Seller, and Seller desires to sell to Buyer, substantially all<sup>11</sup> of the properties, business, and assets of Seller used and/or<sup>12</sup> useful \_\_\_\_\_

<sup>9</sup> The final version of this document typically would contain a title page, a thorough, accurate table of contents, and a list of attachments, all of which would precede the first page of the actual contract. For the sake of brevity, however, these portions of the original document are omitted here. Also not included are schedules and other attachments, referenced throughout the text of this document, that are intended to memorialize further agreements between the parties or set forth additional facts and other information. The contents of these schedules and attachments frequently are deal-specific.

<sup>10</sup> There “is no legal requirement that an acquisition agreement contain recitals,” but they are, of course, helpful in conveying the transaction’s context. ABA MODEL AGREEMENT, *supra* note 2, at 11. In Tennessee, recitals, also known as “preamble paragraphs,” “may have a material influence in construing the contract and determining the intent of the parties.” TENN. CODE ANN. § 47-50-112 (Analysis, n.2) (2002) (citing Pyramid Operating Auth., Inc. v. City of Memphis, 144 Bankr. 795 (Bankr. W.D. Tenn. 1992)).

The word “Whereas,” which traditionally begins all but the final recital paragraph, and the phrase “Now, therefore,” which generally begins the last recital paragraph, are omitted in the Model Tennessee APA to illustrate the growing “plain English” trend in legal writing. For a general discussion of plain English and other commonly accepted conventions in contract drafting, see GEORGE W. KUNEY, THE ELEMENTS OF CONTRACT DRAFTING (Thomson-West 2002).

<sup>11</sup> Under applicable Tennessee law, this asset sale must be approved by Seller’s board of directors and shareholders. Unless a corporation’s charter states or the board of directors decides otherwise, approval of the corporation’s sale of substantially all of its assets outside the “regular course of business” requires approval of a majority of shareholders entitled to vote on the sale. TENN. CODE ANN. § 48-22-102(c) (2000). In exercising its authority to manage the business and affairs of the corporation, the board of directors first approves the terms and provisions of a proposed offer to sell substantially all corporate assets. *Id.* § 48-18-101. The board then proposes the sale to the shareholders entitled to vote on the transaction, making its recommendation to the shareholders regarding the transaction. *Id.* §§ 48-22-101(a), 48-22-102. The closing of this deal is delayed to accommodate the requisite shareholder vote.

in the operation of the Business, constituting substantially all of Seller's assets, and Buyer desires to assume from Seller, and Seller desires to assign to Buyer, certain liabilities and obligations of Seller with respect to the operation of the Business, in each case in accordance with the terms and conditions of this Agreement.

Buyer and Seller (collectively, the "Parties") desire to enter into this Agreement for the purpose of setting forth their mutual understandings and agreements with respect to the foregoing.

In consideration of the premises and the representations, warranties, and covenants contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the Parties, intending to be legally bound, agree as set forth below.<sup>13</sup>

## **ARTICLE 1. DEFINITIONS<sup>14</sup>**

"Accounts Receivable"<sup>15</sup> means all notes receivable, trade receivables, accounts receivable, commissions, and other receivables and rights to payment of Seller in respect of the Business.

"Acquired Assets" means all right, title, and interest in and to all of the assets of Seller used and/or useful in the operation of the Business, including<sup>16</sup> the following assets, but specifically excluding the Excluded Assets:

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<sup>12</sup> *But see* KUNEY, *supra* note 10, at 36, 44 (recommending that "and/or" not be used and that, more generally, slashes not be used in legal drafting).

<sup>13</sup> *See id.* at 59-60.

<sup>14</sup> For ease of reference, commonly used terms often are defined in a separate article or section at the beginning of an acquisition agreement. Definitions for commonly used terms alternatively may be placed (a) in a separate article or section at the end of the agreement, (b) in a separate document that is incorporated into the agreement by reference, or (c) in the section of the agreement in which each defined term first appears. *See* ABA MODEL AGREEMENT, *supra* note 2, at 13.

<sup>15</sup> Important accounting terms often are defined in acquisition agreements to ensure that the parties have the same understanding of those terms in the context of the agreement. These definitions may be contested and hotly negotiated. For a discussion of accounting terms and procedures, see generally GEORGE T. FRIEDLOB & FRANKLIN J. PLEWA, UNDERSTANDING BALANCE SHEETS (1996) or BARTON E. FERST & STANLEY D. FERST, BASIC ACCOUNTING FOR LAWYERS (1965).

<sup>16</sup> Many drafters include a phrase such as "but not limited to" or "without limitation" after the word "including" when used in this context. These additional words have been omitted throughout the

(a) all tangible personal property (such as machinery, equipment, Inventories, furniture, automobiles, \_\_\_\_\_);

(b) all Intellectual Property, associated goodwill, related licenses and sublicenses (in each case, whether granted or obtained), and other rights, remedies against infringements of, and rights to protection of interests in Intellectual Property under the Laws of all jurisdictions;

(c) the Contracts listed on Schedule 2.2 and all associated rights of Seller;<sup>17</sup>

(d) all Accounts Receivable;

(e) all franchises, approvals, permits, licenses, orders, registrations, certificates, variances, and similar rights obtained by, on behalf of, or for the benefit of Seller from any Governmental Agency; and

(f) all books, records, ledgers, files, documents, correspondence, lists, plats, architectural plans, drawings, specifications, creative materials, advertising and promotional materials, studies, reports, and other printed or written materials used and/or useful in the operation of the Business.

“Affiliate” means any Person that, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with another Person.<sup>18</sup>

“Affiliated Group” means any affiliated group within the meaning of Code Section 1504(a).

“Alternative Transaction” has the meaning set forth in Section 7.4.

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Agreement because they are unnecessary in achieving drafting clarity. *See* KUNEY, *supra* note 10, at 39-40.

<sup>17</sup> Certain of the seller’s contracts may not be freely assignable or transferable, even though they may be included in the assets that the buyer wishes to purchase. For example, some contracts may not be assignable without notice, without consent, or without effecting an amendment to the contract.

<sup>18</sup> This definition of “affiliate” is identical to the regulatory definition used in various contexts under both the Securities Act of 1933, as amended, and the Securities Exchange Act of 1934, as amended. *See* 17 C.F.R. §§ 230.144(a)(1), 230.405, 240.12b-2 (2000).

“Asserted Liability” has the meaning set forth in Section 9.4(a).

“Assignments” has the meaning set forth in Section 2.5.

“Assumed Liabilities” means all obligations of Seller arising from and after Closing under the Contracts listed on Schedule 2.2.

“Basis” means any past or present fact, situation, circumstance, status, condition, activity, practice, plan, occurrence, event, incident, action, failure to act, or transaction that forms or could form the Basis for any specified consequences.

“Breakup Fee” has the meaning set forth in Section 7.4.

“Business” has the meaning set forth in the Recitals to this Agreement.

“Buyer” has the meaning set forth in the introductory paragraph to this Agreement.

“Cash” means cash and cash equivalents (including marketable securities and short-term investments) valued in accordance with GAAP applied on a Basis consistent with that used in the preparation of the Financial Statements.

“Claims Notice” has the meaning set forth in Section 9.4(a).

“Closing” has the meaning set forth in Section 2.4.

“Closing Balance Sheet” has the meaning set forth in Section 2.3(c).

“Closing Date” has the meaning set forth in Section 2.4.

“COBRA” means the Consolidated Omnibus Budget Reconciliation Act of 1985.

“Code” means the U.S. Internal Revenue Code of 1986, as amended.

“Confidential Information” has the meaning set forth in Section 10.2.

“Contracts” means all executory contracts, purchase orders, agreements, and understandings with respect to the Business to which Seller is a party or any of the Acquired Assets is subject, whether oral or written, including without limitation those listed on Schedule 2.2 and Disclosure Schedule 3.16.

“Covered Non-occurrence” has the meaning set forth in Section 7.4.

“Disclosure Schedules” has the meaning set forth in the introductory paragraph to Article 3.

“Escrow Agent” has the meaning set forth in Section 2.3(a)(v).

“Escrow Agreement” has the meaning set forth in Section 2.3(a)(v).

“Estimated Holdback” has the meaning set forth in Section 2.3(b)(v).

“Estimated Purchase Price” has the meaning set forth in Section 2.3(b)(iv).

“Excluded Assets” means:

- (a) all Cash of Seller;
- (b) all real property of Seller, including land, buildings, and other improvements used in connection with the operation of the Business;
- (c) all leases and subleases for real property leased by Seller, including real property leased in connection with the operation of the Business; and
- (d) all other assets of Seller not used and/or not useful in the operation of the Business.<sup>19</sup>

“Final Balance Sheet” has the meaning set forth in Section 2.3(c).

“Financial Statements” has the meaning set forth in Section 3.7.

“GAAP” means U.S. generally accepted accounting principles, as promulgated by the Financial Accounting Standards Board and as in effect from time to time.

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<sup>19</sup> Representative of the fact that this is a buyer’s agreement, note that “Excluded Assets” identifies a more specific set of assets than the “Acquired Assets,” evidenced by a lack of language such as “including but not limited to.” This form may be advantageous to Buyer in that questions as to whether or not certain assets are contemplated as “Acquired Assets” reasonably may be resolved in favor of Buyer.

“Governmental Agency” means any legislature, agency, instrumentality, department, commission, court, tribunal, board, agency, or organization of any government, whether foreign or domestic and whether national, multi-national, federal, state, provincial, or local.

“Hart-Scott-Rodino Act” means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended.<sup>20</sup>

“Holdback” has the meaning set forth in Section 2.3(a)(v).

“Indemnifiable Losses” has the meaning set forth in Section 9.2.

“Indemnitor” has the meaning set forth in Section 9.4(a).

“Indemnitee” has the meaning set forth in Section 9.4(a).

“Intellectual Property” means: (a) all inventions (whether patentable or unpatentable and whether or not reduced to practice), all improvements to those inventions, and all patents, patent applications, and patent disclosures, together with

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<sup>20</sup> Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended in scattered sections of 15 U.S.C.). The Hart-Scott-Rodino Act

requires that the parties to a proposed acquisition subject to the [Hart-Scott-Rodino] Act give prior notice of the proposed acquisition to the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice and delay consummation of the acquisition until expiration (or early termination) of the specified waiting period. The purpose of the [Hart-Scott-Rodino] Act is to allow the government an opportunity to evaluate the anticompetitive aspects of a proposed acquisition and to seek to enjoin its consummation in appropriate circumstances.

ABA MODEL AGREEMENT, *supra* note 2, at 26. A filing is required if either party is engaged in business that affects commerce and if either the contemplated transaction or the parties “satisfy certain size requirements.” *Id.* More specifically, transactions that result in the acquiror holding assets of the acquired entity valued in excess of \$200,000,000 satisfy the size requirements, or transactions that result in the acquiror holding assets of the acquired entity valued between \$50,000,000 and \$200,000,000 and where (a) the acquired entity, whether or not “engaged in manufacturing,” has annual net sales or total assets worth at least \$10,000,000 and the acquiror has total assets or net sales worth at least \$100,000,000 or (b) the acquired entity has annual net sales or total assets worth at least \$100,000,000 and the acquiror has total assets or net sales worth at least \$10,000,000. *See* 15 U.S.C. § 18a(a)(1)-(2) (2002). For a more detailed discussion of the Hart-Scott-Rodino Act and its impact on acquisitions, see STEPHEN M. AXINN, ACQUISITIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT (2d ed. 1988).

all re-issuances continuations, continuations-in-part, revisions, extensions, and reexaminations of these assets; (b) all trademarks, service marks, trade dress, logos, trade names, and corporate names, together with all translations, adaptations, derivations, registrations, and combinations of these assets; (c) all copyrightable works, all copyrights, and all applications, registrations, and renewals in connection with these assets; (d) all mask works<sup>21</sup> and all applications, registrations, and renewals in connection with these assets; (e) all trade secrets and confidential business information (including ideas, research and development, know-how, formulas, compositions, manufacturing and production processes and techniques, technical data, designs, drawings, specifications, customer and supplier lists, pricing and cost information, and business and marketing plans and proposals); (f) all computer software (including data and related documentation); (g) all other proprietary rights; and (h) all copies and tangible embodiments of the assets detailed in (a) through (g) of this paragraph (in whatever form or medium).

“Inventories” means all inventories<sup>22</sup> of raw materials and supplies, manufactured and purchased parts, goods in process, and finished goods of Seller used and/or useful in the operation of the Business.

“Knowledge” means, with respect to Seller, actual knowledge of any of the following individuals after reasonable investigation: \_\_\_\_\_.<sup>23</sup>

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<sup>21</sup> “Mask work” is defined by the Semiconductor Chip Protection Act of 1984 as “a series of related images, however fixed or encoded” that have or that represent “the predetermined, three-dimensional pattern of metallic, insulating, or semiconductor material present or removed from the layers of the semiconductor chip product” and “in which series the relation of the images to one another is that each image has the pattern of the surface of one form of the semiconductor chip product.” 17 U.S.C. § 901(a)(2). This particular form of intellectual property applies in a relatively limited number of transactions.

<sup>22</sup> This definition and others in this Agreement repeat all or a part of the defined term itself in the text of the definition. This practice should be avoided, when practicable, but may be desirable in circumstances where (a) the repeated word or words have a clear meaning in the context of the definition and (b) alternatives are not possible or practicable or result in unclear or unduly cumbersome drafting that obscures or detracts from the definition.

<sup>23</sup> This definition has the effect of requiring Seller to conduct inquiries in connection with various representations, while at the same time allowing Seller to limit its risk of loss with respect to those representations to matters known by a specified group of individuals. It is common to include executive officers, directors, and certain key department managers in the list of individuals whose knowledge is attributed to the seller.

“Laws” means all laws, rules, regulations, codes, ordinances, resolutions, orders, judgments, decrees, rulings, or promulgations already adopted or issued by any Governmental Agency.

“Liability” means any liability or other obligation (whether known or unknown, whether asserted or unasserted, whether absolute or contingent, whether accrued or unaccrued, whether liquidated or unliquidated, and whether due or to become due), including any liability for Taxes.

“Most Recent Financial Statements” has the meaning set forth in Section 3.7.

“Most Recent Fiscal Month End” has the meaning set forth in Section 3.7.

“Named Officers” has the meaning set forth in Section 6.1(m).

“Net Book Value of Accounts Receivable” means the amount reflected on the Final Balance Sheet for Accounts Receivable, net of reserves for doubtful accounts.

“Net Book Value of Inventories” means the amount reflected on the Preliminary Balance Sheet and Final Balance Sheet for Inventories, net of reserves for unsaleable, obsolete, and damaged Inventories and shrinkage, based on the Physical Inventory, with appropriate adjustments for additions to and sales from the date of the Physical Inventory to the Closing Date.

“Party” or “Parties” has the meaning set forth in the Recitals to this Agreement.

“Person” means an individual, a partnership, a corporation, an association, a joint stock company, a trust, a joint venture, an unincorporated organization, a Governmental Agency, or any other form of entity.

“Physical Inventory” means a physical inventory of the Acquired Assets to be conducted by representatives of Buyer and Seller not more than seven<sup>24</sup> and not fewer than two days<sup>25</sup> before the Closing Date.

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<sup>24</sup> In this Agreement, whole numbers lower than 10 and those that begin sentences are spelled out in text, and all others are expressed as Arabic numerals. In accordance with this style, the word “percent” is spelled out in text only if used to express whole number percentages lower than 10%; however where actual percentages are omitted from the Agreement, the word “percent” is expressed in symbol form (that is, “%”). All dollar amounts and decimal numbers also are expressed as Arabic numerals.

“Preliminary Balance Sheet” has the meaning set forth in Section 2.3(b).

“Prepaid Inventory” means the amount reflected on the Final Balance Sheet as prepayments made by Seller for Inventories that Seller has not received as of the time of the Physical Inventory.

“Purchase Price” has the meaning set forth in Section 2.3(a)(iv).

“Security Interest” means any mortgage, pledge, lien, encumbrance, charge, or other security interest other than (a) mechanic’s, materialmen’s, and similar liens; (b) liens for Taxes not yet due and payable or for Taxes that the taxpayer is contesting in good faith through appropriate proceedings; (c) purchase money liens and liens securing rental payments of the borrower under capital lease arrangements; and (d) other liens arising in the Seller’s Ordinary Course of Business and not incurred in connection with the borrowing of money.<sup>26</sup>

“Seller” has the meaning set forth in the introductory paragraph of this Agreement.

“Seller’s Ordinary Course of Business” means the ordinary course of Seller’s business, consistent with Seller’s past custom and practice (including with respect to quantity and frequency).

“Stipulated Amount” has the meaning set forth in Section 9.5.

“Survival Date” has the meaning set forth in Section 9.1(a).

“Subsidiary” means any corporation or other entity with respect to which a specified Person (or its subsidiary) owns a majority of the common stock or other

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<sup>25</sup> By providing for a number of “days” and not “business days,” this definition necessarily includes weekend days and holidays in its time parameters. If the parties to an agreement are concerned that the time period provided would be too short or otherwise impracticable after giving effect to the exclusion of weekend days or holidays (including especially a three-day weekend), then the parties should consider either (a) lengthening the maximum number of days in the time period provided or (b) using and defining “business days” to exclude weekend days and specified holidays (e.g., holidays on which banks in the State of Tennessee are closed).

<sup>26</sup> Note that security interest exceptions vary with the nature of the seller’s business. This definition is intended to cover mortgages and other lender security interests. Under other circumstances, a more expansive definition of “security interest” may be desirable.

voting equity interests or has the power to vote or direct the voting of sufficient equity interests to elect a majority of the directors.

“Tax” means any federal, state, local, or foreign income, gross receipts, license, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, environmental (including taxes under Code Section 59A), capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, real property, personal property, sales, use, transfer, registration, value added, alternative or add-on minimum, estimated, or other tax of any kind whatsoever, including customs duties, and any interest, penalty, or addition to any of these taxes, whether disputed or not.

“Tax Return” means any return, declaration, report, claim for refund, or information statement relating to Taxes, including any applicable schedule, attachment, or amendment.

“WARN Act” has the meaning set forth in Section 8.3.<sup>27</sup>

## **ARTICLE 2. BASIC TRANSACTION**

**2.1 Purchase and Sale of Assets.** On and subject to the terms and conditions of this Agreement, Buyer agrees to purchase and acquire from Seller, and Seller agrees to sell, transfer, assign, convey, and deliver to Buyer, all of the Acquired Assets at the Closing for the consideration specified in this Article 2.

**2.2 Assumption of Liabilities.** On and subject to the terms and conditions of this Agreement, Buyer agrees to assume and become responsible for the Assumed Liabilities as of the Closing. Schedule 2.2 sets forth a list of contracts being assigned by Seller to Buyer and assumed by Buyer from Seller at the Closing. Buyer will not assume or have any responsibility with respect to any Liability of Seller that is not an Assumed Liability.<sup>28</sup>

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<sup>27</sup> See 29 U.S.C. §§ 2101-109 (2002). The WARN Act requires that covered employers give advance notice to employees of large lay-offs or plant closings. See *id.* § 2102(a); ABA MODEL AGREEMENT, *supra* note 2, at 125. Employers generally are subject to the WARN Act if they employ 100 or more full-time employees or if all employees (full-time and part-time) work a total 4,000 or more hours per week. 29 U.S.C. § 2101(a)(1).

<sup>28</sup> For example, Buyer assumes only those liabilities that arise in the Contracts specifically listed in Schedule 2.2. See *supra* Article 1. Definitions, “Assumed Liabilities.” One appealing aspect of an asset purchase, as compared to a merger or stock purchase, is that a buyer of assets generally need not

## 2.3 Purchase Price.

(a) Computation of Purchase Price. As consideration for the sale, transfer, assignment, conveyance and delivery of the Acquired Assets, Buyer shall pay to Seller the following consideration:

- (i) \$ \_\_\_\_\_<sup>29</sup>; plus
- (ii) an amount equal to \_\_\_\_% of the remainder of (A) the Net Book Value of Accounts Receivable minus (B) Seller's accrued volume rebates as of the Closing Date; plus
- (iii) an amount equal to \_\_\_\_% of the Net Book Value of Inventories; plus
- (iv) an amount equal to \_\_\_\_% of the Prepaid Inventory (items (i), (ii), (iii), and (iv) being collectively referred to hereinafter as the "Purchase Price"); less
- (v) an amount equal to 10%<sup>30</sup> of the Purchase Price (the "Holdback"), which Buyer shall deposit with \_\_\_\_\_, as escrow agent (the "Escrow Agent"),<sup>31</sup> pursuant to the terms of an Escrow Agreement to be executed at or prior to the Closing by Buyer, Seller, and the Escrow Agent, substantially in the form of Exhibit A attached to this Agreement and incorporated into this Agreement by reference (the "Escrow Agreement").

(b) Payment of Estimated Purchase Price. At least two business days before the Closing, Seller shall provide Buyer with a preliminary balance sheet reflecting the estimated assets used in the operation of Seller's Business<sup>32</sup> and the

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automatically legally assume the seller's liabilities, although some or all of these liabilities may be charged to the buyer under successor liability theories of tort law.

<sup>29</sup> For buyers located outside the United States or for acquisitions with an international aspect, the drafter should specify the appropriate country of origin of the currency used (e.g., "U.S. Dollars").

<sup>30</sup> Ten percent of the purchase price held back in escrow is within a customary range, but the exact percentage escrowed in any given transaction often is a hotly contested matter.

<sup>31</sup> Typical escrow agents may include banks, specifically their trust divisions or departments, or legal counsel.

<sup>32</sup> For routine accounting purposes, Seller should easily be able to provide a preliminary balance sheet that includes all assets that it uses in its Business. Therefore, the preliminary balance sheet that Seller

Assumed Liabilities as of the Closing Date, prepared in accordance with GAAP, consistently applied, and on a Basis consistent with that used in the preparation of the Most Recent Financial Statements, that shall reflect Seller's estimates of the (i) Net Book Value of Accounts Receivable less Seller's accrued volume rebates, (ii) Net Book Value of Inventories based on the Physical Inventory, and (iii) Prepaid Inventory (the "Preliminary Balance Sheet"). At Closing, Buyer shall pay to Seller:

(i) \$\_\_\_\_\_; plus

(ii) an amount equal to \_\_\_\_% of the remainder of (A) the estimated Net Book Value of Accounts Receivable minus (B) Seller's estimated accrued volume rebates, as reflected on the Preliminary Balance Sheet; plus

(iii) an amount equal to \_\_\_\_% of the estimated Net Book Value of Inventories, as reflected on the Preliminary Balance Sheet; plus

(iv) an amount equal to \_\_\_\_% of the estimated Prepaid Inventory, as reflected on the Preliminary Balance Sheet (items (i), (ii), (iii) and (iv) referred to hereinafter collectively as the "Estimated Purchase Price"); less

(v) an amount equal to \_\_\_\_% of the Estimated Purchase Price (the "Estimated Holdback"), which amount shall be deposited with the Escrow Agent at Closing as contemplated by the Escrow Agreement.

(c) Final Balance Sheet. Within 15 days following the Closing, Seller shall deliver to Buyer a balance sheet reflecting the assets used in the operation of Seller's Business and of the Assumed Liabilities as of the Closing Date, prepared in accordance with GAAP, consistently applied, and consistent with and on the same Basis as the Preliminary Balance Sheet, that shall reflect Seller's computation of the (i) Net Book Value of Accounts Receivable less Seller's accrued volume rebates, (ii) Net Book Value of Inventories (based on the Physical Inventory and giving effect to adjustments for additions to and sales from Inventories from the time of the Physical Inventory through the Closing Date), and (iii) Prepaid Inventory (the "Closing Balance Sheet"), along with a certification as to the accuracy of the Closing Balance Sheet, which constitutes a representation by Seller pursuant to Section 3.7 of this Agreement. Buyer shall have a period of 15 business days from the time Buyer is delivered the Closing Balance Sheet to review the Closing Balance Sheet and notify Seller in writing whether Buyer disputes the Closing Balance Sheet. If Buyer does not so notify Seller, Buyer shall be deemed to have accepted the Closing Balance

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is required to provide Buyer includes all estimated assets used in Seller's Business rather than just the Acquired Assets, for the sake of simplicity.

Sheet. If Buyer does dispute the Closing Balance Sheet, Buyer and Seller shall negotiate in good faith to resolve the dispute, and if Buyer and Seller are unable to resolve the dispute within 15 business days of the date on which Buyer notifies Seller of the dispute, the Closing Balance Sheet shall be submitted to \_\_\_\_\_,<sup>33</sup> whose determination shall be final and binding on the Parties. The Closing Balance Sheet, as accepted by Buyer, mutually agreed upon by the Parties following a dispute by Buyer, or finally determined by the independent accounting firm following a dispute by Buyer is referred to hereinafter as the “Final Balance Sheet.” Upon determination of the Final Balance Sheet, the certification made by Seller with respect to the Closing Balance Sheet shall be deemed revised and conformed to the Final Balance Sheet (if and as necessary) and, in this revised and conformed form, shall be deemed a representation by Seller pursuant to Section 3.7 of this Agreement.

(d) Post-Closing Adjustments. Within five business days following the determination of the Final Balance Sheet pursuant to Subsection (c) above, adjustments and payments shall be made as set forth in (i) or (ii) below, as applicable.

(i) If the Purchase Price exceeds the Estimated Purchase Price, Buyer shall deposit with the Escrow Agent pursuant to the Escrow Agreement the amount in cash by which the Holdback exceeds the Estimated Holdback, and Buyer shall pay to Seller the amount in cash by which the Purchase Price, less the Holdback, exceeds the Estimated Purchase Price, less the Estimated Holdback.

(ii) If the Purchase Price is less than the Estimated Purchase Price, the Escrow Agent, pursuant to the Escrow Agreement, shall refund to Buyer the amount by which the Estimated Holdback exceeds the Holdback, and Seller shall refund to Buyer the amount in cash by which the Estimated Purchase Price, less the Holdback, exceeds the Estimated Purchase Price less the Purchase Price. If the Escrow Agent retains insufficient funds to, or otherwise cannot, make payments required to be made by it under this paragraph, Seller shall refund to

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<sup>33</sup> In the event of a dispute regarding the Closing Balance Sheet and failed negotiations between the parties, this Agreement provides that the Closing Balance Sheet shall be submitted to a third party, a named independent accounting firm, for final determination. In comments accompanying its model agreement, the ABA suggests that the independent accounting firm employ the same “principles, policies[,] and practices” used by either the buyer or seller to calculate the Closing Balance Sheet. *See* ABA MODEL AGREEMENT, *supra* note 2, at 61. To avoid disputes, or at least better enable determination of a final balance sheet, the parties should set forth as clearly as possible the principles, policies, and practices to be used by the seller and the buyer in preparing and reviewing any preliminary or closing balance sheet. Alternative dispute resolution mechanisms (e.g., arbitration or mediation) also may be useful here. *See* KUNEY, *supra* note 10, at 113-15.

Buyer, after giving effect to any payments already made by the Escrow Agent under this paragraph, the amount necessary to satisfy the Escrow Agent's payment obligation under this paragraph.

(e) Holdback. The Holdback, as finally determined, shall be held and distributed by the Escrow Agent in accordance with the terms of the Escrow Agreement.

(f) Form of Payments. All payments made under this Agreement shall be in the form of wire transfer of immediately available funds or another method of funds transfer to which the Parties mutually agree.

**2.4 The Closing.** The closing of the transactions contemplated by this Agreement (the "Closing") shall take place at the offices of \_\_\_\_\_ in \_\_\_\_\_, commencing at \_\_\_\_\_, local time, on the second business day following the satisfaction or waiver of all conditions to the obligations of the Parties to consummate the transactions contemplated hereby (other than conditions with respect to actions the respective Parties will take at the Closing itself) or as the Parties may mutually determine (the "Closing Date").

**2.5 Deliveries at the Closing.** At the Closing, (a) Seller will deliver to Buyer the various certificates, instruments, and documents referred to in Section 6.1 below; (b) Buyer will deliver to Seller the various certificates, instruments, and documents referred to in Section 6.2; (c) Seller will execute, acknowledge (if appropriate), and deliver to Buyer (i) assignments (including Intellectual Property transfer documents) reasonably requested by Buyer (the "Assignments") and (ii) other instruments of sale, transfer, conveyance, and assignment as Buyer and its counsel reasonably may request; and (d) Buyer will deliver to Seller and the Escrow Agent the consideration specified in Section 2.3(b).

**2.6 Allocation.** The Parties agree to allocate the Purchase Price (and all other capitalizable costs) among the Acquired Assets for all purposes (including financial accounting and Tax purposes) in accordance with the allocation schedule attached to this Agreement as Exhibit B.<sup>34</sup>

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<sup>34</sup> See KUNEY, *supra* note 10, at 60 (describing the use of allocation schedules in this context).

### ARTICLE 3. REPRESENTATIONS AND WARRANTIES<sup>35</sup> OF SELLER

Seller<sup>36</sup> represents and warrants to Buyer that the statements contained in this Article 3 are correct and complete as of the date of this Agreement, except as set forth on the disclosure schedules accompanying this Agreement and initialed by the Parties (the “Disclosure Schedules”). Generally, each schedule in the Disclosure Schedules will be designated with a number corresponding to the lettered and numbered sections and paragraphs contained in this Article 3.<sup>37</sup>

**3.1 Organization of Seller.** Seller is a corporation duly organized, validly existing, and in good standing under the laws of the State of Tennessee.<sup>38</sup> Seller is duly qualified or licensed to do business in and is in good standing as a foreign corporation in all jurisdictions where Seller is required to be qualified or licensed to do business as a foreign corporation,<sup>39</sup> except for those jurisdictions where the failure to so qualify is not reasonably likely to have a material adverse

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<sup>35</sup> The difference between a representation and a warranty is a technical one: “[R]epresentations are statements of past or existing facts, and warranties are promises that existing facts are or will be true . . . .” ABA MODEL AGREEMENT, *supra* note 2, at 69. Practically, however, the difference between the two “has proven unimportant in acquisition practice.” *Id.* (citing JAMES FREUND, ANATOMY OF A MERGER 153 (1975)). For a discussion of a seller’s representations and warranties generally, see LOU R. KLING & EILEEN NUGENT SIMON, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES, AND DIVISIONS ch. 11 (1992).

<sup>36</sup> A buyer alternatively may desire—depending, for example, on the specific circumstances surrounding the seller’s ownership structure—to have the seller and one or more controlling shareholders (or other equity owners in a non-corporate entity) jointly and severally make representations and warranties. *See, e.g.*, ABA MODEL AGREEMENT, *supra* note 2, at 69.

<sup>37</sup> The parties may, but need not, agree that facts disclosed in connection with one representation or warranty are deemed to be disclosed for any and all representations and warranties or any and all other purposes under or in connection with the Agreement.

<sup>38</sup> Appropriate evidence that a Tennessee corporation is “duly organized, validly existing, and in good standing” simply may include a certificate of existence issued by the Tennessee Secretary of State, a copy of Seller’s corporate charter, certified by the Tennessee Secretary of State, and a copy of Seller’s bylaws, certified by Seller’s corporate secretary. The Tennessee Secretary of State’s website, [www.state.tn.us/sos](http://www.state.tn.us/sos), contains a wealth of information regarding Tennessee businesses, including how to obtain certified copies of corporate documents and other forms generally.

<sup>39</sup> Good standing certificates issued by the secretary of state of each applicable jurisdiction would be required to be delivered by Seller at the Closing.

effect<sup>40</sup> on the Business.

**3.2 Authorization of Transaction.** Subject to obtaining the approval of its shareholders, Seller has full corporate power and authority to execute and deliver this Agreement and to perform its obligations under this Agreement.<sup>41</sup> Without limiting the generality of the foregoing, the board of directors of Seller and, upon obtaining the approval of the shareholders of Seller, the shareholders of Seller have duly authorized the execution, delivery, and performance of this Agreement by Seller. This Agreement has been duly executed and delivered by Seller and, assuming due authorization, execution, and delivery of this Agreement by Buyer, constitutes the valid and legally binding obligation of Seller, enforceable in accordance with its terms and conditions, subject to general principles of equity and except as enforceability may be limited by applicable bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium, or other similar Laws of general application relating to creditors' rights generally.

**3.3 Noncontravention.** Except as set forth on Disclosure Schedule 3.3, neither the execution and the delivery of this Agreement, nor the consummation of the transactions contemplated hereby (including the Assignments referred to in Section 2.5), will (a) violate any Laws to which Seller is subject or any provision of the charter or bylaws of Seller or (b) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify, or cancel, or require any notice under any Contract (or result in the exercise of a secured party's rights under any Security Interest upon any of the Acquired Assets). Except for filings under the Hart-Scott-Rodino Act and as reflected on Disclosure Schedule 3.3, neither Seller nor any shareholder is required to

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<sup>40</sup> The term "material adverse effect" may be defined in the agreement. In the absence of an express definition and for purposes of interpreting any express definition, the parties would look to decisional law in the jurisdiction or in another similar jurisdiction. An example interpretation of "material adverse effect" is an effect that "is consequential to the company's earnings power over a commercially reasonable period, which one would think would be measured in years rather than months." *In re IBP, Inc. S'holders Litig. v. Tyson Foods, Inc.*, 789 A.2d 14, 141 (Del. Ch. 2001) (ultimately discussing a material adverse change clause in a merger agreement). For a brief, recent summary of these types of provisions, see Bradley D. Peters, Note, *Material Adverse Change Clauses Following the Tyson Decision*, 3 TRANSACTIONS, Fall 2001, at 19 (discussing material adverse change and material adverse effect clauses in merger agreements under Delaware law).

<sup>41</sup> The existence of corporate power and authority is dependent upon state corporate law, the corporation's charter and bylaws, and any effective board of directors policies or board of directors or shareholder resolutions, together with any related or resulting arrangements. State corporate law may, for example, require approval of the transaction by both the board of directors and the shareholders. *See supra* note 11.

give any notice to, make any filing with, or obtain any authorization, consent, or approval of any Governmental Agency in order for the Parties to consummate the transactions contemplated by this Agreement (including the Assignments referred to in Section 2.5).

**3.4 Brokers' Fees.** Neither Seller nor any shareholder has any Liability for the payment of any fees or commissions to any broker, finder, or agent with respect to the transactions contemplated by this Agreement for which the Buyer will become liable or obligated.

**3.5 Title to Assets.** Except as set forth on Disclosure Schedule 3.5, Seller has good and marketable title to, or a valid leasehold interest in, the properties and assets used by it, located on its premises, or shown on the Most Recent Financial Statements used and/or useful in the operation of the Business or acquired after the date of the Most Recent Financial Statements in connection with the operation of the Business, free and clear of all Security Interests, except for properties and assets disposed of in the Seller's Ordinary Course of Business since the date of the Most Recent Financial Statements. Without limiting the generality of the foregoing, except as set forth on Disclosure Schedule 3.5, Seller has good and marketable title to all of the Acquired Assets, free and clear of any Security Interest or restriction on transfer. At Closing, Seller will have good and marketable title to all of the Acquired Assets, free and clear of any Security Interest or restriction on transfer.<sup>42</sup>

**3.6 Subsidiaries.** Seller does not have any Subsidiaries and does not have an ownership interest, direct or indirect, in any other Person.

**3.7 Financial Statements.** Attached to this Agreement as Exhibit C are the following financial statements (collectively, the "Financial Statements"):

(a) audited balance sheets as of and statements of income, changes in shareholder equity, and cash flow for Seller for the fiscal years ended \_\_\_\_\_<sup>43</sup> and \_\_\_\_\_<sup>44</sup> for Seller and unaudited balance sheets as of \_\_\_\_\_

<sup>42</sup> Buyer also could require Seller to obtain title to any Acquired Asset that is subject to a lease through, for example, the exercise of available options. Note that, in this particular provision, Seller represents that it has "good and marketable title to, or a valid leasehold interest in" more than just the Acquired Assets. This strategy enables Buyer to better understand the overall assets of Seller, which may later be brought to bear in any claim for indemnification from, or litigation against, Seller.

<sup>43</sup> This blank line represents Seller's second most recently completed fiscal year.

<sup>44</sup> This blank line represents Seller's most recently completed fiscal year.

and statements of income, changes in shareholder equity, and cash flow for Seller for the fiscal year ended \_\_\_\_\_<sup>45</sup>; and

(b) unaudited balance sheets as of and statements of income and cash flow (the “Most Recent Financial Statements”) for Seller for the \_\_\_\_\_<sup>46</sup> months ended \_\_\_\_\_<sup>47</sup> (the “Most Recent Fiscal Month End”) for Seller.

The Financial Statements (including notes to the Financial Statements) have been prepared in accordance with GAAP, consistently applied throughout the periods covered by the Financial Statements, present fairly, in all material respects, the financial condition of Seller as of the specified dates and the results of operations of Seller for the specified periods, and are consistent with the books and records of Seller (which books and records are correct and complete); provided, however, that the Most Recent Financial Statements are subject to normal year-end adjustments (that will not be material individually or in the aggregate) and lack footnotes and other presentation items. When made, the Seller’s certification under Section 2.3(c) constitutes a representation under this Section 3.7.<sup>48</sup>

**3.8 Interim Change.**<sup>49</sup> Except as set forth on Disclosure Schedule 3.8, since the Most Recent Fiscal Month End, there has not been any material adverse change<sup>50</sup> in the business, financial condition, operations, results of operations, or future prospects<sup>51</sup> of the Business. Without limiting the generality of the foregoing, since that date, with respect to the Business, Seller has not:

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<sup>45</sup> This blank line represents the last day of Seller’s most recently completed fiscal year.

<sup>46</sup> This blank line represents the number of completed months in Seller’s current fiscal year.

<sup>47</sup> This blank line represents the last day of the most recently completed month in Seller’s current fiscal year.

<sup>48</sup> This sentence enables Buyer to be indemnified by Seller under Article 9 for any breach. Alternatively, Buyer’s risk in this regard could be covered by a specific reference in Section 9.2.

<sup>49</sup> If the financial statements are current as of the month ending prior to the date of the Agreement, the parties may omit all or part of this Section 3.8 and merely rely on the “bring-down” provision in the closing conditions and on any relevant covenants pending the closing. *See infra* Section 6.1(a).

<sup>50</sup> *See supra* note 40.

<sup>51</sup> Many sellers are reluctant to assume risk by representing to the speculative matter of “future prospects.” Some sellers are able to prevail in negotiations with their buyers for exclusion of “future prospects” from this representation. *See* KLING & SIMON, *supra* note 35, § 11.04[9].

(a) made any change in the Business or its operations or in the manner of conducting the Business other than changes made by Seller in Seller's Ordinary Course of Business;

(b) incurred any Liabilities, except Liabilities incurred in Seller's Ordinary Course of Business, or experienced any change in any assumptions underlying or methods of calculating any bad debt, contingency, or other reserves;

(c) paid, discharged or satisfied any Security Interest or Liability, other than Security Interests or Liabilities (i) that are reflected or reserved against in the Most Recent Financial Statements and that were paid, discharged, or satisfied since the date of the Most Recent Financial Statements in Seller's Ordinary Course of Business or (ii) that were incurred and paid, discharged or satisfied since the Most Recent Fiscal Month End in Seller's Ordinary Course of Business;

(d) written down the value of any Inventories, written off as uncollectible any or any portion of Accounts Receivable, experienced any customer deductions from Accounts Receivable, except for immaterial write-downs, write-offs, or customer deductions made or experienced in Seller's Ordinary Course of Business at a rate no greater than that used for the fiscal period covered by the Most Recent Financial Statements;

(e) canceled any other debts or claims of substantial value or waived any rights of substantial value, other than in Seller's Ordinary Course of Business;

(f) sold, transferred or conveyed any of its properties or assets (whether real, personal or mixed, tangible or intangible), except in Seller's Ordinary Course of Business;

(g) disposed of or permitted to lapse, or otherwise failed to preserve its rights to use, any patent, trademark, trade name, logo, or copyright, or any application for any patent, trademark, trade name, logo, or copyright, or disposed of or permitted to lapse any license or permit, or disposed of or disclosed to any Person any trade secret, formula, process, or know-how, other than in Seller's Ordinary Course of Business;

(h) made any capital expenditures or commitments in excess of \$\_\_\_\_\_, in the aggregate, for replacements of or additions to property, plant, equipment, or intangible capital assets;

- (i) made any change<sup>52</sup> in any method of accounting or accounting practice;
  - (j) subjected any of the Acquired Assets to any Security Interest;
- or
- (k) agreed, whether in writing or otherwise, to take any action described in this Section.

**3.9 Undisclosed Liabilities.** Except as set forth on Disclosure Schedule 3.9, Seller has no Liability (and there is no Basis for any present or future action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand against Seller that could give rise to any Liability), except for (a) Liabilities set forth on the face of, not merely in any noted to, the Most Recent Financial Statements and (b) Liabilities that arise after the Most Recent Fiscal Month End in Seller's Ordinary Course of Business (none of which results from, arises out of, relates to, is in the nature of, or was caused by any breach of contract, breach of warranty, tort, infringement, or violation of law).

**3.10 Legal Compliance.** Except as set forth on Disclosure Schedule 3.10, Seller has complied with and is in compliance with all applicable Laws, and no action, suit, proceeding, hearing, investigation, charge, complaint, claim, demand, or notice has been filed or commenced against Seller alleging the failure so to comply.<sup>53</sup>

**3.11 Tax Matters.** Except as set forth on Disclosure Schedule 3.11, Seller has filed all Tax Returns that it was required to file, and all of these Tax Returns were correct and complete in all respects when filed. All Taxes owed by Seller (whether or not shown on any Tax Return) have been paid. Seller currently is not the beneficiary of any extension of time within which to file any Tax Return. No audit of any Tax Return filed by Seller is pending or, to the Knowledge of Seller, threatened by any Governmental Agency, and Seller has not waived any statute of limitations in respect of Taxes or agreed to any extension of time with respect to a Tax assessment or deficiency. There is no dispute or claim concerning any Tax Liability of Seller claimed or raised by any Governmental Agency in writing, and Seller is not presently

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<sup>52</sup> As drafted, the change in method of accounting or accounting practice need not necessarily be a "material change," providing Buyer with more assurance that the financial parameters of the Business are precisely communicated.

<sup>53</sup> Depending on the circumstances, the parties may include separate representations that specifically cover topics such as environmental matters, employee benefit plans, employee disputes, and unionization activities.

contesting any Tax Liability alleged to be owed by Seller. No claim ever has been made by an authority 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 Security Interests on any of the assets of any of Seller that arose in connection with any failure (or alleged failure) to pay any Tax. Seller has not been a member of any Affiliated Group filing a consolidated federal income Tax Return and does not have Liability for the Taxes of any Person under Treas. Reg. Section 1.1502-6 (or any similar provision of state, local, or foreign law), as a transferee or successor, by contract, or otherwise.

**3.12 Customers and Suppliers.** Disclosure Schedule 3.12 contains accurate and complete lists of the names and addresses of (a) the 20 largest customers to whom Seller has sold or leased products or services during Seller's past two fiscal years (ended \_\_\_\_\_ and \_\_\_\_\_) and (b) the 20 largest suppliers from whom Seller has purchased either supplies or Inventories during those same two fiscal years. Except as set forth on Disclosure Schedule 3.12, all customers and suppliers whose names appear on those lists currently are customers and suppliers of Seller, and Seller has not received any notice, whether written or oral, from any customer or supplier whose name appears on those lists that the customer or supplier will materially reduce the volume of business as a customer or supplier of Buyer after the Closing relative to that volume with Seller as of the date of this Agreement. Except as set forth in Disclosure Schedule 3.12, no customer of the Business accounted for more than 10% of the revenues generated by the Business for either of Seller's last two fiscal years.

### **3.13 Intellectual Property.**<sup>54</sup>

(a) Seller owns or has the right to use under a valid and enforceable license, sublicense, agreement, or permission all Intellectual Property necessary for the operation of the Business as presently conducted. Except for the necessary consents listed on Disclosure Schedule 3.13(a), each item of Intellectual Property owned or used by Seller immediately prior to the Closing will be owned or available for use by the Buyer on identical terms and conditions immediately subsequent to the Closing. Seller has taken all necessary action<sup>55</sup> to maintain and

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<sup>54</sup> The relative importance of intellectual property in an acquisition transaction is, of course, deal-specific. A strong and relatively long intellectual property representation is included in this agreement because Seller produces computer hardware and software. *See supra* note 4.

<sup>55</sup> This standard is aggressively pro-Buyer, but arguably warranted given the importance of intellectual property assets to the Buyer and the subject transaction. In other circumstances, a "best efforts" or "commercially reasonable efforts" standard may be more consistent with the parties' relative expectations. *See infra* note 63.

protect all material items of Intellectual Property that it owns or uses.

(b) Except as set forth on Disclosure Schedule 3.13(b), Seller has not interfered with, infringed upon, misappropriated, or otherwise come into conflict with any Intellectual Property rights of third parties (including, without limitation, any infringement of the trade dress, package design, or product formula of any competitor of the Business), and none of Seller's directors or officers (or employees with responsibility for Intellectual Property matters) has ever received any charge, complaint, claim, demand, or notice alleging any interference, infringement, misappropriation, or violation (including any claim that Seller must license or refrain from using any Intellectual Property rights of any third party). To the Knowledge of Seller, no third party has interfered with, infringed upon, misappropriated, or otherwise come into conflict with any Intellectual Property rights of Seller.

(c) Disclosure Schedule 3.13(c) identifies each patent, trademark, service mark, or any of their registrations that have been issued to Seller and any application for those registrations with respect to any of its Intellectual Property and identifies each license, agreement, or other permission that Seller has granted to any third party with respect to any of its Intellectual Property (together with any exceptions). Seller has delivered to the Buyer a correct and complete copy of each patent, trademark, service mark, registration, application, license, agreement, and permission, as amended to date and listed in Disclosure Schedule 3.13(c), and has made available to Buyer correct and complete copies of all other written documentation evidencing ownership and prosecution (if applicable) of each item. Disclosure Schedule 3.13(c) also identifies each trade name or unregistered trademark or service mark used by Seller in connection with the Business. With respect to each item of Intellectual Property required to be identified on Disclosure Schedule 3.13(c) and except as otherwise indicated on Disclosure Schedule 3.13(c):

(i) Seller possesses all right, title, and interest in and to the item, free and clear of any Security Interest, license, or other restriction;

(ii) the item is not subject to any outstanding judgment, order, decree, ruling, or charge;

(iii) no action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand is pending or, to the Knowledge of Seller, is threatened which challenges the legality, validity, enforceability, use, or ownership of the item; and

(iv) Seller has never agreed to indemnify any Person for

or against any interference, infringement, misappropriation, or other conflict with respect to the item.

(d) Disclosure Schedule 3.13(d) identifies each item of Intellectual Property that any third party owns that Seller uses in connection with the Business under any valid and enforceable license, sublicense, agreement, or permission covering the item. Seller has delivered to Buyer correct and complete copies of all licenses, sublicenses, agreements, and permissions covering these items (as amended to date). With respect to each item of Intellectual Property required to be identified in Disclosure Schedule 3.13(d) and except as otherwise identified on Disclosure Schedule 3.13(d):

(i) the license, sublicense, agreement, or permission covering the item is legal, valid, binding, enforceable, and in full force and effect;

(ii) the license, sublicense, agreement, or permission covering the item will be legal, valid, binding, enforceable, and in full force and effect on identical terms following the consummation of the transactions contemplated by this Agreement (including the Assignments referred to in Article 2);

(iii) Seller is not in breach of or default under any license, sublicense, agreement, or permission covering the item, and no event has occurred that, with notice or lapse of time, would constitute a breach or default by Seller or permit termination, modification, or acceleration of any license, sublicense, agreement, or permission covering the item by any other party;

(iv) to Seller's Knowledge, no other party is in breach of or default under any license, sublicense, agreement, or permission covering the item, and no event has occurred that, with notice or lapse of time, would constitute a breach or default by any other party or permit termination, modification, or acceleration of any license, sublicense, agreement, or permission covering the item by Seller;

(v) Seller has not repudiated or received notice of repudiation from any other party of any provision of any license, sublicense, agreement, or permission covering the item;

(vi) to Seller's Knowledge, with respect to each sublicense covering the item, the representations and warranties set forth in subsections (i) through (v) above are true and correct with respect to the underlying license;

(vii) the item is not subject to any outstanding injunction,

judgment, order, decree, ruling, or charge;

(viii) no action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand is pending or, to Seller's Knowledge, is threatened which challenges the legality, validity, or enforceability of the item; and

(ix) Seller has not granted any sublicense or similar right with respect to the license, sublicense, agreement, or permission covering the item.

(e) To Seller's Knowledge, Seller will not interfere with, infringe upon, misappropriate, or otherwise come into conflict with, any Intellectual Property rights of third parties as a result of the continued operation of the Business as presently conducted.

(f) Seller has no Knowledge of any new products, inventions, procedures, or methods of manufacturing or processing that any competitors or other third parties have developed that reasonably could be expected to supersede or make obsolete any product or process of Seller.

**3.14 Tangible Assets.** Seller owns or leases all machinery, equipment, and other tangible assets used in the operation of Seller's Business. Each tangible asset used in the operation of Seller's Business is free from defects (patent and latent) that would adversely affect the operation of the tangible asset, has been maintained in accordance with normal industry practice, is in good operating condition and repair (subject to normal wear and tear), and is suitable for the purposes of the Business.<sup>56</sup>

**3.15 Inventories.** The Inventories consist of raw materials and supplies, manufactured and purchased parts, goods in process, and finished goods, all of which are merchantable and fit for the purpose for which they were procured or manufactured, and none of which is slow-moving, obsolete, damaged, or defective (as determined consistent with the past practices of Seller), subject only to the reserve for inventory write-down set forth on the face of, not merely in any notes to, the Most Recent Financial Statements as adjusted for the passage of time through the Closing Date in accordance with GAAP, consistently applied and on a Basis consistent with the Preliminary Balance Sheet.

**3.16 Contracts.** Disclosure Schedule 3.16 lists the following Contracts to

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<sup>56</sup> Depending on the size of a seller's operations, the importance of tangible assets to a seller's business, and the value of tangible assets on a seller's balance sheet, a buyer may desire the seller to list all tangible assets necessary for the conduct of the seller's business in a disclosure schedule.

which Seller is a party or that relate to the Business:

(a) any Contract (or group of related Contracts) for the lease of personal property to or from any Person providing for lease payments in excess of \$\_\_\_\_\_ per annum;

(b) any Contract (or group of related Contracts) for the purchase or sale of raw materials, commodities, supplies, products, or other personal property, or for the furnishing or receipt of services, the performance of which will extend over a period of more than one year, result in a material loss to Seller, or involve consideration in excess of \$\_\_\_\_\_;

(c) any Contract concerning a partnership or joint venture;

(d) any Contract (or group of related Contracts) under which Seller has created, incurred, assumed, or guaranteed any indebtedness for borrowed money, or any capitalized lease obligation, in excess of \$\_\_\_\_\_ or under which Seller has given any third party a Security Interest in any of the Acquired Assets;

(e) any Contract concerning confidentiality or noncompetition;

(f) any Contract under which the consequences of a default or termination could have a material adverse effect on the Business; or

(g) any other Contract (or group of related Contracts), the Seller's performance of which involves consideration in excess of \$\_\_\_\_\_, or which is not terminable by Seller on 90 days' notice.

Seller has delivered to Buyer a correct and complete copy of each written Contract listed in Disclosure Schedule 3.16 and a written summary setting forth the terms and conditions of each oral Contract referred to in Disclosure Schedule 3.16. With respect to the Contracts that constitute Assumed Liabilities: (a) Seller is not in breach of or in default under any of these Contracts, and no event exists that, with the giving of notice or the passage of time, or both, would constitute a breach of or default by Seller under any of these Contracts; (b) to Seller's Knowledge, no other party is in default under any of these Contracts, and no event exists that, with the giving of notice or the passage of time, or both, would constitute a breach of or default under any of these Contracts by any other party; (c) absent any limitations imposed on Buyer as a result of its internal corporate governance regulatory status, all obligations of Seller under any of these Contracts may be performed by Buyer, as required by these Contracts, operating in a manner consistent with Seller's Ordinary

Course of Business; and (d) the proceeds anticipated to be received by Seller under the terms of the Contract are reasonably expected by Seller to exceed the cost to complete the Contract in Seller's Ordinary Course of Business.

**3.17 Accounts Receivable.** Except as set forth on Disclosure Schedule 3.17, all Accounts Receivable of Seller are reflected properly on Seller's books and records, are valid Accounts Receivable subject to no set-offs or counterclaims, are collectible and will be collected in accordance with their terms at their recorded amounts, subject only to the reserve for doubtful accounts set forth on the face of the Most Recent Financial Statements (not merely in any notes to the Most Recent Financial Statements) as adjusted for the passage of time through the Closing Date in accordance with Seller's Ordinary Course of Business.

**3.18 Powers of Attorney.** Except as set forth on Disclosure Schedule 3.18, there are no outstanding powers of attorney executed by or on behalf of Seller.

**3.19 Insurance.** Seller has been covered during the past \_\_\_\_ years by insurance in scope and amount customary and reasonable for the Business. Seller's insurance coverage will be sufficient to cover all product liability claims relating to the operation of the Business prior to Closing, whether in the form of an existing occurrence Basis policy or through the procurement of sufficient tail insurance coverage for any existing claims made policy.

**3.20 Litigation.** Disclosure Schedule 3.20 sets forth each instance with respect to the Business in which Seller (a) is subject to any outstanding judgment, order, decree, ruling, or charge or (b) is a party or, to Seller's Knowledge, is threatened to be made a party to any action, suit, proceeding, hearing, or investigation of, in, or before any court or quasi-judicial or administrative Governmental Agency or before any arbitrator or mediator. None of the actions, suits, proceedings, hearings, and investigations set forth in Disclosure Schedule 3.20 will have any material adverse effect on the Business. None of Seller and the directors and officers (and employees with responsibility for litigation matters) of Seller have any reason to believe that any action, suit, proceeding, hearing, or investigation may be brought or threatened against Seller with respect to the Business that could have any material adverse effect on the Business.

**3.21 Product Warranty.** Except as set forth on Disclosure Schedule 3.21(a), each product manufactured, sold, leased, licensed, or delivered by Seller in the operation of the Business is and has been in conformity with all applicable contractual commitments and all express and implied warranties, and Seller does not have any Liability (and there is no Basis for any present or future action, suit,

proceeding, hearing, investigation, charge, complaint, claim, or demand against any of them giving rise to any Liability) for replacement or repair of or damages in connection with its products, subject only to the deductibles under Seller's product liability insurance policies as described on Disclosure Schedule 3.21(b). No product manufactured, sold, leased, licensed, or delivered by Seller in the operation of the Business is subject to any guaranty, warranty, or other indemnity beyond the applicable standard terms and conditions of sale, lease, or license. Disclosure Schedule 3.21(c) includes copies of the standard terms and conditions of sale, lease, or license used by Seller in the Business (containing applicable guaranty, warranty, and indemnity provisions). Each product is in compliance with all applicable Laws.

**3.22 Product Liability.** Except as set forth on Disclosure Schedule 3.22, Seller does not have any Liability (and there is no Basis for any present or future action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand against any of them giving rise to any Liability) arising out of any injury to individuals or property as a result of the ownership, possession, or use of any product manufactured, sold, leased, licensed, or delivered by Seller in the operation of the Business.

**3.23 Certain Business Relationships With Seller.** Except as set forth on Disclosure Schedule 3.23, none of the shareholders of Seller or any of their Affiliates has been a party to any business arrangement or relationship with Seller within the past 12 months, and none of the shareholders of Seller or any of their Affiliates owns any asset, tangible or intangible, that is used in the Business.

**3.24 Disclosure.** The representations and warranties contained in this Article 3 do not contain any untrue statement of a material fact or omit to state any material fact necessary to make the statements and information contained in this Article 3 not misleading.<sup>57</sup>

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<sup>57</sup> This Section 3.24 and Section 4.5 *infra* are included as possible first-draft inclusions for a buyer-drafter. Many arguments can be, and are, forwarded by the seller's counsel for the exclusion of these representations for both parties. For example, the seller's counsel may plausibly argue for the exclusion of these representations on the grounds that state fraud actions are available, even in their absence ("so why add a parallel breach of contract claim that only results in the same damages being assessed?"). The seller's counsel also may respond to the inclusion of these representations by asking the buyer's counsel what he or she is afraid is missing from the representations, and offer to insert specific representations to cover the buyer's areas of concern (implicitly accusing the buyer's counsel of being lazy by including a catch-all when proper focus may better serve his or her client). For additional information about representations regarding "no misleading statements," see KLING & SIMON, *supra* note 35, § 15.

**ARTICLE 4.**  
**REPRESENTATIONS AND WARRANTIES OF BUYER<sup>58</sup>**

Buyer represents and warrants to Seller that the statements contained in this Article 4 are correct and complete as of the date of this Agreement, except as set forth on the Disclosure Schedules. Generally, each schedule in the Disclosure Schedules will be designated with a number corresponding to the lettered and numbered sections and paragraphs contained in this Article 4.

**4.1 Organization of the Buyer.** Buyer is a corporation duly organized, validly existing, and in good standing under the Laws of the State of Tennessee.<sup>59</sup>

**4.2 Authorization of Transaction.** Buyer has full corporate power and authority to execute and deliver this Agreement and to perform its obligations under this Agreement.<sup>60</sup> This Agreement has been duly executed and delivered by Buyer and, assuming due authorization, execution and delivery of this Agreement by Seller, constitutes the valid and legally binding obligation of Buyer, enforceable in accordance with its terms and conditions, subject to general principles of equity and except as enforceability may be limited by applicable bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium or other similar Laws of general application relating to creditors' rights generally.

**4.3 Noncontravention.** Neither the execution and the delivery of this Agreement nor the consummation of the transactions contemplated hereby (including the Assignments referred to in Section 2.5) will (a) violate any Laws to which Buyer is subject or any provision of its charter or bylaws or (b) conflict with, result in a breach of, constitute a default under, result in the acceleration of, create in any party the right to accelerate, terminate, modify, or cancel, or require any notice under any agreement, contract, lease, license, instrument, or other arrangement to which the Buyer is a party or by which it is bound or to which any of its assets is

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<sup>58</sup> Buyer's representations and warranties would include far more information if the consideration for sale were Buyer securities. In the event that interests in Buyer in the nature of an investment contract are used as the total or partial consideration for an asset acquisition or similar transaction, a drafter may find the recent Tennessee Supreme Court case *King v. Pope* useful. See 91 S.W.3d 314 (Tenn. 2002). In that case, the Tennessee Supreme Court adopts the *Hawaii Market* test to define the term "investment contract" as used in the definition of "security" in the Tennessee Securities Act of 1980. *Id.* at 322.

<sup>59</sup> See *supra* note 38.

<sup>60</sup> See *supra* note 41.

subject. Except for filings under the Hart-Scott-Rodino Act, Buyer does not need to give any notice to, make any filing with, or obtain any authorization, consent, or approval of any Governmental Agency in order for the Parties to consummate the transactions contemplated by this Agreement (including the Assignments referred to in Section 2.5).

**4.4 Brokers' Fees.** Buyer has no Liability for the payment of any fees or commissions to any broker, finder, or agent with respect to the transactions contemplated by this Agreement for which Seller will become liable or obligated.

**4.5 Disclosure.** The representations and warranties contained in this Article 4 do not contain any untrue statement of a material fact or omit to state any material fact necessary to make the statements and information contained in this Article 4 not misleading.<sup>61</sup>

## **ARTICLE 5. PRE-CLOSING COVENANTS<sup>62</sup>**

The Parties agree as follows with respect to the period between the execution of this Agreement and the Closing:

**5.1 General.** Each of the Parties shall<sup>63</sup> use its commercially reasonable efforts<sup>64</sup> to take all action and to do all things necessary, proper, or advisable

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<sup>61</sup> See *supra* note 57.

<sup>62</sup> As referenced earlier, the Parties require a delayed Closing to accommodate Seller's shareholders' vote on approval of the transaction. See *supra* note 11. A delayed Closing also is required to accommodate the filing and review process under the Hart-Scott-Rodino Act. See *supra* note 20.

<sup>63</sup> See KUNEY, *supra* note 10, 36-7 (stating that use of the word "shall" indicates duties or obligations of a party and that use of the word "will" indicates predictive behavior).

<sup>64</sup> "Commercially reasonable" is defined neither in this Agreement nor in the Tennessee Uniform Commercial Code. However, a sample clarification follows:

For purposes of this Agreement, "commercially reasonable efforts" will not be deemed to require a Person to undertake extraordinary or unreasonable measures, including the payment of amounts in excess of normal and usual filing fees and processing fees, if any, or other payments with respect to any Contract that are significant in the context of [that] Contract (or significant on an aggregate Basis as to all Contracts).

ABA MODEL AGREEMENT, *supra* note 2, at 15. Use of "commercially reasonable efforts" may be interchanged with "best efforts." Like "commercially reasonable efforts," "best efforts" is rarely

(including by satisfaction, but not waiver, of the closing conditions set forth in Article 6) to consummate and make effective the transactions contemplated by this Agreement.

**5.2 Notices and Consents.** Seller shall give any notices to third parties, and Seller shall use its commercially reasonable efforts to obtain the third-party consents identified on Schedule 5.2. Each of the Parties shall give any notices to, make any filings with, and use its commercially reasonable efforts to obtain any authorizations, consents, and approvals of Governmental Agencies in connection with the matters referred to in Section 3.3 and Section 4.3. Without limiting the generality of the foregoing, each of the Parties shall file any Notification and Report Forms and related material that it may be required to file under the Hart-Scott-Rodino Act with the U.S. Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice, shall use its commercially reasonable efforts to obtain an early termination of the applicable waiting period, and shall make any further filings that may be necessary, proper, or advisable in connection with clearance of the transaction under the Hart-Scott-Rodino Act.

**5.3 Operation of Business.** Seller will use its commercially reasonable efforts to (a) operate the Business, including the plants and facilities of Seller, at normal production levels (relative to the comparable period in the most recent completed fiscal year ended \_\_\_\_\_), (b) maintain working capital sufficient to operate the Business in Seller's Ordinary Course of Business, and (c) otherwise operate the Business in Seller's Ordinary Course of Business and consistent with industry practice and standards. Seller shall not engage in any practice, take any action, or enter into any transaction outside Seller's Ordinary Course of Business without the prior written consent of Buyer.<sup>65</sup>

**5.4 Preservation of Business.** Seller shall keep its Business and

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definitively interpreted in case law, but at a minimum, "best efforts" seems to require good faith. *Id.* However, "commercially reasonable efforts" usually is considered a lower standard than "best efforts," and its use may therefore favor sellers over buyers. *See id.* For an interesting discussion of possible interpretations under New York law of reasonable efforts and best efforts clauses, see *Bloor v. Falstaff Brewing Corp.*, 601 F.2d 609, 612-13 (2d Cir. 1979); *see also* KLING & SIMON, *supra* note 35, § 13.06.

<sup>65</sup> This provision is a general, short-form covenant on operation of a business pending closing. In many transactions, a more specific, longer provision (including specific affirmative and negative operating covenants pending closing) is included. *See* KLING & SIMON, *supra* note 35, § 13.03. The important function of either type of covenant, working together with conditions to closing, is described in Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 260-61 (1984).

properties substantially intact, including its present operations, physical facilities, working conditions, and relationships with lessors, lessees, licensors, licensees, suppliers, customers, and employees.

**5.5 Full Access.** Seller shall permit representatives of Buyer to have full access at all reasonable times, and in a manner so as not to interfere with the normal business operations of Seller, to all premises, properties, personnel, books, records (including Tax records), contracts, and documents of or pertaining to Seller.

**5.6 Shareholder Action.** Seller agrees to call a special meeting of its shareholders,<sup>66</sup> to be held not later than \_\_\_\_\_, for the purpose of obtaining shareholder approval<sup>67</sup> of this Agreement and the transactions contemplated hereby and agrees to use its commercially reasonable efforts to obtain voting commitments with respect to shareholder action as contemplated in Section 6.1(l) before \_\_\_\_\_.

**5.7 Notice of Developments.** Each Party shall give prompt written notice to the other Party of any material adverse development that, were it to have been known at or before the date of this Agreement, would constitute a breach of any of its own representations or warranties in Article 3 or Article 4. No disclosure by any Party under this Section 5.7 shall be deemed to amend or to supplement the disclosure schedules or to prevent or cure any misrepresentation, breach of warranty, breach of covenant, or any failure to satisfy a Closing condition.

**5.8 Exclusivity.** Seller shall not (a) solicit, initiate, or encourage the submission of any proposal or offer from any Person relating to (i) the acquisition of any capital stock or other voting securities, or (except in Seller's Ordinary Course of Business) any of the assets, of Seller or (ii) any acquisition structured as a merger, consolidation, or share exchange or (b) participate in any discussions or negotiations regarding, furnish any information with respect to, assist or participate in, or facilitate in any other manner any effort or attempt by any Person to do or seek any of the

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<sup>66</sup> The board of directors of a corporation or "the person or persons authorized to do so by the charter or bylaws" may call a special meeting of the corporation's shareholders. TENN. CODE ANN. § 48-17-102(a)(1) (2002). The special meeting must be held at the location specified in the bylaws or, if no location is so specified, at the corporation's principal office. *Id.* § 48-17-102(c). Notice of meetings is governed by Tennessee Code Annotated section 48-17-105.

<sup>67</sup> See *supra* note 11.

foregoing.<sup>68</sup> Seller will immediately notify Buyer if any Person makes any proposal, offer, inquiry, or contact with respect to any of the foregoing.

## **ARTICLE 6. CONDITIONS TO OBLIGATION TO CLOSE**

**6.1 Conditions to Obligation of Buyer.** The obligation of Buyer to consummate the transactions to be performed by it at and in connection with the Closing is subject to satisfaction of the following conditions:

(a) the representations and warranties set forth in Article 3 shall be true and correct in all material respects (except for representations and warranties limited by material adverse effect or material adverse change, which shall be true and correct in all respects) at and as of the Closing Date (as though then made);

(b) Seller shall have performed and complied with all of its covenants under this Agreement in all material respects through the Closing;

(c) Seller shall have procured all of the third-party consents specified in Section 5.2;

(d) no action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand against Seller is pending or, to Seller's Knowledge, threatened before any court or quasi-judicial or administrative Governmental Agency or before any arbitrator as a result of which an unfavorable judgment, order, decree, ruling, or charge would (i) prevent consummation of any of the transactions contemplated by this Agreement, (ii) cause any of the transactions contemplated by this Agreement to be rescinded following consummation, or (iii) affect adversely the right of the Buyer to own the Acquired Assets and to operate the Business (and no judgment, order, decree, ruling, or charge having any effect described in clause (i), (ii), or (iii) of this Section 6.2(d) will be in effect);

(e) Seller shall have delivered to Buyer a certificate to the effect that each of the conditions specified above in Section 6.1(a)-(d) is satisfied in all respects;

(f) all applicable waiting periods (and any waiting period extensions) under the Hart-Scott-Rodino Act have expired or otherwise been

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<sup>68</sup> A seller should consider negotiating a carve-out—specifically known as a “fiduciary out”—here for actions taken by the board of directors of the seller in satisfaction of its fiduciary duties to the seller's shareholders.

terminated and Seller, and Buyer has received all other authorizations, consents and approvals of the Governmental Agencies referenced in Section 3.3 and Section 4.3;

(g) Buyer shall have received from counsel to Seller an opinion in form and substance as set forth in Exhibit D attached to this Agreement, addressed to Buyer and dated as of the Closing Date;

(h) Buyer shall be satisfied, in its sole discretion, after visits with the customers of Seller listed on Disclosure Schedule 3.12, that the material relationships with those customers will survive the Closing and continue in effect so long as Buyer continues to conduct the Business in a manner consistent with Seller's Ordinary Course of Business before Closing;

(i) Buyer, in its sole discretion, shall be satisfied with the exercise of its due diligence investigation regarding compliance of products manufactured or published by Seller in the operation of the Business;

(j) Buyer, Seller, and the Escrow Agent shall have entered into the Escrow Agreement;

(k) Seller shall have executed and delivered to Buyer the Assignments;

(l) Not later than \_\_\_\_\_, Seller shall have obtained and delivered to Buyer written commitments from the necessary number of holders of Seller's voting stock agreeing (i) to vote in favor of approval of this Agreement and the transactions contemplated by this Agreement at any meeting of the shareholders called for this purpose or (ii) if action is taken on written consent in lieu of a meeting, to execute written consents in favor of this approval;<sup>69</sup>

(m) Buyer shall have obtained non-compete agreements substantially in the form of Exhibit E attached to this Agreement from each of \_\_\_\_\_ (the "Named Officers");<sup>70</sup> and

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<sup>69</sup> See *supra* note 11.

<sup>70</sup> It is often prudent for a buyer to obtain agreements not to compete from certain or all shareholders of a closely held corporate seller. Tennessee has for some time followed the majority rule that covenants not to compete will be upheld if they are reasonable in the context of their circumstances. See, e.g., *Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 32 (Tenn. 1984). The oft-cited reasonableness standard generally is measured by examining the consideration provided and the

(n) all actions to be taken by Seller in connection with consummation of the transactions contemplated by this Agreement, and all certificates, opinions, instruments, and other documents required to effect the transactions contemplated by this Agreement will be reasonably satisfactory in form and substance to Buyer.

Buyer may waive any condition specified in this Section 6.1 if it executes a writing so stating at or prior to the Closing.

**6.2 Conditions to Obligation of Seller.** The obligation of Seller to consummate the transactions to be performed by it at and in connection with the Closing is subject to satisfaction of the following conditions:

(a) the representations and warranties set forth in Article 4 shall be true and correct in all material respects (except for representations and warranties limited by material adverse effect or material adverse change, which shall be true and correct in all respects) at and as of the Closing Date (as though then made);

(b) Buyer shall have performed and complied with all of its covenants under this Agreement in all material respects through the Closing;

(c) no action, suit, proceeding, hearing, investigation, charge, complaint, claim, or demand against Buyer is pending or, to the actual Knowledge of Buyer's \_\_\_\_\_,<sup>71</sup> threatened before any court or quasi-judicial or administrative Governmental Agency or before any arbitrator as a result of which an unfavorable injunction, judgment, order, decree, ruling, or charge would (i) prevent consummation of any of the transactions contemplated by this Agreement or (ii) cause any of the transactions contemplated by this Agreement to be rescinded following consummation (and no unfavorable injunction, judgment, order, decree, ruling, or charge shall be in effect);

(d) Buyer shall have delivered to Seller a certificate to the effect that each of the conditions specified above in Section 6.2(a)-(c) is satisfied in all respects;

(e) all applicable waiting periods (and any waiting period

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territory and time restrictions. *See* TENN. JUR. *Employer and Employee* § 5 (2002); *see also* KUNEY, *supra* note 10, at 123.

<sup>71</sup> Note that Buyer's listed officers (e.g., its President or Chief Executive Officer, Chief Financial Officer, etc.) are not contractually required to perform a reasonable investigation. *See supra* note 23.

extensions) under the Hart-Scott-Rodino Act have expired or otherwise been terminated, and Seller and Buyer have received all other authorizations, consents, and approvals of Governmental Agencies referenced in Section 3.3 and Section 4.3;

(f) Seller shall have received from Buyer's counsel an opinion in form and substance as set forth in Exhibit F attached to this Agreement, addressed to Seller and dated as of the Closing Date;

(g) Buyer, Seller, and the Escrow Agent shall have entered into the Escrow Agreement;

(h) Buyer shall have delivered to Seller and the Escrow Agent the consideration specified in Section 2.3(b); and

(i) all actions to be taken by Buyer in connection with consummation of the transactions contemplated by this Agreement, and all certificates, opinions, instruments, and other documents required to effect the transactions contemplated by this Agreement will be reasonably satisfactory in form and substance to Seller.

Seller may waive any condition specified in this Section 6.2 if it executes a writing so stating at or prior to the Closing.

## **ARTICLE 7. TERMINATION**

**7.1 Termination of Agreement.** Either of the Parties may terminate this Agreement as provided below:

(a) Buyer and Seller may terminate this Agreement by mutual written consent at any time prior to the Closing;

(b) Buyer may terminate this Agreement by giving written notice to Seller at any time prior to the Closing (i) if Seller has breached any material representation, warranty, or covenant contained in this Agreement in any material respect, (ii) if Seller has failed to satisfy the condition set forth in Section 6.1(l) of this Agreement in accordance with its express terms, or (iii) if the Closing shall not have occurred on or before \_\_\_\_\_, because of Seller's failure to satisfy any condition precedent under Section 6.1 (unless the failed satisfaction results primarily from Buyer itself breaching any representation, warranty, or covenant contained in this Agreement); and

(c) Seller may terminate this Agreement by giving written notice

to Buyer at any time prior to the Closing (i) if Buyer has breached any material representation, warranty, or covenant contained in this Agreement in any material respect or (ii) if the Closing shall not have occurred on or before \_\_\_\_\_, because of Buyer's failure to satisfy any condition precedent under Section 6.2 (unless the failure results primarily from Seller itself breaching any representation, warranty, or covenant contained in this Agreement).

**7.2 Effect of Termination.** If either Party terminates this Agreement under Section 7.1, all rights and obligations of the Parties shall terminate without any Liability of either Party to the other Party, except for any Liability to the other Party of a Party then in breach.

**7.3 Remedies in Event of Breach.** A non-breaching Party terminating this Agreement shall be entitled to pursue any and all rights and remedies, at law or in equity, available to that Party resulting from the breach of this Agreement.

**7.4 Payment of Breakup Fee.** As a material inducement to Buyer's willingness to enter into this Agreement, in the event the Closing fails to occur for any reason under Seller's direct control or for any reason in which Seller had a substantial role, including Seller's failure to obtain any required approval of its shareholders, but excluding a failure to close resulting primarily from Buyer itself breaching any representation, warranty, or covenant contained in this Agreement (a non-occurrence of the Closing triggering the Breakup Fee being referred to as a "Covered Non-occurrence"), Seller shall pay to Buyer, as liquidated damages in lieu of any damages that Buyer may have sought from Seller under this Agreement, by wire transfer of immediately available funds or by another method of funds transfer mutually agreed upon by the Parties, within five business days following Buyer's termination of this Agreement, the sum of \$\_\_\_\_\_ (the "Breakup Fee"); provided, however, that in the event of a Covered Non-occurrence and in the further event that at any time before \_\_\_\_\_ Seller consummates an Alternative Transaction or enters into a binding agreement consummate an Alternative Transaction, then an additional increment of the Breakup Fee (i.e., in addition to the \$\_\_\_\_\_ referenced above) shall be payable in the amount of \$\_\_\_\_\_, due within five business days of the date of consummation of the Alternative Transaction. "Alternative Transaction" means (a) a transaction or series of transactions involving the sale or other disposition (including by lease, foreclosure, transfer in lieu of foreclosure, or management agreement) of the majority of Seller's assets to a Person other than Buyer; (b) the sale of outstanding or newly issued (or some combination of sold and newly issued) capital stock of Seller resulting in a transfer of voting control of Seller to a Person or group of Persons who, before the transaction or series of transactions, did not hold

voting control of Seller; or (c) any other business combination with a Person other than Buyer affecting a majority of the Seller's assets or voting control of Seller.<sup>72</sup>

**ARTICLE 8.**  
**ADDITIONAL AGREEMENTS OF THE PARTIES**<sup>73</sup>

**8.1 Taxes and Fees in Connection with Transfer of Acquired Assets.** Seller shall pay all Taxes and fees applicable to the transfer of the Acquired Assets.<sup>74</sup>

**8.2 Other Taxes.**

(a) Seller shall be liable for and shall pay all Taxes, whether assessed or unassessed, applicable to the Business or the Acquired Assets, in each case attributable to all periods prior to the Closing Date. Except as otherwise provided in Section 8.1, Buyer shall be liable for and shall pay all Taxes, whether assessed or unassessed, applicable to the operation of the Business or the Acquired Assets, in each case attributable to periods beginning on or after the Closing Date.

(b) Seller or Buyer, as the case may be, shall provide reimbursement for any Tax paid by the other that is the responsibility of Seller or Buyer, respectively, in accordance with the terms of this Agreement. Within a reasonable time prior to the payment of any Tax by one Party on behalf of the other, the Party paying the Tax shall give notice to the other Party of the Tax for which it is responsible, although failure to do so will not relieve the other Party from its liability under this Agreement.

(c) After the Closing, Seller and Buyer shall (and shall cause their respective Affiliates to):

(i) make available to the other and to any taxing

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<sup>72</sup> This provision contemplates consummation of an asset sale, merger, share exchange, or business combination that results in the acquisition of Seller or the Business by any Person other than Buyer.

<sup>73</sup> Older agreements may have contained in this Article 8 agreements regarding Liabilities in connection with bulk sales. However, the former chapter 6 of the Tennessee Uniform Commercial Code, which contained Tennessee bulk sales laws, was repealed in 1998. *See* TENN. CODE ANN. § 47-6-101 to -111 (2002); *see also* ABA MODEL AGREEMENT, *supra* note 2, at 169-171 (discussing repeal and use of bulk sales laws).

<sup>74</sup> These may include transfer taxes on real property, which do not apply in this particular transaction, and indebtedness taxes if the purchase price is being financed.

authority, as reasonably requested, all information, records, and documents with respect to Taxes relating to the Business or the Acquired Assets and preserve that information and those records and documents until the expiration of any applicable statute of limitations, including any extensions of that statute of limitations;

(ii) provide timely notices to the other in writing of any pending or threatened Tax audits or assessments relating to the Business or the Acquired Assets for taxable periods for which the other Party may have a responsibility under this Section 8.2 or otherwise; and

(iii) furnish the other with copies of all correspondence received from any taxing authority in connection with any Tax audit or information request with respect to any taxable period for which the other Party may have a responsibility under this Section 8.2 or otherwise.

(d) After the Closing, Buyer shall promptly remit to Seller any Tax refunds or credits received by Buyer or any of its Affiliates relating to Seller, the Business, or the Acquired Assets for taxable periods ending on or before the Closing Date.

**8.3 Employees.** Buyer shall have no responsibility of any form or nature with respect to Seller's employees from and after the Closing. Buyer shall have no obligation to hire any employee of Seller.<sup>75</sup> However, Seller acknowledges that Buyer shall be entitled to hire any of Seller's employees, provided that Buyer shall give Seller a written list of those employees whom Buyer desires to hire effective on the Closing Date at least five days prior to the Closing. No obligations of Seller to or with respect to any of its employees, including but not limited to obligations under employment contracts, employee benefit plans, collective bargaining agreements, and applicable Laws (including without limitation liability for payroll Taxes and other proper deductions and withholdings) are being assumed by Buyer. Without limiting the generality of the foregoing, Seller shall be solely responsible for any and all liability arising directly or indirectly under the Worker Adjustment and Retraining Notification Act, as amended (the "WARN Act"), as a result of the transactions contemplated by this Agreement. Seller acknowledges and agrees that Buyer does not assume or agree to discharge any liability of Seller under COBRA with respect to any current or former employees of Seller. Seller agrees that it will not take any voluntary action, including, without limitation, the termination of

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<sup>75</sup> Alternatively, it is common in an acquisition context for a seller to request that all of seller's employees be hired by the buyer or, at a minimum, that the buyer not terminate a number of employees that triggers the WARN Act, and if the buyer does so, the seller is entitled to indemnification.

its healthcare plan, the effect of which would be, or might reasonably be expected to be, the imposition upon Buyer of COBRA liability for current or former employees of Seller not hired by Buyer. Seller shall indemnify, defend, and hold harmless Buyer from and against any and all liabilities, damages, costs, and expenses with respect to any liability assessed upon or incurred by Buyer that is the responsibility of Seller under this Section 8.3.

**8.4 Consents of Third Parties; Governmental Approvals.** To the extent that Seller has not obtained any required consents, approvals, or waivers in accordance with Section 5.2 as of the Closing and Buyer and Seller nonetheless elect to close, then upon request by Buyer, for a period of six months after the Closing Date, Seller shall use its commercially reasonable best efforts to:

(a) cooperate with Buyer in any reasonable and lawful arrangements under which Buyer would obtain the benefit of the matter concerned; and

(b) enforce for the account of Buyer any rights of Seller arising from the matter concerned.

If, after the conclusion of the above-referenced six-month period, any consent, approval, or waiver has not been obtained, Buyer and Seller will cooperate in any commercially reasonable arrangement to obviate the need for that consent, approval, or waiver.

**8.5 Covenant Not to Compete; Non-Solicitation.** For a period of five years after the Closing Date, Seller will not, directly or indirectly, own (as more than five percent equity owner<sup>76</sup>), manage, operate, join, control, or participate in the ownership, management, operation, financing, or control of any business, regardless of the form in which the business is organized, where that business includes the manufacture, publication, or distribution of products of the types manufactured in the Business as of the Closing Date. For a period of one year after the Closing Date, Seller will not, directly or indirectly, solicit the employment of, or offer employment to, any employee who is then an employee of Buyer, or who has terminated employment without the consent of Buyer within 60 days of the solicitation or offer. The Parties specifically acknowledge and agree that the remedy at law for any breach

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<sup>76</sup> A five percent equity ownership allowance may be deemed too high in circumstances where the competitor is a public company with a class of equity securities registered under the Securities Exchange Act of 1934, as amended. Accordingly, the drafter may want to propose a one percent or two percent allowance.

of the foregoing will be inadequate and that Buyer, in addition to any other relief available to it, may be entitled to temporary and permanent injunctive relief without the necessity of proving actual damage. In addition, notwithstanding the provisions of Section 9.5, Buyer may be entitled to recover, directly from Seller, its actual damages as a result of a breach of this provision by Seller. In the event that the non-compete and non-solicitation provisions of this Section 8.5 should ever be deemed to exceed the maximum scope permitted by applicable Law, the Parties agree that these provisions shall be reformed to set forth the maximum permitted by applicable Law.

**8.6 Further Assurances and Cooperation.** From and after the date of this Agreement, upon the request of either Party, the other Party shall execute and deliver the Disclosure Schedules, instruments, documents, or other writings and take actions as may be reasonably necessary or desirable to confirm and carry out and to fully effectuate the intent and purposes of this Agreement.

## **ARTICLE 9. INDEMNIFICATION<sup>77</sup>**

### **9.1 Survival of Representations, Warranties, and Covenants.**

(a) All representations, warranties, and covenants contained in this Agreement shall survive the execution and delivery of this Agreement and the Closing for a period of \_\_\_\_\_ years after the Closing Date,<sup>78</sup> provided that each of the representations and warranties set forth in Sections 3.1 (Organization of Seller), Section 3.2 (Authorization of Transaction), Section 3.5 (Title to Assets), and Section 3.11 (Tax Matters) shall survive until expiration of the applicable statute of limitations. All covenants of the Parties contained in this Agreement shall survive until expiration of the applicable statute of limitations. (The applicable expiration of each survival period is hereinafter referred to as the “Survival Date”). From and after the Survival Date, neither Party nor any shareholder, director, officer, employee, or Affiliate of either Party shall incur any Liability whatsoever as a result of any inaccuracy in or breach of any applicable representation or warranty or failure to

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<sup>77</sup> For basic information on indemnities, see KUNEY, *supra* note 10, at 79-80.

<sup>78</sup> A survival period of one or two years is within a customary range for most representations and warranties. At a minimum, the buyer should request that the representations and warranties survive until they can be independently verified by the buyer in the ordinary course of business. Generally, the buyer can complete that verification process with its first full financial audit after the closing date. Some representations and warranties, however (including those relating to business operations that are not easily audited by certified public accountants), may take longer to verify.

comply with any covenant, except for indemnification obligations with respect to those inaccuracies, breaches, or failures as to which notice has been received in accordance with Section 9.1(b).

(b) No Party shall have any indemnification obligation as a result of any inaccuracy in or breach of any applicable representation or warranty or failure to comply with any covenant unless before the Survival Date it shall have received from the Party seeking indemnification written notice of the existence of the claim for indemnification in respect of that inaccuracy, breach, or failure.

**9.2 Obligation of Seller to Indemnify.** Seller agrees to indemnify, defend, and hold harmless Buyer (and its directors, officers, shareholders, employees, Affiliates, successors, assigns, and representatives) from and against all claims, losses, damages, Liabilities, or other expenses (including reasonable consultants' and attorneys' fees and disbursements), net of any applicable insurance proceeds actually received (collectively, the "Indemnifiable Losses"), based upon, arising out of, or otherwise in respect of:

(a) any inaccuracy in or any breach of any representation, warranty, or covenant of Seller contained in this Agreement or in any schedule, exhibit, instrument, or document delivered under this Agreement;

(b) the employee-related Liabilities referenced in Section 8.3, in accordance with the provisions of that section;

(c) Seller's operation of the Business and Acquired Assets and all Liabilities of Seller existing prior to the Closing; and

(d) any and all actions, suits, proceedings, claims, demands, assessments, judgments, costs and expenses, including reasonable legal fees, costs, and expenses and including reasonable consultants' fees, costs, and expenses incident to any of the foregoing or incurred in investigating or attempting to avoid or to oppose the imposition of any action, suit, proceeding, claim, demand, assessment, judgment, cost or expense or in enforcing this indemnity.

**9.3 Obligation of Buyer to Indemnify.** Buyer agrees to indemnify, defend, and hold harmless Seller (and its directors, officers, shareholders, employees, Affiliates, successors, assigns, and representatives) from and against any Indemnifiable Losses based upon, arising out of, or otherwise in respect of:

(a) any inaccuracy in or breach of any representation, warranty, or covenant of Buyer contained in this Agreement or in any schedule, exhibit,

instrument, or document delivered under this Agreement;

(b) Buyer's operation of the Business and Acquired Assets from and after the Closing; and

(c) any and all actions, suits, proceedings, claims, demands, assessments, judgments, costs and expenses, including reasonable legal fees, costs, and expenses and including reasonable consultants' fees, costs, and expenses incident to any of the foregoing or incurred in investigating or attempting to avoid or to oppose the imposition of any action, suit, proceeding, claim, demand, assessment, judgment, cost, or expense or in enforcing this indemnity.

#### **9.4 Notice and Opportunity to Defend Third-Party Claims.**

(a) Promptly after discovery or receipt by any Party (the "Indemnitee") of notice of any demand, claim, or circumstance that would or might give rise to a claim or the commencement (or threatened commencement) of any action, proceeding, or investigation (an "Asserted Liability") that may result in an Indemnifiable Loss, the Indemnitee shall give written notice of any action, proceeding, or investigation (the "Claims Notice") to the Party obligated to provide indemnification pursuant to Section 9.2 or Section 9.3 (the "Indemnitor"). The Claims Notice shall describe the Asserted Liability in reasonable detail and shall indicate the amount (estimated, if necessary, and to the extent feasible) of the Indemnifiable Loss that has been or may be suffered by the Indemnitee.

(b) The Indemnitor may elect to compromise or defend, at its own expense and with its own counsel, any Asserted Liability. If the Indemnifying Party elects to compromise or defend the Asserted Liability, it shall within 30 days (or sooner, if the nature of the Asserted Liability so requires) notify the Indemnitee in writing of its intent to do so. In that event, the Indemnitee shall cooperate, at the expense of the Indemnitor, in the compromise of or defense against the Asserted Liability and at its option also may choose to participate in that defense or compromise through counsel of its choosing at its own expense. If the Indemnitor elects not to compromise or defend the Asserted Liability, fails to notify the Indemnitee of its election as provided, or contests its obligation to indemnify under this Agreement, the Indemnitee may pay, compromise, or defend the Asserted Liability, subject to the terms and conditions of this Section 9.4(b). Notwithstanding the foregoing, neither the Indemnitor nor the Indemnitee may settle or compromise any claim over the objection of the other; provided, however, that (i) consent to settlement or compromise shall not be unreasonably withheld or delayed and (ii) the Indemnitor only may settle claims for monetary damages without the consent of the

Indemnatee. If the Indemnitor chooses to defend any claim, the Indemnatee shall cooperate with and make available to the Indemnitor any books, records, or other documents within its control that are necessary or appropriate for its defense.

(c) Notwithstanding any other provision of this Agreement to the contrary, the Indemnitor shall not be required to indemnify the Indemnatee to the extent the Indemnitor's position is prejudiced as a result of any unreasonable delay of the Indemnatee in providing any Claims Notice to the Indemnitor.

**9.5 Limits on Indemnification.** Except as otherwise provided in Section 8.5, neither Buyer nor Seller shall have any obligation to indemnify the other Party under this Article 9 with respect to any Indemnifiable Losses unless and until any aggregate Indemnifiable Losses incurred exceed \$\_\_\_\_\_ (the "Stipulated Amount"), in which event the Indemnatee shall be entitled to and be indemnified under this Article 9 for the amount of Indemnifiable Losses in excess of the Stipulated Amount. Except as otherwise provided in Section 8.5, in no event will Seller's total obligation to Buyer pursuant to Section 9.2 or Buyer's total obligation to Seller pursuant to Section 9.3 for Indemnifiable Losses exceed, in the aggregate, the Purchase Price.<sup>79</sup>

## **ARTICLE 10. GENERAL PROVISIONS**

**10.1 Notices.** Any notice, request, instruction or other document to be given under this Agreement will be in writing and will be: (a) delivered personally; (b) sent by Federal Express or other similarly reputable overnight courier; or (c) transmitted by facsimile, according to the instructions set forth below. These notices will be sent to the following addresses and/or facsimile numbers and will be deemed given: (x) if delivered personally, at the time delivered; (y) if sent by Federal Express

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<sup>79</sup> This section is intended to set a *de minimis* amount (a "basket"), in the form of the Stipulated Amount, below which each Indemnatee must bear its own Indemnifiable Losses and a maximum amount (a "cap") above which each Indemnatee must bear its own Indemnifiable Losses. This scheme effectively puts a "collar" around the Indemnifiable Amount, limiting the exposure of each Party to the other. There exist numerous permutations on this theme, as negotiated by the parties (e.g., creating a basket only as to the seller or to both parties, instituting a cap only as to the seller or to both parties, formulating a collar only for the seller, instituting indemnification for the full amount of indemnifiable losses once the cap stipulated amount is exceeded, etc.). Moreover, baskets can function in one of two ways: as a deductible or as a "nuisance" threshold. When the basket serves as a deductible, the basket amount (here, the Stipulated Amount) is not payable by the indemnitor once the basket has been exceeded. Where the basket serves as a nuisance threshold (sometimes known as a "tipping basket"), once the basket has been exceeded, the entire amount of the covered loss is payable by the indemnitor.

or other similarly reputable overnight courier, at the time sent; or (z) if transmitted by facsimile, at the time when receipt is confirmed by the sender or sending facsimile machine.

If to Seller, to:	with a copy to: <sup>80</sup>
_____	_____
_____	_____
_____	_____
Attention: _____	Attention: _____
Facsimile: _____	Facsimile: _____
If to Buyer, to:	with a copy to: <sup>81</sup>
_____	_____
_____	_____
_____	_____
Attention: _____	Attention: _____
Facsimile: _____	Facsimile: _____

or to another address as either Party may indicate by notice delivered to the other Party in accordance with the provisions of this Section 10.1.

**10.2 Confidential Information.** Each Party agrees that it shall treat in confidence all documents, materials and other information that it obtains regarding the other Party during the course of (a) the negotiations leading to the execution of, and consummation of the transactions contemplated in, this Agreement (whether obtained before or after the date of this Agreement) or (b) the investigation provided for in, and the preparation of, this Agreement and other related documents (“Confidential Information”). Confidential Information shall not be communicated to any third party (other than the Parties’ respective counsel, accountants, financial advisors, or other agents or representatives, each of whom also should be bound to confidentiality by agreement with the retaining Party).<sup>82</sup> No Party shall use any Confidential Information in any manner whatsoever except solely for purposes related to the transaction contemplated by this Agreement. The obligation of each Party to treat Confidential Information in confidence shall not apply to any Confidential Information that (a) is or becomes available to the Party, other than in

<sup>80</sup> The copies typically go to the parties’ counsel.

<sup>81</sup> See *supra* note 80.

<sup>82</sup> Each party should make these arrangements with its own counsel, accountants, financial advisors, or other agents or representatives, as necessary.

violation of a confidentiality obligation to the other Party, from a source other than that Party or its counsel, accountants, financial advisors, or other agents or representatives; (b) is or becomes available to the public other than as a result of disclosure by that Party or its counsel, accountants, financial advisors, or other agents or representatives; (c) is required to be disclosed by the Party under applicable law or judicial process, but only to the extent it must be so disclosed; or (d) as to which the Party reasonably deems disclosure necessary after consultation with the other Party to obtain any of the consents or approvals contemplated by this Agreement. If the transactions contemplated in this Agreement are not consummated, each Party will return to the other Party all copies of nonpublic Confidential Information that have been furnished to it by the other Party or its counsel, accountants, financial advisors, or other agents or representatives in connection with this Agreement.

**10.3 Public Announcement.** No Party shall, without the approval of the other Party, issue any press release or other public announcement concerning this Agreement or the transactions contemplated by this Agreement. Notwithstanding the foregoing, any Party may issue a press release or other public announcement concerning the transactions contemplated by this Agreement to the extent that the Party shall be so obligated by Law, or to comply with accounting or other disclosure obligations,<sup>83</sup> provided that the Party desiring to make public disclosure of this Agreement or the transactions contemplated by this Agreement shall be obligated to give the other Party prior notice of the press release or other public announcement if prior notice is commercially reasonable. Notwithstanding the foregoing, nothing contained in this Section 10.3 is deemed to prohibit, limit, or restrict communications by either party with Seller's customers and suppliers regarding the transactions contemplated by this Agreement.

**10.4 Entire Agreement; Amendments.** This Agreement and the schedules and exhibits referred to in this Agreement contain the entire understanding of the Parties with regard to the subject matter contained in this Agreement and supersede all prior written or oral agreements, understandings, or letters of intent between the Parties.

**10.5 Successors and Assigns.** The rights of each Party under this Agreement are not be assignable without the written consent of the other Party,

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<sup>83</sup> Disclosure allowances in this provision are left general because this Agreement is between two non-public companies. However, if one or both parties were public companies, disclosure may be required by, for example, rules and regulations of the Securities and Exchange Commission or a stock exchange.

unless the assignment occurs by operation of Law.<sup>84</sup> This Agreement is binding upon and inures to the benefit of the Parties and their successors and permitted assigns. Nothing in this Agreement, expressed or implied, is intended or will be construed to confer upon any Person other than the Parties and their respective successors and permitted assigns any right, remedy, or claim under or by reason of this Agreement.

#### 10.6 Interpretation.<sup>85</sup>

(a) Articles titles and headings to sections in this Agreement are inserted for convenience of reference only and are not intended to be part of or to affect the meaning or interpretation of this Agreement. The exhibits and schedules referred to in this Agreement will be construed with and as an integral part of this Agreement to the same extent as if they were set forth in the Agreement.

(b) This Agreement has been mutually prepared, negotiated, and drafted by the Parties. The Parties agree that the terms of this Agreement will be construed and interpreted against each Party in the same manner and that none of this Agreement's provisions will be construed or interpreted more strictly against one Party on the assumption that an instrument is to be construed more strictly against the Party that drafted the Agreement.

10.7 **Waivers.** Any term or provision of this Agreement may be waived, or the time for its performance may be extended, pursuant to a written action by the Party or Parties entitled to the term's or provision's benefit. Any waiver will be validly and sufficiently authorized for purposes of this Agreement if, as to any Party, it is authorized in writing by an authorized representative of that Party. Subject to Sections 6.1 and 6.2, the failure of either Party to enforce at any time any provision of this Agreement will not be construed to be a waiver of that provision, nor in any way to affect the validity of this Agreement or any of its parts or the right of any Party to subsequently enforce each and every provision. No waiver or any breach of this Agreement will be held to constitute a waiver of any other or subsequent breach.

10.8 **Expenses.** Each Party will pay its own costs and expenses incident to the negotiation, preparation, and performance of this Agreement, including the

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<sup>84</sup> Transactions or events that may result in the assignment of an agreement by operation of law include mergers and liens.

<sup>85</sup> This provision purports to contract around the canon of contract interpretation providing that ambiguities are construed against the drafter. See James P. Nehf, *Writing Contracts in the Client's Interest*, 51 S.C. L. REV. 153, 174 (1999). A court may, however, fail to give effect to a contractual waiver of this kind, especially if the underlying facts prove to be untrue.

fees, expenses, and disbursements of its counsel, accountants, and financial advisors, except as otherwise expressly provided in this Agreement.

**10.9 Partial Invalidity.** Whenever possible, each provision of this Agreement will be construed in a manner as to be effective and valid under applicable Law, but in case any provision contained in this Agreement is, for any reason, be held to be invalid, illegal, or unenforceable in any respect, that provision will be ineffective only to the extent of that invalidity, illegality, or unenforceability without invalidating the remainder of that provision or any other provisions in this Agreement, unless that construction would be unreasonable.

**10.10 Execution in Counterparts.** This Agreement may be executed in counterparts, each of which will be considered an original instrument and will become binding when each of the counterparts has been signed by each of the Parties and delivered to the other Party.

**10.11 Governing Law.** This Agreement is governed by and construed in accordance with the internal Laws of the State of Tennessee, without giving effect to any choice of Law provisions that may direct the application of the Laws of another jurisdiction.

**IN WITNESS WHEREOF,** the Parties have executed this Agreement on the date first written above.<sup>86</sup>

BUYER: \_\_\_\_\_<sup>87</sup>

SELLER: \_\_\_\_\_<sup>88</sup>

By \_\_\_\_\_  
Name:  
Title:

By \_\_\_\_\_  
Name:  
Title:

<sup>86</sup> See KUNEY, *supra* note 10, at 117.

<sup>87</sup> This blank represents Buyer's full corporate name.

<sup>88</sup> This blank represents Seller's full corporate name.

