212 - Negotiating Environmental Provisions in Commercial Transactions

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Mr. Braem's professional affiliations include: president of ACC's New Jersey Chapter (NJCCA) and chair of NJCCA's environment and safety committee; member of board of directors of the New Jersey State Bar Association's environmental law section; and member of New Jersey State Bar Association's professional responsibility committee. Mr. Braem helped develop and is a faculty member for the ethics and professionalism program mandated by the New Jersey Supreme Court for all in-house counsel receiving the New Jersey in-house counsel limited license.

Mr. Braem received a B.S. from the University of Wisconsin-Milwaukee and a J.D. from DePaul University, Chicago.

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Mr. Franzel is chair of the Hawaii State Bar Association corporate counsel section and the Mid-Pacific Institute Board of Counselors. He speaks and consults frequently throughout the United States on in house counsel issues. Mr. Franzel's recently published article entitled "A Model Letter for a Model Mediation" can be found in the American Law Institute ABA Practical Litigator magazine.

Mr. Franzel has a B.A. from the University of Wisconsin, Madison and graduated from the John Marshall Law School.

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Prior to joining Sempra Energy, Mr. Gonzales was in-house counsel for Atlantic Richfield Company (ARCO), now operating as BP America. Before ARCO, he was an associate in the corporation department of O'Melveny & Myers.

Mr. Gonzales is the president of the board of directors of ACC's Southern California Chapter (ACCA-SoCal), is serving as chair of the ACC's Environmental Health & Safety Committee, and vice chair of the ACC's Council of Committees. He serves as treasurer of the board of directors of the Asian Pacific American Legal Center of Southern California, a member, and former president, of the Philippine American Bar Association of Los Angeles, and as an officer of the environmental law section of the Los Angeles County Bar Association (LACBA). Mr. Gonzales has published a number of articles in the areas of environmental law and commercial law. He is a frequent speaker on environmental subjects. Mr. Gonzales is the recipient of the ACCA-SoCal Pro Bono Exemplary Service Award, as well as the chairman's award by the board of directors of Sempra Energy.

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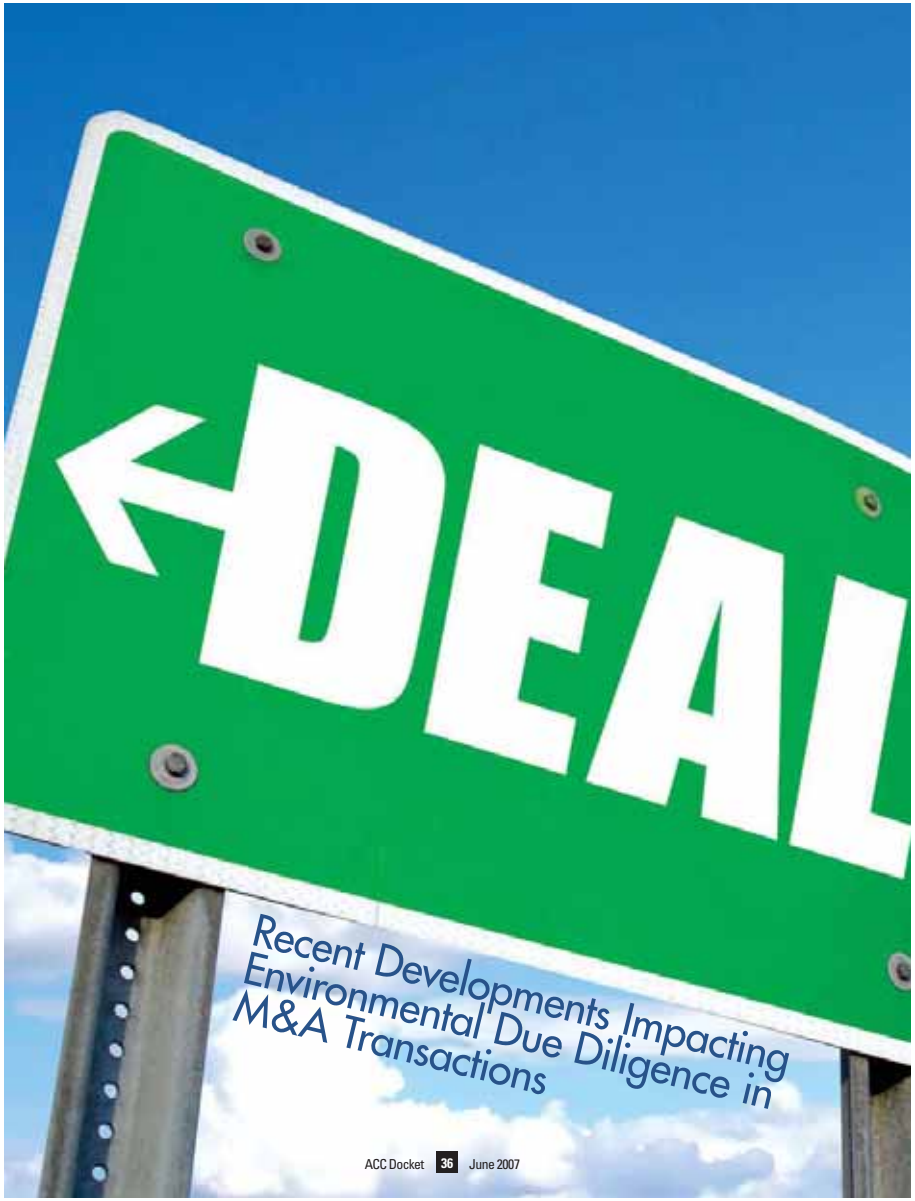

Recent Developments Impacting Environmental Due Diligence in M&A Transactions

Company A's CEO has just informed his general counsel (GC) that the company will be selling off some under performing facilities in various states. It's not yet clear whether the transaction will proceed as a stock purchase, an asset purchase, or a straight real estate sale. In addition to structuring and overseeing the transaction itself, the CEO further instructed his GC to organize and direct the company's environmental due diligence efforts. Where should Company A's GC begin? The first thing to do is to understand exactly how the deal itself will be structured. Will it be a straightforward sale of real properties, or the sale of income-generating operating assets, or the sale of stock? The answer to this question, in turn, will indicate what type of environmental due diligence will be needed.

By contrast, the GC representing the likely purchaser, Company B, has a completely different set of questions, priorities, and concerns. What she will need during the course of due diligence and the ensuing negotiations will also depend upon the nature of the deal. The purpose of this article is to offer a practical framework to address these issues, from both a seller's and a purchaser's perspective.

By Vincent M. Gonzales, Brian E. Heim, Rose M. Murphy, Amy L. Edwards, Jennifer L. Hernandez, and Bonni F. Kaufman

It should come as no surprise to most in-house counsel that environmental issues are frequently material in any kind of M&A transaction, particularly with respect to asset valuation and the disposition of past and future environmental liability and risk. The job of the general counsel is to identify the possible risks and liabilities so that he or she can find a transactional solution to these issues in order to ensure deal success. What is less obvious is that the environmental due diligence process itself can trigger other concerns for the seller, particularly if it is publicly traded. For example, if the seller learns about areas of non-compliance or unanticipated cleanup costs that are necessary, it may need to amend its financial disclosures in its 10Ks, 10Qs, and annual reports in order to satisfy evolving requirements under Sarbanes Oxley and FIN 47.

The rules governing environmental due diligence have recently changed. Many purchasers will now require compliance with EPA's Final All Appropriate Inquiries Rule (AAI), 40 CFR Part 312, which governs the acquisition of commercial real estate. This rule went into effect on November 1, 2006. Other due diligence standards may be more appropriate for other types of transactions. Purchasers might also seek greater price concessions for known environmental conditions because of the greater difficulty in recouping "voluntary" cleanup costs in light of the Supreme Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, in December 2004. Finally, a purchaser will be using the environmental due diligence process to ascertain what regulatory conditions or constraints, if any, exist that may limit or even prohibit its intended use of the target company and its assets. Typical constraints could include permit limits, wetlands, or endangered species on the target's property. We will discuss each of these issues in greater depth.

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Purpose and Scope of Environmental Due Diligence

The primary purpose of the environmental due diligence process is to identify material environmental conditions, risks and constraints, such as legacy liabilities, operational or ongoing liabilities, areas of non-compliance, and potential constraints upon facility expansion or modification.

One of the first things that the two GCs need to address is the likely structure of the deal. Whether the transaction is structured as an asset sale, stock sale, or traditional sale of real estate will dictate what type of environmental due diligence is appropriate. Other preliminary considerations include confidentiality concerns and financial disclosure issues.

Asset Purchase

If the transaction is structured as an asset purchase and sale, Company B may have a greater ability to insulate itself contractually from Company A's environmental liabilities. The primary exceptions to this rule include a de facto merger or consolidation, a "continuation of the enterprise," a situation where Company B expressly assumes Company A's environmental liabilities, or a fraudulent transfer. If Company B is able to insulate itself from Company A's liabilities, it is not going to need to press as hard to discover what all of those liabilities may be. However, Company B should consider the financial strength of Company A after the sale. An indemnity is only as good as the solvency of the indemnitor.

As a practical matter, it is important not to be too confident in the law as it currently exists. Not only does the law change frequently in this area, but the changes can sometimes be very radical or unexpected. The *Cooper v. Aviall* case, in particular, is forcing many courts to rethink their approaches to contribution claims, even after having established decades of jurisprudence on the subject. Even if the current law favors the fact that liability will be retained by Company A, Company B should still expressly provide in the agreement that Company A retains all responsibility for claims arising from or related to any event or condition present or occurring prior to the sale, including, but not limited to, environmental conditions, exposures, or releases. Moreover, Company B should obtain an indemnity from Company A. Many long tail exposures (such as asbestos and various cancers) surface decades after the sale and the laws either could change or, based on public policy, another state's laws could apply.

Stock Purchase

In a typical stock purchase transaction, the purchaser is stepping into the shoes of the seller and thereby assuming all of the seller's liabilities. For this reason, in a stock transaction, Company B would have a vested interest in knowing as much as it can about the full scope and extent of Company A's existing environmental liabilities and any potential constraints upon facility expansion or modification. An informed purchaser is likely to insist upon a type of due diligence that goes beyond AAI. Alternative standards for this type of transaction include the ISO 14015 standard, "Environmental Management—Environmental Assessment of Sites and Organizations" or an alternative standard that is under development and currently titled, "Diligence Alternatives for Transactional Assessments" (the DATA Standard). Often, the seller is spinning off a wholly-owned subsidiary. Where the seller is a well funded "parent," there is a much greater opportunity to contractually obligate the seller to retain some or even all the environmental liabilities of its former subsidiary.

After full due diligence, the agreements should specifically reflect retained and transferred liabilities, the cleanup standards and procedures for any cleanup. Often current acceptable standards of exposure based on known science are modified in future years or things are missed. Company B should attempt to draft a provision that:

- is not restricted to existing laws but, rather, any environmental condition, release or exposure occurring before the sale;
- leaves the length of time to bring a claim open; and
- does not cap Company A's economic responsibility to remediate and pay for claims.

Company A would want the opposite: a limitation of its retained liabilities to current environmental laws, a limitation on the length of time of any retained liability, a cap on its total economic exposure and, if it can get it, a release and an indemnity from Company B for any exposures transferred to Company B above the caps or after the limitations period expires. One way to bridge this gap is to have both split the cost of environmental insurance to cover the cost of any future environmental liability, commencing after an agreed time period, say, 10 years after the closing date, during which period Company A bears all the risk of any legacy environmental liability.

Key Areas to Coordinate with the Transactional Negotiation Team

There are a number of other issues that should be coordinated between the transactional negotiation team and the environmental due diligence team to be sure that Company B is acquiring the information it needs to know as part of the due diligence process. These include:

1. Identification of any capital expenditures needed to meet new or renewed pollution control permits. There may be a need, for example, to upgrade existing pollution control equipment to meet new Clean Air Act regulatory limits that will become effective shortly. If inadequate reserves have been set aside for this upgrade, the plant may be unable to operate, or unable to operate at the throughputs currently specified in its permit. Company B should try to keep Company A liable for post-closing capital improvement upgrades in the event that the government brings an enforcement action and requires such upgrades based on pre-sale operations or violations.
2. Identification of any future costs to comply with global warming legislation and increases in energy spending. New legislation, particularly at the state level, may require operating facilities to report and reduce their CO2 emissions and to obtain "credits" for these reductions. It behooves the transactional and environmental teams to discuss whether CO2 emissions may be an issue in the transaction.
3. Identification of any future permitting issues for expanded operations, process modifications, or new facilities. If the facility intends to expand its current operations, or to build new ones, or to otherwise change its operations, it is important for the transactional and environmental due diligence teams to be talking about environmental issues that could adversely impact these plans, such as whether the facility is in a non-attainment area, whether the facility might encounter new source review (NSR) or prevention of significant deterioration (PSD) issues, and whether the watershed in which the facility operates has any total maximum daily load (TMDL) issues.
4. Identification of other project constraints, such as protected species and wetlands/surface waters. The presence of endangered species (or their habitat) or wetlands may adversely impact the company's ability to expand its existing facilities or to build new ones.

Other Due Diligence Do's and Don'ts

There are a number of other issues that in-house counsel should keep in mind when reviewing the environmental provisions in a corporate or real estate transaction:

1. Beware of using outdated boilerplate environmental language! The field of environmental law is constantly changing, so if your outside real estate or corporate counsel are using "boilerplate" environmental provisions that have not been reviewed by experienced environmental attorneys within the past year, they could be creating unnecessary ambiguity and vagueness in your contractual documents.
2. Identify employees who will be "going with the deal" and separate them from the negotiations if possible on the seller side and insure that you have access to them from the buyer side. This is a key consideration when the transaction is of the company itself, or of an operating asset, where the employees' understanding of the environmental requirements as well as overall institutional knowledge of the asset or the company, make them an important part of the deal.
3. Don't hide issues—Obfuscation of the issues will only damage your credibility and possibly delay the closing in the long run. Consider entering into a confidentiality agreement at the start of negotiations so that sensitive environmental issues can be disclosed and discussed candidly.
4. Be prepared to make the tough decision as an in-house lawyer to advise your company's management not to go forward with a particular deal. Outside counsel can provide the legal pros and cons, and environmental consultants can provide all of the relevant data points and technical analyses you need, but neither of them are in the position to determine which risk levels are acceptable to the company. An in-house lawyer's client is the company as a whole, and not its individual parts or departments. Hence, even if one part of the company views a given transaction favorably, if in-house counsel's environmental due diligence efforts have led to the conclusion that the deal may not be in the best interest of the company as a whole or in the long term, then it is his or her professional duty to say so.
5. Assist in setting appropriate environmental reserves and verify that they will survive closing. You will also need both your business person and your risk management expert to help you.
6. Be mindful of whom you represent—the seller or the purchaser—lest you do the other party's due diligence duty instead of your own. In our example, Company A must disclose what it knows about the environmental condition of the property to Company B who then must process that information and assess the property in light of what it wants to use it for—a datum that Company A is not likely to know or understand fully. For example, a purchaser who owns and operates, say, day-care facilities is in a better position of evaluating the environmental risks of purchasing a property for its specific uses, compared to a seller of a former service station who is disclosing the site's environmental conditions to the purchaser and is not likely to understand such an operation as much as the purchaser.
7. Be mindful of the fact that, if the purchaser is planning to use outside financing to fund the acquisition, the purchaser's lender is likely to have its own environmental due diligence requirements. Many (but not all) lenders are requiring their borrowers to follow the new AAI rule. They frequently are unwilling to fund an acquisition unless a No Further Action letter (or equivalent) has been issued by a federal or state environmental agency for a known environmental condition on the site, or at least know what type of process the purchaser intends to follow to resolve the environmental concern. In our example, if the environmental condition is significant, the lender is also likely to demand an environmental indemnity and perhaps an environmental escrow from Company B. Company B will be conducting its negotiations with Company A with these considerations in mind.
8. Finally, if you are purchasing an asset as an ongoing concern, with the intent to continue operating it as such, then do not forget to include in your environmental due diligence plan, the careful review of the asset's environmental permits, plans and approvals, such as air quality operating permits, wastewater discharge permits, spill prevention, containment, and contingency plans. Permit conditions, in particular, need to be closely scrutinized to ensure that they do not include limits or restrictions that you are not prepared to accept. Do cast a very critical eye when these permits are later reissued with Company B's name, because permitting agencies can sometimes revise permit conditions without informing the purchaser accordingly.

How the other issues are resolved depends in large part on which party has a greater stake in having the deal succeed; that party is more likely to make compromises in the end. The parties should also address who will be responsible for remediation and the cleanup standard. Company B will control the facility and will want a zero detection standard. Company A will have the economic exposure and will want to limit the remediation to the minimum legal standard in place at the time of the sale with maybe a deductible or threshold that needs to be reached before and a total cap. Since Company B will, in the end, be in possession of the property, another approach to consider would be for Company A to fund a trust account dedicated solely to the remediation of the property which Company B will be responsible for managing. This, in turn, will incentivize Company B to be prudent in its choice of cleanup levels and ongoing monitoring methods, in order to make the trust fund last as long as it can. Regardless of how this issue is resolved, it should be negotiated and understood from the beginning to avoid litigation and hostility when claims surface years later.

Commercial Real Estate Acquisition

Where commercial real estate is being purchased, Company B is likely to insist upon conducting its own environmental due diligence in accordance with EPA's final AAI rule or the current version of the ASTM Standard for Environmental Site Assessments: The Phase I Environmental Site Assessment Process (E 1527-05), in order to qualify for one of the Landowner Liability Protections (LLPs) that was created as part of the Brownfields Amendments of 2002. Notwithstanding the AAI rule, a judge or jury might still hold a "sophisticated" buyer to a higher due diligence standard than AAI. Most large corporations, as well as companies that routinely buy and sell commercial or industrial real estate, would likely to be considered "sophisticated" buyers by a court, whereas a "Mom and Pop" tenant might not.

Confidentiality Issues

The transaction may proceed in a two step process if the parties have agreed on the need to keep the proposed transaction confidential. For example, during the first step, the general counsel of Company A may not want its employees,

Seller's Due Diligence Checklist

1. Objective is to sell property "as-is" with full releases and indemnification from the Purchaser with minimal impact upon price.
   - o Limited or no environmental reps and warranties and indemnities;
   - o Broad releases from the purchaser;
   - o Control type and timing of cleanup;
   - o Make Purchaser responsible for any change in use of the property; prohibit certain uses on the site (e.g. day care centers, residences, schools, parks); and
   - o Place a total economic cap on any claim arising from the agreement.

Buyer's Due Diligence Checklist

1. Objective is to purchase property without any responsibility for pre-existing environmental contamination and conduct due diligence with any expansion plans for the facility in mind.
   - o Broad environmental representations and warranties and indemnities from Seller;
   - o Escrows or purchase price reduction to address known environmental conditions;
   - o Ability to control type and timing of cleanup;
   - o Ability to conduct a Phase I ESA;
   - o Determine whether Phase II ESA will be needed/allowed; and
   - o Determine whether environmental insurance is warranted and, if so, if it is available and at what cost.

Type of Due Diligence That Should be Conducted

1. Real Estate Acquisition Due Diligence—Phase I ESAs
   - o E 1527-05
   - o Purchaser needs to be named or obtain reliance letter
2. Regulatory Compliance Due Diligence
   - o ASTM E 2107-00
   - o EPA's Audit Policies
3. EMS Due Diligence—ISO 14015 Environmental Management—Environmental Assessment of Sites and Organizations (EASO)
4. Diligence Alternatives for Transactional Assessments (DATA Standard)

ACC Extras on…Environmental Due Diligence

2007 ACC Annual Meeting

204 What Litigators Know About Transactions that M&A Lawyers Should Know Too. How would you like to have open time with your litigation peers who will share their 20/20 hindsight on the M&A deal and what M&A practitioners should know about how your contracts get interpreted? You can if you register now for this session at ACC's 2007 Annual Meeting, October 29-31, in Chicago. Visit our website at *am.acc.com* for more information.

ACC Annual Meeting Program Materials

Corporate Governance Issues in M&A Transactions (2006). This program material is your chance to learn the law you need to intelligently advise your management and board. It reviews corporate governance issues and responses through all stages of an M&A transaction including planning, due diligence, negotiation, board liability issues, the board approval process, and the shareholder approval process and send you home with the resources you need to counsel your client. *www.acc.com/resource/v8202*

ACC Quick Reference

Due diligence checklist (2007). This due diligence checklist should be used in evaluating the acquisition of a company. *www.acc.com/resource/v7418*

InfoPAKs

Preparing for and Responding to an Accidental Environmental Release: A Legal Primer (2005). This InfoPAK seeks to provide in-house counsel with information on planning for, responding to, and investigating the causes of accidental releases of hazardous substances to the environment. *www.acc.com/resource/v5277*

***Metropolitan Corporate Counsel* (MCCA)**

Merger & Acquisition Practice in China (December 2006). This article provides an overview of the laws regarding mergers and acquisitions in China. *www.acc.com/resource/v8018*

Sample Forms

- *Memo: Process for Dissolving a Delaware Corporation (2006). www.acc.com/resource/v6680*
- *Merger Notification and Procedures Template* (2006). This template is intended to provide initial background on the jurisdiction's merger notification and review procedures. *www.acc.com/resource/v7673*
- *Term Sheet* (2006). This term sheet lists structure, purchase price, and other conditions to consider in M&A transactions. *www.acc.com/resource/v7699*

Webcasts

- "Deal or No Deal: Recent Developments Impacting Environmental Due Diligence in M&A Transactions" (2006). The authors provide an update on some of the legal requirements that have changed, and provide some practical tips on how to conduct environmental due diligence quickly and efficiently. The attorneys who presented this program addressed:
- The purpose and scope of environmental due diligence; how those two issues will affect the process; and some practical tools;
- SEC environmental disclosure obligations;
- Methods for estimating environmental liabilities;
- New regulatory requirements for conducting environmental due diligence (AAI); and
- the legal protections that a company might enjoy if it conducts due diligence in accordance with these new standards.

  Transcript available at *www.acc.com/resource/v7574.*

- "Recent Developments in European M&A and Securities Law, and EU Privacy Law" (2006). This webcast discusses the effect of the EU Prospectus Directive on offerings of securities in the EU in connection with employee stock-holding plans, the impact across Europe of the EU Take-over Directive, the growing appeal to US companies of the London Stock Exchange's AIM market, and the clash of EU privacy laws with SOX whistleblowing requirements. Whether your company is located in the EU, doing business there, or has listed (or is contemplating a listing of) securities on an EU exchange, our panel of experts will provide you with the most up-to-date information. *www.acc.com/resource/v7420.*

neighbors, tenants, or regulatory agencies to know that the company is being sold until the basic structure of the deal has been worked out with Company B. Why would this need for confidentiality be more compelling in a deal involving environmental issues, compared to a deal with no environmental issues? This is because any premature disclosure of the transaction, before both parties are ready, can cause problems in various environmental situations. For example, if one of Company A's properties being sold is the subject of a remediation effort funded by multiple PRPs (potentially responsible parties), then the premature disclosure of its impending sale could potentially disrupt cost allocation negotiations among the PRPs, especially if some PRPs feel that Company A will be unfairly receiving a "windfall" from the sale of a contaminated property that has now been cleaned up with help from other PRPs. Accordingly, a confidentiality agreement with Company B is a very important aspect of the deal at this stage. Once the basic deal structure has been determined, then Company B may be able to conduct something closer to an AAI type inquiry during the second phase of the deal.

> **Typical parties** who should be included are the director of **environmental health** and safety; counsel; the business person; possibly the **plant manager;** an outside environmental consulting firm; and someone to serve as a **liaison** to the transaction negotiation team.

Disclosure Issues

Company A is likely to be very apprehensive about reporting and disclosure issues that could be triggered by Company B's due diligence process. Indeed, the kinds of environmental issues discovered through this process may very well trigger disclosure obligations under Sarbanes Oxley, FASBY, and FIN 47, in addition to state release reporting obligations, state transfer law requirements in various jurisdictions, and even employee right-to-know requirements. Furthermore, Company A's anxiety level is likely to rise even more if Company B can also change its mind and walk away from the deal as a result of such a process.

The filing of the purchase agreement should not be the first time that long-term environmental liabilities see the light of day. A public company had better have its environmental disclosure house in order before a major deal. At a minimum, Company A will want to control any governmental or financial disclosures that are required as a result of Company B's due diligence and should be able to oppose any consultant's conclusions. The agreement should restrict Company B's ability to discuss matters with environmental agencies without Company A's agreement and participation. Company B may need direct access to the local environmental agency, but should understand the sensitivity. A wrong communication could result in an investigation or could damage the current relationship between the seller and the agency.

The Environmental Due Diligence Process

The CEO has said the process needs to begin next week. The first question for Company A's general counsel is who should be part of the environmental due diligence team. Typical parties who should be included are the director of environmental health and safety; counsel; the business person; possibly the plant manager; an outside environmental consulting firm; and someone to serve as a liaison to the transaction negotiation team.

The next step is to identify which environmental reports should be furnished to prospective purchasers. Just those reports that the company has commissioned? All reports within its possession or control? How far back in time? Company A's GC has to consider how best to make this information available to prospective purchasers. Options include providing hard copies of the reports; burning copies onto a CD; creating a central repository of the reports; or using a secure website.

Another early consideration will be which individuals will be identified as "having knowledge" on behalf of Company A in the contractual documents, such as the purchase and sales agreement. The potential parties include senior officials only; the director of environmental health and safety; the plant manager or other plant personnel; and possibly former plant personnel. This individual (or individuals) will likely be listed as the person with knowledge of various conditions and compliance issues for purposes of the company's representations and warranties in the purchase and sale agreement and related schedules. If the purchaser will agree to a knowledge qualifier limited to certain people, it could potentially decrease future claims or litigation due diligence costs since the list of people will be limited.

As the transaction is being put together, Company A's GC

will also need to decide whether the purchaser will be given the option of selecting which of the operating facilities to purchase (an "opt in/opt out" choice). In some cases, allowing such a choice can play a key role in preventing a deal from crashing in light of the environmental issues being disclosed. The purchaser may also be concerned about formerly owned and operated facilities and disposal facilities previously used, particularly if the company had not previously divested itself of such legacy liabilities. Moreover, if the facility was purchased by the Company, the GC should ascertain whether there are indemnities or retained liabilities from the prior owner that could be transferred as part of the sale.

An area of increasing tension in transactions is whether the purchaser should have the ability to conduct intrusive sampling during due diligence. The purchaser is driven by the need to understand and quantify potential risks and costs and to understand the "continuing obligations" that it may assume upon purchasing the property. A purchaser will typically request 60 to 90 days in order to collect one or more rounds of intrusive samples. In our case, Company B may insist on such testing even if Company A provides Company B with prior analytical data about the environmental condition of the property, primarily because only Company B is in the best position to evaluate the property and determine its value to its business. For example, if Company B plans to construct a day-care facility on the property and Company A's prior environmental study has analyzed the property for every hazardous substance with the sole exception of lead, then Company B has no choice but to enter the property and test for lead, because lead, once ingested, can cause much more severe harm to a child than to an adult.

Of course, Company A would understandably push back against such an intrusive activity. Apart from the reporting and disclosure issues that such sampling would raise, this activity could also place an undue burden on Company A, particularly if the property is an operating facility with employees and critical process units. If no alternative presents itself, then the parties must carefully negotiate an access agreement that contains or addresses in full all of the important items, such as a detailed and comprehensive sampling plan that includes a site map with sampling points identified therein, a safety or hazard communication plan to ensure that no individuals or personal property are harmed or damaged during the sampling events, as well as a discussion of how the samples will be analyzed, for what constituents and by what labs. On the other hand, Company A may be able to avoid this by agreeing to purchase an environmental insurance policy for Company B, or to agree in the sales agreement to indemnify Company B for any loss with certain caps, deductibles and other restrictions. In the end, Company A may conclude that it has no other choice but to allow Company B to conduct intrusive analytical sampling, because refusal will likely cause Company B either to adjust the purchase price downward to compensate for unknown environmental risk, or, worse, to walk away from the deal entirely.

> The parties will **need to agree upon** what types of claims will **trigger** the indemnity, **how long** the indemnity agreement will remain in place, and the **process for raising a claim.**

Company B will also typically seek the right to interview and potentially negotiate with the regulatory agency in order to verify the scope of required cleanup activities and potentially negotiate an alternative arrangement for resolving any environmental conditions that may have been found (e.g., a state voluntary cleanup agreement or a Prospective Purchaser Agreement with EPA). This is another area of concern for Company A who understandably might object to such a request unless it received reasonable assurance that Company B is intent on completing the transaction and will not "walk away" and leave Company A in a worse position with respect to the government. As stated in the disclosure section above, at a minimum, Company A will want to control any governmental or financial disclosures that are required as a result of Company B's due diligence and should be able to oppose any consultant's conclusions.

Steps in the Environmental Due Diligence Process

If a recognized environmental condition exists, or is likely to be discovered during the environmental due diligence process, it is important to decide, from a business risk perspective, how the company wishes to deal with that environmental condition. Options that are commonly used include the following:

- An environmental escrow,
- An environmental indemnity agreement,
- Pollution Legal Liability Insurance,
- Cost Cap Insurance Policy or Guaranteed Fixed Price Remediation contract,
- A reduction in the purchase price, and
- A decision whether the seller, or the purchaser, will clean up the contamination, and whether the cleanup will occur pre- or post-closing.

Each of these tools has its own strengths and weaknesses. Environmental escrows are commonly established to deal with known environmental issues on a site. The parties will need to agree, in advance, upon the amount of money to be placed in escrow, the process for accessing those funds, how long the escrow will endure, and how to resolve disputes whether an expense is an allowable cost. If Company A is unwilling to set aside funds up front, an environmental indemnity agreement can serve a similar function. The parties will need to agree upon what types of claims will trigger the indemnity, how long the indemnity agreement will remain in place, and the process for raising a claim. The parties should also determine whether the environmental indemnity should be assignable to subsequent purchasers. Environmental insurance can be another mechanism for addressing Company B's concerns about known or suspected contamination on a site. A Pollution Legal Liability policy will generally protect Company B (and potentially Company A as well) against claims relating to "unknown" environmental conditions on the site, regulatory re-openers, and legal defense costs. Another type of insurance is the "Cost Cap" insurance policy, which will protect the party conducting a cleanup from cost overruns. This type of insurance is typically available only for "significant" cleanups costing $2 million or more, and will require significant underwriting by the insurance carrier. Another option to address known contamination on a site is to have the party who will be responsible for the cleanup enter into a Guaranteed Fixed Price Remediation (GFPR) or Performance Based Contract with an experienced environmental consulting firm offering that type of service. If properly structured, the GFPR contract can offer many of the same types of benefits as a Cost Cap insurance policy. Nevertheless, the proposed GFPR contract must be reviewed carefully to ensure that it does not contain significant gaps in the proposed coverage. Finally, it is important for the parties to decide who should be responsible for conducting any necessary cleanup on a site and whether this cleanup should occur pre- or post-closing. If Company B is planning significant redevelopment on the site, there are advantages in Company B having control over the timing and scope of the remediation process. Company A, however, may want greater control over the scope (and therefore cost) of any planned cleanup. It will, however, be more difficult for purchasers to recoup "voluntary" cleanup costs from other Responsible Parties in the wake of US Supreme Court's decision in *Cooper v. Aviall*, 543 U.S. 157 (2004).

Once the **environmental** due diligence process begins, Company A needs to recognize that Company B's **findings may trigger** environmental release reporting or other types of environmental **disclosure obligations.**

Expanded SEC Requirements for Environmental Disclosures

Mergers and acquisitions and other types of corporate and real estate transactions are subject to Sarbanes-Oxley requirements. Environmental issues are already a target of the SEC disclosure rules.

In particular, corporations are already subject to the requirement to provide a description of their environmental obligations in their annual reports; to disclose any material legal proceedings; and to disclose environmental issues in their management discussion and analysis (SK 103).

Staff Accounting Bulleting (SAB) No. 92 requires that a corporation disclose estimates for accrual and disclosure of environmental liabilities in its reserves. This disclosure obligation was enhanced further by the release of FAS 143, which revises the accounting treatment of Asset Retirement Obligations (ARO). FIN 47 was issued to clarify that *any* current legal obligation to take action upon retirement of an asset must be booked as an ARO.

Many companies are also voluntarily reporting on global warming issues. The federal government has not yet enacted a federal requirement to report greenhouse gas emissions (GHG), but many states have. Even if there is no federal or state requirement, many companies are voluntarily reporting these emissions because of public interest pressure to do so.

Finally, while there has not been a lot of enforcement by the SEC in this area, there is more interest than there was in the past. The SEC took a major enforcement action against a company in the chemical industry this past year because of its alleged underreporting of its cleanup reserves. This was the first such action in more than ten years.

Due Diligence and Contamination: AAI, Landowner Liability Protections, ASTM E 1527-05 and *Aviall*

Environmental due diligence is also being impacted by Congressional changes made to the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund") in 2002. The 2002 Amendments provided two new potential defenses to CERCLA liability, and clarified an older defense (collectively, these three defenses are referred to as the "Landowner Liability Protections," or LLPs). The LLPs include:

- *Bona fide* prospective purchaser defense (BFPP) (a prospective purchaser may acquire property *with prior knowledge* that the property is contaminated and still qualify for this defense);
- Contiguous property owner defense (CPO) (this defense is available to a property owner who acquired the property without knowledge of any contamination being present, and subsequently learned that the property had been adversely impacted by releases from other properties); and
- "Innocent" landowner defense (the property owner had no knowledge of, or reason to know of a release, and conducted appropriate due diligence).

In order to qualify for the any of these liability defenses, Company B must do a number of things, including:

- Conduct "All Appropriate Inquiries" in accordance with EPA's final rule or ASTM E 1527-05 (AAI);
- Provide full cooperation to environmental agencies and comply with any information requests;
- Comply with land use restrictions and institutional controls;
- Not be affiliated with the prior owner or any Potentially Responsible Party; and
- Take "reasonable steps" and exercise "appropriate care" regarding releases or threatened releases, preserve institutional and engineering controls, and comply with release reporting obligations.

The requirement to conduct "all appropriate inquiries" (AAI) is a threshold requirement under each of these potential defenses. AAI can be satisfied by following EPA's Final AAI Rule (69 *Fed. Reg.* 66, 070) or the updated ASTM Standard Practice on Phase I ESAs (ASTM E 1527-05).

Environmental due diligence may be impacted further by the U.S. Supreme Court's decision in *Cooper Industries, Inc. v. Aviall Services, Inc.,* 543 U.S. 157 (2004). This decision held that a purchaser may not bring a CERCLA §113 contribution action against other Responsible Parties unless it has been sued or entered into a judicial settlement. As a result, a purchaser now has a stronger motivation to qualify for one of the LLPs so that it may bring a CERCLA §107 cost recovery action. In our case, if through its environmental due diligence, Company B learns that Company A had "voluntarily" remediated a number of contaminated sites but had not yet secured contribution from the other PRPs, then in the post-*Cooper v. Aviall* world, the moneys Company A spent on these sites are no longer recoverable, thereby making Company A "less v aluable" in Company B's eyes.

Please note, the US Supreme Court has agreed to review whether Section 107 of CERCLA includes an implied right of contribution among PRPs that do not qualify for one of the LLPs. Some Circuit Courts have found such a Section 107 contribution right to exist. Without such a right, a PRP who conducts a "voluntary" cleanup has no CERCLA cause of action. The Supreme Court's holding on this matter will have to be taken into account when negotiating a deal.

Transaction Structure Key to Environmental Due Diligence

Once the environmental due diligence process begins, Company A needs to recognize that Company B's findings may trigger environmental release reporting or other types of environmental disclosure obligations. These findings may affect the type of representations and warranties that Company B expects Company A to provide.

The environmental due diligence process will be used by Company B to identify environmental conditions, risks and constraints (and may be used to seek a price reduction or other concessions in the deal).

From Company A's perspective, it is important to limit open-ended risks that may be created by the environmental due diligence process and to identify an individual within the company who will continue to monitor and manage the environmental issues post-closing.

Finally, it is important to understand how any environmental indemnities that have been agreed to as part of the deal can be triggered, and to establish a process for doing so.

The nature, scope and depth, therefore, of environmental due diligence are dependent primarily upon how the given transaction is likely to be structured. Will it be an asset transaction? Will Company B be acquiring the stock of Company A? Is a straightforward purchase of real estate intended? Is the property an ongoing operation, or is it surplus property? By the same token, the individual terms of the transaction and even its final outcome, become dependent upon what the parties—especially Company B—learn in the course of environmental due diligence process. After everything has been viewed through the environmental due diligence microscope, the only question remaining for the parties, therefore, is: *deal or no deal?*

Have a comment on this article? Email editorinchief@acc.com.

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Model EHS Contract Provisions:
Definitions

Set forth below are model EHS definitions – in some cases both long and short forms – that may be incorporated into a transaction agreement.

Table of Contents

Model Provisions

1. BASIC SET OF EHS DEFINITIONS – XX AS BUYER

1.01 Definitions

"Environmental Laws" shall mean any and all past, present and future[1] [local/municipal], [state/provincial/regional], [national/federal], or [international[2]] law, statute, treaty, directive, decision, judgment, award, regulation, decree, rule, code of practice, guidance, order, direction, consent, authorization, permit, or similar requirement, approval or standard [of relevant jurisdiction(s)] concerning environmental, health or safety[3] matters (including, but not limited to, the clean-up standards and practices for Hazardous Materials) in buildings, equipment, soil, sub-surface strata, air, surface water, or ground water, whether set forth in applicable law or applied in practice[4] to [Facilities] such as those of the [Business] in the [jurisdiction(s)] in which the [Facility/Premises/Business – or other term used in the transaction] [is/are] located.

"Environmental Permits" shall have the meaning set forth in Section __ below.[5]

"Environmental Review" [6] shall have the meaning set forth in Section __ below.[7]

[1] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities. For example, unregulated chemicals now in the ground may become subject to regulation in the future. As such, it is just as important to protect against environmental "conditions" that may create problems in the future, as it is to cover current non-compliance or liabilities. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

[2] Increasingly, international requirements are imposing real costs on XX's operations. For example, some European Union instruments ("Regulations"), while adopted at the international level, are directly enforceable against companies operating in individual countries. In other cases, such international agreements essentially set forth the national requirements to be imposed in the relatively near future (particularly EU "Directives"). If XX is buying an existing business, efforts should be made to understand and negotiate protections against the costs of meeting such foreseeable, future requirements based on international commitments.

[3] Instead of separate definitions and provisions for health and safety requirements, XX's model provisions integrate them into the definition of environmental law. This is not to understate the importance of health and safety issues, however, particularly during due diligence.

[4] In many countries, the remedial standards actually applied to contaminated sites by government agencies are not formally included in statutes or regulations. As a result, when XX is the buyer, it is important to find ways to cover such "applied in practice" standards in the requirements to be met by the seller.

[5] In the Section on EHS Representations and Warranties.

[6] When XX is buying or selling businesses or properties, it must understand the environmental risks involved. Preparation of one or more environmental studies is the usual approach. Such studies provide a written record of the environmental aspects of the business/property against which future disputes will be measured. Both chemical release (remedial and environmental tort issues) and compliance matters are usually reviewed, by the business and by the transactions group. While such studies are normally shared between the parties to the transaction, they can contain extremely sensitive information. As such, their circulation is often quite limited and subject to a confidentiality agreement between the parties.

[7] In the section on Pre-Closing Covenants.

"Existing Condition"[8] means the identity, state of repair, condition or any other characteristics as of the [Closing Date], of the operations, uses, raw materials, products, activities, facilities, equipment, properties, sites and any other processes or items which are or have been used by or in connection with the [Business].

"Governmental Authority" means any international or national governmental body, any state, provincial, regional, local, municipal or other political subdivision thereof, and any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government.

"Hazardous Materials" means any and all dangerous substances, hazardous substances, toxic substances, radioactive substances, hazardous wastes, special wastes, controlled wastes, oils, petroleum and petroleum products, hazardous chemicals and any other materials which may be harmful to human health or the environment [and which are or may be [at any time during the term of this [Agreement]] regulated or controlled under Environmental Laws in any of the jurisdictions in which the [Business] has been operated or is being operated][9].

"Liabilities and Costs" shall mean all liabilities, obligations, responsibilities, losses, damages, personal injury, death, punitive damages, economic damages, consequential damages, treble damages, intentional, willful or wanton injury, damage or threat to the environment, natural resources or public health or welfare, costs and expenses (including, without limitation, attorney, expert, engineering and consulting fees and costs, and any other fees and costs associated with any investigations or studies), fines, penalties and monetary sanctions, interest, direct or indirect, known or unknown, absolute or contingent, past, present or future.

"Release" shall mean any release, spill, emission, leaking, pumping, injection, deposit, disposal, discharge, dispersal, leaching or migration into the indoor or outdoor environment or into or out of any [Property], including the movement of Hazardous Materials through or in the air, soil, surface water, groundwater or other [Property].

ALTERNATIVE OR MORE DETAILED DEFINITIONS FOLLOW BELOW

2. ACTUAL NET EXPENDITURES – NARROW DEFINITION OF THE AMOUNT OF MONEY SPENT IN A MATTER FOR WHICH INDEMNIFICATION MAY BE SOUGHT (XX AS SELLER)

[8] Seller's responsibility for EHS risks is often limited to activities occurring prior to the Closing Date. Distinguishing between pre- and post- closing activities can be difficult, particularly if XX is maintaining the same basic operations. Extensive base-line studies to define the condition of the business as of the Closing Date are one method for addressing this issue.

[9] Different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. When XX is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements.

ACTUAL NET EXPENDITURES means the actual expenditures made by a [Party] (net[10] of any resulting tax benefit and net of any refund or reimbursement of any portion of such actual expenditures, including, without limitation, reimbursement by way of insurance, third party indemnification or the inclusion of any portion of such actual expenditures as a cost under any government contracts) in respect of any [Matter -- for which indemnification may be claimed as provided in the indemnification provisions].

3. ASBESTOS CONTAINING MATERIAL -- PROVIDING SPECIFIC % OF ASBESTOS

ASBESTOS CONTAINING MATERIAL shall mean any material containing more than [one percent (1%)]/[one tenth of one percent (0.1%)] asbestos by [weight]/[area][11].

4. CERCLA -- BROAD DEFINITION, INCLUDING ANY FUTURE REGULATIONS AND AMENDMENTS

CERCLA shall mean the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601 et seq., any amendments thereto, any successor statutes, and any regulations or guidance promulgated thereunder.[12]

5. CLAIM -- BROAD DEFINITION

CLAIM[13] shall mean any claim or demand, by any [Person], of whatsoever kind or nature, written or oral, for any alleged [Liabilities, Costs or other similar terms defined in the particular transaction], whether based in contract, tort, implied or express warranty, strict liability, criminal or civil statute, permit, ordinance or regulation, common law or otherwise.

[10] Payments relating to or under indemnification provisions may have tax consequences (positive and negative) for the parties. There may also be offsetting payments by third party insurers, guarantors, customers and others. Careful attention needs to be paid to how these issues may affect XX in any particular deal. At a minimum, this requires attention to the detailed language in both the definitions and indemnification sections, as well as coordination with tax and other advisors.

[11] Where asbestos is a significant issue in a particular deal, the different limits and measures reflected in this definition should be chosen in consultation with the business and technical personnel.

[12] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

[13] When using such a general term in the EHS provisions, special care must be taken to ensure that it is used in a manner consistent with the more general provisions of the Transaction Agreement. This is particularly true in the indemnification provisions, where the breadth of the term should be modified to reflect XX's likely status as an indemnified (broad) or indemnifying (narrow) party. To the extent the environmental aspects of the term need to be specified, they should either be included in the more general definition or a special "environmental" term should be defined separately.

6. CONTAMINANT – *BROAD GENERAL DEFINITION (XX AS BUYER) – CRITICAL TO REMEDIAL AND INDEMNIFICATION PROVISIONS – SEE ALSO DEFINITIONS OF HAZARDOUS MATERIALS AND SUBSTANCES BELOW.*

CONTAMINANT shall mean any waste, pollutant, hazardous material, hazardous substance, toxic substance, hazardous waste, special waste, petroleum or petroleum-derived substance or waste, asbestos, polychlorinated biphenyl's ("PCBs") or similar material, or any constituent of any such substance or waste[14], and includes but is not limited to these terms as defined now or in the future[15] in [international,[16]] [federal/national], [state/provincial/regional] or [local/municipal] treaties, laws, regulations, decisions, authorizations, permits, guidance, or similar instruments.

7. CUSTOMARY USES -- ENVIRONMENTAL SLANT ON TRADITIONAL DEFINITION

CUSTOMARY USES shall mean the normal and lawful use of chemicals, substances or materials reasonably necessary, customarily used, and in quantities reasonably stored for the construction, operation, repair and maintenance of the [Premises/Project/Facility or other defined term in the particular transaction].[17]

[14] Different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. If XX is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements. If XX is the seller, narrower lists of chemicals should be incorporated, and those lists should be set as of a particular time, often the Closing Date.

[15] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

[16] Increasingly, international requirements are imposing real costs on XX's operations. For example, some European Union instruments ("Regulations"), while adopted at the international level, are directly enforceable against companies operating in individual countries. In other cases, such international agreements essentially set forth the national requirements to be imposed in the relatively near future (particularly EU "Directives"). If XX is buying an existing business, efforts should be made to understand and negotiate protections against the costs of meeting such foreseeable, future requirements based on international commitments.

[17] "Customary Uses" will primarily be applied in provisions imposing a general duty of care on the future use of XX property by tenants and others. Such a broad term should only rarely be used in place of more specific representation and warranty or indemnity provisions.

8. DAMAGES – NARROW DEFINITION NET OF OTHER PAYMENTS (XX AS SELLER)

DAMAGES[18] means all demands, claims, actions or causes of action, assessments, losses, damages, costs, expenses, liabilities, judgments, awards, fines, sanctions, penalties, charges and amounts paid in settlement, including, without limitation, costs, fees and expenses of attorneys, experts, accountants, appraisers, consultants, witnesses, investigators and any other agents or representatives of such [Person] [(with such amounts to be determined net[19] of any resulting tax benefit and net of any refund or reimbursement of any portion of such amounts, including, without limitation, reimbursement by way of insurance, third party indemnification or the inclusion of any portion of such amounts or cost under government contracts)].

9. DISCLOSURE SCHEDULE OR LETTER -- BASIC DEFINITION

DISCLOSURE [SCHEDULE/LETTER] [20] means the Disclosure [Schedule/Letter] as [referenced in Section(s) ___] of the [Transaction Agreement].

10. DISPUTE RESOLUTION -- ENVIRONMENTAL ARBITRATION USING AMERICAN ARBITRATION ASSOCIATION ("AAA") PERSONNEL

DISPUTE RESOLUTION[21] means, except as otherwise provided herein, the dispute resolution procedures in the [Transaction Agreement], provided, however, that any arbitration concerning the environmental provisions of the [Transaction Agreement] shall be conducted under AAA rules by arbitrators with recognized environmental experience or by JAMS Endispute.[22]

11. ENVIRONMENTAL ACTIVITY -- BROAD DEFINITION

ENVIRONMENTAL ACTIVITY shall mean any use, storage, installation, existence, presence, release, threatened release, discharge, generation, abatement, removal, disposal, handling or transportation from under, into, or in the [Premises/Properties] of any [Hazardous Materials/Substance/Contaminant].

12. ENVIRONMENTAL BASELINE STUDY – BASIC DEFINITION

ENVIRONMENTAL BASELINE STUDY[23] shall mean the review of Environmental Conditions and compliance with Environmental Laws at the [Facility/Premises/Business] prepared by _____[24] under the direction of _____[25] dated _____.[26]

[18] When using such a general term in the EHS provisions, special care must be taken to ensure that it is used in a manner consistent with the more general provisions of the Transaction Agreement. This is particularly true in the indemnification provisions, where the breadth of the term should be modified to reflect XX's likely status as an indemnified (broad) or indemnifying (narrow) party. To the extent the environmental aspects of the term need to be specified, they should either be included in the more general definition or a special "environmental" term should be defined separately.

[19] Payments relating to or under indemnification provisions may have tax consequences (positive and negative) for the parties. There may also be offsetting payments by third party insurers, guarantors, customers and others. Careful attention needs to be paid to how these issues may affect XX in any particular deal. At a minimum, this requires attention to the detailed language in both the definitions and indemnification sections, as well as coordination with tax and other advisors.

[20] When using such a general term in the EHS provisions, special care must be taken to ensure that it is used in a manner consistent with the more general provisions of the Transaction Agreement. This is particularly true in the indemnification provisions, where the breadth of the term should be modified to reflect XX's likely status as an indemnified (broad) or indemnifying (narrow) party. To the extent the environmental aspects of the term need to be specified, they should either be included in the more general definition or a special "environmental" term should be defined separately.

[21] When using such a general term in the EHS provisions, special care must be taken to ensure that it is used in a manner consistent with the more general provisions of the Transaction Agreement. To the extent the environmental aspects of the term need to be specified, they should either be included in the more general definition or a special "environmental" term should be defined separately.

[22] Disputes over environmental contractual provisions often require specialized knowledge of both their technical and legal aspects. Care should be taken to ensure that the general dispute resolution provisions allow or call for such expertise to be made available should an environmental dispute arise. Contact the transactions group for further information on the company's experience handling such environmental contract disputes to date.

[23] When XX is buying or selling businesses or properties, it must understand the environmental risks involved. Preparation of one or more environmental studies is the usual approach. Such studies provide a written record of the environmental aspects of the business/property against which future disputes will be measured. Both chemical release (remedial and environmental tort issues) and compliance matters are usually reviewed, by the business and by the transactions group. While such studies are normally shared between the parties to the transaction, they can contain extremely sensitive information. As such, their circulation is often quite limited and subject to a confidentiality agreement between the parties.

[24] From any list of preferred technical consultants.

[25] Wherever possible, XX should either control or have joint control over the preparation of any baseline studies.

[26] Baseline studies are often assumed to have been completed as of a particular date – such as the Closing Date – upon which environmental responsibilities shift from one party to the other (such as seller to buyer).

13. ENVIRONMENTAL CONDITIONS – *CRITICAL FOR DUE DILIGENCE, POST-CLOSING AND INDEMNIFICATION PROVISIONS – MULTIPLE VARIANTS – TIE TO XX'S INTERESTS IN THE PARTICULAR TRANSACTION – SEE ALSO "EXISTING CONDITIONS"*

ENVIRONMENTAL CONDITIONS -- MEANING THOSE INVOLVING HAZARDOUS SUBSTANCES, EXPRESSLY EXCLUDING "NATURALLY OCCURRING" SUBSTANCES (XX AS SELLER)

ENVIRONMENTAL CONDITION(S) means the presence[27] on, at or under the [Facility or other definition of covered properties used in the Agreement] of hazardous substance(s) as such term is defined in CERCLA (herein "Hazardous Substances"[28]), except naturally occurring substances present in concentrations above applicable state or federal cleanup standards, whether such presence is in soil, surface water or groundwater, structures, equipment or facilities. With respect to regulatory authorities or other third parties, designation of a condition as an Environmental Condition pursuant to this [Agreement] shall not be construed as an admission by either [Party] of any legal conclusion.[29]

ENVIRONMENTAL CONDITIONS – NARROW DEFINITION FOCUSING ON DAMAGE BY HAZARDOUS SUBSTANCES (XX AS SELLER)

ENVIRONMENTAL CONDITION(S) means any damage[30] caused by, related to, arising from or in connection with the generation, use, handling, treatment, storage, transportation, disposal, discharge, release or emission of Hazardous Substances.[31] With respect to regulatory authorities or other third parties, designation of a condition as an Environmental Condition pursuant to this [Agreement] shall not be construed as an admission by either [Party] of any legal conclusion.[32]

[27] Thought needs to be given to the breadth of the environmental conditions covered by this definition – in light of XX's interests in the transaction. For example, use of the term "presence" covers more conditions than more limited terms such as "storage" or "installation."
[28] Need to ensure that use of this CERCLA-limited definition does not conflict with any broader definitions of Hazardous Materials or Substance that may be used in other parts of the Agreement. In addition, different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. If XX is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements. If XX is the seller, narrower lists of chemicals should be incorporated, and those lists should be set as of a particular time, often the Closing Date.
[29] While the studies often used to define "environmental conditions" are normally shared between the parties to the transaction, they can contain extremely sensitive information. As such, their circulation is often quite limited and subject to a confidentiality agreement between the parties.
[30] Thought needs to be given to the breadth of the environmental conditions covered by this definition – in light of XX's interests in the transaction. For example, use of the term "damage" covers fewer conditions than more extensive terms such as "presence" or "release."
[31] Need to ensure that use of this CERCLA-limited definition does not conflict with any broader definitions of Hazardous Materials or Substance that may be used in other parts of the Agreement. In addition, different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. If XX is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements. If XX is the seller, narrower lists of chemicals should be incorporated, and those lists should be set as of a particular time, often the Closing Date.
[32] While the studies often used to define "environmental conditions" are normally shared between the parties to the transaction, they can contain extremely sensitive information. As such, their circulation is often quite limited and subject to a confidentiality agreement between the parties.

ENVIRONMENTAL CONDITIONS – BASIC DEFINITION COVERING BOTH COMPLIANCE AND REMEDIAL ISSUES

ENVIRONMENTAL CONDITION(S) means (i) the presence[33] on, at or under the [Facility or other definition of covered properties used in the Agreement] of [Hazardous Materials/Substances][34], whether such presence is in soil, surface water or groundwater, structures, equipment or facilities, and (b) the compliance of the [Business/Facility] with Environmental Laws. With respect to regulatory authorities or other third parties, designation of a condition as an Environmental Condition pursuant to this [Agreement] shall not be construed as an admission by either [Party] of any legal conclusion.[35]

[33] Thought needs to be given to the breadth of the environmental conditions covered by this definition – in light of XX's interests in the transaction. For example, use of the term "presence" covers more conditions than more limited terms such as "storage" or "installation."
[34] Different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. If XX is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements. If XX is the seller, narrower lists of chemicals should be incorporated, and those lists should be set as of a particular time, often the Closing Date.
[35] While the studies often used to define "environmental conditions" are normally shared between the parties to the transaction, they can contain extremely sensitive information. As such, their circulation is often quite limited and subject to a confidentiality agreement between the parties.

Model EHS Contract Provisions: Definitions

14. ENVIRONMENTAL LAWS – *CRITICAL TO COMPLIANCE, REMEDIAL AND INDEMNIFICATION PROVISIONS – MULTIPLE VARIANTS – TIE TO XX'S INTERESTS IN THE PARTICULAR TRANSACTION*

ENVIRONMENTAL LAWS – BROAD INTERNATIONAL DEFINITION, GOING BEYOND REQUIREMENTS TO INCLUDE PRACTICES (XX AS BUYER)

ENVIRONMENTAL LAWS shall mean any and all past, present and future[36] [local/municipal], [state/provincial/regional], [national/federal], or [international[37]] law, statute, treaty, directive, decision, judgment, award, regulation, decree, rule, code of practice, guidance, order, direction, consent, authorization, permit, or similar requirement, approval or standard [of relevant jurisdiction(s)] concerning environmental, health or safety[38] matters (including, but not limited to, the clean-up standards and practices for Hazardous Materials[39]) in buildings, equipment, soil, sub-surface strata, air, surface water, or ground water, whether set forth in applicable law or applied in practice[40] to [Facilities] such as those of the [Business] in the [jurisdiction(s)] in which the [Facility/Premises/Business – or other term used in the transaction] [is/are] located. [It is specifically agreed that [designated Party] bears all risk of changes in the Environmental Laws as applied to the Existing Conditions.[41]]

[36] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

[37] Increasingly, international requirements are imposing real costs on XX's operations. For example, some European Union instruments ("Regulations"), while adopted at the international level, are directly enforceable against companies operating in individual countries. In other cases, such international agreements essentially set forth the national requirements to be imposed in the relatively near future (particularly EU "Directives"). If XX is buying an existing business, efforts should be made to understand and negotiate protections against the costs of meeting such foreseeable, future requirements based on international commitments.

[38] Instead of separate definitions and provisions for health and safety requirements, XX's model provisions integrate them into the definition of environmental law. This is not to understate their importance, however, particularly during due diligence.

[39] Different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. If XX is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements. If XX is the seller, narrower lists of chemicals should be incorporated, and those lists should be set as of a particular time, often the Closing Date.

[40] In many countries, the remedial standards applied by government agencies are not formally included in statutes or regulations. As a result, when XX is the buyer, it is important to find ways to cover such "applied in practice" standards in the requirements to be met by the seller.

[41] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing. In some cases, XX has been able to negotiate indemnities covering the costs of bringing the operations being purchased into compliance with requirements proposed, but not yet in effect, at the time of Closing.

ENVIRONMENTAL LAWS -- US/CANADA BROAD DEFINITION, INCLUDING CAA, RCRA, CERCLA, TSCA

ENVIRONMENTAL LAWS shall mean any and all past, present and future[42] laws (including without limitation statutes, regulations, and common law) of the United States, Canada, any State, Province, Municipality or other political subdivision of either of them, or any other nation or political subdivision, for the protection of the environment or human health and safety,[43] including without limitation, judgments, awards, decrees, regulations, rules, standards, requirements, orders and permits issued by any court, administrative agency or commission or other Governmental Authority under such laws, and shall include without limitation the Comprehensive Environmental Response Compensation and Liability Act (42 USC 9601 et seq.), the Clean Air Act (42 USC §§ 7401 et seq.), the Resource Conservation and Recovery Act (42 USC §§ 6901 et seq.), the Clean Water Act (33 USC §§ 1251 et seq.), the Occupational Safety and Health Act (29 U.S.C. §§ 651 et seq.), the Toxic Substance Control Act (15 USC §§ 2601 et seq.), and the Safe Drinking Water Act (42 USC §§ 300f et seq.), as well as any and all state or local laws that relate to pollution, contamination of the environment, human health or safety, and all future amendments to such laws, and all past, present and future regulations, rules, standards, requirements, orders and permits issued thereunder.

[42] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

[43] Instead of separate definitions and provisions for health and safety requirements, XX's model provisions integrate them into the definition of environmental law. This is not to understate their importance, however, particularly during due diligence.

ENVIRONMENTAL LAWS -- BROAD DEFINITION, COVERING PRODUCTION, TRANSPORTATION AND MANUFACTURING OPERATIONS

ENVIRONMENTAL LAWS means all [international[44]], [national/federal], [provincial/regional/state] and [municipal/local] laws,[45] (including without limitation those adopted or applied by legislative, administrative and judicial authorities), concerning pollution, protection of the environment, and human health or safety,[46] including laws relating to emissions, discharges, releases or threatened releases of pollutants, contaminants, chemicals, or toxic or hazardous substances or wastes[47] into the environment (including ambient air, surface water, groundwater, land surface or subsurface strata, buildings, equipment or the work place), or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport or handling of pollutants, contaminants, chemicals, or toxic or hazardous substances or wastes, or to the exposure of individuals to such materials, or to the safe operation of equipment, processes and other activities of the [Business].

[44] Increasingly, international requirements are imposing real costs on XX's operations. For example, some European Union instruments ("Regulations"), while adopted at the international level, are directly enforceable against companies operating in individual countries. In other cases, such international agreements essentially set forth the national requirements to be imposed in the relatively near future (particularly EU "Directives"). If XX is buying an existing business, efforts should be made to understand and negotiate protections against the costs of meeting such foreseeable, future requirements based on international commitments.

[45] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

[46] Instead of separate definitions and provisions for health and safety requirements, XX's model provisions integrate them into the definition of environmental law. This is not to understate their importance, however, particularly during due diligence.

[47] Different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. If XX is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements. If XX is the seller, narrower lists of chemicals should be incorporated, and those lists should be set as of a particular time, often the Closing Date.

ENVIRONMENTAL LAWS -- SHORT FORM, INCLUDING CAA, RCRA, CERCLA, TSCA, OSHA, SDWA

ENVIRONMENTAL LAWS means any and all federal, state and local laws and regulations governing[48] the protection of the environment, human health and safety,[49] such as the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, et seq., as amended; the Resource Conservation and Recovery Act, 42 USC §§ 6901 et seq., as amended; the Clean Water Act, 33 USC §§ 1251 et seq., as amended; the Clean Air Act, 42 USC §§ 7401 et seq., as amended; the Toxic Substances Control Act, 15 USC §§ 2601 et seq., as amended; the Safe Drinking Water Act, 42 USC §§ 300f et seq., as amended; and the Occupational Safety and Health Act, 29 U.S.C. §§ 651 et seq., as amended.

ENVIRONMENTAL LAWS – SHORT FORM, GENERIC

ENVIRONMENTAL LAWS means laws, statutes, ordinances, rules, regulations, orders, or other standards applied by[50] Governmental Authorities pertaining to[51] the environment, human health or safety[52] in the jurisdictions where the [Purchased Assets] are located or where any Hazardous Materials[53] used, generated or disposed of by [Seller] are located.

[48] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

[49] Instead of separate definitions and provisions for health and safety requirements, XX's model provisions integrate them into the definition of environmental law. This is not to understate their importance, however, particularly during due diligence.

[50] In many countries, the remedial standards applied by government agencies are not formally included in statutes or regulations. As a result, when XX is the buyer, it is important to find ways to cover such "applied in practice" standards in the requirements to be met by the seller.

[51] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

[52] Instead of separate definitions and provisions for health and safety requirements, XX's model provisions integrate them into the definition of environmental law. This is not to understate their importance, however, particularly during due diligence.

[53] Different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. If XX is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements. If XX is the seller, narrower lists of chemicals should be incorporated, and those lists should be set as of a particular time, often the Closing Date.

15. ENVIRONMENTAL LIABILITIES -- INCLUDING RESPONSE COSTS, ENVIRONMENTAL TORTS AND DAMAGES

ENVIRONMENTAL LIABILITIES[54] means any liabilities arising under Environmental Laws, including, without limitation, (i) the costs of Remedial Actions under CERCLA, or other federal, state, or local laws, (ii) natural resource damages, or (iii) environmental tort or property damage claims arising from or alleged to arise from the presence of Hazardous [Substances/Materials[55]] in soil, surface water, groundwater, equipment, or buildings.

16. ENVIRONMENTAL LIEN -- INCLUDING LIENS RESULTING FROM RELEASES OR EHS NON-COMPLIANCE

ENVIRONMENTAL LIEN shall mean a lien in favor of any Governmental Authority for any (i) liabilities under any Environmental Laws, or (ii) damages arising from, or costs incurred by such Governmental Authority in response to, a Release or threatened Release of a Contaminant[56] into the outdoor or indoor environment.[57]

17. ENVIRONMENTAL LOSSES – BROAD DEFINITION

ENVIRONMENTAL LOSSES[58] shall include any and all liabilities, penalties, fines, damages, lost profits, consequential losses, costs and expenses (including, but not limited to, technical consultants' fees, legal fees and the costs of investigating or addressing any non-compliance with Environmental Laws) [arising directly or indirectly from the matters covered in Section _____].

[54] When using such a general term in the EHS provisions, special care must be taken to ensure that it is used in a manner consistent with the more general provisions of the Transaction Agreement. This is particularly true in the indemnification provisions, where the breadth of the term should be modified to reflect XX's likely status as an indemnified (broad) or indemnifying (narrow) party. To the extent the environmental aspects of the term need to be specified, they should either be included in the more general definition or a special "environmental" term should be defined separately.

[55] Different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. If XX is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements. If XX is the seller, narrower lists of chemicals should be incorporated, and those lists should be set as of a particular time, often the Closing Date.

[56] Different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. If XX is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements. If XX is the seller, narrower lists of chemicals should be incorporated, and those lists should be set as of a particular time, often the Closing Date.

[57] The authority of governmental agencies and others to impose environmental liens varies across jurisdictions. Contact transactions or remedial groups, or the EHS Council(s) for the area(s) in which the facilities are located, for further information.

[58] When using such a general term in the EHS provisions, special care must be taken to ensure that it is used in a manner consistent with the more general provisions of the Transaction Agreement. This is particularly true in the indemnification provisions, where the breadth of the term should be modified to reflect XX's likely status as an indemnified (broad) or indemnifying (narrow) party. To the extent the environmental aspects of the term need to be specified, they should either be included in the more general definition or a special "environmental" term should be defined separately.

18. ENVIRONMENTAL PROPERTY TRANSFER ACTS – BASIC DEFINITION

ENVIRONMENTAL PROPERTY TRANSFER ACTS[59] shall mean any Requirement of Law that for environmental reasons conditions, restricts, prohibits or requires any notification or disclosure triggered by the transfer, sale, lease or closure of any [Property] [or deed or title for or other ownership interest therein[60]], including, but not limited to, any so-called "Environmental Cleanup Responsibility Acts" or "Responsible Property Transfer Acts." [Be more specific as facts allow …].

19. EXISTING CONDITION – ***CRITICAL TO DEFINING RESPONSIBILITY FOR PRE AND POST CLOSING CHANGES TO ENVIRONMENTAL CONDITIONS – SEE "ENVIRONMENTAL BASELINE STUDY" AND "ENVIRONMENTAL CONDITIONS" – INCLUDE PORTIONS OF THESE DEFINITIONS AS APPROPRIATE TO THE PARTICULAR TRANSACTION***

EXISTING CONDITION means the identity, state of repair, condition or any other characteristics[, including but not limited to the Environmental Conditions,] as of the [Closing Date], of the operations, uses, raw materials, products, activities, facilities, equipment, properties, sites and any other processes or items which are or have been used by or in connection with the [Business]. [Existing Condition also includes the changes to any condition, which exists as of the Operational Closing Date.] The information contained in the [Environmental Baseline Study (as defined in Section ____ hereof)] [and in the Additional Review/Disclosure Schedule (as defined in Section ____ hereof)] shall constitute [rebuttable/presumptive] evidence[61] of the Existing Condition of the [Facilities reviewed] and shall be deemed to have been completed as of the [Closing Date].[62]

[59] Many states (such as Connecticut, Illinois, Indiana, Massachusetts, and New Jersey) and some other countries (such as Belgium (Flanders) and France), require that on-site contamination be addressed as part of the transfer of property or shares in a company owning covered property. The presence or absence of such property transfer requirements should be confirmed with local counsel, local Environmental Counsel, or your local EHS Counsel. Further information on such requirements can be obtained from Transactions Group.

[60] Some property transfer statutes are triggered solely by sales of shares in companies owning real property.

[61] Consideration should be given to the evidentiary weight accorded to the Baseline and similar studies. If XX is the seller and is preparing the study, efforts should be made to give them more weight than if XX is the buyer and the seller prepared the study.

[62] Baseline studies are often assumed to have been completed as of a particular date – such as the Closing Date – upon which environmental responsibilities shift from one party to the other (such as seller to buyer).

20. GOVERNMENTAL AUTHORITY – BROAD DEFINITION

GOVERNMENTAL AUTHORITY[63] means any international or national governmental body, any state, provincial, regional, local, municipal or other political subdivision thereof, and any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government.

21. GOVERNMENTAL CLAIMS – BROAD DEFINITION

GOVERNMENTAL CLAIMS[64] means any orders, requests, notices, letters or directions, or any suits, demands, actions for damages or other legal claims made, formally or informally, in writing or otherwise,[65] by any Governmental Authority.

22. HAZMAT – BASIC DEFINITION

HAZMAT shall mean the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801 et seq., and any amendments or successor statute, and any regulations or guidance promulgated thereunder.[66]

[63] When using such a general term in the EHS provisions, special care must be taken to ensure that it is used in a manner consistent with the more general provisions of the Transaction Agreement. This is particularly true in the indemnification provisions, where the breadth of the term should be modified to reflect XX's likely status as an indemnified (broad) or indemnifying (narrow) party. To the extent the environmental aspects of the term need to be specified, they should either be included in the more general definition or a special "environmental" term should be defined separately.

[64] When using such a general term in the EHS provisions, special care must be taken to ensure that it is used in a manner consistent with the more general provisions of the Transaction Agreement. This is particularly true in the indemnification provisions, where the breadth of the term should be modified to reflect XX's likely status as an indemnified (broad) or indemnifying (narrow) party. To the extent the environmental aspects of the term need to be specified, they should either be included in the more general definition or a special "environmental" term should be defined separately.

[65] The degree of informality of a claim that will meet the definition should depend whether it is in XX's interests to have a broad (buyer) or narrow (seller) provision in place.

[66] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

23. HAZARDOUS MATERIALS/SUBSTANCES – ***CRITICAL TO DUE DILIGENCE, COMPLIANCE, REMEDIAL AND INDEMNIFICATION PROVISIONS – MULTIPLE VARIANTS – LINK TO XX'S INTERESTS IN THE PARTICULAR TRANSACTION***

HAZARDOUS MATERIALS/SUBSTANCES -- GENERAL LANGUAGE DESCRIBING HAZARDOUS MATERIALS IN ANY JURISDICTION (XX AS BUYER)

HAZARDOUS MATERIALS means any and all dangerous substances, hazardous substances, toxic substances, radioactive substances, hazardous wastes, special wastes, controlled wastes, oils, petroleum and petroleum products, hazardous chemicals and any other materials which may be harmful to human health or the environment [and which are or may be [at any time during the term of this [Agreement][67]] regulated or controlled under Environmental Laws in any of the jurisdictions in which the [Business] has been operated or is being operated][68].

HAZARDOUS MATERIALS/SUBSTANCES -- DETAILED LANGUAGE DESCRIBING SUCH MATERIALS IN GENERAL AND PURSUANT TO U.S. FEDERAL LAWS

HAZARDOUS MATERIALS shall mean (i) asbestos or asbestos containing material, (ii) polychlorinated biphenyl's [in concentrations greater than 50 parts per million], (iii) nuclear waste or materials, (iv) petroleum, crude oil or any fraction thereof, natural gas or synthetic gas used for fuel, and (v) any other substance or material, whether solid, liquid or gaseous, which at any time[69] is classified, identified or defined as a hazardous or toxic substance or material under any Environmental Law, including, without limitation, (A) the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. Sections 9601 et seq.), (B) the Hazardous Materials Transportation Act, as amended (49 U.S.C. Sections 1801 et seq.), (C) the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. Sections 6901 et seq.), (D) the Toxic Substances Control Act, as amended (15 U.S.C. Sections 2601 et seq.), the Occupational Safety and Health Act, as amended (29 U.S.C. §§ 651 et seq.), (E) similar state or local laws, and (F) any regulations adopted and publications issued pursuant to

[67] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

[68] Different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. If XX is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements. If XX is the seller, narrower lists of chemicals should be incorporated, and those lists should be set as of a particular time, often the Closing Date.

[69] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

each of the foregoing,[70] [excluding, however, such materials as are customarily present in first class office buildings provided the same are reasonable in amount and handled, stored and disposed of in accordance with applicable laws, e.g., cleaning fluids for cleaning of [office] space.]

HAZARDOUS MATERIALS/SUBSTANCES -- GENERAL DEFINITION

HAZARDOUS MATERIAL means any substance that is toxic, ignitable, reactive, corrosive, radioactive, caustic, or dangerous, or is or may be[71] regulated under any Environmental Laws as a hazardous substance, hazardous material, contaminant, toxic substance, toxic pollutant, hazardous waste, special waste, industrial waste, or pollutant (including, without limitation, petroleum, its derivatives, by-products and other hydrocarbons, poly-chlorinated bi-phenyls and asbestos).[72]

24. HAZARDOUS SUBSTANCES -- AS DEFINED IN CERCLA (XX AS SELLER)

HAZARDOUS SUBSTANCES means hazardous substances as defined in CERCLA as of the [Closing Date].[73]

[70] Different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. If XX is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements. If XX is the seller, narrower lists of chemicals should be incorporated, and those lists should be set as of a particular time, often the Closing Date.

[71] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

[72] Different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. If GE is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements. If XX is the seller, narrower lists of chemicals should be incorporated, and those lists should be set as of a particular time, often the Closing Date.

[73] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

25. LIABILITIES AND COSTS – BROAD DEFINITION

LIABILITIES AND COSTS[74] shall mean all liabilities, obligations, responsibilities, losses, damages, personal injury, death, punitive damages, economic damages, consequential damages, treble damages, intentional, willful or wanton injury, damage or threat to the environment, natural resources or public health or welfare, costs and expenses (including, without limitation, attorney, expert, engineering and consulting fees and costs and any fees and costs associated with any investigation, feasibility, or Remedial Action studies), fines, penalties and monetary sanctions, interest, direct or indirect, known or unknown, absolute or contingent, past, present or future.

26. MATERIAL ADVERSE EFFECT – BASIC DEFINITION

MATERIAL ADVERSE EFFECT[75] means, for purposes of this [Agreement] only, with respect to any event, occurrence or condition, or series of events, occurrences or conditions, a material adverse effect on the operations, property or financial condition of the [Business] or entity taken as a whole, including by way of illustration and not limitation, the absence of any permit, license or similar authorization required for the [Business'] operations under any Environmental Laws, noncompliance with Environmental Laws which may reasonably be expected to subject the [Business] to environmental Liabilities and Costs in excess of $_____, or noncompliance with Environmental Laws which is [substantially similar to two or more prior instances of noncompliance over the prior _____ years.]

27. OSHA – BASIC DEFINITION

OSHA shall mean the Occupational Safety and Health Act, 29 U.S.C. §§ 651 et seq., any amendment thereto, any successor statute, and any regulations and guidance promulgated thereunder.[76]

[74] When using such a general term in the EHS provisions, special care must be taken to ensure that it is used in a manner consistent with the more general provisions of the Transaction Agreement. This is particularly true in the indemnification provisions, where the breadth of the term should be modified to reflect XX's likely status as an indemnified (broad) or indemnifying (narrow) party. To the extent the environmental aspects of the term need to be specified, they should either be included in the more general definition or a special "environmental" term should be defined separately.

[75] When using such a general term in the EHS provisions, special care must be taken to ensure that it is used in a manner consistent with the more general provisions of the Transaction Agreement. This is particularly true in the indemnification provisions, where the breadth of the term should be modified to reflect XX's likely status as an indemnified (broad) or indemnifying (narrow) party. To the extent the environmental aspects of the term need to be specified, they should either be included in the more general definition or a special "environmental" term should be defined separately.

[76] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess

28. PERMITS – BASIC DEFINITION

PERMITS shall mean any permit, approval, authorization, license, variance, or permission required from a Government Authority under a Requirement of Law.

29. POLLUTION CONTROL EQUIPMENT – BASIC DEFINITION

POLLUTION CONTROL EQUIPMENT means that capital equipment ordinarily and necessarily used to collect, capture, reduce, treat, or destroy emissions or waste from the business operations of the [Facilities].

30. PROPERTY – BASIC DEFINITION

PROPERTY[77] shall mean any real or personal property, plant, building, facility, structure, underground storage tank, equipment or unit, or other asset owned, leased or operated by the [Business] (including any surface water thereon or adjacent thereto, soil or groundwater thereunder, or any air thereon or above).

31. RCRA – BASIC DEFINITION

RCRA shall mean the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 et seq., and any amendments or successor statute, and any regulations or guidance promulgated thereunder.[78]

whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

[77] When using such a general term in the EHS provisions, special care must be taken to ensure that it is used in a manner consistent with the more general provisions of the Transaction Agreement. This is particularly true in the indemnification provisions, where the breadth of the term should be modified to reflect XX's likely status as an indemnified (broad) or indemnifying (narrow) party. To the extent the environmental aspects of the term need to be specified, they should either be included in the more general definition or a special "environmental" term should be defined separately.

[78] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

32. RELEASE – BASIC DEFINITION

RELEASE shall mean any release, spill, emission, leaking, pumping, injection, deposit, disposal, discharge, dispersal, leaching or migration into the indoor or outdoor environment or into or out of any [Property], including the movement of Contaminants through or in the air, soil, surface water, groundwater or other [Property].[79]

33. REMEDIAL ACTION/ACTIVITIES – ***CRITICAL TO PRE AND POST CLOSING CONDITIONS, AS WELL AS INDEMNIFICATION PROVISIONS – MULTIPLE VARIANTS – LINK TO XX'S INTERESTS IN THE PARTICULAR TRANSACTION***[80]

REMEDIAL ACTION – BROADLY DEFINED TO INCLUDE PREVENTING RELEASES AND CLEANING-UP SITES

REMEDIAL ACTION shall mean any action required to (i) clean up, remove, treat or in any other way address Contaminants[81] in the indoor or outdoor environment; (ii) prevent the Release or threat of Release or minimize the further Release of Contaminants; or (iii) perform any pre-remedial studies and investigations or post remedial care.

REMEDIAL ACTION -- DEFINED TO INCLUDE PREVENTING RELEASES AND CLEANING-UP SITES, NAMING CERCLA

REMEDIAL ACTION means the investigation, removal, clean-up or remediation of contamination or environmental degradation or damage caused by, related to or arising from the generation, use, handling, treatment, storage, transportation, disposal, discharge, release or emission of Hazardous Substances[82], including, without limitation, investigations, responses and remedial actions under CERCLA, corrective action under RCRA Sections 3004(u), 3004(v), 3008(h) and 7003, and any activities under the clean-up requirements of other Environmental Laws.

[79] The definition of release can be broadened or narrowed according to XX's interests in the transaction, from seller (narrower) to buyer (broader).

[80] When considering the definitions of remedial activities, XX's position in the transaction will determine how narrow and specific (seller) or broad and vague (buyer) the language should be.

[81] Different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. If XX is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements. If XX is the seller, narrower lists of chemicals should be incorporated, and those lists should be set as of a particular time, often the Closing Date.

[82] Different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. If XX is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements. If XX is the seller, narrower lists of chemicals should be incorporated, and those lists should be set as of a particular time, often the Closing Date.

REMEDIATION ACTIVITIES – DEFINED AS ACTIONS NEEDED TO BE TAKEN TO ACHIEVE COMPLIANCE

REMEDIATION ACTIVITY(IES) means those actions necessary to address an Environmental Condition in a manner and to an extent necessary to cause the [Facilities] to be in compliance with Environmental Laws, including, without limitation, the treatment, destruction, containment, removal or transportation offsite for disposal of Hazardous Materials[83].

34. REQUIREMENT OF LAW – BASIC DEFINITION

REQUIREMENT OF LAW shall mean any [international[84]], [federal/national], [state/provincial/regional] or [local/municipal] legislative act or statute, administrative rule or regulation, permit or authorization, judicial decision, or other requirement or determination of any Governmental Authority [during the pendency of this Agreement][85].

35. SDWA – BASIC DEFINITION

SDWA shall mean the Safe Drinking Water Act, 42 USC §§ 300f et seq., and any amendments or successor statute, and any regulations or guidance promulgated thereunder.[86]

36. TSCA – BASIC DEFINITION

[83] Different jurisdictions have many different lists of chemicals that can be reflected in EHS provisions. If XX is the buyer, the widest lists should be used, and changes to those lists over time should be automatically reflected in the agreements. If XX is the seller, narrower lists of chemicals should be incorporated, and those lists should be set as of a particular time, often the Closing Date.

[84] Increasingly, international requirements are imposing real costs on XX's operations. For example, some European Union instruments ("Regulations"), while adopted at the international level, are directly enforceable against companies operating in individual countries. In other cases, such international agreements essentially set forth the national requirements to be imposed in the relatively near future (particularly EU "Directives"). If XX is buying an existing business, efforts should be made to understand and negotiate protections against the costs of meeting such foreseeable, future requirements based on international commitments.

[85] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

[86] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

TSCA shall mean the Toxic Substances Control Act, 15 USC §§ 2601 et seq., and any amendments or successor statute, and any regulations or guidance promulgated thereunder.[87]

[87] Attention needs to be paid to the effect that changes in law after Closing have on contractual rights and responsibilities, either to limit the risks to XX as seller or to expand the opportunities for having some of XX's post-closing environmental costs be covered by seller. For example, unregulated chemicals now in the ground may become subject to regulation in the future. For each transaction, XX needs to assess whether the statutory/regulatory definitions should be fixed as of the Closing Date or should automatically incorporate any changes post-Closing.

[FORM BUY-SIDE STOCK PURCHASE AGREEMENT]

By and Among

[*SHAREHOLDER*]

[*COMPANY*]

and

[*PURCHASER*]

_____, 200_

STOCK PURCHASE AGREEMENT

THIS STOCK PURCHASE AGREEMENT (this "Agreement"), dated as of the ___ day of _____, 200_, by and among _____ (the "Shareholder"), _____, a _____ corporation (the "Company"), and _____, a _____ corporation (the "Purchaser").

W I T N E S S E T H

WHEREAS, the Shareholder owns all of the shares of the outstanding capital stock of the Company (collectively, the "Shares"); and

WHEREAS, the Shareholder desires to sell and transfer to the Purchaser all of the Shares that the Shareholder owns, and the Purchaser wishes to acquire such Shares pursuant to and in accordance with the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the premises and mutual covenants and agreements herein set forth, the parties hereto hereby agree as follows:

ARTICLE 1. PURCHASE AND SALE OF SHARES

1.1 Purchase and Sale.
Subject to the terms and conditions of this Agreement, the Purchaser agrees to purchase from the Shareholder, and the Shareholder on the Closing Date (as defined below) agrees to sell, transfer and convey to the Purchaser all of the Shares.

ARTICLE 2. PURCHASE PRICE; INVENTORY; ADJUSTMENT.

2.1 Purchase Price.
Subject to the adjustment provisions of Section 2.5 hereof, and upon the terms and subject to the conditions contained in this Agreement, the Purchaser shall pay to the Shareholder the amount of _____ Dollars ($_____) (the "Purchase Price") in full consideration for the purchase by the Purchaser of the Shares.

2.2 Payment of the Purchase Price.

At the Closing, the Purchaser shall pay the Purchase Price less the Holdback Amount (as defined below), to the Shareholder by wire transfer in immediately available funds, to the account or accounts identified by the Shareholder at least two (2) business days prior to the Closing Date (as defined below), subject to subsequent adjustment, if any, pursuant to Section 2.5 hereof.

2.3 Holdback Amount.

A portion of the Purchase Price, in the amount of _____ Dollars ($_____) (the "Holdback Amount"), shall be held by the Purchaser and paid to the Shareholder pursuant to and in accordance with the terms of the form of the holdback agreement attached hereto and made a part hereof as **Schedule 2.3** (the "Holdback Agreement").

2.4 Determination of Inventory.

The quantity and valuation of the inventory of the Company (the "Inventory") shall be determined as follows:

(a) The value of the Inventory as of the Closing Date shall be determined from the books and records of the Company on a [first-in, first-out basis]. A physical inventory shall be taken on or immediately after the Closing Date, and the books and records of the Company shall be adjusted for Inventory quantities as of the Closing, and such Inventory shall be valued in accordance with paragraph (b) of this Section 2.4. Such physical inventory shall be conducted by the Shareholder's representatives at the Shareholder's expense jointly with the Purchaser's representatives at the Purchaser's expense.

(b) The Inventory reflected on the Contract Net Asset Statement (as defined in Section 2.5.1 hereof) and the Final Net Asset Statement (as defined in Section 2.5.1 hereof) shall be determined in accordance with U.S. generally accepted accounting principles consistently applied ("GAAP").

(c) Any disagreement regarding the quantity or value of the Inventory, or both, shall be resolved in the manner and at the time described in Section 2.5.1 hereof.

2.5 Post-Closing Adjustment.

2.5.1 Determination of Adjustment.

The Purchase Price will be adjusted dollar for dollar following the Closing Date to the extent that the Net Assets (as hereinafter defined) of the Company as of the Closing Date (the "Final Net Assets") shown upon the Final Net Asset Statement (as hereinafter defined) differs from the Net Assets of the Company at _____ (the "Contract Net Assets") shown upon the statement set forth in **Schedule 2.5.1** attached hereto and made a part hereof (the "Contract Net Asset Statement"). For purposes of this Agreement, the term "Net Assets" shall mean the net assets of the Company as shown on the Contract Net Asset Statement. The Final Net Asset Statement will be prepared by the Purchaser from the books of account of the Company as of the Closing Date. The Final Net Asset Statement shall be prepared in accordance with GAAP consistent with the practice of the Company used in the preparation of the Contract Net Asset Statement, but shall exclude the tax effects of any deductions available to the Company as a result of the exercise or cancellation of stock options or warrants and the effects of the transactions contemplated hereby. The Final Net Assets will be valued in accordance with GAAP. The Purchaser will furnish a statement showing the Final Net Assets (the "Final Net Asset Statement") to the Shareholder not later than sixty (60) days after the Closing Date, provided, however, that the Purchaser's failure to provide such statement to the Shareholder within such 60-day period shall not relieve the Shareholder or the Purchaser from any obligations under Section 2.5.2 hereof. The Purchaser will give representatives of the Shareholder reasonable access to the premises of the Company, to its books and records and to the appropriate personnel of the Purchaser for purposes of confirming the Final Net Asset Statement. Unless the Shareholder notifies the Purchaser in writing that the Shareholder disagrees with the Final Net Asset Statement within thirty (30) days after receipt thereof, the Final Net Asset Statement shall be conclusive and binding on the Purchaser and the Shareholder. If the Shareholder notifies the Purchaser in writing of the Shareholder's disagreement with the Final Net Asset Statement within such thirty (30) day period, then the Purchaser and the Shareholder shall attempt to resolve their differences with respect thereto within thirty (30) days after the Purchaser's receipt of the Shareholder's written notice of disagreement. Any dispute regarding the Final Net Asset Statement not resolved by the Purchaser and the Shareholder within such thirty (30) day period will be resolved by an accounting firm mutually acceptable to both parties or, in the absence of agreement, by an accounting firm of national reputation selected by lot after eliminating the Company's and the Purchaser's principal outside accountants and one additional firm designated as objectionable by

the Shareholder and the Purchaser. The determination by the accounting firm so selected of the Final Net Asset Statement and the Final Net Assets (with such modifications therein, if any, as reflect such determination) shall be conclusive and binding upon the parties. The fees and expenses of such accounting firm in acting under this Section 2.5.1 shall be shared equally by the Purchaser and the Shareholder.

2.5.2 Payment of Adjustment.

If the Contract Net Assets are greater than the Final Net Assets, then the Shareholder shall pay to the Purchaser an amount equal to the difference. If the Final Net Assets are greater than the Contract Net Assets, then the Purchaser shall pay to the Shareholder an amount equal to the difference. Payment shall be made by the party obligated to make such payment not more than five (5) business days following the determination of the Final Net Assets pursuant to Section 2.5.1 hereof by wire transfer in immediately available funds to the account of the Purchaser or the Shareholder, as the case may be, and the amount of such payment shall bear interest from the Closing Date to the date of payment at the simple interest rate of __ percent (_%) per annum.

2.6 Transfer Taxes.

All transfer, sale and use, registration, documentary, recording, value added, stamp and similar taxes and fees (including any penalties and interest) incurred, imposed, assessed or payable in connection with or as a result of this Agreement or any transaction contemplated hereby (collectively, the "Transfer Taxes") shall be paid by the Shareholder, and the Shareholder shall, at its own expense, properly file on a timely basis all necessary Tax Returns, reports, forms and other documentation with respect to any Transfer Taxes and provide to the Purchaser evidence of payment of all Transfer Taxes.

ARTICLE 3. REPRESENTATIONS AND WARRANTIES

3.1 Representations and Warranties of the Company and the Shareholder.

Each of the Company and the Shareholder jointly and severally represent and warrant to the Purchaser as follows:

3.1.1 Corporate Organization and Standing; Subsidiaries.

The Company is a [corporation] duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation and has all requisite [corporate] power and authority necessary to own or lease and operate its properties and to carry on its business as presently conducted. The Company has delivered to the Purchaser complete and correct copies of the [Articles][Certificate] of Incorporation and by-laws of the Company. The Company is duly qualified, licensed or registered to do business in each of the jurisdictions set forth in **Schedule 3.1.1** hereto, which are the only jurisdictions in which the nature of the business as now being conducted by it or the property owned or leased by it makes such qualification, licensing or registration necessary except where the failure to be so qualified could not reasonably be expected to have a Material Adverse Effect[1] (as defined below) with respect to the Company. [Except as set forth in **Schedule 3.1.1** hereto,] the Company does not directly or indirectly own any equity or similar interest in, or any interest convertible into or exchangeable or exercisable for any equity or similar interest in, any corporation, partnership, joint venture or other business association or entity. The Company has no subsidiaries or any interest in any company, partnership, or joint venture.[2]

3.1.2 Capitalization of the Company.

The authorized capital stock of the Company consists of (i) _____ shares of common stock, _____ par value, of which _____ shares have been duly authorized, validly issued, are fully paid and non-assessable, were not issued in violation of any preemptive rights, and are owned by the Shareholder, free and clear of all Liens (as defined below), and [(ii) _____ shares of preferred stock, _____ par value, of which _____ shares have been duly authorized, validly issued, are fully paid and non-assessable, were not issued in violation of any preemptive rights, and are owned by the Shareholder, free and clear of all Liens]. Except as described above, no shares of capital stock of the Company are authorized, issued, outstanding or reserved for issuance. [Except as set forth in **Schedule 3.1.2** attached hereto and made a part hereof,] there are no preemptive, first refusal or similar rights on the part of any holder of any class of securities of the Company, or obligating the Company to issue or sell any shares of

[1] XX: Consider deleting all MAE qualifiers in an aggressive initial draft.

[2] XX: Please note that this Form Buy-Side Stock Purchase Agreement covers the acquisition by XX of a target company with no subsidiaries. Should the target company have any subsidiaries, this Section, and other representations, warranties and covenants of the Shareholder and the Company will need to be modified to reflect such fact.

capital stock of, or other equity interests in the Company. [Except as set forth in **Schedule 3.1.2** hereto,] no options, warrants, subscriptions, conversion, exchange or other rights, agreements or commitments of any kind obligating the Company, contingently or otherwise, to issue or sell any shares of its capital stock of any class or any securities convertible into or exchangeable for any such shares, or any other equity or voting interest in the Company, are outstanding, and no authorization therefore has been given. There are no outstanding or authorized stock appreciation, phantom stock, profit participation or similar rights with respect to the capital stock of, or other equity or voting interest in, the Company. There are no contracts, arrangements or agreements to which the Company is a party or by which it is bound, to (i) repurchase, redeem or otherwise acquire any shares of capital stock of, or other equity or voting interest in, the Company or any other person or (ii) vote or dispose of any shares of capital stock of, or other equity or voting interest in, the Company. There are no irrevocable proxies and no voting agreements with respect to any membership interests of, or other equity or voting interest in, the Company.

3.1.3 Authorization.

All corporate and other proceedings required to be taken on the part of the Company, including all action required to be taken by the directors or the shareholders of the Company to authorize the Company to execute and deliver this Agreement and the other instruments and agreements to be executed and delivered by the Company, as contemplated hereby and thereby, and to consummate the transactions contemplated hereby and thereby, have been duly and properly taken. The Company has full right, power and authority to enter into this Agreement and to perform fully its obligations hereunder. This Agreement has been duly executed and delivered by the Company and is the valid and binding obligation of the Company enforceable against it in accordance with its terms, except as enforcement may be limited by equitable principles limiting the right to obtain specific performance or other equitable remedies, or by applicable bankruptcy or insolvency laws and related decisions affecting creditors' rights generally.

3.1.4 No Conflict.

[Except as set forth in **Schedule 3.1.4** attached hereto and made a part hereof,] neither the execution and delivery of this Agreement and other instruments and agreements contemplated hereby, nor the consummation of the transactions contemplated hereby will (i) result in the

acceleration of, or the creation in any party of any right to accelerate, terminate, modify or cancel any material indenture, contract, lease, sublease, loan agreement, note or other obligation or liability to which the Company is a party or by which it is bound or to which any of its assets is subject, (ii) conflict with or result in a breach of or constitute a default under any provision of the [Articles][Certificate] of Incorporation or Bylaws (or other charter documents) of the Company, or a default under or violation of any material restriction, Lien, bond, guarantee, license, permit, agreement, understanding, arrangement, commitment, indenture, contract, lease, sublease, loan agreement, note or other obligation or liability, whether oral or written, to which it is a party or by which it is bound or to which any of its assets is subject or result in the creation of any Lien or encumbrance upon any of said assets, or (iii) violate or result in a breach of or constitute a default under any Legal Requirement (as defined below) to which the Company is subject or by which the Company or any of its assets are bound.

3.1.5 Financial Statements.

(a) The Contract Net Asset Statement was prepared in accordance with GAAP and on a basis consistent with prior practices of the Company, and fairly presents the assets and liabilities (whether accrued, contingent or otherwise) of the Company at _____, 20__. Except as set forth in **Schedule 3.1.5** attached hereto and made a part hereof, the Company has no material liabilities of any nature, whether absolute, accrued, asserted or unasserted or contingent or whether due or to become due which will not be recorded or reserved for on the Final Net Asset Statement.

(b) The audited balance sheets of the Company as of _____ and ____ (the "Balance Sheet Date"), true and correct copies of which have been furnished to the Purchaser, and the related income and cash flows statements for the years then ended, were prepared in accordance with GAAP and fairly present in all material respects, the financial condition at the date thereof of, and the results of the operations and cash flows of the Company for the years then ended.

3.1.6 Insurance.

Schedule 3.1.6 attached hereto and made a part hereof sets forth a complete and correct list and description of the policies of insurance in effect on the date hereof covering the assets and operations of the Company. All such policies are with reputable insurance carriers, provide full

and adequate coverage for all normal risks incident to the business of the Company and its properties and assets and are in character and amount at least equivalent to that carried by persons engaged in similar businesses and subject to the same or similar perils or hazards. All such policies are valid and subsisting and in full force and effect in accordance with their terms, all premiums thereon have been paid, and the Company is otherwise in compliance in all material respects with the terms and provisions of such policies. The Company is not in default under any of the insurance policies set forth on **Schedule 3.1.6.** (or required to be set forth on **Schedule 3.1.6**) and there exists no event, occurrence, condition or act which, with the giving of notice, the lapse of time or the happening of any other event or condition, would become a default thereunder. The Company has not been denied insurance or suffered the cancellation of any insurance with respect to the Company in the past five (5) years.

3.1.7 Litigation.

Except as set forth in **Schedule 3.1.7** attached hereto and made a part hereof, there is no claim, action, suit, proceeding (at law or in equity), including any litigation relating to Environmental Laws (as defined in Section 3.1.21 hereto), arbitration or investigation pending or, to the best knowledge of the Company and the Shareholder, threatened against the Shareholder, the Company or the directors, officers, agents or employees of the Company, or any properties, assets or rights of the Company, and there are no orders, writs, injunctions or decrees currently in force against the Shareholder, the Company or the directors, officers, agents or employees of the Company, with respect to the conduct of the Company's business. Neither the Shareholder nor the Company know of any valid basis for any such claim, action, suit, proceeding (at law or in equity), arbitration or investigation.

3.1.8 Licenses and Permits; Compliance with Laws.

(a) Except as set forth in **Schedule 3.1.8(a)** attached hereto and made a part hereof, the Company owns, holds or possesses in its own name, all licenses, franchises, permits, approvals and other governmental authorizations (federal, state and local), including Environmental Permits (defined in Section 3.1.21), (collectively, "Licenses and Permits") necessary to entitle it to use its corporate name, to own or lease, operate and use its assets and properties and to carry on and conduct its business and operations as presently conducted. The Company is not in violation of or default under any Licenses or Permits. **Schedule 3.1.8(a)**

attached hereto and made a part hereof, sets forth a complete and correct list of all Licenses and Permits related to the design, manufacture, and marketing of the products of the Company, all of which are in full force and effect as of the date hereof. A true and correct copy of each such License and Permit has been provided to the Purchaser as of the date hereof.

(b) Except as set forth in **Schedule 3.1.8(b)** attached hereto and made a part hereof, the Company is, and has been, in full compliance with each Legal Requirement that is or was applicable to it or to the conduct by the Company of its business, or the ownership or use of any of its assets. No event has occurred or circumstance exists that (with or without the lapse of time) (i) may constitute or result in a violation by the Company, or a failure on the part of the Company, to comply with any Legal Requirements, or (ii) may give rise to any obligation on the part of the Company to undertake, or to bear all or any portion of the cost of, any remedial action of any nature. For the purposes of this Agreement, "Legal Requirement(s)" means any federal, state, local, municipal, foreign, international, multinational, or other administrative order, constitution, law, ordinance, principle of common law, rule or regulation, statute, judgment or treaty of any Governmental or Regulatory Authority, including Environmental Laws (as defined in Section 3.1.21 hereto).

3.1.9 Tax Matters.

(a) For purposes of this Agreement:

(i) "Tax" means any of the Taxes, and "Taxes" means (A) all income, capital gains, gross income, gross receipts, sales, use, ad valorem, franchise, capital, profits, license, and other withholding, employment, social security, payroll, transfer, conveyance, documentary, stamp, property, value added, customs duties, minimum taxes, estimated and any other taxes, fees, charges, levies, excises, duties or assessments of any kind whatsoever, together with additions to tax or additional amounts, interest and penalties relating thereto that may be imposed by the federal government or any state, local, or foreign government, and (B) any liability of the Company for the payment of any amount of any type described in clause (A) as a result of (i) the Company being a transferee or a member of an affiliated or combined group prior to the Closing, or (ii) a contractual obligation to indemnify any person or other entity,

(ii) "Tax Returns" means all returns, reports (including elections, declarations, disclosures, schedules, estimates and informational tax returns), statements, and forms required to be filed in respect of any Tax, and

(iii) "Code" means the Internal Revenue Code of 1986, as amended, including the rules and regulations thereunder and any substitute or successor provisions.

(b) All Taxes and Tax liabilities due by or with respect to the income, assets and operations of the Company for all taxable years or other taxable periods that end on or before the Closing Date and, with respect to any taxable year or other taxable period beginning on or before and ending after the Closing Date, the portion of such taxable year or period ending on and including the Closing Date ("Pre-Closing Period") have been timely paid or accrued and fully provided for in accordance with GAAP on the books and records of the Company and adequately disclosed to the Purchaser in writing. The Company has timely filed or caused to be timely filed all Tax Returns that are required to be filed by or with respect to the income, assets and operations of the Company on or prior to the Closing Date. All such Tax Returns have accurately reflected, and will accurately reflect, all liability for Taxes relating to Company and its assets for the periods covered thereby.

(c) There are no Liens for Taxes (other than for current Taxes not yet due and payable) on the assets of the Company. None of the assets of the Company directly or indirectly secures any debt the interest on which is tax exempt under Section 103(a) of the Code.

(d) The Shareholder is a "United States person" within the meaning of Section 897 of the Code.

(e) The Company has not been the subject of an audit or other examination of Taxes by the tax authorities of any nation, state or locality (and no such audit is pending or contemplated) nor has the Company received any notices from any taxing authority relating to any issue which could affect the Taxes relating to the Company or its assets.

(f) Neither the Shareholder nor the Company (A) has, as of the Closing Date, entered into an agreement or waiver or requested to enter into an agreement or waiver extending any statute of limitations relating to the payment or collection of Taxes relating to the Company, or (B) is presently contesting the Tax liability relating to the Company before any Governmental or Regulatory Authority.

(g) All Taxes which the Company is (or was) required by Legal Requirement to withhold or collect in connection with the amounts paid or owing to any employee, independent contractor, creditor, stockholder or other third party, have been duly withheld or collected, and have been timely paid over to the proper authorities to the extent due and payable.

(h) No written claim has ever been made by any taxing authority in a jurisdiction where the Company does not file Tax Returns that the Company is or may be subject to taxation by that jurisdiction.

(i) There are no tax sharing, allocation, indemnification or similar agreements in effect as between the Company and any other party, including the Shareholder and any predecessor or affiliate thereof, under which the Purchaser or the Company could be liable for any Taxes or other claims of any party.

(j) The Company has not been included in any "consolidated," "unitary" or "combined" Tax Return provided for under the law of the United States, any foreign jurisdiction or any state or locality with respect to Taxes for any taxable period for which the statute of limitations has not expired.

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

(l) The Company has not participated in any "listed transactions" within the meaning of Treasury Regulation Section 1.6011-4(b)(2).

(m) **Schedule 3.1.9(m)** attached hereto and made a part hereof, sets forth the names and addresses of each shareholder of the Company and the amount of money and fair market value of property transferred to each such shareholder and other information required to be provided under Section 6043A of the Code.

(n) Neither the Company nor the Shareholder is a party to any agreement, contract, arrangement, or plan that has resulted or would result, separately or in the aggregate, in the payment of any "excess parachute payments" within the meaning of Section 280G of the Code.

(o) There are no material elections regarding Taxes affecting the Company.

(p) The Company is not, and has not been, a United States real property holding company within the meaning of Section 897(c) of the Code during the applicable period specified in Section 897(c)(1)(A)(ii) of the Code.

(q) The Company has not participated in an international boycott as defined in Section 999 of the Code.

(r) The Company has no net operating losses or other Tax attributes currently subject to limitation under Sections 382, 383, or 384 of the Code.

(s) None of the Company's property is "tax-exempt use property" within the meaning of Section 168(h) of the Code.

(t) The Company is not a party to any joint venture, partnership or other arrangement or contract which could be treated as a partnership for federal income tax purposes.

(u) The Company has not entered into any sale-leaseback or any leveraged lease transaction that fails to satisfy the requirements of Revenue Procedure 75-21 (or similar provisions of foreign law).

(v) The Company is not liable with respect to any indebtedness the interest of which is not deductible for applicable federal, foreign, state or local income tax purposes.

(w) The Company is not, nor has it been, a "reporting corporation" subject to the reporting requirements of Section 6038A.

(x) The transactions contemplated herein are not subject to any tax withholding provisions.

(y) The Company has no permanent establishment in any country other than the United States, as defined in any applicable Tax treaty between the United States and such other country.

3.1.10 Brokers, Finders.

Except for _____, whose fees for their work in connection with the sale of the Company to the Purchaser shall be paid by the Shareholder, neither the Company nor the Shareholder has retained any broker or finder in connection with the transactions contemplated herein or is obligated or has agreed to pay any brokerage or finder's commission, fee or similar compensation.

3.1.11 Absence of Certain Changes.

(a) Since the Balance Sheet Date and through the date hereof, except as set forth in **Schedule 3.1.11** attached hereto and made a part hereof, the Company has conducted its business only in the ordinary course and there has not occurred with respect to the Company:

(i) any Material Adverse Effect;

(ii) any payment, discharge or satisfaction of any liabilities or obligations (whether accrued, absolute, contingent or otherwise) in excess of _____ Dollars ($_____), other than the payment, discharge or satisfaction of accounts payable or accrued expenses incurred in the ordinary course of business;

(iii) any assets (whether real, personal or mixed, tangible or intangible) becoming subject to any mortgage, pledge, Lien, security interest, encumbrance, restriction or charge of any kind or any entering into, materially amending or becoming subject to any contract of a type described in Section 3.1.13;

(iv) any cancellation or waiver of any claims or rights of value, or any sale, lease, transfer, assignment, distribution or other disposition of any material assets, except for sales of finished goods inventory in the ordinary course of business, or any disposal of any material assets for any amount to Affiliates of the Company;

(v) any disposal or lapse of any rights in, to or for the use of any patent, trademark, trade name or copyright, or any disclosure of such items to any person not an employee, or other disposition of, any customer lists;

(vi) any increase in the compensation (including, but not limited to, wages, salaries, bonuses or any other remuneration) or other payment to any director, officer or employee, whether now or hereafter payable or granted (other than increases in base compensation in the ordinary course consistent in timing and amount with past practices), or entry into or variation of the terms of any employment or incentive agreement with any such person;

(vii) any capital expenditure or commitment for additions to property, plant or equipment, or lease agreement, which individually exceeds _____ Dollars ($_____) or exceeds _____ Dollars ($_____) in the aggregate, and which, if purchased, would be reflected in the property, plant or equipment accounts;

(viii) any change in any method of accounting or keeping its books of account or accounting practices;

(ix) any damage, destruction or loss of any asset, whether or not covered by insurance, which individually exceeds _____ Dollars ($_____) or exceeds _____ Dollars ($_____) in the aggregate;

(x) except liabilities incurred in the ordinary course of business, any obligation or liability, including any liability for nonperformance or termination of any contract;

(xi) any sale, transfer, lease, licensing or other disposition of any of the assets of the Company, except for (A) sales of inventory in the ordinary course of business consistent with past practice and (B) leases or licenses entered into in the ordinary course of business consistent with past practice [with annual lease or royalty payments that are not reasonably expected to exceed $_____];

(xii) any elimination of any reserves established on the Company's books or any changing of the method of accrual unless there is any change of significant facts or circumstances pertaining to any reserves which would justify their elimination;

(xiii) any incurrence of Indebtedness;

(xiv) any acquisition of a business or person, by merger or consolidation, purchase of substantial assets or equity interests, or by any other manner, in a single transaction or a series of related transactions, or entered into any contract, letter of intent or similar arrangement (whether or not enforceable) with respect to the foregoing;

(xv) any entering into, materially amending or becoming subject to a joint venture, partnership, strategic alliance, members' agreement, co-marketing, co-promotion, co-packaging, joint development or similar arrangement;

(xvi) any preparation of Tax Returns relating to the Company in a manner which is inconsistent with the past practice of the Company;

(xvii) any entering into a settlement or a closing agreement with a taxing authority, with respect to the Company;

(xviii) any taking of an action that, if taken subsequent to the execution of this Agreement and on or prior to the Closing Date, would constitute a breach of the covenants set forth in Section 6.1.;

(xix) any issuance, authorization for issuance, sale or delivery of (A) any capital stock of, or other equity or voting interest in the Company or (B) any securities convertible into, exchangeable for, or evidencing the right to subscribe for or acquire either (1) any equity or voting interest in, the Company, or (2) any securities convertible into, exchangeable for, or evidencing the right to subscribe for or acquire, any shares of the capital stock of, or other equity or voting interest in the Company;

(xx) any declaration, payment or setting aside for payment any dividend or other distribution (whether in cash, stock or property or otherwise) in respect of any Shares, or redemption, purchase or otherwise acquisition of any Shares, any securities convertible into or exchangeable for any Shares, or any options, warrants or other rights to purchase or subscribe to any of the foregoing (and no dividends are or will be owed to any holder of Shares);

(xxi) any amendment to the [Articles][Certificate] of Incorporation or by-laws of the Company;

(xxii) any entering into a contact or letter of intent with respect to (whether or not binding), or otherwise committed or agreed, whether or not in writing, to do any of the foregoing; or

(xxiii) any Environmental Claim (as defined in Section 3.1.21 hereto).

3.1.12 Real Properties.

Schedule 3.1.12 attached hereto and made a part hereof sets forth a complete and correct list and the addresses of all real property, including the name of the record title owner, owned by the Company and lists any lease including the name and address of the landlord and the tenant pursuant to which the Company leases real property as lessee or lessor and each agreement and/or document relating to the use and/or occupancy of the real property, including all leases, subleases, offers to lease or agreements to lease, lease guarantees, tenant estoppels, subordinations, non-disturbance and attornment agreements. Except as set forth on **Schedule 3.1.12** hereto, the Company has (a) good and marketable title in fee simple to all of the real property listed in **Schedule 3.1.12** hereto owned by it, and (b) valid leasehold interests in all real properties listed in **Schedule 3.1.12** hereto as leased by it, in each case free and clear of all options, rights of first refusal, claims, mortgages, liens, charges, easements, security interests, indentures, deeds of trust, rights of way, restrictions on the use of real property, encroachments,

licenses to third parties, leases to third parties, security agreements or any other encumbrances and other restrictions or limitations on use of real or personal property, or irregularities in title thereto, including any liens or conditions imposed by Environmental Property Transfer Act or Environmental Laws (both terms defined in Section 3.1.21 hereto) (collectively, "Liens") other than (i) those listed in **Schedule 3.1.12** hereto, (ii) Liens for current taxes, assessments or governmental charges not yet due and delinquent, and (iii) those which do not, individually or in the aggregate, materially interfere with the use of the real properties or materially detract from their value (collectively, "Permitted Liens"). The Company enjoys peaceful and undisturbed possession under all real property leases listed in **Schedule 3.1.12** hereto (the "Real Property Leases"). Each Real Property Lease set forth on **Schedule 3.1.12** (or required to be set forth on **Schedule 3.1.12**) is in full force and effect; all rents and additional rents due to date on each such Real Property Lease have been paid and neither the Company, and to the best knowledge of the Company and the Shareholder, no other party to such Real Property Lease, is in material breach or default or has repudiated any material provision thereof. The ownership or lease of real property by the Company or the use thereof, as presently used by the Company, does not violate any local zoning or similar land use laws or governmental regulations, including Environmental Laws. The Company is not in violation of or in noncompliance with any covenant, condition, restriction, order or easement affecting the real property owned or leased by the Company, including imposed by Environmental Law [where such violation or noncompliance could reasonably be expected to have a Material Adverse Effect. There is no condemnation pending or, to the best knowledge of the Shareholder and the Company, threatened affecting the real property owned or leased by the Company. The Shareholder has delivered complete and correct copies of the Real Property Leases listed in **Schedule 3.1.12** hereto, and all amendments and waivers thereto. All of the buildings, structures and appurtenances situated on the real property owned in whole or in part by the Company are in good operating condition and in a state of good maintenance and repair (ordinary wear and tear excepted), are adequate and suitable for the purposes for which they are presently being used and all necessary certificates and permits for the occupancy and use of each real property has been obtained and is in full force and effect and, with respect to each, the Company has adequate rights of ingress and egress for operation of the Company. None of such buildings, structures or appurtenances (or any equipment therein), nor

the operation or maintenance thereof, violates any restrictive covenant or any provision of any Legal Requirement, or encroaches on any property owned by others.

3.1.13 Material Contracts.

Schedule 3.1.13 attached hereto and made a part hereof sets forth a complete and correct list of all of the Material Contracts (as hereinafter defined) to which the Company is a party or to which the Shareholder is a party and that relate to the business of the Company. The Shareholder has furnished to the Purchaser true and correct copies of all Material Contracts. As used in this Agreement, "Material Contracts" means,

(a) all leases or other agreements under which the Company is lessee of, or holds or operates, any machinery, equipment, vehicle or other tangible personal property owned by a third party and used in the business of the Company and which entails annual payments, in the case of any such lease or agreement, in excess of _____ Dollars ($_____) or _____ Dollars ($_____) in the aggregate;

(b) all contracts and agreements to which the Company is a party and which are:

(i) outstanding contracts with its officers, employees, agents, consultants, advisors, salesmen, sales representatives, distributors, sales agents or dealers of the Company other than contracts which by their terms are cancelable by the Company with notice of not more than thirty (30) days and without cancellation penalties or severance payments, in the case of any such contract, in excess of _____ Dollars ($_____),

(ii) collective bargaining agreements of the Company which relate to the business of the Company, and

(iii) pension, profit-sharing, 401(k), bonus, retirement, stock option or employee benefit plans or other similar plans or arrangements of the Company;

(c) all mortgages, indentures, security agreements, pledges, notes, loan agreements or guarantees relating to the Company;

(d) all customer contracts relating to the business of the Company that are expected to result in a loss to the Company;

(e) all uncompleted customer contracts relating to the business of the Company and not priced in a manner consistent with the Company's past practice;

(f) all outstanding contracts with customers or vendors expected to result in payment to or by the Company in excess of _____ Dollars ($_____);

(g) all joint venture agreements and joint product development agreements relating to the Company;

(h) all sole source supply agreements relating to the Company;

(i) all contracts relating to capital expenditures or other purchases of material, supplies, equipment or other assets or properties (other than purchase orders for inventory or supplies in the ordinary course of business);

(j) all contracts involving a loan (other than accounts receivable from trade debtors in the ordinary course of business) or advance to (other than travel and entertainment allowances to the employees of the Business extended in the ordinary course of business), or investment in, any person or any contract relating to the making of any such loan, advance or investment;

(k) all management service, consulting, financial advisory or any other similar type contract and any contracts with any investment or commercial bank;

(l) all contracts (including letters of intent) involving the future disposition or acquisition of assets or properties, or any merger, consolidation or similar business combination transaction, whether or not enforceable;

(m) all contracts involving any joint venture, partnership, strategic alliance, shareholders' agreement, co-marketing, co-promotion, co-packaging or similar arrangement;

(n) all contracts involving any resolution or settlement of any actual or threatened litigation, arbitration, claim or other dispute;

(o) all contracts involving a confidentiality, standstill or similar arrangement;

(p) all contracts involving $____ or more which are not cancelable by the Company without penalty on thirty (30) days or less notice;

(q) all contracts and agreements (including non-competition and non-solicitation agreements) relating to the Company and/or any of its assets that by their terms impose any material restriction on the business activities or operations of the business of the Company (or the ability of any person to conduct or engage in the same) or the use, ownership, operation or alienability of any of the Company's assets;

(r) all contracts which contain restrictions with respect to payment of dividends or any other distribution in respect of the capital stock or other equity interests of the Company; and

(s) all other contracts that are material to the business of the Company.

Each Material Contract listed on **Schedule 3.1.13** (or required to be listed on **Schedule 3.1.13**), and each other contract, sales order, unfilled purchase order, real property lease and Personal Property Lease (collectively, the "Commitments") is a legal, valid and binding obligation of the Company enforceable (except as enforcement may be limited by equitable principles limiting the right to obtain specific performance or other equitable remedies or by applicable bankruptcy or insolvency laws and related decisions affecting creditors' rights generally) against the Company; has been negotiated in good faith on an "arms length" transaction basis; is, to the best knowledge of the Shareholder and the Company, enforceable against the other parties in accordance with their respective terms; is fully assignable without the consent of any third party except as listed on **Schedule 3.1.13** attached hereto and made a part hereof; and, except as listed on **Schedule 3.1.13** hereto, neither the Shareholder nor the Company has knowledge of any default or claimed or purported or alleged default or state of facts which, with notice or lapse of time or both, would constitute a default on the part of any party in the performance of any obligation to be performed or paid by any party under the Commitments, and neither the Shareholder nor the Company has received or given notice of any default or claimed or purported or alleged default or state of facts which, with notice or lapse of time or both, would constitute a default on the part of any party in the performance or payment of any of the Commitments.

3.1.14 Intellectual Property Rights.

(a) "Intellectual Property" shall mean all United States and foreign patents, patent applications, licenses, trademarks, service marks and other indicia of origin, trademark and service mark registrations and applications for registration thereof, trade names, service names, brand names, corporate and business names, trade dress, domain names and the corresponding Internet sites (including all content and other materials accessible and/or displayed thereon), logos, copyrights, copyright registrations and application for registration thereof, trade secrets, unpatented inventions, invention disclosures, discoveries and improvements, moral and economic rights of authors and inventors (however denominated), technical data, product drawings, customer lists, know-how, show-how, maskworks, formulae, methods (whether or not patentable), specifications, designs and other technical information, processes, shop rights, procedures, technology, source codes, object codes, computer software programs, databases, and

other proprietary information or material of any type, whether written or unwritten (and all derivatives, improvements and refinements thereof, and all applications for the foregoing), and all other intellectual property and proprietary rights (collectively, "Intellectual Property") owned by or licensed to the Company or used or held for use by the Company, and all of the goodwill associated with the foregoing (such Intellectual Property shall be collectively referred to as the "Company Intellectual Property").

(b) **Schedule 3.1.14** is a complete list of all domestic and foreign patents, patent applications, trademarks, service marks and other indicia of origin, trademark and service mark registrations and applications for registrations thereof, registered copyrights and applications for registration thereof, domain names, corporate and business names, trade names, brand names and material computer software programs used or held for use by the Company. For each listed item, **Schedule 3.1.14** sets forth the (i) owner, (ii) the jurisdiction where issued, registered, legally sanctioned, filed or the equivalent, (iii) the jurisdictions where used or expected to be used by the Company and (iv) the particulars of any registrations or issuances including, without limitation, all relevant dates, inventors' names, application numbers and the status thereof.

(c) **Schedule 3.1.14** lists each and every item of Company Intellectual Property licensed by the Company as licensor, together with (i) the owner, (ii) the licensee (and any third party beneficiaries), (iii) the jurisdiction(s) where licensed for use and (iv) the license agreement, listed by date and earliest expiry, with respect to each such item.

(d) **Schedule 3.1.14** lists each and every license or other agreement by which the Company has obtained rights under any Intellectual Property, together with the identity of the licensor and licensee, the type of rights licensed, and the Intellectual Property licensed.

(e) The Company Intellectual Property and rights under licenses and agreements listed on **Schedule 3.1.14** includes all Intellectual Property rights necessary or material to the conduct of the business of the Company as and where conducted on the Closing Date and as contemplated to be conducted in the near term and the Company does not use any Intellectual Property which is not owned by the Company or licensed under an agreement listed in **Schedule 3.1.14**. The Company's business operations (including the manufacturing, marketing, licensing, sale or distribution of products and the general conduct and operation of the Company) do not violate, infringe, misappropriate or misuse any Intellectual Property rights.

(f) Each item of the Company Intellectual Property listed on **Schedule 3.1.14**, shown as registered, filed, issued or applied for, has been duly and validly registered in, filed in or issued by, the official governmental registrars and/or issuers (or officially recognized issuers) of patents, trademarks, copyrights or Internet domain names, in the various jurisdictions (national, provincial, prefectural and local) indicated on such Schedule, and except as set forth on **Schedule 3.1.14**, each such registration, filing and/or issuance (i) has not been abandoned, canceled or otherwise compromised, (ii) has been maintained effective by all requisite filings, renewals and payments, and (iii) remains in full force and effect as of the Closing Date. Except as set forth on **Schedule 3.1.14**, there are no actions that must be taken or payments that must be made by the Company within one hundred and eighty (180) days following the Closing Date that, if not taken, will adversely affect the Intellectual Property or the right of the Company to use same as and where used as of the Closing Date. The Company has the exclusive right to file, prosecute and maintain all applications and registrations with respect to the Company Intellectual Property set forth on **Schedule 3.1.14**.

(g) Complete and correct copies of all items of Company Intellectual Property which have been reduced to writing or other tangible form have been delivered by the Company to the Purchaser (including true and complete copies of all related licenses, and amendments and modifications thereto).

(h) To the extent any Intellectual Property is or has been used under license by the Company, including that listed in **Schedule 3.1.14**, no notice of a material default of such license has been sent or received by the Shareholder or the Company which default remains uncured, and the execution, delivery or performance of the Shareholder's and the Company's obligations hereunder and under the other instruments and agreements to be executed and delivered as contemplated hereby will not result in such a default. Each such license agreement is a legal, valid and binding obligation of the Company and the relevant other parties thereto, enforceable in accordance with the terms thereof and the transactions contemplated by this Agreement will not breach the terms thereof.

(i) Except as set forth on **Schedule 3.1.14**, the Company owns or is licensed to use the Company Intellectual Property free and clear of any Liens, without obligation to pay any royalty or any other fees with respect thereto.

(j) Except as set forth on **Schedule 3.1.14**, neither the Shareholder nor the Company has received any notice of any claim, or a threat of any claim, from any third party, and no third party claims are pending, (i) challenging the right of the Shareholder or the Company to use any Company Intellectual Property or alleging any violation, infringement, misuse or misappropriation by the Company of Intellectual Property or indicating that the failure to take a license would result in any such claim, or (ii) challenging the ownership rights of the Shareholder or the Company in any Company Intellectual Property or asserting any opposition, interference, invalidity, termination, abandonment, unenforceability, or other infirmity of any Company Intellectual Property.

(k) Except as set forth on **Schedule 3.1.14**, the Company has not made any claim of a violation, infringement, misuse or misappropriation by any third party (including any employee or former employee of the Company) of its rights to, or in connection with, any Company Intellectual Property, which claim is pending. Except as set forth on **Schedule 3.1.14**, the Company has not entered into any agreement to indemnify any other person against any charge of infringement of any Company Intellectual Property, other than indemnification provisions contained in purchase orders or license agreements arising in the ordinary course of business.

(l) The Company has obtained valid written assignments from all consultants, contractors and employees who contributed to the creation or development of Company Intellectual Property of the rights to such contributions that the Company does not already own by operation of law.

(m) The Company has published internal policies and taken all other necessary and reasonable steps to protect and preserve the confidentiality of all the Company's trade secrets and other proprietary and confidential information including know-how, source codes, databases, data collections, customer lists, schematics, ideas, algorithms and processes and all disclosure of such information to, and use by, any third party (other than (i) to competent regulators, accountants and counsel, in each instance acting in their professional capacities, or (ii) pursuant to an applicable order) has been pursuant to the terms of a written confidentiality agreement between such third party and the Company. The Company has not breached any agreements of non-disclosure or confidentiality and is not currently alleged or claimed to have done so.

3.1.15 Labor Matters.

(a) Except as set forth in **Schedule 3.1.15** attached hereto and made a part hereof, there are no (i) labor strikes, disputes, slowdowns, representation campaigns or work stoppages with respect to employees of the Company pending or, to the best knowledge of the Shareholder and the Company, threatened against or affecting the Company, (ii) grievance or arbitration proceedings arising out of collective bargaining agreements to which the Company is a party (other than informal grievances), (iii) unfair labor practice complaints pending or, to the best knowledge of the Shareholder and the Company, threatened against the Company, (iv) collective bargaining agreements or other labor union contracts applicable to persons employed by the Company and to the best knowledge of the Shareholder and the Company, there are no activities or proceedings of any labor union to organize any such employees, (v) material labor difficulties or work stoppages that have occurred during the last three (3) years, or (vi) to the best knowledge of the Shareholder and the Company, there will not be any Material Adverse Change in relations with employees of the Company as a result of any announcement of the transactions contemplated by this Agreement.

(b) Except to the extent set forth in **Schedule 3.1.15** attached hereto and made a part hereof, the Company is in compliance in all material respects with all applicable Legal Requirements respecting employment and employment practices, terms and conditions of employment and wages and hours, and is not engaged in any unfair labor practice.

3.1.16 No Consent.

[Except for such filings and approvals as may be required pursuant to the Hart-Scott-Rodino Antitrust Improvement Act of 1976, as amended, and the rules and regulations thereunder (the "**HSR Act**") and] except as set forth in **Schedule 3.1.16** attached hereto and made a part hereof, no consent, approval, authorization order, filing, registration or qualification of or with any Governmental or Regulatory Authority or third party is necessary or required to be made or obtained by the Company or the Shareholder in connection with the execution and delivery of this Agreement by the Company or the Shareholder, the performance by the Company and the Shareholder of their respective obligations hereunder or the consummation by the Company or the Shareholder of the transactions contemplated hereby.

3.1.17 Employee Benefit Plans; Employment Agreements.

(a) **Schedule 3.1.17** attached hereto and made a part hereof sets forth a complete and correct list of all domestic and foreign (i) "employee benefit plans," within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended, and the rules and regulations thereunder ("ERISA"); (ii) bonus, stock option, stock purchase, restricted stock, incentive, fringe benefit, "voluntary employees' beneficiary associations" ("VEBAs") under Section 501(c)(9) of the Internal Revenue Code of 1986, as amended, and the rules and regulations thereunder (the "Code"), profit-sharing, pension, or retirement, deferred compensation, medical, life insurance, disability, accident, salary continuation, severance, accrued leave, vacation, sick pay, sick leave, supplemental retirement and unemployment benefit plans, programs, arrangements, commitments and/or practices (whether or not insured); and (iii) employment, consulting, termination, and severance contracts or agreements; for active, retired or former employees or directors, whether or not any such plans, programs, arrangements, commitments, contracts, agreements and/or practices (referred to in (i), (ii) or (iii) above) are in writing or are otherwise exempt from the provisions of ERISA; that have been established, maintained or contributed to (or with respect to which an obligation to contribute has been undertaken) or with respect to which any potential liability is borne by the Company (including, for this purpose and for the purpose of all of the representations in this Section 3.1.17, any predecessors to the Company and all employers (whether or not incorporated) that would be treated together with the Company, and/or the Shareholder as a single employer within the meaning of Section 414 of the Code), since January 1, 1997 (the "Plans").

(b) None of the Plans is a multi-employer plan within the meaning of Section 3(37) of ERISA, and the Company and the Shareholder have not maintained or sponsored, have not been required to contribute to, have not withdrawn from (either completely or partially), and no withdrawal liability (as defined in Section 4201, 4063 or 4064 of ERISA) has been incurred by the Company with respect to any multi-employer plan, whether or not maintained by the Company.

(c) The Plans have been administered in compliance with their terms and with all filings, reporting, disclosure, and other requirements of applicable law, including ERISA and the Code. Each Plan (together with its related funding instrument) which is intended to be qualified under Section 401 of the Code and the regulations issued thereunder, and each such Plan and its related funding instrument have been the subject of a favorable determination letter issued by the Internal Revenue Service on or after January 1, 2002, holding that such Plan and funding instrument are so qualified. Each VEBA has been determined by the Internal Revenue Service to be exempt from Federal income tax under Section 501(c)(9) of the Code. No event or omission has occurred which would cause any Plan to lose its qualification or otherwise fail to satisfy the relevant requirements to provide tax-favored benefits under the applicable Code Section (including, without limitation, Code Sections 105, 125, 401(a) and 501(c)(9)).

(d) None of the Plans (whether qualified or non-qualified under Section 401(a) of the Code) provide for post-employment or retiree health, life insurance and/or other welfare benefits nor have unfunded liabilities, and neither Shareholder nor the Company have any obligation to provide any such benefits to any retired or former employees or active employees following such employees' retirement or termination of service. Neither the Shareholder nor the Company has any unfunded liabilities pursuant to any Plan that is not intended to be qualified under Section 401(a) of the Code.

(e) Each Plan may be amended, terminated, or otherwise modified by the Company to the greatest extent permitted by applicable law, including the elimination of any and all future benefit accruals and no employee communications or provision of any Plan document has failed to effectively reserve the right of the Company or an Affiliate to so amend, terminate or otherwise modify such Plan. An entity is an "Affiliate" of the Company if it would have ever been considered a single employer with the Company under ERISA Section 4001(b) or part of the same "controlled group" as the Company for purposes of ERISA Section 302(d)(8)(C). No complete or partial termination of any Plan has occurred or is expected to occur, and no proceedings have been instituted, and no condition exists and no event has occurred that could constitute grounds, under Title IV of ERISA to terminate, or appoint a trustee to administer, any Plan. The Company does not have any commitment, intention or understanding to create, modify or terminate any Plan. No event has occurred and no condition or circumstance has existed that could result in a material increase in the benefits under or the expense of maintaining any Plan from the level of benefits or expense incurred for the most recent fiscal year ended thereof. No Plan is a plan described in Section 4063(a) of ERISA.

(f) Neither the Company, nor any of its employees or directors, nor any plan fiduciary of any of the Plans, has engaged in any transaction in violation of Section 406(a) or (b)

of ERISA or any "prohibited transaction" (as defined in Section 4975(c)(1) of the Code) for which no exemption exists under title I of ERISA or under Section 4975(d) of the Code, and no "reportable event" (as defined in Section 4043 of ERISA and the regulations promulgated thereunder), other than such as may arise out of the consummation of the transactions contemplated by this Agreement, has occurred in connection with any such Plan. Neither the Shareholder nor the Company nor any of their respective directors, officers, employees or, to the best knowledge and belief of the Shareholder and the Company, other persons who participate in the operation of any Plan or related trust or funding vehicle, has engaged in any transaction with respect to any Plan or breached any applicable fiduciary responsibilities or obligations under ERISA or the Code that could result in any claim being made under, by or on behalf of any such Plan by any party with standing to make such claim.

(g) Other than routine claims for benefits made in the ordinary course of business, there are no pending claims, investigations or causes of action ("Claims") and to the best knowledge of the Shareholder and the Company, no such Claims are threatened against any Plan or fiduciary of any such Plan by any participant, beneficiary or governmental agency with respect to the qualification or administration of any such Plan and there is no basis to anticipate that any such claims will be made. The Shareholder and the Company have classified all individuals who perform services for them correctly under each Plan, ERISA and the Code and other applicable law as common law employees, independent contractors or leased employees. The Company does not maintain any Plan which is (a) a "group health plan" (as such term is defined in Section 5000(b)(1) of the Code or Section 607(1) of ERISA) that has not been administered and operated in all respects in compliance with the applicable requirements of Part 6 of Subtitle B of Title I of ERISA and Section 4980B of the Code or (b) a "group health plan" (as defined in 45 Code of Federal Regulations Section 160.103) that has not been administered and operated in all respects in compliance with the applicable requirements of the Health Insurance Portability and Accountability Act of 1996 and the regulations promulgated thereunder, and the Company is not subject to any liability, including additional contributions, fines, taxes, penalties or loss of tax deduction as a result of such administration and operation. No Plan which is such a group health plan is a "multiple employer welfare arrangement," within the meaning of Section 3(40) of ERISA. Each Plan that is intended to meet the requirements of Section 125 of the Code meets such requirements, and each program of benefits for which

employee contributions are provided pursuant to elections under any Plan meets the requirements of the Code applicable thereto. The Company does not maintain any Plan which is an "employee welfare benefit plan" (as such term is defined in Section 3(1) of ERISA) that has provided any "disqualified benefit" (as such term is defined in Section 4976(b) of the Code) with respect to which an excise tax could be imposed. Each Plan ever maintained by the Company or an Affiliate has complied with the applicable notification and other applicable requirements of the Newborns' and Mothers' Health Protection Act of 1996, the Mental Health Parity Act of 1996, and the Women's Health and Cancer Rights Act of 1998.

(h) The _____ for _____ (the "Pension Plan") is the sole Plan subject to Section 412 of the Code or Section 302 or title IV of ERISA. The Company has provided to the Purchaser with true and complete age, salary, service and related data for employees, former employees and beneficiaries thereof covered under the Pension Plan as of the Closing Date.

(i) The Pension Plan never incurred any "accumulated funding deficiency" within the meaning of Section 302 of ERISA or Section 412 of the Code, whether or not waived. No asset of the Company is subject to any lien arising under Section 302(f) of ERISA or Section 412(n) of the Code, and no event has occurred and no condition or circumstance has existed that could give rise to any such lien. The Company has not been required to provide any security under Section 307 of ERISA or Section 401(a)(29) or 412(f) of the Code, and no event has occurred and no condition or circumstance has existed that could give rise to any such requirement to provide any such security.

(j) The Pension Plan has not been terminated, no proceeding has been initiated to terminate the Pension Plan, and no liability to the Pension Benefit Guaranty Corporation ("PBGC") or any trust under Section 4049 of ERISA has been incurred with respect to the Pension Plan (except for premium payments, if any, which are not yet due and when due will be timely made). Neither the Company nor any Affiliate have incurred any liability to the PBGC or the Pension Plan under Title IV of ERISA that could become a liability of the Purchaser or any entity required to be aggregated with the Purchaser under Sections 414(b), (c), (m) and (o) of the Code after the Closing Date. The Company and the Shareholder warrant that neither the Purchaser nor any entity required to be aggregated with it under Sections 414(b), (c),

(m) and (o) of the Code will incur any liability under Section 411(d)(3) of the Code for vested accrued benefits arising from a partial termination of the Pension Plan prior to the Closing Date.

(k) The Company has made all contributions required to be made to date in order to comply with Section 412 of the Code, which shall include a pro rata contribution of such requirement for the current plan year through the Closing Date and all amounts required to be contributed to the Pension Plan under the Company's normal funding procedures for periods prior to the Closing Date have been properly recorded on the books of the Company and will be properly paid by the Company on or prior to the Closing Date. Any amounts required to be accrued as expense in accordance with applicable pension accounting requirements through the Closing Date have been properly recorded on the books of the Company as of the Closing Date.

(l) Full payment has been timely made of all amounts which the Company is required, under applicable Legal Requirement under any Plan or any agreement relating to any Plan to which the Company or any of its subsidiaries is a party, to have paid as contributions or premiums thereto as of the last day of the most recent fiscal year of such Plan ended prior to the date hereof and such contributions or premiums have been timely deposited into the appropriate trusts or accounts. All such contributions and/or premiums have been fully deducted for income tax purposes and no such deduction has been challenged or disallowed by any Governmental or Regulatory Authority, and to the best knowledge and belief of the Shareholder and the Company no event has occurred and no condition or circumstance has existed that could give rise to any such challenge or disallowance. The Company has made either contributed or made adequate provision for reserves to meet contributions and premiums and any other liabilities that have not been paid or satisfied because they are not yet due under the terms of any Plan, applicable law or related agreements. Benefits under all Plans are as represented and have not been increased subsequent to the date as of which documents have been provided.

(m) No condition exists and no event has occurred which (i) would constitute grounds for termination by the PBGC of the Pension Plan, or (ii) has caused or would give rise to a partial termination of the Pension Plan.

(n) Under the Pension Plan, which is a single-employer plan, the "Projected Benefit Obligation", within the meaning of the Statement of Financial Accounting Standards No. 87 (as determined on the basis of the actuarial assumptions and methods contained in the Plan's most recent actuarial valuation but using the discount rate, rates of increase in compensation

levels, and any other economic assumptions used in the preparation of the most recent audited financial statements of the Company, prepared in accordance with the Statement of Financial Accounting Standards No. 87), as of the last valuation date of the Pension Plan does not exceed the fair market value of the assets of such Pension Plan on such date and since such date, no event has occurred or circumstance exists that would cause the [Projected][3] Benefit Obligation to exceed the fair market value of the assets of the Pension Plan. Since the Balance Sheet Date, there has been (i) no material adverse change in the financial condition of the Pension Plan, (ii) no change in the actuarial assumptions with respect to the Pension Plan and (iii) no increase in benefits under the Pension Plan as a result of plan amendments, written interpretations or announcements (whether written or not), change in applicable law or otherwise, which individually or in the aggregate, would result in the current value of the Pension Plan's accrued benefits exceeding the current value of all such Pension Plan's assets. No Plan holds as an asset any interest in any annuity contract, guaranteed investment contract or any other investment or insurance contract, policy or instrument issued by an insurance company that, to the best knowledge and belief of the Shareholder and the Company, is or may be the subject of bankruptcy, conservatorship, insolvency, liquidation, rehabilitation or similar proceedings.

(o) None of the assets of any Plan are invested in property constituting employer real property or an employer security (within the meaning of Section 407(d) of ERISA). Each Plan (including each non-qualified deferred compensation arrangement) has been maintained in compliance with all applicable requirements of federal and state securities laws including (if applicable) the requirements that the offering of interests in such Plan be registered under the Securities Act of 1933 and/or state "Blue Sky" laws.

(p) Neither the execution and delivery of this Agreement nor the sale of the Shares or any of the transactions contemplated herein will terminate or modify, or give a third person a right to terminate or modify, the provisions or terms of any Plan, policy, agreement, arrangement or commitment, whether or not legally enforceable (including employment agreements) and will or may not constitute a stated triggering event under any Plan (including

[3] XX: Consider using "Accumulated Benefit Obligation" rather than "Projected Benefit Obligation," as the former is more typically used in corporate transactions with respect to this type of representation.

employment agreements) that will or may result in any payment (including parachute payments under Section 280G of the Code, severance payments or any similar payments) becoming due to any employees of the Company.

(q) The Company has not incurred any liability for any Tax or excise Tax arising under Chapter 43 of the Code, and no event has occurred and no condition or circumstance has existed that could give rise to any such liability.

(r) The Shareholder and the Company have delivered or caused to be delivered to the Purchaser true and complete copies of all material documents in connection with each Plan, including (where applicable): (i) all documents embodying or governing such Plans as in effect on the date hereof, together with all amendments thereto, including, in the case of any Plan not set forth in writing, a written description thereof; (ii) all current summary plan descriptions, summaries of material modifications, and material communications; (iii) all current trust agreements, declarations of trust and other documents establishing other funding arrangements (and all amendments thereto and the latest financial statements thereof); (iv) the most recent IRS determination letter, if any, obtained with respect to each Plan intended to be qualified under Section 401(a) of the Code or exempt under Section 501(a) or 501(c)(9) of the Code; (v) the annual report on IRS Form 5500-series or 990 for each of the last three (3) years for each Plan required to file such form, with all applicable schedules and accountants' opinions attached thereto; (vi) the most recently prepared actuarial valuation report for each Plan covered by Title IV of ERISA; (vii) all contracts and agreements relating to each Plan, including service provider agreements, insurance contracts (including any fiduciary liability insurance policy or fidelity bond), annuity contracts, investment management agreements, subscription agreements, participation agreements, and recordkeeping agreements and collective bargaining agreements; (viii) the three most recent annual ADP/ACP nondiscrimination tests for any Plan intended to be qualified under Section 401(k) of the Code; (ix) the most recently filed Form PBGC-1; (x) any registration statement or other filing made pursuant to federal or state securities law; (xi) all correspondence to and from any Governmental or Regulatory Authority with respect to the Plans; (xi) all minutes with respect to the meetings of each Plans' administrative committee and/or plan administrator; and (xii) all contracts and agreements relating to each Plan, including, without limitation, service provider agreements, insurance contracts, annuity contracts,

investment management agreements, subscription agreements, participation agreements, recordkeeping agreements and collective bargaining agreements.

3.1.18 Product Liability and Recalls.

(a) Except as set forth in **Schedule 3.1.18** attached hereto and made a part hereof, there is no claim, action, suit, inquiry, proceeding or investigation in any case by or before any Governmental or Regulatory Authority pending or, to the best knowledge of the Shareholder and the Company, threatened, against or involving the Company relating to any product alleged to have been designed, manufactured or sold by the Company and alleged to have been defective or improperly designed or manufactured.

(b) Except as set forth in **Schedule 3.1.18** hereto (i) there has been no recall or investigation, or threatened or contemplated recall or investigation, in the last five (5) years of any product sold by the Company, (ii) there is no pending, or to the best knowledge of the Shareholder and the Company, threatened or contemplated recall or investigation of any product sold by the Company, and (iii) there is no reasonable basis to believe that there are any threatened or contemplated recalls or investigations of any product sold by the Company.

3.1.19 Books and Records.

The books of account, minute books, stock record books and other records of the Company, including any Environmental Records (as defined in Section 3.1.21 hereto) are true, complete and correct in all material respects and have been maintained in accordance with sound and prudent business practices.

3.1.20 Personal Property.

Schedule 3.1.20 attached hereto and made a part hereof sets forth a complete and correct list of all personal property owned by the Company and sets forth any lease pursuant to which the Company leases personal property as lessee or lessor (the "Personal Property Leases"). Except as set forth in **Schedule 3.1.20** hereto, the Company has (a) good, valid and marketable title to all of the personal property listed in **Schedule 3.1.20** hereto as owned by it free and clear of all Liens, other than Permitted Liens, including the personal property acquired after the date of this Agreement (except for inventories and other assets sold or otherwise disposed of in accordance with the provisions of this Agreement), and (b) valid leasehold interests in all personal property listed in **Schedule 3.1.20** hereto as leased by it, in each case free and clear of all Liens, other

than Permitted Liens. The Company enjoys peaceful and undisturbed possession under all Personal Property Leases. The personal property set forth in **Schedule 3.1.20** hereto constitutes all personal property necessary for the operation of the Company's business as presently conducted. Except as set forth on **Schedule 3.1.20** hereto, the personal property is maintained in good operating condition, reasonable wear and tear excepted, for the purposes for which it is currently being used. The Shareholder has furnished to the Purchaser true and correct copies of all Personal Property Leases.

3.1.21 Environmental Matters.

(a) For purposes of this Agreement, the capitalized terms defined below shall have the meanings ascribed to them below.

(i) "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. §§ 9601 et seq.), as amended, and the rules and regulations promulgated thereunder, and any state law counterpart.

(ii) "CERCLIS" means the Comprehensive Environmental Response and Liability Information System, as provided for by 40 C.F.R. § 300.5.

(iii) "Environmental Assessment" means any soil or groundwater test, survey, environmental assessment or other inspection, test or inquiry (including analytical data, boring logs, photographs and other imaging) conducted by Shareholder or Company, or any agent of Shareholder or Company or in the possession of Shareholder or Company and its agents on any real property, facilities or improvements presently or formerly owned, occupied, or leased by Shareholder in connection with the operations and business of the Company.

(iv) "Environmental Claim" means any written or oral notice, service of process, claim, demand or other communication (collectively hereinafter a "claim") by any Governmental or Regulatory Entity or any person or entity alleging or asserting liability under statute, common law or any theory of law for damages, investigatory costs, cleanup costs, response costs, damages to natural resources or other property, personal injuries, fines or penalties arising out of, based on or resulting from (a) the presence, Release or threatened Release into the indoor or outdoor environment, of any Hazardous Material at any location, whether intentional or non-intentional and whether in compliance with Environmental Law at the time of its occurrence, or (b) circumstances forming the basis of any violation, or alleged violation, of any Environmental Law or any Environmental Permit, regardless of whether Shareholder deems such claims to have merit or not. The term "Environmental Claim" shall include any claim asserted by any Governmental or Regulatory Entity or any third party for enforcement, penalties, termination or withdrawal of an Environmental Permit, cleanup, removal, response, remedial or other actions or damages pursuant to any applicable Environmental Law, and any claim by any third party seeking damages, penalties, contribution, indemnification, cost recovery, compensation, injunctive or other equitable relief resulting from the presence of Hazardous Materials or arising from alleged injury or threat of injury to health, safety or the environment, and shall also include any request for information under Section 104(e) of CERCLA or any claim from a person or entity representing a "potentially responsible party" group alleging liability of Shareholder and/or Company under CERCLA relating to the operation or business of the Company.

(v) "Environmental Law" or "Environmental Laws" shall mean all federal, state, foreign and local statutes, regulations, directives, ordinances and other rules, orders, decrees, judgments, treaties, standards, policies or guidelines having the effect of law, principles of common law, and other standards of practice which pertain to protection of human health, safety and the environment. Environmental Laws include those relating to (1) the manufacture, processing, use, labeling, distribution, treatment, storage, discharge, disposal, recycling, generation or transportation of Hazardous Materials; (2) air (including indoor air), soil, surface, subsurface, groundwater or noise pollution; (3) Releases or threatened Releases; (4) protection of wildlife, endangered species, wetlands or natural resources; (5) Tanks; (6) health and safety of employees and other persons; (7) the presence or content of Hazardous Materials in a product, item or article, whether a component or finished product; (8) product life-cycle; (9) land use and zoning requirements; and (10) notification requirements relating to the foregoing. Without limiting the above, Environmental Law also includes the following within the United States: (i) CERCLA; (ii) the Solid Waste Disposal Act, as amended by RCRA; (iii) the Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. §§ I 101 et seq.), as amended; (iv) the Clean Air Act (42 U.S.C. §§ 7401 et seq.), as amended; (v) the Clean Water Act (33 U.S.C. §§ 1251 et seq.), as amended; (vi) the Toxic Substances Control Act (15 U.S.C. §§ 2601 et seq.), as amended; (vii) the Hazardous Materials Transportation Act (49 U.S.C. §§ 1801 et

seq.), as amended; (viii) the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. §§ 136 et seq.), as amended; (ix) the Federal Safe Drinking Water Act (42 U.S.C. §§ 300 et seq.), as amended; (x) the Federal Radon and Indoor Air Quality Research Act (42 U.S.C. §§ 7401 note, et seq.); (xi) the Occupational Safety and Health Act (29 U.S.C §§ 651 et seq.), as amended; and (xii) any state, county, municipal or local statutes, laws or ordinances similar or analogous to (including counterparts of) any of the statutes listed above in effect as of the Closing Date.

(vi) "Environmental Permit" or "Environmental Permits" shall mean the licenses, certificates, permits, permissions, registrations, governmental approvals, agreements, authorizations, variances, and consents which are required under or are issued pursuant to an Environmental Law.

(vii) "Environmental Property Transfer Act" shall mean an Environmental Law that conditions, restricts, prohibits, or requires notice or disclosure in land records or to governmental parties as a result of the transfer, sale, lease, reduced operations, abandonment, shutting down, or closure of any property, real property, facilities, operations, or business. Such laws include but are not limited to the Industrial Site Recovery Act (N.J.S.A. 13:1K) in New Jersey as well as other laws that condition transfer of real estate containing wells or septic systems.

(viii) "Environmental Record" or "Environmental Records" means any record, document, file, report, data, or analysis, whether in paper or electronic form (collectively hereinafter referred to as "records") pertaining to Environmental Laws or Environmental Permits or any record required to be generated, maintained, or filed by Company or required to be submitted from time to time to Governmental or Regulatory Entities under Environmental Law or Environmental Permits.

(ix) "Governmental or Regulatory Entity" or "Governmental or Regulatory Entities" shall mean any instrumentality, subdivision, court, administrative agency, commission, official or other authority of the United States or any other country or any state, province, prefect, municipality, locality or other government or political subdivision thereof, or any quasi-governmental or private body exercising any regulatory, taxing, importing or other governmental or quasi-governmental authority.

(x) "Hazardous Material" or "Hazardous Materials" shall mean any chemical, pollutant, contaminant, pesticide, fungicide, rodenticide, poison, petroleum or petroleum product,

radioactive substance, biological material, genetically modified organism, wastes (including solid, hazardous, extremely hazardous, special, dangerous, or toxic), any substance, chemical or material regulated, listed, limited or defined as such under any Environmental Law, including: (i) any by-products, derivatives, or combinations of such material; (ii) lead, asbestos, asbestos-containing material, presumed asbestos-containing material, polychlorinated biphenyls, solvents and waste oil, and mold or other indoor air contaminants; (ii) any "hazardous substance," "pollutant", "toxic pollutant" or "contaminant" as defined under CERCLA and/or the Clean Water Act; and (iii) any "hazardous waste" as defined under RCRA.

(xi) "RCRA" means the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 et seq.), as amended, and any state counterpart.

(xii) "Release" or "Releases" means any spill, discharge, leak, migration, emission, escape, injection, dumping, leaching, or other release of any Hazardous Material into the indoor or outdoor environment, whether or not intentional, and whether or not notification or reporting to any governmental agency was or is required at the time it initially occurred or continued to occur. Release includes the meaning of Release as defined under CERCLA.

(xiii) "Tank" or "Tanks" means above-ground and Underground Storage Tanks, containers, vessels and related equipment, including appurtenant pipes, lines and fixtures, containing or previously containing any Hazardous Materials or fractions thereof.

(xiv) "Underground Storage Tank" or "Underground Storage Tanks" means any one or combination of tanks, including underground pipes connected thereto, which is used to contain an accumulation of material, and the volume of which (including the volume of the underground pipes connected thereto) is ten (10) percent or more beneath the surface of the ground. The term also means any pit, cistern, sump, septic system, cesspool, underground injection or seepage system that was or is not intended to permanently contain any liquid or semi-liquid placed into it.

(b) Shareholder hereby represents and warrants to Purchaser the following:

(i) Shareholder has furnished to Purchaser true, accurate, and complete copies of (i) all reports of inspections of the business and property of the Company made through the date hereof pertaining to environmental matters, including any Environmental Assessments (including drafts thereof); (ii) Environmental Records pertaining to communications with Governmental or Regulatory Entities, all of which are listed on **Schedule 3.1.21(a)** hereto. All deficiencies, if

any, noted in such reports, documents or records have been corrected, except as noted on **Schedule 3.1.21(b)** hereto.

(ii) Shareholder has furnished to Purchaser true, accurate and complete copies of all Environmental Permits as of the date hereof, all of which are listed on **Schedule 3.1.21(c)** hereto;

(iii) Except as set forth on **Schedule 3.1.21(d)** hereto, and in addition to any other provisions of this Agreement:

(a) the Company and its operations and business are in compliance with all Environmental Laws;

(b) the Company has obtained all Environmental Permits necessary for its operations and business, all such Environmental Permits are in good standing, and Company is in compliance with the conditions of all such Environmental Permits;

(c) without limiting (i) and (ii) above, the real property described in **Schedule 3.1.12** hereto ("Real Property") are and have been owned, leased, operated and maintained in compliance with all applicable Environmental Laws and Environmental Permits during Company's record of beneficial ownership, lease, sublease, operation or occupancy, and, to the best knowledge of Shareholder, all such real properties were so operated and maintained prior to such date;

(d) all real properties formerly owned or leased by Company or used in connection with the business or operations ("Formerly Owned or Leased Real Property") are identified on **Schedule 3.1.21(e)** hereto, and were operated by Company in compliance with all Environmental Laws and Environmental Permits during Company's period of ownership, lease, sublease, operation or occupancy;

(e) without limiting (iii) and (iv) above relating to Real Property and to Formerly Owned or Leased Real Property, (a) no polychlorinated biphenyl is or was present, (b) no surface impoundments for Hazardous Materials, active or abandoned, are or were present, at, on or under any such property during any period that Company owned, operated or leased such property, nor, to the best knowledge of Shareholder, at any other time;

(f) no Real Property or Formerly Owned or Leased Real Property is listed or proposed for listing on the National Priorities List under CERCLA, CERCLIS or any similar state or local list of sites pertaining to Releases of Hazardous Materials or to landfills requiring investigation or clean-up;

(g) the Company does not own, operate or lease, nor has Company owned, operated or leased, a treatment, storage or disposal facility as part of its business or operations requiring a permit, closure or management under RCRA or under any comparable state or local law.

(h) there has been no Release or threatened Release of a Hazardous Material at, on, under or in any of the Real Property or Formerly Owned or Leased Real Estate that could give rise to an Environmental Claim against the Company or Shareholder;

(i) without limiting (viii) above, the soil, subsoil, bedrock, surface or groundwater at, on or under the Real Property is free of any Hazardous Materials and there is no threat of a Release of Hazardous Materials on, at or under the Real Property from the operations or business of the Company, or from adjacent properties or businesses, that could give rise to an Environmental Claim against Company or Shareholder.

(j) no Liens or land use restrictions have arisen under or pursuant to any Environmental Law or Environmental Property Transfer Act on any Real Property or Formerly Owned or Leased Real Property, and no action has been taken by any Governmental or Regulatory Entity or, to the best knowledge of Shareholder, is in the process of being taken, that could subject any such property to such Liens or restrictions, and Shareholder has not been and does not expect to be required to place any notice or restriction relating to the presence of Hazardous Materials at any such property;

(k) without limiting (x) above, the transaction contemplated by this Agreement is not subject to any Environmental Property Transfer Act;

(l) there are no Tanks at, in, on or under any Real Property that could give rise to any Environmental Claims against the Shareholder or the Company. For any removed, closed or abandoned Tanks at, in or under any Real Property or any Formerly Owned or Leased Real Property, Company has done so in compliance with Environmental Law.

(m) Company has not transported or arranged for the transportation, processing (including toll manufacturing), or disposal of any Hazardous Material in connection with the operation or business of the Company to any facility or location that is (i) listed on the National Priorities List under CERCLA, (ii) listed for possible inclusion on the National Priorities List in CERCLIS or on any similar state or local list or (iii) the subject of enforcement

or remediation actions by any Governmental or Regulatory Entity that may lead to Environmental Claims against Company or Shareholder;

(n) the Real Property and any facilities or improvements are free of asbestos or asbestos containing material, whether friable or non-friable, and all asbestos abatement measures (if any) pertaining to such facilities and improvements have been conducted in compliance with the Occupational Health and Safety Act asbestos regulations, 29 C.F.R. § 1926.58, the Asbestos Hazard Emergency Response Act, 40 C.F.R. § 763, Subpart E, the Environmental Protection Agency's NESHAPS Asbestos Regulations, 40 C.F.R. § 61.145, 61.149(e), 61.150, and any similar local, state or foreign laws, rules or regulations, as applicable.

(o) there are no other Environmental Claims not specifically addressed elsewhere in this Agreement either pending or threatened against or by the Shareholder in connection with the Company or its business or operations and there are no facts or circumstances known, including any inquiries or investigations by Governmental or Regulatory Entities that could reasonably be expected to form the basis of any such Environmental Claims;

(p) there are no draft or pending Environmental Laws or Environmental Permits that will or may go into effect prior to the Closing Date that will have any adverse effect on the Company or impose any conditions or limitations on the operation or business of the Company not in effect as of the date hereof.

(q) no Environmental Permit listed in **Schedule 4.1.19(c)** hereof will expire or terminate or be withdrawn prior to the Closing Date and no Environmental Record is required or scheduled to be submitted to a Governmental or Regulatory Entity prior to Closing Date;

(r) there are no capital expenditures ongoing, planned or required to control, remediate or eliminate any occupational hazard (as defined under applicable Environmental Laws) by means of engineering controls, arising from the operations or the business of the Company;

(s) there are no other requirements to file a notice or other submission to a Governmental or Regulatory Entity under Environmental Law, or to modify any provision of any agreement, consent order or consent decree entered into under an Environmental Law as a result of the transaction contemplated by this Agreement.

(t) the Company has not entered into or agreed to, nor does it contemplate entering into, any consent decree or order is respect of the operations, business or any of the Real Property with respect to Environmental Law, and the Company is not subject to any court order relating to compliance with, or addressing the presence of Hazardous Materials under, any Environmental Law in respect to the operations or business or Real Property of the Company; and

(u) the Company and Shareholder have not assumed any liability or obligation that has or may arise relating to an Environmental Claim of any other person or entity.

3.1.22 Customers and Suppliers.

Schedule 3.1.22 attached hereto and made a part hereof contains a list setting forth the 10 largest customers of the Company, by dollar amount, over the twelve (12) months ended _____, and the ten (10) largest suppliers of the Company, by dollar amount, over the twelve (12) months ended _____. All purchase and sale orders and other commitments for purchases and sales made by the Company have been made in the ordinary course of business in accordance with past practices, and no payments have been made to any supplier or customers or any of their respective representatives other than payments to such suppliers or the payment of the invoiced price of supplies purchased or goods sold in the ordinary course of business. Trade inventories of the products of the Company are not excessive in kind or amount. The Company does not have any obligation to accept returns of products in excess of the reserve for returns set forth in the Contract Net Asset Statement. There has been no termination or threatened termination, or cancellation or threatened cancellation of any purchase or sale order, in each case by any customer or supplier of the Company listed on **Schedule 3.1.22** hereto, over the twelve (12) months ended _____, 200_.

3.1.23 Product Warranty.

Each product manufactured, sold, leased, or delivered by the Company has been in conformity with all applicable contractual commitments and all express and implied warranties, and the Company does not have any liability (and there is no basis for any present or future action, suit, proceeding, hearing, investigation, charge, complaint, claim, demand, or Environmental Claim against any of them giving rise to any liability) for replacement or repair thereof or other damages in connection therewith, subject only to the reserve for product warranty claims set

forth on the Contract Net Asset Statement. No product manufactured, sold, or delivered by the Company is subject to any guaranty, warranty, or other indemnity beyond the applicable standard terms and condition of sale. **Schedule 3.1.23** attached hereto and made a part hereof includes copies of the standard terms and conditions of sale for the Company (containing applicable guaranty, warranty and indemnity provisions).

3.1.24 Accuracy of Information Furnished.

No representation or warranty by the Shareholder or the Company contained in this Agreement, the disclosure schedules, or in respect of the exhibits or other documents delivered to the Purchaser by the Shareholder or the Company and referred to herein, and no statement contained in any certificate furnished or to be furnished by or on behalf of the Shareholder pursuant hereto, or in connection with the transactions contemplated hereby, contains, or will contain as of the date such representation or warranty is made or such certificate is or will be furnished, any untrue statement of a material fact, or omits, or will omit to state as of the date such representation or warranty is made or such certificate is or will be furnished, any material fact which is necessary to make the statements contained herein or therein not misleading. To the best knowledge of the Shareholder and the Company, there is no fact which could reasonably be expected to have a Material Adverse Effect with respect to the Company, which the Shareholder and the Company have not prior to or on the date hereof disclosed to the Purchaser in writing.

3.1.25 Inventory.

The Inventory as reflected in the most recent financial statements (i) is carried at an amount not in excess of the lower of cost or net realizable value, and (ii) is merchantable and fit for the purpose for which it was procured or manufactured, and none of which is slow-moving, obsolete, damaged, or defective, or not usable or saleable in the ordinary course of business of the Company as heretofore conducted, subject to inventory valuation reserves in the Final Net Asset Statement.

3.1.26 Notes and Accounts Receivable.

All notes and accounts receivable of the Company are reflected properly on their respective books and records, are valid and existing receivables which arose in the ordinary course of business and are subject to no refunds or other adjustments and to no defenses, rights of setoff, assignments, restrictions, encumbrances, conditions enforceable by third parties, or counterclaims, are current

and collectable, and to the best knowledge of the Company and the Shareholder, will be collected in accordance with their terms at their recorded amounts, subject only to the reserve for bad debts set forth in the Contract Net Asset Statement as adjusted for the passage of time through the Closing Date in accordance with the past custom and practice of the Company.

3.1.27 Powers of Attorney.

Except as set forth in **Schedule 3.1.27** attached hereto and made a part hereof, there are no powers of attorney executed on behalf of the Company.

3.1.28 Bank Accounts; Safe Deposit Boxes.

Schedule 3.1.28 attached hereto and made a part hereof sets forth a complete and correct list of each account with any bank, trust company, securities broker or other financial institution with which the Company has any account and all safe deposit boxes maintained by the Company, the identifying numbers or symbols thereof, and the name of each person authorized to draw thereon or to have access thereto.

3.1.29 Guaranties.

Except as set forth in **Schedule 3.1.29** attached hereto and made a part hereof, the Company is not a guarantor for any liability or obligation (including Indebtedness) of any third party.

3.1.30 Affiliate Transactions; Interests in Clients, Suppliers, Etc.

Except as set forth on **Schedule 3.1.30** (i) there are no contracts, arrangements, licenses and agreements, liabilities or obligations between the Company, on the one hand, and any Affiliate of the Company on the other hand (ii) neither the Company, the Shareholder, any Affiliate of the Company or the Shareholder, nor any officer, director or employee of the Company or the Shareholder possesses, directly or indirectly, any financial interest in, or is a director, officer or employee of, any person which is a client, supplier, customer, lessor, lessee, or competitor or potential competitor of the Company. Ownership of securities of a company whose securities are registered under the Securities Exchange Act of 1934, as amended, of 1% or less of any class of such securities shall not be deemed to be a financial interest for purposes of this Section 3.1.30.

3.1.31 Undisclosed Liabilities.

The Company has no liabilities or obligations, whether accrued, absolute, contingent or otherwise, which are material to the Company, and there is no existing condition, situation or set of circumstances which could reasonably be expected to result in such a liability, except (i) to the extent reflected or reserved for on the Contract Net Asset Statement, (ii) liabilities or obligations incurred in the normal and ordinary course of business of the Company since the Balance Sheet Date, (iii) liabilities or obligations disclosed in **Schedule 3.1.31** attached hereto and made a part hereof, or (iv) liabilities or obligations disclosed in this Agreement.

3.1.32 Restrictions on Business Activities.

Except for this Agreement or as set forth in **Schedule 3.1.32** attached hereto and made a part hereof, there is no agreement, judgment, injunction, order or decree binding upon the Company which has or could reasonably be expected to have the effect of prohibiting or impairing any business practice of the Company, acquisition of property by the Company, or the conduct of business by the Company as currently conducted or as proposed to be conducted by the Company.

3.1.33 Federal Tax Identification Number.

The Company's Federal Tax Identification Number is _____.

3.2 Additional Representations and Warranties of the Shareholder.

The Shareholder represents and warrants to the Purchaser as follows:

3.2.1 Approvals, etc.

All consents, approvals, authorizations and orders (corporate, governmental or otherwise) necessary for the due authorization, execution and delivery by the Shareholder of this Agreement and the valid sale and delivery of the Shares have been obtained.

3.2.2 Corporate Existence and Power.

The Shareholder is a corporation duly organized, validly existing and in good standing under the laws of the state of [_____], and has all requisite [corporate] power and authority necessary to carry on its business as now conducted and to own the Shares.

3.2.3 Authorization.

All Corporate and other proceedings required to be taken on the part of the Shareholder, including all action required to be taken by the directors or the shareholders of the Shareholder to authorize the Shareholder to execute and deliver this Agreement and the other instruments and agreements to be executed and delivered by the Shareholder, as contemplated hereby and thereby, and to consummate the transactions contemplated hereby and thereby, have been duly and properly taken. The Shareholder has full right, power and authority to enter into this Agreement and to perform fully its obligations hereunder. This Agreement has been duly executed and delivered by the Shareholder and is the valid and binding obligation of the Shareholder enforceable against it in accordance with its terms, except as enforcement may be limited by equitable principles limiting the right to obtain specific performance or other equitable remedies, or by applicable bankruptcy or insolvency laws and related decisions affecting creditors' rights generally.

3.2.4 No Conflict.

The execution and delivery of this Agreement by the Shareholder, the consummation by the Shareholder of the transactions contemplated hereby, the sale to the Purchaser of the Shares owned by the Shareholder, and the performance by the Shareholder of this Agreement in accordance with its terms do not and will not conflict with or result in a breach of any terms and provisions of, or constitute a default under or conflict with, any material agreement, indenture or other instrument to which the Shareholder is a party or by which the Shareholder or his or its assets are bound, or any judgment, decree, order or award of any court, governmental body of arbitrator or any law, rule or regulation applicable to the Shareholder.

3.2.5 Title to Shares.

The Shareholder is the lawful record and beneficial owner of and has good and valid title to the Shares, free and clear of any Liens, title retention agreements, adverse claims or options, and upon the delivery of and payment for the Shares at the Closing as provided for herein, the Purchaser will acquire good and valid title to all the outstanding capital stock of the Company, free and clear of any Liens, title retention agreements, adverse claims or options.

3.3 Interpretation.

In this Agreement, unless the context otherwise requires: (i) any reference in this Agreement to "writing" or comparable expressions includes a reference to facsimile transmission or comparable means of communication (but excluding e-mail communications); (ii) words expressed in the singular number shall include the plural and vice versa, and words expressed in the masculine shall include the feminine and neuter gender and vice versa; (iii) references to Articles, Sections, Exhibits, Schedules and Recitals are references to articles, sections, exhibits, schedules and recitals of this Agreement; (iv) reference to "day" or "days" are to calendar days; (v) this "Agreement" or any other agreement or document shall be construed as a reference to this Agreement or, as the case may be, such other agreement or document as the same may have been, or may from time to time be, amended, varied, novated or supplemented; and (vi) "include," "includes," and "including" are deemed to be followed by "without limitation" whether or not they are in fact followed by such words or words of similar import.

3.4 Definition of "Best Knowledge".

For purposes of this Agreement, the term "to the best knowledge of the Shareholder and the Company" or other term of similar import means the knowledge of the Shareholder, and any executive officer or employee of either of them with primary responsibility for the matter in question, which knowledge of such Shareholder and/or the Company, officer or employee actually has, at any time had, or should reasonably be expected to have in the ordinary course of the discharge of its or his responsibilities after having made diligent inquiries regarding the matter in question.

3.5 Definition of "Material Adverse Effect".

For purposes of this Agreement, "Material Adverse Effect" or "Material Adverse Change" means (i) when used with respect to the Company, any change, effect or circumstance that, individually or when taken together with all other changes, effects or circumstances that have occurred prior to the date of determination of the occurrence of the Material Adverse Effect, is or is reasonably likely to be materially adverse to the business, assets (including intangible assets), condition (financial or otherwise), prospects or results of operation of the Company taken as a whole, and (ii) when used with respect to the Shareholder, such term means any materially

adverse change in or effect on (including any material delay) the ability of the Shareholder to perform its respective obligations hereunder.

3.6 Definition of "Indebtedness".

For purposes of this Agreement, "Indebtedness" of any person means and includes: (i) indebtedness for borrowed money or indebtedness issued or incurred in substitution or exchange for indebtedness for borrowed money, (ii) amounts owing as deferred purchase price for property or services, including all the Shareholder notes and "earn-out" payments, (iii) indebtedness evidenced by any note, bond, debenture, mortgage or other debt instrument or debt security, (iv) commitments or obligations by which such person assures a creditor against Loss (including contingent reimbursement obligations with respect to letters of credit), (v) indebtedness secured by a Lien on assets or properties of such person, (vi) obligations or commitments to repay deposits or other amounts advanced by and owing to third parties, (vii) obligations under any interest rate, currency or other hedging agreement or (viii) guarantees or other contingent liabilities (including so called take-or-pay or keep-well agreements) with respect to any indebtedness, obligation, claim or liability of any other person of a type described in clauses (i) through (vii) above. Indebtedness shall not, however, include accounts payable to trade creditors and accrued expenses arising in the ordinary course of business consistent with past practice and shall not include the endorsement of negotiable instruments for collection in the ordinary course of business.

3.6 Definition of "Affiliate".

For purposes of this Agreement, "Affiliate" shall mean, with respect to any person, any other person directly or indirectly controlling, controlled by, or under common control with, such person; provided that, for the purposes of this definition, "control" (including, with correlative meanings, the terms "controlled by" and "under common control with"), as used with respect to any person, shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such person, whether through the ownership of voting securities, by contract or otherwise and provided, further, that an Affiliate of any person shall also include (i) any person that directly or indirectly owns more than five percent (5%) of any class of capital stock or other equity interest of such person, (ii) any officer, director, trustee or beneficiary of such person, (iii) any spouse, parent, sibling or descendant of any person

described in clauses (i) or (ii) above, and (iv) any trust for the benefit of any person described in clauses (i) through (iii) above or for any spouse, issue or lineal descendant of any person described in clauses (i) through (iii) above. Without limitation to the above, for the purposes of Section 3.1.17, "Affiliate" means an entity that is or would have ever been considered a single employer with the Company under Section 4001(b) of ERISA or part of the same "controlled group" as the Company for purposes of Section 302(d)(8)(C) of ERISA.

ARTICLE 4. REPRESENTATIONS AND WARRANTIES OF THE PURCHASER

4.1 Representations and Warranties.

The Purchaser represents and warrants to the Shareholder as follows:

4.1.1 Organization and Standing.

The Purchaser is a [corporation] duly incorporated, organized, and validly existing under the laws of the State of _____ and has all requisite corporate power and authority to execute and deliver this Agreement and to consummate the transactions contemplated hereby and perform its obligations hereunder.

4.1.2 Authorization.

All [corporate] proceedings required to be taken on the part of the Purchaser to authorize the Purchaser to enter into and carry out this Agreement and to purchase the Shares hereunder, have been, or prior to the Closing will be, duly and properly taken. This Agreement has been duly executed and delivered by the Purchaser and is the valid and binding obligation of the Purchaser enforceable against it in accordance with its terms, except as enforcement may be limited by equitable principles limiting the right to obtain specific performance or other equitable remedies, or by applicable bankruptcy or insolvency laws and related decisions affecting creditors' rights generally.

4.1.3 Compliance.

The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby, upon satisfaction of the conditions set forth in Article 7 hereof, will not:

(a) result in the breach of any of the terms or conditions of, or constitute a default under or violate, as the case may be, the [Articles][Certificate] of Incorporation or by-laws of the Purchaser, or any material agreement, lease, mortgage, note, bond, indenture, license or other document to which the Purchaser is bound, or by which any of its properties or assets may be affected; or

(b) violate any rule, regulation, writ, injunction, order or decree of any Governmental or Regulatory Authority applicable to Purchaser.

4.1.4 Investment Only.

The Purchaser is purchasing the Shares solely for its own account for investment purposes only and not with a view to the distribution or resale thereof. The Purchaser will not sell or transfer any of the Shares (or any securities issued in substitution, reclassification or recapitalization) in violation of applicable federal or state securities laws.

4.1.5 Litigation.

There are no actions, suits, proceedings or investigations pending, or to the Purchaser's best knowledge, threatened which question the validity of this Agreement or of any action taken or to be taken in connection herewith or the consummation of the transactions contemplated herein.

4.1.6 Brokers, Finders.

Except for _____, whose fees for their work in connection with the purchase of the Company from the Shareholder shall be paid by the Purchaser, the Purchaser has not retained any broker or finder in connection with the transactions contemplated herein and is not obligated and has not agreed to pay any brokerage or finder's commission, fee or similar compensation.

4.1.7 Approvals, etc.

Subject to compliance by the Purchaser with the H-S-R Act, all consents, approvals, authorizations and orders (corporate, governmental or otherwise) necessary for the due authorization, execution and delivery by the Purchaser of this Agreement and the consummation of the transactions contemplated hereby have been obtained or will be obtained prior to the Closing Date.

4.1.8 Financial Condition.

The Purchaser has the financial capabilities to fully meet and perform all of its obligations under this Agreement.

ARTICLE 5. COVENANTS AND AGREEMENTS

5.1 Employees.

5.1.1 Definitions of Employees.

For purposes of this Agreement, "Employees" shall include all employees of the Company, both salaried and hourly, who are active employees of the Company on the Closing Date.

5.1.2 Employee Benefits; Crediting of Service.

After the Closing Date, the Purchaser shall provide, or cause the Company to provide, to all Employees, for their service with the Purchaser, employee benefits that are in the aggregate substantially similar to those provided to the Company's employees for a period of at least three (3) months as long as an Employee continues to be employed by the Company after the Closing Date. The Purchaser shall grant and shall continue to grant, or cause the Company to grant, and continue to grant, to all Employees under all of its employee benefit plans in which Employees are or will be eligible to participate, all service with the Company credited to them and to be credited to them in respect of employee benefits for all purposes under such plans.

5.1.3 Liability with Respect to Certain Benefit Obligations.

Except for the liabilities, responsibilities, and obligations set forth in the Plans that are sponsored or maintained by the Company (identified by an asterisk in **Schedule 3.1.17** attached hereto and made a part hereof), which plans shall on the Closing Date continue to be the responsibility of the Company, the Shareholder shall assume all liabilities, responsibilities and obligations under the Plans with respect to any amounts payable or benefits to be provided to any Employee or former Employee or any beneficiary thereof for payments, services, benefits, materials or supplies incurred, provided or received thereunder by any Employee or former Employee or beneficiary thereof prior to the Closing Date, except for those amounts reflected on the Final Net Asset Statement. The Purchaser shall be liable for, or cause the Company to be liable for or remain liable for, employee benefits, under the terms of the Purchaser's employee benefit plans, in respect of Employees and their beneficiaries, which benefits relate to services rendered after

the Closing Date. Anything herein to the contrary notwithstanding, the Purchaser may, but need not, in its sole discretion, assume on or after the Closing Date some or all of the liabilities, responsibilities or obligations under one or more of the Plans.

5.1.4 Required Documentation.

In connection with the implementation of this Section 5.1, the Shareholder and the Purchaser shall cooperate, and the Shareholder or the Purchaser, as the case may be, shall cause the Company to cooperate, in the preparation and filing of all documentation required to be filed with any applicable Governmental or Regulatory Authority.

5.2 Commercially Reasonable Efforts.

Subject to the terms and conditions contained herein, the Shareholder, the Company and the Purchaser shall cooperate and use their respective commercially reasonable efforts to take, or cause to be taken, all appropriate action, and to make, or cause to be made, all filings necessary, proper or advisable under applicable Legal Requirements and to consummate and make effective the transactions contemplated by this Agreement, including their respective commercially reasonable efforts to obtain, prior to the Closing Date, all Licenses and Permits, consents, approvals, authorizations, qualifications and orders and parties to contracts (including landlords) as are necessary for consummation of the transactions contemplated by this Agreement and to fulfill the conditions to consummation of the transactions contemplated hereby set forth in Article 7 of this Agreement; provided, that no Material Contract shall be amended to increase the amount payable thereunder or otherwise to be materially more burdensome to the Business to obtain any such consent, approval or authorization, without first obtaining the written approval of the Purchaser.

5.3 Disclosures.

Except as required by any applicable Legal Requirement, none of the Shareholder, the Company or the Purchaser, without the prior written consent of the other, will make any press release or any similar public announcement concerning the transactions contemplated hereby. Except as required by any applicable Legal Requirement, no written or oral announcement or private disclosure with respect to the transactions contemplated hereby will be made to any person unrelated to the Shareholder or the Purchaser unless jointly approved by the Shareholder and the Purchaser. If disclosure is required by any applicable Legal Requirement, the disclosing party

shall consult in advance with the other party and attempt in good faith to reflect such other party's concerns in the required disclosure.

5.4 Books, Records and Information.

5.4.1 The Purchaser's Access and Inspection.

(a) The Shareholder and the Company shall provide the Purchaser and its representatives full access during normal business hours from and after the date hereof until the Closing, to the Company, the books and records of the Company and the employees, officers, directors, accountants and advisors of the Company, for the purpose of making such investigation as the Purchaser may reasonably desire, including having surveys and environmental studies, sampling (including subsurface) and testing (including both Phase I and Phase II studies, at the Purchaser's cost) made of the Company's operations, facilities, and real property, and the Company shall furnish the Purchaser such information concerning its business, facilities, and real estate, including those related to Releases, applicable Environmental Records, and Environmental Assessments, as the Purchaser may reasonably request. The Shareholder and the Company shall assist the Purchaser in making such investigation including by providing the Purchaser with written authorizations to Governmental or Regulatory Authorities and third parties to enable the Purchaser to perform its due diligence and causing its counsel, accountants, engineers, consultants and other non-employee representatives, managers and executive officers to be reasonably available to the Purchaser for such purposes. No investigation made heretofore or hereafter by the Purchaser shall limit or affect the representations, warranties, covenants and indemnities of the Shareholder and the Company hereunder, each of which shall survive any such investigation.

(b) Any information obtained by the Purchaser pursuant to paragraph (a) above shall be subject to that certain Confidentiality Agreement, dated _____, 20__ between [_____] and [_____], the terms of which are incorporated herein by reference (the "Confidentiality Agreement"). Effective upon, and only upon, the Closing, the Purchaser's obligations under the Confidentiality Agreement shall terminate with respect to information relating to the Company.

5.4.2 Confidentiality by the Shareholder.

The Shareholder acknowledges that it is in possession of [Confidential Information] (as defined in the Confidentiality Agreement) concerning the Company. The Shareholder agrees that it shall, and that it shall cause its [representatives] (as defined in the Confidentiality Agreement) to, keep all such [Confidential Information] strictly confidential and use such [Confidential Information] only for the purpose of evaluating the transactions contemplated by this Agreement; provided, that the Shareholder may also use the [Confidential Information] for the purpose of operating the business of the Company prior to the Closing. The Shareholder acknowledges and agrees that the [Confidential Information] is proprietary and confidential in nature and may be disclosed to its [representatives] only to the extent necessary for the Shareholder and such [representatives] to evaluate the transactions contemplated by this Agreement; provided, that the Shareholder shall be responsible for any breach of these confidentiality provisions by its [representatives] for breaches following the Closing. If the Shareholder or any of its [representatives] are legally required to disclose (after the Shareholder has used its commercially reasonable efforts to avoid such disclosure and after promptly advising and consulting with the Purchaser about its intention to make, and the proposed contents of such, disclosure) any of the [Confidential Information] (whether by deposition, interrogatory, request for documents, subpoena, civil investigative demand or similar process), the Shareholder shall, or shall cause such [representative], to provide the Purchaser with prompt written notice of such request so that the Purchaser may seek an appropriate protective order or other appropriate remedy. If such protective order or remedy is not obtained, the Shareholder or such [representative], may disclose only that portion of the [Confidential Information] which such person is legally required to disclose, and the Shareholder shall exercise its commercially reasonable efforts to obtain assurance that confidential treatment will be accorded to such [Confidential Information] so disclosed. The Shareholder further agrees that, from and after the Closing Date, the Shareholder and its [representatives], upon the request of the Purchaser, promptly will deliver to the Purchaser all documents, or other tangible embodiments, constituting [Confidential Information], without retaining any copy thereof, and shall promptly destroy all other information and documents constituting or containing [Confidential Information].

5.4.3 Inspection of Documents.

The Purchaser agrees that all documents delivered to the Purchaser by the Shareholder pursuant to this Agreement and all documents of the Company shall after the Closing Date be open for inspection by representatives of the Shareholder after prior written notice at any time during regular business hours for reasonable and necessary purposes until such time as documents are destroyed or possession thereof is given to the other party as provided for in Section 5.4.4 and that the Shareholder may during such period at their expense make such copies thereof as they may reasonably request. The Shareholder agrees that all documents that are retained by the Shareholder after the Closing Date and that are related to the Company shall be open for inspection by representatives of the Purchaser at any time during regular business hours until such time as documents are destroyed or possession thereof is given up to the other party as provided for in Section 5.4.4 hereof and that the Purchaser may during such period at its expense make such copies thereof as it may reasonably request.

5.4.4 Destruction of Documents.

Without limiting the generality of Section 5.4.3 hereof, for a period ending on the seventh (7) anniversary of the Closing Date, neither the Purchaser nor the Shareholder shall destroy or give up possession of any item referred to in Section 5.4.3 hereof without first offering to the other, or in the case of the Company, to the Shareholder, the opportunity, at such other's expense (but without any other payment), to obtain the same. Thereafter each party shall be free to dispose of them as it deems fit.

5.4.5 Access to Employees.

The Purchaser shall use reasonable efforts to afford the Shareholder access to employees who were previously employees of the Shareholder, and remain in the employ of the Company, or the Purchaser or its Affiliates, as the Shareholder shall reasonably request for their proper corporate purposes, including the defense of legal proceedings not involving any proceedings between the Purchaser and the Shareholder and the Company or any of their Affiliates. Such access may include interviews or attendance at depositions or legal proceedings. All out-of-pocket expenses reasonably incurred by the Purchaser in connection with this Section 5.4.5 shall be paid or promptly reimbursed by the Shareholder; such reimbursement shall include the cost on a pro rata basis of the salary or wages and benefits of the employee involved to the extent the time involved is in excess of _____ business days per year.

5.5 Tax Matters.

5.5.1 Taxes Through Closing Date.

Notwithstanding any provision to the contrary contained in this Agreement, the Shareholder agrees to indemnify, defend and hold harmless the Purchaser, its Affiliates and the successors to the foregoing (and their respective shareholders, officers, directors, employees and agents) on an after-tax basis against (i) any and all Taxes, losses, claims and expenses resulting from, arising out of, or incurred with respect to, any claims that may be asserted by any party based upon, attributable to, or resulting from the failure of any representation or warranty made pursuant to Section 3.1.9 of this Agreement to be true and correct as of the Closing Date; (ii) all Taxes imposed on or asserted against or with respect to the Company for all Pre-Closing Periods; (iii) all Taxes imposed on the Purchaser, or for which the Purchaser may be liable, as a result of any transaction contemplated by this Agreement; and (iv) all Taxes imposed on the Company as a result of the provisions of Treasury Regulations Section 1.1502-6 or the analogous provisions of any state, local or foreign law. Any claim for indemnification hereunder shall be subject to the procedures set forth in Section 10.4 and Section 10.5.

5.5.2 Preparation of Tax Returns.

The Shareholder shall prepare or cause to be prepared in a manner consistent with past practice, and timely file or cause to be timely filed, all Tax Returns of the Company with respect to periods ending on or before the Closing Date, and shall timely pay, or cause to be timely paid, all Taxes shown due on such Tax Returns. Such Tax Returns shall be prepared in accordance with past practice of the Company and shall be subject to the Purchaser's approval (which approval shall not be unreasonably withheld or delayed) and shall be delivered to the Purchaser at least thirty (30) days prior to the due date for review and approval (and signed by an officer of the Company, if necessary). The Purchaser shall prepare or cause to be prepared, and file or cause to be filed, all Tax Returns of the Company with respect to periods ending after the Closing Date. The Shareholder shall not file or cause to be filed any amended Tax Return or claims for refund with respect to the Company without the prior written consent of the Purchaser, which consent shall not be unreasonably withheld or delayed. All Taxes and Tax liabilities with respect to the income, property or operations of the Company that relate to any taxable year or period that includes but does not end on the Closing Date (the "Overlap Period") shall be apportioned

between the Shareholder and Purchaser as follows: (i) in the case of Taxes other than income, sales and use and withholding Taxes, on a per diem basis, and (ii) in the case of income, sales and use and withholding Taxes, as determined from the books and records of the Company as though the taxable year of the Company terminated at the close of business on the Closing Date. The Shareholder shall pay Purchaser the amount of any Taxes allocated to the Shareholder pursuant to this Section 5.5.2 (to the extent not already paid by Shareholder on or before the Closing Date) at least five (5) business days prior to the due date of such Taxes.

5.5.3 Cooperation and Assistance.

The Purchaser and the Shareholder shall provide each other with such cooperation and assistance as may be reasonably requested by either of them in connection with the preparation of any Tax Return, any audit or other examination by any taxing authority, or any judicial or administrative proceedings relating to liability for Taxes, and each will retain and provide the other with any records or information which may be relevant to such Tax Return, audit, or examination, proceedings or determination. Such cooperation and assistance shall include making employees available on a mutually convenient basis during normal business hours to provide additional information. The party requesting assistance hereunder shall reimburse the other for reasonable expense incurred in providing such assistance. Without limiting in any way the foregoing provisions of this Section 5.5.3, the Company agrees that it will retain, until the seventh (7) anniversary of the Closing Date, copies of all Tax Returns, work schedules and other records or information which it possesses and which may be relevant to such Tax Returns of the Company for all taxable periods ending on or prior to the Closing Date. The Company shall not destroy or otherwise dispose of such records without first providing the Shareholder a reasonable opportunity to review and copy such records at the Shareholder's expense.

5.5.4 Tax Sharing Agreements.

Any and all Tax sharing agreements or practices among or between the Company on the one hand and the Shareholder or any of the Shareholder's Affiliates on the other hand shall be terminated as of the Closing Date and no payments relating thereto shall be made subsequent to the Closing Date.

5.5.5 Powers of Attorney.

All powers of attorney authorizing any party to represent the Company with respect to Taxes shall be terminated on or before the Closing Date.[4]

5.5.6 Non-Foreign Status Tax Affidavit.

At the Closing, the Shareholder shall furnish the Purchaser with an affidavit as described in Section 1445(b)(2) of the Code, signed under penalty of perjury, containing the Shareholder's United States taxpayer identification number, address, and a statement that the Shareholder is not a foreign person.

5.5.7 Tax Elections; Waivers; Settlement or Compromise.

Except as otherwise expressly permitted by the terms of this Agreement, the Company shall not, without the prior written consent of the Purchaser, make any election regarding Taxes, execute any waiver of restrictions on assessment or collection of any Tax, or settle or compromise any claim regarding any Tax liability.

5.6 Non-Competition and Non-Solicitation Agreements.

(a) The Shareholder agrees that, as part of the consideration for the payment by the Purchaser of the Purchase Price, for a period of _____ (__) years immediately following the Closing Date, neither the Shareholder nor any of its divisions, subsidiaries or Affiliates will, directly or indirectly, own, manage, control, be employed by, operate, perform, have any interest in or otherwise be engaged in or concerned with a business which develops, manufactures, prepares, sells, installs or distributes products or performs services in competition with the Company. For these purposes, ownership of securities of a company whose securities are publicly traded under a recognized securities exchange not in excess of 1% of any class of such securities shall not be considered to be competition with the Company. The Shareholder also agrees that for such period, the Shareholder shall not solicit the business of any person which is a customer or client of the Company, or was its customer or client within _____ (__) years prior to the date of this Agreement or in any way interfere with the relationship between the Company and any such person or business relationship (including making any negative or disparaging statements or communications about the Company).

[4] XX: Please note that the Purchaser will need to replace such POA's on the Closing Date.

(b) Further, the Shareholder agrees that for a period of _____ (__) years following the Closing Date neither the Shareholder nor any of its related or Affiliated entities will induce any of the Employees of the Company to terminate his or her relationship with the Company and/or the Purchaser, or hire any such Employees.

(c) The Shareholder acknowledges that the restrictions on its activities under Sections 5.6(a) and (b) hereof are necessary for the reasonable protection of the Purchaser and constitute a material inducement to the Purchaser's entering into and performing this Agreement. The Shareholder further acknowledges, stipulates and agrees that a breach of any of such obligations and agreements will result in irreparable harm and continuing damage to the Purchaser for which there will be no adequate remedy at law and further agrees that in the event of any breach of said obligations and agreements, the Purchaser and its successors and assigns will be entitled to injunctive relief and to such other relief as is proper under the circumstances.

(d) If any of the covenants set forth in this Section 5.6 are held to be unreasonable, arbitrary, or against public policy, such covenants will be considered divisible with respect to scope, time, and geographic area, and in such lesser scope, time and geographic area, will be effective, binding and enforceable against the Shareholder.

5.7 Repayment of Indebtedness.

(a) Prior to or upon the Closing Date, the Shareholder shall arrange for the full repayment and discharge of all Indebtedness of the Company, including (i) all Taxes due and payable, whether pursuant to any tax sharing agreement or otherwise, (ii) Indebtedness owned to any Affiliate of the Company, and (iii) any other Indebtedness, all including accrued and unpaid interest thereon, original issue discounts and any fees and expenses related to the repayment thereof, if any.

(b) Prior to or upon the Closing Date, the Shareholder shall arrange, and shall cause the Company to be, released, as of the Closing, from all Liens, guaranties and guaranty obligations relating to the obligations of any other person, if any. The Shareholder agrees to indemnify the Purchaser, its Affiliates and any of its successors or assigns for any Losses incurred by the Purchaser, its Affiliates and any of its successors or assigns arising out of any such Lien, guaranty or guaranty obligations, if any.

(c) Prior to the Closing, the Shareholder shall provide evidence satisfactory to the Purchaser that the requirements of this Section 5.7 have been satisfied.

5.8 Notification of Certain Matters.

The Shareholder shall give prompt notice to the Purchaser of any of the following which occurs, or of which it becomes aware, following the date hereof: (i) any notice of, or other communication relating to, a default or event that, with notice or lapse of time or both, would become a default under any Material Contract disclosed (or required to be disclosed) on **Schedule 3.1.13**; (ii) the occurrence or existence of any fact, circumstance or event which could reasonably be expected to result in (A) any representation or warranty made by the Shareholder and/or the Company in this Agreement to be untrue or inaccurate or (B) the failure of any condition precedent to either party's obligations; and (iii) any notice or other communication from any third party alleging that the consent of such third party is or may be required in connection with the transactions contemplated by this Agreement.

5.9 Exclusive Dealing.

During the period from the date of this Agreement to the earlier of (i) the Closing Date and (ii) the date this Agreement is terminated in accordance with its terms, neither the Shareholder nor the Company shall, and shall cause their respective Affiliates, officers, directors, employees, agents, representatives, consultants, financial advisors, attorneys, accountants and other agents to refrain from taking any action to, directly or indirectly, encourage, initiate, solicit or engage in discussions or negotiations with, or provide any information to, any person, other than the Purchaser (and its Affiliates and representatives), concerning any purchase of any capital stock of the Company (other than in connection with the exercise of any options or warrants outstanding on the date hereof) or any merger, asset sale, recapitalization or similar transaction involving the Company. The Shareholder will not vote the capital stock of the Company in favor of any purchase of any capital stock of the Company, or any merger, asset sale, recapitalization or similar transaction involving the Shareholder or the Company. The Shareholder will notify the Purchaser as soon as practicable if any person makes any proposal, offer, inquiry to, or contact with, the Shareholder or the Company with respect to the foregoing and shall describe in reasonable detail the identity of any such person and, the substance and material terms of any such contact and the material terms of any such proposal.

ARTICLE 6. CONDUCT OF BUSINESS PENDING CLOSING

6.1 Conduct of Business Pending Closing.

The Shareholder and the Company agree that:

6.1.1 Conduct of Business in Ordinary Course.

(a) During the period from the date of this Agreement to the Closing Date, the Shareholder shall cause the Company to conduct its business (including its working capital and cash management practices) in a manner materially consistent with past practice of the Company, and the Company shall not engage in any transaction out of the ordinary course of business. Furthermore, except as is otherwise expressly permitted or required by this Agreement, the Shareholder shall cause the Company to refrain from the following, without the prior written consent of the Purchaser:

(i) incur or permit to be incurred any payment, discharge or satisfaction of any liabilities or obligations (whether accrued, absolute, contingent or otherwise) in excess of _____ Dollars ($_____) other than the payment, discharge or satisfaction of accounts payable or accrued expenses incurred in ordinary course of business;

(ii) allow any asset of the Company (whether real, personal or mixed, tangible or intangible) to become subject to any mortgage, pledge, Lien, security interest, encumbrance, or restriction or charge of any kind or enter into, materially amend or becoming subject to any contract of a type described in Section 3.1.13;

(iii) cancel or waive any claims or rights of value, or conduct any sale, transfer, distribution or other disposal of any assets, except for sales of finished goods inventory or other assets in the ordinary course of business, or dispose of any assets for any amount to Affiliates of the Shareholder;

(iv) dispose or lapse any rights in, to or for the use of any patent, trademark, trade name or copyright, or disclose such items to any person not an employee, or dispose of any customer lists used by the Company;

(v) increase the compensation (including, but not limited to, any wages, salaries, bonuses or other remuneration) or other payment to any director, officer or employee of the Company, whether now or hereafter payable or granted, or enter into or vary the terms of any employment or incentive agreement with any such person (other than increases or variations in

base compensation in the ordinary course consistent in timing and amount with past practices) or enter into or vary the terms of any employment or incentive agreements with any such person;

(vi) make any capital expenditure or commitment for additions to property, plant or equipment, or lease agreement which individually exceeds _____ Dollars ($_____) or exceeds _____ Dollars ($_____) in the aggregate, and which, if purchased, would be reflected in the property, plant or equipment accounts;

(vii) make any change in any method of accounting or keeping its books of account or accounting practices;

(viii) cause any damage, destruction or loss of any asset, whether or not covered by insurance which individually exceeds _____ Dollars ($_____) or exceeds _____ Dollars ($_____) in the aggregate;

(ix) except liabilities incurred in the ordinary course of business, incur any obligation or liability, including any liability for nonperformance or termination of any contract;

(x) cause any event which would require in accordance with GAAP an increase in the reserve for bad debts set forth in the Contract Net Asset Statement which in the aggregate exceeds _____ Dollars ($_____);

(xi) incur any Indebtedness;

(xii) acquire any business or person, by merger or consolidation, purchase of substantial assets or equity interests, or by any other manner, in a single transaction or a series of related transactions, or enter into any contract, letter of intent or similar arrangement (whether or not enforceable) with respect to the foregoing;

(xiii) enter into, materially amend or become subject to any joint venture, partnership, strategic alliance, members' agreement, co-marketing, co-promotion, co-packaging, joint development or similar arrangement;

(xiv) prepare any Tax Returns relating to the Company in a manner which is inconsistent with the past practices of the Company;

(xv) enter into a settlement or a closing agreement with a taxing authority with respect to the Company;

(xvi) enter into any contract or letter of intent with respect to (whether or not binding), or otherwise commit or agree, whether or not in writing, to do any of the foregoing;

(xvii) take any action, or fail to take any action, that would cause any of the representations and warranties of the Shareholder contained herein to become untrue or inaccurate in any material respect; or

(xvii) cause any event or fail to prevent any event that gives rise to an Environmental Claim or modify any obligation or condition imposed by Environmental Law or Environmental Permit, including any financial assurances.

(b) During the period from the date of this Agreement to the Closing Date, the Shareholder shall cause the Company to confer on a regular basis with one or more designated representatives of the Purchaser to report material operational matters and to report the general status of ongoing operations.

(c) The Shareholder shall keep, or cause the Company to keep, all insurance policies currently maintained with respect to the Company and its assets and properties, or suitable replacements or renewals, in full force and effect through the close of business on the Closing Date.

6.1.2 No Changes to Organization Documents.

No change, amendment or restatement will be made to the Company's [Articles][Certificate] of Incorporation or by-laws, or to other comparable organization documents of the Company.

6.1.3 Changes to Capital Stock.

No issuance, sale, pledge, disposition, delivery or encumbrance of, or authorization of the issuance, sale, pledge, disposition, delivery or encumbrance of, (A) any capital stock of, or other equity or voting interest in, the Company or (B) any securities convertible into, exchangeable for, or evidencing the right to subscribe for or acquire either (1) any shares of capital stock of, or other equity or voting interest in the Company, or (2) any securities convertible into, exchangeable for, or evidencing the right to subscribe for or acquire, any shares of the capital stock of, or other equity or voting interest in the Company, will be made.

6.1.4 Dividends.

No dividends or other distributions or payments will be declared, set aside, made or paid with respect to any shares of capital stock of, or other equity or voting interest in the Company. No split, combination, redemption, reclassification, purchase or other acquisition, directly or

indirectly, of any shares of capital stock of, or other equity or voting interest in the Company, or any other change in the capital structure of the Company, will be made.

ARTICLE 7. CLOSING DATE, CONDITIONS AND TRANSACTIONS

7.1 Closing Date and Place.

The consummation of the sale and purchase of the Shares contemplated by this Agreement (the "Closing") will take place at the offices of the Purchaser at _____ at 10:00 A.M. _____ time on _____, 200_ or at such other date and time as may be mutually agreeable to the parties hereto (the "Closing Date"). At the Closing, the Shareholder will deliver to the Purchaser certificates representing the Shares with (i) all necessary transfer tax and other revenue stamps, acquired at the Shareholder's expense, affixed and canceled, and (ii) duly endorsed in blank or accompanied by either stock powers duly executed in blank by the Shareholder or such other instrument of transfer as are reasonably acceptable to the Purchaser. The Shareholder agrees to cure any deficiencies with respect to the endorsement of the certificates representing the Shares or with respect to the stock power accompanying any such certificates.

7.2 Conditions Precedent to the Obligations of the Purchaser.

The obligations of the Purchaser under this Agreement are subject to the fulfillment prior to or at the Closing of each of the following conditions, any one or more of which may be waived by the Purchaser:

7.2.1 No Injunctive Proceedings.

No preliminary or permanent injunction or other order (including a temporary restraining order) of any Governmental or Regulatory Authority which prevents the consummation of the transactions which are the subject of this Agreement or prohibits the Purchaser's ownership of the Shares shall have been issued and remain in effect.

7.2.2 Representations and Warranties.

All representations and warranties of the Company and/or the Shareholder contained in this Agreement shall be true and correct in all material respects on and as of the Closing Date with the same effect as though such representations and warranties had been made on and as of such

date, except for each of the representations and warranties of the Shareholder and the Company contained herein that is limited by Material Adverse Effect, Material Adverse Change or materiality, which shall be true and correct in all respect as of the Closing Date.

7.2.3 Performance of Agreements; Instruments of Transfer.

The Company and the Shareholder shall have fully performed in all material respects all obligations, agreements, conditions and commitments required to be fulfilled by the Company and the Shareholder pursuant to the terms hereof on or prior to the Closing Date, including compliance with any applicable Environmental Property Transfer Act, and the Shareholder shall have tendered to the Purchaser the Shares and other documents, instruments and certificates required by Article 9 hereof.

7.2.4 Release of Liens.

The Shareholder shall have provided to the Purchaser evidence reasonably satisfactory to the Purchaser that all Liens (other than Permitted Liens), including those Liens listed on Schedule 3.1.12 hereof, on or relating to the assets of the Company have been released as of the Closing.

7.2.5 Repayment of Indebtedness.

The Shareholder shall have provided to Purchaser evidence satisfactory to the Purchaser that all Indebtedness of the Company has been repaid as of the Closing in accordance with Section 5.7.

[7.2.6 H-S-R Act Waiting Periods.

All applicable waiting periods under the H-S-R Act with respect to the transactions contemplated by this Agreement shall have expired or been terminated.][5]

7.2.7 Compliance Certificate.

The Company and the Shareholder shall have delivered to the Purchaser their certificates, dated the Closing Date, executed on their behalf by their respective duly authorized representatives, as to the fulfillment of the conditions set forth in Sections 7.2.2, 7.2.3, [7.2.4, 7.2.5 and 7.2.6].

[5] Include if the transaction is reportable under the H-S-R Act.

7.2.8 Material Changes.

Since the Balance Sheet Date, there shall have been no Material Adverse Change with respect to the Company, and no events, facts or circumstances shall have occurred which could reasonably be expected to result, individually or in the aggregate, in a Material Adverse Change with respect to the Company.

7.2.9 Opinion of Counsel.

The Purchaser shall have received the opinion of _____, counsel for the Company and the Shareholder, in the form set forth in **Schedule 7.2.9** attached hereto and made a part hereof.

7.2.10 Consents, etc.

All authorizations, consents or approvals of any and all Governmental or Regulatory Authorities and third parties necessary in connection with the consummation of the Closing shall have been obtained and be in full force and effect. [The H-S-R Act filings have been made and all applicable waiting periods thereunder shall have expired or been terminated.]

7.2.11 Surveys.

The Purchaser shall have received a currently dated survey of the Company's real property listed in **Schedule 3.1.12** hereto by duly licensed land surveyors reasonably acceptable to the Purchaser. The survey shall: (i) show the boundaries of the properties; (ii) contain proper and complete legal descriptions of the properties and show the total number of acres in the properties and the number of acres, if any, within dedicated streets and highways; (iii) show all dedicated public streets providing access to the properties and locate any areas of restricted access; (iv) show all existing improvements, including buildings, driveways, power lines, transformers and fences; (v) locate all recorded and visible easements and rights-of-way; (vi) show the location of any easements necessary to bring off-site improvements to the properties; (vii) show any encroachments upon or off the properties, including encroachments into zoning or other set back requirements; and (viii) show such other matters as may be required to obtain title insurance over matters of survey. Each of the surveys shall contain a certification, acceptable to the Purchaser's attorney, that the surveyor has surveyed the property and shown all improvements and encroachments and that the surveyor's liability extends to those who purchase, mortgage or

guarantee title to the property within at least one year from the date of the survey. The fees for any surveys shall be paid by the Shareholder.

7.2.12 Title Insurance.
The Shareholder shall have delivered to the Purchaser, at the Shareholder's sole cost and expense, an owners policy of title insurance issued by a title company selected by the Purchaser that includes all title insurance endorsements requested by the Purchaser in a form acceptable to the Purchaser, dated the Closing Date, in face amounts and inform reasonably satisfactory to the Purchaser, insuring fee simple or leasehold title to all of the real property of the Company.

7.2.13 Non-foreign Person Affidavit.
The Shareholder shall have delivered to the Purchaser a duly executed affidavit as set forth in Section 5.5.6 hereof.

7.2.14 Due Diligence/Environmental Investigation.
The Purchaser shall have completed all business and legal review of the Company for which the Company shall have afforded the Purchaser full access, including for an environmental investigation or review, and the Purchaser shall in its sole discretion be satisfied with the results of said review.

7.2.15 Non-competition Agreements
The Shareholder shall have delivered to the Purchaser a non-competition agreement in substantially the same form as set forth in **Schedule 7.2.15** attached hereto and made a part hereof, duly executed by _____ and _____.

7.3 Conditions Precedent to the Obligations of the Shareholder.
The obligations of the Shareholder and/or the Company under this Agreement are subject to the fulfillment prior to the Closing of each of the following conditions, any one or more of which may be waived by the Shareholder and the Company:

7.3.1 No Injunctive Proceedings.
No preliminary or permanent injunction or other order (including a temporary restraining order) of any Governmental or Regulatory Authority which prevents the consummation of the transactions which are the subject of this Agreement or prohibits the Purchaser's ownership of

the Shares shall have been issued and remain in effect (provided that the Shareholder has acted in accordance with the requirements of Section 5.2 hereof).

7.3.2 Payment.
The Purchaser shall have delivered to the Shareholder the payments provided for in Section 2.1.

7.3.3 Representations and Warranties.
Except as otherwise contemplated by this Agreement, all representations and warranties of the Purchaser contained in this Agreement shall be true and correct in all material respects as of the Closing Date.

7.3.4 Performance of Agreements; Instruments of Transfer.
The Purchaser shall have fully performed in all material respects all obligations, agreements, conditions and commitments required to be fulfilled by the Purchaser on or prior to the Closing Date and shall have tendered to the Shareholder the documents, instruments and certificates required by Article 9 hereof.

7.3.5 Compliance Certificate.
The Purchaser shall have delivered to the Shareholder its certificate, dated the Closing Date, executed on its behalf by its President or a Vice President, as to the fulfillment of the conditions set forth in Sections 7.3.3 and 7.3.4 hereof.

7.3.6 Consents, etc.
All authorizations, consents or approvals of any and all Governmental or Regulatory Authorities necessary in connection with the consummation of the Closing shall have been obtained and be in full force and effect. [The H-S-R Act filings have been made and all applicable waiting periods thereunder shall have expired or been terminated.]

ARTICLE 8. TERMINATION

8.1 Non-Compliance with and Termination of This Agreement.
(a) Each of the parties hereto agrees to use its commercially reasonable efforts to bring about the satisfaction of the conditions required to be performed by it hereunder prior to and at the Closing, including compliance with the requirements of Section 5.2 hereof.

(b) This Agreement may be terminated at any time prior to the Closing without any liability of any party to any other party:

(i) by the mutual agreement of the Shareholder, the Company, and the Purchaser provided, such termination is set forth in writing executed by both parties;

(ii) by the Purchaser, if any of the conditions specified in Section 7.2 hereof shall not have been met by _____, 200_ and shall not have been waived in writing by the Purchaser; or

(iii) by the Shareholder and the Company, if any of the conditions set forth in Section 7.3 hereof shall not have been met by _____, 200_ and shall not have been waived in writing by the Shareholder;

(iv) by either the Shareholder or the Purchaser, if consummation of the transactions contemplated hereby would violate any nonappealable final order, decree or judgment of any Governmental or Regulatory Authority having competent jurisdiction;

(v) by the Purchaser, if there has been a Material Adverse Change with respect to the Company; or

(vi) by either the Shareholder or the Purchaser, if the other party has breached any provision of this Agreement, and such breach remains uncured by such party for ____ days after receipt by the breaching party of written notice of such breach.

ARTICLE 9. CLOSING DOCUMENTS

9.1 The Shareholder's Obligations.

At the Closing, the Shareholder shall deliver to the Purchaser the following:

9.1.1 Resolutions.

Copies of resolutions of the board of directors and/or of the shareholders of the Company and the Shareholder, as required by Legal Requirements, certified by the Secretary or Assistant Secretary of the Company or the Shareholder, as the case may be, authorizing the execution, delivery and performance of this Agreement and the transactions contemplated hereby.

9.1.2 Share Certificates.

Certificates representing the Shares, duly endorsed in blank or accompanied by an appropriate stock power.

9.1.3 Books and Records.

The Company's corporate minute books, seals and stock ledger books.

9.1.4 Resignations.

Resignations of those officers and directors of the Company who are listed in **Schedule 9.1.4.** hereof.

9.1.5 Compliance Certificate.

The certificate required by Section 7.2.7 hereof.

9.1.6 Opinion of Counsel.

The opinion of counsel for the Shareholder required by Section 7.2.9 hereof.

9.1.7 Affidavits.

The affidavits set forth in Section 5.5.6 hereof.

9.1.8 Good Standing and Other Certificates.

(i) Copies of the Company's [Articles][Certificate] of Incorporation as in effect on the Closing Date, including all amendments thereto, in each case certified by the Secretary of State or other appropriate official of its jurisdiction of incorporation, (ii) Certificates from the Secretary of State or other appropriate official of their respective jurisdictions of incorporation to the effect that the Company and the Shareholder are in good standing or subsisting in such jurisdiction and listing all charter documents of the Company and the Shareholder on file, and (iii) Certificates from the Secretary of State or other appropriate official in each State in which the Company or the Shareholder are qualified to do business to the effect that the Company and the Shareholder are in good standing in such State.

9.1.9 Environmental Property Transfer Act.

The documents demonstrating to Purchaser's sole satisfaction compliance with any applicable Environmental Property Transfer Act.

9.2 The Purchaser's Obligations.

At the Closing, the Purchaser shall deliver to the Shareholder the following:

9.2.1 Payment.

Funds in the amounts and payable as set forth in Section 2.1 hereof and all other payments required to be made by the Purchaser on or prior to the Closing Date pursuant to the provisions of this Agreement.

9.2.2 Compliance Certificate.

The certificate required by Section 7.3.5. hereof.

9.3 Joint Obligations.

Each party will deliver to the other the certificates, records, schedules, the Non-Competition Agreement, the Holdback Agreement, and the other documents required by the terms of this Agreement.

ARTICLE 10. INDEMNIFICATION

10.1 Indemnification by the Shareholder.

Subject to the limits set forth in this Article 10, the Shareholder agrees to indemnify, defend and hold the Purchaser and each of the Purchaser's shareholders, Affiliates, officers, controlling persons, stockholders, agents, representatives, directors, employees, agents, successors and assigns (the Purchaser and such persons are collectively hereinafter referred to as the "Purchaser's Indemnified Persons"), harmless from and against any and all loss, liability, damage or deficiency (including interest, penalties, costs of preparation and investigation, and reasonable attorneys' fees) (collectively, "Losses") that the Purchaser's Indemnified Persons may directly or indirectly suffer, sustain, incur or become subject to arising out of or due to: (a) any inaccuracy of any representation or warranty of the Company and/or the Shareholder in this Agreement, any schedule or exhibit hereto, or any certificate or other document delivered pursuant hereto, (other than representations and warranties set forth in Section 3.1.9, as to which Section 5.5 is applicable) or in any other agreement, exhibit or certificate delivered pursuant to this Agreement (without giving effect to any "materiality," "Material Adverse Effect," "Material Adverse Change" or similar qualification); (b) the non-fulfillment of any covenant, undertaking, agreement or other obligation of the Company and/or the Shareholder under this Agreement, any

schedule or exhibit hereto, or any certificate or other document delivered pursuant hereto not otherwise waived by the Purchaser.

10.2 Indemnification by the Purchaser.

Subject to the limits set forth in this Article 10, the Purchaser agrees to indemnify, defend and hold the Shareholder and the Shareholder's Affiliates, officers, controlling persons, stockholders, agents, representatives, directors, employees, agents, successors and assigns (the Shareholder and such persons are hereinafter collectively referred to as the "Shareholder's Indemnified Persons"), harmless from and against any and all Losses that the Shareholder's Indemnified Persons may directly or indirectly suffer, sustain, incur or become subject to arising out of or due to: (a) any inaccuracy of any representation or warranty of the Purchaser in this Agreement, any schedule or exhibit hereto, or any certificate or other document delivered pursuant hereto; or (b) the non-fulfillment of any covenant, undertaking, agreement or other obligation of the Purchaser under this Agreement, any schedule or exhibit hereto, or any certificate or other document delivered pursuant hereto not otherwise waived by the Shareholder.

10.3 Survival of Representations and Warranties; Threshold and Deductible.

The several representations and warranties of the parties contained in this Agreement or in any document delivered pursuant hereto and the parties' right to indemnity in accordance with Section 10.1(a) and 10.2(a) shall survive the Closing Date and shall remain in full force and effect thereafter for a period of [___] months after the Closing Date and shall be effective with respect to any inaccuracy therein or breach thereof, notice of which shall have been duly given within such [___]-month period in accordance with Section 10.4 hereof, after which [___]-month period they shall terminate and be of no further force or effect. Notwithstanding the foregoing, the Purchaser may give notice of, and make a claim relating to, and shall be indemnified in connection with (i) the breach of the representations and warranties contained in Section 3.1.9 (Tax) and in Section 3.1.17 (Employees Benefit Plans; Employment Agreement), and the covenants contained in Section 5.5 (Tax), at any time prior to 60 days after the expiration of the appropriate statute of limitations or any extensions thereof, (ii) any breach of the representations and warranties contained in Section 3.1.21 (Environmental Matters) hereof for a period of 60 months after the Closing Date after which 60-month period it shall terminate and be of no further force or effect, and (iii) any breach of the representations and warranties contained in Sections

3.1.2 (Capitalization of the Company), 3.1.3. (Authorization), 3.1.10 (Brokers; Finders), 3.2.3 (Authorization) and 3.2.5. (Title to Shares) at any time. Except as provided in Section 10.6, anything to the contrary contained herein notwithstanding, neither party shall be entitled to any recovery from the other party with respect to any inaccuracy or breach of such warranties or representations unless and until the amount of such Losses suffered, sustained or incurred by the asserting party, or to which such party becomes subject, by reason of such inaccuracy or breach, shall exceed _____ Dollars ($_____) calculated on a cumulative basis and not a per item basis (the "Basket Amount"), and then only with respect to the excess over the Basket Amount, but in no event shall the Shareholder or the Purchaser be liable to the other, in each case, in an aggregate amount in excess of the Purchase Price (the "Cap"). The Basket Amount and the Cap shall not be applicable to claims arising under Sections 3.1.3. (Authorization), 3.1.9 (Tax Matters), 3.1.10 (Brokers; Finders), 3.1.17 (Employee Benefit Plans; Employee Agreements), 3.1.21 (Environmental Matters), 3.2.3 (Authorization) or 5.5 (Tax Matters) hereof or to any covenants contained in this Agreement, or to Losses based on fraud, willful misrepresentation or deceit by the Shareholder or its Affiliates or advisors. Notwithstanding anything to the contrary contained in this Section 10.3 to the contrary, the covenants of the parties contained in this Agreement shall survive according to their respective terms.

10.4 Notice and Opportunity to Defend.

If the Indemnitee seeks indemnification hereunder in connection with (a) any claim, or (b) the commencement of any action or proceeding by a third person, the Indemnitee will give the Indemnitor written notice of such claim or the commencement of such action or proceeding within fifteen (15) days of Indemnitee's becoming aware thereof; provided, however, that delay or failure to so notify the Indemnitor shall only relieve the Indemnitor of its obligations to the extent, if at all, that it is materially prejudiced by reasons of such delay or failure. The Indemnitor shall have a period of thirty (30) days within which to respond thereto. If the Indemnitor accepts responsibility within such thirty (30) day period, the Indemnitor shall be obligated to compromise or defend, at its own expense and by counsel chosen by the Indemnitor and reasonably satisfactory to the Indemnitee, such matter, and the Indemnitor shall provide the Indemnitee with such assurances as may be reasonably required by the Indemnitee to

assure that the Indemnitor will assume and be responsible for the entire liability at issue ; provided, however, that the Shareholder shall have the right to assume the defense of any claim, action or proceeding relating to Taxes only if such claim, action or proceeding solely relates to Taxes with respect to the income or operations of the Company for a taxable year or other taxable period ending on or before the Closing Date. If the Indemnitor does respond within such thirty (30) day period and rejects responsibility for such matter in whole or in part, or does not respond, the Indemnitee shall be free to pursue, without prejudice to any of its rights hereunder, such remedies as may be available to the Indemnitee under applicable Legal Requirement at the Indemnitor's expense. The Indemnitee agrees to cooperate fully with the Indemnitor and its counsel in the defense against any such asserted liability. In any event, the Indemnitee shall have the right to participate in a non-controlling manner and at its own expense in the defense of such asserted liability. Any compromise of such asserted liability by the Indemnitor shall require the prior written consent of the Indemnitee and until such consent is obtained the Indemnitor shall continue the defense of such asserted liability. If, however, the Indemnitee refuses its consent (other than a consent with respect to a claim, action or proceeding relating to Taxes which claim, action or proceeding the Shareholder shall have the right to assume defense of pursuant to this Section 10.5) to a bona fide offer of settlement that the Indemnitor wishes to accept, the Indemnitee may continue to pursue such matter, free of any participation by the Indemnitor, at the sole expense of the Indemnitee. In such event, the obligation of the Indemnitor to the Indemnitee shall be equal to the lesser of (i) the amount of the offer of settlement which the Indemnitee refused to accept plus the costs and expenses of the Indemnitee prior to the date the Indemnitor notifies the Indemnitee of the offer of settlement, and (ii) the actual out-of-pocket amount the Indemnitee is obligated to pay as a result of the Indemnitee's continuing to pursue such matter. The Indemnitor shall be entitled to recover from the Indemnitee any additional expenses incurred by the Indemnitor as a result of the decision of the Indemnitee to pursue such matter. Notwithstanding anything in this Section 10.5 to the contrary, the Indemnitor shall not be entitled to assume control of the defense of any third party claim if (i) the claim for indemnification relates to or arises in connection with any criminal proceeding, action, indictment, allegation or investigation; (ii) the claim seeks an injunction or equitable relief against the Indemnitee; (iii) the Indemnitee has been advised in writing by counsel that a reasonable likelihood exists of a conflict of interest between the Indemnitor and the Indemnitee;

(iv) the Indemnitee reasonably believes an adverse determination with respect to the action, lawsuit, investigation, proceeding or other claim giving rise to such claim for indemnification would be detrimental to or injure the Indemnitee's reputation or future business prospects; or (v) upon petition by the Indemnitee, the appropriate court rules that the Indemnitor failed or is failing to vigorously prosecute or defend such claim. Notwithstanding any provision to the contrary contained in this Agreement, the Shareholder shall not consent to entry of any judgment or enter into any settlement (or otherwise compromise) any claim, action or proceeding relating to Taxes without the written consent of the Purchaser, which consent shall not be unreasonably withheld or delayed.

10.5 Environmental Indemnification and Procedures.

(a) The Shareholder shall indemnify, defend and hold harmless the Purchaser's Indemnified Persons from and against any and all loss, liability, damage or deficiency (including interest, penalties, costs of preparation and investigation, remediation, consultants, and reasonable attorneys' fees) (collectively, "Losses") incurred or suffered by the Purchaser to the extent that the Losses arise by reason of, or result from (i) the failure of any representation or warranty of the Company or the Shareholder contained in Section 3.1.21 to have been true when made and as of the Closing Date, (ii) investigating, cleaning-up, remediating, preventing the Release of or otherwise responding to the presence of Hazardous Materials in, upon or under the buildings or the soil, sub-strata, air water or groundwater at or adjacent to any of the Shareholder's current or past Properties which are or have been used or included within the Company, the presence of which Hazardous Materials resulted, directly or indirectly from acts or omissions prior to or upon the Closing Date; (iii) claims by any past or present employees of Company with respect to any personal injuries, including permanent disability or death or other adverse health effects, allegedly arising as a result of exposure to any Hazardous Material or other occupational hazard during their employment by Company, which exposure occurred prior to or upon the Closing Date; or (iv) claims by any third parties for personal injuries, including permanent disability or death or other adverse health effects, or property damage, allegedly arising as a result of exposure to or the release of any Hazardous Materials from any of the operations or facilities of the Company prior to or upon the Closing Date.

(b) The parties agree that in the event a claim for indemnification is made pursuant to subparagraph (a) above, then, in lieu of the procedures set forth in Section 10.5, the following procedures shall apply:

In seeking indemnification for a claim under this Section 10.5, the Purchaser shall promptly notify the Shareholder of the assertion of any such claim in respect of which indemnity may be sought hereunder and will give the Shareholder such information with respect thereto as the Shareholder may reasonably request, but failure to give such notice shall not relieve the Shareholder of any liability hereunder. The Shareholder shall have the right, but not the obligation, exercisable by written notice to the Purchaser within thirty (30) days of receipt of notice from the Purchaser of the claim in respect of which indemnity may be sought hereunder, to assume the defense of the claim; provided, however, that if any action is required prior to the expiration of the Shareholder's thirty (30) day response period in order to preserve the rights of the Purchaser, the Purchaser shall so notify the Shareholder, and the Purchaser may assume the defense of the claim until the Shareholder responds, subject to the right of the Shareholder to control such action as provided below unless the Shareholder provides written notice that it will timely perform such required action. In such event, the Shareholder shall have full control over any actions, including, without limitation, any remedial action, negotiation or litigation and settlement thereof, in connection with any such claim, provided that:

(i) if a remedial action or other action proposed to be taken by the Shareholder in settlement of the claim would materially and adversely affect the Purchaser's operation of its business, including any material impairment in its relationships with customers, suppliers, the government, or the general public, such action shall not be taken without the Purchaser's prior written consent (which consent shall not be unreasonably withheld); provided, however, the Purchaser's consent is not required if the Shareholder agrees to compensate the Purchaser for any Losses resulting from the remedial action's effect on the Purchaser's operation of its business;

(ii) the Shareholder shall not compromise or settle any claim unless such compromise or settlement provides only for the payment of money, provides a complete release of the Purchaser, and does not materially and adversely affect the Purchaser's operation of its business without the Purchaser's consent (which consent shall not be unreasonably withheld); and

(iii) the Purchaser may participate in (but not control) the settlement or defense of an claim through counsel chosen by the Purchaser, provided that the fees and expenses of such counsel shall be borne by the Purchaser.

10.6 Waivers by the Shareholder.

(a) The Shareholder, on behalf of itself and each Shareholder Indemnified Person, hereby irrevocably waives, to the fullest extent permitted by law, any right including, without limitation, any right of contribution, exoneration, indemnification, reimbursement, subrogation, suretyship or any similar right, that the Shareholder may now have or hereafter acquire against the Company or of any of its shareholders, affiliates, directors, officers, employees, agents, successors and assigns (each, a "Company Person") that arises from the payment in any respect of any claim for indemnification under this Article 10, and the Shareholder further irrevocably waives any objection, defense, claim, demand or cause of action which the Shareholder ever had, now has or which the Shareholder may hereafter acquire by reason of, arising out of, or in respect of any payment in respect of any claim for indemnification under this Article 10. The Shareholder expressly agrees and covenants, to the fullest extent permitted by applicable Legal Requirement, that it will not (and will not cause or permit any other Shareholder Indemnified Person) bring, commence, institute, maintain, prosecute or aid or assist in any action or proceeding at law or in equity or otherwise, or any counterclaim, third party claim, or cross-claim against the Company or any Company Person by reason of, arising out of, or in respect of any payment in respect of any claim for indemnification under this Article 10.

(b) The Shareholder hereby acknowledges that the Shareholder makes the waivers and agreements set forth in Subsection (a) above and in Section 11.14 (Waiver of Jury Trial) of this Agreement knowingly and voluntarily, without duress and only after consideration of the ramifications of these waivers with the attorneys for the Shareholder, and that these waivers constitute a material inducement for the Purchaser to enter into and consummate the transactions contemplated by this Agreement.

ARTICLE 11. MISCELLANEOUS

11.1 Expenses.

Except as otherwise set forth in this Agreement, each of the parties hereto shall pay its own expenses and costs incurred or to be incurred by it in negotiating, closing and carrying out this Agreement.

11.2 Notices.

All notices, requests, demands and other communications given hereunder (collectively, "Notices") shall be in writing and delivered personally or by overnight courier to the parties at the following addresses or sent by facsimile, with confirmation received, to the facsimile number specified below:

(a) If to the Shareholder at:

_____
_____
_____

(b) If to the Company at:

_____
_____
_____

with a copy to:

_____
_____
_____
Facsimile:_____

(c) If to the Purchaser at:

_____
_____
_____
Facsimile:_____

with a copy to:

_____
_____
_____
Facsimile:_____

(d) All Notices shall be deemed delivered when actually received if delivered personally or by overnight courier, sent by facsimile (promptly confirmed in writing), addressed in accordance with Sections 11.2(a), (b) or (c) hereof, as the case may be. Each of the parties shall hereafter notify the other in accordance with this Section 11.2 of any change of address or facsimile number to which notice is required to be mailed.

11.3 Counterparts.

This Agreement may be executed simultaneously in one or more counterparts, and by different parties hereto in separate counterparts, each of which when executed shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

11.4 Entire Agreement.

This Agreement constitutes the entire agreement and supersedes all prior agreements and understandings among the parties hereto with respect to the subject matter hereof.

11.5 Headings.

The headings contained in this Agreement and in the Schedules and Exhibits hereto are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

11.6 Assignment; Amendment of Agreement.

This Agreement shall be binding upon the respective successors and assigns of the parties hereto. This Agreement may not be assigned by any party hereto without the prior written consent of all other parties hereto. This Agreement may be amended only by written agreement of the parties hereto, duly executed and delivered by an authorized representative of each of the parties hereto. Notwithstanding the forgoing, the Purchaser shall have the absolute right to assign its rights and obligations under this Agreement, in whole or in part, to an Affiliate and to any person who acquires all or substantially all of the capital stock or assets of the Purchaser, without consent.

11.7 Governing Law.

This Agreement shall be governed by and construed and enforced in accordance with the internal laws of the State of _____ applicable to contracts made in that State, without giving effect to the conflicts of laws principles thereof.

[11.8 Failure to Close.

If for any reason this Agreement is terminated prior to the Closing, the Purchaser shall return to the Shareholder all documents and other information, including all originals and all copies thereof, theretofore delivered to the Purchaser by the Shareholder or the Company. The Purchaser shall not retain copies of any such documents or other information, and shall not thereafter for a period of five years disclose to any person for any purpose or use any information conveyed to the Purchaser in connection with the transactions contemplated by this Agreement, except for such information that was: (a) possessed by the Purchaser prior to the disclosure thereof by the Shareholder or the Company; (b) disclosed to the Purchaser by an independent third party without a violation of any obligation of confidentiality on the part of such third party to the Shareholder or the Company; or (c) ascertainable from public or published information or trade sources.][6]

11.9 Further Assurances.

Each party agrees that it will execute and deliver, or cause to be executed and delivered, on or after the date of this Agreement, all such other instruments and will take all reasonable actions as may be necessary to transfer and convey the Shares to the Purchaser, on the terms herein contained, to consummate the transactions contemplated hereby, and to effectuate the provisions and purposes hereof.

11.10 No Third Party Rights.

This Agreement is not intended and shall not be construed to create any rights in any parties other than the Company, the Shareholder and the Purchaser and no person shall assert any rights as third party beneficiary hereunder, including any rights with respect to the provisions of Section 6.1 hereof.

11.11 Non-Waiver.

The failure in any one or more instances of a party hereto to insist upon performance of any of the terms, covenants or conditions of this Agreement, to exercise any right or privilege in this Agreement conferred, or the waiver by said party of any breach of any of the terms, covenants or

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[6] XX: Consider deleting if there is an existing confidentiality agreement in place when this Agreement is executed that would survive any termination of this Agreement.

conditions of this Agreement shall not be construed as a subsequent waiver of any such terms, covenants, conditions, rights or privileges, but the same shall continue and remain in full force and effect as if no such forbearance or waiver had occurred.

11.12 Severability.

If any term or other provision of this Agreement 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 so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner adverse to any party. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Agreement so as to affect the original intent of the parties as closely as possible in an acceptable manner to the end that transactions contemplated hereby are fulfilled to the extent possible.

11.13 Incorporation of Exhibits and Schedules.

The Exhibits and Schedules hereto are incorporated into this Agreement and shall be deemed a part hereof as if set forth herein in full. References herein to "this Agreement" and the words "herein," "hereof" and words of similar import refer to this Agreement (including its Exhibits and Schedules) as an entirety. In the event of any conflict between the provisions of this Agreement and any such Exhibit or Schedule, the provisions of this Agreement shall control.

11.14 Waiver of Jury Trial.

EACH OF THE COMPANY, THE PURCHASER AND THE SHAREHOLDER HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ALL RIGHTS TO TRIAL BY JURY IN ANY ACTION, PROCEEDING, OR COUNTERCLAIM (WHETHER BASED UPON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OF THE TRANSACTIONS CONTEMPLATED HEREBY.

IN WITNESS WHEREOF, the Company, the Purchaser and the Shareholder have duly executed and delivered this Agreement as of the day and year first above written.

THE PURCHASER

By: _____

Title: _____

THE SHAREHOLDER

By: _____

Title: _____

THE COMPANY

By: _____

Its: _____

_____

_____, the sole shareholder

]

[FORM SELL-SIDE STOCK PURCHASE AGREEMENT]
By and Among

[SHAREHOLDER]

[COMPANY]

and

[PURCHASER]

_____, 200_

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(continued)

STOCK PURCHASE AGREEMENT

THIS STOCK PURCHASE AGREEMENT (this "Agreement"), dated as of the __ day of _____, 200_, by and among _____, a _____ corporation ("Purchaser"), _____, a _____ corporation (the "Company") and _____, a _____ corporation ("Seller") being the sole [stockholder/shareholder][1] of the Company.

W I T N E S S E T H:

WHEREAS, Seller owns [____] shares (the "Shares") of [common] stock, [insert par value as stated in the Company's charter], of the Company, such Shares being [all] of the outstanding shares of capital stock of the Company;

WHEREAS, Seller wishes to sell and transfer to Purchaser, and Purchaser wishes to acquire from Seller, the Shares, pursuant to and in accordance with the terms and conditions of this Agreement; and

WHEREAS, it is the intention of the parties hereto that, upon consummation of the purchase and sale of the Shares pursuant to this Agreement, Purchaser shall own [all] of the outstanding shares of capital stock of the Company;

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements herein set forth, the parties hereto hereby agree as follows:

ARTICLE 1. SALE AND PURCHASE OF SHARES

1.1 Sale of Shares. On the terms, and subject to the conditions, set forth in this Agreement, Seller agrees to sell, assign, transfer and deliver to Purchaser on the Closing Date,

[1] The statute under which the Company is organized should be checked to determine whether "stockholder" or "shareholder" is correct usage. Delaware uses "stockholder". Certain other jurisdictions use "shareholder".

and Purchaser agrees to purchase from Seller on the Closing Date, the Shares. The certificates representing the Shares shall be duly endorsed in blank, or accompanied either by stock powers duly executed in blank by Seller, or by such other instruments of transfer as are reasonably acceptable to Purchaser, in each case with all necessary transfer tax and other revenue stamps, acquired at [Seller's][2] expense, affixed and canceled. Seller agrees to cure any deficiencies with respect to the endorsement of the certificates representing the Shares or with respect to any stock power accompanying any such certificates.

ARTICLE 2. PURCHASE PRICE; ADJUSTMENT

2.1 Purchase Price.

Subject to the adjustment provisions of Section 2.3 hereof, and upon the terms and subject to the conditions contained in this Agreement, Purchaser shall pay to Seller the sum of _____ Dollars ($_____) (the "Purchase Price") in full consideration for the purchase by Purchaser of the Shares.

2.2 Payment of the Purchase Price.

At the Closing, Purchaser shall pay the Purchase Price to Seller by wire transfer in immediately available funds, subject to subsequent adjustment, if any, pursuant to Section 2.3 hereof.

2.3 Post-Closing Adjustment.

2.3.1 Determination of Adjustment.

The Purchase Price will be adjusted dollar for dollar following the Closing to the extent that the Net Working Capital of the Company as of the Closing Date shown upon the Net

[2] Consider having Purchaser and Seller split the transfer taxes.

Working Capital Statement differs from the Net Working Capital of the Company at _____, 200_ (the "Contract Net Working Capital") shown upon the statement set forth in **Schedule 2.3.1(a)** attached hereto and made a part hereof (the "Contract Net Working Capital Statement"). For purposes of this Agreement, the term "Net Working Capital" shall mean current assets of the Company less the current liabilities of the Company, [determined in accordance with U.S. generally accepted accounting principles ("GAAP") and in a manner consistent with the policies and principles used by the Company in connection with the preparation of the Contract Net Working Capital Statement. Current assets shall include cash and cash equivalents, accounts receivable, prepaid expenses and other prepaid items, inventory and other current assets. Current liabilities shall include accounts payable and other current liabilities and shall not include the current portion of any long-term debt of the Company and its Subsidiaries. Purchaser will deliver a statement showing the Net Working Capital (the "Final Net Working Capital Statement") to Seller not later than 45 days after the Closing Date. The Final Net Working Capital Statement shall be prepared by Purchaser from the books of account of the Company as of the Closing Date, and in accordance with the procedures set forth in **Schedule 2.3.1(b)** attached hereto and made a part hereof. Purchaser will give representatives of Seller access to the premises of the Company, to its books and records and to the appropriate personnel of Purchaser for purposes of confirming the Final Net Working Capital Statement. Unless Seller notifies Purchaser in writing that it disagrees with the Final Net Working Capital Statement within 30 days after receipt thereof, the Final Net Working Capital Statement shall be conclusive and binding on Purchaser and Seller. If Seller notifies Purchaser in writing of its disagreement with the Final Working Capital Statement within such 30-day period, then Purchaser and Seller shall attempt in good faith to resolve their differences with respect thereto

within 30 days after Purchaser's receipt of Seller's written notice of disagreement. Any dispute regarding the Final Net Working Capital Statement not resolved by Purchaser and Seller within such 30-day period will be resolved by an accounting firm mutually acceptable to both parties or, in the absence of agreement, by an accounting firm of national reputation selected by lot after eliminating Seller and Purchaser's principal outside accountants and one additional firm designated as objectionable by each of Seller and Purchaser. The determination by the accounting firm so selected of the Final Net Working Capital Statement and the Final Net Working Capital (with such modifications therein, if any, as reflect such determination) shall be conclusive and binding upon the parties. The fees and expenses of such accounting firm in acting under this Section 2.3.1 shall be shared equally by Purchaser and Seller.

2.3.2 Payment of Adjustment.

If the Contract Net Working Capital is greater than the Final Net Working Capital, then Seller shall pay to Purchaser an amount equal to such difference. If the Final Net Working Capital is greater than the Contract Net Working Capital, then Purchaser shall pay to Seller an amount equal to such difference. The payment (if any) required by this Section 2.3.2 shall be made by the party obligated to make such payment not more than two (2) Business Days following the determination of the Final Net Working Capital pursuant to Section 2.3.1 hereof in the manner described in Section 2.2 hereof, and the amount of such payment shall bear interest from the Closing Date to the date of payment at the simple interest rate of ____ percent (___%). For the purposes of this Agreement, "Business Day" shall mean any day other than a Saturday, a Sunday or a day on which banks in [New York, New York] are authorized or required by law to close.

2.4 Transfer Taxes.

Purchaser shall be responsible for all sales, transfer, use, value added, registration, stamp, and similar taxes (including penalties and interest) assessed or payable in connection with the transfer of the Shares to Purchaser or in connection with this Agreement or any transaction contemplated hereby (collectively, the "Transfer Taxes"), and Purchaser shall, at its own expense, properly file on a timely basis all necessary Tax Returns, reports, forms, and other documentation with respect to any Transfer Tax and promptly provide to Seller evidence of payment of all Transfer Taxes.

ARTICLE 3. REPRESENTATIONS AND WARRANTIES OF THE COMPANY

3.1 Representations and Warranties of the Company.

The Company represents and warrants to Purchaser as follows:

3.1.1 Corporate Organization and Standing.

The Company is a corporation duly organized, validly existing and in good standing under the laws of _____ and has all corporate power and authority to own or lease its properties and to carry on its business as presently conducted, to execute and deliver this Agreement, to consummate the transactions contemplated hereby and to perform its obligations hereunder. The Company is qualified to do business as a foreign corporation and is in good standing in each of the jurisdictions in which the nature of the business as now being conducted by the Company or the property owned or leased by the Company makes such qualification, licensing or registration necessary, except where the failure to be so qualified would not have a Material Adverse Effect with respect to the Company.

3.1.2 Capital Stock. The Company has an authorized capitalization consisting of [see Company's charter] shares of common stock, [____] par value ("Common Stock"), of which [_____] shares are issued and outstanding [and [_____] shares are held in the Company's treasury].[3] [The Shares constitute all of the issued and outstanding capital stock of the Company.] [All such outstanding shares of capital stock] [The Shares] have been duly authorized and validly issued, are fully paid and nonassessable and are not subject to, nor were they issued in violation of, any preemptive rights. Except as described above, no shares of capital stock of the Company are authorized, issued, outstanding or reserved for issuance. Except as set forth on **Schedule 3.1.2**, there are no outstanding or authorized options, warrants, rights, subscriptions, claims of any character, agreements, obligations, convertible or exchangeable securities, or other commitments contingent or otherwise, relating to the capital stock of, or other equity or voting interest in, the Company, pursuant to which the Company or any of its Subsidiaries is or may become obligated to issue, deliver or sell or cause to be issued, delivered or sold, shares of Common Stock, any other shares of the capital stock of or other equity or voting interest in, the Company or any securities convertible into, exchangeable for, or evidencing the right to subscribe for or acquire, any shares of the capital stock of or other equity or voting interest in, the Company. There are no outstanding or authorized stock appreciation, phantom stock, profit participation or similar rights with respect to the capital stock of, or other equity or voting interest in, the Company. Neither the Company nor any of its Subsidiaries has any authorized or outstanding bonds, debentures, notes or other indebtedness for borrowed money, the holders of which have the right to vote (or which are convertible into, exchangeable for, or evidencing the right to subscribe for or acquire securities having the right to vote) with the [stockholders][shareholders] of the Company on any matter. There is no note, bond, mortgage, indenture, guarantee, license, franchise, permit, agreement, understanding arrangement, contract, commitment, lease, franchise agreement or other instrument or obligation (whether oral or written) (each, including all amendments thereto, a "Contract") to which the Company or any of its Subsidiaries is a party or by which they are bound to (i) repurchase, redeem or otherwise acquire any shares of capital stock of, or other equity or voting interest in, the Company or any other Person or (ii) vote or dispose of any shares of capital stock of, or other equity or voting interest in, the Company. There are no irrevocable proxies and no voting agreements with respect to any capital stock of, or other equity or voting interest in, the Company.

3.1.3 Subsidiaries and Investments.[4] (a) Set forth on **Schedule 3.1.3(a)** is a complete and accurate list of each Subsidiary of the Company and the jurisdiction of organization of such Subsidiary. Each Subsidiary of the Company is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization and has all requisite corporate power and authority to own its property and to carry on its business as now being conducted.

(b) Set forth on **Schedule 3.1.3(b)** is a complete and accurate list of jurisdictions in which each Subsidiary of the Company is qualified or licensed to do business. Each Subsidiary of the Company is duly qualified or licensed to do business and is in good standing in each jurisdiction in which the character or location of the properties owned, leased or operated by such Subsidiary or the nature of the business conducted by such Subsidiary make

[3] Add other classes of stock if applicable.

[4] If the Company does not own any Subsidiaries, this representation should state that the Company does not own any Subsidiaries, and the rest of Section 3.1.3 should be deleted (other than Section 3.1.3(f) below).

such qualification or licensing necessary, except for such jurisdictions where the failure to be so qualified or licensed and in good standing would not have a Material Adverse Effect with respect to the Company.

(c) Each Subsidiary of the Company has the capitalization set forth on **Schedule 3.1.3(c)**. All of the outstanding capital stock or other equity securities or voting interests, as the case may be, of each Subsidiary of the Company has been duly authorized and validly issued, is fully paid and nonassessable and is not subject to, nor were same issued in violation of, any preemptive rights, and, except as set forth on **Schedule 3.1.3(c)** is owned, of record and beneficially, by the Company or a Subsidiary of the Company, free and clear of all Liens. Except as set forth on **Schedule 3.1.3(c)** there are no outstanding or authorized options, warrants, rights, subscriptions, claims of any character, agreements, obligations, convertible or exchangeable securities, or other commitments, contingent or otherwise relating to the capital stock of, or other equity or voting interest in, any Subsidiary of the Company or any securities convertible into, exchangeable for, or evidencing the right to subscribe for or acquire any capital stock of, or other equity or voting interest in, such Subsidiary, other than such rights granted to the Company or a Subsidiary of the Company. There are no outstanding or authorized stock appreciation, phantom stock, profit participation or similar rights with respect to the capital stock of, or other equity or voting interest in, any Subsidiary of the Company. Neither the Company nor any of its Subsidiaries has any authorized or outstanding bonds, debentures, notes or other indebtedness for borrowed money, the holders of which have the right to vote (or which are convertible into, exchangeable for, or evidencing the right to subscribe for or acquire securities having the right to vote) with the stockholders of any Subsidiary of the Company on any matter. There are no Contracts to which the Company or any of its Subsidiaries is a party or by which

any of them is bound to (i) repurchase, redeem or otherwise acquire any shares of the capital stock of, or other equity or voting interest in, any Subsidiary of the Company or (ii) vote or dispose of any shares of the capital stock of, or other equity or voting interest in, any Subsidiary of the Company. There are no irrevocable proxies and no voting agreements with respect to any shares of the capital stock of, or other equity or voting interest in, any Subsidiary of the Company.

(d) Neither the Company nor any its Subsidiaries owns, directly or indirectly, any capital stock of, or other equity, ownership, proprietary or voting interest in, any Person except as set forth on **Schedule 3.1.3(d)**.

(e) There are no restrictions of any kind which prevent or restrict the payment of dividends or other distributions by any of the Company's Subsidiaries other than those imposed by the laws of general applicability of their respective jurisdictions of organization.

(f) For the purposes of this Agreement, "Subsidiary" shall mean, with respect to any Person, (i) any corporation more than 50% of whose stock of any class or classes having by the terms thereof ordinary voting power to elect a majority of the directors of such corporation (irrespective of whether or not at the time stock of any class or classes of such corporation shall have or might have voting power by reason of the happening of any contingency) is owned by such Person directly or indirectly through one or more Subsidiaries of such Person and (ii) any partnership, association, joint venture or other entity in which such Person directly or indirectly through one or more Subsidiaries of such Person has more than a 50% equity interest.

3.1.4 No Conflict.

Except as set forth in **Schedule 3.1.4** attached hereto and made a part hereof, to the knowledge of Company, the execution and delivery of this Agreement does not, and the consummation of the transactions contemplated hereby will not (i) result in the acceleration of or the creation in any party of any right to accelerate, terminate, modify or cancel any material indenture, contract, lease, sublease, loan agreement, note or other material obligation or liability to which the Company is a party or by which it is bound or to which any of its assets is subject, or result in a default under or violation of any material restriction, lien, encumbrance, indenture, contract, lease, sublease, loan agreement, note or other obligation or liability to which it is a party or by which it is bound or to which any of its assets is subject or result in the creation of any lien or encumbrance upon any of said assets, (ii) conflict with or result in a breach of or constitute a default under any provision of the [Certificate] [Articles][5] of Incorporation or Bylaws (or other constitutive documents) of the Company, or (iii) subject to obtaining and making the approvals, consents, notices and filings referred to in Section 3.1.22, violate or result in a breach of or constitute a default under any judgment, order, decree, rule or regulation of any court or governmental agency to which the Company or its assets are subject, except, in each of clauses (i), and (iii) above, for such accelerations, terminations, modifications, cancellations, defaults, liens, encumbrances or violations as would not have a Material Adverse Effect with respect to the Company.

3.1.5 Financial Statements.

(a) Attached hereto as **Schedule 3.1.5** are (i) the unaudited [consolidated] balance sheet of the Company [and its Subsidiaries] as at [___] (the "Unaudited Balance Sheet Date" and

[5] Insert as appropriate.

such balance sheet, the "Unaudited Balance Sheet") and the related unaudited statements of income, [shareholders' equity] [retained earnings] and [changes in financial position] [cash flows] for the [three] [six] [nine] months then ended and (ii) the audited balance sheet of the Company [and its Subsidiaries] as at [most recent audited date] (the "Balance Sheet Date" and such balance sheet, the "Balance Sheet"). The financial statements referred to above, including the footnotes thereto, except as described therein, have been prepared in accordance with GAAP consistently followed throughout the periods indicated.

(b) The Unaudited Balance Sheet fairly presents (subject to normal year-end adjustments and as otherwise described therein), in all material respects, the financial position of the Company [and its Subsidiaries] at the respective dates thereof and the related statement of income [shareholders' equity] [retained earnings] and [changes in financial position] [cash flows] fairly presents, in all material respects, the results of operations [and cash flows] of the Company and its Subsidiaries and the changes in [its] [their] financial position for the period indicated (except for the absence of notes thereto and subject to year-end adjustments and as otherwise described therein).

3.1.6 Insurance.

Schedule 3.1.6 attached hereto and made a part hereof accurately lists the policies of insurance covering the assets and operations of the Company [and its Subsidiaries] [, copies of which have been made available to Purchaser]. All such policies are valid and subsisting and in full force and effect in accordance with their terms. The Company has not been denied insurance or suffered the cancellation of any insurance in the past [five] years.

3.1.7 Litigation.

Except as set forth in **Schedule 3.1.7** attached hereto and made a part hereof, (i) there is no action, suit, proceeding, arbitration or investigation pending or, to the knowledge of the Company, threatened against the Company [or any of its Subsidiaries] that would have a Material Adverse Effect with respect to the Company, and (ii) there are no orders, writs, injunctions or decrees currently in force against the Company [or any of its Subsidiaries] that would have a Material Adverse Effect with respect to the Company.

3.1.8 Licenses and Permits; Compliance with Laws.

(a) Except as set forth in **Schedule 3.1.8(a)** attached hereto and made a part hereof, to the knowledge of Company, Company owns, holds or possesses in its own name, all franchises, approvals, permits, orders, certificates, variances and product licenses and license applications, permits and other governmental authorizations and approvals (federal, state and local) (collectively, "Licenses and Permits") necessary to entitle it to use its corporate name, to own or lease, operate and use its assets and properties and to carry on and conduct its business and operations as presently conducted, except for such Licenses and Permits, the absence of which would not have a Material Adverse Effect with respect to the Company. To the knowledge of the Company [the Company is not] [neither the Company nor any of its Subsidiaries is] in violation of or default under any Licenses and Permits which violation or default would have a Material Adverse Effect with respect to the Company.

(b) Except as set forth in **Schedule 3.1.8(b)** attached hereto and made a part hereof, to the knowledge of the Company, Company [and each of its Subsidiaries] is in compliance with each Legal Requirement that is applicable to it or to its ownership or use of any of its properties

or assets except for such noncompliance as would not have a Material Adverse Effect with respect to the Company. For the purposes of this Agreement, "Legal Requirement(s)" means any currently applicable federal, state, local, municipal, foreign, international, multinational or other administrative order, constitution, law, ordinance, common law, regulation, statute, judgment or treaty.

3.1.9 Taxes.

(a) Definitions. For purposes of this Agreement:

(i) The term "Tax" means any of the Taxes, and "Taxes" means (A) all net income, capital gains, gross income, gross receipts, sales, use, ad valorem, franchise, capital, profits, license, and other withholding, employment, social security, payroll, transfer, conveyance, documentary, stamp, property, value added, customs duties, minimum taxes, estimated and any other taxes, fees, charges, levies, excises, duties or assessments of any kind whatsoever, together with additions to tax or additional amounts, interest and penalties relating thereto that may be imposed by the federal government or any state, local or foreign government (whether payable directly or by withholding and whether or not requiring the filing of a Tax Return), and (B) any liability for the payment of any amount of any type described in clause (A) as a result of a person being a transferee or a member of an affiliated consolidated, unitary or combined group or of a contractual obligation to indemnify any person or other entity prior to the Closing;

(ii) "Tax Returns" means all returns, reports, statements and forms (including elections, declarations, disclosures, schedules, estimates and information tax returns) required to be filed in respect of any Tax; and

(iii) "Code" means the Internal Revenue Code of 1986, as amended, including the rules and regulations thereunder and any substitute or successor provisions.

(b) The Company [or its applicable Subsidiary] has paid or provided for on the books of the Company [or such Subsidiary] all material Taxes due and payable by the Company [or such Subsidiary]. The Company [or its applicable Subsidiary] has filed or caused to be filed on a timely basis, or so will file or will cause to be filed on or prior to the Closing Date, all material Tax Returns required to be filed by it on or prior to the Closing Date.

3.1.10 Brokers; Finders.

Except for _____, whose fees and expenses shall be paid by Seller, [the Company has not] [neither the Company nor any of its Subsidiaries has] retained any broker or finder in connection with the transactions contemplated herein and is not obligated and has not agreed to pay any brokerage or finder's commission, fee or similar compensation.

3.1.11 Absence of Certain Changes.

(a) Except as set forth in **Schedule 3.1.11** attached hereto and made a part hereof, during the period from the Balance Sheet Date to the date of this Agreement, the Company [has] [and each of its Subsidiaries have] conducted its business in the ordinary course, and there has not occurred with respect to the Company:

(i) except in the ordinary course of business, any properties or assets of the Company [or any of its Subsidiaries] becoming subject to any mortgage, pledge, Lien, security interest, encumbrance, restriction or charge of any kind;

(ii) any cancellation or waiver of any material claims or rights of value, or any sale, transfer, distribution or other disposal of any properties or assets of the Company [or any of its Subsidiaries], except for sales of finished goods inventory or other assets in the ordinary course of business;

(iii) any disposal, cancellation or abandonment of any rights in any Company Intellectual Property Rights, or any unauthorized disclosure to any person not an employee or other unauthorized disposal of any confidential and proprietary customer lists, of the Company [or any of its Subsidiaries];

(iv) any material increase in the base compensation or other payment to any director or officer of the Company [or any of its Subsidiaries], whether now or hereafter payable or granted, or entry into or variation of the material terms of any employment or incentive agreement with any such person (other than increases or variations in base compensation in the ordinary course consistent with past practices or pursuant to a written agreement in effect on the date hereof);

(v) any single capital expenditure or commitment for additions to property, plant or equipment, or lease agreement which exceeds _____ Dollars ($_____) and which, if purchased, would be reflected in the property, plant or equipment accounts;

(vi) any material change in any method of accounting or keeping its books of account or accounting practices; or

(vii) any damage, destruction or loss of any of the properties or assets of the Company [or any of its Subsidiaries], whether or not covered by insurance, which exceeds _____ Dollars.

3.1.12 Real Properties.

Schedule 3.1.12 attached hereto and made a part hereof sets forth a complete and correct list and summary description of all real property owned by the Company [and each of its

Subsidiaries] and lists any lease pursuant to which the Company [and each of its Subsidiaries] lease[s] real property as lessee or lessor (each a "Real Property Lease" and collectively, the "Real Property Leases"). Except as set forth in **Schedule 3.1.12** hereto, the Company [has] [and each of its Subsidiaries have] [or will have at the Closing] (a) good and valid title to all of the real property listed in **Schedule 3.1.12** hereto as owned by it, and (b) valid leasehold interests in all real properties listed in **Schedule 3.1.12** hereto as leased by it, in each case free and clear of all mortgages, liens, charges, encumbrances, easements, security interests or title imperfections (collectively, "Liens") other than (i) those listed in **Schedule 3.1.12** hereto, (ii) Liens not yet due and delinquent for current taxes, assessments or governmental charges, or (iii) Liens which do not, individually or in the aggregate, materially interfere with the use of the real or personal properties by or materially detract from their value to the Company ((i) through (iii) collectively, "Permitted Liens"). To the knowledge of the Company, the ownership or lease of real property by the Company [and its Subsidiaries] or the use thereof, as presently used by the Company [and its Subsidiaries], does not violate any local zoning or similar land use laws or governmental regulations currently in effect where such violation would have a Material Adverse Effect with respect to the Company. To the knowledge of Company, [the Company is not] [Neither the Company nor any of its Subsidiaries is] in violation of or in noncompliance with any current covenant, condition, restriction, order or easement affecting the real property owned or leased by the Company where such violation or noncompliance would have a Material Adverse Effect with respect to the Company. There is no condemnation pending, or to the knowledge of the Company, threatened, affecting the real property owned or leased by the Company. The Company has delivered or made available to Purchaser prior to the Closing complete and correct copies of the Real Property Leases listed in **Schedule 3.1.12** hereto.

3.1.13 Material Contracts.

(a) **Schedule 3.1.13** attached hereto and made a part hereof lists as of the date hereof all of the Material Contracts to which the Company [or any of its Subsidiaries] is a party. The Company has delivered or made available to Purchaser true and correct copies of all Material Contracts prior to the Closing. As used in this Agreement, "Material Contracts" means:

(i) all leases or other Contracts under which the Company is a lessee of, or holds or operates, any machinery, equipment, vehicle or other tangible personal property owned by a third party (collectively, "Personal Property Leases") which entails annual rental payments, in the case of any such Personal Property Lease, in excess of _____ Dollars $_____);

(ii) all Contracts to which the Company [or any of its Subsidiaries] is a party and which are:

(x) outstanding Contracts with the officers, employees, agents, consultants, advisors, salesmen, sales representatives, distributors, sales agents or dealers of the Company [or such Subsidiary] requiring payments in excess of _____ Dollars ($_____) per annum other than Contracts which by their terms are cancelable by the Company [or such Subsidiary] with notice of not more than 30 days (except as required by any state laws) and without cancellation penalties or severance payments;

(y) collective bargaining agreements of the Company [or such Subsidiary]; or

(z) pension, profit-sharing, 401(k), bonus, severance, retirement, stock option or employee benefit plans or other similar plans or arrangements of the Company [or such Subsidiary];

(iii) all mortgages, indentures, security agreements, pledges, notes, loan agreements or guarantees by the Company [or any of its Subsidiaries] in excess of _____ Dollars ($_____);

(iv) all material customer Contracts of the Company [or any of its Subsidiaries];

(v) all outstanding Contracts with vendors of the Company [or any of its Subsidiaries] expected to result in payment by the Company [or such Subsidiary] in excess of _____ Dollars ($_____) per annum or _____ Dollars ($_____) in the aggregate;

(vi) all outstanding material licenses pursuant to which the Company [or any of its Subsidiaries] is a licensee or a licensor, except for licenses for "off the shelf" computer software and hardware or licenses in which the Company [or any of its Subsidiaries] is a licensee but the rights licensed are not required in the conduct of the Company's business;

(vii) all written Contracts or agreements materially restricting the ability of the Company [or any of its Subsidiaries] to engage in any business or compete with any Person;

(viii) all joint venture agreements and joint product development agreements to which the Company [or any of its Subsidiaries] is a party; and

(ix) all sole source supply agreements relating exclusively to the Company [or any of its Subsidiaries].

(b) All Material Contracts are legal, valid and binding obligations of the Company [or its applicable Subsidiary] enforceable (except as enforcement may be limited by equitable principles limiting the right to obtain specific performance or other equitable remedies, or by applicable bankruptcy or insolvency laws and related decisions affecting creditors' rights generally) against the Company [or such Subsidiary]; are, to the knowledge of the Company, enforceable against the other parties in accordance with their respective terms; and, except as listed on **Schedule 3.1.13** hereto, the Company has no knowledge of any default or claimed or purported or alleged default or state of facts which, with notice or lapse of time or both, would constitute a default on the part of any party in the performance of any obligation to be performed or paid by any party under any such Material Contract, and has not received or given notice of any default or claimed or purported or alleged default or state of facts which, with notice or lapse of time or both, would constitute a default on the part of any party in the performance or payment thereunder.

3.1.14 Intellectual Property Rights.

(a) **Schedule 3.1.14** attached hereto and made a part hereof sets forth a complete and correct list of all of the patents, registered trademarks and registered copyrights, and applications for any of the foregoing, included in the Company Intellectual Property Rights. Except as set forth in **Schedule 3.1.14** hereto, the Company [or its applicable Subsidiary] solely owns or has the exclusive right to use, free and clear of all Liens other than as set forth on **Schedule 3.1.14**, all of the Company Intellectual Property Rights, except where the failure to so own or have such right to use would not have a Material Adverse Effect with respect to the Company. Except as set forth in **Schedule 3.1.14** hereto, to the knowledge of the Company, there is no claim or demand of any Person pertaining to, or any proceeding pending or, to the knowledge of the Company, threatened, which challenges the exclusive rights of the Company [or its applicable Subsidiary] in respect of the Company Intellectual Property Rights. Except as set forth on **Schedule 3.1.14**, and except for such infringement, misappropriation, misuses or violation which would not have a Material Adverse Effect with respect to the Company, (i) to the knowledge of the Company, the conduct of the Company's business operations does not infringe, misappropriate, misuse or violate any intellectual property or trade secret of any Person and (ii)

to the knowledge of the Company, no Person is infringing the Company Intellectual Property Rights.

(b) For the purposes of this Agreement, "Company Intellectual Property Right" shall mean any patent, trademark, trade name, copyright or otherwise included in the all United States and foreign patents, patent applications, licenses, trademarks (whether registered or unregistered), service marks, trade names, service names, brand names, Internet domain names, logos, copyrights and any applications therefor, and any other intangible property rights, including, without limitation, proprietary know-how, technology licenses, inventions, discoveries and improvements, shop rights, formulae, trade secrets, product drawings, specifications, designs and other proprietary and/or confidential information owned by the Company [or its Subsidiaries] and used exclusively in its [their] business and all of the goodwill associated with the foregoing.

3.1.15 Authorization.

All corporate and other proceedings required to be taken on the part of the Company, including, without limitation, all action required to be taken by the directors or shareholders of the Company to authorize the Company to enter into and carry out this Agreement have been properly taken. This Agreement has been duly executed and delivered by the Company and, assuming the due execution and delivery hereof by Purchaser, constitutes the valid and binding obligation of the Company enforceable against it in accordance with its terms, except as enforcement may be limited by equitable principles limiting the right to obtain specific performance or other equitable remedies, or by applicable bankruptcy or insolvency laws and related decisions affecting creditors' rights generally.

3.1.16 Employee Benefit Plans.[6]

(a) Each material employee benefit plan within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") (whether or not such plan is subject to ERISA), maintained by the Company [and/or any of its Subsidiaries] or to which the Company [or any such Subsidiary] contributes (or has any obligation to contribute) or is a party (collectively, the "Employee Benefit Plans") is listed on **Schedule 3.1.16(a)** attached hereto and made a part hereof.

(b) Neither the Company [nor any of its Subsidiaries] has ever maintained or contributed to, or had any obligation to contribute to (or borne any liability with respect to) any "employee pension benefit plan," within the meaning of Section 3(2) of ERISA, that is a "multiemployer plan," within the meaning of Section 3(37) of ERISA.[7]

(c) Except [as set forth on such **Schedule 3.1.16(c)**, or] to the extent that any breach of the representations set forth in this sentence would not have a Material Adverse Effect with the respect to the Company: (i) each Employee Benefit Plan which is intended to be "qualified" within the meaning of Section 401(a) of the Code has received a favorable determination letter from the Internal Revenue Service (or has submitted, or is within the remedial amendment period for submitting, an application for a determination letter with the

[6] We drafted the following representations under the assumption that Purchaser will not be assuming any of XX's Employee Benefit Plans. If this is not the case, or in the event that a Purchaser is accepting a transfer of assets from any XX Employee Benefit Plan (other than in the form of a rollover at the direction of a plan participant), such Purchaser will likely push for more detailed representations with respect to any of the plans that it is required to assume (or from which it is accepting a transfer of assets).

[7] Please confirm that this statement is true. If the Company and/or its subsidiaries have ever maintained, contributed to or had an obligation to contribute to a multiemployer plan, this representation will need to be modified to provide that the Company has no withdrawal liability with respect to such plan.

Internal Revenue Service and is awaiting receipt of a response) and, to the knowledge of the Company, no event has occurred and no condition exists which could reasonably be expected to result in the revocation of any such determination; (ii) neither the Company [nor any of its Subsidiaries], nor, to the Company's knowledge, any other "disqualified person" or "party in interest" (as defined in Section 4975(e)(2) of the Code and Section 3(14) of ERISA, respectively) has engaged in any transactions in connection with any Employee Benefit Plan that could reasonably be expected to result in the imposition of a penalty pursuant to Section 502 of ERISA or a tax pursuant to Section 4975 of the Code; and (iii) no claim, action or litigation has been made, commenced or, to the Company's knowledge, threatened with respect to any Employee Benefit Plan (other than routine claims for benefits payable in the ordinary course, and appeals of denied such claims).

(d) The Company [and each of its Subsidiaries] have paid and discharged all of their respective liabilities and obligations arising under ERISA or the Code of a character which, if unpaid or unperformed, would result in the imposition of a lien against the properties or assets of the Company.

3.1.17 Personal Property.

Except as set forth on **Schedule 3.1.17** attached hereto and made a part hereof, the Company [has] [and its Subsidiaries have] good title to or, in the case of leased assets, a valid leasehold interest in, free and clear of all Liens, except for Permitted Liens, all of the tangible and intangible personal property and assets reflected in the [Unaudited] Balance Sheet or thereafter acquired, except for properties and assets disposed of in the ordinary course of business, consistent with past practice, since the date of the [Unaudited] Balance Sheet. The Company [owns or has] [and its Subsidiaries own or have] the [exclusive] right to use all of the

tangible personal properties and assets necessary for the conduct of their business as currently conducted. All of the tangible personal property used in the business of the Company [and its Subsidiaries] is in operating condition and repair, ordinary wear and tear excepted, and, in the aggregate, is adequate and suitable for the purposes for which it is presently being used.

3.1.18 Environmental Matters.

(a) For purposes of this Agreement "Environmental Law" shall mean any law, statute, regulation, judgment, treaty, or order of federal, state, local and foreign, international or multinational government or other current requirements of law, including common law, relating to the protection of the environment and to the manufacture, use, transport, treatment, storage, disposal, release or threatened release of petroleum products, asbestos, urea formaldehyde insulation, polychlorinated biphenyls or any substance listed, classified or regulated as "hazardous" or "toxic" (collectively hereinafter referred to as "regulated substances").

(b) Except as set forth on **Schedule 3.1.18** hereto, to the knowledge of the Company: (i) the Company is in compliance with Environmental Laws that is applicable to it or to its ownership or use of any of its properties or assets, except for such noncompliance as would not have a Material Adverse Effect with respect to the Company; (ii) there are no claims, proceedings, investigations or actions by any governmental or regulatory authority or other person or entity pending or threatened in connection with the operation of the business, properties or assets of the Company [or any of its Subsidiaries] alleging a violation by Company of any Environmental Law; and (iii) there are no facts, circumstances or conditions relating to the present operation of the properties, assets and business of the Company [or any of its Subsidiaries] (including the disposal of any regulated substances), or to any real property

currently or formerly owned or operated by the Company [or any of its Subsidiaries], that could reasonably be expected to give rise to any liability, under applicable Environmental Law.

(c) Other than as set forth in this Section 3.1.18, and inclusive of Section 3.1.23 hereto, the Company does not make any representations or warranties, either express or implied, with respect to any environmental matters. Any information, reports, statements, documents or records that may have been provided to Buyer or its agents by Seller, its agents or employees concerning environmental matters shall not be representations or warranties. Buyer shall rely only upon its own inspection of the properties, assets and business of the Company in assessing any environmental matters with respect to Company.

3.1.19 Powers of Attorney.

Except as set forth in **Schedule 3.1.19** attached hereto and made a part hereof, there are no powers of attorney executed on behalf of the Company [or any of its Subsidiaries].

3.1.20 Undisclosed Liabilities.

To the knowledge of the Company, [the Company has no] [neither the Company nor any of its Subsidiaries has any] liabilities or obligations, whether accrued, absolute, contingent or otherwise, which are material to the business of the Company [and its Subsidiaries] taken as a whole, except (i) to the extent reflected or reserved for on the Unaudited Balance Sheet as required by generally accepted accounting principles, (ii) liabilities or obligations disclosed in **Schedule 3.1.20** attached hereto and made a part hereof and in the other Schedules hereto, or (iii) liabilities or obligations disclosed in this Agreement, or liabilities that may arise subsequent to the Unaudited Balance Sheet date in the ordinary course of business.

3.1.21 Labor Matters.

(a) Except as set forth in **Schedule 3.1.21** attached hereto and made a part hereof, as of the date hereof there are no (i) labor strikes, disputes, slowdowns, representation campaigns or work stoppages with respect to employees of the Company [or any of its Subsidiaries] pending or, to the knowledge of the Company, threatened against or affecting the Company [or any of its Subsidiaries], (ii) grievance or arbitration proceedings arising out of collective bargaining agreements to which the Company [or any of its Subsidiaries] is a party (other than informal grievances), (iii) unfair labor practice complaints pending or, to the knowledge of the Company, threatened against the Company [or any of its Subsidiaries], or (iv) collective bargaining agreements or other labor union contracts applicable to persons employed by the Company [or any of its Subsidiaries]. To the knowledge of the Company, there are no activities or proceedings of any labor union to organize any such employees, except, in each case, for such strikes, disputes, slowdowns, representation campaigns, work stoppages, grievances, arbitration proceedings, complaints, agreements, activities and proceedings as would not have a Material Adverse Effect with respect to the Company.

(b) Except to the extent set forth in **Schedule 3.1.21** hereto, the Company [is] [and each of its Subsidiaries are] in compliance with all applicable laws respecting employment and employment practices, terms and conditions of employment and wages and hours and is not engaged in any unfair labor practice, except for such noncompliance or practices as would not have a Material Adverse Effect with respect to the Company.

3.1.22 No Consent Requirements.

Except [for such filings and approvals as may be required pursuant to the Hart-Scott-Rodino Antitrust Improvement Act of 1976, as amended, and the rules and regulations

thereunder (the "HSR Act") or] as set forth in **Schedule 3.1.22** attached hereto and made a part hereof, to the knowledge of Company, no consent, approval, authorization, order, filing, registration or qualification of or with any court, governmental authority or third person is required to be made or obtained by the Company [or any of its Subsidiaries] in connection with the execution and delivery of this Agreement by the Company or the consummation by the Company of the transactions contemplated hereby except for such consents, approvals, authorizations, orders, filings, registrations or qualifications the failure to make or obtain of which would not have a Material Adverse Effect with respect to the Company.

3.1.23 No Other Representation and Warranties.

Notwithstanding anything contained in this Article 3 or any other provision of this Agreement to the contrary, neither the Company nor any of its officers, directors, Affiliates, agents or representatives is making (or has made) any representation or warranty whatsoever, whether express or implied (including, but not limited to, any implied warranty or representation as to the value, condition, merchantability or suitability of any of the properties or assets of the Company [or any of its Subsidiaries]) or contained, or referred to, in any materials (including, without limitation, projections, forecasts, budgets and estimates) that have been provided to Purchaser or any of its Affiliates, agents or representatives beyond those expressly given by the Company in this Agreement.

ARTICLE 4. REPRESENTATIONS AND WARRANTIES OF SELLER

4.1 Representations and Warranties of Seller.

Seller represents and warrants to Purchaser as follows:

4.1.1 Ownership of Shares; Corporate Organization and Standing of Seller.

Seller is the lawful owner, beneficially and of record of all of the Shares, free and clear of all Liens. Seller is a corporation duly organized, validly existing and in good standing under the laws of its jurisdiction of organization and has all corporate power and authority to execute and deliver this Agreement, to consummate the transactions contemplated hereby and to perform its obligations hereunder.

4.1.2 No Conflict.

Except as set forth in **Schedule 4.1.2** attached hereto and made a part hereof, the execution and delivery of this Agreement does not, and the consummation of the transactions contemplated hereby will not (i) result in the creation of any Lien upon any of the Shares, (ii) conflict with or result in a breach of or constitute a default under any provision of the [Articles] [Certificate] of Incorporation or Bylaws (or other constitutive documents) of Seller, or (iii) subject to obtaining and making the approvals, consents, notices and filings referred to in Section 4.1.3, violate or result in a breach of or constitute a default under any judgment, order, decree, rule or regulation of any court or governmental agency to which Seller is subject, except, in each of clauses (i), and (iii) above, for such accelerations, terminations, modifications, cancellations, defaults, liens, encumbrances or violations as would not have a Material Adverse Effect with respect to Seller.

4.1.3 No Consent Requirements.

Except [for such filings and approvals as may be required pursuant to the Hart-Scott-Rodino Antitrust Improvement Act of 1976, as amended, and the rules and regulations

thereunder (the "HSR Act") or] as set forth in **Schedule 4.1.3** attached hereto and made a part hereof, to the knowledge of Seller, no consent, approval, authorization, order, filing, registration or qualification of or with any court, governmental authority or third person is required to be made or obtained by Seller in connection with the execution and delivery of this Agreement by Seller or the consummation by Seller of the transactions contemplated hereby except for such consents, approvals, authorizations, orders, filings, registrations or qualifications the failure to make or obtain of which would not have a Material Adverse Effect with respect to Seller.

4.1.4 Authorization.

All corporate and other proceedings required to be taken on the part of Seller, including, without limitation, all action required to be taken by the directors or shareholders of Seller to authorize Seller to enter into and carry out this Agreement and to sell the Shares, have been properly taken. This Agreement has been duly executed and delivered by Seller and, assuming the due execution and delivery hereof by Purchaser, constitutes the valid and binding obligation of Seller enforceable against it in accordance with its terms, except as enforcement may be limited by equitable principles limiting the right to obtain specific performance or other equitable remedies, or by applicable bankruptcy or insolvency laws and related decisions affecting creditors' rights generally.

4.1.5 Litigation.

There is no action, suit, proceeding, arbitration or investigation pending or, to the knowledge of Seller, threatened against Seller that would affect the legality, validity or enforceability against Seller of this Agreement or Seller's ability to perform its obligations hereunder.

4.1.6 Brokers; Finders.

Except for _____, whose fees and expenses shall be paid by Seller, Seller has not retained on its or the Company's behalf any broker or finder in connection with the transactions contemplated herein and is not obligated and has not agreed to pay any brokerage or finder's commission, fee or similar compensation.

4.1.7 U.S. Person.

Seller is not a person other than a United States person within the meaning of Section 1445 of the Code.

ARTICLE 5. REPRESENTATIONS AND WARRANTIES OF PURCHASER

5.1 Representations and Warranties.

Purchaser represents and warrants to Seller as follows:

5.1.1 Organization and Standing.

Purchaser is a corporation duly organized, validly existing and in good standing under the laws of _____ and has all corporate power and authority to execute and deliver this Agreement, to consummate the transactions contemplated hereby and to perform its obligations hereunder.

5.1.2 Authorization.

All corporate and other proceedings required to be taken on the part of Purchaser, including, without limitation, all action required to be taken by the directors or shareholders of

Purchaser to authorize Purchaser to enter into and carry out this Agreement and to purchase the Shares, have been properly taken. This Agreement has been duly executed and delivered by Purchaser and, assuming the due execution and delivery hereof by Seller, constitutes the valid and binding obligation of Purchaser enforceable against it in accordance with its terms, except as enforcement may be limited by equitable principles limiting the right to obtain specific performance or other equitable remedies, or by applicable bankruptcy or insolvency laws and related decisions affecting creditors' rights generally.

5.1.3 No Conflict.

Except as set forth in **Schedule 5.1.3** attached hereto and made a part hereof, the execution and delivery of this Agreement does not, and the consummation of the transactions contemplated hereby will not (i) result in the acceleration of, or the creation in any party of any right to accelerate, terminate, modify or cancel any material indenture, contract, lease, sublease, loan agreement, note or other obligation or liability to which Purchaser is a party or by which it is bound or to which any of its assets is subject, (ii) subject to obtaining and making the approvals, consents, notices and filings referred to in Section 5.1.6, conflict with or result in a breach of or constitute a default under any provision of the [Articles] [Certificate] of Incorporation or Bylaws (or other constitutive documents) of Purchaser, or a default under or violation of any material restriction, Lien, encumbrance, indenture, contract, lease, sublease, loan agreement, note or other obligation or liability to which it is a party or by which it is bound or to which any of its assets is subject or result in the creation of any Lien upon any of said assets, or (iii) violate or result in a breach of or constitute a default under any judgment, order, decree, rule or regulation of any court or governmental agency to which Purchaser is subject.

5.1.4 Litigation.

Except as set forth in **Schedule 5.1.4** attached hereto and made a part hereof, there is no action, suit, proceeding, arbitration or investigation pending or, to the knowledge of Purchaser, threatened, against Purchaser or the directors, officers, agents or employees of Purchaser, and there are no orders, writs, injunctions or decrees currently in force against Purchaser or the directors, officers, agents or employees of Purchaser.

5.1.5 Brokers, Finders.

Except for _____ whose fees and expenses shall be paid by Purchaser, Purchaser has not retained any broker or finder in connection with the transactions contemplated herein and is not obligated and has not agreed to pay any brokerage or finder's commission, fee or similar compensation.

5.1.6 Consent Requirements.

Except for such filings and approvals as may be required pursuant to the HSR Act and as set forth in **Schedule 5.1.6** attached hereto and made a part hereof, no consent, approval, authorization, order, filing, registration or qualification of or with any court, governmental authority or third person is required to be made or obtained by Purchaser in connection with the execution and delivery of this Agreement by Purchaser or the consummation by Purchaser of the transactions contemplated hereby.

5.1.7 Financing.

At the Closing Purchaser will have sufficient funds available (from its working capital and/or unrestricted credit facilities or otherwise) to enable it to consummate the transactions contemplated by this Agreement.

5.1.8 Purchase for Investment.

Purchaser will acquire the Shares for its own account for investment and not with a view toward any resale or distribution thereof.

ARTICLE 6. COVENANTS AND AGREEMENTS

6.1 Employee Matters.[8]

6.1.1 Continuation of Compensation and Benefits. For at least two (2) years following the Closing Date, Purchaser shall provide or cause to be provided to all employees of the Company [and its Subsidiaries] (i) a salary or wage level and bonus opportunity at least equal to the salary or wage level and bonus opportunity to which they were entitled immediately prior to the Closing Date and (ii) benefits, perquisites and other terms and conditions of employment that are at least equivalent to the benefits, perquisites and other terms and conditions that they were entitled to receive immediately prior to the Closing Date (including, without limitation, benefits pursuant to qualified and non-qualified retirement and savings plans, medical, dental and pharmaceutical plans and programs, deferred compensation arrangements and equity-based and incentive compensation plans). Notwithstanding the foregoing, following the Closing Date, Purchaser and its Affiliates shall provide each employee of the Company, as of the Closing Date, with compensation and benefits (including, without limitation, incentive and equity-based compensation) at least as favorable as the compensation and benefits provided to similarly situated employees of Purchaser and its Affiliates.

6.1.2 Severance; Retention; Bonuses. Without limiting the generality of the foregoing, (i) Purchaser and its Affiliates shall have in effect for at least two (2) years following the Closing Date severance and retention plans, practices and policies applicable to employees of the Company [and its Subsidiaries] on the Closing Date that are not less favorable than such practices and policies in effect immediately prior to the Closing Date with respect to such employees, and Purchaser shall indemnify and hold harmless Seller and its Affiliates from any severance or retention liabilities or obligations with respect to such employees effective on and after the Closing Date; and (ii) Purchaser shall, or shall cause its Affiliates to, ensure that all employees of the Company [and its Subsidiaries] who were notified of their target bonuses for the current fiscal year receive annual bonuses at least equal to such target bonuses.

6.1.3 Liabilities. From and after the Closing Date, Purchaser shall (i) honor, pay, perform and satisfy any and all liabilities, obligations and responsibilities to, or in respect of, each employee of the Company [and its Subsidiaries] arising under the terms of any employment, consulting, retention, severance[9], change-of-control or similar agreement, in accordance with the terms thereof in effect on the Closing Date; (ii) assume, honor and be solely

[8] We drafted the following covenant to address many different situations and types of benefits, each of which is intended to protect the interests of the Transferred Employees and/or XX. We can revise the covenant to reflect the specifics of any particular transaction. The covenants were drafted under the assumption that Company employees participate in a XX sponsored plan (rather than a stand-alone plan sponsored at the subsidiary/Company level). Certain covenants would not be necessary in the event that Company employees participate in a plan(s) sponsored at the Company level.

[9] Are the Company's employees currently covered by a severance plan that would be triggered in connection with any contemplated asset sale? If so, in the event that the Purchaser does not agree to assume this liability, consider whether or not to amend the plan (assuming such amendment is permitted) to preclude the triggering of severance payments by XX with respect to employees who are offered employment by Purchaser.

responsible for paying, providing or satisfying when due (A) all vacation, sick pay and other paid time off for employees of the Company [and its Subsidiaries] accrued but unused as of the Closing Date, on terms and conditions not less favorable than the terms and conditions in effect immediately prior to the Closing Date, and (B) all compensation (including salary, wages, commissions, bonuses, incentive compensation, overtime, premium pay and shift differentials), benefits and benefit claims, severance and termination pay, notice and benefits under all applicable Federal, state or local Law and under any plan, policy, practice or agreement and all other Liabilities, in each case accruing, incurred, or arising as a result of employment or separation from employment with Purchaser or its Affiliates, on or after the Closing Date with respect to employees of the Company [and its Subsidiaries]; and (iii) be solely responsible for paying and providing long-term disability benefits with respect to any employee of the Company [and its Subsidiaries] and any former employee of the Company [or any of its Subsidiaries] who is receiving long-term disability benefits under any plan or program of the Sellers or their Affiliates as of the Closing Date.[10] Purchaser shall indemnify and hold each Seller harmless from any Losses arising out of or related to the obligations of Purchaser under this Section 6.1.3.

6.1.4 Tax-Qualified Plans. Each employee of the Company who is a participant in the [XX Pension Plan] (the "XX Pension Plan") or the [XX Savings and Investment Plan] (the "XX Savings Plan") shall cease to be an active participant under each such plan effective as of the Closing Date. Effective as of the Closing Date, Purchaser shall have in effect or cause the Company to have in effect (1) a defined contribution plan that is qualified under Section 401(a) of the Code and that includes a qualified cash or deferred arrangement

[10] A purchaser will likely have concerns about this subsection (iii), which is primarily relevant if XX's LTD plan is self-insured. Is XX's LTD plan insured or self-insured?

within the meaning of Section 401(k) of the Code with terms and conditions equivalent to the XX Savings Plan (the "Purchaser Savings Plan") and (2) a tax-qualified defined benefit pension plan (the "Purchaser Pension Plan") with benefits and other terms and conditions equivalent to the XX Pension Plan, in each case, in which employees of the Company [and its Subsidiaries] shall be eligible to participate. [As soon as practicable following the Closing Date, the XX Savings Plan shall transfer to the Purchaser Savings Plan, and Purchaser agrees to cause the Purchaser Savings Plan to accept, the account balance (including promissory notes evidencing all outstanding loans and subject to any qualified domestic relations orders pursuant to Section 414(p) of the Code) of each employee of the Company [and its Subsidiaries] under the XX Savings Plan as of the valuation date next preceding the date of transfer. Such transfer shall be subject to Seller's receipt of a current determination letter from the Internal Revenue Service indicating that the Purchaser Savings Plan is qualified under Sections 401(a) and 401(k) of the Code. Following such transfer, Purchaser and its Affiliates shall assume all liabilities of Seller and its Affiliates under the XX Savings Plan to provide benefits to or on behalf of the employees of the Company [and its Subsidiaries] to the extent of the account balances so transferred, and neither the XX Savings Plan nor Seller or its Affiliates shall have any obligation to Purchaser or any Affiliate of Purchaser or with respect to any employee of the Company [and its Subsidiaries] with respect thereto.] [With regard to the XX Pension Plan, Seller shall cause the calculation and transfer to the Purchaser Pension Plan of assets equal to the accumulated benefit obligation calculated using the XX Pension Plan's current assumptions under Financial Accounting Standard No. 87 ("ABO") with respect to employees of the Company [and its Subsidiaries] who are vested participants in the XX Pension Plan. The ABO shall be determined as of the Closing Date, and the transfer of the ABO shall be made in cash.[11] Such transfer shall be subject to

[11] ABO asset transfer subject to XX consideration. We should discuss appropriate pension asset transfer language

Seller's receipt of a current determination letter from the Internal Revenue Service indicating that the Purchaser Pension Plan is qualified under Sections 401(a) of the Code. The Purchaser Pension Plan shall recognize and credit all service (including, without limitation, for purposes of benefit accrual) of employees of the Company [and its Subsidiaries] credited under the XX Pension Plan. Following such transfer from the XX Pension Plan to the Purchaser Pension Plan, the XX Pension Plan shall have no liability to or with respect to any employee of the Company [and its Subsidiaries] with respect to their accrued benefits under the XX Pension Plan, and Purchaser shall indemnify and hold harmless Seller and its Affiliates from all liabilities, costs and expenses that may result to Seller or such Affiliates or the XX Pension Plan from any claim by or on behalf of any employee of the Company [and its Subsidiaries] for any benefit alleged to be payable under the XX Pension Plan.]

6.1.5 Non-Qualified Plans. Effective as of the Closing Date, Purchaser shall have in effect non-qualified retirement plans ("Purchaser NQ Plans") that shall provide benefits to employees of the Company [and its Subsidiaries] participating in (or to any employee of the Company [and its Subsidiaries] who would otherwise be eligible to participate therein under the terms of such plans assuming any such employee's earnings were at or above the relevant threshold, or assuming that any such employee would have been entitled to make a contribution (or have a contribution made on his or her behalf) or to accrue a benefit if any applicable threshold (whether under such plans or under a tax-qualified plan) had been met or exceeded) one or more non-qualified retirement plans of Seller or its Affiliates (the "XX NQ Plans"), which are substantially equivalent in all material respects to the benefits provided under the XX NQ Plans as of the Closing Date. Each such employee participating in the XX NQ Plans as of the Closing Date shall become a participant in the Purchaser NQ Plans as of the Closing Date. With respect to such employees who participate as of the Closing Date in a XX NQ Plan that is a defined benefit plan, Purchaser shall cause to be provided to each such employee a vested accrued benefit, upon termination of employment with Purchaser and its Affiliates, under a Purchaser NQ Plan that is a defined benefit pension plan equal to the accrued benefit that would have been payable under the terms of such XX NQ Plan determined based on the terms of such plan as of the Closing Date assuming that (A) such employee's service following the Closing Date with Purchaser and its Affiliates was added to the employee's service through the Closing Date taken into account by Seller and its Affiliates and (B) such employee received compensation from Seller and its Affiliates following the Closing Date while employed by Purchaser and its Affiliates in the same amounts as actually paid by Purchaser and its Affiliates during such period.[12]

6.1.6 Post-Retirement Health and Life Insurance. The employees of the Company [and its Subsidiaries] who are eligible to participate in the post-retirement health and life insurance benefit plans of Seller or its Affiliates (the "XX Post-Retirement Health and Life Insurance Plan") upon satisfaction of the applicable eligibility conditions of the XX Post-Retirement Health and Life Insurance Plan shall be entitled to receive post-retirement health and life insurance benefits under a post-retirement health and life insurance plan established or caused to be established by Purchaser ("Purchaser Post-Retirement Health and Life Insurance Plan") that are not less favorable than the benefits provided by the XX Post-Retirement Health and Life Insurance Plan, and Purchaser shall be solely responsible for paying and providing (and

with XX's actuaries.

[12] If XX maintains a rabbi trust with respect to a non-qualified plan, it should consider an asset transfer, otherwise the Purchaser may resist providing the benefits discussed above.

shall indemnify and hold Seller and their Affiliates harmless from all liabilities and obligations related to) all post-retirement health and life insurance benefits with respect to such employees. Purchaser, on behalf of itself and its Affiliates, hereby covenants and agrees to maintain and not terminate or amend in a manner that adversely affects such employees of the Company [and its Subsidiaries] the Purchaser Post-Retirement Health and Life Insurance Plan at any time prior to satisfaction of all liabilities and obligations thereunder in respect of all such employees.

6.1.7 Certain Welfare Plan Matters. Following the Closing Date, (i) Purchaser shall ensure that no waiting periods, exclusions or limitations with respect to any pre-existing conditions, evidence of insurability or good health or actively-at-work exclusions are applicable to any employees of the Company [and its Subsidiaries] or their dependents or beneficiaries under any welfare benefit plans in which such employees may be eligible to participate; and (ii) Purchaser shall provide or cause to be provided that any costs or expenses incurred by employees of the Company [and its Subsidiaries] (and its dependents or beneficiaries) up to (and including) the Closing Date shall be taken into account for purposes of satisfying applicable deducible, co-payment, coinsurance, maximum out-of-pocket provisions and like adjustments or limitations on coverage under any such welfare benefit plans. Seller's Affiliate shall retain responsibility under its employee welfare benefit plans for all amounts payable by reason of claims reported or submitted by employees of the Company [and its Subsidiaries] and their eligible spouses and dependents prior to the Closing Date, and Purchaser shall be responsible under its employee welfare benefit plans for all amounts payable by reason of claims reported or submitted by such employees and their eligible spouses and dependents on or after the Closing Date. Purchaser shall be solely responsible for compliance with the requirements of Section 4980B of the Code and part 6 of subtitle B of Title I of ERISA

("COBRA"), including, without limitation, the provisions of continuation coverage with respect to all employees of the Company [and its Subsidiaries], and their spouses and dependents, for whom a qualifying event occurs on or after the Closing Date. (For purposes of this Section 6.1.6, the terms "continuation coverage' and "qualifying event" shall have the meanings ascribed to them in COBRA.)

6.1.8 Cafeteria Plan. Purchaser shall have in effect, or cause to be in effect, as of the Closing Date, flexible spending reimbursement accounts under a cafeteria plan qualifying under Section 125 of the Code (the "Purchaser Cafeteria Plan") that provides benefits to employees of the Company [and its Subsidiaries] substantially identical in all material respects to those provided by the flexible spending reimbursement accounts under the cafeteria plans in which such employees are eligible to participate as of the date hereof (the "XX Cafeteria Plan"). [As soon as practicable following the Closing Date, Seller shall cause to be transferred to Purchaser an amount in cash equal to the excess of the aggregate accumulated contributions to the flexible spending reimbursement accounts under the XX Cafeteria Plan made during the year in which the Closing Date occurs by the employees of the Company [and its Subsidiaries] over the aggregate reimbursement payouts made for such year from such accounts to such employees; *provided, however*, that, if the aggregate payouts from the flexible spending reimbursement accounts made during the year in which the Closing Date occurs to employees of the Company [and its Subsidiaries] exceed the aggregate accumulated contributions to such accounts for such year by such employees, Purchaser shall cause such excess to be transferred to Seller as soon as practicable following the Closing Date.][13] Purchaser shall cause such amounts to be credited to

[13] Please carefully consider whether or not to provide for this rollover of funds from XX's cafeteria plan to the Purchaser's cafeteria plan, as the netting that is contemplated therein could result in an additional cost to XX if the transferred employees have contributed more to XX's cafeteria plan than they have taken out for the applicable

each such employee's corresponding accounts under the Purchaser Cafeteria Plan in which such employees participate following the Closing Date. On and after the Closing Date, Purchaser shall assume and be solely responsible for all claims for reimbursement by employees of the Company [and its Subsidiaries], whether incurred prior to, on or after the Closing Date, that have not been paid in full as of the Closing Date, which claims shall be paid pursuant to and under the terms of the Purchaser Cafeteria Plan, and Purchaser shall indemnify and hold harmless Seller and its Affiliates from any and all claims by or with respect to employees of the Company [and its Subsidiaries] for reimbursement under the XX Cafeteria Plan that have not been paid in full as of the Closing Date. Purchaser agrees to cause the Purchaser Cafeteria Plan to honor and continue through the end of the calendar year in which the Closing Date occurs the elections made by each employee of the Company [and its Subsidiaries] under the XX Cafeteria Plan in respect of the flexible spending reimbursement accounts that are in effect immediately prior to the Closing Date.

6.1.9 Supplemental Life and LTD. Effective on and after the Closing Date, Purchaser shall, or shall cause its Affiliates to, assume and duly and punctually pay and perform all employer obligations under any supplemental life insurance and long-term disability policies covering employees of the Company [and its Subsidiaries] as of the date hereof, and Purchaser shall indemnify and hold harmless Seller and its Affiliates from any liabilities, costs or expenses with respect to such policies.

6.1.10 Credited Service. With respect to each employee benefit plan, policy or practice, including, without limitation, severance, vacation and paid time off plans, policies or

year. If, however, such a rollover is not permitted, the transferred employees will forfeit any amount in XX's cafeteria plan when they are terminated by XX.

practices, sponsored or maintained by Purchaser or its Affiliates, Purchaser shall grant, or cause to be granted to, all employees of the Company [and its Subsidiaries] from and after the Closing Date credit for all service with the Company [and its Subsidiaries] and [its] [their] predecessors, prior to the Closing Date for all purposes (including, without limitation, eligibility to participate, vesting credit, eligibility to commence benefits, benefit accrual, early retirement subsidies and severance).

6.2 [Reasonable Best Efforts][14] to Close.

(a) During the period commencing on the date of the execution of this Agreement and continuing until the Closing Date, Purchaser and Seller shall use [reasonable best efforts] to comply promptly with all requests or requirements, which applicable federal or state law or governmental officials may impose on them with respect to the transactions which are the subject of this Agreement, and to consummate such transactions as promptly as practicable.

(b) Without limiting the generality of Section 6.2(a), the Purchaser shall (i) take all actions which are necessary, proper or advisable to consummate and make effective the transactions contemplated hereby and shall comply in all material respects at the earliest possible date with any formal or informal request for information received by it or any of its Affiliates from any governmental entity pursuant to and in connection with the transactions contemplated by this Agreement, (ii) use [reasonable best efforts] to resolve at the earliest possible date any investigation or other inquiry concerning the transactions contemplated by this Agreement initiated by any governmental entity and (iii) use [reasonable best efforts] to obtain approval

[14] We continue to prefer a "commercially reasonable efforts" standard, as "best efforts" under New York law is a high standard and efforts to modify that standard (*e.g.*, "reasonable best efforts") could result in a burden greater than intended.

from any governmental entity required in connection with this Agreement as promptly as possible.

(c) In connection with any governmental or regulatory inquiry, the Purchaser shall (i) comply within 45 calendar days with any request for additional information or documentary material issued to it or its Affiliates by the Federal Trade Commission or the United States Department of Justice Antitrust Division under the HSR Act; and (ii) at its sole cost, (x) resist or resolve any administrative proceeding or suit, including appeals, that may be instituted by any governmental entity or private third party with respect to any Antitrust Laws, (y) use [reasonable best efforts] to have vacated, lifted, reversed or overturned any decree, judgment, injunction or other order, whether temporary, preliminary or permanent, that is in effect and that prohibits, prevents or restricts consummation of the transactions contemplated by this Agreement, and (z) enter into any settlement, undertaking, consent decree, stipulation or other agreement with any governmental entity with respect to any Antitrust Law and comply with all restrictions and conditions, if any, imposed by such governmental entity as a requirement for granting any necessary clearance or terminating any applicable waiting period, including but not limited to, agreeing to hold separate, divest, license or cause a third party to purchase, assets and/or businesses of Purchaser and/or the Company or any of their respective Affiliates.

(d) Purchaser shall promptly inform Seller of any material communication made to or received by Purchaser from any governmental entity relating to any of the transactions contemplated hereby and shall provide Seller with an accurate description of the material contents of such communication. Seller shall promptly inform Purchaser of any material communication made to or received by Seller from any governmental entity relating to any of the

transactions contemplated hereby and shall provide Purchaser with an accurate description of the material contents of such communication.

(e) For purposes of this Agreement, the term "Antitrust Laws" shall mean the Sherman Act, as amended, the Clayton Act, as amended, the HSR Act, the Federal Trade Commission Act, as amended and all other federal, state and foreign statutes, rules, regulations, orders, decrees, administrative and judicial doctrines, and other laws that are designed or intended to prohibit, restrict or regulate actions having the purpose or effect of monopolization or restraint of trade.

6.3 Press Release; Disclosures.

Except as required by law, neither Seller nor the Company nor Purchaser prior to Closing, without the prior written consent of the other, will make any press release or any similar public announcement concerning the transactions contemplated hereby. Except as required by law, no written or oral announcement or private disclosure with respect to the transactions contemplated hereby will be made, either prior to or after the Closing, to any person unrelated to Seller, the Company or Purchaser unless jointly approved by Seller, the Company and Purchaser. If disclosure is required by law, the disclosing party shall consult in advance with the other parties and attempt in good faith to reflect such other parties' concerns in the required disclosure.

6.4 Books and Records and Information.

6.4.1 Inspection of Documents.

Purchaser agrees that all documents delivered to Purchaser by Seller pursuant to this Agreement and all documents of the Company (including, but not limited to, files, books and records) shall after the Closing be open for inspection by representatives of Seller at any time during regular business hours for reasonable and necessary purposes until such time as

documents are destroyed or possession thereof is given to the other party as provided for in Section 6.4.2 hereof and that Seller may during such period at its expense make such copies thereof as it may reasonably request. Seller agrees that all documents that are retained by Seller after the Closing Date and that are related to the Company (other than tax records of Seller) shall be open for inspection by representatives of Purchaser at any time during regular Company hours until such time as documents are destroyed or possession thereof is given up to the other party as provided for in Section 6.4.2 hereof and that Purchaser may during such period at its expense make such copies thereof as it may reasonably request.

6.4.2 Destruction of Documents.

Without limiting the generality of Section 6.4.1 hereof, for a period ending on the sixth anniversary of the Closing Date, neither Purchaser nor and Seller shall destroy or give up possession of any item referred to in Section 6.4.1 hereof without first offering to the other the opportunity, at such other's expense (but without any other payment) to obtain the same. Thereafter each party shall be free to dispose of them as it deems fit.

6.4.3 Access to Employees.

Purchaser shall use reasonable efforts to afford Seller access to Employees of the Company [and its Subsidiaries], as Seller shall reasonably request for its proper corporate purposes, including, without limitation, the defense of legal proceedings. Such access may include interviews or attendance at depositions or legal proceedings. All out-of-pocket expenses reasonably incurred by Purchaser in connection with this Section 6.4.3 shall be paid or promptly reimbursed by Seller.

6.5 Tax Matters.

6.5.1 Tax Returns.

Seller shall have the exclusive authority to file or cause to be filed all Tax Returns that are required to be filed by or with respect to Seller for all taxable years or periods and with respect to the Company for all taxable years or periods ending on or prior to the Closing Date. Except as provided in the preceding sentence, Purchaser shall have the exclusive obligation and authority to file or cause to be filed all Tax Returns that are required to be filed with respect to the Taxes imposed upon or by reference to the Company, its income, operations, or its properties or assets, for any taxable year or other taxable period; provided, however, items set forth on such Tax Returns shall be treated in a manner consistent with the past practices (taking into account any amended Tax Returns and the submission of any IRS Forms 3115 filed prior to the Closing Date) with respect to such items unless otherwise required by law. Prior to the filing of any Tax Return with respect to the Company, its income, its properties or assets, or its operations, for the taxable periods beginning on or before the Closing Date and ending after the Closing Date (the "Overlap Period") and no later than thirty (30) days prior to the due date for filing of such Tax

Return, Purchaser shall provide Seller with notice, which notice shall (i) set forth Purchaser's calculations regarding the amount of such Taxes which Purchaser determines is allocated to Seller pursuant to Section 6.5.3 hereof in sufficient detail and particularity to enable Seller to verify the amount of the Taxes and (ii) include a draft of such Tax Return. No later than fifteen (15) days prior to the due date for filing of such Tax Return, Seller shall notify Purchaser of any reasonable objections Seller may have to Purchaser's calculations regarding the amount of such Taxes which Purchaser determined is allocated to Seller pursuant to Section 6.5.3 hereof and to any items set forth in such draft Tax Returns. Purchaser and Seller agree to consult and resolve in good faith any such objection, it being understood and agreed that in the absence of any such resolution, any and all such objections shall be resolved in a manner consistent with the past practices with respect to such items unless otherwise required by law.

6.5.2 Controversies.

Purchaser shall promptly forward to Seller all notifications and other communications from any taxing authority relating to any Tax audit or other proceeding relating to the Tax liability of the Company with respect to a taxable year or period (or portion thereof) ending on or prior to the Closing Date. The failure of Purchaser to give Seller such written notice shall excuse Seller from its obligations under Section 10.1 hereof with respect to any increased Tax liability directly or indirectly attributable to any such notification or other communication if the failure to provide such written notice adversely affected the ability of Seller to contest any claim arising from such Tax audit or other proceeding. Seller and its duly appointed representatives shall have the exclusive authority to control any audit or examination by any taxing authority, initiate any claim for refund, amend any Tax Return and contest, resolve and defend against any assessment for additional Taxes, notice of Tax deficiency or other

adjustment of Taxes of or relating to any liability for Taxes of the Company for all taxable years or periods (or portions thereof) ending on or prior to the Closing Date, and Seller shall be entitled to any Tax refund relating to any such taxable period. Purchaser shall have the exclusive authority to control any audit or examination by any taxing authority, initiate any claim for refund, amend any Tax Return and contest, resolve and defend against any assessment for additional Taxes, notice of Tax deficiency or other adjustment of Taxes of or relating to any liability for Taxes that are imposed upon or by reference to the income, properties or assets of the Company or the conduct of the operation of the Company for all taxable periods after the Closing Date; provided, however, that (i) neither Purchaser nor its duly appointed representatives shall, without the prior written consent of Seller, enter into any settlement of any contest or otherwise compromise any issue that affects or may affect the Tax liability of Seller for any taxable year or period (or portion thereof) ending on or prior to the Closing Date and (ii) neither Purchaser nor its duly appointed representatives shall, without the prior consent of Seller, which consent shall not be unreasonably withheld, enter into any settlement of any contest or otherwise compromise any issue that would or may result in a proper reduction in liability accruals for Taxes on the books and records of the Company or require payment by Seller of any amount under Section 10.1 hereof unless Purchaser shall have waived or caused to be waived any right to indemnification for any such amounts from Seller.

6.5.3 Apportionment of Taxes.

Any Taxes of the Company that relate to the Overlap Period shall be apportioned between the portion of such period ending on or prior to the Closing Date and the portion of such period beginning after the Closing Date, and based on accounting methods, elections and conventions that do not have the effect of distorting income or expenses as follows: (i) in the case of Taxes

other than income, sales and use and withholding Taxes, on a per diem basis, and (ii) in the case of income, sales and use and withholding Taxes, as determined from the books and records of the Company as though the taxable year of the Company terminated at the close of business on the Closing Date.

6.5.4 Tax Benefit.

If Seller makes any payment under Section 4.1.7(b) hereof for any taxable year or period ending on or prior to the Closing Date and the payment of such Tax liability gives rise to a Tax Benefit to Purchaser, then promptly following the filing of the Tax Return (or Tax Returns) reflecting such Tax Benefit, Purchaser shall pay to Seller the amount of such Tax Benefit. The determination of any such Tax Benefit shall be made in good faith by Purchaser and, if requested by Seller, shall be verified in writing by an independent certified public accounting firm selected by Purchaser and reasonably satisfactory to Seller. For purposes of this Agreement, "Tax Benefit" shall mean the sum of the amount by which the actual Tax liability (after giving effect to any alternative minimum or similar Tax) of a corporation to the appropriate taxing authority is reduced (including, without limitation, by or as a result of a deduction, increase in basis, entitlement to refund, credit or otherwise, whether available in the current taxable year, as an adjustment to the taxable income in any other taxable year or as a carryforward or carryback, as applicable) plus any interest (on an after-Tax basis) from such government or jurisdiction relating to such Tax liability.

6.5.5 Cooperation and Exchange of Information.

Purchaser and Seller shall provide each other with such cooperation, information and business records as may be reasonably requested with respect to the filing of any Tax Return, amended Tax Return or claim for refund, the determination of a liability for Taxes, or a right to refund of Taxes, or the evaluation of any claim for indemnification under Sections 10.1 or 10.2 hereof or the conduct of any audit, investigation or contest or other proceeding in respect of Taxes. Such cooperation, information and business records shall include providing copies of all relevant Tax Returns, together with accompanying schedules and related work papers, documents relating to rulings or other determinations by taxing authorities and records concerning the ownership and tax basis of property, which Purchaser or Seller may possess concerning the Company or the Shares. Purchaser and Seller shall make their employees available to each other on a mutually convenient basis to provide explanation of any documents or information provided hereunder. Notwithstanding the foregoing, neither Purchaser nor Seller shall be required to prepare any documents or determine any information not then in its possession in response to a request under this Section 6.5.5. Purchaser and Seller shall reimburse each other for any reasonable out-of-pocket costs incurred by the other in providing any Tax Return, document or other written information and shall reimburse the other for any reasonable out-of-pocket costs (including regular wages, salaries and traveling expenses) of making employees available, upon receipt of reasonable documentation of such costs. Except as otherwise provided in Section 11.8 hereof, Purchaser shall retain all Tax Returns, schedules and work papers and all material records or other documents relating thereto, until the expiration of the period of time beginning on the Closing Date and ending on the later of the seventh (7th) year anniversary of the Closing Date or the date on which taxes may no longer be assessed under the applicable statutes of limitation, including the period of waivers or extensions thereof, and thereafter, not to destroy or dispose of the Tax Returns, schedules and work papers and all material records or other documents relating thereto without giving written notice to Seller of such pending disposal and offering Seller the right to copy such documents and information.

Purchaser shall be entitled to dispose of the Tax Returns, schedules and work papers and all material records or other documents relating thereto described in such notice if Seller shall fail to request copies of such Tax Returns, schedules and work papers and all material records or other documents relating thereto within ninety (90) days after receipt of the notice described in the preceding sentence. Purchaser shall **[**and shall cause its Subsidiaries to**]** cooperate fully with Seller and any of its Affiliates in the defense of or pursuit of any claim or action which relates to the conduct of the Company's business and the ownership of its property and assets prior to the Closing Date. Any information obtained under this Section 6.5.5 shall be kept confidential, except as may be otherwise necessary in connection with the filing of returns or claims for refund or in conducting any audit or other proceeding.

6.6 Seller's Tradename, Trademarks and other Intellectual Property.

Promptly following Closing, Purchaser shall (a) cause the Company [and each of its Subsidiaries] to change its corporate name to a name that does not include the name "XX", "_____" or any derivatives thereof or anything confusingly similar thereto and (b) Purchaser, each Affiliate thereof and their respective directors, officers, successors, assigns, agents, or representatives shall not register, or attempt to register, and shall not directly or indirectly use or seek to register, in connection with any products or services anywhere in the world in any medium, any intellectual property that includes, is identical to or is confusingly similar to, any of the trademarks, service marks, domain names, trade names or other indicia of origin (i) set forth on **Schedule 6.6(a)** or (ii) owned by Seller or any Affiliate of Seller (collectively, the "Seller's Marks"), nor shall any of them challenge or assist any third party in opposing the rights of Seller or any Affiliate of Seller anywhere in the world in any such intellectual property. For the avoidance of doubt, in no event shall any of the intellectual property explicitly set forth on

Schedule 3.1.14 be deemed to be intellectual property that includes, is identical to or is confusingly similar to, any of the Seller's Marks. All contracts or agreements between Seller or any Affiliate of Seller on the one hand and the Company [or any of its Subsidiaries] on the other relating to the use of the name "XX", "_____" or any derivatives thereof or anything confusingly similar thereto, including all name protection and license agreements, shall immediately terminate as of the Closing Date.

ARTICLE 7. CONDUCT OF BUSINESS PENDING CLOSING

7.1 Conduct of Business Pending Closing.

Seller agrees that, during the period between the date of this Agreement and the Closing Date, Seller shall cause the Company [and each of its Subsidiaries] to conduct its business in a manner materially consistent with past practices of the Company [and each such Subsidiary], and [the Company shall not] [neither the Company nor any of its Subsidiaries shall] engage in any transactions out of the ordinary course of business. Furthermore, except as may otherwise be required under this Agreement, [the Company will not][neither the Company nor any of its Subsidiaries will], and Seller will cause the Company [and each of its Subsidiaries] not to, do any of the following without the prior written consent of Purchaser:

(i) incur or permit to be incurred any obligation or other liabilities (exclusive of health and property insurance premiums) individually in excess of _____ Dollars ($_____) or _____ Dollars ($_____) in the aggregate except for inventory purchases in the normal and ordinary course of business consistent with past practice;

(ii) voluntarily permit to be incurred any lien or encumbrance on any of the material properties or assets of the Company [or any of its Subsidiaries];

(iii) materially increase the rate of compensation for any employee of the Company (other than increases in the ordinary course and consistent with past practices or pursuant to a written agreement in effect on the date hereof), or otherwise enter into or alter the material terms of any employment, consulting or service agreement to which the Company [or any of its Subsidiaries] is a party;

(iv) commence, enter into or alter any profit sharing, 401(k) deferred compensation, bonus, stock option, stock purchase, pension, retirement, incentive plan or any fringe benefit plan for its employees;

(v) sever or terminate any employee except for cause in the ordinary course of business;

(vi) make or commit to any capital expenditure in excess of _____ Dollars ($_____) or make or commit to such expenditures which would, in the aggregate, exceed _____ Dollars ($_____);

(vii) dispose of any of the material properties or assets of the Company [or any of its Subsidiaries], except for sales of products of the Company [or such Subsidiary] in the ordinary course of business; or

(viii) authorize or enter into an agreement to do any of the foregoing.

ARTICLE 8. CLOSING DATE; CONDITIONS AND TRANSACTIONS

8.1 Closing Date and Place.

The consummation of the sale and purchase of the Shares contemplated by this Agreement (the "Closing") will take place at the offices of Seller at _____ as soon as practicable after the last of the conditions set forth in this Article 8 have been satisfied or waived (other than any such conditions that can only

be satisfied on the Closing Date), but in no event later than the second (2nd) Business Day thereafter or at such other date and time as may be mutually agreeable to the parties hereto (the "Closing Date"). The parties hereto agree that the Closing may be effected by telephonic facsimile.

8.2 Conditions Precedent to the Obligations of Purchaser.

The obligations of Purchaser under this Agreement are subject to the fulfillment by Seller prior to or at the Closing of each of the following conditions, any one or more of which may be waived in writing by Purchaser:

8.2.1 No Injunctive Proceedings.

No preliminary or permanent injunction or other order (including a temporary restraining order) of any state or federal court or other governmental agency which prevents the consummation by Seller of the transactions which are the subject of this Agreement or prohibits Purchaser's ownership of the Shares of the Company shall have been issued and remain in effect.

8.2.2 Representations and Warranties.

All representations and warranties of Seller and the Company contained in this Agreement shall be true and correct in all material respects as of the Closing Date, except (i) for each of the representations and warranties of Seller or the Company contained herein that are limited by materiality which shall be true and correct in all respects as of the Closing Date (except to the extent such representations and warranties expressly relate to an earlier date (in which case such representations and warranties shall be true and current on and as of such earlier date)), and (ii) that no representation or warranty of Seller or the Company shall be deemed to be

untrue or incorrect by reason of any transaction that conforms to the requirements of Article 7 hereof or is otherwise contemplated by this Agreement.

8.2.3 Performance of Agreements.

Seller and the Company shall have fully performed in all material respects all obligations, agreements, conditions and commitments required to be fulfilled by Seller and the Company pursuant to the terms hereof on or prior to the Closing Date.

8.2.4 Compliance Certificate.

Each of Seller and the Company shall have delivered to Purchaser its certificate, dated the Closing Date, executed on its behalf by its duly authorized representative, as to the fulfillment of the conditions set forth in Sections 8.2.2 and 8.2.3 hereof.

8.2.5 Consents, etc.

All authorizations, consents or approvals [designated with an asterisk (*)] on **Schedule 3.1.22** or **Schedule 4.1.3** shall have been obtained and be in full force and effect.

8.3 Conditions Precedent to the Obligations of Seller.

The obligations of Seller under this Agreement are subject to the fulfillment by Purchaser prior to or at the Closing of each of the following conditions, any one or more of which may be waived in writing by Seller:

8.3.1 No Injunctive Proceedings.

No preliminary or permanent injunction or other order (including a temporary restraining order) of any state or federal court or other governmental agency which prevents the consummation by Purchaser of the transactions which are the subject of this Agreement or prohibits Purchaser's ownership of the Shares or the Company shall have been issued and remain in effect.

8.3.2 Payment.

Purchaser shall have delivered to Seller the payment provided for in Section 2.1 hereof.

8.3.3 Representations and Warranties.

All representations and warranties of Purchaser contained in this Agreement shall be true and correct in all respects as of the Closing Date, except that no representation or warranty of Purchaser shall be deemed to be untrue or incorrect by reason of any transaction contemplated by this Agreement.

8.3.4 Performance of Agreements, Instruments of Transfer.

Purchaser shall have fully performed in all material respects all obligations, agreements, conditions and commitments required to be fulfilled by Purchaser on or prior to the Closing Date.

8.3.5 Compliance Certificate.

Purchaser shall have delivered to Seller its certificate, dated the Closing Date, executed on its behalf by its President or a Vice President, as to the fulfillment of the conditions set forth in Sections 8.3.3 and 8.3.4 hereof.

8.3.6 Consents, etc.

All authorizations, consents or approvals on **Schedule 5.1.6** shall have been obtained and be in full force and effect.

ARTICLE 9. TERMINATION

9.1 Termination of this Agreement.

(a) This Agreement may be terminated at any time prior to the Closing without any liability of any party to any other:

(i) by the mutual agreement of Seller and Purchaser; provided, that such termination is set forth in writing executed by both parties;

(ii) by Purchaser, if any of the conditions specified in Section 8.2 hereof shall not have been met by _____, 200_ and shall not have been waived in writing by Purchaser; or

(iii) by Seller, if any of the conditions set forth in Section 8.3 hereof shall not have been met by _____, 200_ and shall not have been waived in writing by Seller.

ARTICLE 10. INDEMNIFICATION

10.1 Indemnification by Seller.

Subject to the limits set forth in this Article 10, Seller agrees to indemnify, defend and hold Purchaser and each of Purchaser's shareholders, Affiliates, officers, directors, employees, agents, successors and assigns (Purchaser and such persons are collectively hereinafter referred to as "Purchaser Indemnified Persons"), harmless from and against any and all loss, liability, damage or deficiency (including interest, penalties, costs of preparation and investigation and reasonable attorneys' fees, but excluding lost profits, lost revenues, lost opportunities, consequential, punitive, treble or other special damages (regardless of the legal theory) unless actually paid to a third party in connection with a claim by such third party that is indemnifiable hereunder) (collectively "Losses") that Purchaser's Indemnified Persons may suffer, sustain, incur or become subject to, arising out of or due to: (a) any inaccuracy of any representation or warranty of Seller or the Company in this Agreement; or (b) the non-fulfillment of any covenant, undertaking, agreement or other obligation of Seller or the Company under this Agreement.

10.2 Indemnification by Purchaser.

Subject to the limits set forth in this Article 10, Purchaser agrees to indemnify, defend and hold Seller and Seller's shareholders, Affiliates, officers, directors, employees, agents, successors and assigns (Seller and such persons are hereinafter collectively referred to as "Seller Indemnified Persons"), harmless from and against any and all Losses that Seller Indemnified Persons may suffer, sustain, incur or become subject to arising out of or due to: (a) any inaccuracy of any representation or warranty of Purchaser in this Agreement; (b) the non-

fulfillment of any covenant, undertaking, agreement or other obligation of Purchaser under this Agreement; (c) the manufacture, sale, shipment or other distribution of the products of the Company, whether occurring before, after, or on the Closing Date; and (d) the ownership, operations, or control of the Company, whether occurring before, after, or on the Closing Date.

10.3 Survival of Representations and Warranties; Limitations.

The several representations and warranties of the parties contained in this Agreement and an indemnified persons' right to indemnity in accordance with this Article 10 shall survive the Closing Date and shall remain in full force and effect thereafter for a period of twelve (12) months after the Closing Date and shall be effective with respect to any inaccuracy therein or breach thereof, notice of which shall have been duly given within such twelve (12) month period in accordance with Section 10.4 hereof after which twelve (12) month period they shall terminate and be of no further force or effect. Notwithstanding the foregoing, a Purchaser Indemnified Person may give notice of, make a claim relating to and shall be indemnified in connection with: (i) the breach of the representations and warranties contained in Sections 3.1.9 and 3.1.16 hereof, at any time prior to sixty (60) days after the expiration of the appropriate statute of limitations and any extensions thereof; and (ii) any breach of the representations and warranties contained in Section 3.1.1, 3.1.2, 3.1.10, 3.1.15, the first sentence of Section 4.1.1, Section 4.1.4 and 4.1.6 hereof, at any time. Anything to the contrary contained herein notwithstanding, no indemnified person shall be entitled to any indemnification under this Article 10 with respect to any inaccuracy or breach of such representations or warranties unless and until the cumulative amount of all Losses exceed _____ Dollars ($_____) (the "Basket Amount"), and then only with respect to the excess over the Basket Amount, but in no event shall either party be liable to the other in an aggregate amount in excess of ____ Dollars

($_____)[15] (the "Cap"). The Basket Amount and the Cap shall not be applicable to claims arising out of a breach of Section 3.1.1, 3.1.2, 3.1.3, 3.1.10, 3.1.15, 4.1.1, 4.1.4 or 4.1.6 hereof. Notwithstanding anything contained in this Section 10.3 to the contrary, the covenants of the parties contained in this Agreement shall survive in accordance with their respective terms.

10.4 Indemnification Procedure.

(a) Within a reasonable period of time after the incurrence of any Loss by any Purchaser Indemnified Persons or any Seller Indemnified Persons, including any claim by a third party described in Section 10.5, which might give rise to indemnification hereunder, the party seeking indemnification (the "Indemnitee") shall deliver to the party from which indemnification is sought (the "Indemnitor") a certificate (the "Certificate"), which Certificate shall:

(i) state that the Indemnitee has suffered, sustained, incurred or become subject to Losses for which such Indemnitee is entitled to indemnification pursuant to this Agreement;

(ii) specify in reasonable detail each individual item of Loss included in the amount so stated, the date that the Indemnitee suffered, sustained, incurred or became subject to such item and the nature of the misrepresentation, breach of covenant or claim to which each such item is related and the computation of the amount to which such Indemnitee claims to be entitled hereunder; and

(iii) be delivered to the Indemnitor.

(b) In the event that the Indemnitor shall object to the indemnification of an Indemnitee in respect of any claim or claims specified in any Certificate, the Indemnitor shall,

[15] 10% of the Purchase Price is aggressive; 15-20% is more typical.

within thirty (30) days after receipt by the Indemnitor of such Certificate, deliver to the Indemnitee a notice to such effect and the Indemnitor and the Indemnitee shall, within the thirty (30) day period beginning on the date of receipt by the Indemnitee of such objection, attempt in good faith to agree upon the rights of the respective parties with respect to each of such claims to which the Indemnitor shall have so objected. If the Indemnitor and the Indemnitee shall succeed in reaching agreement on their respective rights with respect to any of such claims, the Indemnitor and the Indemnitee shall promptly prepare and sign a memorandum setting forth such agreement. Should the Indemnitor and the Indemnitee be unable to agree as to any particular item or items or amount or amounts, then the Indemnitor and the Indemnitee shall submit such dispute to a court of competent jurisdiction. The party which receives a final judgment in such dispute shall be indemnified and held harmless for all reasonable attorneys' and consultant's fees or expenses by the other party.

(c) Claims for Losses specified in any Certificate to which an Indemnitor shall not object in writing within thirty (30) days of receipt of such Certificate, claims for Losses covered by a memorandum of agreement of the nature described in Section 10.4(b) hereof, claims for Losses the validity and amount of which have been the subject of judicial determination as described in Section 10.4(b) and claims for Losses the validity and amount of which shall have been the subject of a final judicial determination, or shall have been settled with the consent of the Indemnitor, as described in Section 10.5 hereof, are hereinafter referred to, collectively, as "Agreed Claims." Within ten (10) days of the determination of the amount of any Agreed Claims, the Indemnitor shall pay to the Indemnitee an amount equal to the Agreed Claim by wire transfer in immediately available funds to the bank account designated by the Indemnitee in a notice to the Indemnitee not less than two (2) Business Days prior to such payment.

10.5 Notice and Opportunity to Defend.

If a claim by a third party is made against any Indemnitee and if such Indemnitee intends to seek indemnification with respect thereto under this Article 10, then such Indemnitee will give the Indemnitor written notice of such claim or the commencement of such action or proceeding within fifteen (15) days of Indemnitee's becoming aware thereof; provided, however, that delay or failure to so notify the Indemnitor shall only relieve the Indemnitor of its obligations to the extent, if at all, that it is prejudiced by reasons of such delay or failure. The Indemnitor shall have a period of thirty (30) days within which to respond thereto. If the Indemnitor accepts responsibility within such thirty (30)-day period, the Indemnitor shall be obligated to compromise or defend, at its own expense and through counsel reasonably satisfactory to the Indemnitee, such matter. If the Indemnitor does respond within such 30-day period and rejects responsibility for such matter in whole or in part, or does not respond, the Indemnitee shall be free to pursue, without prejudice to any of its rights hereunder, such remedies as may be available to the Indemnitee under applicable law at the Indemnitor's expense (subject, for the avoidance of doubt, to the limits set forth in this Article 10). The Indemnitee agrees to cooperate fully with the Indemnitor and its counsel in the defense against any such asserted liability. In any event, the Indemnitee shall have the right to participate in a non-controlling manner and at its own expense in the defense of such asserted liability. Any compromise of such asserted liability by the Indemnitor shall require the prior written consent of the Indemnitee and until such consent is obtained the Indemnitor shall continue the defense of such asserted liability. If, however, the Indemnitee refuses its consent to a bona fide offer of settlement containing a complete release of the Indemnitee from all liability in connection with the underlying claim that the Indemnitor wishes to accept, the Indemnitee may continue to

pursue such matter, free of any participation by the Indemnitor, at the sole expense of the Indemnitee. In such event, the obligation of the Indemnitor to the Indemnitee shall be equal to the lesser of (i) the amount of the offer of settlement which the Indemnitee refused to accept plus the costs and expenses of the Indemnitee prior to the date the Indemnitor notifies the Indemnitee of the offer of settlement; or (ii) the actual out-of-pocket amount the Indemnitee is obligated to pay as a result of the Indemnitee's continuing to pursue such matter. The Indemnitor shall be entitled to recover from the Indemnitee any additional expenses incurred by the Indemnitor as a result of the decision of the Indemnitee to pursue such matter. So long as the Indemnitor is reasonably contesting any such claim in good faith, the Indemnitee shall not pay or settle such claim without the Indemnitor's prior written consent; provided that the Indemnitee may pay or settle such claim if it waives its right to indemnity therefor from the Indemnitor.

10.6 Reduction for Insurance [and Other Claims].

(a) The amount which the Indemnitor is required to pay to, for, or on behalf of the Indemnitee pursuant to this Article 10 shall be reduced (including, without limitation, retroactively) by any insurance proceeds actually recovered by or on behalf of the Indemnitee in reduction of the related indemnifiable loss (the "Indemnifiable Loss"). Amounts required to be paid, as so reduced, are hereinafter sometimes called an "Indemnity Payment." If the Indemnitee shall have received, or if the Indemnitor shall have paid on its behalf, an Indemnity Payment in respect of an Indemnifiable Loss and shall subsequently receive, directly or indirectly, insurance proceeds (which duplicate in whole or in part, the Indemnity Payment) in respect of such Indemnifiable Loss, then the Indemnitee shall promptly pay to the Indemnitor the amount of such insurance proceeds, or, if less, the amount of the Indemnity Payment. The parties hereto

agree that the foregoing shall not affect the subrogation rights of any insurance companies making payments hereunder.

(b) Notwithstanding anything to the contrary contained in this Article 10, if any Purchaser Indemnified Person is entitled to indemnification pursuant to any Material Contract or any other agreement, arrangement or understanding with respect to all or any portion of any indemnifiable Loss under this Article 10, such Purchaser Indemnified Person shall pursue all rights and remedies under any such Assumed Contract or other agreement, arrangement or understanding prior to asserting its rights under this Article 10. Any payment of an indemnifiable Loss under this Article 10 shall be net of any proceeds received by the Purchaser Indemnified Person under any such Assumed Contract or other agreement, arrangement or understanding.

10.7 Limitations of Remedies.

(a) Notwithstanding anything to the contrary set forth herein, the parties hereto agree that the indemnification provisions set forth in this Article 10 shall constitute the sole and exclusive remedy of either party for any breach or inaccuracy of any representation or warranty contained in this Agreement, other than such breaches or inaccuracies involving fraud or willful misconduct.

(b) Notwithstanding anything in this Article 10 to contrary, no person shall be entitled to indemnification under Sections 10.1 or 10.2 hereof if such person had knowledge on or prior to the Closing Date of the failure of any representation or warranty, the breach of any covenant or agreement or the existence of any fact, event or circumstance, which may serve as the basis for bringing a claim for indemnification under such Sections.

ARTICLE 11. MISCELLANEOUS

11.1 Expenses.

Except as otherwise set forth in this Agreement, each of the parties hereto shall pay its own expenses and costs incurred or to be incurred by it in negotiating, closing and carrying out this Agreement.

11.2 Notices.

All notices, requests, demands and other communications given hereunder (collectively, "Notices") shall be in writing and personally delivered, sent by facsimile or mailed by registered or certified mail, postage prepaid, as follows:

(a) If to Seller at:

_____
_____
_____
Attention: _____
Facsimile: _____

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

(b) If to Purchaser at:

_____
_____
_____
Attention: _____
Facsimile: _____

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

(c) If to the Company at:

_____
_____
_____
Attention: _____
Facsimile: _____

(d) All Notices shall be deemed delivered when actually received if personally delivered or sent by facsimile, or three days after having been placed in the mail, addressed in accordance with Sections 11.2(a), (b) or (c) hereof, as the case may be, provided that any notice sent by facsimile must immediately be placed in the mail. Each of the parties shall hereafter notify the other in accordance with this Section 11.2 of any change of address to which notice is required to be mailed.

11.3 Counterparts.

This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

11.4 Entire Agreement.

This Agreement constitutes the entire agreement between the parties and supersedes any prior understandings, agreements or representations by or among the parties, written or oral, to the extent they related in any way to the subject matter hereof.

11.5 Headings.

The headings contained in this Agreement and in the schedules hereto are for reference purposes only and shall not affect the meaning or interpretation of this Agreement.

11.6 Assignment and Amendment of Agreement.

This Agreement shall be binding upon the respective successors and assigns of the parties hereto. This Agreement may be amended only by written agreement of the parties hereto, duly executed by an authorized representative of each of the parties hereto. Notwithstanding the forgoing, Purchaser shall have the absolute right to assign its rights and obligations under this Agreement, in whole or in part, to any direct or indirect wholly owned Subsidiary or to any Affiliate of which Purchaser is a direct or indirect wholly owned Subsidiary; provided, further, that if Purchaser makes any such assignment referred, Purchaser shall remain liable under this Agreement.

11.7 Governing Law.

This Agreement shall be governed by and construed and enforced in accordance with the laws of the state of New York applicable to contracts made in that state, without giving effect to the conflict of laws principles thereof. Except as otherwise expressly provided in this Agreement, the parties hereto agree that any suit, action or proceeding seeking to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby may only be brought in the United States District Court for the Southern District of New York or any New York State court sitting in New York County, New York, and each of the parties hereby consents to the jurisdiction of such courts (and of the

appropriate appellate courts therefrom) in any such suit, action or proceeding and irrevocably waives, to the fullest extent permitted by law, any objection which it may now or hereafter have to the laying of the venue of any such suit, action or proceeding in any such court or that any such suit, action or proceeding which is brought in any such court has been brought in an inconvenient forum. Process in any such suit, action or proceeding may be served on any party anywhere in the world, whether within or without the jurisdiction of any such court.

11.8 Failure to Close.

If for any reason this Agreement is terminated prior to the Closing, Purchaser shall return to Seller all documents and other information, including all originals and all copies thereof, theretofore delivered to Purchaser by Seller. Purchaser shall not retain copies of any such documents or other information, and that certain Confidentiality Agreement, dated as of _____ __, 200_, between [Seller] and [Purchaser] shall remain in full force and effect.

11.9 No Third Party Rights.

Other than as set for in Sections 6.1, 10.1 and 10.2 hereof, this Agreement is not intended and shall not be construed to create any rights in any parties other than Seller and Purchaser and no person shall have any rights as a third-party beneficiary hereunder.

11.10 Non-Waiver.

The failure in any one or more instances of a party to insist upon performance of any of the terms, covenants or conditions of this Agreement, to exercise any right or privilege in this Agreement conferred or the waiver by said party of any breach of any of the terms, covenants or conditions of this Agreement shall not be construed as a subsequent waiver of any

such terms, covenants, conditions, rights or privileges, but the same shall continue and remain in full force and effect.

11.11 Severability.

The invalidity of any provision of this Agreement or portion of a provision shall not affect the validity of any other provision of this Agreement or the remaining portion of the applicable provision.

11.12 Incorporation of Schedules.

The schedules hereto are incorporated into this Agreement and shall be deemed a part hereof as if set forth herein in full. References herein to "this Agreement" and the words "herein," "hereof" and words of similar import refer to this Agreement (including its schedules as an entirety). In the event of any conflict between the provisions of this Agreement and any such schedule the provisions of this Agreement shall control.

11.13 Waiver of Jury Trial.

SELLER AND PURCHASER HEREBY IRREVOCABLY WAIVE, TO THE FULLEST EXTENT PERMITTED BY LAW, ALL RIGHTS TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER BASED UPON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OF THE TRANSACTIONS CONTEMPLATED HEREBY.

11.14 Non-Confidentiality.

Notwithstanding anything contained in this Agreement or in any other document, agreement or understanding relating to the transactions contemplated by this Agreement, each

party (and each employee, representative, or other agent of such party) is authorized to disclose to any and all persons, beginning immediately upon commencement of discussions regarding the transactions contemplated by this Agreement, and without limitation of any kind, the tax treatment and tax structure of such transactions, and all materials of any kind (including opinions or other tax analyses) that are provided to such party (or any employee, representative, or other agent of such party) relating to such tax treatment and tax structure. For purposes of this authorization, the "tax treatment" of a transaction means the purported or claimed U.S. federal and state income tax treatment of the transaction, and the "tax structure" of a transaction means any fact that may be relevant to understanding the purported or claimed U.S. federal and state income tax treatment of the transaction. None of the parties to the transactions contemplated by this Agreement provides tax advice, and each party should consult its own advisors regarding its participation in the transactions contemplated by this Agreement.

11.15 Non-Confidentiality.

Notwithstanding anything contained in this Agreement or in any other document, agreement or understanding relating to the transactions contemplated by this Agreement, each party (and each employee, representative, or other agent of such party) is authorized to disclose to any and all persons, beginning immediately upon commencement of discussions regarding the transactions contemplated by this Agreement, and without limitation of any kind, the tax treatment and tax structure of such transactions, and all materials of any kind (including opinions or other tax analyses) that are provided to such party (or any employee, representative, or other agent of such party) relating to such tax treatment and tax structure. For purposes of this authorization, the "tax treatment" of a transaction means the purported or claimed U.S. federal and state income tax treatment of the transaction, and the "tax structure" of a transaction means

any fact that may be relevant to understanding the purported or claimed U.S. federal and state income tax treatment of the transaction. None of the parties to the transactions contemplated by this Agreement provides tax advice, and each party should consult its own advisors regarding its participation in the transactions contemplated by this Agreement.

11.16 No Strict Construction.

The parties hereto have participated jointly in the negotiation and drafting of this Agreement. In the event of any ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by all parties hereto, and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provision of this Agreement.

ARTICLE 12. DEFINED TERMS

12.1 Definitions.

(a) For the purposes of this Agreement, the term "Affiliate" means with respect to any Person any person directly or indirectly controlling, controlled by, or under common control with such Person.

(b) For purposes of this Agreement, the term "to the knowledge of the Company" or other term of similar import means the actual knowledge of [insert names(s) of senior managers of the Company involved in the transaction], and the term "to the knowledge of Seller" or other terms of similar import means the actual knowledge of [insert names(s) of senior managers of Seller involved in the transaction].

(c) For purposes of this Agreement, "Material Adverse Effect" means any change, effect or circumstance that, individually or when taken together with all other changes, effects or circumstance that have occurred prior to the date of determination of the occurrence of the material adverse effect, is (1) with respect to the Company, materially adverse to the properties, assets, the financial condition or results of operations of the Company [and its Subsidiaries taken as a whole], excluding, in each case, any change, effect or circumstance that results from or relates to (i) changes in (A) United States or global economic conditions which do not disproportionately impact the Company [and its Subsidiaries taken as a whole], (B) the industry in which the Company conducts its business which do not disproportionately impact the Company [and its Subsidiaries taken as a whole], (C) laws or accounting standards, principles or interpretations of general application which do not disproportionately impact the Company [and its Subsidiaries taken as a whole], (ii) the announcement of this Agreement or consummation of the transactions contemplated hereby or (iii) the announcement by Purchaser of its plans or intentions with respect to the Company [and/or any of its Subsidiaries] or (2) with respect to Seller, materially adverse to the ability of Seller to perform its obligations under this Agreement.

(d) For purposes of this Agreement, "Person" shall mean and include an individual, a partnership, a joint venture, a corporation, a limited liability company, a limited liability partnership, a trust, an incorporated organization and a Governmental or Regulatory Authority.

12.2 Other Definitions.

In addition to the foregoing, the following terms shall have the respective meanings assigned thereto in the Sections indicated below:

IN WITNESS WHEREOF, Seller and Purchaser have duly executed and delivered this Agreement as of the day and year first above written.

SELLER

By: _____

Title: _____

PURCHASER

By: _____

Title: _____

AM07 Environmental Contract Session		
Section Heading	**Seller's Language**	**Buyer's Language**
Absence of Certain Changes		Since the Balance Sheet Date and through the date hereof, except as set forth in Schedule X, the Seller has conducted its business only in the ordinary course and there has not occurred with respect to the Company: … (x) any Environmental Claim (as defined in Environmental Section hereto).
Real Property		Except as set forth on Schedule X hereto, the Company has (a) good and marketable title in fee simple to all of the real property listed in Schedule X hereto owned by it, … in each case free and clear of all options, rights of first refusal, claims, mortgages, liens, charges, easements, security interests, indentures, deeds of trust, rights of way, restrictions on the use of real property, encroachments, licenses to third parties, leases to third parties, security agreements or any other encumbrances and other restrictions or limitations on use of real or personal property, or irregularities in title thereto, including any liens or conditions imposed by Environmental Property Transfer Act or Environmental Laws (both terms defined in Section 3.1.21 hereto) (collectively, "Liens") other than (i) those listed in Schedule X hereto, (ii) Liens for current taxes, assessments or governmental charges not yet due and delinquent, and (iii) those which do not, individually or in the aggregate, materially interfere with the use of the real properties or materially detract from their value (collectively, "Permitted Liens"). … The ownership or lease of real property by the Company or the use thereof, as presently used by the Company, does not violate any local zoning or similar land use laws or governmental regulations, including Environmental Laws. The Company is not in violation of or in noncompliance with any covenant, condition, restriction, order or easement affecting the real property owned or leased by the Company, including imposed by Environmental Law.

Books and Records		The books of account, minute books, stock record books and other records of the Company, including any Environmental Records (as defined in Section X) are true, complete and correct in all material respects and have been maintained in accordance with sound and prudent business practices.
Environmental Matters	(a) For purposes of this Agreement "Environmental Law" shall mean any law, statute, regulation, judgment, treaty, or order of federal, state, local and foreign, international or multinational government or other current requirements of law, including common law, relating to the protection of the environment and to the manufacture, use, transport, treatment, storage, disposal, release or threatened release of petroleum products, asbestos, urea formaldehyde insulation, polychlorinated biphenyls or any substance listed, classified or regulated as "hazardous" or "toxic" (collectively hereinafter referred to as "regulated substances"). (b) Except as set forth on **Schedule X** hereto, to the knowledge of the Company: (i) the Company is in compliance with Environmental Laws that is applicable to it or to its ownership or use of any of its properties or assets, except for such noncompliance as would not have a Material Adverse Effect with respect to the Company; (ii) there are no claims, proceedings, investigations or actions by any governmental or regulatory authority or other person or entity pending or threatened in connection with the operation of the business, properties or assets of the Company [or any of its Subsidiaries] alleging a violation by Company of any Environmental Law; and (iii) there are no facts, circumstances or conditions relating to the present operation of the properties, assets and business of the Company [or any of its Subsidiaries] (including the disposal of any regulated substances), or to any real property currently or formerly owned or operated by the Company [or any of its Subsidiaries], that could reasonably be expected to give rise to any liability, under applicable Environmental Law. (c) Other than as set forth in this Section X, and inclusive of Section X hereto, the Company does not make any representations or warranties, either	(a) For purposes of this Agreement, the capitalized terms defined below shall have the meanings ascribed to them below. (i) "CERCLA" means the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. §§ 9601 et seq.), as amended, and the rules and regulations promulgated thereunder, and any state law counterpart. (ii) "CERCLIS" means the Comprehensive Environmental Response and Liability Information System, as provided for by 40 C.F.R. § 300.5. (iii) "Environmental Assessment" means any soil or groundwater test, survey, environmental assessment or other inspection, test or inquiry (including analytical data, boring logs, photographs and other imaging) conducted by Shareholder or Company, or any agent of Shareholder or Company or in the possession of Shareholder or Company and its agents on any real property, facilities or improvements presently or formerly owned, occupied, or leased by Shareholder in connection with the operations and business of the Company. (iv) "Environmental Claim" means any written or oral notice, service of process, claim, demand or other communication (collectively hereinafter a "claim") by any Governmental or Regulatory Entity or any person or entity alleging or asserting liability under statute, common law or any theory of law for damages, investigatory costs, cleanup costs, response costs, damages to natural resources or other property, personal injuries, fines or penalties arising out of, based on or resulting from (a) the presence, Release or threatened Release into the indoor or outdoor environment, of any Hazardous Material at any location, whether intentional or non-intentional and whether in compliance
	express or implied, with respect to any environmental matters. Any information, reports, statements, documents or records that may have been provided to Buyer or its agents by Seller, its agents or employees concerning environmental matters shall not be representations or warranties. Buyer shall rely only upon its own inspection of the properties, assets and business of the Company in assessing any environmental matters with respect to Company.	with Environmental Law at the time of its occurrence, or (b) circumstances forming the basis of any violation, or alleged violation, of any Environmental Law or any Environmental Permit, regardless of whether Shareholder deems such claims to have merit or not. The term "Environmental Claim" shall include any claim asserted by any Governmental or Regulatory Entity or any third party for enforcement, penalties, termination or withdrawal of an Environmental Permit, cleanup, removal, response, remedial or other actions or damages pursuant to any applicable Environmental Law, and any claim by any third party seeking damages, penalties, contribution, indemnification, cost recovery, compensation, injunctive or other equitable relief resulting from the presence of Hazardous Materials or arising from alleged injury or threat of injury to health, safety or the environment, and shall also include any request for information under Section 104(e) of CERCLA or any claim from a person or entity representing a "potentially responsible party" group alleging liability of Shareholder and/or Company under CERCLA relating to the operation or business of the Company. (v) "Environmental Law" or "Environmental Laws" shall mean all federal, state, foreign and local statutes, regulations, directives, ordinances and other rules, orders, decrees, judgments, treaties, standards, policies or guidelines having the effect of law, principles of common law, and other standards of practice which pertain to protection of human health, safety and the environment. Environmental Laws include those relating to (1) the manufacture, processing, use, labeling, distribution, treatment, storage, discharge, disposal, recycling, generation or transportation of Hazardous Materials; (2) air (including indoor air), soil, surface, subsurface, groundwater or noise pollution; (3) Releases or threatened Releases; (4) protection of wildlife, endangered species, wetlands or natural resources; (5) Tanks; (6) health and safety of employees and other persons; (7) the presence or content of

		Hazardous Materials in a product, item or article, whether a component or finished product; (8) product life-cycle; (9) land use and zoning requirements; and (10) notification requirements relating to the foregoing. Without limiting the above, Environmental Law also includes the following within the United States: (i) CERCLA; (ii) the Solid Waste Disposal Act, as amended by RCRA; (iii) the Emergency Planning and Community Right to Know Act of 1986 (42 U.S.C. §§ I 101 et seq.), as amended; (iv) the Clean Air Act (42 U.S.C. §§ 7401 et seq.), as amended; (v) the Clean Water Act (33 U.S.C. §§ 1251 et seq.), as amended; (vi) The Toxic Substances Control Act (15 U.S.C. §§ 2601 et seq.), as amended; (vii) the Hazardous Materials Transportation Act (49 U.S.C. §§ 1801 et seq.), as amended; (viii) the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. §§ 136 et seq.), as amended; (ix) the Federal Safe Drinking Water Act (42 U.S.C. §§ 300 et seq.), as amended; (x) the Federal Radon and Indoor Air Quality Research Act (42 U.S.C. §§ 7401 note, et seq.); (xi) the Occupational Safety and Health Act (29 U.S.C §§ 651 et seq.), as amended; and (xii) any state, county, municipal or local statutes, laws or ordinances similar or analogous to (including counterparts of) any of the statutes listed above in effect as of the Closing Date. (vi) "Environmental Permit" or "Environmental Permits" shall mean the licenses, certificates, permits, permissions, registrations, governmental approvals, agreements, authorizations, variances, and consents which are required under or are issued pursuant to an Environmental Law. (vii) "Environmental Property Transfer Act" shall mean an Environmental Law that conditions, restricts, prohibits, or requires notice or disclosure in land records or to governmental parties as a result of the transfer, sale, lease, reduced operations, abandonment, shutting down, or closure of any property, real property, facilities, operations, or business. Such laws include but are not limited to the Industrial Site Recovery Act (N.J.S.A. 13:1K) in New Jersey as well as other laws that condition transfer of real estate

		containing wells or septic systems. (viii) "Environmental Record" or "Environmental Records" means any record, document, file, report, data, or analysis, whether in paper or electronic form (collectively hereinafter referred to as "records") pertaining to Environmental Laws or Environmental Permits or any record required to be generated, maintained, or filed by Company or required to be submitted from time to time to Governmental or Regulatory Entities under Environmental Law or Environmental Permits. (ix) "Governmental or Regulatory Entity" or "Governmental or Regulatory Entities" shall mean any instrumentality, subdivision, court, administrative agency, commission, official or other authority of the United States or any other country or any state, province, prefect, municipality, locality or other government or political subdivision thereof, or any quasi-governmental or private body exercising any regulatory, taxing, importing or other governmental or quasi-governmental authority. (x) "Hazardous Material" or "Hazardous Materials" shall mean any chemical, pollutant, contaminant, pesticide, fungicide, rodenticide, poison, petroleum or petroleum product, radioactive substance, biological material, genetically modified organism, wastes (including solid, hazardous, extremely hazardous, special, dangerous, or toxic), any substance, chemical or material regulated, listed, limited or defined as such under any Environmental Law, including: (i) any by-products, derivatives, or combinations of such material; (ii) lead, asbestos, asbestos-containing material, presumed asbestos-containing material, polychlorinated biphenyls, solvents and waste oil, and mold or other indoor air contaminants; (ii) any "hazardous substance," "pollutant", "toxic pollutant" or "contaminant" as defined under CERCLA and/or the Clean Water Act; and (iii) any "hazardous waste" as defined under RCRA. (xi) "RCRA" means the Resource Conservation and Recovery Act (42 U.S.C. §§ 6901 et seq.), as amended, and any state counterpart.

		(xii) "Release" or "Releases" means any spill, discharge, leak, migration, emission, escape, injection, dumping, leaching, or other release of any Hazardous Material into the indoor or outdoor environment, whether or not intentional, and whether or not notification or reporting to any governmental agency was or is required at the time it initially occurred or continued to occur. Release includes the meaning of Release as defined under CERCLA. (xiii) "Tank" or "Tanks" means above-ground and Underground Storage Tanks, containers, vessels and related equipment, including appurtenant pipes, lines and fixtures, containing or previously containing any Hazardous Materials or fractions thereof. (xiv) "Underground Storage Tank" or "Underground Storage Tanks" means any one or combination of tanks, including underground pipes connected thereto, which is used to contain an accumulation of material, and the volume of which (including the volume of the underground pipes connected thereto) is ten (10) percent or more beneath the surface of the ground. The term also means any pit, cistern, sump, septic system, cesspool, underground injection or seepage system that was or is not intended to permanently contain any liquid or semi-liquid placed into it. (b) Shareholder hereby represents and warrants to Purchaser the following: (i) Shareholder has furnished to Purchaser true, accurate, and complete copies of (i) all reports of inspections of the business and property of the Company made through the date hereof pertaining to environmental matters, including any Environmental Assessments (including drafts thereof); (ii) Environmental Records pertaining to communications with Governmental or Regulatory Entities, all of which are listed on Schedule X hereto. All deficiencies, if any, noted in such reports, documents or records have been corrected, except as noted on Schedule X hereto. (ii) Shareholder has furnished to Purchaser true, accurate and complete

		copies of all Environmental Permits as of the date hereof, all of which are listed on Schedule X hereto; (iii) Except as set forth on Schedule X hereto, and in addition to any other provisions of this Agreement: (a) the Company and its operations and business are in compliance with all Environmental Laws; (b) the Company has obtained all Environmental Permits necessary for its operations and business, all such Environmental Permits are in good standing, and Company is in compliance with the conditions of all such Environmental Permits; (c) without limiting (i) and (ii) above, the real property described in Schedule X hereto ("Real Property") are and have been owned, leased, operated and maintained in compliance with all applicable Environmental Laws and Environmental Permits during Company's record of beneficial ownership, lease, sublease, operation or occupancy, and, to the best knowledge of Shareholder, all such real properties were so operated and maintained prior to such date; (d) all real properties formerly owned or leased by Company or used in connection with the business or operations ("Formerly Owned or Leased Real Property") are identified on Schedule X hereto, and were operated by Company in compliance with all Environmental Laws and Environmental Permits during Company's period of ownership, lease, sublease, operation or occupancy; (e) without limiting (iii) and (iv) above relating to Real Property and to Formerly Owned or Leased Real Property, (a) no polychlorinated biphenyl is or was present, (b) no surface impoundments for Hazardous Materials, active or abandoned, are or were present, at, on or under any such property during any period that Company owned, operated or leased such property, nor, to the best knowledge of Shareholder, at any other time; (f) no Real Property or Formerly Owned or Leased Real Property is listed or proposed for listing on the National Priorities List under CERCLA,

		CERCLIS or any similar state or local list of sites pertaining to Releases of Hazardous Materials or to landfills requiring investigation or clean-up; (g) the Company does not own, operate or lease, nor has Company owned, operated or leased, a treatment, storage or disposal facility as part of its business or operations requiring a permit, closure or management under RCRA or under any comparable state or local law. (h) there has been no Release or threatened Release of a Hazardous Material at, on, under or in any of the Real Property or Formerly Owned or Leased Real Estate that could give rise to an Environmental Claim against the Company or Shareholder; (i) without limiting (viii) above, the soil, subsoil, bedrock, surface or groundwater at, on or under the Real Property is free of any Hazardous Materials and there is no threat of a Release of Hazardous Materials on, at or under the Real Property from the operations or business of the Company, or from adjacent properties or businesses, that could give rise to an Environmental Claim against Company or Shareholder. (j) no Liens or land use restrictions have arisen under or pursuant to any Environmental Law or Environmental Property Transfer Act on any Real Property or Formerly Owned or Leased Real Property, and no action has been taken by any Governmental or Regulatory Entity or, to the best knowledge of Shareholder, is in the process of being taken, that could subject any such property to such Liens or restrictions, and Shareholder has not been and does not expect to be required to place any notice or restriction relating to the presence of Hazardous Materials at any such property; (k) without limiting (x) above, the transaction contemplated by this Agreement is not subject to any Environmental Property Transfer Act; (l) there are no Tanks at, in, on or under any Real Property that could give rise to any Environmental Claims against the Shareholder or the Company. For any removed, closed or abandoned Tanks at, in or under any Real Property or any Formerly Owned or Leased Real

		Property, Company has done so in compliance with Environmental Law. (m) Company has not transported or arranged for the transportation, processing (including toll manufacturing), or disposal of any Hazardous Material in connection with the operation or business of the Company to any facility or location that is (i) listed on the National Priorities List under CERCLA, (ii) listed for possible inclusion on the National Priorities List in CERCLIS or on any similar state or local list or (iii) the subject of enforcement or remediation actions by any Governmental or Regulatory Entity that may lead to Environmental Claims against Company or Shareholder; (n) the Real Property and any facilities or improvements are free of asbestos or asbestos containing material, whether friable or non-friable, and all asbestos abatement measures (if any) pertaining to such facilities and improvements have been conducted in compliance with the Occupational Health and Safety Act asbestos regulations, 29 C.F.R. § 1926.58, the Asbestos Hazard Emergency Response Act, 40 C.F.R. § 763, Subpart E, the Environmental Protection Agency's NESHAPS Asbestos Regulations, 40 C.F.R. § 61.145, 61.149(e), 61.150, and any similar local, state or foreign laws, rules or regulations, as applicable. (o) there are no other Environmental Claims not specifically addressed elsewhere in this Agreement either pending or threatened against or by the Shareholder in connection with the Company or its business or operations and there are no facts or circumstances known, including any inquiries or investigations by Governmental or Regulatory Entities that could reasonably be expected to form the basis of any such Environmental Claims; (p) there are no draft or pending Environmental Laws or Environmental Permits that will or may go into effect prior to the Closing Date that will have any adverse effect on the Company or impose any conditions or limitations on the operation or business of the Company not in effect as of the date hereof.

		(q) no Environmental Permit listed in Schedule X hereof will expire or terminate or be withdrawn prior to the Closing Date and no Environmental Record is required or scheduled to be submitted to a Governmental or Regulatory Entity prior to Closing Date; (r) there are no capital expenditures ongoing, planned or required to control, remediate or eliminate any occupational hazard (as defined under applicable Environmental Laws) by means of engineering controls, arising from the operations or the business of the Company; (s) there are no other requirements to file a notice or other submission to a Governmental or Regulatory Entity under Environmental Law, or to modify any provision of any agreement, consent order or consent decree entered into under an Environmental Law as a result of the transaction contemplated by this Agreement. (t) the Company has not entered into or agreed to, nor does it contemplate entering into, any consent decree or order is respect of the operations, business or any of the Real Property with respect to Environmental Law, and the Company is not subject to any court order relating to compliance with, or addressing the presence of Hazardous Materials under, any Environmental Law in respect to the operations or business or Real Property of the Company; and (u) the Company and Shareholder have not assumed any liability or obligation that has or may arise relating to an Environmental Claim of any other person or entity.
Due Diligence		The Purchaser shall have completed all business and legal review of the Company for which the Seller shall have afforded the Purchaser full access, including for an environmental investigation or review, and the Purchaser shall in its sole discretion be satisfied with the results of said review.
Closing Documents		The documents demonstrating to Purchaser's sole satisfaction compliance with any applicable Environmental Property Transfer Act.

ACC Association of Corporate Counsel

Panelists

- Lee Braem, *Degussa Corporation*
- David H. Franzel, *James Campbell Company*
- Vincent M. Gonzales, *Sempra Energy*
- Bonni F. Kaufman, *Holland & Knight*

The ideas and thoughts expressed by the panelists reflect their individual and personal opinions, and not necessarily the views of their respective companies and firms. Thank you.

Program Objectives

- For the transactional attorney/generalist to develop a comfort level and understanding of environmental provisions in a deal.
- For the environmental attorney to benchmark his/her practice & tools.
- For the in-house practitioner to become a smarter client.

Program Preview

- Preliminary Considerations
- Two Hypotheticals
- Key Environmental Provisions
  - Definitions
  - Representations & Warranties
  - Covenants
  - Indemnities
  - Environmental Due Diligence
- Q&A

What is in the CD?

- Presentation slides & panelists' bios
- Copy of articles (reprinted w/ permission):
  - *ACC Docket* (June 2007): "Deal or No Deal: Recent Developments Impacting Environmental Due Diligence in M&A Transactions"
  - *Practical Litigator* (May 2007): "A Model Letter for a Model Mediation"
  - "Contaminated Property: When the Agency Delays, Who Pays?"
- Sample definitions, representations, warranties, covenants & indemnities, etc.

Caveat: The language offered here

- Is sample language only; any resemblance to actual transaction documentation is not intended and is purely coincidental;
- Needs to be revised to fit the facts of a particular transaction; and
- Once revised, should be reviewed by local or outside counsel to ensure enforceability.

Preliminary Considerations

"It isn't pollution that's harming the environment. It's the impurities in our air and water that are doing it."

Dan Quayle

The Environmental Liability Maze

- Civil & Criminal Liability
- Federal, State & Local Laws
- Employee Liability & Corporate Liability
- Private Citizen & Citizen Group Enforcement
- Traditional Damages, Remediation Costs & Natural Resource Damages

Types of Deals

- Asset Purchase
- Stock Purchase
- Merger
- Bankruptcy Sale
- Long Term & Short Term Leases

Each has its own unique set of issues.

Hypothetical # 1: Asset Purchase

Non-Binding Letter of Intent

- Seller: owns 60,000 acres agricultural land
  - Sugar cane for over 100 years
  - Old warehouses w/ asbestos & lead
  - Old tractors & equipment
  - Chemical insecticides
- Buyer: local electric utility
  - Buy 30,000 acres to operate bagasse-fired power plant
  - Bagasse: from sugar cane production

30 days to negotiate PSA

- Concerned about environmental condition
  - Phase I environmental investigation
  - Followed by Phase II
  - Contaminants of concern
- Parties motivated
  - Weak sugar cane market
  - Looming energy crisis
  - Agree to use neutral property appraiser

Seller prepares first draft of PSA

1. "As is" purchase
2. Full indemnity and release
3. Environmental due diligence: 30-day period
4. Dispute resolution
5. Guaranteed Fixed Price investigation and clean up in lieu of full indemnity; insurance; migration; final site regulatory closure
6. Access and insurance cooperation
7. Confidentiality

Buyer's response reflects concerns

- Buyer cannot indemnify for unknown issues
- Buyer wants representations & warranties
- Limited release
- Due diligence w/ unlimited Phase II scope
  - Terminate and walk away if property condition is not acceptable.
  - If Phase 2 discloses possible reportable Releases, then Seller shall report Releases

PSA: Key Environmental Provisions

- Definitions
- Representations & Warranties
- Covenants
- ADR
- Indemnity
- GFP Agreement

Defined Terms

"There is nothing more likely to start disagreement among people or countries than an agreement."
E. B. White

"Release"

- Release shall mean any release, spill, emission, leaking, pumping, injection, deposit, disposal, discharge, dispersal, leaching or migration into the indoor or outdoor environment or into or out of the Property, including the movement of Contaminants through or in the air, soil, surface water, groundwater or other property.

"Remediation"

- Remediation means the investigation, removal, clean-up or remediation of contamination or environmental degradation or damage caused by, related to or arising from the generation, use, handling, treatment, storage, transportation, disposal, discharge, Release or emission of Hazardous Materials, including, without limitation, investigations, responses, remedial actions, operation and maintenance of institutional controls under CERCLA, corrective action under RCRA Sections 3004(u), 3004(v), 3008(h) and 7003, and any activities under the clean-up requirements of other Environmental Laws.

Other Environmental Terms (in CD)

- Asbestos Containing Material, or ACM
- CERCLA
- RCRA
- TSCA
- Contaminant
- Customary Uses
- Material Adverse Effect
- Permits/Approvals
- Environmental Activity
- Pollution Control Equipment

Representations and Warranties

"A thing is not necessarily true because badly uttered, nor false because spoken magnificently."
St. Augustine

Seller: "AS-IS" Condition

- "Property shall be sold "**AS IS, WHERE IS, WITH ALL FAULTS**" with no right of set-off or reduction in the purchase price. Buyer has assumed all risks regarding all aspects of the Property, and the condition thereof, including, without limitation: (i) the risk of any physical condition affecting the Property including, without limitation, the existence of any Environmental Condition (as defined herein), the existence of any soils, groundwater or geophysical conditions, or the existence of archeological or historical conditions on the Property, (ii) the risk of any damage or loss to the Property caused by any means including, without limitation, flood or earthquake; (iii) the risk of use, zoning, habitability, merchantability or quality of the Property or the suitability of the Property for its present use or future development; and (iv) the activities of Seller or others on adjacent or nearby lands as of the Closing Date."

Buyer's response:

- Not buying land "with all faults"
- Not relinquishing right of set-off, nor right to re-negotiate purchase price
- Not assuming "all risks" unless disclosed and specifically agreed to

Negotiated provision:

- Property shall be sold "as is, where is[, with all faults]" [with no right of set-off or reduction in the purchase price], except as set forth in Section __ below, and that, subject to the representations, warranties and covenants of Seller set forth in this Agreement, Buyer has assumed all known risks regarding all aspects of the Property, and the condition thereof, including, without limitation: (i) the risk of any physical condition affecting the Property including, without limitation, the existence of any Environmental Condition (as defined herein), the existence of any soils conditions, or the existence of archeological or historical conditions on the Property, (ii) the risk of any damage or loss to the Property caused by any means including, without limitation, flood or earthquake; (iii) the risk of use, zoning, habitability, merchantability or quality of the Property or the suitability of the Property for its present use or future development; and (iv) the activities of Seller or others on adjacent or nearby lands as of the Closing Date.

Seller: No Reps or Warranties

- Such sale shall be without representation or warranty of any kind, express or implied, regarding any aspect of the Property, including, but not limited to, the implied warranties of merchantability, fitness for a particular purpose, suitability, habitability, quality, physical condition and value, and Seller hereby disclaims any and all liability for any and all such representations and warranties.

Buyer's Response:

- No purchase without some representations and warranties

Negotiated provision:

- "Except as otherwise provided herein and expressly subject to the representations and warranties set forth in Section ___, such sale shall be without representation or warranty of any kind, express or implied, regarding any aspect of the Property, including, but not limited to, the implied warranties of merchantability, fitness for a particular purpose, suitability, habitability, quality, physical condition and value[, and Seller hereby disclaims any and all liability for any and all such representations and warranties].

Buyer-added Reps/Warranties:

- Except as set forth on Schedule ___, Seller has not received any claim or notice alleging that Seller is not in compliance with or is in violation of any Environmental Law, or has liability or responsibility under any Environmental Law.

Reps/Warranties continued . . .

- Except as set forth on Schedule ___, there are no pending or threatened investigations, inquiries, administrative proceedings, actions, suits, claims, charges, complaints, demands, notices or legal proceedings against Seller or the Property, under Environmental Laws including those that involve or relate to Environmental Conditions, Environmental Noncompliance or the Release, use, disposal or arranging for disposal of any Hazardous Materials on or from, the Property.

Reps/Warranties continued . . .

- Except as set forth on Schedule __, Seller has not Released any Hazardous Materials on, under or about the Property, that requires reporting, monitoring, investigation or remediation pursuant to Environmental Law or that otherwise is in violation of any requirement of any Environmental Law.

Reps/Warranties continued . . .

- Except as set forth on Schedule __, no Hazardous Materials have been generated, stored, treated, handled, transported to, or disposed of, in a manner on the Property that could reasonably be expected to result in liability under Environmental Laws.

Reps/Warranties continued . . .

- Except as set forth on Schedule __, none of the following exists on the Property: (A) underground storage tanks, (B) asbestos containing material in any friable and damaged form or condition, (C) materials or equipment containing polychlorinated biphenyls, (D) landfills, surface impoundments, or disposal areas, or (E) soil or ground water contamination in excess of applicable Federal or state clean-up levels.

Environmental Due Diligence

"Truth, when not sought after, rarely comes to light."
Oliver Wendell Holmes

Pre-Closing Access to Site

- Seller wants to limit; Buyer wants to expand
- Right of entry or access agreement
- Phase I Environmental Investigation
- Potential for Phase II Environmental Investigation

Phase I Environmental Investigation

- ASTM Definition
- EPA AAI Standard
- Comprehensive document review
- Sets forth the justification for conducting a Phase II Environmental Investigation
  - Focusing on specific environmental conditions identified in the Phase I report

Phase II Environmental Investigation

- The collection or extraction of samples of any soil, water, vegetation, building materials, or other man-made or natural material or substance from, underneath or at the Property for testing or analysis, or conducting any chemical analysis or other test on such materials
- Characterize/delineate contamination
- Typically provides cost estimates for remediation of certain conditions identified in the Phase II report
- Recommends additional sampling to quantify such costs

Seller wants to exercise control:

- Typically will not consent to Phase II testing
- Will require prior consent before Phase II entry
  - Prior review/approval of scope, methodologies
- Time limits, e.g., 30 days, after-hours, etc.
- Non-interference with on-site activities
- Review of/comment on draft report
- Confidentiality
- Return of information to Seller if deal falls through

Seller: Restore to Original Condition

- Upon completion of any soils investigations, Buyer shall return the Property to the approximate state existing prior to such soils investigations. Buyer shall be responsible for any damage to the Property or to the adjoining land of others that occurs as a result of the activities of Buyer at the Property.

Buyer: Restore Surface Only

- Upon completion of any soils investigations, Buyer shall return the surface of the Property to the approximate state existing prior to such soils investigations. Buyer shall be responsible for any damage to the Property or to the adjoining land of others that occurs as a proximate result of the activities of Buyer at the Property.

Covenants

"Those that are most slow in making a promise are the most faithful in the performance of it."
Jean Jacques Rousseau

Post-Closing Remediation

- Assumes government order in place (e.g. consent decree, etc.) requiring Seller to remediate with deed restriction recorded which requires Buyer to permit Seller to access Property
- Buyer must cooperate
- Seller's risk transfer alternative (e.g. guaranteed fixed price contract)

Seller's Risk Transfer Alternatives

- Guaranteed fixed price contract
  - Indemnity
  - Backed by insurance & corporate guarantee
  - End result is "NFA" (No Further Action letter)

ADR Term re Environmental Issues

- Seller and Buyer agree to meet within ten (10) days to discuss environmental disputes; then
- Joint senior management to address disputes within five (5) days if not resolved; then
- To mediation if still unresolved; then
- To binding arbitration if not yet resolved.
- Seller or Buyer may seek equitable remedies (TRO, Injunction, specific performance, etc.)

Valuation Issues

"Price is what you pay. Value is what you get."
Warren Buffett

Environmental Indemnity

"In law, nothing is certain but the expense."
Samuel Butler

Seller's Draft

- Buyer shall indemnify, defend with counsel reasonably acceptable to Seller, and hold Seller harmless from and against any and all liabilities, lawsuits including but not limited to all personal injury claims, administrative actions, settlements, other claims, penalties, fines, causes of action, without limitation reasonable attorneys' fees, and the cost and expenses to investigate or defend any claim or proceeding under environmental law resulting from or attributable to the past, present or future use, Release, discharge, or presence of any Hazardous Materials, known or unknown, on, under or within the Property.

Buyer's Response

- For a period not to exceed ___ years after execution and only for matters involving at least $_____ in dispute, Buyer shall indemnify[, defend with counsel reasonably acceptable to Seller,] and hold Seller harmless from and against any and all liabilities, lawsuits including but not limited to all personal injury claims, administrative actions, settlements, other claims, penalties, fines, causes of action, without limitation reasonable attorneys' and consultants' fees, and the cost and expenses to investigate or defend any claim or proceeding under environmental law resulting from or attributable to the [past,] present or future use, Release, discharge, or presence of any Hazardous Materials, known or unknown, on, under or within the Property.

Summary: Asset Purchase Hypo

- Important covenants - “AS-IS", indemnity, release, due diligence sampling, dispute resolution
- Representations and warranties - give and take; dependant on situation and type of historical operations on the Property
- Post-closing remediation requirements may promote use of risk transfer alternatives (e.g. guaranteed fixed price contracting)
- Environmental Insurance

Hypothetical # 2: Stock Purchase

Buyer, Seller and Target

- Company B (Buyer): software design & distribution
- Company T (Target): packaging for CDs, DVDs, etc.
- Company S (Seller): parent, sole shareholder of T
- Deal: B to acquire stock of T from S
- T to be held as wholly-owned sub of B:
  - Overlapping Boards of Directors
  - Independent Management Teams
  - T's EH&S Manager reports to B's EH&S VP

Environmental Due Diligence: Phase I

- B's environmental in-house counsel
- B's environmental consultant
  - Phase I environmental assessment
- T's 4 manufacturing facilities: 2 are owned & 2 are leased
- Phase 1 results:
  - 3 underground fuel tanks (do Phase II)
  - Historical electroplating operations
  - Friable asbestos
  - Mold
  - Permit issues

Buyer prepares first draft of PSA

1. Wants series of reps and warranties (land & operations)
2. Full indemnity and release (known & unknown)
3. Environmental due diligence
4. Seller must reduce purchase price based on expected costs of remediation (or Seller and Buyer negotiate which party remediates any findings from Phase II)
5. Permit and Transfer Act assistance covenant

Seller's response reflects concerns

- Seller wants to sell "as is" and limit reps and warranties
- Seller will not indemnify for unknown issues
- Due diligence w/ limited Phase II scope
- If any remediation necessary, wants Seller to assume – no obligations after sale

PSA: Key Environmental Provisions

- Definitions
- Representations & Warranties
- Covenants
- Indemnity
- Environmental Due Diligence

Defined Terms

"It is the trade of lawyers to question everything, yield nothing, and talk by the hour."
Thomas Jefferson

"Hazardous Materials"

- "Hazardous Materials" shall mean any materials regulated as hazardous or toxic under applicable Environmental Laws, [or any other material regulated, or that could result in the imposition of liability,] including, without limitation, petroleum, petroleum products, fuel oil, crude oil or any fraction thereof, derivatives or byproducts of petroleum products or fuel oil, natural gas, natural gas liquids, liquefied natural gas, synthetic natural gas useable for fuel, hazardous substances, toxic substances, polychlorinated biphenyls, [medical waste, biomedical waste, infectious materials,] and any friable materials containing more than one (1%) asbestos by weight. "Hazardous Materials" shall also mean any environmental media, including without limitation soil, sediment and water, containing any of the materials described or set forth in the preceding sentence [and any other substance determined to present a deleterious effect on human health]

"Environmental Condition"

- "Environmental Condition" means any contamination or damage to the environment caused by or relating to the use, handling, storage, [treatment, recycling,] generation, [transportation], Release, spilling, [leaching, pumping, pouring, emptying, discharging, injection, escaping,] disposal, dumping [or threatened Release] of Hazardous Materials by the Company [or any other Person] that requires investigation, response or remediation under Environmental Law. With respect to claims by employees [or any other third parties], Environmental Condition shall also include the occupational exposure [of Persons] to Hazardous Materials in amounts that have an action level established by OSHA. [been determined to be deleterious to human health.]

Representations and Warranties

"There are no exceptions to the rule that everybody likes to be an exception to the rule."
Charles Osgood

Compliance with Environmental Law

- Buyer: Wants reps for the following:
  - Except as set forth in disclosure Schedule …
  - No claims or notices by any parties alleging noncompliance or violation of Environmental Law
  - No pending actions, investigations, complaints involving Environmental Conditions
  - Seller has complied with, is in compliance with and has operated its business and maintained its assets in compliance with all Environmental Laws in all respects, and holds all permits necessary for lawful conduct of its business.

Compliance with Environmental Law

- Seller only wants simple rep:

  "Except as set forth in Disclosure Schedule, to the Knowledge of Seller, (i) Company T is in compliance with Environmental Laws that are applicable to it or to its ownership or use of any of its properties or assets, except for such noncompliance as would not have a Material Adverse Effect with respect to Company T."

Negotiated Language 1:

- "Except as set forth on the Disclosure Schedule, to the Knowledge of Seller, Company T has not received any claim or notice, written or oral, alleging that Company T is not in compliance with or is in violation of any Environmental Law, or has liability or responsibility under any Environmental Law."

Negotiated Language 2:

- "Except as set forth on the Disclosure Schedule, to the Knowledge of Seller there are no pending or threatened investigations, inquiries, administrative proceedings, actions, suits, claims, charges, complaints, demands, notices or legal proceedings against Company T or its business under Environmental Laws, including those that involve or relate to Environmental Conditions, Environmental Noncompliance or the Release, use, disposal or arranging for disposal of any Hazardous Materials on or from, any Real Property or the Leased Premises or any other real property or facility formerly owned, leased or used by Company T."

Negotiated Language 3:

- Except as set forth on the Disclosure Schedule, Company T (i) has complied with, is in compliance with and has operated its business in compliance with all Environmental Laws in all Material respects, and (ii) holds all Permits necessary for the lawful conduct of its business.

Legacy Liabilities

- Seller:

  Except as set forth in Schedule X, to the Knowledge of Seller there are no claims, proceedings or actions by any governmental authority in connection with operation of the business, property or assets of Company T.

Legacy Liabilities, Continued . . .

- Buyer: Wants Seller reps for the following
  - No liability or responsibility under Environmental Law
  - No claims or actions that involve or relate to Environmental Conditions
  - As to formerly owned or leased property/operations
  - No disposal at any locations that could result in liability under Environmental Laws
  - No exposure to employees or basis for personal injury claims
  - As to specific operations on current or formerly owned/leased properties
  - No assumption, by contract or operation of law, of liabilities or obligations under Environmental Law

Legacy Liabilities: Negotiated Results 1

- Except as set forth on the Disclosure Schedule, to the Knowledge of Seller, Company T has not generated, stored, treated, handled, disposed of, or arranged to dispose of, Hazardous Materials in a manner or to a location that could result in Material Liability to Company T under Environmental Law.

Legacy Liabilities: Negotiated Results 2

- Except as set forth on the Disclosure Schedule, to the Knowledge of Seller, Company has not exposed any employee to any Hazardous Materials, operations, Releases or other conditions that could result in an Environmental Condition.

Legacy Liabilities: Negotiated Results 3

- Except as set forth on the Disclosure Schedule, to the Knowledge of Seller, there is not now nor has there ever been located on the Real Property or Leased Premises or any other real property or facility formerly owned, leased or used by Company, any drum storage areas, surface impoundments, incinerators, landfills, tanks, lagoons, ponds, waste piles or deep well injection systems used or intended for the treatment, storage or disposal of Hazardous Materials.

Legacy Liabilities: Negotiated Results 4

- Except as set forth on the Disclosure Schedule, to the Knowledge of Seller, Company T has not assumed, contractually or by operation of Law, any liabilities or obligations under any Environmental Laws arising out of its current or former operations, or current or former lease or ownership of any real property.

Environmental Reports and Audits

- Seller: will disclose any existing reports and audits, but does not want them to constitute representations and warranties – wants Buyer to rely on its own due diligence.
- Buyer wants reports and audits and wants rep and warranty to ensure action against Seller should it turn out information was not accurate or complete.

Negotiated Provision

- Seller represents and warrants that it has provided Buyer with access to true and complete copies of all environmental audits, reports and other environmental documents relating to Company T or its predecessors' past or current properties, facilities or operations, in the Seller or Company T's possession, or over which the Seller or Company T has control.

Use & Presence of Hazardous Materials

- Seller: No reps and warranties on this.
- Buyer: Wants reps for the following:
  - No pending or threatened legal actions based on the Release, use or disposal of Hazardous Materials
  - No Release of Hazardous Materials on current or former properties
  - No known liabilities under Environmental Laws
  - No tanks, asbestos, PCBs, etc exist at any properties.

Hazardous Materials: Negotiated Result 1

- Except as set forth on the Disclosure Schedule, to the Knowledge of Seller, the Company has not Released any Hazardous Materials on, under or about any Real Property or the Leased Premises or any real property formerly owned, leased or operated by Company, [that creates an Environmental Condition.]

Hazardous Materials: Negotiated Result 2

- Except as set forth in the Disclosure Schedule, to the Knowledge of the Seller, none of the following exists at any Leased Premises or Real Property: (A) underground storage tanks, (B) asbestos containing material in any friable form or condition, (C) materials or equipment containing polychlorinated biphenyls, (D) landfills, surface impoundments, or disposal areas, or (E) soil or ground water contamination in excess of applicable Federal or state clean-up levels.

Required Notices or Approval

- Except as set forth in the Disclosure Schedule, Seller represents and warrants that the execution of this Agreement does not require any notice to be given to the purchaser or any application or notice to be submitted to a Governmental Authority pursuant to any environmental notice or transfer laws, including for example, the New Jersey Industrial Site Recovery Act or the Connecticut Transfer Act.

Covenants

"The best way to keep one's word is not to give it."
Napoleon Bonaparte

Environmental Permits and Plans

- Seller agrees to cooperate and assist in the notice and transfer of all Permits or Plans necessary to operate the Company in compliance with Environmental Laws, as long as such assistance does not require Seller to incur out-of-pocket costs and only to the extent Seller's signature or consent for the transfer of permits or notice for change in control of the Company is required by Environmental Laws.

Transfer Act Compliance

- If any notice, approval or other application is required under a Transfer Act, Seller agrees to take such action as is necessary to comply with such Acts and Buyer agrees to cooperate, as appropriate, to implement such compliance, including but not limited to, granting post-closing access and signing applications and permits.

Environmental Indemnities

"The task we must set for ourselves is not to feel secure, but to be able to tolerate insecurity."
Erich Fromm

Special Indemnity for Known Condition

- Notwithstanding the above [general indemnity], Seller agrees to indemnify, defend and hold harmless Buyer and its respective consultants and attorneys, from any costs, damages, liabilities and expenses, including attorney and consultant fees, removal, remediation, and investigation costs, third party or governmental claims, penalties, fines (collectively, "Indemnified Costs") related directly or indirectly to Releases of Hazardous Materials from the underground storage tank identified in Phase II Audit Report dated [ ], but only to the extent Buyer is ordered to investigate, remediate, or take other action with respect to such tank by a governmental authority. This provision expires on the third anniversary of the Closing Date.

Summary: Stock Purchase Hypo

- Buyer concerned with liability from multiple site industrial operations, both as to off- and on-site legacy liability and liability for any noncompliance at ongoing operations
- Buyer wants to limit reps and warranties and limit definitions in order to lessen chance of liability triggers
- By negotiating a combination of purchase price, PSA language, due diligence, insurance and indemnity, parties attempt to reach acceptable balance of risk.

Other Considerations

"Never before have we had so little time in which to do so much."
Franklin Delano Roosevelt

EPA/State Audit Policies

- Regulated entities may get significant penalty reductions:
  - Voluntarily discover as part of formal audit program
  - Promptly disclose
  - Expeditiously correct and prevent future recurrence
- Buyer may report violation after acquisition:
  - Short time period to report
- Most states have similar policies:
  - Audit privilege which protects information discovered during a proper audit

Deed Restrictions

- Key Agreement Disclosures
- Recording - Pre or Post Closing
- Uniform Environmental Covenants Act

Restrictive Covenants

- Buyer acknowledges that Seller has provided it with a copy of the Deed Notice and Activity Use Limitation which limits the Real Property to industrial use and prohibits excavation activities or other underground construction activities on the area of the Real Property referred to as the "concrete drum storage pad," more particularly described in Exhibit A. To the extent Buyer violates or removes this Deed Notice or Activity Use Limitation, the Buyer hereby waives and releases Seller for and from any claims for damages or Environmental Liabilities arising out of or relating to Hazardous Materials present under the concrete drum storage pad.

ACC Association of Corporate Counsel

Conclusions

- All Transactions Unique
- Prepare and Fully Understand Client and Deal, Type of Business and conduct extensive due diligence
- Contract Language is Critical to Allocating Environmental Liabilities ➔ Which Can Be Significant
- Be Creative ➔ Environmental Issues include Unknown Conditions that can be Insured, Indemnified or addressed by Escrow.
- Get Outside Help as Necessary

Contaminated Property: When the Agency Delays, Who Pays?

Bonni F. Kaufman
Holland & Knight
Washington, D.C.

Property owners have experienced it: the delay that sometimes seems inevitable and inherent in review by environmental agencies. That delay can cost landlords money, particularly when a shopping center has had historical tenants, such as dry-cleaners and gas stations that may have an impact on the property. A recent case decided by the United States Court of Appeals for the Third Circuit has important implications for how damages resulting from delay can be claimed and awarded.

Jaasma v. *Shell Oil Company*, 412 F.3d 501 (2005), involved a dispute between a landlord and her tenant. The case is significant because damages were awarded against a tenant who lived up to its obligations under the lease and promptly remediated the contamination it caused. Despite this action, the landlord claimed that she had been damaged because the environmental agency overseeing the clean-up did not issue a "no further action" ("NFA") letter until more than two years later. That delay, she said, made the property unmarketable because no one would buy it without final agency approval. Despite the tenant's argument that it had no control over the agency, the court agreed and held the tenant liable.

Facts of the Case

Alice Jaasma leased a parcel in West Paterson, N.J., to Shell Oil Company in 1988. The lease contained provisions requiring Shell and its assignee to remove all gasoline, waste oil and fuel-oil tanks from the premises upon termination of the lease and restore the property to its original state.

In October 2001, one week before the end of the lease, Shell removed the underground storage tanks and discovered petroleum contamination adjacent to the tanks. It promptly reported the contamination to the New Jersey Department of Environmental Protection ("NJDEP"). Shell then remediated the contamination by excavating 6,500 tons of soil and replacing it with clean fill. Three months after the lease expired, Shell prepared and filed a report with NJDEP detailing its activities and concluding that the remediation was complete. The report requested issuance of an NFA letter.

In April 2002, NJDEP acknowledged receipt of the report, but requested re-sampling of the property due to technical deficiencies in the sampling methodology. The re-sampling was not completed until September 2003. Twenty-eight months after the original clean-up was completed, NJDEP issued an NFA letter, stating that applicable standards had been met and no further action was required.

In her claim, the landlord did not dispute that the tenant had successfully remediated the site in October 2001. Instead, she alleged that due to NJDEP's ongoing review and the uncertainty surrounding the environmental status of the property, she was unable to sell or rent the property at fair market value (FMV) for the 28-month period from the expiration of the lease until NJDEP issued the NFA letter. In support of her claim, she presented evidence that three different realtors concluded she would not receive FMV for the property during that period, as she could not warrant the condition of the property to prospective purchasers without an NFA letter. In addition, several prospective purchasers had made an NFA letter a condition of sale.

The court held that the landlord could recover damages from the tenant for the delay, reversing the district court's decision that the landlord had not suffered cognizable damages. It also determined that "loss of use" was an appropriate measure of damages during the period after the clean-up was complete, but before the NFA letter had been received. It agreed with the landlord that the regulatory uncertainty during that period meant that the property could not be sold or rented at FMV.

The Third Circuit's opinion makes clear that "clean" sampling results may not be sufficient to foreclose claims for damages. Without final approval by a regulatory agency, lingering concerns may be enough to diminish the FMV of the property.

The Future

The *Jaasma* opinion will likely be followed by other state and federal courts because it relies not only on the law of property in New Jersey, but also on general common law principles of property rights. Landlords should now include indemnification provisions for loss of use damages in leases as a matter of course. The lease should also specify that no remediation is complete until an NFA letter or similar document is issued by the applicable regulatory agency. The good news for landlords is that contaminated properties may become more appealing to prospective purchasers if purchasers believe they can recover the property's fair market rental during the regulatory approval process. The bad news for tenants is that damages may be assessed against them for a delay over which they have no control. That possibility counsels in favor of initiating and completing clean-ups well before expiration of the lease, whenever possible.

BONNI F. KAUFMAN is Senior Counsel in the Environmental Practice group in the Washington, D.C., office of Holland & Knight.

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A Model Letter For A Model Mediation

David Franzel

David Franzel
is an in-house lawyer in Honolulu. He frequently speaks on topics impacting in house counsel. An active client representative, facilitator and mediator, Mr. Franzel has many years of experience in alternative dispute resolution and litigation both in Hawaii and on the U.S. Mainland. Although the letter below reflects Mr. Franzel's experience, the addressees noted are fictitious and any resemblance to living persons or entities is purely coincidental and not intentional. Mr. Franzel would appreciate hearing from you should you have any additional suggestions aimed at enhancing the mediation process that are not covered in the letter. He can be reached via email at davidf@jamescampbell.com.

Understanding your client's dispute prevention and resolution experience and expertise can greatly increase the prospects for a successful settlement.

Jane Doe, Esq.
Alpha Beta & Charlie, LLLC
Re: ABC v.XYZ

Dear Jane,

I am very excited about working with you to resolve this dispute! As I mentioned when you were retained, it looks like this matter is headed for mediation. Because we have not yet worked together, I thought it would be helpful to pass on some of the lessons learned from our past mediation experience. This information is from our own observations and from discussions with other in-house and outside counsel and mediators. Of course, I look forward to an open dialogue and encourage you to get back to us with your thoughts and experiences as well.

For the most part, the mediation process has been good to us. However, this is not to say that there has not been some rough going along the way. Learning from our and other's experiences and applying what works and what does not have helped increase the likelihood that we will achieve some measure of success through mediation.

The key question is, how can we maximize our chances for success?

To mediate or not to mediate, that is the question. How best to proceed from the onset?

As we contemplate whether or not to mediate, it is important to understand and discuss the principal dispute resolution alternatives. This is because an informed team must make key decisions regarding the best process for a particular dispute early on. To do so, outside counsel and their in-house counterparts must understand the process and the strengths and weaknesses of litigation, facilitation, mediation, and arbitration.

Fully involve us early on. We can provide critical information that can assist you in determining the best process for the dispute at hand and the best results. For instance, understanding our dispute resolution track record puts you in the best position to recommend how best to proceed. This is critical because it can save us both time and money!

Some related suggestions for you to think about:

- Carefully review and evaluate potential dispute outcomes with us as early as is practicable. This can help to foster the most realistic expectations and pave the way for settlement. For example, a likely outcome or probability analysis or jury verdict review may determine the most realistic negotiation strategy and best inform and support settlement options. Likewise, retaining a jury consultant to conduct focus groups for larger cases can provide the real world view of a matter that can be quite instructive to outside counsel and client alike. What looks like a "home run" on paper and in the eyes of an advocate can turn out to look quite different to a layperson. Let's be sure to discuss these options!
- At the same time, be sure to acquaint us with all potential non-dollar specific mediation outcomes. For instance, identifying issues in dispute during mediation can lead to a reduction in the number of issues in dispute. This can be quite beneficial as time required and dollars spent can be reduced. Furthermore, identifying and reducing the number of issues can promote settlement at a later date. Another important non-dollar outcome can bring the parties together to repair their long term business relationship. Be sure to check with us to see if maintaining or strengthening our relationship is important for this matter.
- Please discuss with us whether a particular case should be mediated and when. Several important questions come to mind. Should the case be litigated because there is a precedent that is important to us? Will the other party or parties participate in good faith? Is the dollar value of the dispute worth the potential long-term litigation expense that we will incur over time? If you conclude a case should be mediated, when is it best to do so? For example, if we mediate now can we avoid expensive document discovery and time-consuming depositions? Do we need motions to be decided first? These are examples of factors that we want you to consider at this early stage.

So we decide to mediate, now what? Please Prepare! Prepare! Prepare!

Once we have decided to mediate, there are additional factors that we like to consider. Although some of what I am going to tell you might seem obvious, it is critical to us that you reflect on these issues so that we can discuss them.

Where should we mediate? Location is very important because it can set the climate and tone which enhances the potential for resolution. Ask yourself, is the location conducive to settlement? For example, conducting a mediation session in a law firm's conference room can cause unnecessary and unneeded tension. Compare this to undertaking mediation in a private home overlooking a forest or large body of water.

Correctly setting the tone is especially important when we hope to repair a relationship and work together cooperatively in the future. Why not start during our mediation session?

We need to spend some time determining who should be our mediator. We prefer a mediator who is persistent and available, trustworthy, familiar with the subject area, neutral, creative, and understands business relationships. Two important means of determining how a particular mediator fits into the above factors are polling your outside counsel colleagues and by our checking with other in-house counsel who have previously used the mediator.

Some additional thoughts that we ask you to keep in mind:

- Please be focused in your preparation. This will save us time and money. Let's be sure to discuss your recommendations for your firm's team and session participants, paying particular attention to the number of attendees including attorneys. When you consider this, ask yourself, what signal do you want to send and to whom? For example, the presence of a number of outside counsel and our CEO might display a level of concern that we do not wish or need to communicate. Plus, our CEO is very busy and therefore his time is at a premium. Of course, we always need to have authority at the table and to be flexible.

__ Take the time to refine your case evaluation with us before the mediation session. What has occurred in the matter since the original evaluation? For example, a court decision's arrival on the day of a session can affect our authority parameters positively or negatively.

__ Consult us regarding our preferred relationship with the other parties. Do we need or want to continue to work together after resolution?

- Let's be sure to carefully consider the content and tone of the briefing papers. For example, would a conciliatory approach work best with the mediator, the other parties, and us? The mediator is obviously a key audience, as is our client representative, the mediator, and the other party's client representatives and outside counsel. This approach can foster communication between the parties, thus enhancing the potential for settlement.

__ How much information do you want to relate to the other side? Telegraphing one's case to the other side can point out our overall strategy that, should the case not settle, could have a detrimental impact on our case. Ask yourself whether it is likely that the case will settle at meditaion. If it is unclear and you are concerned, please consider providing the mediator with a confidential "his or her eyes only" document if they will agree to accept it. Also give some thought to whether a dollar or other demand should be included in our papers. Does the mediator require it? If not, consider whether it could shut down the process.

- Experience has shown us that a clear, concise, organized, and less inflammatory presentation can be very effective. Remember, we have only so much time and our audience will likely have different levels of interest and understanding. As a suggestion, the norm should be clear, concise, and to the point, and more neutral than argumentative.

Also, please ask yourself:

- What level of participation do you need from the client representative during the mediation session? Remember, it is likely that the clients have not spoken for some time, and therefore this is a good time to consider our message from the company to the other parties and the mediator. For example, is a general apology without admitting liability something that we want to consider?

- How should information be presented during the opening stage or other parts of the mediation session? For example, should we use deposition video clips if we have them? One issue that we will need to consider is whether the statements or behavior of a deponent on video will embarrass any of the client representatives who are present.
- Should we address ground rules ahead of time? For example, will we permit the mediator to talk directly with us without you during the session? Are ex parte communications with the mediator going to be acceptable? Can we authorize the mediator to speak with the judge? We should discuss how we want to handle these and related issues well before the mediation session.
- As we prepare, let's be sure to conduct a dry run before the session with our session team and consider the appropriate attire for attorneys and client representatives in advance.
- Last but not least, let's minimize travel the evening before the session. Because it is likely to be a long day, we encourage all of our session team to arrive near the session location the day before so they will be well rested.

The Mediation Session

Preparation is also very important here. Below are some rules of thumb that we have found helpful over the years.

- If I am not at the session, please be sure to tell the client representative not to noticeably react if verbally attacked. They should endeavor to stay neutral. One useful tip is to consider having the client representatives for the parties actually sit together (as opposed to across the table from each other); this can help build empathy and discussion between the parties.
- Once again, carefully consider the tone of your presentation and its impact on your client, the other parties, and the mediator.
- Let's also be optimistic. If we can, let's pre-agree with the other parties about the form of a settlement agreement. It is time-efficient to bring an agreed-to form to the mediation session. This minimizes the potential for the need to seek court assistance to address drafting details.

There are no "templates" for success. However, if we consider your experience and the above points, I am sure that we will put ourselves in the best position for a successful session and outcome.

Checklist

Below is a summary checklist for your use. It tracks the above-mentioned items with key points that we like to try to keep in mind. Of course, you are our settlement counsel so you can ignore Item #5! Please be sure to let me know if you have any suggestions or additions; I would be pleased to incorporate them.

Checklist – Key Considerations

1. *Work to prevent disputes.* Keep little "d" disputes from becoming big "D" Disputes. Consider ADR agreements for transactions that outline the party's preferences for negotiation, mediation, arbitration, other dispute resolution techniques, and related rules.
2. *Involve client from outset.* Enlist the client in the process to pave the way for realistic expectations and eventual settlements.

3. *Complete and periodically update a case evaluation.* Determine the realistic value of a settlement. Review probable outcomes and comparable jury award/settlement data and consider a focus group for large matters to test facts. Re-review periodically before the mediation session and update us on any significant changes.
4. *Carefully consider timing.* Do we really need and want to conduct extensive discovery and motion practice? Is our adversary amenable to the mediation process?
5. *Choice of outside counsel.* Gladiator or conciliator (or both)? Consider retaining settlement counsel who specialize in settling and not trying cases. They can often be very objective because they have less time and effort invested in a matter and have no pecuniary interest in taking a matter to trial. At the same time, separate settlement and trial counsel permits trial preparation and settlement efforts to continue on parallel tracks unimpeded and undistracted.
6. *Choice of mediator.* Retain a persistent, trustworthy, knowledgeable, effective, and committed neutral.
7. *Keep the client up to speed.* Communicate key case events to the client so he or she can be prepared for the session (and potentially be more amenable to your recommendations).
8. *Let's choose the mediation team very carefully.* Who do we need and want from the client? Which attorneys are really necessary? What kinds of signals do we want to send to the mediator and the parties? Bigwigs? Lots of firepower or one outside attorney and one client representative if we believe the other parties will try to fill the room?
9. *Location, location, location.* How important is the ambiance of the session? Law firm conference room or private home?
10. *Authority.* Always have someone present who has the necessary settlement authority.
11. *Presentation and papers.* Carefully consider content, tone, and impact on session participants; do a full run-through.
12. *Agreement.* Let's try to get the parties to pre-agree on a form so we can make the most of any settlement momentum.

Jane, thanks very much for considering our input. I look forward to hearing your thoughts so that we can add them to our list. One thing is for sure; with our collective experience, we can do great things! Let's get started today!

Sincerely,
John Smith
General Counsel
XYZ Corporation