

ASSET PURCHASE AGREEMENT

This Asset Purchase Agreement (the “Agreement”) is entered into as of _____, 200__ by and among _____, a _____ corporation (the “Company”), _____ and _____ (each, a “Seller” and collectively, the “Sellers”) and _____, a Delaware limited liability company (the “Purchaser”).

Introduction

The Purchaser wishes to purchase from the Company, and the Company desires to sell to the Purchaser, substantially all of the assets of the Company. The purchase and sale of the assets and the other transactions contemplated hereby are sometimes collectively referred to herein as the “Transactions”. The Sellers are the principal owners of the Company and will benefit substantially from the Transactions.

An index of defined terms used herein is set forth in ARTICLE 11.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

ARTICLE 1 THE TRANSACTIONS; CLOSING

1.1. Purchase and Sale of Purchased Assets. Subject to the terms and conditions of this Agreement, and in reliance upon the representations and warranties contained herein, at the Closing (as hereinafter defined) the Purchaser shall purchase from the Company, and the Company shall sell, convey, transfer, assign and deliver to the Purchaser, free and clear of all liens, security interests, mortgages, encumbrances and restrictions of every kind (collectively, “Liens”), all of the Company’s assets and properties of every kind (collectively, the “Purchased Assets”), including without limitation the following:

- (a) all cash and cash equivalents;
- (b) all accounts receivable;
- (c) all tangible assets, including without limitation all equipment, machinery, computers and servers, information technology and telecommunications equipment, leasehold improvements, fixtures and other improvements on real estate, furniture and office equipment, and vehicles;
- (d) all inventories, including without limitation all finished goods, work in process, raw materials, processing materials, purchased parts and supplies;
- (e) all Owned Property;
- (f) all Company Intellectual Property;

- (g) all shares, securities, interests and rights in the Subsidiaries;
- (h) all rights under all contracts, agreements, leases, licenses, permits, authorizations, franchises and certifications;
- (i) all sale orders, customer orders, open bids, warranties, prepaid expenses, deposits, retentions and refunds;
- (j) originals or duplicate copies of all Company data and information (whether in paper or electronic format or any other medium) including all books and records, technical data, financial, accounting and operating data, payroll and personnel records, marketing, sales and promotional data, advertising materials, credit information, cost and pricing information, customer, supplier and service provider lists, business plans, projections, reference catalogs, and other similar property, rights and information;
- (k) all claims, causes of action and rights of the Company against any Person, whether matured or unmatured, direct or indirect, known or unknown, or absolute or contingent; and
- (l) all goodwill associated with the Company, the Business and/or the Purchased Assets.

1.2. Excluded Assets. The Purchased Assets shall not include, however, the following assets of the Company (collectively, the “Excluded Assets”): (a) the Company’s rights under this Agreement or any other agreement, document or instrument entered into by the Company pursuant to this Agreement; or (b) those assets of the Company expressly set forth on **Schedule 1.2(b)** attached hereto.

1.3. Assumed Liabilities. Subject to the terms and conditions of this Agreement, and in reliance upon the representations and warranties contained herein, at the Closing the Purchaser shall assume from the Company and agree to pay when due, perform and discharge in accordance with the terms thereof only the following liabilities and obligations of the Company (collectively, the “Assumed Liabilities”):

- (a) obligations for future performance after the Closing Date under all of the contracts listed on **Schedule 1.3(a)** (it being understood that the Purchaser is not assuming and shall not be liable for any liabilities or obligations under such contracts to the extent the same should have been paid, performed or otherwise discharged on or prior to the Closing Date or to the extent the same arise out of any breach or default by the Company or any of its Affiliates prior to or as of the Closing Date);
- (b) all liabilities included in the final calculation of the Closing Working Capital; and
- (c) [all Assumed Indebtedness].

1.4. Excluded Liabilities. Except for the Assumed Liabilities, the Purchaser shall not assume or in any way be responsible for any other obligations or liabilities of the Company (whether or not disclosed) of any kind. Without limiting the generality of the foregoing, the Assumed Liabilities will not include: (a) any Taxes; (b) any liability relating to any Benefit Plans; (c) any obligation of the Company under this Agreement or any other agreement, document or instrument entered into by the Company pursuant to this Agreement; (d) the Sellers' Expenses; (e) the Sale Bonuses; (f) any Indebtedness; (g) any liability arising out of any action, arbitration, claim, proceeding or litigation of any nature (whether or not disclosed) against the Company, or relating to the pre-Closing operation of the Business; (h) any liability arising out of the Company's violation of any Legal Requirement; (i) any liability arising out of the failure of the Company to comply with any agreement, contract, lease or other commitment; and (j) any liability to any Seller or to any Affiliate of the Company or any Seller. Liabilities of the Company which are not Assumed Liabilities are herein referred to collectively as the "Excluded Liabilities". The Company will discharge when due all of the Excluded Liabilities.

1.5. General.

(a) Certain Definitions. For purposes of this Agreement, the following terms shall have the meanings indicated below:

"Base Purchase Price" means \$_____.

"Closing Purchase Price" means the sum of the Base Purchase Price, [(i) plus the amount, if any, by which the Closing Working Capital (as hereinafter defined) exceeds \$_____, or minus the amount, if any, by which the Closing Working Capital is less than \$_____, [and (ii) minus the amount of the Assumed Indebtedness]. The Closing Purchase Price shall be finally determined in accordance with Section 1.7.

"Closing Working Capital" means (i) the cash and cash equivalents, inventory, accounts receivable, prepaid expenses and other current assets (excluding for this purpose all deferred tax assets and the Excluded Assets) of the Company and its Subsidiaries as of immediately prior to the Closing (net of all applicable reserves), minus (ii) the accounts payable, accrued expenses, accrued compensation and all other current liabilities of the Company and its Subsidiaries as of immediately prior to the Closing (excluding for this purpose all liabilities paid by or behalf of the Company at the Closing and the Excluded Liabilities). The Closing Working Capital shall be determined on a consolidated basis in accordance with generally accepted accounting principles [and, to the extent consistent with generally accepted accounting principles, the Company's historical accounting practices [as reflected in the most recent audited financial statements described in Section 3.7]].

"Escrow" means \$_____, which will be deposited at the Closing with the Escrow Agent (as hereinafter defined) pursuant to the Escrow Agreement (as hereinafter defined).

“Estimated Closing Purchase Price” means the Base Purchase Price, with any increase or decrease thereto shown on the Estimated Closing Purchase Price Certificate (as hereinafter defined) and approved by the Purchaser.

“Indebtedness” means all principal, interest, fees, expenses and other amounts in respect of borrowed money, notes, bonds, debentures and other debt securities, guarantees, interest rate, currency or other hedging arrangements, capital leases, letters of credit and/or installment purchases incurred by the Company or any Subsidiary prior to the Closing, or required to be paid in order to discharge fully all such amounts as of the Closing.

_____ [“Assumed Indebtedness” means the following Indebtedness:
]

[“Repaid Indebtedness” means all Indebtedness that is not Assumed Indebtedness.]

“Sale Bonuses” means the aggregate amount of (i) all transaction, sale and change of control bonuses and similar payments, and (ii) all payments in respect of stock appreciation, phantom stock or similar rights.

“Sellers’ Expenses” means the aggregate fees, costs, expenses and obligations incurred by the Company, its Subsidiaries or any of the Sellers in connection with the Transactions including, without limitation, all amounts in respect of legal, accounting, investment banking and other similar fees, costs, expenses and obligations.

(b) Pre-Closing Deliveries. At least two (2) business days prior to the Closing, the Company will furnish to the Purchaser (i) a certificate signed by the Company setting forth the Company’s (A) good faith estimated Closing Working Capital, including an itemization of the components of Closing Working Capital, [(B) the amount of the Indebtedness existing as of the Closing and specifying whether such Indebtedness is Assumed Indebtedness or Repaid Indebtedness] and [(B)/(C)] good faith estimated calculation of the Closing Purchase Price based thereon (the “Estimated Closing Purchase Price Certificate”), (ii) a payoff letter, in form and substance satisfactory to the Purchaser, from each holder of [Repaid] Indebtedness indicating the amount required to discharge in full such [Repaid] Indebtedness at Closing and, if such [Repaid] Indebtedness is secured, an undertaking by such holder to discharge at Closing any Liens securing such [Repaid] Indebtedness, (iii) a final bill and wire transfer instructions from each payee of any portion of the Sellers’ Expenses, provided, however, that if any such payee delivers to the Purchaser and the Company a letter stating that it will seek payment solely from the Sellers, such portion shall not be deemed to be part of the Sellers’ Expenses for purposes of Section 1.5(c), and (iv) a schedule that provides a breakdown by recipient and amount of all Sale Bonuses.

(c) Payments at Closing. At the Closing, the Purchaser will make or cause to be made the following payments of the Estimated Closing Purchase Price by wire transfer as follows: (i) first, to the respective holders of the [Repaid] Indebtedness, the amounts specified in the pay-off letters delivered pursuant to Section 1.5(b), (ii) second, to the respective payees of

the Sellers' Expenses, the amounts set forth in the final bills delivered pursuant to Section 1.5(b), other than any payee that delivers a letter pursuant to the proviso to Section 1.5(b)(iii) above, (iii) third, to the Escrow Agent, an amount equal to the Escrow, and (v) fourth, the balance to the Company. Promptly upon receipt by the Company of the amount contemplated by clause (iv), the Company shall pay the Sale Bonuses (less applicable Tax withholdings) to the recipients and in the amounts set forth in the schedule delivered by the Company pursuant to Section 1.5(b)(iv).

1.6. Closing. The Transactions contemplated hereby shall take place at a closing (the "Closing") to be held at the offices of Choate, Hall & Stewart LLP in Boston, Massachusetts on (a) the later of [_____, 2006] and five (5) business days after the satisfaction or waiver of the conditions to Closing specified in ARTICLE 7 hereof (other than those conditions which are normally performed at the Closing, but subject to the satisfaction or waiver of such conditions), or (b) such other date as agreed to in writing by the Company and the Purchaser (the "Closing Date").

1.7. Determination of Closing Purchase Price.

(a) Within [90] days after the Closing Date, the Purchaser will deliver to the Company a certificate (the "Closing Purchase Price Certificate"), executed by the Purchaser, setting forth an itemized statement of the Closing Working Capital [and Assumed Indebtedness], and a calculation of the Closing Purchase Price based thereon.

(b) If the Company delivers written notice (the "Disputed Items Notice") to the Purchaser within 30 days after the date of delivery of the Closing Purchase Price Certificate, stating that the Company objects to any items on the Closing Purchase Price Certificate, specifying the basis for such objection in reasonable detail and setting forth the Company's proposed modifications to the Closing Purchase Price Certificate, the Company and the Purchaser will attempt to resolve and finally determine and agree upon the Closing Purchase Price as promptly as practicable.

(c) If the Company and the Purchaser are unable to agree upon the Closing Purchase Price within 30 days after delivery of the Disputed Items Notice, the Company and the Purchaser will select an independent, nationally recognized accounting firm to resolve the disputed items specified in the Disputed Items Notice. If the Purchaser and the Company are unable to agree on the selection of an accounting firm, the accounting firm will be chosen by the American Arbitration Association, with the expenses of the American Arbitration Association to be shared equally by the Purchaser and the Company. The accounting firm shall address only the disputed items set forth in the Disputed Items Notice and may not assign a value greater than the greatest value claimed for such item by either party or smaller than the smallest value claimed for such item by either party. The accounting firm will (i) resolve the disputed items specified in the Disputed Items Notice and (ii) determine the Closing Purchase Price, as modified only by the resolution of such items. The determination of the selected accounting firm will be made within 60 days after being selected and will be final and binding upon the parties. The fees, costs and expenses of the accounting firm so selected will be borne by the party whose positions generally did not prevail in such determination, or if the accounting firm determines that neither party could be fairly found to be the prevailing party, then such fees, costs and

expenses will be borne 50% by the Company and the Sellers, on the one hand, and 50% by the Purchaser, on the other.

(d) If the Company does not deliver the Disputed Items Notice to the Purchaser within 30 days after the date of delivery of the Closing Purchase Price Certificate, the calculation of the Closing Purchase Price specified in the Closing Purchase Price Certificate will be conclusively presumed to be true and correct in all respects and will be final and binding upon the parties.

(e) At such time as the Closing Purchase Price is finally determined, either (i) the Purchaser shall pay or cause to be paid to the Company an aggregate amount equal to the excess of the Closing Purchase Price over the Estimated Closing Purchase Price, or (ii) the Company and the Sellers shall pay to the Purchaser an aggregate amount equal to the excess of the Estimated Closing Purchase Price over the Closing Purchase Price.

(f) The final determination of the Closing Purchase Price under this Section 1.7 shall not impair any other rights of a party under this Agreement including, without limitation, any rights to indemnification.

1.8. [Allocation. The total amount of the Closing Purchase Price and the Assumed Liabilities shall be allocated among the assets of the Company for tax purposes in a manner consistent with the allocations set forth on **Schedule 1.8** [*Note: to be provided by the Purchaser; consider allocation to non-competition covenant at Section 5.7*]. It is agreed by the parties that such allocation was arrived at by arm's length negotiation and in the judgment of the parties properly reflects the fair market value of such assets. It is agreed that the allocations under this Section 1.8 above will be binding on all parties for federal, state, local and other tax purposes and will be consistently reflected by each party on such party's tax returns.]

ARTICLE 2 REPRESENTATIONS AND WARRANTIES CONCERNING THE SELLERS

Each Seller severally, but not jointly, represents and warrants to the Purchaser that the information contained in this ARTICLE 2 is true and correct and will be true and correct as of the Closing Date:

2.1. [Organization and Authority. If the Seller is not a natural person, (a) it is duly formed, validly existing and in good standing under the laws of its jurisdiction of formation, (b) it has the requisite power and authority to execute and deliver this Agreement and the other agreements, documents and instruments of the Seller contemplated hereby and to perform its obligations hereunder and thereunder, and (c) such execution, delivery and performance by the Seller have been duly and validly authorized by all requisite action on the part of the Seller.]

2.2. No Conflict. No consent, order, authorization, approval, declaration or filing is required on the part of the Seller for or in connection with the execution, delivery or performance of this Agreement and the other agreements, documents and instruments of the Seller contemplated hereby. The execution, delivery and performance of this Agreement and the other agreements, documents and instruments contemplated hereby by the Seller will not

result in any violation of, be in conflict with, constitute a default under, or cause the acceleration of any obligation or loss of any rights under any Legal Requirement, agreement, contract, instrument, charter, by-laws, operating agreement, partnership agreement, organizational document, license, permit, authorization, franchise or certification to which the Seller is a party or by which the Seller is bound.

2.3. Validity and Enforceability. This Agreement is, and each of the other agreements, documents and instruments contemplated hereby to which the Seller is a party shall be when executed and delivered by the Seller, the valid and binding obligations of the Seller enforceable in accordance with its terms [except as limited by applicable bankruptcy, insolvency, reorganization, moratorium and other laws of general application affecting enforcement of creditors' rights generally, and by laws related to the availability of specific performance, injunctive relief or other equitable remedies].

ARTICLE 3 REPRESENTATIONS AND WARRANTIES CONCERNING THE COMPANY

The [Sellers and the] Company hereby [jointly and severally] represent[s] and warrant[s] to the Purchaser that each of the statements contained in this ARTICLE 3 is true and correct and will be true and correct as of the Closing Date:

3.1. Organization, Power and Standing. The Company is a corporation duly organized, validly existing and in good standing under the laws of the State of _____, and has all requisite power and authority to own, lease and operate its properties and to carry on its business (either directly or through its Subsidiaries) as currently conducted and as currently proposed by the Company to be conducted after the Closing (the "Business").

3.2. Subsidiaries. Except as set forth on Schedule 3.2, the Company has no subsidiaries. The entities indicated on such Schedule as subsidiaries are referred to herein as the "Subsidiaries" and each as a "Subsidiary". Except as set forth on Schedule 3.2 and except for the Company's interests in the Subsidiaries, neither the Company nor any of the Subsidiaries directly or indirectly owns or has the right to acquire any equity interest in any other corporation, partnership, limited liability company, joint venture, trust or other business organization. Each Subsidiary is duly organized, validly existing and in good standing under the laws of the state or jurisdiction in which it is organized, as set forth on Schedule 3.2. Each of the Subsidiaries has full power and authority to own, lease and operate its properties and to carry on the Business.

3.3. Foreign Qualifications. The Company and each of its Subsidiaries are duly qualified and authorized to do business and are in good standing in each of the jurisdictions listed on Schedule 3.3. Neither the Company nor any of its Subsidiaries is required to qualify to do business as a foreign entity in any other jurisdiction [, except where the failure to do so would not have a material adverse effect on the Business, the Purchased Assets or the affairs, condition (financial or otherwise), prospects or results of operations of the Business, whether or not such effect is foreseeable].

3.4. Due Authorization; No-Conflict. The Company has full power and authority and has taken all required action on its part (including board and stockholder approval) necessary to permit it to execute and deliver and to carry out the terms of this Agreement and the other agreements, instruments and documents of the Company contemplated hereby. Each Subsidiary has full power and authority and has taken all required action on its part (including board and stockholder approval) necessary to permit it to execute and deliver and to carry out the terms of each agreement, instrument and document of such Subsidiary contemplated hereby. Except as specified on **Schedule 3.4** and except for any applicable filings and approvals under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the “HSR Act”), no consent, order, authorization, approval, declaration or filing, including, without limitation, any consent, approval or authorization of or declaration or filing with any governmental or non-governmental authority or any party to a Material Contract (as hereinafter defined), is required on the part of the Company or any Subsidiary for or in connection with its execution, delivery or performance of this Agreement or any of the other agreements, documents and instruments contemplated hereby, or the conduct of the Business by the Purchaser or any Subsidiary after the Closing (the “Required Consents”). The Company has no reason to believe that all of the Required Consents will not be obtained. Subject to obtaining the Required Consents specified on **Schedule 3.4**, the execution, delivery and performance of this Agreement and the other agreements, documents and instruments contemplated hereby by the Company and the Subsidiaries will not result in any violation of, be in conflict with, constitute a default under, or cause the acceleration of any obligation or loss of any rights under, any Legal Requirement, agreement, contract, instrument, charter, by-laws, operating agreement, partnership agreement, organizational document, license, permit, authorization, franchise or certification to which the Company or any Subsidiary is a party or by which the Company or any Subsidiary is bound.

3.5. Validity and Enforceability. This Agreement is, and each of the other agreements, documents and instruments contemplated hereby to which the Company is a party shall be when executed and delivered by the Company, the valid and binding obligations of the Company enforceable in accordance with its terms [, except as limited by applicable bankruptcy, insolvency, reorganization, moratorium and other laws of general application affecting enforcement of creditors’ rights generally, and by laws related to the availability of specific performance, injunctive relief or other equitable remedies]. Each agreement, document and instrument contemplated hereby to which any Subsidiary is a party shall be, when executed and delivered by such Subsidiary, the valid and binding obligations of such Subsidiary enforceable in accordance with its terms [, except as limited by applicable bankruptcy, insolvency, reorganization, moratorium and other laws of general application affecting enforcement of creditors’ rights generally, and by laws related to the availability of specific performance, injunctive relief or other equitable remedies].

3.6. Capitalization.

(a) The Company’s authorized and outstanding capital stock is as set forth on **Schedule 3.6(a)** hereto. There are no outstanding options, warrants, convertible or exchangeable securities or other rights that could, directly or indirectly, obligate the Company to issue shares of its capital stock or other securities.

(b) Each Subsidiary's authorized and outstanding capital stock or other securities are as set forth on **Schedule 3.6(b)** hereto. Each Subsidiary's outstanding capital stock and other securities are owned beneficially and of record by the Persons (as hereinafter defined) and in the amounts set forth on **Schedule 3.6(b)** and are duly authorized, validly issued, fully paid and nonassessable. The offer, issuance and sale of such shares of capital stock and other securities were made in compliance with all applicable federal and state securities laws and all applicable preemptive and similar rights. There are no outstanding options, warrants, convertible or exchangeable securities or other rights that could, directly or indirectly, obligate any Subsidiary to issue shares of its capital stock or other securities. As used herein, "Person" means any natural person or corporation, limited liability company, partnership, trust or other entity.

(c) There are no outstanding or authorized stock appreciation, phantom stock or similar rights with respect to the Company or any Subsidiary.

(d) Except as described on **Schedule 3.6(d)**, there are no agreements, written or oral, relating to the securities of the Company or any Subsidiary including, without limitation, the acquisition, disposition, repurchase, voting or registration thereof.

(e) No Subsidiary is subject to any obligation (contingent or otherwise) to redeem, purchase or otherwise acquire or retire any of its equity securities. No Person has any right of first offer, right of first refusal, preemptive right or other similar right in connection with the issuance or sale of the outstanding securities of any Subsidiary, or with respect to any future offer, sale or issuance of securities by any Subsidiary.

3.7. Financial Information.

(a) The Company has delivered to the Purchaser the audited, consolidated balance sheet of the Company as at _____, _____ and _____ (the [_____] balance sheet is sometimes referred to herein as the "Balance Sheet" and the date thereof is sometimes referred to as the "Balance Sheet Date"), and the audited, consolidated statements of cash flows, income and stockholders' equity for the fiscal years then ended. The Company has also furnished to the Purchaser the unaudited, consolidated balance sheet of the Company and the Subsidiaries as at _____ and the unaudited, consolidated statements of cash flows, income and stockholders' equity of the Company for the _____-month period then ended.

(b) As used herein, "Financial Statements" means the financial statements referenced in clause (a) above together with (as of the Closing) the financial statements delivered pursuant to Section 5.4. The Financial Statements and the notes thereto, if any, (i) are complete and accurate in all material respects and fairly present the financial condition of the Company and its Subsidiaries at the respective dates thereof and the results of operations for the periods then ended, and (ii) were prepared in accordance with the books and records of the Company and its Subsidiaries in conformity with generally accepted accounting principles consistently applied during the periods covered thereby, except, in the case of unaudited Financial Statements, for the omission of footnotes and normal year-end adjustments which are not, individually and in the aggregate, material. None of the Financial Statements contains any material, non-recurring items, except as expressly set forth therein.

(c) [For the twelve month period ending [_____], the Company's EBITDA was at least \$_____.] As used herein, "EBITDA" means [_____].

3.8. No Material Adverse Changes. Since [the date of the most recent unaudited financial statements described in Section 3.7(a)/the Balance Sheet Date], other than as shown on **Schedule 3.8**, (a) the Company and each Subsidiary has operated only in the usual and ordinary course of business, (b) there has been no event or condition which individually, or together with any other events or conditions, has had or could reasonably be expected to have a material adverse effect on the Business, the Purchased Assets or the affairs, condition (financial or otherwise), prospects or results of operations of the Business or any material division of the Business, whether or not such effect is foreseeable, and (c) the Company and its Subsidiaries have complied with the covenants set forth in Section 5.1 of this Agreement as if this Agreement had been executed as of such date.

3.9. Material Contracts. **Schedule 3.9** sets forth a complete and accurate list, in each case whether written or unwritten, of all of the following contracts, agreements and arrangements with respect to the Company or any Subsidiary:

(a) contracts with respect to which the Company or any Subsidiary has any liability or obligation involving more than \$_____, contingent or otherwise;

(b) contracts which may extend for a term of more than one year after the Closing;

(c) contracts under which the amount payable by the Company or any Subsidiary is dependent on the revenue, income or other similar measure of the Company, any Subsidiary or any other Person;

(d) licenses, leases, contracts, agreements and other arrangements with respect to any [material] property of the Company or any Subsidiary, including without limitation, distribution, sales and supply contracts;

(e) contracts, instruments and arrangements relating to any Indebtedness or the guarantee thereof;

(f) contracts and other arrangements of the Company or any Subsidiary with any officer, director, manager, stockholder, member or Affiliate of the Company or any Subsidiary or any of their respective relatives or Affiliates;

(g) contracts or other arrangements which place any limitation on the method of conducting or scope of the Business including, without limitation, any agreement that contains any exclusivity, non-competition, non-solicitation or no-hire provisions;

(h) employment, severance, consulting, deferred compensation, collective bargaining, benefits and similar plans, agreements, contracts or other arrangements involving the Company or any Subsidiary;

- (i) contracts relating to or involving any franchise, partnership, joint venture or other similar arrangement;
- (j) contracts with respect to mergers or acquisitions, sales of securities or material assets, or investments by the Company or any Subsidiary;
- (k) contacts with governmental agencies, departments or authorities;
- (l) strategic alliance, co-marketing, co-promotion, co-packaging, joint development or similar agreements;
- (m) powers of attorney;
- (n) agreements, contracts, instruments, commitments, plans or other arrangements of the Company or any Subsidiary outside of the ordinary course of business; and
- (o) other agreements, contracts, instruments, commitments, plans or other arrangements of the Company or any Subsidiary which are material to the Business or which a reasonable purchaser would consider important in deciding whether or not to acquire the Company.

All the foregoing (whether written or unwritten), including all amendments or modifications thereto, all Real Estate Leases (as hereinafter defined) and all IP Licenses (as hereinafter defined) are sometimes collectively referred to as “Material Contracts”. The Company has furnished to the Purchaser true and correct copies of all Material Contracts (or descriptions thereof, in the case of oral contracts). Each Material Contract (or description) sets forth the entire agreement and understanding between the Company and/or each Subsidiary and the other parties thereto. Each Material Contract is valid, binding and in full force and effect. There is no event or condition which has occurred or exists which constitutes or which, with or without notice, the happening of any event and/or the passage of time, could constitute a default or breach under any such Material Contract by the Company and/or any Subsidiary or, to the knowledge of the Company (for purposes of this Agreement, the knowledge of the Company or any similar phrase shall be deemed to include the knowledge of the Subsidiaries), any other party thereto, or could cause the acceleration of any obligation or loss of any rights of any party thereto or give rise to any right of termination or cancellation thereof. The Company has no reason to believe that the parties to any Material Contract will not fulfill their obligations thereunder in all material respects.

3.10. Real Property.

(a) **Schedule 3.10(a)** sets forth each interest in real property (including all land, buildings, easements, rights of way and other real property rights) owned by the Company or any Subsidiary (the “Owned Property”). The Company and each Subsidiary, as applicable, has good and marketable title to the Owned Property, free and clear of all Liens, except for Permitted Liens, and enjoys peaceful and quiet possession of the Owned Property. The Owned Property is legally subdivided and consists of separate tax lots so that each is assessed separate and apart from any other real property. There are no suits, actions or proceedings pending or, to the Company’s knowledge, threatened against or affecting any of the Owned Property before any

court or administrative agency or office. Each parcel of the Owned Property is an independent unit which does not now rely on any facilities (other than the facilities of public utility and water companies) located on any other property (i) to fulfill any Legal Requirement or (ii) for structural support or the furnishing to the buildings or other improvements on the Owned Property of any building systems. There are no material Taxes, levies, fees or similar costs or charges which must be paid with respect to existing water or sewer hook-ups or other similar services relating to the Owned Property. As used herein, “Permitted Liens” means (i) prior to the Closing, the Liens designated as such on **Schedule 3.10(a)**, (ii) statutory Liens for current taxes or assessments not yet due and payable and (iii) such other Liens, imperfections in title and easements of record, if any, which do not detract, individually or in the aggregate, from the value of or interfere with the present or proposed use by the Company or any Subsidiary of the property subject thereto or affected thereby.

(b) **Schedule 3.10(b)** sets forth each interest in real property (including all land, buildings, easements, rights of way and other real property rights) leased by the Company or any Subsidiary, the lessor of such leased property, the annual rent payable by the Company or any Subsidiary in respect of such leased property, and each lease or any other arrangement under which such property is leased (the “Leased Property” and together with the Owned Property, the “Real Property”). The Company and each Subsidiary, as applicable, enjoys peaceful and quiet possession of its leased premises, and is not in default or breach under any such leasehold. Neither the Company nor any Subsidiary has been informed that any lessor under any of the leases set forth on **Schedule 3.10(b)** (the “Real Estate Leases”) has taken action in respect of any Real Estate Lease or threatened to terminate any Real Estate Lease before the expiration date specified in such lease. The Company and each Subsidiary is entitled to the benefit of non-disturbance agreements that will permit it to continue to occupy any Leased Property under its existing leases in the event of a change in ownership or foreclosure upon the fee interest in such Leased Property.

(c) The Real Property includes all real property necessary for the conduct of the Business and is adequate to conduct the operations of the Company and the Subsidiaries as currently conducted. Neither the Company nor any Subsidiary needs to own or lease any other real property to conduct the Business. The Real Property is in compliance in all material respects with all applicable Legal Requirements.

(d) None of the buildings, plant or structures on any Real Property is in need of maintenance or repairs except for ordinary, routine maintenance and repairs that are, individually and in the aggregate, immaterial. All utility systems serving the Real Property are adequate for the Business as currently conducted. Each Real Property has adequate access for ingress from and egress to a public way. There is no pending or, to the knowledge of the Company, threatened condemnation, eminent domain or similar proceeding with respect to any Real Property.

3.11. Personal Property and Assets.

(a) All material tangible assets of the Company and each Subsidiary are in good operating condition and repair, normal wear and tear excepted, and are adequate to conduct the operations of the Company and its Subsidiaries as currently conducted.

(b) The Purchased Assets include all assets and properties necessary for or currently used in the conduct of the Business, and are adequate to conduct the Business as currently conducted. No assets used or useful in the Business are owned by any Seller or any Affiliate of the Company or any Seller. At the Closing, the Purchaser will acquire from the Company good title to or a valid leasehold or license interest in the Purchased Assets, free and clear of all Liens, other than Permitted Liens.

3.12. Intellectual Property.

(a) As used herein “Intellectual Property” means all intellectual property rights of every kind including all (i) patents, patent applications, patent disclosures and inventions, (ii) trademarks, service marks, trade dress, trade names, logos and corporate names (in each case, whether registered or unregistered) and registrations and applications for registration thereof, (iii) copyrights (registered or unregistered) and registrations and applications for registration thereof, (iv) computer software, data, data bases and documentation thereof, (v) trade secrets and other confidential or proprietary information (including, without limitation, ideas, formulas, compositions, inventions (whether patentable or unpatentable and whether or not reduced to practice), know-how, manufacturing and production processes and techniques, research and development information, drawings, specifications, designs, plans, proposals, technical data, copyrightable works, financial and marketing plans and customer and supplier lists and information), (vi) World Wide Web addresses and domain name registrations, (vii) works of authorship including, without limitation, computer programs, source code and executable code, whether embodied in software, firmware or otherwise, documentation, designs, files, records, data and mask works and any rights in semiconductor masks, layouts, architectures or topography, and (viii) goodwill associated with any of the foregoing. As used herein “Company Intellectual Property” means Intellectual Property owned or used by the Company or any Subsidiary.

(b) **Schedule 3.12(b)** hereto contains a complete and accurate list of all Company Intellectual Property included in clauses (i) – (iii) and (vi) of the definition of Intellectual Property. **Schedule 3.12(b)** contains a complete and accurate list of all licenses and other rights granted by the Company or any Subsidiary to any Person with respect to any Company Intellectual Property and all licenses and other rights granted by any Person to the Company or any Subsidiary with respect to any Company Intellectual Property (for this purpose, excluding so-called “off-the-shelf” products and “shrink wrap” software licensed to the Company or any Subsidiary in the ordinary course of business and easily obtainable without material expense) identifying the subject Company Intellectual Property and describing the material terms of such licenses or other rights (collectively, the “IP Licenses”). The Company and its Subsidiaries are in compliance with all of their respective obligations pursuant to any license or agreement relating to use of any Intellectual Property owned by a third party, except for such non-compliance that, individually or in the aggregate, would not reasonably be expected to have a Material Adverse Effect on the Company.

(c) The Company and each Subsidiary owns or possesses sufficient legal rights to use all Intellectual Property necessary for or used in the Business. Neither the Company nor any Subsidiary has violated or infringed, is violating or infringing or, by conducting the Business, and the Company has no knowledge of any violation or infringement by any Person of

any Company Intellectual Property. None of the Company or any Subsidiary has received any notice from any Person claiming any violation or infringement of a Person's Intellectual Property rights.

(d) Each item of Company Intellectual Property owned by the Company or its Subsidiaries is valid and subsisting, and all necessary registration, maintenance and renewal fees in connection with such Company Intellectual Property have been paid and all necessary documents and certificates in connection with such Company Intellectual Property have been filed with the relevant authorities in the United States or foreign jurisdictions, as the case may be, for the purposes of maintaining such Company Intellectual Property. There is no threatened or reasonably foreseeable loss or expiration of any Company Intellectual Property.

(e) The Company and each Subsidiary has taken all steps that are reasonably required to protect their rights in, and the confidentiality of, the Company Intellectual Property belonging to the Company or such Subsidiary or provided by any other Person to the Company or any Subsidiary. Without limiting the foregoing, the Company and each Subsidiary has, and enforces, a policy requiring each of its employees, consultants and contractors to execute a proprietary information, confidentiality and assignment agreement, copies of which have been previously provided to the Purchaser, and all current and former employees, consultants, and contractors of the Company and each Subsidiary have executed such an agreement. To the knowledge of the Company, no employee of the Company or any Subsidiary is obligated under any agreement or commitment, or subject to any judgment, decree or order of any court or administrative agency, that could interfere with such employee's duties to the Company or any Subsidiary, or that could conflict with the Business.

(f) Neither the Company nor any Subsidiary is required to pay any royalties or other compensation to any third parties in respect of its ownership or use of any Company Intellectual Property, other than payments in the ordinary course of business for so-called "off-the-shelf" products or "shrink wrap" software. None of the software owned, used or distributed by the Company or any Subsidiary incorporates, includes or is otherwise derived from or dependent upon software made available under the terms of the General Public License or a similar licensing regime that would, under any circumstance, impose upon Company an obligation to make such software available to others in source code form.

(g) The Company and each Subsidiary's rights in and to Intellectual Property that is owned by Company or any Subsidiary are free and clear of all Liens.

3.13. Accounts Receivable. All of the accounts receivable of the Company and each Subsidiary are valid and enforceable claims, subject to no set off or counterclaim [, and will be collected in the ordinary course of business]. All accounts receivable of the Company and each Subsidiary are determined in accordance with generally acceptable accounting principles and arose out of bona fide transactions in the ordinary course of business.

3.14. Inventories. The inventory of the Company and each Subsidiary consists of raw materials, manufactured and purchased parts and finished goods saleable or usable in the ordinary course of business within _____ months. The inventory of the Company and each

Subsidiary is fit and sufficient for the purposes for which it was provided or manufactured and is normal and reasonable in kind and amount in light of the normal needs of the Business.

3.15. Warranty Claims. Since _____, there have been no material claims against the Company or any Subsidiary alleging any defects in the Company's or any Subsidiary's services or products, or alleging any failure of the products or services of the Company or any Subsidiary to meet applicable specifications, warranties or contractual commitments. The Company's and each Subsidiary's liability for breach of warranty is limited to repair or replacement of products or nonconforming parts. The Company's and each Subsidiary's liability for any breach of warranty for products manufactured or services provided prior to Closing shall not exceed the warranty reserve set forth in the most recent financial statements set forth in Section 3.7(a). The Company's and each Subsidiary's products are free from material defects and perform in all material respects in accordance with all applicable specifications, warranties and contractual commitments.

3.16. Business Relationships. Schedule 3.16 sets forth a list of all customers which accounted for at least \$_____ of consolidated net sales by the Company during the twelve calendar months ended as of [_____]. To the knowledge of the Company, (a) all such customers will continue purchasing, without significant reductions, products and services from the Company and its Subsidiaries, and (b) all suppliers, vendors and service providers which are material to the Company or any Subsidiary will continue after the Closing to sell the products and provide the services to the Purchaser currently sold and provided by them to the Company and its Subsidiaries. The Company's and its Subsidiaries' relationships with such customers, suppliers, vendors and service providers are good commercial working relationships. During the previous 18 months, no customer representing more than \$_____ of consolidated annualized revenues and no significant supplier, vendor or service provider (x) has terminated or, to the knowledge of the Company threatened to terminate, its relationship with the Company or any Subsidiary, (y) has decreased or limited materially or, to the knowledge of the Company threatened to decrease or limit materially, the services, supplies or materials supplied to or purchased from the Company or any Subsidiary, or (z) has materially changed or, to the knowledge of the Company threatened to change materially, its business relationship with the Company or any Subsidiary.

3.17. Regulatory and Legal Compliance. The Company and each Subsidiary is in compliance in all material respects with all Legal Requirements. Since _____, neither the Company nor any Subsidiary has received any notice from any governmental authority or any other Person of any alleged violation or noncompliance. As used herein, the term "Legal Requirements" means, with respect to any Person, all foreign, federal, state and local statutes, laws, ordinances, judgments, decrees, orders, rules, regulations, policies and guidelines applicable to such Person.

3.18. Licenses and Permits. Schedule 3.18 sets forth all licenses, permits, authorizations, franchises and certifications of governmental and non-governmental authorities held by the Company and each Subsidiary which are material to the Company, any Subsidiary, the Purchased Assets or the Business. The Company and each Subsidiary is in compliance in all material respects with all such licenses, permits, authorizations, franchises and certifications, all of which are in full force and effect and will be in full force and effect and held by the Purchaser

immediately after giving effect to the Transactions. There are no other licenses, permits, authorizations, franchises or certifications which are material to the Company, any Subsidiary or the Business which the Company or any Subsidiary is required to obtain or which, in good industry practice, the Company or any Subsidiary should hold for the conduct of the Business. The Company does not know of any threatened suspension, revocation or invalidation of any such licenses, permits, authorizations, franchises or certifications, or any basis therefor.

3.19. Tax Matters.

(a) **Definitions.** For purposes of this Agreement, the following definitions shall apply:

(i) “Tax” or “Taxes” means all taxes, charges, fees, levies, penalties, additions or other assessments imposed by any foreign, federal, state or local taxing authority, including, but not limited to, income, excise, property, sales, use, transfer, franchise, payroll, withholding, value added, social security or other taxes, charges or assessments, including any interest, penalties or additions attributable thereto.

(ii) “Tax Returns” means all reports, estimates, declarations of estimated Tax, information statements and returns relating to, or required to be filed in connection with, any Taxes and any schedules attached to or amendments of (including refund claims with respect to) any of the foregoing.

(b) Except as set forth on **Schedule 3.19(b)** hereto: (i) all Tax Returns required to be filed by or on behalf of the Company or any of the Subsidiaries have been duly filed on a timely basis; (ii) such Tax Returns are true, complete and correct; (iii) all Taxes owed by the Company or any of the Subsidiaries for or with respect to any taxable period or partial taxable period ending on or before the Closing Date, whether or not stated as due on such Tax Returns, have been paid or will be timely paid by the Company and the Subsidiaries, respectively, prior to the Closing; (iv) the Purchaser has been supplied with true and complete copies of each Tax Return of the Company or any of the Subsidiaries, including each franchise or excise Tax Return based on income filed for the last three taxable years; (v) neither the Company nor any Subsidiary (A) has ever been audited or received notice of initiation thereof by any governmental taxing authority for which the statute of limitations for assessment of Taxes remains open, (B) has ever extended any applicable statute of limitations regarding Taxes for which the statute of limitations for assessment of Taxes remains open, (C) is liable, contractually or otherwise, for the Taxes of any other Person (other than withholding Taxes arising in the ordinary course of business), (D) has agreed to or is required to make any adjustment under Code Section 481(a) or 263A, (E) has ever made any payments, is obligated to make any payments, or is a party to any agreement or arrangement that under certain circumstances could obligate it to make any payments that may not be deductible under Section 280G of the Code, (F) is a party to any allocation or sharing agreement with respect to Taxes, (G) has ever participated in the filing of any consolidated, combined or unitary Tax Return, (H) is currently the beneficiary of any extension of time within which to file any Tax Return, and (I) has received notice of any claim by any authority in any jurisdiction where it does not file Tax Returns that it (or the Sellers) is or may be subject to any Taxes or future taxation in such jurisdiction; (vi) all Taxes which the Company and each Subsidiary is required to withhold or to collect for payment have been duly

withheld and collected and paid to the proper governmental entity or third party; and (vii) each of the Sellers, the Company and each Subsidiary is a “United States person” as such term is used in Code Section 1445.

(c) [The Purchaser has been supplied with the Tax Return workpapers of the Company and its Subsidiaries and other Tax related information, which accurately set forth the tax basis of the Company’s consolidated assets and the amount of its consolidated liabilities, net operating loss and other carry forwards, and other tax attributes.]

(d) Neither the Company nor any Subsidiary is a party to any joint venture, partnership or other arrangement or contract that could be treated as a partnership for federal income tax purposes.

(e) [Neither the Company nor any of its Subsidiaries has been, at any time, a “United States Real Property Holding Corporation” within the meaning of Section 897(c)(2) of the Code.]

3.20. Litigation. Except as expressly set forth on **Schedule 3.20**, no action, arbitration, suit, proceeding or investigation is pending or, to the knowledge of the Company, threatened against the Company, any Subsidiary or, to the knowledge of the Company, against any stockholder, member, officer, director, manager or employee of the Company or any Subsidiary in relation to the affairs of the Company or any Subsidiary. Except as expressly set forth on **Schedule 3.20**, the matters disclosed on such Schedule will be covered by the Company’s insurance policies. Neither the Company nor any Subsidiary is currently planning to initiate any action, suit, or proceeding before any court, arbitrator or governmental authority.

3.21. Employees and Compensation.

(a) The Company and each Subsidiary is in compliance in all material respects with all applicable Legal Requirements respecting employment and employment practices in the jurisdictions within which they operate including, without limitation, the Age Discrimination in Employment Act of 1967, as amended, the Americans with Disabilities Act of 1990, as amended, ERISA (as hereinafter defined), and state fair employment practices laws.

(b) Neither the Company’s nor any Subsidiary’s employees are represented by a union, and there is no labor strike, dispute, arbitration, grievance, slowdown, stoppage, organizational effort, dispute or proceeding by or with any employee or former employee of the Company or any Subsidiary or any labor union pending or, to the knowledge of the Company, threatened against the Company or any Subsidiary.

(c) There are no employment or consulting contracts or arrangements (other than those terminable at will without liability to the Company) with any employees or consultants of the Company or any Subsidiary other than as described on **Schedule 3.9**. **Schedule 3.21** sets forth a complete list of all employees of and consultants to the Company and each Subsidiary, with annual compensation in excess of [\$50,000], showing date of hire, hourly rate or salary or other basis of compensation, other benefits accrued as of a recent date and job function. To the knowledge of the Company, no officer or key employee of the Company or any Subsidiary intends to terminate his or her employment with the Company or any Subsidiary.

3.22. ERISA; Compensation and Benefit Plans.

(a) **Schedule 3.22(a)** sets forth all employee compensation and benefit plans, agreements, commitments, practices or arrangements of any type (including, but not limited to, plans described in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”)) offered, maintained or contributed to by the Company or any Subsidiary for the benefit of current or former employees or directors of the Company or any Subsidiary, or with respect to which the Company or any Subsidiary has or may have any liability, whether direct or indirect, actual or contingent (including, but not limited to, liabilities arising from affiliation under Section 414(b), (c), (m) or (o) of the Internal Revenue Code of 1986, as amended (the “Code”), or Section 4001 of ERISA) (collectively, the “Benefit Plans”), and includes a written description of all oral Benefit Plans. There are no material compensation or benefit plans, agreements, commitments, practices or arrangements of any type providing benefits to employees or directors of the Company or any Subsidiary, or with respect to which the Company or any Subsidiary may have any liability, other than the Benefit Plans.

(b) With respect to each Benefit Plan, the Company and each Subsidiary has delivered to the Purchaser true and complete copies of: (i) any and all plan texts and agreements (including, but not limited to, trust agreements, insurance contracts and investment management agreements); (ii) any and all material employee communications (including all summary plan descriptions and material modifications thereto); (iii) the two most recent annual reports, if applicable; (iv) the most recent annual and periodic accounting of plan assets, if applicable; (v) the most recent determination letter received from the Internal Revenue Service (the “Service”), if applicable; and (vi) in the case of any unfunded or self-insured plan or arrangement, a current estimate of accrued and anticipated liabilities thereunder.

(c) With respect to each Benefit Plan: (i) if intended to qualify under Section 401(a) of the Code, such plan so qualifies, and its trust is exempt from taxation under Section 501(a) of the Code; (ii) such plan has been administered and enforced in accordance with its terms and all applicable Legal Requirements in all material respects; (iii) no breach of fiduciary duty has occurred with respect to which the Company or any Subsidiary or any Benefit Plan may be liable or otherwise damaged in any material respect; (iv) no material disputes nor any audits or investigations by any governmental authority are pending or, to the knowledge of the Company, threatened; (v) no “prohibited transaction” (within the meaning of either Section 4975(c) of the Code or Section 406 of ERISA) has occurred with respect to which the Company or any Subsidiary or any Benefit Plan may be liable or otherwise damaged in any material respect; (vi) all contributions, premiums, and other payment obligations have been accrued on the consolidated financial statements of the Company in accordance with generally accepted accounting principles, and, to the extent due, have been made on a timely basis, in all material respects; (vii) all contributions or benefit payments made or required to be made under such plan meet the requirements for deductibility under the Code; (viii) the Company and each Subsidiary has expressly reserved in itself the right to amend, modify or terminate such plan, or any portion of it, at any time without liability to itself; and (ix) no such plan requires the Company or any Subsidiary to continue to employ any employee or director.

(d) No Benefit Plan is, or has ever been, subject to Title IV of ERISA.

(e) With respect to each Benefit Plan which provides welfare benefits of the type described in Section 3(1) of ERISA: no such plan provides medical or death benefits with respect to current or former employees or directors of the Company or any Subsidiary beyond their termination of employment, other than coverage mandated by Sections 601-608 of ERISA and 4980B(f) of the Code, (ii) each such plan has been administered in compliance with Sections 601-609 of ERISA and 4980B(f) of the Code; (iii) no such plan is or is provided through a “multiple employer welfare arrangement” within the meaning of Section 3(40) of ERISA; and (iv) no such plan has reserves, assets, surpluses or prepaid premiums.

(f) The consummation of the Transactions contemplated by this Agreement will not (i) entitle any individual to severance pay, (ii) accelerate the time of payment or vesting under any Benefit Plan, or (iii) increase the amount of compensation or benefits due to any individual.

3.23. Environmental Matters. The ownership and use of the Company’s and each Subsidiary’s premises and assets, the occupancy and operation thereof, and the conduct of the Company’s and each Subsidiary’s operations and business, are in compliance in all material respects with all applicable Legal Requirements relating to pollution, environmental protection, hazardous substances and related matters. Since _____, neither the Company nor any Subsidiary has received any notice from any governmental authority or any other Person of any alleged violation or noncompliance. There is no liability attaching to the Purchaser, the Subsidiaries, the Purchased Assets or the Business as a result of any hazardous substance that may have been discharged on or released from such premises, or disposed of on-site or off-site, or any other circumstance occurring prior to the Closing or existing as of the Closing. For purposes of this Section, “hazardous substance” shall mean oil or any other substance which is included within the definition of a “hazardous substance”, “pollutant”, “toxic substance”, “toxic waste”, “hazardous waste”, “contaminant” or other words of similar import in any foreign, federal, state or local environmental law, statute, ordinance, rule or regulation.

3.24. Insurance. Schedule 3.24 sets forth all insurance policies under which the Company or any Subsidiary is insured, the name of the insurer of each policy, the type of policy provided by such insurer, the amount, scope and period covered thereby and a description of any material claims made thereunder. Such insurance policies are valid and in full force and effect and are adequate to insure against all liabilities, claims and risks against which it is customary for companies similarly situated as the Company and its Subsidiaries to insure. All premiums due to date under such policies have been paid, no default exists thereunder and, with respect to any material claims made under such policies, no insurer has made any “reservation of rights” or refused to cover all or any portion of such claims. Neither the Company nor any Subsidiary has received any notice of any proposed material increase in the premiums payable for coverage, or proposed reduction in the scope (or discontinuation) of coverage, under any of such insurance policies.

3.25. Affiliate Transactions. Except as set forth on Schedule 3.25, (a) neither the Company nor any Subsidiary is a party to any contract or arrangement with, or indebted, either directly or indirectly, to any of its officers, directors, managers, members or stockholders, or any of their respective relatives or Affiliates, (b) none of such Persons is indebted to the Company or any Subsidiary or has any direct or indirect ownership interest in, or any contractual or business

relationship with, any Person with which the Company or any Subsidiary is or was Affiliated or with which the Company or any Subsidiary has a business relationship, or any Person which, directly or indirectly, competes with the Company or any Subsidiary and (c) none of the Company's officers, directors, managers, members or stockholders have any interest in any property, real or personal, tangible or intangible, including inventions, copyrights, trademarks, or trade names, used in or pertaining to the business of the Company, or any supplier, distributor or customer of the Company, except for the normal rights of a stockholder, and except for rights under existing employee benefit plans. As used herein, "Affiliate" has the meaning ascribed to it in Rule 405 promulgated under the Securities Act of 1933, as amended (the "Securities Act").

3.26. Absence of Material Undisclosed Liabilities. Except for (a) accounts payable and accrued expenses reflected on the Balance Sheet and other similar amounts incurred in the ordinary course of business since the Balance Sheet Date, and (b) obligations of future performance under contracts set forth on a Schedule hereto and under other contracts entered into in the ordinary course in accordance with this Agreement which are not required to be listed on a Schedule hereto, as of the Closing Date, none of the Company or any of its Subsidiaries will have any material liabilities or obligations, whether absolute, accrued, contingent or otherwise, and whether due or to become due.

3.27. Brokers. Except as set forth on Schedule 3.27, no finder, broker, agent, financial advisor or other intermediary has acted on behalf of the Sellers, the Company or any Subsidiary in connection with the negotiation or consummation of this Agreement or the Transactions and no such Person is entitled to any fee, payment, commission or other consideration in connection therewith as a result of any arrangement made by any of them. The obligations to any Person set forth on Schedule 3.27 will be included in the Sellers' Expenses.

3.28. Certain Payments. Neither the Company, nor to the knowledge of the Company, any Person acting on behalf of the Company has, directly or indirectly, on behalf of or with respect to the Company: (i) made an unreported political contribution, (ii) made or received any payment which was not legal to make or receive, (iii) engaged in any material transaction or made or received any material payment which was not properly recorded on the books of the Company, (iv) created or used any "off-book" bank or cash account or "slush fund," or (v) engaged in any conduct constituting a violation of the Foreign Corrupt Practices Act of 1977.

3.29. Bank Accounts. Schedule 3.28 sets forth a true, correct and complete list showing the name and address of each banking institution, mutual fund or stock brokerage firm in which the Company or any Subsidiary has accounts or safe deposit boxes, the account numbers or box numbers relating thereto and the name of each Person authorized to draw thereon or to have access thereto.

3.30. Disclosure. The representations, warranties and other statements of the Company and the Sellers contained in this Agreement and the other documents, certificates and written statements furnished to the Purchaser by or on behalf of the Company or the Sellers pursuant hereto, taken as a whole, do not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements contained herein and therein not misleading.

ARTICLE 4
REPRESENTATIONS AND WARRANTIES OF THE PURCHASER

The Purchaser represents and warrants to the Company that each of the statements contained in this ARTICLE 4 is true and correct and will be true and correct as of the Closing Date:

4.1. Authority. The Purchaser has full power and authority and has taken all required action on its part (including board and stockholder approval) necessary to permit it to execute and deliver and to carry out the terms of this Agreement and the other agreements, instruments and documents of the Purchaser contemplated hereby.

4.2. No-Conflict. Except for applicable filings and approvals under the HSR Act, no consent, approval or authorization of or declaration or filing with any governmental or non-governmental authority or any party to any contact with the Purchaser is required on the part of the Purchaser for or in connection with its execution, delivery or performance of this Agreement and the other agreements, documents and instruments contemplated hereby. The execution, delivery and performance of this Agreement and the other agreements, documents and instruments contemplated hereby by the Purchaser will not result in any violation of, be in conflict with, or constitute a default under any Legal Requirement, agreement, contract, instrument, charter, by-laws, operating agreement, partnership agreement, organizational document, license, permit, authorization, franchise or certification to which the Purchaser is a party or by which the Purchaser is bound.

4.3. Validity and Enforceability. This Agreement is, and each of the other agreements, documents and instruments contemplated hereby to which the Purchaser is a party shall be when executed and delivered by the Purchaser, the valid and binding obligations of the Purchaser enforceable in accordance with its terms [, except as limited by applicable bankruptcy, insolvency, reorganization, moratorium and other laws of general application affecting enforcement of creditors' rights generally, and by laws related to the availability of specific performance, injunctive relief or other equitable remedies].

ARTICLE 5
COVENANTS OF THE COMPANY AND THE SELLERS

5.1. Conduct of the Business. The Company and each Subsidiary will, and the Sellers will cause the Company and each Subsidiary to, comply with the following covenants prior to the Closing, unless otherwise approved in writing by the Purchaser.

- (a) The Company and each Subsidiary will:
 - (i) maintain its legal existence;
 - (ii) use all reasonable efforts to preserve the Business and its business organization intact, retain its licenses, permits, authorizations, franchises and certifications, and preserve the existing contracts and goodwill of its customers, suppliers, vendors, service providers, personnel and others having business relations with it;

(iii) conduct its business only in the ordinary course (including without limitation the collection of receivables and the payment of payables and capital expenditures); and

(iv) use all reasonable efforts to operate in such a manner as to assure that the representations and warranties of the Company and the Sellers set forth in this Agreement will be true and correct as of the Closing Date with the same force and effect as if such representations and warranties had been made on and as of the Closing Date.

(b) The Company and each Subsidiary will not:

(i) change its method of management or operations in any material respect;

(ii) dispose, acquire or license any assets or properties or make any commitment to do so, other than in the ordinary course of business;

(iii) incur any indebtedness for borrowed money, make any loans or advances, assume, guarantee or endorse or otherwise become responsible for the obligation of any other Person, or subject any of its properties or assets to any Lien, in each case other than in the ordinary course of business;

(iv) modify, amend, cancel or terminate any Material Contract or any other existing agreement, contract or instrument material to the Company, any Subsidiary or the Business;

(v) make any change in the compensation paid or payable to any officer, director, manager, employee, agent, representative or consultant as shown or required to be shown on Schedule 3.21, or pay or agree to pay any bonus or similar payment (other than bonus payments or other amounts to which the Company or any Subsidiary is committed and which are expressly disclosed in this Agreement);

(vi) promote, change the job title of, or otherwise alter in any material respect the responsibilities or duties of, any management employee or officer of the Company or any Subsidiary;

(vii) enter into any contract or agreement (A) with respect to which the Company or any Subsidiary has any liability or obligation involving more than \$_____, contingent or otherwise, (B) which may place any limitation on the method of conducting or scope of the Business, or (C) which would otherwise be considered a "Material Contract";

(viii) make or cause to be made any dividend, distribution, redemption, repurchase, recapitalization, reclassification, issuance, split, combination or other transaction involving the capital stock or other equity securities of the Company or any Subsidiary, or any option, warrant or right to acquire any such capital stock or equity securities;

- (ix) make any change in its accounting practices or procedures;
- (x) file or make any change to any material Tax election or any Tax Return, except as required by law;
- (xi) change its customer pricing or offer any rebates, discounts or promotions, other than in the ordinary course of business;
- (xii) acquire any business or Person, whether by merger or consolidation, purchase of assets or equity securities or any other manner;
- (xiii) cancel or waive any rights of substantial value, or pay, discharge or settle any claim of substantial value;
- (xiv) make any capital expenditures that, individually or in the aggregate, exceed \$ _____;
- (xv) take any other action which could have a material adverse effect on the Business or the affairs, assets, condition (financial or otherwise), prospects or results of operations of the Company or any Subsidiary or any material division of the Company or any Subsidiary, or could adversely affect or detract from the value of the Company, any Subsidiary, their respective assets or the Business; or
- (xvi) commit to do any of the foregoing referred to in clauses (i) - (xv).

5.2. Access. Until the Closing Date, if requested by the Purchaser, the Company and its Subsidiaries will, and the Sellers will cause the Company and its Subsidiaries to, permit the Purchaser, its financing sources and their respective representatives, during normal business hours, access to (a) the assets, properties, records, books of account, contracts and other documents of the Company and its Subsidiaries and (b) any employees, advisors, consultants, other personnel, customers, service providers, vendors or suppliers of, or others having material business relations with, the Company or any of its Subsidiaries. Until the Closing Date, the Company and its Subsidiaries will, and the Sellers will cause the Company and its Subsidiaries to, furnish promptly to the Purchaser such additional data and other information as to its affairs, assets, business, properties or prospects as the Purchaser, its financing sources or their representatives may from time to time reasonably request.

5.3. Efforts; Cooperation.

(a) The Company and the Sellers will use all reasonable efforts to cause the conditions specified in Section 7.1 to be satisfied as soon as practicable.

(b) The Purchaser intends to arrange for banks and/or other institutional lenders to make loans to the Purchaser and/or the Company at the Closing. Proceeds from the loans will be used to consummate the Transactions. The Company and the Sellers will cooperate with any reasonable request by the Purchaser or its financing sources in connection with the Purchaser's financing of the Transaction. For example, if requested by the Purchaser, the Company and the Sellers will assist the Purchaser in obtaining any mortgage, leasehold

mortgage, title commitment, landlord waiver, control agreement, collateral assignment or other document, instrument or agreement reasonably requested by the Purchaser's financing sources.

(c) To the extent required in connection with the Transactions contemplated by this Agreement, within five (5) business days following the date of execution of this Agreement each of the Company and the Purchaser shall promptly make or cause to be made any and all required filings under the HSR Act, and will request early termination of the waiting period required under the HSR Act. The parties agree to cooperate and promptly respond to any inquiries or investigations initiated by the Federal Trade Commission or the Department of Justice in connection with any such filings. The Purchaser and the Company shall each pay one-half of the filing fee required by the HSR Act.

(d) [The Company will use all reasonable efforts to obtain the Required Consents. The Company will, within ten (10) days of the date of this Agreement, make all required filings and notifications with the appropriate governmental authorities in order to obtain the approval of such governmental authorities to consummate the Transactions. The Purchaser will provide the Company with any information reasonably requested by the Company in order for the Company to complete such filings and notifications. The parties agree to cooperate and promptly respond to any inquiries or investigations initiated by any governmental authority in connection with such filings and notifications.]

(e) [Should any Person require as a condition to it consenting to the Transactions or otherwise providing a Required Consent, (i) the amendment, modification or replacement of any material term of any authorization, certification, franchise, license, permit or contract, or (ii) any new material terms to any authorization, certification, franchise, license, permit or contract, the Company shall not agree to the same without the prior written approval of the Purchaser. Except as set forth in Section 5.3(c), any fee or other cost required to be incurred to obtain any Required Consent shall be borne by the Company or, if required to be paid after the Closing, the Sellers.]

5.4. Stub Period Financial Statements. For the period commencing as of the date hereof and ending as of the Closing Date, the Company shall deliver to the Purchaser the (a) unaudited balance sheet of the Company for each month after the month of the most recent financial statements listed in Section 3.7(a), and (b) related statements of cash flows and income for the period then ended. Such financial statements shall be delivered within [] days after the end of such month or, if earlier, contemporaneously with the delivery of such financial statements to the directors, stockholders or lenders of the Company or any Subsidiary.

5.5. Nonsolicitation. Prior to the Closing, neither the Company nor any of the Subsidiaries or the Sellers will, directly or indirectly, (a) solicit any competing offers for the recapitalization or purchase of the Company or any Subsidiary or the purchase of all or any substantial portion of the stock or assets (including by merger, purchase of assets or in any other form of transaction) of the Company or any Subsidiary, (b) negotiate or otherwise respond, other than to decline to enter into such negotiations, with respect to any unsolicited offer or indication of interest with respect to any such transaction or (c) furnish confidential information to any Person in connection with any such transaction. The Company and the Sellers will promptly disclose to the Purchaser all such unsolicited offers or indications of interest.

5.6. Confidentiality. At all times following the Closing, neither the Company nor any of the Sellers shall, directly or indirectly, disclose, divulge or make use of any trade secrets or other information of a business, financial, marketing, technical or other nature pertaining to the Purchaser, the Company, the Subsidiaries or the Business, including information of others that the Purchaser, the Company or any Subsidiary has agreed to keep confidential, except (a) to the extent that such information shall have become public knowledge other than by breach of this Agreement by any of the Sellers, (b) as required in connection with the performance of such Seller's duties as an employee of the Purchaser, and (c) to the extent that disclosure of such information is required by law or legal process (but only after the Seller has provided the Purchaser with reasonable notice and opportunity to take action against any legally required disclosure).

5.7. Noncompetition.

(a) During the Noncompetition Period (as hereinafter defined) (i) neither the Company nor any of the Sellers will, directly or indirectly, or as a stockholder, partner, member, manager, employee, consultant or other owner or participant in any Person other than Purchaser, engage in or assist any other Person to engage in any Covered Business (as hereinafter defined) anywhere in the Covered Area (as hereinafter defined), (ii) neither the Company nor any Seller will, directly or indirectly, solicit or endeavor to entice away from the Purchaser, or offer employment or a consulting position to, or otherwise interfere with the business relationship of the Purchaser with, any Person who is, or was within the one-year period prior thereto, an employee of or consultant to the Purchaser and (iii) neither the Company nor any Seller will, directly or indirectly, solicit or endeavor to entice away from the Purchaser, endeavor to reduce the business conducted with the Purchaser by, or otherwise interfere with the business relationship of the Purchaser with, any Person who is, or was within the one-year period prior thereto, a customer or client of, supplier, vendor or service provider to, or other Person having business relations with, the Purchaser.

(b) For purposes of this Section 5.7, the following terms shall have the following meanings:

“Covered Area” means (i) anywhere in the United States, (ii) anywhere else in the world where the Company or any Subsidiary does business or plans to do business as of the Closing and (iii) for any Seller that will be employed by the Purchaser after the Closing, anywhere else in the world where the Purchaser does business or plans to do business during such Seller's employment.

“Covered Business” means (i) any business in which the Company or any Subsidiary is engaged or planning to engage as of the Closing, and (ii) for any Seller that is an employee of the Purchaser after the Closing, shall also include any business in which the Purchaser is engaged or planning to engage during such Seller's employment.

“Noncompetition Period” means, for any Seller that is an employee of the Purchaser after the Closing, the period commencing as of the Closing and ending as of the later of (i) the [] year anniversary of the Closing and (ii) the [] year anniversary of the termination of such Seller's employment, whether by the Purchaser or the Seller. For any Seller

that is not an employee of the Purchaser after the Closing, such term shall mean the period commencing as of the Closing and ending as of the [_____] year anniversary of the Closing.

“Purchaser” shall mean the Purchaser, each of its subsidiary, parent and affiliated companies, whether now existing or existing in the future, and all of their respective successors and assigns.

5.8. Injunctive Relief. The Company and the Sellers acknowledge that any breach or threatened breach of the provisions of Sections 5.5, 5.6 or 5.7 of this Agreement will cause irreparable injury to the Purchaser for which an adequate monetary remedy does not exist. Accordingly, in the event of any such breach or threatened breach, the Purchaser shall be entitled, in addition to the exercise of other remedies, to seek and (subject to court approval) obtain injunctive and other equitable relief, without necessity of posting a bond, restraining the Company and/or the Sellers, as the case may be, from committing such breach or threatened breach. The right provided under this Section 5.8 shall be in addition to, and not in lieu of, any other rights and remedies available to the Purchaser.

5.9. Reasonable Restrictions. The Company and each Seller (a) has carefully read and understands all of the provisions of this Agreement and has had the opportunity for this Agreement to be reviewed by counsel, (b) acknowledges that the duration, geographical scope and subject matter of Sections 5.6, 5.7 and 5.8 of this Agreement are reasonable and necessary to protect the goodwill, customer relationships, legitimate business interests, trade secrets and confidential and proprietary information of the Business and/or the business of the Purchaser, (c) acknowledges that the Purchaser would not have closed the Transactions without the benefits contained in this Agreement, (d) will be able to earn a satisfactory livelihood without violating this Agreement and (e) understands that this Agreement is assignable by the Purchaser and shall inure to the benefit of its successors and permitted assigns.

5.10. Company Intellectual Property. If any Seller owns or shall at any time hereafter acquire any rights in any Company Intellectual Property, such Seller shall, and hereby does, transfer all of its rights, title and interest in such Company Intellectual Property to the Purchaser for no additional consideration. Each Seller shall execute and deliver such additional documents and instruments and take such other actions as the Purchaser shall reasonably request to give effect to the provisions of this Section.

5.11. Use of Name. The Company acknowledges and agrees that the names “_____” and “_____,” and any abbreviations or derivations thereof, constitute part of the Purchased Assets and shall refrain from using any such names, abbreviations or derivations after the Closing. Within ten (10) business days after the Closing, the Company shall change its legal name to a name that is not confusingly similar to such name[s].

ARTICLE 6 COVENANTS OF THE PURCHASER

6.1. Representations and Warranties. Until the Closing Date, the Purchaser will not take any action that would cause any of the representations and warranties made by the

Purchaser in this Agreement not to be true and correct in all material respects on and as of the Closing Date with the same force and effect as if such representations and warranties had been made on and as of the Closing Date.

6.2. Efforts. Pending the Closing, the Purchaser will use all reasonable efforts to cause the conditions specified in Section 7.2 to be satisfied as soon as practicable.

6.3. Confidentiality. Pending the Closing, all proprietary information obtained by the Purchaser from or on behalf of the Company or any of its Subsidiaries will be kept confidential and will not be disclosed by the Purchaser other than to its Affiliates, partners, directors, officers, employees, advisors and financing sources; provided that the foregoing restriction shall not apply to information which (a) is lawfully and independently obtained by the Purchaser from a third party without restriction as to disclosure by the Purchaser, (b) was known by the Purchaser prior to its disclosure by or on behalf of the Company or its Subsidiaries, (c) is in the public domain or enters into the public domain through no fault of the Purchaser, (d) is independently developed by the Purchaser without reference to information provided by the Company or its Subsidiaries or (e) the Purchaser is required by law or legal process to disclose. If this Agreement is terminated, and if requested in writing by the Company, the Purchaser will cause to be delivered to the Company all materials obtained by the Purchaser from or on behalf of the Company or its Subsidiaries, whether obtained before or after the date of this Agreement.

ARTICLE 7 CONDITIONS TO CLOSING

7.1. Conditions to Obligations of the Purchaser. Unless waived in writing by the Purchaser, the obligation of the Purchaser hereunder to consummate the Transactions is subject to the satisfaction at or prior to the Closing of the following conditions:

(a) Representations and Warranties True. The representations and warranties of the Sellers and/or the Company contained in this Agreement shall be true and accurate in all material respects (except that (i) the representations and warranties contained in Article 2 and Section 3.11(b) and (ii) each other representation or warranty to the extent already qualified by materiality shall be true and correct in all respects) on and as of the date of the Closing with the same effect as though made on and as of such date.

(b) Covenants Performed. The Company and the Sellers shall have performed and complied in all material respects with the covenants, agreements and conditions required to be performed or complied with by them hereunder on or prior to the date of the Closing.

(c) Compliance Certificate. The Purchaser shall have received a certificate of the Sellers and the Company certifying as to the matters set forth in Sections 7.1(a) and (b) above.

(d) Required Consents Received. The Company and the Sellers shall have obtained and delivered to the Purchaser copies of all Required Consents listed on or required to be listed on Schedule 3.4, and no such Required Consents shall have been withdrawn, suspended or conditioned.

(e) **No Injunction.** The consummation of the Transactions contemplated hereby shall not violate any order, decree or judgment of any court or governmental body having competent jurisdiction.

(f) **Management Arrangements.** Each of _____ and _____ and the Purchaser shall have entered into an Employment Agreement in substantially the form attached hereto as **Exhibit 7.1(f)** (the “Employment Agreements”).

(g) **Certificates; Documents.** The Purchaser shall have received copies of each of the following for the Company certified to its satisfaction by an officer of the Company: (i) the Company’s charter, as amended, certified by the Secretary of State of _____ as of a recent date; (ii) a certificate of the Secretary of State of _____ as of a recent date as to the legal existence and good standing of the Company; (iii) the Company’s Bylaws, as amended; (iv) votes adopted by the stockholders and resolutions adopted by the directors of the Company authorizing the execution, delivery and performance of this Agreement and the other agreements, documents and instruments contemplated hereby and the consummation of the Transactions; and (v) evidence as of a recent date of the qualification of the Company as a foreign corporation in the jurisdictions listed on **Schedule 3.3**. The Purchaser shall have also received copies of each of the following for each Subsidiary certified to its satisfaction by an officer of such Subsidiary: (x) each Subsidiary’s organizational documents, certified by the appropriate governmental authority as of a recent date, (y) a certificate as to each Subsidiary’s legal existence and good standing, certified by the appropriate governmental authority as of a recent date and (z) each Subsidiary’s Bylaws, as amended. The Purchaser shall also have received such other certificates, documents and materials as it shall reasonably request.

(h) **Related Party Lease.** The lease for the property located in _____ shall have been amended in substantially the form attached hereto as **Exhibit 8.1(h)**.

(i) **Opinion of Counsel to the Company and the Sellers.** The Purchaser and its financing sources shall have received an opinion of counsel to the Company and the Sellers, dated as of the date of the Closing, in substantially the form attached hereto as **Exhibit 8.1(i)**.

(j) **Escrow Agreement.** The Company and _____, as escrow agent (the “Escrow Agent”), shall have entered into the Escrow Agreement in substantially the form attached hereto as **Exhibit 8.1(j)** (the “Escrow Agreement”).

(k) **Pre-Closing Deliveries.** The Sellers and the Company shall have delivered the items, certificates and documents required by Section 1.5.

(l) **Financing.** The Purchaser shall have obtained debt financing in an amount sufficient to consummate the Transactions and provide for a reasonable level of working capital for the Purchaser, the Company and their respective subsidiaries after the Closing, on terms and conditions satisfactory to the Purchaser, at its sole discretion.

(m) **[Due Diligence Review.** The findings of the Purchaser’s due diligence review of the Company and each Subsidiary’s affairs, assets, business, condition (financial or

otherwise), prospects and results of operations shall be satisfactory to the Purchaser, in its sole and absolute discretion.]

(n) **HSR Act.** The waiting period under the HSR Act applicable to the Transactions contemplated by this Agreement shall have expired or been terminated.

(o) **Licenses, Consents, Etc. Received by Purchaser.** The Purchaser shall have obtained all consents, licenses, approvals, authorizations and permits required to be obtained by it as a result of the Transactions contemplated hereby, in each case in which the failure to obtain the same would materially interfere with the Purchaser's ability to consummate the Transactions contemplated hereby or to operate the Business after the Closing, and no such consent, license, approval, authorization or permit shall have been withdrawn, conditioned or suspended.

(p) **Instruments of Transfer.** The Company shall have executed and delivered to the Purchaser such bills of sale, assignments and other instruments of transfer as the Purchaser may reasonable request in order to transfer the Purchased Assets to the Purchaser free and clear of all Liens.

(q) **Actions and Proceedings.** Prior to the Closing, all actions, proceedings, instruments and documents required to carry out the Transactions contemplated hereby or incident hereto and all other legal matters required for such Transactions shall have been reasonably satisfactory to counsel for the Purchaser.

(r) **Non-Foreign Affidavit.** The Company shall have delivered to the Purchaser a statement satisfying the requirements of Treas. Reg. §1.1445-2(b)(2).

7.2. Conditions to Obligations of the Company and the Sellers. Unless waived in writing by the Sellers, the obligation of the Company and the Sellers hereunder to consummate the Transactions is subject to the satisfaction at or prior to the Closing of the following conditions:

(a) **Representations and Warranties True.** The representations and warranties contained in ARTICLE 4 shall be true and accurate in all material respects on and as of the date of the Closing with the same effect as though made on and as of such date.

(b) **Covenants Performed.** The Purchaser shall have performed and complied in all material respects with the covenants, agreements and conditions required to be performed or complied with by it under this Agreement on or prior to the date of the Closing.

(c) **Compliance Certificate.** The Company shall have received a certificate of the Purchaser certifying as to the matters set forth in Sections 8.2(a) and (b) above.

(d) **No Injunction.** The consummation of the Transactions contemplated hereby shall not violate any order, decree or judgment of any court or governmental body having competent jurisdiction.

(e) **HSR Act.** The waiting period under the HSR Act applicable to the Transactions contemplated by this Agreement shall have expired or been terminated.

ARTICLE 8 TERMINATION

8.1. Termination. This Agreement and the Transactions contemplated hereby may be terminated at any time prior to the Closing:

(a) by mutual written consent of the Purchaser and the Company;

(b) by the Purchaser, if the Company or the Sellers shall have breached or failed to perform in any material respect any of their respective obligations, covenants or agreements under this Agreement, or if any of the representations and warranties of the Sellers and/or the Company set forth in this Agreement shall not be true and correct to the extent set forth in Section 7.1(a), and such breach, failure or misrepresentation is not cured to the Purchaser's reasonable satisfaction within 10 days after the Purchaser gives the Company or the Sellers written notice identifying such breach, failure or misrepresentation;

(c) by the Company, if the Purchaser shall have breached or failed to perform in any material respect any of its obligations, covenants or agreements under this Agreement, or if any of the representations and warranties of the Purchaser set forth in this Agreement shall not be true and correct to the extent set forth in Section 7.2(a), and such breach, failure or misrepresentation is not cured to the Company's reasonable satisfaction within 10 days after the Company gives the Purchaser written notice identifying such breach, failure or misrepresentation;

(d) by the Purchaser, if the conditions set forth in Section 7.1 become incapable of satisfaction;

(e) by the Company, if the conditions set forth in Section 7.2 become incapable of satisfaction; or

(f) by the Purchaser or the Company, if the Closing shall not have occurred on or before _____ or such other date, if any, as the Purchaser and the Company may agree in writing;

except that this Agreement may not be terminated under this Section by or on behalf of any party that is in breach of any representation or warranty or in violation of any covenant or agreement contained herein. For this purpose, any breach of this Agreement by the Company or any Seller shall be considered a breach of the Agreement by the Company and all of the Sellers.

8.2. Effect of Termination.

(a) If this Agreement is terminated (i) under Section 8.1(a) herein or (ii) under Sections 8.1(d), (e) or (f) herein at a time when no party is in breach of a representation or warranty or in violation of a covenant or agreement contained herein, all further obligations of

the Company and the Sellers to the Purchaser, and of the Purchaser to the Company and the Sellers, will terminate without further liability of any party hereto.

(b) If this Agreement is terminated under Section 8.1(b), (c), (d), (e) or (f) herein at a time when one or more parties is in breach of a representation or warranty or in violation of a covenant or agreement contained in this Agreement, the liabilities and obligations of the parties not in breach or violation of this Agreement shall terminate, and the party or parties which are in breach or violation of this Agreement shall remain liable for such breaches and violations, and nothing shall be deemed to restrict the remedies available against such party or parties.

(c) The obligations of the Purchaser under Section 6.3 shall survive the termination of this Agreement for a period of two years.

ARTICLE 9 SURVIVAL; INDEMNIFICATION

9.1. Survival. The representations, warranties, covenants and agreements contained herein shall survive the Closing and any investigation or finding made by or on behalf of the Purchaser, the Sellers or the Company. No action for a breach of the representations and warranties contained herein shall be brought more than ___ years following the Closing Date, except for (a) claims arising out of the representations and warranties contained in Article 2 or Sections 3.11(b) or 3.25, which shall survive indefinitely after the Closing, (b) claims arising out of the representations and warranties contained in Sections 3.19, 3.22 or 3.23, which shall survive until thirty (30) days after the expiration of the statute of limitations period (including all extensions thereof) applicable to the underlying subject matter being represented, and (c) claims of which the Company have been notified with reasonable specificity by the Purchaser, or claims of which the Purchaser has been notified with reasonable specificity by the Company, within such ___-year period. The representations and warranties contained in Article 2 and Sections 3.11(b), 3.19, 3.22, 3.23 and 3.25 are sometimes collectively referred to herein the “Specified Representations”.

9.2. Indemnification Limits. If the Closing occurs, the Purchaser Indemnified Parties (as hereinafter defined) shall not be entitled to recover any Losses (as hereinafter defined) for breach of the representations and warranties of the Sellers and/or the Company contained herein (a) unless and until the Purchaser Indemnified Parties’ aggregate claims therefor exceed \$ _____, at which time the Purchaser Indemnified Parties shall be entitled to recover Losses for all claims, including the first \$ _____, or (b) for an aggregate amount in excess of [\$ _____] [the sum of the Closing Purchase Price and, to the extent earned, the Earnout Payment]; provided, that claims for breach of any of the Specified Representations shall not be subject to the foregoing limits and shall not be included in the determination of whether the limit in clause (b) has been reached. [Notwithstanding the limitations on indemnification set forth in Section 9.1 and this Section 9.2, such limitations shall not apply to any claim against the Sellers or the Company for breach of any representation or warranty which was actually known by the Sellers or the Company to be inaccurate at Closing and which breach was not previously disclosed to the Purchaser in writing prior to the Closing.] For all purposes of this Article 9, when determining whether a representation or warranty of any Seller or the Company has been

breached or is inaccurate and the amount of the Losses, any material adverse effect or other materiality qualifier contained in any such representation or warranty will be disregarded.

9.3. Indemnification by the Company and the Sellers.

(a) The Company and the Sellers shall jointly and severally indemnify and hold the Purchaser and its Affiliates (the “Purchaser Indemnified Parties”) harmless from and against all claims, liabilities, obligations, costs, damages, losses and expenses (including reasonable attorneys’ fees and costs of investigation) of any nature (collectively, “Losses”) arising out of or relating to (i) any breach or violation of the representations or warranties of the Sellers (other than those set forth in Article 2) or the Company set forth in this Agreement (including the schedules) or in any certificate or document delivered pursuant to this Agreement, (ii) any breach or violation of the covenants or agreements of the Company set forth in this Agreement, (iii) any breach or violation of the covenants or agreements of the Sellers set forth in this Agreement (except for any breach or violation of Sections [], [] and [], for which indemnification shall be provided pursuant to Section 9.3(b) below), (iv) the Excluded Liabilities, or (v) any violation of any bulk sales laws as a result of the consummation of the Transactions.

(b) Each Seller shall severally, but not jointly, indemnify and hold the Purchaser Indemnified Parties harmless from and against all Losses arising out of or relating to (i) any breach or violation of the representations or warranties of such Seller in Article 2 of this Agreement or in any certificate or document delivered pursuant to this Agreement relating to Article 2, or (ii) any breach or violation by such Seller of Sections [], [] or [].

(c) No Purchaser Indemnified Party may initiate a claim for indemnification under this Agreement without the prior approval of the Purchaser.

9.4. Indemnification by the Purchaser. The Purchaser shall indemnify and hold the Company harmless from and against all Losses arising out of or relating to (a) any breach or violation of the representations, warranties, covenants or agreements of the Purchaser set forth in this Agreement, or (b) the Assumed Liabilities.

9.5. Procedures for Indemnification of Third Party Claims.

(a) A party or parties entitled to indemnification hereunder with respect to a third party claim (the “Indemnified Party”) will give the party or parties required to provide such indemnification (the “Indemnifier”) prompt written notice of any legal proceeding, claim or demand instituted by any third party (in each case, a “Claim”) in respect of which the Indemnified Party is entitled to indemnification hereunder.

(b) If the Indemnifier provides written notice to the Indemnified Party stating that the Indemnifier is responsible for the entire Claim within 10 days after the Indemnifier’s receipt of written notice from the Indemnified Party of such Claim, the Indemnifier shall have the right, at the Indemnifier’s expense, to defend against, negotiate, settle or otherwise deal with such Claim and to have the Indemnified Party represented by counsel, reasonably satisfactory to the Indemnified Party, selected by the Indemnifier; provided, that (i) the Indemnified Party may participate in any proceeding with counsel of its choice and at its expense, (ii) the Purchaser, at

any time when it believes in good faith that any Claim is having or could reasonably be expected to have a material adverse effect on the Business or assets, affairs, condition (financial or otherwise) or prospects of the Purchaser or any of its subsidiaries, may assume the defense and otherwise deal with such Claim in good faith, with counsel of its choice, and be fully indemnified therefor, (iii) the Purchaser, at any time when it believes that a claim for indemnification relates to or arises in connection with any criminal proceeding, indictment or investigation, may assume the defense and otherwise deal with such Claim in good faith with counsel of its choice, and be fully indemnified therefor, (iv) the Indemnifier may not assume the defense of any Claim if an actual conflict of interest exists between the Indemnifier and the Indemnified Party that precludes effective joint representation, and (v) the Indemnified Party may take over the defense and prosecution of a Claim from the Indemnifier if the Indemnifier has failed or is failing to vigorously prosecute or defend such Claim; and provided further, that the Indemnifier may not enter into a settlement of any Claim without the written consent of the Indemnified Party unless such settlement provides the Indemnified Party with a full release from such Claim and requires no more than a monetary payment for which the Indemnified Party is fully indemnified.

(c) The parties will cooperate fully with each other in connection with the defense of any Claim.

9.6. Right of Set-Off. If the Company and the Sellers have not satisfied in cash any indemnification obligation owed by them hereunder, the Purchaser or any of its Affiliates may, at their discretion, satisfy the unpaid portion of such obligation by, to the extent permitted by law, setting-off against any amounts due and owing from the Purchaser or any of its Affiliates to the Company or any of the Sellers.

9.7. Adjustment to Purchase Price. All indemnification payments paid pursuant to this Article shall be adjustments to the purchase price.

**ARTICLE 10
MISCELLANEOUS**

10.1. Notices. All notices, demands or other communications hereunder shall be in writing and shall be deemed to have been duly given if delivered in person, by e-mail or fax, by United States mail, certified or registered with return receipt requested, or by a nationally recognized overnight courier service, or otherwise actually delivered:

(a) if to the Sellers or the Company, to:

c/o _____

with a copy (which shall not constitute notice) to:

(b) if to the Purchaser, to:

with a copy (which shall not constitute notice) to:

or at such other address as may have been furnished by such person in writing to the other parties. Any such notice, demand or communication shall be deemed given on the date given, if delivered in person, e-mailed or faxed or otherwise actually delivered, on the date received, if given by registered or certified mail, return receipt requested or given by overnight delivery service, or three days after the date mailed, if otherwise given by first class mail, postage prepaid.

10.2. Governing Law; Forum. This Agreement shall be governed by and construed in accordance with the internal laws of the State of Delaware applicable to agreements executed and to be performed solely within such State. Any judicial proceeding arising out of or relating to this Agreement shall be brought in the courts of the State of Delaware, and, by execution and delivery of this Agreement, each of the parties to this Agreement accepts the exclusive jurisdiction of such courts, and irrevocably agrees to be bound by any judgment rendered thereby in connection with this Agreement. Each of the parties further agrees that a summons and complaint commencing an action or proceeding in any of such courts shall be properly served and shall confer personal jurisdiction if served to it at the address and in the manner set forth in Section 10.1 or as otherwise provided under the laws of the State of Delaware. This provision may be filed with any court as written evidence of the knowing and voluntary irrevocable agreement between the parties to waive any objections to jurisdiction, to venue or to

convenience of forum. The foregoing consents to jurisdiction and appointments of agents to receive service of process shall not constitute general consents to service of process in the State of Delaware for any purpose except as provided above and shall not be deemed to confer rights on any Person other than the respective parties to this Agreement.

10.3. Amendments, Waivers. This Agreement may be amended or modified only with the written consent of the Purchaser and the Company. No waiver of any term or provision hereof shall be effective unless in writing signed by the party waiving such term or provision. No failure to exercise or delay in exercising any right, power or remedy hereunder shall operate as a waiver thereof; nor shall any single or partial exercise of any right, power or remedy hereunder preclude any other or further exercise thereof or the exercise of any other right, power or remedy. The rights provided hereunder are cumulative and not exclusive of any rights, powers or remedies provided by law.

10.4. Expenses. Except as otherwise expressly set forth herein, all legal and other costs and expenses incurred in connection with this Agreement and the Transactions contemplated hereby shall be paid by the party incurring such costs and expenses.

10.5. Successors and Assigns. This Agreement, and all provisions hereof, shall be binding upon and inure to the benefit of the respective successors and assigns of the parties hereto, provided that this Agreement may not be assigned by any party without the prior written consent of the other parties hereto except that (a) the indemnification and other rights hereunder of the Purchaser may be assigned to any bank or other financial institution which is or becomes a lender to the Purchaser or any of its subsidiaries, and (b) this Agreement may be assigned by the Purchaser to any of its Affiliates or to any Person acquiring a material portion of the assets, business or securities of the Purchaser, whether by merger, consolidation, sale of assets or securities or otherwise.

10.6. Entire Agreement. This Agreement, the attached exhibits and schedules, and the other agreements, documents and instruments contemplated hereby contain the entire understanding of the parties, and there are no further or other agreements or understandings, written or oral, in effect between the parties relating to the subject matter hereof unless expressly referred to herein.

10.7. Counterparts. This Agreement may be executed in one or more counterparts, and with counterpart facsimile signature pages, each of which shall be an original, but all of which when taken together shall constitute one and the same Agreement.

10.8. Headings. The headings of Articles and Sections herein are inserted for convenience of reference only and shall be ignored in the construction or interpretation hereof.

10.9. Further Assurances. Following the Closing, the parties will execute and deliver such documents and take such other actions as may be reasonably requested from time to time by the Purchaser or the Company in order to fully consummate the Transactions.

10.10. Third Party Beneficiaries. Nothing in the Agreement shall be construed to confer any right, benefit or remedy upon any Person that is not a party hereto or a permitted assignee of a party hereto, except as otherwise expressly set forth in this Agreement.

10.11. No Strict Construction. The parties hereto have participated jointly in the negotiation and drafting of this Agreement and the other agreements and documents contemplated herein. In the event an ambiguity or question of intent or interpretation arises under any provision of this Agreement or any other agreement or documents contemplated herein, this Agreement and such other agreements or documents shall be construed as if drafted jointly by the parties thereto, and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of authoring any of the provisions of this Agreement or any other agreements or documents contemplated herein.

10.12. Publicity. Pending the Closing, no party shall issue a press release or make any other public announcement concerning the Transactions contemplated by this Agreement without the prior written consent of the Purchaser and the Company, except to the extent required by law.

10.13. Schedules and Exhibits. All schedules and exhibits to this Agreement are an integral part of this Agreement and are incorporated herein by reference in this Agreement for all purposes of this Agreement. All Schedules delivered with this Agreement shall be arranged to correspond with the numbered and lettered Sections and Subsections contained in this Agreement, and the disclosures in such Schedules shall qualify only the corresponding Sections and Subsections contained in this Agreement, unless otherwise expressly provided herein.

10.14. Waiver of Jury Trial. EACH PARTY HERETO ACKNOWLEDGES AND AGREES THAT ANY CONTROVERSY WHICH MAY ARISE UNDER THIS AGREEMENT IS LIKELY TO INVOLVE COMPLICATED AND DIFFICULT ISSUES, AND THEREFORE IT HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT AND ANY OF THE AGREEMENTS DELIVERED IN CONNECTION HEREWITH OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY.

10.15. Severability. This Agreement shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision hereof shall be prohibited or invalid under any such law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating or nullifying the remainder of such provision or any other provisions of this Agreement. If any one or more of the provisions contained in this Agreement shall for any reason be held to be excessively broad as to duration, geographical scope, activity or subject, such provisions shall be construed by limiting and reducing it so as to be enforceable to the maximum extent permitted by applicable law.

10.16. Exclusive Agent for Sellers. The Company shall serve as the exclusive agent of the Sellers (the “Agent”) for all purposes of this Agreement and the Transactions contemplated hereby. Without limiting the generality of the foregoing, the Agent shall be authorized (a) in connection with the Closing, to execute all certificates, documents and agreements on behalf of and in the name of any of the Sellers necessary to effectuate the Closing and the Transactions, and (b) to negotiate, execute and deliver all amendments, modifications and waivers to this Agreement or any other agreement, document or instrument contemplated by this Agreement. The Agent also shall be exclusively authorized to take all actions on behalf of the Sellers in

connection with any claims or disputes in respect of this Agreement, any other agreement, document or instrument contemplated by this Agreement or the Transactions, to bring, prosecute, defend or settle such claims and disputes, and to make and receive payments in respect of such claims and disputes on behalf of the Sellers, and no Seller shall take any such action without the Agent's prior written approval. The Agent shall not be liable to any of the Sellers for any action taken by the Agent pursuant to this Agreement unless the Agent has acted in bad faith or with gross negligence or willful misconduct, and the Sellers shall jointly and severally indemnify the Agent from any Losses arising out of or relating to him serving as agent hereunder. The Agent is serving in the capacity as exclusive agent of the Sellers hereunder solely for purposes of administrative convenience.

10.17. Certain Taxes. All transfer, documentary, sales, use, real property gains, stamp, registration, and other such Taxes and fees incurred in connection with this Agreement shall be paid by the Company when due, and the Company will, at its expense, file all necessary Tax Returns and other documentation with respect to all such transfer, documentary, sales, use, real property gains, stamp, registration, and other Taxes and fees, and, if required by applicable law, the Purchaser and the Sellers will join in the execution of any such Tax Returns and other documentation.

ARTICLE 11 DEFINITIONS

The following terms, as used in this Agreement, have the meanings given to them where indicated below:

Term	Section or Place Where Defined
Agent	Section 10.16
Agreement	Preamble
Affiliate	Section 3.25
[Assumed Indebtedness]	[Section 1.5]
Assumed Liabilities	Section 1.3
Balance Sheet	Section 3.7
Balance Sheet Date	Section 3.7
Base Purchase Price	Section 1.5
Benefit Plans	Section 3.22
Business	Section 3.1
Claim	Section 9.5
Closing	Section 1.6
Closing Date	Section 1.6
Closing Purchase Price	Section 1.5
Closing Purchase Price Certificate	Section 1.7
Closing Working Capital	Section 1.5
Code	Section 3.22
Company	Preamble and Section 5.7

Company Intellectual Property	Section 3.12
Covered Area	Section 5.7
Covered Business	Section 5.7
Disputed Items Notice	Section 1.7
EBITDA	Section 3.7
Employment Agreements	Section 7.1
ERISA	Section 3.22
Escrow	Section 1.5
Escrow Agent	Section 7.1
Escrow Agreement	Section 7.1
Estimated Closing Purchase Price	Section 1.5
Estimated Closing Purchase Price Certificate	Section 1.5
Excluded Assets	Section 1.2
Excluded Liabilities	Section 1.4
Financial Statements	Section 3.7
Hazardous Substance	Section 3.23
HSR Act	Section 3.4
Indebtedness	Section 1.5
Indemnified Party	Section 9.5
Indemnifier	Section 9.5
Intellectual Property	Section 3.12
IP Licenses	Section 3.12
Leased Property	Section 3.10
Legal Requirements	Section 3.17
Lien	Section 1.1
Losses	Section 9.3
Material Contracts	Section 5.1
Measurement Period	Section 1.5
Noncompetition Period	Section 5.7
Owned Property	Section 3.10
Permitted Liens	Section 3.10
Person	Section 3.6
Pre-Closing Taxable Periods	Section 7.2
Purchased Assets	Section 1.1
Purchaser	Preamble and Section 5.7
Purchaser Indemnified Parties	Section 9.3
Real Estate Leases	Section 3.10
Real Property	Section 3.10
Repaid Indebtedness	Section 1.5
Required Consents	Section 3.4
Sale Bonuses	Section 1.5
Securities Act	Section 3.25
Seller or Sellers	Preamble
Sellers' Expenses	Section 1.5
Service	Section 3.22

Specified Representations
Subsidiary or Subsidiaries
Tax or Taxes
Tax Returns
Transactions

Section 9.1
Section 3.2
Section 3.19
Section 3.19
Introduction

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

[INSERT LEGAL NAME OF COMPANY]

By _____
(title)

[INSERT SIGNATURE BLOCKS FOR SELLERS]

By _____
(title)

[INSERT LEGAL NAME OF PURCHASER]

By _____
(title)