"Representations and Warranties Insurance in M & A Transactions"

Speakers: Matthew Miller and Andrew Sullivan

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1100 Poydras Street, 36th Floor | New Orleans, LA 70163

www.bhbmlaw.com | T: 504.569.2900 |

INDEMNIFICATION IN M&A TRANSACTIONS

By: Matthew Miller and Andrew Sullivan

Introduction

The rights and remedies that make up the indemnification provisions of merger, share exchange, asset purchase or other acquisition agreements are among the most important elements of an M&A deal. Despite their importance, however, they are not often the subject of rigorous party-to-party negotiations in the same way as are the major financial terms. Rather, most parties lean more heavily on their legal counsel regarding the content of the final indemnity-related deal provisions than perhaps any other area of an acquisition agreement. As a result, in this area the role of legal counsel is critical.

In the indemnification provisions of M&A agreements, one finds the most important elements of the non-price risk allocation between the parties regarding the target business. That risk allocation is also embodied in one way or another in almost every other aspect of an acquisition agreement from the purchase price and related funding provisions, to the covenants and closing conditions, to the termination provisions and post-closing covenants. But, it is in the indemnification provisions where one finds the principal enforcement mechanisms that give effect to the parties' agreed-upon risk allocation.

The purchase price internalizes the buyer's view of the condition of the business to be delivered at closing, including how the known and unknown pre-closing liabilities and business risks will be allocated between the parties. The seller's representations and warranties collectively establish that agreed-upon pricing status and, in so doing, they serve both as a basis to set the conditions to closing and to allocate pre-closing liabilities and business risks.

Used properly, the indemnification provisions (including the survival provisions, special rights and limitations, the claims process and related provisions) should work seamlessly with the other key elements of an acquisition agreement to complete the deal. Because indemnity provisions are almost always near the end of every acquisition agreement,

many parties (and sometimes their counsel) tend to overlook the details as "legal boilerplate". That is a mistake. Indemnity provisions can be critical to a successful transaction and can mean the difference between commercial life and death when things go awry. Indemnification provisions are often the most negotiated parts of the business deal and should be dealt with early in the negotiation process.

These materials identify basic issues that need to be addressed with respect to indemnity rights and remedies in acquisition agreements and the contractual techniques that are ordinarily used to do so. They also discuss the interplay between some of these issues with a view to giving you the tools to develop more effective strategies to assist your clients.

I. The Basic Provisions

There are a few traditional techniques that are almost always used to establish the parameters for each party's indemnification rights and obligations. These contractual rules, when used, function in a manner similar to an insurance policy's coverage and claims process provisions by, among other things: (i) establishing what is covered, (ii) setting deadlines for bringing claims, (iii) establishing the "coverage" limits, (iv) setting a deductible or a minimum claims threshold, (v) describing how claims will be calculated and (vi) describing how claims will be defended and by whom. The discussion below highlights some of the most common techniques in these areas.

A. The Core Obligation – What is Covered? Set forth below is a common formulation of a selling group's indemnification obligation. The statement of coverage essentially describes contractual obligations and breach of contract (whether styled as a breach of a representation or warranty or a covenant or other agreement). A coverage statement may also contain (i) general indemnity language to reinforce other concepts in the agreement (e.g., presumption that seller's liabilities are not being assumed by the buyer except as otherwise expressly provided) and (ii) special indemnities reflecting the risk allocation for specified liabilities usually identified in the buyer's due diligence investigation.

Indemnification by Sellers and Principals. Subject to any limitations and conditions contained in Article ___ hereof, Company, Holdings and Principals, jointly and severally, agree to

indemnify, defend and hold Buyer harmless, on demand, from and against any and all Damages of every kind, nature or description which arise out of or result from or as a consequence of (i) any false, incorrect or misleading representation or warranty or breach contained in Section __ hereof (including the Disclosure Schedules relating to Section __hereof); or (ii) any failure by Company to perform, comply with or observe any one or more of the covenants, agreements or obligations contained in this Agreement or in any instrument or document delivered to Buyer in connection with this Agreement to be performed by Company on or before the Closing Date (provided, that, if the Closing occurs, Company shall not be an Indemnifying Party hereunder).

Note: In the agreement in which the foregoing provision was used, the term "Damages" was broadly defined to mean – any loss, liability, claim, damage or expense (including reasonable attorneys' fees and costs).

Examples of other issues that might be addressed in a special indemnity or via an alternative remedy (e.g., purchase price adjustment) include: (i) disclosed litigation or other disclosed liabilities, (ii) accounts receivable or similar post-closing balance sheet adjustments (which are often handled by means of a separate accounting true-up or reconciliation process), and (iii) taxes (which are often handled via a separate covenant).

In addition, the use of special indemnities can be used to fill gaps that may exist (from the buyer's perspective) in the representations and warranties. For example, a special indemnity may cover the costs of unknown claims resulting in litigation or unknown environmental liabilities the existence of either of which is not a breach of the applicable representation or warranty because of a knowledge qualifier/limitation. The use of special indemnities can be very risky for a seller, however, and each time a seller agrees to such a change, the seller should make sure that the agreement is clear as to whether the damages recoverable under a special indemnity are subject to, or operate outside of, any otherwise applicable indemnity deductible or threshold, any aggregate damage cap or other limitation.

B. Survival. Most practitioners who handle mergers and acquisitions understand the black letter rule that, at closing, representations and warranties set forth in the contract of sale ordinarily merge into the instrument of conveyance. Under this rule, if a transaction closes, an ordinary claim for breach of the purchase and sale contract cannot be brought without express provisions in the agreement permitting such claims. Accordingly, unless a buyer is willing to rely on rights and remedies that may exist outside the contractual context, the merger must specify which contractual provisions will continue to apply post-closing, i.e., "survive" the

closing. Survival provisions can range from the simple to the complex based on the nature of the transaction.

1. *General Survival Provision*. The simplest survival provision may be nothing more than a statement that all of seller's representations and warranties and certain specified covenants (including the indemnity rights) shall "survive the closing of the transactions contemplated in the acquisition agreement." It may also re-confirm that rights under ancillary agreements, e.g., promissory notes, escrow agreements, non-competition agreements, employment or consulting agreements, etc., will survive the closing according to their express terms. A non-specific survival provision would ordinarily be interpreted to mean that the applicable provisions would continue for the applicable statute of limitations period (generally, 2-3 years depending on applicable state law).

An example of general survival provision is set forth below:

All representations and warranties contained in this Agreement or any other agreement, schedule, certificate, instrument or other writing delivered by the parties in connection with this transaction shall survive for eighteen (18) months after the Closing Date

2. *Tailored Survival Provisions*. More commonly, parties tend to customize the survival provisions based on the nature of the potential claim and when the claim would likely arise post-closing. Typically, a buyer organizes the seller's representations and warranties into categories and establishes a separate survival period for each category. The chart below describes some of the common categories and time periods used:

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	CATEGORY	REFERENCE	SURVIVAL PERIOD
●	General Survival Period	**A**	Typically ranges from 12-24 months
●	Fundamental Reps & Warranties	**B**	Typically ranges from the period of the Applicable Statute of Limitations (S/L) to an Indefinite Period
	○Capitalization of Target		
	○Title to Assets (asset purchase)		
	○Title to Shares of target		
	○Due Organization		
	○Due Authority		
●	Specialty Areas (Rep and related Covenant) where applicable)		Typically, the S/L usually plus a short post-expiration notice period (e.g., 30-60 days)
	○Tax/Income Tax		6
	○ERISA		3
	○Environmental		various
	○Intellectual Property		various
●	Other Areas		General S/L up to Indefinite Period
	○ Pending/Threatened Litigation		
	○Title to key assets (in a stock deal)		
	○Broker/Finder		
	○Breach of general post-closing	**C**	
	○No Conflict/Non-Contravention	**D**	
	○Fraud or Intentional Misrepresentation		

Note A	This is the catch-all, but it usually includes many of the most important and potentially most dangerous reps and warranties, including: (i) governmental approvals/permits; (ii) general governmental compliance; (iii) indebtedness; (iv) financial statements, including specific accounts (e.g., aged A/R, aged A/P, inventories, etc.); (v) undisclosed liabilities; (vi) title and/or condition of physical assets; (vii) material contracts; (viii) specific key relationships (e.g., top 10 customers or suppliers, etc.); (ix) absence of changes (bring-down); and (x) full disclosure.
Note B	This tracks most closely to the types of continuing protections under, for example, a warranty deed and they include many of the necessary elements to successful delivery.
Note C	This category usually excludes the covenants that expressly extend post-closing such as non-competition and non-solicitation covenants, covenants contained in separate agreements and covenants related to specialty areas, such as tax and ERISA which would be co-terminous with the related rep & warranty.
Note D	This rep (by whatever name) is intended to capture required internal or contractual third party consents or approvals. As such, it may overlap with other reps and warranties, meaning that it more commonly falls under the general category.

An example of a tailored survival provision is set forth below:

All representations and warranties contained in this Agreement or any other agreement, schedule, certificate, instrument or other writing delivered by the parties in connection with this transaction shall survive for eighteen (18) months after the Closing Date (the "General Survival Period"); provided, however, that, all representations of Sellers in Section __ (Taxes) and all representations and warranties of Sellers in Section __ (Authority; No Conflict), Section __ (Capitalization), Section __ (Employee Benefits) and Section __ (Environmental Matters) and of Holdings in Section __ (Ownership of LLC Interests) and Section __ (Authority; No Conflict) shall survive for the period of the applicable statute of limitations (each, as applicable, an "Extended Survival Period"). If a party hereto determines that there has been a breach by any other party hereto of any such representation or warranty and notifies the breaching party, in writing, prior to the expiration of the General Survival Period or Extended Survival Period, as applicable, such representation or warranty and Liability therefor shall survive with respect to the specified breach until such matter has been resolved.

C. Caps and Baskets. Setting an aggregate maximum amount of seller exposure to indemnity claims is a common technique. Often, the seller's argument in favor of such a ceiling is based on the proposition an investor in a business ordinarily cannot lose more than his or her investment. As a result, while a seller will work to decrease his or her exposure resulting from a sale, he or she usually likes to backstop his or her exposure at no more than would have applied if the business was not sold. Similarly, a per claim or aggregate deductible or threshold may be used to align the incentives of buyer and seller and to reduce post-closing disputes to matters that are material in size and scope.

1. *Indemnity Caps*. The most common indemnity cap (or ceiling) is the amount of the purchase price but negotiating leverage and seller interest in holding some sales proceeds "free and clear" of indemnity often leads to lower caps. It is also common to see the use of multiple caps based on a breakdown substantially similar to that described above with respect to the survival periods. Here is a common example of the use of multiple indemnity caps, using an aggressive formulation of 25%, 50% and 100% of the purchase price and excluding some claims from the caps altogether:

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CLAIM TYPE	SAMPLE CAP	TYPICAL INDEMNITY CAP RANGE*
Claims subject to the General Survival Period	25%	25-50% up to 100%
Claims relating to the Fundamental Reps & Warranties	100%	100%
Tax/Income Tax Claims	50%	50-100% up to unlimited
Claims relating to ERISA Plans or nonqualified plans	50%	Most often under the general cap but may have 50-100% cap similar to tax obligations
Environmental Claims	50%	50-100% cap, depending on risk profile and due diligence, e.g., Phase I or II testing, Brownfields enrollment, etc.
Pending/Threatened Litigation	100%	100%
Title to key assets (in a stock deal)	50%	50-100%
Broker/Finder Fees	50%	50% up to Unlimited
Breach of general post-closing covenants	100%	Unlimited
No Conflict/Non-Contravention	25%	Most often under the general cap but may have 50-100% cap similar to tax obligations
Fraud or Intentional Misrepresentation	Unlimited	Most often under the general cap but may have 50-100% cap similar to tax obligations

***** Percentages apply to aggregate purchase price or in some instances net amount received.

Sample language applying multi-layered indemnity caps is set forth below:

Notwithstanding anything contained in this Agreement to the contrary, a party shall be required to indemnify and hold harmless any other party under Section __ or Section __ with respect to Damages only to the extent [**Deductible**] that the amount of loss and expense suffered by such party related to the aggregate claims exceeds an amount equal to One Hundred Fifty Thousand Dollars ($150,000) (it being understood that such amount shall be a deductible for which there shall be no indemnification responsibility hereunder). In addition, except as set forth below, the aggregate amount required to be paid by any party under Section __, or Section __shall not exceed [**Ceiling**] an amount equal to Three Million Dollars ($3,000,000). Any indemnity claim arising out of a breach of the all representations of Sellers in Section __ (Taxes), Section __ (Authority; No Conflict), Section __ (Employee Benefits), and Section __ (Environmental Matters) and of Holdings in Section __ (Ownership of LLC Interests) and Section __ (Authority; No Conflict) shall not exceed an amount equal to the Purchase Price.

The limitations on the indemnification obligations that are set forth in Section __shall not apply to: (i) any Damages related to the termination of the employees of the Company set forth on Section __; (ii) any breach of Section __ (Capitalization); or (iii) any Damages related to [intentional misrepresentation or] fraud.

2. *Indemnity Baskets*. The use of a claims deductible (non-tipping basket) or threshold (tipping basket) is very common. However designed, a basket simply means to limit a seller's exposure to indemnity claims and, in so doing, provides additional protection from small claims that may be difficult (and not cost efficient) for parties to pursue or defend. Generally, sellers prefer the use of a deductible because the buyer does not have more than dollar-for-dollar incentive to pursue the next marginal claim. In contrast, when a claims threshold is met, the seller is liable for all claims back to the first dollar – hence the common description of a threshold as a tipping basket. Accordingly, buyers tend to prefer a claims threshold because once the threshold is met, the relief available will exceed that available under a true deductible.

As a result, one might expect claims threshold amounts to be higher than claims deductible amounts insofar as the threshold is the favored approach of the buyer parties.

Just as different categories of indemnity claims may face different survival periods and claim caps, many claims are also excluded from any otherwise applicable indemnity basket (deductible or threshold). Claims under Fundamental Reps, tax claims, most post-closing covenants and the like are typically excluded. Essentially, the deductibles are generally intended to apply to unknown and unanticipated losses not ordinary expenses or claims that can be manipulated by the seller entity.

D. Additional Limitations. In addition to the basic tools discussed above that are used to manage the nature and extent of the indemnity obligation, there are a number of other concepts that can be used to limit or tweak those obligations. Set forth below is a list of some of the ones I most often encounter along with sample provisions:

1. *Exclusive Remedy*. Upon closing, establishing contractual indemnity as the exclusive remedy for breach of contract or for any claim relating to the acquisition agreement absent fraud:

Except for remedies that cannot be waived as a matter of law and injunctive and provisional relief (including specific performance), if the Closing occurs, this Article XI shall be the exclusive remedy for

breaches of this Agreement (including any covenant, obligation, representation or warranty contained in this Agreement or in any certificate delivered pursuant to this Agreement) or otherwise in respect of the sale of the LLC Interests contemplated hereby. In furtherance of the foregoing, Buyer hereby waives, to the fullest extent permitted by law, any and all rights, claims and causes of action it may have against Company or Holdings arising under or based upon any law (including any such rights, claims or causes of action arising under or based upon common law or otherwise).

2. *Non-Reliance*. To manage extra-contractual liability, including an acknowledgement by buyer that it has not relied on any representations or warranties of any seller party (including external advisors) that are not expressly included in, or delivered in connection with, the acquisition agreement:

Other than the representations and warranties set forth in Articles ___ and ___ of this Agreement (as modified by the Disclosure Schedules delivered in connection herewith), no one shall be deemed to have made any other representation or warranty in connection with this Agreement or any of the transactions contemplated hereby. Buyer acknowledges that it has not been induced by and has not relied upon any representations, warranties or statements, whether express or implied, written or oral, made by Company or any of its representatives (including any of the Seller Parties) that are not expressly set forth in this Agreement and the related Disclosure schedules.

3. *Collateral Source*. Reducing indemnifiable damages by the amount of any insurance recovery or reserves established for such for such loss which are reflected on the target company's balance sheet:

In calculating any Damages there shall be deducted any insurance recovery in respect thereof (and no right of subrogation shall accrue hereunder to any insurer) as well as any reserves with respect thereto set forth on the Financial Statements.

In any case where an Indemnified Party recovers from third Persons (including under any insurance coverage of Company or Buyer) any amount in respect of a matter with respect to which an Indemnifying Party has indemnified it pursuant to this Article XI, such Indemnified Party shall promptly pay over to the applicable Indemnifying Party(ies) the amount so recovered (after deducting therefrom the amount of the reasonable expenses incurred by it in procuring such recovery), but not in excess of the sum of (i) any amount previously so paid by the Indemnifying Party(ies) to or on behalf of the Indemnified Party in respect of such matter and (ii) any amount expended by the Indemnifying Party(ies) in pursuing or defending any claim arising out of such matter.

4. *Tax Effect*. Reducing an indemnifiable loss by the tax benefit received by the party seeking indemnification:

The amount of any Losses subject to indemnification under this Section ___ shall be calculated net of any Loss Tax Benefit to the extent realized in the taxable period in which the Loss was incurred. For purposes of the foregoing, the "Loss Tax Benefit" shall mean the Tax savings (including savings from the use of credits) or refunds actually realized by such Indemnified Party that is attributable to any Tax Deduction, loss or credit resulting from or arising out of such Loss.

5. *Excluding Certain Types of Damages*. Expressly excluding from direct claims, certain categories of damages including, for example: (i) lost profits, (ii) indirect damages, (iii) consequential damages, (iv) exemplary damages, (v) punitive damages, or (vi) diminution in value or similar damages calculated using a multiple of cash flow or similar device:

> Notwithstanding anything contained in this Agreement to the contrary, no party shall have any Liability hereunder for any lost profits or any indirect, consequential, incidental, exemplary or punitive damages, each of which is hereby excluded by agreement of the parties regardless of whether or not any party has been advised of the possibility of such damages.

6. *Mitigation*. While it may be a black letter rule, if the agreement restricts the parties to specified contractual rights and obligations, some sellers will want to ensure that any claimant remain under an express duty to mitigate damages usually with the proviso that the costs of mitigation are themselves indemnifiable damages.

> Each of the parties agrees to take all reasonable steps to mitigate their respective Damages upon and after becoming aware of any event or condition that could reasonably be expected to give rise to any Damages that are indemnifiable hereunder. In such event, all costs incurred by the Indemnified Parties in connection with any such mitigation efforts will be includable as Damages.

E. Buy Side Adjustments. While most of the work of buyer's counsel with respect to the indemnity section of an M&A agreement involves paring back the various indemnity limitations advanced by seller's counsel, in some instances buyers will propose means to increase a buyer's claim. The most common provisions in this arena are provisions that expand the indemnity obligation to encompass claims that do not violate the representations and warranties. These include the special indemnities (discussed above) and the use of a materiality "scrape" where the "materiality" limitation is, in effect, written out of the representation and

warranty for purposes of calculating the amount of a claim for indemnity. I have also seen buyer seek similar treatment for knowledge qualifiers.

> For purposes of calculating the indemnity obligations under the section, Damages shall be determined without reference to any materiality limitations (including any reference to Material Adverse Effect) set forth in the representation or warranty concerning which an indemnity claim has been asserted hereunder.

F. Buy Side Limitations. Depending on the nature of the transaction, a buyer's representations and warranties may be minimal and, for obvious reasons, they are almost always far less substantial than those applicable to sellers. That said, it is common for buyers to demand that any shortened survival period, indemnity basket or cap applicable to seller also apply to any indemnity claim against buyer. Because it is much more unusual for a seller to seek indemnity from a buyer, many sellers tend to reflexively grant this request without understanding its full implications. In asset sale transactions, where sellers assign contract rights for which sellers remain contingently liable, the possibility of seller-to-buyer indemnity claims is much more obvious and clear-cut. The challenge for sellers is to make sure that a buyer's key post-closing obligations embodied in deferred payment obligations notes, earn-out rights, etc. or in a wide variety of covenants (e.g., to assume and perform leases or contracts, to handle COBRA obligations, etc.) are excluded from all deductibles and caps to ensure that such limitations cannot be used to unilaterally adjust the purchase price by means of a breach of contract subject to a deductible or threshold.

Finally, while per claim deductibles are less commonplace than in years past, I did see that approach used recently in a substantial transaction in which we were only tangentially involved. The point is that while the various techniques available to customize the indemnity parameters for a transaction may come in and out of fashion, circumstances and economics will dictate which techniques are likely to be acceptable to meet your client's need. Understanding what limitations techniques are available and how they work together allows you to customize the indemnity parameters for a transaction based on the business involved, its risk profile and other factors, including client preferences.

II. Escrows, Seller Notes, Holdback's, Set-Offs, etc.

One of the most important critical deal points relating to M&A indemnity is the extent to which any part of the purchase price will be set aside or deferred as a means to directly or indirectly secure payment of indemnity claims. From a buyer's perspective, any amount of purchase price that is not being paid in cash at closing is a potential source of payment of an indemnity claim. From a seller's perspective, amounts yet to be funded by the buyer (notes, holdbacks, deferred ancillary payments, etc.) or funded into escrow (or holdback) are the preferred source of funds to pay indemnity claims. In some instances, where some of the seller parties have substantially more personal assets than others or where joint and several liability may apply to the seller parties, those higher net worth seller parties may actually prefer a larger escrow fund or promissory note.

A. Escrow-Hold Back vs. Note. Deferred payments whether styled as promissory notes, simple contractual deferred payment obligations or contingent payment obligations (a.k.a. "earnouts"), may serve as simple financing techniques or as means to achieve a higher nominal price (or both). In determining which technique makes most sense in a particular transaction, you need to understand the primary purpose for the deferred payment. Generally, unless a deferred payment obligation is the mechanism for achieving a higher nominal price, the seller parties will always choose a funded escrow in order to minimize, if not eliminate, the credit risk associated with the deferred payment.

The other technique used by buyers to help them fund the purchase price for an M&A transaction is to require that a portion of the seller's equity be rolled over (or reinvested) in the target or buyer entity.

B. Integrating Note/Escrow Terms with Other Indemnity Parameters. Seller parties may be willing to provide greater security for potential indemnity claims in return for lower caps – resulting in a greater portion of the purchase price being deferred (to the benefit of the buyer) and a greater portion of the amount received (by seller) being considered free and clear of indemnity risk upon receipt. In a transaction with multiple tiers of indemnity caps, it is not

uncommon to see the general cap (exclusive of fundamental issues and special exceptions such as tax claims) set to equal the amount deposited into escrow. Similarly, the time period for an escrow or a note or other deferred payment ordinarily will coincide with the general survival period. Longer pay-out periods create greater credit risks with all the attendant concerns. Staged releases from escrow function in a manner similar to note payments and are often associated with longer escrow periods, e.g., ½ of the escrow fund releases after 18 months (to coincide with the general survival period) and ½ releases after 36 months (to coincide with many general S/L periods).

C. Other Issues. In connection with the use of seller financing, a number of legal issues arise including: the manner by which set-off or recoupment would be claimed and the consequences, if any, of deferring payments or claiming set-off for an amount exceeding the final amount determined to be owed.

Set forth below is an example of a provision designed to address some of these issues:

> **Recoupment Under Buyer Note**. Buyer shall have the option of recouping all or any part of any Damages it may suffer (in lieu of seeking any indemnification to which it is entitled under this Article ___) by notifying Holdings that Buyer is reducing the principal amount outstanding under the Buyer Note. This shall affect the timing and amount of payments required under the Buyer Note in the same manner as if Buyer had made a permitted prepayment (without premium or penalty) thereunder. Notwithstanding the foregoing, under the terms of the Buyer Note, Buyer may not exercise its recoupment rights hereunder unless and until its rights to indemnification have been finally determined as provided herein. In the event that Buyer has timely asserted an indemnity claim against Holdings and/or the Principals hereunder and such claim has not been finally determined as of the due date of the Buyer Note, then Buyer may defer payment on that portion of the Buyer Note equal to the amount of its claim; provided, that, if the amount of the claim, when finally determined, is less than the amount withheld hereunder, then immediately following the final determination of such claim, Buyer shall remit to Holdings, the amount of such excess, plus interest. Interest on the Buyer Note in respect of excessive recoupment claims, shall accrue at an annual percentage rate equal to two percent (2%) above the rate otherwise applicable under the Buyer Note.

III. Responsibility for Indemnification

Depending on the nature of the transaction (asset sale vs stock sale or the equivalent) and other factors, determining which parties will offer the sell side indemnity protection and the extent of that protection can be very important deal points.

A. Stock Transactions. In a stock transaction, generally all selling shareholders will participate in at least part of the indemnity risk (e.g., that portion that is subject to an escrow or seller note or similar deferred payment provision). But it may be appropriate to limit the financial responsibility of some shareholders vis-à-vis others. For example, some shareholders may have relatively small holdings, may have played little to no role in management and may have had little to no role in the negotiation of the transaction documents. In addition, some shareholders may desire pro rata exposure rather than joint and several exposure to indemnity claims. In addition, in a stock sale, it is likely that there will be two sets of seller representations and warranties – those relating to the target entity and those relating to the individual owners of that entity. Often the level of indemnity risk may be different depending on whether the matter for which indemnity is sought is a company matter or an individual matter (e.g., title to shares). Here are some of the alternatives used in the stock sale context:

(i) Joint and several liability among all shareholders of the target company – meaning the buyer can collect 100% of any indemnity claim from any one shareholder;

(ii) Joint and several liability up to a cap – meaning the buyer can collect monies from a shareholder in excess of his or her pro rata ownership percentage but only up to a cap of , e.g., 25%-50%;

(iii) Proportional liability – meaning no one selling shareholder may be liable for more than his or her pro rata portion of the indemnifiable loss;

(iv) Several liability for individual representations and warranties with joint and several or proportional liability for all other claims; and

(v) No liability or limited proportional liability for specified shareholders (e.g., ESOP, management shareholders, small shareholders, etc.) and joint and several liability for certain major, controlling shareholders.

B. Asset Transactions. In asset sale transactions, additional issues may be in play. The selling entity may continue to exist (at least for a while) but it may distribute the net sales proceeds in a manner that makes it a poor indemnitor. Where a selling entity is the subsidiary of another entity, a simple parent guaranty may suffice to address buyer concerns. Shareholder guaranties are often used when the shareholders are individuals rather than corporations or LLCs, etc. In that circumstance, careful attention should be paid to ensuring that the shareholders of a selling entity do not inadvertently take on more financial risk than they had as shareholders or as the distributees of monies in connection with a liquidation of an entity following a sale of all or substantially all of its assets. Here are some of the alternatives we have seen and used in the asset sale context in addition to those listed above:

(i) Setting a minimum period of continuing existence and/or minimum liquid net asset retention requirements for the selling entity – effectively an escrow in the hands of the seller rather than a third party; and

(ii) Requiring the use by the seller of a liquidating trust of other similar vehicle to the same essential effect as the restrictions described in clause (i) above.

IV. Indemnification Process; Dispute Resolution

A. Third Party Claims. Who controls the defense of the claim is the most substantial issue that is often in dispute regarding the process for indemnification of third party claims. From the perspective of the seller, the party bearing the responsibility for any loss resulting from the claim should control the case. From the perspective of the buyer, claims that affect its business relations (e.g., claims against a key customer), future tax liabilities (e.g., claims that may affect years before and years after a transaction) or other claims that affect the ongoing business activities should be controlled by the buyer without exception. Complications also arise if claims are for amounts that exceed the indemnity caps or amounts escrowed such that responsibility for payment of claims may depend on the outcome of the matter even if the subject matter is clearly covered. Set forth below is an example of an indemnity process provision that addresses many of these issues:

(i) In the event Parent becomes aware of a third party claim (a "Third Party Claim") which Parent reasonably believes may result in a demand for indemnification

pursuant to this Article ___, Parent shall notify the Shareholders' Representative of such claim.

(ii) If a Third Party Claim is asserted under Section ___ and/or Section ____, then the Shareholders' Representative shall be entitled to assume and control the defense of such Third Party Claim at its expense and through counsel of its choice reasonably acceptable to the Parent Indemnitee so long as (A) **[Acceptance of Financial Responsibility]** the Shareholders' Representative gives written notice to the Parent Indemnitees within twenty (20) days after the Parent Indemnitees have given notice of the Third Party Claim that the Indemnifying Parties will, and thereby covenant to, indemnify the Parent Indemnitees from and against the entirety of any and all Liabilities the Parent Indemnitees may suffer resulting from the Third Party Claim, (B) **[Money Damages Only]** the Third Party Claim involves money damages and does not seek an injunction or other equitable relief against the Parent Indemnitees, (C) **[Excluding Criminal and Regulatory Matters]** the Third Party Claim does not relate to or otherwise arise in connection with any criminal or regulatory enforcement action, (D) **[Amount Below the Cap]** the monetary relief sought in the Third Party Claim does not exceed the Cap (or any remaining portion to the extent the Cap has been reduced by prior claims), (E) **[Business Relations]** the Third Party Claim is not brought by an existing customer, distributor or supplier of the Company, and (F) **[Bona Fide Defense]** the Shareholders' Representative conducts the defense of the Third Party Claim in a reasonably active and diligent manner.

(iii) **[Cooperation]** The non-controlling party shall cooperate with the controlling party in the defense of any Third Party Claim and make available, at the Indemnitor's expense, all witnesses, pertinent records, materials and information in the non-controlling party's possession or under the non-controlling party's control relating thereto as is reasonably required by the controlling party.

(iv) **[Right to Partipate if not Control Defense]** To the extent the Shareholders' Representative elects not to defend such Third Party Claim, ceases to defend such Third Party Claim or is not entitled to defend such Third Party Claim, and the Parent Indemnitees defend such Third Party Claim, the Parent Indemnitees may retain counsel and control the defense of such Third Party Claim, but the Shareholders' Representative shall be entitled, at the expense of the Indemnifying Parties, to participate in (but not control) such defense.

(v) **[Limitations on Settlement by Seller]** If the Shareholders' Representative has assumed and is conducting the defense of the Third Party Claim in accordance with Section __, the Shareholders' Representative will not consent to the entry of any judgment or enter into any settlement with respect to the Third Party Claim without the prior written consent of the Parent Indemnitees (not to be unreasonably conditioned, delayed or withheld (it being understood and agreed that it shall be considered unreasonable to condition, delay or withhold consent to any compromise or settlement for monetary payments only (to be paid by the Indemnifying Parties))).

(vi) **[Settlement by Buyer]** If the Parent Indemnitees have assumed and are conducting the defense of the Third Party Claim in accordance with Section __, they may settle any such Third Party Claim without the consent of the Shareholders' Representative, provided, no settlement of any such Third Party Claim with third party claimants shall be determinative of the amount of Liabilities the Parent Indemnitees are

> entitled to recover pursuant to the indemnification provisions of this Article ___ relating to such matter. In the event that the Shareholders' Representative has consented to any such settlement, the Indemnifying Parties shall not have any power or authority to object under any provision of this Article___ to the amount of any claim by the Parent Indemnitees with respect to such settlement.

B. Dispute Resolution. There are a number of critical issues relating to dispute resolution that should be addressed in an M&A agreement. The parties will likely have created a customized risk allocation in the M&A agreement. To ensure that your client is not unduly disadvantaged if a dispute arises, it is important to give appropriate attention to the details of the dispute resolution provisions.

1. *Governing Law*. Most M&A agreements address the governing law but appropriate care should be taken to ensure that the agreement operates in the manner intended. This can be done by ensuring that the selection of law relates to the applicable substantive law regardless of the impact of choice of law rules that may be applied under the "whole" law of the chosen state which could apply the law of another state to the matter. Also, there may be circumstances where the laws of different states may apply to different matters, e.g., internal matters relating to a party created under the laws of state vs. the law of the contract or laws applicable to certain ancillary documents, employment agreements or non-competition agreements vs. the law of the M&A agreement itself. Here are a couple of examples of governing law provisions:

> **Governing Law**. This Agreement will be governed by the laws of the State of Delaware without regard to conflicts of laws principles.

> **Governing Law**. This agreement shall be governed by and construed in accordance with the domestic laws of the State of Delaware, without giving effect to any choice of law or conflicting provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the laws of any jurisdiction other than the State of Delaware to be applied. In furtherance of the foregoing, the internal law of the State of Delaware will control the interpretation and construction of this agreement, even if under such jurisdiction's choice of law or conflict of law analysis, the substantive law of some other jurisdiction would ordinarily apply.

> *This is very important for noncompetition agreement purposes.

2. *Jurisdiction/Venue*. Venue selection for matters that may be litigated in court can be critical. For sellers, the issue may be one of cost as well as concern over potential

advantages for buyer parties with more familiarity with the venue. The reverse is also true of buyers. When mandatory arbitration is employed in an M&A contract, the jurisdiction and venue concerns are lessened in one sense – they only apply when an equitable remedy is sought (e.g, specific performance) or to enforce an arbitration award. However, the equitable remedy exception could mean much more than a seller intended if, for example, the issue for determination is whether seller has breached the contract giving rise to a right of buyer to specific performance or whether buyer has breached the contract giving rise to a right of seller to terminate. Here are a couple of examples of jurisdiction/venue provisions:

> **Venue**. Any action or proceeding seeking to enforce any provision of, or based on any right arising out of, this Agreement may be brought against any of the parties in the courts of the State of Delaware, County of _____, or, if it has or can acquire jurisdiction, in the United States District Court for the District of Delaware, and each of the parties consents to the jurisdiction of such courts (and of the appropriate appellate courts) in any such action or proceeding and waives any objection to venue laid therein.
>
> **Consent to Jurisdiction**. Each party hereto agrees and consents to the exclusive jurisdiction of any court sitting in the State of Delaware and any United States District Court in the State of Delaware (if federal jurisdiction exists), and any applicable appellate courts, with respect to all matters relating to this Agreement and to the transactions contemplated hereby, waives all objections based on lack of venue and *forum non conveniens*, and irrevocably consents to the personal jurisdiction of all such courts.

3. Waiver of Jury Trial. A large majority of M&A agreements contain a waiver of jury trial provision. Generally, unless a party is expressly intending to use venue as a source of post-closing leverage in negotiating resolutions to direct disputes, this provision is usually not controversial.

> **Waiver of Jury Trial.** Each party hereto hereby irrevocably and unconditionally waives, to the fullest extent such party may legally and effectively do so, trial by jury in any suit, action or proceeding arising hereunder.

4. *Arbitration*. While it may not offer as much protection from the costs of litigation, as many casual observers may think, parties often choose to employ arbitration provisions in M&A agreements to better ensure the presence of a forum with experience in considering M&A issues. Since cost is a source of real leverage to buyers making indemnity claims, particularly where the defense is not consolidated under a single shareholder

representative, venue for the arbitration and other techniques to manage cost may also be important. Generally, buyers favor litigation as the means for dispute resolution because it should be more predictable, especially if the buyer's choice of governing law and venue are applied. Generally, sellers prefer arbitration because it is less likely to unduly favor one side or another and due to the perception that the cost of arbitration would be less than that of litigation – reducing the role that defense costs would play in resolving the matter.

While it can be overplayed, negotiating a custom arbitration provision should be considered. Subjects for potential customization include: (i) the rules under which it must be conducted; (ii) selection of the arbitration panel; (iii) limiting the number of arbitrators, limiting the amount and time period for discovery or similar matters for smaller claims; (iv) establishing a customized appeal process for claims of a certain size or awards of a certain size; (v) confirming the types of issues that must be arbitrated and authorizing certain interim remedies via arbitration to limit the use of litigation in such circumstances. Below is an example of an arbitration provision that addresses some of the issues noted above:

> **Resolution of Conflicts; Arbitration.**
>
> (i) In case the Shareholders' Representative shall object in writing to any claim or claims made in any Officer's Certificate to recover Liabilities from the Escrow Amount or from the Indemnifying Parties directly, within thirty (30) days after delivery of such Officer's Certificate, the Shareholders' Representative and Parent shall attempt in good faith to agree upon the rights of the respective parties with respect to each of such claims. If the Shareholders' Representative and Parent should so agree, a memorandum setting forth such agreement shall be prepared and signed by both parties.
>
> (ii) If no such agreement can be reached after good faith negotiation and prior to sixty (60) days after delivery of an Officer's Certificate, either Parent or the Shareholders' Representative may demand arbitration of the matter unless the amount of the Liability is at issue in pending litigation with a third party, in which event arbitration shall not be commenced until such amount is ascertained or both parties agree to arbitration, and in either such event the matter shall be settled by arbitration conducted by one arbitrator mutually agreeable to Parent and the Shareholders' Representative. In the event that, within thirty (30) days after submission of any dispute to arbitration, Parent and the Shareholders' Representative cannot mutually agree on one arbitrator, then, within fifteen (15) days after the end of such thirty (30) day period, Parent and the Shareholders' Representative shall each select one arbitrator. The two arbitrators so selected shall select a third arbitrator. If either party fails to select an arbitrator during this fifteen (15) day period, then the parties agree that the arbitration will be conducted by one arbitrator selected by the other party.

(iii) Any such arbitration shall be held in Atlanta, Georgia, under the rules then in effect of JAMS. The arbitrator(s) shall determine how all expenses relating to the arbitration shall be paid, including without limitation, the respective expenses of each party, the fees of each arbitrator and the administrative fee of JAMS. The arbitrator or arbitrators, as the case may be, shall set a limited time period and establish procedures designed to reduce the cost and time for discovery while allowing the parties an opportunity, adequate in the sole judgment of the arbitrator or majority of the three arbitrators, as the case may be, to discover relevant information from the opposing parties about the subject matter of the dispute. The arbitrator, or a majority of the three arbitrators, as the case may be, shall rule upon motions to compel or limit discovery and shall have the authority to impose sanctions, including attorneys' fees and costs, to the same extent as a competent court of law or equity, should the arbitrators or a majority of the three arbitrators, as the case may be, determine that discovery was sought without substantial justification or that discovery was refused or objected to without substantial justification. The decision of the arbitrator or a majority of the three arbitrators, as the case may be, as to the validity and amount of any claim in such Officer's Certificate shall be final, binding, and conclusive upon the parties to this Agreement and the Indemnifying Parties. Such decision shall be written and shall be supported by written findings of fact and conclusions which shall set forth the award, judgment, decree or order awarded by the arbitrator(s). Within thirty (30) days of a decision of the arbitrator(s) requiring payment by one party to another, such party shall make the payment to such other party.

The forgoing arbitration provision shall apply to any dispute between the Indemnifying Parties and the Parent Indemnitees under this Article __ whether relating to claims upon the Escrow Amount or to the other indemnification obligations set forth in this Article___.

V. Other Issues

A. Sandbagging; Anti-Sandbagging. What? According to one online dictionary, the term "sandbagging" means hiding one's strength or skill early in a contest (or in earlier contests) to take advantage of the opponent. In M&A transactions, the terms refers to a buyer using its pre-contract or pre-closing actual knowledge of a breach by seller of a representation or warranty as a defense against a post-closing claim based on that breach. Legally, the issue could be framed in terms of waiver (closing with knowledge as a de facto waiver) or lack of causation (reliance) or perhaps some other basis. Regardless of the legal theory, the issue is a thorny one for both buyer and seller.

From the seller's perspective, a buyer seeking to take advantage of a breach of warranty of which the buyer has become aware prior to contract or closing (and has not told seller) seems deceptive and unfair and that a rule permitting sandbagging promotes the perverse incentive for buyer to hide its knowledge of seller's faults to use against seller post-closing.

The buyer typically argues that the elimination of claims merely because facts giving rise to the claim were known to buyer is equally unfair because it could be used to defeat a legitimate claim of which buyer may have been/should have been aware or where mere knowledge by buyer occurred is at a lower level. Silence in the contract probably favors the seller despite the fact that most M&A agreements will contain an express non-waiver clause (i.e., that no action, failure to act or course of dealing can be deemed to effect a waiver).

Accordingly, buyers and sellers will battle over inclusion of a sandbagging clause – giving the buyer the right to rely on the seller's disclosure schedules regardless of any knowledge of buyer regarding any breach or potential breach thereof.

> **Actual Knowledge**. Notwithstanding anything to the contrary in this Agreement: (i) no investigation by Buyer shall affect the representations and warranties of Seller under this Agreement or contained in any document, certificate or other writing furnished or to be furnished to Buyer in connection with the transactions contemplated hereby; and (ii) such representations and warranties shall not be affected or deemed waived by reason of the fact that Buyer knew or should have known that any of the same is or might be inaccurate in any respect.

The seller may attempt to include an express anti-sandbagging clause – eliminating the buyer's right to recover for any known breach of any representation or warranty.

> **Actual Knowledge**. Seller shall not be liable under this Article ___ for any Loss resulting from any event relating to a breach of any representation or warranty if the Seller can establish that the Buyer had actual knowledge on or before the Closing date of such event.

One alternative is for seller to condition the buyer's right to recover on the absence of prior disclosure by seller rather than the absence of prior knowledge by the buyer. But, if the seller is using the exclusive remedy provision and non-reliance provision (discussed above), this alternative is less appealing.

> **Other limitations**. No claim for breach of representations or warranties may be made by Buyer under this Article ___ if (i) such claim is based on a fact or event occurring prior to Closing (whether or not occurring prior to the date of this Agreement) and (b) such fact or event was disclosed by Seller prior to Closing.

Other alternatives include a "duty to inform" provision or a representation from the buyer that it has no actual knowledge of any misrepresentation by the seller. Other scenarios

include using the anti-sandbagging provision as trade bait for elimination of one or more of the most onerous representations often required of sellers (e.g., the so-called 10b-5 or full disclosure representation). In the absence of a reverse break-up fee or similar provision setting a ceiling on damages for a seller failing to close, resolving this issue is often nothing more than the result of negotiating leverage.

B. Calculating Damages from Financial Misstatements. The challenge of facing an indemnity claim can quickly become a nightmare to a seller when the buyer has the ability to calculate its damages based its pricing model (often a multiple of EBITDA[1], adjusted EBITDA[2] or projected EBITDA, etc.) The joy with which the seller had considered the 8X multiple if received on the seller's past performance quickly evaporates upon learning that a $100,000 accounting error may cost that seller $800,000 plus attorneys' fees.

This issue can be addressed by the seller in two important ways – limiting damages for diminution of value and consequential damages. Ordinarily, there are no representations as to the value of specific assets or classes of assets other than inventory and accounts receivable which are often the subject of purchase price adjustment mechanisms relating to the delivery of a specified target amount of working capital. Accordingly, elimination of these categories of damages with respect to direct claims is ordinarily the most complete approach.

In more than one instance in representing a seller where we faced difficulty in completely eliminating these categories of damages, we were able to eliminate claims relating to accounts receivable and inventory from indemnity altogether on the basis that such matters were being addressed in the working capital reconciliation. In others, we expressed eliminated the right of buyer to calculate damages using its pricing model or any similar methodology using a multiple of earnings or cash flow. In still others, in combination with other techniques, I have expressly set a ceiling on the multiple of cash flow that could be used making any such claim.

[1] **E**arnings **B**efore **I**nterest, [Income] **T**axes, **D**epreciation and **A**mortization.

[2] EBITDA adjusted to eliminate the effect of extraordinary (non-recurring items) and above market insider benefits, etc.

When facing a claim based on a multiple of earnings, consider the extent to which the disputed issue even affects the base to which a multiple should be applied. For example consider an issue of revenue recognition. If a seller's revenue was recognized early under a mistaken application of generally accepted accounting principles (GAAP), buyer will have paid seller for revenue recognized in the measurement year that should have been credited to buyer post-closing. If the same revenue recognition policy had been consistently applied, however, revenue in earlier years should have been applied to the measurement year likely limiting the true amount of the inaccuracy in the measurement year.

Similarly, the parties may have agreed to limit recovery for accounting issues that related to accounts receivable and inventory (which affect the P&L as they relate to sales and cost of sales) to a dollar-for-dollar balance sheet adjustment under a purchase price adjustment mechanism.

With respect to the calculation of damages for financial misstatements, it is generally to the buyer's advantage to stay silent on these issues and it is up to the seller to address these risks in the agreement. And it is important for counsel to make sure his client understands what is at risk when these issued are discussed. For clients without audited financial statements, the risk of a GAAP misstatement means that they should heavily negotiate the financial statement representations and ensure that known exceptions to GAAP are expressly disclosed. For buyers of such companies, the use of independent accounting advisors who are experienced in purchase price investigations should be strongly encouraged.

REPRESENTATIONS AND WARRANTIES INSURANCE IN M & A TRANSACTIONS

Matthew Miller & Andrew Sullivan

est. 1914
BALDWIN HASPEL BURKE & MAYER LLC
LAW OFFICES

BASICS OF REPRESENTATIONS AND WARRANTIES INSURANCE

1. Intended to provide protection against losses that result from a Seller's unanticipated breach of representations and warranties in an acquisition agreement that arises after the closing.
2. Total cost of these policies has decreased dramatically.
    a. Now, affordable for transactions generally in the $15M+ range.
3. Can provide coverage for fundamental (authority, ownership) and non-fundamental (customer relationships, etc.) representations and warranties.

BASICS OF REPRESENTATIONS AND WARRANTIES INSURANCE (CONTINUED)

4. Sellers tend to like representations and warranties insurance because it helps to reduce, or sometimes eliminate, an escrow or holdback in an acquisition agreement.
5. Most policies are procured by buyers, but can be procured by either the buyer or the seller.
6. Costs can be split between the buyer and the seller in the acquisition agreement.
7. Representations and warranties insurance helps buyers to manage risk and eases collection concerns.

TYPICAL POLICY

1. 1-2% Retention (born entirely by buyer and/or seller).
2. The policy limit is typically 10-15% of the total purchase price.
3. Thus, the Retention can often result in a small (1-2%) escrow or holdback for the seller.

TYPICAL POLICY (CONTINUED)

4. Policy Period is generally 3 years for non-fundamental representations and warranties and 6 years for fundamental representations and warranties.
5. General Exclusions
    a. Inaccuracy in the No Claims Declaration
    b. Actual Knowledge breach
    c. Sales Tax Liability
    d. Employee misclassification
6. Thus, representations and warranties does not generally provide coverage for actual or known risks – typically carved out.

KEY CONSIDERATIONS IN TRANSACTION PLANNING

1. Who is responsible for the losses within the retention or deductible?
2. Are there any special indemnifications which are carved out in the policy?
3. Define “Knowledge” parties tightly.
4. Subrogation.
5. Who pays for the premium?
6. Consequential Damages covered?
7. Closing Consideration.

TRENDS

1. 2017 ABA Deal Points Study shows that at least 30% of all deals wherein public companies acquired private companies for between $30 Million and $500 Million had Representations and Warranties insurance.
2. More insurers are getting into the industry and making pricing much more competitive.

Matt Miller
miller@bhbmlaw.com

Andrew Sullivan
asullivan@bhbmlaw.com

QUESTIONS?

est. 1914 BALDWIN HASPEL BURKE & MAYER LLC
LAW OFFICES

MEMBERSHIP INTEREST PURCHASE AGREEMENT

BY AND AMONG

MEMBER A
("Seller")

PURCHASER B
("Purchaser")

and

NEWCO, INC.
("NewCo")

Dated as of October _____, 2015

MEMBERSHIP INTEREST PURCHASE AGREEMENT

This MEMBERSHIP INTEREST PURCHASE AGREEMENT (the "Agreement") is entered into as of the ____ day of October, 2015, by and among **MEMBER A** ("Seller"), **NEWCO, INC.**, a Delaware corporation ("Parent"), and **PURCHASER B**, a Delaware corporation and wholly owned subsidiary of NewCo ("Purchaser"). Seller, NewCo and Purchaser may be referred to herein as, individually, a "Party" and, collectively, the "Parties".

WHEREAS, Seller owns beneficially and of record one hundred percent (100%) of the outstanding membership interests of Widgets R'Us, L.L.C., a Louisiana limited liability company (the "Company");

WHEREAS, the Company is treated as a corporation for federal and state income tax purposes and has elected to be an S corporation under Sections 1361 and 1362 of the Code;

WHEREAS, the Company's services include the rental and manufacture of widgets (the "Business");

WHEREAS, Seller desires to sell, and Purchaser desires to purchase, one hundred percent (100%) of the issued and outstanding membership interests of the Company, represented by one thousand Units (collectively, the "Purchased Units"), for the consideration and upon the terms and subject to the conditions hereinafter set forth; and

WHEREAS, the Parties agree to treat the acquisition of the Purchased Units as a "qualified stock purchase" within the meaning of Section 338(d)(3) of the Code.

NOW, THEREFORE, in consideration of the premises and the mutual agreements and covenants hereinafter set forth, the Parties do hereby agree as follows:

ARTICLE I
DEFINITIONS

1.01 Certain Defined Terms. As used in this Agreement, the following terms shall have the following meanings:

"401(k) Plan" shall have the meaning set forth in Section 3.24.

"Accounting Firm" shall have the meaning set forth in Section 2.03(d).

"Affiliate" means, with respect to any specified Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, such specified Person.

"Allocation Schedule" shall have the meaning set forth in Section 5.06(f).

"Ancillary Agreements" means (i) the Assignment of Interests, (ii) the Non-Competition Agreement, (iii) the Lease Agreement, (iv) the Stock Issuance Agreement and (v) the Escrow Agreement.

"Assignment of Interests" shall have the meaning set forth in Section 2.04(b).

"Audited Financial Statements" shall have the meaning set forth in Section 3.08(a).

"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 reasonably be expected to form the basis for any specified consequence.

"Business" shall have the meaning set forth in the Recitals.

"Business Day" means any day that is not a Saturday, Sunday or legal holiday in the State of Louisiana.

"Cause" shall have the meaning set forth in Section 5.08.

"CERCLA" means the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601 et. seq.

"Claimant" shall have the meaning set forth in Section 6.06(a).

"Claim Certificate" shall have the meaning set forth in Section 6.06(a).

"Closing" shall have the meaning set forth in Section 2.04(a).

"Closing Date" shall have the meaning set forth in Section 2.04(a).

"Closing Payment" shall have the meaning set forth in Section 2.02(a).

"Closing Statement" shall have the meaning set forth in Section 2.03(d).

"Code" means the Internal Revenue Code of 1986, as amended.

"Company" shall have the meaning set forth in the Recitals.

"Company Contract" means any Contract to which the Company is a party or by which the Company is bound or to which any assets or properties of the Company are subject.

"Company Employee Benefit Plans" shall have the meaning set forth in Section 3.16(a).

"Competition Law" shall mean the Sherman Act, as amended, the Clayton Act, as amended, the Federal Trade Commission Act, as amended, the HSR Act, and any other federal state, national, foreign, international, supra-national, regional, municipal, or local rule, regulation, statute, order, ordinance, guideline, code or other legally enforceable provision, including without limitation merger control laws, designed to prohibit, restrict or regulate actions having the purpose or effect of monopolization, restraint of trade, or substantial lessening of competition.

"Confidential Information" shall have the meaning set forth in Section 5.03(a).

"Contract" means any contract, agreement, indenture, evidence of Indebtedness, note, bond, loan, instrument, lease, sublease, mortgage, license, sublicense, franchise, obligation, commitment or other arrangement, agreement or understanding, whether express or implied and whether written, oral or otherwise.

"Disputed Amounts" shall have the meaning set forth in Section 2.03(d).

"Dollars" and "$" mean the lawful money of the United States of America.

"EAR" shall have the meaning set forth in Section 3.11(c).

"Employee Benefit Plans" means: (i) "employee benefit plans," as such term is defined in Section 3(3) of ERISA, whether or not funded and whether or not terminated, (ii) personnel policies and (iii) fringe or other benefit or compensation plans, policies, programs and arrangements, whether or not subject to ERISA, whether or not funded and whether or not terminated, including stock bonus or other equity compensation, deferred compensation, pension, severance, retention, change of control, bonus, vacation, travel, incentive, and health, disability and welfare plans, policies, programs or arrangements.

"Encumbrance" means any Security Interest, pledge, mortgage, Lien, charge, adverse claim, preferential arrangement or restriction of any kind.

"Enforceability Limitations" shall mean limitations on enforcement and other remedies imposed by or arising under or in connection with applicable bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and other similar Laws relating to or affecting creditors' rights generally from time to time in effect or general principles of equity (including concepts of materiality, reasonableness, good faith and fair dealing with respect to those jurisdictions that recognize such concepts).

"Environment" means soil, land surface or subsurface strata, surface waters (including navigable waters, ocean waters, streams, ponds, drainage basins, and wetlands), groundwater, drinking water supply, stream sediments, ambient air (including indoor air) and any other environmental medium or natural resource.

"Environmental Law" means any applicable Law and common law relating to protecting the human health and safety as affected by Hazardous Materials, the Environment or natural resources, including those: (i) requiring notification to appropriate authorities, employees and the public of intended or actual releases of Hazardous Materials, violations of discharge limits, or other activities, such as resource extraction or construction that could have a significant impact on the Environment; (ii) requiring prevention or mitigation of a release of Hazardous Materials to the Environment (meaning any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the Environment), or the exposure of employees or the public to Hazardous Materials; (iii) requiring reducing the quantities, preventing the release, or mitigating the hazardous characteristics of waste generated, handled, treated, stored, disposed or transported; (iv) requiring managing the risks related to transportation of Hazardous Materials; (v) requiring cleaning up Hazardous Materials that have been released, preventing the threat of release, or paying the costs of such cleanup or prevention;

or (vi) requiring efforts to make responsible parties pay for liability, if any, for remedial action, damages for personal or bodily injury, property damage, or damage to the Environment or natural resources. Without limiting the generality of the foregoing sentence, "Environmental Laws" includes CERCLA, the Hazardous Materials Transportation Act (49 U.S.C. §§ 1801 et seq.), the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 et seq.) ("RCRA"), the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 et seq.) ("FWPCA"), the Safe Drinking Water Act (42 U.S.C. §§ 300f et seq.), the Clean Air Act (42 U.S.C. §§ 7401 et seq.), the Toxic Substances Control Act (15 U.S.C. §§ 2601 et seq.), the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. §§ 136 et seq.) and the Occupational Safety and Health Act (29 U.S.C. §§ 651 et seq.) ("OSHA") to the extent related to exposure to Hazardous Materials, as each has been amended from time to time, the regulations promulgated pursuant thereto, and any permits, licenses or governmental authorizations required thereunder, as well as similar state and local laws, as each has been amended from time to time, the regulations promulgated pursuant thereto, and any permits, licenses or governmental authorizations required thereunder.

"Environmental Liabilities" means any Liability under any Environmental Law.

"Environmental Permits" means all Permits required under any applicable Environmental Law.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended.

"Escrow Account" shall mean the bank account established and administered by the Escrow Agent.

"Escrow Agent" shall mean Bank Z.

"Escrow Amount" shall have the meaning set forth in Section 2.02(c).

"Estimated Balance Sheet" shall have the meaning set forth in Section 2.03(a).

"Estimated Closing Statement" shall have the meaning set forth in Section 2.03(a).

"Estimated Working Capital Amount" shall have the meaning set forth in Section 2.03(a).

"Exchange Act" means the Securities Exchange Act of 1934, as amended, and any successor statute or statutes thereto, and the rules and regulations promulgated thereunder.

"Final Working Capital Amount" shall have the meaning set forth in Section 2.03(e).

"Financial Statements" shall have the meaning set forth in Section 3.08(a).

"Foreign International Trade Law" shall have the meaning set forth in Section 3.11(c).

"Form" shall have the meaning set forth in Section 5.06(f).

"Fundamental Representation" means Section 3.01 (Capacity of Seller), Section 3.02 (Organization and Power), Section 3.03 (Subsidiaries), Section 3.05 (Capitalization), Section 3.11 (Compliance with Laws), Section 3.14 (Taxes), Section 3.16 (Employee Benefit Plans), Section 3.19 (Environmental) and Section 3.23 (Brokers' Fees).

"GAAP" means United States generally accepted accounting principles and practices as in effect from time to time.

"Governmental Authority" means any United States federal, state or local or any foreign government, governmental, regulatory or administrative authority, agency or commission or any court, tribunal, or judicial or arbitral body (including without limitation any non-public arbitrator).

"Gross Up Payment" shall have the meaning set forth in Section 5.06(f).

"Hazardous Materials" means any substance, material or waste (regardless of physical form or concentration) that is identified, defined, designated, listed, restricted or otherwise regulated under Environmental Law, including any: (i) "hazardous substance," "pollutant," or "contaminant" (as defined in Sections 101(14) and (33) of CERCLA or the regulations issued pursuant to Section 102 of CERCLA and found at 40 C.F.R. § 302), including any element, compound, mixture, solution or substance that is designated pursuant to Section 102 of CERCLA; (ii) "pollutant" as defined in Section 502(6) of the FWPCA; (iii) substance that causes "pollution" as defined in Section 502(19) of the FWPCA; (iv) substance that is designated pursuant to Section 311(b)(2)(A) of the FWPCA; (v) hazardous waste having the characteristics identified under or listed pursuant to Section 3001 of RCRA; (vi) substance containing petroleum, as that term is defined in Section 9001(6) of RCRA; (vii) "oil" as defined in Section 311(a)(1) of the Oil Pollution Act (33 U.S.C. § 1321(a)(1)); (viii) natural gas, natural gas condensate, liquefied natural gas, and synthetic gas; (ix) toxic pollutant that is listed under Section 307(a) of the FWPCA; (x) hazardous air pollutant that is listed under Section 112 of the Clean Air Act, as amended (42 U.S.C. §§ 7401, 7412); (xi) imminently hazardous chemical substance or mixture with respect to which action has been taken pursuant to Section 7 of the Toxic Substances Control Act, as amended (15 U.S.C. §§ 2601, 2606); (xii) source, special nuclear, or by-product material as defined by the Atomic Energy Act of 1954, as amended (42 U.S.C. §§ 2011 et seq.); (xiii) substances regulated under Section 655 of OSHA as a "hazardous chemical" (as defined in 29 C.F.R. § 1910.1200) or "toxic and hazardous substances" (as defined at 29 C.F.R. §§ 1910.1000-.1450); (xiv) asbestos, asbestos-containing material, or urea formaldehyde or material that contains it; (xv) waste oil and other petroleum products; and (xvi) any other toxic materials, radioactive materials, contaminants, substances or wastes regulated pursuant to any Environmental Law.

"HSR Act" shall have the meaning set forth in Section 3.07.

"Indebtedness" means, without duplication, (i) all indebtedness of the Company for borrowed money (including the current portion thereof), together with all prepayment premiums, penalties and accrued interest thereon and other costs, fees and expenses payable in connection therewith, (ii) all Liabilities of the Company, under any

reimbursement obligation relating to a letter of credit, bankers' acceptance or note purchase facility, (iii) all Liabilities of the Company evidenced by a bond, debenture or similar instrument (including a purchase money obligation), (iv) all Liabilities of the Company for accrued but unpaid dividends or other amounts payable to the Seller, (v) all indebtedness of the Company under derivatives, swap or exchange agreements, together with all prepayment premiums, penalties and accrued interest thereon, and in each such case all breakage costs, unwind costs, fees, termination costs, redemption costs, expenses and other charges with respect to any of the foregoing, (vi) all indebtedness of the Company created or arising under any conditional sale or other title retention agreement with respect to property acquired by the Company (whether or not the rights and remedies of the seller or lender under such agreement in the event of default are limited to repossession or sale of such property), (vii) all indebtedness of any Person (whether or not the Company) secured by any Security Interest on any property or assets of the Company (even if the Company has not assumed or become liable for the payment of such indebtedness), (viii) all obligations under leases that have been or must be, in accordance with GAAP, recorded as capital leases in respect of which the Company is liable as lessee, (ix) all Liabilities of the Company under securitization or receivables factoring arrangements or transactions, and (x) all Liabilities of any third party of the types described above that are guaranteed, directly or indirectly, by the Company.

"Indemnified Party" and "Indemnifying Party" shall have the meanings set forth in Section 6.04(a).

"Initial Cash Consideration" shall have the meaning set forth in Section 2.02(a).

"Insurance Policies" shall have the meaning set forth in Section 3.20.

"Intellectual Property" shall have the meaning set forth in Section 3.15(a).

"International Trade Law" shall have the meaning set forth in Section 3.11(c).

"IRS" means the Internal Revenue Service.

"ITAR" shall have the meaning set forth in Section 3.11(c).

"Knowledge" (including, without limitation, the terms "know", "knowing", "best knowledge", or "to the best knowledge of") means actual knowledge of a Person or knowledge of a Person that should have been gained after reasonable due inquiry and investigation.

"Latest Balance Sheet" shall have the meaning set forth in Section 3.08(a).

"Latest Balance Sheet Date" shall have the meaning set forth in Section 3.08(a).

"Latest Income Statement" shall have the meaning set forth in Section 3.08(a).

"Law" means any foreign, federal, state, local or other law or governmental requirement of any kind, and the rules, regulations, permits, licenses and Order promulgated thereunder.

"Lender" means Bank X.

"Liability" means any liability or obligation, whether known or unknown, accrued or fixed, absolute or contingent, matured or unmatured, determined or determinable, liquidated or unliquidated, whether due or to become due, and whether in contract, tort, strict liability or otherwise and including all costs and expenses related thereto including all fees, disbursements and expenses of legal counsel experts, engineers and consultants and costs of investigation, defending or prosecuting any and all Proceedings and complying with any Orders thereto.

"Lien" shall mean any Security Interest, lien, bailment, covenant, mortgage, charge, claim, condition, pledge, hypothecation, deed of trust, conditional sales, title retention agreement, equitable interest, escrow, right of first refusal, sublease, right of way, easement, encroachment, servitude, option, right of first option, right of first refusal, license or encumbrance or similar restriction or other claims or rights of third parties of any nature, including any restriction on use, voting, transfer, receipt of income, or exercise of any other attribute of ownership, and in the case of securities any put, call, or similar right of a third party with respect to such asset.

"Loss" means any damage, obligation, payment, cost, expense, injury, judgment, settlement, penalty, fine, interest, Tax, royalty, lost profits or other loss (whether known or unknown, accrued or fixed, absolute or contingent, matured or unmatured, determined or determinable, liquidated or unliquidated, and whether due or to become due), including the cost and expense of defending and prosecuting any and all Proceedings and complying with any and all Orders relating thereto, expenses of preparation and investigation thereof and reasonable attorneys', experts', consultants' and accountants' fees in connection therewith, and specifically excluding any and all special damages described in Section 6.05(e).

"Material Adverse Change" means any change, event or occurrence that individually or in the aggregate (taking into account all other such changes, events or occurrences) has had, or would be reasonably likely to have, a material adverse effect upon the assets, business, operations, financial condition or prospects of the Business or the Company, taken as a whole, other than any such change, event or occurrence resulting from (i) changes in general economic conditions or the securities, credit or financial markets in general, in each case, generally affecting the industries in which the Business is conducted, (ii) changes affecting the industries in which the Business is conducted, (iii) any acts of terrorism or war (other than any of the foregoing that causes any damage or destruction to or renders unusable any facility or property of the Company) or (iv) changes in generally accepted accounting principles or the interpretation thereof, except, in the case of foregoing clause (i) or clause (ii), to the extent such changes or developments referred to therein would reasonably be expected to have a disproportionate impact on the Business or the Company, taken as a whole.

"Material Contracts" means any Company Contract of the type described in Section 3.10(a) of this Agreement.

"Objection Notice" shall have the meaning set forth in Section 2.03(d).

"Operating Agreement" shall have the meaning set forth in Section 3.04.

"Order" means (i) any order, judgment, decree, decision, ruling, writ, assessment, charge, stipulation, injunction (whether temporary or permanent) or other determination of any foreign, federal, state, local or other court, regulatory agency, department or commission or other governmental body of any kind having competent jurisdiction to render such, (ii) any settlement agreement entered into in connection with the settlement, dismissal or other resolution of any Proceeding and (iii) any arbitration award entered by an arbitrator having competent jurisdiction to render such.

"Ordinary Course of Business" means the ordinary course of business of the Company, consistent with its past custom and practice (including with respect to quantity and frequency), but excluding any action or omission that constitutes (or, with the passage of time, the giving of notice by any Person or the happening of any other event, would constitute) a breach of any Contract or warranty, a tort, an infringement of any right of any other Person, or a violation of Law.

"Parent" shall have the meaning set forth in the Preamble.

"Parent Preferred Stock" means Parent's Series C Convertible Preferred Stock, par value $0.00001 per share.

"Party" and "Parties" shall have the meaning set forth in the Preamble.

"Permit" means any permit, license, review, certification, approval, registration, exemption, consent, franchise, accreditation or other authorization issued pursuant to any Law.

"Permitted Liens" means (a) Taxes, assessments and other governmental levies, fees or charges (including those imposed with respect to the Real Property) (i) which are not yet due and payable or (ii) that are being contested in good faith and for which adequate accruals or reserves have been established; (b) mechanics liens and similar Liens for labor, materials or supplies provided with respect to the Real Property incurred in the ordinary course of business for amounts which are not due and payable and which shall be paid in full and released at closing; and (c) zoning, building codes and other land use laws regulating the use or occupancy of the Real Property or the activities conducted thereon which are imposed by any Governmental Authority having jurisdiction over such Real Property which are not violated by the current use or occupancy of such Real Property or the operation of the Company's business thereon.

"Person" means an individual, a partnership, a corporation, an association, a limited liability company, a joint stock company, a trust, a joint venture, an unincorporated organization, a governmental entity or any department, agency or political subdivision thereof or any other entity.

"Personally Identifiable Information" shall have the meaning set forth in Section 3.15(d).

"Post-Closing Tax Period" means any Taxable period beginning on or after the Closing Date and the portion of any Straddle Period beginning after the Closing Date.

"Pre-Closing Tax Period" means any Taxable period ending on or before the Closing Date and the portion through the end of the Closing Date for any Straddle Period.

"Pre-Closing Taxes" shall have the meaning set forth in Section 5.06(a).

"Proceeding" means any charge, complaint, action, suit, litigation, proceeding, hearing, investigation, assessment, claim or demand, or any notice of any of the foregoing, of or in any court or quasi-judicial or administrative agency of any federal, state, local, or foreign jurisdiction, or before any arbitrator.

"Purchase Price" shall mean the sum of (i) the Initial Cash Consideration, *plus* (ii) the dollar value of the Stock Consideration, *plus* (iii) the dollar amount of any Working Capital Overage paid to Seller pursuant to Section 2.03(e), *minus* (iv) the dollar amount of any Working Capital Shortage paid to Purchaser pursuant to Section 2.03(e).

"Purchased Units" shall have the meaning set forth in the Recitals.

"Real Property" means any real property owned, used, operated, leased or subleased by the Company, together with all buildings, structures and facilities located thereon.

"Recognized Environmental Condition" shall mean any recognized environmental condition identified with respect to the Relevant Property in any Phase I Site Assessment.

"Related Party" means (i) the Seller, (ii) any Affiliate of the Seller (other than the Company), (iii) any director, manager, officer or employee of the Company, of the Seller or of any Affiliate of the Seller, (iv) any family member of any of the foregoing who is a natural person, or (v) trusts for family members of any of the foregoing.

"Release" shall have the meaning set forth in Section 7.15(b).

"Release Date" shall have the meaning set forth in Section 6.09.

"Released Person" and "Releasing Person" shall have the meanings set forth in Section 7.15.

"Relevant Property" means any Real Property (or, to the Knowledge of the Seller, any real property previously owned, used, operated, leased or subleased by the Company or its predecessors).

"Representative" means, with respect to any Person, any and all directors, officers, employees, consultants, financial advisors, counsel, accountants and other agents of such Person.

"Respondent" shall have the meaning set forth in Section 6.06(a).

"Restated Certificate" means the Amended and Restated Certificate of Incorporation of Parent.

"Section 338(h)(10) Election" shall have the meaning set forth in Section 5.06(f).

"Section 338(h)(10) Tax Adjustment" shall have the meaning set forth in Section 5.06(f).

"Securities Act" means the Securities Act of 1933, as amended, and any successor statute or statutes thereto, and the rules and regulations promulgated thereunder.

"Security Interest" means any mortgage, pledge, conditional sales contract, security agreement, security interest, Encumbrance, charge, or other Lien.

"Seller" shall have the meaning set forth in the Preamble.

"Software" means computer software, programs and databases in any form, including Internet web sites, web content and links, source code, object code, operating systems and specifications, data, databases, database management code, utilities, graphical user interfaces, menus, images, icons, forms, methods of processing, software engines, platforms, development tools, library functions, compilers, and data formats, all versions, updates, corrections, enhancements and modifications thereof.

"Stock Consideration" shall have the meaning set forth in Section 2.02(b).

"Straddle Period" means any Taxable period that includes (but does not end on) the Closing Date.

"Target Working Capital" means $$$.

"Tax" or "Taxes" means (i) any and all federal, state, local and foreign taxes, assessments and other governmental charges, duties, impositions and liabilities, including taxes based upon or measured by gross receipts, income, profits, sales, use and occupation, and value added, ad valorem, transfer, franchise, withholding, payroll, recapture, employment, excise and property taxes or other tax of any kind whatsoever, whether disputed or not, together with all interest, penalties and additions imposed with respect thereto; (ii) any liability for the payment of any item described in clause (i) as a result of being a member of an affiliated, consolidated, combined or unitary group for any period, including pursuant to Treasury Regulation Section 1.1502-6 or any analogous or similar state, local or foreign Law; (iii) any liability for the payment of any item described in clause (i) or (ii) as a result of any express or implied obligation to indemnify any other Person or as a result of any obligations under any agreements or arrangements with any other Person with respect to such item; or (iv) any successor liability for the payment of any item described in clause (i), (ii) or (iii) of any other Person, including by reason of being a party to any merger, consolidation, conversion or otherwise.

"Tax Return" means any return, declaration, report, claim for refund, or information return or statement relating to Taxes, including any schedule or attachment thereto, and including any amendment thereof.

"Third Party Claim" shall have the meaning set forth in Section 6.04(a).

"Threshold Amount" shall have the meaning set forth in Section 6.05(a).

"Transaction Expenses" means the aggregate amount of all fees and expenses incurred by the Seller or the Company on or prior to the Closing Date.

"Treasury Regulations" means the income Tax regulations, including temporary regulations, promulgated under the Code, as those regulations may be amended from time to time. Any reference herein to a specific section of the Treasury Regulations shall include any corresponding provisions of succeeding, similar, substitute, proposed or final Treasury Regulation.

"Working Capital" shall have the meaning set forth in Section 2.03(c).

"Working Capital Holdback" means $$$$$.

"Working Capital Overage" shall have the meaning set forth in Section 2.03(e).

"Working Capital Shortage" shall have the meaning set forth in Section 2.03(e).

1.02 Other Capitalized Terms. All capitalized terms not otherwise defined in Section 1.01 shall have the meaning given such terms elsewhere in this Agreement.

ARTICLE II
SALE AND PURCHASE

2.01 Purchase and Sale of the Purchased Units. On the terms and subject to the conditions set forth in this Agreement, at the Closing, the Seller shall sell, transfer and deliver to Purchaser, and Purchaser shall purchase, accept and receive from the Seller, on a cash-free, debt-free basis, the Purchased Units. The Purchased Units shall be sold and transferred to Purchaser free and clear of all Encumbrances.

2.02 Consideration.

(a) The aggregate cash consideration to be delivered at the Closing by Purchaser to Seller for the Purchased Units shall be an amount equal to the sum of the following (the "Closing Payment"):

(i) $$$$$ as adjusted pursuant to Section 2.03 (the "Initial Cash Consideration"), *minus*

(ii) the Escrow Amount, *minus*

(iii) the Working Capital Holdback, *minus*

(iv) the aggregate amount of Indebtedness as of the Closing Date, other than any amount of Indebtedness to the extent that such amount is included in

the computation of Working Capital pursuant to Section 2.03, which Indebtedness will be paid off by Purchaser at Closing, *minus*

(v) the aggregate amount of any Transaction Expenses as of the Closing Date, other than any amount of such Transaction Expenses to the extent that such amount is included in the computation of Working Capital pursuant to Section 2.03, which Transaction Expenses will be paid by Purchaser at Closing.

(b) In addition to the Closing Payment described in Section 2.02(a), at the Closing the Purchaser shall deliver to Seller certificates representing x# shares of Parent Preferred Stock (the "Stock Consideration").

(c) At the Closing, the Purchaser shall deliver to the Escrow Agent an amount equal to $$$$$ (the "Escrow Amount") to be held in the Escrow Account and released therefrom pursuant to Section 6.11 and the Escrow Agreement.

(d) At the Closing, the Purchaser shall retain the Working Capital Holdback to be paid or retained as set forth in Section 2.3(e).

2.03 Purchase Price Adjustments.

(a) Estimated Working Capital Amount. Seller has prepared and delivered to Purchaser two (2) Business Days prior to the date of this Agreement (i) an estimated balance sheet of the Company as of the Closing Date in the form attached as Schedule 2.03(a) of the Disclosure Schedule (the "Estimated Balance Sheet"), (ii) a statement in the form attached as Schedule 2.03(b) of the Disclosure Schedule (the "Estimated Closing Statement") setting forth Seller's calculation of the estimated Working Capital as of the Closing Date (the "Estimated Working Capital Amount"), and (iii) a certificate executed by both Seller and the Company's chief financial officer certifying as to (A) the amount of the adjustment to the Closing Payment pursuant to Section 2.03(b), (B) the Indebtedness of the Company to be paid directly by Purchaser pursuant to Section 2.02(a)(iii) and (C) the Transaction Expenses of the Company, if any, to be paid directly by Purchaser pursuant to Section 2.02(a)(iv).

(b) The Closing Payment set forth in Section 2.02(a) shall be increased by the amount, if any, by which the Estimated Working Capital Amount exceeds the Target Working Capital; the Closing Payment set forth in Section 2.02(a) shall be decreased by the amount, if any, by which the Target Working Capital exceeds the Estimated Working Capital Amount.

(c) "Working Capital" shall mean current assets of the Company as of the Closing Date *minus* cash and cash equivalents *minus* current liabilities of the Company as of the Closing Date. As used in this Agreement, "current assets" and "current liabilities" shall each have the respective meaning ascribed to such term in accordance with GAAP, and to the extent consistent therewith, applied using the same accounting methods, practices, principles, policies and procedures, with consistent

classifications, judgments and valuation and estimation methodologies that were used in the preparation of the Audited Financial Statements for the most recent fiscal year end as if such accounts were being prepared and audited as of a fiscal year end.

(d) Post-Closing Determination.

(i) Within sixty (60) calendar days after the Closing Date, the Purchaser shall conduct a review of the Working Capital and shall deliver to the Seller a statement (the "Closing Statement") setting forth the actual amount of Working Capital as of the Closing Date. The Closing Statement shall also contain the draft balance sheet from which the Working Capital was determined. Purchaser shall also make available to Seller and his Representatives all financial records and work papers to the extent used in preparing the draft balance sheets as Seller and his Representatives may reasonably request.

(ii) If the Seller disagrees with the computation of the Working Capital as reflected on the Closing Statement, Seller may, within forty-five (45) days after receipt of the Closing Statement deliver a notice (an "Objection Notice") to Purchaser setting forth Seller's calculation of the Working Capital, all of Seller's calculations and a statement setting forth Seller's objections in reasonable detail. Purchaser and the Seller shall negotiate in good faith to resolve any disagreements as the computation of the Working Capital, but if there is no final resolution with respect to any amounts remaining in dispute (the "Disputed Amounts") within thirty (30) calendar days after the Purchaser has received the Objection Notice, Purchaser and Seller shall jointly retain a mutually acceptable and independent, accounting firm of regional or national standing (the "Accounting Firm") to resolve any disagreements relating only to the Disputed Amounts and to determine the Final Working Capital Amount (as defined below). The Purchaser and the Seller shall each submit all back-up documentation to the Accounting Firm promptly (and in any event within thirty (30) calendar days after the Accounting Firm's engagement), which documentation shall include such party's computation of the Working Capital and information, arguments and support for such party's position with respect to the Disputed Amounts. The Accounting Firm shall review all such documentation and base its determination solely on such documentation in accordance with GAAP and in accordance with the definition of Working Capital herein. In resolving such Disputed Amounts, the Accounting Firm may not assign a value to any item greater than the greatest value used for such item claimed by either party or less than the smallest value for such item claimed by either party. The determination of the Accounting Firm shall be conclusive and binding upon the Purchaser and the Seller.

(iii) Seller shall pay a portion of the fees and expenses of the Accounting Firm equal to 100% multiplied by a fraction, the numerator of which is the amount of Disputed Amounts submitted to the Accounting Firm that are resolved in favor of Purchaser (that being the difference between the Accounting Firm's determination and Seller's determination) and the denominator of which is the total amount of the Disputed Amounts submitted to the Accounting Firm (that being the sum total by which Purchaser's determination and Seller's determination differ from the determination of the Accounting Firm). Purchaser shall pay that portion of the fees and expenses of the Accounting Firm that Seller is not required to pay hereunder.

(iv) Purchaser shall cause the Company to make its financial records, accounting personnel and advisors as may be reasonably requested available to the Accounting Firm at reasonable times during the review by the Accounting Firm of the Closing Statement.

(e) Post-Closing Adjustment.

(i) Once all disputes relating to the Working Capital are resolved in accordance with Section 2.03(b) such that there is a final amount of Working Capital (the "Final Working Capital Amount"), if the Final Working Capital is less than the Estimated Working Capital Amount, then the Purchase Price shall be adjusted by the amount of such shortfall (the "Working Capital Shortage") and the amount of such shortfall shall be satisfied as follows: (A) first, the Working Capital Shortage shall be deducted from the amount of the Working Capital Holdback and shall be irrevocably retained by Purchaser thereafter, and (B) if the Working Capital Holdback shall be insufficient to satisfy the Working Capital Shortage, then Seller and Purchaser shall deliver written instructions to the Escrow Agent to pay such amount from the Escrow Amount in accordance with the Escrow Agreement. If any portion of the Working Capital Holdback has not been retained by Purchaser pursuant to the preceding sentence, then the Purchaser shall pay or cause to be paid to the Seller such remaining portion of the Working Capital Holdback by bank wire transfer of immediately available funds to the account designated in writing by the Seller within five (5) Business Days of the determination of the Final Working Capital Amount.

(ii) If the Final Working Capital Amount is greater than the Estimated Working Capital Amount, then the Purchase Price shall be adjusted by the amount of such excess (the "Working Capital Overage") and the Purchaser shall pay or cause to be paid to the Seller (A) the balance thereof and (B) the entire amount of the Working Capital Holdback, in each case by bank wire transfer of immediately available funds to the account designated in writing by the Seller within five (5) Business Days of the determination of the Final Working Capital Amount.

(iii) If the Final Working Capital Amount is equal to the Estimated Working Capital Amount, there shall be no adjustment to the Purchase Price based on the Final Working Capital Amount and the Purchaser shall pay or cause to be paid to the Seller the entire amount of the Working Capital Holdback by bank wire transfer of immediately available funds to the account designated in writing by the Seller within five (5) Business Days of the determination of Final Working Capital.

2.04 Closing.

(a) Date and Location of Closing. The closing of the transactions contemplated by this Agreement (the "Closing") shall take place by e-mail, mail courier, facsimile or other electronic means on the date hereof; provided that, the Closing shall be deemed to have occurred in Louisiana, effective as of 11:59 p.m. on the date hereof (the "Closing Date").

(b) Closing Deliveries by the Seller. At the Closing, the Seller is delivering, or causing to be delivered, to Purchaser, in addition to this Agreement, each of the following:

(i) a certificate of a duly authorized manager of the Company, dated as of the Closing Date certifying that attached thereto are (A) the Articles of Organization certified by the Secretary of State of the State of Louisiana as of a date not more than five (5) days before the Closing Date, (B) a true and complete copy of the Operating Agreement, and (C) a true and complete copy of resolutions of the board of managers and the members of the Company approving the consummation of the transactions contemplated by this Agreement;

(ii) a certificate of the Secretary of State of the State of Louisiana dated as of a date not more than five days before the Closing Date as to the legal existence and good standing of the Company in the State of Louisiana;

(iii) certificates of the secretary of state or equivalent officer dated as of a date not more than five days before the Closing Date as to the corporate good standing of the Company in each state other than the State of Louisiana in which the Company is qualified to do business;

(iv) certificates representing the Purchased Units, each of which shall be either (A) duly endorsed in blank by the Seller, or (B) accompanied by interest transfer powers duly executed in blank by the Seller;

(v) an Assignment of Limited Liability Company Interests, in the form attached hereto as Exhibit A (the "Assignment of Interests"), with respect to the Purchased Units held by the Seller, duly executed by the Seller;

(vi) a payoff letter, in form and substance reasonably satisfactory to Purchaser from each holder of Indebtedness providing for the release of all Security Interests, if any, relating to such Indebtedness immediately

upon satisfaction of the terms contained in such payoff letters, with Uniform Commercial Code or other appropriate termination statements and documents to evidence the foregoing;

(vii) an IRS Form W-9, completed by the Seller;

(viii) copies of all governmental and third-party filings, licenses, consents, authorizations, waivers, and approvals that are required to be made or obtained for the consummation of the transactions contemplated by this Agreement or for the operation of the Business by the Company after the Closing Date;

(ix) the resignation of each limited liability company manager of the Company, effective as of the Closing Date;

(x) a Non-Competition Agreement, in the form attached hereto as Exhibit B, duly executed by Seller (the "Seller Non-Competition Agreement");

(xi) an Employment Agreement in the form attached hereto as Exhibit C, duly executed by Seller (the "Employment Agreement");

(xii) a Lease Agreement, in the form attached hereto as Exhibit D, duly executed by the landlord for all of the Relevant Property owned by it (the "Lease Agreement");

(xiii) an opinion of law firm in the form attached hereto as Exhibit E;

(xiv) evidence of termination of the Company's 401(k) Plan in a form reasonably satisfactory to Purchaser, including (A) copies of duly adopted resolutions of the board of managers of the Company authorizing the termination of the 401(k) Plan and (B) an executed amendment to the 401(k) Plan sufficient to assure compliance with all applicable requirements of the Code and regulations thereunder so that the Tax-qualified status of the 401(k) Plan shall be maintained at the time of termination;

(xv) a counterpart signature page to the Preferred Stock Issuance Agreement in the form attached hereto as Exhibit F (the "Stock Issuance Agreement"), duly executed by Seller;

(xvi) the Escrow Agreement in the form attached hereto as Exhibit G, duly executed by Seller (the "Escrow Agreement");

(xvii) a statement, in a form reasonably satisfactory to Purchaser, executed by Seller pursuant to section 1.1445-2(b)(2) of the Treasury Regulations certifying that the Seller is not a foreign person;

(xviii) IRS Form 8023 in accordance with Section 5.06(f)(i) duly executed by Seller; and

(xix) such other documents or instruments as Purchaser may reasonably request in order to effect the transactions contemplated by this Agreement.

(c) Closing Deliveries by the Parent and Purchaser. At the Closing, Parent and the Purchaser are delivering to Seller, in addition to this Agreement, each of the following:

(i) a certificate of a duly authorized officer of Purchaser, dated as of the Closing Date, certifying that attached thereto is a true and complete copy of resolutions of the board of directors of Purchaser, authorizing the execution, delivery and performance of this Agreement and the consummation of the transactions contemplated hereby by Purchaser and certifying that such resolutions were duly adopted, have not been amended or rescinded and are in full force and effect;

(ii) a certificate of a duly authorized officer of Parent, dated as of the Closing Date, certifying that attached thereto is a true and complete copy of resolutions of the board of directors of Parent and its stockholders (if required) authorizing the execution, delivery and performance of this Agreement and the consummation of the transactions contemplated hereby by Parent;

(iii) the Closing Payment by bank wire transfer of immediately available funds to the account designated by the Seller at least two Business Days prior to the Closing Date;

(iv) the Escrow Amount by bank wire transfer of immediately available funds to the Escrow Account;

(v) the certificate(s) representing the Stock Consideration;

(vi) the Seller Non-Competition Agreement, duly executed by Purchaser;

(vii) the Employment Agreement, duly executed by Purchaser;

(viii) the Lease Agreement, duly executed by Purchaser;

(ix) the Restated Certificate file stamped by the Secretary of State of the State of Delaware, which shall continue to be in full force and effect as of the Closing;

(x) the Escrow Agreement, duly executed by Purchaser and the Escrow Agent;

(xi) confirmation in a form reasonably acceptable to Seller that Purchaser has paid off the Indebtedness of the Company which is to be repaid by Purchaser at Closing; and

(xii) such other documents or instructions as Seller may reasonably request in order to effect the transactions contemplated by this Agreement, including without limitation to effect the distribution of any Oil Spill claims as contemplated in Section 5.07.

ARTICLE III
REPRESENTATIONS AND WARRANTIES OF THE SELLER CONCERNING THE SELLER AND THE COMPANY

Subject to the terms and conditions of this Agreement, the Seller represents and warrants to Purchaser the following as of the date hereof, except as may otherwise be set forth on the Disclosure Schedule:

3.01 Capacity of Seller. The Seller is an individual, with full legal capacity to enter into this Agreement and each Ancillary Agreement to which Seller is a party, to carry out the Seller's obligations hereunder and thereunder and to consummate the transactions contemplated hereby and thereby. The Seller is a resident of the State of Louisiana. This Agreement and each of the Ancillary Agreements to which Seller is a party has been duly executed and delivered by the Seller, and this Agreement and each of the Ancillary Agreements to which Seller is a party constitutes a legal, valid and binding obligation of the Seller enforceable against Seller in accordance with its terms, except as enforceability may be limited by: (a) the Enforceability Limitations, and (b) Laws relating to the availability of specific performance and/or other equitable remedies. No other proceedings on the part of Seller or the Company are necessary to authorize the execution and delivery of this Agreement or any Ancillary Agreement or to consummate the transactions contemplated hereby or thereby.

3.02 Organization and Power. The Company is a limited liability company, duly organized, validly existing and in good standing under the Laws of the State of Louisiana, and the Company has all requisite power and authority necessary to own and operate its assets and properties and to carry on its Business as previously and currently conducted. The Company is qualified, licensed or admitted to do business and is in good standing in each jurisdiction in which the ownership, use or licensing of its assets and properties, or the conduct or nature of its Business, makes such qualification, licensing or admission necessary. Schedule 3.02 of the Disclosure Schedule sets forth each jurisdiction where the Company is so qualified, licensed or admitted to do business.

3.03 Subsidiaries. The Company does not own, beneficially or of record, directly or indirectly, any shares of capital stock, or any equity interest or any financial interest in any Person other than ownership of any Person through brokerage accounts, which are listed on the Latest Balance Sheet.

3.04 Corporate Records/Authority. The Articles of Organization and the operating agreement of the Company dated date 1 (the "Operating Agreement") previously provided to Purchaser are correct and complete and reflect all amendments made thereto at any time prior to the date of this Agreement. All material actions taken by the Company since the date of its formation have been duly authorized to the extent so required by applicable Laws and the organizational documents of the Company.

3.05 Capitalization; Purchased Units. As of the date hereof, Seller owns, beneficially and of record, all of the Purchased Units. Neither the Seller nor the Company is a party to, nor has any of them authorized, any options, warrants, purchase rights, subscription rights, conversion rights, appreciation rights, phantom stock, exchange rights or other contracts or commitments that could require the Company or Seller to issue, sell, convey or otherwise cause any of the membership interests of the Company, including the Purchased Units or a portion thereof or other profit or equity rights to be shared or allocated to any Person other than Seller. The Purchased Units represent one hundred percent (100%) of all ownership, equity and profits rights in the Company. Seller owns all rights, title and interest in and to the Purchased Units free and clear of any and all Encumbrances. Seller has the right, authority and power to sell, assign and transfer the Purchased Units to Purchaser. Seller is solvent. At the Closing, Purchaser shall acquire good, valid and marketable title to the Purchased Units, free and clear of any and all Encumbrances. There are no agreements, written or oral, to which Seller is a party or to which the Company is a party, relating to the acquisition (including without limitation rights of first refusal or preemptive rights), transfer, sale or other disposition, registration under the Securities Act, or voting of the membership interests of the Company.

3.06 Non-contravention. Neither the execution and delivery by the Seller of this Agreement and the other agreements contemplated hereby to which Seller is to be a party, nor the consummation by the Seller of the transactions contemplated hereby or thereby will (a) violate any Law, Order or other restriction to which Seller or the Company is subject, (b) violate or conflict with any provision of the Articles of Organization or the Operating Agreement or (c) except as set forth on Schedule 3.06 violate or conflict with in any respect, result in a breach of, constitute a default under (or an event that, with notice or lapse of time or both, would become a default), result in the acceleration of, create in any party the right to accelerate, terminate, modify or cancel, allow the imposition of any fees or penalties, require the offering or making of any payment or redemption, require any authorization, consent, approval, execution or other action by or notice to any third party, give rise to any increased, guaranteed, accelerated or additional rights or entitlements of any Person or otherwise adversely affect any rights of Seller or the Company under, or result in the creation of any Encumbrance on any property, asset or right of Seller or the Company pursuant to, any note, bond, mortgage, indenture, agreement, lease, license, permit, franchise, instrument, obligation or other Contract or any Security Interest to which Seller or the Company is a party or by which Seller or the Company or any of their respective properties, assets or rights are bound or affected or to which any of its assets are subject, or result in any loss of any Permit of any Governmental Authority.

3.07 Governmental Consent. Neither Seller nor the Company is required to make any declaration to or registration or filing with, or to obtain any Permit, from any

Governmental Authority in connection with the execution and delivery by the Seller of this Agreement and the other agreements contemplated hereby which the Seller or the Company is to be a party or the consummation by the Seller or the Company of the transactions contemplated hereby or thereby. Neither Seller nor Company has annual net sales or total assets equal to or exceeding $141.8 million as determined pursuant to Rule 801.11 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") (16 C.F.R. §§ 801.11).

3.08 Financial Statements.

(a) Annual and Current Financial Statements. Schedule 3.08(a) of the Disclosure Schedule contains the following financial statements of the Company (collectively, the "Financial Statements"): (i) the unaudited balance sheet and related statement of income of the Company for the seven (7) months ended July 31, 2015 (the "Latest Balance Sheet Date"), and (ii) the audited balance sheets, and the related statements of income, cash flows and changes in owner's equity for the fiscal years ending December 31, 2012, December 31, 2013 and December 31, 2014 (the "Audited Financial Statements"). The balance sheet described in Section 3.08(a)(i) is referred to herein as the "Latest Balance Sheet". The income statement described in Section 3.08(a)(i) is referred to herein as the "Latest Income Statement".

(b) Accuracy of Financial Statements. Except as set forth on Schedule 3.08(b), the Financial Statements (i) are true, correct and complete, (ii) were derived from and have been prepared in accordance with the information contained in the Company's books and records, (iii) have been prepared in accordance with GAAP, consistently applied, throughout the periods covered thereby, and (iv) present accurately and fairly in all material respects the assets, liabilities (including all reserves), financial condition and results of operations of the Company as of the times and for the periods referred to therein, subject in the case of the unaudited financial statements to (i) the absence of footnote disclosures and other presentation items and (ii) changes resulting from normal year-end adjustments (the effect of which will not, individually or in the aggregate, be material). There were no changes in the method of application of the Company's accounting policies or changes in the method of applying the Company's use of estimates in the preparation of the Latest Balance Sheet and the Latest Income Statement as compared with the Audited Financial Statements.

(c) No Undisclosed Liabilities. The Company does not have any Liability (nor is there any Basis for any Liability of the Company), except for (i) Liabilities set forth on the face of the Financial Statements, (ii) current Liabilities that have arisen after the Latest Balance Sheet Date in the Ordinary Course of Business (none of which arose out of any Proceeding), (iii) Liabilities arising in the Ordinary Course of Business under any Company Contract, or (iv) Liabilities arising out of matters reflected on Schedule 3.12 of the Disclosure Schedule. The Company is not party to or otherwise involved in any "off-balance sheet" arrangements (as defined in Item 303 of Regulation S-K under the Exchange Act).

(d) Accountants. During the periods covered by the Financial Statements of the Company, the Company has not changed its independent accountants nor had any disagreement with such accountants on any matter of accounting principles or practices, financial statement disclosure or auditing scope or procedure for which such accountants advised the Company in writing that if not resolved to the satisfaction of such accountants would have caused such accountants to make reference to the subject matter of the disagreements in connection with its report.

(e) Internal Controls over Financial Reporting.

(i) The books, records and accounts of the Company, all of which have been made available to Purchaser, are complete and correct in all material respects and represent actual, bona fide transactions and have been maintained in accordance with sound business practices.

(ii) The Company's system of internal controls over financial reporting is sufficient to provide reasonable assurance (A) that transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP, consistently applied, (B) that transactions are executed only in accordance with the authorization of management, and (C) regarding prevention or timely detection of the unauthorized acquisition, use or disposition of the assets of the Company.

3.09 Recent Events. Since January 1, 2015, there has not been any Material Adverse Change. Except as set forth on Schedule 3.09 of the Disclosure Schedule, without limiting the generality of the foregoing, since the Latest Balance Sheet Date, the Company has not:

(a) borrowed any amount or incurred, assumed, guaranteed any Indebtedness or become subject to any material Liabilities, except Liabilities incurred in the Ordinary Course of Business;

(b) mortgaged, pledged or subject to any Lien, any material portion of its assets or properties;

(c) made or agreed to make any disposition, sale, assignment or transfer, or waiver or cancellation of any claims or rights to, license or lease of, or incurrence of any Liens on, any assets or properties of the Company, except in the Ordinary Course of Business;

(d) sold, assigned, transferred or otherwise disposed of any Intellectual Property or other intangible assets;

(e) sold, assigned, transferred or otherwise disposed of any tangible assets, other than for fair market value in the Ordinary Course of Business, consistent with past practices;

(f) suffered any physical damage, destruction or other extraordinary losses (whether or not covered by insurance) affecting any of its Real Property or personal property or equipment individually or in the aggregate in an amount exceeding $50,000;

(g) issued, sold or otherwise disposed of any of its limited liability company interests, or granted any options, warrants or other rights to purchase or obtain (including upon conversion or exercise) any of its limited liability company interests;

(h) made or agreed to make any capital expenditures or commitments exceeding $50,000 individually;

(i) made or agreed to make payment, discharge or satisfaction, in an amount in excess of $50,000, of any claim or Liability;

(j) entered into any other material transaction, except in the Ordinary Course of Business;

(k) acquired any business or Person, whether by merger, consolidation or reorganization or by purchase of its assets or equity interests;

(l) entered into any transaction with any officer, director, equityholder or Affiliate of the Company;

(m) executed or modified any collective bargaining agreement with any labor organization;

(n) amended, modified, had accelerated or received a notice of default, claim for indemnification, or termination of, or under, any Contract;

(o) been made party to any Proceeding, nor to the Company's Knowledge has any such Proceeding been threatened by or against the Company;

(p) amended its Articles of Organization or its Operating Agreement;

(q) granted any loan, bonus, severance or termination pay to any director, manager, officer, employee or consultant;

(r) paid or approved the payment of any consideration (other than customary salary, bonuses, commissions, consulting fees and customary benefits paid to any current officer, director, equityholder, employee or consultant of the Company) or to any current or former officer, director, equityholder, employee, independent contractor or consultant of the Company;

(s) increased or enhanced the compensation or benefits (including any increase in change of control, retention, severance, separation or other termination benefits) of any employee by an amount greater than the lesser of $10,000 per year or ten percent (10%) of such compensation for the fiscal year ended November 30, 2012;

(t) made, revoked or changed any election in respect of Taxes, adopted or changed any accounting method in respect of Taxes (including the inclusion in the books and records of the Company any receivable relating to any anticipated refund or credit for sales and use Taxes owed, paid or anticipated to be paid), entered into any Tax allocation agreement, Tax sharing agreement, Tax indemnity agreement or closing agreement, settled or compromised, or entered into any agreement to settle or compromise, any claim or assessment in respect of Taxes, or consented to any extension or waiver of the limitation period applicable to any claim or assessment in respect of Taxes with any Governmental Authority responsible for the imposition or collection of any Tax or otherwise;

(u) made any change in accounting policies, principles, methods, practices or procedures (including, without limitation, for bad debts, contingent liabilities or otherwise, respecting capitalization or expense of research and development expenditures, depreciation or amortization rates or timing of recognition of income and expense) or revalued any assets;

(v) canceled or failed to renew any insurance policy, received any notice of cancellation or termination from any insurance provider or failed to give all notices and present all claims (if any) under all such policies in a timely fashion;

(w) revalued any of its assets, including the writing down or off of notes or accounts receivable and the writing down of the value of inventory, other than in the Ordinary Course of Business and consistent with past practice;

(x) engaged in (A) any trade loading practices, (B) any promotional sales or discount activity with any customers or distributors with the effect of accelerating to pre-Closing periods sales to the trade or otherwise that would otherwise be expected (based on past practice) to occur in post-Closing periods, (C) any practice which would have the effect of accelerating to pre-Closing periods collections of receivables that would otherwise be expected (based on past practice) to be made in post-Closing periods, (D) any practice which would have the effect of postponing to post-Closing periods payments by the Company that would otherwise be expected (based on past practice) to be made in pre-Closing periods or (E) any other promotional sales, discount activity, deferred revenue activity or inventory overstocking or understocking activity, in each case in clauses (B) through (E), in a manner consistent with Ordinary Course of Business and past practices; or

(y) entered into or approved any Contract having the effect of any of the foregoing.

3.10 Company Contracts.

(a) Schedule 3.10(a) of the Disclosure Schedule sets forth each Company Contract that is described in any subsection below (and in the case of an oral Contract, the summary of the material terms of such Contract) to which the Company is a party or by which the Company is bound (collectively, the "Material Contracts"):

(i) collective bargaining agreement of contract with any labor union;

(ii) employee benefit, bonus, pension, profit sharing, retirement or other form of deferred compensation plan;

(iii) consulting agreements for all consultants of the Company pursuant to which such consultant is paid at least $5,000 per year;

(iv) agreement or indenture relating to the borrowing of money or to the mortgaging, pledging or otherwise placing Liens on any portion of the Company's assets or any guaranty of any obligation for borrowed money or other guaranty in excess of $50,000;

(v) lease or agreement under which it is the lessee of, or holds or operates any personal property owned by any other party, for which the annual rental exceeds $50,000;

(vi) any Contract which provides for exclusivity or any similar requirement in favor of any person or otherwise prohibits the Company from freely engaging in business anywhere in the world or with any Person or that restricts the right of the Company to sell to or purchase goods or services from any Person or to hire or attempt to hire any Person or that grants to the other party or any third Person "most favored nation" status or any special discount rights, excluding (i) territorial or field of use restrictions imposed by any license agreements with respect to the use of the subject matter thereof, and (ii) reasonable limitations on use in connection with secrecy, research, consulting or other agreements entered into in the Ordinary Course of Business that would not materially prohibit the Company from freely engaging in the Business as currently conducted;

(vii) each Contract requiring the purchase or the sale or rental by the Company of materials, supplies, goods, services, equipment or other assets that provides for annual payments by or to the Company of $50,000;

(viii) any license of Intellectual Property to or from the Company, other than commercially available off-the-shelf, shrink-wrap or click-wrap licenses;

(ix) any trust indenture, mortgage, promissory note, loan Contract, security agreement or other Contract for the borrowing of money, any currency exchange, commodities or other hedging arrangement or any leasing transaction of the type required to be capitalized in accordance with GAAP, including with respect to each such Contract (i) the principal amount currently due thereunder and (ii) the date of maturity;

(x) any Contract to indemnify, hold harmless or defend any other Person, other than indemnification provisions contained in customary master services agreements or rental agreements arising in the Ordinary Course of Business and consistent with past practice;

(xi) any Contract to indemnify, hold harmless or defend any other Person that does not expressly limit the Company's liability thereunder;

(xii) any Contract that guarantees or warrants that any of the products or services of the Company is fit for any particular purpose or that guarantees a result or commits to performance levels;

(xiii) any Contract providing for monetary liquidated damages or any other specified amount of damages, including damages or discounts relating to future payments for failure to meet any service level commitments;

(xiv) any Contract to indemnify, hold harmless or defend any other Person for losses, Environmental Liabilities, breaches of Environmental Laws or Environmental Permits or the discharge of Hazardous Materials;

(xv) any Contract containing any provisions dealing with a "change of control" or similar event with respect to the Company;

(xvi) any Contract containing any provisions that give any Person the right to receive notice in connection with the consummation of any of the transactions contemplated by this Agreement, or compliance by Seller with the provisions of this Agreement (alone or in combination with any other event) or the execution, delivery, performance, or effectiveness of this Agreement (alone or in combination with any other event);

(xvii) any master services agreement, rental agreement, blanket order or similar type of Contract;

(xviii) any Contract entered into by the Company since December 1, 2003 in connection with the settlement or resolution of any litigation;

(xix) any Contract for capital expenditures or the purchase of materials, supplies, merchandise, equipment or other goods or services by the Company requiring annual or aggregate payments by the Company in excess of $50,000; and

(xx) any Contract pursuant to which the Company leases real property or any interest therein.

(b) Status of Company Contracts. The Company is not in breach or default under any Material Contract, nor, to the Company's Knowledge, is any other party thereto in material breach or default under any such Material Contract. The Company has performed or is performing all material obligations required to be performed by it under each Material Contract. The execution, delivery and performance of this Agreement by the Company and Seller and the consummation of the transactions contemplated hereby do not conflict with or result in any breach of, constitute a default under or result in a violation of, or require any consent under the provisions of any Material Contract. The Company is not a party to or bound by any Contract

that automatically terminates or allows termination by the other party thereto upon consummation of the transactions contemplated by this Agreement. Each Material Contract is in full force and effect and constitutes a legal, valid, binding and enforceable obligation of the Company, except as such enforceability may be limited by Enforceability Limitations. Seller has delivered to Purchaser true and complete copies of all Material Contracts, including any amendments thereto.

3.11 Compliance with Laws.

(a) The Company is in compliance with all applicable Laws of all Governmental Authorities. The Company has not been given written notice of or, to the Company's Knowledge, been threatened to be given notice of any violation of any applicable Law or Order.

(b) The Company owns, holds, possesses or lawfully uses in the operation of the Business all material Permits which are necessary for it to conduct the Business as now conducted or for the ownership, operation and use of its assets. All such Permits and the expiration dates (if any) thereof are listed and described on Schedule 3.11 of the Disclosure Schedule. The Company is not in default, nor has it received any notice of any claim of default, with respect to any such Permits nor, to the Knowledge of the Company has any Person threatened a claim of default with respect to such Permits. None of such Permits will be adversely affected by consummation of the transactions contemplated hereby nor will any such Permits require any action on the part of Seller, the Company, the Purchaser or the Parent within 90 days of the Closing Date in connection with the transaction contemplated hereby.

(c) Each of the Company and Seller is, and at all times has been, in compliance with and have not been and are not in violation of any International Trade Law (as defined below) or any Foreign International Trade Law (as defined below). Neither the Company nor Seller has received any Order, notice, or other communication from any Governmental Authority of any actual or potential violation or failure to comply with any International Trade Law or Foreign International Trade Law, including pre-penalty notice, notice of penalty, subpoena or request for documents, or notice of audit, investigation or inquiry. "International Trade Law" shall mean the Export Administration Regulations ("EAR"), the Foreign Corrupt Practices Act of 1977, the Arms Export Control Act, the International Traffic in Arms Regulations ("ITAR"), the International Emergency Economic Powers Act, the Trading with the Enemy Act, the U.S. Customs Laws, the Foreign Asset Control Regulations, and any regulations or Orders issued thereunder, nor is there any reasonable basis therefor. "Foreign International Trade Law" shall mean foreign statutes, laws, ordinances, regulations or rules (i) to the extent governing the import or export of commodities, software or technology into any country or from any country in which the Company's Business is conducted and the payment of required duties and tariffs in connection with same and (ii) to the extent that compliance with such laws is permissible under U.S. statutes, laws or regulations. The Company and Seller have neither been required to obtain nor currently possess any

licenses from the United States Departments of Commerce or State or an authorized body thereof under ITAR or EAR relating to the export of any items, including but not limited to any commodities, software or technology.

3.12 Litigation. Schedule 3.12 of the Disclosure Schedule sets forth each instance in which the Company (i) is subject to any unsatisfied Order, (ii) is a party to any Proceeding, or (iii) to the Knowledge of Seller, has been threatened to be made a party to any Proceeding. None of the Proceedings set forth on Schedule 3.12 could reasonably be expected to result in a Material Adverse Change. To the Knowledge of the Seller, there is no Basis on which any other Proceeding may be brought or threatened against the Business or the Company.

3.13 Title to Properties.

(a) Schedule 3.13 of the Disclosure Schedule sets forth (i) a true, correct and complete list of all Real Property or personal property owned, leased, subleased or licensed to the Company, (ii) the address of each parcel of such Real Property or description of such personal property, and (iii) as to each parcel of such Real Property or item of personal property, the name and address of the parties to each lease, the expiration date of the current term of each such lease, the monthly rent as of the date hereof paid under each such lease, and any additional rent currently payable under each such lease.

(b) Use of the Real Property for the various purposes for which it is presently being used is permitted as of right under applicable zoning Laws and is not subject to a "permitted non-conforming" use or structure classification. Use of the Real Property for the various purposes for which it is presently being used does not violate any restrictive covenants encumbering such Real Property. The Real Property is supplied with utilities and other services necessary for the operation thereof in the Ordinary Course of Business of the Company, including gas, electricity, water and telephone, all of which utilities are adequate for the operation of the business conducted thereon. Each parcel of Real Property abuts on and has direct vehicular access to an improved public road or access to an improved public road via a permanent, irrevocable appurtenant easement improved with a road benefiting the parcel of such real property. The Company has not granted any Person the right to use or occupy any portion of any parcel of the Real Property or has received notice of any claim of any Person to the contrary. The Real Property demised by the leases described on Schedule 3.13 of the Disclosure Schedule constitutes all of the real property leased, subleased or licensed by the Company.

(c) The leases described on Schedule 3.13 of the Disclosure Schedule are, or as of Closing will be, in full force and effect, and the Company holds, or will hold as of Closing, a valid and existing leasehold interest under each of the leases for the term set forth therein. The Company is not in default under any of such leases, nor, to the Company's Knowledge, is any other party in default under any such leases.

(d) Except as set forth on Schedule 3.13 of the Disclosure Schedule, the Company does not own any real property.

(e) The Company owns indefeasible and marketable title to (or has a leasehold interest in or license of) all of the tangible personal property and assets shown on the Latest Balance Sheet, free and clear of all Liens. The Seller does not have any interest in any tangible personal property used by the Company.

(f) Each item of personal property of the Company is in all material respects in good operating condition and repair, ordinary wear and tear excepted, and is adequate for the uses to which it is being put.

(g) The property described in this Section 3.13 includes all of the assets, properties and rights currently used to conduct the Business, consistent with past customs and practices of the Company.

3.14 Tax Matters.

(a) The Company (i) has timely filed all material Tax Returns which are required to be filed by the Company, (ii) has paid all Taxes shown as due on such Tax Returns and (iii) all such Tax Returns were timely filed and were accurate and complete in all material respects. The Company has paid all Taxes due and owing by the Company and has withheld and paid over to the appropriate Taxing authority all Taxes which the Company is required to withhold from amounts paid or owing to any employee, creditor or other third party.

(b) The Company has not waived any statute of limitations with respect to any Taxes or agreed to any extension of time with respect to any Tax assessment or deficiency.

(c) No audits or other Proceedings are pending or being conducted, or, to the Company's Knowledge, are threatened with respect to the Taxes of the Company.

(d) The Company is not liable for the Taxes of another Person (i) under Section 1.1502-6 of the Treasury Regulations (or comparable provisions of state, local or foreign Law), (ii) as a transferee or successor, or (iii) by contract or indemnity. The Company is not a party to any Tax allocation or sharing agreement, other than commercial agreements, the principal purpose of which is unrelated to Tax and pursuant to which the Company has no obligation to pay or contribute to the Taxes of another Person.

(e) The Company is not a member of an "Affiliated Group" within the meaning of Section 1504 of the Code (or any similar group defined under a similar provision of state, local or foreign Law).

(f) No claim has been made by an authority in a jurisdiction where the Company does not file Tax Returns that it is or may be subject to Taxation by that jurisdiction.

(g) There are no Liens for unpaid Taxes on the assets of the Company.

(h) The Company has not received from any Governmental Authority any (i) written notice indicating an intent to open an audit or other review relating to Tax matters,

or (ii) written notice of deficiency or proposed adjustment for any amount of Tax proposed, asserted, or assessed by any Governmental Authority against the Company, nor, to the Company's Knowledge, has any of such actions been threatened.

(i) The Company has complied in all respects with all Laws relating to the payment and withholding of Taxes and has duly and timely withheld from employee salaries, wages and other compensation and has paid over all amounts required to be so withheld to the appropriate Taxing authorities for all periods under all applicable Laws.

(j) The Company is currently and has been since inception, a validly electing S corporation within the meaning of Sections 1361 and 1362 of the Code (or any similar provision of state or local Law) for U.S. federal income Tax purposes.

(k) The Company has properly collected and remitted sales and use and similar Taxes with respect to sales made to its customers or has properly received and retained any appropriate Tax exemption certificates and other documentation for all sales made without charging or remitting sales or similar Taxes that qualify such sales as exempt from sales and use and similar Taxes.

3.15 Intellectual Property.

(a) Schedule 3.15(a) of the Disclosure Schedule sets forth all of the following that are owned or used by the Company in any and all jurisdictions (collectively, "Intellectual Property"): (i) patents and pending patent applications, including continuations, continuations-in-part, divisions, reexaminations and reissues thereof, (ii) registered and material unregistered trademarks, service marks, trade names, corporate names or logos, and pending applications to register the same, (iii) registered copyrights, and pending applications to register the same, (iv) Internet domain names and registrations thereof, (v) all Contracts under which the Company is licensed or otherwise permitted to use any intellectual property (other than shrink-wrap licenses of computer software and licenses of intellectual property arising by implication in the Ordinary Course of Business), (vi) all Contracts under which the Company licenses or otherwise permits any party to use any Intellectual Property, and (vii) all material trade secrets developed or acquired by the Company pertinent to the conduct of the Business of the Company as it currently is conducted. All of the Intellectual Property is subsisting, valid and enforceable.

(b) The Company owns and possesses all right, title and interest in and to, or possesses the valid right to use, the Intellectual Property. All of the Intellectual Property is free and clear of any Liens. Except as set forth on Schedule 3.15(b) of the Disclosure Schedule, neither the Company nor the conduct of the Business of the Company as it has been conducted, is currently conducted, or is currently proposed to be conducted, infringes, misappropriates or otherwise violates the intellectual property rights of any third party, and, to the Company's Knowledge, no Person

has asserted any claim of the foregoing or challenging the ownership, validity, or enforceability of any Intellectual Property owned, licensed, or used by the Company within the last three (3) years. Except as set forth on Schedule 3.15(b) of the Disclosure Schedule, the Company has not received or sent any written notices or other oral or written communications of infringement or misappropriation from any third party and the Company is not aware of any facts indicating a possibility of the foregoing. To the Knowledge of the Company, no Person has infringed, misappropriated or otherwise violated any of the Intellectual Property.

(c) Except as set forth on Schedule 3.15(c) of the Disclosure Schedule, the Closing hereof shall not terminate or alter (or give rise to any right to terminate or alter) any Contract granting rights to any Intellectual Property or give rise to or allow any third party to exercise any additional right or impose any additional restriction on the Company under any Contract granting rights to any Intellectual Property.

(d) There is no action pending, asserted or, to the Knowledge of the Seller and the Company, threatened against the Company alleging a violation of any Person's privacy, personal or confidentiality rights under any applicable Laws, and to the Knowledge of the Seller and the Company, there are no facts that form a valid basis for any such action or claim.

3.16 Employee Benefit Plans.

(a) Schedule 3.16(a) of the Disclosure Schedule contains an accurate and complete list of all Employee Benefit Plans (i) maintained or sponsored by the Company, (ii) contributed to by the Company or to which the Company is obligated to contribute, or (iii) with respect to which the Company has any liability or potential liability (whether direct or indirect). The Employee Benefit Plans disclosed or required to be disclosed on Schedule 3.16(a) of the Disclosure Schedule are referred to collectively herein as the "Company Employee Benefit Plans."

(b) Except as set forth on Schedule 3.16(b) of the Disclosure Schedule, the Company does not contribute to, has no obligation to contribute to or has no liability or potential liability (including actual or potential withdrawal liability, as applicable) with respect to (i) any "multiemployer plan," as such term is defined in Section 3(37) of ERISA, (ii) any employee benefit plan of the type described in Section 4063 and 4064 of ERISA or in Section 413(c) of the Code (and regulations promulgated thereunder), (iii) any "employee pension benefit plan" (within the meaning set forth in ERISA Sec. 3(2)), whether or not terminated, or (iv) any Company Employee Benefit Plan, whether or not terminated, that provides health, life insurance, accident or other "welfare-type" benefits to current or future retirees, current or future former employees, or current or future former independent contractors, their spouses, dependents, or other beneficiaries, other than in accordance with Section 4980B of the Code or Part 6 of Subtitle B of Title I of ERISA or applicable state continuation coverage Law.

(c) Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated hereby will (either alone or in conjunction with any other event such as termination of employment or other service) (i) result in or cause any payment (whether of separation, severance or termination pay or otherwise), acceleration, forgiveness of indebtedness, vesting, distribution or increase in benefits with respect to any Company Employee Benefit Plan or any current or former director, manager, officer, employee or other service provider of the Company, or give rise to any obligation to fund any such payment or benefit, in each case, (ii) limit the ability of the Company to amend or terminate any Company Employee Benefit Plan, or (iii) result in any payment or benefit that will or may be made that will be characterized as an "excess parachute payment" within the meaning of Section 280G of the Code. None of the Company Employee Benefit Plans obligates the Company to pay separation, severance, termination or similar benefits (whether or not resulting from the execution and delivery of this Agreement or the consummation of the transactions contemplated hereby).

(d) With respect to each Company Employee Benefit Plan, all required payments, premiums, contributions, reimbursements or accruals for all periods ending prior to or as of the Closing Date shall have been made or properly accrued for on the Financial Statements. No Company Employee Benefit Plan has any unfunded liabilities.

(e) Each Company Employee Benefit Plan and all related trusts, insurance contracts and funds have been maintained, funded and administered in compliance in all material respects with its terms and all applicable Laws, including ERISA and the Code. Neither the Company nor any trustee or administrator of any Company Employee Benefit Plan, nor any other person has engaged in any transaction with respect to any Company Employee Benefit Plan that could subject the Company or any trustee or administrator of such Company Employee Benefit Plan, or any party dealing with such Company Employee Benefit Plan, to any Tax or penalty (whether civil or otherwise) imposed by Applicable Law. No Proceedings with respect to the Company Employee Benefit Plans (other than routine claims for benefits) or any fiduciary or other person dealing with such Company Employee Benefit Plans are pending or, to the Knowledge of the Seller, threatened and there are no facts that could reasonably give rise to or reasonably be expected to give rise to any such Proceedings.

(f) No underfunded "defined benefit plan," as such term is defined in Section 3(35) of ERISA, has been, during the six (6) years preceding the Closing Date, transferred out of the controlled group of companies (within the meaning of Sections 414(b), (c) and (m) of the Code) of which the Company is a member or was a member during such six-year period.

(g) Each Company Employee Benefit Plan that is intended to be qualified under Section 401(a) of the Code, and each trust (if any) forming a part thereof, has either received a favorable determination letter from the IRS as to the qualification under the Code of such Company Employee Benefit Plan and the Tax-exempt status of

such related trust, or has been established pursuant to a prototype plan that has received a favorable opinion letter from the IRS. With respect to each Company Employee Benefit Plan, the Company has delivered or made available to Purchaser a true, complete and correct copy of (i) such Company Employee Benefit Plan (or, if not written, a written summary of its material terms) and the most recent summary plan description, if any, related to such Company Employee Benefit Plan, (ii) each trust agreement or other funding arrangement relating to such Company Employee Benefit Plan, if any, (iii) the most recent annual report (Form 5500) filed with the IRS with respect to such Company Employee Benefit Plan (and, if the most recent annual report is a Form 5500-R, the three (3) most recent Forms 5500-C filed with respect to such Benefit Plan), if such report is required with respect to such Company Employee Benefit Plan together with all schedules and any financial statements, (iv) the three (3) most recent actuarial reports or financial statements relating to such Company Employee Benefit Plan, if such reports or statements are required with respect to such Company Employee Benefit Plan, (v) the most recent determination letter, if any, issued by the IRS with respect to such Company Employee Benefit Plan and any pending request for such a determination letter, (vi) for each Company Employee Benefit Plan which is a "top-hat" plan, a copy of filings with the United States Department of Labor; (vii) the three (3) most recent actuarial valuations, studies or estimates of any Company Employee Benefit Plan that provides retiree medical and life insurance benefits or supplemental retirement benefits; (viii) the most recent minimum coverage and discrimination testing results for each applicable Company Employee Benefit Plan; and (ix) written descriptions of all non-written agreements relating to the Company Employee Benefit Plans.

(h) Except for routine claims for benefits arising in the ordinary course with respect to any Company Employee Benefit Plan, there are no Proceedings or hearings pending or, to the Company's Knowledge, threatened with respect to any Company Employee Benefit Plan, related trust or other funding medium or any fiduciary or assets thereof.

3.17 Employment Matters.

(a) Schedule 3.17(a) of the Disclosure Schedule contains a complete list of the names of all Persons who are employees or independent contractors of the Company as of the date hereof, specifying (i) with respect to each hourly employee, the title and rate of hourly pay; (ii) with respect to each salaried employee, the title, rate of salary and commission or bonus structure; (iii) with respect to each employee, work location, vacation entitlement formula, amount of accrued but unused vacation, sick leave, or other paid-time-off, amount of accrued but unused bonus, and commissions, whether such employee is classified as exempt or nonexempt under the Fair Labor Standards Act and whether or not any such employee is on leave of absence (and if so the reason for absence and the expected date of return to work, if any), (iv) with respect to each independent contractor, a description of the services performed and the compensation arrangement; and (v) with respect to each Person listed (A) the date of hire or engagement, and (B) a list of all consulting or employment agreements, as applicable. Schedule 3.17(a) of the Disclosure

Schedule also lists (I) all employees of the Company who are not citizens or permanent residents of the United States, together with a listing of each such employee's work authorization status and work authorization expiration date and (II) all employment Contracts which provide for any payment (whether of separation, severance or termination pay or otherwise) upon termination of service.

(b) The Company is, and has since January 1, 2009 been, in compliance with all applicable Laws respecting employment, including but not limited to discrimination and retaliation laws, whistle-blowing laws, worker classification (including the proper classification employees as exempt or nonexempt and workers as independent contractors), wages, hours and occupational safety and health and employment practices, the Worker Adjustment Retraining Notification Act, leaves of absences, the Family and Medical Leave Act, reasonable accommodation for employees with disabilities and has not engaged in any unfair labor practice. All employees classified as exempt from state and federal overtime laws are properly classified as exempt under applicable Laws. All persons classified as independent contractors are properly classified as such under applicable Laws. The Company has withheld all amounts required by applicable Laws or by Contract to be withheld from the wages, salaries, and other payments to employees; and is not liable for any arrears of wages, compensation, Tax, penalties or other sums for failure to comply with any of the foregoing. The Company has paid in full to all employees, independent contractors and consultants all wages, salaries, commissions, bonuses, benefits and other compensation due to or on behalf of such employees, independent contractors and consultants. The Company is not liable for any payment to any trust or other fund or to any Governmental Authority, with respect to unemployment compensation benefits, social security or other benefits or obligations for employees (other than routine payments to be made in the normal course of business and consistent with past practice). The Company is not bound by, any consent decree with, or citation by, any Governmental Authority relating to employees or employment practices. All employees of the Company are employed at-will, with no entitlement to severance or notice of termination. No employees of the Company work outside the United States. The Company has not undertaken any reductions-in-force in the past 90 days.

(c) All employees of the Company are legally authorized to work in the United States. The Company has properly completed all reporting and verification requirements pursuant to applicable Law relating to immigration control for all of its employees, including Form I-9. The Company has retained for each current employee a Form I-9 and have retained a Form I-9 for each former employee of the Company for a period of one (1) year from the date of termination of such employee or three (3) years from the date of hire, whichever is later. The Company has not received any notice that the Company is in violation of any applicable Laws pertaining to immigration control or that any current or former employee of the Company is or was not legally authorized to be employed in the United States or is or was using an invalid social security number.

(d) The Company has provided to Purchaser all employment Contracts related to any employees, contractor agreements, and employment and/or personnel policies and procedures, and all such Contracts, and/or policies and procedures are in material compliance with applicable Laws.

(e) Except as set forth on Schedule 3.17 of the Disclosure Schedule:

(i) The Company is not involved or, to the Company's Knowledge, threatened with any labor dispute or Proceeding relating to labor matters involving the employees or independent contractors of the Company (including occupational safety and health standards);

(ii) There are no Proceedings against the Company (whether under applicable Law, employment agreement or otherwise) pending, or to the Company's Knowledge, threatened on account of or for (A) overtime pay, (B) wages or salary, (C) vacation time or pay in lieu of vacation time off or (D) any violation of any Law relating to minimum wages or maximum work hours; and

(iii) No Person (including any Governmental Authority) has given notice to the Company of or, to the Company's Knowledge, threatened to file any claim against the Company under or arising out of any Laws relating to employer-employee relationships, employee entitlements, discrimination in employment or employment practices, immigration or plant closings.

(f) The Company is not a party to, or bound by, any collective bargaining or other agreement with a labor organization representing any of its Employees. There has not been, nor, to the Company's Knowledge, has there been any threat of, any strike, slowdown, work stoppage, lockout, concerted refusal to work overtime or other similar labor activity or dispute affecting the Company. The Company has no Knowledge of any activities or proceedings of any labor union to organize any employees.

3.18 Accounts Receivable. Except as set forth on Schedule 3.18, the accounts receivable of the Company as of the Closing will be valid and enforceable receivables (and will not be subject to any counterclaim, deduction, credit, set-off or other offset) at the aggregate recorded amount thereof subject to the reserve for uncollectible accounts set forth on the Latest Balance Sheet. All such accounts receivable (a) have been incurred in the Ordinary Course of Business consistent with past custom and practice, and (b) are current and collectible in accordance with their terms at the full face amounts thereof without offset or discount, and the Company will not be required to incur any expenses or take any action outside of the Ordinary Course of Business to collect any such accounts receivable.

3.19 Environmental Matters.

(a) The Company is and has been in compliance in all material respects with Environmental Laws and has obtained and is in compliance in all material respects

with all Permits required under Environmental Laws for the operations of the Company and the conduct of the Business ("Environmental Permits") and all of such Environmental Permits are valid and in full force and effect. There is no Basis for the revocation, cancellation or suspension of any Environmental Permit currently held by the Company. No Environmental Law imposes any obligation on the Seller or the Company to give prior notification to, or receive the prior approval of, any Governmental Authority as a result of any transactions contemplated hereby, including any such notification or approval for the direct or indirect transfer to Purchaser and its Affiliates of any Environmental Permit. The Company has provided to Purchaser all Environmental Permits held by the Company, which are listed on Schedule 3.19(a) of the Disclosure Schedule.

(b) Neither the Company nor any Real Property is subject to any Order pursuant to any Environmental Law or in connection with Hazardous Materials which is currently effective or for which there are any outstanding obligations. No portion of any Real Property is part of a site listed on the National Priorities List under CERCLA, the CERCLIS or any other list of sites potentially requiring environmental investigation or remediation under any Environmental Law.

(c) Neither the Company nor any other Person has disposed of, released or placed any Hazardous Materials on, under or at any Real Property or any former Real Property of the Company, other than in compliance with applicable Environmental Laws and under conditions that would not result in liability under Environmental Law. The Company has not disposed of, released, placed or arranged for the transportation or disposal of any Hazardous Materials on, under or at any other location, including third party disposal facilities and locations used or operated by the Company that are neither owned or leased, other than in compliance with applicable Environmental Laws and under conditions that would not result in liability under Environmental Laws. As used in this Section 3.19(c), the term "release" or "released" shall mean any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing of Hazardous Material into the Environment.

(d) There are no Environmental Liabilities nor is there any Basis for any Environmental Liabilities. There are no Security Interests arising under or pursuant to any applicable Environmental Laws on any property owned, nor to the Knowledge of the Seller, used, operated or leased by the Company.

(e) Except as set forth on Schedule 3.19 of the Disclosure Schedule, the Company has not received any notice from any Person (including any governmental authority or the current or prior owner or operator of the Company's properties or facilities) alleging (i) the Company's violation or failure to comply with any Environmental Law, (ii) any obligation for the Company to undertake or bear the cost of any Environmental Liabilities or (iii) any harm to the Environment at any owned or leased real property or any other facility or property at or to which Hazardous Materials have been generated, manufactured, refined, processed, treated, used, imported, transferred, transported, stored, handled, disposed, recycled or received

by the Company (or any third party for whose conduct the Company is responsible), including offsite disposal sites.

(f) The Seller has made available to Purchaser copies of all reports, studies, analyses and tests relating to the Company's compliance with Environmental Laws and to the environmental condition of any Real Property or any property previously owned, leased, subleased, used or operated by the Company or any predecessor thereof that have ever been generated and are currently in the actual possession or control of the Company or the Seller.

(g) There are no pending nor threatened proceedings or investigations with respect to Environmental Liabilities of or with respect to the Company.

(h) The Company has not assumed or agreed to indemnify any person for Environmental Liabilities.

(i) This Agreement and the transactions contemplated hereby will not trigger an obligation for the Company to investigate or cleanup any of the Real Property or former Real Property of the Company.

3.20 Insurance. Schedule 3.20 of the Disclosure Schedule sets forth a complete and correct list and description, including annual premiums and deductibles, as of the date hereof, of all insurance policies, including property insurance, third party liability, product liability, worker's compensation and employers liability and any other applicable commercial insurance policy coverage, fidelity bonds and other forms of insurance maintained by or which cover the assets, properties, officers, directors, managers, employees or agents of the Company or with respect to which the Company is a named insured or otherwise the beneficiary of coverage (collectively, the "Insurance Policies"). Schedule 3.20 of the Disclosure Schedule also sets forth a complete and accurate summary of any material self-insurance coverage provided by or for the benefit of the Company. The Insurance Policies are in full force and effect on the date of this Agreement. There is no default under any Insurance Policy and no event has occurred, including the failure by the Company to give any notice or information or present a claim in a timely fashion or the delivery of any inaccurate or erroneous notice or information, which limits or impairs the rights of the Company under any of the Insurance Policies. At all times, the Insurance Policies have been sufficient and are sufficient to protect the properties, assets, operations and businesses of the Company against the risks of the sort normally insured by similar businesses. All premiums due with respect to such policies have been paid. Excluding insurance policies that have expired and been replaced in the ordinary course of business, no Insurance Policy has been canceled within the two (2) years prior to the date hereof. The Company has not received (i) any notice of cancellation of any such policy, refusal or denial of coverage, increase of premiums or failure to renew thereunder, (ii) any notice that any issuer of any such policy has filed for protection under applicable bankruptcy Laws or is otherwise in the process of liquidating or has been liquidated, or (iii) any other indication that such policies are no longer in full force or effect or that the issuer thereof is no longer willing or able to perform its obligations thereunder. No letters of credit have been posted and no cash has been restricted to support any reserves for insurance. The

activities and operations of the Company have been conducted in a manner so as to conform to all applicable material provisions of the Insurance Policies. As of the date of this Agreement, all claims under the Insurance Policies have been reported by the Company to the appropriate insurer and no claims have been denied coverage by any such insurer. The Company does not have any open claims being handled by any insurer subject to a reservation of rights letter or similar letter.

3.21 Significant Customers and Suppliers. Schedule 3.21 of the Disclosure Schedule lists the ten (10) largest customers and ten (10) largest suppliers of the Company (measured in each case by dollar volume or purchases, sales or rentals) during the year ended December 31, 2014, and during the period from January 1, 2015 through July 31, 2015, and the dollar amount of purchases or sales which each listed customer or supplier represented during each such period. To the Company's Knowledge, as of the date hereof, no such customer or supplier has indicated that it will stop or materially decrease the rate or amount of its transactions with the Company.

3.22 Related Party Transactions. Except as set forth on Schedule 3.22 and except for salaries, expense reimbursements and participation in the Company Employee Benefit Plans, no Related Party is a party to any Material Contract or any other Contract that pertains to the Business, or has any interest in any property used in or pertaining to the Business. No Related Party owns or has owned, directly or indirectly, any equity or other financial or voting interest in any competitor, supplier, licensor, lessor, distributor, independent contractor or customer of the Company or its business.

3.23 Brokers' Fees. Except for the fee due to Broker 1, whose fees and expenses will be paid by the Seller at Closing, the Seller and the Company have no other Liability or obligation to pay any fees or commissions to any broker, finder or agent with respect to the transactions contemplated by this Agreement.

3.24 Termination of 401(k) Plan. The Company has terminated its 401(k) plan (the "401(k) Plan") by proper Company action effective no later than the day immediately preceding the Closing Date. The form and substance of such resolutions and amendment shall be subject to the prior review and approval of Purchaser, which approval shall not be unreasonably withheld. Notwithstanding anything in this Agreement or the 401(k) Plan to the contrary, on or before the Closing Date, the Company shall contribute all employer contributions (including matching contributions) payable under the 401(k) Plan.

3.25 Restrictions on Business Activities. There is no Contract or Order binding upon the Seller or the Company that has had or could reasonably be expected to have the effect of prohibiting or impairing any business practice of the Company, any acquisition of property by the Company or the conduct of Business by the Company.

3.26 Completeness of Disclosure. No representation or warranty by Seller in this Agreement, and no statement made by Seller in the Disclosure Schedule, or any certificate or other document furnished or to be furnished to Purchaser pursuant hereto, or in connection with the negotiation, execution or performance of this Agreement, contains any untrue statement of a material fact or omits or will omit to state a material fact required to be

stated herein or therein or necessary to make any statement herein or therein not misleading.

ARTICLE IV
REPRESENTATIONS AND WARRANTIES OF PURCHASER AND NEWCO

Purchaser and Parent jointly and severally represent and warrant to the Seller that, as of the date hereof:

4.01 Organization and Power. Each of Purchaser and Parent is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware, with full power and authority to enter into this Agreement and each Ancillary Agreement to which it is a party and perform its obligations hereunder and thereunder.

4.02 Authorization. The execution, delivery and performance of this Agreement by each of Purchaser and Parent, and the consummation of the transactions contemplated hereby have been duly and validly authorized by all requisite action, and no other proceedings on the part of Purchaser or Parent are necessary to authorize the execution, delivery or performance of this Agreement and each Ancillary Agreement to which it is a party.

4.03 Due Execution. This Agreement and the other agreements contemplated hereby to which Purchaser and Parent is a party have been duly and validly executed and delivered by Purchaser and Parent, respectively. This Agreement and the other agreements contemplated hereby to which Purchaser and Parent is a party constitute the valid and legally binding obligations of Purchaser and Parent, respectively, enforceable against Purchaser and Parent, respectively, in accordance with their respective terms, except as enforceability may be limited by (a) the Enforceability Limitations, and (b) Laws relating to the availability of specific performance and/or other equitable remedies.

4.04 Governmental Consent. Assuming the accuracy of the representations and warranties set forth in the last sentence of Section 3.7, neither Purchaser nor Parent is required to make any declaration to or registration or filing with, or to obtain any permit, license, consent, accreditation, exemption, approval or authorization from, any Governmental Authority in connection with the execution and delivery by the Purchaser and the Parent of this Agreement and the other agreements contemplated hereby to which the Purchaser and Parent is to be a party or the consummation by the Purchaser and Parent of the transactions contemplated hereby or thereby.

4.05 Litigation. There are no Proceedings pending or overtly threatened against or affecting Purchaser or Parent at law or in equity, or before or by any Governmental Authority, which would materially and adversely affect Purchaser's or Parent's respective performance under this Agreement or the consummation of the transactions contemplated hereby.

4.06 Brokers' Fees. There are no claims for brokerage commissions, finders' fees or similar compensation in connection with the transactions contemplated by this Agreement based on any arrangement or agreement made by or on behalf of Purchaser or Parent.

4.07 Securities Law Matters. Purchaser and Parent each understands and acknowledges that the Purchased Units have not been registered or qualified under the federal or applicable state securities laws and the Purchased Units are being sold to and purchased by Purchaser in reliance upon applicable exemptions from such registration and qualification requirements.

4.08 No Current Obligation to Sell the Company. As of the Closing Date, neither Purchaser nor Parent has any current obligation, whether oral or in writing, to sell the Purchased Units or substantially all of the assets of the Company to any third party.

4.09 Reserved

ARTICLE V
COVENANTS

5.01 Further Assurances. After the Closing, and without further consideration, the Seller covenants and agrees that he will execute and deliver to Purchaser such further instruments of transfer and assignment as Purchaser may reasonably request in order to more effectively convey and transfer the Purchased Units to Purchaser. Each Party covenants and agrees to execute any and all documents and to perform such other acts as may be necessary or expedient to further the purposes of this Agreement and the transactions contemplated hereby.

5.02 Access to Books and Records. From and after the Closing, Purchaser shall, and shall cause the Company, to provide the Seller and his agents with reasonable access (for the purpose of examining and copying), during normal business hours, to the books and records of the Company for the purpose of preparing or responding to any inquiry regarding any Tax Returns of the Seller or the Company required to be filed by the Seller, including any Tax Returns filed by the Company with respect to Pre-Closing Tax Periods. Unless otherwise consented to in writing by the Seller, the Company shall not, for a period of six (6) years following the Closing Date, destroy, alter or otherwise dispose of any of the books and records of the Company related to Taxes during a Pre-Closing Tax Period without first offering to surrender to the Seller such books and records or any portion thereof which Purchaser or the Company may intend to destroy, alter or dispose of.

5.03 Confidentiality.

(a) Definition. "Confidential Information" means (i) the terms and conditions of this Agreement (including the consideration to be paid hereunder) and the course of dealing between the Parties hereunder (including any dispute between the Parties) and (ii) any trade secrets, know-how, technical data or proprietary information of the Company, including information relating to products, properties, services, processes, designs, formulas, developmental or experimental work, improvements, discoveries, plans for research or products, databases, computer programs, other original works of authorship, marketing and sales plans, business plans, budgets and financial information, prices and costs, customer lists, supplier lists, information regarding the skills and compensation of the employees and contractors

of the Company and any other non-public business information. The term "Confidential Information" includes all of the foregoing information, rights and materials, whether tangible or intangible, whether in written, oral, chemical, magnetic, photographic, optical or other form, in all stages of research and development, and whether now existing, or previously developed or created. "Confidential Information" does not include any information that is or becomes generally available to the public other than as a result, directly or indirectly, of a breach of this Section 5.03, or other legal or fiduciary obligation of confidentiality owing to Purchaser or the Company, by any Person that is subject to this Section 5.03.

(b) Covenant. The Seller covenants and agrees that he will, and that he will cause each of his Affiliates, and their respective Representatives to, for a period of two (2) years after the Closing Date (except with regards to trade secrets for which the duration shall be perpetual), to use such Person's best efforts to maintain the confidentiality of the Confidential Information, and not, directly or indirectly: (i) use, disclose or permit any other Person to have access to any Confidential Information (except in the good faith performance of any employment or contractual obligations owed to the Company or, subject to Section 5.03(c), as required by applicable Law or legal process, or to his professional advisors who are under an obligation of confidentiality), (ii) sell, license or otherwise exploit any products or services that embody, in whole or in part, any Confidential Information or (iii) take any other action with respect to the Confidential Information that is inconsistent with the confidential and proprietary nature thereof.

(c) Compulsory Disclosure. If any Person that is subject to this Section 5.03 is requested or required to disclose any Confidential Information pursuant to a subpoena, court order or other similar process, such Person must provide written notice to Purchaser of such request or requirement so that Purchaser may seek an appropriate protective order or such other reasonable assurance that confidential treatment will be afforded to the Confidential Information. In the event that no such protective order is issued or assurance regarding confidential treatment is obtained, and such Person is, based on written advice of his or her counsel, compelled to disclose such Confidential Information under threat of liability for contempt of court or other censure or penalty, such Person may disclose Confidential Information that such Person's counsel advises is legally required to be disclosed in accordance with and for the limited purpose of compliance with such subpoena, court order or process, without liability under this Section 5.03.

5.04 Expenses. Except as otherwise expressly provided herein, Seller or the Company (on the one hand) and Purchaser (on the other hand) shall pay all of their own expenses (including attorneys' and accountants' fees and expenses) in connection with the negotiation of this Agreement, the performance of the Parties' respective obligations hereunder and the consummation of the transactions contemplated by this Agreement.

5.05 Press Releases and Communications. No press release or public announcement related to this Agreement or the transactions contemplated herein shall be issued or made without

the joint approval of Purchaser and Seller, unless required by Law (upon the reasonable, written advice of counsel).

5.06 Certain Tax Matters. The following provisions shall govern the allocation of responsibility as between Purchaser and the Company on the one hand and the Seller on the other hand for certain Tax matters following the Closing:

(a) The Seller shall prepare or cause to be prepared all Tax Returns for the Company for Pre-Closing Tax Periods that end on or before the Closing Date in a manner consistent with the Company's past practice unless otherwise required by applicable Law. The Seller shall provide Purchaser with a copy of such Tax Returns at least thirty (30) days prior to the due date (including any extension thereof) for filing of such Tax Return. Purchaser shall be permitted to review and comment on each such Tax Return described in the preceding sentence and Purchaser shall deliver such comments, if any, to Seller within ten (10) days after receipt of such Tax Returns. The Parties agree to consult with each other and to negotiate in good faith any timely raised issue arising as a result of the review by Purchaser to permit the filing of such Tax Returns as promptly as possible, which good faith negotiations shall include each side exchanging in writing their positions concerning the matter or matters in dispute and a meeting to discuss their respective positions. In the event the Parties are unable to resolve any dispute within ten (10) Business Days following the delivery of Purchaser's comments to Seller, Purchaser and Seller immediately shall jointly request the Accounting Firm to resolve any issue in dispute. The Accounting Firm shall make a determination with respect to any disputed issue within five (5) Business Days before the due date (including extensions) for the filing of the Tax Return in question, and Seller shall file such Tax Return on the due date (including extensions) therefor in a manner consistent with the determination of the Accounting Firm. The determination of the Accounting Firm shall be binding on all Parties; provided that any such determination shall be limited to the resolution of issues in dispute. The fees of the Accounting Firm shall be paid in accordance with Section 2.03(b)(iii) *mutatis mutandis*. The Purchaser shall prepare or cause to be prepared all Tax Returns that relate to the Company for Taxable Periods ending after the Closing Date (including Straddle Periods). With respect to any Straddle Period Tax Return required to be filed with respect to the Company prepared by Purchaser as to which Taxes are allocable to Seller, Purchaser shall provide the Seller a copy of such Tax Return and a statement (with respect to which Purchaser will make available supporting schedules and information) certifying the amount of Tax shown on such Tax Return that is allocable to Seller at least thirty (30) days prior to the due date (including any extension thereof), except to the extent such Tax Return is due within thirty (30) days of the Closing, for filing of such Tax Return, and the Seller shall have the right to review and comment on such Tax Return and statements prior to the filing of such Tax Return. With respect to the preparation or filing of a Tax Return by a party in compliance with the provisions of this Section 5.06(a), any costs or expenses incurred by such party with respect to the preparation of such Tax Return (other than Taxes due thereunder) shall be borne by the party incurring such expenses, except that any costs or expenses incurred by the Purchaser or the

Company in connection with a Straddle Period shall be allocated among the Seller and the Purchaser in accordance with the allocation of the actual Taxes owed pursuant to such Tax Return in accordance with the provisions below. The Seller and Purchaser agree to consult and to attempt in good faith to resolve any issues arising as a result of the review of such Tax Return and statement by the other party. In the case of any Straddle Period, the amount of any Taxes based on or measured by income, receipts, or payroll of the Company for the Pre-Closing Tax Period shall be determined based on an interim closing of the books as of the close of business on the Closing Date and the amount of any other Taxes of the Company for a Straddle Period that relates to the Pre-Closing Tax Period shall be deemed to be the amount of such Tax for the entire Taxable period multiplied by a fraction the numerator of which is the number of days in the Taxable period ending on the Closing Date and the denominator of which is the number of days in such Straddle Period. All Taxes allocable to a Pre-Closing Tax Period shall be referred to as "Pre-Closing Taxes."

(b) Purchaser, the Company and Seller shall cooperate fully, as and to the extent reasonably requested by the other party, in connection with the filing of Tax Returns pursuant to this Section 5.06 and any Proceeding with respect to Taxes. Such cooperation shall include the retention and (upon the other party's request) the provision of records and information which are reasonably relevant to any such Proceeding and making employees available on a mutually convenient basis to provide additional information and explanation of any material provided hereunder. The Company shall retain all books and records with respect to tax matters pertinent to the Company relating to any Pre-Closing Tax Periods as set forth in Section 5.02 and shall abide by all record retention agreements entered into with any Taxing authority.

(c) All transfer, documentary, sales, use, stamp, registration and other such Taxes and fees (including any penalties and interest) incurred in connection with this Agreement shall be paid fifty percent (50%) by Seller and fifty percent (50%) by Purchaser, and Seller will, at his own expense, file all necessary Tax Returns and other documentation with respect to all such transfer, documentary, sales, use, stamp, registration and other Taxes and fees, and, if required by applicable Law, Purchaser and Company will join in the execution of any such Tax Returns and other documentation.

(d) Except if the refund of Taxes is included in the calculations in Section 2.03, Seller shall be entitled to any refund of Taxes (or portion thereof) attributable to a Pre-Closing Tax Period, together with any interest received from the Taxing authority (including, for the avoidance of doubt, any receivable relating to any refund or credit for sales and use Taxes owed, paid or credited to the Company in respect of a Pre-Closing Tax Period). Purchaser shall be entitled to any refund of Taxes (or portion thereof) attributable to a Post-Closing Tax Period, together with any interest received from the taxing authority. If a party receives a refund of Taxes (or portion thereof) to which another party is entitled under this Section 5.06(d), it shall pay

the refund to the other party within fifteen (15) Business Days of its receipt from the Taxing authority.

(e) In the case of a Proceeding that relates to Pre-Closing Tax Periods ending on or before the Closing Date, the Seller shall have the sole right, at his expense, to control the conduct of such Tax Proceeding; provided however, the Seller shall (i) keep the Company and Purchaser informed of all developments on a timely basis, (ii) provide to the Company and the Purchaser copies of any and all correspondence received from the Governmental Authority related to such Tax Proceeding, (iii) provide the Company and the Purchaser with the opportunity to attend conferences, hearings and other meetings with or involving the Governmental Authority and to review and provide comments with respect to written responses provided to the Governmental Authority with respect to such Tax Proceeding and (iv) shall not enter settle or compromise any asserted liability which may result in indemnification under the terms of this Agreement without the prior written consent of the Company and Purchaser, which shall not be unreasonably withheld, unless the settlement or compromise absolves the Company and Purchaser of all liability for Taxes with respect to such claims. With respect to Straddle Periods, Purchaser or the Company shall control such Proceeding (with any such expenses incurred by Purchaser or the Company to be allocated between the Seller, and the Company or the Purchaser in accordance with the proportion to which the relative amounts at issue in such Proceeding relate to Pre-Closing Tax Periods and Post-Closing Tax Periods); provided however, the Company and Purchaser shall (i) keep the Seller informed of all developments on a timely basis, (ii) provide to the Seller copies of any and all correspondence received from the Governmental Authority related to such Tax Proceeding, (iii) provide the Seller with the opportunity to attend conferences, hearings and other meetings with or involving the Governmental Authority and to review and provide comments with respect to written responses provided to the Governmental Authority with respect to such Tax Proceeding and (iv) shall not enter settle or compromise any asserted liability which may result in indemnification under the terms of this Agreement without the prior written consent of the Seller, which shall not be unreasonably withheld, unless the settlement or compromise absolves the Seller of all liability for Taxes with respect to such claims. For the avoidance of doubt, all Tax Proceedings shall be governed solely by this Section 5.06 and Section 6.04(a).

(f) Section 338(h)(10) Election

(i) The Parties acknowledge that a timely, irrevocable and effective election under Section 338(h)(10) of the Code (collectively, the "Section 338(h)(10) Election") with respect to Purchaser's purchase of the Purchased Units pursuant to this Agreement may be made after the Closing Date in the sole discretion of the Purchaser and Parent. To facilitate such election, at the Closing, Seller shall deliver to Purchaser an IRS Form 8023 or successor form (the "Form") with respect to Purchaser's purchase of the Purchased Units, which Form shall have been duly executed by Seller. At least sixty (60) days prior to the earlier of (A) the due date of the Form or (B) the Company's final Form 1120S, Purchaser shall provide Seller

with written notice of Purchaser's determination as to whether a Section 338(h)(10) Election will be filed along with a schedule allocating the Purchase Price and the liabilities of the Company to the assets of the Company for Tax purposes in a manner consistent with Section 338 of the Code and the Treasury Regulations thereunder (the "Allocation Schedule"). IRS Form 8883 (or successor form) shall be prepared in accordance with the Allocation Schedule. If Purchaser elects to file the Section 338(h)(10) Election, Purchaser shall (A) cause the Form to be duly executed by an authorized person for Purchaser, (B) complete the schedules required to be attached thereto, (C) provide a copy of the executed Form and schedules to Seller, and (D) duly and timely file the Form as prescribed by Treasury Regulations Section 1.338(h)(10)-1. Seller shall, and Purchaser shall cause Parent to, file all Tax Returns (including amended returns and claims for refund) and information reports in a manner consistent with the Allocation Schedule.

(ii) Purchaser shall deliver to Seller, within five (5) days after the date on which the Allocation Schedule is delivered to Seller, a detailed computation of the Section 338(h)(10) Tax Adjustment (defined below), including such schedules and information that may be relevant to such computation. Purchaser shall prepare the Section 338(h)(10) Tax Adjustment in a manner consistent with the Allocation Schedule. If Seller disagrees with the Section 338(h)(10) Tax Adjustment, Seller may, within ten Business (10) Days after receipt of the Section 338(h)(10) Tax Adjustment, deliver a notice (the "338 Objection Notice") to Purchaser setting forth Seller's calculation of the 338(h)(10) Tax Adjustment and a statement setting forth Seller's objections in reasonable detail. Purchaser and Seller shall negotiate in good faith to resolve any disagreements as to the computation of the 338(h)(10) Tax Adjustment, but if there is no final resolution by the date which is thirty (30) days prior to earlier of (A) the due date of the Form or (B) the date on which the Company's final Form 1120S is due, Purchaser and Seller shall jointly retain an Accounting Firm to resolve any disagreements relating to the 338(h)(10) Tax Adjustment. The Accounting Firm shall review all such documentation as necessary and the determination of the Accounting Firm shall be conclusive and binding upon the Purchaser and the Seller. The cost of determination of the 338(h)(10) Tax Adjustment by the Accounting Firm shall be borne by the Parties in the same way as the costs in Section 2.03(d). Purchaser shall deliver an amount of cash equal to the Section 338(h)(10) Tax Adjustment to Seller no later two (2) days before the Company's final Form 1120S is due. The "Section 338(h)(10) Tax Adjustment" is equal to the amount, if any, of any additional cash consideration that is necessary to be paid to Seller to make Seller whole, for the Company and Seller's additional Taxes attributable to the Section 338(h)(10) Election. The Section 338(h)(10) Tax Adjustment shall be calculated using the same processes and methodologies as the example set forth on Exhibit H attached hereto. The Section 338(h)(10) Tax Adjustment shall be determined taking into account all appropriate federal, state, and local Tax implications (including taxes imposed on the receipt of any Gross Up Payments). A "Gross Up Payment" shall mean, with respect to Seller, a payment by Purchaser to Seller of an additional amount of Purchase Price such that, after paying all federal, state and local income Taxes

attributable to the receipt of amounts pursuant to this Section 5.06(f)(ii), Seller has received a net after Tax amount equal to the Section 338(h)(10) Tax Adjustment.

5.07 Reserved

5.08 Reserved

ARTICLE VI
INDEMNIFICATION

6.01 Survival. The covenants, representations and warranties set forth in this Agreement and in any certificates delivered at the Closing in connection with this Agreement, shall survive the execution and delivery of this Agreement and the closing and continue in full force and effect thereafter until the eighteen (18) month anniversary of the Closing Date, except that: (a) the representations and warranties set forth in Section 3.14 (Taxes), Section 3.16 (Employee Benefit Plans) and Section 3.17 (Employment Matters) will survive until sixty (60) days after the expiration of the statute of limitations applicable thereto; (b) the representations and warranties set forth in Section 3.01 (Capacity of Seller), Section 3.02 (Organization and Power), Section 3.03 (Subsidiaries), Section 3.05 (Capitalization), Section 3.11 (Compliance with Laws), Section 3.19 (Environmental) and Section 3.23 (Brokers' Fees) shall survive indefinitely; and (c) claims for fraud or willful misconduct shall survive indefinitely; provided further, if written notice of a breach of representation and warranty is given by an Indemnified Party prior to the end of a survival period, the applicable survival period shall be tolled until any bona fide related claim is fully and finally resolved in accordance with this Agreement. The covenants and agreements contained herein shall survive until performed in accordance with their terms.

6.02 Indemnification by the Seller. Subject to the limitations set forth in Section 6.05, from and after the Closing Date, the Seller shall be obligated to indemnify, defend and hold harmless (including by reimbursement for Losses) Purchaser, its successors and assigns and their respective Affiliates, from and against the entirety of any Loss that the Purchaser, its successors and assigns and their respective Affiliates, may suffer that results from, arises out of, relates to, is in the nature of, or is caused by, any one or more of the following:

(a) any inaccuracy in or breach of any representation or warranty of the Seller contained in this Agreement or in any schedule (including the Disclosure Schedule) hereto or in any certificate or instrument delivered at the Closing by or on behalf of Seller or the Company;

(b) any breach by Seller or Company (prior to the Closing) of any covenant, agreement or undertaking contained in this Agreement;

(c) except if included in the computations pursuant to Section 2.03, any and all Taxes of (A) the Company for all Pre-Closing Tax Periods, (B) any member of an affiliates, consolidated, combined or unitary group of which the Company (or any predecessor of the Company) is or was a member on or prior to the Closing Date, including pursuant to Treasury Regulation Section 1.1502-6 or any analogous or

similar Law, and (C) any Person (other than the Company) imposed on the Company as a transferee or successor, by contract or pursuant to any law which Taxes relate to an event or transactions occurring prior to the Closing Date;

(d) any Indebtedness solely to the extent that such Indebtedness was not included in the computation of (i) the Closing Payment pursuant to Section 2.02(a)(iv) or (ii) Working Capital pursuant to Section 2.03; and

(e) any Transaction Expenses solely to the extent that such Transaction Expense was not included in the computation of (i) the Closing Payment pursuant to Section 2.02(a)(v) or (ii) Working Capital pursuant to Section 2.03.

6.03 Indemnification by the Purchaser. From and after the Closing Date, Parent and Purchaser shall be obligated to indemnify, defend and hold harmless (including by reimbursement for Losses) the Seller, his successors and assigns and their respective Affiliates, from and against the entirety of any Loss that the Seller, his successors and assigns or their respective Affiliates may suffer that results from, arises out of, relates to, is in the nature of, or is caused by, any one or more of the following:

(a) any inaccuracy in or breach of any representation or warranty made by Parent or Purchaser contained in this Agreement, including any schedule hereto or in any certificate or instrument delivered at the Closing by or on behalf of Parent or Purchaser; and

(b) any breach by Parent, Purchaser or the Company (after the Closing) of any covenant, agreement or undertaking contained in this Agreement or any Ancillary Agreement.

6.04 Matters Involving Third Parties.

(a) Notice. If any third party (including any Taxing Authority) shall make or assert a claim against any party entitled to indemnification hereunder (the "Indemnified Party") with respect to any matter that may give rise to a claim for indemnification (a "Third Party Claim") against a party required to provide indemnification under this Article VI (the "Indemnifying Party"), then the Indemnified Party shall notify each Indemnifying Party thereof promptly; provided, however, that no delay on the part of the Indemnified Party in notifying any Indemnifying Party shall relieve the Indemnifying Party from any liability or obligation under this Agreement unless (and then solely to the extent) the Indemnifying Party is materially damaged or materially prejudiced thereby.

(b) Defense and Settlement of Claims.

(i) In the event of a Third Party Claim, Purchaser shall, unless it determines in good faith that there is no reasonable probability that a claim may adversely affect it or its Affiliates, regardless of whether it is the Indemnifying Party or the Indemnified Party with respect to such Third Party Claim, assume the defense of such Third Party Claim. In such case

the Indemnifying Party may retain separate co-counsel at its sole cost and expense. Purchaser shall thereafter (A) provide the Indemnifying Party with all material information requested by such party relating to the defense of such claim, and (B) confer with the Indemnifying Party as to the management and defense of such claim. Purchaser will not consent to the entry of any judgment or enter into any settlement with respect to the Third Party Claim without the written consent of the Indemnifying Party (not to be withheld, conditioned or delayed unreasonably), and the Indemnifying Party will not consent to the entry of any judgment or enter into any settlement with respect to such matter without the written consent of Purchaser (not to be withheld, conditioned or delayed unreasonably). Upon receipt of the consent of the Indemnifying Party pursuant to the foregoing sentence, the Indemnifying Party shall have no power or authority to object under any provision of this Article VI to the amount of any claim by Purchaser against the Escrow Fund for indemnity with respect to such settlement.

(ii) If Purchaser does not assume the defense of a Third Party Claim pursuant to Section 6.04(b)(i) and the Indemnifying Party enters into an agreement with the Indemnified Party (in form and substance reasonably satisfactory to the Indemnified Party) pursuant to which the Indemnifying Party agrees to be fully responsible (with no reservation of any rights other than the right to be subrogated to the rights of the Indemnified Party) for all Losses relating to such claim, the Indemnifying Party may, by giving written notice to the Indemnified Party, assume the defense thereof. In such case, (A) the Indemnifying Party will defend the Indemnified Party against such matter with counsel of its choice reasonably satisfactory to the Indemnified Party and (B) the Indemnified Party may retain separate co-counsel at its sole cost and expense (except that the Indemnifying Party will be responsible for the fees and expenses of any separate counsel to the Indemnified Party incurred prior to the date upon which the Indemnifying Party effectively assumes control of such defense). The Indemnifying Party shall thereafter (X) provide the Indemnified Party with all material information requested by such party relating to the defense of such claim, and (Y) confer with the Indemnified Party as to the management and defense of such claim. The Indemnifying Party will not consent to the entry of any judgment or enter into any settlement with respect to the Third Party Claim without the written consent of the Indemnified Party (not to be withheld, conditioned or delayed unreasonably), and the Indemnified Party will not consent to the entry of any judgment or enter into any settlement with respect to such matter without the written consent of Indemnifying Party (not to be withheld, conditioned or delayed unreasonably).

6.05 Limitations on Liability.

(a) Basket.

(i) Purchaser shall not be entitled to indemnification under Section 6.02(a) unless the aggregate amount of all Losses for which indemnification under such section sought by the Purchaser, collectively, exceeds $$$$$ (the "Threshold Amount"), whereupon the Purchaser's Indemnified Parties shall be entitled to indemnification for all such Losses in excess of the Threshold Amount; provided, however, that the limitation set forth in this Section 6.05(a)(i) shall not be applicable to any Losses (A) resulting from fraud or willful misconduct, (B) arising under Section 6.02(d) or (C) arising out of or resulting from any Recognized Environmental Condition.

(ii) Seller shall not be entitled to indemnification under Section 6.03(a) unless the aggregate amount of all Losses for which indemnification under such section sought by the Seller, collectively, exceeds the Threshold Amount, at which time the Seller's Indemnified Parties shall be entitled to indemnification for all such Losses in excess of the Threshold Amount; provided, however, that the limitation set forth in this Section 6.05(a)(ii) shall not be applicable to any Losses resulting from fraud or willful misconduct.

(b) Cap. The aggregate liability of the Seller to the Purchaser's Indemnified Parties pursuant to Section 6.02(a) shall not exceed $$$$$ and the aggregate liability of Purchaser to the Seller's Indemnified Parties pursuant to Section 6.03(a) shall not exceed $$$$$; provided, however, that the limitations set forth in this Section 6.05(b) shall not be applicable to any Losses resulting from fraud or willful misconduct, arising out of Section 6.02(a) with respect to any Fundamental Representation or arising out of Section 6.02(c), (d), (e) and (f).

(c) Insurance Proceeds. Notwithstanding anything contained herein to the contrary, the amount of any Losses incurred or suffered by any Indemnified Party shall be calculated after giving effect to any insurance proceeds actually received by such Indemnified Party with respect to such Losses, less any related costs and expenses, including the aggregate cost of pursuing any related insurance claims and related increases in insurance premiums or other chargebacks. If any insurance proceeds are received by an Indemnified Party with respect to any Losses after the Indemnifying Party has made a payment to the Indemnified Party with respect thereto, the Indemnified Party shall pay to the Indemnifying Party the amount of such proceeds up to the amount of the Indemnifying Party's payment to the Indemnified Party less any of the Indemnified Party's related costs and expenses of recovering such insurance proceeds, including the aggregate cost of pursuing any related insurance claims and related increases in insurance premiums or other chargebacks. The Indemnified Party shall seek to recover insurance proceeds or any other amounts from third parties related to any Losses for which indemnification is sought pursuant to this Article VI only to the extent such Indemnified Party determines, in its sole discretion, that it is commercially

reasonable for it to do so. Otherwise, no Indemnified Party shall have any obligation to seek to recover insurance proceeds or any other amounts from third parties in connection with making an indemnification claim under this Article VI or thereafter.

(d) Tax Benefits. Notwithstanding anything contained herein to the contrary, the amount of any Losses incurred or suffered by the Purchaser shall be calculated net of any Tax benefit that the Purchaser or the Company actually realizes in the year the Losses are incurred as a result of being able to currently deduct the Losses for Tax purposes.

(e) Disclaimer of Special Damages. Each Party waives any rights to assert or receive any indirect, special, exemplary or punitive damages or any diminution in value of the Purchased Units suffered or incurred by such Party as a result of the breach by another Party of any of its representations, warranties or obligations hereunder. Notwithstanding the foregoing, Losses may, however, include indirect, special, exemplary or punitive damages to the extent that (i) the injuries or losses resulting in or giving rise to such Losses are incurred or suffered by a third party that is not an Indemnified Party or an Affiliate of any Indemnified Party and (ii) such damages are required to be paid by an Indemnified Party to a third party.

6.06 Procedures for Assertions of Claims.

(a) Claim Certificate. In connection with any claim (including any Tax claim) for reimbursement of Losses subject to indemnification under this Article VI, including any Losses attributable to matters subject to Section 6.04 that are not paid by an Indemnifying Party directly to third parties, the Party seeking reimbursement (the "Claimant") shall prepare, and deliver to the party from which reimbursement is sought (the "Respondent"), a certificate (a "Claim Certificate"): (i) stating that the Claimant has paid or sustained Losses subject to indemnification pursuant to this Article VI and (ii) specifying in reasonable detail the Loss included in the amount so stated.

(b) Resolution of Claims. As soon as practicable following the delivery of a Claim Certificate, the Seller and Purchaser shall attempt to agree upon the rights of the respective parties with respect to each claim set forth therein. If the Seller and Purchaser should so agree, a written memorandum setting forth such agreement shall be prepared and signed by the Seller and Purchaser, and a copy of such memorandum shall be delivered to the Claimant and the Respondent. Such memorandum and the agreements contained therein shall be final and binding on the Seller, Purchaser, the Claimant, the Respondent and all other Persons having any interest therein.

(c) Failure to Resolve Objections. If the Seller and Purchaser cannot agree upon the rights of the respective parties with respect to each of the claims in a Claim Certificate within sixty (60) days after delivery of the Claim Certificate (as such period may be extended only by mutual written agreement of the Seller and

Purchaser, by giving notice thereof to the Claimant and the Respondent), the Claimant may pursue any and all legal remedies that may be available to it.

(d) Entitlement to Indemnity. The Claimant shall be entitled to receive payment for all amounts that the Respondent (i) has agreed in writing to pay, (ii) is obligated to pay pursuant to a written memorandum between the Seller and Purchaser pursuant to Section 6.06(b) or (iii) has been found liable to pay pursuant to a final, non-appealable order of a court of competent jurisdiction.

(e) Payment of Claims. The Respondent shall pay all amounts to which a Claimant is entitled promptly upon demand of the Claimant by certified check or wire transfer of immediately available funds, as the Claimant may specify.

6.07 Materiality. For purposes of determining the amount of any Losses with respect thereto, all such representations and warranties of the Seller or Purchaser that are qualified as to "Knowledge," "materiality," or by reference to a "Material Adverse Change" shall be deemed to be not so qualified.

6.08 Exclusive Remedy. Except for (a) remedies arising from claims based on fraud or willful misconduct, in which case the Indemnified Party shall have all rights and remedies under this Agreement and those provided by law and in equity, and (b) as set forth in Section 7.13 the indemnification provisions set forth in this Article VI shall be the sole and exclusive remedy of the Indemnified Parties with respect to any and all claims from and after the Closing Date relating to the subject matter of this Agreement.

6.09 Escrow Period; Release from Escrow. The funds in the Escrow Account, if any, shall become available for distribution to the Seller on the date that is eighteen (18) months from the Closing Date (the "Release Date"). As soon as reasonably practicable after the Release Date, the Escrow Agent shall pay to Seller any funds remaining in the Escrow Account subject to the terms and conditions of this Agreement and the Escrow Agreement. Notwithstanding anything to the contrary herein, any portion of the Escrow Account subject to any pending but unresolved indemnification claims set forth in a Claim Certificate delivered to the Escrow Agent prior to the Release Date shall only be released by the Escrow Agent and paid to the Seller, or released to an Indemnified Party (as appropriate), in each case, following resolution of each specific indemnification claim involved.

ARTICLE VII
MISCELLANEOUS

7.01 No Third Party Beneficiaries. Except for the Indemnified Parties set forth in Article VI, this Agreement shall not confer any rights or remedies upon any Person other than the Parties and their respective successors and permitted assigns.

7.02 Entire Agreement. This Agreement (including the documents and schedules referred to herein) constitutes the entire agreement among the Parties and supersedes any prior understandings, agreements, or representations by or among the Parties, written or oral, that may have related in any way to the subject matter hereof.

7.03 Succession and Assignment. This Agreement and all of the provisions hereof shall be binding upon, inure to the benefit of, and be enforceable by, the Parties and their respective successors and permitted assigns. Neither this Agreement nor any of the rights, interests or obligations of any Party under this Agreement may be assigned or delegated, in whole or in part, by operation of law or otherwise, by any Party without the prior written consent of each other Party, and any such assignment without such prior written consent shall be null and void.

7.04 Notices. All notices, requests, demands, claims, and other communications hereunder shall be in writing. Any notice, request, demand, claim, or other communication hereunder shall be deemed duly given (a) when delivered, if personally delivered, (b) when receipt is confirmed if faxed (with hard copy to follow via first class mail, postage prepaid, or overnight courier), or (c) on the next Business Day after deposit with a reputable overnight courier, in each case addressed to the intended recipient as set forth below:

If to Purchaser:

Purchaser B

If to Seller:

Member A

7.05 Headings. The section headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

7.06 GOVERNING LAW. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE DOMESTIC LAWS OF THE STATE OF LOUISIANA, WITHOUT GIVING EFFECT TO ANY CHOICE OF LAW OR CONFLICT OF LAW PROVISION OR RULE (WHETHER OF THE STATE OF LOUISIANA OR ANY OTHER JURISDICTION) THAT WOULD CAUSE THE APPLICATION OF THE LAWS OF ANY JURISDICTION OTHER THAN THE STATE OF LOUISIANA. THE PARTIES HEREBY CONSENT TO THE EXCLUSIVE JURISDICTION AND VENUE OF ANY UNITED STATES FEDERAL COURT IN THE STATE OF LOUISIANA FOR ANY ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT AND WAIVE ANY CLAIM THAT THIS VENUE IS AN INCONVENIENT FORUM.

7.07 WAIVER OF JURY TRIAL. EACH PARTY TO THIS AGREEMENT HEREBY WAIVES ALL RIGHTS TO TRIAL BY JURY IN ANY ACTION, SUIT, OR PROCEEDING BROUGHT TO RESOLVE ANY DISPUTE BETWEEN OR AMONG ANY OF THE PARTIES HERETO, WHETHER ARISING IN CONTRACT, TORT, OR OTHERWISE, ARISING OUT OF, CONNECTED WITH, RELATED OR INCIDENTAL TO THIS AGREEMENT, THE TRANSACTIONS CONTEMPLATED HEREBY AND/OR THE RELATIONSHIP ESTABLISHED AMONG THE PARTIES HEREUNDER.

7.08 Amendments and Waivers. No amendment or waiver of any provision of this Agreement shall be valid unless the same shall be in writing and signed by each Party. No waiver by any Party of any default, misrepresentation or breach of warranty or covenant hereunder, whether intentional or not, shall be deemed to extend to any prior or subsequent default, misrepresentation or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence.

7.09 Severability. Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction. If the final judgment of a court of competent jurisdiction declares that any term or provision hereof is invalid or unenforceable, the Parties agree that the court making the determination of invalidity or unenforceability shall have the power to reduce the scope, duration or area of the term or provision, to delete specific words or phrases, or to replace any invalid or unenforceable term or provision with a term or provision that is valid and enforceable and that comes closest to expressing the intention of the invalid or unenforceable term or provision, and this Agreement shall be enforceable as so modified after the expiration of the time within which the judgment may be appealed.

7.10 Construction. The Parties have jointly participated in the negotiation and drafting of this Agreement. In the event of an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the Parties and no presumptions or burdens of proof shall arise favoring any Party by virtue of the authorship of any of the provisions of this Agreement. The Parties intend that each representation, warranty, and covenant contained herein shall have independent significance. If any Party has breached any representation, warranty or covenant contained herein in any respect, the fact that there exists another representation, warranty or covenant relating to the same subject matter (regardless of the relative levels of specificity) that the Party has not breached shall not detract from or mitigate the fact that the Party is in breach of the first representation, warranty or covenant.

7.11 Incorporation of Exhibits and Schedules. The exhibits and schedules identified in this Agreement are incorporated herein by reference and made a part hereof.

7.12 Remedies. Each of the Parties acknowledges and agrees that each Purchaser and the Company would be damaged irreparably in the event any of the provisions of Section 5.03 of this Agreement is not performed in accordance with its specific terms or otherwise is breached. Accordingly, Seller agrees that Purchaser shall be entitled to an injunction or injunctions to prevent breaches or threatened breaches of the provisions of Section 5.03 of this Agreement and to enforce specifically Section 5.03 of this Agreement and the terms and provisions thereof in any action instituted in any court of the United States or any state thereof having jurisdiction over the Parties and the matter, in addition to any other remedy to which it may be entitled, at law or in equity. Seller hereby agrees that should Purchaser institute any action or proceeding for injunctive or similar equitable relief to enforce the provisions of Section 5.03, Seller waives and agrees not to assert the claims

or defenses that Purchaser or the Company has an adequate remedy at law or that Purchaser will not suffer irreparable damage.

7.13 Interpretation.

(a) Any capitalized terms used in any schedule or exhibit attached hereto and not otherwise defined therein shall have the meanings set forth in this Agreement.

(b) Whenever required by the context, any pronoun used in this Agreement shall include the corresponding masculine, feminine or neuter forms, and the singular form of nouns, pronouns and verbs shall include the plural and vice versa.

(c) The terms "hereof," "herein," "hereof," "hereto" and "hereunder" and terms of similar import are references to this Agreement as a whole and not to any particular provision of this Agreement.

(d) Section, clause, schedule and exhibit references contained in this Agreement are references to sections, clauses, schedules and exhibits in or to this Agreement, unless otherwise specified.

(e) The terms "includes," "including" and similar terms shall be deemed to mean "including, without limitation,"

(f) The use of "or" is not intended to be exclusive unless expressly indicated otherwise.

(g) Reference to any Person includes such Person's successors and assigns to the extent such successors and assigns are permitted by the terms of any applicable agreement, and reference to a Person in a particular capacity excludes such Person in any other capacity or individually.

(h) Reference to any agreement (including this Agreement), document or instrument shall mean such agreement, document or instrument as amended, modified or supplemented and in effect from time to time in accordance with the terms thereof and, if applicable, the terms hereof.

(i) For the avoidance of doubt, any subtraction of a negative number or amount hereunder shall be equal to the addition of the absolute value of such negative number or amount.

7.14 Reserved.

7.15 Intervention. The undersigned spouse of the Seller hereby intervenes in this Agreement and consents to the sale and the agreements, releases any obligations set forth herein with respect to such spouse's community property interest in the Purchased Units, if any, sold herein and with respect to any other rights or claims said spouse may have against the Company, its members, and the Purchaser.

IN WITNESS WHEREOF, Seller and Purchaser have caused this Agreement to be executed as of the date first written above.

SELLER:

_____
Member A

_____
Spouse of Member A

PURCHASER:

Purchaser B

By:_____
Name:_____
Title:_____

PARENT:

NewCo, Inc.

By:_____
Name:_____
Title:_____

ASSET PURCHASE AGREEMENT

This ASSET PURCHASE AGREEMENT (this "Agreement") is made and entered into as of this ____ day of _____ 2015, by and among Buyer, Inc., a Louisiana corporation ("Buyer"), Seller, Inc., a Louisiana corporation ("Seller"), and Person X and Person Y (each a "Stockholder" and collectively, the "Stockholders").

WITNESSETH:

WHEREAS, Seller is engaged in the business of selling widgets (the "Business");

WHEREAS, as of the date hereof, Stockholders are the sole stockholders of Seller;

WHEREAS, concurrently with the execution and delivery of this Agreement, Buyer and Stockholder are executing employment agreements in the forms attached hereto as Exhibit A (the "Employment Agreements"); and

WHEREAS, Buyer desires to purchase from Seller, and Seller desires to sell to Buyer, subject to the terms and conditions of this Agreement, all or substantially all of the assets of Seller.

NOW, THEREFORE, in consideration of the premises, mutual covenants and agreements contained herein, and for other good and valuable consideration, the parties hereby agree as follows:

ARTICLE I

SALE OF ASSETS

1.1 Assets To Be Sold. Subject to the terms and conditions contained in this Agreement, on the Closing Date (as hereinafter defined), Seller shall sell, convey, transfer, assign and deliver to Buyer, and Buyer shall acquire and accept from Seller all right, title and interest of Seller in and to Seller's assets other than the Excluded Assets (the "Acquired Assets"). The Acquired Assets include, but shall not be limited to, the following:

(a) All tangible personal property, including all furniture, fixtures, computer equipment, furnishings, leasehold improvements, equipment, facilities, machinery, vehicles, structures and any related capitalized items and other assets, including, without limitation, those assets enumerated and described in Schedule 1.1(a), as well as all manufacturer's warranties associated with such items;

(b) All inventories (whether raw materials, packaging, supplies, work-in-progress, finished goods, spare parts and tools) and deposits on inventory (collectively, "Inventory"), including, without limitation, those assets enumerated and described in Schedule 1.1(b);

(c) All Accounts Receivable and notes receivable related to the Business, including all vendor, dealers and customers and trade accounts receivable enumerated and described in Schedule 1.1(c);

(d) All of Seller's rights under each of the Contracts identified on Schedule 1.1(d) hereto (the "Assumed Contracts");

(e) All licenses, franchises, approvals, permits (including postal permits), consents, certificates, orders, trademarks, brand names, logos, copyrights, websites, domain names, social

media accounts and any other intellectual property and rights thereto, proprietary and technical information, know-how, trade secrets, and all authorizations issued by any Governmental Authority with respect to the operation of the Business, including, without limitation, the items listed on Schedule 1.1(e);

(f) All of Seller's rights in and to all computer software used in the operation of the Business which is installed on computers including, without limitation, all computer software listed on Schedule 1.1(f);

(g) All of Seller's intangible assets related to the Business, including Seller's goodwill related to the Business;

(h) All of Seller's prepaid assets related to the Business, including all prepaid property taxes and expenses, and all surety bonds, surety deposits, security deposits and post office deposits posted by or on behalf of Seller in connection with the operations of the Business, except for any prepaid insurance;

(i) Subject to Section 1.2(d), all business records of Seller of every kind including all advertising materials, customer lists, vendor and dealer lists, contractor and supplier lists, logs, government reports, employee information, books, records, ledgers, billing records and files, accounts receivable records, files, documents, correspondence, lists, plats, mats, architectural plans, drawings, specifications, creative materials (including artwork), advertising and promotional materials, studies, reports, engineering data, blue prints, schematics, correspondence with customers and suppliers, actual and prospective and all other printed or written materials relating to the Business, including all of its historical materials relating to the Business;

(j) All refunds and rebates owed to Seller, except for any refunds related to taxes, which shall remain the property of Seller;

(k) All judgments, Claims, causes of action, choses in action, rights of recovery, rights of set-off and rights of recoupment of Seller, except for any of the foregoing to the extent they relate to the Excluded Assets or Excluded Liabilities; and

(l) All other assets used in the operation of the Business, including all of the Business's telephone numbers, fax numbers, post office boxes and e-mail addresses, except for the Excluded Assets.

The conveyance, transfer, assignment and delivery of the Acquired Assets shall be made free and clear of all Liens, liabilities, obligations and encumbrances whatsoever, except for the Assumed Liabilities (as defined below). Subject to Section 5.2, all expenses of transfer and assignment of the Acquired Assets, including without limitation all applicable sales and use taxes and motor vehicle transfer fees, shall be borne fifty percent (50%) by Buyer and fifty percent (50%) by Seller.

1.2 Excluded Assets. There shall be excluded from the assets and properties to be conveyed, transferred, assigned and delivered to Buyer under this Agreement the following assets related to the Business (the "Excluded Assets"):

(a) Seller's cash funds and financial institution deposit accounts;

(b) All of Seller's employee benefit plans and programs;

(c) All of Seller's insurance policies and prepaid insurance;

(d) Seller's corporate books and ledgers;

(e) Seller's Tax Returns (as hereinafter defined) and Claims for tax refunds; and

(f) The items set forth on Schedule 1.2(f).

1.3 No Assumption of Liabilities of Seller. At the Closing, except as otherwise provided herein, Buyer shall assume only the following obligations and liabilities of Seller:

(a) Liabilities and obligations arising after the Closing pursuant to the Assumed Contracts set forth on Schedule 1.1(d) and related to the operation of the Business after the Closing;

(b) Any credit card Liability of Seller to the extent included in the calculation of Closing Working Capital;

(c) The Accounts Payable set forth on the Post-Closing Statement; and

(d) The non-tax expenses accrued in the normal course of business and set forth on the Post-Closing Statement ((a), (b), (c) and (d) together, the "Assumed Liabilities").

Buyer shall not assume or undertake to assume and shall have no responsibility for any other obligations or Liabilities of Seller of any kind, other than the Assumed Liabilities (collectively, the "Excluded Liabilities").

1.4 Purchase Price. At the Closing, Buyer shall:

(a) deliver (or cause to be delivered) to Seller cash (the "Estimated Purchase Price"), by wire transfer of immediately available funds to an account or accounts designated in writing by Seller and delivered to Buyer no fewer than three (3) Business Days prior to the anticipated Closing Date, in an aggregate amount equal to:

(i) $_____ ("Closing Date Purchase Price");

(ii) plus the Estimated Working Capital Overage (if any);

(iii) minus the sum of:

(1) the Estimated Closing Indebtedness;

(2) the Holdback Amount; and

(3) the Estimated Working Capital Underage (if any).

(b) pay (or cause to be paid) on behalf of Seller, all of the Funded Indebtedness in accordance with the Pay Off Letters.

The Estimated Purchase Price is being calculated pursuant to the estimates agreed to by Buyer, on the one hand, and Seller, on the other hand, at least three (3) Business Days prior to the anticipated Closing Date in a statement (the "Pre-Closing Statement") setting forth (A) such agreed estimate of Closing Working Capital (such estimate, the "Estimated Closing Working Capital") and the resulting estimate of

Working Capital Overage (the "Estimated Working Capital Overage") or Working Capital Underage (the "Estimated Working Capital Underage") (B) such agreed estimate of all Closing Indebtedness as of the Closing Date (such estimate, the "Estimated Closing Indebtedness"), including (1) the names of each Person to which such Closing Indebtedness to be repaid at the Closing is owed (each, a "Pay Off Lender"), (2) the amounts owed to each Pay Off Lender and (3) pay off letters in form and substance reasonably satisfactory to Buyer executed by all Pay Off Lenders (the "Pay Off Letters" and such Closing Indebtedness to be repaid at the Closing, the "Funded Indebtedness") and (C) the resulting calculation of the Estimated Purchase Price. The "Purchase Price" for purposes of this agreement shall be an amount equal to the sum of (i) the Estimated Purchase Price as recalculated following the Closing pursuant to Section 1.5 and (ii) the Holdback Amount.

1.5 Post-Closing Adjustments. The Purchase Price shall be determined on the basis of the post-Closing adjustments as set forth below in this Section 1.5 to reflect the difference (if any) between the amount of the Purchase Price as conclusively determined pursuant to Section 1.5(a) and the Estimated Purchase Price.

(a) Purchase Price Adjustment.

(i) Post-Closing Statement. As promptly as practicable after the Closing, but in no event later than sixty (60) days thereafter, Buyer shall prepare and deliver to Seller a statement (the "Post-Closing Statement") setting forth Buyer's determination of (A) the Closing Working Capital, and the resulting Working Capital Overage or Working Capital Underage, (B) the Closing Indebtedness, and (C) the resulting calculation of the Purchase Price determined in the same manner as the Estimated Purchase Price under Section 1.4(a), but using such determined Closing Working Capital and the resulting Working Capital Overage or Working Capital Underage and the determined Closing Indebtedness in lieu of the estimates used in Section 1.4(a), in each case determined in accordance with this Agreement and the Balance Sheet Rules, together with any supporting documentation for the Post-Closing Statement that Seller may reasonably request.

(ii) Dispute Resolution. Within thirty (30) days of the delivery of the Post-Closing Statement by Buyer to Seller, Seller may object to the Post-Closing Statement by notifying Buyer in writing of each objection and a reasonably detailed description of the basis therefor (but only on the basis that the Post-Closing Statement contained arithmetic errors or was not prepared in accordance with this Agreement and the Balance Sheet Rules). Any component of the Post-Closing Statement that is not subject to an objection by Seller within such period shall be conclusive and binding on the parties. The parties shall use reasonable efforts to resolve any objections by Seller within fifteen (15) days following Buyer's receipt of a notice thereof, and if they are unable to do so within such fifteen (15)-day period, within ten (10) Business Days of the end of such fifteen (15)-day period, Seller and Buyer shall submit any remaining disputes, and only such remaining disputes, to Accountants R'Us or, if such firm is not available for such assignment, such other accounting firm upon which Buyer, on the one hand, and Seller, on the other hand, shall reasonably agree (the "Accountants") for review and final resolution. Such resolution by the Accountants shall be within the range of dispute between Seller and Buyer and shall be set forth in a written report ("Accountants' Report") delivered by the Accountants to the parties hereto within thirty (30) days following the submission of such dispute to the Accountants. Such resolution by the Accountants shall be final and binding upon the parties hereto and any amounts due shall be paid in accordance with the terms of Section 1.5(b). The fees charged by the Accountants shall be borne fifty percent (50%) by Seller, on the one hand, and fifty percent (50%) Buyer, on the other hand.

(b) Settlement. If the Purchase Price, as conclusively determined pursuant to Section 1.5(a) or as determined by written agreement of Buyer and Seller, is:

(i) greater than the Estimated Purchase Price (any such excess, the "Seller Adjustment Amount"), then Buyer shall pay Seller the dollar amount of the Seller Adjustment Amount, by wire transfer of immediately available funds to an account or accounts designated by Seller in writing within three (3) Business Days;

(ii) less than the Estimated Purchase Price (any such shortfall, the "Buyer Adjustment Amount"), then the then remaining Adjustment Holdback Amount not used to satisfy obligations under Section 5.1(b) shall be used to satisfy the Buyer Adjustment Amount. If the Buyer Adjustment Amount exceeds the then remaining Adjustment Holdback Amount, then Buyer may, at its sole option, elect that (A) Seller and Stockholders promptly pay Buyer all or a portion of the dollar amount of the Buyer Adjustment Amount in excess of the then remaining Adjustment Holdback Amount (the "Excess Amount"), by wire transfer of immediately available funds to an account or accounts designated by Buyer in writing, (B) the remaining portion of the Holdback Amount be used in whole or in part to satisfy the Excess Amount, or (C) any amount payable to Seller or Stockholders by Buyer or its Affiliates under this Agreement ("Set-off Amount") be reduced in whole or in part to satisfy the Excess Amount.

(iii) equal to the Estimated Purchase Price, then no payment to Buyer or Seller shall be made pursuant to this Section 1.5.

The obligations of Seller and Stockholders under Section 1.5(b)(ii) shall be joint and several, except that as between Stockholders, each Stockholder shall only be responsible for his or her Pro Rata Share of such obligations.

1.6 Holdback Amount and Payment of Holdback Amount.

(a) At the Closing, Buyer shall hold back from the Closing Date Purchase Price the Holdback Amount to provide for the satisfaction of any liability of Seller or Stockholders to Buyer under Sections 1.5, 5.1 or 5.3 or any other provision of this Agreement.

(b) Promptly following the date that is the first (1^{st}) anniversary of the Closing Date, Buyer shall promptly pay Seller the portion of the Holdback Amount that has not been used in satisfaction of any liability of Seller or Stockholders to Buyer under this Agreement, by wire transfer of immediately available funds to an account or accounts designated by Seller in writing; provided, that, the amount to be so paid to Seller shall be reduced by (i) any amounts due and payable, but not yet paid, to Buyer or any of its Affiliates by Seller or Stockholders pursuant to this Agreement, (ii) the amount of any Claims for indemnification pursuant to Section 5.3 that have not been finally resolved and (iii) the amount by which the Estimated Purchase Price exceeds the Purchase Price determined by Buyer pursuant to Section 1.5(a)(i) (the "Claimed Buyer Adjustment Amount"), if the Purchase Price has not, as of such first anniversary, been conclusively determined pursuant to Section 1.5(a) (the sum of the foregoing clauses (i), (ii) and (iii), the "Payment Reduction"). At any such time as (I) any pending Claim for indemnification pursuant to Section 5.3 is resolved or (II) if the Claimed Buyer Adjustment Amount exceeds the Buyer Adjustment Amount as conclusively determined pursuant to Section 1.5(a), then the Payment Reduction shall be recalculated and Buyer shall promptly pay to Seller the amount by which the then remaining Holdback Amount exceeds the amount of the recalculated Payment Reduction.

1.7 Reserved.

1.8 The Closing. The execution of the closing documents provided for in this Agreement shall take place at the offices of the Seller on the date hereof (the "Closing" or the "Closing Date"). The Closing may be effectuated by the exchange of documents using facsimile or scanned signature pages electronically exchanged. The Closing shall be effective as of 12:01 a.m. central time on the Closing Date.

1.9 Seller Deliverables. At the Closing, Seller shall execute and/or deliver to Buyer:

(a) An appropriate bill of sale, assignment and assumption agreement ("Bill of Sale and Assignment"), in the form attached hereto as Exhibit C, and such other documents conveying, transferring and assigning to Buyer all of the Acquired Assets free and clear of any security interest, Lien, or encumbrance, in form and substance satisfactory to Buyer and its counsel, each duly executed by Seller, Stockholders or their respective Affiliates, as applicable;

(b) Where appropriate, certificates of title or separate instruments of sale, assignment or transfer in form suitable for filing and recording with the appropriate office or agency, for various items of the property where the same are necessary or desirable in order to vest or evidence title thereto in Buyer;

(c) All required consents (including all consents required as set forth in Schedule 2.10), in form and substance reasonably satisfactory to Buyer, to assignment of any Contract or any other document or agreement to be assigned to Buyer pursuant to Section 1.1(d) of this Agreement which is not by its terms assignable without such consent.

(d) A fully executed lease agreement ("Lease") for the property located at 100 Smith Street, New Orleans, LA, in the form attached hereto as Exhibit D, duly executed by Buyer and the landlord party thereto;

(e) The Employment Agreements, duly executed by Stockholders;

(f) Reserved;

(g) Written evidence in form and substance acceptable to Buyer of the release of all Liens, liabilities, obligations and encumbrances relating to the Acquired Assets;

(h) Duly executed Pay Off Letters;

(i) Written evidence in form and substance acceptable to Buyer of the termination of all Affiliate Transactions listed on Schedule 2.11;

(j) A certificate duly executed by Seller certifying that Seller is not a foreign person within the meaning of section 1445(f)(3) of the Code, which certificate shall set forth all information required by, and otherwise be executed in accordance with, Treasury Regulation section 1.1445-2(b)(2); and

(k) Any other documents required to be delivered at Closing as provided in this Agreement or as reasonably requested by Buyer.

1.10 Buyer Deliverables. At the Closing, Buyer shall execute and/or deliver to Seller:

(a) The Estimated Purchase Price;

(b) The Bill of Sale and Assignment and other documents referred to in Section 1.9(a), each duly executed by Buyer;

(c) The Lease, duly executed by Buyer;

(d) The Employment Agreements, duly executed by Buyer; and

(e) Any other documents required to be delivered at Closing as provided in this Agreement or as reasonably requested by Seller.

1.11 Further Assurances. Following the Closing, Seller and Stockholders shall also execute and deliver without expense to Buyer such further instruments of conveyance, sale, assignment or transfer and shall take or cause to be taken such other or further actions as Buyer may reasonably request in order to vest, confirm or evidence in Buyer title to all or any part of the Acquired Assets. Following the Closing, Buyer shall also execute and deliver without expense to Seller such further instruments of conveyance, sale, assignment or transfer and shall take or cause to be taken such other or further actions as Seller may reasonably request in order to vest, confirm or evidence in Buyer title to all or any part of the Acquired Assets.

1.12 "Bulk Sales" Law. To the fullest extent permitted by applicable Law, the parties hereby waive compliance with the provisions of any "bulk sales" Law or similar Law in effect in any applicable jurisdiction as of Closing in respect of the transactions contemplated by this Agreement.

1.13 Purchase Price Allocation. The Purchase Price, as adjusted in accordance with the terms of this Agreement (and any other amounts treated as Purchase Price for U.S. federal, state and local income tax purposes), shall be allocated among the Acquired Assets and the covenants under Section 4.1 hereof, in the manner set forth on Schedule 1.13. Seller and Buyer shall each file Form 8594 as required under Section 1060 of the Code in a manner consistent with such allocation.

1.14 Nonassignable Assets.

(a) Notwithstanding any other provision of this Agreement, with respect to any Acquired Asset which by its terms or by any Law is not assignable or transferable without a consent or approval of any Governmental Authority or other third party (a "Nonassignable Asset"), such assignment and transfer shall not be made unless and until such consent or approval shall have been obtained or condition satisfied or Buyer shall have waived in writing the requirements of this Section 1.14.

(b) Seller shall use its best and commercially reasonable efforts to obtain as expeditiously as possible any consent or approval that may be required and to satisfy a condition necessary to the assignment or transfer of a Nonassignable Asset to Buyer. All filing fees and payments to Persons required to obtain any such consent or approval or satisfying any such condition, including any filing fees incurred in connection with the transfer or assignment of any permit, shall be borne by Seller.

(c) Unless and until any such consent or approval that may be required is obtained or condition satisfied, to the extent permitted by applicable Law and by the terms of the applicable Nonassignable Asset, Seller and Buyer will cooperate and use commercially reasonable efforts to establish an arrangement reasonably satisfactory to Buyer under which Buyer would obtain the Claims, rights and benefits and assume the corresponding liabilities under such Nonassignable Asset (including by means of any subcontracting, sublicensing or subleasing arrangement) or under which Seller would enforce for the

benefit of Buyer, in respect of such Nonassignable Asset, any and all Claims, rights and benefits of Seller against any third party that is party thereto.

(d) If and when the applicable consents or approvals, the absence of which caused the deferral of transfer of any Nonassignable Asset pursuant to this Section 1.14, are obtained, the transfer of the applicable Nonassignable Asset to Buyer shall automatically and without further action be effected in accordance with the terms of this Agreement.

1.15 Withholding Rights. Buyer shall be entitled to deduct and withhold from the consideration otherwise payable pursuant to this Agreement such amounts as Buyer is required to deduct and withhold with respect to the making of such payment under the Code, or any provision of state, local or foreign tax law; provided, that Buyer and Seller shall, to the extent reasonably possible, work together to avoid or reduce any such withholding obligation. To the extent that such amounts are so withheld by Buyer and paid over to the appropriate taxing authority, such withheld and deducted amounts will be treated, for all purposes of this Agreement, as having been paid to Seller.

ARTICLE II

REPRESENTATIONS AND WARRANTIES OF SELLER AND STOCKHOLDERS

Seller and Stockholders jointly and severally (except that as between Stockholders, each Stockholder shall only be responsible for his Pro Rata Share) represent and warrant to Buyer as follows:

2.1 Organization, Power and Authority. Seller is duly organized, validly existing, and in good standing under the Laws of the State of Louisiana and has all necessary powers to own its properties and operate the Business. Except as set forth on Schedule 2.1, neither the ownership of its properties nor the nature of the Business requires Seller to be qualified to do business as a foreign corporation in any other jurisdiction. Seller and Stockholders, as applicable, have full power, legal capacity and authority to enter into and perform this Agreement and each of the other agreements contemplated by this Agreement (collectively, the "Transaction Documents") and the transactions contemplated hereby and thereby.

2.2 Authorization of Agreement. This Agreement, the other Transaction Documents and each of the transactions contemplated hereby and thereby have been duly authorized by all corporate, company, shareholder or individual actions necessary to authorize Seller and Stockholders to enter into this Agreement and the other Transaction Documents and to enable Seller and Stockholders to carry out their terms, and this Agreement and the other Transaction Documents are binding on Seller and Stockholders and enforceable in accordance with their terms. Neither the execution nor the delivery of this Agreement or the other Transaction Documents nor the consummation of the transactions contemplated hereby or thereby is an event which, of itself or with the giving of notice or passage of time or both, constitutes the violation of any provision of, or results in the breach of or accelerates or permits the acceleration of the performance required by the term of any license or any applicable Law of any Governmental Authority having jurisdiction, or any agreement, indenture, mortgage, lien, security agreement or lease to which Seller and/or Stockholders are a party, or by which Seller and/or Stockholders may be bound, or of any judgment, decree, writ, injunction, order or award of any arbitration panel, court or Governmental Authority, applicable to Seller and/or Stockholders, or results in the creation of any Claim, lien, charge or encumbrance upon any of the property or assets of Seller and/or Stockholders, or terminates or cancels or results in the termination or cancellation of any such agreement. No notice to or consent, approval or authorization of, or designation, declaration or filing with, any Governmental Authority or other Person is required by Seller with respect to Seller's execution or delivery of this Agreement and the other Transaction Documents to which Seller is or will be a party or the consummation of the transactions contemplated herein and therein.

2.3 Ownership. Stockholders are the owners, beneficially and of record, of all the issued and outstanding equity interests in Seller, free and clear of all options, warrants, rights of refusal, liens, security interests, encumbrances, preemptive rights, Claims and charges ("Liens").

2.4 Litigation; Product Liability. Except as set forth on Schedule 2.4, there are no pending or threatened actions before or by any Governmental Authority or by any other Person against Seller or relating to the Business. Seller is not subject to any outstanding order that prohibits or otherwise restricts the ability of Seller to consummate fully the transactions contemplated herein or to operate the Business. There are no pending or threatened, actions with respect to any breach of any express or implied product warranty or any product liability or other similar Claim (including Claims respecting damage to Persons or property) with respect to any product manufactured or sold by Seller, other than standard warranty obligations (to replace, repair or refund) made by Seller in the ordinary course of business. There has been no product recall in the past three years respecting any product sold or distributed by Seller.

2.5 Good Title. Except for the Liens set forth on Schedule 2.5, Seller holds good and valid title to the Acquired Assets free and clear of all Liens, and, no other Person or entity has any ownership interest whatsoever (legal or equitable) in any of the Acquired Assets. Except as set forth on Schedule 2.5, Seller has not signed any presently effective security agreement authorizing any secured party thereunder to file any mortgages, financing statements or similar documents that name Seller as debtor or that otherwise cover any of the Acquired Assets. The execution, delivery and performance of this Agreement and the other Transaction Documents by Seller will not result in the creation or imposition of any Lien on any of the Acquired Assets. All Liens set forth in Schedule 2.5 have been released, or will be released, on or prior to the Closing Date.

2.6 Condition of Assets. All tangible assets included in the Acquired Assets, including all of the assets set forth on Schedule 1.1(a) are in good repair, working order and condition in all material respect, free from any known defects and are suitable and usable for the conduct of the Business in the same manner as conducted by Seller prior to the Closing.

2.7 Assets Used in Business; Infringement.

(a) The Acquired Assets constitute all of the assets (real, intangible or personal), properties, licenses, rights and agreements which are used in the operation of the Business and include all assets, properties, licenses, rights and agreements necessary to conduct the Business in substantially the same manner as it has been historically conducted and all such assets are included in the Acquired Assets except for those specifically excluded pursuant to Section 1.2 of this Agreement. The Acquired Assets (other than the Excluded Assets) are all of the assets necessary to permit Buyer and its Affiliates to conduct the Business substantially as conducted by Seller as a going concern prior to Closing.

(b) Seller owns or is licensed to use pursuant to a valid contract or otherwise has the exclusive right to use, practice, sell, license and dispose of, without restrictions, all copyrights, patents, trade secrets, trademarks, inventions, know-how, databases, customer lists, brand names, logos, designs, software, domain names, websites, social media accounts and any other intellectual proprietary rights (collectively, the "Intellectual Property") that are used or held for use in connection with the Business free and clear of any Liens ("Seller Intellectual Property"). Seller has taken all necessary actions to maintain and protect each item of Seller Intellectual Property.

(c) The conduct of the Business does not infringe or otherwise violate any Intellectual Property or other proprietary rights of any other Person, and there is no Claim pending or threatened alleging any such infringement or violation or challenging Seller's rights in or to any Seller Intellectual Property and there is no existing fact or circumstance that would be reasonably expected to give

rise to any such Claim. No Person is infringing or otherwise violating, in any material respect, any Seller Intellectual Property owned by Seller or any rights of Seller in any Contract pursuant to which Seller uses any Intellectual Property in connection with the Business. Upon the Closing, Buyer will have the right to use all Intellectual Property used or held for use in connection with the Business on identical terms and conditions as Seller enjoyed immediately prior to the Closing.

2.8 Financial Statements. Seller has delivered to Buyer the audited balance sheets of Seller as of December 31, 2013 and December 31, 2014 and the internally prepared balance sheet as of August 30, 2015 and the related statements of income and cash flows for the fiscal years and the eight (8) months then ending (the "Financial Statements"). The Financial Statements fairly and accurately present in accordance with GAAP the financial condition and the results of operations of Seller as of their respective date and for the periods referred to in such Financial Statements and are consistent with the books and records of Seller (except that the Interim Financial Statements do not contain footnotes and are subject to normal year-end adjustments) and have been prepared in the ordinary course of business in accordance with past practices consistently applied throughout the periods indicated. Seller has not incurred any liabilities (contingent or otherwise) outside of the ordinary course of business that are not reflected in the Financial Statements.

2.9 Taxes. Seller and its predecessors have filed or will file with the appropriate Governmental Authorities, all federal, state and local tax returns (including income, sales and use, property, and payroll tax returns and information returns) and reports required to be filed by Seller for all taxable periods ending on or before the Closing Date (collectively, "Tax Returns"). All Tax Returns of Seller are true, correct and complete in all respects. Seller has paid or will pay all such taxes, related interest and penalties shown on such returns or otherwise assessed and levied, to the extent that such taxes have or will become due. Neither federal or state audits or examinations by taxing authorities are pending or threatened in writing with respect to taxes due from and with respect to Seller, nor have any such audits or examinations of any Tax Returns been conducted within the previous six (6) years of Seller. Seller has not waived any statute of limitations for any tax year pursuant to the request of the Internal Revenue Service or any other taxing authority. There are no Liens for federal, state or local taxes upon any Acquired Assets and the Acquired Assets will be conveyed to Buyer free and clear of all such Liens. No Governmental Authority has given written notice of any intention to assert any deficiency or claim for additional Taxes against Seller, and no claim in writing has been made by any Governmental Authority in a jurisdiction where Seller does not file Tax Returns that it is or may be subject to taxation by that jurisdiction, and all deficiencies for Taxes asserted or assessed in writing against Seller have been fully and timely paid, settled or properly reflected in the Financial Statements.

2.10 Contracts and Commitments. Schedule 2.10 is a complete list, as of the date of this Agreement, with respect to (i) all of Seller's Contracts relating to the Acquired Assets, including the Assumed Contracts, and (ii) all of Seller's Contracts relating to Indebtedness (including guarantees). True and complete copies of the written Contracts so listed and summary statements with respect to oral Contracts, if any, have been delivered to Buyer prior to the execution of this Agreement. Except as disclosed on Schedule 2.10, Seller has in all material respects performed all obligations required to be performed by it to date and is not in default in any material respects under any Contract included on Schedule 2.10. Each Contract listed on Schedule 2.10 is a valid and binding agreement of Seller and the other parties thereto, is in full force and effect and is enforceable against the respective parties thereto except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws affecting the rights of creditors. Neither Seller or any other party to a Contract listed on Schedule 2.10 is in default (with or without the lapse of time or the giving of notice, or both) or breach in any material respect under the terms thereof. Seller has not received any notice of intention of any party to terminate or amend in any material respect any Contracts. Except as disclosed on Schedule 2.10, the execution, delivery and

performance by Seller of this Agreement and such other agreements, instruments and documents delivered in connection hereto, and the consummation of the transactions contemplated hereby and thereby, do not and will not require any consent of, approval by, notice to, waiver from, or other action by any Person under, or give rise to any right of termination, amendment, modification, cancellation or acceleration of any right or obligation of Seller, or to a loss of any benefit to which Seller is entitled under, in any material respect, any provision of any Contract binding upon or held by Seller, or by which any of the Acquired Assets may be bound or affected.

2.11 Affiliate Transactions. Except as set forth on Schedule 2.11 (the transactions or arrangements set forth on such Schedule 2.11, collectively, "Affiliate Transactions"), none of (i) Seller, (ii) any of its Affiliates, (iii) any officer or director of Seller, (iv) Stockholders and (iv) any immediate family member or Affiliate of any of the foregoing Persons is a party to or the beneficiary of (by trust or otherwise) any Contract with Seller or has any interest, directly or indirectly, in any of the Acquired Assets or any property used by Seller.

2.12 Leased Real Property; Compliance; Zoning.

(a) Seller does not own any real property. Schedule 2.12 sets forth the address and description of each leased real property occupied by Seller in connection with the operation of the Business (the "Leased Real Property"). Seller has a good and valid leasehold interest in each Leased Real Property, free and clear of any Liens. Seller has heretofore delivered to, or has caused to be delivered to, Buyer true, correct and complete copies of all existing real property leases and subleasess (including each amendment, supplement and other modification thereto) related to the Leased Real Property (collectively, the "Existing Real Property Leases") and each Existing Real Property Lease constitutes the entire agreement between Seller and each landlord or sublandlord with respect to the applicable property. Each Existing Real Property Lease is a valid and binding agreement of Seller and the other parties thereto, is in full force and effect and is enforceable against the respective parties thereto except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws affecting the rights of creditors. Neither Seller nor any other party to an Existing Real Property Lease is in default (with or without the lapse of time or the giving of notice, or both) or breach in any material respect under the terms thereof. Except as contemplated in this Agreement, Seller has not received any notice of the intention of any party to terminate or amend in any material respect any Existing Real Property Lease. Seller is in peaceful and undisturbed possession of each Leased Real Property. Except as disclosed in the Existing Real Property Leases, Seller has not exercised or given any notice of exercise, received any notice of exercise by a lessor or landlord of, nor has any lessor or landlord exercised, any option, right of first refusal or right of first offer contained in any such Existing Real Property Lease, including any such option or right pertaining to purchase, expansion, renewal, extension, termination or relocation. Seller is not a sublessor or grantor under any sublease or other instrument granting to any other Person any right to the possession, lease, occupancy or enjoyment of any real property.

(b) All of the land, buildings, structures and other improvements used by Seller in the conduct of the Business are included in the Leased Real Property. There are no parties (other than Seller) in possession of any Leased Real Property. The buildings, structures, fixtures and other improvements on any Leased Real Property are in all material aspects in good operating condition, ordinary wear and tear excepted, and are adequate and suitable for the purposes for which they are currently being used or intended to be used.

(c) There does not exist any violation of any material covenant, condition, or restriction of record with respect to any Leased Real Property or any portion thereof and all Leased Real Property is in compliance in all material respects with all zoning, subdivision, health and safety and other land use Laws.

2.13 Environmental Laws.

(a) Except as disclosed on Schedule 2.13, Seller is and has been in compliance with all applicable Environmental Laws.

(b) Seller has not been alleged to be in violation of, or liable under, any Environmental Law, nor has Seller ever been subject to any administrative or judicial proceeding pursuant to such Laws or regulations either now or at any time during the past five (5) years.

(c) There has been no release or threatened release of any Hazardous Materials at, on, under or from any property currently or formerly owned, leased or occupied by Seller or any other location that could form the basis for the assertion of a Claim against Seller.

(d) There are no facts or circumstances that exist that could form the basis for the assertion of a Claim against Seller relating to environmental matters.

2.14 Employee Relations.

(a) No Union. Seller's employees are not unionized nor has there been in the past three (3) years, any organized effort or demand for recognition or certification or attempt to organize employees of Seller by any labor organization. There is no labor strike, dispute, request for representation, slow down, or stoppage, pending or threatened against Seller.

(b) Employee Claims. No present or former employee of Seller has any Claim against Seller (whether under federal, state or local Law) under any employment agreement, or otherwise, including on account of or for (i) breach of contract, (ii) unlawful termination, (iii) overtime pay, other than overtime pay for the current payroll period, (iv) wages or salary for any period other than the current payroll period, (v) vacation or time off (or pay in lieu thereof), or (vi) any violation of any Law relating to minimum wages or maximum hours of work. Seller is in compliance with all applicable Laws with respect to the employment of labor, employment practices and terms and conditions of employment, and wages and hours.

(c) Discrimination, Occupational Safety and Other Laws. No Persons (including Governmental Authorities of any kind) have any Claim, or any basis for any action or proceeding, against Seller arising out of any Law relating to discrimination in employment or employment practices or occupational safety and health standards, including, but not limited to, the Occupational Safety and Health Act and Title VII of the Civil Rights Act of 1964, or the Age Discrimination in Employment Act of 1967.

(d) Schedule of Employees. Schedule 2.14(d) sets forth the names, titles and base salary or hourly wage and all other compensation arrangements of all employees of Seller as of the date of this Agreement and the amount of any raise received by an employee on or after June 30, 2015. Except as set forth on Schedule 2.14(d), (i) no payments will be made to any employees by Seller or Stockholders in connection with the transaction or following the Closing and (ii) in the immediately preceding twelve (12) months, no administrative or key employee of Seller has notified Seller of his or her intent to resign employment with Seller (for clarification purposes, the rank and file employees of Seller are excluded from this representation and warranty).

2.15 Employee Benefit Plans.

(a) Neither Buyer nor its Affiliates will have any liability respecting any Employee Benefit Plan of Seller or any of its Affiliates under ERISA.

(b) Schedule 2.15 sets forth a true, complete and correct list of each material pension, profit-sharing, savings, retirement, employment, consulting, severance pay, termination, executive compensation, incentive compensation, deferred compensation, bonus, stock purchase, stock option, phantom stock, or other equity-based compensation, change-in-control, retention, salary continuation, vacation, sick leave, disability, death benefit, group insurance, hospitalization, medical, dental, life (including all individual life insurance policies as to which Seller is the owner, the beneficiary, or both), Code Section 125 "cafeteria" or "flexible" benefit, employee loan, educational assistance, or fringe benefit plan, program, policy, practice or Contract, whether written or oral, formal or informal, including each "employee benefit plan" (as defined in Section 3(3) of ERISA), and each other material employee benefit plan, program, policy, practice, or Contract, whether or not subject to ERISA, that Seller maintains or sponsors or has any obligation to maintain or sponsor, or to which Seller contributes or has any obligation to contribute (or with respect to which Seller has any direct or indirect liability, contingent or otherwise) (each, an "Employee Benefits Plan"). With respect to each Employee Benefits Plan, Seller has delivered or made available to Buyer true, complete and correct copies of the plan documents and summary plan descriptions or written summary of material terms of any unwritten plan.

(c) Each Employee Benefits Plan has been established and administered in all material respects in accordance with its terms and the applicable provisions of ERISA, the Code and all other applicable Laws.

(d) None of the Employee Benefits Plans is subject to Title IV of ERISA. Neither Seller nor any of its ERISA Affiliates has incurred any current or projected liability in respect of post-employment health, medical or life insurance benefits for any current or former employees of Seller, except as may be required under the Consolidated Omnibus Budget Reconciliation Act of 1986, and at the expense of the employee or former employee. Neither Seller nor any of its ERISA Affiliates contributes to or has in the past six (6) years sponsored, maintained, contributed to or had any liability in respect of any defined benefit pension plan (as defined in Section 3(35) of ERISA) or plan subject to Section 412 of the Code or Section 302 of ERISA. No Employee Benefits Plan is a "multiemployer plan" within the meaning of Section 4001(a)(3) of ERISA and neither Seller nor any of its ERISA Affiliates has at any time sponsored or contributed to, or had any liability in respect of, any such multiemployer plan.

2.16 Customers and Suppliers. Schedule 2.16 sets forth the top 20 commercial customers and top 20 suppliers (by dollar amount of purchases) for the seven (7) month period ended July 31, 2015. Except as otherwise set forth on Schedule 2.16, Seller continues to transact business with all of the commercial customers and suppliers set forth on Schedule 2.16, none of the commercial customers or suppliers set forth on Schedule 2.16 has materially changed the terms and conditions by which they conduct business with Seller, and none of the commercial customers or suppliers set forth on Schedule 2.16 has indicated to Seller that it plans to do so. Buyer acknowledges that the customers and suppliers of Seller may change each year depending upon the activities of Seller, its customers and its suppliers in any year.

2.17 Compliance with Laws; Licenses. (a) Seller has complied with and is in present compliance with, all Laws applicable to its Business, properties and personnel. Seller has not received notice from any applicable Governmental Authority of any alleged violation of any such Laws, and there is no basis existing for a violation thereof which may occur or be asserted in the future; and (b) Seller is the sole holder of all valid business licenses and business permits (including postal permits) issued by Governmental Authorities with respect to the ownership or operation of the Business, all of which are listed on Schedule 1.1(e) and which together permit the operation of the Business as heretofore conducted. Seller holds all licenses and permits required to operate the Business. Each license or permit has been issued to Seller without condition, is now in full force and effect, and no action or proceeding is pending or threatened which might result in the revocation, cancellation, limitation, modification, non-renewal or suspension thereof and no license is or has been impaired by any act or omission of Seller or any of its officers,

directors, representatives or agents. Seller's operations of the Business and any associated auxiliary facility are consistent with such licenses and permits. All such licenses and permits are being assigned to Buyer as of the Closing Date and all required third party consents are set forth on Schedule 1.1(e) and have been obtained prior to the Closing.

2.18 Brokers or Finders. Except as set forth on Schedule 2.18, which fees will be paid solely by Seller or Stockholders, there are no, and will be no, claims for brokerage commissions, finder's fees or similar compensation in connection with the transactions contemplated by this Agreement based on any arrangement or agreement made by Seller.

2.19 Reserved.

2.20 Operation of the Business. Since January 1, 2015, Seller has managed and operated the Acquired Assets and the Business only in the ordinary course.

2.21 Absence of Certain Changes or Events. Since January 1, 2015, there has not been any material adverse change, nor any event or occurrence which is reasonably likely to result in a material adverse change, in the Business operations, properties, assets or condition of the Business, taken as a whole.

2.22 Inventory. Except as disclosed on Schedule 2.8(a) or Schedule 2.22, all Inventory on Schedule 1.1(b) has been valued in accordance with GAAP, is suitable for the uses for which such Inventory is intended, has been recorded on the applicable Seller's books and records in amounts not in excess of the lesser of the actual cost paid by Seller for such items or the market value thereof, consists solely of Inventory of the kind and quality regularly purchased, produced, used and sold in the ordinary course of business of Seller, is good and merchantable and readily saleable at prices customarily charged by Seller in the ordinary course of business consistent with past practices, and is in quantities that are usable or saleable in the ordinary course of business consistent with past practices and are free of any material defects. Schedule 1.1(b) completely and accurately describes, quantifies and identifies the book value and the actual cost of all Inventory held by Seller as of July 31, 2015]. Seller has no liabilities (including repurchase obligations) with respect to the return of Inventory, except for the rights of any purchaser of Inventory to return damaged goods and materials or goods and materials that do not conform with the purchase orders with respect thereto.

2.23 Accounts Receivable. Except as set forth on Schedule 2.8(a) or Schedule 2.23, all of the outstanding accounts receivable shown on Schedule 1.1(c) and the Doubtful Account Allowance have been valued in accordance with GAAP and outstanding accounts receivable shown on Schedule 1.1(c) represent, as of the respective dates thereof, valid accounts receivable arising from sales actually made or services actually performed, in each case, in the ordinary course of business consistent with past practice. Seller has not canceled, or agreed to cancel, in whole or in part, any accounts receivable except in the ordinary course of business consistent with past practice.

2.24 Warranties. Since January 1, 2013, to the Knowledge of Seller, all products sold or delivered by Seller have been in conformity, in all material respects, with all applicable contractual commitments and all express and implied warranties. Since January 1, 2013, Seller has not made any warranties or provided for liability limitations that are inconsistent or in conflict with the terms of any Contracts with material suppliers. Except as set forth on Schedule 2.24, since January 1, 2013, Seller has not been notified of any claims for, and, to the Knowledge of Seller, there are no threatened claims for, any extraordinary product returns, warranty obligations or product services relating to Seller's products or services, and there have been no product recalls, withdrawals or seizures with respect to any products sold or delivered by Seller.

2.25 Documentation. All records and documentation attached to this Agreement are true, complete and correct as of the date to which such records or documentation pertain, and the identity and description of Seller and the Acquired Assets are true, complete and correct.

2.26 Full Disclosure. This Agreement does not contain any untrue statement of a material fact or omit to state any material fact required to be stated or necessary to make the statements made herein not misleading.

ARTICLE III

REPRESENTATIONS AND WARRANTIES OF BUYER

Buyer represents and warrants to Seller as follows:

3.1 Organization, Power and Authority. Buyer is a corporation duly incorporated, validly existing and in good standing under the Laws of the State of Louisiana, is duly qualified to conduct business in the State of Louisiana, and has full power and authority to enter into this Agreement and other the Transaction Documents and consummate the transactions contemplated hereby and thereby.

3.2 Authorization of Agreement. This Agreement and each of the Transaction Documents have been duly authorized by all necessary company action of Buyer. Neither the execution or delivery of this Agreement or the Transaction Documents nor the consummation of the transactions contemplated herein and therein is an event which, of itself or with the giving of notice or passage of time or both, constitutes the violation of any provision of, or results in the breach of or accelerates or permits the acceleration of the performance required by the term of any license or any applicable Law of any Governmental Authority having jurisdiction, the Certificate of Incorporation and the Shareholders' Agreement of Buyer (as amended), or any agreement, indenture, mortgage, lien, security agreement or lease to which Buyer is a party, or of any judgment, decree, writ, injunction, order or award of any arbitration panel, court or other Governmental Authority, applicable to Buyer, or results in the creation of any Claim, lien, charge or encumbrance upon any of the property or assets of Buyer, or terminates or cancels or results in the termination or cancellation of any such agreement. No notice to or consent, approval or authorization of, or designation, declaration or filing with, any Governmental Authority or other Person is required by Buyer with respect to Buyer's execution or delivery of this Agreement and the other Transaction Documents to which Buyer is or will be a party or the consummation of the transactions contemplated hereby and thereby.

3.3 Brokers or Finders. There are no, and will be no, claims for brokerage commissions, finder's fees or similar compensation in connection with the transactions contemplated by this Agreement based on any arrangement or agreement made by Buyer or any of its Affiliates.

3.4 Lawsuits. There is no suit, action, arbitration, administrative or other proceeding pending or threatened affecting the ability of Buyer to enter into this Agreement and the other Transaction Documents, to consummate the transactions described herein and therein, or fulfill the obligations set forth herein and therein.

3.5 No Current Obligation to Sell the Business. As of the date hereof, neither Buyer nor any Affiliate of Buyer is subject to a binding commitment, whether oral of written, to sell the Business.

3.6 Independent Investigation. Buyer has conducted its own independent investigation, review and analysis of the Acquired Assets and acknowledges that Buyer has been provided adequate access to the personnel, properties, assets, premises, books and records, and other documents and

data of the Seller for such purpose. Buyer acknowledges and agrees that: (i) in making its decision to enter into this Agreement and to consummate the transactions contemplated herein, Buyer has relied solely on its own investigation and the representations and warranties of the Seller contained herein; and (ii) neither Seller or the Stockholders has made any representation or warranty except as expressly set forth in this Agreement.

ARTICLE IV

COVENANTS OF SELLER AND STOCKHOLDERS

4.1 Covenant Not to Compete; Confidentiality. In consideration of the promises herein contained and in consideration of the payments and other consideration to be provided to Seller (which is, ultimately, wholly owned by Stockholders) as set forth in this Agreement, the Covered Persons (as defined below) do hereby agree for the benefit of Buyer as follows:

(a) Restrictive Covenant. Each Covered Person shall not, directly or indirectly, engage in the Business and shall not directly or indirectly, own, manage, operate, control, be employed by, be a consultant to, participate in or have a financial interest in, or be connected in any manner (including as an employee, consultant, officer, director, owner or lender) with the ownership, management, operation or conduct of any entity engaged in the Business or any similar Business during the Restricted Period, as set forth in this Agreement, anywhere within the Business Territory. In addition, during the Restricted Period, each Covered Person shall not:

(i) divert, take away, solicit, attempt to solicit or accept business from any individual, firm, partnership or other entity within the Business Territory which is then or has been within the preceding twelve (12) month period a client, customer or account of Seller or Buyer or any of its Affiliates; or

(ii) solicit, attempt to solicit, induce for employment, hire, employ, train or supervise any Person who is then or has been employed during the preceding twelve (12) month period by Seller or Buyer or any of its Affiliates, provided, however, that the foregoing will not prevent Seller from conducting any general advertisements or internet solicitations for employment, not specifically targeted at such Persons, directly or through any agent (including placement and recruiting agencies).

Nothing in this Agreement shall, however, prohibit Stockholders from being employed by Buyer or any of its Affiliates.

"Covered Person" means Seller and each Stockholder. "Restricted Period" means (i) in the case of each of Seller and each Stockholder, a period of two (2) years following the Closing Date. "Business Territory" means the counties in the State of Mississippi and the parishes in the State of Louisiana set forth on Exhibit E attached hereto. Each of the covenants of the parties to this Agreement contained in this Section 4.1(a) shall be deemed and shall be construed as a separate and independent covenant.

(b) Confidentiality. From and after the Closing, each Covered Person agrees to, and agrees to cause each of such Person's members, partners, equityholders, Affiliates, directors, officers, employees, counsel, accountants, financial advisors, auditors, consultants or other representatives to keep confidential any and all information or documents relating to Seller, Buyer, Buyer's Affiliates or any of their respective operations or business, including "know how," financial information, trade secrets, recipes and formulas, lease or construction terms, consultant contracts, customer lists, supplier lists, pricing policies, operational methods, marketing or franchising plans or strategies, product development techniques or plans, business acquisition plans, new personnel acquisition plans, training materials, designs and design

projects and other business affairs relating to the Company, and shall not disclose such information or documents to any Person or use such information or documents in any manner without the prior written consent of Buyer; provided, that the foregoing shall not include any documents or information that are or become publicly available other than by reason of a violation of this clause or any other confidentiality obligations of a Covered Person.

(c) Acknowledgment. Each Covered Person acknowledges that the territory of the Business and Buyer is the Business Territory set forth herein. Each Covered Person further acknowledges that the restrictions contained in this paragraph are reasonable, that damages in the event of breach will be difficult to ascertain, and that Buyer and any Affiliate, successor or assign of Buyer, in addition to any other remedies or rights which it may have, shall be entitled to specific performance of the rights set forth in this paragraph or injunctive relief against Seller or Stockholders for any breach without the requirement of posting any bond or security. Each Covered Person agrees that the non-compete covenant is ancillary to an otherwise enforceable agreement, including the confidentiality covenant and the payment provision in Section 1.4 of this Agreement.

(d) Attorney's Fees and Court Costs. If any legal action is instituted to enforce the provisions of this Section 4.1, the party prevailing pursuant to a final, non-appealable judgment of a court of competent jurisdiction shall be entitled to receive reasonable and documented attorneys' fees and court costs.

(e) Severability. Should any part or provision contained in this Section 4.1 be rendered or declared invalid by reason of any existing or any subsequently enacted legislation or by any decree of a court of competent jurisdiction, the remaining provisions shall nevertheless remain in full force and effect to the maximum extent permitted by Law. Any court having power to make such an adjudication is further authorized to modify any provisions hereof which may be deemed unduly restrictive to the end that such restrictions, as modified, shall be reasonable and valid to the fullest extent permitted by Law.

4.2 Other Covenants.

(a) Change of Name. Promptly after the Closing (but in any event no later than three (3) Business Days following the Closing), Seller shall effect a change of its name from its name as of the Closing to another name reasonably acceptable to Buyer, and immediately following the Closing, Seller and/or its Affiliates shall cease the sale, distribution or use of any products, materials or names bearing or incorporating the name _____ or any derivation thereof (the "Seller Names"). In no event shall Seller use the Seller Names or any other name after the Closing in a manner likely to cause confusion, or to cause mistake or to deceive as to the affiliation, connection, or association of Seller, or as to the origin, sponsorship or approval of such products or services.

(b) Employees of Seller. Seller will terminate all of its employees effective as of immediately prior to the Closing and comply with all applicable Laws when doing so. For the avoidance of doubt, Seller shall retain all liabilities relating to, or arising out of, such terminations of employment whether under any policy or agreement or any applicable Law. Effective as of the Closing Date, Buyer shall, or shall cause an Affiliate of Buyer to, offer to employ all employees of Seller who, on the Closing Date, are actively employed in the Business acquired by Buyer, including those employees who are absent from employment as of the Closing Date, due to illness, injury, military service or mobilization, or other authorized absence, but excluding those employees who are disabled within the meaning of the long-term disability plan of Seller or who are former employees, retired or otherwise not actively employed in the Business acquired by Buyer (each, an "Active Employee"). Such offers to employ shall provide Active Employees with the same base salary or hourly wages as those provided by Seller to such Active Employees immediately prior to the Closing. Subject to applicable Law, Buyer shall have reasonable access

to the facilities and personnel records (including performance appraisals, disciplinary actions, grievances and medical records) of Seller for the purpose of preparing for and conducting employment interviews with all Active Employees and will conduct the interviews as expeditiously as possible prior to the Closing Date. Access will be provided by Seller upon reasonable prior notice during normal business hours. Notwithstanding anything to the contrary herein, nothing in this Section 4.2(b) shall confer any rights, remedies or claims upon any employee of Seller.

(c) Access to Insurance. Unless Buyer and Seller agree otherwise in writing, Seller shall maintain in effect until the current term has expired all underwritten insurance policies of Seller which provide insurance coverage (on an occurrence or claims made basis) to Seller following the Closing for Claims arising out of occurrences prior to the Closing to the extent such Claims are covered prior to the date hereof. Seller shall not be required to pay any additional premiums to continue such policies beyond the current policy period but shall not release, commute, buy-back or otherwise eliminate the coverage available to Seller under any such insurance policies. Seller shall not have an obligation to renew or extend any existing policies that terminate by their terms after Closing. Seller acknowledges the right of Buyer for access to the benefit of such insurance for such pre-Closing occurrences. Following the Closing, Seller shall cooperate with and assist Buyer in issuing notices of Claims under such insurance policies, presenting such Claims for payment and collecting insurance proceeds related hereto.

ARTICLE V

MISCELLANEOUS

5.1 Deliveries Subsequent to Closing; Warranty Claims.

(a) Each party, upon the request of another party, shall deliver such additional documents, instruments and materials as may be necessary or advisable in order to carry out the provisions and purposes of this Agreement or to report the transaction to appropriate Governmental Authorities, including additional specific bills of sale, deeds and instruments of assignment.

(b) Buyer shall assume responsibility for administering customer and consumer warranty claims in relation to products sold or services performed by Seller prior to the Closing Date which represent a liability retained by Seller under Section 1.3 and has assumed responsibility for customer and consumer warranty claims in relation to Assumed Contracts (together, "Warranty Claims"). Buyer shall bear the costs, charges and expenses imposed on, incurred by or asserted against Buyer arising from or relating to any such Warranty Claim ("Warranty Costs") up to an aggregate amount of $w (the "Warranty Cost Cap"). In addition to, and not in limitation of, Section 5.3, Seller and Stockholders, jointly and severally (except that as between Stockholders, each Stockholder shall only be responsible for his Pro Rata Share of such obligations), shall reimburse Buyer for all Warranty Costs in excess of the Warranty Cost Cap.

5.2 Expenses. The parties to this Agreement shall, except as otherwise specifically provided herein, bear their respective expenses incurred in connection with the preparation, execution and performance of this Agreement and the other Transaction Documents and the transactions contemplated hereby and thereby, including all fees and expenses of agents, representatives and counsel.

5.3 Indemnification by Seller and Stockholder. Seller and Stockholders shall jointly and severally (except that as between Stockholders, each Stockholder shall only be responsible for his Pro Rata Share of such obligations) indemnify and hold Buyer and its members, partners, equityholders, Affiliates, directors, officers, employees, counsel, accountants, financial advisors, auditors, consultants or other representatives (the "Buyer Covered Persons") free and harmless from and against any Claims, losses,

damages, costs and expenses including attorney's fees, costs of investigation, court costs, and costs of enforcement ("Covered Losses") incurred by any Buyer Covered Person as a result of:

(a) any inaccuracy in or breach of any representation or warranty of Seller or Stockholders contained in this Agreement;

(b) any breach or default by Seller or a Stockholder under any of Seller's or such Stockholder's covenants or agreements under this Agreement including under the restrictive covenants and confidentiality agreement set forth in Section 4.1;

(c) all Excluded Liabilities.

In the event Seller or Stockholders owe any Buyer Covered Persons indemnification obligations for any of the foregoing matters, Seller and Stockholders shall jointly and severally (except that as between Stockholders, each Stockholder shall only be responsible for his Pro Rata Share of such obligations) pay all Covered Losses incurred by Buyer as a result of any such indemnification and Buyer may, at Buyer's option, use the Holdback Amount or the Set-off Amount to satisfy all or a portion of such Covered Losses.

For purposes of indemnification Claims pursuant to this Agreement in determining whether there has been a breach and then calculating the amount of Covered Losses that are the subject matter of such Claim for indemnification, the representations and warranties contained in this Agreement shall be deemed to have been made without any qualifications as to "materiality," "material adverse effect," or any other materiality qualifications. Any amounts payable under this Section 5.3 shall be treated by Buyer and Seller as adjustments to the Purchase Price. The right to indemnification, payment of Covered Losses or other remedies based on any representations, warranties, covenants or agreements set forth in this Agreement or in any document delivered with respect hereto will not be affected by any investigation conducted with respect to or any knowledge or information acquired (or capable of being acquired) at any time, whether before or after the Closing Date, with respect to the accuracy or inaccuracy of or compliance with, any such representation, warranty, covenant or agreement (other than disclosures made in the Schedules hereto).

5.4 Buyer Indemnification. Buyer shall indemnify and hold Seller, Stockholders and any of Seller's Affiliates, directors, officers, employees, counsel, accountants, financial advisors, auditors, consultants or other representatives (collectively, the "Seller Covered Persons") free and harmless from and against any Covered Loss incurred by any Seller Covered Person as a result of:

(a) any inaccuracy in or breach of any representation or warranty of Buyer contained in this Agreement;

(b) any breach or default by Buyer under any of Buyer's covenants or agreements under this Agreement, and

(c) all Assumed Liabilities.

5.5 Limitations on Indemnification.

(a) Except for the Excluded Sections, the Buyer Covered Persons shall not be entitled to indemnification under Section 5.3(a) and the Seller Covered Persons shall not be entitled to indemnification under Section 5.4(a), unless and until the aggregate amount of liability for Covered Losses thereunder exceeds $xx (the "Deductible") at which point Seller will be obligated to indemnify the Buyer

Covered Persons and Buyer will be obligated to indemnify the Seller Covered Persons for the entire amount of all Covered Losses in excess of the Deductible up to $yy (the "Indemnification Cap"), it being understood that the Deductible and the Indemnification Cap do not apply to the Excluded Sections. Notwithstanding the foregoing, in no event shall indemnified Persons be entitled to indemnification for the aggregate amount of any Covered Losses in excess of the Closing Date Purchase Price.

(b) In no event shall Seller or Stockholders on the one hand, or Buyer, on the other hand, be liable to the Buyer Covered Persons or the Seller Covered Persons (as applicable) for any Special Damages unless such damages are included in an action, suit, claim or other legal proceeding bought by a third party.

5.6 Survival. The representations, warranties, covenants, indemnification obligations and all other agreements of the parties set forth in this Agreement (i) shall be deemed to have been made on the Closing Date, (ii) are material and being relied upon by both Buyer and Seller, and (iii) except as set forth in this Section 5.6, shall survive for eighteen (18) months following the Closing; provided, however, that:

(a) in the case of all such representations, warranties, covenants and agreements (including indemnification obligations), there shall be no such termination to the extent a Claim has been asserted by written notice of such Claim delivered to the party or parties which made such representation, warranty, covenant or agreement prior to the expiration of the applicable survival period;

(b) the representations and warranties set forth in Sections 2.1, 2.2, 2.3, 2.5, 2.7(a), 2.11, 2.18, 3.1, 3.2 and 3.3 shall not terminate and shall survive indefinitely;

(c) the covenants and agreements set forth in this Agreement that contemplate compliance or performance after the Closing shall survive the Closing and shall continue until all obligations with respect thereto shall have been performed or satisfied or shall have been terminated in accordance with the terms, including the restrictive covenant set forth in Section 4.1;

(d) the representations and warranties set forth in Section 2.13 shall survive for a period of five (5) years after Closing and the representations and warranties in Sections 2.9 and 2.15 shall survive for a period equal to the applicable statute of limitations for said matters plus sixty (60) days; and

(e) notwithstanding anything herein to the contrary, to the extent that any representation, warranty, covenant or agreement of a party set forth herein was fraudulent, any Claim with respect thereto shall survive indefinitely.

5.7 Applicable Law, Jurisdiction and Venue. This Agreement shall in all respects be construed in accordance with and governed by the Laws of the State of Louisiana, without regard to the conflicts of Laws provisions therein. The parties hereto further agree and consent that jurisdiction and venue for any action brought related to or arising out of this Agreement shall be the state or Federal courts located in the Parish of Jefferson, State of Louisiana, and if such courts deny jurisdiction, then the other state or Federal courts located in the State of Louisiana (each party herby agreeing not to challenge the jurisdiction of any such court or the appropriateness of such venue).

5.8 WAIVER OF JURY TRIAL. EACH PARTY HERETO HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY

(WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY). EACH PARTY HERETO (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER, AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

5.9 Notices. Any notice or other communication required or permitted hereunder shall be in writing and shall be delivered personally, sent by certified, registered or express mail, postage prepaid, or sent by e-mail. Any such notice shall be deemed given when so delivered personally, sent by e-mail or, if mailed, five days after the date of deposit in the United States mails, and shall be addressed as follows:

If to Buyer:	Buyer, Inc.
With a copy to:	Buyer, Inc's Counsel
If to Seller or Stockholders:	Stockholders/Seller
With a copy to:	Seller's Counsel

or to the attention of such other Persons or to such other addresses as may be given by due notice.

5.10 Successors and Assigns; Binding Effect. Neither Buyer nor Seller may assign this Agreement without receiving the prior written consent of the other party hereto.

5.11 Usage. Unless the express context otherwise requires: (a) all pronouns and any variations thereof refer to the masculine, feminine or neuter, singular or plural, as the context may require; (b) all terms defined in this Agreement in their singular or plural forms have correlative meanings when used herein in their plural or singular forms respectively; (c) unless otherwise expressly provided, the words "include," "includes" and "including" do not limit the preceding words or terms and shall be deemed to be followed by the words "without limitation"; (d) references herein to any Contract mean such Contract as amended, supplemented or modified (including any waiver thereto) in accordance with the terms thereof, except that with respect to any Contract listed on any schedule hereto, all such amendments, supplements or modifications must also be listed on such schedule; (e) the words "hereof," "herein," and "hereunder" and words of similar import, when used in this Agreement, shall refer to this Agreement as a whole and not to any particular provision of this Agreement; (f) the terms "Dollars" and "$" mean United States Dollars; (g) references herein to a specific Section, Subsection, Recital, Schedule or Exhibit shall refer, respectively, to Sections, Subsections, Recitals, Schedules or Exhibits of this Agreement; (h) references herein to any Person shall include such Person's heirs, executors, personal representatives, administrators, successors and assigns; provided, however, that nothing contained in this clause (h) is intended to authorize any assignment or transfer not otherwise permitted by this Agreement; (i) references herein to a Person in a particular capacity or capacities shall exclude such Person in any other capacity; (j) with respect to the determination of any period of time, the word "from" means "from and including" and the words "to" and "until" each means "to but excluding"; and (k) references herein to any Law or any license mean such Law or license as amended, modified, codified, reenacted, supplemented or superseded in whole or in part, and in effect from time to time.

5.12 Certain Defined Terms. Except as otherwise provided herein, all capitalized terms described in this Section 5.12 shall have the meanings assigned to them below:

(a) "Accounts Payable" means, all accounts payable arising from the conduct of the Business after the Closing or included in Closing Working Capital, except for such accounts payable that are aged over ninety (90) days.

(b) "Accounts Receivable" means Seller's accounts or notes receivable, (including any security or collateral for such accounts receivable and including both billed and unbilled work), prior to any write-off, allowance or reserve for doubtful accounts.

(c) "Adjustment Holdback Amount" means an amount equal to $zz.

(d) "Affiliate" means, with respect to any Person, any other Person controlling, controlled by or under common control with, or the parents, spouse, lineal descendants or beneficiaries of, such Person.

(e) "Balance Sheet Rules" means, collectively, the accounting principles as used by the Seller on a consistent basis with past practices and in accordance with the preparation of the Financial Statements (the "Accounting Principles") and the rules and adjustments set forth on Exhibit F; provided that in the event of any conflict between the Accounting Principles and the rules and adjustments set forth on Exhibit F, the rules and adjustments set forth on Exhibit F shall apply.

(f) "Business Day" means any day other than a Saturday, a Sunday or other day on which commercial banks in New Orleans, Louisiana are authorized or required by law to close.

(g) "Claim" shall mean any and all claims, demands, causes of actions, suits, proceedings, administrative proceedings, investigations, losses, judgments, decrees, debts, damages, liabilities, court costs, attorney fees and any other expenses incurred, as sustained by or against the Business.

(h) "Closing Indebtedness" means the amount of consolidated Indebtedness of Seller outstanding immediately before the Closing, determined in accordance with Balance Sheet Rules.

(i) "Closing Working Capital" means Net Working Capital as of 12:01 a.m. central time on the Closing Date.

(j) "Code" means the Internal Revenue Code of 1986, as amended, and the rules and regulations promulgated thereunder.

(k) "Contract" means any contract, lease, sublease, license (including with respect to Intellectual Property), indenture, bond, debenture, note, mortgage, guarantee, instrument, agreement, deed of trust, conditional sales contract or other legally binding arrangement, together with modifications and amendments thereto (in each case, whether written or oral).

(l) Reserved.

(m) "Environmental Law" means any Law relating to (a) the environment or natural resources, (b) the protection of human or worker health and safety, or (c) the regulation or remediation of or exposure to Hazardous Materials.

(n) "ERISA" means the Employee Retirement Income Security Act of 1974, as amended.

(o) "ERISA Affiliate" means any Person that, together with Seller, would be treated as a single employer under Section 4001 of ERISA or Section 414 of the Code.

(p) "ERISA Affiliate Liability" means any liability of Seller that arises under or relates to any Employee Benefits Plan that is subject to Title IV of ERISA, Section 302 of ERISA, Section 412 or 4980B of the Code, or any other statute or regulation that imposes liability on a so-called "controlled group" basis with or without reference to any provision of Section 414 of the Code or Section 4001 of ERISA, including by reason of Seller's affiliation with any of its ERISA Affiliates or Buyer's being deemed a successor to any ERISA Affiliate of Seller.

(q) "Excluded Sections" means the representations and warranties set forth in Sections 2.1, 2.2, 2.3, 2.5, 2.7(a), 2.9, 2.11, 2.13, 2.15, and 2.18.

(r) "GAAP" means generally accepted accounting principles in the United States of America as in effect from time to time.

(s) "Governmental Authority" means any government (including any United States or foreign federal, state, provincial, cantonal, municipal or county government), any political subdivision thereof and any governmental, administrative, ministerial, regulatory, central bank, self-regulatory, quasi-governmental, taxing, executive or legislative department, commission, body, agency, authority or instrumentality of any thereof.

(t) "Hazardous Materials" means: (i) any pollutant, contaminant, waste or chemical; (ii) any toxic, radioactive, ignitable, corrosive, reactive or otherwise hazardous substance, waste or material; or (iii) any substance, waste or material having any constituent elements displaying any of the foregoing characteristics or otherwise defined or regulated by, or giving rise to liability under, Environmental Law, including petroleum, its derivatives, by-products and other hydrocarbons, polychlorinated biphenyls, asbestos and mold.

(u) "Holdback Amount" means $_____.

(v) "Indebtedness" means (i) any indebtedness or other obligation of Seller for borrowed money, whether current, short-term or long-term and whether secured or unsecured; (ii) any indebtedness of Seller evidenced by any note, bond, debenture or other security or similar instrument; (iii) any liabilities of Seller with respect to interest rate or currency swaps, collars, caps and similar hedging obligations; (iv) any liabilities of Seller for the deferred purchase price of property or other assets (including any "earn-out" or similar payments); (v) any liabilities of Seller in respect of any lease of (or other arrangement conveying the right to use) real or personal property, or a combination thereof, which liabilities are required to be classified and accounted for under GAAP as capital leases; (vi) any liabilities of Seller under any performance bond or letter of credit or any bank overdrafts and similar charges; (vii) any liabilities of Seller in respect of any customer deposits; (viii) any accrued interest, premiums, penalties and other obligations relating to the foregoing; (ix) any indebtedness referred to in clauses (i) through (viii) above of any Person that is either guaranteed (including under any "keep well" or similar arrangement) by, or secured (including under any letter of credit, banker's acceptance or similar credit transaction) by any Lien upon any property or asset owned by Seller; and (x) Accounts Payable aged more than ninety (90) days. Indebtedness shall also include accrued interest and any pre-payment penalties, "breakage costs," redemption fees, costs and expenses or premiums and other amounts owing pursuant to the instruments evidencing Indebtedness, assuming that such Indebtedness is repaid on the Closing Date.

(w) "Knowledge of Seller" means the actual knowledge of each Stockholder.

(x) "Law" means any law (including common law), statute, ordinance, code, regulation, rule, order, decision, judgment, writ injunction, decrees, award or other requirement or determination of, or any Contract with, any Governmental Authority.

(y) "Net Working Capital" means an amount equal to (A) the sum of, (I) Accounts Receivable (net of the Doubtful Account Allowance), and (II) Inventory, minus (B) Accounts Payable, all as determined in accordance with the Balance Sheet Rules.

(z) "Special Damages" means any (i) punitive or exemplary damages or (ii) indirect, special or consequential damages.

(aa) "Person" means any natural person, business, corporation, company, partnership, association, limited liability company, limited partnership, limited liability partnership, joint venture, business enterprise, trust or other legal entity, including any Governmental Authority.

(bb) "Pro Rata Share" means, with respect to each Stockholder, such Stockholder's portion, which shall be equal to a fraction, the numerator of which shall be such Stockholder's total number of shares of Seller and the denominator of which shall be 850.

(cc) "Target Amount" means $[_____].

(dd) "Working Capital Overage" shall exist when (and shall be equal to the amount by which) the Closing Working Capital exceeds the Target Amount.

(ee) "Working Capital Underage" shall exist when (and shall be equal to the amount by which) the Target Amount exceeds the Closing Working Capital.

5.13 Counterparts. This Agreement may be signed in counterparts, none of which shall be deemed to be binding unless and until all parties have signed this Agreement. Facsimile or portable document format (PDF) signatures shall be treated as original signatures for all purposes hereunder.

5.14 Severability. Should any part of provision contained in this Agreement be rendered or declared invalid by reason of any existing or subsequently enacted legislation or by any decree of a court of competent jurisdiction, the remaining provisions shall nevertheless remain in full force and effect to the maximum extent permitted by Law; provided that this Section 5.14 is not intended to supersede the provisions of Section 4.1(e).

5.15 Entire Agreement. This Agreement including all schedules and exhibits hereto, constitutes the entire agreement between the parties and supersedes any and all prior agreements between them relating to the subject matter hereof and may not be amended except in writing signed by the party to be bound.

5.16 Exclusive Remedies. The parties acknowledge and agree that, except with respect to claims arising from fraud or willful misconduct, the specific enforcement of any covenant requiring performance following the Closing or claims for equitable relief, their sole and exclusive remedy with respect to any and all Claims for any breach of any representation, warranty, covenant, agreement or obligation set forth herein or otherwise relating to the subject matter of this Agreement shall be pursuant to the indemnification provisions set forth in Sections 5.3 and 5.4.

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year first written above.

BUYER:

BUYER, INC.

By:_____
Name:
Title:

SELLER:

SELLER, INC.

By:_____
Name:
Title:

STOCKHOLDERS:

_____
Stockholder 1

_____
Stockholder 2

GETTING YOUR COMPANY INTO 'SALE' SHAPE AND KEEPING IT THERE

By: Matthew Miller and Andrew Sullivan

If a company has not diligently prepared itself before it puts out the "for sale" sign or executes a non-disclosure agreement to consider an unsolicited offer, the company may have already lost the best chance it may have to maximize the financial results of the sales process for the benefit of its owners. This short article cannot address or even realistically identify all of the various issues that could come into play in preparing a company for sale but it does identify the main areas that should be a part of any successful company "fitness" program:

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There is no "one-size fits all" company fitness program but most highly successful sales processes result from careful preparation for that sale -- not just from a continuation of successful business operations. The process of self-evaluation and pro-active problem-solving involved in

properly preparing a company for sale can be just as valuable in laying the groundwork for leadership transitions, generational succession planning or just disciplined corporate management. Moreover, keeping a company in "sellable" shape develops a culture of compliance and attention to detail and it frees up the most senior executives to focus on the most important top-line business issues.

If a company is facing a tight deadline to take advantage of an opportunity to raise capital and grow the company's business and the company has not yet selected the best legal structure to do so, the owners may be in for a headache or a costly process in terms of dollars spent and opportunities lost. Similarly, in the sale-of-business context, the last minute discovery of a chronic problem or major issue can be financially devastating to the sellers, or cause the transaction to be terminated (after the sellers have already given lots of information to the potential buyer). Such discovery can raise concerns about the target company's management - concerns that can have real world consequences whether related to the price to be received or the amount of indemnity risk (caps and baskets) that the sellers must bear. In addition, solving last minute problems can also be extraordinarily expensive when completed in a tight timeframe or under the microscope of a potential buyer.

Getting your company into "sellable" shape will have associated costs and there is no simple linear equation to directly translate those costs into added future deal value or long-term company growth. But, everyone with any substantial transactional experience has seen too many deals that have failed to close or that were the subject of significant price reductions because of avoidable legal or business issues that emerged late in a sale process.

I. The Basic Items

In every sale transaction, the most basic questions involve the price to be paid and ultimately retained after the deal is done and the specifics of what is being acquired or assumed – whether it be the entire entity (with all of its assets and liabilities) or just certain specific assets and liabilities.

A. *Structure*. A sale transaction can take many forms and, for many companies, the ability to grow to the next level before selling can make an almost exponential difference in the amount of money the sellers receive. Legal structure can also be critical in determining the tax

cost and thus the net, after-tax proceeds resulting from a transaction. In some industries, equity sales are the most common deal structure. In other industries, asset sales (or statutory transactions designed to achieve asset sale treatment for tax purposes) are more common.

Regardless, a company's legal structure must be determined with a view toward not only tax efficiency during its start-up phase or operational life span but also tax efficiency in the exit strategy context. Bad tax structure can cost the sellers significant after-tax cash and can lead to the termination of the transaction when the seller evaluates the after-tax cash. Fortunately, most of these issues are preventable even though some solutions may require trade-offs between minimizing operational tax concerns and sale-of-business tax issues.

For example:

- While use of an S Corporation may help an active owner/manager minimize his or her self-employment tax versus use of an LLC, the prohibition on an S Corporation having more than one class of stock eliminates the flexibility some companies may need to attract critical venture capital via preferred returns, convertible debt, etc.

Careful attention should be paid to legal and tax structure analysis and company life cycle issues so that business owners interested in a potential future sale transaction can focus their attention on critical decision surrounding those potential transactions with confidence in knowing that the important structure-related issues have already been addressed.

B. *Accounting*. With some exceptions, the value of a business is based on the amount of cash generated by its operations and the qualitative view of the likelihood that the business will continue to perform as well or better in the hands of a buyer. As a result, before a potential buyer ever sends over its detailed, legal due diligence checklist seeking corporate records and business documents, the buyer ordinarily makes at least a preliminary determination of the value of the target business based on its financial statements and non-GAAP financial measures such as

EBITDA[1] or adjusted EBITDA.[2] Consequently, there is no single area where the seller's credibility is more important than with respect to having good, reliable (and ideally, predictable) numbers (i.e., financial statements).

In evaluating the credibility of its own numbers, some of the questions that a company should ask itself include:

- Should the company have GAAP financials or will cash basis, tax-oriented numbers be sufficient?

The "E" in EBITDA is for earnings, which is generally understood to mean GAAP net income. Aggressive tax basis accounting that accelerates expenses and defers revenue could, over time, result in financial statements that are so removed from GAAP that a prospective buyer will need to completely dissect and recast them in order to have confidence in the numbers and how they would translate into its approach to financial reporting.

- Is the company managed on book or tax numbers and does the company focus its financial systems and reporting on minimizing its reported revenue or net income?

Consideration should be given to the trade-off between maximizing GAAP net income and minimizing reportable tax basis income. When a company is valued based on a multiple of its EBITDA, owners may be chagrined to learn that its historically aggressive tax basis accounting approach that arguably saved them 60¢ dollars in the form tax deductions[3] has cost them $3.00-$8.00 dollars[4] in the form of a lower sales price. In some instances, recognized book-to-tax differences can be cited to minimize tax liabilities without lowering book EBITDA but in many cases there will be no opportunity to have the best of both. Where a non-GAAP accounting policy or practice favors the buyer, the buyer is likely to hold a seller to it with respect to price

[1] Earnings before interest, taxes, depreciation and amortization

[2] Ordinarily, EBITDA adjusted for (i) extraordinary items and other or one-time or atypical gains or losses, (ii) related party transactions or non-recurring items, (iii) synergies or expenses that could be eliminated, and (iv) in some cases, deferred expenses.

[3] The immediate tax benefit of an accelerated deduction of $1.00 assuming, for illustration purposes only, a 40% combined federal and state income tax rate.

[4] The effect of $1.00 multiplied by a valuation multiple of 5X -10X, net of applicable taxes assuming, for illustration purposes only, a 30% combined federal and state income tax rate for long term capital gains.

considerations. Where a non-GAAP accounting policy or practice might tend to artificially inflate a company's value, a buyer is certain to set its price on the lower number or adjust the multiple downward to reflect concerns about the reliability of valuation base.

- Does the company regularly prepare a calculation of its EBITDA (or similar non-GAAP financial measure)?

- How well documented are the company's bases for potential EBITDA adjustments arising from related party transactions, etc.?

Running around on the eve of a deal looking for upward adjustments to EBITDA or the documentation behind the numbers, is likely to be much less productive or persuasive than having such numbers regularly calculated and studied. If a number is likely to be the base to which a valuation multiple will be applied when pricing your business, doesn't it make sense to know that number and how it is likely to be determined well before a company is put on sale?

- Should the company have an annual audit or will a compilation or review engagement suffice?

- Does the company have the types of internal controls and safeguards that a buyer's independent accountants would require?

- If the company uses a small, local accounting firm, should it consider also establishing a relationship with a larger firm whose name will be more recognizable to a potential purchaser?

Small firms, lean organizations and simple financial statements are almost always the heritage of any successful business, where a founder has built value, in part, by carefully managing every expense. Added costs that do not add immediate value will always be a hard sell but upgrading the credibility and transparency of financial reporting can be a valuable tool to expedite sales processes by increasing the confidence level in a seller's financial picture and putting numbers into the format (audited GAAP) that most buyers will prefer if not require.

C. *Corporate and Shareholder Records*. Having current and complete corporate records is one of those relatively simple things to accomplish that is often overlooked until the

very last moment. A buyer will often ask to examine several years' worth of annual minutes (or similar documents), even in an asset sale, to better understand the seller's attention to detail. Being able to quickly deliver all of the key documents may not add to a target's sales price but having gaping holes in an entity's corporate documentation can unduly complicate or delay a transaction. In evaluating the state of its critical corporate records, a company should ask itself the following:

- Does the company have a complete copy of its organizational documents?

For a corporation, the minimum basic requirements would include a copy of (i) the corporate charter (i.e., articles or certificate of incorporation) and all amendments; (ii) the bylaws and all amendments; (iii) all voting agreements, voting trusts or similar documents that deal with board composition, approval requirements for major actions or similar issues. In addition, you should have a copy of the minutes of all director actions or director and shareholder actions where the foregoing documents were authorized and approved.

For a limited liability company or other non-corporate entity, the minimum basic requirements would include the articles of organization (or similar document) together with the operating agreement (partnership agreement), or other agreements, if any addressing similar issues.

- Does the company have minutes documenting the election of its current managers/directors and appointment of its current officers and the authorization of its major contracts and transactions?

While many corporate documentation problems can be easily fixed, for many situations, the "fix" can be more problematic. Directors and officers die and resign or are fired and obtaining key signatures after the fact can be difficult. And simply ratifying old decisions that were improperly documented at the time can present other difficult issues at a potentially awkward time.

- Is the entity qualified to do business where it should be?

While not directly related, this issue also concerns the extent to which a company's operations are subject to tax in multiple states. Retaining competent accountants experienced in

multistate taxation and having a ready answer when questions in the area arise can be a key to avoiding complicated and time-consuming and potentially very expensive due diligence issues.

- Are the company's stock or ownership records up-to-date and carefully maintained?

In a stock or statutory transaction (e.g., merger, share exchange, conversion, etc.), nothing will be the subject of a more intense audit than the target's shareholder records. Having a clear audit trail with respect to the number and character of all authorized and issued shares of stock (or other equity units) is an absolute must as are having records detailing the current outstanding shares or interests and the proper identity of the shareholders. Also, it may be necessary to examine old stock certificates to ensure that those are current and represent the current issued and outstanding shares.

II. Critical Risk Management

Nothing is more important than timing in identifying and managing business and liability risks. In many cases, problem areas can be identified and completely neutralized if there is enough available time. In some instances, the process may be as simple as retaining the right accountant, engineer, scientist or consulting firm to take a look at what you do with a "buyer's eye" for risk identification. In other instances, it may require developing a better understanding of the nature of the most likely types of buyers for your business and what risks concern them the most.

A. *Identifying the Show Stoppers*. There are some obvious risks that, if present, will almost certainly halt a deal, no matter the identity or risk tolerance of the buyer. In the M&A world, these risks are often referred to as "show stoppers" because they usually stop a sales process in its tracks. Common examples include: (i) discovering certain types of environmental contamination or hazardous material discharge, particularly where there is enhanced risk of contamination to drinking water or other human safety risks; (ii) product liability lawsuits or other major claims or contingent risks relating to product safety or work force safety; (iii) challenges to the company's ownership of its key product or service offering via an intellectual property infringement claim or the like (loss of an S election by failing to make the proper election for trusts or the spouses of the shareholders failing to sign the S election as a community property holder);

(iv) claims alleging accounting irregularities, legal or ethical improprieties by senior management or similar situations; (v) loss or instability (financial or relational) with respect to a critical supplier or customer; (vi) loss or instability in key senior management; (vii) internal disputes over control of the company, particularly between active owner/managers and passive investor/owners; and (viii) any number of others depending on the nature of the business and other factors.

Each potential buyer will bring its own history of problems in past deals and its own corporate culture of risk tolerance to the table. In addition, it is unlikely that a potential buyer will identify any show stoppers in the preliminary due diligence phase of an auction process that ordinarily precedes the execution of a letter of intent. Rather, this type of problem is almost always discovered after a letter of intent has been signed when the seller is more vulnerable to the cost of an abandoned deal.

B. *Intellectual Property Risks*. Does your company sell a proprietary product or service? Does your company have critical production know-how that distinguishes it from its competition? Does it have important trade names or marks or any signature descriptors that are valuable in distinguishing it in the marketplace? Are you sure you own and control those critical intellectual property assets?

These questions are not academic and the solutions can be difficult if not timely addressed. If product development, software development or other similar steps are a part of your company's business operations then you should have work-for-hire and confidentiality and non-disclosure agreements in place with everyone in the product development process. You may need similar protections with respect to personnel involved in developing marketing and sales materials. Filing registrations for trademarks, etc. cannot provide complete protection but they should be strongly considered as part of a comprehensive risk management effort.

C. *Taxes*. Every business has a healthy respect for the various taxing authorities and most are very careful about tax compliance. But tax compliance is a risk area that poses greater potential concerns for sellers than many others. Very few, if any, buyers fail to require sellers to bear 100% of all pre-closing tax risks. Once a deal is done, however, buyers ordinarily have substantial involvement in, if not control over, the resolutions of those issues. The bottom line is

while this is an area that business owners already carefully consider and address, it is also one that should be consistently revisited because of its potential for harm.

D. *Insurance*. A legal or business risk that has been managed by insurance is almost never a show stopper. Not all risks are insurable but many that were once impossible to insure at a reasonable price are now routinely insured. Insurance allows a business to limit its exposure and to cover the costs of the legal processes that may come into play (whether they be defense costs for a pending proceeding or defense costs for preliminary or formal investigations). In some instances, the very existence of insurance can be critical in allowing a business to take a more aggressive posture in defending itself. A target company with a well thought out and comprehensive insurance plan is usually more attractive than one that has run big risks without an adequate insurance safety net, particularly if that insurance plan has been in place and has been kept current for a reasonable time period. A shrewd buyer will build into its pricing model the full cost of insurance that a company should have maintained but failed to maintain, meaning that there is usually little if any price effect upside to going without adequate protection.

III. Housekeeping

A. *Real Property and Other Key Assets*. Having reasonably complete and up-to-date records of key assets is very important in every M&A transaction. In almost instance, good records save time and it is generally in a seller's best interests to move as quickly as possible to a closing once the buyer has been identified and the business is no longer on the open market. This is often even more important when dealing with real estate assets, where commercial standards of title, title insurance, as-built surveys, etc. will almost certainly be applied. It also applies to other key assets like intellectual property (owned or licensed) and major capital assets. Making lists, obtaining title abstracts and surveys, etc. take time that is precious once a deal has begun. Keep these key corporate records up-to-date and reap the benefits when the sale process is underway.

B. *Material Contracts*. It is always surprising how rarely companies have complete and signed copies of its most important customer and supplier contracts. In some instances, contracts have expired or have been amended and neither party to the agreement can produce a signed copy. By definition, a company's material contracts are among its most valuable assets and keeping complete and accurate records of these key assets is of critical importance at sale time.

Just as important is maintaining a working abstract of the most important contracts and their key provisions (term, termination date, notice requirements to extend or terminate, financial inflator provisions, etc.). Inadvertently allowing a contract with an evergreen (automatic renewal) provision to renew can be as problematic as inadvertently allowing an important agreement to expire. It may be advantageous to maintain maximum flexibility and long-term agreements may be a disadvantage – every situation is different and each may present its own unusual challenge. The important point is making sure that the condition of a company's material contracts is the result of careful consideration and prudent action by senior decision makers – not neglect.

C. *Licenses and Permits*. Knowing that a company has the legal right to undertake its business activities and understanding how to transfer that right to the buyer can be critical to getting a deal done quickly and cleanly. When a company has been operating without a needed permit or license, it can be tempting not to press the issue. But, sellers should be aware that a buyer almost always applies a worse-case scenario risk assessment to any missing governmental approval or permit and dealing with these issues with a major transaction pending can give governmental officials far more leverage in resolving the matter than would otherwise likely be present. Every situation is different but prospective sellers should always remember that speed is their friend and that gaps in licensing, permitting and other governmental approvals slow down transactions and all delays raise the risk that other problems or concerns will surface.

D. *Benefits Plans*. Most companies think they are up-to-date and in full compliance with all ERISA requirements with respect to their employee benefit plans including health and welfare plans and retirement plans as well as non-qualified deferred compensation arrangements for senior management of other key personnel. The real truth is that few companies are.

In fact, the sheer complexity of the compliance requirements for many areas of employee benefits can make it difficult for even the most conscientious company to maintain a good compliance record. Regrettably, the penalties for non-compliance in these areas can be astonishingly harsh even if they are rarely imposed. The result is a very challenging compliance area where problems are often overlooked and addressing shortcomings can be very expensive and time-consuming. The existence of various IRS and DOL amnesty programs under which past problems can be corrected without risking catastrophic consequences makes this topic one that

every company should address up-front, before it goes on the auction block. Further, many business people fail to fully appreciate the potential deal-related risks that can arise with old and under-maintained plans, especially defined benefit plans and employee stock ownership plans.

IV. Next Steps

Many of the steps to preparing a company for sale are not difficult or costly or terribly time-consuming, particularly if addressed in a timely manner before the sales process is underway. Addressing the basic items of structure, accounting and corporate records is a must for every business whether or not the company is actively considering some type of exit strategy. It is equally important to timely identify and address the kinds of risks that can slow down or derail a transaction. If those showstoppers are handled before a sales transaction is commenced, the buyer will reap the benefit in a cleaner and more expeditious sales process. Finally, while it may not be very popular, few sales process preparations are more important than maintenance of good records of key assets, agreements, governmental approvals and other business documentation.

Staying in "sale" shape may be more difficult than maintaining the status quo but like so much else in the business world -- speed, flexibility and timing can be the key to a successful transaction.