DOCUMENTING PARTNERSHIP & LLC ACQUISITIONS

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State Bar of Texas
16TH ANNUAL
CHOICE, GOVERNANCE & ACQUISITION OF ENTITIES
May 18, 2018
San Antonio

CHAPTER 9

S. Benton Cantey is a partner at Kelly Hart & Hallman LLP, where he currently serves as the chair of firm's corporate and securities practice group. He represents a variety of publicly traded and privately held corporate clients and family offices in complex mergers and acquisitions, including negotiated acquisitions and divestitures, controlled auctions, strategic alliances, and joint ventures. He also assists clients with public financing through the issuance of debt and equity securities. Additionally, he regularly advises clients regarding various aspects of corporate and securities laws, including SEC compliance and corporate governance matters. Mr. Cantey has been voted by *Texas Monthly* as one of the "Super Lawyers" in the area of Mergers & Acquisitions, as published in *Texas Monthly* and *Law & Politics* magazines and is listed in *The Best Lawyers in America*®, 2018. Additionally, Mr. Cantey was recognized as a "Top Attorney" in Corporate Finance / Mergers & Acquisitions by *Fort Worth, Texas* magazine, was named a "Power Attorney" by the *Fort Worth Business Press,* as well a "40 Under 40" honoree by the *Fort Worth Business Press*. Mr. Cantey has also been named a Fellow of the Texas Bar Foundation and the Tarrant County Bar Association, currently serves as a member of the Board of Trustees of the Bullock Texas State History Museum, and previously served as an adjunct professor of law at Texas A&M University School of Law and as an adjunct professor of business law at Texas Christian University. Mr. Cantey holds a MEM from Duke University, a LLM in Securities and Financial Regulation, with Distinction, from Georgetown University Law Center, a J.D. with highest honors from The University of Tulsa, a M.B.A. from Texas Tech University and a B.A. from Auburn University, where he is a member of the Auburn University Football Lettermen Club.

David W. Cook is a partner at Kelly Hart & Hallman LLP and is based in the firm's Fort Worth office. His practice focuses primarily on mergers and acquisitions and energy transactions, including negotiated acquisitions and divestitures, leveraged acquisitions, recapitalizations, controlled auctions and the purchase and sale of producing properties. He has substantial experience in representing clients (both private equity firms and management teams) in connection with private equity investments. He also regularly counsels clients in connection with compliance issues and statutory required filings and motions, including with respect to the Hart-Scott-Rodino Antitrust Improvements Act of 1976. He has served as an adjunct professor at Texas A&M University School of Law, has spoken at a number of conferences and CLEs, including as a panellist and presenter of *M&A Transactions - How to Negotiate Key Provisions in a Private Company Acquisition Agreement*, presented at the 14th Annual Choice, Governance and Acquisition of Entities 2016 CLE in San Antonio, Texas, and at the Business Law and Corporate Counsel Forum at the State Bar of Texas Annual Meeting in 2013 in Dallas, Texas, has been recognized as a "Texas Super Lawyer, Rising Star" by Thomson Reuters, as published in *Texas Monthly* magazine (2008-2010, 2013-2018), an "Up-and-Coming 100: 2018 Texas Rising Star," as published in *Texas Monthly* magazine (2018), a "Top Attorney" by *Fort Worth, Texas* magazine (2008, 2010-2017), and a "Top Attorney" in Business Law, Civil Law and Transactional, and Corporate Finance / Mergers and Acquisitions by *360 West* magazine (2017), is a Fellow of the Texas Bar Foundation and the Tarrant County Bar Foundation, is a "40 Under 40" honoree by the *Fort Worth Business Press* and serves on the Texas Business Organizations Code Committee. He graduated first in his class at Texas Wesleyan University School of Law (now known as Texas A&M University School of Law) where he served as the Editor-in-Chief of its Law Review and received his B.B.A. from Baylor University.

Thomas R. Hegi is a partner at Kelly Hart & Hallman LLP, where he currently serves as the chair of firm's tax practice group. He has represented numerous clients in connection with the formation, structuring and maintenance of entities used in business transactions (including partnerships and limited liability companies, as well as corporations), and the tax aspects of business entities and transactions. He has substantial experience in structuring, preparing and negotiating complex partnership and limited liability company agreements, in the purchase and sale of partnerships, limited liability companies and other entities, in representing clients in connection with private equity and family office investments, in corporate governance issues and in federal and state tax matters. Mr. Hegi has been recognized as a "Texas Super Lawyer" by Thomson Reuters, as published in *Texas Monthly* magazine (2013-2017), a "Texas Super Lawyer, Rising Star" by Thomson Reuters, as published in *Texas Monthly* magazine (2008-2012), a "Top Attorney" by *Fort Worth, Texas* magazine (2008-2013, 2015-2017), and a "Top Attorney" in Tax Law by *360 West* magazine (2017), is a Fellow of the Texas Bar Foundation and the Tarrant County Bar Foundation, and is a "40 Under 40" honoree by the *Fort Worth Business Press*. Mr. Hegi holds an LLM in Taxation from Southern Methodist University School of Law, a J.D., magna cum laude, from Texas Tech University School of Law, a M.S. from Texas A&M University, and a B.B.A. from Texas A&M University, and is a certified public accountant.

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DOCUMENTING PARTNERSHIP & LLC ACQUISITIONS

As the formation of limited partnerships and limited liability companies has outpaced the formation of corporations (almost 7 to 1 based on the number of certificates of formation for domestic limited partnerships and domestic limited liability companies filed with the Texas Secretary of State in calendar year 2016 as compared to the number of certificates of formation for domestic corporations filed with the Texas Secretary of State during that same period),[1] it is not surprising that practitioners find themselves dealing with more transactions involving partnerships and limited liabilities companies, including acquisitions and divestitures of partnerships and limited liability companies.

Purchasing or selling a partnership or limited liability company, while similar in many respects to the purchase or sale of their corporate brethren, can present some different issues, ranging from the mechanics of transferring (what is often) uncertificated equity interests, to (when applicable) dealing with "claw backs" in distribution waterfalls, to (of course) tax matters.

The presentation will cover a number of key differences between the sale of shares of a corporation and the sale of partnership interests in a partnership or limited liability company, and certain key provisions that are often negotiated in purchasing and selling partnerships and limited liability companies. In addition, included with these materials is an example form of Membership Interests Purchase Agreement. Such form was prepared for educational purposes and is intended to serve as an example of a Membership Interest Purchase Agreement that a reasonable Buyer might propose in its initial draft. The form contemplates multiple Sellers and a single Buyer, and is not intended to be industry-specific. Like all forms, such form is not intended, and may not be sufficient, to address the specific facts and circumstances of any particular situation. All example provisions contained in, and the other contents of, such form should be independently reviewed and evaluated for accuracy and completeness, and should be appropriately tailored to the particular transaction and the circumstances of such transaction.

Such form contains a number of annotations explaining many of the example provisions contained in the form. Neither the example provisions nor any of the annotations should be construed as the authors' view regarding the appropriateness or applicability of any such provisions or annotations to any particular transaction or circumstance or as to what constitutes "market."

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[1] Byron F. Egan, *Choice of Entity and Acquisition Decision Tree*, TexasBarCLE & Business Law Section of State Bar of Texas Choice, Governance & Acquisition of Entities Course, San Antonio, May 19, 2017.

MEMBERSHIP INTERESTS PURCHASE AGREEMENT

BY AND AMONG

[BUYER ENTITY],

[TARGET COMPANY], LLC,

THE MEMBERS OF [TARGET COMPANY], LLC,

AND

[SELLER REPRESENTATIVE]

Execution Date: [_____]

Target Closing Date: [_____]

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INDEX OF EXHIBITS AND SCHEDULES

MEMBERSHIP INTERESTS PURCHASE AGREEMENT[1]

This Membership Interests Purchase Agreement (as the same may be amended, restated, supplemented or otherwise modified from time to time in accordance with its terms, this "Agreement") is entered into as of the [__] day of [_____], 20[__] (the "Execution Date"), by and among [Buyer Entity], a [State of Formation] [Type of Entity] ("Buyer"), [Target Company], LLC, a Texas limited liability company (the "Company"),[2] all of the members of the Company, each of which is identified in Exhibit A (each, a "Seller" and collectively, "Sellers"), and [Seller Representative], solely in its capacity as the representative of Sellers for the purposes provided in this Agreement (the "Seller Representative").[3] Each of Buyer, the Company, Sellers and, for the purposes provided herein, the Seller Representative may be referred to herein as a "Party" and collectively as the "Parties."

RECITALS:[4]

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[1] Note: This form of Membership Interests Purchase Agreement was prepared for educational purposes and is intended to serve merely as an example of a Membership Interests Purchase Agreement that a reasonable Buyer might propose in its initial draft. This form contemplates multiple Sellers and a single Buyer, and is not intended to be industry-specific. Like all forms, this form is not intended, and may not be sufficient, to address the specific facts and circumstances of any particular situation. All example provisions contained in, and the other contents of, this form should be independently reviewed and evaluated for accuracy and completeness, and should be appropriately tailored to the particular transaction and the circumstances of such transaction.

This form contains a number of annotations explaining many of the example provisions contained herein. Neither the example provisions nor any of the annotations should be construed as the authors' view regarding the appropriateness or applicability of any such provisions or annotations to any particular transaction or circumstance or as to what constitutes "market." While the example provisions, annotations and other contents of this form are believed by the authors to be accurate at the time of this form's preparation, this form is being shared for educational and reference purposes only, and on the basis that no person or entity may rely on the accuracy or completeness of this form, and none of the authors, any firm or other entity with whom any of them are associated, or any other person or entity will have any duty, liability or responsibility to any person or entity in respect of any of the contents of this form or any person's or entity's use of and/or reliance on this form or any part thereof, and that none of the authors, any firm or other entity with whom any of them are associated, or any other person or entity have any duty or other obligation to update or correct any of the contents of this form.

[2] Note: While it is not necessary that the target company be a party, it may be beneficial in certain circumstances. For example, in a sign and subsequent close transaction, it may be beneficial for the target company to be a party so that Buyer has appropriate recourse (in the form of specific performance or otherwise) in the event of a breach of a covenant made by the Company or in the event of termination of the Agreement prior to Closing. However, a Buyer should be mindful to not impose inappropriate post-closing obligations on the Company (e.g., if the Company were to indemnify Buyer post-closing for breaches of Sellers' representations and warranties, Buyer would be, in effect, indemnifying itself, given that it will own the Company post-closing).

[3] Note: Where there are multiple Sellers, Buyer should consider asking the Sellers to appoint a Seller Representative in order to deal with a single representative on certain matters (e.g., addressing dispute regarding purchase price adjustments). The scope of powers and authority granted to a Seller Representative can vary greatly, but often include receipt of notices, dealing with certain disputes and, in some cases, serving as payment agent for all Sellers.

[4] Note: Recitals are often included to serve as a short roadmap of the agreement. They can be particularly useful in more complicated transactions where, for example, a series of related transactions or transaction steps are occurring in a sequential order. To be useful, the recitals should help a reader having little or no background regarding the agreement quickly understand the general purpose of the agreement. Binding provisions should be reserved for the body of the agreement as opposed to being included in the recitals.

A. Sellers collectively own all of the issued and outstanding membership interests of the Company.

B. Sellers desire to sell, assign, transfer and convey to Buyer, and Buyer desires to purchase and acquire from Sellers, all of the issued and outstanding membership interests of the Company, in each case, on the terms and subject to the conditions set forth in this Agreement.

C. The Parties desire to enter into this Agreement to evidence their mutual understanding and agreement with respect to such transaction and the other matters set forth herein.

AGREEMENT:

NOW, THEREFORE, for and in consideration of the mutual agreements herein contained, the benefits to be derived by each Party, and other good and valuable consideration, the receipt, adequacy and sufficiency of which are hereby acknowledged and confessed, the Parties hereby agree as follows:

ARTICLE I
DEFINITIONS AND INTERPRETATION

1.1 Defined Terms.[5] Capitalized terms used herein and not otherwise defined shall have the meanings given such terms as set forth below in this Section 1.1 (which shall be equally applicable in the singular and plural forms):

"Affiliate" means, with respect to any Person, any other Person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such Person. The concept of control, controlling or controlled as used in the aforesaid context means the possession, directly or indirectly, of the power to direct or cause the direction of the management, policies or action of another, whether through the ownership of voting securities, voting trust, by contract, or membership in management or in the group appointing or electing management or otherwise through formal or informal arrangements or business relationships.

"Agreement" has the meaning set forth in the preamble.

"Alternative Proposals" has the meaning set forth in Section 12.16.

"Assets" has the meaning set forth in Section 4.23.

[5] Note: Defined terms can vary greatly from agreement to agreement, both as to what terms are defined and how such terms are defined. Great care should be taken in drafting (and reviewing) definitions, as they constitute a substantive part of the agreement and can greatly impact the interpretation of the agreement. The Parties should be mindful of "catch all" language in defined terms to ensure they are appropriate in the context of how such definitions are used in the agreement. It is often helpful to include an index of defined terms (which is often included in the front or back of the agreement).

"Assignment" means an Assignment of Membership Interests substantially in the form attached to this Agreement as Exhibit B.

"Balance Sheet Date" has the meaning set forth in Section 4.7(a).

"Base Purchase Price" has the meaning set forth in Section 2.2.

"Business Day" means any day other than Saturday or Sunday or a day on which banking institutions in [City, State] are authorized by Law to close.

"Buyer" has the meaning set forth in the preamble.

"Buyer Indemnified Parties" has the meaning set forth in Section 10.2.

"Claim Notice" has the meaning set forth in Section 10.7(b).

"Closing" has the meaning set forth in Section 3.1.

"Closing Date" has the meaning set forth in Section 3.1.

"Closing Payment" has the meaning set forth in Section 2.3(a)(iv).

"Closing Statement" has the meaning set forth in Section 2.4(b).

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

"Company" has the meaning set forth in the preamble.

"Company ERISA Affiliate" has the meaning set forth in Section 4.15(a).

"Confidential Information" has the meaning set forth in Section 7.8.

"Dispute Notice" has the meaning set forth in Section 2.4(c).

"Employee Benefit Plan" has the meaning set forth in Section 4.15(a).

"Engagement" has the meaning set forth in Section 12.16.

"Environmental Claim" means any claims relating to the failure to comply with any Environmental Requirements, including: (i) claims by Governmental Authorities for enforcement, cleanup, removal, response, remedial, or other actions or damages pursuant to any applicable Environmental Requirement and (ii) claims by any Person relating to any Environmental Liability or Environmental Requirement seeking damages, contribution, indemnification, cost recovery, compensation, or injunctive relief or arising from alleged injury or threat of injury to human health or safety, or the environment, including surface waters, groundwater, soil, subsurface strata and ambient air. Environmental Claim shall not include any claim, cause of action, judgment or liability arising from or pursuant to any workers compensation Laws.

"Environmental Liabilities" means any and all Losses and Liabilities relating to, based upon, or arising in connection with any act or omission with respect to environmental, human health or safety conditions, or relating to the presence, use, production, generation, handling, transportation, treatment, storage, disposal, distribution, labeling, testing, processing, discharge, release, threatened release, control, exposure to, or cleanup of any Hazardous Materials. Environmental Liabilities shall not include any claim, cause of action, judgment or liability arising from or pursuant to any workers compensation Laws.

"Environmental Requirement(s)" means any applicable Law relating to the environment, prevention or control of pollution, preservation, restoration or reclamation of wildlife, air, water, land or other natural resources, Hazardous Materials release or exposure, protection of human health and safety, including those relating to the presence, use, production, generation, handling, transportation, treatment, storage, disposal, distribution, labeling, testing, processing, discharge, release, threatened release, control, exposure to, or cleanup of, any Hazardous Materials, and include, including the federal Clean Air Act, as amended, the federal Clean Water Act, as amended, the Federal Water Pollution Control Act, as amended, the federal Oil Pollution Act of 1990, as amended, the federal Rivers and Harbors Act of 1899, as amended, the federal Safe Drinking Water Act, as amended, the federal Comprehensive Environmental Response, Compensation and Liability Act, as amended, the federal Superfund Amendments and Reauthorization Act of 1986, as amended, the federal Resource Conservation and Recovery Act, as amended, the federal Hazardous and Solid Waste Amendments Act of 1984, as amended, the federal Toxic Substances Control Act, as amended, the federal Occupational Safety and Health Act, as amended, the federal Hazardous Materials Transportation Act, as amended, the Texas Health and Safety Code, the Texas Water Code, and the Texas Natural Resources Code, and shall also include all state, local and municipal Laws dealing with the subject matter of the above listed federal or state statutes or promulgated by any Governmental Authority thereunder in order to carry out the purposes of any such federal, state, local or municipal Law.

"ERISA" has the meaning set forth in Section 4.15(a).

"Escrow Account" means the account holding the Escrow Amount pursuant to the Escrow Agreement.

"Escrow Agent" means [_____].

"Escrow Amount" means an amount equal to $[_____].[6]

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[6] Note: A post-Closing indemnification escrow account is a common approach taken by Buyers to partially secure Seller's post-closing indemnification obligations under the Agreement. If, for example, the Seller(s) is/are an entity and are selling all or substantially all of its/their assets, Buyer may be concerned that Seller(s) will distribute the proceeds from the sale promptly upon their receipt, leaving Buyer with recourse against an entity with few or no assets post-Closing, or, for example, there are multiple Sellers with several liability, Buyer may wish to avoid having to chase multiple Sellers for their pro rata portion of such obligations, and instead recover such from the escrow funds and allow the Sellers to address the allocation of such responsibility as among themselves.

Other post-Closing security approaches may include (1) a Buyer holdback, where Buyer holds back a portion of the Purchase Price at Closing for some period of time as partial security for Seller's post-Closing indemnification

"Escrow Agreement" means an escrow agreement to be entered into by Buyer, Seller Representative and the Escrow Agent as of the Closing.[7]

"Escrow Claim" has the meaning set forth in Section 2.5(b).

"Escrow Claim Notice" has the meaning set forth in Section 2.5(b).

"Escrow Fund" has the meaning set forth in Section 2.5(a).

"Escrow Period" has the meaning set forth in Section 2.5(b).

"Estimated Net Working Capital" has the meaning set forth in Section 2.4(a).

"Execution Date" has the meaning set forth in the preamble.

"Financial Statements" have the meaning set forth in Section 4.7(a).

"Final Closing Statement" means the Closing Statement, as finally determined in accordance with the procedures set forth in Section 2.4.

"Final Net Working Capital" means Net Working Capital as of the Closing Date, as finally determined in accordance with the procedures set forth in Section 2.4.

"Fraud" means a false representation made herein by a Party, with (a) such Party's actual knowledge or belief that such representation was false when made, (b) such Party's intent to induce the other Party to enter into this Agreement in reliance on such representation, (c) the

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obligations, (2) a Seller holdback, where Seller(s) agree to retain a portion of the Purchase Price at Closing within such Seller entity for some period of time as partial security for Seller's post-Closing indemnification obligations, and (3) a parental or affiliate guaranty by Seller(s), where an owner or affiliate of Seller having more assets agrees to guaranty Seller's post-Closing indemnification obligations.

A Buyer holdback is often preferred by Buyer because Buyer retains possession of the funds, while a Seller will usually prefer a Seller holdback or that a third party escrow agent holds such funds in escrow (as is contemplated by this form). A parental or affiliate guaranty may be accomplished in a separate stand-alone guaranty or in the purchase agreement itself (as long at the guarantor(s) join in the purchase agreement for that purpose).

[7] Note: The parties may prefer to attach an agreed upon form of Escrow Agreement as an Exhibit to the purchase agreement to avoid the necessity of negotiating the form of the agreement between executing the purchase agreement and closing the transaction. In most cases, the Escrow Agent will charge a fee for its service as Escrow Agent and will have a form of Escrow Agreement from which it will want to start. While Escrow Agreements can range widely in length and scope, they generally provide that the Escrow Agent (a) is acting solely in a ministerial capacity, (b) will release the escrow funds only on receipt of joint written instructions from the parties or a court order, (c) may interplead the escrow funds in the event of a dispute between the parties, (d) is not liable for anything other than its own bad faith or willful misconduct and (e) is entitled to be indemnified by the parties on a joint and several basis for anything other than the Escrow Agent's own bad faith or willful misconduct. In most cases, a bank of other financial institution serves as the Escrow Agent, and will require the parties to satisfy its know-your-customer (KYC) requirements before it will establish the Escrow Account. KYC requirements can vary, and the time it takes an Escrow Agent to open an account can also vary greatly. The parties should plan in advance to provide sufficient lead time to satisfy all such requirements well in advance of the time that the Escrow Account is to be funded.

other Party's justifiable reliance upon such representation and (d) damage to the other Party resulting from such reliance.[8]

"Fundamental Representations" means those representations and warranties (i) regarding the Company contained in Section 4.1 (Organization; Existence), Section 4.2 (Authorization; Enforceability), Section 4.3 (No Conflicts), Section 4.4 (Capitalization; Organizational Documents), Section 4.5 (Subsidiaries), Section 4.12 (Taxes), and Section 4.19 (Broker's Fees); (ii) of Sellers contained in Section 5.1 (Organization; Existence), Section 5.2 (Authorization; Enforceability), Section 5.3 (No Conflicts), Section 5.4 (Ownership of Membership Interest) and Section 5.5 (Broker's Fees); and (iii) of Buyer in Section 6.1 (Organization; Existence), Section 6.2 (Authorization; Enforceability), Section 6.3 (No Conflicts), and Section 6.6 (Broker's Fees).[9]

"GAAP" means generally accepted accounting principles as used in the United States of America.

"Governmental Authority" means any federal, state, county, city, local, municipal, foreign or other government; any governmental, quasi-governmental, regulatory or administrative agency, commission, body or other authority exercising or entitled to exercise any administrative, executive, judicial, legislative, regulatory or Taxing authority or power; and any court or other tribunal having or asserting jurisdiction.

"Hazardous Material(s)" means any substance, material or waste which is defined as a "hazardous waste," "hazardous substance," "hazardous material," "restricted hazardous waste," "industrial waste," "solid waste," "contaminant," "pollutant," "special waste," "toxic material," "toxic waste," or "toxic substance," under any provision of any Environmental Requirement, including petroleum and derivatives thereof, asbestos and asbestos-containing materials, and polychlorinated biphenyls.

"Indebtedness" means, with respect to a Person at any applicable time of determination, without duplication: (i) all obligations for borrowed money (whether or not contingent); (ii) all obligations evidenced by bonds, debentures, notes or other similar instruments or debt securities; (iii) all obligations under swaps, hedges or similar instruments; (iv) all obligations in respect of letters of credit, surety bonds, performance bonds or bankers' acceptances; (v) all obligations recorded or required to be recorded as capital leases in accordance with GAAP as of the date of

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[8] Note: Fraud is often a carve-out to the Parties' respective limitations on liability. When fraud is not defined, a question as to what constitutes fraud can arise (e.g., actual fraud vs. common law fraud). As such, it may be advisable to define "Fraud" (e.g., a false representation made by a Person, with (a) such Person's actual knowledge or belief that the representation was false; (b) such Person's intent to induce another Person to act or to refrain from acting; (c) the other Person's justifiable reliance upon such representation; and (d) damage to the other Person resulting from such reliance).

[9] Note: Fundamental Representations are often a carve-out to the Parties' respective limitations on liability, and often a different (i.e., longer) survival period than the Parties' respective "non-fundamental" representations and warranties. What representations and warranties constitute "Fundamental Representations" is often highly negotiated. While the list included in the example definition above contains a common list of Fundamental Representations, it is not intended to constitute the authors' view as to what is "market" or appropriate for a particular transaction.

determination thereof; (vi) all obligations created or arising under any conditional sale or other title retention agreement with respect to acquired property; (vii) all guaranties and similar obligations of such Person in connection with any of the foregoing; (viii) all obligations secured by a Lien (other than a Permitted Lien) and (ix) all interest, principal, premiums, fees or expenses due or owing in respect of any item listed in clauses (i) through (viii) above.

"Indemnified Party" has the meaning set forth in Section 10.7(a).

"Indemnifying Party" has the meaning set forth in Section 10.7(a).

"Indemnity Deductible" has the meaning set forth in Section 10.3(a).

"Intellectual Property" means (i) all inventions (whether patentable or unpatentable and whether or not reduced to practice), all improvements thereto, and all United States and foreign patents, patent applications, and patent disclosures, together with all reissuances, continuations, continuations-in-part, revisions, extensions, and reexaminations thereof; (ii) all trademarks, service marks, trade dress, logos, trade names, and corporate names, together with all translations, adaptations, derivations, and combinations thereof and including all goodwill associated therewith, and all applications, registrations, and renewals in connection therewith; (iii) all copyrightable works, all copyrights, and all applications, registrations, and renewals in connection therewith; (iv) all trade secrets and confidential or valuable information (including ideas, research and development, know-how, formulas, compositions, manufacturing and production processes and techniques, technical data, designs, drawings, specifications, customer and supplier lists, pricing and cost information, training materials, and business and marketing plans and proposals); (v) all computer software (including data and related documentation); (vi) all websites and domain names and all content thereon, (vii) all other proprietary, intangible, or intellectual property rights; and (viii) all copies and tangible embodiments thereof (in whatever form or medium).

"Knowledge" means the actual knowledge of (i) with respect to any Seller, such Seller, (ii) with respect to the Company, any of the following Persons: [_____], [_____], or [_____], in each case after having made reasonable inquiry of the employee(s) of Company or its applicable Affiliate having management level responsibility with respect to the particular matter in question; and (iii) with respect to Buyer, any of the following Persons: [_____], [_____], or [_____], in each case after having made reasonable inquiry of the employee(s) of Buyer or its applicable Affiliate having management level responsibility with respect to the particular matter in question.[10]

"Last Audited Balance Sheet" has the meaning set forth in Section 4.7(a).

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[10] Note: The definition of "Knowledge" is often highly negotiated. Because Knowledge is often primarily used to qualify certain representations and warranties (and Sellers usually make more representations and warranties than Buyer), Buyer often prefers that the definition include some inquiry or diligence obligation or other "constructive knowledge" component, while most Sellers prefer to limit the definition to only the actual, present knowledge of certain identified persons without any inquiry obligation. Before engaging in substantive debate over how to appropriately define Knowledge, it is wise to trace how it is used throughout the Agreement.

"Law" means any applicable statute, law (including any obligation arising under the common law), rule, regulation, ordinance, order, code, ruling, writ, injunction, decree or other official act of or by any Governmental Authority.

"Leased Real Property" has the meaning set forth in Section 4.24(b).

"Liability" means any damage, claim, liability, obligation, loss, fines, costs, expenses, charges, interest, penalties, or commitment of any nature whatsoever (whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured, or due or to become due, or otherwise).

"Lien" means any lien, pledge, mortgage, deed of trust, collateral assignment, security interest or similar encumbrance.

"Loss" or "Losses" means any and all injunctions, judgments, orders, decrees, rulings, awards, damages, penalties, fines, costs, amounts paid in settlement, Liabilities, obligations, Taxes, Liens, actual losses, third party expenses, and fees (but in the case of fees for attorneys, accountants, other professional advisors and experts, fees shall be limited to reasonable fees of such Persons).[11]

"Material Adverse Effect" means, with respect to the Company or its Subsidiaries, any change, inaccuracy, effect, event, result, occurrence, condition or fact (for the purposes of this definition, each, an "event"), whether individually or in combination with any other events, that has had or could reasonably be expected to result in (1) a material adverse effect upon the ability of any Seller to consummate the transactions contemplated by this Agreement, or to perform its obligations hereunder, or (2) a material adverse effect on the business, ownership, operation, financial condition, results of operations, prospects or value of the material assets of the Company and its Subsidiaries, in each case, taken as a whole, as currently owned and operated by the Company or any of its Subsidiaries as of the Execution Date; provided, however, that Material Adverse Effect shall not include any events resulting from: (a) entering into this Agreement or the announcement of the transactions contemplated by this Agreement; (b) changes in general market, economic, financial or political conditions (including changes in commodity prices, fuel supply or transportation markets, interest or rates, or general market prices) in the area in which the Company's or its Subsidiaries' material assets are located, the United States or worldwide; (c) changes in conditions or developments generally applicable to the industry in which the Company or any of its Subsidiaries operate; (d) acts of God, including hurricanes, storms or other naturally occurring events; (e) acts or failures to act of Governmental Authorities; (f) civil unrest, any outbreak of disease or hostilities, terrorist activities or war or any similar disorder; (g) any actions taken or omitted to be taken (A) by or at the request or with the prior consent of Buyer or any of its Affiliates or (B) as permitted or prescribed under this Agreement; (h) matters that are cured or no longer exist as of the Closing; (i) any change in Laws or in GAAP and any interpretations thereof from and after the Execution Date; and (j) casualty or

[11] Note: The type of Losses that may be recovered is often negotiated. For example, if Buyer valued the business on the basis of a multiple of the Company's EBITDA, Buyer may wish to make it clear that it is entitled to recover Losses for diminution in value if, for example, the financial statements representation is inaccurate.

condemnation losses; provided, further, that with respect to the preceding clauses (b) and (c), any event that materially disproportionately impacts the Company or its Subsidiaries in comparison to others in the industry in which they operate or the areas in which the material assets of the Company and its Subsidiaries are located will be deemed not to be an exception to the definition of Material Adverse Effect.[12]

"Material Contract" has the meaning set forth in Section 4.10(a).

"Membership Interests" means all of the issued and outstanding membership interests of the Company.

"Most Recent Balance Sheet" has the meaning set forth in Section 4.7(a).

"Multiemployer Plan" has the meaning set forth in Section 4.15(b).

"Net Working Capital" means (i) those assets that should be reflected as current assets on a consolidated balance sheet of the Company and its Subsidiaries minus, (ii) those liabilities that should be reflected as current liabilities on a consolidated balance sheet of the Company and its Subsidiaries, in each case, (A) prepared in accordance with GAAP using, to the extent in accordance with GAAP, the same accounting methods, principles, policies, practices and procedures, with consistent classifications, judgments and estimation methodology, as were used in the determination of the current assets or current liabilities, as applicable, in the preparation of the Most Recent Balance Sheet and (B) excluding any Indebtedness and Transaction Expenses of the Company or its Subsidiaries. Exhibit C contains a spreadsheet illustrating the calculation of Net Working Capital using the Most Recent Balance Sheet.[13]

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[12] Note: The definition of "Material Adverse Effect" or "MAE" is sometimes used to qualify certain of the representations and warranties, as a stand-alone representation in the "Absence of Certain Developments" representation, and/or as a condition to Buyer's obligation to close. How it is defined can vary greatly from deal to deal. Many Sellers may want to attempt to remove any forward looking component, such as "could reasonably be expected to result in…" and impacts on "prospects," while many Buyers will argue that such are appropriate. The carve-outs are an integral component of the definition, as they allocate risk between the parties for things such as changes in laws, changes in market conditions, etc. The carve-outs should be tailored to the particular transaction. Note also that the example definition contains a "no materially disproportionate impact" component as to certain of the carve-outs, which favors Buyer. The parties should also ensure that the no disproportionate impact component is tailored to the appropriate carve-outs.

[13] Note: The definition of Net Working Capital can vary greatly and often includes certain exclusions. Great care should be taken in drafting the definition and purchase price adjustment mechanics to ensure they are appropriately tailored to the business deal. For example, if there is a working capital band or collar (i.e., there is no adjustment to the Purchased Price for Net Working Capital if the actual Net Working Capital falls within a certain range or the adjustment to the Purchase Price as a result thereof would be less than a specified amount), then the Parties may wish to consider excluding cash from the Net Working Capital definition and have a separate adjustment for closing cash on a dollar-for-dollar basis so that the band or collar does not apply to closing cash. One should also be mindful of creating "bad" incentives. For example, if cash is excluded from the definition and is retained by Sellers, Sellers may be motivated to convert accounts receivable into cash even if it has to use more aggressive collection practices than it otherwise would use with its customers.

"Neutral Accountant" means [_____], and if [_____] is unwilling or unable to serve as the Neutral Accountant, the Neutral Accountant shall be a [national / regional] accounting firm mutually agreed upon by Buyer and the Seller Representative and, if such Parties are unable to agree upon the Neutral Accountant within five (5) Business Days after being informed by [_____] that it is unwilling or unable to serve in such capacity, the Neutral Accountant shall be appointed by the [_____] office of the American Arbitration Association.[14]

"Organizational Documents" means, with respect to any entity, the certificate of incorporation, articles of incorporation, bylaws, articles of organization, limited partnership agreement, limited liability company agreement, formation agreement and other similar organizational documents of such entity (in each case, as amended from time to time).

"Owned Real Property" has the meaning set forth in Section 4.24(a).

"Party" and "Parties" have the meanings set forth in the preamble.

"Permitted Liens" means (i) Liens for Taxes not yet due and payable, or being contested in good faith by appropriate procedures, or for current Taxes that may thereafter be paid without penalty and (ii) statutory Liens or other Liens arising by operation of Law securing payments not yet due or that are being contested in good faith, including Liens of mechanics, suppliers, landlords, warehouseman, materialmen and repairmen.[15]

"Person" means any individual, firm, corporation, company, partnership, joint venture, limited partnership, limited liability company, association, trust, estate, labor union, organization, Governmental Authority or any other entity.

"Pre-Closing Period" means any Tax period ending on or before the Closing Date.

"Pre-Closing Taxes" means any Taxes imposed on the Company or any of its Subsidiaries (i) for any Pre-Closing Period, and (ii) for the portion of any Straddle Period ending on the Closing Date (determined in accordance with Section 7.6).

It is often helpful to include an illustrative example of the calculation of Net Working Capital based on the Most Recent Balance Sheet as an Exhibit.

[14] Note: In this form, the Neutral Accountant is the arbitrator of disputes between the Parties regarding the calculation of Final Net Working Capital and the associated Purchase Price adjustments therefor pursuant to Section 2.4(c). It is often advisable that the Parties mutually agree upon the Neutral Accountant in the purchase agreement and to plan for how the Neutral Accountant would be appointed in the event that the Neutral Accountant they selected is unwilling to serve in such capacity for some reason. The Neutral Accountant should be neutral and, to the extent possible, should not have a pre-existing business relationship with either Party or any of their respective Affiliates that could affect such Neutral Accountant's decision.

[15] Note: The definition of "Permitted Liens" is often negotiated and should be tailored as appropriate based on the assets of the Company. For example, if the Company owns real property, it may be appropriate to include matters filed of record in the county where the real property is located and/or other common real property related liens that are not material.

"Proceeding" means any suit, action or legal, governmental, administrative, arbitration or regulatory proceeding.

"Proposed Final Net Working Capital" has the meaning set forth in Section 2.4(b).

"Purchase Price" has the meaning set forth in Section 2.2.

"Real Property" has the meaning set forth in Section 4.24(b).

"Securities Act" means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

"Seller" and "Sellers" have the meaning set forth in the preamble.

"Seller Counsel" has the meaning set forth in Section 12.16.

"Seller Indemnified Parties" has the meaning set forth in Section 10.4.

"Seller Representative" has the meaning set forth in the preamble.

"Straddle Period" means any Tax period beginning before and ending after the Closing Date.

"Subsidiary" means, with respect to any Person, any entity of which such Person (either alone or through or together with one or more of its other Subsidiaries) owns, directly or indirectly, more than 50% of the capital stock or other equity interests the holders of which are (a) generally entitled to vote for the election of the board of directors or other governing body of such entity or (b) generally entitled to share in the profits or capital of such entity; provided, however, that a Subsidiary shall not include any joint venture, whether arising pursuant to a joint operating agreement or otherwise.

"Survival Period" has the meaning given in Section 10.1.

"Target Net Working Capital" means [_____] dollars ($_____).[16]

"Tax" or "Taxes" means (a) all taxes, assessments, duties, levies, imposts or other similar charges imposed by a Governmental Authority, including all income, franchise, profits, capital gains, capital stock, transfer, gross receipts, sales, use, transfer, service, occupation, ad valorem, property, excise, severance, production, windfall profit, premium, stamp, license, alternative minimum, add-on, value-added, and other taxes, assessments, duties, levies, imposts or other similar charges, and all estimated taxes, deficiency assessments, additions to tax, additional amounts imposed by any Governmental Authority, penalties and interest, and (b) any Liability in

[16] Note: The amount of Target Net Working Capital is a business issue and is often (but not always) based on the amount of working capital historically maintained by the Company to operate its business based on its recent activity levels. In determining the appropriate amount of Target Net Working Capital, one should be mindful to consider historical fluctuations in the Company's working capital (e.g., if the Company's business is seasonal, a longer historical "look back" may be appropriate).

respect of any item described in clause (a) above that arises by reason of a contract, assumption, transferee or successor liability, operation of Law (including by reason of being a member of a consolidated, combined or unitary group) or otherwise.

"Tax Return" means any return, declaration, report or information return (including any related or supporting estimates, elections, schedules, statements, or information) filed or required to be filed in connection with the determination, assessment, or collection of any Tax.

"Third Party" means any Person other than a Party to this Agreement or an Affiliate of a Party to this Agreement.

"Third Party Claim" has the meaning set forth in Section 10.7(b).

"Transaction Documents" means this Agreement and the other agreements contemplated hereby to be executed and/or delivered pursuant to or in connection with this Agreement on the Closing Date, including the Assignment, the Escrow Agreement and the certificates referenced in Section 3.2.

"Transaction Expenses" means the aggregate amount (without duplication) of all unpaid costs and expenses, if any, incurred by Sellers and the Company or any of its Subsidiaries in connection with this Agreement and the transactions contemplated hereby (whether or not accrued) for which Buyer, the Company or any of its Subsidiaries would be responsible following Closing, including (i) legal, accounting and other expenses incurred by Sellers, the Company or by the Company or any of its Subsidiaries on behalf of Sellers, (ii) investment banking fees and any reimbursement of fees and expenses relating thereto incurred by Sellers, the Company or by the Company or any of its Subsidiaries on behalf of Sellers, (iii) any fees or expenses associated with obtaining the release and termination of any Liens required to be released or terminated hereunder, (iv) any special bonuses or other similar compensation payable to any employee of the Company or any of its Subsidiaries in connection with the transactions contemplated by this Agreement or other change of control triggered bonuses, including with respect to any equity appreciation rights and (v) the employer portion of any payroll, social security, unemployment or similar Taxes in connection with the payments described in the preceding clause.

"Transfer Taxes" means any sales, use, excise, real property transfer, registration, documentary, stamp or transfer Taxes, recording fees and similar Taxes and fees incurred and imposed upon, or with respect to, any of the transactions contemplated by this Agreement, as well as any interest, penalty or addition thereto whether disputed or not.

"Treasury Regulations" means the regulations promulgated by the United States Department of the Treasury pursuant to and in respect of provisions of the Code. All references herein to sections of the Treasury Regulations shall include any corresponding provision or provisions of amended, succeeding, similar, substitute, proposed or final Treasury Regulations.

1.2 References and Rules of Construction. All references in this Agreement to Exhibits, Schedules, Articles, Sections, subsections and other subdivisions refer to the corresponding Exhibits, Schedules, Articles, Sections, subsections and other subdivisions of or to this Agreement unless expressly provided otherwise. Titles appearing at the beginning of any

Articles, Sections, subsections and other subdivisions of this Agreement are for convenience only, do not constitute a substantive part of this Agreement, and shall be disregarded in construing the language hereof. The words "this Agreement," "herein," "hereby," "hereunder" and "hereof," and words of similar import, refer to this Agreement as a whole and not to any particular Article, Section, subsection or other subdivision unless expressly so limited. The word "including" (in its various forms) means including without limitation. All references to "$" or "dollars" shall be deemed references to United States dollars. Each accounting term not defined herein, and each accounting term partly defined herein to the extent not defined, will have the meaning given to it under GAAP as in effect as of the Execution Date. Pronouns in masculine, feminine or neuter genders shall be construed to state and include any other gender, and words, terms and titles (including terms defined herein) in the singular form shall be construed to include the plural and vice versa, unless the context otherwise requires. References to any date shall mean such date in [City, State] and for purposes of calculating the time period in which any notice or action is to be given or undertaken hereunder, such period shall be deemed to begin at 12:01 a.m. on the applicable date in [City, State]. The word "extent" in the phrase "to the extent" shall mean the degree or proportion to which a subject or other thing extends, and such phrase shall not mean simply "if".

ARTICLE II
PURCHASE AND SALE

2.1 Purchase and Sale. Upon the terms and subject to the conditions of this Agreement, at the Closing, each Seller shall sell, assign, transfer, convey and deliver to Buyer, and Buyer shall purchase and acquire from each Seller, all of such Seller's Membership Interests, in each case free and clear of all Liens (other than Permitted Liens and Liens imposed by applicable securities Laws) in exchange for the Purchase Price.

2.2 Purchase Price. The purchase price (the "Purchase Price") for the sale, assignment, transfer and conveyance of the Membership Interests shall be [_____] dollars ($_____) (the "Base Purchase Price"), minus (i) the amount, if any, by which Final Net Working Capital is less than Target Net Working Capital, and plus (ii) the amount, if any, by which the Final Net Working Capital is greater than the Target Net Working Capital.[17]

[17] Note: This form contemplates a "traditional" purchase price adjustment for working capital (i.e., adjusts for the difference between actual working capital compared to a target working capital agreed upon by the parties at the time the purchase agreement is executed). While a working capital adjustment is a fairly typical purchase price adjustment, other options may be more typical for certain industries. For example, many oil and gas transactions (which are often structured as an asset purchase as opposed to equity purchase) typically contain adjustments for pre-effective time and post-effective time expenses and income. Where an oil and gas transaction is structured as an equity deal, it may be desirable to use an alternative purchase price adjustment more akin to what would be included in an asset purchase, which can be more difficult to draft in an equity purchase.

This form contemplates a two-step working capital adjustment: at the Closing, the purchase price is adjusted to reflect the difference between a target working capital determined by the parties at the time of execution and an estimation of working capital as of the time of Closing prepared shortly before the Closing. The purchase price is then adjusted a second time after Closing to reflect the difference, if any, between the actual closing working capital of the Company at Closing and the estimated working capital of the Company prepared shortly before Closing.

2.3 Payment of Purchase Price. The Purchase Price shall be payable as follows:

(a) At the Closing, Buyer shall:

(i) pay, on behalf of the Company and, if applicable, its Subsidiaries, all amounts necessary to release the Liens upon the assets of the Company or any of its Subsidiaries secured by any of the Indebtedness set forth on Schedule 2.3(a)(i) by wire transfer of immediately available funds to the account(s) designated to Buyer prior to the Closing by the holders of such Indebtedness;[18]

(ii) pay, on behalf of the Company and, if applicable, its Subsidiaries and Sellers, all Transaction Expenses by wire transfer of immediately available funds to each Person who is owed a portion thereof as identified in writing, together with wire instructions, by the Company to Buyer prior to the Closing;[19]

(iii) deposit the Escrow Amount in the Escrow Account by wire transfer of immediately available funds to an account designated in writing to Buyer by the Escrow Agent; and

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Alternatively, parties may choose a one-step adjustment for working capital involving a single post-closing adjustment between actual working capital of the Company at the time of closing and a target working capital determined at the time the purchase agreement is executed. While such a one-step adjustment is a more simplified approach, a two-step adjustment may serve to lower the amount of any post-closing adjustment as the estimated working capital prepared shortly before closing would presumably be more accurate than a target calculated at the time of execution. In some cases (e.g., when there are multiple sellers, or Buyer is concerned that the post-closing working capital adjustment will result in a large payment owing from Sellers to Buyer), it may be appropriate to propose a separate escrow account for working capital as partial security for any working capital adjustment payment owing to Buyer post-closing so that Buyer does not have to chase multiple Sellers or tap the "general" post-Closing indemnification escrow to recover any working capital adjustment payment owing to Buyer.

[18] Note: This form contemplates certain Indebtedness of the Company (often represented by "payoff" or "release" letters issued by the applicable lender holding such Indebtedness) to be paid off at Closing by Buyer out of the cash proceeds. Alternatively, the Parties may prefer to leave existing Indebtedness in place or have the Company pay off Indebtedness prior to Closing. It is fairly common for a Buyer to require that certain indebtedness of the Company be paid off in full (and all Liens encumbering any of the Company's assets be released) before or contemporaneously with the Closing. The Company / Sellers often do not wish to pre-pay such indebtedness prior to the Closing (because of the lack of certainty of Closing, the lack of availability of sufficient available cash to do so, or both). As a result, it is fairly common for Buyer to require that the Company / Sellers deliver payoff letters to Buyer in advance of the Closing containing (1) the amount of the payoff as of the anticipated Closing Date and a per diem amount thereafter, (2) the payment instructions from such lender and (3) assurance that upon receipt of such funds on such date, the lender will release all Liens securing such indebtedness, and for Buyer to pay the payoff amounts at Closing on behalf of the Company / Sellers and reduce the Purchase Price by the amount of such indebtedness so paid on behalf of the Company / Sellers. Section 7.11 contains an example provision regarding the delivery of payoff letters prior to Closing.

[19] Note: Like in any equity purchase, Buyer is acquiring the Company subject to all of its assets and all of its liabilities. Buyer should ensure that the Agreement appropriately addresses the treatment of Transaction Expenses incurred by the Company. This is often addressed through the working capital adjustment or as a separate adjustment to the purchase price (as is the case in this form). Note that in this form, "Transaction Expenses" are (1) defined as transaction expenses that are unpaid as of Closing and (2) are excluded from the definition of Net Working Capital.

(iv) pay, by wire transfer of immediately available funds to an account specified by the Seller Representative for further distribution by the Seller Representative to Sellers (which Sellers agree as among themselves shall be distributed by the Seller Representative to Sellers pro rata based upon each Seller's percentage ownership of the Membership Interests as set forth on Exhibit A, unless otherwise agreed in writing by all Sellers), an amount equal to the Base Purchase Price minus (A) an amount equal to any Transaction Expenses paid by Buyer pursuant to Section 2.3(a)(ii), minus (B) an amount equal to the aggregate amount of Indebtedness of the Company and its Subsidiaries paid by Buyer pursuant to Section 2.3(a)(i), minus (C) an amount equal to the Escrow Amount, minus (D) the amount, if any, by which Estimated Net Working Capital is less than Target Net Working Capital, and plus (E) the amount, if any, by which the Estimated Net Working Capital is greater than the Target Net Working Capital (such amount to be so paid to the Seller Representative at the Closing pursuant to this Section 2.3(a)(iv) may be referred to herein as the "Closing Payment").

(b) Following Closing, the Purchase Price will be (i) reduced in the event and to the extent that Final Net Working Capital is less than Estimated Net Working Capital and (ii) increased in the event and to the extent that Final Net Working Capital is greater than Estimated Net Working Capital, in each case, as determined pursuant to Section 2.4.

2.4 Net Working Capital Adjustment.

(a) Estimated Net Working Capital. Not less than five (5) Business Days prior to the Closing Date (or such other date as Buyer and the Seller Representative may mutually agree), the Company shall prepare and deliver to Buyer, the Company's good faith estimate of the Net Working Capital as of the Closing Date (the "Estimated Net Working Capital"), which shall quantify in reasonable detail the estimates of each item included in such calculation, in each case, calculated in accordance with the terms of this Agreement. Sellers and the Company shall provide Buyer with reasonable access to all relevant personnel, documents, and information reasonably requested by Buyer in connection with its review of the Estimated Net Working Capital. Within three (3) Business Days of Buyer's receipt of the Estimated Net Working Capital, Buyer will deliver to the Seller Representative a written report containing all changes that Buyer proposes to be made to the Estimated Net Working Capital, if any, together with a reasonably detailed explanation of such changes. The Estimated Net Working Capital, as agreed upon by the Parties, will be used to adjust the Purchase Price at Closing; provided that if the Parties cannot agree on the Estimated Net Working Capital prior to the Closing, absent manifest error, the Estimated Net Working Capital provided by [the Company / Buyer], with any agreed upon adjustments included, will be deemed the Estimated Net Working Capital for purposes of Closing, and will be used to adjust the Purchase Price at Closing pursuant to Section 2.3(a)(iv)(D) or (E), as applicable (but, for the avoidance of doubt, shall be subject to further adjustment pursuant to Section 2.3(b)).

(b) Closing Statement. Within sixty (60) days after the Closing Date (or such other date as Buyer and the Seller Representative may mutually agree in writing), Buyer shall prepare and deliver to Seller Representative a statement (the "Closing Statement") setting forth Buyer's good faith calculation of the actual Net Working Capital as of the Closing Date (the "Proposed Final Net Working Capital"), which shall quantify in reasonable detail each item

included in such calculation, in each case calculated in accordance with the terms of this Agreement, as well as Buyer's proposed adjustment to the Purchase Price to be made pursuant to Section 2.3(b). Buyer shall provide Seller Representative and its representatives with reasonable access to all relevant personnel, documents, and information reasonably requested by Seller Representative in connection with its review of the Closing Statement and Buyer's Proposed Final Net Working Capital. If Buyer fails to prepare and deliver the Closing Statement to the Seller Representative within such time period, the Seller Representative may notify Buyer in writing of such failure and should Buyer fail to prepare and deliver the Closing Statement to the Seller Representative within five (5) Business Days thereafter, the Seller Representative may prepare and deliver the Closing Statement to Buyer, in which case all references to Buyer in Section 2.4(c) shall be deemed references to the Seller Representative and all references to the Seller Representative in Section 2.4(c) shall be deemed references to Buyer.[20]

(c) Dispute Resolution. If the Seller Representative disputes any amounts as shown on the Closing Statement, the Seller Representative shall deliver to Buyer within thirty (30) days after the Seller Representative's receipt of the Closing Statement a notice (the "Dispute Notice") setting forth the Seller Representative's calculation of the Proposed Final Net Working Capital and describing in reasonable detail the basis for the determination of such different amount. If the Seller Representative does not deliver a Dispute Notice to Buyer within such thirty (30) day period, the Closing Statement (and the determination of the Proposed Final Net Working Capital therein) shall conclusively be deemed to be the Final Closing Statement and the Final Net Working Capital. In the event that the Seller Representative timely delivers a Dispute Notice to Buyer, then Buyer and the Seller Representative shall use commercially reasonable efforts to attempt to resolve any issues raised in the Dispute Notice within a period of thirty (30) days after Seller Representative has given the Dispute Notice, including by causing their appropriate representatives having authority to resolve such dispute to meet to attempt in good faith to resolve any differences in their respective positions with respect to the issues raised in the Dispute Notice. If Buyer and the Seller Representative resolve such differences, the Closing Statement and Proposed Final Net Working Capital, in each case as agreed to by Buyer and the Seller Representative shall conclusively be deemed to be the Final Closing Statement and Final Net Working Capital. If, however, Buyer and the Seller Representative are unable to agree upon the Final Closing Statement and the calculations for the Final Net Working Capital within thirty (30) days after delivery of the Dispute Notice (or such longer period as agreed in writing by Buyer and the Seller Representative), either Buyer or the Seller Representative may submit the matter to the Neutral Accountant for determination, which shall be the sole and exclusive method of dispute resolution available to the Parties with respect to Final Closing Statement and Final Net Working Capital. In such an event, the Party submitting the matter shall submit a copy of this Agreement, the Closing Statement, the Dispute Notice and a summary of such Party's position of the Neutral Accountant with a copy to the other Party and the other Party shall have

[20] Note: It is not uncommon for the party then in possession of the relevant books and records to prepare the relevant estimates (i.e., the Seller for purposes of preparing the pre-closing Estimated Net Working Capital, and Buyer for purposes of preparing the proposed Final Net Working Capital), and to provide the other party with reasonable access to the relevant books and records to confirm or dispute such calculations. The last sentence of Section 2.4(b) is intended to address a concern sometimes raised by Sellers—namely, what happens if Buyer fails to timely deliver the Closing Statement.

five (5) Business Days thereafter within which to submit a summary of its position to the Neutral Accountant with a copy to the other Party. The Neutral Accountant shall have full authority to resolve all of the issues or matters relating to the adjustments under this Section 2.4, but shall only decide the specific components still in dispute between the Parties and shall do so solely in accordance with the terms of this Agreement. The Neutral Accountant's determination shall be based solely on the positions of Buyer and Seller Representative (i.e., not on independent review) and on the definitions and other applicable provisions of this Agreement. The Closing Statement (and determination of the Proposed Final Net Working Capital therein) so determined by the Neutral Accountant must be either Buyer's position, the Seller Representatives position or within the range of Buyer's position and the Seller Representative's position with respect to each matter still in dispute and shall conclusively be deemed to be the Final Closing Statement and Final Net Working Capital. Such determination by the Neutral Accountant shall be conclusive and binding upon the Parties, absent fraud or manifest error, and shall be an arbitral award that is non-appealable, and will be enforceable against each of the Parties in any court of competent jurisdiction. The fees and expenses of the Neutral Accountant shall be borne equally by Buyer and Sellers. The Neutral Accountant shall be authorized to resolve only the specific disputed aspects of the Final Closing Statement and the Proposed Final Net Working Capital submitted by the Parties as provided above and may not award damages, interest or penalties to any Party with respect to any matter.[21]

(d) Payment of Net Working Capital Adjustment. Promptly, but no later than five (5) Business Days after the final determination thereof, if the Final Net Working Capital (i) exceeds the Estimated Net Working Capital, Buyer shall pay such excess amount to the Seller Representative in immediately available funds for further distribution by the Seller Representative to Sellers (which Sellers agree as among themselves shall be pro rata based on each Seller's percentage ownership of the Membership Interests as set forth on Exhibit A, unless otherwise agreed in writing by all Sellers) or (ii) is less than the Estimated Net Working Capital, such amount shall, at Buyer's election, (A) be paid by Sellers to Buyer by wire transfer of immediately available funds (which such obligation of Sellers shall be joint and several), or (B) be collected by Buyer from the Escrow Account (in which case, Buyer and the Seller Representative shall issue joint written instructions to the Escrow Agent directing the Escrow Agent to release such amount to Buyer from the Escrow Account, in which case Buyer may

[21] Note: This example provision allows the Neutral Accountant to determine the items still in dispute within the range proposed by the Parties and provides for the fees and expenses of the Neutral Accountant to be borne equally by the parties. Alternatively, the parties may prefer "baseball" arbitration, where the Neutral Accountant is to pick either Buyer's position or the Seller Representative's position (either in total, or with respect to each matter still in dispute) and the party whose position is not selected is responsible for the fees and expenses of the Neutral Arbitrator. The benefit of this alternative approach is that, at least in theory, it keeps the Parties from taking unreasonable positions. There are, of course, other alternatives, such as splitting the Neutral Accountant's fees and expenses based on the relative "correctness" of the Parties positions.

thereafter require Sellers to contribute to the Escrow Account their pro rata portion of the amount so released to Buyer from the Escrow Account).[22]

2.5 Escrow Fund.

(a) The Escrow Amount, together with the interest earned thereon from the date of its initial deposit with the Escrow Agent at the Closing (the "Escrow Fund"), shall be held in the Escrow Account and released in accordance with the provisions of this Section 2.5 and the Escrow Agreement. From time to time after Closing, the Escrow Agent shall be jointly instructed in writing by Buyer and the Seller Representative to release all or portions of the then-remaining Escrow Fund to Buyer or the Seller Representative (for further distribution by the Seller Representative to Sellers), in each case, as provided in this Section 2.5.

(b) If at any time prior to the date that is the [_____] anniversary date of the Closing Date (such time period, the "Escrow Period")[23] there are amounts remaining in the Escrow Fund and Buyer believes that it or any other Buyer Indemnified Party is entitled to indemnification pursuant to the applicable provisions of Article X, then Buyer shall be entitled, at any time and from time to time during the Escrow Period, to deliver to the Seller Representative [and the Escrow Agent] written notice (an "Escrow Claim Notice"), which notice shall specify with reasonable particularity the nature and amount of such claim pursuant to the applicable provisions of Article X (the "Escrow Claim"), including reasonable detail of, and the basis under this Agreement entitling Buyer to, such Escrow Claim, together with any other information required by the applicable provisions of Article X.

(c) Upon final resolution of any such Escrow Claim pursuant to the mutual written agreement of Buyer or other applicable Buyer Indemnified Party and the Seller Representative or as determined by a final, non-appealable judgment of a court of competent jurisdiction in accordance with Section 12.10, if a Buyer Indemnified Party is entitled to all or any portion of the Escrow Fund then-remaining, then Buyer and the Seller Representative shall provide joint written instructions to the Escrow Agent to disburse to the applicable Buyer Indemnified Party the amount set forth in such joint written instruction, which amount shall be that portion of the Escrow Fund then-remaining in the Escrow Account at such time as would satisfy such Escrow Claim as so finally resolved.

(d) On the first Business Day following the expiration of the Escrow Period, Buyer and the Seller Representative shall provide joint written instructions to the Escrow Agent to release to the Seller Representative for further distribution by the Seller Representative to

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[22] Note: Parties may prefer to escrow a separate amount with a third party escrow agent that is dedicated solely to the payment of any post-closing working capital adjustment amount owed by Sellers to Buyer as an alternative to (i) any such amounts reducing the available escrowed amount for future indemnification claims made by Buyer against Sellers, and (ii) Sellers having to fund, on a joint and several basis, any such amount out of their own pocket post-closing.

[23] Note: It is fairly common for the Escrow Period to match the Survival Period for non-fundamental representations and warranties. The Parties may also consider agreeing to release a portion of the Escrow Fund prior to the expiration of the Escrow Period in the event, for example, that no indemnifiable claims have been made as of such time.

Sellers (which Sellers agree as among themselves will be pro rata based on each Seller's percentage ownership of the Membership Interests as set forth on Exhibit A, unless otherwise agreed in writing by all Sellers) any amounts then-remaining in the Escrow Fund, excluding those amounts attributable to any then-outstanding Escrow Claim for which Buyer has in good faith provided an Escrow Claim Notice to the Seller Representative [and Escrow Agent] in accordance with Section 2.5(b) that have not been previously satisfied, and, with respect to each such outstanding Escrow Claim, each amount attributable thereto claimed in good faith by Buyer (to the extent sufficient funds remain in the Escrow Fund as of such date and if there are insufficient funds remaining in the Escrow Fund as of such date, the entirety of the funds remaining in the Escrow Fund as of such date) shall remain part of the Escrow Fund in the Escrow Account until final resolution of such Escrow Claim pursuant to the mutual written agreement of Buyer (either on behalf of itself or on behalf of any other Buyer Indemnified Party) and the Seller Representative, or as determined by a final, non-appealable judgment of a court of competent jurisdiction in accordance with Section 12.10, after which Buyer and the Seller Representative shall provide joint written instructions to the Escrow Agent to release the then-remaining amount of the Escrow Fund to Buyer and/or the Seller Representative, as applicable, as so agreed by Buyer and the Seller Representative or as so determined by a final, non-appealable judgment of a court of competent jurisdiction in accordance with Section 12.10, as applicable.

2.6 Allocation of Purchase Price.[24] The Parties agree for federal income Tax purposes to treat the transactions contemplated hereby as a transaction described in Situation 2 of Revenue Ruling 99-6, 1999-1 CB 432, whereby each Seller will be treated as selling all of its membership interests in the Company and Buyer will be treated as purchasing all of the assets held by the Company subject to the liabilities of the Company. Attached hereto as Schedule 2.6 is the Parties' preliminary allocation of the Base Purchase Price, as preliminarily adjusted at the Closing pursuant to Section 2.3(a)(iv)(D) or (E), any liabilities of the Company or its Subsidiaries assumed by Buyer and any other items that constitute consideration for applicable income Tax purposes (to the extent known at such time) among the Company's assets in accordance with Section 1060 of the Code. Within thirty (30) days of the final determination of the Purchase Price (as finally adjusted pursuant to Section 2.3(b)), Seller shall prepare a final allocation of the Purchase Price, and any liabilities of the Company or its Subsidiaries assumed by Buyer, and any other items that constitute consideration for applicable income Tax purposes (to the extent known at such time) among the Company's assets in accordance with Section 1060 of the Code, provided that the final allocation shall be determined in a manner consistent with

[24] Note: Situation 2 of Revenue Ruling 99-6, 1999-1 CB 432, provides that when Sellers collectively sell all of the membership interest in the Company to a single purchaser, for federal income tax purposes, Sellers will be treated as selling their membership interests and Buyer will be treated as purchasing the Company's assets. The allocation of the purchase price in this situation affects Sellers as it will be used to determine whether they will recognize any ordinary income (instead of capital gain) attributable to the Company's holding of so-called "hot assets" under Section 751 of the Code, which includes inventory items, unrealized receivables and certain depreciation recapture items. As with a typical asset purchase, the purchase price allocation will set the Buyer's tax basis in the acquired assets. Buyer will be motivated to allocate as much of the purchase price as possible to assets that can be deducted/depreciated over the shortest period of time, whereas Sellers who have held their membership interests for more than one year will be motivated to allocate as much of the purchase price to non-hot assets as possible – to potentially enable them to recognize as much long-term capital gain as possible.

the preliminary allocation set forth on Schedule 2.6, and deliver such allocation to Buyer for its approval.[25] Buyer and Seller shall report, act and file income Tax Returns, including IRS Form 8594, as applicable, in all respects and for all purposes consistent with such allocation prepared by Seller and approved by Buyer unless a change is otherwise required by Law, a change in known facts, or reasonably necessary to effectively settle a Tax audit. The Parties agree to report consistently with this Section 2.6 on all filed Tax Returns.

2.7 Seller Representative as Payment Agent for Sellers. Notwithstanding anything to the contrary herein, all payments owing hereunder from Buyer to any Seller (including, without limitation, the Closing Payment, any Net Working Capital adjustment due to Sellers pursuant to Section 2.4(d) (if any), any release of any portion of the Escrow Funds due to Sellers (if any), or otherwise (if any)), shall be made by Buyer to a single account specified in writing by the Seller Representative as payment agent for each Seller, and all such payments will be subject to the provisions of Section 11.3.[26]

ARTICLE III
CLOSING MATTERS

3.1 Closing. The closing of the transactions contemplated hereby (the "Closing") will take place at the offices of Seller Counsel, [Address], or remotely via the exchange of all documents to be executed or delivered by the Parties at the Closing (with originals to follow upon the request of any Party) on the fifth Business Day following the satisfaction or due waiver (by the Party entitled to the benefit of such condition) of each of the conditions set forth in Article VIII (other than those conditions that are to be satisfied at the Closing), or on such other date or at such other time and place as the Parties mutually agree in writing (the date on which the Closing actually occurs is referred to herein as the "Closing Date"). All Proceedings to be taken and all documents to be executed and delivered by the Parties at the Closing will be deemed to have been taken and executed simultaneously and no Proceedings will be deemed to have been taken nor documents executed or delivered until all have been taken, executed and delivered. The effective time of the Closing shall be at 12:01 a.m. (prevailing [City, State] time) on the Closing Date for all purposes of this Agreement.[27]

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[25] Note: In view of the discussion in the prior footnote, Buyer may have a strong interest in preparing the allocation of the purchase price (to be approved of by Sellers.) This is a negotiation item.

[26] Note: When there are multiple Sellers, Buyer may wish to appoint a single Seller Representative to serve as its primary point of contact and to, for example, among other things, receive notices on behalf of all Sellers. As noted above, the scope of powers and authority granted to a Seller Representative can vary greatly, and, in some cases, may include serving as payment agent for all Sellers (as is contemplated by this form). When the Seller Representative is to serve as payment agent for all Sellers, it is wise for Buyer to include provisions to the effect that Buyer's responsibility to make any required payments owing to any Seller under the agreement is satisfied when it makes such payment to the Seller Representative and that Buyer has no responsibility to ensure that any Seller ultimately receives the portions of any amounts to which such Seller is entitled under the agreement. An example of such provisions are included in Section 11.3 of this form.

[27] Note: It is now fairly common to have "remote" closings by exchanging the closing deliverables electronically. There may, however, be certain closing deliverables for which an original is required or advisable, such as a promissory note or a document to be recorded in the real property records.

3.2 Closing Deliverables.[28]

(a) Seller Closing Deliverables. At the Closing, Sellers shall deliver or cause to be delivered the following to Buyer:

(i) the Assignment, duly executed by each Seller;

(ii) a certificate of [Sellers / the Seller Representative on behalf of all Sellers] to the effect that the conditions set forth in Sections 8.2(a) and 8.2(b) have been satisfied, such certificate to be substantially in the form attached hereto as Exhibit D;[29]

(iii) a certificate of each Seller stating that under Treasury Regulations Section 1.1445-2(b) such Seller is not a foreign person within the meaning of Section 1445 of the Code, duly executed by such Seller;[30]

(iv) the Escrow Agreement, duly executed by [Sellers / the Seller Representative] and the Escrow Agent;

(v) each of the consents set forth on Schedule 3.2(a)(v);[31]

(vi) if requested by Buyer, a resignation letter in form and substance reasonably acceptable to Buyer from each officer [and manager] of the Company and its Subsidiaries as designated by Buyer, pursuant to which such person resigns from his position as an officer [and manager] of the Company and its Subsidiaries effective as of

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[28] Note: Closing deliverables can vary widely depending on the transaction. Having closing deliverables as a condition to closing is necessary for a sign and subsequent close transaction. Having closing deliverables in a simultaneous sign and close transaction is not necessary, but can be helpful to ensure the parties are on the same page regarding what is required for closing. Note that in this form (which is structured as a sign and subsequent close), the delivery of the parties' respective closing deliverables are a condition precedent to the other party's obligation to close pursuant to Article VIII.

[29] Note: This certificate is often referred to as a "bring down" certificate, where Seller or the Seller Representative on behalf of all Sellers "brings" down its representations and warranties and confirms its compliance with its pre-closing covenants (often subject to some qualification by materiality, in all material respects or Material Adverse Effect). An example Seller Representative "bring down" certificate tracking the provisions of this form is included as Exhibit D.

[30] Note: Under Public Law 115-97 (conventionally referred to as the Tax Cuts and Jobs Act of 2017) or the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA), a Buyer may be required to withhold a portion of the purchase price when, generally, the Seller is disposing of an interest in a partnership that is either treated as engaged in the conduct of a trade or business in the U.S. or holds one or more U.S. real property interests. One way in which such withholding can be avoided is if the Buyer requests, and the Seller provides, an IRS Form W-9 and a certification of non-foreign status (often referred to as a FIRPTA certificate) prior to the purchase or as a closing deliverable, as applicable.

[31] Note: Schedule 3.2(a)(v) would set forth any consents that the Parties agree should be required to be obtained as a condition to Closing. This could include all consents implicated by the transaction, or some subset of those consents (e.g., those deemed sufficiently material by Buyer without which Buyer would not be willing to proceed with Closing).

immediately prior to, but contingent upon, the Closing, with each such letter being substantially in the form attached hereto as Exhibit F;[32]

(vii) invoices reasonably acceptable to Buyer evidencing any Transaction Expenses, if any, payable pursuant to Section 2.3(a)(ii), including payment instructions for the payment of such Transaction Expenses;

(viii) IRS Form W-9 duly executed by each Seller;[33] and

(ix) any other documents, agreements or Closing deliverables of Sellers or the Company that are contemplated by this Agreement.

(b) Buyer Closing Deliverables. At the Closing, Buyer shall deliver or cause to be delivered the following to Sellers or other Person identified below:

(i) to each Person who is entitled to receive a portion of the Purchase Price pursuant to Section 2.3(a), the Purchase Price as provided in Section 2.3(a);

(ii) to the Seller Representative, the Assignment, duly executed by Buyer;

(iii) the Escrow Agreement, duly executed by Buyer and the Escrow Agent;

(iv) IRS Form W-9 duly executed by each Buyer;[34]

(v) a certificate from Buyer to the effect that the conditions set forth in Sections 8.1(a) and 8.1(b) have been satisfied, such certificate to be substantially in the form attached hereto as Exhibit E; and[35]

(vi) any other documents, agreements or Closing deliverables of Buyer that are contemplated by this Agreement.

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[32] Note: In cases where Buyer intends to replace some or all of the officers or managers of the Company or its Subsidiaries at Closing, Buyer may wish to require resignation letters from such officers or managers as a closing deliverable. An example form of resignation letter is attached as Exhibit F.

[33] Note: If a Seller is not a U.S. person, then it should deliver the appropriate IRS Form(s) W-8.

[34] Note: If the Buyer is not a U.S. person, then it should deliver the appropriate IRS Form(s) W-8.

[35] Note: This certificate is often referred to as a "bring down" certificate, where Buyer "brings" down its representations and warranties and confirms its compliance with its pre-closing covenants (often subject to some qualification by materiality, in all material respects or Material Adverse Effect). An example Buyer "bring down" certificate tracking the provisions of this form is included as Exhibit E.

ARTICLE IV
REPRESENTATIONS AND WARRANTIES OF THE COMPANY[36]

[The Company / Each Seller, jointly and severally][37] hereby represents and warrants to Buyer as follows:

4.1 Organization; Existence.[38] The Company is a limited liability company duly formed, validly existing and in good standing under the Laws of the State of Texas. The

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[36] Note: In contrast to covenants, which are generally promises to do or refrain from doing something in the future, representations and warranties are generally statements of fact that speak as of a particular point in time. Exceptions to representations and warranties are usually "scheduled" (i.e., identified in a Disclosure Schedule).

This form contains three separate sets of representations and warranties: (1) representations and warranties regarding the Company are set forth in Article IV, (2) representations and warranties regarding Sellers are set forth in Article V and (3) representations and warranties regarding Buyer are set forth in Article VI. Sometimes common representations made by the parties are included in a single article and sometimes representations and warranties regarding the Company and the Sellers are combined into a single article. We have generally found it easier to draft other provisions of the agreement (e.g., the indemnification provisions) when the representations and warranties regarding the various parties (i.e., the Company, the Sellers and the Buyer) are in separate articles, but such is not necessary.

What representations and warranties are appropriate (and the precise formulation of those representations and warranties) can and do vary greatly from deal to deal. Buyers generally prefer a more expansive set and formulation of representations and warranties regarding the Company, and Sellers generally prefer a less expansive set and formulation of such representations and warranties, and often prefer to qualify many of them by Knowledge and/or some materiality standard (e.g., "material," "in all material respects" and "except where such would not have and would not reasonably be expected to have a Material Adverse Effect"). While the parties often negotiate where, and to the extent, such qualifiers may be appropriate, the purpose of such is to allocate risks for the covered items between the parties. Because in an equity purchase Buyer is acquiring the Company subject to all of its assets and all of its liabilities, it is not uncommon for Buyer to ask for more expansive and broader formulations of representations and warranties regarding the Company in an equity purchase than in an asset purchase (where Buyer is often able to take comfort in a "light-switch" indemnity (i.e., where the Seller(s) are generally responsible for pre-closing operations of the Company and Buyer is generally responsible for post-closing operations of the Company).

[37] Note: In an equity purchase, it is not uncommon for the Seller(s) to make the representations and warranties relating to the Company, or, if the Company is also a party, for the Company (or the Company and the Seller(s)) to make representations and warranties regarding the Company. Who makes such representations is a different issue than who is responsible for a breach of those representations and warranties. Generally, most Buyers would be indifferent as to whether the Company or the Seller(s) make such representations and warranties, as long as the Sellers (and not the Company, which will be owned by Buyer post-closing) are responsible for a breach of those representations and warranties.

[38] Note: The "Organization; Existence" representation is a common representation made by all parties; although, the components of such representation may vary from deal to deal and depending on which party is making such representation (e.g., it may be appropriate for Buyer to ask Seller / the Company to identify the jurisdictions in which it is qualified / has registered to conduct business as a foreign limited liability company given that Buyer will own and operate the Company post-closing, while it may be of little or no relevance for Seller to know the jurisdictions in which Buyer has qualified / registered).

The purpose of the representation is to provide Buyer assurance that the Company has been duly formed, remains in existence, and has requisite authority to operate its business as currently operated in the jurisdictions in which it currently operates. Note that Buyers can also often obtain additional assurances (beyond that provided by the representation) of the Company's valid formation and good standing by requesting certified copies of the Company's charter documents and a good standing certificate from the jurisdiction of the Company's formation.

Company has all requisite power and authority to own its assets and to carry on its business as presently conducted, and is duly qualified to transact business as a foreign limited liability company in each jurisdiction in which the nature of the business conducted by it requires such qualification, each of which is listed on Schedule 4.1.

4.2 Authorization; Enforceability.[39] The execution, delivery, and performance by the Company of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by all necessary limited liability company action on the part of the Company. This Agreement has been duly executed and delivered by the Company and constitutes a valid and legally binding obligation of the Company, enforceable against the Company in accordance with its terms, except as enforcement may be limited by applicable bankruptcy, insolvency, reorganization, moratorium and other Laws affecting creditors' rights generally and except insofar as the availability of equitable remedies may be limited by applicable Law.

4.3 No Conflicts.[40] Except as set forth on Schedule 4.3, the execution, delivery and performance by the Company of this Agreement and the consummation of the transactions

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Note that the supporting documentation can vary from jurisdiction to jurisdiction. In Texas, (a) the existence of a Texas entity is usually represented by a "Certificate of Fact" issued by the Secretary of State of the State of Texas and (b) the good standing of a Texas entity is usually represented by a statement of "Franchise Tax Account Status" from the Office of the Comptroller of Public Accounts of Texas. Also note that, effective May 5, 2013, the Comptroller's Office changed its procedure so that the terms "good standing" and "active" now mean that a relevant taxable entity's right to transact business in Texas has not been forfeited by the Comptroller's Office because of the entity's failure to file franchise tax reports or pay franchise taxes; prior to this change in procedure, the term "good standing" meant that all franchise tax filing requirements had been met and no franchise tax was due. Note also that a statement of Franchise Tax Account status is now obtained through the Comptroller's website (available at: https://mycpa.cpa.state.tx.us/coa/).

This representation is often included as a "Fundamental Representation" (i.e., one that has a longer survival period than the general representations and one that is not subject to the general limitations on Seller's liability). As such, Seller's should be mindful of overly expansive formulations of this representation and may wish to, for example, qualify the foreign registration / qualification component with "except where the failure to be so qualified has not resulted in, and should not reasonably be expected to result in, a Material Adverse Effect" or something similar.

[39] Note: The "Authorization; Enforceability" representation is a common representation made by all parties. The purpose of the representation is provide Buyer assurance that the Company has the requisite authority to enter into the purchase agreement and that such is legally enforceable against the Company. The parties may wish to extend this representation (and certain other representations) to the other Transaction Documents. Where the other Transaction documents are to be delivered in the future, the representation should be revised to reflect such (e.g., "This Agreement has been, and at Closing the other Transaction Documents to which the Company will be a party will be, duly executed and delivered by the Company and constitutes, or when so executed and delivered will constitute, a valid and legally binding obligation of the Company, enforceable against the Company in accordance with its terms…."

This representation is often included as a "Fundamental Representation" (i.e., one that has a longer survival period than the general representations and one that is not subject to the general limitations on Seller's liability). As such, Seller's should be mindful of overly expansive formulations of this representation.

[40] Note: The "No Conflicts" representation is a common representation made by all parties. The purpose of the representation is to provide Buyer assurance that, by entering into the purchase agreement, the Company is not (a) violating its Organizational Documents, (b) creating a Lien, or (c) violating any applicable Law. The first component is related to the "Authorization; Enforceability" representation discussed above. Some formulations of

contemplated hereby do not and will not (a) conflict with or result in a breach of any provisions of the Organizational Documents of the Company, (b) result in a default or give rise to any right of termination, cancellation or acceleration or, result in the creation of any Lien (other than Permitted Lien) under any of the terms, conditions or provisions of any agreement to which the Company is a party or by which the Company is otherwise subject or bound or (c) violate any Law applicable to the Company.

4.4 Capitalization; Organizational Documents.[41] The Membership Interests constitute all of the issued and outstanding membership interests and other equity interests of the Company. The Membership Interests have been duly authorized and validly issued, and are fully paid and non-assessable and were not offered, sold or issued in violation of any preemptive rights or any applicable Law. Except for the rights created pursuant to this Agreement, there are no preemptive or other outstanding rights, subscriptions, options, warrants, phantom equity, convertible securities, redemption rights, repurchase rights, or other rights or commitments of any kind relating to the right to subscribe for or purchase any membership interests or other equity interests in the Company or obligation of the Company to issue or sell any membership interests or other equity interests in the Company. There are no outstanding contractual obligations of the Company to repurchase, redeem or otherwise acquire any membership interests in the Company. True, complete and correct copies of the Organizational Documents of the Company have been made available to Buyer.

4.5 Subsidiaries.[42] Schedule 4.5 lists each Subsidiary of the Company and its jurisdiction of formation. Each such Subsidiary has been duly formed and is validly existing under the Laws of the jurisdiction of its formation, has all requisite power and authority to own its assets and to carry on its business as presently conducted, and is duly qualified to transact business as a foreign entity in each jurisdiction in which the nature of the business conducted by it requires such qualification. The equity interests held by the Company in each such Subsidiary have been duly authorized and validly issued, and are fully paid and non-assessable and were not offered, sold or issued in violation of any preemptive rights or any applicable Law. There are no preemptive or other outstanding rights, subscriptions, options, warrants, phantom equity, convertible securities, redemption rights, repurchase rights, or other rights or commitments of

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the "No Conflicts" representation extend to contracts and other agreements to which the Company is a party or may otherwise be bound. In such cases, such "No Conflicts" representation serves as a "Consents" representation, which is covered here separately in Section 4.6 because while the parties often agree that the "No Conflicts" component of the representation are "Fundamental Representations" they often negotiate whether the "Consents" representation should be a "Fundamental Representation."

[41] Note: Like in any other equity purchase, it is strongly advisable for Buyer to require an appropriate representation regarding the capitalization of the Company to ensure that it understands the full nature of the Company's capitalization and that it addresses any issues / exceptions (e.g., outstanding options).

[42] Note: While sometimes overlooked, it is wise for Buyers to request representations regarding the organization, good standing, authority, qualification and capitalization of the Company's Subsidiaries. If the Company does not presently have any Subsidiaries, it would be wise for a Buyer to ask for a representation to that effect, and to the effect that it never has had any Subsidiaries (other than those that are identified in a Schedule). It would also be wise for Buyer to ask for a representation to the effect that the Company does not hold, and never has held, any equity interest in any other Person (other than the Subsidiaries and as scheduled), as depending on the definition of "Subsidiaries" the representation may not otherwise extend to minority holdings of the Company.

any kind relating to the right to subscribe for or purchase equity interests in any Subsidiary of the Company or obligation of any Subsidiary of the Company to issue or sell any equity interests in such Subsidiary. There are no outstanding contractual obligations of any Subsidiary of the Company to repurchase, redeem or otherwise acquire any equity interests in such Subsidiary of the Company. True, complete and correct copies of the Organizational Documents of each Subsidiary of the Company have been made available to Buyer. Other than the Subsidiaries listed on Schedule 4.5, the Company does not directly or indirectly hold, and never has directly or indirectly held, any equity interest in any other Person.

4.6 Consents.[43] Except as set forth on Schedule 4.6, and assuming the accuracy of the representations of Buyer set forth in Article VI, no consent, approval or authorization of, declaration to or filing or registration with, any Governmental Authority or any party to a Material Contract, is required to be made or obtained by the Company in connection with the execution, delivery and performance by the Company of this Agreement or the consummation by the Company of the transactions contemplated hereby.

[43] Note: The purpose of the "Consents" representation is to identify any consents, approvals or authorizations that may be required in connection with the transaction. This could include governmental approvals and/or approvals from counterparties to contracts to which the Company is a party. Anti-assignment provisions (in contrast to change-in-control provisions) are generally not implicated by an equity purchase because the contract is not being assigned as a result of the transaction, although some anti-assignment provisions are drafted in such a way that they could arguably be construed as a change-in-control provision. All contracts to which the Company is a party or is otherwise bound should be carefully reviewed as part of Buyer's due diligence. Note that the example formulation extends to consents required by Governmental Authorities and parties to Material Contracts (as such term is defined in Section 4.10). Note that such still leaves open the possibility that there are other contracts (i.e., those that do not constitute "Material Contracts") that would not need to be scheduled under this formulation, but for which consent may still be required.

Once applicable contracts containing change-in-control provisions have been identified, the parties should discuss (1) which of such contracts are sufficiently material such that, absent the consent of the counterparty prior to the Closing, Buyer should not be obligated to proceed with closing and (2) the process for obtaining such consents prior to the Closing. In this form, (1) "required consents" are addressed in Section 3.2(a)(v) as a closing deliverable of Sellers, which is in turn a condition precedent to Buyer's obligation to close pursuant to Section 8.1(d) and (2) Section 7.3 contains a covenant of the parties to use commercially reasonable efforts to obtain all required consents prior to the Closing.

4.7 Financial Statements; Indebtedness.[44]

(a) Schedule 4.7(a) contains copies of the following financial statements (collectively, the "Financial Statements"): (i) the audited consolidated balance sheet of the Company and its Subsidiaries as of [_____ ___, 20___] (the "Last Audited Balance Sheet"), and the related audited consolidated statements of operations, changes in members' equity and cash flows for the periods then ended, together with all related notes and schedules thereto and (ii) the unaudited consolidated balance sheet of the Company and its Subsidiaries as of [_____ ___, 20___] (the "Most Recent Balance Sheet" and such date, the "Balance Sheet Date") and the related statements of consolidated income and cash flows for the [____]-month period then ended.[45]

(b) Each of the Financial Statements has been based upon the applicable books and records of the Company and its Subsidiaries and presents fairly, in all material respects, the financial position of the Company and its Subsidiaries on a consolidated basis at the dates thereof and the results of operations and cash flows of the Company and its Subsidiaries for the periods then ended, as applicable, in accordance with GAAP consistently applied throughout the periods covered thereby and are consistent with the books and records of the Company and its Subsidiaries (which books and records are correct and complete in all material respects), except (i) as may be stated in the notes thereto, (ii) that the unaudited Financial Statements are subject to year-end adjustments and lack the footnote disclosure otherwise required by GAAP and (iii) as otherwise indicated on Schedule 4.7(b).

(c) Neither the Company nor any of its Subsidiaries has any liabilities that would be required to be reflected or reserved against on a consolidated balance sheet of the Company and its Subsidiaries prepared in accordance with GAAP, except for those (i) reflected or reserved against in the Financial Statements, (ii) incurred since the date of the Most Recent Balance Sheet in the ordinary course of business consistent with past practice (none of which results from, arises out of, relates to, is in the nature of, or was caused by any breach of contract,

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[44] Note: The scope of the financial statements representation is often negotiated and can vary greatly from deal to deal. Sellers may desire to attempt to qualify certain components of the representation with knowledge and materiality, although the use of such qualifiers is often discussed and negotiated. Seller's counsel should pay particular attention to what the Company has (e.g., audited vs. unaudited vs. reviewed financials) and ensure that the scope of the representation is appropriate to accurately reflect what is being provided (e.g., are they prepared in accordance with GAAP, are there exceptions that should be Scheduled or otherwise identified, is there an allowance for collection of doubtful accounts, etc.). If financial statements, whether audited or unaudited, are provided to Buyer by the Company or Sellers, Buyer may prefer to include a representation regarding the accuracy of those financial statements upon which Buyer may have relied in entering into the transaction.

Because many Buyers value companies based on their financials (e.g., a multiple of EBITDA), depending on the scope of recoverable damages, suing for a violation of the financial statements representation can be fruitful ground for Buyer to recover an easily determinable measure of damages (e.g., if Buyer can demonstrate that it valued the Company at 5 times EBITDA on its most recent annual financials and that actual EBITDA was $X less than what is represented, Buyer may have a good argument that the measure of its damages as a result of such breach is simply formulaic).

[45] Note: Section 4.7(a) should describe the specific financial statements subject to the representation.

breach of warranty, tort, infringement or violation of Law), which individually or in the aggregate do not exceed $[_____], or (iii) as otherwise indicated on Schedule 4.7(c).[46]

(d) The accounts receivable reflected on the Most Recent Balance Sheet in the aggregate are (i) to the Company's Knowledge, collectible in the ordinary course of business subject to any reserve set forth on the Most Recent Balance Sheet and (ii) represent legal, valid and binding obligations for services actually performed by the Company or its Subsidiaries and are enforceable in accordance with their terms. Such accounts receivable have arisen from bona fide transactions entered into by the Company or its Subsidiaries. To the Company's Knowledge, there are no contests, claims, counterclaims, rights of set-off or other defenses with respect to the accounts receivable reflected on the Most Recent Balance Sheet.

(e) The accounts payable and accrued liabilities reflected on the Most Recent Balance Sheet have arisen in bona fide arm's-length transactions in the ordinary course of business, and each of the Company and its Subsidiaries has been paying its accounts payable and accrued liabilities as and when due.

(f) Schedule 4.7(f) sets forth each item of Indebtedness of the Company and its Subsidiaries and the Company's good faith estimate of the amount of the outstanding obligations of the Company or its Subsidiaries thereunder as of the Execution Date.

4.8 Absence of Certain Developments.[47] Except as set forth on Schedule 4.8 (by reference to the applicable subsection below where applicable), since the Last Audited Balance Sheet, (i) there has not been any Material Adverse Effect, (ii) the Company and each of its Subsidiaries has conducted its business in the ordinary course of business consistent with past practices and (iii) without prejudice to the foregoing, neither the Company nor any of its Subsidiaries has:

(a) amended its Organizational Documents;

(b) issued or sold any of its equity interests or any options, warrants, convertible or exchangeable securities, or other similar rights with respect to any of its equity interests;

(c) redeemed, repurchased or otherwise acquired any of its equity interests;

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[46] Note: This component of the "Financial Statements" representation is often included as a standalone "No Undisclosed Liabilities" representation.

[47] Note: An "Absence of Certain Developments" representation is often requested by Buyer regarding the Company. The purpose of the representation is to identify the existence of certain specified events that have occurred since a specified date. When the Company has audited financial statements, the specified date is often the most recent audited balance sheet date, because the Buyer has some assurance, based upon the audit, that issues identified in the prior audit would be reflected in the most recent audited financials. In some cases, such as where the most recent annual audited financials are several months old, the parties may wish to negotiate an alternative measurement date, limit the scope of the events that need to be disclosed, or even bifurcate what events are disclosable after the date of the most recent audited financials and what events are disclosable after another specified date.

(d) made any material change in its method of accounting;

(e) made any change in the tax characterization of the Company or any of its Subsidiaries;

(f) amended or otherwise modified any Material Contract;

(g) adopted any plan of merger, consolidation, reorganization, liquidation, or dissolution, or filed a petition in bankruptcy under any provisions of federal or state bankruptcy Law, or consented to the filing of any bankruptcy petition against it under any similar Law;

(h) hired or terminated the employment of any key employee, or received the resignation of, or otherwise been informed of the termination of employment of, any key employee;

(i) changed the compensation of any key employee, other than in the ordinary course of business consistent with past practices;

(j) entered into any compromise or settlement agreement of any Proceeding; or

(k) entered into any agreements or commitments to do or perform in the future any of the actions referred to in this Section 4.8.

4.9 Claims and Litigation.[48] Except as set forth on Schedule 4.9, there is no Proceeding by any Person by or before any Governmental Authority or arbitrator, pending or, to the Company's Knowledge, threatened against the Company or any of its Subsidiaries.

[48] Note: A "Claims and Litigation" representation is a common representation requested by Buyer regarding the Company. The purpose of the representation is to identify pending and threatened litigation involving the Company. The "threatened" component is often, but not always, knowledge qualified. While Buyer can conduct a litigation search as part of its diligence, it is often more expensive and time consuming than, for example, a UCC search (which can generally be conducted through a search with the Secretary of State (or similar governing authority) of the jurisdiction in which the Company was formed (other than fixture filings, which are generally filed in the real property records in the jurisdiction where the real property is located)) because litigation searches are generally conducted on a county by county basis.

4.10 Material Contracts.[49]

(a) Schedule 4.10(a) sets forth a list (by reference to the applicable subsection below where applicable) of the following contracts (each such contract, a "Material Contract") to which the Company or any of its Subsidiaries is a party:

(i) all contracts relating to capital expenditures or other purchases of materials, supplies, maintenance, equipment, or other assets or properties or services to the extent any such contract involves an annual expenditure of greater than $[_____] or $[_____] in the aggregate over the life of the contract;

(ii) all contracts constituting a partnership or joint venture to which the Company or any of its Subsidiaries is party;

(iii) all contracts limiting the ability of the Company or any of its Subsidiaries to engage in any line of business or to compete with any Person or in any geographical area;

(iv) all contracts involving any resolution or settlement of any actual or threatened litigation, arbitration, claim or other dispute that have any continuing effect on the Company or any of its Subsidiaries;

(v) any contract evidencing any material Indebtedness of the Company or any of its Subsidiaries;

(vi) any contract relating to the employment of any employee of the Company or any of its Subsidiaries; and

(vii) all collective bargaining agreements or other agreements with any labor union.

(b) Except as set forth in Schedule 4.10(b), neither the Company nor any of its Subsidiaries, nor, to the Company's Knowledge, any other party thereto is in breach in any material respect of any Material Contract. To the Company's Knowledge, each Material Contract is in full force and effect, is valid and enforceable in all material respects in accordance with its terms and is not subject to any claims, charges, set-offs or defenses. There are no claims of default under a Material Contract made by a counterparty pending or, to the Company's

[49] Note: Section 4.10 serves to provide representations and warranties by the Company as to those contracts that are deemed to be material to the operations of the Company. The purpose of this representation is to ensure that (a) Buyer is aware of material contracts of the Company, (b) Buyer has received / has access to copies of such contracts, (c) such contracts are valid and enforceable and (d) neither the Company nor the counterparty has violated such contracts. These contracts may be of particular concern to Buyer in order to continue operation of the Company after Closing. The scope of the example language suggests some common categories of contracts that may be of interest to Buyer, but this can vary greatly based on the industry in which the Company operates, the type and number of contracts to which the Company is a party and the preferences of the parties. Additionally, appropriate dollar thresholds that serve to establish materiality for certain items are also dependent upon the parties and the industry in which the Company operates.

Knowledge, threatened, and neither the Company nor any Subsidiary of the Company has asserted any unsettled claim of default under any Material Contract.

(c) A true, complete and correct copy of each Material Contract has been made available to Buyer.

4.11 Compliance with Laws; Permits.[50] Except as set forth on Schedule 4.11, (a) the Company and its Subsidiaries are not currently in violation in any material respect of any Law to which it or its assets or properties is subject, (b) during the [____]-year period prior to the Execution Date, the Company and its Subsidiaries have not been in violation in any material respect of any Law to which it or its assets or properties is subject, and (c) neither the Company nor its Subsidiaries has received during the [___]-year period prior to the Execution Date, nor, to Sellers' Knowledge, is there any basis for, any notice or other communication from any Governmental Authority or any other Person alleging that the Company or any of its Subsidiaries is not in compliance in any material respect with any Law to which it or its assets or properties is subject. The Company or its applicable Subsidiary is the authorized legal holder of all material permits, licenses, approvals, certificates and other authorizations of and from, and have made all declarations, registrations and filings with, all Governmental Authorities that are necessary for the lawful conduct of their respective businesses as presently conducted.

4.12 Taxes. Except as set forth on Schedule 4.12 (by reference to the applicable subsection below where applicable):[51]

(a) The Company and each of its Subsidiaries have timely filed with the appropriate taxing authorities all Tax Returns that it has been required to file. All such Tax Returns are true, correct, and complete in all material respects. All Taxes owed by the Company or any of its Subsidiaries, which are required to be paid by the Company or any of its Subsidiaries on or prior to the Closing Date, whether or not shown on any Tax Return, have been

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[50] Note: A "Compliance with Laws; Permits" representation is a common representation requested by Buyer regarding the Company. The purpose of the representation is to give Buyer comfort that the Company has complied with applicable Laws. The scope (e.g., look-back period, materiality qualifiers, etc.) of this representation is often negotiated.

[51] Note: Most equity purchase agreements will, at a minimum, contain representations regarding the following: (a) the filing of required tax returns, (b) the accuracy of such tax returns, (c) the payment of taxes due, (d) the absence of tax liens, (e) any waiver of limitations or extensions of time regarding taxes, (f) any audit or dispute regarding taxes, and (g) the tax characterization of the Company. It is critical to have a tax specialist involved in the drafting and negotiation of the tax representations and all other tax provisions in the agreement.

As a result of the federal income tax implications discussed in the footnote accompanying Section 2.6 (i.e., the transaction is treated as a sale of membership interests for Sellers and an asset purchase for Buyer), the tax representations are similar to what one would expect to see in an asset purchase agreement when the Seller is not as concerned about the tax history of the selling entity. However, in the event that not all of the Company's membership interests are being purchased or if the Company's membership interests are being purchased by multiple and separate Buyers so that the Company would continue to be treated for federal income tax purposes as a partnership after the closing (with the Buyers as the new partners for federal income tax purposes), one would expect to see more exhaustive tax representations.

timely paid in full. Neither the Company nor any of its Subsidiaries have waived or extended any statute of limitations with respect to Taxes or agreed to any extension of time with respect to the assessment, payment, or collection of any Tax. Neither the Company nor any of its Subsidiaries have received any written claim by any Governmental Authority with respect to the Company or any of its Subsidiaries in a jurisdiction where the Company or such Subsidiary does not file Tax Returns that it is or may be subject to taxation by that jurisdiction.

(b) No deficiency or proposed adjustment that has not been settled or otherwise finally resolved for any amount of Taxes has been asserted or assessed in writing by any Taxing authority or other Governmental Authority against the Company or any of its Subsidiaries.

(c) There is no examination, audit, or claim for refund in progress, pending or, to the Company's Knowledge, threatened against or with respect to the Company or any of its Subsidiaries. There has not been any audit, examination, or notice of potential examination of any Tax Returns filed by the Company or any of its Subsidiaries.

(d) The Company is treated as a partnership for federal income Tax purposes and has not elected under Treasury Regulations Section 301.7701-3 to be treated as a corporation.

(e) There are no liens (other than Permitted Liens) imposed by any Governmental Authority on any of the assets of the Company or any of its Subsidiaries that arose in connection with any failure to pay any Tax.

(f) No Seller is a "foreign person" (as that term is defined in Section 1445 of the Code).

(g) The Company and each of its Subsidiaries has complied in all material respects with all laws applicable to the payment and withholding of Taxes (including those pertaining to any cross border payments, employees, independent contractors, creditors or equity owners) and has timely paid over to the appropriate taxing authority all amounts required to be so withheld and paid over for all periods under all applicable Laws.

(h) Neither the Company nor any of its Subsidiaries is responsible for Taxes of any Person (i) as a result of transferee or successor Liability, of being a member of an affiliated, consolidated, combined or unitary group for any period, or otherwise through operation of law, or (ii) as a result of any tax sharing, tax indemnity, tax allocation or agreement.

Notwithstanding anything herein to the contrary, all matters required to be disclosed on Schedule 4.12 shall be the sole responsibility of Sellers, regardless of whether such matters are disclosed on Schedule 4.12.

4.13 Customers and Suppliers.[52] Schedule 4.13 sets forth a list of names and addresses of, and the amounts purchased by or from, (a) the [_____] [(__)] largest customers of the Company and its Subsidiaries during the most recent fiscal year and the period from [_____], 20[__] through [_____], 20[__], and the [_____] [(__)] largest suppliers or vendors to the Company and its Subsidiaries during the most recent fiscal year and the period from [_____], 20[__] through [_____], 20[__]. To the Knowledge of the Company, except as set forth on Schedule 4.13, none of such customers, suppliers or vendors has expressed any intention or indication that such customer, supplier or vendor intends to terminate its business relationship with the Company or its Subsidiaries or to limit or alter its business relationship with the Company. In addition, except as set forth on Schedule 4.13, the Company has not received any written notice from any suppler or vendor required to be listed on Schedule 4.13 of any adverse change in the price (excluding normal price fluctuations consistent with industry practice), quality and delivery terms and conditions on which such supplier or vendor will continue to make delivery of such item, and, to the Knowledge of the Company, the consummation of the transactions contemplated hereby will not cause any of such events to happen.

4.14 Intellectual Property.[53] The Company or its applicable Subsidiary, as applicable, owns, free and clear of all Liens, other than Permitted Liens, or otherwise possesses legally enforceable rights to use, all of the Intellectual Property of such Party that is currently being used or is being held for use in connection with the ownership or operation of its material assets. Schedule 4.14 sets forth a list of all material Intellectual Property owned or licensed by the Company or any of its Subsidiaries currently being used in connection with its business. All required filings and fees related to the Intellectual Property owned or licensed by the Company or its Subsidiaries have been timely filed with and paid to the relevant Governmental Authority, in each case except as would not reasonably be expected to materially impair the Company's or such of its Subsidiary's rights with respect to such Intellectual Property. The Company has not received any written notice alleging its or any of its Subsidiaries' infringement upon any Intellectual Property rights of third parties. To the Company's Knowledge, no Person has infringed or is infringing on any Intellectual Property rights of the Company or any of its Subsidiaries or has otherwise misappropriated or is otherwise misappropriating any Intellectual Property owned or licensed by the Company or any of its Subsidiaries.

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[52] Note: It is fairly common for Buyer to request a representation regarding the Company's material customers and suppliers. This can help Buyer understand whether, for example, the Company has a small group of large customers or suppliers, in which case if such customers or suppliers are party to a contract containing a change-in-control provision, Buyer may desire for such customers or suppliers to provide their consent as a condition precedent to Buyer's obligation to close. Buyer may also desire assurances that the Company has not been notified by any of its material customers or suppliers of anticipated material changes to their relationship with the Company.

[53] Note: The scope of the "Intellectual Property" representation can vary greatly from deal to deal, but generally includes (a) the Company's ownership of, or right to use, the intellectual property it uses, (b) a listing of the material intellectual property it uses and (c) and representations regarding the non-infringement (i) by the Company of intellectual property of others and (ii) by others (often on a knowledge-qualified basis) of intellectual property of the Company. In some cases, such as where a material part of the Company's business or value relates to its intellectual property, more robust formulations may be appropriate. In such a case, it is advisable to have an IP specialist involved in the drafting and negotiation of the IP related representations, and in reviewing the Company's IP agreements, including licenses, patents, trademarks, etc. as part of Buyer's due diligence.

4.15 Employee Benefits. Except as set forth on Schedule 4.15 (by reference to the applicable subsection below where applicable):[54]

(a) There are no "employee benefit plans" as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), or any other material plans, agreements, arrangements, programs, or payroll practices (including severance pay, other termination benefits or compensation, vacation pay, salary, company awards, stock option, stock purchase, salary continuation for disability, sick leave, retirement, deferred compensation, bonus, incentive compensation, stock purchase arrangements or policies, hospitalization, medical insurance, life insurance, and scholarship programs) (whether funded or unfunded, qualified or nonqualified), sponsored, maintained, or contributed to or required to be contributed to by the Company or any of its Subsidiaries or by any trade or business, whether or not incorporated, that together with the Company or any of its Subsidiaries would be deemed a "single employer" within the meaning of Section 4001 of ERISA (a "Company ERISA Affiliate") for the benefit of any employee of the Company or any of its Subsidiaries ("Employee Benefit Plans").

(b) None of the Company, any of its Subsidiaries or any Company ERISA Affiliate participates currently or has ever participated in or is required currently to contribute to or otherwise participate in any multiemployer plan (as defined in Section 4001(a)(3) of ERISA) ("Multiemployer Plan"), and none of them have outstanding withdrawal liability with respect to any Multiemployer Plan, in each case, for which Buyer could incur any liability. No Employee Benefit Plan is or at any time was a "defined benefit plan" as defined in Section 3(35) of ERISA or a pension plan subject to the funding standards of Section 302 of ERISA or Section 412 of the Code. Neither the Company nor any of its Subsidiaries participate currently in or is required currently to contribute to or otherwise participate in any plan, program, or arrangement subject to Title IV of ERISA.

[54] Note: An "Employee Benefits" representation is often requested by Buyers in an equity purchase. Because, the Company's pre-closing benefit plans will generally remain in place after closing, it is important for Buyer to (a) be aware of all such benefit plans and (b) ensure the Company has complied with such benefit plans and applicable Law relating to such benefit plans (and, if not, to understand the potential liability resulting from such non-compliance and to allocate that potential liability among the parties as the parties may negotiate). It is important to have an employee benefits specialist involved in drafting and negotiating of the employee benefits representations, and in reviewing all of the Company's employee benefit plans as part of Buyer's due diligence.

4.16 Other Employee Matters.[55]

(a) Schedule 4.16(a) contains a list of all persons who are currently employees of the Company or any of its Subsidiaries, and sets forth for each such individual the following, as applicable: (i) name, (ii) title or position (including whether full or part time), (iii) current annual base compensation or hourly rate, as applicable, and (iv) commission, bonus, or other similar incentive-based compensation.

(b) None of the Company or any of its Subsidiaries are party to or bound by any labor or collective bargaining agreement or other contract with a labor organization representing any employee of the Company or any of its Subsidiaries, and, to the Company's Knowledge, there are no labor organizations representing, purporting to represent or attempting to represent any employee of the Company or any of its Subsidiaries. There are no material grievances, arbitrations, unfair labor practice charges, or other labor disputes pending or, to the Company's Knowledge, threatened against the Company or any of its Subsidiaries with respect to any employee of the Company or any of its Subsidiaries.

(c) Except as set forth Schedule 4.16(c), the Company and each of its Subsidiaries is and has been in compliance in all material respects with all applicable Laws pertaining to employment and employment practices to the extent they relate to the employees of the Company or any of its Subsidiaries, including all Laws relating to labor relations, equal employment opportunities, immigration and naturalization, fair employment practices, employment discrimination, harassment, retaliation, reasonable accommodation, disability rights or benefits, immigration, wage and hours, overtime compensation, child labor, health and safety, workers' compensation, uniformed services employment, whistleblowers, leaves of absence and unemployment.

[55] Note: In addition to representations regarding the Company's employment benefit plans, representations regarding "Other Employee Matters" are often requested by Buyers in an equity purchase. The purpose of such representations is to (a) ensure Buyer understands the Company's employment arrangements, including who the Company's employees are, the titles / functions, and how they are being compensated), (b) inform Buyer whether there is any union or collective bargaining arrangement and, if so, the details relating to such arrangement(s) and (c) provide assurances to Buyer that the Company has complied with applicable employment Laws. Note that there is some overlap between the more general "Compliance with Laws" representation (an example of which is included in Section 4.11) and the more specific compliance with employment Laws component of this representation (in Section 4.16(c)). If such representations and warranties are subject to the same standards (e.g., same qualifications, survival periods, limitations on indemnification, etc.) the overlap should not be problematic; however, if they are subject to different standards, then it may make sense to clarify such. It is important to have an employment specialist involved in drafting and negotiating of the employment related representations, and in reviewing all of the Company's employment related agreements. If the Company has a union or collective bargaining arrangement, it is important to have an appropriate employment specialist involved in the review of such union or collective bargaining arrangements as well.

4.17 Environmental Matters.[56] Except as set forth on Schedule 4.17:

(a) The Company and each of its Subsidiaries and each of their respective operations are currently, and at all times have been, in compliance in all material respects with all Environmental Requirements, which compliance has included obtaining and maintaining all permits, licenses and authorizations required under Environmental Requirements that are material to the operations of the Company as currently conducted.

(b) Neither the Company nor any of its Subsidiaries has received any written notice regarding any actual or alleged uncured violation of any Environmental Requirements by the Company or any of its Subsidiaries.

(c) There are no Environmental Claims pending or, to the Company's Knowledge, threatened against the Company or any of its Subsidiaries.

(d) Neither the Company nor any of its Subsidiaries has assumed or otherwise become subject to any Liability, including any obligation for corrective or remedial action, of any other Person relating to Environmental Requirements.

(e) The Company has made available to Buyer true, complete and correct copies of all environmental assessment reports prepared by or for the Company regarding any of the assets, properties or operations of the Company or any of its Subsidiaries.

4.18 Transactions with Affiliates.[57] Except as set forth on Schedule 4.18, neither the Company nor any of its Subsidiaries has loaned or borrowed any amounts to or from, and does not have outstanding any Indebtedness or other similar obligations to or from, any Affiliate of the Company or any of its Subsidiaries or any employee of the Company or any of its Subsidiaries. Except as described on Schedule 4.18 and except as reflected in the Organizational Documents of the Company and/or its Subsidiaries, neither the Company nor any of its

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[56] Note: In many cases, it is common for Buyers to request certain representations regarding environmental matters, including (a) the Company's compliance with environmental laws, (b) the Company's receipt (or, hopefully lack of receipt) of alleged violations of environmental laws, (c) the absence of environmental claims and (d) Buyer's receipt of environmental reports prepared by or for the Company. It is worth noting that the inclusion of most representations and warranties (and the scope thereof) can vary greatly from deal to deal and based on the Company's business and other facts and circumstances, this may be especially the case for environmental representations. For example, if a Company does not own (and never has owned) any real property and provides a professional service that is unlikely to implicate any environmental laws or concerns, it may be appropriate to have no (or a very limited) environmental representation, and if a Company is substantially engaged in operations that could pose environmental concerns, it may be appropriate to have more robust environmental representations, especially if Buyer's ability to diligence such matters is limited. It is advisable to have an environmental specialist involved in drafting and negotiating of the environmental related representations, and in reviewing any environmental due diligence, especially if the Company is substantively engaged in operations that could pose environmental concerns.

[57] Note: Some Buyers may be concerned, for example, about "sweetheart" deals between the Company and one or more of its Affiliates that would continue to be binding on the Company after Closing, and therefore may wish to include some form of relationship with Affiliates representation to ensure it understands such arrangements and to, if necessary, ensure such arrangements are terminated or renegotiated prior to the Closing.

Subsidiaries is a party to any contract with any of its Affiliates or has engaged in any transaction or business with any such Affiliate, other than transactions or business that are commercially reasonable and are on terms that are competitive with terms that would be agreed to with a Third Party on an "arm's-length" basis.

4.19 Broker's Fees.[58] None of the Company or any of its Subsidiaries has any Liability to pay any fees or commissions to any investment banker, broker, finder, or similar agent with respect to the transactions contemplated by this Agreement for which Buyer or any of its Affiliates could become directly or indirectly liable.

4.20 Insurance.[59] Schedule 4.20 sets forth a list of each material insurance policy currently in effect to which the Company or any of its Subsidiaries is a party or a named insured. With respect to each such insurance policy, except as set forth on Schedule 4.20, (a) to the Company's Knowledge each policy is in full force and effect, (b) all premiums with respect thereto covering all current periods have been paid to the extent due, (c) no written notice of cancellation has been received by the Company or any of its Subsidiaries with respect to such policy, and (d) no claim is outstanding that would reasonably be expected to cause a material increase in the rates of such policy. Such insurance, in terms of scope, coverage, deductibles, exclusions and limitations, is adequate to comply with the agreements to which the Company is a party or is otherwise bound, and is reasonable and customary for the business conducted by the Company. True, complete and correct copies of such insurance policies have been made available to Buyer.

4.21 Powers of Attorney.[60] Except as set forth on Schedule 4.21, neither the Company nor any of its Subsidiaries has granted any unrevoked power of attorney, proxy or authority to act on its behalf to any Person.

4.22 Bank Accounts.[61] Schedule 4.22 sets forth a list of (a) the name and address of each bank with which the Company or any of its Subsidiaries has an account or safe deposit box, (b) the name of each Person authorized to draw thereon or have access thereto and (c) the account number for each bank account of the Company or any of its Subsidiaries.

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[58] Note: The "Broker's Fee" representation is a common representation made by all parties. The purpose of the representation is to provide assurance that there is no unexpected liability to a broker, finder or similar agent.

[59] Note: It is not uncommon for Buyers to request representations regarding the Company's insurance, given that usually such insurance will remain in effect after the Closing. In some instances, such as where the Buyer and Seller are in the same industry, Seller may argue that Buyer can make its own determination as to whether the Company's current insurance is sufficient, and therefor may desire to limit the scope of the representation accordingly.

[60] Note: A representation regarding powers of attorney is not uncommon in an equity purchase, as Buyer will want to know whether the Company or any of its Subsidiaries have issued a power of attorney authorizing someone else to act on the Company's behalf, especially if such persons are not officers or managers of the Company.

[61] Note: A representation regarding bank accounts is not uncommon in an equity purchase given that Buyer will own the Company at Closing and needs to know where the Company has bank accounts and who is authorized to make withdraws from such accounts.

4.23 Assets.[62] The Company or its applicable Subsidiary owns or, in the case of leased property, have valid leasehold interest in, and immediately following the Closing will continue to own, good and valid title to, or a valid right to use, all of the material tangible and intangible assets and property used or held in connection with their businesses (the "Assets"), free and clear of any and all Liens other than Permitted Liens (other than Real Property, which is addressed by Section 4.24). The Assets are all the material assets and property that are necessary to enable the businesses of the Company and its Subsidiaries to be conducted immediately after the Closing in substantially the same manner as the businesses of the Company and its Subsidiaries have been conducted since the date of the Last Audited Balance Sheet. Each such Asset is free from all material defects, has been maintained in accordance with normal industry practice, is in good operating condition and repair (subject to normal wear and tear) and is suitable, adequate and sufficient for the purposes for which it presently is used and presently is proposed to be used and is adequate and sufficient to carry on the Company's business as presently conducted. Except as set forth on Schedule 4.24, each material Asset used by the Company is included in the Most Recent Balance Sheet.

4.24 Real Property.[63]

(a) Schedule 4.24(a) sets forth a complete list, including an address and description, of all real property, if any, owned in fee by the Company or its Subsidiaries (the "Owned Real Property"). With respect to each Owned Real Property, (i) the Company or its Subsidiaries has good and valid indefeasible fee simple title, free and clear of all Liens except Permitted Liens, (ii) neither the Company nor its Subsidiaries has leased, licensed or otherwise granted to any Person the right to use or occupy the Owned Real Property or any portion thereof and (iii) there are no outstanding options, rights of first offer or rights of first refusal to purchase the Owned Real Property or any portion thereof or interest therein.

(b) Schedule 4.24(b) sets forth a complete list, including an address, of each leasehold or subleasehold estate or other right to use or occupy any interest in real property held by the Company or its Subsidiaries ("Leased Real Property" and, together with Owned Real Property, the "Real Property") and the real property leases (including all amendments, guaranties and other agreements with respect thereto) relating to each such Leased Real Property. With respect to each Leased Real Property, (i) the Company or its Subsidiaries' possession and quiet enjoyment under the applicable real property lease has not been disturbed, and (ii) neither the

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[62] Note: While the Company's Most Recent Balance Sheet will list its assets, it is not uncommon for Buyers to request a representation to the effect that the Company has valid title to its assets, free and clear of liens, that the assets are all the material assets used by the Company for its current operations and that such assets are in sufficient condition for the purposes for which they are being used. Some components of this representation may be more customary / appropriate in certain contexts than others. For example, if Buyer has a sufficient opportunity to conduct due diligence, a lesser representation may be needed than if Buyer does not have an opportunity to conduct much due diligence regarding the Company's assets prior to signing.

[63] Note: Representations regarding real property can vary greatly from deal to deal. If the Company has significant real property holdings that are material to its business, it may be appropriate to have more robust real property representations. Alternatively, Buyer may be able to adequately satisfy itself of some of the components of this example representation through its pre-signing due diligence, and the availability of title insurance could arguably reduce or even eliminate the need for a title representation regarding the real property in certain circumstances.

Company nor its Subsidiaries has subleased, licensed or otherwise granted any other person the right to use or occupy any Leased Real Property or any portion thereof.

(c) The Real Property comprises all of the real property that is used in or held for use in connection with the businesses of the Company and its Subsidiaries. There is no pending or, to the Company's Knowledge, threatened condemnation, expropriation or other governmental taking of any part or interest in any Owned Real Property or, to the Company's Knowledge, Leased Real Property. Except as set forth on Schedule 4.24(c), the current and intended use and occupancy of the Real Property and the operation of the Company and its Subsidiaries' businesses as currently conducted and intended to be conducted thereon do not violate any applicable zoning Law, easement, covenant, condition, restriction or similar provision in any instrument of record affecting the Owned Real Property, or to the Company's Knowledge, the Leased Real Property.

4.25 Full Disclosure.[64] No representation or warranty regarding the Company in this Article IV contains any untrue statement of a material fact, or omits to state a material fact necessary to make the statements contained therein, in light of the circumstances in which they are made, not misleading.

BUYER ACKNOWLEDGES THAT EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS ARTICLE IV AND IN THE OTHER APPLICABLE TRANSACTION DOCUMENTS, NEITHER THE COMPANY, ANY SELLER NOR ANY OTHER PERSON ON BEHALF OF THE COMPANY OR ANY SELLER, MAKES ANY OTHER EXPRESS OR IMPLIED REPRESENTATION OR WARRANTY WITH RESPECT TO THE COMPANY, AND ALL OTHER REPRESENTATIONS AND WARRANTIES WITH RESPECT TO THE COMPANY ARE HEREBY DISCLAIMED.[65]

[64] Note: The "full disclosure" representation is often negotiated. Many Buyers will argue that the representation is akin to a Rule 10b-5 standard under the Securities and Exchange Act of 1934, which (according to Buyer) should be appropriate in an equity purchase, and many Sellers will argue that they prefer to negotiate whatever slate of representations and warranties Buyer deems is appropriate, but would prefer to avoid a broad "full disclosure" representation that could be construed as a broad catch-all. Depending on a number of factors, some Sellers may be willing to give the representation, or give the representation on a knowledge qualified basis.

[65] Note: It is fairly common for Sellers to attempt to include some formulation of a provision similar to this to avoid any implied representations. In most transactions, Sellers will provide Buyer and its representatives with significant amounts of information in connection with its due diligence, not all of which is subject to the representations and warranties contained in the final definitive purchase agreement. As a result, most Sellers will want to include some form of disclaimer of other representations and/or "non-reliance" representation in order to prevent Buyer from asserting that it relied on representations or statements made by Sellers that were not included in the definitive purchase agreement. The example disclaimer language in this form is fairly typical, but there are many variations. Many Sellers may prefer a more expansive disclaimer. Buyers should be mindful to ensure that the disclaimer is appropriately worded so as not to diminish the meaning or effectiveness of the representations and warranties that are negotiated and included in the definitive purchase agreement.

ARTICLE V
REPRESENTATIONS AND WARRANTIES OF SELLERS

Each Seller, severally and not jointly,[66] hereby represents and warrants to Buyer as follows:[67]

5.1 Organization; Existence. Such Seller (other than a Seller that is an individual) is duly organized, validly existing and in good standing under the Laws of the jurisdiction of its formation or organization. Such Seller (other than a Seller that is an individual) has all requisite power and authority to own its assets and to carry on its business as presently conducted, and is duly qualified to transact business in each jurisdiction in which the nature of the business conducted by it requires such qualification.

5.2 Authorization; Enforceability. If applicable, the execution, delivery, and performance by such Seller of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by all necessary action on the part of such Seller. If such Seller is an individual, such Seller is of lawful age and has the legal capacity to execute, deliver and perform his or her respective obligations under this Agreement without the need for consent or authorization of any other Person. This Agreement has been duly executed and delivered by such Seller and constitutes a valid and legally binding obligation of such Seller, enforceable against such Seller in accordance with its terms, except as enforcement may be limited by applicable bankruptcy, insolvency, reorganization, moratorium and other Laws affecting creditors' rights generally and except insofar as the availability of equitable remedies may be limited by applicable Law.

5.3 No Conflicts. Except as set forth on Schedule 5.3, the execution, delivery and performance by such Seller of this Agreement and the consummation of the transactions contemplated hereby do not and will not (a) (if such Seller is not an individual) conflict with or result in a breach of any provisions of the Organizational Documents of such Seller, (b) result in a default or give rise to any right of termination, cancellation or acceleration or, result in the creation of any Lien (other than Permitted Lien) under any of the terms, conditions or provisions of any agreement to which such Seller is a party or by which such Seller is otherwise subject or bound or (c) violate any Law applicable to such Seller.

5.4 Ownership of Membership Interest. Such Seller owns, beneficially and of record, the portion of the Membership Interests set forth opposite such Seller's name on Exhibit A. Such Seller holds good and valid title to the portion of the Membership Interests set forth opposite its name on Exhibit A, free and clear of all Liens other than Permitted Liens and Liens imposed by applicable securities Laws. At Closing, such Seller will convey the portion of the Membership Interests set forth opposite such Seller's name on Exhibit A to Buyer free and clear of all Liens other than Permitted Liens and Liens imposed by applicable securities Laws, at which time Buyer will acquire good and valid title to such Membership Interests.

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[66] See note regarding joint and several vs. several liability in Section 10.2.

[67] Note: See notes in Article 4 regarding similar representations regarding the Company.

5.5 Broker's Fees. Such Seller has no Liability to pay any fees or commissions to any investment banker, broker, finder, or similar agent with respect to the transactions contemplated by this Agreement for which Buyer or any of its Affiliates could become directly or indirectly liable.

5.6 Not a Foreign Person.[68] Such Seller is not a "foreign person" within the meaning of Code Section 1445 and the Treasury Regulations promulgated thereunder.

5.7 Full Disclosure. No representation or warranty by such Seller in this Article V contains any untrue statement of a material fact, or omits to state a material fact necessary to make the statements contained therein, in light of the circumstances in which they are made, not misleading.

BUYER ACKNOWLEDGES THAT EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS ARTICLE V AND IN THE OTHER APPLICABLE TRANSACTION DOCUMENTS, NO SELLER NOR ANY OTHER PERSON ON BEHALF OF ANY SELLER, MAKES ANY OTHER EXPRESS OR IMPLIED REPRESENTATION OR WARRANTY WITH RESPECT TO SUCH SELLER, AND ALL OTHER REPRESENTATIONS AND WARRANTIES WITH RESPECT TO SUCH SELLER ARE HEREBY DISCLAIMED.

ARTICLE VI
REPRESENTATIONS AND WARRANTIES OF BUYER

Buyer hereby represents and warrants to the Company and Sellers as follows:[69]

6.1 Organization; Existence. Buyer is a [_____] duly formed, validly existing and in good standing under the Laws of the State of [_____]. Buyer has all requisite power and authority to own its assets and to carry on its business as presently conducted, and is duly qualified to transact business as a foreign limited liability company in each jurisdiction in which the nature of the business conducted by it requires such qualification.

6.2 Authorization; Enforceability. The execution, delivery, and performance by Buyer of this Agreement and the consummation of the transactions contemplated hereby (a) are within Buyer's powers and (b) have been duly authorized by all necessary action on the part of Buyer. This Agreement has been duly executed and delivered by Buyer and constitutes a valid and legally binding obligation of Buyer, enforceable against Buyer in accordance with its terms, except as enforcement may be limited by applicable bankruptcy, insolvency, reorganization, moratorium and other Laws affecting creditors' rights generally and except insofar as the availability of equitable remedies may be limited by applicable Law.

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[68] Note: This representation serves the same purpose as the "FIRPTA certificate" discussed in the applicable note to Section 3.2(a)(iii).

[69] Note: See notes in Article IV regarding similar representations regarding the Company. One can argue that the corresponding representations of the parties should be subject to the same standard; however, one can also argue that certain of the Buyer's representations should be subject to a lesser standard on the basis that Sellers are not damaged as long as they receive their pro rata portion of the Purchase Price and are not exposed to post-closing liability as a result of the different standard. Some of the example representations in this Article VI (e.g., Consents and Claims and Litigation) are subject to a different standard on that basis.

6.3 No Conflicts. The execution, delivery and performance by Buyer of this Agreement and the consummation of the transactions contemplated hereby do not and will not (a) conflict with or result in a breach of any provisions of the Organizational Documents of Buyer or (b) result in a default or give rise to any right of termination, cancellation or acceleration or, result in the creation of any Lien (other than Permitted Lien) under any of the terms, conditions or provisions of any agreement to which Buyer is a party or by which Buyer is otherwise subject or bound or (c) violate any Law applicable to Buyer, except in the case of clauses (b) and (c) where such default, Lien, termination, cancellation, acceleration or violation would not have a material adverse effect on Buyer's ability to consummate the transactions contemplated by this Agreement, or to perform its obligations hereunder.

6.4 Consents. No consent, approval or authorization of, declaration to or filing or registration with, any Governmental Authority or any Third Party, is required to be made or obtained by Buyer in connection with the execution, delivery and performance by Buyer of this Agreement or the consummation by Buyer of the transactions contemplated hereby, except for such consents or approvals the failure of which to obtain would not reasonably be expected to have a material adverse effect on Buyer's ability to consummate the transactions contemplated by this Agreement, or to perform its obligations hereunder.

6.5 Claims and Litigation. There is no Proceeding by any Person by or before any Governmental Authority or arbitrator, pending, or to Buyer's Knowledge, threatened against Buyer or any of its Affiliates that would have a material adverse effect upon the ability of Buyer to consummate the transactions contemplated by this Agreement, or to perform its obligations hereunder.

6.6 Broker's Fees. None of Buyer or any of its Affiliates has any Liability to pay any fees or commissions to any investment banker, broker, finder, or similar agent with respect to the transactions contemplated by this Agreement for which Sellers or any of their respective Affiliates could become directly or indirectly liable.

6.7 Financial Capability.[70] At the Closing, Buyer shall have sufficient immediately available funds to pay the full Purchase Price and to make all other payments required to be made by Buyer under this Agreement, to pay all related fees and expenses in connection with this Agreement and the transactions contemplated hereby and to otherwise consummate the transactions contemplated hereby in accordance with the terms hereof.

6.8 Independent Evaluation.[71] Buyer is knowledgeable and sophisticated in the evaluation, purchase, ownership and operation of businesses similar to the businesses in which

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[70] Note: A "Financial Capability" representation is designed to give Sellers assurance that Buyer has, or at closing will have, sufficient resources available to consummate the transaction. Even where there is no financing contingency (as is contemplated by this form), Seller may still wish to have assurances that Buyer has the financial ability to close. Note, however, that if Buyer is a newly formed entity or an entity with insufficient assets, such a representation may be of little utility value, so in such a situation, a Seller may desire other assurance of Buyer's ability to perform (e.g., a parental or affiliate guaranty).

[71] Note: The "Independent Evaluation" representation serves a similar purpose to Seller's disclaimer of other representations (i.e., to avoid any implied representations), and, like the "Investor Representations" representation in

the Company and its Subsidiaries are engaged. Buyer, both directly and through its Affiliates and representatives, has conducted its own independent investigation, review and analysis of the Company, each of its Subsidiaries and their respective businesses, assets and Liabilities, the Membership Interests and the transactions contemplated by this Agreement, which investigation, review and analysis was done by Buyer and its own legal, Tax, economic, environmental, and other necessary advisors. Buyer acknowledges that it has been provided access to the personnel, properties, assets, premises, books and records, and other documents and data relating to the Company, each of its Subsidiaries, their respective businesses, assets and Liabilities, the Membership Interests and the transactions contemplated hereby for such purpose. Buyer further acknowledges and agrees that (a) in making its decision to enter into this Agreement and the transactions contemplated hereby, it has relied solely upon (i) such independent investigation, review and analysis, (ii) the representations and warranties regarding (A) the Company that are set forth in Article IV and in the other applicable Transaction Documents, and (B) regarding Sellers that are set forth in Article V and in the other applicable Transaction Documents, and (iii) the covenants and other agreements of the Company and Sellers contained herein and in the other applicable Transaction Documents, and (b) neither Sellers nor any other Person has made, is making or has any duty to make any representation or warranty (express or implied, written or oral, at Law or in equity) as to the Company, any of its Subsidiaries, their respective businesses, assets or Liabilities, the Membership Interests, the transactions contemplated by this Agreement, or any other matter, except solely for (A) those representations and warranties regarding the Company contained in Article IV and in the other applicable Transaction Documents, and (B) those representations and warranties regarding Sellers expressly contained in Article V and in the other applicable Transaction Documents.

6.9 Investor Representations.[72] Buyer is acquiring the Membership Interests solely for investment purposes only for Buyer's own account and not with a view to the distribution, reoffer, resale, or other disposition in violation of the Securities Act and applicable state

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Section 6.9, contains representations similar to what one would expect to see in a subscription agreement (see also note below regarding the "Investor Representations"). In most transactions, Sellers will provide Buyer and its representatives with significant amounts of information in connection with its due diligence, not all of which is subject to the representations and warranties contained in the final definitive purchase agreement. As a result, most Sellers will want to include some form of "non-reliance" representation in order to prevent Buyer from asserting that it relied on representations or statements made by Sellers that were not included in the definitive purchase agreement. Buyers should be mindful to ensure that the non-reliance representation is appropriately worded so as not to diminish the meaning of the representations, warranties, covenants and other agreements of Sellers (and, where applicable, the Company) that are included in the definitive purchase agreement. Buyers may also wish to attempt to carve-out instances of fraud (in which case Sellers may desire to define "fraud").

[72] Note: The "Investor Representations" contain representations similar to what one would expect to see in a subscription agreement. The Securities Act generally requires that, before securities can be sold, such securities must be registered with the Securities Exchange Commission or an exemption from registration must be available. In practice, many purchases of LLC membership interests are exempt from registration under Regulation D promulgated under the Securities Act. The purpose of the "Investor Representations" (and, to some extent, the "Independent Evaluation" representation) is for Buyer to represent that certain facts relevant to the availability of the applicable exemption have been met. In some cases, more than one exemption may be available, in which case the parties may include representations applicable to more than one exemption. In the event that only one exemption applies, the parties may wish to tailor the representations to ensure that it addresses each component of the applicable exemption upon which the parties are relying.

securities Laws. Buyer possesses such expertise, knowledge, and sophistication in financial and business matters generally, and in the type of businesses in which the Company and its Subsidiaries are engaged in particular, that Buyer is capable of evaluating the merits and economic risks of acquiring and holding the Membership Interests, and Buyer is able to bear all such economic risks now and in the future. Buyer has had access to all of the information with respect to the Membership Interests, the Company, its Subsidiaries and their respective businesses, assets and Liabilities that Buyer deems necessary to make a complete evaluation thereof, and such Buyer's decision to acquire the Membership Interests for investment has been based solely upon (a) the evaluation made by Buyer, (b) the representations and warranties (i) regarding the Company as set forth in Article IV and in the other applicable Transaction Documents, and (ii) regarding Sellers as set forth in Article V and in the other applicable Transaction Documents and (c) the covenants and other agreements of the Company and Sellers contained herein and in the other applicable Transaction Documents. Buyer is aware that Buyer must bear the economic risk of Buyer's investment in the Membership Interests for an indefinite period of time because the Membership Interests have not been registered under the Securities Act or under the securities laws of any state, and, therefore, cannot be sold unless subsequently registered under the Securities Act and any applicable state securities laws or an exemption from registration is then available. Buyer is an "accredited investor" as defined under Regulation D promulgated under the Securities Act.

SELLERS AND THE COMPANY ACKNOWLEDGE THAT EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES CONTAINED IN THIS ARTICLE VI, NEITHER BUYER NOR ANY OTHER PERSON ON BEHALF OF BUYER, MAKES ANY OTHER EXPRESS OR IMPLIED REPRESENTATION OR WARRANTY WITH RESPECT TO BUYER, AND ALL OTHER REPRESENTATIONS AND WARRANTIES WITH RESPECT TO BUYER ARE HEREBY DISCLAIMED.

ARTICLE VII
COVENANTS OF THE PARTIES[73]

7.1 Books and Records.[74] During the period from the date of this Agreement until the earlier of the Closing Date or termination of this Agreement pursuant to Article IX, Seller and

[73] Note: In contrast to representations and warranties, which are generally statements of fact that speak as of a particular point in time, covenants are generally promises to do or refrain from doing something in the future. Some purchase agreements may separate pre-closing covenants and post-closing covenants into separate articles, which can be helpful, but is not necessary. The example covenants contained in this form may or may not be appropriate for a particular transaction, and additional covenants (e.g., regarding financing, certain employment matters (e.g., continuing to offer employment to substantially all employees on substantially similar terms, WARN act liability, etc.), termination of intercompany agreements, etc.) may be appropriate for some transactions.

[74] Note: In a sign and subsequent close transaction, it is not uncommon for Buyer to continue to conduct certain due diligence, therefore, continued access to the Company's books, records, properties and, in some cases, personnel, is often appropriate. Many Sellers may be sensitive to what personnel of the Company are aware of the transaction, especially prior to signing (and, in some cases, prior to Closing), and as such, post-signing may be the first opportunity Buyer has to have discussions with certain personnel. Because, for example, most purchase agreements allocate pre-closing tax liability to Sellers, many Sellers request Buyer to retain records regarding the Company for a specified period of time after Closing, and to allow Sellers reasonable access to such records for a legitimate

the Company shall afford Buyer and its representatives reasonable access to the books and records, properties and employees of the Company and its Subsidiaries, during normal business hours, upon reasonable advance written notice. Such access shall be conducted in such a manner as not to unreasonably interfere with the operation of the business of the Company or any of its Subsidiaries. After the Closing, Buyer shall cause the Company to preserve and keep the books and records of the Company and its Subsidiaries in existence prior to the Closing Date for a period of three (3) years from the Closing Date. During such period, Buyer will cause the Company to, upon prior written notice for a legitimate business purpose reasonably approved by Buyer, provide to the Seller Representative and its representatives reasonable access to such books and records during normal business hours for review, it being understood that all such books and records constitute Confidential Information and shall be subject to the provisions of Section 7.8. Such access shall be conducted in such a manner as not to unreasonably interfere with the operation of the business of Buyer, the Company or any of its Subsidiaries.

7.2 Further Assurances.[75] If any further action is necessary or desirable to carry out the purposes of this Agreement and the other Transaction Documents, or to consummate the transactions contemplated hereby and thereby, each Party will take such further commercially reasonable action (including the execution and delivery of such further instruments and documents) as the other Party reasonably may request; provided, however, that neither Party shall be required to incur any out-of-pocket expense in connection therewith if it may be entitled to indemnity in connection therewith or if it is an obligation of another Party.

7.3 Cooperation to Consummate Transaction.[76] Subject to the terms and conditions set forth in this Agreement, Sellers, the Company and Buyer shall cooperate with each other and use (and shall cause their respective Affiliates to use) their respective reasonable best efforts to take or cause to be taken all actions, and to do or cause to be done all things, reasonably necessary, proper or advisable on their part under this Agreement and applicable Law to consummate the transactions contemplated by this Agreement as soon as practicable, including preparing and filing as promptly as practicable all documentation to effect all necessary notices, reports and other filings and to obtain as promptly as practicable all Permits necessary to be obtained from any Governmental Authority in order to consummate the transactions contemplated by this Agreement. Subject to applicable Laws relating to the exchange of information and appropriate confidentiality protections, Buyer and Seller shall cooperate in good

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business purpose (e.g., in the event of an audit of the Company's records attributable to the pre-closing period). The scope and duration of such covenant is often negotiated.

[75] Note: Some formulation of a "Further Assurances" covenant is customary in most purchase agreements and other agreements. The parties should be mindful to ensure that the covenant is appropriate in scope, mutual where applicable, and not overreaching.

[76] Note: It is fairly common for a purchase agreement to include provisions regarding cooperation in connection with any matters necessary to consummate the contemplated transactions. The example provision contains a general cooperation obligation as well as a more specific obligation to attempt to obtain all required consents. In some circumstances, such as where particular governmental approvals are required, additional and more specific provisions may be advisable (e.g., if a filing is required under the Hart-Scott-Rodino Act, the parties may wish to include additional provisions regarding the timing of making such filing, the payment or allocation of the filing fee, coordination of any additional requests received and, in some cases, provisions regarding what happens in the event of a challenge).

faith in the preparation of the other's notices, reports and filings (including by responding reasonably to questions or requests by any Government Authority), shall have the right to review in advance, and, to the extent practicable, each will consult in advance with the other on and consider in good faith the views of the other in connection with, all of the information relating to Buyer, Seller, the Company and its Subsidiaries, as the case may be, and any of their respective Affiliates, that appears in any filing made with, or written materials submitted to, any third party and/or any Governmental Authority in connection with the transactions contemplated by this Agreement. Without limiting the foregoing, as promptly as practicable after the execution of this Agreement, but in any event prior to the Closing, each Party to this Agreement (a) shall make all filings (if any), and give all notices (if any), and give all information (if any) required to be made and given by such Party in connection with the transactions contemplated hereby and (b) shall use commercially reasonable efforts to obtain all consents (if any) required to be obtained (pursuant to any applicable Law, contract, agreement, or otherwise) by such Party in connection with the transactions contemplated hereby. During the period from the date of this Agreement until the earlier of the Closing Date or termination of this Agreement pursuant to Article IX, each Party shall promptly notify the other Party in writing of any fact, change, condition, circumstance or occurrence or nonoccurrence of any event of which it is aware that will or is reasonably likely to result in any of the conditions set forth in Article VIII becoming incapable of being satisfied.

7.4 Public Announcements.[77] Unless otherwise required by applicable Law, each Party shall not, and each Party shall cause its Affiliates, agents and other representatives not to, make any disclosure or public announcements or otherwise communicate with any news media without the prior written consent of the other Party in respect of this Agreement and the other Transaction Documents or the transactions contemplated hereby and thereby (including price and terms); provided, however, press releases related to this Agreement and the transactions contemplated herein may be issued with the prior written consent of each of Buyer and Seller Representative (which consent shall not be unreasonably withheld, delayed or conditioned). If a disclosure is required by applicable Law, Buyer or Seller Representative, as applicable, shall promptly notify the other Party in writing and shall disclose only that portion of such information which such Party is advised by its counsel is legally required to be disclosed; provided, however, that such Party shall use commercially reasonable efforts to obtain, and promptly notify the other Party in writing so that such other Party shall be able to seek to obtain, an appropriate protective order or other reasonable assurance that confidential treatment will be accorded such

[77] Note: One, and in some cases each, party may wish to control (or at least have a say) in how and when the transaction is publicly announced (if at all), and the contents of any public announcement. This is usually accomplished by the inclusion of a covenant regarding public announcements, specifying who can make such an announcement, whether the announcement requires the approval of the other party or one of its representatives, and the standard of such approval (e.g., not to be unreasonably withheld). The terms of such a covenant can vary greatly (for example, some parties are sensitive to the purchase price being disclosed). The parties should ensure there is an appropriate carve-out for disclosures required by Law and ensure they understand whether some form of disclosure may be required (e.g., if so required by applicable securities Laws). In addition, the parties should be mindful that in some cases it may make sense to negotiate a form of public announcement to be made at signing or closing in order to control the timing and the messaging, as it is usually wise for the transaction to be announced internally before it is announced publicly and the more third parties know about the transaction (e.g., sending request for consents to third parties) the greater the likelihood that the existence of the transaction could be disclosed.

information. The Parties may disclose the existence and terms of this Agreement to their respective Affiliates, agents and other representatives (including their respective financing sources and debt and equity investors) so long as each such Person is advised of the confidential nature of such information and agrees to keep such information confidential in accordance with the applicable provisions of this Agreement.

7.5 Transfer Taxes.[78] Sellers and Buyer believe that the purchases and sales contemplated by this Agreement are exempt from or are otherwise not subject to Transfer Taxes. If Transfer Taxes do apply to the purchases and sales contemplated by this Agreement, Buyer shall be responsible for one-half of any Transfer Taxes incurred in connection with such transactions, and Sellers shall be responsible for the remaining Transfer Taxes incurred in connection with such transactions.[79] The Parties will cooperate with one another and take such actions as may be commercially reasonable in order to attempt to reduce, minimize or eliminate any such Transfer Taxes. Each Party shall timely file or cause to be filed all documents required to be filed by it with respect to Transfer Taxes under applicable Law. Prior to, or in no event later than the Closing, each Party shall provide to the other Party, as applicable, copies of any applicable and available exemption certificates necessary to establish the right to any exemption from Transfer Taxes. Each Party shall thereafter provide the other Party, as applicable and available, with any additional exemption certificates and other documentation as may be required by the Taxing authority having jurisdiction for such purpose.

7.6 Other Tax Matters.

(a) Cooperation.[80] Sellers and Buyer shall, and Buyer shall cause the Company to, cooperate fully, as and to the extent reasonably requested by the other Party, in connection with the filing of Tax Returns pursuant to this Section 7.6 and any audit, examination, litigation or other Proceeding with respect to Taxes regarding the Company or its Subsidiaries.[81] Such cooperation shall include the retention and (upon the other party's request)

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[78] Note: Under current Texas law, the sale of membership interests in a company is not subject to Transfer Taxes, even though for federal income tax purposes, under Section 2.6, the Buyer treats the sale as a purchase of the assets of the Company. However, depending upon the facts and circumstances at hand, the laws of one or more other states may apply in connection with the sale, and certain Transfer Taxes may apply. Accordingly, in the event that a transaction could be subject to Transfer Taxes, it is advisable to include cooperation language in this provision, particularly if an exemption from Transfer Taxes is available only if certain requirements are satisfied (e.g., the delivery of certificates, affidavits, or other documentation to establish or support a basis for a Transfer Tax exemption.)

[79] Note: This is a negotiation item. Another possibility is for Buyer or Seller to be entirely responsible for Transfer Taxes.

[80] Note: Sellers particularly will want to include a provision requiring the Buyer to cooperate with Sellers in the event of any future audit or litigation. Additionally, access to the Company's employees who were employed by the Company when it was owned by Sellers and who are familiar with and can explain prior reporting could be important in the event of an audit or examination.

[81] Note: Under new partnership audit rules, the IRS can attempt to recover a tax underpayment (including any interest and penalties relating thereto) from an entity that is treated as a partnership for federal income tax purposes (rather than from its partners.) Thus, for example, in a situation in which (i) the IRS is auditing an entity treated as a partnership for federal income purposes in the post-Closing period but the audit relates to a pre-Closing tax year; (ii)

the provision of records and information that are reasonably relevant to any such audit, examination, litigation or other Proceeding with respect to Taxes and making employees available on a mutually convenient basis to provide additional information and explanation of any material provided hereunder.

(b) Filing of Pre-Closing and Straddle Period Tax Returns.[82] Sellers shall prepare or cause to be prepared the Tax Returns of the Company and its Subsidiaries for all Pre-Closing Tax Periods and cause such Tax Returns to be timely filed. Such Company Tax Returns shall be prepared in a manner consistent with past practice and custom of the Company, except as otherwise required by applicable Law. To the extent applicable, Buyer shall authorize the officers of the Company to cooperate in filing all such Tax Returns. Buyer shall prepare or cause to be prepared all other Tax Returns of the Company. Such Tax Returns shall be prepared on a basis consistent with past practice except to the extent otherwise required by applicable Law. Reasonably in advance of the due date for filing a Straddle Period Tax Return (which shall not be later than thirty (30) days prior to such due date), Buyer shall deliver a copy of such Tax Return, and such supporting documentation and workpapers as may reasonably be requested, to Seller Representative for its review and reasonable comment. Buyer will cause all such Tax Returns (as revised to incorporate Seller Representative's reasonable comments) to be timely filed and will provide a copy to Seller Representative.

(c) Proration of Straddle Period Tax Returns.[83] For purposes of determining the amount of Taxes payable with respect to a Straddle Period that constitute Pre-Closing Taxes,

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there was more than one buyer of such entity (so that the entity will not be treated as having ceased to exist under the principles of Revenue Ruling 99-6, as discussed in the footnote accompanying Section 2.6); (iii) the entity has not elected out of the new partnership audit rule regime; and (iv) the entity has not elected to "push-out" the liability for the tax underpayment to the partners of the partnership for the tax year under review (i.e., the sellers), the entity (directly) and the buyers (indirectly) would be liable for any tax underpayment. As such, when the IRS is auditing an entity that is treated as a partnership for federal income purposes in the post-Closing period but the audit relates to a pre-Closing tax year (and when the entity has not elected out of the new partnership audit rule regime) the entity, through a decision of the buyers, may elect to "push out" the liability for the tax underpayment to the partners in the pre-Closing tax year (i.e., the sellers). In such a situation however, the interest rate charged to the sellers in respect of the liability for the tax underpayment would be 2% higher than the interest rate that would otherwise apply. In view of this example (among others), in the situation when there is more than one buyer, the sellers and the buyers may wish to consider the potential consequences of audits under the new partnership audit rule regime (including whether an election out of the new partnership audit rule regime can be made prior to or after the sale) and negotiate accordingly.

[82] Note: In the scenario when the Sellers are selling all of the membership interests in the Company to a single Buyer, as discussed in the footnote accompanying Section 2.6, the transaction will be treated as an asset purchase for the Buyer and the company will terminate for federal income tax purposes. Therefore, the Sellers will want to file all Tax Returns for all Pre-Closing Tax Periods prior to the Closing, to the extent that it can.

[83] Note: This provision addresses how Taxes will be allocated between the Buyer and the Sellers for Straddle Periods (tax periods beginning prior to Closing and ending after Closing). The allocation of activity-related taxes (e.g., income tax and franchise/margin tax) is typically allocated based on a "closing of the books" method so that the Sellers are responsible for all Taxes related to the Company's activities prior to the sale and the Buyer is responsible for Taxes on the Company's activities thereafter. Annual taxes, such as ad valorem taxes, are typically allocated between the Sellers and the Buyer pro rata based on the number of days in the Straddle Period prior to Closing compared to the number of days in the Straddle Period after closing.

the portion of any such Taxes that is attributable to the portion of the Straddle Period ending on the Closing Date shall be:

(i) in the case of Taxes that are either (A) based upon or related to income or receipts, or (B) imposed in connection with any sale or other transfer or assignment of property (real or personal, tangible or intangible) deemed equal to the amount that would be payable if the Tax period of the Company ended with (and including) the Closing Date using a deemed closing of the books method; provided that exemptions, allowances or deductions that are calculated on an annual basis (including depreciation and amortization deductions) shall be allocated between the portion of the period ending on and including the Closing Date and the portion of the period beginning after the Closing Date in proportion to the number of days in each period; and

(ii) in the case of Taxes that are imposed on a periodic basis with respect to the assets or capital of the Company, deemed to be the amount of such Taxes for the entire Straddle Period (or, in the case of such Taxes determined on an arrears basis, the amount of such Taxes for the immediately preceding period), multiplied by a fraction the numerator of which is the number of calendar days in the portion of the period ending on and including the Closing Date and the denominator of which is the number of calendar days in the entire period.

(d) Responsibility for Taxes.[84] Sellers shall be responsible for the payment of all Pre-Closing Taxes, if any, that are not taken into consideration as a liability of the Company in connection with the calculation of the Final Net Working Capital adjustment in Section 2.4; provided that if Buyer pays any portion of such Pre-Closing Taxes that Sellers are responsible for paying, then as promptly as practicable after delivery to Seller Representative of proof of such payment, Sellers will pay to Buyer the amount of such Pre-Closing Taxes paid by Buyer. Buyer shall be responsible for the payment of all Pre-Closing Taxes, if any, that are taken into consideration as a liability of the Company in connection with the calculation of the Net Working Capital adjustment in Section 2.4 and all other Taxes imposed on the Company that are not Pre-Closing Taxes; provided that if Sellers pay any portion of such Taxes that Buyer is responsible for paying, then as promptly as practicable after delivery to Buyer of proof of such payment, Buyer will pay to Sellers the amount of such Taxes paid by Sellers.

(e) Amended Tax Returns. Unless required by applicable Law, no amended Tax Return with respect to a Pre-Closing Period or a Straddle Period shall be filed by or on behalf of the Company or any of its Subsidiaries without the consent of the Seller Representative.

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[84] Note: This provision provides that the Sellers will be responsible for all Pre-Closing Tax, which includes Sellers' portion of the Straddle Period Taxes, and that Buyer will be responsible for all other Company Taxes. When reviewing or drafting this allocation of responsibility for Taxes, be sure that the Sellers do not get charged twice for Pre-Closing Taxes, which can happen if a liability for Pre-Closing Taxes is included in the Working Capital and is not excluded from the Sellers' obligations in this provision.

(f) Tax Refunds. The amount of any refunds of Taxes of the Company for a Pre-Closing Period that ends on or before the Closing Date shall be for the account of Sellers. The amount of any refund of Taxes of the Company for any Straddle Period shall be equitably apportioned between Buyer and Sellers in accordance with the principles set forth in Section 7.6(c). Each Party shall forward, to the Party entitled to receive a refund of Tax pursuant to this Section 7.6(f) the amount of such refund within thirty (30) days after such refund is received, net of any reasonable out-of-pocket costs or expenses incurred by such Party or its Affiliates in procuring such refund. For purposes of this Section 7.6(f), any such amount credited against Taxes of the Company rather than refunded shall be treated as a "refund."

7.7 Pre-Closing Operation of the Company.[85] During the period from the date of this Agreement until the earlier of the Closing Date or termination of this Agreement pursuant to Article IX, except (a) as required to implement this Agreement, (b) as Buyer shall otherwise consent in writing and (c) as required by applicable Law, Sellers shall, and shall cause the Company and its Subsidiaries, as applicable, to conduct their business in the ordinary course consistent with past practice (including maintaining all insurance policies currently in place with respect to the Company and its Subsidiaries) and use its commercially reasonable efforts to (i) preserve intact the Company's and its Subsidiaries' goodwill, (ii) keep available the services of the Company's and its Subsidiaries' officers and employees and (iii) preserve the Company's and its Subsidiaries' business relationships with their material customers and suppliers. Without limiting the foregoing, during the period from the date of this Agreement until the earlier of the Closing Date or termination of this Agreement pursuant to Article IX, except (i) as required to implement this Agreement, (ii) as Buyer shall otherwise consent in writing and (iii) as required by applicable Law, Sellers shall not, and shall cause the Company and its Subsidiaries not to, (A) take any of the actions listed in Section 4.8 that, had such actions been taken since the Last Audited Balance Sheet, would be required to be listed on Schedule 4.8 or (B) enter into any contract that, had such contract been in existence on the Execution Date, been required to be listed on Schedule 4.10(a).

7.8 Confidentiality.[86] Each Seller agrees, severally and not jointly,[87] shall hold in confidence, and cause its Affiliates and representatives to hold in confidence and not use, any confidential or proprietary information of the Company or any of its Subsidiaries, except to the extent that such information: (i) is generally available to the public through no breach of this

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[85] Note: It is fairly common to include some kind of covenant regarding how the Company will be operated between signing and closing. This is often an "ordinary course of business" standard, with carve-outs for actions contemplated by the purchase agreement, taken with the approval of Buyer or as otherwise required by Law, and an obligation to refrain from taking certain specified actions.

[86] Note: Buyers often wish to protect the confidentiality of the confidential information of the Company such Buyer is acquiring. Therefore, it is not uncommon for Buyer to request a covenant regarding confidentiality and use of such confidential information. The scope of this obligation (including as to what constitutes confidential information, the duration (if any) of the obligation, and the carve-outs to the obligation) are often negotiated. It should be noted that not all of the "customary" carve-outs to what constitutes confidential information that are appropriate in many standalone confidentiality agreements are appropriate in the purchase agreement context. For example, carve-outs for information in the Seller's prior possession could abrogate the provision, given that Seller was in possession of all confidential information during the time it owned the Company.

[87] See note regarding joint and several vs. several liability in Section 10.2.

Section 7.8 by such Seller; or (ii) was or is lawfully acquired by such Seller or its Affiliates or representatives from and after the Closing from sources other than Buyer or the Company or their Affiliates which are not prohibited from disclosing such information by a legal, contractual or fiduciary obligation to Buyer, the Company or any of their respective its Affiliates with respect to such information (collectively, "Confidential Information"). If any Seller or its Affiliates or representatives become required to disclose any Confidential Information by judicial or administrative process or by other requirements of Law, Seller Representative shall promptly notify Buyer in writing and such Person shall disclose only that portion of such information which such Person is advised by its counsel is legally required to be disclosed.

7.9 Non-Compete; Non-Solicit.[88]

(a) Non-Compete. Each Seller, severally and not jointly, agrees that for a period of [___] [(__)] years from the Closing Date, such Seller shall not, directly or indirectly, including through one or more agents or representatives, engage in or participate (including, without limitation, as an investor, officer, employee, director, partner, member, manager, agent, representative, creditor, lender, advisor, contractor or consultant in or on behalf of any Person engaging in or deriving benefit from [the distribution or sale of goods or the provision of services of the type or nature distributed, sold or provided by the Company or any of its Subsidiaries as of the Closing Date], including but not limited to the distribution, sale or supply of [_____]. The geographic limitation for the obligations described in this Section 7.9(a) includes [_____]. Each Seller acknowledges and agrees that the market for the products, services, and activities of the Company and its Subsidiaries exist throughout such entire area, and that the Company and/or its Subsidiaries have customers, clients and/or suppliers throughout such entire area.

(b) Non-Solicit. Each Seller, severally and not jointly, agrees that for a period of [___] [(__)] years from the Closing Date, such Seller shall not, directly or indirectly, including through one or more agents or representatives (i) contact, solicit or otherwise call on, or attempt to contact, solicit or otherwise call on, any Person who is, or was within the immediately preceding [___] [(__)] year period prior to the Closing Date, a customer, client or supplier of or to the Company or any of its Subsidiaries for the purpose of generating customers, clients, or suppliers or prospective customers, clients or suppliers on behalf of any Person other than the Company or its Subsidiaries, (ii) request or advise any customers, clients or suppliers of the

[88] Note: Some Buyers may want assurances that Sellers (or some subset of Sellers) will not compete against the Company for some reasonable period of time after Closing. The scope of such provisions can vary greatly from deal to deal. In some cases, it may be appropriate for such obligations to apply to some Sellers (e.g., those who were, or may continue to be, members of senior management of the Company) and not others (e.g., Sellers having small holdings, that were not involved in the day-to-day business of the Company or that are in the business of investing in companies). Some Buyers may desire that certain Sellers who were and will remain employees of the Company be bound by similar obligations in connection with their continued employment by the Company, which may be included in an employment agreement or standalone non-compete and non-solicitation agreement. The Parties should ensure that such obligations are reasonable and appropriately tailored in terms of duration, geographical area and scope, which can vary greatly depending on the facts and circumstances. Overly broad non-compete and non-solicitation provisions can be subject to challenge and may not be enforceable (but may still have the practical effect of making the restricted party unmarketable for the duration of the restricted period).

Company or any of its Subsidiaries to cancel or terminate their relationships with the Company or any of its Subsidiaries or to curtail their dealings with the Company or any of its Subsidiaries, (iii) induce, solicit or encourage, or attempt to induce solicit or encourage, any Person who is or was an employee of the Company or any of its Subsidiaries within the immediately preceding [_____] [(__)] month period prior to the Closing Date to terminate such individual's employment with the Company or any of its Subsidiaries, (iv) solicit, hire or retain the services of, or attempt to solicit, hire or retain the services of, any such person, regardless of whether such person had been solicited for employment, or (v) assist or attempt to assist any other Person in any such activities.

(c) Certain Acknowledgements. Without prejudice to any of the other provisions of this Agreement, each Seller expressly acknowledges and agrees that (i) the terms of this Section 7.9 are reasonable, valid and enforceable, (ii) the scope of such obligations are reasonable in view of the nature of the business in which the Company and its Subsidiaries are engaging and have previously engaged and such Seller's knowledge of the Company's and its Subsidiaries respective businesses, operations and customer, client and supplier relationships that such Seller has had as a result of ownership interest in [and management of] the Company and (iii) the limited prohibition against unfair competition set forth in this Section 7.9 is narrowly tailored to safeguard the Company's and its Subsidiaries legitimate business interests and goodwill [while not unreasonably interfering with such Seller's ability to earn a livelihood without violating such restrictions] and is a material factor, a material inducement and a material condition to Buyer's participation in the transactions contemplated by this Agreement.

7.10 Exclusivity.[89] During the period from the date of this Agreement until the earlier of the Closing Date or termination of this Agreement pursuant to Article IX, no Seller will, the Company and its Subsidiaries will not, and Sellers will cause the Company and its Subsidiaries not to, nor will any of them it authorize or permit any of their respective representatives to (a) solicit or knowingly encourage, facilitate or induce the making, submission or announcement of any inquiry, expression of interest, proposal or offer concerning (i) the sale or other conveyance of the Company or any material portion of the assets of the Company or any of its Subsidiaries as an alternative to the transactions contemplated by this Agreement, (ii) a merger, consolidation, liquidation, recapitalization, share exchange, share purchase or other business combination transaction involving the Company or any of its Subsidiary or (iii) the issuance or acquisition of Membership Interests or other equity securities of the Company or any of its Subsidiaries from any Person other than Buyer, (b) deliver or make available to any Person other than Buyer and its representatives, or to any other Person as required by applicable Law, any Confidential Information other than in the ordinary course of business consistent with past practice, or (c) negotiate, attempt to negotiate or enter into any discussions regarding any agreement, arrangement or understanding with respect to any such alternative transaction, and Sellers and the Company shall promptly notify Buyer in writing in the event that any of them receive an offer or indication of interest from any Third Party regarding any such alternative transaction.

[89] Note: Buyers may wish to include an exclusivity provision to ensure that Sellers / the Company do not attempt to negotiate a backup contract for an alternative transaction in the event that the transactions contemplated by the purchase agreement are not consummated.

7.11 Payoff Letters.[90] Not less than three (3) Business Days prior to the Closing Date, Sellers shall deliver or cause to be delivered to Buyer payoff letters in form and substance reasonably acceptable to Buyer from each holder of any of the Indebtedness set forth on Schedule 2.3(a)(i) containing (a) the payoff amount of such indebtedness as of the Closing Date and a per diem amount thereafter, (b) the payment instructions of such holder and (c) a commitment that upon receipt of such funds on such date, such holder will release all Liens securing such Indebtedness held by it.

7.12 Release by Sellers.[91] From and after the Closing, each Seller, on behalf of itself and each of its Affiliates and its and their respective officers, directors, partners, members, managers, employees, agents, advisors and other representatives and any Person claiming by, through or under any of the foregoing, hereby fully releases and forever discharges each of the Company and its Subsidiaries and its and their respective officers, directors, partners, members, managers, employees, agents, advisors and other representatives from any and all claims and Losses of every kind and character arising from or related to any periods prior to the Closing; provided that the Parties acknowledge and agree that the foregoing release shall not extend to (i) any obligations (or claims relating thereto) that have accrued as of the Closing solely to the extent that such obligations (or claims relating thereto) relate to the payment of compensation or vested employee benefits (other than employee benefits related to equity interests of any kind (convertible, phantom or otherwise)) owing to such Person as a result of his or her employment with the Company or any of its Subsidiaries in the ordinary course of business or (ii) any claims, rights or remedies arising from the breach of any of the representations, warranties, covenants, agreements and obligations set forth in this Agreement. THE FORGOING RELEASE SHALL APPLY NOTWITHSTANDING ANY NEGLIGENCE (INCLUDING GROSS NEGLIGENCE) ON THE PART OF THE COMPANY OR ANY OF ITS SUBSIDIARIES OR ANY OF THEIR RESPECTIVE REPRESENTATIVES.

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[90] Note: If Buyer will pay off some or all of the Company's indebtedness at Closing (as is contemplated by this form), Buyer will likely wish to receive payoff letters from the holders of such indebtedness prior to closing specifying the payoff amount, such holder payment instructions and assurances that upon receipt of such payment, such holder will release any Liens on the Company or any of its assets. On occasion, obtaining payoff letters can take some time, so it is wise to plan accordingly. Note that this form contemplates payoff letters being delivered three (3) Business Days prior to the Closing as opposed to at Closing. This is to ensure that they are timely received and the form is acceptable to Buyer.

[91] Note: In an equity purchase, some Buyers may ask for a release of all claims any Seller may have against the Company relating to matters that existed prior to the Closing to gain assurance that such person will not bring a claim after Closing against the Company for matters occurring prior to the Closing. Some Sellers may request a similar waiver of any claims the Company may have against such Sellers relating to matters that existed prior to the Closing. The scope of any such release should be reviewed carefully to ensure it is appropriate and to ensure that appropriate carve-outs are included when applicable.

ARTICLE VIII
CLOSING CONDITIONS[92]

8.1 Conditions to Buyer's Obligations. The obligations of Buyer to consummate the transactions contemplated by this Agreement are subject to the satisfaction (or waiver by Buyer) of the following conditions immediately prior to the Closing:

(a) the representations and warranties set forth in Article IV and Article V (disregarding all qualifications or limitations as to "materiality" "in all material respects" or "Material Adverse Effect" and words of similar import set forth therein), shall be true and correct in all material respects as of the Closing Date as though such representations and warranties had been made on and as of the Closing Date (except that representations and warranties that are made as of a specified date need be true and correct only as of such date); provided that the Fundamental Representations set forth in Article IV and Article V shall be true and correct in all respects;[93]

(b) the Company and each Seller shall have performed in all material respects all of the covenants and agreements required to be performed by each of them under this Agreement at or prior to the Closing;[94]

(c) no Material Adverse Effect shall have occurred; and[95]

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[92] Note: The conditions to closing specify the conditions precedent to each Party's obligation to close. Closing conditions can vary widely from deal to deal, but generally include (1) the accuracy or material accuracy of the Parties' respective representations and warranties, (2) the performance or material performance of the Parties' respective pre-closing covenants, (3) the delivery of the Parties' respective closing deliverables and (4) no restraining litigation. In the event that the transaction is contingent upon Buyer obtaining financing (which is not contemplated by this form), an appropriate financing condition should be included in Buyer's conditions precedent. The Parties should be mindful of closing conditions that may give a party wide discretion to terminate the transaction (e.g., satisfactory outcome of ongoing due diligence, approval of the transaction by a party that could approve the transaction prior to signing (e.g., a party's governing body or parent company), etc.).

[93] Note: The standard for how correct Seller's representations and warranties must be is often negotiated. In the example provision, all of the representations and warranties regarding the Company and Sellers (other than Fundamental Representations) must be true and correct in all material respects, materiality qualifiers included in the working of such representations themselves are "scraped" to avoid a double materiality standard, and all Fundamental Representations regarding the Company and Sellers must be correct in all respects. In some cases, such representations and warranties may be qualified by a Material Adverse Effect standard, in which case it is important to understand the carve-outs to that definition, and the Parties may wish to specify a dollar amount or percentage of the purchase price threshold that would be deemed to constitute a Material Adverse Effect for purposes of Closing.

[94] Note: The extent to which the parties must have performed their pre-closing covenants is often negotiated. In the example provision, all of such covenants must have been performed in all material respects.

[95] Note: A standalone closing condition that no Material Adverse Effect has occurred is included in some deals. In those cases, it is important to understand the carve-outs to that definition, and the Parties may wish to specify a dollar amount or percentage of the purchase price threshold that would be deemed to constitute a Material Adverse Effect for purposes of Closing.

(d) Sellers shall have delivered or caused to be delivered each of the Closing deliverables listed in Section 3.2(a).[96]

8.2 Conditions to the Company's and Sellers' Obligations.[97] The obligation of Sellers and the Company to consummate the transactions contemplated by this Agreement is subject to the satisfaction (or waiver by the Seller Representative) of the following conditions immediately prior to the Closing:

(a) The representations and warranties of Buyer contained in Article VI shall be true and correct (disregarding all qualifications or limitations as to "materiality," "in all material respects" or "Material Adverse Effect" and words of similar import set forth therein), in all material respects as of the Closing Date as though such representations and warranties had been made on and as of the Closing Date (except that representations and warranties that are made as of a specified date need be true and correct only as of such date); provided that the Fundamental Representations set forth in Article VI shall be true and correct in all respects;

(b) Buyer shall have performed in all material respects all of the covenants and agreements required to be performed by it under this Agreement at or prior to the Closing; and

(c) Buyer shall have delivered or caused to be delivered each of the Closing deliverables listed in Section 3.2(b).

8.3 Condition to All Parties' Obligations. The obligation of each of Sellers and Buyer to consummate the transactions contemplated by this Agreement is subject to the satisfaction of the following conditions immediately prior to the Closing:

(a) No Proceeding before any Governmental Authority shall be pending wherein an unfavorable judgment, decree or order would restrain, enjoin or otherwise prohibit, or declare unlawful, the consummation of the transactions contemplated by this Agreement, declare unlawful the transactions contemplated by this Agreement or cause such transactions to be rescinded; and[98]

(b) This Agreement shall not have been terminated in accordance with Section 9.1.

8.4 Waiver of Conditions. Upon the occurrence of the Closing, any condition set forth in this Article VIII which was not satisfied as of the Closing shall be deemed to have been waived as of and after the Closing.

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[96] Note: The delivery of the Parties' respective closing deliverables is a common mutual condition to closing. In this form, the example provision would capture all of the deliverables in Section 3.2(a), including "required consents" and requested officer / manager resignations.

[97] Note: See notes above regarding Buyer's corresponding conditions to Closing.

[98] Note: The absence of restraining litigation is a common mutual closing condition. The standard can vary (e.g., no threatened or pending litigation or no judgment or order having actually been entered enjoining the transaction).

ARTICLE IX
TERMINATION[99]

9.1 Termination. This Agreement may be terminated at any time prior to the Closing as follows:

(a) by mutual written agreement of Buyer, on the one hand, and the Seller Representative, on the other hand;

(b) by Buyer, in the event of any breach by the Company or any Seller of any of their respective agreements, representations or warranties contained herein that would prevent the conditions to Closing set forth in Section 8.1(a) or Section 8.1(b) from being satisfied, and the failure of the Company or any Seller to cure such breach within five (5) Business Days after receipt of notice from Buyer requesting such breach to be cured;[100]

(c) by Seller Representative, in the event of any breach by Buyer of any of its agreements, representations or warranties contained herein that would prevent the conditions to Closing set forth in Section 8.2(a) or Section 8.2(b) from being satisfied, and the failure of Buyer to cure such breach within five (5) Business Days after receipt of notice from Seller Representative requesting such breach to be cured;

(d) by Buyer, if any of the other the conditions set forth in Section 8.1 have not been satisfied by the Company or Sellers (as applicable) or waived by Buyer in writing by the Closing Date (other than those conditions which by their terms are to be satisfied at the Closing) and the Company or Sellers fail to consummate the transactions contemplated by this Agreement on the date the Closing should have occurred pursuant to Section 3.1 and Buyer stood ready and willing to consummate such transactions on that date;

(e) by Seller Representative, if any of the other conditions set forth in Section 8.2 have not been satisfied by Buyer or waived by Seller Representative in writing by the Closing Date (other than those conditions which by their terms are to be satisfied at the Closing) and Buyer fails to consummate the transactions contemplated by this Agreement on the date the Closing should have occurred pursuant to Section 3.1 and the Company and Sellers stood ready and willing to consummate such transactions on that date; and

(f) by Buyer or Seller Representative, if the Closing shall not have occurred on or before [_____] (or such later date as may be agreed to in writing by Buyer and Seller Representative);

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[99] Note: It is critical to include termination provisions in a sign and subsequent close transaction. Termination prior to Closing is generally permitted (1) by mutual agreement, (2) by either Party when its conditions precedent to Closing have not been met or (3) by either Party when Closing has not occurred by some specified outside closing date.

[100] Note: The notice and right to attempt to cure may not be appropriate for all transactions.

provided, however, that no Party shall have the right to terminate this Agreement pursuant to clauses (b) through (f) of this Section 9.1 if such Party is at such time in material breach of any of its representations, warranties or covenants in this Agreement.[101]

9.2 Notice of Termination. Any Party desiring to terminate this Agreement pursuant to Section 9.1 shall give written notice of such termination to the other Parties (or, in the case of termination by Buyer, to the Seller Representative).

9.3 Effect of Termination. In the event that the Closing does not occur as a result of a Party properly exercising its right to terminate pursuant to Section 9.1, then except as set forth in this Section 9.3, this Agreement shall be null and void (except for the provisions of this Article IX, and Article XII, which shall remain in full force and effect) and no Party shall have any further rights or obligations under this Agreement, except that nothing herein shall relieve any Party from any liability for any breach hereof or any liability that has accrued prior to the date of such termination.[102]

ARTICLE X
REMEDIES FOR BREACH[103]

10.1 Survival.[104] The representations and warranties of the Parties contained in this Agreement will survive the Closing for a period of [_____] following the Closing Date, except that the Fundamental Representations will survive the Closing until sixty (60) days after the expiration of the applicable statute of limitations (giving effect to any waiver, mitigation or extension thereof) with respect to the subject matter of such representation or warranty. The covenants to be performed under this Agreement (a) at or prior to the Closing will terminate upon the Closing and (b) in whole or in part after the Closing Date will survive the Closing until the end of the period of applicable performance. The applicable survival periods set forth in this Section 10.1 may be referred to herein, respectively, as the applicable "Survival Period".

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[101] Note: This proviso is fairly typical, but could result in the inability of either party to unilaterally terminate in the event both Parties were in material breach, leaving the only means to terminate the agreement being by mutual agreement of the Parties. An alternative formulation could be to provide that neither Party may rely on the failure of any of its closing conditions if such failure was caused by such Party's failure to comply with any provision of the agreement.

[102] Note: It is important to state what happens in the event of termination. In most cases, most (but not all) of the agreement becomes null and void. If, for example, a pre-closing deposit has been made, it is important that the provisions in the agreement regarding the distribution of the deposit upon termination survive termination. If Buyer signed a confidentiality agreement, Seller may wish to provide that the terms of such confidentiality agreement remain in full force and effect in accordance with its terms.

[103] Note: Remedies for breach are a critical component of each deal and can and do vary greatly from deal to deal.

[104] Note: The Survival Period for representations and warranties is often negotiated by the parties and can vary greatly from deal to deal. Generally speaking, Sellers will prefer a shorter survival period and Buyers will prefer a longer survival period. It is common for certain representations and warranties (i.e., those that the agreement defines as being "Fundamental Representations") to survive for a period that is longer than the Survival Period for the other representations and warranties.

10.2 Indemnification of Buyer by Sellers.[105] Subject to the other provisions and applicable limitations set forth in this Article X and otherwise in this Agreement, Sellers shall (i) jointly and severally with respect to Section 10.2(a) and Section 10.2(b), and (ii) severally and not jointly with respect to Section 10.2(c) and Section 10.2(d),[106] indemnify and hold harmless Buyer, its Affiliates and each of their respective officers, directors, partners, members, managers, employees, agents, advisors and other representatives (collectively, the "Buyer Indemnified

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[105] Note: Unlike in an asset purchase, where the Parties often allocate liability based on pre-closing operation of the Company (which is usually allocated to Seller, perhaps with some exceptions) and post-closing operating of the Company (which is usually allocated to Buyer, perhaps with some exceptions), assumed liabilities (which are usually allocated to Buyer) and retained liabilities (which are usually allocated to Seller), in an equity purchase, Buyer is purchasing the Company subject to all of its assets and all of its liabilities. While the Parties can contractually agree to an alternative or more "asset-like" allocation of liability among themselves, indemnification obligations in equity transactions generally extend to (1) breaches of representations and warranties regarding such Party and the Company and (2) breaches of covenants and other agreements made by such Party and the Company. As a result, Buyers often conduct more extensive due diligence and may request a more comprehensive slate, and more robust formulation, of representations and warranties in an equity purchase than in an asset purchase. If Buyer identifies certain issues in its due diligence, it may request additional covenants or items of specific indemnity to allocate liability (as between the Parties) for such issues to Seller.

[106] Note Regarding Joint and Several vs. Several Liability: This form contemplates that each Seller will be jointly and severally liable for any breach of a representation or warranty regarding the Company (and any pre-closing covenant made by the Company), but will be severally liable for any breach of any representation or warranty made by such Seller or any covenant made by such Seller.

When there is more than one Seller, joint and several liability is usually discussed and negotiated. Sellers generally prefer to be liable solely for their own representations and actions and their pro rata share of the Company's representations and pre-closing actions and Buyers generally prefer to be able to recover any damages to which it is entitled from one or a smaller group of Sellers and may argue that Sellers can enter into a contribution and backup guaranty agreement among themselves to address the allocation of responsibility among themselves.

What is appropriate depends on a number of factors, including the number of Sellers, the relative holdings of the Sellers (e.g., if a large number of Sellers hold relatively small amounts, Buyer may have to spend considerable time and resources to recover 100% of its damages), the relative financial condition of the Sellers (e.g., if one Seller has significant assets, it may be concerned that it will be the "target" for any indemnification claims made by Buyer based on his, her or its ability to pay), the relationship between or among the Sellers (e.g., if the Sellers are all Affiliates or have common ownership, joint and several liability may be more appropriate), the relationship between certain of the Sellers and Buyer (e.g., if some, but not all, of the Sellers will be employees of Buyer (or the Company) post-closing, the Sellers not being employed by Buyer (or the Company) post-closing may believe they are more likely to be the "target" for any indemnification claims made by Buyer on the basis that Buyer would prefer not to sue its own employees) and other recourse available to Buyer (e.g., if Buyer has a sizable holdback or escrow for a sufficient duration, or access to, for example, representation and warranty insurance, Buyer may be more willing to accept several liability on the basis that it is comfortable with the alternative recourse available).

In cases where Buyer is willing to accept several liability of Sellers for matters concerning the Company, the Parties should consider specifying the allocation of such liability among Sellers. Such allocation is often pro rata among the Sellers based on their percentage ownership of the Membership Interests; however, it is wise to specify such in a schedule for clarity, especially if the Company's Organizational Documents contain a more complex waterfall / distribution provision where the percentage of the purchase price allocated among the Sellers changes based on the different tiers of the waterfall.

Parties")[107] from and against any and all Losses suffered or incurred by such Buyer Indemnified Party arising from, based upon, related to or associated with:

(a) any breach of any representation or warranty of the Company contained in Article IV;

(b) any breach of any covenant, obligation or other agreement of the Company contained in this Agreement that is to be performed at or before the Closing;[108]

(c) any breach of any representation or warranty of such Seller contained in Article V; or

(d) any breach by such Seller of its covenants, obligations or other agreements under this Agreement that is to be performed before, at or after the Closing.

10.3 Limitations on Liability of Sellers.[109]

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[107] Note: The Parties' respective "Indemnified Parties" usually extend beyond the Party to the agreement to its Affiliates and their respective officers, etc. While this is not uncommon, the Parties should be mindful of overly broad definitions. For example, if Buyer is a publicly traded company, Sellers should attempt to avoid agreeing to indemnify Buyer's shareholders.

[108] Note: If the Company is a party to the agreement (see note to the preamble), Seller is usually allocated liability for any breach by the Company of its pre-closing covenants, obligations and other agreements.

[109] Note: It has become fairly common for certain of Seller's indemnification obligations to be subject to certain limitations. What is limited (e.g., representations and warranties, Fundamental Representations, covenants, items of specific indemnity, etc.) and to what extent (e.g., eligible claim thresholds, deductibles or threshold baskets, caps, and the amounts thereof) varies greatly from deal to deal. In many cases, Seller's indemnification obligations for (a) non-Fundamental representations is subject to some kind of basket (whether a "deductible" basket, where Seller is responsible for Losses incurred by the Buyer Indemnified Parties only to the extent such Losses exceed the amount of the deductible, a "threshold" or "tipping" basket, where Seller is responsible for all Losses incurred by the Buyer Indemnified Parties, but only after the amount of Losses incurred exceeds the threshold, or some combination thereof) and cap (which is often expressed as, or calculated based on, a percentage of the purchase price, and, where the agreement contains a post-closing indemnification escrow, is often, but not always, equal to the amount of the escrow) and (b) Fundamental Representations is not subject to a basket or the general cap, but may be subject to a purchase price cap. Some agreements also contain an "eligible claim" or "de minimis" threshold where individual claims or series of related claims that fall under a certain amount are not recoverable. In agreements containing such an additional limitation, the Parties should specify whether or not such de minimis claims count toward the basket. Buyers may wish to attempt to include certain carve-outs, such as Fraud, from these limitations.

This form contemplates (1) a percentage of the Base Purchase Price deductible basket applicable to non-Fundamental Representations, (2) a percentage of the Base Purchase Price cap applicable to non-Fundamental Representations, (3) a cap equal to the Base Purchase Price applicable to Fundamental Representations, and (4) a carve-out for Fraud. Such limitations do not extend to covenants.

Note Regarding Representation and Warranty Insurance: Representation and warranty insurance ("R&W Insurance") has become more common in recent years. R&W Insurance is intended to shift some or all of the risk for breaches of the representations and warranties from the Parties to a third party insurer. R&W Insurance can be beneficial in a number of circumstances, such as where Buyer (or the Company) may employ all or some of the Sellers post-closing (which it does not want to sue for post-closing indemnification for breaches of representations and warranties), where Buyer desires a longer Survival Period for Seller's representations and warranties (as R&W

(a) Notwithstanding anything to the contrary contained in this Agreement, but subject to Section 10.3(c), Sellers shall have no Liability for any indemnification under Section 10.2(a) of this Agreement (other than with respect to any breach of any Fundamental Representation set forth in Article IV or Article V) unless the aggregate amount of all Losses for which Sellers are liable under this Agreement exceed [_____] ([__]%) of the unadjusted Base Purchase Price (the "Indemnity Deductible") and then only to the extent such Losses exceed the Indemnity Deductible.

(b) Notwithstanding anything to the contrary contained in this Agreement, but subject to Section 10.3(c), Sellers shall not be required to indemnify the Buyer Indemnified Parties under Section 10.2(a) of this Agreement (other than with respect to any breach of any Fundamental Representation set forth in Article IV or Article V) for aggregate Losses in excess of an amount equal to the [_____] ([__]%) of the unadjusted Base Purchase Price.

(c) The limitations set forth in Sections 10.3(a) and 10.3(b) will be inapplicable with respect to (i) any breach of any of the Fundamental Representations set forth in Article IV or Article V, for which Sellers will required to indemnify the Buyer Indemnified Parties under Section 10.2(a) for all Losses incurred not to exceed an aggregate amount equal to the Base Purchase Price, (ii) Fraud on the part of any Seller, the Company or any of its Subsidiaries and (iii) claims for indemnification made pursuant to Section 10.2(b), Section 10.2(c) and Section 10.2(d).

(d) Notwithstanding anything to the contrary herein, for the purposes of determining (i) the amount of Losses arising from a breach of a representation or warranty for which the Buyer Indemnified Parties are entitled to indemnification under this Agreement and (ii) whether a breach of such representation or warranty exists, each such representation and warranty shall be read without giving effect to any qualification by the words "material," "in all material respects," "Material Adverse Effect," and other uses of the word "material" (and shall be treated, solely for the purposes described above, as if such words were deleted from such representation or warranty).[110]

Insurance policies often have a longer Survival Period for Seller's representations and warranties than what would usually otherwise be included in a purchase agreement) and where Sellers desire to avoid or reduce the size of the post-closing indemnification escrow (because Buyer's principal recourse for breaches of representations and warranties is against the R&W Insurance policy instead of the escrow / Sellers). R&W Insurance does, of course, cost money (in the form of a premium and a "retention" (akin to a deductible), and may also require a deposit and/or fee reimbursement for the underwriting to conduct its due diligence). Who bears these costs, or the allocation of such costs between the Parties, is negotiated. The R&W Insurance underwriter will want to conduct due diligence, including reviewing the purchase agreement and disclosure schedules, and will likely desire for its counsel to talk to Buyer's counsel (and in some cases, Seller's counsel) regarding the due diligence process and issues discovered in due diligence. R&W Insurance is not appropriate for all transactions, but in the right circumstances may be an option worth considering.

[110] Note: This provision is known as a "materiality scrape." The rationale for including a materiality scrape, as some Buyer's will argue, is that by including both (a) materiality qualifiers in certain of Sellers representations and warranties and (b) a basket on certain of Seller's representations and warranties, Buyer's ability to recover Losses is subjected to a "double materiality" standard, the amount of the basket should set the standard of materiality, and as such, uses of "materiality" in the representations should be read out or "scraped" for at least some purposes (see

10.4 Indemnification of Sellers by Buyer.[111] Subject to the other provisions and applicable limitations set forth in this Article X and otherwise in this Agreement, Buyer agrees to indemnify, defend and hold harmless each Seller, their respective Affiliates and each of their respective officers, directors, partners, members, managers, employees, agents, advisors and other representatives (collectively, the "Seller Indemnified Parties") from and against any and all Losses suffered or incurred by such Seller Indemnified Party arising from, based upon, related to or associated with:

(a) any inaccuracy in or breach by Buyer of its representations or warranties contained in this Agreement; or

(b) any breach by Buyer of its covenants, obligations or other agreements under this Agreement.

10.5 Other Limitations on Liability.[112]

(a) Notwithstanding anything to the contrary contained in this Agreement, no claim for indemnification may be asserted for any breach of any representation, warranty, covenant, obligation or other agreement contained in this Agreement beyond the applicable

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below regarding the two types of materiality scrapes). Following that logic, the scrape should arguably not apply to representations and warranties that are not subject to the basket.

There are two types of materiality scrapes: (1) a "full scrape," which reads out the materiality qualifiers in representations and warranties regarding the Company for purposes of both (i) determining whether a breach has occurred and (ii) calculating the amount of Losses incurred as a result of such breach (as is the case in the example provision above), and (2) a "partial scrape," which reads out materiality qualifiers in representations and warranties regarding the Company solely for purposes of calculating the amount of Losses incurred as a result of such breach, and not for purposes of determining whether a breach has occurred.

One can argue that a "full scrape," which reads out the materiality qualifiers in representations and warranties regarding the Company for purposes of both (i) determining whether a breach has occurred and (ii) calculating the amount of Losses incurred as a result of such breach, is akin to removing such qualifiers for all meaningful purposes of the agreement, and as such, there is no purpose in having materiality qualifiers in the representations at all (other than, perhaps, to avoid a fraud claim).

Whether a scrape (and if so, which scrape) is appropriate is often negotiated. It is worth noting that while some "deal point" studies can be helpful in providing information on the percentage of deals surveyed included a materiality scrape, they generally do not provide information regarding how and where materiality is used in the specific representations and warranties that are subject to a scrape. One can argue that if a scrape is included, Buyer should be more open to including materiality qualifiers in the representations and more open to a higher basket than might otherwise apply.

[111] See notes above regarding Seller's corresponding indemnification obligations. In this form, Buyer's indemnification obligations for breaches of its representations and warranties are not subject to the limitations applicable to Seller's obligations that are set forth in Section 10.3. This is not uncommon given that Buyer's representations and warranties are significantly more limited than Seller's representations and warranties.

[112] Note: Notwithstanding the fact that Buyer's indemnification obligations for breaches of its representations and warranties are generally not subject to the limitations applicable to Seller's obligations that are set forth in Section 10.3, it is common for some limitations to apply to each Parties' obligations. These generally include (1) timely delivery of a Claim Notice, (2) no "double-recovery" (e.g., recovery from insurance), (3) an obligation to attempt to mitigate damages and (4) a limitation on the type of damages that can be recovered (e.g., consequential, special and punitive damages, etc.).

Survival Period for such representation, warranty, covenant, obligation or other agreement; provided, however, that if a Claim Notice is delivered in good faith prior to the expiration of the Survival Period for such representation, warranty, covenant, obligation or other agreement, such claim (as specified in good faith in the Claim Notice) shall survive until the final resolution of such claim, but only with respect to the specific claim specified in good faith in such Claim Notice.[113]

(b) No Indemnified Party is entitled to recover more than once in respect of any one matter giving rise to a claim for indemnification under this Article X. Payments by or on behalf of an Indemnifying Party pursuant to this Article X in respect of any Loss shall be limited to the amount of any liability or damage that remains after deducting therefrom any insurance proceeds received (net of deductibles, reasonable costs incurred in prosecuting the insurance claim and premium adjustments resulting therefrom) and any indemnity, contribution or other similar payment received by or on behalf of an Indemnified Party from a Third Party in respect of any such claim (without taking into account amounts received or to be received by other Indemnifying Parties). Each applicable Indemnified Party shall use its commercially reasonable efforts to recover under applicable insurance policies or indemnity, contribution or other similar agreements for any Losses prior to or simultaneously with seeking indemnification under this Agreement, it being understood that such commercially reasonable efforts shall be limited to making a claim against such applicable policy, indemnity, contribution or similar agreement and providing the insurer or other applicable party thereto with any information that it may reasonably request in connection with such claim. If, after an Indemnified Party has recovered a Loss hereunder from or on behalf of an Indemnifying Party, such Indemnified Party recovers amounts under any insurance policy (net of deductibles, reasonable costs incurred in prosecuting the insurance claim and premium adjustments resulting therefrom), or any indemnity, contribution or similar obligation from a third party with respect to such Losses, less the reasonable costs and expenses of pursuing such recovered amount (without taking into account amounts received or to be received by other Indemnifying Parties), such Indemnified Party shall reimburse the Indemnifying Party all such amounts recovered by such Indemnified Party with respect to such claim (it being understood that such amounts shall not exceed the amount received by such Indemnified Party for such Losses) promptly following the receipt of such amounts by such Indemnified Party. For the avoidance of doubt, this Section 10.5(b) is not intended, and shall not be construed, to require any Party to obtain or maintain insurance or any particular insurance.[114]

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[113] Note: Section 10.1 defines the Survival Period applicable to the Parties' respective representations, warranties, covenants and other agreements. This provision, which is related but serves a slightly different purpose, requires that any claim for indemnification be asserted within the applicable Survival Period. It is important to include the proviso, which extends the availability to recover for a claim that has been timely asserted until it has been finally resolved.

[114] Note: This provision is intended to prevent a "double recovery" where, for example, recourse is available from a third party, such as insurance, and to provide for a "true up" in the event that a Party subsequently obtains recovery from a third party amounts that had previously been recovered from the other Party. One could argue that because it chooses its own insurance and pays the premiums, it should not be required to utilize its own insurance policy to recover Losses that it is entitled to recover from the other Party pursuant to this agreement. As a compromise, the example language limits what efforts must be utilized to attempt to collect from a third party (e.g., make a claim

(c) Each Indemnified Party shall take, and cause its Affiliates to take, commercially reasonable steps to attempt to mitigate any Loss upon becoming aware of any event or circumstance that would be reasonably expected to, or does, give rise thereto, including incurring costs only to the extent reasonably necessary to remedy the breach that gives rise to such Loss.[115]

(d) Notwithstanding anything to the contrary contained in this Agreement, (i) no Person shall be entitled to indemnification under this Agreement for any Losses to the extent such Losses are taken into account in the determination of Final Net Working Capital and associated adjustment therefor pursuant to Section 2.4, and (ii) NONE OF THE BUYER INDEMNIFIED PARTIES OR THE SELLER INDEMNIFIED PARTIES SHALL BE ENTITLED TO RECOVER FROM SELLERS OR BUYER, AS APPLICABLE, ANY INDIRECT, CONSEQUENTIAL, SPECIAL, PUNITIVE, INCIDENTAL, SPECULATIVE OR EXEMPLARY DAMAGES OR DAMAGES FOR LOST PROFITS OR LOSS OF BUSINESS OPPORTUNITY OF ANY KIND ARISING UNDER, RELATED TO OR IN CONNECTION WITH THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY, EXCEPT TO THE EXTENT ANY SUCH PERSON SUFFERS SUCH DAMAGES TO A THIRD PARTY, WHICH DAMAGES SHALL NOT BE EXCLUDED BY THIS PROVISION AS TO RECOVERY HEREUNDER.[116]

10.6 Exclusive Remedy. Notwithstanding anything to the contrary contained in this Agreement, the Parties acknowledge and agree that the provisions of this Article X shall be the sole and exclusive remedies of the Parties for any breach of any representation, warranty, covenant obligation or other agreement contained in this Agreement; provided, however, that the foregoing shall not preclude any Party from seeking injunctive relief or declaratory action with respect to any failure by the other Party to comply with any of the covenants or other agreements of such other Party contained herein as contemplated by Section 12.13.[117]

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against the applicable policy or agreement and provide information reasonably requested by the insurer or counterparty (but not prosecute the payment of such claim)) and deducts costs associated with such claim, including premium adjustments resulting therefrom (which may admittedly be difficult to determine). If a claim can be made against the Company's insurance policies, Sellers have a good argument that the Company (thus, indirectly, Sellers) bore the cost of the premium of such policies prior to the Closing, and as such it is appropriate for Buyer to seek recourse against such policies (to the extent coverage is available) instead of / prior to seeking recourse from Sellers. Sellers may argue that if, for example, the Company owns real property, the title to which is insured, and title fails, Buyer should look to the title policy instead of / before looking to Sellers for a breach of Section 4.24.

Note that if representation and warranty insurance is obtained (see note in Section 10.3), a more specific provision should be included, as in such cases, it is common to limit Buyer's recover for breaches of representations and warranties covered by the R&W Insurance policy to making claims against the policy, subject in some cases to certain exclusions and allocation of the retention amount between the Parties.

[115] Note: The Parties may wish to provide a contractual obligation to attempt to mitigate Losses in addition to relying on the common law obligation.

[116] Note: Clause (i) of this provision is intended to prevent a "double recovery" for matters taken into account in connection with the working capital adjustment to the purchase price and clause (ii) of this provision limits the scope of recoverable damages. See note regarding the definition of "Losses" in Article I.

[117] Note: It is important (to Sellers in particular) to include an "Exclusive Remedy" provision to, for example, preserve the benefit of the limitations on liability that were negotiated and included in the definitive agreement. In many cases, it is appropriate to carve-out the ability to seek specific performance, especially where the remedy for certain breaches (e.g., confidentiality obligations) may be difficult to quantify in Losses.

10.7 Indemnification Procedures.[118] All claims for indemnification under this Article X shall be asserted and resolved as follows:

(a) For purposes of this Agreement, the term "Indemnifying Party" when used in connection with particular Losses shall mean the Party having an obligation to indemnify another Party or Person(s) with respect to such Losses pursuant to this Article X, and any and the term "Indemnified Party" when used in connection with particular Losses shall mean the Party or Person(s) having the right to be indemnified with respect to such Losses by the other Party pursuant to this Article X.

(b) To make a claim for indemnification under this Article X, an Indemnified Party shall notify the Indemnifying Party in writing of its claim under this Section 10.7, including the specific details of and specific basis under this Agreement for its claim (the "Claim Notice"). In the event that the claim for indemnification is based upon a claim by a Third Party against the Indemnified Party (a "Third Party Claim"), the Indemnified Party shall provide its Claim Notice promptly after the Indemnified Party has Knowledge of the Third Party Claim and shall enclose a copy of all papers (if any) served with respect to the Third Party Claim; provided that the failure of any Indemnified Party to give notice of a Third Party Claim as provided in this Section 10.7(b) shall not relieve the Indemnifying Party of its obligations under this Article X except to the extent such failure materially prejudices the Indemnifying Party's ability to defend against the Third Party Claim. In the event that the claim for indemnification is based upon a breach of a representation, warranty, covenant, obligations or agreement, the Claim Notice shall specify the representation, warranty, covenant, obligation or agreement that was breached.

(c) In the case of a claim for indemnification based upon a Third Party Claim, the Indemnifying Party shall have thirty (30) days from its receipt of the Claim Notice to notify the Indemnified Party whether it admits or denies its liability to defend the Indemnified Party against such Third Party Claim at the sole cost and expense of the Indemnifying Party. The Indemnified Party is authorized, prior to and during such thirty (30) day period, at the expense of the Indemnifying Party, to file any motion, answer or other pleading that it shall deem necessary or appropriate to protect its interests or those of the Indemnifying Party and that is not prejudicial to the Indemnifying Party.

(d) If the Indemnifying Party admits its liability to defend the Indemnified Party against a Third Party Claim, it shall have the right and obligation to diligently defend, at its sole cost and expense, such Third Party Claim. The Indemnifying Party shall have full control of such defense and Proceedings, including (subject to the terms of this Section 10.7(d)) any compromise or settlement thereof. If requested by the Indemnifying Party, the Indemnified Party

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[118] Note: It is advisable to include provisions regarding the procedures to be followed to make a claim for indemnification. One often does not realize how important these provisions can be until such person has had to make or defend a claim made pursuant to a purchase agreement. These provisions can be critically important to a Party's ability to recover for breaches and its liability, as often such provisions include a "deemed" admission of liability if it fails to respond to a Claim Notice within a specified time frame. It is advisable to include a process for Third Party Claims (which generally include the provision of prompt notice of the claim, the provision of information in such Party's possession regarding such claim, cooperation in the defense of such claim, parameters regarding settlement of such claim, etc.) and a process for direct claims.

shall cooperate in contesting any Third Party Claim that the Indemnifying Party elects to contest. The Indemnified Party may participate in, at its own expense, but subject to the Indemnifying Party's full control of, any defense or settlement of any Third Party Claim controlled by the Indemnifying Party pursuant to this Section 10.7(d); provided, however, that the Indemnified Party shall not be required to bring any counterclaim or cross complaint against any Person. An Indemnifying Party shall not, without the prior written consent of the Indemnified Party, (i) settle any Third Party Claim or consent to the entry of any judgment or order with respect thereto which does not result in a final resolution of the Indemnified Party's Liability in respect of such Third Party Claim (including, in the case of a settlement, an unconditional written release of the Indemnified Party from all Liability in respect of such Third Party Claim), or (ii) settle any Third Party Claim or consent to the entry of any judgment or order with respect thereto in any manner that may materially and adversely affect the Indemnified Party (other than as a result of money damages covered by the indemnity).

(e) If the Indemnifying Party does not admit its liability or admits its liability to defend the Indemnified Party against the Third Party Claim, but fails to diligently prosecute or settle such Third Party Claim, then the Indemnified Party shall have the right to defend against the Third Party Claim at the sole cost and expense of the Indemnifying Party, with counsel of its choosing, subject to the right of the Indemnifying Party to admit its liability and assume the defense of the Third Party Claim at any time prior to settlement or final determination thereof. If the Indemnifying Party has not yet admitted its liability to defend the Indemnified Party against the Third Party Claim, the Indemnified Party shall send written notice to the Indemnifying Party of any proposed settlement, unless the proposed settlement is solely for money damages and results in a final resolution, and the Indemnifying Party shall have the option for ten (10) days following receipt of such notice to (i) admit in writing its liability to indemnify the Indemnified Party from and against the liability and consent to such settlement, (ii) if liability is so admitted, reject, in its reasonable judgment, the proposed settlement, or (iii) deny liability. Any failure to respond to such notice by the Indemnified Party within such ten (10) day-period shall be deemed to be an election under subsection (i) above.

(f) In the case of a claim for indemnification not based upon a Third Party Claim, the Indemnifying Party shall have thirty (30) days from its receipt of the Claim Notice to (i) cure the Liabilities complained of, (ii) admit its liability for such Liability or (iii) dispute the claim for such Liabilities. If the Indemnifying Party does not notify the Indemnified Party within such thirty (30) day period that it has cured the Liabilities or that it disputes the claim for such Liabilities, the amount of such Liabilities shall conclusively be deemed a liability of the Indemnifying Party hereunder.

10.8 Waiver of Right to Rescission.[119] Sellers and Buyer acknowledge that, subject to any rights the Parties may have hereunder to seek and obtain specific performance or other express injunctive remedies, following Closing, the payment of money, as limited by the terms of this Agreement, shall be adequate compensation for breach of any representation, warranty,

[119] Note: In some cases, a Party's available remedies at law or in equity for a particular claim may include rescission. In order to avoid such a remedy, which could have significant and unforeseeable consequences, such remedy is often disclaimed by the Parties.

covenant, obligation or agreement contained herein or for any other claim arising in connection with or with respect to the transactions contemplated by this Agreement. As such, Buyer and each Seller waive any right to rescind this Agreement or any of the transactions contemplated hereby.

10.9 Effect of Investigation.[120] Notwithstanding any right of Buyer, its Affiliates and their respective representatives (whether or not exercised) to investigate the affairs of, and to otherwise conduct due diligence regarding, the Company and its Subsidiaries, Buyer shall have the right to rely fully upon the representations, warranties, covenants and other agreements of the other Parties contained in this Agreement. No information or knowledge obtained by Buyer, its Affiliates or any of their respective representatives in connection with its or their investigation or other due diligence efforts or otherwise shall affect or be deemed to modify any representation, warranty, covenant or other agreement of any other Party contained herein or shall be deemed to limit or restrict Buyer's ability to recover Losses for any breach of such representation, warranty, covenant or other agreement pursuant to this Agreement.

10.10 Tax Treatment of Indemnification Payments.[121] Indemnification payments made under this Agreement shall be treated by the Parties as an adjustment to the Purchase Price for Tax purposes, unless otherwise required by Law.

ARTICLE XI
SELLER REPRESENTATIVE[122]

11.1 Appointment. Each Seller hereby designates Seller Representative as his, her or its attorney-in-fact, agent and duly authorized representative to act on behalf of such Person in as herein provided. By executing this Agreement under the heading "Seller Representative," the

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[120] Note: Because during its due diligence, Buyer will inevitably discover information and facts that relate to the subject matter of certain of the representations and warranties regarding the Company, the Parties may wish to specify the effect of such knowledge on Buyer's ability to recover Losses for a breach of a representation or warranty that Buyer knew was inaccurate. Three common approaches are (1) a "pro-sandbagging" provision (such as the example in this form), where Buyer may recover Losses for a breach of such representation or warranty even if Buyer knew such representation or warranty was inaccurate, (2) an "anti-sandbagging" provision, where Buyer may not recover Losses for a breach of such representation or warranty if Buyer knew such representation was inaccurate and (3) silence. Sellers prefer an anti-sandbagging provision to protect against Buyer bringing a claim post-closing for issues it knew about pre-closing and Buyers prefer a "pro-sandbagging" provision on the basis that it should have the right to rely on the representations and warranties that the parties negotiated and included in the definitive purchase agreement and, in the event any such representations and warranties were breached, it does not have to demonstrate knowledge of such breach (i.e., a fact question) to be a defense to its ability to recover for such breach. Note that if the agreement is silent on the impact of such knowledge, the applicable laws of the jurisdiction governing the agreement will likely control, which varies from jurisdiction to jurisdiction.

[121] Note: It is common to include a provision to treat indemnification payments as adjustments to the purchase price for tax purposes.

[122] See note to the preamble regarding the appointment of a Seller Representative. The scope of powers and authority granted to a Seller Representative can vary greatly, but often include receipt of notices, dealing with certain disputes and, in some cases, serving as payment agent for all Sellers. This form grants the Seller Representative broad power and authority and authorizes the Seller Representative to serve as payment agent for all Sellers. What powers and authority are appropriate for a particular deal can vary greatly.

Seller Representative hereby (a) accepts such appointment and authorization to act as Seller Representative and attorney-in-fact, agent and duly authorized representative on behalf of each Seller in accordance with the terms of this Agreement, and (b) agrees to perform its obligations under, and otherwise comply with, this Article XI. This appointment is coupled with an interest and irrevocable.

11.2 Powers of Seller Representative. Each Seller hereby authorizes the Seller Representative (a) to take all action necessary or desirable to consummate the transactions contemplated by this Agreement, (b) to negotiate, execute and deliver all ancillary agreements, certificates, statements, notices, approvals, extensions, waivers, undertakings, amendments and other documents required or permitted to be given in connection with the consummation of the transactions contemplated by this Agreement; (c) to determine and settle on behalf of all Sellers any dispute regarding the Closing Statement, Net Working Capital, or any adjustment to the Purchase Price pursuant to Section 2.3(b), (d) to enforce and protect the rights and interest of such Seller arising out of or under or in any manner relating to this Agreement and each other agreement, document, instrument or certificate referred to herein or therein or the transactions provided for herein or therein (including in connection with any claims for indemnification pursuant to Article X), (e) to enforce payment of amounts due to such Seller under this Agreement on behalf of such Seller, in the name of Seller Representative or, if Seller Representative so elects, in the name of such Seller, (f) to refrain from enforcing any right of such Seller arising out of or under or in any manner relating to this Agreement (without prejudice to the ability of such Seller to enforce such rights directly), (g) to give and receive all notices and communications to be given or received under this Agreement on behalf of any Seller, (h) to provide any joint written instructions to the Escrow Agent on behalf of all Sellers directing the Escrow Agent to disburse funds from the Escrow Account as provided in Article II, (i) to make payments it receives under this Agreement for the benefit of Sellers to Sellers pro rata in accordance with each Seller's ownership of the Membership Interests, unless otherwise agreed in writing by all Sellers, and (j) to take all other actions which under this Agreement may be taken by any Seller that Seller Representative deems necessary or appropriate in its sole discretion relating to the subject matter of this Agreement.

11.3 Appointment as Payment Agent. Without limiting the generality of the preceding, by executing this Agreement, each Seller hereby irrevocably constitutes and appoints the Seller Representative as payment agent for such Seller for all payments owing to Sellers pursuant to this Agreement (including, without limitation, the Closing Payment, any Net Working Capital adjustment due to Sellers pursuant to Section 2.4(d) (if any), any release of any portion of the Escrow Funds Amount due to Sellers (if any), or otherwise (if any)). All such payments to any Seller shall be deemed made in full when such amounts are paid to a single account specified in writing to Buyer by the Seller Representative. The Seller Representative shall be solely responsible for properly allocating such amounts among, and properly paying such amounts to, the appropriate Sellers (which Sellers agree as among themselves shall be distributed by the Seller Representative to Sellers pro rata based upon each Seller's percentage ownership of the Membership Interests as set forth on Exhibit A, unless otherwise agreed in writing by all Sellers), and none of Buyer, any of its Affiliates (which shall, for the avoidance of doubt, include the Company after the Closing), any of their respective officers, directors, employees, agents and other representatives shall have any obligation whatsoever to ensure that any Seller ultimately receives the portions of any amounts to which such Seller is entitled under this Agreement, and

each Seller hereby unconditionally and irrevocably fully and forever releases Buyer, each of its Affiliates (which shall, for the avoidance of doubt, include the Company after the Closing), and each of their respective officers, directors, employees, agents and other representatives from any and all claims of every kind or nature, whether known or unknown, accrued or unaccrued, suspected or unsuspected, both at law and in equity, that such Seller has, ever had, or might have, directly or indirectly, against any such Person relating, directly or indirectly, thereto.

11.4 Liability of Seller Representative. Seller Representative will not be liable for any act taken or omitted by it in good faith as permitted under this Agreement, except if such act is taken or omitted in bad faith or by willful misconduct. Seller Representative will also be fully protected in relying upon any written notice, demand, certificate or document that it in good faith believes to be genuine.

11.5 Right to Rely. Each of Buyer and the Escrow Agent shall have the right to rely upon all actions taken or omitted to be taken by Seller Representative pursuant to this Agreement.

11.6 Survival. The authorizations of the Seller Representative under this Article XI shall be effective until its rights and obligations under this Agreement terminate by virtue of the termination of all obligations of each Seller under this Agreement.

11.7 Successor Seller Representative. If [Name of Seller Representative] ceases to function in its capacity as the Seller Representative for any reason, then [Name of Alternative Seller Representative] will serve as the Seller Representative. If [Name of Alternative Seller Representative] ceases to function in its capacity as the Seller Representative for any reason, the Sellers (or their respective authorized representatives) shall select (by majority vote of the Membership Interests as set forth in Exhibit A) a Person to serve as the Seller Representative.[123]

ARTICLE XII
MISCELLANEOUS[124]

12.1 Expenses.[125] Except as otherwise expressly provided in this Agreement, each of the Parties shall bear its own fees, costs, and expenses (including legal, accounting, consulting, and investment advisory fees and expenses) incurred in connection with this Agreement and the other Transaction Documents and the transactions contemplated hereby and thereby.

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[123] Note: In many, but not all, cases the Seller Representative is an entity. It is wise to include a mechanism to appoint a successor Seller Representative in the event that the initially designated Seller Representative fails to serve in that capacity for any reason. This may be especially important if the Seller Representative is an individual.

[124] Note: The provisions in the "Miscellaneous" Article should be reviewed carefully. While many of such provisions may be considered "boilerplate," in some cases such provisions include substantive deal points and other important agreements, and even boilerplate provisions need to be carefully evaluated and tailored to ensure they are appropriate in the context of the agreement and the contemplated transaction.

[125] Note: It is common to include a provision stating who is responsible for what expenses. Often, each Party bears its own expenses, but that is not always the case.

12.2 Assignment.[126] Neither this Agreement, nor any rights, obligations, liabilities, covenants, duties or responsibilities hereunder, may be assigned by either Party, in whole or in part, without the prior written consent of the other Party, which consent may be withheld for any reason. Any assignment in violation of the foregoing shall be deemed void *ab initio*. No assignment by a Party of this Agreement shall relieve such Party of any of its obligations, liabilities, covenants, duties or responsibilities hereunder.

12.3 Preparation of Agreement.[127] Sellers, Buyer and their respective counsel participated in the preparation of this Agreement. In the event of any ambiguity in this Agreement, no presumption shall arise based on the identity of the draftsman of this Agreement.

12.4 Notices.[128] All notices and communications which are required or may be given to a Party hereunder shall be in writing and shall be deemed to have been duly given upon the earliest of: (a) if sent by U.S. certified mail, postage prepaid, return receipt requested, then the date shown as received on the return notice, (b) if personally delivered, then the date of such personal delivery, (c) if by Federal Express overnight delivery (or other reputable overnight delivery service), the date shown on the notice of delivery if such date is a Business Day during normal business hours, or, if such date is not a Business Day during normal business hours, then on the next Business Day and (d) if sent by email, then the date on which it is received, provided that a copy of such notice is also promptly provided pursuant to subclause (a), (b) or (c) of this Section 12.4 unless the recipient affirmatively acknowledges receipt of such email by its response thereto:

If to any Seller, Seller Representative or (prior to the Closing) the Company:

_____
_____
_____
Attention:_____
E-mail:_____

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

_____

[126] Note: It is common to include a provision regarding the ability of the Parties to assign the agreement and the liability of the assigning Party after any assignment. What is appropriate can vary based on the facts and circumstances. For example, if Buyer has a lender that requires a security interest in the Company assets after Closing (regardless of whether Buyer's obligation to close is contingent upon financing), such lender may require that the agreement be capable of being collaterally assigned to such lender after Closing.

[127] Note: This is an interpretative provision to negate the *contra proferentem* doctrine of contract interpretation (i.e., that ambiguities should be construed against the drafter).

[128] Note: It is important to include a notice provision so that the Parties know and understand how to properly provide notice and when notices are deemed received for purposes of calculating time periods for response, etc. Be mindful of e-mail notices. While they are convenient, they can be easily overlooked or glossed over. The example provision permits notice by e-mail, but only if a copy of such notice is also promptly provided pursuant to one of the other notice methods unless the recipient affirmatively acknowledges receipt of such email.

_____
_____
Attention:_____
E-mail:_____

If to Buyer or (after the Closing) the Company:

_____
_____
_____
Attention:_____
E-mail:_____

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

_____
_____
_____
Attention:_____
E-mail:_____

The Parties may change the addresses and email addresses to which such communications are to be addressed by giving written notice to the other Party in the manner provided in this Section 12.4.[129]

12.5 Entire Agreement.[130] This Agreement, the Exhibits and Schedules hereto and the other Transaction Documents collectively constitute the entire agreement between the Parties pertaining to the subject matter hereof and thereof and supersede all prior agreements, understandings, negotiations and discussions, whether written or oral, of the Parties pertaining to the subject matter hereof or thereof. There are no representations, warranties or other agreements between the Parties relating to the subject matter of this Agreement except as specifically set forth in this Agreement and in the other Transaction Documents, and no Party shall be bound by or liable for any alleged representation, warranty, promise, inducement, statement of intention or other agreement not so set forth.

12.6 Successors and Permitted Assigns.[131] This Agreement shall be binding upon and inure to the benefit of the Parties and their successors and permitted assigns.

[129] Note: The Parties should also remember to update their notice information if such changes in the future.

[130] Note: It is important to include an appropriate "Entire Agreement" provision to avoid allegations of competing agreements, written or oral, living outside of the agreement. If the Parties had previously negotiated a letter of intent, term sheet or similar preliminary agreement, whether or not binding in whole or in part, the Parties may wish to expressly provide that this agreement supersedes such preliminary agreement.

[131] Note: This is a simple and fairly standard "binding effect" provision.

12.7 Parties in Interest.[132] Notwithstanding anything contained in this Agreement to the contrary, nothing in this Agreement, expressed or implied, is intended to confer on any Person other than the Parties, the Buyer Indemnified Parties and the Seller Indemnified Parties, any rights, remedies, obligations or liabilities under or by reason of this Agreement; provided that only a Party will have the right (but not the obligation) to enforce the provisions of this Agreement on its own behalf or on behalf of any of its Buyer Indemnified Parties or Seller Indemnified Parties, as applicable.

12.8 Amendment.[133] This Agreement may be amended only by an instrument in writing that is expressly identified as an amendment or modification to this Agreement and that is executed by Buyer and the Seller Representative on behalf of all Sellers; provided, however, that no such amendment that adversely affects a Seller in a disproportionate manner as compared to other Sellers or that increases the liability of a Seller hereunder shall be effective without such Seller's written consent.

12.9 Waiver; Rights Cumulative.[134] Any of the terms, covenants, representations, warranties or conditions hereof may be waived only by a written instrument executed by or on behalf of the Party waiving compliance. No course of dealing on the part of a Party, or its officers, directors, members, managers, employees, agents, or other representatives, nor any failure by a Party to exercise any of its rights under this Agreement shall operate as a waiver thereof or affect in any way the right of such Party at a later time to enforce the performance of such provision. No waiver by a Party of any condition, or any breach of any term, covenant, representation or warranty contained in this Agreement, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such condition or breach or a waiver of any other condition or of any breach of any other term, covenant, representation, or warranty. The rights of the Parties under this Agreement shall be cumulative, and the exercise or partial exercise of any such right shall not preclude the exercise of any other right.

12.10 GOVERNING LAW; JURISDICTION; VENUE; SERVICES OF PROCESS.[135] THIS AGREEMENT AND ALL MATTERS ARISING OUT OF THIS AGREEMENT SHALL BE GOVERNED BY AND

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[132] Note: This provision is akin to a no third party beneficiaries provision and limits both remedies and liabilities to the Parties to the agreement. The example provision goes further to provide the benefit of the agreement to each Parties' respective indemnified parties, but requires the actual Parties to initiate the enforcement of the agreement. Where there are multiple Sellers and a Seller Representative, a Buyer might wish to further limit the initiation of enforcement to the Seller Representative as opposed to any Seller.

[133] Note: It is important to include an appropriate "Amendment" provision so it is clear how and who can amend the agreement. In the example provision, the Seller Representative has the authority to amend the agreement on behalf of all Sellers, subject to certain limitations.

[134] Note: This is a fairly standard no waiver and cumulative rights provision to ensure that (a) any waiver of non-compliance be in writing, (b) any waiver that is given is given only for that circumstance and is not a continuing waiver and (c) that the rights of the Parties pursuant to the agreement are cumulative (e.g., where appropriate, a Party may seek both indemnification and specific performance).

[135] Note: It is important to include a governing law provision to specify the applicable law governing the agreement. The selected governing law generally should bear a rational relationship to the Parties and/or the transaction. It is advisable to include a venue provision, specifying the appropriate venue to resolve claims between or among the Parties with respect to the agreement. Note that the example language permits venue in federal (assuming it has

CONSTRUED IN ACCORDANCE WITH THE INTERNAL LAWS OF THE STATE OF TEXAS (WITHOUT GIVING EFFECT TO ANY CHOICE OR CONFLICT OF LAW PROVISION OR RULE (WHETHER OF THE STATE OF TEXAS OR ANY OTHER JURISDICTION) THAT WOULD RESULT IN THE APPLICATION OF THE LAWS OF ANY JURISDICTION OTHER THAN THE STATE OF TEXAS). ANY LEGAL SUIT, ACTION OR OTHER PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY SHALL BE INSTITUTED IN THE FEDERAL COURTS OF THE UNITED STATES OF AMERICA OR THE COURTS OF THE STATE OF TEXAS LOCATED IN [_____] COUNTY, AND EACH PARTY IRREVOCABLY SUBMITS TO THE EXCLUSIVE JURISDICTION OF SUCH COURTS IN ANY SUCH SUIT, ACTION OR OTHER PROCEEDING; PROVIDED, HOWEVER, THAT A LEGAL SUIT, ACTION OR OTHER PROCEEDING FOR A TEMPORARY INJUNCTION OR OTHER TEMPORARY RELIEF MAY BE BROUGHT IN ANY COURT OF COMPETENT JURISDICTION. SERVICE OF PROCESS, SUMMONS, NOTICE, OR OTHER DOCUMENT DELIVERED IN ACCORDANCE WITH SECTION 12.4 SHALL BE EFFECTIVE SERVICE OF PROCESS FOR ANY SUIT, ACTION OR OTHER PROCEEDING BROUGHT IN ANY SUCH COURT. THE PARTIES IRREVOCABLY AND UNCONDITIONALLY WAIVE ANY OBJECTION TO THE LAYING OF VENUE OF ANY SUIT, ACTION OR OTHER PROCEEDING IN SUCH COURTS AND IRREVOCABLY WAIVE AND AGREE NOT TO PLEAD OR CLAIM IN ANY SUCH COURT THAT ANY SUCH SUIT, ACTION OR OTHER PROCEEDING BROUGHT IN ANY SUCH COURT HAS BEEN BROUGHT IN AN INCONVENIENT FORUM.

12.11 WAIVER OF RIGHT TO TRIAL BY JURY.[136] EACH PARTY HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY ACTION, SUIT OR OTHER PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT, THE OTHER TRANSACTION DOCUMENTS OR ANY TRANSACTION CONTEMPLATED HEREBY OR THEREBY.

12.12 Severability.[137] If any term or other provision of this Agreement (including, without limitation, any of the provisions of Section 7.9) is invalid, illegal, or incapable of being enforced by any rule of Law or public policy, all other conditions and provisions of this Agreement shall nevertheless remain in full force and effect. Upon such determination that any term or other provision is invalid, illegal, or incapable of being enforced, the applicable Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the

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jurisdiction) or state courts in a specified county, but permits claims for temporary relief in any court of competent jurisdiction. The Parties may wish to consider alternative dispute resolution options, such as mediation in advance of litigation or arbitration. If the Parties desire arbitration, the arbitration provision should be carefully drafted and reviewed by a litigator or arbitration specialist. The example language also specifies that service of process pursuant to the notice provision of Section 12.4 is deemed valid service.

[136] Note: It is not uncommon for the Parties to waive a jury trial in a purchase agreement. While this can benefit both Parties, it can also be more beneficial to one party than the other, so an attorney should consider his or her client's position and which benefits his or her client's best interest. Note that the example provision extends to the other Transaction Documents. If the other Transaction Documents include agreements for which such a waiver is not desirable, the Parties may wish to limit the application of the waiver to the agreement and only certain other specified Transaction Documents.

[137] Note: This is a fairly typical "Severability" provision, where, in the event that any provision of the agreement is unenforceable, the Parties agree to negotiate in good faith an appropriate modification to make the agreement enforceable and, failing such agreement, request that a court do so. The example provision specifically references (without limitation) Section 7.9 (Non-Compete; Non-Solicit), as such provisions may be more likely to be subject to scrutiny.

Parties as closely as possible in an acceptable manner to the end that the transactions and other agreements contemplated hereby are fulfilled to the fullest extent possible, and if despite such good faith negotiations, the applicable Parties are unable to agree to such modification, such Parties request that a court of competent jurisdiction designated in Section 12.10 modify the offending provisions of this Agreement so as to effect the original intent of the Parties as closely as possible in an lawful manner to the end that the transactions and other agreements contemplated hereby are fulfilled to the fullest extent possible.

12.13 Specific Performance.[138] The Parties agree that irreparable damage would occur if any provision of this Agreement (including, without limitation, any of the provisions of Section 7.8 and Section 7.9) were not performed by any of the Parties in accordance with the specific terms hereof or were otherwise breached by a Party. It is accordingly agreed that each Party shall be entitled, without posting a bond or similar security and without limiting it other remedies available hereunder, to an injunction or other equitable relief to prevent breaches of this Agreement or to enforce specifically the performance of the terms hereof. Each Party agrees that it will not oppose the granting of an injunction, specific performance, and other equitable relief when expressly available pursuant to the terms of this Agreement on any basis, including that another Party has an adequate remedy at law or an award of specific performance is not an appropriate remedy for any reason at law or equity.

12.14 Counterparts.[139] This Agreement may be executed in any number of counterparts, and each such counterpart hereof shall be deemed to be an original instrument, but all of such counterparts shall constitute for all purposes one agreement. Any signature hereto delivered by a Party by facsimile transmission or other electronic transmission (including in portable document format (PDF)) shall be deemed an original signature hereto.

12.15 Time is of the Essence.[140] With respect to all dates and time periods in this Agreement, time is of the essence. If the date specified in this Agreement for giving any notice or taking any action is not a Business Day (or if the period during which any notice is required to be given or any action taken expires on a date which is not a Business Day), then the date for

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[138] Note: This is a fairly typical "Specific Performance" provision where the Parties agree that each Party is entitled to specific performance, an injunction and other appropriate equitable relief, without limiting the other remedies available pursuant to this agreement. The example provision specifically references (without limitation) Section 7.8 (Confidentiality) and Section 7.9 (Non-Compete; Non-Solicit), as it can sometimes be difficult to prove monetary damages in the event of a breach of those provisions in particular.

[139] Note: This is a fairly standard "Counterparts" provision, allowing the Parties to execute separate signature pages and deliver those pages electronically. Counterparts provisions are customary, but one should be mindful of poor drafting of such provisions. For example, some (outdated) formulations specify that signature pages may be delivered by facsimile transmission (without reference to other electronic transmission), which may call into question whether other forms of electronic delivery (such as PDF) are permitted.

[140] Note: This provision serves two functions. First, it specifies that "time is of the essence," which is important because absent a statement that time is of the essence, it is generally assumed that time is not of the essence. *See Siderius, Inc. v. Wallace Co., Inc*., 583 S.W.2d 852, 863 (Tex. Civ. App.—Tyler 1979, no writ). Second, it specifies how days are calculated, which is important because the Parties often draft certain provisions of the agreement to require action within a specified number of dates without reference to a calendar which would show, for example, that a key date falls on a holiday or other non-Business Day.

giving such notice or taking such action (or the expiration date of such period during which notice is required to be given or action taken) shall be the next day which is a Business Day.

12.16 Representation.[141] Recognizing that [INSERT NAME OF SELLER COUNSEL] ("Seller Counsel") has acted as legal counsel to the Company, Sellers and certain of their respective Affiliates and other related entities prior to date hereof, and that Seller Counsel intends to act as legal counsel to Sellers and certain of their respective Affiliates and other related entities (which will not include the Company) after the Closing, Buyer, on behalf of itself and each of its Affiliates (including the Company and its Subsidiaries after the Closing) hereby waives any conflicts that may arise in connection with Seller Counsel representing Sellers or any of their respective Affiliates or other related entities after the Closing as such representation may relate to Buyer or any of its Affiliates (including the Company and its Subsidiaries after the Closing) with respect to the transactions contemplated hereby. In addition, (a) all communications involving attorney-client confidences between the Company, Sellers or any of their respective Affiliates or other related entities, on the one hand, and Seller Counsel, on the other hand, in the course of the negotiation, documentation and consummation of the transactions contemplated hereby shall be deemed to be attorney-client confidences that belong solely to Sellers (and not Buyer or any of its Affiliates, including the Company or any of its Subsidiaries after the Closing) and (b) all alternative proposals relating to the potential sale of the Company, any of its Subsidiaries or any of their respective assets (collectively, "Alternative Proposals") shall be deemed to belong solely to Sellers (and not Buyer or any of its Affiliates, including the Company or any of its Subsidiaries after the Closing) (jointly the "Engagement"). Accordingly, none of the Company or any of its Subsidiaries shall have access to any such communications or to the files of Seller Counsel relating to the Engagement from and after the Closing, or to any of the Alternative Proposals, and from and after the Closing, none of the Company or any of its Subsidiaries or any Person purporting to act on behalf of or through the Company or any of its Subsidiaries will seek to obtain any such communications or Alternative Proposals relating to the Engagement, whether by seeking a waiver of the attorney-client privilege or through other means. Without limiting the generality of the foregoing, from and after the Closing, (i) Sellers and certain of their respective Affiliates or other related entities represented by Seller Counsel (and not the Company or any of its Affiliates after the Closing) shall be the sole holders of the attorney-client privilege with respect to the Engagement, and none of the Company or any of its Affiliates after the Closing shall be a holder thereof, (ii) to the extent that files of Seller Counsel in respect of the Engagement constitute property of the client, only Sellers and their respective Affiliates and other related entities represented by Seller Counsel (and not the Company or any of its Affiliates after the Closing) shall hold such property

[141] Note: In an equity transaction, Buyer is purchasing the Company, and after Closing Buyer will indirectly own, through the Company, all of the Company's assets, which may include, among other things, legal advice given by Seller Counsel to the Company with respect to the transaction and alternative proposals. This provision is intended to preserve the attorney-client relationship between the Company and Seller Counsel pre-closing on a post-closing basis as between Seller and Seller Counsel, including preserving privileged communications and information regarding alternative proposals (which may be of particular concern when the transaction arose as a result of an auction process), as well as to prevent Buyer from causing the Company to assert a conflict in the event of a post-closing dispute among the Parties on the basis that Seller's Counsel previously represented the Company. The scope of such provisions can vary widely, but Sellers should be aware of the concept and address the issue appropriately.

rights, (iii) Seller Counsel shall have no duty whatsoever to reveal or disclose any such attorney-client communications or files to the Company or any of its Affiliates relating to the Engagement by reason of any attorney-client relationship between Seller Counsel and the Company or any of its Affiliates or otherwise, (iv) Seller Counsel may represent Sellers and/or any of their respective Affiliates or other related entities in connection with any dispute that relates in any way to the transactions contemplated by this Agreement, including in any claim for indemnification brought by Buyer (whether on its own behalf of on behalf of any other Buyer Indemnified Party) and (v) all Alternative Proposals shall be deemed to belong solely to Sellers (and not Buyer or any of its Affiliates, including the Company and its Subsidiaries after the Closing).

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the Parties hereto have executed this Membership Interests Purchase Agreement in one or more counterparts as of the Execution Date.

Buyer:

[BUYER ENTITY],
a [_____]

By:_____
Name:_____
Title:_____

Company:

[TARGET COMPANY], LLC,
a [_____] limited liability company

By:_____
Name:_____
Title:_____

Seller Representative:

_____
[**SELLER REPRESENTATIVE**]

Sellers:

_____
[SELLER NAME]

[SELLER COMPANY], LLC,
a [_____] limited liability company

By:_____
Name:_____
Title:_____

[Signature Page To Membership Interests Purchase Agreement]

EXHIBIT A

Sellers

Seller	Membership Interests
[Seller Name]	[__]%
[Seller Name]	[__]%
...	...
Total	100%

EXHIBIT B

Form of Assignment of Membership Interests

Attached hereto and incorporated herein.

ASSIGNMENT OF MEMBERSHIP INTERESTS IN [TARGET COMPANY], LLC

Effective as of _____, 20___ (the "Effective Date"), [_____], [a _____] and [_____], [a _____] (each, an "Assignor" and collectively, the "Assignors"), for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and confessed, hereby assigns, transfers, conveys, and delivers to [Buyer Entity], a [_____] ("Assignee"), all of such Assignor's membership interests in [Target Company], LLC, a Texas limited liability company (the "Company"), which conveyed interests constitutes, in the aggregate, One Hundred Percent (100%) of the issued and outstanding membership interests of the Company, together with all rights appurtenant thereto (collectively, the "Assigned Interests"), in each case free and clear of all Liens other than Permitted Liens and Liens imposed by applicable securities Laws. Assignee hereby accepts the assignment of the Assigned Interests from Assignors.

This Assignment of Membership Interests (this "Assignment") is being executed and delivered pursuant to that certain Membership Interests Purchase Agreement, dated as of [_____], by and among Assignee, the Company, Assignors and [_____], in [its / his] capacity as Seller Representative (the "MIPA"). This Assignment is expressly subject to the terms and conditions of the MIPA. If there is a conflict between the terms of this Assignment and the MIPA, the terms of the MIPA shall control. Capitalized terms used but not defined herein shall have the meanings given such terms in the MIPA unless the context otherwise requires. The provisions of Section 12.10 and Section 12.11 of the MIPA shall apply to this Assignment and are incorporated herein, *mutatis mutandis*.

This Assignment may be executed in any number of counterparts, and each such counterpart hereof shall be deemed to be an original instrument, but all of such counterparts shall constitute for all purposes one agreement. Any signature hereto delivered by a Party by facsimile transmission or other electronic transmission shall be deemed an original signature hereto.

[*Signature Page Follows*]

IN WITNESS WHEREOF, the Parties have executed and delivered this Assignment in one or more counterparts to be effective as of the Effective Date.

ASSIGNOR:

[SELLER SIGNATURE BLOCK]

ASSIGNEE:

[BUYER ENTITY SIGNATURE BLOCK]

EXHIBIT C

Illustration of Net Working Capital Calculation

Attached hereto and incorporated herein.

EXHIBIT D

Form of Seller Representative Closing Certificate

Attached hereto and incorporated herein.

Example Seller Representative "Bring Down" Certificate

CLOSING CERTIFICATE

[Closing Date]

This Closing Certificate is delivered pursuant to Section 3.2(a)(ii) of that certain Membership Interests Purchase Agreement (the "Purchase Agreement"), dated as of the [__] day of [_____], 20[__], by and among by and among [Buyer Entity], a [State of Formation] [Type of Entity] (the "Buyer"). [Target Company], LLC, a Texas limited liability company (the "Company"), all of the members of the Company, each of which is identified in Exhibit A to the Purchase Agreement (each, a "Seller" and collectively, the "Sellers"), and [Seller Representative], solely in its capacity as the representative of Sellers for the purposes provided in the Purchase Agreement (the "Seller Representative"). Capitalized terms used but not defined herein shall have the meanings given such terms in the Purchase Agreement unless the context otherwise requires. The undersigned Seller Representative, on behalf the Company and each Seller, hereby certifies as follows as of the date first set forth above:

1. The representations and warranties set forth in Article IV and Article V of the Purchase Agreement (disregarding all qualifications or limitations as to "materiality" "in all material respects" or "Material Adverse Effect" and words of similar import set forth therein), are true and correct in all material respects as of the Closing Date as though such representations and warranties had been made on and as of the Closing Date (except that representations and warranties that are made as of a specified date are true and correct as of such date), and the Fundamental Representations set forth in Article IV and Article V of the Purchase Agreement are true and correct in all respects as of the Closing Date.

2. The Company and each Seller has performed in all material respects all of the covenants and agreements required to be performed by each of them under the Purchase Agreement at or prior to the Closing.

IN WITNESS WHEREOF, the undersigned, both his capacity as an officer and manager of the Company and in his capacity as the Seller Representative, has hereunto set his name as of the date set forth above.

_____
[Seller Representative]

SELLER REPRESENTATIVE

By:_____
Name:_____
Title:_____

EXHIBIT E

Form of Buyer Closing Certificate

Attached hereto and incorporated herein.

Example Buyer "Bring Down" Certificate

CLOSING CERTIFICATE

[Closing Date]

This Closing Certificate is delivered pursuant to Section 3.2(b)(iv) of that certain Membership Interests Purchase Agreement (the "Purchase Agreement"), dated as of the [__] day of [_____], 20[__], by and among by and among [Buyer Entity], a [State of Formation] [Type of Entity] (the "Buyer"). [Target Company], LLC, a Texas limited liability company (the "Company"), all of the members of the Company, each of which is identified in Exhibit A to the Purchase Agreement (each, a "Seller" and collectively, the "Sellers"), and [Seller Representative], solely in its capacity as the representative of Sellers for the purposes provided in the Purchase Agreement (the "Seller Representative"). Capitalized terms used but not defined herein shall have the meanings given such terms in the Purchase Agreement unless the context otherwise requires. The undersigned officer of Buyer, solely in his capacity as an officer of Buyer and not in individually, hereby certifies as follows as of the date first set forth above:

1. The representations and warranties of Buyer contained in Article VI of the Purchase Agreement (disregarding all qualifications or limitations as to "materiality," "in all material respects" or "Material Adverse Effect" and words of similar import set forth therein), are true and correct in all material respects as of the Closing Date as though such representations and warranties had been made on and as of the Closing Date (except that representations and warranties that are made as of a specified date are true and correct as of such date), and the Fundamental Representations set forth in Article VI of the Purchase Agreement are true and correct in all respects as of the Closing Date.

2. Buyer has performed in all material respects all of the covenants and agreements required to be performed by it under the Purchase Agreement at or prior to the Closing

IN WITNESS WHEREOF, the undersigned, solely in his capacity as an officer and not individually, has hereunto set his name as of the date set forth above.

[BUYER ENTITY],
a [_____]

By:_____
Name:_____
Title:_____

EXHIBIT F

Form of Resignation Letter

Attached hereto and incorporated herein.

Example Form of Resignation Letter

[Closing Date]
[Company Name]
[Address]
[Address]

Re: Resignation

Ladies and Gentlemen:

I hereby tender my resignation from my position as an officer [and manager] of [_____], LLC, a Texas limited liability (the "Company") and each subsidiary of the Company, in each case effective as of, and contingent upon, the Closing (as such term is defined in that certain Membership Interests Purchase Agreement dated as of [_____], 20[__], by and among [Buyer Entity], a [State of Formation] [Type of Entity] ("Buyer"), the Company, all of the members of the Company ("Sellers"), and [Seller Representative], in its capacity as the representative of Sellers for the purposes provided in said agreement).

Sincerely,

_____
[_____]