

ACQUISITIONS OF PARTNERSHIPS AND LLCS

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Winstead PC

State Bar of Texas

**CHOICE AND ACQUISITION
OF ENTITIES IN TEXAS COURSE**

May 28, 2010

Houston

CHAPTER 3

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**BACKGROUND, EDUCATION AND PRACTICE**

John Ale is the partner leading the Houston office of Skadden, Arps, Slate, Meagher & Flom LLP, focusing on energy, infrastructure, finance and corporate matters. He has represented clients in the development, financing and acquisition of energy and water infrastructure projects, privatizations, and acquisitions and divestitures of whole companies or divisions. In addition, he has worked extensively with partnership and other joint-ownership formats and innovative financings, including publicly traded partnerships, or MLPs.

John received his B.A. (with highest honors) and J.D. (Order of the Coif) from the University of Virginia, where he also served as Executive Editor of the *Virginia Law Review*. Following law school, he clerked for Hon. Edward Allen Tamm of the U.S. Court of Appeals for the District of Columbia Circuit and for Hon. Warren E. Burger, then Chief Justice of the United States.

After practicing in Houston for 15 years, John was the managing partner of the London office of another US-headquartered law firm in 1997 and 1998. From late 1998 until early 2002, he was executive director and general counsel of Azurix Corp., a global water company.

John is a past Chairman of the Business Law Section of the State Bar of Texas. He previously was Vice Chair of the Section and chaired its committees on Partnership Law, Professional Ethics and Choice of Law Legislation. He was heavily involved in the preparation of Texas partnership and limited liability company statutes.

John also has written and spoken extensively on project finance and partnership issues. He is the author of *Partnership Law for Securities Practitioners*, volume 20 of the West Group's Securities Law Series. Previously he has taught as an adjunct professor at the University of Texas School of Law.

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Michael K. Pierce is a partner in the Houston office of Thompson & Knight LLP. Mr. Pierce has over thirty years of business transactions experience, with a primary emphasis on M&A, energy finance and private equity.

Mr. Pierce has served on the State Bar of Texas Partnership Law Committee since 1985 and was chairman from 1995 to 2002. Mr. Pierce has also served on the State Bar of Texas Ad Hoc Codification Committee. Mr. Pierce is a member of the American College of Investment Council and is listed in the Best Lawyers of America, 2003-present (Corporate, Mergers and Acquisitions and Securities Law and Natural Resources Law) and Texas Superlawyers (2003-present).



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Frank Ruttenberg studied business finance and tax law before entering the practice of commercial and real estate law in San Antonio 25 years ago. This pragmatic combination of disciplines forms the foundation for an extensive representation of businesses in the energy, construction, hospitality, sports and entertainment industries.

In general commercial law, Frank assists businesses with day-to-day operating needs, negotiating and drafting business contracts, and the formation of business entities, including limited partnerships, limited liability companies, general partnerships, registered limited liability partnerships and corporations. He prepares intra-owner agreements for commercial entities of all types and the documentation of private offerings in connection with the formation of investment capital.

Frank's real estate practice includes negotiating and preparing documents relating to the financing, lease, sale, purchase and operation of income producing properties; the finance, acquisition, development and day-to-day operations for apartment and commercial-use complexes; landlord/tenant relations; commercial transactions with governmental agencies; and the redevelopment and preservation of historic structures.

Increasingly, Frank is involved in assisting development clients with the purchase, sale or lease of groundwater and surface water rights, the development of diversion facilities, and other water development and water supply agreements.

Education

New York University School of Law

- LL.M., 1982

St. Mary's University School of Law

- J.D., 1979

University of Texas at Austin

- B.B.A., Finance, 1976

Professional & Community Involvement

- American Bar Association, Tax Section, Committee on Partnerships
- State Bar of Texas, Business Law Section, Partnership and Limited Liability Company Law Committee, Chair
- San Antonio Bar Association, Real Estate Discussion Group

Awards & Recognition

- Scene in San Antonio Monthly, Most Influential
- Super Lawyers, Corporate Counsel Edition, 2009
- Texas Super Lawyers, *Texas Monthly*, 2006-2009
- The Best Lawyers in America, 2008 and 2009-2010

Admitted to Practice

- Texas, 1979

MEMBERSHIP INTEREST PURCHASE AGREEMENT

dated as of _____, 20__

by and between

as Seller

and

as Buyer

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NOTE: This is a sample form for the acquisition of membership interests in a limited liability company formed under Texas law. **As with any sample form, a practitioner must tailor it to the needs of the client, which may involve extensive additions, deletions and modifications.** These can arise out of, among other things, the business in which the company engages, the assets the company owns, whether it has subsidiaries or other investments, the percentage of the aggregate membership interests being acquired, whether those interests or other securities of the company are publicly traded, regulatory requirements affecting the company, its business or the transaction, planned financings, plans for the business going forward and a host of other matters. This form does not attempt to address anything beyond a simple company operating under no particular regulatory or other regime and not having publicly traded securities.

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MEMBERSHIP INTEREST PURCHASE AGREEMENT

This MEMBERSHIP INTEREST PURCHASE AGREEMENT (this “**Agreement**” as it may be amended or modified as provided below) is made and entered into as of _____, 20__, by and between [NAME], a [TYPE OF ENTITY] (“**Buyer**”), and [NAME], a [TYPE OF ENTITY] (“**Seller**,” with each of Buyer and Seller being called a “**Party**” and, together, the “**Parties**”).¹

RECITALS:

WHEREAS, [_____] a Texas limited liability company (the “**Company**”), is engaged in the business of [DESCRIBE BUSINESS]; and

WHEREAS, Seller owns [___% of the issued and outstanding [Class __] membership interests in the Company / ___ Units (as defined in the Company Agreement, as defined below)] (the “**Subject Interests**”).

WHEREAS, Seller desires to sell, and Buyer desires to purchase, the Subject Interests on the terms and subject to the conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, and intending to be legally bound, the Parties agree as follows:

ARTICLE 1

DEFINITIONS

Section 1.1 Definitions. In addition to the terms defined elsewhere in this Agreement, the following terms shall have the respective meanings specified below (with those meanings to be equally applicable to both the singular and plural forms of the terms defined):

“**Affiliate**” of a Person many any other Person controlling, controlled by, or under common control with that Person, where “control” means (a) owning, directly or indirectly, outstanding equity securities or securities carrying 50% or more of the voting power in the election of the board of directors or other governing body of the other Person or (b) if there is no such governing body, the power to control or direct the other Peron’s business and affairs, whether as a general partner, a manager or member of a limited liability company, by contract or otherwise[; provided, however, that neither the Company nor any Subsidiary shall be deemed to be an Affiliate of Seller or Buyer].²

“**Agreement**” is defined in the introduction to this Agreement.

¹ If Seller owns all or substantially all of the membership interests, then it may be appropriate to have the Company itself be a party.

² If Seller controls the Company, then without this proviso the Company and the Subsidiaries would be Affiliates of Seller before the Closing, and (because Buyer acquires that interest) of Buyer after the Closing. Where the term is used, however, it is meant to pick up affiliated Persons other than the Company and the Persons the Company controls.

“**Books and Records**” means the originals or copies of all customer lists, financial records, books of account, limited liability company record books, minute books, compliance records, data files prepared for or filed with regulators of the business of the Company and the Subsidiaries, and their respective Tax records, each in the possession or control of Seller, the Company or any Subsidiary, whether or not stored in hardcopy form or on magnetic or optical media (to the extent not subject to licensing restrictions).

“**Buyer**” is defined in the introduction to this Agreement.

“**Buyer Indemnitees**” is defined in Section 7.2(a).

“**Buyer Losses**” is defined in Section 7.2(a).

“**Closing**” is defined in Section 2.2.

“**Closing Date**” is defined in Section 2.2.

“**Code**” shall mean the Internal Revenue Code of 1986, as amended.

“**Company**” is defined in the recitals to this Agreement.

“**Company Agreement**” means the [Company Agreement of the Company, dated as of _____, 20__.

“**Company Financial Statements**” is defined in Section 3.6(a).

“**Contract**” means any [oral or] written contract, agreement, indenture, note, bond, loan, instrument, lease, commitment or other arrangement or agreement.

“**Default**” means (a) any breach or violation of, default under, contravention of, or conflict with, any Contract, Law, Order, or Permit, (b) any occurrence of any event that with the passage of time or the giving of notice or both would constitute a breach or violation of, default under, contravention of, or conflict with, any Contract, Law, Order, or Permit, or (c) any occurrence of any event that with or without the passage of time or the giving of notice would give rise to a right of any Person to exercise any remedy or obtain any relief under, terminate or revoke, suspend, cancel, or modify or change the current terms of, or renegotiate, or to accelerate the maturity or performance of, or to increase or impose any Liability under, any Contract, Law, Order, or Permit.

“**Effective Time**” means 12:01 a.m. _____ time on the Closing Date.

“**Employee Benefit Plans**” is defined in Section 3.16(a).

“**Environmental Law**” means any and all Laws pertaining in any way to health, safety, the environment, the preservation or reclamation of natural resources, or the management, Release or threatened Release of any Hazardous Materials, in effect in any and all jurisdictions in which ATP is conducting, or at any time has conducted, business, or where the Titan Assets are or have been located, used or operated, including, the Oil Pollution Act of 1990, the Clean Air Act, the Comprehensive Environmental, Response, Compensation, and Liability Act of 1980, the Federal Water Pollution Control Act, the Occupational Safety and Health Act of 1970, the Resource Conservation and Recovery Act of 1976, the Safe Drinking Water Act, the Toxic Substances Control Act, the Superfund Amendments and Reauthorization Act of 1986, the Hazardous Materials Transportation Law and other environmental conservation or protection Laws.

“**ERISA**” means the Employee Retirement Income Security Act of 1974 and the rules and regulations under that statute.

“**GAAP**” means generally accepted accounting principles consistently applied throughout the periods indicated in accordance with GAAP as published by the Financial Accounting Standards Board.

“**Governmental Authority**” means the government of the United States of America, any other nation or any political subdivision thereof, whether state or local, and any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government.

“**Hazardous Material**” means any substance regulated or as to which liability might arise under any applicable Environmental Law, including (a) any chemical, compound, material, product, byproduct, substance or waste defined as or included in the definition or meaning of “hazardous substance,” “hazardous material,” “hazardous waste,” “solid waste,” “toxic waste,” “extremely hazardous substance,” “toxic substance,” “contaminant,” “pollutant,” or words of similar meaning or import found in any applicable Environmental Law; (b) hydrocarbons, petroleum products, petroleum substances, natural gas, oil, oil and gas waste, crude oil, and any components, fractions, or derivatives thereof; and (c) radioactive materials, explosives, asbestos or asbestos containing materials, polychlorinated biphenyls, radon, infectious or medical wastes.

“**Indemnitee**” is defined in Section 7.2(c).

“**Indemnitor**” is defined in Section 7.2(c).

“**Intellectual Property Rights**” is defined in Section 3.24.

“**IRS**” means Internal Revenue Service or any successor agency.

“**Knowledge**” of a fact, event or circumstance means that at least one of the following individuals is actually aware of the particular matter: in the case of Knowledge of Seller, _____, _____, or _____ or, in the case of Knowledge of Buyer, _____, _____, or _____.

“**Law**” means any statute, law, treaty, rule, code, ordinance, requirement, rule, regulation, Permit, franchise, rule of common law, authorization, directive, certificate, or other requirement of any Governmental Authority, any interpretation of any of the foregoing by any Governmental Authority, or any binding judgment, decision, decree, injunction, writ, order or like action of any court, arbitrator or other Governmental Authority, and includes any and all Environmental Laws.

“**Lien**” means any interest in property securing an obligation owed to, or a claim by, a Person other than the owner of the property, whether that interest is based on the common law, statute or contract, and whether that obligation or claim is fixed or contingent, and including the lien or security interest arising from a mortgage, encumbrance, pledge, security agreement, conditional sale or trust receipt or a lease, consignment or bailment for security purposes. The term “*Lien*” includes easements, restrictions, servitudes, permits, conditions, covenants, exceptions or reservations.

“**Liability**” means any direct or indirect, primary or secondary, liability (including any liability for Taxes), indebtedness, obligation, penalty, cost or expense (including costs of investigation, collection and defense), claim, deficiency, guaranty or endorsement (other than endorsements of notes, bills, checks, and drafts presented for collection or deposit in the ordinary course of business) of any type, whether accrued, absolute or contingent, liquidated or unliquidated, matured or unmatured, or otherwise.

“**Losses**” means any and all demands, claims, actions or causes of action, assessments, losses, diminution in value, damages (including special and consequential damages), Liabilities, costs, and expenses, including interest, penalties, cost of investigation and defense, and reasonable attorneys’ and other professional fees and expenses.

“**Material Adverse Effect**” shall mean an event, change or occurrence (or any development that, insofar as can reasonably be foreseen, is likely to result in any change or effect) that, individually or together with any other event, change or occurrence, has a material adverse impact on (a) the financial position, business, assets[, prospects] or results of operations of the Company and the Subsidiaries, or (b) the ability of either Seller or the Company to perform its obligations under this Agreement; provided that “Material Adverse Effect” shall not be deemed to include the impact of (i) changes in Laws of general applicability or their interpretation thereof by Governmental Authorities, (ii) changes in GAAP, (iii), changes in general economic or market conditions or in the [COMPANY’S BUSINESS] industry, or (iv) actions and omissions of the Company taken with the prior written consent of Buyer in contemplation of the transactions contemplated by this Agreement.

“**Material Contracts**” is defined in Section 3.9(a).

“**Order**” means any administrative decision or award, decree, injunction, judgment, order, quasi-judicial decision or award, ruling, or writ of any federal, state, local or foreign or other court, arbitrator, mediator, tribunal, administrative agency, or Governmental Authority.

“**Parties**” and “**Party**” are defined in the introduction to this Agreement.

“**Permit**” means any federal, state, local, and foreign governmental approval, authorization, certificate, easement, filing, franchise, license, notice, permit, or right to which Seller, the Company or the Subsidiaries is a party or that is or may be binding upon or inure to the benefit of the Company or any of the Subsidiaries, or their securities, business or assets.

“**Person**” shall mean any natural person, partnership, limited partnership, joint venture, corporation, trust, limited liability company, limited liability partnership, unincorporated association, government or agency thereof, or any other similar entity.

“**Purchase Price**” is defined in Section 2.1.

“**Real Property**” means all interests in real property, including without limitation, fee estates, leaseholds and subleaseholds, purchase options, easements, licenses, rights to access, and rights of way, and all buildings, fixtures and other improvements thereon, owned or used by the Company and the Subsidiaries, together with any additions and replacements.

“**Real Property Leases**” means all leases, subleases and other agreements under which the Company or any of the Subsidiaries uses or occupies or has the right to use or occupy, now or in the future, any Real Property.

“**Release**” means any depositing, spilling, leaking, pumping, pouring, placing, emitting, discarding, abandoning, emptying, discharging, migrating, injecting, escaping, leaching, dumping or disposing.

“**Returns**” shall mean all returns, statements, forms and reports for Taxes.

“**Seller**” is defined in the introduction to this Agreement.

“**Seller Indemnitees**” is defined in Section 7.2(b).

“**Seller’s Losses**” is defined in Section 7.2(b).

“**Straddle Period**” shall mean any taxable period beginning before the Closing Date and ending after the Closing Date.

“**Subject Interests**” is defined in the recitals to this Agreement.

“**Subsidiary**” means any Person controlled by the Company, as “control” is used in the definition of “Affiliate” above.³

“**Taxes**” means all taxes, assessments, charges, duties, fees, levies or other governmental charges, including, without limitation, all federal, state, local, foreign and other jurisdiction income, franchise, profits, capital investments, capital gains, capital Subject Interests, transfer, sales, use, occupation, property, excise, severance, windfall profits, receipts, valued-added stamp, license, payroll, employment withholding and other taxes, assessments, charges, duties, claims fees, levies or other governmental charges of any kind whatsoever (whether payable directly or by withholding and whether or not requiring the filing of a Return), all estimated taxes, deficiency assessments, additions to tax, penalties and interest and shall include any liability for such amounts as a result either of being a member of a combined, consolidated, unitary or affiliated group or of a contractual obligation to indemnify any Person or other entity for any such amounts.

“**Threshold Amount**” is defined in Section 7.2(d).

“**Transition**” is defined in Section 5.2(a).

Section 1.2 *Rules of Construction.*

(a) As used in this Agreement; (i) the term “business day” means a day other than a Saturday, a Sunday or a day upon which banks generally are closed in the State of Texas, (ii) references to an Article, Section, Exhibit or Schedule are references to an Article or Section of, or an Exhibit or Schedule to, this Agreement unless otherwise indicated, (iii) whenever the words “include,” “includes” or “including” are used in this Agreement, they are deemed to be followed by the words “without limitation,” (iv) references to any statute, rule or regulation are to the statute, rule or regulation as amended, modified, supplemented or replaced from time to time (and, in the case of statutes, include any rules and regulations promulgated under the statute) and to any section of any statute, rule or regulation include any successor to the section, (v) the use of “or” is not intended to be exclusive unless expressly indicated otherwise; and (vi) references to “\$” or dollars shall refer to United States dollars, unless otherwise specified.

(b) Headings are for reference purposes only and do not affect in any way the meaning or interpretation of this Agreement.

(c) The Parties acknowledge that each party and its counsel have reviewed and revised this Agreement and that no rule of construction to the effect that any ambiguities are to be

³ This test is based on control. Consider whether the test should be based on economic ownership or some other criterion, based on the circumstances of the transaction.

resolved against the drafting party shall be employed in the interpretation of this Agreement (including all of the Schedules) or any amendments to them.

ARTICLE 2

PURCHASE OF SUBJECT INTERESTS

Section 2.1 *Purchase of Subject Interests.* Subject to the terms and conditions set forth in this Agreement, at the Closing, Buyer shall purchase and acquire from Seller, and Seller shall sell, assign, transfer, convey and deliver to Buyer, the Subject Interests, free and clear of all Liens, for a purchase price of \$_____ (the “Purchase Price”).⁴

Section 2.2 *Closing.* The closing of the purchase and sale of the Subject Interests (the “Closing”) shall occur at the offices of [NAME], [ADDRESS], at __:__ local time on [DATE CERTAIN] / [the [fifth] business day after all conditions set forth in Article 6 have been satisfied or waived, other than the conditions to exist and the actions to be performed at the Closing], or at such other date, place and time as the Parties may agree in writing (the “Closing Date”). At the Closing:

(a) Buyer shall deliver to Seller, by wire transfer of immediately available funds to an account specified by Seller least two business days prior to the Closing Date, cash in an amount equal to the Purchase Price;

(b) Seller shall deliver to [Buyer the original certificates representing the Subject Interests duly endorsed in blank, or accompanied by transfer powers duly executed in blank, by Seller transferring the Subject Interests to Buyer with any necessary transfer tax and other revenue stamps] / [the Company a letter, in form satisfactory to Buyer, notifying the Company in accordance with Section ___ of the Company Agreement that Seller has transferred the Subject Interests to Buyer];⁵

(c) Each Party has delivered to the other a certificate, signed by its chief executive officer,⁶ certifying that (i) all of the representations and warranties it has made in this Agreement are true and correct as if restated on the Closing Date, other than those that expressly refer to

⁴ This form does not address any adjustments to the Purchase Price. Parties often agree to adjust the Purchase Price provisionally at Closing, and subsequently once final figures become available, to take into account particular events, such as net revenues, contributions and distributions between the date of the latest financial statements and the Closing Date or extraordinary events. The provisions for a limited liability company should not differ from those for a corporation, other than technical terms; e.g., referring to distributions rather than dividends. This is a very important area that sometimes can be confusing, especially when terms used in accrual accounting are applied to what often is intended as a cash-based adjustment. The parties and their accountants should work through any adjustments very carefully.

⁵ Membership interests may be, but are not required to be, certificated. If the Subject Interests are certificated, then typically the Company Agreement will provide that the Company will recognize transfers only if it receives the original certificate with appropriate endorsements or transfer power. If not certificated, then the Company Agreement probably has some procedures to be followed. In either case, this provision needs to conform to the requires of the particular Company Agreement.

⁶ The description of who signs will vary depending on the type of entity and whether it has its own officers or its business is conducted by a general partner, manager or member. If the latter, it might be appropriate to have the certificate come from an officer of that entity or the entity that ultimately controls it.

another specific date, and (ii) it has performed all of its obligations under this Agreement required to be performed at or before the Closing.

(d) [Seller has delivered to Buyer the resignations of all individuals as officers [and managers] of the Company, other than those Buyer may specify to Seller by notice no later than the [second] business day before the Closing Date.]⁷

Section 2.3 *Effective Time.* If the Closing occurs, the purchase, sale and transfer of the Subject Interests shall be deemed to have occurred at the Effective Time.

ARTICLE 3

REPRESENTATIONS OF THE COMPANY AND SELLER

Seller represents and warrants to Buyer that, as of the date of this Agreement and, if the Closing occurs, the Effective Time:⁸

Section 3.1 *Existence and Good Standing.*

(a) Seller is a [TYPE OF ENTITY] duly formed, validly existing and in good standing under the laws of the State of _____. Seller has the requisite corporate power and authority to enter into, execute and deliver this Agreement and perform its obligations under this Agreement.

(b) The Company is a limited liability company duly formed, validly existing and in good standing under the laws of the State of Texas. Each Subsidiary is an entity of the type set forth on Schedule 3.5 duly formed (and if a corporation organized), validly existing and in good standing under the laws of the jurisdiction of its formation set forth on Schedule 3.5. Each of the Company and the Subsidiaries has the requisite corporate power and authority to own, lease and operate its assets and to carry on its businesses as are now being conducted. Each of the Company and the Subsidiaries is duly qualified to do business and is in good standing as a foreign corporation in each jurisdiction where the ownership, leasing or operation of its assets or the conduct of its business as currently conducted requires such qualification, except in such jurisdictions where the failure to be so duly qualified or licensed and in good standing could not reasonably be expected to have a Material Adverse Effect.

Section 3.2 *Capitalization of the Company; Subject Interests.*

(a) The Company's equity interests consist solely of [membership interests with no classes or series] / [membership interests of ____ [classes / series] as more fully described in the Company Agreement] / [____ authorized Units, of which ____ Units are issued and outstanding and

⁷ If the Company has a board of managers or directors, Buyer will want Seller's representatives to resign. If Seller controls the Company, Buyer may want some or all officers to resign as well.

⁸ If Seller does not control the Company, it may be appropriate for Seller to make some of these representations and warranties only to its Knowledge. Further, if Seller does not control the Company and/or is subject to confidentiality obligations, it might not have access to all the information required to make these representations, feel comfortable doing so or be restricted from doing so. Because that would narrow the information available to Buyer and/or Buyer's recourse if the information is not in fact correct, Buyer would be taking on more risk in the transaction than this form allocates.

have the features described in the Company Agreement]. There are no other classes or series of membership or other equity or ownership interests in the Company authorized or outstanding and no outstanding subscriptions, options, warrants, rights, calls, commitments, conversion rights, rights of exchange, plans or other agreements of any character providing for the purchase, issuance or sale of any equity or ownership interests of any kind in the Company[, other than preemptive rights set forth in the Company Agreement].⁹

(b) The Subject Interests [constitute an undivided __% interest in the equity of the Company and all obligations and rights of its members, including rights to distributions in the ordinary course or on liquidation] / [constitute an undivided __% interest in the issued and outstanding Class __ membership interests in the Company having the features described in the Company Agreement] / [are __ Units], are duly issued and outstanding, and are fully paid and nonassessible [except as provided in the Company Agreement].

(c) Seller owns the Subject Interests, and will transfer them to Buyer, free and clear of all Liens.

Section 3.3 *Authorization and Validity of this Agreement.* Seller has the requisite power and authority to enter into, execute and deliver this Agreement, to perform its obligations under this Agreement and to consummate the transactions this Agreement it will perform. The execution, delivery and performance of this Agreement by Seller and the performance of its obligations under this Agreement have been duly authorized and approved by all requisite action by it, including its governing authorities and, if required, its equity owners. This Agreement has been duly executed and delivered by Seller and, assuming the due execution of this Agreement by Buyer, is a legal, valid and binding obligation of Seller, enforceable against Seller in accordance with its terms, except to the extent that its enforceability may be subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar Laws affecting the enforcement of creditors' rights generally and by general equitable principles (whether considered in a proceeding in equity or at Law) and any implied covenant of good faith and fair dealing, or remedies in general as from time to time in effect, or the exercise by courts of equity power.

Section 3.4 *Governing Documents.* Seller has made available to Buyer prior to the execution of this Agreement true and complete copies of the certificate of formation of the Company, the Company Agreement and the certificate of formation and the company agreement or by-laws (or comparable governing documents) of each of the Subsidiaries. The Company is not in violation of its certificate of formation or the Company Agreement, and none of the Subsidiaries is in violation of any of the provisions of its respective certificate of formation or company agreement or by-laws (or comparable governing documents).

Section 3.5 *Subsidiaries and Investments.*

(a) A true and complete list of all Subsidiaries is set forth on Schedule 3.5. The Company is the direct or indirect owner of the outstanding shares or partnership, membership or other equity or ownership interests in each Subsidiary as set forth on Schedule 3.5, free and clear of any Lien. Except as set forth on Schedule 3.5, there are no outstanding subscriptions, options, warrants, rights,

⁹ The description of the Company's authorized and outstanding equity and of the Subject Interest will depend on the provisions of the Company Agreement and can vary from members owning a fixed percentage to various classes, series and preferences. Company agreements often provide for preemptive and other rights that may need to be addressed.

calls, commitments, conversion rights, rights of exchange, plans or other agreements of any character providing for the purchase, issuance, repurchase, redemption or sale of any shares of shares or partnership, membership or other equity or ownership interests in any Subsidiary.

(b) Schedule 3.5 lists all other shares or partnership, membership or other equity or ownership interests in any Person owned by the Company or any Subsidiary.

Section 3.6 *Financial Statements; No Material Changes.*

(a) Seller has furnished Buyer with audited balance sheets of the Company and its consolidated subsidiaries as of December 31, 20__, 20__ and 20__, and audited statements of income and of cash flows of the Company for the years then ended, and all related reports of the Company's independent public accountants[, and (ii) the unaudited balance sheet of the Company and its consolidated subsidiaries as of _____, 20__, and unaudited statements of income and of cash flows of the Company and its consolidated subsidiaries for the portion of the year then ended] (these audited [and unaudited] statements, including the related notes and schedules to them, as applicable, are referred to collectively as the "**Company Financial Statements**"). The Company Financial Statements have been prepared in accordance with GAAP consistently applied, subject to normal year-end adjustments [(provided that the unaudited financial statements do not contain notes and other presentations items that may be required by GAAP)] and present fairly in all material respects the financial position of the Company and its consolidated subsidiaries as of their respective dates, and the results of the income and cash flows of the Company and its consolidated subsidiaries for the respective periods indicated.¹⁰

(b) The Company maintains a system of accounting controls reasonably sufficient to allow for the preparation of financial statements in accordance with GAAP.

(c) Neither the Seller nor the Company nor any Subsidiary, nor to Seller's Knowledge any Person acting on their behalf, has received any complaint, allegation, assertion or claim, whether written or oral, that the Company or the Subsidiaries has engaged in questionable accounting or auditing practices.

(d) Except as set forth on Schedule 3.6, since [DATE OF LATEST BALANCE SHEET], there has been no (i) material change in the business, operations, inventory, [prospects,]¹¹ financial condition, bank debt, working capital, customer base, or results of operations of the Company and the Subsidiaries or (ii) event, occurrence, development or state of circumstances or facts, damage, destruction or loss to any asset or property, tangible or intangible, of the Company and the Subsidiaries in any material respect.

(e) Except as set forth in Schedule 3.6 or the Company Financial Statements, the Company and the Subsidiaries have no outstanding Liabilities, contingent or otherwise, other than Liabilities incurred in the ordinary course of business. Neither the Company nor any of the Subsidiaries

¹⁰ This representation should be tailored to the financial statements delivered. Depending on when the agreement is signed, the latest financials may be year-end audited or for a recent quarter. The references to the Company's subsidiaries is not to the defined term "Subsidiary", as GAAP may provide for consolidation of subsidiaries on a basis different from that definition.

¹¹ Many parties resist making representations with respect to changes in prospects because the term looks to the future rather than verifiable past events and conditions and can be vague.

is in Default in respect of the terms and conditions of any Liabilities, other than Defaults as set forth on Schedule 3.6.

(f) Schedule 3.6 sets forth the outstanding balance on all loans or credit agreements that will survive the Closing and that are owed or guaranteed by the Company or any Subsidiary.

Section 3.7 Books and Records. The Buyer has been furnished with copies of all of the Books and Records. The Books and Records are complete and accurate in all material respects, reflecting the assets and Liabilities of the Company and the Subsidiaries, and have been maintained in accordance with the Company's customary business practices and with applicable Law. At the Closing, all of the Books and Records of the Company and the Subsidiaries will be in the possession of the Company and the Subsidiaries or their counsel.

Section 3.8 Assets Generally.

(a) Except as set forth on Schedule 3.8, each of the Company and the Subsidiaries has such title to all assets as is necessary to operate its business in accordance with past practice, including the assets reflected in the Company Financial Statements, subject to no Liens, except for Liens reflected in the Company Financial Statements and Liens for current Taxes, assessments or governmental charges or levies on property not yet due and delinquent for which reserves have been established and shown on the Company Financial Statements.

(b) Except as set forth on Schedule 3.8(b), all tangible assets of the Company and the Subsidiaries are usable in the ordinary course of business consistent with the past practices of the Company and the Subsidiaries, as applicable.

(c) Without limiting the preceding provisions of this Section 3.8:

(i) Schedule 3.8(c) sets forth a time and correct summary of all Real Property. The Company and the Subsidiaries have good and marketable title to, or have a valid and enforceable right to use or a valid and enforceable leasehold interest in, all Real Property purported to be owned by them and material to the conduct of the business as such business is now being conducted. With the exception of the Liens identified on Schedule 3.8(c), the Company has not caused any Liens securing obligations to pay indebtedness for borrowed money to be placed on any of the Real Property.

(ii) Each of the Real Property Leases is valid, binding and in full force and effect, and no termination event or condition or uncured Default on the part of the Company or any of the Subsidiaries exists under any Real Property Lease in any material respect. Schedule 3.8(c) sets forth a time and correct summary of all Real Property Leases.

(iii) The Company and the Subsidiaries have good and marketable title to, or a valid and enforceable leasehold interest in, all material personal assets owned, leased, used or held for use by any of them. Neither the Company's nor any Subsidiary's ownership of or leasehold interest in any such personal asset is subject to any material Liens.

Section 3.9 *Material Contracts.*

(a) Except for the Employee Benefit Plans identified on Schedule 3.16, Schedule 3.9(a) contains a complete and accurate list of all Contracts, including all commitments, leases, instruments, agreements, indentures, notes, bonds, loans, licenses or permits, written or oral, (i) to which the Company or any of the Subsidiaries is a party or by which it or its properties are bound, (ii) that will survive the Closing and (iii) that (A) may give rise to obligations or Liabilities exceeding \$_____ during their terms, (B) may generate revenues or income exceeding, exceeding \$_____ during their terms, (C) are joint venture, limited liability company or partnership agreements, (D) are with any labor organizations, (E) are employment agreements, (F) contain restrictions on the right of the Company or any of the Subsidiaries to engage in activities competitive with any Person or to solicit suppliers anywhere in the world, (G) obligate the Company or any of the Subsidiaries to procure goods or services exclusively from any Person, (H) are loan agreements, indemnity or guaranty agreements, bonds or mortgages, (I) are agreements or options to purchase land or (J) are with Seller or any of its Affiliates (collectively the “**Material Contracts**”).¹²

(b) Except to the extent set forth on Schedule 3.9(b), each of the Company and the Subsidiaries has complied with all of its material commitments and obligations and is not in Default under any of the Material Contracts, and no notice of Default has been received with respect to any of them. To the Knowledge of Seller, each Material Contract is valid and binding on the other parties and no other party to a Material Contract is in breach of or default under the terms of any Material Contract in any material respect.

Section 3.10 *Consents and Approvals; No Violations.* The execution and delivery of this Agreement by Seller and the consummation of the transactions it contemplates (a) will not violate, conflict with or contravene any provision of the certificate of formation, the company agreement or by-laws (or comparable governing documents) of Seller, the Company or any of the Subsidiaries, (b) will not violate, conflict with, or contravene any Law or Order by which Seller, the Company or any of the Subsidiaries is bound or by which any of their respective assets are bound or affected, (iii) except as set forth on Schedule 3.10, will not require any filing with, or Permit, action, consent or approval of, or the giving of any notice to, any Government Entities, or any other Person, and (iv) except as set forth on Schedule 3.10, will not result (immediately or with notice or lapse of time or both) in a Default under, or result in the creation of any Lien upon any asset of the Company or any of the Subsidiaries under, any of the terms, conditions or provisions of any note, bond, mortgage, indenture, license, franchise, Permit, agreement (including any Material Contract), lease, franchise agreement or any other instrument or obligation to which Seller, the Company or any of the Subsidiaries is a party, or by which it or any of its or theirs assets may be bound.

Section 3.11 *Litigation.* Except as set forth on Schedule 3.11, there is no claim, action, suit, investigation, proceeding at Law or in equity, arbitration or administrative or other proceeding by or before any Governmental Authority, pending, or, to the Knowledge of Seller, threatened, against or affecting the Company or any of the Subsidiaries or their respective directors, officers or employees in their capacities as such or, to the Knowledge of Seller, any other Person for whom the Company or any of the Subsidiaries may be liable; Seller is not aware of any valid basis for any such

¹² What should be defined to be a “Material Contract” will depend on the Company’s business and assets. A buyer wants to know about the principal sources of revenues and expenditures, restrictions on business and risks assumed. That will be different, for example, for an oil and gas exploration and production company vs. a telecommunications service provider vs. a seller of retail goods.

action, proceeding or investigation. The Company and the Subsidiaries are subject to no judgment, Order or decree entered in any lawsuit or proceeding.

Section 3.12 Taxes.

(a) The Company has timely filed or caused to be timely filed and will timely file or cause to be timely filed with the appropriate taxing authorities all Returns that are required to be filed by, or with respect to, the Company on or prior to the Closing Date. The Returns have accurately reflected and will accurately reflect in all material respects all liability for Taxes of the Company for the periods covered thereby.

(b) All Taxes and Liabilities for Taxes of the Company have been timely paid or accrued and adequately disclosed within the Company Financial Statements and fully provided for on the Books and Records of the Company in accordance with GAAP. There are no understated or inadequate Taxes paid or accrued for any Tax period prior to the Closing Date.

(c) Other Tax Matters.

(i) Schedule 3.12 sets forth (A) each taxable year or other taxable period of the Company for which an audit or other examination of Taxes by the appropriate tax authorities of any nation, state, locality or other taxing jurisdiction is currently in progress (or, to the Knowledge of Seller, scheduled to be conducted) together with the names of the respective tax authorities conducting (or, to the Knowledge of Seller, scheduled to conduct) those audits or examinations and a description of the subject matter of those audits or examinations, (B) the most recent taxable year or other taxable period for which an audit or other examination relating to United States federal, state or local income taxes (and any applicable foreign income taxes) of the Company has been finally completed and the disposition of such audit or examination, (C) the taxable years or other taxable periods of the Company that will not be subject to the normally applicable statute of limitations by reason of the existence of circumstances that would cause any such statute of limitations for applicable Taxes to be extended, (D) the amount of any proposed adjustments (and the principal reason therefor) relating to any Returns of the Company, which have been proposed or assessed by any taxing authority and (E) a list of all notices received by the Company from any taxing authority relating to any issue which could affect the Tax liability of the Company, which issue has not been finally determined and which, if determined adversely to the Company, could result in a Tax liability.

(ii) All Taxes that the Company or any Subsidiary is (or was) required by Law to withhold or collect have been duly withheld or collected, and have been timely paid over to the proper authorities to the extent due and payable.

(iii) The Company is not a “United States real property holding corporation” within the meaning of Section 897(c)(2) of the Code.

(iv) There are no tax sharing, allocation, indemnification or similar agreements in effect as between the Company or any of its predecessors and Affiliates and any other party (including Seller and any of its predecessors and Affiliates) under which Buyer or the Company could be liable for any Taxes or other claims of any party.

(v) No indebtedness of the Company consists of “corporate acquisition indebtedness” within the meaning of Section 279 of the Code.

(vi) The Company has not applied for, been granted, or agreed to any accounting method change for which it will be required to take into account any adjustment under Section 481 of the Code or any similar provision of the Code or the corresponding tax laws of any nation, state, locality or other taxing jurisdiction.

(vii) No election under Section 341(f) of the Code has been made or shall be made prior to the Closing Date to treat the Company as a consenting corporation, as defined in Section 341 of the Code.

(viii) The Company is not a party to any agreement that would require it to make any payment that would constitute an “excess parachute payment” for purposes of Sections 280G and 4999 of the Code.

Section 3.13 Insurance. Schedule 3.13 contains an accurate and complete summary description of all insurance policies of property, fire and casualty, product liability, workers compensation, key man life, and employment practices liability, and other forms of insurance owned or held by the Company or any of the Subsidiaries or maintained with respect to the assets of the Company or any of the Subsidiaries for the past three years. The business operations and all the insurable assets of the Company or any of the Subsidiaries are insured for their benefit under insurance policies and fidelity bonds (including financial institutions bond, property and casualty insurance, professional liability insurance and workers’ compensation insurance), of the type and in amounts customarily carried by Persons conducting businesses similar to the Company’s and the Subsidiaries’ businesses, in each case with such insurance policies and fidelity bonds issued by insurers of recognized responsibility. The Company and the Subsidiaries have not received (a) any notice of cancellation of any policy described in Schedule 3.14 or refusal of coverage thereunder, (b) any notice that any issuer of such policy has filed for protection under applicable bankruptcy laws or is otherwise in the process of liquidating or has been liquidated, or (c) any other indication that such policies are no longer in full force or effect or that the issuer of any such policy is no longer willing or able to perform its obligations thereunder or (d) any claim under such policy. Since the last renewal date of any insurance policy, there has not been any material adverse change in the relationship of the Company or any of the Subsidiaries with its insurers or in the premiums payable pursuant to such policies.

Section 3.14 Compliance with Laws; Permits.

(a) Except as set forth on Schedule 3.14(a), the Company and the Subsidiaries are and have been in compliance in all material respects with all Laws and Orders. None of the Company and the Subsidiaries has engaged in any sales policies or trade practices that would injure the reputation or goodwill of the Company and the Subsidiaries or has caused the Company or any of the Subsidiaries to be in violation of the Foreign Corrupt Practices Act of the United States of America, or directly nor indirectly made any illegal payment to a governmental official. No investigation or review by any Governmental Authority with respect to the Company or any of the Subsidiaries or their respective businesses is pending or, to the Knowledge of Seller, threatened.

(b) The Company and the Subsidiaries hold all Permits necessary for the conduct of their businesses. Except as set forth on Schedule 3.14(b), (i) all Permits held by the Company and the Subsidiaries are valid and in full force and effect, (ii) the Company and the Subsidiaries are not in Default under, or in material violation of, any Permit, and to the Knowledge of Seller, no event has occurred or condition exists which constitutes or, that with notice or lapse of time or both, would

constitute, a Default under, or violation of, any Permit, (iii) none of the Permits shall be terminated or impaired or become terminable, in whole or in part, as a result of the transactions contemplated by this Agreement, and (iv) all applications required to have been filed for the renewal of any Permits have been duly filed on a timely basis with the appropriate Government Authorities.

Section 3.15 *Employment Relations.*

(a) The Company and the Subsidiaries are in compliance in all material respects with all applicable Laws respecting employment and employment practices, terms and conditions of employment and wages and hours, equal opportunity, nondiscrimination, immigration, labor, affirmative action, and occupational safety and health and has not, and is not, engaged in any unfair labor practice as defined in the National Labor Relations Act or other applicable Law or any statutory disputes under the Railroad Labor Act or other applicable Law.

(b) The Company has not received any notice of any pending unfair labor practice complaint against the Company or any of the Subsidiaries before the National Labor Relations Board.

(c) There is no labor strike, dispute, slowdown, stoppage, lockout or material grievance actually pending or, to the Knowledge of Seller, threatened against or involving the Company or any of the Subsidiaries and, since January 1, 20__, there has not been any such action;

(d) Since January 1, 20__, the Company and the Subsidiaries have not effectuated (i) a “plant closing” as defined in the Worker Adjustment and Retraining Notification Act of 1988 affecting any site of employment or one or more facilities or operating units within any site of employment or facility of the Company or any of the Subsidiaries, or (ii) a “mass layoff” as defined in that statute affecting any site of employment or facility of the Company or any of the Subsidiaries.

(e) Neither the Company nor any of the Subsidiaries is a party to a collective bargaining agreement, no collective bargaining agreement is currently being negotiated by the Company or any of the Subsidiaries and, to the Knowledge of Seller, neither the Company nor any of the Subsidiaries is the subject of any organizing effort on behalf of any union;

(f) Except as set forth in Schedule 3.15, no claim in respect of the employment of any employee has been asserted in writing or, to the Knowledge of Seller, asserted orally or threatened, against the Company or any of the Subsidiaries; and

(g) Neither the Company and nor any of the Subsidiaries has experienced any material labor difficulty in the past three years, other than difficulty caused by the shortage of qualified individuals to serve as employees of the Company and the Subsidiaries.

Section 3.16 *Employee Benefit Plans.*

(a) Set forth in Schedule 3.16 is an accurate and complete list of all employee benefit plans (“**Employee Benefit Plans**”), all of which are in writing or are otherwise exempt from the provisions of ERISA, that have been established, maintained or contributed to (or with respect to which an obligation to contribute has been undertaken) or with respect to which any potential material liability is borne by the Company (including, for this purpose and for the purpose of all of the representations in this Section 3.16, any predecessors to the Company and all employers (whether or not incorporated) that are by reason of common control treated together with the Company as a single employer.

(b) Each Employee Benefit Plan has at all times been maintained and operated in substantial compliance with its terms and the requirements of all applicable Laws, including ERISA and the Code. No complete or partial termination of any Employee Benefit Plan has occurred or is expected to occur[, excepting actions that Buyer may take after Closing].¹³ None of the Company and the Subsidiaries has any present commitment, intention or understanding to create, modify or terminate any Employee Benefit Plan. Except as required by applicable Law, no condition or circumstance exists that would prevent the amendment or termination of any Employee Benefit Plan. No event has occurred and no condition or circumstance has existed that could result in a material increase in the benefits under or the expense of maintaining any Employee Benefit Plan from the level of benefits or expense incurred for the most recent fiscal year ended thereof.

(c) In respect of each Employee Benefit Plan, a complete and correct copy of each of the following documents has been made available to the Buyer: (i) the most recent plan documents (or, if a plan is not written, a written description thereof) or written agreement thereof, and all amendments thereto and all related trust or other funding vehicles with respect to each such Employee Benefit Plan (provided that with respect to restricted Subject Interests agreements or agreements evidencing options between the Company and any employee of it or any Subsidiary, representative forms of such agreements have been made available), (ii) the most recent summary plan description, and all related summaries of material modifications, (iii) the most recent Form 5500 (including schedules and attachments), financial statements and actuarial reports for the past three years and (iv) the most recent IRS determination letter and any pending application.

(d) Neither the Company nor any Subsidiary, nor any entity treated as a single employer with the Company or any Subsidiary under Section 414(b), (c), (m) or (o) of the Code at any time within the immediately preceding six years maintains or is required to contribute to any Employee Benefit Plan that (i) is a “multiemployer plan” as defined in Sections 3(37) of ERISA, (ii) is subject to the funding requirements of Section 412 of the Code or Title IV of ERISA, (iii) provides for post-retirement medical, life insurance or other welfare-type benefits (other than as required by Part 6 of Subtitle B of Title I of ERISA or Section 4980B of the Code or under a similar state law), or (iv) is a “defined benefit plan” (as defined in Section 414 of the Code), whether or not subject to the Code or ERISA.

(e) The Employee Benefit Plans and their related trusts intended to qualify under Sections 401 and 501(a) of the Code are subject to current favorable determination letters from the IRS and, to the Knowledge of Seller, nothing has occurred that is reasonably likely to result in the revocation of such letter.

(f) There is no Contract, plan or arrangement (written or otherwise) covering any current or former employee or contractor of the Company or any of the Subsidiaries that, individually or collectively, would entitle any employee or former employee to any severance or other payment or benefit as a result of the transactions contemplated by this Agreement (i) that would constitute an “excess parachute payment” within the meaning of Section 280G of the Code or (ii) that would not be deductible pursuant to the terms of Section 162(m) of the Code.

(g) All contributions (including all employer contributions and employee salary reduction contributions) and premium payments that are due have been timely made with respect to each Employee Benefit Plan or have been recorded on the financial statements or records of the Company and the Subsidiaries.

¹³ The bracketed language should be added if Buyer will control the Company after Closing and may make changes.

(h) There are no suits, actions, disputes, claims (other than routine claims for benefits), arbitrations, administrative or other proceedings pending or, to the Knowledge of Seller, threatened, anticipated or expected to be asserted with respect to any Employee Benefit Plan.

(i) Other than as set forth on Schedule 3.16(i), the consummation of the transactions contemplated by this Agreement will not (i) entitle any current or former employee, officer or director of the Company or any of the Subsidiaries to any stay or retention payment or to any severance pay, unemployment compensation or any other similar termination payment, or (ii) accelerate the time of payment or vesting of, or increase the amount of or otherwise enhance, any benefit due any such employee, officer or director.

Section 3.17 *Interests in Customers, Suppliers, etc.* Except as set forth on Schedule 3.17, neither Seller nor any of its Affiliates nor any officer or director of the Company or any Subsidiary possesses, directly or indirectly, any ownership interest in, or is a director, officer or employee of, any Person that is a supplier, customer, lessor, lessee, licensor, developer, competitor or potential competitor of the Company or any of the Subsidiaries. Ownership of securities of companies whose securities are registered under the Securities Exchange Act of 1934 of 1% or less of any class of such securities shall not be deemed to be a financial interest for purposes of this Section 3.17.

Section 3.18 *Environmental Laws and Regulations.*

(a) Except as set forth on Schedule 3.18, to the Knowledge of Seller (i) the operations of the Company and the Subsidiaries are and have been in compliance with all applicable federal, state, foreign or local statutes, Laws, rules, regulations, ordinances, Orders, judicial or administrative decisions of any Governmental Authority in effect and in each case, if applicable, as amended as of the Closing Date relating to Environmental Laws, which compliance includes the possession by the Company and the Subsidiaries of all Permits and other governmental authorizations required under applicable Environmental Laws, (ii) there has been no Release by the Company or any Subsidiary of any Hazardous Materials on the Real Property, except for Releases that have not and could not reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect, (iii) there have not been any underground storage tanks on the Real Property, (iv) none of the Company and the Subsidiaries has received any communication (written or oral), whether from a Governmental Authority, citizens group, employee or otherwise, that alleges that the Company or any of the Subsidiaries is not in full compliance, and there are no circumstances that may prevent or interfere with full compliance in the future, (v) there is no Environmental Claim pending or threatened against the Company or any of the Subsidiaries, (vi) there are no past or present actions, activities, circumstances, conditions, events or incidents, including, without limitation, the Release, emission, discharge, presence or disposal of any Hazardous Material that could form the basis of any Environmental Claim against the Company or any of the Subsidiaries, (vii) there is no asbestos contained in or forming part of any building, building component, structure or office space owned or leased by the Company and the Subsidiaries, (viii) no polychlorinated biphenyls (PCBs) are used or stored at any property owned or leased by the Company or any of the Subsidiaries, (ix) the Company is not obligated to conduct or pay for, and is not conducting or paying for, any response or corrective action under any Environmental Law at any location and (x) all underground storage tanks owned, operated, or leased by the Company or any of the Subsidiaries and which are subject to regulation under the federal Resource Conservation and Recovery Act (or equivalent state or local law regulating underground storage tanks) meet the technical standards prescribed.

(b) Seller has provided Buyer with all legal evaluations prepared by outside counsel with respect to any ongoing environmental investigations. Except as set forth in the preceding sentence, to the Knowledge of Seller, there has been no environmental investigation, study, audit, test, review or other analysis conducted in relation to the business of the Company or any of the Subsidiaries

or any property or facility now owned or leased by the Company or any of the Subsidiaries that has been requested by Buyer in writing or its representatives but not been made available to Buyer.

Section 3.19 *Bank Accounts, Powers of Attorney.* Set forth on Schedule 3.19 is an accurate and complete list showing the name and address of each bank or financial institution in which the Company or any of the Subsidiaries has an account or safe deposit box, the number of each such account or box and the names of all Persons authorized to draw or to have access to it.

Section 3.20 *Compensation of Employees and Consultants.* Set forth on Schedule 3.20 is an accurate and complete list for calendar year 20__ showing the names of all Persons employed or contracted by the Company or any of the Subsidiaries who received more than \$_____ in 20__ cash compensation (including salary, consulting fees, commission and bonus) or who are reasonably expected to receive in the aggregate for all such Persons more than \$_____ in 20__ cash compensation (including salary, consulting fees, commission and bonus) and who are expected to be employed by the Company or any of the Subsidiaries on the Closing Date, along with the present salary or hourly wage, total in 20__ cash compensation (including salary, commission and bonus) and fringe benefits, of each such Person.

Section 3.21 *Accounts Receivable.* The amount of all accounts receivable, unbilled invoices and other debts due or recorded in the Books and Records of the Company as being due to the Company or any of the Subsidiaries (less the amount of any applicable provision or reserve made in the accounting records of the Company or any of the Subsidiaries) were calculated in accordance with GAAP in a manner consistent with past practice and are bona fide and represent amounts validly due. Except as set forth on Schedule 3.21, there has been no material adverse change since the Company Financial Statements in the amount, aging or collectibility of accounts receivable or other debts due the Company or any of the Subsidiaries or the allowances with respect to accounts receivable or other debts from that reflected in the Company Financial Statements.

Section 3.22 *Customer and Supplier Relations.* There has not been, and Seller has no reason to believe that there will be, any material adverse change in relations with customers or suppliers of the Company or the Subsidiaries or decrease in the level of business of such customers or suppliers with the Company or the Subsidiaries as a result of the transactions contemplated by this Agreement. None of the Company and the Subsidiaries has received any notice of any distribution (including delayed deliveries or allocations by suppliers) in the availability of the materials or products used by Summit or any of the Subsidiaries.

Section 3.23 *Broker's, Finder's Fees and Legal Fees.* Other than through arrangements (if any) made by Buyer and its Affiliates, no agent, broker, finder, investment bank, Person or firm is, or will be, entitled to any commission or broker's or finder's fees from Buyer, its Affiliates, the Company or any Subsidiary in connection with any of the transactions contemplated by this Agreement.

Section 3.24 *Intellectual Property.* The Company or a Subsidiary of the Company owns, or is licensed or otherwise has the right to use, all patents, patent applications, trademarks, trademark applications, trade names, service marks, service mark applications, domain name registrations and registered copyrights and applications therefor (collectively, "**Intellectual Property Rights**") that, in each case, are required for the conduct of the business of the Company and the Subsidiaries, as presently conducted. The conduct of the business of the Company and the Subsidiaries as currently conducted does not infringe, misappropriate or otherwise violate any Intellectual Property Rights of any Person, and no claims are pending or, to the Knowledge of Seller, threatened that the Company or any of the Subsidiaries is infringing the rights of any Person with regard to any Intellectual Property Right in any material respect. To the Knowledge of Seller, no Person is infringing the rights of the Company or any of the Subsidiaries with respect to any Intellectual Property Right in any material respect.

ARTICLE 4

REPRESENTATIONS OF THE BUYER

The Buyer represents and warrants to the Company and Seller as follows:

Section 4.1 *Existence and Good Standing.* Buyer is a [TYPE OF ENTITY] duly formed, validly existing and in good standing under the laws of the State of _____. Buyer has the requisite corporate power and authority to enter into, execute and deliver this Agreement and perform its obligations under this Agreement.

Section 4.2 *Authorization and Validity of this Agreement.* Buyer has the requisite power and authority to enter into, execute and deliver this Agreement, to perform its obligations under this Agreement and to consummate the transactions this Agreement it will perform. The execution, delivery and performance of this Agreement by Buyer and the performance of its obligations under this Agreement have been duly authorized and approved by all requisite action by it, including its governing authorities and, if required, its equity owners. This Agreement has been duly executed and delivered by Buyer and, assuming the due execution of this Agreement by Seller, is a legal, valid and binding obligation of Seller, enforceable against Buyer in accordance with its terms, except to the extent that its enforceability may be subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar Laws affecting the enforcement of creditors' rights generally and by general equitable principles (whether considered in a proceeding in equity or at Law) and any implied covenant of good faith and fair dealing, or remedies in general as from time to time in effect, or the exercise by courts of equity power.

Section 4.3 *Restrictive Documents.* Buyer is not subject to any mortgage, encumbrance, lease, agreement, instrument, Order, Law, rule, regulation, judgment or decree, or any other restriction of any kind or character that would prevent its consummation of the transactions contemplated by this Agreement.

Section 4.4 *Broker's or Finder's Fees.* Other than through arrangements made by Seller, its Affiliates, the Company or any Subsidiary, no agent, broker, finder, investment bank, person or firm is, or will be, entitled to any commission or broker's or finder's fees from Seller or its Affiliates in connection with any of the transactions contemplated by this Agreement.

Section 4.5 *Consents and Approvals; No Violations.* The execution and delivery of this Agreement by Buyer and the consummation of the transactions contemplated hereby (a) will not violate or contravene any provision of the certificate of formation and [company agreement/by-laws] of Buyer, (b) will not violate or contravene any statute, rule, regulation, order or decree of any public body or authority by which Buyer is bound or by which any of its respective properties or assets are bound, and (c) will not result in a violation or breach of, conflict with, constitute (with or without due notice or lapse of time or both) a Default (or give rise to any right of termination, cancellation, payment or acceleration) under any agreement or commitment to which Buyer is a party or is bound.

Section 4.6 *Financing.* On the Closing Date Buyer will have cash on hand and/or available financial resources to close the transaction contemplated by this Agreement.

ARTICLE 5**COVENANTS****Section 5.1 *Conduct of the Company and the Subsidiaries.***

(a) Between the date of this Agreement and the Closing Date, Seller shall [vote the Subject Interests and (subject to any fiduciary duties) cause all [directors] it has named to the Company's [board of directors] to vote to]¹⁴ cause the Company and each of the Subsidiaries to, (i) subject to the restrictions and exceptions set forth in Section 5.1(b) or elsewhere in this Agreement, conduct its business and operations in its ordinary and usual course of business consistent with past practice, (ii) maintain its existence in good standing under applicable Law, (iii) use its reasonable best efforts to preserve intact its business organizations, keep available the services of its officers and employees and maintain satisfactory relationships and goodwill with licensors, suppliers, distributors, customers, landlords, employees, agents, lessees and other Persons with which the Company or any of the Subsidiaries has business relations; (iv) confer with Buyer concerning operational matters of a material nature and report periodically upon request to Buyer concerning its business, operations and finances.

(b) Notwithstanding the provisions of Section 5.1(a), prior to the Closing Date, except as may be first specifically approved in writing by Buyer or as is otherwise specifically permitted or required by this Agreement, Seller shall [vote the Subject Interests and (subject to any fiduciary duties) cause all [directors] it has named to the Company's [board of directors] to vote to] cause the Company and each of the Subsidiaries to not:

(i) amend or modify its certificate of formation or company agreement or by-laws (or other governing document);

(ii) (A) pay (other than in the ordinary course of business consistent with past practice) or increase any bonuses, salaries, or other compensation to any director, officer, employee or Subject Interestsholder, (B) enter into any collective bargaining agreement (except in the ordinary course of business consistent with past practice after consultation with Buyer), or (C) enter into any employment, severance, or similar agreement with any director, officer, or employee [except in the ordinary course of business consistent with past practice];

(iii) enter into, adopt or amend in any material respect any profit sharing, bonus, deferred compensation, savings, insurance, pension, retirement, or other employee benefit plan for or with any of its employees;

(iv) enter into any Contracts other than (A) any contract that is entered into in the ordinary course of business consistent with past practice, (B) any contract not entered into in the ordinary course of business consistent with past practice

¹⁴ If Seller controls the Company and the Subsidiaries but there are other members or equity owners, it may be able to dictate these results, but should be concerned about duties to the Company and its other owners. If Seller does not control, then all it can do is vote the interest it controls. If Seller does not have the power to control these items, or will not agree to do so because of concerns about its duties, then Buyer is assuming the risk that the Company or the Subsidiaries may take these actions. An alternative would be to condition Buyer's obligation to close on these matters not occurring; however, that puts Buyer in an awkward position and/or lead to allegations that Seller persuaded the Company to take the actions to influence Buyer to decline to close.

and that provides for the payment of less than \$[_____] individually, or any such Contracts that, when aggregated with all other such Contracts, provide for total payments of less than \$[_____] in the aggregate;

(v) (A) create, incur or assume any indebtedness for borrowed money (including surplus notes or capital notes), (B) guarantee, endorse or otherwise become liable or responsible (whether directly, contingently or otherwise) for any obligations of another, (C) make any loans or advances of borrowed money or capital contributions to, or equity investments in, any other Person, (D) create or assume any other material liability or obligation other than in the ordinary course of business, (E) grant or create any Encumbrance on any of the assets of the Company or any of the Subsidiaries other than in the ordinary course of business (but not any shares or other equity interests in or securities of the Company or any of the Subsidiaries, whether or not in the ordinary course of business), or (F) merge or consolidate with another entity;

(vi) modify, amend or terminate, or waive, forfeit, abandon, release or assign any claim or right of substantial value that individually or in the aggregate is material, except in the ordinary course of business consistent with past practice;

(vii) (A) issue, split, combine or reclassify any equity or other ownership interests, (B) declare, set aside or pay any distribution (whether in cash, equity, or other ownership interests or property or any combination), or (C) redeem, purchase or otherwise acquire any of its equity or other ownership interests [(except from former employees, directors or consultants in accordance with agreements previously provided to Buyer providing for the repurchase of equity in connection with any termination of employment with or services to the Company or any of the Subsidiaries)];

(viii) change any of its material accounting methods, principles or practices, except insofar as may be required by a generally applicable change in GAAP;

(ix) except as required by Law or by any Governmental Authority and except for elections made in the ordinary course of business, (A) make any settlement or compromise of any current audit, or settle or compromise any audit, relating to any material Taxes, (B) consent to any extension or waiver of any limitation period with respect to any material Taxes or (C) make a request for a Tax ruling or enter into an agreement related to Taxes, or settle or compromise any audit or other controversy relating to any material Taxes; change any of its material hedging, investing, underwriting, actuarial, pricing, marketing or agency principles, practices, methods or policies (including reserving methods, practices or policies) in any material respect, except as may be required by Law;

(x) issue or sell any equity or other ownership interests, or issue any securities convertible into, or options, warrants or rights to purchase or subscribe to, or enter into any arrangement or contract with respect to the issue and sale of, any equity or other ownership interests, or make any other changes in its capital structure;

(xi) sell, lease, license or dispose of any material asset or property, other than purchases and sales of inventory in the ordinary course of business, consistent with past practice;

(xii) make or commit to make any capital expenditure except (A) as set forth in Schedule 5.1(b), (B) to the extent consistent with the budget previously provided Buyer or (C) in amounts not in excess of \$_____ for each existing capital expenditure project and for each new capital expenditure project, in each case over and above the budget previously disclosed to Buyer, subject to a maximum of [_____ in the aggregate;

(xiii) fail to maintain insurance as described in Section 3.13;

(xiv) institute or settle, except for settlements that do not exceed \$_____ in the aggregate, any legal proceeding;

(xv) enter into any activities that are unrelated to the current business of the Company and the Subsidiaries; and

(xvi) agree in writing to do any of the foregoing.

Section 5.2 *Transition, Access and Confidentiality.*

(a) [Prior to the Closing, the Parties shall consult and cooperate with each other, and shall use their commercially reasonable efforts, to prepare for and ensure (x) the orderly and prompt transition and integration of the Company and the Subsidiaries to and with Buyer [and its Affiliates] and their respective systems, operations, management and personnel and (y) the ability of Buyer, the Company and the Subsidiaries to provide substantially similar services after Closing as are provided by the Company and the Subsidiaries to customers of the Company and the Subsidiaries prior to the Closing (collectively, the “**Transition**”). In connection with the Transition, Seller shall cause the Company and the Subsidiaries to make available the equipment, facilities, personnel and support reasonably necessary to effect the Transition and cooperate with Buyer in all transitional arrangements contemplated by this Agreement in a diligent and professional manner comparable to that in which similar functions are performed by the Company and the Subsidiaries in the conduct of the business; provided, however, that in the performance of the transitional arrangements contemplated hereby, the Company and each of the Subsidiaries shall at all times act as an independent agent and the Company and each of the Subsidiaries shall in no respect be an agent, attorney, employee, representative, joint venturer or fiduciary of Buyer or any of its Affiliates and no Party shall declare or represent to any third party that any Party is acting in any respect as such.

(b) Subject to applicable Law, from the date of this Agreement until the Closing Date, Seller shall cause the Company and each of the Subsidiaries to: (i) upon reasonable prior notice to the Company, give Buyer, its attorneys, accountants and such other representatives of Buyer as Buyer shall designate to the Company, free and full access during normal business hours to the offices, properties, computer systems, books and records of the Company (with respect to its business and that of any of the Subsidiaries) and any of the Subsidiaries, as well as reasonable after hours access for Transaction planning and preparation, (ii) furnish to Buyer and its Affiliates and their respective representatives such financial and operating data and other information as such Persons may reasonably request, and all inquiries and subpoenas from any Governmental Authority to the Company or any of the Subsidiaries with respect to any alleged deficiency or violation material to the financial condition or operations of its business, and (iii) instruct the employees and representatives the Company and the Subsidiaries to cooperate with Buyer and its Affiliates and their respective representatives in the Transition; provided, however, that access for environmental matters shall not include any intrusive sampling or testing. Any access granted to Buyer and its Affiliates, and their respective representatives, pursuant to this Section 5.2(b) shall be conducted in such manner as not to interfere unreasonably with the

conduct of the business of the Company and the Subsidiaries. No information or knowledge obtained by Buyer, its Affiliates or any of their respective representatives pursuant to this Section 5.2(b) shall affect or be deemed to modify any representation or warranty made by Seller [or the Company] under this Agreement. Buyer shall be solely responsible for all costs and expenses of its due diligence investigation. Buyer shall indemnify the Company and the subsidiaries and hold them harmless from and against any and all Liabilities, obligations or claims in respect thereof, with respect to any personal injury or property damage arising out of Buyer's due diligence investigation **[INCLUDING] [EXCLUDING] MATTERS ARISING OUT OF THE SOLE, CONCURRENT OR GROSS NEGLIGENCE OF THE COMPANY OR ANY SUBSIDIARY.]**¹⁵

(c) From and after the Closing, Seller shall not, and shall cause its Affiliates and their respective representatives not to, disclose to any other Person any confidential information about the Company or the Subsidiaries; provided, that Seller may disclose any such information (i) to the extent required by Law, in any report, statement, testimony or other submission to any Governmental Authority having jurisdiction over Seller, or (ii) to comply with any Law applicable to Seller, or in response to any summons, subpoena or other legal process or formal or informal investigative demand issued to Seller, in the course of any litigation, investigation or administrative proceeding; provided, further, that, if Seller or any of their respective Affiliates, as applicable, becomes legally compelled by deposition, interrogatory, request for documents, subpoena, civil investigative demand or similar judicial or administrative process to disclose any such information, Seller shall provide Buyer with prompt prior notice of such requirement, and, to the extent reasonably practicable, cooperate with Buyer, the Company and their respective Affiliates (at Buyer's expense) to obtain a protective order or similar remedy to cause all such information not to be disclosed, including interposing all available objections to disclosure, including objections based on settlement privilege. In the event that such a protective order or other similar remedy is not obtained, Seller shall furnish only that portion of the information that has been legally compelled. Seller shall, and shall cause its Affiliates to, protect all such confidential information by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of such business confidential information as Seller uses to protect its own confidential information of a like nature.

(d) Subject to applicable Law, from and after the date of this Agreement, the Parties shall not, and shall cause each of their respective Affiliates and representatives not to, disclose to any other Person any confidential written, oral or other information obtained from the other party in connection with this Agreement or the transactions it contemplates, provided that the Parties (and their respective Affiliates and representatives) may disclose such confidential information (i) to the extent the information is already known to the recipient or to others not bound by a duty of confidentiality or information becomes publicly available through no fault of such party, (ii) to the extent required by Law, in any report, statement, testimony or other submission to any Governmental Authority having jurisdiction over the parties or any Affiliate thereof, as applicable or (iii) to comply with any Law applicable to the parties or any of their respective Affiliates, or in response to any summons, subpoena or other legal process or formal or informal investigative demand issued to the parties or any of their respective Affiliates, in the course of any litigation, investigation or administrative proceeding; provided, further, that, if any of the parties or any of their respective Affiliates, as applicable, becomes legally compelled by deposition, interrogatory, request for documents, subpoena, civil investigative demand or similar judicial or administrative process to disclose any confidential information obtained from the other party in connection with this Agreement or the transactions it contemplated, that party or its Affiliate shall provide the other parties with prompt prior written notice of such requirement, and, to the extent

¹⁵ The provisions in clauses (a) and (b) are appropriate only if Seller controls the Company and the businesses of the Company and Buyer will be integrated in whole or in part.

reasonably practicable, cooperate with the other parties to obtain a protective order or similar remedy to cause all such confidential information not to be disclosed, including interposing all available objections, to disclosure including objections based on settlement privilege. In the event that such a protective order or other similar remedy is not obtained, the party required to disclose the confidential information shall furnish only that portion of the information that has been legally compelled.

Section 5.3 *Notice of Changes.* From the date of this Agreement to the Closing Date, each of the Parties shall promptly notify the other, upon acquiring knowledge of any fact that, if existing or known on the date of this Agreement, would have been required to be set forth or disclosed pursuant to this Agreement or of any fact that, if existing or known on the date of this Agreement, would have made any of the representations of that party in this Agreement untrue in any material respect. No such information shall impact any representation or warranty of the party disclosing the information or any rights or remedies available to the party receiving such information in connection with any breach of any representation or warranty; provided that a breach of this Section 5.3 shall not be considered for purposes of determining the satisfaction of the closing conditions set forth in Article 6 or give rise to a right of termination under Article 7 if the underlying breach or breaches with respect to which the other party failed to give notice would not result in the failure of the closing conditions set forth in Article 6 or would not result in the ability of such non-breaching party to terminate this Agreement under Article 7, as the case may be.

Section 5.4 *Efforts; Filings.*

(a) Under the terms and subject to the conditions of this Agreement, each of Seller and Buyer shall use its commercially reasonable efforts to take, agree to take, or cause to be taken, any and all actions and to do, or cause to be done, any and all things necessary, proper or advisable under any requirement of Law or otherwise, so as to, as promptly as practicable (i) permit consummation of the purchase of the Subject Interests and (ii) otherwise enable consummation of the transactions contemplated by this Agreement, and each party shall, and shall cause its respective Affiliates to, cooperate fully to that end.

(b) Without limiting the foregoing, each Party agrees to use its commercially reasonable efforts before, during and after the Closing to prepare all documentation, to effect all filings and to obtain (and to fully comply with any conditions and all other provisions of) all consents of all Government Entities and other Persons necessary to consummate the transactions contemplated by this Agreement, include those set forth on Schedule 3.10, as promptly as practicable and in any event within any prescribed period. In connection with effecting any such filing or obtaining any such consent, each Party shall, subject to applicable Law, (i) permit counsel for the other party to review in advance, and consider in good faith the views of the other party in connection with, any proposed written communication to any Governmental Authority, and (ii) provide counsel for the other party with copies of all filings made by such party, and all correspondence between that party (and its advisors) with any Governmental Authority and any other information supplied by that party and that party's Subsidiaries to, or received from, a Governmental Authority relating to the transactions contemplated hereby; provided, however, that materials may be redacted or withheld (x) to the extent that they concern the valuation of the business of the Company and the Subsidiaries, or alternatives to the transactions contemplated by this Agreement and (y) as necessary to comply with contractual arrangements.¹⁶

¹⁶ This section needs to be tailored to the legal requirements affecting the Parties, the Company and the Subsidiaries and their assets and businesses. In particular, the Parties should determine whether notification requirements under the Hart-Scott-Rodin Antitrust Improvement Act of 1976, as amended, applies

(c) Notwithstanding anything to the contrary in this Agreement, Buyer and its Affiliates shall not be required to (i) sell, hold separate, license or otherwise dispose of or conduct any of their businesses or assets in a specified manner, or agree to sell, hold separate, license or otherwise dispose of or conduct any of their businesses or assets in a specified manner, (ii) permit the sale, holding separate, licensing or other disposition of, any portion of the Company or any of the Subsidiaries or (iii) conduct all or any portion of the business in a specified manner, in each such case, whether as a condition to obtaining any approval from a Governmental Authority or any other Person or for any other reason.

Section 5.5 Further Assurances. After the Closing Date, each of Seller and Buyer shall use its commercially reasonable efforts from time to time to (a) execute and deliver at the reasonable request of the other party such additional documents and instruments as may be reasonably required to give effect to this Agreement and the transactions contemplated by this Agreement and (b) provide whatever documents or other evidence of ownership as may be reasonably requested by Buyer to confirm Buyer's ownership of the acquired Subject Interests.

Section 5.6 Notice of Proceedings. Each of the Parties will promptly notify the other upon (a) becoming aware of any Order or any complaint praying for an order or decree restraining or enjoining the execution of this Agreement or the consummation of the transactions contemplated by this Agreement or (b) receiving any notice from any Governmental Authority of its intention to (i) institute a suit or proceeding to restrain or enjoin the execution of this Agreement or the consummation of the transactions it contemplates or (ii) nullify or render ineffective this Agreement or any of these transactions if consummated.

ARTICLE 6

CONDITIONS PRECEDENT

Section 6.1 Conditions to Each Party's Obligation to Effect the Transaction. The obligations of each of the Parties to consummate the transactions to occur at the Closing are conditioned upon satisfaction or waiver, at or prior to the Closing, of the following conditions:

(a) No action or proceeding shall have been instituted, threatened before a court or other government body or any public authority to challenge, delay materially, restrain or prohibit any of the transactions contemplated hereby.

(b) No Law or Order (whether temporary, preliminary or permanent) shall have been enacted, issued, promulgated, enforced or entered that is in effect and that prevents or prohibits consummation of the transactions contemplated by this Agreement.

(c) All consents, approvals and authorizations of any Governmental Authority or other Person required to consummate the transactions contemplated by this Agreement shall have been obtained, including those listed on Schedule 3.10.¹⁷

Section 6.2 Additional Conditions to Obligations of Buyer. The obligations of Buyer to consummate the transactions to occur at the Closing are conditioned upon satisfaction or waiver, at or prior to the Closing, of the following conditions in addition to those in Section 6.1:

¹⁷ This provides that receipt of consents is a requirement of each Party's obligations to close. If failure to receive a particular consent has little or no consequence to Seller, but only to Buyer, the Company and/or the Subsidiaries, then it may be reasonable to make receipt of that consent a condition only to Buyer's obligation to close.

(a) Buyer shall have received (i) copies of the certificate of formation (or comparable charter documents) of each of Seller, the Company and the Subsidiaries, including all amendments, certified by the Secretary of State of the applicable jurisdiction of formation, (ii) a certificate from the Secretary of State of the applicable jurisdiction of formation, to the effect that each of Seller, the Company and the Subsidiaries is validly existing and in good standing, and (iii) a copy of the company agreement or by-laws (or comparable organizational documents) of Seller, the Company and each of the Subsidiaries certified by the secretary of the Company or the Subsidiary, as applicable, as being true and correct and in effect on the Closing Date.

(b) The representations or warranties of Seller contained in this Agreement (i) that are qualified by materiality shall be true and correct at and as of the date of this Agreement and at and as of the Closing Date as if made at and as of the Closing Date (except to the extent expressly made as of an earlier date, in which case as of that earlier date), (ii) that are contained in Sections 3.2, 3.3 and 3.24 shall be true and correct in all respects as of the date of this Agreement and as of the Closing Date as though made at and as of the Closing Date, and (iii) that are not qualified by materiality shall be true and correct in all material respects at and as of the date of this Agreement and at and as of the Closing Date as if made at and as of the Closing Date (except to the extent expressly made as of an earlier date, in which case as of that earlier date), and Buyer shall have received a certificate signed on behalf of each of Seller by a senior executive officer to the foregoing effect.

(c) Seller shall have performed or complied in all material respects with all agreements and covenants required by this Agreement to be performed or complied with by it prior to the Closing Date, and Buyer shall have received a certificate signed on behalf of Seller by a senior executive officer to the foregoing effect.

Section 6.3 *Additional Conditions To Obligations of the Company and Seller.*

The obligations of Seller to consummate the transactions to occur at the Closing are conditioned upon satisfaction or waiver, at or prior to the Closing, of the following conditions in addition to those in Section 6.1:

(a) Seller shall have received (i) copies of the certificate of formation of Buyer, including all amendments, certified by the Secretary of State of _____, and (ii) a certificate from the Secretary of State of _____ to the effect that Buyer is validly existing and in good standing.

(b) The representations or warranties of Buyer contained in this Agreement (i) that are qualified by materiality shall be true and correct at and as of the date of this Agreement and at and as of the Closing Date as if made at and as of the Closing Date (except to the extent expressly made as of an earlier date, in which case as of that earlier date), and (ii) that are not qualified by materiality shall be true and correct in all material respects at and as of the date of this Agreement and at and as of the Closing Date as if made at and as of the Closing Date (except to the extent expressly made as of an earlier date, in which case as of such earlier date), and Seller shall have received a certificate signed on behalf of Buyer by a senior executive officer to the foregoing effect.

(c) Buyer shall have performed or complied in all material respects with all agreements and covenants required by this Agreement to be performed or complied with by it prior to the Closing Date, Seller shall have received a certificate signed on behalf of Buyer by a senior executive officer to the foregoing effect.

ARTICLE 7

SURVIVAL OF REPRESENTATIONS; INDEMNIFICATION

Section 7.1 *Survival.* The respective representations and warranties, covenants and agreements of Seller and Buyer contained in this Agreement, or in any agreement, certificate or document executed by Seller or Buyer in connection with this Agreement, shall survive the Closing, subject to the other provisions of this Article 7.

Section 7.2 *Indemnification.*

(a) Subject to the other provisions of this Article 7, Seller agrees to indemnify and hold harmless Buyer and its respective equity owners, officers, directors, employees, agents, successors and assignees (collectively, the “**Buyer Indemnitees**”), from and against any and all Losses, damages, Liabilities, obligations, assessments, suits, actions, proceedings, claims or demands, including costs, expenses and fees (including reasonable attorneys’ fees and expert witness fees) incurred in connection with, suffered by any of them or asserted against any of them or the assets of the Company or any of the Subsidiaries (collectively, “**Buyer’s Losses**”), arising out of or based upon (i) provided notice of the claim for indemnification is given by the time (if any) set forth in the proviso to Section 7.1, the failure of any representation or warranty of Seller contained in this Agreement, or in any agreement, certificate or document executed by Seller in connection with this Agreement, to be true and correct when made, (ii) the breach of any covenant or agreement of Seller contained in this Agreement, (iii) any liability or obligation of Seller other than the Liabilities of or by the Company, (iv) any arrangements or agreements made or alleged to have been made by Seller with any broker, finder or other agent in connection with the transactions contemplated by this Agreement, or (v) any Environmental Claim, including pollution or threat to human health or the environment that is related in any way to the Company or any of the Subsidiaries, or any previous owner’s or operator’s management, use, control, ownership or operation of the Company or any of the Subsidiaries, or of any plant, facility, or Real Property, formerly or currently owned, operated, or leased by the Company or any of the Subsidiaries, as well as all on-site and off-site activities involving Hazardous Materials, and that occurred, existed, arises out of conditions or circumstances that occurred or existed, or was caused, in whole or in part, on or before the Closing Date, whether or not the pollution or threat to human health or the environment is described in Schedule 3.19, provided that, with respect to any Environmental Claim, Buyer shall have the right at Buyer’s sole discretion to elect to pursue recovery for any such Losses under any subsection of this Section 8.2(a) regardless of whether remedies for the Losses also may be available pursuant to other provisions of this Agreement.

(b) Subject to the other provisions of this Article 7, Buyer agrees to indemnify and hold harmless Seller and Company and their respective Subject Interestsholders, officers, directors, employees, agents, successors and assignees (collectively, the “**Seller Indemnitees**”), from and against any and all Losses, damages, Liabilities, obligations, assessments, suits, actions, proceedings, claims or demands, including costs, expenses and fees (including reasonable attorneys’ fees and expert witness fees) incurred in connection with, suffered by any of them, or asserted against any of them (collectively, “**Seller’s Losses**”), arising out of or based upon (i) the failure of any representation or warranty of Buyer contained in this Agreement, or in any agreement, certificate or document executed by Buyer in connection with this Agreement, to be true and correct in all material respects when made, (ii) the breach in any material respect of any covenant or agreement of Buyer contained in this Agreement, (iii) the any Liabilities or obligations arising out of the operation of the business of the Company after the Closing, or (iv) any arrangements or agreements made or alleged to have been made by Buyer with any broker, finder or other agent in connection with the transactions contemplated by this Agreement.

(c) If any Party becomes aware of or receives notice of any third party claim or the commencement of any third party action or proceeding with respect to which another party (the “**Indemnitor**”) is obligated to provide indemnification under this Section 7.2, the party entitled to indemnification (the “**Indemnitee**”) shall promptly notify the Indemnitor of the matter. This notice shall not be a condition precedent to any liability of the Indemnitor under the provisions for indemnification contained in this Agreement, unless (and only to the extent that) failure to give such notice materially prejudices the rights of the Indemnitor with respect to such claims, actions, or proceedings. The Indemnitor may compromise or defend, at the Indemnitor’s own expense, and by the Indemnitor’s own counsel reasonably acceptable to the Indemnitee, any such matter involving the asserted liability of the Indemnitee; provided, however, that no compromise or settlement thereof may be effected by the Indemnitor without the Indemnitee’s consent (which shall in any event not be unreasonably withheld or delayed); and further provided that an Indemnitor may not undertake the defense of any such third party claim unless (i) the claim is solely for monetary damages, and (ii) the Indemnitor confirms in writing to the Indemnitee (and to the third party), prior to undertaking the defense or prior to making the compromise or settlement, that the matter concerning indemnification is indemnifiable by the Indemnitor. If the Indemnitor elects not to compromise or defend the matter or if the Indemnitor may not undertake the defense of the third party claim, then the Indemnitee, at the Indemnitor’s expense and by the Indemnitee’s own counsel, may defend such matter, but regardless of whether the Indemnitor elects to assume the defense of any such matter, the Indemnitee may not compromise the defense without the prior written consent of the Indemnitor, which consent shall not be unreasonably withheld or delayed. In any event, the Indemnitee, the Indemnitor and the Indemnitor’s counsel (and, if applicable, the Indemnitee’s counsel) shall cooperate in the compromise of, or the defense against, any such asserted Liability. If the Indemnitor chooses to defend any claim, the Indemnitee shall make available to the Indemnitor any books, records, or other documents within its control that are reasonably necessary or appropriate for such defense. The foregoing indemnity procedures shall not be read as a limitation on either party’s right to seek indemnification under this Article 7 for matters other than third party initiated claims or demands.

(d) For purposes of this Section 7.2, Buyer Indemnitees shall be considered as one Indemnitee. To be entitled to indemnification for a breach by Seller of any representation or warranty of Seller (except those in Sections 3.1, 3.2, 3.3, 3.4, and 3.23, for which there is no time limit), the Buyer Indemnitee must notify Seller of its claim for indemnification (i) in the case of the representations and warranties in Section 3.12, on or before the expiration of the applicable statute of limitations, (ii) in the case of the representations and warranties in Section 3.18, on or before the date occurring __ months after the Closing Date, (iii) in all other cases, on or before the date occurring __ months after the Closing Date. A Buyer Indemnitee shall be entitled to recovery for any Buyer’s Losses, suffered by that Buyer Indemnitee as a result of a breach of a representation and warranty by Seller, only when and if the aggregate amount of all Buyer’s Losses suffered as a result of all breaches of Seller’s representations and warranties exceeds a cumulative aggregate total of \$____ (the “**Threshold Amount**”), and in that event Seller shall indemnify Buyer Indemnitees [only for the amount of Indemnity Losses in excess of the Threshold Amount] / [for all Buyer’s Losses, including those below the Threshold Amount]; provided, however, that the aggregate liability of Seller under this Article 7 shall not exceed \$____, other than in the case of Sections 3.1, 3.2, 3.3, 3.4, 3.12 and 3.23, in which cases it shall not exceed the Purchase Price in the aggregate.¹⁸

¹⁸ It is common for a party’s ability to make a claim for a breach of a representation or warranty to expire after some period of time. That often is longer for tax and environmental representation. The ability to bring a claim for certain “core” representations (e.g., existence and power of parties, ownership of equity being sold usually does not expire. Further, Recognizing that every business has some issues, a buyer often agrees to make claims only if its damages exceed some threshold level. That threshold may act as a deductible or only amounts over it may be

(cont’d)

(e) The indemnification set forth in this Agreement shall only apply to Buyer's Losses or Seller's Losses incurred after taking into account any insurance payments and tax savings resulting from the applicable Losses.

(f) Absent a showing of fraud by a party, and assuming the Closing has occurred, the indemnification obligation of a Party under this Article 7 shall be the sole remedy of any other party against that Party for monetary damages for breach of any representation or warranty or covenant contained in this Agreement. Nothing in this Agreement shall limit a Party's right to seek injunctive or other equitable relief in connection with the enforcement of this Agreement. Notwithstanding anything to the contrary in this Agreement, in the case of fraud or intentional misrepresentation, the limitations on indemnification (including as to duration, amount and sole remedy limitations) contained in this Section 7.2 shall not apply to any claim for indemnification under this Article 7.

ARTICLE 8

TERMINATION

Section 8.1 *Termination.* This Agreement may be terminated at any time prior to the Closing Date:

(a) By Buyer, provided, it is not in material breach of its obligations under this Agreement, if (i) any of the representations and warranties of Seller in this Agreement is or becomes untrue and incorrect such that the conditions set forth in Section 6.2(b) shall not be satisfied (or would be incapable of being satisfied) or (ii) there has been a breach on the part of Seller or any of his or its covenants or agreements in this Agreement such that the conditions set forth in Section 6.2(c) shall not be satisfied (or would be incapable of being satisfied);

(b) By Seller, provided, it is not in material breach of its obligations under this Agreement, if (i) any of the representations and warranties of Buyer in this Agreement is or becomes untrue and incorrect such that the conditions set forth in Section 6.3(b) shall not be satisfied (or would be incapable of being satisfied) or (ii) there has been a breach on the part of Buyer or any of its covenants or agreements in this Agreement such that the conditions set forth in Section 6.3(c) shall not be satisfied (or would be incapable of being satisfied);

(c) By written consent of Buyer and Seller; or

(d) By Seller or Buyer if there shall be a final, non-appealable Order of a federal or state court or Governmental Authority in effect preventing consummation of the transaction contemplated by this Agreement or there shall be any action taken by any Governmental Authority applicable to the transactions contemplated by this Agreement that would make the consummation of those transactions illegal.

Section 8.2 *Effect of Termination.* In the event of termination of this Agreement pursuant to Section 8.1, this Agreement shall be of no further force or effect; provided, however, that any

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claimed, or as a trigger that, once reached, allows all claims above it to be claimed. Sellers also regularly negotiate for caps of their liability, usually some percentage of the purchase price. Breaches of "core" representations and taxes, however, often are capped at the purchase price.

termination pursuant to Section 8.1 shall not relieve any Party of (a) any Liability for material breach of any representation, warranty, covenant or agreement in this Agreement occurring prior to the termination, or (b) any Liability or obligation under this Agreement that expressly provides for its survival after such termination.

ARTICLE 9

MISCELLANEOUS

Section 9.1 Notices. All notices and other communications provided for in this Agreement shall be in writing and shall be delivered by hand or overnight courier service, mailed by certified or registered mail or sent by telecopy, and shall be valid only upon receipt, at the following address or such other address as the receiving party previously may have specified by notice to the sending party:

If to Seller [or the Company]:

 _____, Texas _____
 Attention: [NAME, TITLE]
 Facsimile: (____) ____-_____

If to Buyer:

 _____, Texas _____
 Attention: [NAME, TITLE]
 Facsimile: (____) ____-_____

Section 9.2 Severance of Invalid Provisions. Any provision of this Agreement held to be invalid, illegal or unenforceable in any jurisdiction shall, as to that jurisdiction, be ineffective to the extent of the invalidity, illegality or unenforceability without affecting the validity, legality and enforceability of the remaining provisions of this Agreement, and the invalidity of a particular provision in a particular jurisdiction shall not invalidate that provision in any other jurisdiction.

Section 9.3 Amendments and Waivers. No term, covenant, agreement or condition of this Agreement may be terminated, amended or compliance therewith waived (either generally or in a particular instance, retroactively or prospectively) except by an instrument or instruments in writing executed by each Party.

Section 9.4 Integrated Agreement. This Agreement and the documents and instruments delivered pursuant to this Agreement constitute the entire contract among the Parties relating to the subject matter of this Agreement and supersede any and all previous agreements and understandings, oral or written, relating to the subject matter of this Agreement. This Agreement represents the final agreement among its parties and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of its parties. There are no unwritten oral agreements between the Parties.

Section 9.5 Successors and Assigns. No Party may assign this Agreement or its rights or obligations under it without the consent of the other [party / parties]. Notwithstanding the foregoing, Buyer may assign its rights under this Agreement to an Affiliate, but in the case Buyer shall remain liable for the performance of all obligations of that Affiliate. Subject to the foregoing provisions of this Section 9.5, the provisions of this Agreement shall be binding upon its parties and their respective successors and permitted assigns and inure to the benefit of its parties, their permitted successors and assigns, and in the case of Article 7, other Indemnitees to the extent provided in Article 7.

Section 9.6 Counterpart Execution. This Agreement may be executed in counterparts (and by different Parties on different counterparts), each of which shall constitute an original, but all of which when taken together shall constitute a single contract.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date specified in the introductory paragraph above.

[SELLER]

By: _____
[Name and Title]

[COMPANY]

By: _____
[Name and Title]

[BUYER]

By: _____
[Name and Title]